

Aragon, LLC v Scottsdale Ins. Co.

2010 NY Slip Op 30230(U)

January 29, 2010

Supreme Court, New York County

Docket Number: 109163/07

Judge: Carol R. Edmead

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. CAROL EDMOND
Justice

PART 31

Index Number : 109163/2007
ARAGON
vs.
SCOTTSDALE INSURANCE
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE 11/16/09
MOTION SEQ. NO. 001
MOTION CAL. NO. _____

in this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

Based on the accompanying Memorandum Decision, it is hereby

ORDERED that the motion by plaintiff Aragon, LLC for summary judgment granting a declaration that Aragon is entitled to defense and indemnification from defendant Scottsdale Insurance Company ("Scottsdale") as an additional insured in a personal injury action entitled *Bernard Ford v 250 Park LLC, Aragon, LLC, et al.*, including reimbursement of attorneys fees and expenses incurred, is denied; and it is further

ORDERED that plaintiff serve a copy of this order with notice of entry upon defendant within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: 1/29/10

HON. CAROL EDMOND
J.S.C.

FILED
FEB 02 2010
NEW YORK
COUNTY CLERK'S OFFICE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

-----X
ARAGON, LLC,

Index No. 109163/07
Sequence 001

Plaintiff,

-against-

SCOTTSDALE INSURANCE COMPANY and
STERLING GROUP, INC.,

Defendants.

-----X
HON. CAROL R. EDMEAD, J.S.C.

FILED
FEB 02 2010
NEW YORK
COUNTY CLERK'S OFFICE

MEMORANDUM DECISION

In this insurance declaratory judgment action, plaintiff Aragon, LLC ("Aragon") moves for summary judgment for a declaration that Aragon is entitled to defense and indemnification from defendant Scottsdale Insurance Company ("Scottsdale") as an additional insured in a personal injury action entitled *Bernard Ford v 250 Park LLC, Aragon, LLC, et al.*, (hereinafter the "Ford Action"), including reimbursement of attorneys fees and expenses incurred.

Factual Background

In the Ford Action, Bernard Ford ("Ford") alleges that he was working as a sheet metal mechanic on October 13, 2005 for his employer, EZ Mechanical Contracting, Inc., ("EZ") when he fell from a ladder at the construction project located at 250 Park Avenue South, New York, New York. The Bill of Particulars alleges that Aragon violated the Labor Law and was generally negligent.

Prior to Mr. Ford's accident, Aragon entered into a construction agreement with defendant Sterling Group, Inc. ("Sterling Group") for certain construction work to be performed at 250 Park Avenue South, New York, New York (the "Aragon/Sterling Contract"). The Aragon/Sterling Contract required Sterling "to maintain the insurance and policies in the

amounts set forth on the insurance requirements (the "insurance requirements") referenced in Addendum 'C' attached hereto." The Aragon/Sterling Contract was executed by Joseph Lopardo of Aragon ("Lopardo") and Michael Levy ("Levy") of Sterling "acknowledging acceptance" on "9/29/05."

Scottsdale issued a general liability policy of insurance to Sterling that contains a Blanket Additional Insured Endorsement (the "Scottsdale Policy").

After Ford's accident, Aragon sought additional insured coverage under the Scottsdale Policy. Scottsdale denied Aragon's request, stating in its denial letter that the Scottsdale Policy provides blanket additional insured status only to "those entities which are required to be named as such in a binding, enforceable contract between the parties that is in force during the policy period(s) and only for exposures arising from our insured's [Sterling Group's] ongoing operations performed for that particular party." Scottsdale further stated that its investigation revealed that plaintiff was injured only "after the completion date of our insured's [Sterling Group's] work and no contract has been provided which contains the requisite additional insured language."

In its motion, Aragon argues that because the accident arose while Ford was performing work for his employer EZ, a subcontractor of Sterling, the accident happened during the course of Sterling's ongoing operations at the premises, and falls within the scope of the additional insured coverage provided by Scottsdale. Aragon argues that the Scottsdale Policy provides additional insured coverage for the acts of Sterling as well as the acts of those acting on Sterling's behalf.

