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

PRESENT: Hon. Milton A. Tingling Justice PART 44

Carlisle SoHo East Trust

- v -

Lexington Ins. Co.

INDEX NO. 600363/2006

MOTION DATE 4/11/06.

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

FILED
AUG 31 2007
COUNTY CLERK'S OFFICE
NEW YORK

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

Defendant, Lexington Insurance Company ("Lexington") brings a motion for summary judgment based on the grounds that they did not have a duty to defend or indemnify Plaintiff. Plaintiff, Carlisle SoHo East Trust ("Carlyle"), cross-moves for summary judgment arguing that Lexington has a duty to defend and indemnify it. Defendant contends Plaintiff is not explicitly named as an additional insured in its contract to indemnify Exterior Erecting Systems Inc, thus it does not have a duty to defend Plaintiff against the claims in the underlying Waitkus action nor does it have a duty to indemnify Plaintiff. Defendant's motion for summary judgment is denied and Plaintiff's cross-motion for summary judgment is granted.

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

Dated: 8/16/07

MAT

JUDGE MILTON A. TINGLING J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

Plaintiff owns property at 199-205 Bowery Street in New York City, where a project is going forth ("the project"). Plaintiff hired York Hunter Construction Services, Inc., ("York Hunter") as the general contractor. York Hunter subcontracted with Lance Industries International, Inc., d/b/a Symmetry Products Group ("Lance") for Lance to furnish and install a pre-fabricated brick panel wall system at the project ("York Hunter Contract"). Lance subcontracted the installation of the brick panel at the project to Exterior Erecting Systems Inc., ("EES").

On December 21, 2001 Gerald Waitkus, employed by EES, was working at the project when a gust of wind caused a panel to fall backward striking the rim of his hard hat. Waitkus commenced a personal injury action against Carlyle alleging injury. In 2003 Plaintiff commenced a third-party action against Lance and EES seeking common law and contractual indemnification. In November 25, 2003, York Claims Service, an authorized claim representative for Defendant, acknowledged receipt of the Third-Party Complaint. Plaintiff tendered its defense and indemnity of the Waitkus action to Defendant and to date, Defendant has not responded to the Carlyle tender.

It is well established that a party moving for summary judgment must make a prima facie showing of entitlement as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact in dispute. *Zuckerman v. City of New York,* 49 N.Y.2d 557, 562. Plaintiff makes a prima facie showing it is entitled to defense and indemnification by Defendant for the claims asserted against it in the Waitkus action.

When the terms of a written contract are clear and unambiguous, the intent of the parties must be found within the four corners of the contract. *Finkelstein v. Tainiter*, 264

A.D.2d 587. Only when an ambiguity is found within the four corners of the contract may the court consider extrinsic evidence; extrinsic evidence should not be used to create an ambiguity in a written agreement which is unambiguous on its face. *Id.* Plaintiff's Exhibit One, is a copy of the York Hunter subcontract ("contract") between York Hunter and Lance. Exhibit C of the contract names Plaintiff and York Hunter as additional insureds.

Lance then subcontracted with EES. In furtherance of procuring insurance with EES, various correspondences were exchanged between Lance and EES. Where words used in a written contract are susceptible to more than one interpretation, the courts will look at the surrounding circumstances existing when the contract was entered into, the situation of the parties, the subject matter of the instrument, and whether parol evidence may be admissible to clear up any ambiguity in the language employed. Korff v. Corbet, 18 A.D.3d 248, 251. In an exchanged correspondence, dated March 27, 2001 the intentions of the parties were made clear. The intention was to have EES bound to the York Hunter Contract. [Letter to Bob from Earl Ferguson, Mar. 27, 2001]. Enclosed with the letter was a contract for EES to review. The contract included York Hunter and Plaintiff as additional insureds. Furthermore, Plaintiff's Exhibit Three includes a document signed by representatives of EES and Lance. The document is titled, "Subcontract Agreement," states EES agrees to all provisions in the York Hunter contract as revised including EES changes. The York Hunter contract included Plaintiff as an additional insured. Thus, it was the intention of the parties to have Plaintiff additionally insured by Defendants as insurers of EES.

Where an insurance policy includes the insurer's promise to defend the insured against specified claims as well as to indemnify for actual liability, the insurer's duty to furnish a defense is broader than its obligation to indemnify. Hotel des Artistes, Inc. v. General Acc. Ins. Co. of America, 9 A.D.3d 181, 267. Exhibit C of Defendant's motion includes the Commercial General Liability Coverage Form for EES which states under section one: "We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury"....we will have the right and duty to defend the insured against any suit seeking those damages." The Waitkus action involved allegation of injuries sustained as a result of the alleged accident. The aforementioned allegations against Carlyle fall squarely within the Commercial General Liability Coverage, thus Defendant has a duty to defend and indemnify Plaintiff.

Accordingly, Defendant's motion for summary judgment is denied. Plaintiff's cross-motion for summary judgment is granted to the extent that Defendant had a duty to defend and indemnify Plaintiff for the claims against it in the underlying Waitkus action.

JUDGE MILTON A. TINGLING