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

JANE S. SOLOMON

PART 55

Index Number : 602142/2003

P JENEL MANAGEMENT CORP.

vs

PACIFIC INS. CO.

Sequence Number : 001

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE 12/11/06

MOTION SEQ. NO. _____

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 ...	1-3
Answering Affidavits — Exhibits	4-6
Replying Affidavits	7-9

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed memorandum decision and order.

N.B. -- Reference to a special Referee is directed in the final decretal paragraphs.

Dated: 2/9/07

JANE S. SOLOMON 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 : IAS PART 55
----------X

JENEL MANAGEMENT CORP. and NAVIGATORS INSURANCE COMPANY,

Plaintiffs,

-against-

PACIFIC INSURANCE COMPANY,

Defendant.

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DECISION AND ORDER

INDEX NO. 602142/03

JANE S. SOLOMON, J.

Plaintiffs Jenel Management Corp. ("Jenel") and Navigators Insurance Company ("Navigators") sued defendant Pacific Insurance Company ("Pacific") for a declaration that Jenel is entitled to indemnification and a defense under a policy issued by Pacific to Youngworld of Eighth Avenue, Inc. ("Youngworld"). Plaintiffs move for summary judgment and for leave to amend the complaint to add 601 Eighth Avenue Associates, Inc. ("601 Eighth") as a party plaintiff nunc pro tunc. Pacific cross-moves for summary judgment dismissing the complaint, and does not oppose that part of plaintiffs' motion seeking to add 601 Eighth as a plaintiff.

Big Sol Manufacturing Company, Inc. ("Big Sol") was the fee owner of a building located at 601 Eighth Avenue, at the corner of Eighth Avenue and West 39th Street in Manhattan. Big Sol leased the building under a net lease to 601 Eighth. 601 Eighth in turn leased commercial retail space on the ground floor

and the entire second floor to Versace Realty Corp. in 1995, which then assigned the lease to Youngworld, a children's clothing store. Jenel was the building manager.

The store lease provided that tenant was required to procure comprehensive general liability insurance protecting 601 Eighth, and naming it as an additional insured. Lease, Notice of Motion, Exhibit C, paragraph 51 (B). The lease further provided that tenant indemnified 601 Eighth against all claims for personal injury arising "upon or about the demised premises, the building including any basement or storage area, or on the sidewalk adjoining the demised premises, except such claims as may be the result of the negligence or acts of the Owner, its agents, employees or contractors." Lease, at paragraph 51(A).

In furtherance of the insurance provision in the lease, Pacific issued a policy to Youngworld included an additional insured endorsement that extended coverage to any person as required by written contract ". . . but only with respect to liability arising out of the ownership, maintenance or use of that part of the premises leased to you and shown in the Schedule . . ." Policy, annexed as Exhibit B to Notice of Cross-motion. Of necessity, this covers Youngworld and, although Pacific denied that Jenel is an additional insured in its answer (Notice of Motion, Exhibit K), on these motions it does not contest Jenel's status as an additional insured. See, Aff. of Christopher A.

South, Esq., in Support of Cross-Motion and in Opposition to Plaintiff's Motion, paragraph 25.

The basement of the building was occupied by an unrelated nightclub. To prevent access to its space from the basement, Youngworld installed a gate (with Jenel's permission) in a stairwell that connected to the two premises, and used the stairwell as a fire exit from the second floor. Youngworld kept the gate open during business hours, and locked it at night.

In May 1996, a security guard employed by Youngworld, named Thomas Page, slipped and fell while he was walking down the stairwell from Youngworld's premises to unlock the gate. In 1999, he sued Jenel and the net lessor (but not 601 Eighth) in the New York State Supreme Court, Richmond County (Page v Big Sol Mfg Co., Inc., index number 10954/99) (the "underlying action"); Jenel impleaded Youngworld as a third-party defendant. The complaint was amended in 2005 to add 601 Eighth as a defendant.

Jenel first learned of Page's accident when it received notice from his lawyer in a letter dated November 17, 1997. Jenel notified Pacific of the claim in a letter dated December 3, 1997. Pacific's third-party claims adjuster acknowledged receipt of the December 3, 1997 letter. Prior to this lawsuit, there had been no disclaimer by Pacific.

By a decision dated September 8, 2006, in Page's underlying action the court granted Youngworld's motion for

summary judgment to the extent of dismissing Jenel's claim for common law negligence (as barred under Workers Compensation Law § 11), but denied the motion with respect to the first cause of action for contractual indemnification and/or breach of covenant to procure insurance for Jenel's benefit. The court held that the contractual claim could not be dismissed because of material issues of fact about whether the subject stairwell was part of Youngworld's space.[1]

In this action, which involves Pacific Insurance's duty to provide a defense and to indemnify Jenel and 601 Eighth, the Staten Island court's finding that questions of fact exist as to whether the incident occurred within Youngworld's premises does not preclude summary judgment here because the legal question is different.

The first relevant question is whether an additional insured enjoys the same protection as the named insured under an insurance policy. The Court of Appeals answered that question in the affirmative. Pecker Iron Works of NY v Traveler's Ins. Co., 99 NY2d 391 (2003). An insurer's duty to defend is "exceedingly broad . . . [it] must defend whenever the four corners of the complaint suggest - or the insurer has actual knowledge of facts establishing - a reasonable possibility of coverage."

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[1] This issue arose because of a diagram included in the store lease that indicated that the stairwell was part of the demised premises on the first floor, but not on the second floor.

Continental Cas. Co. v Rapid-Am. Corp., 80 NY2d 640, 648 (1993) (citations omitted).

