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

PRESENT: MARTIN SHULMAN J.S.C. Justice PART 1

Index Number : 116334/2007

AMERICAN EMPIRE SURPLUS LINES INS.

VS.

WEST AMERICAN INSURANCE COMPANY

SEQUENCE NUMBER : # 001

SUMMARY JUDGMENT

INDEX NO. 116334-07

MOTION DATE

MOTION SEQ. NO. #001

MOTION CAL. NO.

were read on this motion to/for

	PAPERS NUMBERED
Notice of Motion/ ~~Order to Show Cause~~ — Affidavits — Exhibits ...	1,2
Answering Affidavits — Exhibits	3
Replying Affidavits	4

Cross-Motion: ☐ Yes ☒ No

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

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Dated: 12/30/08

MARTIN SHULMAN 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 CITY OF NEW YORK
COUNTY OF NEW YORK: PART 1

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AMERICAN EMPIRE SURPLUS LINES INSURANCE COMPANY and I. GRACE COMPANY, INC.,

Index No.: 116334/07

Plaintiffs,

Decision, Order and Judgment

-against-

WEST AMERICAN INSURANCE COMPANY, FORDHAM MARBLE, INC., MEAD & JOSIPOVICH, INC. and JERZY POLANSKI-TARNAWA,

Defendants.

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SHULMAN, J.:

Plaintiff I. Grace Company, Inc. ("I. Grace") and its insurer, plaintiff American Empire Surplus Lines Insurance Company ("American"), seek summary judgment, pursuant to CPLR 3212, declaring that defendant West American Insurance Company ("West") has a duty to defend and indemnify them in the now-settled action captioned *Polanski-Tarnawa v I. Grace Co., Inc., et al.,* Richmond Couty Index No. 12936/04.

The underlying settled action involved a worker injured at a job site at which I. Grace was the general contractor. The worker, who was employed by subcontractor Mead & Josipovich, Inc., was injured when he stepped into a hole that had been prepared for a stone saddle that defendant Fordham Marble, Inc. ("Fordham"), another subcontractor hired by I. Grace, was going to install in the area of a service elevator.

Fordham had been contracted to install stone flooring provided by the owners of the premises. Allegedly, Fordham had completed the installation of the stones prior to the day of the accident. The only items left to be installed were the door saddles, which

could not be installed until I. Grace or another subcontractor installed Rixon boxes in the transition area and doorways.

The Rixon boxes had not been obtained when Fordham completed all of its other work, and I. Grace told Fordham not to install the saddles until the other contractor completed the installation of the Rixon boxes. For this reason, Fordham ceased work and was "off the project" for one to two weeks prior to the date of the accident. On the day of the accident, there was only one Fordham employee present at the site, whose function was to answer questions pertaining to a different area of the project.

After Fordham installed the stones, I. Grace or another of its subcontractors covered the stones with homosote to protect the stones until the Rixon boxes arrived. Fordham played no role in covering the floors. Once the homosote was installed, Fordham returned to the site and butted the saddle up against the Rixon box.

It is alleged that the worker fell while carrying a door as he stepped on the homosote that I. Grace had used to protect the stone floors. Defendants maintain that Fordham had completed its entire contract, except for the installation of the thresholds, and were prevented from doing so because work that had to be performed by others prior to such installation had not yet taken place. Consequently, Fordham was not responsible for the occurrence.

Pursuant to the subcontract between I. Grace and Fordham, Fordham was required to maintain general liability insurance, and to name I. Grace as an additional insured. West does not dispute that I. Grace is a named additional insured on the policy that it issued to Fordham, but it maintains that liability does not arise from Fordham's work. West has also admitted that it has a duty to defend plaintiffs in the

underlying action, but insists that it need only reimburse plaintiffs for 50% of its reasonable expenses because other insurance companies are involved and a determination as to the apportionment of such costs has not yet been reached.

On January 19, 2005, West denied liability in a letter to plaintiffs' attorney, stating "[o]ur insured [Fordham] did not create the openings and was not responsible for providing temporary covering for these openings. We must respectfully deny your tender."

On September 27, 2007, West again wrote to plaintiffs' counsel, and agreed to pay 50% of the reasonable legal fees incurred in defending the litigation. However, West declined to indemnify plaintiffs, asserting that there was a question of fact as to who was responsible for the accident.

Prior to the September 27, 2007 letter, the worker moved for summary judgment in the underlying action. In a decision dated May 25, 2007, the Supreme Court, Richmond County decided that a triable question of fact existed as to whether Fordham or I. Grace created the allegedly dangerous condition that caused the injuries.

On January 8, 2008, the underlying action was settled for $425,000, with I. Grace paying $350,000 of the settlement and the worker's employer paying $75,000. I. Grace's payment was entirely funded by American, and none of the defendants paid anything towards the settlement.

DISCUSSION

"The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case [internal quotation marks and citation

omitted]." *Santiago v Filstein*, 35 AD3d 184, 185-186 (1st Dept 2006). The burden then shifts to the motion's opponent to "present facts in admissible form sufficient to raise a genuine, triable issue of fact." *Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 (1st Dept 2006); *see Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied. *See Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 (1978).

