SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

DCM PART 3

SCOTTSDALE INSURANCE COMPANY

Index No. 101026/09
Calendar Nos: 2211-001
2546-002

Plaintiff,

-against-

DECISION AND ORDER
HON. JOSEPH J. MALTESE

SAGONA LANDSCAPING LTD., TRADES CONSTRUCTION SERVICES CORP., RAYMOND HOMES INC., and PC GROUP LLC,

***Defendants*.**

The following papers numbered 1 to 6 were marked fully submitted on the 14th day of August, 2009:

	Pages Numbered
Notice of Motion to Dismiss by Defendant Sagona Landscaping Ltd., with Supporting Papers and Exhibits (dated June 23, 2009)	1
Affirmation in Opposition by Plaintiff, with Exhibits (dated July 31, 2009)	2
Notice of Cross Motion for Summary Judgment by Plaintiff, with Supporting Papers and Exhibits (dated August 3, 2009)	3
Affirmation in Opposition by Defendant Sagona Landscaping Ltd., with Exhibits (dated August 6, 2009)	4
Reply Affirmation (dated August 6, 2009)	5
Reply Affirmation (dated August 13, 2009)	6

Upon the foregoing papers, the motion to dismiss plaintiff's first cause of action (No. 2211) by defendant Sagona Landscaping Ltd. is denied, and plaintiff's cross motion for summary judgment (No. 2546) is granted.

In this declaratory judgment action, plaintiff Scottsdale Insurance Company (hereinafter "plaintiff insurer") seeks a declaration that it is not obligated to defend or indemnify defendant Sagona Landscaping Ltd. (hereinafter "Sagona") in the underlying property damage action (CPLR 3001).

To the extent relevant, Raymond Homes Inc. and PC Group LLC, co-defendants herein, commenced an action for damages against Sagona for negligence and breach of contract (including punitive damages) arising out of the collapse of a retaining wall.[1] It is undisputed that Sagona constructed the subject wall in July of 2005, and completed said construction in September of 2005. It is alleged that the subject retaining wall collapsed on or about November 6, 2006, and that Sagona refused to perform repairs. As a result of that action, Sagona sought a defense and indemnification under its general liability policy with plaintiff-insurer.

On or about March 1, 2007, plaintiff-insurer notified Sagona that it was disclaiming coverage in the aforementioned action on the basis that Sagona's Commercial General Liability policy bearing No. CLS1313929 (hereinafter "the policy"), excludes coverage for property damage to Sagona's "work product" (Defendant's Exhibit "C"). Subsequently, on April 21, 2009, plaintiff insurer commenced this action for a declaration, inter alia, that it is not obligated to defend or indemnify Sagona for (1) any damages associated with the cost of replacing or repairing the collapsed retaining wall erected by its insured; (2) any of the claims against it sounding in breach of contract; and (3) any punitive damages which may be assessed against Sagona in the underlying action.

In support of its motion to dismiss plaintiff's first cause of action, defendant Sagona refers to sections I(2)(j)(6) and V(16) of policy (Form No. CG00011204 [Defendant's Exhibits "C", "D", Plaintiff's Exhibit "D-1", pp 4-5,14]), and contends that these sections exempt any "work product" of the insured that is "fully completed" from the coverage. Other express terms of the policy mandate coverage and indemnification under, e.g., the "Products-Completed Operations Hazard"

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[1]The underlying action entitled *Raymond Homes Inc and PC Group, LLC v. Trades Construction Services Corp and Sagona Landscaping, LTD*, is filed in the Supreme Court, Richmond County under Index Number 100574/07.

exemption (Defendant's Exhibits "C", "D", Plaintiff's Exhibit "D-1", p14).

In relevant part, section "I", subsection "2", paragraph "j", item "6" on page 5 of Form CG00011204 provides as follows:

This insurance does not apply to:

"Property damage" to:

(6) That particular part of any property that must be restored, repaired or replaced because "your work" was incorrectly performed on it.

[T]his exclusion does not apply to "property damage" included in the "products-completed operations hazard".

In relevant part, section "V", subsection "16"on page 14 of the same Form provides as follows:

16. "Products-completed operations hazard":

a. Includes all "bodily injury" and "property damage" occurring away from premises you own or rent and arising out of "your product" or "your work" except:

(1) Products that are still in your physical possession; or
(2) Work that has not yet been completed or abandoned. However, "your work" will be deemed completed at the earliest of the following times:

(a)When all of the work called for in your contract has been completed.
(b)When all of the work to be done at the job site has been completed if your contract calls for work at more than one job site.
(c)When that part of the work done at a job site has been put to its intended use by any person or organization other than another contractor or subcontractor working on the same project.

