At an IAS Term, Part 9 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the3rd day of April, 2009.

P R E S E N T:

HON. BRUCE M. BALTER,
Justice.

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DONNELLY INDUSTRIES, INC. and
HARTFORD FIRE INSURANCE COMPANY,

Plaintiffs,

- against -

Index No. 24048/08

UTICA FIRST INSURANCE COMPANY, et al.,

Defendants.

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The following papers numbered 1 to 7 read on this motion:

| | Papers Numbered |
|---|---|
| Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed | 1 -3 4, 5 |
| Opposing Affidavits (Affirmations) | 6 |
| Reply Affidavits (Affirmations) | 7 |
| Affidavit (Affirmation) | |
| Other Papers | |

Upon the foregoing papers, the motion by defendant Utica First Insurance Company (Utica) for an order, pursuant to CPLR 3211(a)(7), dismissing the complaint against it is granted and the cross motion by plaintiffs Donnelly Industries, Inc. (Donnelly) and Hartford Fire Insurance Company (Hartford) for an order, pursuant to CPLR 3212, granting summary judgment in their favor with respect to the liability of Utica is, in all respects, denied.

On September 29, 2005, Winsbert Spence (Spence) was allegedly injured during the course of his employment by Nachman Electric Inc. (Nachman), a corporation owned by Arthur Jurgrau. At the time of his injury, Spence was performing construction services at a building located at 548-554 Lefferts Avenue in Brooklyn. Subsequently, Spence commenced an action to recover damages for personal injuries against the alleged owners of the subject premises. Also names as a defendant was Donnelly, the contractor hired to do construction work at the location and which, in turn, retained Nachman as a subcontractor. Thereafter, Donnelly and Hartford, its insurer, brought this action seeking declaratory relief and money damages against Arthur Jurgrau, d/b/a Quality Electric (Quality) and Utica, Quality Electric's insurer. According to the complaint, Utica issued general liability insurance policies to Quality on or before September 29, 2005 under policy numbers ART 118674 and ART 1262086 and Donnelly was named as an additional insured under the policies. The policies were allegedly in effect on the date of Spence's accident and Utica has refused to provide for Donnelly's defense and indemnification despite Donnelly's demand therefor. Accordingly, in their complaint, Donnelly and Hartford seek a judgment declaring that Utica is obligated to pay all costs incurred in the defense and indemnification of Donnelly in the underlying personal injury action. Additionally, because of Utica's alleged "bad faith" in refusing to provide coverage, Donnelly and Hartford demand both punitive and consequential damages.

In its motion, Utica seeks an order dismissing the complaint and all cross claims against it and a declaration that it has no obligation to defend or indemnify Donnelly or any

other party in connection with the September 29, 2005 accident. Alternatively, Utica requests that the third cause of action for punitive and compensatory damages be dismissed. In support of its motion, Utica submits the affidavit of Patrick Kernan, its claims representative, in which he avers that policy number ART 1186741 expired on September 22, 2004 (one year prior to Spence's accident). Although he points out that policy number ART 126086 was in effect at the time of the accident, he also notes that Utica disclaimed coverage to Quality and Donnelly on February 2, 2007 on the grounds that they provided late notice of the loss to Utica, that a "Employee Exclusion" in the policy precludes coverage for injuries sustained by employees of any insured and of contractors hired or retained by any uninsured, and that a "Contractual Liability Exclusion" precludes coverage for "liabilities assumed under a contract or agreement," such as that between Donnelly and Quality. With respect to plaintiffs' claim for punitive damages, Utica argues that a "bad faith" claim will not lie where, as here, the issue is one "where the purported insured in merely unhappy with the insurance carrier's coverage determination."

