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

PRESENT: HON. MICHAEL D. STALLMAN PART 7

Index Number : 603742/2007

NAUTILUS INS. CO.

VS

MATTHEW DAVID EVENTS, LTD.

Sequence Number : 001

SUMMARY JUDGMENT

INDEX NO. 603742/07

MOTION DATE 7/24/08

MOTION SEQ. NO. 001

MOTION CAL. NO. 57

The following papers, numbered 1 to 7 were read on this motion to/for Summary judgment

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits A-E	1-2
Answering Affidavits — Exhibits A	3-6
Replying Affidavits	7

Cross-Motion: ☐ Yes ☒ No

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

FILED

JAN 12 2009

COUNTY CLERK'S OFFICE
NEW YORK

MICHAEL D. STALLMAN
J.S.C.

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

Dated: 12/24/08

J.S.C.

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 7

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NAUTILUS INSURANCE COMPANY, **Index No. 603742/07**

Plaintiff, **Decision and Order**

- against -

MATTHEW DAVID EVENTS, LTD. and TIMOTHY SHEA,

Defendants.

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HON. MICHAEL D. STALLMAN, J.:

In this declaratory judgment action, plaintiff Nautilus Insurance Company (Nautilus) moves for an order: (1) pursuant to CPLR 3212, granting summary judgment in its favor and declaring that it is under no obligation to defend or indemnify defendants Matthew David Events, Ltd. (MDE) and Timothy Shea (Shea) in the underlying case, *Shea v Bloomberg, L.P.*, Sup Ct, Kings County, index No. 23363/07 (the Shea Action); and (2) dismissing any and all counterclaims against Nautilus.

Shea is the plaintiff and MDE is a defendant in the Shea Action, which was commenced on June 25, 2007, and which concerns a June 27, 2004 accident that resulted in injuries to Shea. On the date of Shea's alleged accident, MDE was insured by Nautilus under a commercial general liability policy, policy number NC331450 (the Policy). The Policy

insured MDE's work as an event planner for a corporate party held by Bloomberg, L.P. on June 27, 2004, on Randall's Island in New York, N.Y. (the Event).

The complaint in the Shea Action alleges, upon information and belief, that MDE entered into a contract with United Stage Associates, Inc. (Stage) to perform work, labor and services for the Event. Shea, then an employee of Stage, worked as a stagehand at the Event. He alleges that he was injured as a result of an on-the-job accident when he fell out of a utility vehicle in which he had been riding. According to Shea, his accident was due, in whole or in part, to MDE's negligence.

In the first and second causes of action, Nautilus seeks a declaration that no coverage is owed to Shea or to MDE, respectively, for any claims asserted in the Shea Action, because none of the parties thereto provided Nautilus with timely notice of the occurrence or suit, as required by the Policy. Nautilus states that it timely disclaimed coverage to Shea and MDE, and that it provided notice to all prospective claimants.

In its third cause of action, Nautilus seeks a declaration that no coverage is owed to MDE for any claims asserted in the Shea Action based on an employee exclusion

in the Policy.

Nautilus maintains that it was first notified of the occurrence in June 2007, although MDE knew of the accident as soon as it occurred in 2004. Upon receiving the tender, in order to protect MDE's rights, Nautilus assigned defense counsel under a reservation of rights. On October 15, 2007, after completing its investigation, Nautilus disclaimed coverage in respect of the Shea Action.

Nautilus argues that an insured's duty to give prompt notice of a potential claim is a condition precedent to coverage and can be excused only by a "lack of knowledge that an accident has occurred or a reasonable belief in nonliability [sic] ... but the insured has the burden of showing the reasonableness of such excuse." *White v City of New York*, 81 NY2d 955, 957 (1993).

Nautilus states that, according to the Shea Action, Shea's accident occurred in front of several witnesses and caused injuries requiring medical treatment. Yet neither MDE nor Shea notified Nautilus of the occurrence until three years later. Nautilus argues that their failure to provide prompt notice of the occurrence cannot be excused by a lack of knowledge of the accident or a reasonable belief in non-liability.

In opposition to the instant motion, Shea argues that he could not have provided notice to Nautilus of his accident at the time it occurred, as he did not have personal knowledge of MDE or MDE's insurance carrier for the Event. Shea explains that he did not become aware of MDE or Nautilus until he retained counsel for his personal injury action in May 2007.

