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

PART 30

Index Number : 122246/2003
PAVLICK, KENNETH
VS
COLUMBIA UNIVERSITY
Sequence Number : 001
SUMMARY JUDGMENT

INDEX NO. 122246/03
MOTION DATE
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 is decided as per the memo decision of June 5, 2007.

FILED
JUN 13 2007
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 6.7.07

SHERRY KLEIN HEITLER
J.S.C.

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

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 30

----------X

KENNETH PAVLICK,

Plaintiff,

-against-

THE TRUSTEES OF COLUMBIA UNIVERSITY IN THE CITY OF NEW YORK and TDX CONSTRUCTION CORPORATION,

Defendants.

----------X

TDX CONSTRUCTION CORPORATION,

Third-Party Plaintiff,

-against-

URBAN FOUNDATIONS/ENGINEERING, LLC, CONSTRUCTION WATERPROOFERS, INC., NORTH AMERICAN CAPACITY INSURANCE CO., CRAWFORD TECHNICAL SERVICES and ONE BEACON INSURANCE GROUP,

Third-Party Defendants.

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Index № 122246/03

DECISION AND ORDER

SHERRY KLEIN HEITLER, J.:

Plaintiff Kenneth Pavlick (Pavlick) commenced this labor law action to recover damages for injuries he allegedly sustained on January 23, 2002, when he fell from a scaffold while working at a construction project at 630 168th Street, New York, New York. The construction project was at Columbia University's Medical Research Building (Research Building)[1] which was, and is, owned and operated by defendant The Trustees of Columbia University in the City of New York (Trustees of Columbia). Trustees of Columbia had retained defendant/ third-party plaintiff TDX Construction

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[1] Some of the supporting documents refer to this building as the Audubon Research Center.

001

Corporation (TDX) to be the construction manager at the project site, and at the time of his accident, Pavlick was an employee of one of the project's subcontractors, third-party defendant Construction Waterproofers, Inc. (Waterproofers).

Upon being named as a defendant in the labor law action, TDX commenced a third-party action against Urban Foundations/Engineering, LLC (Urban Foundations), Waterproofers, North American Capacity Insurance Co. (NAC), Crawford Technical Services (Crawford), and OneBeacon Insurance Group (OneBeacon) in an effort to obtain both a defense and indemnification in the underlying action.

Currently before the court are three motions pertaining to the third-party action and the dispute over insurance coverage (defense and indemnification) stemming from Pavlick's accident and lawsuit. Under motion sequence 001, OneBeacon moves for an order, pursuant to CPLR 3212, granting summary judgment and dismissing the third-party complaint against it on the ground that TDX did not comply with the terms and conditions of the policy, specifically, that TDX did not provide the requisite proof that it was named as an additional insured on the face of the policy. Under motion sequence 002, NAC seeks a judicial declaration that NAC does not owe TDX a defense and/or indemnification in the underlying action. Under motion sequence 004, OneBeacon served a second motion, this time seeking: (1) a judicial declaration that it does not owe a coverage obligation to TDX, Urban Foundations and/or Columbia based on the failure of these defendants to provide timely notification of the underlying occurrence; and (2) summary judgment on the issue of timely notification. These motions, under sequence numbers 001, 002, and 004, are consolidated herein for the purpose of disposition, and the facts, as they pertain to these motions, are as follows.

By purchase order, dated August 14, 2000, Waterproofers agreed to perform waterproofing services at the Research Building for the sum of $110,000.00, and on February 1, 2001, Waterproofers contracted with Urban Foundations (Urban/Waterproofers contract) regarding certain work to be done at the Research Building. Attached to the August 14, 2000 purchase order is a page entitled "subcontractors' insurance requirements" which states, in relevant part:

> Urban Foundation Engincering, LLC is to be listed as an additional insured.
>
> * * *
>
> The contractor agrees to indemnify, defend and save harmless the indemnitees from and against all losses, claims, costs . . . demand, payments, suits, actions. . .brought or recoverable against it or them by reason of any act or omission of the contractor, his agents of any negligence or carelessness.
> Additional insured: Urban Foundation Engineering, LLC
> TDX Construction Corporation
> Columbia University

According to TDX, the Urban/Waterproofers contract requires both Urban Foundations and Waterproofers to indemnify TDX against personal injury claims arising from their work under the contract and at the site. The Urban/Waterproofers contract also required both Urban Foundations and Waterproofers to procure and maintain comprehensive general liability insurance naming TDX as an additional insured.

