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

PRESENT: Hon Joan A. Madden PART 11

Index Number : 107326/2007

BOVIS LEND LEASE LMB INC

VS

VIRGINIA SURETY INSURANCE CO

Sequence Number : 002

ORDER OF PROTECTION

INDEX NO. _____

MOTION DATE 9-9-09

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on 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 is decided in accordance with the annexed Memorandum Decision + Order.

FILED
SEP 21 2010
COUNTY CLERK'S OFFICE
NEW YORK

Dated: September 16, 2010

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):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 11

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BOVIS LEND LEASE LMB, INC. and ZURICH AMERICAN INSURANCE COMPANY,

Plaintiffs,

-against-

Index No. 107326/07

VIRGINIA SURETY INSURANCE COMPANY and RSUI INDEMNITY CO. (pertaining to multiple underlying actions commenced by Thomas Garrett; William Alter; Daniel Carpluck; and Gilberto Rosario, against Bovis Lend Lease LMB, Tower 31 LLC et al.,

Defendants.

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JOAN A. MADDEN, J:

In this action for a declaratory judgment as to insurance coverage, plaintiffs Bovis Lend Lease LMB, Inc. (Bovis) and its insurer, Zurich American Insurance Company (Zurich) move for an order (1) granting a protective order pursuant to CPLR 3103 denying defendant Virginia Surety Insurance Company's (Virginia Surety's) demand to take the deposition of Bovis or the non-party deposition of Bovis' former employees regarding Bovis' role in the underlying accident, and (2) striking that part of the Compliance Conference order dated July 30, 2009 directing Bovis to appear for a deposition. Virginia Surety and defendant RSUI Indemnity Company (RSUI) oppose the motion, which is denied for the reasons below.

Background

This insurance coverage dispute arises out of an elevator accident which occurred on December 1, 2005, during work on a construction project at 9 West 31st Street, New York, N.Y. Bovis was the construction manager on the project.

The claimants in the underlying personal injury action were passengers in the elevator at the time of the accident. With the exception of Nellie Rodriguez ("Rodriguez"), all of the claimants were employees of one of the subcontractors on the project, GM Crocetti Flooring, Inc. (Crocetti).[1] Virginia Surety issued an insurance policy to Crocetti, which named Bovis as an additional insured, "with respect to liability arising out of 'your' [i.e. Crocetti's] work." Defendant RSUI Indemnity Company (RSUI) issued an umbrella commercial general liability insurance policy to Crocetti affording excess coverage of up to $5 million per occurrence over and above the coverage afforded by Virginia Surety's primary policy.

Virginia Surety paid the claims on behalf of Bovis to all of the claimants except for Rodriguez, asserting that Rodriguez's claim did not arise out of Crocetti's work since Rodriguez was not a Crocetti employee. In this action, Bovis and its insurer Zurich are suing Virginia Surety for defense and indemnity with respect to the remaining claim as to Rodriguez.

Virginia Surety previously moved for summary judgment dismissing the complaint, asserting that since Rodriguez was not a Crocetti employee at the time of the accident his claims could not have arisen out of Crocetti's work and did not fall under the policy provision at issue. In support of its position, Virginia Surety contended that Crocetti had no responsibility for the maintenance, operation or control of the elevator in question, and that the elevator was installed and maintained, pursuant to contract, by non-party Fujitec New York (Fujitec). Virginia Surety also contended that Bovis was operating the elevator on the day of the elevator accident.

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[1] In addition to Rodriguez, the claimaints include Thomas Garrett, William Alter, Curtis Edwards, Gilberto Rosario, and David Carpluck. Although only six claimants have brought underlying claims with respect to the elevator accident, as many as 14 Crochetti employees were riding in the elevator and thus at least eight more claims may exist.

In opposition, Bovis pointed to accident reports by Bovis and Crocetti indicating that Crocetti had 14 men on the elevator car it caused the elevator to be overloaded and potentially caused the accident.

By decision and order dated October 22, 2008 ("the October decision"), this court held that Virginia Surety had a duty to defend Rodriguez based on the language of the additional insured endorsement, citing precedent holding that "the duty to defend [its insured] is 'exceedingly broad' and an insurer will be called upon to provide a defense whenever the allegations of the complaint 'suggest . . . a reasonable possibility of coverage.'" BP Air Conditioning Corp. v One Beacon Ins. Group, 8 NY3d 708, 714 (2007)(internal citation omitted).

The Motion

At a compliance conference held on July 30, 2009, this court directed plaintiffs to produce a witness from Bovis for deposition. Bovis did not comply with this directive but, instead, made this motion for a protective order to deny Virginia Surety's demand to take the deposition of Bovis or the non-party deposition of former employee of Bovis and to strike the July 30, 2009 compliance conference order to the extent it directs that plaintiffs to produce a witness from Bovis for deposition.