Shea further contends that discovery has not been conducted regarding when MDE first became aware of Shea's accident, and thus, whether notice of the accident was timely provided to Nautilus. Shea argues that, although Nautilus states that MDE knew or should have known of Shea's accident, Nautilus does not provide support for this assertion. According to Shea, such speculation does not establish prima facie entitlement to judgment as a matter of law.

In opposition to the instant motion, MDE contends that it provided Nautilus with timely notice by promptly informing Nautilus after being served with process in the Shea Action in July 2007. MDE states that, prior to that time, it was unaware of the existence of any claim by Shea.

MDE disputes Nautilus's assertion that MDE knew or should have known of the accident on or around the date that

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it occurred. MDE states that Nautilus does not provide any details supporting this allegation. MDE contends that more than 10,000 people either worked for or attended the Event, such that it is reasonable that Shea's accident may not have been brought to MDE's attention.

In response, Nautilus maintains that it is unnecessary to go through discovery to show that MDE knew of Shea's accident. Nautilus states that Shea was knocked unconscious and was transported to the hospital by ambulance. He suffered serious injuries that required several surgeries, including two hip replacements. Nautilus further contends that, according to the pleadings in the Shea Action and Shea's own affidavit, he fell from a crowded vehicle full of witnesses who were his co-workers and superiors. Some of these witnesses called the ambulance while Shea was unconscious. Nautilus argues that, under those circumstances, it is unreasonable to believe that MDE, the entity controlling the Event, would be unaware of such an accident.

In order for a court to grant summary judgment, the moving party must make a prima facie showing of entitlement to judgment as a matter of law, providing sufficient evidence to demonstrate the absence of any material issues

of fact. *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985). The motion must be denied if the proponent of the motion fails to establish a prima facie case, "regardless of the sufficiency of the opposing papers." *Id.* If the moving party makes the prima facie showing, the opposing party, in order to defeat the motion, must set forth the existence of a factual issue requiring a trial of the action. *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980).

In the instant case, Nautilus fails to establish a prima facie case of entitlement to summary judgment on the first and second causes of action. Although Nautilus asserts that it is unreasonable to believe that MDE did not learn of the accident at the time of its occurrence, such a conclusory assertion is not sufficient to establish a prima facie case. *See e.g. Ayotte v Gervasio*, 81 NY2d 1062 (1993).

Discovery is necessary to determine when MDE learned of the accident, and thus, whether it timely notified Nautilus of the occurrence. Therefore, summary judgment is denied as to the first and second causes of action, which seek a declaratory judgment on the basis of failure to timely notify Nautilus.

The third cause of action is based on the Policy's employee exclusion, which is set forth as an Amendatory Endorsement that replaces the employee exclusion found in the body of the Policy. For purposes of the exclusion, the definition of "employee" includes, but is not limited to, "any person or persons hired by, loaned to, leased to, contracted for, or volunteering services to the insured, whether or not paid by the insured." The employee exclusion states that the insurance does not apply to "'Bodily injury' to: (1) [a]n 'employee' of the insured arising out of and in the course of: (a) [e]mployment by the insured; or (b) [p]erforming duties related to the conduct of the insured's business."

According to the instant complaint, at the time of the accident, Shea was an "employee" of MDE, as that term is defined in the employee exclusion. Nautilus contends that, because MDE had a contract with Stage, which was Shea's then-employer, Shea was "contracted for" MDE. Nautilus further asserts that Shea was performing duties related to the conduct of MDE's business at the time of the accident. Thus, Nautilus contends that the employee exclusion applies and the Policy does not provide defense or indemnity coverage to MDE for the Shea Action.

According to Nautilus, the intent of the employee exclusion is to exclude from coverage any and all injuries that occur to employees not only of the insured but also of any contractor, subcontractor or other entity that performs work for the direct or indirect benefit of the insured.

Nautilus argues that New York courts have ruled that injuries sustained by employees of an insured's sub-subcontractor can be excluded from coverage under an employee exclusion similar to the one at issue herein. *U.S. Underwriters Ins. Co. v Congregation Kollel Tisereth, TZVI*, 2004 WL 2191051, 2004 US Dist LEXIS 19608 (ED NY 2004). Nautilus points out that a federal court in Florida, interpreting identical language, found there was no coverage because the employee exclusion was "clear and unambiguous." *Nautilus Ins. Co. v S & S Indus. Servs., Inc.*, 2007 WL 951776, *6, 2007 US Dist LEXIS 22248 (SD Fla 2007). Thus, Nautilus contends that it is entitled to summary judgment, pursuant to CPLR 3212, because there are no triable issues of fact.

