[* 1]

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

PRESENT: HON. JUDITH J. GISCHE J.S.C. PART 10

Index Number : 110204/2009
UTICA FIRST INS. COMPANY
vs.
RJR MAINTENANCE GROUP, INC.
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. 001
MOTION CAL. NO. _____

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

FILED
SEP 23 2010
COUNTY CLERK'S OFFICE
NEW YORK

motion (s) and cross-motion(s) decided in accordance with the annexed decision/order of even date.

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

Dated: SEP 22 2010

HON. JUDITH J. GISCHE 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 10

UTICA FIRST INSURANCE COMPANY,

Plaintiff,

-against-

RJR MAINTENANCE GROUP, INC., ST. JOHN'S UNIVERSITY and FRANKLIN EDWARDS,

Defendants.

---X

DECISION/ORDER
Index No. 110204/09
Seq. No. 001

Present:
Hon. Judith J. Gische
J.S.C.

Recitation, as required by CPLR § 2219 [a], of the papers considered in the review of this/these motion(s):

Papers	**Numbered**
Pltf's n/m (3212) w/WRB affirm, SW affids, exhs	1
Def St. John's opp w/PH affirm, exhs	2
Pltf's reply w/WRB affirm, exh	3
Def St. John's sur-reply w/PH affirm, exh	4
Pltf's sur-reply w/SNP affirm	5

Upon the foregoing papers the court's decision is as follows:

GISCHE, J.:

Plaintiff Utica First Insurance Company (Utica) moves, pursuant to CPLR 3212, for a declaration that it has no obligation to defend and indemnify defendants RJR Maintenance Group, Inc. (RJR) or St. John's University (St. John's) in connection with an underlying personal injury action brought against those defendants by defendant Franklin Edwards (Edwards), an employee of non-party CIA, a subcontractor hired by defendant RJR. In the alternative, Utica moves for a default judgment, pursuant to CPLR 3215, against defendant RJR for RJR's failure

to answer or otherwise appear in this action.

BACKGROUND

Utica issued a commercial liability policy to RJR for a policy period from October 3, 2007 to October 3, 2008 (the policy). The policy contains a blanket additional insured endorsement which states:

> **BLANKET ADDITIONAL INSURED**
> **(Contractors)**
>
> Item 7.d is added to the ADDITIONAL DEFINITIONS of COMMERCIAL LIABILITY COVERAGES of the Contractors Special Policy form AP-100.
>
> 7. Insureds also includes:
>
> d. Any person or organization whom you are required to name as an additional insured on this policy under a written contract or agreement.
>
> The written contract or agreement must be:
>
> (1) Currently in effect or becoming effective during the term of this policy; and
> (2) Executed prior to the "bodily injury", "property damage", "Personal injury", or "advertising injury"

(2/19/10 Wheaton Aff., Ex. 1)

The policy also provides that it does not provide coverage for bodily injuries sustained by an employee of any insured during the course of employment, or for injuries to contractors and/or employees of contractors hired or retained by or for any insured (the employee exclusion)(2/19/10 Wheaton Aff., Ex. 1).

On April 24, 2008, Utica received a letter from the St. John's' claims administrator, notifying Utica, for the first time, of Edwards alleged February 25, 2008 accident and injury.

Utica provided St. John's with a gratuitous defense in the underlying matter, but disclaimed coverage based upon, among other things, the employee exclusion on the policy.

Thereafter, Utica commenced this lawsuit seeking a declaratory judgment that it is not obligated to defend or indemnify St. John's in the underlying personal injury action because St. John's is not an additional insured under the policy. It seeks a declaration that it is not obligated to defend and indemnify RJR because the employee exclusion bars coverage for Edwards's injuries.

In opposition to Utica's motion for summary judgment, St. John's argues that Utica is obligated to defend and indemnify it in the underlying personal injury action because Utica failed to disclaim in a timely fashion and that employee exclusion does not apply to St. John's because Edwards was not an employee of St. John's or any of its contractors. In addition, St. John's contends that it was an additional insured under the policy pursuant to a certain April10,2008 Certificate of Insurance issued to RJR (Howansky Aff., Ex. E). In the alternative, St. John's states that there is a question of fact regarding its status as an additional insured under the policy.

St. John's also argues that Utica's disclaimer to RJR was untimely.

RJR has not appeared in this action.