Page alleged that his injury occurred in the course of his employment by Youngworld, and that he fell in the stairwell running from Youngworld's second floor to the gate. The Staten Island decision shows that there is no triable issue of fact on these points. While not critical to determining this motion, that decision certainly supports the finding that Page's claim arises from Youngworld's operation at the premises, and the underlying facts are sufficient to trigger Pacific Insurance's obligation to defend the claim on behalf of its additional insureds.

The second relevant question here is one of contractual interpretation. Pacific argues that summary judgment cannot be granted because there is a question of fact as to whether the subject stairwell is part of the leased premises, and the Pacific policy only covers claims for personal injuries that occur within the premises. It further argues that the motion must be denied because the lease is ambiguous as to the scope of Youngworld's agreement to indemnify Jenel and 601 Eighth. Pacific is mistaken on both points.

The policy does not limit coverage for additional insureds to accidents that occur on the premises. The additional insured endorsement provides coverage "with respect to liability

arising out of the ownership, maintenance or use of that part of the premises leased to [Youngworld]". Page's injury arose from Youngworld's use of the leased premises. The policy language unambiguously covers claims arising from Youngworld's ownership and use of the premises, and Page's injury falls within the scope of coverage. To the extent that an ambiguity is discerned, it is construed in favor of the insured and against the insurer. See, 242-44 East 77th Street, LLC v. Greater New York Mutual Ins. Co., 31 AD3d 100 (1st Dept 2006), appeal denied, ___ AD3d ___, NY App. Div. LEXIS 11766 (September 28, 2006).

Youngworld agreed to procure insurance protecting it and 601 Eighth from liability occasioned by an occurrence on or about the demised premises or any appurtenances thereto. Lease, at paragraph 51(B). Pacific argues that this provision required Youngworld to procure insurance only with respect to claims arising on the premises, and not one where the accident occurred on the subject stairwell. This construction would render meaningless the phrase "on or about" the demised premises, and the rest of the language that clearly indicates the intent to include the immediately surrounding area and appurtenances. Moreover, if Jenel and 601 Eighth are entitled to coverage under the Pacific policy as additional insureds on the same basis as Youngworld, then such coverage is primary, because there is no indication in the lease or in the policy that nonprimary coverage

would satisfy the additional insurance coverage requirement. See, Pecker Iron Works of NY, supra, and BP Air Conditioning Corp. v One Beacon Ins. Group, 33 AD3d 116 (1st Dept. 2006).

Pacific also argues that the phrase "appurtenance", as used in the insurance procurement clause in paragraph 51(B) of the lease, is ambiguous, and that the lease should have specified the staircase as an area outside the premises to which its obligation to indemnify and procure insurance was extended. "Appurtenance" is defined in Black's Law Dictionary as "something that belongs to or is attached to something else" (West, 7th Ed. 1999, p. 98). Pacific does not suggest any alternate meaning, and under its plain meaning, the stairwell is an appurtenance. In any event, the accident occurred "upon or about" the premises in the clear, unambiguous meaning of that phrase.

Finally, Pacific argues that discovery is needed to determine whether Jenel gave notice of the occurrence as required under the policy. Jenel's November 17, 1999 notice was sent to Pacific at an address in address in California, and Pacific maintains that it had an office in New York. However, Pacific's agent acknowledged receipt of the notice in 2000, in a letter copied to "CNA Excess & Select, 180 Maiden Lane, New York NY", which is the address Pacific claims notice should have been sent. Pacific also argues that the policy requires that service of process of a summons and complaint in an action to compel Pacific

to pay an amount claimed should have been made upon Martin Haber, Vice President and General Counsel, c/o Pacific Insurance Company, 180 Maiden Lane, New York, NY. However, the policy states that service "may" be made upon Mr. Haber, and does not require it. Moreover, this action was commenced in 2003, and it is too late to challenge the sufficiency of service. Accordingly, it hereby is

ORDERED that plaintiffs' motion to amend the complaint to add 601 Eighth as a party plaintiff nunc pro tunc, in the form annexed as Exhibit L to the Notice of Motion, is granted without opposition, and service of the supplemental summons and amended complaint is deemed made upon service of a copy hereof with notice of entry; and it further is

ORDERED, ADJUDGED and DECLARED that plaintiffs' motion for summary judgment is granted, and it hereby is declared that plaintiffs Jenel and 601 Eighth are entitled to primary coverage, including a defense and indemnity, for the personal injury claim made by Thomas Page in the underlying action, under the insurance policy issued by defendant Pacific Insurance Company to Youngworld Stores Group, Inc. (policy number PCL 001435) in effect from September 30, 1995 to March 30, 1997; and it further is

ORDERED, ADJUDGED and DECLARED that plaintiff Navigators is entitled to recover costs it has incurred in

defending or indemnifying Jenel and 601 Eighth in the underlying action; and it further is

ORDERED that Pacific's cross-motion for summary judgment is denied, and plaintiffs are awarded $100 in costs for this motion; and it further is

ORDERED that the issue of the amount of damages plaintiffs are entitled to recover is referred to a Special Referee to hear and report with recommendations; and it further is

ORDERED that entry of judgment shall abide receipt of the report and recommendations of the Special Referee and a motion pursuant to 4403; and it further is

ORDERED that a copy of this order with notice of entry shall be served by hand on the Clerk of the Judicial Support Office (Room 311) to arrange a date for the reference to a Special Referee.

Dated: February 9, 2007

ENTER:

J.S.C.

JANE S. SOLOMON

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