Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE JANICE A. TAYLOR IA Part 15
Justice

TOMASZ FRYC,

Plaintiff,

- against -

JMT BROTHERS REALTY, LLC, MARTA CONSTRUCTION INC., FIRST REALTY BUILDERS INC. AND JRF CONSTRUCTION MANAGEMENT,

Defendants.

Index Number 19171 2006

Motion Date September 9, 2008

Motion Cal. Number 11

Motion Seq. No. 3

The following papers numbered 1 to 15 read on this motion by third-party defendant U.S. Underwriters Insurance Company (U.S. Underwriters) to sever the "coverage" case from the rest of the case, and after severance, for summary judgment dismissing the third-party complaint asserted against it, and for summary judgment in its favor on its counterclaims and cross claims, declaring that it is not obligated to defend or indemnify third-party defendant Abecon Services, Inc. (Abecon), defendant Marta Construction, Inc. (Marta) and defendant JMT Brothers Realty, Inc. (JMT Brothers) with respect to the claims asserted against them in this action; and this cross motion by defendant Marta for summary judgment dismissing the complaint and all cross claims and counterclaims asserted against it.

	Papers Numbered
Notice of Motion - Affidavits - Exhibits.....	1-8
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Stipulation dated September 4, 2008.....	15

Upon the foregoing papers it is ordered that the motion and cross motion are determined as follows:

The cross motion is withdrawn pursuant to the stipulation dated September 4, 2008.

Plaintiff commenced this action as against JMT Brothers and Marta seeking to recover damages for personal injuries he allegedly sustained due to a fall at a construction site at the premises known as 12 East 69th Street, New York, New York, during the course of his employment as a foreman by third-party defendant Abecon. Plaintiff alleged that JMT Brothers as the building owner, and Marta, as the general contractor, had a duty to protect him against foreseeable and inherent elevation-related risks, and violated that duty by failing to provide him with a proper safety device to protect him from falling. Plaintiff asserted causes of action based upon common-law negligence and violations of Labor Law § § 200, 240(1), (2) and (3) and 241(6). Plaintiff thereafter commenced a separate action (Index No. 6369/2007) against defendants First Realty Builders and JRF Construction based upon the same facts, alleging that First Realty Builders and JRF Construction Management owned, operated, managed and controlled the premises, and performed construction, demolition and repair work at the same site. Plaintiff likewise alleged that First Realty Builders and JRF Construction Management were guilty of negligence and violations of the Labor Law. The actions were consolidated by order dated January 4, 2008 under Index No. 1917/2006.

In the meantime, third-party plaintiff JMT Brothers commenced the third-party action against U.S. Underwriters and its insured Abecon, seeking coverage in the main action, and disputing the disclaimers of coverage issued to Abecon and JMT Brothers. Third-party plaintiff JMT Brothers claims that third-party defendant U.S. Underwriters is required to defend, indemnify and hold it harmless from any liability arising out of the accident alleged in plaintiff's complaint, pursuant to a policy of insurance issued by third-party defendant U.S. Underwriters to Abecon and naming JMT Brothers as an additional insured. JMT Brothers also claims that Abecon was contractually obligated to procure liability insurance on its behalf, and to assume liability for claims against JMT Brothers attributable to bodily injury arising out of the work of Abecon and Abecon's employees, and that Abecon and U.S. Underwriters are therefore obligated to defend, indemnify and hold it harmless from any liability arising out of the accident alleged in plaintiff's complaint. Third-party plaintiff JMT Brothers seeks declaratory and monetary relief. Third-party defendant U.S. Underwriters asserted cross claims and counterclaims seeking a declaration that it has no duty to defend or indemnify to defend or indemnify Abecon, JMT Brothers or "any party to this action."

Abecon served an answer to the third-party complaint and asserted a cross claim against U.S. Underwriters for a judgment declaring that U.S. Underwriters is obligated to defend, indemnify and furnish coverage to it and to JMT Brothers.

The note of issue has been filed.

At the outset, the court notes that although opposition had been made to the cross-motion, no opposition to the motion by third-party defendant U.S. Underwriters has been presented.

