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

PRESENT: MARCY S. FRIEDMAN, J.S.C. PART 57

Index Number : 111303/2007
J.T. MAGEN
VS.
PENNSYLVANIA LUMBERMENS
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT

INDEX NO. 111303/07
MOTION DATE
MOTION SEQ. NO. 001
MOTION CAL. NO.

this motion to/for Summary judgment

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits Notice of Cross Motion	2
Replying Affidavits	3, 4

Memos. 1 — 4

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion + cross-motion are determined as per decision/order and judgment dated 4-29-10

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: 4-29-10

MARCY S. FRIEDMAN, J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST ☐ REFERENCE

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

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 57

x Index No. 111303/07

J.T. MAGEN & COMPANY, INC.,

Plaintiff,

v. DECISION/ORDER

PENNSYLVANIA LUMBERMENS MUTUAL INSURANCE COMPANY,

Defendant.

In this declaratory judgment action, plaintiff J.T. Magen & Company, Inc. (J.T. Magen) seeks a declaration that defendant Pennsylvania Lumbermens Mutual Insurance Company (Lumbermens) is obligated to defend and indemnify Magen in an underlying personal injury action entitled Milano v. J.T. Magen & Co., 875 Third Avenue LLC and Exis Capital Management, Inc., New York County Index No. 113698/05. Defendant moves for summary judgment dismissing this action, and plaintiff cross-moves for summary judgment directing defendant to defend and indemnify it in the underlying action.

The standards for summary judgment are well settled. The movant must tender evidence, by proof in admissible form, to establish the cause of action "sufficiently to warrant the court as a matter of law in directing judgment." (CPLR 3212[b]; Zuckerman v City of New York, 49 NY2d 557, 562 [1980].) "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers." (Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 [1985].) Once such proof has been offered, to defeat summary judgment "the opposing party

must 'show facts sufficient to require a trial of any issue of fact' (CPLR 3212, subd. [b])." (Zuckerman v City of New York, supra, at 562.)

The material facts are not in dispute: J.T. Magen was hired by Exis Capital Management as a general contractor for a project at 875 Third Avenue, 29th Floor, New York, NY. J.T. Magen then subcontracted with Mill Wright Woodwork & Installers, Inc. d/b/a Martin Thomas Contracting Corp. ("Mill Wright") as a woodworker for the construction project. The purchase order between J.T. Magen and Mill Wright required Mill Wright to obtain general liability insurance and to name J.T. Magen as an additional insured on a primary and non-contributing basis. (See Exhibit K to Defendant's Motion].) Steven Milano (Milano) was hired by Mill Wright to perform work at the project site. Milano was instructed to install a door closure in an office entrance on the 29th floor. When he entered the office on December 17, 2003 to begin his work, he fell into an opening in the computer floor of that room. (Plaintiff's Dep. at 32-33 [Exhibit M to Defendant's Motion].) Milano then commenced the underlying action against J.T. Magen & Co., 875 Third Avenue LLC and Exis Capital Management, Inc., seeking damages for his injuries. (See Amended Verified Complaint [Exhibit L to Defendant's Motion].) Plaintiff in the underlying action claims that while he was at the project site in "furtherance of his employment," he was "violently precipitated to the ground," and sustained injuries as a result. (Id., ¶ 19.) Subsequently, J.T. Magen commenced this action against Lumbermens seeking defense and indemnity as additional insured under Mill Wright's insurance policy with Lumbermens.

The Purchase Order between J.T. Magen and Mill Wright, section 11.3, provides that Mill Wright will obtain Comprehensive General Liability insurance naming J.T. Magen and

Company Inc. "as additional insured (on a primary and non-contributory basis.)" Plaintiff and defendant agree that Mill Wright obtained additional insured coverage for Magen. Defendant claims that there is an issue as to which of two additional insured endorsements was in effect at the time of the accident. CL-261 (Exhibit D to Defendant's Motion) provides coverage "with respect to liability arising out of your operations or premises owned or rented by you." LAM-125 (Exhibit E to Defendant's Motion) provides that "[t]he additional insured is covered for its vicarious liability for the acts or omissions of the named insured's ongoing construction operations. The additional insured is not covered for liability due to its independent acts or for any supervision of 'your work' or the work of any other person or organization."

