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

PRESENT: HERMAN CAHN

Index Number : 601491/2003

ILLINOIS NATIONAL INSURANCE

VS

LUMBERMENS MUTUAL CASUALTY

Sequence Number : 004

RENEWAL

PART 49

INDEX NO.

MOTION DATE 5/21/07

MOTION SEQ. NO. 004

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

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

REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 6/25/07

HON. HERMAN CAHN J.S.C.

Check one: ☐ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate:

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

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ILLINOIS NATIONAL INSURANCE COMPANY, THE NEW YORK CITY SCHOOL CONSTRUCTION AUTHORITY, THE CITY OF NEW YORK and THE BOARD OF EDUCATION OF THE CITY OF NEW YORK,

Plaintiffs,

Index No. 601491/03

-against-

LUMBERMENS MUTUAL CASUALTY COMPANY,

Defendants.

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Herman Cahn, J.:

In this action for a declaratory judgment, plaintiffs Illinois National Insurance Company (Illinois National), the New York City School Construction Authority (NYCSCA), the City of New York (City) and the Board of Education of the City of New York (Board of Ed) move for summary judgment determining that defendant Lumbermens Mutual Casualty Company (Lumbermens) is obligated to reimburse Illinois National for costs incurred in defending an underlying personal injury action entitled Vera v The City of New York, et al, (Vera action) Sup. Ct. N.Y. County Index # 108682/01, CPLR 3212.

Plaintiffs assert that the NYCSCA, the City and the Board of Ed are additional insureds pursuant to a commercial general liability (CGL) policy issued by Lumbermens to non-party ABC Construction Contracting Inc. (ABC).

Lumbermens cross-moves for summary judgment determining that

Lumbermens has no defense or indemnification obligations to plaintiffs.

The underlying personal injury action was commenced on April 26, 2001 by Hector Vera, who was employed by CEMA Construction (CEMA) at the time of the accident. On June 7, 2000, CEMA had contracted with the NYCSCA for exterior modernization of JHS 25, a school located in New York City. On July 26, 2000, CEMA sub-contracted with ABC for roof asbestos abatement work. Vera alleged that he fell from a ladder while working at the construction site, although the complaint did not provide further details as to how the accident occurred. He later asserted that he fell while using a ladder that was connected to a waste container at the site.

Illinois National had issued a Comprehensive General Liability policy to NYCSCA for the period from January 1, 2000 to January 1, 2001. Lumbermens had issued a Comprehensive General Liability policy to ABC for the period from May 7, 2000 to May 7, 2001. The Lumbermens' policy listed NYCSCA, the City and the Board of Ed as additional insureds.

The Lumbermens policy provided coverage for bodily injury or property damage arising from "work" done by ABC. The term "work" was defined to include work or operations performed by ABC or on its behalf, and materials, parts or equipment furnished in connection with such work.

The instant declaratory judgment action was commenced in 2003. In a decision dated April 7, 2005, this Court referred to a Special Referee the issue of whether the accident took place at the premises where ABC was working and whether ABC's work was in any way involved in the accident.

In a report dated June 26, 2006, the Special Referee reported "sufficient credibility in the testimony adduced of Mr. Vera that he made use of an ABC asbestos waste container as a means of descending from the bridge scaffolding at the premises on the date and at the time he allegedly sustained his injuries so as to allow for a determination that ABC was involved in the alleged incident." (Referee's Report at 9). This Court confirmed the Referee's report on August 29, 2006.

In a decision dated May 10, 2007, Justice Karen Smith of this Court granted summary judgment dismissing Vera's claims against ABC. The Court found that it was clear that Vera had fallen while using a ladder connected to the asbestos container. However, the Court also found that the accident did not arise out of ABC's work at the site because Vera was not doing asbestos work. Thus, Vera had no claims against ABC.

In the instant action, each side now moves for summary judgment. A party moving for summary judgment is required to make a prima facie demonstration that it is entitled to judgment as a matter of law by producing sufficient evidence to eliminate any

material issues of fact. Winegrad v NYU Medical Center, 64 NY2d 851 [1985]; Grob v Kings Realty Associates, LLC, 4 AD3d 394 [2d Dept 2004]. The party opposing the motion is then required to demonstrate that a factual issue exists requiring a trial. Zuckerman v City of New York, 49 NY2d 557, 560 [1980].