Aragon also contends that the Blanket Additional Insured Endorsement provides that the "insured" "include[s] as an additional insured any . . . organization whom you are required to add as an additional insured on this policy under a written contract, agreement or permit" which

must be (a) in effect or becoming effective during the policy term and (b) executed prior to the bodily or personal injury. Aragon contends that Sterling had an agreement with Aragon for Sterling to procure additional insured coverage for Aragon. In the Ford Action, Lopardo, a project manager with Aragon at the time of Ford's accident, testified that the Aragon/Sterling Contract contained an Addendum C which required Sterling to procure insurance as outlined in the sample certificate of insurance. Pursuant to the "insurance requirements" in the sample certificate or Addendum C, Sterling was required to procure liability insurance in the amount of \$1,000,000 per occurrence and add Aragon as an additional insured on the policy. Also, Levy, the president of Sterling, testified that Sterling retained "Easy Mechanical and Master Cooling Services" to perform the work at the project. Aragon sent the insurance requirements to Sterling after Sterling was awarded the project. With respect to the insurance requirements, Levy recalled that "Aragon did request that they be named as an additional insured." By virtue of the requirement that Sterling Group procure additional insured coverage for Aragon contained in the aforementioned Addendum C to the Aragon/Sterling Contract, Aragon qualifies as an additional insured on the Scottsdale Policy.

The Certificate of Insurance provided by Sterling to Aragon also contains the insurance coverages and additional insured parties required by Addendum C or the sample certificate.

Furthermore, the phrase "under a written contract, agreement or permit" allows for a verbal agreement to provide insurance coverage. Based on Levy's testimony, there was a verbal agreement by which Sterling was required to obtain additional insured coverage for Aragon for the project

Finally, the additional insured coverage from Scottsdale is primary. The additional insured endorsement cited by Scottsdale to deny coverage does not contain any other limitation

on the availability of primary additional insured coverage and Scottsdale did not refer to any such limitation on the availability of primary additional insured coverage under the Policy in the denial letter. However, Scottsdale has produced a policy in response to Aragon's Notice to Admit (Exhibit L) containing a Blanket Additional Insured Endorsement with a limitation on the availability of primary additional insured coverage under the Scottsdale Policy. This slightly different additional insured endorsement produced by Scottsdale requires that a written contract must require primary coverage for the Scottsdale Policy to be primary.

The "Other Insurance" clause contained in the Scottsdale Policy states that the coverage provided is primary.¹

The "Other Insurance" Clause in the Aragon's policy with QBE Insurance Corporation (the "Aragon/QBE Policy") was amended by endorsement "EXCESS INSURANCE PROVISION - ADDITIONAL INSUREDS (Endorsement Number QBCG-0105 (11-99)" such that the Aragon/QBE Policy would only provide excess coverage when there is any "other insurance . . . that is valid and collectible insurance available to you as an additional insured under a policy issued to: a contractor performing work for you . . . "

¹ The Scottsdale "Other Insurance" clause states that

4. Other Insurance

If other valid and collectible insurance is available to the insured for a loss we cover under Coverages A or B of this Coverage Part, our obligations are limited as follows:

a. Primary Insurance

This insurance is primary except when b. below applies. If this insurance is primary, our obligations are not affected unless any of the other insurance is also primary. Then, we will share with all that other insurance by the method described in c. below.

b. Excess Insurance

This insurance is excess over:

(2) Any other primary insurance available to you covering liability for damages arising out of the premises or operations . . . for which you have been added as an additional insured by attachment of an endorsement.

Since the Aragon/QBE Policy only provides excess coverage to Aragon since it qualifies for additional insured status on Scottsdale's Policy, the Scottsdale Policy provides primary coverage to Aragon and the Aragon/QBE Policy is excess over the Scottsdale Policy.

Because the Aragon/Sterling contract contained a written "Addendum C" requiring Sterling to add Aragon as an additional insured, and an additional insured is entitled to the same coverage as the named insured, Aragon is entitled to the same primary coverage as Sterling under the Scottsdale Policy.