Shea maintains that the definition of "employee" is ambiguous, and does not specifically include subcontractors or other entities that perform work for the direct or indirect benefit of the insured. Furthermore, Shea argues

that the relationship between Stage and MDE has not been established, and documents, including contracts, regarding the entities hired to perform services at the Event have not been exchanged. Shea does not know the entity with whom Stage contracted to perform services at the Event. He states that, not only did he not have an employee relationship with MDE, he did not even know of MDE's existence at the Event.

Shea further asserts that the employee exclusion in the Policy is silent as to the intent of this language, and that Nautilus has not presented prima facie evidence of its entitlement to summary judgment. Shea also asserts that there are multiple issues of fact that preclude the grant of summary judgment.

MDE states that the pertinent allegations in the Shea Action are pled upon information and belief, including that MDE entered into a contract with Stage. MDE maintains that genuine issues of fact remain, which may be resolved during discovery.

Any exclusions from coverage in an insurance policy "must be specific and clear in order to be enforced. They are not to be extended by interpretation or implication, but are to be accorded a strict and narrow construction."

Seaboard Sur. Co. v Gillette Co., 64 NY2d 304, 311 (1984). The insurance company bears the burden of proving that the exclusion applies to the matter at issue, and that it is "subject to no other reasonable interpretation." *Id.*

"The ambiguities in an insurance policy are, moreover, to be construed against the insurer, particularly when found in an exclusionary clause." *Ace Wire & Cable Co. v Aetna Cas. & Sur. Co.*, 60 NY2d 390, 398 (1983). "However, an unambiguous policy provision must be accorded its plain and ordinary meaning, and the court may not disregard the plain meaning of the policy's language in order to find an ambiguity where none exists." *Bassuk Bros. v Utica First Ins. Co.*, 1 AD3d 470, 471 (2d Dept 2003) (internal citations omitted).

The complaint in the Shea Action alleges, upon information and belief, that MDE entered into a contract with Stage to perform work at the Event. (Shea Complaint, ¶ 19). Thus, the relationship between MDE and Stage is not yet clear. Even if it is established, however, that a contract between MDE and Stage existed, the language of the employee exclusion is ambiguous as to whether Shea, as Stage's employee, would be a person "contracted for" MDE. The term "contracted for" is not further defined in the

Policy. Nautilus contends that an employee of an entity that has a contract with MDE is a person "contracted for" MDE. The term "contracted for" is, however, susceptible to more than one meaning. For instance, it could be more narrowly defined as a temporary worker who is "contracted for MDE" by a temporary employment agency.

Given the ambiguity of the term "contracted for," and in light of the rule that exclusions in insurance policies are to be narrowly construed, with any ambiguities construed against the insurer (*Seaboard Sur. Co. v Gillette Co.*, 64 NY2d 304, *supra; Ace Wire & Cable Co. v Aetna Cas. & Sur. Co.*, 60 NY2d 390, *supra*), this Court applies the narrower definition, and finds that Shea was not "contracted for" MDE. Thus, Shea was not an employee of MDE under the Policy, and the employee exclusion is inapplicable to him. Nautilus's summary judgment motion is therefore denied. Pursuant to CPLR 3212 (b), the Court grants defendants reverse summary judgment dismissing the third cause of action.

The cases relied upon by Nautilus are distinguishable. In *U.S. Underwriters Ins. Co. v Congregation Kollel Tisereth, TZVI* (2004 WL 2191051, 2004 US Dist LEXIS 19608, *supra*), cited by Nautilus, the employee exclusion

specifically defines an employee of the insured to include an employee of any contractor hired or retained by, or for, the insured. In contrast, such explicit and unambiguous language regarding employees of contractors of the insured is not found in the Policy. In *Nautilus Ins. Co. v S & S Indus. Servs., Inc.* (2007 WL 951776, 2007 US Dist LEXIS 22248, *supra*), cited by Nautilus, the injured person at times worked directly for the insured, such that the court did not have to determine, as in the instant case, whether an employee of another company was "contracted for" the insured.

As to that branch of the instant motion that seeks dismissal of any and all counterclaims against Nautilus, none of the parties to this action addressed those claims at all in the papers submitted in support of and in opposition to the instant motion. Thus, that part of the motion is denied.

Accordingly, it is

ORDERED that Nautilus Insurance Company's motion for summary judgment is denied; and it is further

ORDERED that the third cause of action is dismissed.

Dated: December 24, 2008
New York, New York

ENTER:

12/24/08

J.S.C.