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

PRESENT: DEBRA A. JAMES Justice — PART 59

SPORT ROCK INTERNATIONAL, INC., and EVANSTON INSURANCE COMPANY,
Plaintiffs,

- v -

AMERICAN CASUALTY COMPANY OF READING, PA,
Defendant.

Index No.: 603080/05
Motion Date: 03/27/07
Motion Seq. No.: 01
Motion Cal. No.: 117

The following papers, numbered 1 to 3 were read on this motion for summary judgment.

	PAPERS NUMBERED
Notice of Motion/Order to Show Cause -Affidavits -Exhibits	1
Answering Affidavits - Exhibits	2
Replying Affidavits - Exhibits	3

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers,

Plaintiffs move for summary judgment seeking a declaration that plaintiff Sport Rock is an additional insured under a policy issued by defendant insurance company and that therefore defendant must defend and indemnify plaintiffs in the underlying personal injury action.

The underlying personal injury action is captioned Anaya v Town Sports Int'l (Supreme Court, New York County, Index No.: 101027/2003). On January 14, 2003, plaintiff Anaya was injured in a 30-foot fall while scaling an indoor rock climbing wall

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

operated by Town Sports International, Inc. Sport Rock constructed, installed and sold the rock climbing wall to non-party Town Sports International in March or April 2002. Part of the equipment sold to Town Sports by Sport Rock included climbing harnesses. Petzl America, Inc., their distributor, sold the harnesses to Sport Rock. By Order dated January 19, 2006, the court (DeGrasse, J.) dismissed the Anaya action as against Sport Rock and Petzl, from which plaintiff therein has filed a notice of appeal.

Plaintiff Evanston issued a Commercial General Liability (CGL) Insurance Policy to Sport Rock covering claims including bodily injury. The policy also contained an endorsement which stated in pertinent part that "when you are added to a manufacturer's or distributor's policy as an additional insured because you are a vendor for such manufacturer's or distributor's products, Paragraph 4, Other Insurance, is amended by the addition of the following: The coverage afforded the insured under this Coverage will be excess over any valid and collectible insurance available to the insured as an additional insured under a policy issued to a manufacturer or distributor for products manufactured, sold, handled or distributed."

Defendant American Casualty issued a CGL policy to Petzl that contains an additional insured endorsement that provides that "Sporting Goods or Athletic Equipment Distributors" are

additional insureds under the policy "but only with respect to 'bodily injury' or 'property damage' arising out of 'your products' . . . which are distributed or sold in the regular course of the vendor's business" subject to certain enumerated exclusions.

Upon tender by the plaintiffs, defendant disclaimed any duty to defend or indemnify Sport Rock in the Anaya action. It is undisputed that Evanston provided a defense for Sport Rock, its insured, in the underlying first party and cross-claim actions. American Casualty provided a defense to its insured, Petzl in the underlying first party and cross-claim actions. Plaintiffs argue that judgment should be granted on their complaint against American Casualty because Sport Rock is an additional insured under the American Casualty policy. American Casualty does not dispute that Sport Rock is an additional insured under its policy. Rather, American Casualty argues that Sport Rock is an additional insured for claims limited to bodily injury arising out of Petzl's products subject to the limitations set forth in the policy and that the Evanston policy provides primary insurance for claims not within the scope of American's additional insured vendor endorsement.

The court agrees with plaintiff that based upon the terms of the American Casualty policy issued to Petzl, American Casualty

had a duty to defend Sport Rock in the underlying personal injury action. As recently stated by the Court of Appeals

> I]t is well settled that an insurer's duty to defend its insured is exceedingly broad and an insurer will be called upon to provide a defense whenever the allegations of the complaint suggest a reasonable possibility of coverage. The duty to defend an insured is derived from the allegations of the complaint and the terms of the policy. If a complaint contains any facts or allegations which bring the claim even potentially within the protection purchased, the insurer is obligated to defend. A duty to defend is triggered by the allegations contained in the underlying complaint. The inquiry is whether the allegations fall within the risk of loss undertaken by the insured and, it is immaterial that the complaint against the insured asserts additional claims which fall outside the policy's general coverage or within its exclusory provisions. The merits of the complaint are irrelevant and, an insured's right to be accorded legal representation is a contractual right and consideration upon which a person's premium is in part predicated, and this right exists even if debatable theories are alleged in the pleading against the insured. An insured's right to representation and the insurer's correlative duty to defend suits, however groundless, false or fraudulent, are in a sense litigation insurance expressly provided by the insurance contract. Furthermore, an insurer may be required to defend under the contract even though it may not be required to pay once the litigation has run its course. . .
> [W]e have held that an additional insured is a recognized term in insurance contracts, and that the well-understood meaning of the term is an entity enjoying the same protection as the named insured. . . Thus, the standard for determining whether an additional named insured is entitled to a defense is the same standard that is used to determine if a named insured is entitled to a defense.