Moreover, because Scottsdale did not apprise Aragon of the limitation in its Policy excluding primary coverage for the additional insured unless a written contract specifically requires primary coverage within a reasonable time as required by Insurance Law § 3420(d), Scottsdale has waived the right, and is precluded from denying primary coverage to Aragon as its additional insured. Scottsdale failed to disclaim based on the limitation or exclusion regarding the availability of primary coverage under its Policy in its disclaimer letter. An exclusion is a limitation placed on the coverage available, and since Aragon is getting less than the primary coverage afforded to Sterling as the named insured under the Scottsdale additional insured endorsement (contained in Exhibit L), it was incumbent on Scottsdale to apprise Aragon of the limitation/exclusion and deny primary coverage in its disclaimer letter to comply with Insurance Law 3420(d). Because the limitation/exclusion does not leave Aragon with no coverage, but instead appears to only exclude the availability of primary coverage, Scottsdale should have raised this limitation/exclusion in its disclaimer, and having failed to do so, Scottsdale has waived the right to so deny.

In the event the Court is disinclined to find that the Aragon/QBE Policy is excess over the Scottsdale Policy, then two policies both provide excess coverage and the Court should find

that Scottsdale is liable to co-insure Aragon in the Ford Action.

In opposition, Scottsdale argues that Aragon cannot prove that the necessary contractual requirements were in place, and the Court should search the record and issue a declaration that Aragon is not an additional insured on the Scottsdale Policy.

Although the Scottsdale Policy adds additional insured coverage where a written contract or agreement so requires, and the contract must be "executed prior to the loss." Scottsdale contends that the written purchase order does not require insurance procurement, the alleged written requirement for insurance, *i.e.*, "Addendum C," is missing from the record, and is the dispositive instrument. Without "Addendum C," there is no requirement that Aragon be added to the Scottsdale Policy, as the contract is silent as to insurance other than by referencing "Addendum C." Thus, Aragon's own insurance carrier must continue to provide coverage to Aragon. Scottsdale points out that Aragon's witness Lopardo testified that he is not aware of an "Addendum C" to the contract and that the contract was "standard boilerplate." Lopardo testified that the four pages (with no Addendum C) made up the "complete contract between Aragon and Sterling" and is the "only executed contract." Lopardo could not produce a document marked "Addendum C" and Aragon has not produced "Addendum C. Mr. Lopardo subsequently modified his testimony to add that "Typically, we do have an addendum that tends to follow showing a sample of the insurance requirements." Aragon's witness then produced at his deposition, for the first time, a "Sample" certificate of insurance, which did not reference Sterling or Scottsdale, is not in any way marked "Addendum C," and is not "executed" by the parties. When Lopardo was asked why the "sample" certificate was not attached to the subcontract, he answered that he had no knowledge whether it was or was not attached to the subcontract. Additionally, Sterling's witness, Levy, testified that he signed the contract, but

could not state whether there was an insurance attachment to the contract. Levy testified that he did not recall the insurance requirements for the job.

Further, the Scottsdale Policy requires that the written contract or agreement be "executed," which precludes any alleged oral understanding. Aragon's papers are silent on the issue of when any alleged oral understanding came to be; any alleged oral understanding was not "executed prior to the loss" as an oral understanding can only be "executed" if the work is completed prior to the loss, and the selective deposition testimony Aragon submits from the underlying action, is ambiguous. Courts routinely hold that the policy requirement that the contract be "executed" is not ambiguous and will be enforced.

Aragon has not shown that the Certificate of Insurance was part of the Aragon/Sterling Contract, and states that it is not binding on Scottsdale, but issued by the broker for information purposes only.

Finally, Scottsdale's named insured, Sterling must "cause" the loss. Ford testified that, he never saw anyone from Sterling at the job site, he never spoke to anyone from Sterling at the job site, and he has never met anyone from Sterling. Additionally, Aragon previously impleaded Sterling as a third-party defendant in the Ford Action, alleging indemnification causes of action. By Order dated May 11, 2009, the Supreme Court (Hon. Michael A. Ambrosio) granted Sterling's motion, dismissing all of Aragon's third-party claims against Sterling. Thus, the issue of whether Sterling "caused" Ford's injury has already been litigated. By virtue of that decision, *res judicata* bars a different determination. Therefore, Scottsdale's Policy can never be triggered, because the accident cannot be said to have been caused by Sterling.