The instant motion presents two distinct issues for consideration: one, whether an insured may be denied initial recourse from an insurer to defend a lawsuit merely because other insurance carriers may also be responsible; and two, whether an insurer's duty to indemnify may be determined prior to a determination of ultimate liability.

> [I]t is well settled that an insurer's duty to defend [the 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. . . .
>
> [I]t is immaterial that the complaint against the insured asserts additional claims which fall outside the policy's general coverage or within its exclusory provisions [internal quotation marks and citations omitted].

BP Air Conditioning Corp. v One Beacon Ins. Group, 8 NY3d 708, 714 (2007).

> [T]he duty to defend is broader than the duty to pay, requiring each insurer to defend if there is an asserted occurrence covered by its policy, and the insured should not be denied initial recourse to a carrier merely because another carrier may also be liable. That is the 'litigation insurance' the insured has purchased. When more than one policy is

> triggered by a claim, a 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. [internal citations omitted].

Continental Casualty Co. v Rapid-American Corp., 80 NY2d 640, 655-656 (1993).

Based on the facts presented, West has admitted that it has a duty to defend plaintiffs, but wishes to limit its responsibility at this time until all of the other potential insurers are before the court. As indicated above, such limitation is not warranted as against the insured. West may always seek contribution from any other applicable insurers. Consequently, that portion of plaintiffs' motion seeking a declaration that West must reimburse them for the costs of their defense of the underlying action is granted.

With respect to the second issue, regarding indemnification, West has asserted two defenses: first, that the occurrence was not a covered event because it did not arise out of its primary insured's, Fordham's, actions; and second, that the occurrence was solely caused by I. Grace.

"The duty to indemnify requires a covered loss, but it should be apparent that a plenary trial of the issue is not always necessary [internal citation omitted]." *Servidone Constr. Corp. v Security Ins. Co. of Hartford*, 64 NY2d 419, 425 (1985). However, where it cannot be concluded from the summary judgment submissions that coverage had been established as a matter of law, further proceedings are required. *Id.*

As noted above in the earlier decision by the Supreme Court, Richmond County in the underlying action, it is impossible at this stage to determine whether the accident

was caused by Fordham or I. Grace. Consequently, summary judgment is inappropriate.

I. Grace's argument that it is owed indemnification because it has settled the underlying action is irrelevant to West's potential responsibility. First, pursuant to Section IV, ¶2(d) of the insurance policy, no insured may voluntarily make a payment or assume any obligation without obtaining West's consent. No evidence has been produced to indicate that West agreed to the stipulation of settlement. Second, there remains a question as to whether Fordham had completed its work to such a degree that the occurrence would not be considered to have arisen from its performance. *See Worth Constr. Co., Inc. v Admiral Ins. Co.*, 10 NY3d 411 (2008). "[E]ven in cases of negotiated settlements, there can be no duty to indemnify unless there is first a covered loss [internal quotation marks and citations omitted]." *Royal Zenith Corp. v New York Marine Managers, Inc.*, 192 AD2d 390, 391 (1st Dept 1993).

However, with respect to West's second theory, that the occurrence was caused solely by I. Grace's actions, the court agrees with plaintiffs that West has waived a disclaimer of liability based on such assertion. "[A]n insurer's notice of disclaimer must apprise claimant with a high degree of specificity of its grounds for disclaiming coverage, otherwise such ground is waived [citations omitted]." *Paul M. Maintenance, Inc. v Transcontinental Ins. Co.*, 300 AD2d 209, 212 (1st Dept 2002); *see also Bovis Lend Lease LMB Inc. v Garito Contracting, Inc.*, 38 AD3d 260 (1st Dept 2007).

In the instant matter, West's letters did not specify that coverage was disclaimed based on I. Grace's total responsibility. Furthermore, West failed to inform the injured

person of its disclaimer of liability, which renders the grounds indicated in such disclaimer ineffective as violative of New York Insurance Law § 3420(d). *Schlott v Transcontinental Ins. Co., Inc.*, 41 AD3d 339 (1st Dept 2007).

Based on the foregoing, it is hereby

ORDERED that plaintiff's motion for summary judgment is granted only to the following extent, so that it is

ORDERED and ADJUDGED that West American Insurance Company is obligated to defend plaintiffs on a primary basis in connection with the matter entitled *Polanski-Tarnawa v I. Grace Co., Inc., et al.,* Index No.: 12936/04, Supreme Court, Richmond County; and it is further

ORDERED that plaintiffs' motion for summary judgment with respect to the issue of indemnification is denied and the issue is severed and continued.

Counsel for the parties are directed to appear for a preliminary conference on February 3, 2009 at 9:30 a.m. at I.A.S. Part 1, 111 Centre Street, Room 1127B, New York, New York.

The foregoing constitutes this court's Decision and Order. A copy of this Decision and Order has been sent to counsel for the parties.

Dated: December 30, 2008

Martin Shulman, J.S.C.