DISCUSSION

On a motion for summary judgment, the moving party has the burden to come forward with sufficient proof, in admissible form, to enable the court to determine that it is entitled to judgment as a matter of law (CPLR 3212; *Zuckerman v City of New York,* 49 NY2d 557, 562 [1980]). Where the documentary evidence submitted in support of the motion "resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim," summary

judgment is warranted (*Fortis Fin. Servs. v Fimat Futures, USA,* 290 AD2d 383, 383 [1st Dept 2002][internal quotation marks and citation omitted]).

Courts are responsible for determining the rights of parties under an insurance contract based on the specific language in the policies (*Sanabria v American Home Assur. Co.,* 68 NY2d 866, 868 [1986]; *State of New York v Home Indem. Co.*, 66 NY2d 669, 671 [1985]). 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" (*United States Fid. & Guar. Co. v Annunziata,* 67 NY2d 229, 323 [1986] quoting *Government Empls. Ins. Co. v Kligler,* 42 NY2d 863,864 [1977]). The plain meaning of the policy's language may not be disregarded to find an ambiguity where none exists (*see Bassuk Bros., Inc. v Utica First Ins. Co.,* 1 AD3d 470, 471 [2d Dept 2003]).

A. St. John's

It is a basic tenet of insurance law that the party claiming to be insured, has the burden of proving that it is covered by the policy (*National Abatement Corp. v National Union Fire Ins. Co. Of Pittsburgh, PA,* 33 AD3d 570, 570 [1st Dept 2006]); *Moleon v Kreisler bork Florman Gen. Constr. Co., Inc.,* 304 AD2d 337, 339 [1st Dept 2003]). In this case, the subject policy contains a blanket additional insured endorsement which only confered additional insured status upon those entities that RJR was required to name as additional insureds pursuant to a written contract or written agreement executed before the alleged bodily injury (2/19/10 Wheaton Aff., Ex. 1, ¶ 7[d]).

Here, contrary to St. John's argument, the St. John's - RJR contract does not require RJR to name St. John's as an additional insured (Brocks Aff., Ex. E). Section 6.0 of that contract, the

only section of the contract that references insurance, provides in pertinent part:

> A. At all times during the term hereof, [RJR] shall maintain each of the following insurance coverages:
>
> | Type of Insurance | | Minimum Liability |
> |---|---|---|
> | Workers' Compensation | | State Statutory Limits |
> | General Liability | | |
> | Bodily Injury | | |
> | a. | Each Occurrence | $1,000,000 |
> | b. | Aggregate | $2,000,000 |
>
> * * * *
>
> B. Upon the University's request, Contractor shall submit certificates of insurance, in form and substance acceptable to the University, evidencing the existence of the insurance coverages required by this agreement.

(Brocks Aff., Ex. E)

Accordingly, because the RJR - St. John's contract does not require RJR to name St. John's as an additional insured, St. John's does not qualify as an additional insured under the blanket endorsement in the policy.

Moreover, St. John's reliance on the April 10, 2008 insurance certificate issued to RJR is without merit. The certificate, which merely identifies St. John's as a certificate holder, contains a disclaimer that states, "[t]his certificate is issued as a matter of information only and confers no rights upon the certificate holder. This certificate does not amend, extend or alter the coverage afforded by the policies below." In *ALIB, Inc. v Atlantic Cas. Ins. Co.* (52 AD3d 419 [1st Dept

2008]), the Court held that a certificate of insurance with a similarly worded disclaimer, did not confer additional insured status where the policy itself made no provision for such coverage (*see also Nicotra Group, LLC v American Safety Indem. Co.*, 48 AD3d 253, 254 [1st Dept 2008]; *Glynn v. United House of Prayer for All People*, 292 AD2d 319, 322 [1st Dept 2002]).

In addition, because St. John's is not an insured under the policy, Utica was not required to provide it with any disclaimer of coverage. In *National Union Fire Ins. Co. of Pittsburgh, Pa. v Utica First Insurance Co.* (6 AD3d 681, 682 [2d Dept 2004), the court discussed whether disclaimer was necessary where the aggrieved party was not an insured, stating:

> Disclaimer pursuant to section 3420(d) is unnecessary when a claim falls outside the scope of the policy's coverage portion. Under such circumstances the insurance policy does not contemplate coverage in the first instance, and requiring payment of a claim upon failure to timely disclaim would create coverage where it never existed. Where a clause limits the circumstances in which a party 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. In this case, since it is clear that CHI was not an additional insured under the circumstances of the underlying action, it was not necessary for Utica First to disclaim coverage on this basis.

[Internal quotations and citations omitted]; (*see also National Abatement Corp. v National Union Fire Ins. Co. of Pittsburgh, Pa.*, 33 AD3d 570, 571 [1st Dept 2006]).

