SUPREME COURT - STATE OF NEW YORK

Present:

HON. ARTHUR M. DIAMOND
Justice Supreme Court

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RICHNER DEVELOPMENT, LLC

Plaintiff,

-against-

THE BURLINGTON INSURANCE COMPANY
Defendant.

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FOUR SEASONS ROOFING, INC.
Plaintiff,

-against-

THE BURLINGTON INSURANCE COMPANY
Defendant.

----------x

2 ENDO BOULEVARD LLC
Plaintiff,

-against-

THE BURLINGTON INSURANCE COMPANY
Defendant.

----------x

TRIAL PART: 21
NASSAU COUNTY

INDEX NO: 021810/07
ACTION #1

INDEX NO. 33063/07
ACTION #2

INDEX NO. 1420/08
ACTION #3

MOTION SEQ. NO: 01,2
SUBMIT DATE: 10/1/09

The following papers having been read on this motion:

Notice of Motion..... 1
Memorandum of Law.....2

Cross-Motion.....3
Memorandum of Law.....4
Opposition.....5
Memorandum of Law.....6
Reply.....7
Memorandum of Law.....8

In action # 3, the motion by the plaintiff, 2 Endo Boulevard, LLC (hereinafter referred to as "2 Endo") for an order granting summary judgment on the grounds that the defendant, The Burlington Insurance Co. (Hereinafter referred to as "TBIC"), must defend and indemnify 2 Endo as a potential additional insured on a policy issued by TBIC is denied for the reasons set forth herein.

The cross -motion by TBIC for summary judgment is granted for the reasons set forth herein.

Four Seasons Roofing, Inc (hereinafter referred to as FSR) was at the time of the incident a roofing subcontractor. FSR had obtained a commercial general liability policy for TBIC for the period May 17, 2005 to May 17, 2006. On May 5, 2005, FSR entered into a contract with Richner, a general contractor/contract manager, on the property known as 2 Endo Boulevard, Garden City, N.Y. (the "premises"). In its policy with TBIC, FSR, the insured, named Richner and the owner of the premises, 2 Endo as additional insureds under the policy. On October 25, 2005, FSR hired Frank Giampetruzzi ("Giampetruzzi") as a roofing laborer to work at the premises. On October 28, 2005, Giampetruzzi was injured by an electrical transformer and allegedly sustained third and fourth degree burns. FSR contacted its broker, Baldon Group, Inc. ("Baldon"). Baldon informed TBIC of the injury on November 11, 2005 (see Exhibit K annexed to TBIC's motion) or less than 20 days after the incident. On November 14, 2005, TBIC issued a notice of disclaimer (see Exhibit R annexed to TBIC's cross motion) citing the exclusion as to an employee's injury while on the job, and incidents such as the Giampetruzzi incident would not be covered.

2 Endo commenced this action for declaratory relief as to TBIC. 2 Endo contests the position of TBIC's disclaimer under the cross liability exclusion in the policy with 2 Endo. 2 Endo notes Giampetruzzi was an employee of FSR, the insured, not 2 Endo, an additional insured. 2 Endo states that the policy of TBIC should provide coverage to 2 Endo as an additional insured and that the TBIC should not be able to exclude liability to 2 Endo in the cross liability provision of the policy. 2 Endo also contends the TBIC policy with FSR was, in part, ambiguous.

FSR obtained a blanket insurance policy to cover 2 Endo as an additional insured. It defines

an "insured party" to include any person or organization whom FSR was required to add as an additional insured on FSR's policy under a written contract or written agreement. This clearly would include 2 Endo.

TBIC notes its policy with FSR excludes employees of the insured ("FSR") and any additional insured such as 2 Endo. Thus, if an employee of the insured (FSR) or the additional insured sustains a bodily injury, FSR and the additional insured (such as 2 Endo) could not avail themselves of the protection of the TBIC policy since Workers Compensation for the injured employee would be the remedy.

When interpreting a contract, words and phrases used by the parties must be given their plain meaning (*DDS Partners, LLC v Celenza*, 6 AD3d 347).

Although an exclusion from insurance coverage must be specific and clear to be enforced (*Seaboard Sur. Co. v Gillette Co.*, 64 NY2d 304), and any ambiguity in an exclusionary clause must be construed most strongly against the insurer (*Ace Wire & Cable Co. v Aetna Cas. & Surety Co.*, 60 NY2d 390), an unambiguous policy provision must be accorded its plain and ordinary meaning (*Sanabria v American Home Assurance Co.*, 68 NY2d 866). Clearly, a court may not disregard the plain meaning of the language of a policy in an attempt to find an ambiguity (*Acorn Ponds v Hartford Ins. Co.*, 105 AD2d 723).