BP Air Conditioning Corp. v One Beacon Ins. Group, 8 NY3d 708, 714-715 (2007) (internal punctuation marks and citations omitted).

The court finds that Sport Rock was an additional insured under the American Casualty policy based upon the allegations in the fifth through eighth causes of action in the Anaya complaint because it was asserted that the harness sold by Petzl to Sport Rock was defective.

American Casualty furnished a defense to its named insured Petzl in the Anaya action under the terms of its policy. It therefore follows that Sport Rock was entitled to a defense by American Casualty as an additional insured under the Petzl policy as argued by the plaintiffs here. Accordingly, plaintiffs are entitled to summary judgment insofar as they seek a declaration that American Casualty is obligated to provide a defense to Sport Rock in the Anaya action.

However, the American Casualty policy only indemnifies Sport Rock as an additional insured for liability claims that arise from Petzl's products as set forth in the policy and its exclusions. To the extent that Sport Rock's liability in the Anaya action were to be predicated on causes not within the vendor's endorsement in the American Casualty policy, for example liability that arose from Sport Rock's negligence, Sport Rock would have to look to the Evanston CGL policy for coverage. The Evanston policy provides that its insurance obligation is excess only as to the liability covered under another insurer's vendor's endorsement. Therefore, as argued by American Casualty,

Evanston's policy is primary insurance for any claim not within other insurance coverage.

That is, while American Casualty had a duty to provide a defense to Sport Rock for all the claims asserted in the Anaya action, its insurance coverage was only primary as to the risks set forth in the additional insured endorsement. Evanston retained the right and duty to defend any claims not covered by the American Casualty policy. As the Court has stated, "[w]hen more than one policy is triggered by a claim, pro rata sharing of defense costs may be ordered, but we perceive no error or unfairness in declining to order such sharing, with the understanding that the insurer may later obtain contribution from other applicable policies." Continental Cas. Co. v Rapid-American Corp., 80 NY2d 640, 655 -656 (1993).

Contrary to plaintiffs' arguments, the American Casualty policy was not "primary" for all of the claims asserted in the Anaya complaint and the Evanston policy remained primary for those claims not within the vendor's endorsement. In considering a similar case involving two primary policies where one policy had an "other insurance" excess clause, the Court stated "[w]e conclude that where, as here, two coincidental primary policies exist--one excess to the other by reason of competing 'other insurance' provisions--and where the excess carrier has voluntarily assumed and marshaled the insured's defense, an

allocation of defense costs based on primary policy limits is appropriate." General Motors Acceptance Corp. v Nationwide Ins. Co., 4 NY3d 451, 453-454 (2005). In this case, both policies were "primary" for separate claims arising out of the complaint in the Anaya action. Therefore, an allocation of defense costs is appropriate.

The court must however deny summary judgment as to the issue of the allocation of defense costs because it has not been established in the pre-discovery posture of this action that there are no other insurance policies that may provide for the defense and indemnification of the claims asserted against Sport Rock in the Anaya action. The Court of Appeals specifically adopted this approach in BP Air Conditioning when it affirmed the trial court's ruling declaring an obligation to defend an additional insured while declining to declare that the "additional" insurer was primarily responsible for the defense costs because not all relevant insurance policies were submitted to the court. BP Air Conditioning Corp. v One Beacon Ins. Group, 8 NY3d 708, 716, supra ("In order to determine the priority of coverage among different policies, a court must review and consider all of the relevant policies at issue. Here, Supreme Court correctly concluded that because none of the other insurance carriers are parties to this declaratory judgment

action and no other relevant policies have been submitted, the priority of coverage cannot be determined.").

Accordingly, it is

ORDERED that plaintiffs' motion for summary judgment is GRANTED to the extent that the court hereby DECLARES that defendant AMERICAN CASUALTY COMPANY OF READING, PA, is obligated to provide a defense to plaintiff SPORT ROCK INTERNATIONAL, INC., in the action captioned Anaya v Town Sports Int'l (Sup Ct, NY County, Index No.: 101027/2003); and it is further

ORDERED that plaintiffs' motion for summary judgment is otherwise DENIED and the parties are directed to proceed with discovery as to the issue of the priority of insurance as set forth in this opinion; and it is further

ORDERED that the parties are directed to attend a preliminary conference on October 2, 2007, at IAS Part 59, Room 1254, 111 Centre Street, at 9:30 A.M.

This is the decision and order of the court.

Dated: August 22, 2007 ENTER:

J.S.C.
DEBRA A. JAMES
J.S.C.