Accordingly, because there is nothing in the RJR - St. John's agreement that requires RJR to name St. John's as an additional insured, and because St. John's is not named as an insured or an additional insured on the face of the policy, and because the certificate of insurance does not confer additional insured status on St. John's, this court finds that the documentary evidence establishes that St. John's is not an insured or additional insured under the policy and that Utica

has no obligation to defend or indemnify St. John's in the underlying personal injury action.

B. RJR

It is undisputed that Edwards sustained his injuries during the course of his employment for CIA, a subcontractor hired by RJR. Edwards's alleged injuries fall within the subject policy's "Employee Exclusion" which precludes coverage for injuries sustained by an employee of any insured, and by the employees of contractors hired by the insured. The policy at issue states, in pertinent part:

EXCLUSION OF INJURY TO EMPLOYEES

Contractors and Employees of Contractors

This insurance does not apply to:

(i) bodily injury to any employee of any insured, to any contractor hired or retained by or for any insured or to any employee of such contractor, if such claim for bodily injury arises out of and in the course of his/her employment or retention of such contractor by or for any insured, for which any insured may become liable in any capacity;

(2/19/10 Wheaton Aff., Ex. 1).

It is well settled in this Department that, in analogous situations, identically worded exclusionary provisions are unambiguous and apply to preclude coverage (*Nautilus Insurance Co. v Matthew David Events, Ltd.*, 69 AD3d 457, 460 [1st Dept 2010]; *Moleon v Kreisler Borg Florman*, 304 AD2d at 340; *Riviera v St. Regis Hotel Joint Venture*, 240 AD2d 332, 334 [1st Dept 1997]).

RJR has not appeared in this action and does not oppose Utica's request for a declaratory judgment. St. John's, on the other hand, opposes this branch of the motion on the ground that

Utica's disclaimer notice to RJR was untimely and therefore, the disclaimer was not effective (*see J.T. Magen v Hartford Fire Ins. Co.*, 64 AD3d 266 [1st Dept 2009]). However, St John's, as a non-insured under the policy, has no standing to challenge whether Utica's disclaimer letter to RJR was in compliance with Insurance Law § 3420(d).

In *Batchie v Travelers Ins. Co.* (130 AD2d 536, 537, 515 NYS2d 271, 272 [2d Dept 1987]), the defendant insurer denied coverage to its insured, but failed to provide a copy of the disclaimer to the injured party as required by the Insurance Law. There, the Court found that the insured had no standing to challenge the insurer's failure to comply with the statute as to the injured party, stating:

> The plaintiffs are not entitled to partial summary judgment against their insurer Travelers, with respect to the issue of indemnity on the ground that Travelers violated Insurance Law § 3420(d) by failing to give the injured parties prompt notice of its denial of coverage. The plaintiffs have no standing to assert this statutory violation, since they have not suffered an injury as the result thereof and they are not within the zone of interest which the statutory requirement of notice to the injured parties seeks to protect [internal citations omitted] .

(*see also Kahn v. Convention Overlook, Inc.*, 253 AD2d 737 [2d Dept 1998][citing *Batchie v Travelers Ins. Co.*,130 AD2d 536)

Here, as in *Batchie* and *Kahn*, St. John's, as a non-insured under the policy, has no standing to challenge the notice of disclaimer because it has not suffered an injury as a result of Utica's alleged noncompliance with Insurance Law § 3420(d).

CONCLUSION

In accordance herewith, it is hereby:

ORDERED that the motion of plaintiff Utica First Insurance Company for summary judgment on its cause of action seeking a declaration that is not obligated to defend or indemnify defendants RJR Maintenance Group, Inc. and St. John's University in the action of Edwards v. RJR Maintenance Group, Inc., Index No. 304959/08, Supreme Court Bronx County, is granted; and it is further

ADJUDGED and DECLARED that plaintiff herein is not obligated to provide a defense to, and provide coverage for, the defendants RJR Maintenance Group, Inc. and St. John's University in the said action pending in Bronx County; and it is further

ORDERED that the matter is severed and dismissed as to defendant, Franklin Edwards, who in the complaint is alleged to be a "nominal defendant" and against whom no affirmative relief is sought; and it is further

ORDERED that any relief not expressly addressed has nonetheless been considered and is hereby denied; and it is further

ORDERED that this constitutes the decision and order of the Court.

Dated: New York, New York
September 22, 2010

So Ordered:

HON. JUDITH J. GISCHE, J.S.C.