STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

ESSEX INSURANCE COMPANY,

Plaintiff,

-against-

DECISION and ORDER
INDEX NO. 08-1687
RJI NO. 19-09-4411

GRANDE STONE QUARRY, LLC,
WILLIAM C. MATTER and JENNIFER MATTER,

Defendants.

Supreme Court Albany County All Purpose Term, September 23, 2009
Assigned to Justice Joseph C. Teresi

APPEARANCES:
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TERESI, J.:

On May 11, 2006, William Matter was injured while driving his all terrain vehicle (hereinafter "ATV") on property owned by Grande Stone Quarry, LLC (hereinafter "Grande Stone"). At the time of the injury Grande Stone was insured by Essex Insurance Company

(hereinafter "Essex"). Mr. Matter commenced a personal injury action against Grande Stone, who have sought defense and indemnification from Essex on Mr. Matter's claim. Essex denied coverage and by this action seeks a declaratory judgment declaring that Grande Stone is not entitled to defense or indemnification. Issue was joined by Grande Stone, Mr. and Mrs. Matter. Essex now moves for summary judgment. The Matters oppose Essex's motion. Grande Stone also opposes Essex's motion; and, moves for summary judgment and other relief. Because Essex demonstrated its entitlement to judgment as a matter of law, and no issue of fact was raised, Essex's motion for summary judgment is granted and Grande Stone's motion denied.

"Summary judgment is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue." (Napierski v. Finn, 229 AD2d 869, 870 [3d Dept. 1996]). On a motion for summary judgment, the movant must "make a prima facie showing of entitlement to judgment as a matter of law." (Ferluckaj v. Goldman Sachs & Co., 12 NY3d 316 [2009] quoting Alvarez v. Prospect Hospital, 68 NY2d 320 [1986]). Only if the movant establishes their right to judgment as a matter of law, will the burden then shift to the opponent of the motion to establish the existence of genuine issues of fact. (Zuckerman v. City of New York, 49 NY2d 557 [1980]).

"When addressing an insurance coverage dispute, a court looks first to the language of the policy." (Travelers Indem. Co. v. Commerce & Industry Ins. Co. of Canada, 36 AD3d 1121, 1122 [3d Dept. 2007]). "Unambiguous provisions of an insurance contract must be given their plain and ordinary meaning, and the interpretation of such provisions is a question of law for the court." (Vigilant Ins. Co. v. Bear Sterns Companies, Inc., 10 NY3d 170, 177 [2008] quoting White v. Continental Cas. Co., 9 NY3d 264, 267 [2007]). "It is well settled that [a] contract is

unambiguous if the language it uses has a definite and precise meaning, unattended by danger of misconception in the purport of the [agreement] itself, and concerning which there is no reasonable basis for a difference of opinion." (White, supra at 267 quoting Greenfield v. Philles Records, Inc., 98 NY2d 562 [2002]). Moreover, "to gain the benefit of an exclusion clause in an insurance policy, the insurer has the burden of demonstrating that the exclusion is stated in clear and unmistakable language, is subject to no other reasonable interpretation, and applies in the particular case." (Nova Cas. Co. v. Central Mut. Ins. Co., 59 AD3d 777, 778 [3d Dept. 2009] quoting Continental Cas. Co. v. Rapid-American Corp., 80 NY2d 640 [1993]).

On this record, Essex demonstrated its entitlement to judgment as a matter of law. Essex disclaimed coverage of Mr. Matter's claim because, as is undisputed, he was injured while using an ATV. Essex claims that injuries arising from the use of an ATV are excluded from coverage. The policy states:

> "This insurance does not apply to 'bodily injury', 'property damage', 'personal injury', 'advertizing injury' or any injury, loss, or damages, including consequential injury, loss or damage, arising out of, caused by or contributed to: by ownership, non-ownership, maintenance, use, or entrustment to others of any 'auto', aircraft, watercraft, snowmobile, all terrain vehicle (ATV), or motorcycle. Use includes operation and 'loading' and unloading". (emphasis added)

The plain language of this section of the policy, applies directly to Mr. Matter's claim to exclude coverage. The policy specifically addresses and excludes from coverage "bodily injury" caused by the "use" of an "ATV", which is precisely Mr. Matter's claim. Based upon this clear, unmistakable and unambiguous provision of the insurance policy, as applied to Mr. Matter's claim, Essex demonstrated its entitlement to judgment as a matter of law.