Plaintiffs argue that such relief is appropriate as (1) under the anti-subrogation rule Virginia Surety cannot seek relief against its insured Bovis for the very risk for which Bovis is covered under its policy, (2) the October decision precludes Virginia Surety from arguing that Bovis is responsible for the accident, (3) the discovery sought from Bovis does not having any bearing on the issues in this action since any negligence by Bovis does not provide a basis for

coverage under the broad language of the policy insuring Bovis for liability arising out of Crocetti's work.

These arguments are unavailing. First, the anti-subrogation rule– which provides that an insurer has no right of subrogation against its own insured for a claim arising out of the very risk that for which the insured is covered-- is not applicable here as in this declaratory judgment action in which Virginia Surety is a defendant and is not seeking any monetary relief from Bovis. See e.g. Liberty Mut. Ins. Co. v. Aetna Cas. & Sur., 168 AD2d 121, 136 (2d Dept 1991)(holding that anti-subrogation rule does not apply to a declaratory judgment action in which there is no possibility that the action could result in a monetary award in favor of the insurer against its insured).

Next, the October decision does not bar Virginia Surety from seeking discovery from Bovis since that decision found that Virginia Surety had a duty to defend Bovis with respect to the Rodiguez claim, but made no determination as to the duty to indemnify Bovis. Notably, "[t]he duty to indemnify is...distinctly different from the [duty to defend]." Servidone Const. Corp. v. Security Ins. Co. of Hartford, 64 NY2d 419, 424 (1985). Specifically, while "the duty to defend is measured against the allegations of the pleadings, the duty to pay is determined by the actual basis for the insured's liability to a third person." Id.; see also, BP Air Conditioning Corp. v. One Beacon Insurance Group, 33 AD3d 116, 124 (1st Dept 2006), modified on other grounds, 8 NY3d 708 (2007)(holding that "a duty to defend an additional insured is not contingent on there having been an adjudication of liability giving rise to a duty to indemnify the additional insured").

With respect to plaintiffs' other arguments, the court recognizes that provisions like the

one in the Virginia Surety policy providing coverage for an additional insured for liability arising out of the work of subcontractor have been interpreted broadly by focusing "not [on] the precise cause of the accident ... but upon the general nature of the work." Consolidated Edison Co. v. Hartford Ins. Co., 203 AD2d 83, 83 (1st Dept 1994); See also, Structure Tone v. Component Assembly Systems, 275 AD2d 603 (1st Dept 2000). Thus, under these provisions, coverage has been found regardless of the additional insured's negligence when the claimant is injured while engaged in work on behalf of the subcontractor whose work was covered by the relevant policy, and/or was employed directly or indirectly by the subcontractor. See e.g., Chelsea Assocs. LLC v. Laquila-Pinnacle, 21 AD3d 739 (1st Dept), lv denied, 6 NY3d 742 (2005)(holding that insurer was required to indemnify plaintiff companies who were named as additional insured under subcontractor's policy for liability "arising out of (subcontractor's) work," for claims arising out of injuries sustained by employee of subcontractor en route to his work assignment); Tishman Const. Corp. of New York v. American Mfrs. Mut. Ins. Co., 303 AD2d 323 (1st Dept 2003)(finding that work performed on behalf of subcontractor pursuant to contract between the additional insured and the subcontractor was covered by policy and that any negligence by the additional insured is irrelevant).

Here, however, since Rodriguez was not employed by Crocetti and was not apparently engaged in work for Crocetti at the time of the accident, Bovis' role, if any, in the accident is relevant to whether Rodriguez's claims arose out of Crocetti's work. In addition, as the construction manager at the project, Bovis may also have knowledge as to the cause of the accident which has not been established. See e.g., BP Air Conditioning Corp. v One Beacon Insurance Group, 33 AD3d 116 (holding that factual issues exist as to whether insurer was

required to indemnify additional insured under subcontractor's policy providing coverage for work arising out of subcontractor's "ongoing operations" for the additional insured where claimant was not employed by subcontractor and issues of fact existed as to the source of the oil on which the claimant slipped).

Accordingly, as Bovis' deposition will potentially provide information regarding the issues material to this action, such deposition was properly sought by Virginia Surety and directed in the July 30, 2010 compliance conference order, and plaintiffs' motion must therefore be denied.

Conclusion

In view above, it is

ORDERED that plaintiffs' motion for a protective order with respect to Virginia Surety's demand to take the deposition of Bovis or the non-party deposition of Bovis' former employees, and to strike that part of the Compliance Conference order dated July 30, 2009 directing Bovis to appear for a deposition is denied; and it is further

ORDERED that on or before September 30, 2010, Bovis shall produce for deposition an employee or former employee with knowledge regarding the December 1, 2005 accident; and it is further

ORDERED that the parties shall appear for a status conference in Part 11, room 351, on October 14, 2010 at 9:30 am.

Dated: ~~July ,2010~~ September 16, 2010

J.S.C.