TDX asserts that Waterproofers purchased a comprehensive general liability insurance policy from OneBeacon naming TDX as an additional insured, and that Urban Foundations purchased a comprehensive general liability insurance policy from NAC naming TDX as an additional insured. Inasmuch as both policies were in effect on the date of the accident, January 23, 2002, TDX, through its own general liability insurance carrier, Travelers Property Casualty (Travelers), sought both a defense and/or indemnification as an additional insured under the respective policies.

Specifically, by letter addressed to Urban Foundations, dated February 19, 2004, and by letter to OneBeacon, dated March 22, 2004, Travelers requested that NAC and OneBeacon accept the defense and indemnification of TDX and The Presbyterian Hospital with respect to Pavlick's action. The letters state that the request is based upon a certificate of insurance listing these entities as additional insureds under a policy issued to Urban Foundations by NAC and under a policy issued to Waterproofers by OneBeacon. However, both Waterproofers and OneBeacon, and Urban Foundations and NAC, have refused to provide TDX with additional insured coverage in the underlying action. As a result, TDX commenced the instant third-party action seeking a declaration that it is entitled to a defense and indemnification from subcontractors Urban Foundations and Waterproofers, and their respective insurers NAC and OneBeacon, for any liability TDX, as construction manager, incurs for any loss or damages resulting from Pavlick's lawsuit, to the extent that it is not found to have been negligent. TDX also alleges that OneBeacon and NAC breached their contracts of insurance by refusing to defend and indemnify TDX in the main action.

This decision first addresses motions sequence 001 and 004, which pertain to TDX and OneBeacon. Both TDX and OneBeacon acknowledge that Waterproofers procured certain policies of insurance naming itself as the insured. There is also no meaningful dispute that a certificate of insurance, dated August 10, 2001, was issued by insurance producer KBS International Corp. (KBS), which names Waterproofers as the insured, and names TDX, Urban Foundations, and Columbia Medical School as additional insureds. The certificate of insurance also names GCU as the company affording coverage, and it identifies three types of insurance coverage, including commercial general liability policy number JR 797017, which is at issue under motions sequence 001 and 004. The actual policy issued to Waterproofers, commercial general liability policy number JR 797017 (policy

JR 797017), was prepared by Global Underwriters Agency Inc., and issued by GA Insurance Company of New York, an affiliate of OneBeacon. Underlying the instant motions is the fact that, despite language in the certificate of insurance to the contrary, policy JR 797017 fails to name TDX as an additional insured.

By letter dated April 23, 2004, OneBeacon responded to Travelers'/TDX's request for coverage under policy JR 797017. In its letter, OneBeacon stated its intention to deny coverage to TDX as an additional insured based, in relevant part, upon late notice of the underlying occurrence, and because the status of TDX as an additional insured was questionable. TDX responded to the denial by commencing the third-party action: (1) contending that the certificate of Insurance is binding on OneBeacon and obligates OneBeacon to provide coverage; and (2) seeking an order estopping OneBeacon from denying coverage.

Along with the information listed above, the August 10, 2001 certificate of insurance contains the following two disclaimers which are clearly printed on the face of the document:

> This certificate is issued as a matter of information only and confers no rights upon the certificate holder. This certificate does not amend, extend or alter the coverage afforded by the policies below.
>
> This is to certify that the policies of insurance listed below have been issued to the insured named above for the policy period indicated, notwithstanding any requirement, term or condition of any condition of any contract or other document with respect to which this certificate may be issued or may pertain the insurance afforded by the policies described herein is subject to all the terms, exclusions and conditions of such policies. Limits shown may have been reduced by paid claims.

