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SHORT FORM ORDER

INDEX No. 05-18003

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 10 - SUFFOLK COUNTY

PRESENT:

Hon. JOHN J.J. JONES, JR.
Justice of the Supreme Court

MOTION DATE 7-9-08 (# 001)
MOTION DATE 6-4-08 (# 002)
MOTION DATE 4-4-08 (# 003)
ADJ. DATE 7-16-08
Mot. Seq. # 001 - MotD
002 - XMotD
003 - XMD

WILLIAM FLOYD SCHOOL DISTRICT AND WILLIAM FLOYD MIDDLE SCHOOL and TRANSPORTATION INSURANCE COMPANY,

Plaintiffs,

- against -

FRANK MAXNER, DEBORAH MAXNER, PREMIUM SUPPLY COMPANY, AURORA CONTRACTORS, INC. and QBE INSURANCE CORP.,

Defendants.

AURORA CONTRACTORS, INC. and QBE INSURANCE CORP.,

Third-Party Plaintiffs,

- against -

ROYAL AND SUNALLIANCE INSURANCE COMPANY,

Third-Party Defendant.

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Upon the following papers numbered 1 to 52 read on these motions for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 16 ; Notice of Cross Motion and supporting papers 17 - 37; 38 - 46 ; Answering Affidavits and supporting papers _____; Replying Affidavits and supporting papers 47- 48; 49- 50 ; Other Memorandum of Law 51 - 52 ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion (#001) by plaintiffs for an order pursuant to CPLR 3212 granting them summary judgment against QBE Insurance Corp. declaring that QBE is obligated to indemnify and defend the plaintiff William Floyd School District in the underlying action, as the primary insurer, and that QBE is obligated to reimburse the plaintiff Transcontinental Insurance Company for its costs and attorney's fees in the underlying action, and scheduling a hearing to assess the amount to be reimbursed, is granted to the extent of granting summary judgment declaring that QBE has a duty to defend and that Transcontinental Insurance Company is entitled to reimbursement, and scheduling a hearing, as set forth below, and is otherwise denied; and it is further

ORDERED that cross motion (#002) by defendant/third-party plaintiffs Aurora Contractors, Inc. and QBE Insurance Corp, for an order pursuant to CPLR 3212 granting summary judgment on the third-party complaint declaring that the third-party defendant, Royal and Sunalliance Insurance Company, is obligated to provide a defense and indemnity to Aurora and to the plaintiff William Floyd School District; that the coverage afforded by Royal and Sunalliance is primary and without contribution; that the coverage afforded by QBE Insurance Corp. to Aurora and William Floyd School District is excess coverage only; and scheduling a hearing to determine the amount of attorney's fees and costs owed by Royal and Sunalliance, is granted to the extent of granting summary judgment declaring that Royal and Sunalliance Insurance Company has a duty to defend and that QBE is entitled to reimbursement, and scheduling a hearing, as set forth below, and is otherwise denied; and it is further

ORDERED that the cross motion (#003) by the third-party defendant, Royal and Sunalliance Insurance Company for an order pursuant to CPLR 3212 granting it summary judgment dismissing the third-party complaint is denied.

This declaratory judgment action has as its genesis a personal injury action currently before this Court, *Maxner v William Floyd School Dist.*, Index No. 2426-2004. In the underlying action Frank Maxner seeks damages for personal injuries he allegedly sustained when the extension ladder he was using to get down from a roof collapsed onto itself, and he fell to the ground. The William Floyd School District (School District) had employed Aurora Contractors, Inc. (Aurora) to act as the general contractor for construction of a new middle school. Aurora subcontracted with Premium Supply Company (Premium) to supply the kitchen equipment , and Premium sub-subcontracted with the plaintiff's employer, Dee's Associated, Inc., to install the walk-in refrigerators.

By decision dated October 17, 2007, Mr. Maxner was granted summary judgment as to his Labor Law § 240(1) claim, and the School District was denied summary judgment as to its claim for contractual indemnification over and against Aurora because it had failed to establish that Mr. Maxner's accident was caused by the negligent act or omission of Aurora or its subcontractor, as required by the parties' contract. By decision dated March 31, 2008, Aurora was denied summary judgment as to its claim for contractual indemnification over and against Premium because it also had failed to establish that the accident was caused by the negligent act or omission of Premium or its subcontractor, as required by the

contract between Aurora and Premium.