Scottsdale further contends that its Policy is excess over Aragon's Policy. Although Scottsdale's Policy is not triggered for Aragon's benefit, Aragon argues that Aragon's own

Policy, issued by QBE, should pay nothing, while Scottsdale should pay for both Aragon and Sterling.

"Other insurance clauses" become effective once an insured has "other insurance" from another source. Scottsdale's "other insurance" clause renders it "excess over any other valid and collectible insurance available to the additional insured."

Aragon's claim that Scottsdale should have issued a disclaimer in order for its "other insurance" clause to be effective is incorrect, as Ins. Law 3420(d) requires disclaimers where an insurer will rely on an exclusion to coverage, and "Exclusions" are denominated as such within the policy. Regular grants of coverage, such as Scottsdale's endorsement which adds coverage by virtue of adding additional insureds to the Policy, do not require a disclaimer in order to be effective. And, it would not make sense to have to issue a disclaimer in order to provide coverage. To bring Aragon's argument full circle, because its argument is that a disclaimer must be issued to render an excess clause effective, its insurer, QBE, would have had to issue a coverage disclaimer to Aragon before QBE could be excess coverage, which did not happen.

Also, Aragon did not attach a copy of its Policy to its motion, and to do so on reply is improper, entitling Scottsdale to submit a sur-reply. The Aragon/QBE Policy is a primary policy, providing primary, underlying coverage to Aragon. The Scottsdale Policy is not triggered for Aragon, but even if it were, it would be excess coverage by its terms.

Even if coverage could be found for Aragon under the Scottsdale Policy, Scottsdale's coverage is excess to Aragon's. If both policies were to contain excess clauses, they would render each other concurrent and thus primary.

In reply, Aragon argues that Lopardo of Aragon and Levy of Sterling executed the

Aragon/Sterling Contract prior to the subject loss on "9/29/05." Also, Lopardo was specifically asked if an insurance requirement was made part of the four page contract - to which he answered "Yes." and stated that "Typically, we do have an addendum that tends to follow showing a sample of the insurance requirements, which I do know was sent." Lopardo was asked if he had a copy of Addendum C and replied "Yes" and Addendum C to the Aragon/Sterling Contract was marked as Exhibit C at his deposition. Most importantly, Lopardo testified that Addendum C was sent during the execution of the subcontract. Scottsdale submits no evidence refuting Lopardo's testimony that an Addendum C with the insurance requirements was sent during the execution of the contract, and therefore fails to create an issue of fact for a trial. When asked about insurance requirements in the Aragon/Sterling Contract, Sterling's principal, Levy testified "I recall that Aragon did request that they be named as an additional insured."

Further, Scottsdale failed to submit any evidence that the issues relevant to coverage in this action with respect to Sterling were fully and fairly litigated on the merits in the Ford Action in order for *res judicata* to apply. Scottsdale does not submit the moving papers, the third-party complaint against Sterling, the cross claims or any other evidence regarding the decision granting Sterling's motion, dismissing all of Aragon's third-party indemnification claims against Sterling. The decision submitted by Scottsdale does not state the claims against Sterling addressed in the motions, does not make any substantive findings or analyze any of the claims against Sterling or Sterling's defenses to those claims that were the subject of the motion or state even a single basis for the decision. The decision also states that an Order should be settled on Notice but no Order is attached to Scottsdale's opposition.

Scottsdale also failed to inform the Court that E-Z is still a defendant in the Ford Action.

Aragon also argues that it submitted the Certificate of Insurance to show that Sterling secured the conforming Certificate to comply the insurance requirements in Addendum C of the Aragon/Sterling Contract. Moreover, because the Scottsdale Certificate of Insurance adding Aragon as an additional insured is dated 9/8/05 before the date of loss which conforms to Addendum C, it is further evidence that the contract between the parties requiring additional insured coverage was executed prior to the date of loss.

The additional insured endorsement provided by Scottsdale is primary to coverage for Aragon based on the relevant other insurance clauses in the respective policies.

