SCAN

SHORT FORM ORDER

SUPREME COURT: STATE OF NEW YORK
COUNTY OF NASSAU

P R E S E N T :
HON. IRA B. WARSHAWSKY,
Justice.

TRIAL/IAS PART 8

LONG ISLAND LIGHTING COMPANY
d/b/a LIPA,

Plaintiff,

INDEX NO.: 021792/2008
MOTION DATE: 11/04/2009
MOTION SEQUENCE: 001

- against -

H2M GROUP, HOLZMACHER, McLENDON & MURRELL, P.C., H2M CONSTRUCTION MANAGEMENT, INC., H2M ARCHITECTS AND ENGINEERS, INC., and EASTERN ENVIRONMENTAL SOLUTIONS, INC.,

Defendants.

The following papers read on this motion:

Notice of Motion, Affirmation, Affidavit & Exhibits Annexed 1
Memorandum of Law in Support of H2M Defendants Motion for Summary Judgment .. 2
Affirmation in Opposition of Gregory S. Katz, Esq. & Exhibits Annexed 3
Affirmation in Further Support of Eric S. Hechler, Esq., Affidavit in Further Support of Gary E. Loesch, P.E. & Exhibits Annexed 4

PRELIMINARY STATEMENT

Defendants H2M Group, Holzmacher, McLendon & Murrell, P.C., H2M Construction Management, Inc., H2M Labs, Inc., H2M Associates, Inc., and H2M Architects and Engineers ("H2M") seek an Order pursuant to CPLR § 3212 granting them summary judgment against their

co-defendant, Eastern Environmental Solutions, Inc., (Eastern), based upon Eastern's claimed breach of contractual obligations to procure insurance on behalf of H2M and Eastern's failure to defend, indemnify and hold H2M harmless with respect to Plaintiff's claims against H2M. Eastern responds that it complied with its obligations to provide insurance coverage and is not responsible for the carrier's denial of H2M's tender of defense and claim for indemnification, which were caused by H2M's failure to comply with certain provisions of the insurance policy.

H2M's reply is that simply naming H2M as an additional insured under Eastern's policy was not compliance with the requirement of the contract. Movant claims that the Eastern/H2M contract required Eastern to obtain an Owner's and Contractor's Protective Liability Policy ("OCPL") for the project's owner and H2M as the project engineer. Eastern was also alleged to be obligated by the contract to obtain an Umbrella Policy naming H2M and the owner as additional insureds. H2M claims that Eastern concedes that it was required to provide an OCPL policy, with six separate forms of coverage, with an Umbrella policy naming H2M and owner as additional insureds. Instead, H2M claims, Eastern provided only a certificate of insurance identifying H2M as an additional insured on Eastern's general liability policy.

BACKGROUND

LIPA engaged H2M to perform services with respect to a groundwater sampling project north and east of the Port Washington L 4 landfill.[1] The complaint alleges that on or about April 5, 2007 while performing a collection of soil or groundwater samples, the defendants performed excavation and boring work, including the use of mechanized excavation and boring equipment, in the area of LIPA's electrical transmission cable. While using the equipment, they caused damage to the transmission cable which led to the release of cable insulating oil.

Three days earlier, on April 2, 2007, Holzmacher, McLendon & Murrell, P.C. ("Holzmacher"), as project engineer, contracted with Eastern, as a subcontractor, to provide all labor, materials and equipment as necessary, and to provide direct push groundwater sampling services in the area of the worksite.

This agreement, annexed to the motion papers as exhibit B, anticipates that the work

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[1] There is no copy of the LIPA Agreement submitted by the parties. It is not known precisely with whom LIPA contracted for the work which is the subject of this action.

required will be for one day at the fee of $1,250 per day. § 5.2 of the Agreement relates to insurance and provides as follows:

5.2 Insurance

5.2.1 The SUBCONTRACTOR shall procure and maintain insurance for protection from claims under the Workers' Compensation Act. Statutory coverage shall be provided. The SUBCONTRACTOR will further see that any subcontractors have the necessary insurance with respect to claims under the Workers' Compensation Act.