A policy which excludes coverage to any employee of any named insured unambiguously applies to bar coverage to an additional insured (here, 2 Endo) against a claim by the primary insured's employee (here, FSR) (*Guachichula v Laszlo N. Tauber Assoc., LLC*, 37 AD3d 760; *Tardy v Morgan Guaranty Trust Co. of New York*, 213 AD2d 296). The plain meaning of the exclusion was to relieve TBIC of liability when an insured or additional insured was sued or indemnification was requested for damages arising out of a bodily injury to an employee sustained in the course of employment. The exclusionary provision precluded coverage herein to 2 Endo. The insurance policy in issue stated that if an employee of FSR or any of the other additional insureds (such as 2 End0) sustained a bodily injury, Worker's compensation was the solution, not TBIC's policy with FSR.

2 Endo contends that there are "public policy" considerations to the FRS policy. However, public policy considerations alone are not sufficient to permit a finding of coverage in an insurance contract when the plain language of the contract cannot fairly be read to otherwise provide that coverage (*see State, Department of Environmental Probation v Sign Trading International, Inc.*, 130 N.J. 51).

2 Endo opines that if the liability policy does not "cover" the injury of FSR's employee, Giampetruzzi, and thus any potential liability 2 Endo might be exposed to, then the policy is "illusory" (*see Wright v Evanston Ins. Co.*, 14 AD3d 505). This court must disagree. As noted, the policy was written to utilize, in the vast majority of incidents, Worker's Compensation for injuries to "employees." Coverage did exist as to invitees, etc., and other third parties who could be injured or whose property could be damaged from a "roofing" job, i.e., items falling, dropped items or caused to be airborne by winds, etc. (there is no indication of the height of the premises). The coverage could be there, it just does not offer a protection blanket to 2 Endo from an injury allegedly sustained by FSR's employee, Giampetruzzi. Giampetruzzi was allegedly injured and 2 Endo, an additional insured under TBIC policy, is not "covered" for Giampetruzzi's bodily injury.

As noted by TBIC, the cross-liability exclusion does not conflict with the employee's liability exclusion. Exclusions in insurance policies must be read seriatim, not cumulatively, and if any one exclusions applies there can be no coverage since no one exclusion can be regarded as inconsistent with another (*see Monteleone v Crow Construction Co.*, 242 AD2d 135).

As this court noted in its earlier decision (November 19, 2008) the cross-liability exclusion is unambiguous.

2 Endo contends the exclusion does not pertain to it since the injured employee, Giampetruzzi, was not a 2 Endo employee but that of named insured FSR. Thus, 2 Endo claims that its status as an additional insured on FSR's policy with TBIC precludes the exclusion from pertaining to 2 Endo since the policy excludes coverage to an injured employee employed by FSR only.

This court must disagree. Such a subject exclusion clearly applies to 2 Endo as "an insured" or "a purported additional insured" (*see Hayner Hoyt Corp. v Utica First Ins. Co.*, 306 AD2d 806).

As to the issue of the definition of "employee," the policy clearly stats that an "employee" is:

> "Employee" means a person working for salary or wages, or any substitute for salary or wages, as compensation in any manner by any insured, under any contract or hire, express or implied, oral or written, where the insured, as employer, has the power or right to control and direct the employee. "Employee" includes a person hired by the our, day or any other irregular or intermittent period.

"Employee" includes a "leased worker" or "temporary worker." (emphasis added) (see Exhibit J annexed to TBIC's cross motion, BG-6-119).

Giampetruzzi was an employee of FSR and, thus, 2 Endo is not covered for bodily injury to Giampetruzzi. The exclusion provision of the policy in issue pertains to any employee of an "insured" or "additional insured" and additional insureds, such as 2 Endo, do not have coverage as to an employee's injury such as the one sustained by Giampetruzzi. There is nothing unique about the definition of "employee" in the insurance contract.

2 Endo places great reliance on *Shelby Realty LLC v National Surety corp.*, (2007 WL 1180651, U.S. District Court, Southern District), as to its severability arguments. This court finds it unavailing for the situation now before it. This court chooses to rely upon New York State case law and the recent United States District Court, Eastern District decision, *Chinbay v Avalon Bay Communities, Inc., d/b/a Avalon Pines*, Index No. 06-CV-1908 EDNY, 9/26/08 (annexed to TBIC's affirmation in support as Exhibit X) which more accurately reflects the current state of the case law in New York.

The issue of timely notice by 2 Endo to TBIC is academic. An insured/defendant's disclaimer does not create coverage where it otherwise would not exist (*Avon Group, Inc. v National Fire Insurance Co. of Pittsburgh, PA*, 235 AD2d 347).

This court's previous determination by order of November 19, 2008 in action #1 held that the cross-liability exclusion provision excluded coverage to 2 Endo. That order constitutes the "law of the case." (*Martin v Cohoes*, 37 NY2d 162). Clearly 2 Endo has failed to establish that the prior "law of the case" herein does not apply (*see Briggs v Chapman*, 53 AD3d 900). 2 Endo does not offer an explanation as to explain why, as a party similarly situated with Richner Development, it did adopt Richner's arguments during the prior motion on the very exact issues as set forth herein. 2 Endo and Richner Development are in privity and it is not disputed that 2 Endo and Richner have the same owners.

This constitutes the decision and order of this Court.

DATED: November 2, 2009

ENTER

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J. S.C.

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