SUPREME COURT - STATE OF NEW YORK

Present:

HON. ARTHUR M. DIAMOND
Justice Supreme Court

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RICHNER DEVELOPMENT, LLC

Plaintiff,

-against-

THE BURLINGTON INSURANCE COMPANY
Defendant.

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FOUR SEASONS ROOFING, INC.
Plaintiff,

-against-

THE BURLINGTON INSURANCE COMPANY
Defendant.

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2 ENDO BOULEVARD LLC
Plaintiff,

-against-

THE BURLINGTON INSURANCE COMPANY
Defendant.

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TRIAL PART: 21
NASSAU COUNTY

INDEX NO: 021810/07
ACTION #1

INDEX NO. 33063/07
ACTION #2

INDEX NO. 1420/08
ACTION #3

MOTION SEQ. NO: 2,3,4
SUBMIT DATE: 10/8/08

The following papers having been read on this motion:

Order to Show Cause (Seq.2)..... 1
Memorandum in Support.....2

Cross-Motion(Seq. 3).....3
Memorandum in Support..... 4
Opposition.....5
Notice of Motion (Seq. 4).....6
Opposition.....7

The motion by plaintiff Four Seasons Roofing, Inc. ("FSR") in action #2 for summary judgment and the motion by Richner Development, LLC ("Richner") in action #1 for partial summary judgment on its first cause of action are both denied. The cross motion by The Burlington Insurance Co. ("TBIC") for summary judgment in action #2 is granted for the reasons set forth herein.

FSR was at the time of the incident a roofing subcontractor. FSR had obtained a commercial general liability policy for TBIC (see Exhibit A annexed to FSR's motion) for the period May 17, 2005 to May 17, 2006. On May 5, 2005, FSR entered into a contract with Richner, a general contractor/contract manager, as a roofing subcontractor on property known as 2 Endo Boulevard, Garden City, N.Y. (The "premises"). In its policy with TBIC, FSR, the insured, named Richner and the owner of the premises, 2 Endo Boulevard, LLC ("2 Endo") as additional insured under the policy. On October 25, 2005, FSR hired Frank Giampetruzzi ("Giampetruzzi") as a roofing laborer to work at the premises. On October 28, 2005, Giampetruzzi was injured by an electrical transformer and allegedly sustained third and fourth degree burns. FSR contacted its broker Baldon Group, Inc. ("Baldon"). Baldon informed TBIC of the injury on November 11, 2005 (see Exhibit C annexed to FSR's motion) or less than 20 days after the incident. On November 14, 2005, TBIC issued a notice of disclaimer (see Exhibit D annexed to FSR's motion) citing the exclusion as to employee's injury while on the job. FSR alleges the exclusion does not apply to a liability under an "insured contract" which FSR alleges it, FSR, had with Richner and 2 Endo (see Exhibit A, § V annexed to FSR's motion).

Giampetruzzi commenced a personal injury action against 2 Endo and Long Island Power Authority on May 4, 2006 (see Exhibit G annexed to FSR's motion). On March 1, 2007 2 Endo began a third-party action against FSR seeking indemnification per the indemnification clause in the contract. TBIC denied coverage of the third-party action whereupon FSR commenced against #2 against TBIC.

FSR seeks a declaration that claims made by 2 Endo against FSR constitute coverage under FSR's policy with TBIC, FSR is entitled to a decision that TBIC improperly denied coverage and

TBIC should reimburse FSR for its defense of the action and for any costs in any judgment FSR might incur. FSR contends it would not have gotten the TBIC policy (for a $90,000 premium per year) if it knew incidents such as the Giampetruzzi incident would not be covered.

Richner commenced this action for declaratory relief as to TBIC. Richner contests the position of TBIC's disclaimer under the cross liability exclusion in the policy with FSR. Richner notes Giampetruzzi was an employee of FSR, the insured, not Richner, an additional insured. Richner states the policy of TBIC should provide coverage to Richner as an additional insured and the TBIC should not be able to exclude liability to Richner in the cross liability provision of the policy. Richner also contends the TBIC policy with FSR was, in part, ambiguous.

TBIC states it disclaimed the Giampetruzzi incident claims based on Workers' Compensation and the employers' liability exclusion (see Exhibit C, affidavit of Jeffrey W. Roberts, claims examiner for TBIC, annexed to TBIC's cross motion). TBIC's exclusion of coverage allegedly includes any employee of FSR, 2 Endo and/or Richner as the insured and as additional insureds. TBIC contends all its disclaimers to the various insureds were timely since it disclaimed only as the various information, i.e., the May, 2006 action by Giampetruzzi against 2 Endo and 2 Endo's March, 2007 third-party action against FSR, became known to TBIC.

