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

PRESENT: JANE S. SOLOMON PART 55

Index Number : 111665/2007
QBE INSURANCE
VS.
INVESTORS INSURANCE
SEQUENCE NUMBER : 002
DISMISS

INDEX NO.
MOTION DATE 9/14/09
MOTION SEQ. NO.
MOTION CAL. NO.

this motion to/for

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1-8
Answering Affidavits — Exhibits (Notice of Motion)	9-13
Replying Affidavits	14-17

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion is decided together with motions 03 and 04 in accordance with the annexed Memorandum decision, order, partial judgment and declaration.

N.B. -- Pre-trial conf. is scheduled for April 19, 2010 at 2 PM.

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Dated: 3/10/10

J.S.C.
JANE S. SOLOMON

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 55
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QBE INSURANCE CORPORATION, BEAVER CONCRETE CONSTRUCTION COMPANY, INC., BEAVER CONCRETE CONSTRUCTION COMPANY, INC./GATEWAY INDUSTRIES, LLC, JOINT VENTURE and THE CITY OF NEW YORK,

Index No.: 111665/07

DECISION, ORDER, PARTIAL JUDGMENT AND DECLARATION

Plaintiffs,

-against-

INVESTORS INSURANCE COMPANY OF AMERICA, FEDERAL INSURANCE COMPANY, TRAVELERS INDEMNITY COMPANY, as successor in interest by merger of Gulf Insurance Company, TRIBOROUGH BRIDGE AND TUNNEL AUTHORITY, THUNDERBIRD CONSTRUCTORS, INC., PERINI CORPORATION, GARY WHITE, KARY ANN ROBERTSON and LOUIS DAILLEBOUST *(pertaining to two underlying actions styled Gary White and Kary Anne Robertson v. The City of New York and the Triborough Bridge & Tunnel Authority, et al., and Louis Dailleboust v. The City of New York and the Triborough Bridge & Tunnel Authority, et al.)*,

Defendants.

----------X

JANE S. SOLOMON, J.:

In this lawsuit, the parties seek declarations regarding insurance coverage available to cover claims for damages arising from a 2001 construction accident that resulted in injuries to two workers. Plaintiff QBE Insurance Corporation (QBE) has been providing a defense for the other plaintiffs.

On May 10, 1999, plaintiffs Beaver Concrete Construction Co., Inc./Gateway Industries, LLC, A Joint Venture (Joint Venture) and the City of New York (City) contracted to

have Joint Venture serve as the general contractor for a New York City Department of Transportation project to reconstruct the Coney Island Avenue Bridge over the Belt Parkway in Brooklyn, New York (the Project). The contract calls for Joint Venture to indemnify and hold the City harmless for any "loss, damage, injury or death resulting from the negligence or carelessness of the Contractor or his subcontractors" (Agreement between the City, the Department of Transportation and Joint Venture, annexed to Plaintiffs' Amended Complaint at Ex. F). The contract also calls for Joint Venture to obtain Commercial General Liability ("CGL") insurance naming the City as an additional insured, with a minimum of $6 million in coverage. Joint Venture obtained CGL insurance from QBE, which named the City as an additional insured (QBE Policy, annexed to Plaintiffs' Amended Complaint at Ex. M). The QBE policy has a liability limit of $1 million. Joint Venture also obtained an umbrella insurance policy from Gulf Insurance Co. ("Gulf"), also naming the City as an additional insured (Gulf Policy, annexed to Plaintiffs' Amended Complaint at Ex. N). The Gulf policy has an aggregate limit of $10 million in excess of the underlying QBE insurance. Defendant Travelers Indemnity Company ("Travelers") is the successor in interest to Gulf.