The disclaimers purport not to extend coverage beyond that which is set forth in the actual policy.

An examination of policy JR 797017, revcals language which makes compliance with its terms and conditions mandatory, including the terms stated on the Commercial General Liability

Coverage Form CG 0001 07 98, which provides, in relevant part:

> 2. Duties In the Event of Occurrence, Offence, Claim or Suit
> a. You must see to it that we are notified as soon as practicable of an "occurrence" of an offense which may result in a claim. To the extent possible, notice should include:
> (1) How, when and where the "occurrence" or offense took place;
> (2) The names an addresses of any injured persons and witnesses; and
> (3) The nature and location of any injury or damage arising out of the "occurrence" or offense.

By including these terms and conditions, policy JR 797017 makes timely notice a condition precedent to coverage, and OneBeacon raised this issue in response to TDX's demand for coverage. It is well settled that

> [w]here a policy of liability insurance requires that notice of an occurrence be given as soon as practicable, such notice must be accorded the carrier within a reasonable period of time. The insured's failure to satisfy the notice requirement constitutes a failure to comply with a condition precedent which, as a matter of law, vitiates the contract. . . . [T]he insured bears the burden of establishing the reasonableness of the proffered excuse.

(Great Canal Realty Corp. v Seneca Ins. Co., Inc., 5 NY3d 742, 743-744 [2005] [internal quotations and citations omitted]). Noticeably absent from the record is the submission of opposition papers from either Urban Foundations or the Trustees of Columbia. Accordingly, while the motion is granted against Urban Foundations and the Trustees of Columbia on default, this court must make a preliminary determination as to the timeliness of TDX's notification to OneBeacon before addressing issues pertaining to TDX's status as an additional insured under the policy.

An examination of the record reveals that the underlying action was commenced by service of Pavlick's summons and complaint on or about December 31, 2003, and that shortly thereafter, Pavlick served and filed an amended complaint. "The duty to give notice arises when, based on the information available, an insured could glean a reasonable possibility of the policy's involvement"

(DiGuglielmo v Travelers Prop. Cas., 6 AD3d 344, 345 [1st Dept], lv denied 3 NY3d 608 (2004) [internal quotations and citations omitted]).

While it is clear from the record that TDX gave prompt notice of Pavlick's lawsuit to OneBeacon following its receipt of the summons and complaint, it is equally clear that more than two years elapsed between the date TDX learned of the accident and the date TDX first provided notice of Pavlick's accident to OneBeacon. In response to written interrogatories, TDX acknowledged that it became aware of Pavlick's accident at or about the time of its occurrence through the incident report which was prepared on the date of the accident. Accordingly, not only did TDX have sufficient information of the accident at or about the time the accident occurred to provide adequate notification to the insurer, but its failure to do so has deprived OneBeacon of an opportunity to conduct its own investigation of the accident (and possible claim of liability) shortly after the accident occurred. "The insured's failure to satisfy the notice requirement constitutes a failure to comply with a condition precedent which, as a matter of law, vitiates the contract" (Great Canal Realty Corp., 5 NY3d at 743 [internal quotation and citation omitted]). Moreover, TDX failed to meet its burden of offering a reasonable explanation for the delay mandating a dismissal of the claim (id. at 743-744).

Furthermore, even if TDX had met the threshold requirement of timely notification, the motion would, nevertheless, be granted on the alternate theory advanced by movant.

OneBeacon asserts that, since TDX is not named as an additional insured on the actual policy, as is required, OneBeacon is not obligated to provide coverage to TDX despite the fact that TDX is named as an additional insured on the certificate of insurance. OneBeacon has demonstrated entitlement to summary judgment on this ground based upon its submissions, which include a copy

of the policy, a copy of the certificate of insurance, together with related letters and documents which were exchanged by the parties both before and during the litigation.

