SCAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. F. DANA WINSLOW,

Justice

TRIAL/IAS, PART 7
NASSAU COUNTY

THE VILLAGE OF LAKE SUCCESS,

Plaintiff,

-against-

MOTION DATE: 11/14/08
MOTION SEQ. NO.: 001

LIBERTY INTERNATIONAL UNDERWRITERS, WB PARKING ENTERPRISES, LTD., d/b/a PARKING SYSTEMS, DYNASTY PARKING, LTD., and PARKING SYSTEMS PLUS, INC.,

INDEX NO.: 9983/08

Defendants.

The following papers having been read on the motion (numbered 1-4):

Notice of Motion.....1
Affirmation in Opposition.....2
Memorandum of Law in Support of Motion.....3
Reply Memorandum of Law in Support of Motion.....4

Motion by defendant Liberty International Underwriters for summary judgment is **denied.**

This is an action for a declaratory judgment that defendant Liberty International Underwriters is obligated to defend and indemnify the Village of Lake Success in the underlying personal injury action.

On February 27, 2006, plaintiff Village of Lake Success entered into a valet parking services agreement with defendant WB Parking Enterprises, Ltd, which was doing business as Parking Systems. Pursuant to the agreement, the Village retained Parking Systems to provide valet parking at the Village's country club located on Lakeville Road in Great Neck. As part of the services provided, Parking Systems was also to assist members and guests with the "on/off loading of golf equipment." The parking

attendants operated golf carts, which were apparently used to transport golfers and golf equipment from the parking lot to another location closer to the course.

Parking Systems agreed to indemnify the Village and hold it harmless from "any loss or damage...that may be sustained by reason of the failure of Parking Systems or its employees... to comply with any...laws...and regulations." The agreement required Parking Systems to obtain "comprehensive general and vehicular liability insurance" for claims of property damage or bodily injury arising out of acts or omissions of Parking Systems' employees. However, the agreement did not provide any minimum amount of insurance coverage. The agreement was signed by Mark Baron, WB Parking Enterprises' president.

Defendant Liberty Insurance Underwriters, Inc. issued a commercial general liability policy to defendant Dynasty Parking, Ltd, another company controlled by Baron, for the period October 27, 2005 to October 27, 2006.[1] The policy contained a "named insured endorsement," providing that the named insureds were Dynasty Parking, Ltd., Olympic Parking Systems, d/b/a Parking Systems, Parking Systems Plus Inc., and American Valet Services Inc.[2] Notably, WB Parking Enterprises was not listed on the named insured endorsement. The policy contained an "additional insured endorsement," providing that the definition of insured included "any person or organization ... whom you have agreed to add as an additional insured by written contract but only with respect to liability arising out of your operations..."[3]

Although the policy provided coverage of $1,000,000 per occurrence, it provided

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[1]Liberty was named as "Liberty International Underwriters" in both the present case and the underlying action.

[2]Liberty's ex. 4 at CGL 1030 0203.

[3]Liberty's ex. 4 at CGL 1000 0103.

for "self-insured retention" of $25,000 per claimant.[4] Thus, the insureds were self-insured for the first $25,000 of loss, including the cost of investigation and defense of the claim. The premium for the policy was calculated based on a percentage of sales for the three named insureds, with a rate of $78.86 per $1,000 of sales assigned to Dynasty and Olympic, and a rate of $13.00 per $1,000 of sales assigned to Parking Systems Plus.[5] At the inception of the policy, the insured paid a deposit, or estimated, annual premium of $217,500.[6]

On July 25, 2006, a motorized golf cart operated by one of the parking attendants struck Deeann Cowart, a member or guest of the country club, in the parking lot. On December 20, 2006, Liberty denied coverage on the ground that WB Parking Enterprises was not a named insured on the policy. On May 14, 2007, Cowart commenced a personal injury action against the Village, WB Parking Enterprises, and Dynasty Parking, Ltd. In the action, Cowart's husband, Henry Levin, asserted a claim for loss of services. Despite Liberty's denial of coverage, the Village attempted unsuccessfully to tender its defense to Liberty on March 26, 2008.

This action seeking a declaratory judgment that Liberty is obligated to defend and indemnify the Village in the underlying action was commenced on May 22, 2008. Alternatively, plaintiff asserts a claim against WB Enterprises for breach of contract for failing to obtain the required insurance coverage under the valet parking agreement. Alleging that Dynasty and Parking Systems Plus are alter egos of WB Parking, plaintiff

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[4]Liberty's ex. 4 at CGL 1026 0103.

