Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE JAMES J. GOLIA IA Part 33
Justice

FULL SERVICE CONTRACTING, INC., et al.

-against-

UTICA FIRST INSURANCE COMPANY, et al.

x Index Number 603 2009

Motion Date June 25, 2009

Motion Cal. Number 7

Motion Seq. No. 1

The following papers numbered 1 to 5 read on this motion by defendant Utica First Insurance Company for an order pursuant to CPLR 3211(a)(1) and (7) dismissing the complaint and any cross claims against it.

	Papers Numbered
Notice of Motion - Affidavits - Exhibits	1
Answering Affidavits - Exhibits	2
Reply Affidavits	3
Memoranda of Law	4-5

Upon the foregoing papers it is ordered that: The branch of the motion by defendant Utica First Insurance Company which is for an order pursuant to CPLR 3211(a)(1) dismissing the complaint and all cross claims against it is granted. The court declares that defendant Utica has no obligation to defend or indemnify any party to this action for the injury sustained by Angel Plasencia on May 21, 2007. The remaining branches of the motion are denied. (See the accompanying memorandum.)

Dated: September 16, 2009

J.S.C.

MEMORANDUM

SUPREME COURT : QUEENS COUNTY
IA PART 33

x

FULL SERVICE CONTRACTING, INC., et al.

-against-

UTICA FIRST INSURANCE COMPANY, et al.

x

INDEX NO. 603/09

MOTION SEQ. NO. 1

BY: GOLIA, JAMES J.

DATED: SEPTEMBER 16, 2009

Defendant Utica First Insurance Company has moved for an order pursuant to CPLR 3211(a)(1) and (7) dismissing the complaint and any cross claims against it.

Lloyd Durgadeen and George Cappello, the owners of premises located at 92-94 107th Avenue, Ozone Park, New York, entered into a contract with Full Service Contracting, Inc. whereby the latter obligated itself to do construction work at the premises. Full Service subsequently subcontracted masonry work to Titan Masonry Corp. The subcontract required Titan Masonry to procure primary commercial general liability insurance naming Full Service as an additional insured.

Defendant Utica First issued a primary commercial general liability policy to Titan Masonry Corp. effective from August 20, 2006 to August 20, 2007. Plaintiff Full Service alleges that it is an additional insured under the policy. The policy provided in

relevant part: "Exclusion of Injury to Employees, Contractors, and Employees of Contractors [:] 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 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***."

On May 21, 2007, Angel Plasencia, an employee of Titan Masonry Corp., allegedly sustained personal injury while performing work at 92-94 107th Avenue. On or about October 2, 2007, Plasencia brought an action for personal injury against Full Service, among others, in the New York State Supreme Court, County of Queens (*Plasencia v Durgadeen*, Index No. 24510/07).

Defendant Utica First received notice of Plasencia's injury when it received a letter dated November 6, 2007 from the attorneys for Full Service demanding a defense in the action brought by Plasencia. By letter dated November 20, 2007, defendant Utica First disclaimed coverage for Plasencia's injury to Titan based on the employee exclusion clause of the policy, and by letter dated November 20, 2007, defendant Utica also disclaimed coverage for Plasencia's injury to Full Service based on the employee exclusion.

On or about December 18, 2007, Full Service began a third-party action against Titan Masonry seeking contribution and indemnification. On or about January 12, 2009, plaintiff Full Service and its insurer, Great American E&S Insurance Company, began the instant action against defendant Utica, defendant Titan Masonry and defendant Plasencia

seeking, inter alia, a declaration that defendant Utica is obligated to defend and indemnify Full Service as an additional insured under the policy issued to Titan Masonry.

Shawn Kain, the Vice-President of Underwriting of defendant Utica, alleges that by letter dated September 29, 2000, the insurer requested that the New York State Department of Insurance approve his company's use of form XCNTR (1.0) entitled "Exclusion of Injury to Employees, Contractors, and Employees of Contractors." Kain further alleges that by letter dated December 5, 2000, the New York State Department of Insurance approved the use of form XCNTR (1.0). Moreover, on September 16, 2004, the Office of General Counsel issued an opinion letter representing the position of the New York State Insurance Department concerning an employee exclusion endorsement in a hypothetical general contractor's general liability policy issued by ABC Insurance Company. The policy endorsement "excludes injuries to employees of the general contractor and subcontractors." The letter noted: "The Department approved the subject endorsement on November 3, 2000 in accordance with [Insurance Law] Section 2307. This approval indicates that the New York State Insurance Department found the endorsement acceptable and not misleading or against public policy. Therefore, the exclusion for injuries to employees in the general contractor's general liability policy issue by ABC Insurance Company is valid."

CPLR 3211 provides in relevant part: "(a) Motion to dismiss cause of action. A party may move for judgment dismissing one or more causes of action asserted against him on the ground that: 1. a defense is founded on documentary evidence***." In order to prevail

on a CPLR 3211(a)(1) motion, the documentary evidence submitted "must be such that it resolves all the factual issues as a matter of law and conclusively and definitively disposes of the plaintiff's claim***." (*Fernandez v Cigna Property and Casualty Insurance Company*, 188 AD2d 700, 702; *Vanderminden v Vanderminden*, 226 AD2d 1037; *Bronxville Knolls, Inc. v Webster Town Center Partnership*, 221 AD2d 248.) Defendant Utica successfully demonstrated that it is entitled to judgment pursuant to CPLR 3211(a)(1).