In opposition, TDX argues that OneBeacon should be estopped from disclaiming under the policy because the certificate of insurance constitutes evidence of the parties' intent to provide such coverage, or at least, raises a question of fact sufficient to preclude the granting of summary judgment at this juncture (Bucon, Inc. v Pennsylvania Mfg. Assn. Ins. Co., 151 AD2d 207, 210-211 [3rd Dept 1989]). Additionally, TDX argues that the motion for summary judgment is premature because it has not had an opportunity to explore the possibility that an agency relationship exists between OneBeacon and KBS, which authorized KBS to act on behalf of OneBeacon when it issued the certificate of insurance, and, therefore, prevents OneBeacon from denying coverage under policy JR 797017 to TDX (Lenox Realty v Excelsior Inc. Co., 255 AD2d 644, 645-647 [3rd Dept 1998], lv denied 93 NY2d 807 [1999]).

TDX's arguments rest, primarily, on Third Department cases which are not binding on this court. In fact, the First Department has consistently held that a certificate of insurance naming an entity, such as TDX, as an additional insured is not, by itself, sufficient to raise a factual issue as to the existence of coverage (Insurance Corp. of N.Y. v U. S. Underwriters Ins. Co., 11 AD3d 235, 236 [1st Dept 2004]; Glynn v United House of Prayer for All People, 292 AD2d 319, 322 [1st Dept 2002]).

Furthermore, TDX's contention that the motion for summary judgment is premature because it has not had an opportunity to explore the possibility that an agency relationship exists between OneBeacon and KBS which would bind OneBeacon to provide coverage for TDX, is without merit. A review of the history of this matter reveals that the parties have had abundant opportunities to

conduct both deposition and document discovery. TDX fails to explain why, if this avenue has merit, it was not pursued earlier. Nor does TDX "demonstrate[] any significant possibility beyond speculation or surmise that further discovery would yield evidence to create any triable issue" (Smith v Fishkill Health-Related Ctr., 169 AD2d 309, 316 [3rd Dept], lv denied 78 NY2d 864 [1991]).

This court turns next to third-party plaintiff's opposition to OneBeacon's second filing of a motion for summary judgment (motion sequence 004) on the ground that "generally successive motions for summary judgment not supported by new factual assertions and proofs are precluded" (Forte v Weiner, 214 AD2d 397, 398 [1st Dept], lv dismissed 86 NY2d 885 [1995]; Levitz v Robbins Music Corp., 17 AD2d 801 [1st Dept 1962]). More recently, however, the First Department has stated that

> [e]xceptions are permitted to the rule against successive summary judgment motions not only when evidence has been newly discovered since the prior motion . . . but also when other sufficient cause for the subsequent motion exists . . . [including, where movant] demonstrates that the matter can be further disposed of without burdening the resources of the court and movants with a plenary trial

(Varsity Tr. v Board of Educ. of City of N.Y., 300 AD2d 38, 39 [1st Dept 2002] [internal quotation marks omitted]).

TDX does not deny that it had, tacitly, agreed not to object to service of the second motion for summary judgment because OneBeacon was entitled to withdraw, and then reserve an, albeit expanded, CPLR 3212 motion. However, the basis for this court's decision to grant the relief sought in the second motion is that sufficient cause has been demonstrated by OneBeacon and not refuted by TDX. Specifically, the failure of TDX to give timely notice of the underlying occurrence to OneBeacon mandates a dismissal of TDX's claims for coverage under the policy.

Accordingly, the motion by OneBeacon is granted to the extent that those aspects of the third-party complaint which seek an order directing OneBeacon to provide TDX with coverage as an additional insured under policy JR 797017, are dismissed. The remaining contentions raised in opposition to the motion have been examined and are found to be without merit.

Under motion sequence 002, NAC seeks: (1) a judicial declaration, pursuant to CPLR 3001, that it does not owe TDX a defense and/or indemnification in the underlying action; (2) an order granting summary judgment dismissing the action as against NAC; and (3) an order, pursuant to CPLR 603 and 1010, severing the third-party action and directing separate trials.

According to NAC, TDX does not qualify as an additional insured under the NAC policy BJG 0000638-00, which was issued to Urban Foundations, because under the terms of the NAC policy, an additional insured is an entity for which the company has a certificate of insurance on file which has been approved by NAC. Despite its search for such documentation, neither the underwriting file nor the claims file contains a certificate of insurance naming TDX as either a certificate holder or an additional insured.