The dispositive issue here is whether the accident arose from "work" being done by ABC at the site as defined in the Lumbermans' policy. The policy defines work as: a) work or operations performed by ABC or on its behalf; and b) materials, parts or equipment furnished in connection with such work or operations.

Plaintiffs argue that the Lumbermens' policy applies here because the accident occurred as part of the work done by ABC at the site. Plaintiffs do not contend that Vera was doing asbestos work. Instead, they assert that he fell on ABC's waste container, which constituted material used in connection with ABC's asbestos work.

Lumbermens argues that Justice Smith has already determined that Vera was not injured as the result of work done by ABC. As such, it contends that the Lumbermens' policy is inapplicable.

The decision of the Appellate Division, First Department, in Worth Construction Company, Inc v Admiral Insurance Company, ___ AD2d ___, [1st Dept 2007] 2007 WL 147511 is instructive. In that case, the plaintiff therein, Worth Construction, was the general

contractor on a construction site. Id. Defendant Admiral Insurance Company insured subcontractor Hackensack Steel, while another defendant, Farm Family Casualty Insurance Company, insured subcontractor Pacific Steel, which had been hired by Worth to build a staircase. Id. Both policies contained "additional insured" endorsements covering plaintiff Worth for liability arising out of the respective insured's operations at the site. Id. The injured worker, who was employed by a sub-subcontractor of Hackensack Steel, brought the underlying action against Worth for injuries allegedly sustained when he slipped on a set of stairs built by Pacific. Id. At the time of the accident, Pacific had finished installing metal pans on the stairs and was scheduled to return to the site to put up handrails after other parties had filled in the metal pans with concrete. Id. In the underlying action, Worth admitted that no negligence on Pacific's part contributed to the accident, resulting in Pacific's dismissal from that action. Id.

The motion court, found that Pacific's dismissal from the underlying action established as a matter of law that the accident did not arise out of any of its operations performed for Worth, as required by the additional insured clause in the Farm Family policy. Id. Thus, Farm Family had no duty to defend or indemnify Worth.

The First Department modified, stating that "[o]verlooked

was the language in paragraph 21.b of the policy defining Pacific's work to mean not only 'Work or operations performed by [Pacific] or on [Pacific's] behalf,' but also 'Materials, parts or equipment furnished in connection with such work or operations.'" Id. at *2. Thus, "[g]iven this definition of Pacific's work, it is immaterial, for purposes of deciding additional insured coverage, whether Pacific had completed its installation of the stairs, whether Pacific's installation of the stairs was negligent, or whether Pacific or a contractor in privity with it was the injured worker's employer." Id. "It is sufficient that the injury was sustained on the stairs." Id., citations omitted.

Here, the definition of "work" in the Lumbermens policy is identical to that in the policy in the Worth case. Therefore, the fact that Vera was not doing asbestos work for ABC is not dispositive of the coverage issue. The policy is triggered if Vera alleges that he was injured on materials used by ABC in its asbestos work.

ABC asserts that the container was owned by non-party Asbestos Transportation Company (ATC) and placed at the site under the direction of CEMA. However, the Special Referee found that ABC procured the container from ATC for use in ABC's asbestos operations. The Special Referee's report, which was confirmed by this Court, determined that ABC procured the

container for use at the site (from ATC). The Referee reported that Vera "made use of an ABC asbestos waste container as a means of descending from the bridge scaffolding at the premises on the date and at the time he allegedly sustained his injuries so as to allow for a determination that ABC was involved in the alleged incident." (Referee's report at 9). This is sufficient to demonstrate that the accident involved materials used in connection with ABC's work as defined by the policy and to trigger a duty to defend under the policy.

ABC points out that Justice Smith determined that Vera was not injured in the course of doing asbestos work for ABC. As such, his direct claims against ABC were dismissed. However, the issue of ABC's liability to Vera differs from the issue of whether Lumbermens had a duty to defend under the policy. The Worth decision demonstrates that if a party is injured on materials used in connection with the insured's operations, that is sufficient to trigger a duty to defend under the policy, even if there is no liability to the underlying plaintiff.

Accordingly, plaintiffs' motion for summary judgment is granted; and defendant's cross-motion for summary judgment is denied.

Settle order.

DATED: June 25, 2007 ENTER:

J.S.C.