The "Exclusion of Injury to Employees, Contractors, and Employees of Contractors" endorsement in the policy issued by defendant Utica plainly excludes coverage of employees of Titan Masonry injured on the job. The endorsement provides that "This insurance does not apply to: (i) bodily injury to *any employee of any insured****if such claim for bodily injury arises out of and in the course of his/her employment***." (Italics added.) Where the terms of an insurance policy are clear and unambiguous, they must be given their plain and ordinary meaning. (*See*, *Government Empls. Ins. Co. v Kligler*, 42 NY2d 863; *Marshall v Tower Ins. Co. of New York*, 44 AD3d 1014.) "New York courts have held that employee exclusionary clauses containing the same or similar language are plain and unambiguous and that such a clause applies to exclude coverage to an additional insured where, as here, the main action is brought against such additional insured by the employee of a named insured***." (*Moleon v Kreisler Borg Florman General Const. Co., Inc.*, 304 AD2d 337, 340.) The term "any insured" in defendant Utica's policy is unambiguous and, when used in the employee exclusion clause, encompasses both the insured and an

additional insured. (*See*, *Hayner Hoyt Corp. v Utica First Ins. Co.*, 306 AD2d 806.) The employee exclusion endorsement contained in the policy issued by defendant Utica operates to preclude coverage for both Titan Masonry and Full Service for the injuries suffered by Plasencia during the course of his employment for Titan Masonry. (*See*, *Bassuk Bros., Inc. v Utica First Ins. Co.*, 1 AD3d 470; *Hayner Hoyt Corp. v Utica First Ins. Co.*, *supra*; *Rivera v St. Regis Hotel Joint Venture*, 240 AD2d 332.) As the Appellate Division, Second Department, stated in deciding *Bassuk*, a similar case: "The plain meaning of the exclusion was to relieve Utica of liability when an insured or additional insured was sued or contribution was requested for damages arising out of bodily injury to an employee sustained in the course of employment." Moreover, the "separation of insureds" clause in defendant Utica's policy, which provides that the coverage afforded "applies separately to each insured against whom claim is made or suit is brought," does not alter the effect of the employee exclusion endorsement whose specific intent was to exclude from the scope of the policy injuries to "any employee of *any* insured." (Italics added.) (*See*, *Michael Carbone, Inc. v General Acc. Ins. Co.*, 937 F Supp 413.) The employee exclusion clause, which is more specific than the separation of insureds clause and, therefore, controlling, applies to employees of more than one insured. In any event, even if the separation of insureds clause required defendant Utica to treat Full Service as though it was the only insured in regard to employee exclusions, defendant Utica still would not have to indemnify Full Service for liability, if any, to Plasencia, the employee of subcontractor Titan Masonry, since the

employee exclusion clause applies "to any contractor hired or retained by or for any insured or to any employee of such contractor***."

The plaintiffs have also attempted to raise an issue concerning whether defendant Utica used the employee exclusion endorsement without first obtaining regulatory approval. Insurance Law § 2307, "Rating classifications or territories; policy forms," provides in relevant part: "(b) Except as otherwise provided herein, no policy form shall be delivered or issued for delivery unless it has been filed with the superintendent and either he has approved it, or thirty days have elapsed and he has not disapproved it as misleading or violative of public policy." In the case at bar, the letter dated September 29, 2000 from defendant Utica to the New York State Department of Insurance and the reply letter dated December 5, 2000 from the New York State Department of Insurance eliminate the factual issue raised by plaintiff Full Service concerning whether the insurer used an endorsement not approved by the Department of Insurance. In any event, "[f]ailure to file under Insurance Law §§ 2307 and 3102 does not, by itself, void the policy clause, but rather carries its own penalties for non-filing." (*National Union Fire Ins. Co. of Pittsburgh, Pa. v Ambassador Group, Inc.*, 157 AD2d 293, 298.)

Plaintiff Full Service has also attempted to raise an issue of fact concerning whether defendant Utica promptly notified Plasencia of the disclaimer of coverage. Insurance Law § 3420, "Liability insurance; standard provisions; right of injured person," provides in relevant part: "(d) If under a liability policy issued or delivered in this state, an

insurer shall disclaim liability or deny coverage for death or bodily injury arising out of a motor vehicle accident or any other type of accident occurring within this state, it shall give written notice as soon as is reasonably possible of such disclaimer of liability or denial of coverage to the insured and the injured person or any other claimant." (*See*, *Heegan v United Intl. Ins. Co.*, 2 AD3d 403.) Plaintiff Full Service, the insured, has no standing to assert that defendant Utica violated Insurance Law § 3420(d) by failing to give Plasencia, the injured party, prompt notice of its denial of coverage. (*See*, *Cincinnati Ins. Companies v Sirius America Ins. Co.*, 51 AD3d 1365; *Khan v Convention Overlook, Inc.*, 253 AD2d 737; *Batchie v Travelers Ins. Co.*, 130 AD2d 536.)

Accordingly, that branch of the motion by defendant Utica which is for an order pursuant to CPLR 3211(a)(1) dismissing the complaint and all cross claims against it is granted. The court declares that defendant Utica has no obligation to defend or indemnify any party to this action for the injury sustained by Angel Plasencia on May 21, 2007. The remaining branches of the motion are denied.

Short form order signed herewith.

J.S.C.