Further, Aragon submitted the QBE/Aragon Policy to its motion.

Additionally, although Scottsdale argues that its Policy also contains another additional insured endorsement that provides that the Scottsdale Policy is excess to any other primary policy, Scottsdale does not deny that the additional insured endorsement, without the excess insurance language, that it produced in discovery is also part of its Policy. One additional insured endorsement contains excess insurance language (Exhibit L) while the other one (Exhibit M) does not, thereby creating an ambiguity in the Policy. Aragon is entitled to have any ambiguity in the Scottsdale Policy resolved in its favor since Scottsdale is the creator of the ambiguity in the Policy. Therefore, Aragon is entitled to rely on the Scottsdale Additional Insured Endorsement that does not contain excess insurance language within the endorsement.

Even if this Court were to apply the excess insurance language found in the additional insured endorsement, and were to find that the provision is not a limitation or exclusion of coverage that must be specifically referenced in Scottsdale's denial letter, a co-insurance situation is then created because of the competing excess insurance language in the QBE/Aragon Policy. Scottsdale is then liable to defend and indemnify Aragon as an additional

insured on a co-primary basis as both excess insurance provisions in the respective policies cancel each other out.

Discussion

Plaintiff, as the proponent of the motion for summary judgment, must make a *prima facie* showing of entitlement to judgment as a matter of law, by advancing sufficient “evidentiary proof in admissible form” to demonstrate the absence of any material issues of fact (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Silverman v Perlbinde*r, 307 AD2d 230, 762 NYS2d 386 [1st Dept 2003]; *Thomas v Holzberg*, 300 AD2d 10, 11, 751 NYS2d 433, 434 [1st Dept 2002]). A party can prove a *prima facie* entitlement to summary judgment through the affirmation of its attorney based upon documentary evidence (*Zuckerman, supra*; *Prudential Securities Inc. v Rovello*, 262 AD2d 172 [1st Dept 1999]).

Alternatively, to defeat a motion for summary judgment, the opposing party must show facts sufficient to require a trial of any issue of fact (CPLR §3212[b]). Thus, where the proponent of the motion makes a *prima facie* showing of entitlement to summary judgment, the burden shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action, or to tender an acceptable excuse for his or her failure to do so (*Vermette v Kenworth Truck Co.*, 68 NY2d 714, 717 [1986]; *Zuckerman* at 560, 562; *Forrest v Jewish Guild for the Blind*, 309 AD2d 546, 765 NYS2d 326 [1st Dept 2003]). Like the proponent of the motion, the party opposing the motion must set forth evidentiary proof in admissible form in support of his or her claim that material triable issues of fact exist (*Zuckerman* at 562).

In interpreting an insurance policy, “words and phrases are to be understood in their

plain, ordinary, and popularly understood sense, rather than in a forced or technical sense"

(*Hartford Ins. Co. of the Midwest v Halt*, 223 AD2d 204, 212, 646 NYS2d 589, 594 [4th Dept 1996]). The policy must be construed "in a way that affords a fair meaning to all of the language employed by the parties in the contract and leaves no provision without force and effect"

(*Raymond Corp. v National Union Fire Ins. Co.*, 5 NY2d 157, 162, 800 NYS2d 89, quoting *Consolidated Edison Co. of N.Y. v Allstate Ins. Co.*, 98 NY2d 208, 221-222, 746 NYS2d 622 [2002]; see also *United States Fid. & Guar. Co. v Annumiata*, 67 NY2d 229, 232, 501 NYS2d 790 [1986] ["Where the provisions of the policy "are clear and unambiguous, they must be given their plain and ordinary meaning, and courts should refrain from rewriting the agreement]).

"Unambiguous provisions of a policy are given their plain and ordinary meaning" (*Lavanant v General Ace. Ins. Co.*, 79 NY2d 623, 629, 584 NYS2d 744 [1992]; *Seaport Park Condominium v Greater New York Mutual Ins. Co.*, 39 AD3d 51, 828 NYS2d 381 [1st Dept 2007]).

