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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: [redacted] PART 49

Index Number : 603891/2004

SPEC, INC.

VS

SEQUA CORPORATION

Sequence Number : 001

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE 11/7/05

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

FILED

FEB 23 2006

COUNTY CLERK'S OFFICE
NEW YORK

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION IN MOTION SEQUENCE .....

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 2/21/06

J.S.C.

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 49

----------X

SPEC, INC.,

Plaintiff,

-against-

SEQUA CORPORATION, Index Nº 603891/04

Defendant.

----------X

HERMAN CAHN, J.:

In this action for a declaratory judgment concerning insurance coverage, defendant Sequa Corporation (Sequa) moves for summary judgment against plaintiff SPEC, INC. (SPEC) on its counterclaim for breach of contract, CPLR 3212.

The underlying facts are that, in or about October 1995, Robert M. Williams (Williams), an employee of Sequa, submitted a written offer to purchase assets of Sequa's special products engineering division, referred to as the "S.P.E.C. Division." Among the S.P.E.C. Division's business, was the design, manufacture and sale of in-line and off-line press finishing equipment. Negotiations between Williams and Sequa culminated in a Purchase and Sale Agreement (P&S Agreement), dated January 31, 1996, pursuant to which Williams and another, E. F. Meihofer, and their newly founded Massachusetts corporation, the plaintiff herein, agreed to purchase certain assets (the Acquired Assets) of Sequa's S.P.E.C. Division. The Acquired Assets specifically included the in-line and off-line press finishing equipment. In addition, SPEC assumed Sequa's lease to a warehouse located at 33-G Wales Avenue, Avon, Massachusetts (Avon warehouse), and purchased from Sequa, by way of a written consignment agreement, certain parts, supplies, and inventory located at the Avon warehouse.

As part of the transaction, it was agreed that SPEC would obtain general liability insurance on an occurrence basis, in a form and amount satisfactory to Sequa. Sequa was to be named an additional insured on the policy. SPEC would maintain such insurance for certain periods from and after the January closing.

At the closing, SPEC delivered an insurance binder representing the insurance coverage it procured from the Utica Mutual Insurance Co. (Utica Mutual). Sequa's representative, John J. Dowling, III (Dowling), accepted the binders and initialed his approval.

The parties are currently disputing the scope of the insurance coverage procured, as Utica Mutual denied a request by Sequa for coverage and a defense, as an additional insured, following an accident involving an in-line gluer, serial number S2815 (the InLine Gluer), which was manufactured by Sequa and put into commerce prior to the January 1996 closing.

It is alleged that on July 15, 1998, non-party Judy Lamar (Lamar), an employee of non-party Quebecor Printing Company (Quebecor) in Illinois, sustained serious physical injuries to her right arm, shoulder, and elbow while using the Inline Gluer, which had been purchased from Sequa in or about 1992. Quebecor, through its Workers' Compensation carrier, American Protection Insurance Company, paid workers' compensation benefits to, and on behalf of, Lamar. American Protection Insurance Company commenced an action, in Effingham County, Illinois, against Sequa and Special Products Engineering Company, seeking to recover costs it incurred with respect to Lamar's accident.

Sequa, thereupon, sought both a defense and indemnification, as an additional insured, under the Utica Mutual insurance policy, number CG 00 01, ED. 10/93 (the Utica Policy). By letter, dated June 4, 2002, Utica Mutual denied coverage on the basis that the only policy

procured by SPEC, naming Sequa as an additional insured, was the Utica Policy which provided coverage for claims of liability arising out of the maintenance, use, or ownership of the Avon warehouse. The denial letter states, in relevant part:

> We do not find any viable coverage under CG 00 01, ED. 10/93. There is no trigger of coverage, since SPEC Inc. is not a named defendant in this action.
> In addition, endorsement CG2011 (11/85) is attached to your policy which states:
> Additional Insured: Managers or Lessors of Premises
> This endorsement modifies insurance provided under the following:
> COMMERCIAL GENERAL LIABILITY COVERAGE PART.
> * * *
> WHO IS INSURED (Section II) is amended to include as an insured the person or organization shown in the Schedule but only with respect to liability arising out of the premises leased to you and shown in the Schedule and subject to the following additional exclusion:
> * * *
> Since Sequa is named as an additional insured for the premises located at 33 G Wales Ave. Avon, Ma. only, we cannot defend Sequa in this action as it occurred at a location other than the designated premises.
> Furthermore, since you have advised that the co-defendant Special Products Engineering Company is not SPEC Inc. we will not be providing a defense of this action for this defendant.