Work that may need service, maintenance, correction, repair or replacement, but which is otherwise complete, will be treated as completed.

Where, as here, evidentiary material is submitted on a motion to dismiss the complaint pursuant to CPLR 3211(a)(7), such evidence may be considered by the court in assessing the sufficiency of the pleading, but unless defendant is able to demonstrate that a material fact alleged by plaintiff is not a fact at all and that no significant dispute exists regarding it, the motion should not be granted (*see Sta-Brite Servs, Inc. v. Sutton*, 17 AD3d 570 [2nd Dept 2005]). Here, Sagona's

evidentiary submissions fail to show that a material fact alleged in the complaint was not a fact at all and that no significant dispute exists regarding it (*see 1911 Richmond Ave Assocs, LLC v. GLG Capital, LLC*, 60 AD3d 1021 [2nd Dept 2009]; *see Sta-Brite Servs, Inc. v. Sutton*, 17 AD3d at 571). In fact, to the extent that Sagona's motion is based upon documentary evidence, the evidence submitted neither definitively contradicts the material allegations of the complaint nor conclusively disposes of plaintiff's claim *(see Sta-Brite Servs, Inc. v. Sutton*, 17 AD3d at 571). Accordingly, Sagona's motion to dismiss is denied.

In its cross motion for summary judgment, plaintiff-insurer contends that pursuant to section I(2)(l) of the subject insurance policy, it is not obligated to defend or indemnify Sagona with respect to the damages associated with the costs of replacing or repairing Sagona's work product.

In relevant part, section "I", subsection "2", paragraph "l"on page 5 of Form CG00011204 provides as follows:

> **This insurance does not apply to:**
>
> > **(l) Damage to Your Work**
> >
> > **"Property damage" to "your work" arising out of it or any part of it and included in the "products-completed operations hazard".**
> >
> > **This exclusion does not apply if the damaged work or the work out of which the damage arises was performed on your behalf by a sub-contractor.**

It is well settled that an insurer's duty to defend is broader than its duty to indemnify, such that an insurer may be obligated to defend an insured even if, at the conclusion of the underlying action, it is found to have no obligation to indemnify under the relevant insurance policy (*see Franklin Dev Co. v. Atlantic Mut Ins Co*, 60 AD3d 897, 900 [2nd Dept 2009]; *Global Constr Co, LLC v. Essex Ins Co*, 52 AD3d 655, 655-656 [2nd Dept 2008]). Thus, an insurer must defend its insured whenever the allegations of the complaint in a pending action suggest a reasonable possibility of coverage *(see Franklin Dev Co. v. Atlantic Mut Ins Co*, 60 AD3d at 900; *Global Constr Co, LLC v. Essex Ins Co*, 52 AD3d at 656). However, an insurer need not provide a defense when, as a matter of law, there is no possible factual or legal basis upon which it might eventually be held obligated to indemnify under any unambiguous provision of the policy in question, or when the only allegations against its insured fall wholly within a policy exclusion the meaning of which is not open to question *(see Franklin Dev Co. v. Atlantic Mut Ins Co*, 60 AD3d at 900-901; *Global Constr Co, LLC v. Essex Ins Co*, 52 AD3d at 656).

In general, it is the courts which bear the responsibility of determining the rights or obligations of the parties under an insurance contract based upon the specific language of the particular policy (*see Jahier v. Liberty Mut Group,* __AD3d__, 2009 NY Slip Op 5948 [2nd Dept]; *Empire Fire & Marine Ins Co v. Eveready Ins Co*, 48 AD3d 406 [2nd Dept 2008]). Unambiguous policy provisions must be given their plain and ordinary meaning (*see Empire Fire & Marine Ins Co v. Eveready Ins Co*, 48 AD3d at 407), while any ambiguity must be construed strongly against the insurer as the drafter of the policy (id.). Nevertheless, the plain meaning of the policy's language may not be disregarded in order to find an ambiguity where none exists (id.). In this regard, it has been held that policy exclusions are to be read seriatim not cumulatively, and, if any one exclusion applies, there is no coverage since no one exclusion can be regarded as inconsistent with another (*see Kay Bee Bldrs, Inc. v. Merchant's Mut Ins Co*, 10 AD3d 631, 633 [2nd Dept 2004]).