TBIC found out about Giampetruzzi's action against 2 Endo on December 15, 2005 and TBIC alleges it promptly disclaimed coverage to FSR in connection with 2 Endo's claim against FSR. TBIC notes it first cited the cross liability exclusion as to 2 Endo since 2 Endo had not previously asserted claims nor had FSR's original claim through FSR's agent, Baldon. TBIC also found that 2 Endo's claims against FSR did not involve an "occurrence" as defined under the policy (see Exhibit A annexed to FSR's motion) since the TBIC policy did not cover an injury to an employee of an insured in the course of employment.

A policy holder bears the initial burden of showing that an insurance contract covers a loss (*Roundabout Theatre Company, Inc. v Continental Casualty Co.*, 302 AD2d 1).

If liberally construed, a claim against an insured is within the embrace of the policy, the insurer must come forward to defend its insurance no matter how groundless, false or baseless the suit may be (*Automobile Insurance Co. of Hartford v Cook*, 7 NY3d 131).

In order to be relieved of its duty to defend on the basis of a policy exclusion, the insurer bears the burden of demonstrating that the allegations of the complaint cast the pleadings wholly within that exclusion, that the exclusion is subject to no other reasonable interpretation, and that there is no possible factual or legal basis upon which the insurer may eventually be held obligated

to indemnify the insured under any policy decision (*Frontier Insulation Contractors v Merchants Mutual Insurance Co.*, 91 NY2d 169).

An exclusion for "bodily injury to an employee of an insured if it occurs in the course of employment" has a plain meaning to relieve the insurance company of liability when an insured or additional insured was sued on contribution was requested for damages arising out of bodily injury to an employee sustained in the course of employment; the Appellate Division Second Department, recently found such a clause did not require the insurance carrier to defend or indemnify a property manager listed as an additional insured in a liability policy, on which a construction company's employee was injured (*Bassuk Bros., Inc. v Utica First Insurance Co.*, 1 AD3d 470).

In order for an insurance policy exclusion to be enforced, the language in the policy must be clear and unmistakable, and the carrier must establish that the exclusion applies in the particular case and is subject to no other reasonable interpretation (*Junius Development, Inc. v New York Marine and General Insurance Co.*, 48 AD3d 426).

An employee exclusion exempts the insurer from providing coverage to an injured employee's employer as well as a general contractor (*see Sixty Sutton Corp. v Illinois Union Insurance Co.*, 34 AD3d 386).

There is no true issue as to whether or not Richner and 2 Endo were additional insureds since they were so named in the policy by FSR (*see Yoda, LLC v National Union Fire Ins. Co. of Pittsburgh*, 50 AD3d 492).

A policy which excludes coverage for "bodily injury to any employee of any named insured" unambiguously applies to bar coverage to an additional insured against a claim by the primary insured's employee (*Tardy v Morgan Guaranty Trust Co. of New York*, 213 AD2d 296). Where the provisions are clear and unambiguous, a court must give them their plain and ordinary meaning (*United States Fidelity & Guarantee Co. v Annunziata*, 67 NY2d 229) and bar coverage to the additional insured (*Consolidated Edison Co. of New York v United Coastal Insurance Co.*, 216 AD2d 137).

An exclusion is an insurance policy that precludes coverage for "bodily injury to an employee of an 'insured' " includes a general contractor as well as the subcontractor since the injured employee was an employee of the insured subcontractor (*Hayner Hoyt Corp. v Utica First Insurance Co.*, 306 AD2d 806).

The cross liability exclusion in the TBIC policy herein is straight to the point, and from an objective point of view, subject to only one reasonable interpretation. That interpretation is that the

policy in issue does not apply in matters involving bodily injury to an employee of a named insured such as FSR or an additional insured such as 2 Endo and Richner. At the time of the incident, it is not disputed that Giampetruzzi was an employee of FSR, and thus the factual scenario herein falls within the cross-liability exclusion. The cross liability exclusion, without question and without ambiguity, excludes coverage to the named insured here (FSR) and the additional insured since the underlying incident involved an injury to any of the insured's employees (FSR, 2 Endo and/or Richner).

A provision in the general liability policy, excluding coverage for bodily injury to an employee of an insured if the injury occurred in the course of employment, precluded coverage to an insured or additional insured relating to the underlying action brought by the insured's injured employee against the general contractor of the job site where the incident occurred as well as the general contractor's third party against the insured (*Guachichulca v Laszio N. Tauber & Associates, LLC*, 37 AD3d 760).

The plain meaning of the exclusion was to relieve the insurance company of liability when an insured such has FSR or additional insured such as 2 Endo or Richner was sued or indemnification was sought for damages arising out of bodily injury sustained to an employee, Giampetruzzi, sustained in the course of employment (*see Guachichulca v Laszio N. Tauber & Associates, LLC, supra*).

The exclusion in the insurance policy for "insured contract" (see Exhibit A, ¶ 2b) does not assist the position of FSR, 2 Endo or Richner. The "insured contract" as defined in ¶ 9, pg. 10 of Exhibit A does not refer to any relevant document herein. It does not describe a contract for instance between FSR and 2 Endo with an insurance policy (from TBIC) as an "insured contract." Upon an objective reading of the policy, there is no ambiguity presented by an "insured contract."