On November 18, 2004, SPEC commenced this action, seeking a judicial declaration that it is not obligated to defend and indemnify Sequa in the Illinois action. In its answer, Sequa asserted four affirmative defenses and a counterclaim for breach of contract. It now moves for summary judgment on its counterclaim for breach of contract.

It is undisputed that the insurance coverage purchased by SPEC does not provide coverage to Sequa for injuries stemming from the use of an Inline Gluer which occurred away from the Avon warehouse. Nor does the subject insurance cover injuries involving the use of an Inline Gluer which was manufactured and placed in the marketplace through Sequa's S.P.E.C. Division prior to the closing between SPEC and Sequa. The issue on this motion is whether

SPEC had agreed to procure the type of insurance which would cover Sequa, as an additional insured, for injuries stemming from the use of in-line and off-line finishing equipment, which occurred after the closing, but which was manufactured and placed into the stream of commerce prior to the closing, and which occurred off premises of the Avon warehouse. Arguing in the affirmative, Sequa asserts that summary judgment on its counterclaim for breach of contract is appropriate because where, as here, the relevant contract language is straightforward and unambiguous, its interpretation presents a question of law for the court without resort to extrinsic evidence (Ruttenberg v Davidge Data Sys. Corp., 215 AD2d 191, 192 [1st Dept 1995]).

In support of its motion, Sequa submits the P&S Agreement, including Article IV: Closing, paragraphs 4.3 (c) (5) and 4.4, which obligated SPEC as follows:

> At the Closing, Purchaser [SPEC] will deliver to Sequa a certificate of insurance on an occurrence basis in such form and amount satisfactory to Sequa, naming Sequa as additional insureds, with waiver of subrogation and contribution in such amounts and subject to such other conditions as are acceptable to Sequa in its sole discretion. Purchaser shall continue to maintain such insurance, or insurance providing the same or similar coverage, for all periods from and after the Closing

(Section 4.4).

At the closing, SPEC delivered insurance binders to Sequa which were then initialed by representatives of both Sequa and SPEC. The specific binder language relied upon by Sequa is as follows:

> DESCRIPTION OF OPERATIONS/ VEHICLES/PROPERTY: Commercial Web Printing Equipment; Manufacturer
>
> TYPE OF INSURANCE:
> Property: Causes of Loss - "Spec."
> Coverage/Forms: Business Personal Property. All Risk Coverage, Replacement Cost Basis

General Liability: Commercial General Liability - "Occur."
Coverage/Forms:C.G.L. Broad Form

SPECIAL CONDITIONS/OTHER COVERAGES:
SEQUA Corporation to be named an additional insured with waiver of subrogation and contributions in such amount and subject to such other conditions as are acceptable to SEQUA in its sole discretion.

With respect to SPEC Division's inventory, SEQUA Corporation is to be named as loss payee.

Sequa argues that the terms set forth above (the binder language together with section 4.4) confirm that SPEC was obligated to procure broad form occurrence-based liability insurance naming Sequa as an additional insured, and that such coverage, which was to include products hazard liability coverage with policy limits of $1,000,000, per occurrence, was to insure against products liability claims stemming from accidents that arise after the closing but involve products produced and put into the steam of commerce prior to the closing.

Sequa further contends that, as part of the closing, the parties entered into a Second Supplemental Letter Agreement, which states, at paragraph 2.4: "Sequa acknowledges that the insurance certificates attached as Exhibit I to the Purchase Agreement satisfy the requirements of Section 4.4 of the Purchase Agreement," and finally, Sequa contends that the merger clause contained in the P&S Agreement excludes evidence extrinsic to that agreement[1] (Jarecki v Shung Moo Loue, 95 NY2d 665, 669 [2001]).