As applicable to the case at bar, section I(2)(l) of the subject policy, more commonly referred to as a "work product exclusion," is typically held to exclude coverage "for business risks, including claims that the insured's product or completed work [was] not that for which the damaged person bargained" (*Nova Cas Co v. Central Mut Ins Co*, 59 AD3d 777, 779 [3rd Dept 2009] [internal quotation marks omitted]; *Grove Hill Assoc v. Colonial Indem Ins Co*, 24 AD3d 607, 608 [2nd Dept 2005]). Clearly, this exclusion is not intended to exempt from coverage physical damage caused by the negligence of an insured, but was designed to apply to those situations "where coverage is sought for contractual liability of the insured for economic loss because the product or completed work is not what the damaged person bargained for" (*see Nova Cas Co v. Central Mut Ins Co*, 59 AD3d at 779-780 [internal quotation marks omitted]). However, the burden of demonstrating that the exclusion relied upon (1) is stated in clear and unmistakable language; (2) is subject to no other reasonable interpretation; and (3) applies in the particular case is on the insurer rather than the insured (*see Nova Cas Co v. Central Mut Ins Co*, 59 AD3d at 778).

Here, plaintiff-insurer met its initial burden of establishing its entitlement to judgment as a matter of law by demonstrating that the plain meaning of the "work product" exclusion relieved it of liability in a case such as this, where the underlying action seeks compensatory damages for the cost to repair Sagona's own work product. While the complaint also contains allegations, inter alia, that Sagona constructed the subject retaining wall unsatisfactorily and with faulty workmanship, it does not contain allegations that said work product caused personal injury or damage to another's property (Plaintiff's Exhibit "D-3"). In response, Sagona's bare contentions that the exclusion is ambiguous and that there are questions of fact as to whether the collapse of the retaining wall was

caused by any defective work, are insufficient to defeat plaintiff-insurer's motion for summary judgment.

Finally, plaintiff-insurer maintains that it is entitled to summary judgment on its second and third causes of action, as well. More specifically, it maintains that it is not obligated to defend or indemnify Sagona for a claim alleging breach of contract, as the subject policy provides coverage for an "occurrence" which results in "property damage" or "personal injury"; a cause of action for breach of contract does not qualify as either. Moreover, 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/or property damage *(see Mid-Hudson Castle v. PJ Exteriors*, 292 AD2d 355, 356 [2nd Dept 2002]; *Structural Bldg Prods Corp v. Business Ins Agency*, 281 AD2d 617, 619 [2nd Dept 2001]).

Here, the subject policy is applicable only to claims for bodily injury and property damage caused by an "occurrence," which was defined as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions" (Defendant's Exhibit "C", Plaintiff's Exhibit "D-1"). As such, the claims for breach of contract against Sagona are not covered under the terms of the instant policy *(see Mid-Hudson Castle, Ltd v. PJ Exteriors, Inc*., 292 AD2d at 356).

Regarding its third cause of action, plaintiff-insurer also contends that it is not obligated to defend or indemnify Sagona for any punitive damages which may be assessed against it in the underlying action, as the subject policy explicitly excludes such coverage, referring to the policy's "punitive or exemplary damage exclusion" (Defendant's Exhibit "C", Plaintiff's Exhibit "D-1", Form No. UTS-246s [9-03]). In opposition to this prima facie demonstration that the exclusion from coverage is specific and clear and must be enforced (*see Jahier v. Liberty Mut Group,* __AD3d__, 2009 NY Slip Op 5948 at 4-6), Sagona has failed to raise a triable issue of fact.

Accordingly, it is hereby:

ORDERED that the motion to dismiss by defendant Sagona Landscaping Ltd. is denied; and it is further

ORDERED that plaintiff's motion for summary judgment as against defendant Sagona Landscaping Ltd. is granted; and it is further

ORDERED and ADJUDGED that plaintiff Scottsdale Insurance Company is not required to defend or indemnify defendant Sagona Landscaping Ltd. in the action entitled *Raymond Homes Inc and PC Group, LLC v. Trades Construction Services Corp and Sagona Landscaping, LTD*, (Richmond County Index Number 100574/07), and it is further

ORDERED that the Clerk enter judgment and mark his records accordingly.

ENTER,

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Joseph J. Maltese
Justice of the Supreme Court

DATED: September 10, 2009