The Gulf Policy contains a notice provision which was modified by Endorsement Number 12. The endorsement lists nine

situations where the insured must give prompt written notice of an occurrence (Section IV - Part 5.a.[a][1]-[9]). The insured must give prompt written notice of an occurrence that may result in a claim under the Gulf Policy (Section IV - Part 5.a.[a][9]). Endorsement 12 also states that an insured must give prompt written notice of "any 'occurrence' or 'offense' wherein the damages may exceed 50% of the 'retained limit' amount shown on the Declarations" (Section IV - Part 5.a.[a][8]). The Declarations of the Gulf Policy state that the retained limit of the policy is $10,000, so, under the reading of this provision urged by Travelers, the insured would be obligated to provide written notice to Gulf of any occurrence or offense which may result in a claim of $5,000 or more.

The Gulf Policy was further amended in June 2002, said amendment made effective retroactively to July 28, 2001, to provide that excess coverage is limited to the amount of insurance the named insured agreed to provide (Endorsement 18, Section II, Part 2.h [a], at Glazer Aff., Ex A-4).

Joint Venture subcontracted with defendant Thunderbird Constructors Inc. (Thunderbird) to perform work on the Project. The Joint Venture/Thunderbird contract requires Thunderbird to indemnify Beaver, the Joint Venture and the City against all damages or liability "to the extent allowed by law."
The contract further states that Thunderbird must acquire CGL

insurance naming Joint Venture, the City and the New York City Department of Transportation as additional insureds (Rider 'A' to the Agreement between Joint Venture and Thunderbird, annexed to Plaintiffs' Amended Complaint at Ex. G). The insurance procurement provision of the agreement states:

> Policy Holder shall be Beaver Concrete Construction Co., Inc. & Gateway Industries, LLC, Joint Venture. Policy must name the Policy Holder, The City of New York and New York City Department of Transportation as additional insureds.

Thunderbird obtained CGL insurance from Investors Insurance Company of America ("Investors"). The Investors policy contains an Additional Insured Endorsement that says the policy will cover additional insureds identified "As Per Written Contract" on the Schedule naming additional insureds (Investors Policy, annexed to Plaintiffs' Amended Complaint at Ex. J). The Endorsement further states:

> WHO IS AN INSURED (Section II) is amended to include as an insured the person or organization shown in the Schedule, but only with respect to liability arising out of your ongoing operations performed for that insured and then only as respects any claim, loss or liability arising out of the operations of the Named Insured, and only if such claim, loss or liability is determined to be solely the negligence or responsibility of the Named Insured.

The Ivestors policy has a liability limit of $1 million per occurrence. Thunderbird obtained an umbrella policy from defendant Federal Insurance Company ("Federal") with a liability limit of $20 million in excess of the Investors policy (Federal

Policy, annexed to Plaintiffs' Amended Complaint at Ex. L). The Federal policy includes as an insured any person or organization that is an insured in the underlying insurance policy.

On August 31, 2001, Louis Dailleboust and Gary White, employees of Thunderbird, were at the Project site. They allege that the scaffolding upon which they were working collapsed, causing them to fall and sustain injuries. Joint Venture employees allegedly designed and erected the scaffolding that collapsed. On September 4, 2001, Dailleboust and White served the City with Notices of Claim alleging that Dailleboust had fractured his ankle and suffered a puncture wound, and that White had fractured his hip and left arm. These workers brought lawsuits in the Supreme Court, Kings County, which have been consolidated ("the underlying action").

On November 15, 2001, the claim representative for QBE, Claims Service Bureau of New York, Inc. ("CSB"), sent a letter to Thunderbird tendering the defense and indemnity of Beaver and the City in the underlying action. On December 12, 2001, Investors Underwriting Managers, Inc., the claims representative for Investors, sent a letter to CSB denying the tender on the grounds that it was untimely, and because "liability appears to rest upon" Beaver and the City (Investors Motion, Ex. F).