To the extent U.S. Underwriters seeks a default judgment against Abecon, Marta and JMT Brothers, a defendant appears in an action by serving a responsive pleading or a notice of appearance, or by making a motion which has the effect of extending the time to answer (CPLR 320[a]; CPLR 3211[f]). With respect to a cross claim, no answer is necessary, and the cross claim is deemed denied, in the absence of a demand for an answer (CPLR 3011). U.S. Underwriters has failed to show that it made a demand upon Abecon or Marta for an answer (CPLR 3011), and the demand was unanswered. Therefore, U.S. Underwriters has failed to demonstrate Abecon and Marta are in default in the action with respect to its cross claims. To the extent U.S. Underwriters seeks a default judgment in its favor and against JMT Brothers on its counterclaims, U.S. Underwriters has provided to the court, a copy of the answer by JMT Brothers to its counterclaims. U.S. Underwriters makes no claim that such answer was late, having been served beyond the statutory time when a responsive pleading was due (CPLR 3012, 3215). Thus, U.S. Underwriters has failed to demonstrate JMT Brothers is in default in the action with respect to its counterclaims. That branch of the motion by U.S. Underwriters for leave to enter a default judgment in its favor and as against defendants Abecon, Marta and JMT Brothers is denied.

To the extent U.S. Underwriters seeks summary judgment in its favor as against Marta, U.S. Underwriters has failed to establish it, in fact, asserted any cross claim against Marta. U.S. Underwriters makes no specific mention of Marta in the cross claims set forth in its third-party answer, and this court finds that the phrase "any other party" provides insufficient notice to Marta to alert Marta that a cross claim has been asserted against it by U.S. Underwriters (see CPLR 3013). Moreover, even if such phrase could be said to apprise Marta of the existence of a cross claim asserted against it, U.S. Underwriters has failed to offer proof sufficient to allow this court to determine the rights of U.S. Underwriters in relation to Marta. That branch of the motion by U.S. Underwriters for summary judgment in its favor on its cross claim against Marta is denied.

U.S. Underwriters seeks summary judgment dismissing the third-party complaint asserted against it by JMT Brothers. U.S. Underwriters contends that JMT Brothers lacks standing to bring a direct action against it because JMT Brothers has not yet obtained

any judgment against Abecon, citing Insurance Law § 3420 and the case, Lang v Hanover Ins. Co., (3 NY3d 350 [2004]).

In Lang, the Court of Appeals explained that under common law, an injured person has no common-law right to sue the insurer of a tortfeasor, because of lack of privity of contract. It further explained, that the Legislature sought to ameliorate the hardship caused when an injured party obtained a judgment against a tortfeasor but the insured failed to satisfy the judgment, by enacting a limited statutory cause of action on behalf of injured parties directly against insurers, now codified at Insurance Law § 3420 (b) (1). That statute authorizes "any person who ... has obtained a judgment against the insured ... for damages for injury sustained or loss or damage occasioned during the life of the policy or contract" to bring an action against the insurance company if the judgment has not been paid within 30 days. Thus, compliance with the requirements of Insurance Law § 3420 (b) (1), including obtaining a judgment against the tortfeasor, is a condition precedent for a lawsuit against the insurer (see Lang v Hanover Ins. Co., (3 NY3d 350 [2004]). But, in Lang, the Court of Appeals stated that "[t]here is no dispute that parties to an insurance contract--the issuer, a named insured or a person claiming to be an insured under the policy--may bring a declaratory judgment action against each other when an actual controversy develops concerning the extent of coverage, the duty to defend, or other issues arising from the insurance contract" (3 NY3d at 353).

JMT Brothers alleges in its third-party complaint that it is an additional insured under the policy. U.S. Underwriters originally denied such allegation in its third-party answer. U.S. Underwriters, however, makes no specific argument in support of its present motion that JMT Brothers is not an additional insured.[1] Rather, U.S. Underwriters argues that two separate policy provisions, i.e. an employee exclusion endorsement and a contractual liability exclusion (as modified by a contractual liability limitation endorsement) govern the lawsuit, and relieves it of the duty to defend or indemnify Abecon and JMT Brothers for damages occasioned by plaintiff as an employee of Abecon during the

[1] The reason for the change in position by U.S. Underwriters is unclear from these submissions. The failure of U.S. Underwriters to make such argument may have some relationship with the concession made by United States Liability Insurance Group (USLIG) to Mutual Marine Office, Inc. in a letter dated October 12, 2006, that USLIG had received confirmation that JMT Brothers and First Realty Builders had been added as additional insureds to the policy via an endorsement.

course of his employment. Thus, to the extent JMT Brothers is an additional insured, it has standing to bring the third-party action (see Lang v Hanover Ins. Co.,3 NY3d at 353; Reliance Ins. Co. of New York v Garsart Bldg. Corp., 122 AD2d 128 [1986]). Moreover, to the extent JMT Brothers is not an additional insured, it nevertheless is a party which would stand to benefit from the U.S. Underwriters insurance policy if, in fact, U.S. Underwriters is obliged to provide coverage and indemnification thereunder (see Abate v All-City Ins. Co., 214 AD2d 627 [1995]). In addition, U.S. Underwriters has asserted a counterclaim against JMT Brothers seeking a judicial declaration of the coverage question (see Lang v Hanover Ins. Co., 3 NY3d 350 [2004]). Under such circumstances, JMT Brothers may properly maintain this third-party action to determine whether U.S. Underwriters owes a defense or coverage under the policy (see CPLR 3001; Abate v All-City Ins. Co., 214 AD2d 627 [1995]). That branch of the motion by U.S. Underwriters for summary judgment dismissing the third-party complaint on the ground of lack of standing is denied.