5.2.2 during the life of the Contract, the SUBCONTRACTOR shall maintain the following insurances in effect:

a.) Owners and Contractors Protective Liability - The SUBCONTRACTOR shall furnish an Owner's and Contractor's Protective Liability policy of a combined single limit of $1 million for both a bottle the injury or property damage liability per occurrence and the aggregate. Coverage shall be extended to include the following:

1) Brought Form Comprehensive General Liability

2) Personal Injury Liability A, B, C. with exclusions A and C deleted.

3) Products and Completed Operations Liability including X, C, and U Coverages.

4) Contractor's Protective Liability.

5) Blanket Contractual Liability.

6) Broad Form Damage Liability.

Prior to any blasting, if required under this contract, special coverage for blasting and explosion shall be obtained under the Liability Policy.

b) Automotive Equipment Insurance - The SUBCONTRACTOR shall take out insurance covering all automotive equipment combined single limit of $1 million for polyandry and property damage per occurrence in the aggregate.

c) Comprehensive Automobile Liability and Property Damage - The SUBCONTRACTOR shall maintain coverage for all and non—owned vehicles including Hired Car Coverage for minimum combined single limit of $1 million for bodily injury and property damage per occurrence and in the aggregate.

d) Disability Benefits Liability - The SUBCONTRACTOR shall provide statutory benefits.

e) Umbrella Liability Polity - The SUBCONTRACTOR shall furnish a Umbrella Liability Policy with minimum limits of $2 million per occurrence and in the aggregate over and above the basic policies, including all coverage afforded thereunder.

5.2.3 The SUBCONTRACTOR shall indicate that the ENGINEER and Owner are named insureds on each of the above policies, and that 45 days written notice be given the ENGINEER prior to expiration or cancellation same.

* * *

5.2.4 Hold Harmless

5.4.1 The SUBCONTRACTOR agrees to HOLD HARMLESS, INDEMNIFY, and DEFEND the ENGINEER, the OWNER, and each of its employees, officers or agents from any and all liability, claims, losses or damages arising out of, or alleged to arise from, the SUBCONTRACTOR's performance of the work, but not including any liability that may be due to the sole negligence of the OWNER, ENGINEER, its officers, employees or agents.

After execution of the contract, Eastern provided H2M with an Accord Form Certificate of Insurance (Exh. "F" to Motion) indicating Commercial General Liability ($1,000,000 per occurrence), Automobile Liability ($1,000,000 single limit), Umbrella Liability ($4,000,000 with $10,000 self-retention), Worker's Compensation ($100,000 per accident), Equipment Floater and Property Coverage. The certificate states that Certificate Holder (Holzmacher, McLendon & Murrell, P.C.) and Town of North Hempstead "are included as additional insureds with respect to work being performed by the named insured (Eastern Environmental Solution) at Fairway Drive and West Shore Rd. In Port Washington, NY".

Upon receipt of the summons and complaint H2M tendered its defense to Eastern and requested copies of the policies as provided for in the contract. (Exh. "G" to Motion). By letter

dated February 13, 2009, (Exh. "G" to Motion) Hudson Insurance Group denied any responsibility to provide insurance coverage to H2M. Hudson took the position that the indemnification clause in the contract is void under General Obligations Law, and in any event, the facts did not indicate Eastern owed H2M indemnification. Even if indemnification were in order, it would be owed only to Holzmacher, the engineer for the project, because the H2M entities were not named insured and do not qualify as additional insured's on the policy

DISCUSSION

The H2M entities have been denied coverage or indemnification by Hudson Insurance Company and AIG as claims manager for Illinois National Insurance Company ("Illinois"). Both contend that the H2M entities were not named insureds on the underlying policies with Hudson or Illinois; and further, that the underlying policy excluded personal injury or property damage as result of the "actual, alleged or threatened discharge, dispersal or escape of pollutants". The claim is that the primary policy excluded such damages, and the excess coverage cannot be broader than the primary obligation.