The problem, according to Sequa, was not that the insurance binders were somehow deficient, but that Sequa was not aware that SPEC had added an endorsement modifying the

[1]Sequa seeks to bar the introduction of, among other things, Williams' proposal of October 9, 1995, which states, at section 5.1, "SEQUA retains responsibility for any product liability issues, either on going or forthcoming, for equipment sold and/or shipped prior to closing."

insurance coverage, which was in contradiction to the agreement between the parties. As a result of the added endorsement, SPEC breached its agreement to obtain insurance which would confer coverage on Sequa for products liability claims including the claims stemming from Lamar's accident.

Relying on Kinney v G. W. Lisk Co., (76 NY2d 215 [1990]), Sequa asserts that it is well settled that a party that breaches its agreement to procure certain liability insurance for another is liable for the resulting damages to that party. However, this is an incomplete assessment of the Court of Appeals' holding. The determination in the Kinney action was based on public policy considerations, including the proposition that it would be against public policy to uphold contract provisions which purport to hold an owner or general contractor free from liability for its own negligence. Following the long established public policy and law in New York, which holds those in the best position to maintain a safe work place, commonly the owner or general contractor, responsible for doing so, the Court of Appeals in Kinney drew a distinction between upholding an agreement to procure insurance, from upholding an agreement to hold harmless or indemnify a negligent party.[2] Accordingly, Sequa's reliance is misplaced.

The dispute over the scope of insurance coverage procured by SPEC cannot be resolved at this juncture. Neither the submissions, nor the specific language highlighted and relied upon by Sequa, conclusively establish SPEC's obligation to provide the subject coverage, nor has

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[2]With respect to the facts before it, the Court of Appeals determined that there is no violation of the General Obligations Law (§ 5-322.1) which renders void and unenforceable any provision or agreement in connection with building construction which purports to indemnify or hold harmless a promisee against liability for damages arising out of bodily injuries to persons which was caused by, contributed to, or resulted from, the negligence of the promisee.

Sequa established that its interpretation is the only construction that can fairly be placed on the quoted language (see, 22 NY Jur 2d Contracts, § 189, at 25).

> Words in a contract are to be construed to achieve the apparent purpose of the parties. Although the words might seem to admit of a larger sense, yet they should be restrained to the particular occasion and to the particular object which the parties had in view. This is particularly true with indemnity contracts. When a party is under no legal duty to indemnify, a contract assuming that obligation must be strictly construed to avoid reading into it a duty which the parties did not intend to be assumed. The promise should not be found unless it can be clearly implied from the language and purpose of the entire agreement and the surrounding facts and circumstances

(Hooper Assoc., Ltd. v AGS Computers, Inc., 74 NY2d 487, 491 - 492 [1989] [internal quotations and citations omitted]).

An examination of the submissions on this motion reveals that, although the issue was raised by SPEC during negotiations (Plaintiff's Exhibit A), neither the P&S Agreement, nor the Second Supplemental Letter Agreement addresses, among other things, the issue of liability, or the scope of insurance coverage, for products manufactured, sold, or shipped, prior to the closing. To grant defendant's motion for summary judgment, the court would have to interpret, or construe, the P&S Agreement in the manner suggested by defendant, and possibly create liability where none exists, or was intended to exist.

Issues of fact exist as to the intent of the parties when drawing, executing, and approving the P&S Agreement and the insurance binders (Amusement Bus. Underwriters v American Intl. Group, 66 NY2d 878, 880 - 881 [1985]). These issues of fact, which preclude summary judgment, include questions as to whether: (1) the insurance procured was intended to cover products which were not part of the inventory at the time of the closing, but which had, in fact, been manufactured and placed in the stream of commerce prior (approximately six years prior) to

Lamar's accident; and (2) based on Dowling's initials, Sequa accepted the policy, as procured, confirming that the certificate of insurance, including endorsement modification CG2011 (11/85) attached to the Utica Policy, was in a form and amount satisfactory to Sequa (Sillman v Twentieth Century-Fox Film Corp., 3 NY2d 395, 404 [1957]).

Accordingly, the motion for summary judgment is denied.

This constitutes the decision and order of the court.

Dated: February 21, 2006

ENTER:

J.S.C.