"'[C]ourts bear the responsibility of determining the rights or obligations of parties under insurance contracts based on the specific language of the policies' (Sanabria v American Home Assur. Co., 68 NY2d 866, 868 [1986], quoting State of New York v Home Indem. Co., 66 NY2d 669, 671 [1985]), whose unambiguous provisions must be given 'their plain and ordinary meaning (United States Fid. & Guar. Co. v Annunziata, 67 NY2d 229, 232 [1986], quoting Government Empls. Ins. Co. v Kligler, 42 NY2d 863, 864 [1977]; see Maroney v New York Cent. Mut. Fire Ins. Co., 5 NY3d 467, 471-472 [2005]; Catucci v Greenwich Ins. Co., 37 AD3d 513, 514 [2007])" Cali v Merrimack Mut. Fire Ins. Co., 43 AD3d 415 [2007]). Exclusionary clauses in insurance contracts are subject to the same rule, and a "[c]ourt is not permitted to construe [such] a clause in a way that drains it of its only intended meaning" (Commissioners of State Ins. Fund v Insurance Co. of North America, 80 NY2d 992, 994 [1992]).

"In order for a policy exclusion to be enforced, the language 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 (see Seaboard Sur. Co. v Gillette Co., 64 NY2d 304, 311 [1984]; Essex Ins. Co. v Pingley, 41 AD3d 774, 776 [2007])" (Junius Development, Inc. v New York Marine and General Ins. Co., 48 AD3d 426 [2008]).

In this instance, Abecon is the named insured on the commercial general liability policy numbered CL 3083684, issued by U.S. Underwriters. The policy is applicable to claims for bodily injury and property damages to which the policy applies, and provides a duty to defend the insured against any suit seeking

damages those damages. The policy includes, however, an endorsement entitled **"EXCLUSION OF INJURY TO EMPLOYEES, CONTRACTORS, SUBCONTRACTORS, EMPLOYEES OF CONTRACTORS, AND EMPLOYEES OF SUBCONTRACTORS,"** excluding coverage for claims and injuries for:

> "I. ...
>
> (I) 'Bodily injury' to any 'employee' of any insured arising out of or in the course of:
>
> (a) Employment by any insured; or
> (b) Performing duties related to the conduct of any insured's business;
>
> (ii) 'Bodily injury' to any contractor, subcontractor or any 'employee' of any contractor or subcontractor arising out of or in the course of the rendering or performing of services of any kind or nature whatsoever by such contractor, subcontractor or 'employee' of such contractor or subcontractor for which any insured may become liable in any capacity; or
>
> (iii) Any obligation of any insured to indemnify or contribute with another because of damages arising out of such 'bodily injury'; or
>
> (iv) ....
>
> This exclusion applies to all claims and 'suits' by any person or organization for damages because of such 'bodily injury', including damages for care and loss of services and any claim under which any insured may be held liable under an Workers' Compensation Law.
>
> ...."

The U.S. Underwriters policy also includes a contractual liability exclusion which provides:

> "**2. Exclusions**
>
> This insurance does not apply to:

> **a.** ...
>
> **b. Contractual Liability**
>
> 'Bodily injury' or 'property damage' for which the insured is obligated to pay damages by reason of the assumption of liability in a contract or agreement. This exclusion does not apply to liability for damages:
>
> **(1)** That the insured would have in the absence of the contract or agreement; or
>
> **(2)** Assumed in a contract or agreement that is an 'insured contract', provided the 'bodily injury' or 'property damage' occurs subsequent to the execution of the contract or agreement. Solely for the purposes of liability assumed in an 'insured contract', reasonable attorney fees and necessary litigation expenses incurred by or for a party other than an insured are deemed to be damages because of 'bodily injury' or 'property damage', provided:
>
> > **(a)** Liability to such party for, or the cost of, that party's defense has also been assumed in the same 'insured contract', and
> >
> > **(b)** Such attorney fees and litigation expenses are for defense of that party against a civil or alternative dispute resolution proceeding in which damages to which this insurance applies are alleged."