Here, the Blanket Additional Insured Endorsement provides:

SECTION II - WHO IS AN INSURED is amended to include as an additional insured any person or organization whom you are required to add as an additional insured on this policy under a *written contract, agreement or permit which must be:*

- a. Currently in effect or becoming effective during the term of the policy; and
- b. Executed prior to the "bodily injury," . . . or "personal and advertising injury."

The Insurance provided to this additional insured is limited as follows:

1. That person or organization is an additional insured only with respect to liability or "bodily injury" . . . caused, in whole or in part, by:

- a. Your [Sterling's] acts or omissions; or
- b. The acts or omissions of those acting on your [Sterling's] behalf.
(Emphasis added)

Arguably, the scope of the endorsement language extends coverage to the purported additional insured, Aragon, in the event the injury occurred while Ford was working under the relevant contract with Aragon.

However, based on a plain reading of the Blanket Additional Insured Endorsement, in its entirety, a contract, agreement or permit in writing obligating Sterling to procure insurance for Aragon is required in order for such endorsement to apply. *Federated Dept. Stores, Inc. v Twin City Fire Ins. Co.*, 28 AD3d 32, 807 NYS2d 62, 2006 NY Slip Op 00105 [1st Dept 2006]) is instructive. In *Federated*, the policy included as additional insureds "any person or organization with whom you agreed, because of a written contract or agreement or permit to provide insurance ..." Such provision did not apply "[u]nless the written contract or agreement has been executed ... prior to the [injury]." The First Department noted that "If nothing else, it is clear from the use of the word 'executed' that a writing is required."

The Court recognizes that the phrase "under a written contract, agreement or permit" has been held ambiguous and interpreted to include oral agreements (*see Superior Ice Rink v Nescon Contracting Corp.*, 52 AD3d 688 [2d Dept 2008] (since the word "written" could also be reasonably interpreted to only modify the word "contract," we find that the phrase is ambiguous); *Travelers Indem. Co. of America v Royal Ins. Co. of Am.*, 22 AD3d 252, 802 NYS2d 125 [1st Dept 2005] (finding an ambiguity where insured is "required by written contract, agreement or permit to name [any person or organization] as an insured" and that an interpretation eliminating any difference in meaning between the words "contract" and "agreement," renders one or the other superfluous, contrary to settled rules of construction) *Bassuk Bros., Inc. v Utica First Ins. Co.*, 2002 WL 31925593 [Supreme Court Kings County](words written contract and agreement, being stated in the disjunctive, must be considered separately; viewed in this way, the court finds that the term "agreement" as used in the Policy is ambiguous may be interpreted to include both written as well as oral agreements)). However, the cases so holding are silent as to whether the policy therein included the additional

requirement that the “written contract, agreement or permit” be “executed” prior to the injury. Thus, Aragon cannot rely on the purported verbal understanding to which Levy testified at his deposition.

The Aragon/Sterling Contract was clearly executed between the representatives of Aragon and Sterling. However, the issue is whether such executed contract contained a requirement for Sterling to name Aragon as an additional insured. Aragon must establish, as the movant for summary judgment, that the Aragon/Sterling Contract required Sterling to obtain insurance in favor of Aragon. Based on the submissions, a question of fact remains as to whether a written agreement existed between Aragon and Sterling to name Aragon as an additional insured with respect to the work being performed at the time of the accident at issue in the Ford Action.

The purchase order itself states that Sterling “shall maintain the insurance and policies in the amounts set forth on the insurance requirements (the “Insurance Requirements”) referenced in Addendum ‘C’ attached hereto.” However, "Addendum C" is missing from the record, and in the absence of "Addendum C," Aragon failed to establish any written requirement that Aragon be added to the Scottsdale Policy.

Furthermore, the deposition testimony of Lopardo and Levy, on which Aragon relies in support of its motion for summary judgment, is equivocal as to whether “Addendum C” was in fact made part of the Aragon/Sterling agreement and whether “Addendum C” existed to name Aragon as an additional insured on the Scottsdale Policy.