With the burden shifted, the Defendants failed to raise an issue of fact. The Defendants

each claim that the above policy provision is ambiguous because it does not specify "who" the exclusion applies to. The Matter defendants note that this policy section is silent as to whether it applies to "acts of the insured only or... to the acts of any party." Similarly, Grande Stone suggests that the policy could "be interpreted to apply to damages... arising from use... of an all terrain vehicle by the insureds." While other exclusion provisions specifically apply to "any" person and the provision at issue does not, this policy provision is not ambiguous. The Defendants each attempt to construe the policy's language narrowly, despite the broad language used and the lack of any indication that the parties intended this section to apply narrowly. The Defendants' construction adds language to the policy, i.e. that the exclusion applies only to "acts of the insured", which is neither specifically stated nor reasonably inferred by the contract. As courts "may not by construction add or excise terms, nor distort the meaning of those used and thereby make a new contract for the parties under the guise of interpreting the writing", Defendants' interpretation is rejected. (Consedine v. Portville Cent. School Dist., 12 NY3d 286, 293 [2009] quoting Vermont Teddy Bear Co., Inc. v. 538 Madison Realty Co., 1 NY3d 470, 475 [2004]). Because the policy's language does not restrict who must "use" and ATV for the exclusion to apply, such term will not be grafted onto the contract.

Similarly, Grande Stone's argument that the exclusion does not apply to a "trespasser" is also unavailing. Again, Grande Stone seeks to add language to the policy which was not agreed upon by the parties nor specifically included in the agreement. Their insurance agent's opinion that the exclusion does not apply to a trespasser is also unpersuasive, because it is not based upon a reading of the plain language of the policy. For the reasons set forth above, such construction is rejected, and no issue of fact is raised.

Lastly, Grande Stone's implied "interpretation" and "waiver" arguments also fail to raise issues of fact. It is undisputed that Grande Stone submitted a claim to Plaintiff for the damages a third party's ATV sustained, which Plaintiff paid, after Mr. Matter had sustained his personal injuries. Grande Stone alleges that such payment demonstrates Plaintiff's implied "interpretation" of the policy. It argues that because the claims are factually similar, Plaintiff is required to indemnify and defend Mr. Matter's claim just as it paid the ATV damage claim. Grande Stone's implied "interpretation" theory is, however, unsupported on this record and contradicted by the divergence of such claims. While Mr. Matter's injury arose from his "use" of an ATV, the later ATV damage claim was based upon the "use" of heavy machinery which caused the damage. As the ATV was not being "used" in the ATV damage claim, the above exclusion did not apply, and Grande Stone's implied "interpretation" argument raises no issue of fact. Likewise, Plaintiff did not and could not have "waived" its disclaimer of Mr. Matter's claim by paying the ATV damage claim. A waiver occurs only with the "intentional relinquishment of a known right with both knowledge of its existence and an intention to relinquish it". (County of Erie v. State, 14 AD3d 14, 17 [3d Dept.2004] quoting Civil Service Employees Ass'n, Inc. v. Newman, 88 AD2d 685 [3d Dept. 1982]). Here, the disclaimer of Mr. Matter's claim was issued one month prior to the occurrence of the later ATV damage claim. The time sequence alone precludes a finding that Plaintiff voluntarily and intentionally relinquished a known right, and no issue of fact was raised.

Accordingly, Plaintiff's motion for summary judgment is granted.

Plaintiff's motion to amend its notice of motion, however, which was first raised in its opposition/reply papers, is denied. Plaintiff's opposition/reply is "an improper vehicle for raising

new arguments to the court" requiring denial of this portion of Plaintiff's motion. (Albany County Dept. of Social Services v. Rossi, 62 AD3d 1049 [3d Dept. 2009]).

Accordingly, Grande Stone's motion is denied in its entirety, Plaintiff's motion is granted to the extent set forth above and it is hereby:

ORDERED, ADJUDGED, DECLARED AND DECREED that Plaintiff is not obligated to defend or indemnify Defendant Grande Stone Quarry, LLC with respect to an action pending in the Supreme Court of the State of New York, County of Greene, captioned *William C. Matter Et. Al. v. Grande Stone Quarry, LLC* (Index No. 07-0608).

This Decision and Order is being returned to the attorneys for the Plaintiff. A copy of this Decision and Order and all other original papers submitted on this motion are being delivered to the Greene County Clerk for filing. The signing of this Decision and Order shall not constitute entry or filing under CPLR §2220. Counsel is not relieved from the applicable provision of that section respecting filing, entry and notice of entry.

So Ordered.

Dated: September 30, 2009
Albany, New York

JOSEPH C. TERESI, J.S.C.

PAPERS CONSIDERED:

1. Notice of Motion dated July 22, 2009, Affidavit of Katherine Fijal, dated July 22, 2009, with attached Exhibits A-I.
2. Notice of Cross Motion, dated September 1, 2009, Affidavit of Nia Cholakis, dated September 1, 2009, with attached Exhibits A-K, Affidavit of kevin Houlihan, dated September 1, 2009, Affidavit of Anthony Grande, dated September 1, 2009.
3. Affirmation of Danielle Meyers, dated August 31, 2009, with attached Exhibits A-I.
4. Reply and Opposition of Katherine Fijal, dated September 15, 2009, with attached Exhibits A-C.