Accordingly, so much of the motion by the School District and its insurer, Transportation Insurance Company (Transportation), and the cross motion by Aurora and its insurer, QBE Insurance Corp. (QBE), which seeks summary judgment on their claims for contractual indemnification is denied because these same issues have already been addressed and rejected in this Court's previous decisions in the underlying action (***D'Arata v New York Cent. Mut. Fire Ins. Co.***, 76 NY2d 659, 664, 563 NYS2d 24 [1990]). ***Ryan v New York Tel. Co.***, 62 NY2d 494, 500, 478 NYS2d 823 [1984]).

However, it is well settled that an insurer's duty to defend is broader than its duty to indemnify, such that an insurer may be obligated to defend its insured even if, at the conclusion of an underlying action, it is found to have no obligation to indemnify its insured (*see,* ***Automobile Ins. Co. of Hartford v Cook***, 7 NY3d 131, 137, 818 NYS2d 176 [2006]; ***Global Constr. Co. v Essex Ins. Co.***, 52 AD3d 655, 860 NYS2d 614 [2008]; ***City of New York v Evanston Ins. Co.***, 39 AD3d 153, 157, 830 NYS2d 299 [2007]). An insurer's duty to defend arises whenever, as is the case here, "the allegations within the four corners of the underlying complaint potentially give rise to a covered claim" (***Worth Constr. Co. v Admiral Ins. Co.***, 10 NY3d 411, 415, 859 NYS2d 101 [2008], quoting ***Frontier Insulation Contrs. v Merchants Mut. Ins. Co.***, 91 NY2d 169, 175, 667 NYS2d 982 [1997]). "This standard applies equally to additional insureds and named insureds" (***Worth Constr. Co. v Admiral Ins. Co.***, *supra* at 415; ***BP A.C. Corp. v One Beacon Ins. Group***, 8 NY3d 708, 714, 840 NYS2d 302 [2007]). Further, "an insured should not be denied an initial recourse to a carrier merely because another carrier may also be responsible" (***Continental Cas. Co. v Rapid-American Corp.***, 80 NY2d 640, 655, 593 NYS2d 966 [1993]).

It is also well settled that a court addressing an insurance coverage dispute must initially look to the language of the subject policy (***Raymond Corp. v National Union Fire Ins. Co.***, 5 NY3d 157, 162, 800 NYS2d 89 [2005]; ***State of New York v Home Indem. Co.***, 66 NY2d 669, 671, 495 NYS2d 969 [1985]). The policy is construed "in a way that affords a fair meaning to all of the language employed by the parties in the contract and leaves no provision without force and effect" (***Raymond Corp. v National Union Fire Ins. Co.***, *supra* at 162, quoting ***Consolidated Edison Co. of N.Y. v Allstate Ins. Co.***, 98 NY2d 208, 221-222, 746 NYS2d 622 [2002]). "Unambiguous provisions of a policy are given their plain and ordinary meaning" (***Lavanant v General Acc. Ins. Co.***, 79 NY2d 623, 629, 584 NYS2d 744 [1992]) and ambiguous provisions are construed "against the insurer who drafted the contract" (***State Farm Mut. Auto Ins. Co. v Glinbizzi***, 9 AD3d 756, 757, 780 NYS2d 434 [2004]).

The Royal & Sunalliance Insurance Policy

Premium's insurer is Royal & Sunalliance (Royal) and the subject policy is modified by the General Liability Enhancement Endorsement, which provides at subdivision H entitled "ADDITIONAL INSUREDS – BY CONTRACT, AGREEMENT OR PERMIT" – The following is added to Section II WHO IS AN INSURED:

Any person or organization not otherwise identified in this coverage or by

> endorsement to this coverage as an insured and that you are required by written contract, written agreement or written permit to name as an insured but only for: (amounts of liability)

The contract between Aurora and Premium provides at Article 13, entitled "INSURANCE AND BONDS"

> 13-1 The Subcontractor shall purchase and maintain insurance of the following types of coverage and limits of liability:
> SEE ATTACHED REQUIREMENT - PROPER INSURANCE CERTIFICATE(S) MUST BE RECEIVED IN MAIN OFFICE PRIOR TO COMMENCEMENT OF FIELD WORK

Attached to the contract is a "sample copy" certificate of insurance which reads, in pertinent part:
under the section labeled: "producer" – "your insurance broker"
under the section labeled: "insured" – "your company name and address"
under the section labeled: "type of insurance" –
"general liability insurance," "automobile insurance," "excess liability," "worker's compensation and employer' liability," and under "other:"
"ADDITIONAL INSUREDS:
THE BOARD OF EDUCATION OF THE WILLIAM FLOYD UFSD, WIEDERSUM ASSOCIATES, PC, PHILIPBAR CONSULTING INC. & AURORA CONTRACTORS, INC."