In their cross motion, plaintiffs assert that Donnelly is an "additional insured" under Utica policy number ART 1262086, given the "Blanket Additional Insured" provision for contractors contained in the policy. According to plaintiffs, that provision provides that, when an insured is required to name a person or entity as an additional insured by written contract, that person or entity will be considered an "insured" under the policy. Since, in this case, Donnelly had contracted with Quality for certain electrical work to be done and the

contract between them required Quality to name Donnelly as an additional insured, plaintiffs maintain that the provision was effective to make Donnelly an additional insured under the policy. Plaintiffs claim that the "Employee Exclusion" does not apply in this case because Spence was not employed by the policyholder (Quality), but by Nachman, nor was he "hired" or "retained" by Quality. Even if Spence were found to be an employee of Quality, plaintiffs maintain that the policy's "Separation of Insureds" clause renders the exclusion inapplicable to Donnelly. According to plaintiffs, under that clause, "Quality, an insured, cannot be considered an insured when determining if the Employee Exclusion applies to Donnelly and Donnelly, an additional insured under the policy, cannot be considered an insured when determining if the Employee Exclusion applies to Quality." Plaintiffs add that nowhere in the "Separation of Insureds" clause does it state that it is not to be read in conjunction with the other clauses, exclusions and endorsements. With respect to the issue of late notice allegedly provided by Donnelly to Utica, Donnelly contends that it notified Utica of the loss in a timely manner (on January 31, 2007), given that Donnelly was unaware of the occurrence until January 19, 2007 when it received a copy of the summons and complaint on behalf of Spence. Insofar as the "Contractual Liability Exclusion" is concerned, plaintiffs argue that the exclusion does not apply where, as here, a contract provides for an entity to be an additional insured under a certain policy and that policy contains a blanket additional insured provision or endorsement. Plaintiffs add that they are entitled to punitive damages

because Utica has demonstrated a gross disregard of Donnelly's interests as an additional insured, rather than there simply being an arguable difference of opinion.

In opposition to the cross motion, Utica questions whether Donnelly is an additional insured under the policy since the alleged "subcontract" between Donnelly and Quality (exhibit "B" of the cross motion) has not been authenticated by an officer of either entity. Even if the "subcontract" were accepted by the court, Utica points out that it is dated December 13, 2006 (following Spence's accident) and the Blanket Endorsement requires that a contract be executed prior to the bodily injury having occurred. Moreover, the Blanket Endorsement requires that the insured have a contractual obligation to name another entity as an additional insured, but the "subcontract" only obliges Quality to obtain a certificate of insurance listing Donnelly as an additional insured. Should Donnelly be deemed an additional insured under the policy, Utica maintains that the "Employee Exclusion" clause precludes coverage since Spence was admittedly working for "or on behalf of" Quality at the time of the accident. Utica insists that Spence need not have been an "employee" of Quality in the strict sense; rather, the exclusion applies to employees of contractors "hired or retained by or for any insured" (emphasis added), as well as employees retained to perform work on Quality's behalf. Insofar as the issue of late notice is concerned, Utica notes that Quality never notified it of the accident and that Donnelly's receipt of a letter from Spence's attorney on November 30, 2006 was sufficient to put Donnelly on notice of the accident and Spence's claim for damages. According to Utica, the letter identified the date and location of the

accident, as well as the fact that Donnelly was the general contractor on the job site. It also requested that Donnelly's insurance carrier be put on notice of the letter. Finally, because "there is absolutely nothing egregious about an insurance company relying upon a policy exclusion that has been almost universally validated by every Court of this state," Utica maintains that a claim for punitive damages does not lie.

In its reply papers, Donnelly points out that the subcontract was executed on April 26, 2005 (five months before the accident date) and that the date referred to by Utica was the date upon which a copy of the contract was faxed. (An affidavit to that effect from a principal of Donnelly is submitted.) Donnelly also scoffs at Utica's suggestion that the subcontract merely required that a certificate of insurance be obtained without the issuance of the policy itself, especially since a certificate of insurance is not proof of the existence or content of a policy. Donnelly repeats its contention that it cannot be precluded from coverage based upon Nachman's employment of Spence since Nachman was not a contractor hired or retained or an insured under the Utica policy. Moreover, Donnelly insists that "when it was first advised of a potential of a lawsuit it had not been given adequate information to identify the employer or insurer of Spence." According to Donnelly, the letter from Spence's attorney only contained the date and place of the occurrence and did not indicate any details regarding the accident or for whom Spence was working.