On August 29, 2002, the City mailed a letter addressed to the claims manager at Gulf, allegedly giving notice of the

Dailleboust and White claims. This letter was sent to Gulf at 388 Greenwich Street, 2nd Floor, New York, New York 10013, and, as evidenced by a return receipt, was accepted and signed for on Gulf's behalf by a "T. Simon" or "J. Simon". Travelers acknowledges that Gulf was at 388 Greenwich Street until March 2000, but claims it then relocated. Travelers states that it had no employee in New York named "T. Simon" or "J. Simon" in August 2002. Travelers further claims that neither it nor any other affiliated insurance-related entity was located at 388 Greenwich Street after March 2000 (Aff. Of Dan Hoefer, paragraph 6), but the court takes judicial notice of Travelers' apparent presence at this location in 2002 and for years before and after.[1]

On August 26, 2005, Joint Venture became aware of the potential exposure to the excess insurance policy through a phone conversation with CSB, when it learned that an expert report prepared on behalf of the injured workers, Dailleboust and White, indicated that their loss of earnings claims could exceed the primary coverage. On August 29, 2005, Joint Venture gave

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[1] The Travelers Building was, and is, a notable landmark in the Tribeca neighborhood abutting this court house. See, Dash, *What's Red, Familiar, Ubiquitous and May Be On Its Way Out?*, New York Times, June 20, 2006, (http://www.nytimes.com/2006/06/20/business/media/20adco.html?_r=1). Those familiar with lower Manhattan will recognize the building which was topped by an enormous neon Travelers logo, the "ubiquitous" red umbrella. See, Deutsch, *In the Glow of a Merger, a Fight Over a Neon Sign*, New York Times, April 9, 1998 (http://www.nytimes.com/1998/04/09/nyregion/in-the-glow-of-a-merger-a-fight-over-a-neon-sign.html).

Travelers notice of the underlying action. Travelers contends that this was the first notice it received of the City's demand for coverage.

On August 1, 2005, QBE and Beaver commenced an action against Thunderbird and Investors, seeking a declaration that Investors was obligated to defend and indemnify Beaver and the City in the underlying action. On August 27, 2007, QBE and Beaver commenced a declaratory judgment action against Federal seeking a similar declaration with respect to Federal's obligation to provide excess coverage. On September 12, 2007, QBE and Beaver commenced an action against Travelers seeking a declaration that Travelers is obligated to defend and indemnify Beaver, Joint Venture and the City in the underlying action. QBE and Beaver filed an Amended Complaint seeking declarations that Travelers, Investors and Thunderbird are obligated to defend and indemnify Beaver, the Joint Venture and the City in the underlying action. The three actions were consolidated by order of this court into the captioned case.

These Motions

Travelers moves for summary judgment and a declaration in its favor that it is not obligated to provide excess coverage for the underlying claims, or if excess coverage is provided, it is limited to $5 million. Plaintiffs cross-move for summary judgment declaring that Beaver, Joint Venture and the City gave

Travelers timely notice of the underlying claim. Investors and Thunderbird move separately for summary judgment in their favor, and declarations that no plaintiff is entitled to indemnification or a defense to the claims in the underlying action. Federal cross-moves on the ground that it is obligated to provide excess coverage only if the Gulf Policy is exhausted, and it is entitled to a declaration in its favor if Travelers succeeds on its motion. Plaintiffs also move for summary judgment in their favor, and for declarations that Beaver, Joint Venture and the City are additional insureds under the Investors policy, and that Thunderbird is contractually obligated to indemnify Beaver, Joint Venture and the City for that portion of damages attributable to Thunderbird's negligence in the underlying action.

The Travelers Motion

Travelers contends that each of Beaver, Joint Venture and the City failed to provide it with timely notice of the underlying occurrence, thereby vitiating the umbrella coverage under the Gulf Policy. Travelers relies on Endorsement 12, arguing that Beaver, the Joint Venture and the City were required to give written notice to Travelers as soon as they learned of the accident, because a reasonable assessment of the claims suggest a potential claim in excess of $5,000 (Section IV - Part 5.a.[a][8]). But the endorsement also provides that the insured must give prompt written notice of an occurrence that may result

in a claim under the Gulf Policy (Section IV - Part 5.a.[a][9]), without limitation to situations where a $5,000 claim is presented.