Lopardo and Mr. Levy each signed the subject contract, but neither could say an "Addendum C" was part of their contract. Lopardo testified that although “Addendum C” is “typically” “sent along with the subcontracts” he was “not sure if it was or if it wasn’t” attached

to the Purchase Order. Mr. Lopardo could not produce a document marked "Addendum C" and stated that "Typically, we do have an addendum that tends to follow showing a sample of the insurance requirements." Also, the "Sample" Certificate of Insurance, did not reference Sterling or Scottsdale, was not marked "Addendum C," and was not "executed" by the parties. Lopardo had no knowledge whether the "sample" Certificate of Insurance was attached to the subcontract. Levy also did not recall the insurance requirements for the job, even after he was shown and read the purchase order.

Finally, the Certificate of Insurance showing that Sterling secured the conforming Certificate to comply the insurance requirements in Addendum C of the contract does not constitute a writing obligating Sterling to obtain insurance naming Aragon as an additional insured.

Thus, issues of fact exist as to whether there ever existed a written "Addendum C," "executed prior to the bodily injury" and even if so, what the terms are of said "Addendum C," and when, if at all, it was provided to Sterling.²

While it is uncontested that Ford testified that he never saw anyone from Sterling at the job site, he never spoke to anyone from Sterling at the job site, and he never met anyone from Sterling, that Sterling may not have caused the accident is not dispositive. The Scottsdale Policy provides additional insured coverage for Aragon for accidents arising out of the acts of those acting on Sterling's behalf, *i.e.*, E-Z, and it cannot be said that the accident did not arise out of

² The Court notes that contrary to Scottsdale's contention, the order indicating that Aragon's third-party indemnification claims against Sterling was dismissed in the Ford Action does not establish, under the doctrine of *res judicata*, that the issue of whether Sterling "caused" Ford's injury has already been litigated. The doctrine of *res judicata* applies to claims "actually litigated" and resolved in a previous action (*Martelli Assocs. v Helmsley-Noyes Co., Inc.*, 265 AD2d 1, 705 NYS2d 571 [1st Dept 2000]) and the order and record before the Court does not indicate whether the issues herein were actually litigated in the Ford Action.

the actions of E-Z, which is still a defendant in the Ford Action.

As to Aragon's contention, that the Scottsdale Policy provides primary coverage to Aragon and the QBE/Aragon Policy is excess over the Scottsdale Policy, rests on its claim that Aragon qualifies for additional insured status on Scottsdale's Policy and the "Other Insurance" Clause in the QBE/Aragon Policy. The "Other Insurance" clause in the QBE/Aragon Policy was amended to by endorsement "EXCESS INSURANCE PROVISION - ADDITIONAL INSUREDS (Endorsement Number QBCG-0105 (11-99)" which replaces Section IV COMMERCIAL GENERAL LIABILITY CONDITIONS, 4. Other Insurance, B. Excess Insurance, Item 2. with the following provision such that the QBE/Aragon Policy is excess over:

2. Any other insurance, whether primary, excess, contingent or any other basis that is valid and collectible insurance *available to you as an additional insured* under a policy issued to:
 - (a) A contractor performing work for you;
 (Emphasis added).

Since there is an issue as to whether Aragon qualifies for additional insured status on Scottsdale's Policy, it cannot be said, at this juncture, that the additional insured coverage under Scottsdale Policy is primary, or that the QBE/Aragon Policy is excess. Further, based on the submissions by Aragon and Scottsdale, it cannot be said that an ambiguity exists between the Blanket Additional Insured Endorsement submitted by Scottsdale, which did not contain the excess language (Exhibit M) and the Blanket Additional Insured Endorsement, which contains the excess language (Exhibit L). Exhibit M is silent as to whether it in fact is made part of Scottsdale Policy, number CLS1133684, and is silent as whether it provides primary or excess coverage. Further, although Scottsdale's Response to Notice to Admit does not deny that the Additional Insured Endorsement which omits the excess language (Exhibit M) is part of the Scottsdale Policy, there is no concrete indication that Exhibit M, a one-page document

containing no reference to any policy in particular, currently represents a true and accurate copy of the Scottsdale Policy.³ Thus, it cannot be said that there is an ambiguity, such that Aragon may rely on the Scottsdale Additional Insured Endorsement which does *not* contain the excess insurance language.