In opposition, TDX contends that NAC has failed to establish entitlement to summary judgment because: (1) it possesses and submits a copy of the certificate of insurance which names Urban Foundations as the insured and both TDX and Trustees of Columbia as additional insureds under policy BJG 0000638; (2) nowhere in NAC's motion papers does NAC actually deny that TDX was listed as an additional insured under the policy; and (3) additional discovery is needed with regard to the relevant policy, certificate of insurance, endorsement, and the ability of the producing agent to bind NAC.

It is noted that while the initial tender by TDX for coverage as an additional insured under

the NAC policy mirrors the tender it made with respect to the OneBeacon policy, the grounds underlying the instant coverage dispute vary sharply from that set forth above.

The certificate of insurance submitted by TDX, is dated January 10, 2002, and names Professional Risk Managers Inc. as the producer, Urban Foundations as the insured, NAC as the insurer affording coverage, TDX as the certificate holder, and both Trustees of Columbia, and TDX as additional insureds. The certificate of insurance also states that "all coverages are subject to policy terms, conditions & exclusions." The certificate also contains the following disclaimers:

> If the certificate holder is an additional insured the policy(ies) must be endorsed. A statement on this certificate does not confer right to the certificate holder in lieu of such endorsement(s). . . .
>
> The Certificate of Insurance on the reverse side of the this form does not constitute a contract between the issuing insurer(s), authorized representative or producer, and the certificate holder, nor does it alternatively or negatively amend, extend or alter the coverage afforded by the policies . . . thereon.

NAC argues that according to the terms of the policy, which includes endorsement number eleven (effective July 31, 2001), an entity is an additional insured only if the entity is "specifically designated as an additional insured on a certificate of insurance approved by the company."

To this end, NAC offers the affidavit of claims adjuster Richard W. Morse (Morse) to explain the significance of endorsement number eleven. According to Morse, for a certificate of insurance to be "approved by the company" the certificate of insurance would be included in the underwriting file retained for the named insured. He then asserts that, based upon his review of the relevant underwriting file, the file does not contain a "certificate of insurance, or any reference to one, providing coverage for TDX approved by North American Capacity Insurance Company."

In its effort to obtain a dismissal of the complaint against it, NAC also submits what purports

to be a copy of the subject policy, consisting of only odd-numbered pages. As neither a cover page nor a final page is attached for the court's review, it is unclear what percentage of the policy has been copied and submitted. Moreover, the submissions include a selection of "endorsement" pages which seem to be important to the ultimate determination of coverage, and a series of both relevant and irrelevant certificates of insurance. These submissions, when not illegible, appear to have been randomly selected and attached as exhibits without regard to their context, order or relevance and, therefore, lack sufficient probative value as evidence in support of the motion. As the procedural equivalent of a trial, summary judgment is appropriate only when it is clear that no triable issue of fact exists (Andre v Pomeroy, 35 NY2d 361, 364 [1974]), and based on NAC's submissions, it would be inappropriate to grant the motion for summary judgment.

Accordingly, consolidated motions sequence 001, 002, and 004, are granted only to the extent that it is

DECLARED that OneBeacon Insurance Group is not obligated to indemnify or defend Third-Party Plaintiff TDX Construction Corporation in the underlying action; and it is further

ORDERED that the motion by OneBeacon Insurance Group for an order, pursuant to CPLR 3212, granting summary judgment and dismissing the third-party complaint against it is granted, and the third-party complaint is severed and dismissed as against third-party defendant OneBeacon Insurance Group, and the Clerk is directed to enter judgment in favor of this defendant; and it is further

ORDERED that the motion by North American Capacity Insurance Co. for an order, pursuant to CPLR 3212, granting summary judgment and dismissing the third-party complaint against it is denied; and it is further

ORDERED that the remainder of the action shall continue.

This shall constitute the decision and order of the court.

DATED: JUNE 5, 2007

SHERRY KLEIN HEITLER
J.S.C.