Generally, the insured party must give written notice only upon the happening of an occurrence "reasonably likely" to trigger the excess insurer's coverage (see, Long Island Lighting Co. v Allianz Under. Ins. Co., 24 AD3d 172 [1st Dept 2005]). Here, notice was promptly given when plaintiffs learned that the claim may exceed the QBE coverage. Although an unambiguous policy provision is generally given its plain and ordinary meaning (Lavanant v. General Acc. Ins. Co. of Am., 79 N.Y.2d 623 [N.Y. 1992]), Travelers' reliance on the provision requiring notice of every claim potentially exceeding $5,000 is contrary both to the governing case law and to other terms of the policy in question (*see* Endorsement 12, Section IV - Part 5.a.[a][9]). Said provision also imposes an absurd prerequisite to coverage which has the effect of vitiating the entire purpose of the insurance policy. Accordingly, that branch of Travelers' motion based on Endorsement 12, Section IV - Part 5.a.(a)(8) is denied.

Moreover, the City contends that it provided notice of the underlying action to Travelers in its August 2002 letter. The fact that the letter was sent to an old Gulf address does not make it untimely. When an insurance company moves offices, it must make a reasonable effort to ensure that mail sent to the old

office address is forwarded to the new address, particularly where, as here, an apparently affiliated entity continues to conspicuously use the old address. Although the August 2002 letter was sent by the City nearly a year after the underlying accident had occurred, the City did not then have reason to suspect that claims in the underlying action would trigger excess insurance coverage. Therefore, the City's 2002 letter also provided timely notice to Travelers.

That branch of Travelers' motion seeking a declaration that its maximum obligation to indemnify the City is limited to $5 million is granted because it is supported by the policy language, and is not meaningfully rebutted.

Investors' and Thunderbird's Motion for Summary Judgment

Investors argues that Joint Venture and the City are not entitled to defense and indemnity because they are not additional insureds under the Investors policy with respect to the underlying action. The Additional Insured Endorsement of the Investors policy states that a person listed on the Schedule is considered to be an additional insured only with respect to those claims determined to be "solely the negligence or responsibility of the Named Insured."

Plaintiffs argue that the Additional Insured Endorsement is ambiguous. Both sides cite City of New York v. Evanston Insurance Company to support their argument concerning

the validity of the "solely the negligence" clause (39 AD3d 153 [2d Dept. 2007]). In Evanston, a CGL insurance policy contained a blanket additional insured endorsement that is almost identical to the endorsement in the Investors policy. The Appellate Division determined that the word "solely" was ambiguous, and had to be construed in favor of coverage and against the insurer who drafted the policy. The Court interpreted the word "solely" to refer only to an apportionment of fault as between the contactor and the City. The Court noted that such an interpretation "would exclude coverage only in those cases in which the putative additional insured is found to be partially at fault for the happening of the accident" (id. at 157).

Here, the accident arose from Thunderbird's work, but Beaver, the Joint Venture and the City all are alleged in the underlying action to be negligent. If it is determined at trial in the underlying action that any plaintiff herein was not negligent, that party will be entitled to indemnification as an additional insured under the Investors policy.

With respect to Investors' duty to defend, however, it is well settled that "an insurance company's duty to defend is broader that its duty to indemnify. . . . If, liberally construed, the claim is witin the embrace of the policy, the insurer must come forward to defend . . ." (Automobile Ins. Co. Of Hartford v Cook, 7 NY3d 131, 137 [2006], and *see* B.P. Air

Conditioning Corp. v One Beacon Ins. Group, 8 NY3d 708 [2007]). Accordingly, Joint Venture and the City are entitled to a declaration in their favor as to Investors' duty to defend.