As to Scottsdale's ability to deny that the coverage for Aragon as an additional insured, if at all, is primary, Scottsdale is not precluded from raising such defense by its failure to mention same in its denial letter. Under CPLR §3420(d), an insurer is required to give written notice of any disclaimer or denial of coverage "as soon as is reasonably possible" after it first learns of the accident or grounds for disclaimer, and where an insurance policy would otherwise cover a particular occurrence, but for an exclusion in the policy, an insurance carrier will be precluded from disclaiming coverage when it has unreasonably delayed in issuing its disclaimer. Scottsdale's position that its Policy does not provide primary coverage does not rise to the level of a disclaimer or denial of coverage, and such position is not based on an exclusion in the Policy (*City of New York v Philadelphia Indem. Ins. Co.*, 2007 WL 6887555 [Supreme Court, Kings County 2007] ("additional insured endorsement is an addition, rather than a limitation of coverage")) citing *Tishman Const. Corp. of New York v CNA Ins. Co.*, 236 AD2d 211, 211 [1997] ("the (additional insured clause) was not to be read as an exclusion of coverage ... since, as an endorsement, it was an addition to coverage, not a limitation")) so as to require that notice of same be given in its disclaimer letter. Where a clause limits the circumstances in which a party

³ In a telephonic conference with counsel for Aragon and Scottsdale, counsel for Scottsdale claims that he previously advised counsel for Aragon that Exhibit M was inadvertently submitted and that he would submit a true and accurate copy of the Scottsdale Policy in his Response to the Notice to Admit. Scottsdale's counsel also took the position that when it inadvertently submitted Exhibit M, it reserved its right to supplement such discovery exchange and that Exhibit L "superseded" his production of Exhibit M by virtue of his statement in the Response to the Notice to Admit that Exhibit L was the "true and complete copy of the relevant Scottsdale policy." Aragon's counsel does not recall any conversation wherein Scottsdale's attorney advised of his inadvertent production.

is an additional insured under an insurance policy and the underlying claim falls outside the limited coverage provided, disclaimer pursuant to Insurance Law §3420(d) is not required” (*Brooklyn Hosp. Center v One Beacon Ins.*, 5 Misc 3d 1029, 799 NYS2d 158 [Supreme Court, New York County 2004] (holding that where the insurer was not required to extend coverage to the plaintiff Hospital insofar as there is no written agreement specifically between “Donaldson” and the Hospital requiring that the Hospital be named as an additional insured, the insurer’s failure to disclaim as to the Hospital is immaterial)). Aragon failed to cite any caselaw holding to the contrary.

Likewise, a determination as to whether, as Aragon contends, a co-insurance situation is created because of the competing “excess” insurance language in the Scottsdale and QBE/Aragon policies is premature, until a determination is made as to whether the Scottsdale Policy provides coverage to Aragon as an additional insured.

Based on the above, the Court declines Scottsdale’s request to search the record and issue a declaration that Aragon is not an additional insured on the Scottsdale Policy.

Conclusion

Based on the foregoing, it is hereby

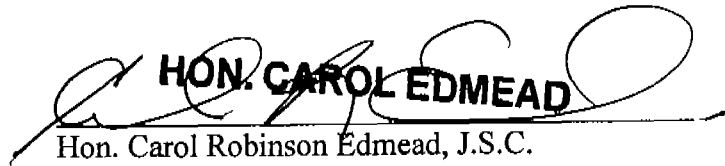
ORDERED that the motion by plaintiff Aragon, LLC for summary judgment granting a declaration that Aragon is entitled to defense and indemnification from defendant Scottsdale Insurance Company (“Scottsdale”) as an additional insured in a personal injury action entitled *Bernard Ford v 250 Park LLC, Aragon, LLC, et al.*, including reimbursement of attorneys fees

and expenses incurred, is denied; and it is further

ORDERED that plaintiff serve a copy of this order with notice of entry upon defendant within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: January 29, 2010


HON. CAROL EDMEAD
Hon. Carol Robinson Edmead, J.S.C.

FILED
FEB 02 2010
NEW YORK
COUNTY CLERK'S OFFICE