An employer bodily injury exclusion which clearly barred coverage for all claims arising out of employee's injuries even if they took the form of a third-party's claim for constructive contribution or indemnity, was not rendered ambiguous when read in conjunction with the policy's contract liability exclusion which contained an exception for an insured contract (*Monteleone v Crow Construction Co.*, 242 AD2d 135). Unambiguous provisions must be given their plain and ordinary meaning (*Sonabria v American Home Assurance Co.*, 68 NY2d 866).

If a contract is capable of only one reasonable interpretation, i.e., it is unambiguous, a court is required to give effect to the contract as written (*K. Bell & Associates, Inc. v Lloyd's Underwriters*, 97 F3d 632).

A court must give unambiguous provisions of an insurance policy their plain and ordinary meaning and refrain from revisiting the contract/policy (*United States Fidelity & Guarantee Co. v Annunziata, supra*).

A court should resort to the doctrine of reasonable expectations (of the insured) only when the phrasing of the policy is so confusing that the average policyholder cannot make out the boundaries of the coverage (*Weedo v Stone-E-Brick, Inc.*, 405 A.2d 788). FSR contends it would not have paid the $90,000 premium for a policy that does not cover insured employees when injured n the performance of their jobs (such as Giampetruzzi). However, the employee of an employer such as FSR is covered by Workers' Compensation (*see Greaves v Public Service Mutual Ins. Co.*, 5 NY3d 120). The policy for a roofing company would be used to cover alleged incidents to visitor to the building, pedestrians, etc., who in our litigious society would clearly bring an action for personal injuries if allegedly injured due to FSR's work on the roof.

As to TBIC's disclaimers, where an insurer's disclaimer was based on policy exclusion, the insurer was required to provide the party with timely notice of its disclaimer (*see Markevics v Liberty Mutual Ins. Co.*, 97 NY2d 646).

An insurance carrier that issues a disclaimer shortly after it begins its investigation or shortly after it received a letter requesting it to defend and indemnify a party is a timely one (*see Rael Automatic Sprinkler Co., Inc. v Schaefer Agency*, 52 AD3d 670).

The timeliness of an insurer's disclaimer is measured from the date it first receives information that would disqualify the claim (*Matter of Arbitration Between Allcity Insurance Co. and Jimenez*, 78 NY2d 1054; *Ace Packing Co., Inc. v Campbell Solberg Associates, Inc.*, 41 AD3d 12).

Here, the disclaimers of TBIC appear, from the record, to have been timely.

Finally, FSR contends there were two separate contracts involved herein. The first was for the original roof work. The second alleged contract was for a different part of the roof at 2 Endo where Giampetruzzi was injured (see Exhibit C annexed to FSR's motion, the Baldon Group letter). FSR contends the second contract between it and 2 Endo/Richner did not have a hold harmless or indemnification clause for Richner and 2 Endo. TBIC alleges no "second contract" exists and only the first contract is controlling. TBIC also contends the "second contract" theory would be excludable at trial and cannot be used to oppose TBIC's cross-motion.

Evidence, otherwise excludable at trial, may be considered to deny a motion for summary judgment provided that the evidence does not form the sole basis for the court's determination

(*Hammett v Diaz-Frias*, 49 AD3d 285; *In re New York City Asbestos Litigation*, 7 AD3d 285).

Clearly, FSR may use this evidence, even if not "trial" worthy" by TBIC's standards, to oppose TBIC's cross motion for summary judgment. Therefore, the issue of the second contract allegedly without the exclusion previously discussed at length must be explored.

A party (such as FSR) who claims ignorance of essential facts to defeat a motion for summary judgment must first demonstrate that ignorance is unavoidable and that reasonable attempts were made to discover facts which would give rise to a triable issue (CPLR 3212[f]; *Mahoney v Turner Construction Co.*, 37 AD3d 377). Further, summary judgment was not premature where a party opposing the motion (here FSR) fails to demonstrate an evidentiary basis to suggest that additional disclosure might lead to relevant evidence (*Lambert v Bracco*, 18 AD3d 619). A party who claims ignorance of central facts to defeat a motion for summary judgment must demonstrate that the ignorance is unavoidable and reasonable attempts were made to discover the facts which would give rise to the triable issues (*Cruz v Otis Elevator Co.*, 238 AD2d 540).

Here, FSR claims a second contract (FSR's second contract) exists yet it has failed to produce this second contract that allegedly lacks the exclusionary provision. The court cannot deny TBIC's cross-motion based on a document FSR (or its broker) should have and should have produced. An unsworn letter from FSR's broker, Baldon, is not sufficient.

This constitutes the decision and order of this Court.

ENTER

DATED: November 19, 2008

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