Therefore, the Court concludes that the contract between Aurora and Premium specifically stated that Premium would provide insurance as set forth in the attached "sample copy," including naming the School District and Aurora as additional insureds under Premium's policy. The "sample copy" is used as an insurance rider to the contract.[1] Aurora has also submitted a copy of the actual certificate of insurance which specifically names the School District and Aurora as additional insureds. As a general rule, "[a] certificate of insurance is only evidence of a carrier's intent to provide coverage but is not a contract to insure the designated party nor is it conclusive proof, standing alone, that such a contract exists" (***Tribeca Broadway Assoc. v Mount Vernon Fire Ins. Co.,*** 5 AD3d 198, 774 NYS2d 11 [2004]; ***Buccini v 1568 Broadway Assoc.,*** 250 AD2d 466, 673 NYS2d 398 [1998]). Here, however, the certificate is not standing alone. The School District and Aurora are additional insureds "by contract" as contemplated in the policy, and the certificate is evidence of the parties' intent and Premium's compliance. Since the contract requires that the School District and Aurora be named as additional insureds, the additional insureds provision under the policy is triggered and they are entitled to a defense (***BP A.C. Corp. v One Beacon Ins. Group***, *supra* at 715-716; ***Pecker Iron Works of N.Y. v Traveler's Ins.***, 99 NY2d 391, 393, 756 NYS2d 822 [2003]; ***Travelers Indem. Co. v Commerce & Indus. Ins. Co.***, 36 AD3d 1121, 828 NYS2d 658 [2007]). The cross motion by Royal for summary judgment dismissing the third-party

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[1] Royal notes in its cross motion that the "sample copy" is a "rider" which was attached to the contract but, nevertheless, argues that the contract contains no provision naming Aurora and the School District as additional insureds.

complaint is correspondingly denied.

However, the Royal policy also states that:

> When an additional insured is added under this provision, *and* the written contract, written agreement or written permit *requires* the insurance to be primary and noncontributory, then this insurance is primary except when the Excess Provision under condition 4. Other Insurance in Section IV Commercial Liability Conditions applies. (Emphasis added)

Therefore, for the Royal policy to be primary, there must be a provision in the contract between Aurora and Premium requiring same. The "Insurance and Bond" provision in their contract, Article 13, contains no such statement, nor does the "rider" or "sample copy." Therefore, QBE has not established as a matter of law that Royal's policy is primary, and summary judgment on this issue is denied.

The QBE Insurance Policy

QBE does not dispute that the contract between its insured, Aurora, and the School District required that the School District be named as an additional insured, and does not dispute that the School District is an additional insured. Nevertheless, QBE argues that the coverage afforded by Royal is primary; that the QBE policy is excess coverage, not contributory, and does not begin until after all available primary coverage is exhausted; and that QBE's coverage was never triggered because the School District failed to properly and timely tender its defense.

As to the School District's notice to QBE, it is clear the School District's carrier gave notice to the Claims Service Bureau by letter dated July 7, 2003 of the specifics of the Maxner accident, the underlying contracts, and the fact that Maxner had not yet commenced an action. QBE does not dispute that the Claims Service Bureau is its authorized representative or that it received the notice forwarded to the Claims Service Bureau, rather, QBE argues that the School District never independently gave notice to QBE. However, QBE has offered no authority for this additional requirement nor has it established that it disclaimed coverage to the School District based upon this requirement. Therefore, the School District established that it is an additional insured under Aurora's policy with QBE and is entitled to a defense in the underlying action. QBE's assertion that Royal also had a duty to defend its additional insured does not relieve QBE of its obligation to defend the School District (***Continental Cas. Co. v Rapid-American Corp.***, *supra* at 655).

The QBE "additional insured endorsement" provides, in relevant part:

> If required by your agreement with such Additional Insured, this insurance shall be primary insurance for that Additional Insured. If anyone, other than the Additional Insured, provides similar insurance for the Additional Insured, than this insurance will apply as outlined in SECTION VI-COMMERCIAL GENERAL LIABILITY CONDITIONS, paragraph 4 Other Insurance, subparagraph c. Method of Sharing.

The contract between Aurora and the School District provides, in relevant part:

> D. All insurance coverage to be provided by the Contractor shall name the Owner, the Construction Manager, and the Architect as additional insureds on the policy. Additionally, the insurance coverage to be provided by the Contractor pursuant to paragraph A of this Article 10 shall state that the Contractor's coverage shall be primary coverage for the Contractor's work.