The U.S. Underwriters policy also includes an endorsement modifying such contractual liability exclusion, in relevant part, as follows:

> "The definition of 'insured contract' in the DEFINITIONS Section is replaced by the following:
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> 'Insured contract' means:
>
> **a.** A contract for a lease of premises. ...

b. A sidetrack agreement;

c. Any easement or license agreement, except in connection with construction or demolition operations on or within 50 feet of a railroad;

d. An obligation, as required by ordinance, to indemnify a municipality, except in connection with work for a municipality;

e. An elevator maintenance agreement."

These exclusionary clauses are clear and unambiguous. In addition, with respect to the contractual liabilities exclusion (as modified), the general rule is that a commercial general liability insurance policy does not afford coverage for breach of contract, but rather for bodily injury and property damage (see Structural Building Products Corp. v Business Ins. Agency, Inc., 281 AD2d 617 [2001]).

U.S. Underwriters offers the affidavit of Joseph Gallagher, a claims examiner, and copies of notices to Abecon, First Realty Builders and JMT Brothers, indicating disclaimer of coverage on the basis, inter alia, that an exclusion to its policy provided that coverage was not available to employees, contractors and subcontractors, and employees of contractors and subcontractors for injuries sustained in the course of employment. U.S. Underwriters also offers a copies of the transcript of the deposition testimony of plaintiff, the construction contract covering the renovation project between JMT Brothers, as owner, and First Realty Builders (the JMT Brothers contract), as builder, and the subcontract for the project between First Realty Builders, as contractor, and Abecon, as subcontractor, (the Abecon contract).

Under the JMT Brothers contract, First Realty Builders agreed, among other things, to renovate the building at 12 East 69th Street. Under the Abecon agreement, Abecon agreed, among other things, to assist in the renovation, defend, indemnify and hold harmless, First Realty Builders and the owner of the property from and against all liability for bodily injury to any person arising out of the work covered by the Abecon agreement, and procure liability insurance for the owner of the property.

Plaintiff testified that at the time of the accident on March 6, 2006, he was engaged in renovation and construction work at the job site as an employee of his employer, Abecon.

U.S. Underwriters has established its prima facie burden that the employee exclusion endorsement is applicable with respect to

the coverage available to Abecon in relation to any claim of liability for bodily injury arising out of the accident alleged in plaintiff's complaint, and the contractual liability exclusion is applicable with respect to the coverage available to Abecon for the claims asserted by JMT Brothers based upon Abecon's contractual assumption of liability vis-a-vis JMT Brothers and duty to indemnify JMT Brothers (see Makan Exports, Inc. v U.S. Underwriters Ins. Co., 43 AD3d 883 [2007]). Abecon has failed to raise a triable issue of fact as to the applicability of such exclusions. These exclusions absolve U.S. Underwriters of any duty to defend or indemnify Abecon (see Makan Exports, Inc. v U.S. Underwriters Ins. Co., 43 AD3d 883 [2007]).

Under such circumstances, U.S. Underwriters is entitled to summary judgment on its cross claim against Abecon declaring that it is not obligated to defend and indemnify Abecon (see Lanza v Wagner, 11 NY2d 317, 334 [1962], appeal dismissed 371 US 74 [1962], cert denied 371 US 901 [1962]). That branch of the motion by U.S. Underwriters for summary judgment on its cross claim against Abecon is granted to the extent of declaring that U.S. Underwriters is not obligated to defend and indemnify Abecon as to the claims asserted in this action.

U.S. Underwriters also has established its prima facie burden that the employee exclusion endorsement is applicable with respect to the coverage available to JMT Brothers in relation to any claim of liability for bodily injury arising out of the accident alleged in plaintiff's complaint. JMT Brothers has failed to raise any triable issue of fact as to the applicability of this exclusion. This exclusion absolves U.S. Underwriters of any duty to defend or indemnify JMT Brothers with respect to claims based upon liability for bodily injury arising out of the accident alleged in plaintiff's complaint. Under such circumstances, U.S. Underwriters is entitled to summary judgment on its counterclaim against JMT Brothers declaring that it is not obligated to defend and indemnify JMT Brothers (see Lanza v Wagner, 11 NY2d 317, 334 [1962], supra, appeal dismissed 371 US 74 [1962], cert denied 371 US 901 [1962]). That branch of the motion by U.S. Underwriters for summary judgment on its counterclaim against JMT Brothers is granted to the extent of declaring that U.S. Underwriters is not obligated to defend and indemnify JMT Brothers as to the claims asserted in this action.

That branch of the motion to sever the third-party action is denied.

Dated: January 8, 2009

J.S.C.