The contract between Holzmacher. and Eastern makes no reference to any organizations or entities other than the "Engineer". To the extent that Eastern was responsible to provide insurance coverage, their obligations did not extend to any of the named defendants except Holzmacher. "Coverage extends only to named entities and/or individuals defined as insured parties under the relevant terms of the policy". (*Catholic Health Services of Long Island, Inc. v. National Union Fire Insurance Company of Pittsburgh, P.A.* 46 A.D.3d 590 [2d Dept. 2007]). Under circumstances in which a carrier provided liability insurance coverage to AFA, the named insured, "and/or subsidiary, organization or company, including subsidiaries of a subsidiary company, owned, controlled or coming under the active management of AFA", the clause was adequate to impose on the carrier the duty to defend and indemnify, subject to the matter being remanded to the trial court for a factual determination as to the relationship between AFA and the party claiming to be a subsidiary. (*AFA Protective Systems, Inc. v. Atlantic Mutual Insurance Company,* 157 A.D.2d 683 [2d Dept. 1990]). There is no such language in the agreement in this action, nor has movant produced any evidence that the policies of insurance actually provide such coverage. The motion for summary judgment on H2M's cross-claims is denied as to all entities other than Holzmacher.

Eastern did provide insurance for Holzmacher. The issue is whether or not the policies provided were consistent with those required by the contract. A second issue is whether, in light of the environmental claims contained in the complaint, if the designated policies had been provided, whether they would have been effective in the face of claimed damages from the release of pollutants, a portion of the claimed damages. Neither party has provided a copy of the policies obtained by Eastern, naming the "Owner" and "Engineer" as named insureds. Exh. "F", the Certificate of Liability Insurance, does nothing to answer the question as to whether the policies actually provided the six forms of coverage set forth at ¶ 5.2.2 (a) (1 — 6) in the contract (Exh. "E"). Of some interest is the fact that the Certificate does indicate that the Commercial Liability Policy includes "Pollution Liab.".

These factual issues preclude the grant of summary judgment on the cross-claim by H2M against Eastern on the ground that the latter failed to obtain insurance as required in the Agreement between Holzmacher and Eastern. The Certificate of Liability Insurance is an insufficient basis upon which to conclude that the coverage provided was, or was not, adequate in the context of the agreement between the parties. An application for declaratory relief on this issue must, of necessity, demonstrate the level of coverage which the contract called for, as compared to the coverage actually provided.

Movant also seeks summary judgment against Eastern on the cross-claim that the contract requires Eastern to defend and indemnify the H2M Defendants. For the same reason that Eastern was not required to provide insurance to cover parties not named in the agreement, they are not obligated to defend and indemnify them. With respect to the obligation to defend and indemnify

any of the co-defendants, including Holzmacher, Eastern denies any such obligation on the ground that "the hold harmless clause of the contract is unenforceable considering that H2M supervised and controlled the worksite and its own negligence contributed to the harm at issue in this litigation". [2] This is a factual issue of some significance, since Hudson Insurance does not deny coverage for all liability of the additional insured, but only for their active, as opposed to imputed, negligence. If Holzmacher were only vicariously liable for the actions of Eastern, then

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[2] Affirmation in Opposition at ¶ 4.

it would appear that coverage as an additional insured is available to them.

Eastern's motion for summary judgment on the cross-claim for defense and indemnification, irrespective of insurance coverage, is also denied because of the factual controversy as to the claimed active negligence of the movant leading to the damages sustained in this action. An agreement " . . . purporting to indemnify or hold harmless the promissee against liability for damages arising out of bodily injury to persons or damage to property contributed to, caused by or resulting rom the negligence of the promisee, his agents, or employees, or indemnitee, whether such negligence be in whole or in part, is against public policy and is void and unenforceable; provided that this section shall not affect the validity of any insurance contract, workers' compensation agreement or other agreement issued by an admitted insurer". General Obligations Law § 5-322.1. The Court is unable to conclude, based upon competing statements, whether or not the indemnitee was guilty of active negligence, which contributed, in whole or in part, to the damages claimed by Plaintiff.

This action is based on negligence. The issues with respect to insurance coverage are collateral to underlying claim for property damage as the result of the claimed negligent operation of equipment in the performance of groundwater sampling in the vicinity of Plaintiff's underground cables. It is not a matter which falls within the jurisdiction of the Commercial Division of the Supreme Court. NYCRR § 202.70 (b). The Court therefore refers the matter to Differentiated Case Management for assignment to an IAS Part.

This constitutes the Decision and Order of the Court.

Dated: January 4, 2010

J.S.C.

ENTERED
JAN 13 2010
NASSAU COUNTY
COUNTY CLERK'S OFFICE