Therefore, the contract provides that QBE's policy would be primary. However, the QBE policy also states, under Section VI, paragraph 4:

> 4. **Other Insurance**
> If other valid and collectible insurance is available to the insured for a loss we cover under coverages **A** or **B** of this Coverage Part, our obligations are limited as follows:
>
> **a. Primary Insurance**
> This Insurance is primary except when **b.** below applies. If this insurance is primary, our obligations are not affected unless any of the other insurance is also primary. Then, we will share with all that other insurance by the method described in **c.** below.
>
> **b. Excess Insurance**
> This Insurance is excess over:
> (1) Any of the other insurance, whether primary, excess, contingent or on any any other basis: (subsections "a" through "d", not relevant here)
>
> (2) Any other insurance, whether primary, excess, contingent or any other basis that is valid and collectible insurance available to you and an additional insured under a policy issued to:
>
> (a) A contractor performing work for you;[2]
>
> * * *

Therefore, both the Royal policy and the QBE policy purport to provide not primary but excess coverage. The general rule is that "where there are multiple policies covering the same risk, and each generally purports to be excess to the other, the excess coverage clauses are held to cancel out each other and each insurer contributes in proportion to its [policy] limit" (***Lumbermens Mut. Cas. Co. v Allstate***

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[2] This provision is stated in an endorsement entitled "**EXCESS INSURANCE PROVISION-ADDITIONAL INSURED**," which "changes the policy." The endorsement was annexed to Aurora/QBE's cross motion but was not included with the policy annexed to the School District/Transportation motion. However, there has been no argument made that this provision was not part of QBE's policy

Ins. Co., 51 NY2d 651, 655, 435 NYS2d 953 [1980]; *see also*, ***Great N. Ins. Co. v Mount Vernon Fire Ins. Co.***, 92 NY2d 682, 687, 685 NYS2d 411 [1999]; ***Cheektowaga Cent. School Dist. v Burlington Ins. Co.***, 32 AD3d 1265, 822 NYS2d 213 [2006]). This general rule does not apply "when its use would distort the meaning of the terms of the policies involved" (***State Farm Fire & Cas. Co. v LiMauro***, 65 NY2d 369, 374, 492 NYS2d 534 [1985]; see ***Lumbermens Mut. Cas. Co. v Allstate Ins. Co.***, *supra* at 655; ***Castricone v Riggi***, 259 AD2d 815, 816, 686 NYS2d 175 [1999]). The question of "whether there will be such distortion turns on consideration of the purpose each policy was intended to serve as evidenced by both its stated coverage and the premium paid for it . . . , as well as upon the wording of its provision concerning excess insurance"[3] (***State Farm Fire & Cas. Co. v LiMauro***, *supra* at 374; ***United States Fire Ins. Co. v CNA***, 300 AD2d 1054, 1055, 752 NYS2d 765 [2002]; ***Castricone v Riggi***, *supra* at 816). Given that the School District's liability is vicarious, that it is an additional insured under both policies, and that the Royal policy provides that it will be primary only when its insured's contract requires it to be primary, the Court finds that QBE and Royal are coinsurers for the same risk and shall share equally the defense costs for the School District (***Continental Cas. Co. v Rapid-American Corp.***, *supra* at 655-656; ***B.K. General Contr. v Michigan Mut. Ins.***, 204 AD2d 584, 612 NYS2d 198 [1994]). The Court also finds that Transportation Insurance Company is entitled to reimbursement of costs and reasonable attorney's fees incurred in defending its insured in the underlying action. Likewise, because Aurora is an additional insured under Royal's policy, Aurora's liability is also vicarious, and both QBE and Royal purport to provide not primary but excess coverage, they shall share equally the defense costs for Aurora. Therefore, QBE is also entitled to reimbursement of one-half of its costs and reasonable attorney's fees incurred in the underlying action.

The Court makes the following declarations: that the defendant QBE Insurance Corp. has a duty to defend the School District plaintiffs in the underlying action pursuant to the subject commercial general liability insurance policy issued to defendant/third-party plaintiff Aurora Contractors, Inc.; that third-party defendant Royal & Sunalliance Insurance Company has a duty to defend both the School District plaintiffs and Aurora in the underlying action pursuant to the policy issued to Premium Supply Company; and that the duties determined herein shall be shared equally as set forth above.

The parties are directed to appear for a hearing at the Arthur M. Cromarty Court Complex, 210 Center Drive, Part 10, Riverhead, New York at 9:30 a.m. on December 10, 2008, and to produce appropriate documentation to support the amount of costs and attorney's fees sought.

Dated: 6 Oct. 2008

J.S.C.

_____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**

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[3] The premium paid for the QBE policy has been redacted and the premium paid for the Royal policy appears to reflect multiple companies. Therefore, that particular inquiry was not relevant here.