Pursuant to policy number ART 1262086 which was issued by Utica to Quality, "[i]n the case of an occurrence or if an insured becomes aware of anything that indicates that there

might be a claim under the Commercial Liability Coverage, the insured must promptly give notice to [Utica]." "Providing the required notice is a condition to the insurance carrier's liability . . . and absent a valid excuse, a failure to satisfy the notice requirement vitiates the policy" (*Lukralle v Durso Supermarkets*, 238 AD2d 318, 319 [1997]). Here, Utica's first notice of the accident came in a letter from Hartford dated January 30, 2007, more than a year after Spence's accident. According to the affidavit of Arthur Jurgrau, the Chief Executive Officer of Quality, he was aware of Spence's injury no later than October 2005 when Spence filed a claim for workers' compensation benefits. Since Quality never provided any notice to Utica, its insurer, the insurer has no duty to defend or indemnify Arthur Jurgrau, Quality Electric, Quality Building Systems, Inc. and Nachman Electric, Inc. in connection with the subject accident.

"A provision that notice be given promptly . . . requires that notice be given within a reasonable time under all the circumstances" (*Gershow Recycling Corp. V Transcontinental Ins. Co.*, 22 AD3d 460, 461 [2007]). In this case, it appears that Donnelly's first notice of the occurrence involving Spence was the letter from his attorney received on or about December 7, 2006. Although Donnelly suggests that the letter "provided no information as to whether he was even employed at the site and, if so, by whom," this court finds that it was sufficient to place Donnelly on notice of "a construction accident on 9/29/05 at 554 Lefferts Avenue" (a site at which Donnelly was the general contractor) and that a claim was being pursued on his behalf, given the request that the letter be forwarded to Donnelly's liability

insurance carrier. Nevertheless, it cannot be said that Hartford's seven-week delay in notifying Utica was unreasonable as a matter of law.

The subject policy contained a clause captioned "Exclusion of Injury to Employees, Contractors, and Employees of Contractors," which read in relevant part: "This insurance does not apply to: (i) bodily injury to any employee of any insured, to any contractor hired or retained by or for any contractor hired or retained by or for any insured or to any employee of such contractor, if such claim for bodily injury arises out of and in the course of his/her employment or retention of such contractor by or for any insured, for which any insured may become liable in any capacity." Such employee exclusion clauses have been upheld and applied on numerous occasions (*see,* e.g., *Makan Exports, Inc. v. U.S. Underwriters Ins. Co.*, 43 AD3d 883 [2007]; *Sixty Sutton Corp. v Illinois Union Ins. Co.*, 34 AD3d 386 [2006]; *Hayner Hoyt Corp. v Utica First Ins. Co.*, 306 AD2d 806 [2003]). In opposition to the motion, Donnelly contends that Spence was not its employee or that of Quality and, therefore, the exclusion does not apply. In his affidavit, Arthur Jurgrau avers, among other things, that in the performance of the subcontract between Donnelly and Quality, he directed Spence (an employee of Nachman, another corporation of which affiant was the principal) to perform some of the services pursuant to the contract. In addition, at his deposition, Spence testified that he worked for both Quality and Nachman. While the exclusion at issue has been characterized as an "employee exclusion," it also refers to any contractor or employee of a contractor "retained by or for" any insured, such as Quality. The language of

the exclusion clearly contemplates that a contractor (such as Nachman) could be retained by a party other than the insured on the insured's behalf and that an injury to an employee of the contractor would fall within the scope of the exclusion (*see U.S. Underwriters Ins. Co. v Beckford*, 1998 WL 23754 at 4). Given the relationship between Quality and Nachman, the subcontract involving Quality, and the use of Spence at the worksite, the court finds that the exclusion applies. Accordingly, the motion by Utica is granted and the complaint and all cross claims against it are dismissed. In light of such relief, the cross motion by plaintiffs is, in all respects, denied.

The foregoing constitutes the decision and order of this court.

E N T E R,


J. S. C.