Investors correctly argues that Beaver is not entitled to coverage as an additional insured because only the Joint Venture and the City are named as additional insureds in the Investors policy, and the contract between the Joint Venture and Thunderbird did not specify that Beaver would be an additional insured.

Investors further contends that the insurance procurement provision of the agreement between Joint Venture and Thunderbird is illogical and void. Although the contract erroneously referred to the Joint Venture as the policy holder, it was clearly the intention that Thunderbird would procure insurance naming the Joint Venture and City as additional insureds, and the conduct of the parties is in accord with that finding.

Federal's obligation to provide excess coverage is contingent upon Investors' duty to indemnify, and accordingly, a declaration on that issue also must be made on a contingent basis.

Plaintiffs' Motion for Summary Judgment

Plaintiffs argue that under the indemnification provision of the Thunderbird contract, if Beaver, the Joint

Venture or the City is obligated to pay any judgment in the underlying action, Thunderbird must reimburse that party for any part of the judgment attributable to Thunderbird's negligence. Thunderbird contends that the indemnification provision is over-broad, in violation of New York General Obligations Law § 5-322.1.

The indemnification clause in question provides that it is limited "to the extent allowed by law". In Brooks v. Judlau Contracting, Inc., another case in which Thunderbird was the subcontractor, the Court of Appeals held that a nearly identical phrase "contemplates partial indemnification and is intended to limit Thunderbird's contractual indemnity obligation solely to Thunderbird's own negligence" (11 NY3d 204 [2008]). The Court further wrote that "there is no language within General Obligations Law § 5-322.1 that prevents partial indemnification provisions such as the one currently before us from being enforced in a case where it is shown that both a general contractor and its subcontractor are joint tortfeasors" (id. at 211). Accordingly, the indemnification provision is enforceable against Thunderbird only to the extent that the claims in the underlying action are attributable to Thunderbird's negligence. Naturally, this finding has no bearing upon the finding that Joint Venture and the City are additional insureds under the relevant policies.

CONCLUSION

It hereby is

ORDERED that the motions for summary judgment are granted in part and denied in part as follows:

It hereby is ADJUDGED and DECLARED that

1. Travelers is obligated to indemnify Joint Venture and the City under the Gulf Policy for any judgment which may be rendered against them in the underlying action, or any settlement which may be reached by the parties in consultation with Travelers, up to $5 million in excess of the limits of the QBE policy.

2. Travelers is not obligated under the Gulf Policy to provide to any plaintiff here a defense in the underlying action.

3. Investors is obligated to provide a defense for Joint Venture and the City in the underlying action on an equal co-primary basis with QBE, and to reimburse QBE for its share of defense costs incurred up to the date of payment.

4. Investors is obligated to indemnify Joint Venture and the City, under the policy it issued to Thunderbird, for any judgment which may be rendered against Joint Venture or the City in the underlying action, or any settlement which may be reached by the parties in consultation with Investors, up to the limit of the policy it issued, but only in the event that Joint Venture or the City is found to be not negligent in causing damages alleged

the City is found to be not negligent in causing damages alleged in the underlying action.

5. Federal shall indemnify either Joint Venture, the City, or both, to the extent that Investors is obligated to provide indemnification to those parties, said indemnification to be provided for any judgment which may be rendered against them in the underlying action, or any settlement which may be reached by the parties in consultation with Federal, in excess of the limit of the Investors policy, and up to the limit of the Federal policy.

6. Joint Venture and the City are entitled to contractual indemnification from Thunderbird in the underlying action to the extent that it is determined therein that damages resulted from Thunderbird's negligence.

And it further is

ORDERED that counsel shall appear for a pre-trial conference in Part 55 on April 19, 2010 at 2 PM.

Dated: March 10, 2010

ENTER:

J.S.C.

JANE S. SOLOMON