[5]Liberty's ex. 4 at CGL 1016 0705.

[6]The deposit premium was purportedly based upon estimated sales of $2.2 million for Dynasty and Olympic combined and estimated sales of $3 million for Parking Systems Plus. However, applying the rates to the estimated sales yields a deposit premium of $212,492.

asserts its claim for breach of contract against all three defendants. Mark Baron is the chief executive officer for WB Parking Enterprises, Dynasty, and American Valet Services. All three corporations have their principal office at 28 Fourth Street, Valley Stream, which is also Baron's address.

Liberty is moving for summary judgment declaring that it is not obligated to defend and indemnify the Village in the underlying action. Liberty argues that the Village cannot be an additional insured because WB Parking Enterprises, the party with whom the Village contracted, is not a named insured. In opposing the motion, the Village argues that the court should "pierce the corporate veil" and consider WB Enterprises to be an insured under the policy.

Principles generally applicable to contract interpretation apply equally to insurance contracts(*New York Central Mutual Fire Ins. Co. v. Ward*, 38 AD3d 898 [2d Dep't 2007]). Analysis begins with the specific language of the policy(*TAG 380, LLC v. ComMet380, Inc.*, 10 NY3d 507, 512 [2008]). An insurance policy is to be read in light of "common speech" and the reasonable expectations of a businessperson(*Belt Painting Corp. v. TIG Ins. Co.*, 100 NY2d 377, 383 [2003]). The court must also consider the nature of the risk and the subject matter of the policy(*New York Central Mutual Fire Ins. Co. v. Ward*, supra, 38 AD3d 898). An insurance contract is to be construed liberally in favor of the insured and against the insurer who drew the policy(*New York Central Mutual Fire Ins. Co. v. Ward*, supra, 38 AD3d 898). An insurer's duty to defend is "exceedingly broad" and applies "whenever the allegations of the complaint suggest a reasonable possibility of coverage"(*BP Air Conditioning Corp. v. One Beacon Ins. Group*, 8 NY3d 708, 714 [2007]).

If the policy provision is ambiguous, the court may consider evidence of a practical construction, or a course of dealing by the insured and insurer(*Continental Casualty Co.*

v. Rapid-American Corp., 80 NY2d 640, 651 [1993]). To show a practical construction, there must be conduct by one party expressly or inferentially claiming as of right under the doubtful provision, coupled with knowledge thereof and acquiescence therein, express or implied, by the other"(Id).

On a motion for summary judgment, it is the proponent's burden to make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact(*JMD Holding Corp. v. Congress Financial Corp.*, 4 NY3d 373, 384 [2005]). Failure to make such a prima facie showing requires denial of the motion, regardless of the sufficiency of the opposing papers(Id). However, if this showing is made, the burden shifts to the party opposing the summary judgment motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial(*Alvarez v. Prospect Hospital*, 68 NY2d 320, 324 [1986]).

Because of the manner in which the premium was calculated, Liberty was clearly aware that Baron operated his valet parking business through a number of related corporations. WB Parking Enterprises should, of course, have been formally listed as a named insured, if it was the parties' intention to provide coverage for its parking operations. However, if the "earned premium" was calculated based upon WB Parking Enterprises' sales, Baron would have reasonably expected that WB Parking was covered by the policy. Stated otherwise, WB Parking would have become a named insured through a practical construction of the parties. If WB Parking was a named insured, its undertaking to obtain comprehensive general and vehicular liability insurance for the Village constituted, as a matter of law, an agreement to add the Village as an additional insured within the meaning of the policy. The court notes that Baron has not taken a position with regard to the coverage of WB Enterprises on the present motion.

On this motion for summary judgment, it is Liberty's burden to establish prima facie that the earned premium was not calculated based upon WB Parking's sales. Since Liberty has offered no evidence as to how the earned premium was actually calculated, it has not established prima facie that WB Parking did not become a named insured under the policy. Accordingly, defendant Liberty International Underwriters' motion for summary judgment is **denied.**

This shall constitute Order of the Court.

Dated: 1/29/09

ENTER:

J.S.C.

ENTERED

FEB 13 2009

NASSAU COUNTY
COUNTY CLERK'S OFFICE