Under both endorsements, coverage is limited to liability arising out of Mill Wright's ongoing operations, or as a result of its acts or omissions. Magen does not dispute Lumbermens' evidence that ADCO Electricians, another subcontractor, was responsible for the work done beneath the floor surface, and that the floor opening through which the plaintiff fell was necessary for such work. (See Deposition of Ralph Occhipinti, [Project Manager for ADCO] at 20-23, 38, 41-42, 55 [Exhibit P to Defendant's Motion].) Rather, Magen claims that the underlying plaintiff's injuries are covered because he was working for Mill Wright at the time of his accident. Lumbermens contends that Milano's injury at the site was due to the work performed by ADCO, not Mill Wright, and that Magen therefore is not entitled to coverage as an additional insured.

Defendant's contention is without merit. It is well settled that injuries incurred by an insured's employee while entering and leaving a worksite "must be deemed as a matter of law to have arisen out of the work." (O'Connor v Serge Elev. Co., 58 NY2d 655, 657 [1982] rearg

denied, 58 NY 2d 824 [1983]; Chelsea Assocs., LLC v Laquila-Pinnacle, 21 AD3d 739 [1st Dept 2005], lv denied 21 AD3d 739.) An additional insured endorsement that limits coverage to liability "arising out of" the insured's operations "focuses not upon the precise cause of the accident, as defendants urge, but upon the general nature of the operation in the course of the which the injury was sustained." (Consolidated Edison Co. of New York, Inc. v Hartford Ins. Co., 203 AD2d 83 [1st Dept 1994]. Accord Tishman Constr. Corp. of New York v CNA Ins. Co., 236 AD2d 211 [1st Dept 1997].)

Worth Construction Co., Inc. v Admiral Ins. Co. (10 NY3d 411 [2008]), on which defendant relies, is not to the contrary. There, a general contractor was found not to be entitled to coverage as an additional insured under a subcontractor's policy that provided coverage for liability arising out of the subcontractor's operations. The subcontractor who provided the insurance was not at the job site at the time of the accident; the plaintiff in the underlying action was not employed by the subcontractor who provided the insurance; and the plaintiff fell on a different subcontractor's materials. Under these circumstances, the Court found no connection between the accident and the risk for which coverage was intended. (Id. at 416.)

Worth expressly reaffirmed the precept that "the focus [of the additional insured clause] is not on the precise cause of the accident but the general nature of the operation in the course of which the injury was sustained." (Id. [internal quotation marks and citation omitted].) Worth did not disturb the First Department cases cited above which held, albeit upon dissents, that an accident arises out of the subcontractor's work where the subcontractor's employee was injured on the way to or from work.

Here, unlike Worth, it is undisputed that the plaintiff in the underlying action was injured

while entering the room in which he was to perform work for his employer Mill Wright, the insuring subcontractor. His accident was therefore directly connected to and arose out of Mill Wright's work.

It is accordingly hereby ORDERED that defendant's motion for summary judgment is denied, and plaintiff's cross-motion for summary judgment is granted to the following extent:

It is hereby ORDERED, ADJUDGED and DECLARED that Pennsylvania Lumbermens Mutual Insurance Company is obligated to defend and indemnify J.T. Magen & Company, Inc. in the underlying action entitled Milano v. J.T. Magen & Co., 875 Third Avenue LLC and Exis Capital Management, Inc., New York County Index No. 113698/05.

This constitutes the decision, order, and judgment of this court.

Dated: New York, NY
April 29, 2010

ENTER:

MARCY FRIEDMAN, J.S.C.