Short Form Order **b**

SUPREME COURT - STATE OF NEW YORK
CIVIL TERM - PART TT-34 - QUEENS COUNTY
25-10 COURT SQUARE, LONG ISLAND CITY, N.Y. 11101

P R E S E N T :

HON. ROBERT J. McDONALD,
Justice

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CHRIST THE KINGS REGIONAL HIGH SCHOOL, THE ROMAN CATHOLIC DIOCESE OF BROOKLYN,	:	Index. No.: 28188 / 2008
Plaintiff(s),	:	Motion: 04.29.10
- against -	:	Cal: 6
THE ZURICH INSURANCE COMPANY OF NORTH AMERICA,	:	Sequence No. 2
Defendant(s).	:	

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The following papers numbered 1 to 8 were read on this motion commenced by the plaintiffs for summary judgment:

	Papers Numbered
Notice of Motion, Affirmation, and Exhibits.....	1 - 4
Affirmation in Opposition and Exhibits.....	5 - 7
Reply Affirmation.....	8

Upon the foregoing papers it is ordered that this motion is determined as follows:

This is a motion for summary judgment pursuant to CPLR 3212 by the plaintiffs Christ the King Regional High School (hereafter "CTKRHS") and The Roman Catholic Diocese of Brooklyn (hereafter "Diocese") (collectively referred to as "CTKRHS") against defendant Maryland Casualty Company (hereafter "Maryland") i/s/h/a Zurich Insurance Company of North America (hereafter "Zurich") declaring that are entitled to "additional insured coverage" under the policy issued by Maryland in an action entitled *Shirley Levine v Christ The Kings Regional High School and The Roman Catholic Diocese of Brooklyn New York,* Index No. 26468/2006 .

The plaintiff in the instant action seeks indemnification under coverage under a general liability policy issued by Maryland.

Shirley Levine was injured when she fell in the rear sidewalk area near the parking lot of the

CTKRHS premises on April 29, 2006. That suit was settled for $20,000.00 by CTKRHS and the CTKRHS claim to have incurred $44,184.57 in legal fees.

Maryland acknowledges that a "Certificate of Liability Insurance" exists which was issued by Wildoner Insurance Agency, which provides that CTKRHS is an additional insured under Maryland's policy [Exhibit "A-3"].

CTKRHS's claim is based on a written "lease agreement between CTKRHS and the Maryland insured, All American Talent, for the rental of the CTKRHS school auditorium and 3 classrooms" for April 26, 2006 and April 30, 2006. According to defendant " the agreement between CTKRHS and All American Talent does not contain any specific requirement that CTKRHS or the Dioceses be named as an additional insured on All American Talent's insurance policy."

Maryland posits that there was no contractual requirement that CTKRHS be named as additional insured by All American Talent, and CTKRHS does not qualify as an additional insured under the Maryland policy which provides "additional insured coverage where required by written contract."

In the alternative Maryland posits that even if there were a written contract, coverage is limited with respect to liability arising out of the use of that part of the premises leased to All American Talent.

All American Talent and CTKRHS reached an agreement with regard to "rental of Christ the King Regional High School Auditorium" [Exhibit "A-1"] dated November 28, 2005. In that agreement it provides "CTKRHS cannot guarantee parking for this event when lot is full gates will be closed." and the last sentence states that "CTKRHS will provide a person to oversee all of the above."

Shirley Levine was injured while attending the All American Talent proceedings when she tripped and fell in or near the parking lot of CTKRHS premises at 68-02 Metropolitan Avenue, Middle Village, New York on April 26, 2006. CTKRHS settled the Levine action prior to trial for $20,000.00 and incurred legal fees previously referred to. Notice of claim was sent on September 26, 2006 to Maryland by the plaintiffs' third-party administrator GAB Robins North America, Inc. [Exhibit "F"]. Thereafter several pieces of correspondence was sent to Maryland who continued to deny coverage [Exhibit "G"].

Maryland posits that the agreement between CTKRHS and All American Talent fails to provide "any specific requirement that CRTKRH[S] or the Dioceses be named as an additional insured" and if such coverage does exist "coverage is only provided under the Maryland Policy with respect to liability arising out of the use of that part of the premises leased to All American Talent."

The rental agreement contains the following language: "It is understood that you will supply us with a Certificate of Insurance freeing Christ the King Regional High School of all liability. This

certificate must be received no later than 10 days prior to the event or we have the right to cancel this contract for non-compliance and Christ the King cannot be held responsible for losses."

Maryland issued the policy which has as part of its provisions language found in Section II -Who Is An Insured, Paragraph 2(f). The defendant relies on this paragraph which provides:

> f. Any person or organization to whom you are obliged by virtue of a written "insured contract" to provide insurance such as is afforded by this policy, but only with respect to liability arising out of the ownership, maintenance or use of that part of any premises leased to you .

The defendant submits that their policy limits liability arising out of the use of that part of the premises leased to the insured and that any additional insured endorsement must be specifically set forth granting coverage to the additional insured.

The plaintiff relies on Maryland's policy which states in Section II -Who Is An Insured, Paragraph 2(e) which provides:

> e. Any person or organization with whom you agree, because of a written contract, to provide insurance such as is afforded under this policy, but only with respect to liability arising out of your operations, "your work" or facilities owned or used by you.

The plaintiff submits that CTKRHS clearly qualifies as an Insured under this paragraph.

Pursuant to Exhibit "I" the "CERTIFICATE OF LIABILITY INSURANCE" CTKRHS was covered by the policy through All American Talent.

The parking lot is covered in asphalt and a sealant [p. 25 Michel 9/4/07] and cement [p. 13 Lambert 4/17/08] . It appears that Levine dropped her daughter and granddaughter off at the school and then went to park her car. As she was walking toward the school auditorium the heel of her shoe became caught in a sidewalk crack causing her to fall. However, she stated that she attended the competition [p. 14 Levine 6/28/07].

The law recognizes that the duty to defend exists up until the time when the insurer establishes as a matter of law that there is no possible factual basis upon which liability can rest (*Allstate Insurance Co v Zuk,* 78 NY2d 41,44). The insurance company is without an obligation to defend only if as a matter of law there is no factual or legal basis upon which the insurer may be obliged to defend (*Spoor-Lasher Co v Aetna Causality & Surety Co,* 39 NY2d 875). If the complaint contains "any facts or allegations that bring the claim even potentially within the embrace of the policy" the insurer must defend its insured (*Village of Brewster v Virginia Surety Company, Inc,* 70 AD3d 1239). Therefore, if the underlying complaint "suggests" a reasonable possibility of coverage the "exceedingly broad" obligation to defend requires the carrier to provide a defense (*BP Air Conditioning Corp v One Beacon Insurance Group,* 8 NY3d 708).

Following the settlement of the underlying action by CTKRHS and Levine it is Maryland's obligation to demonstrate that the loss sustained by Levine was not within the policy coverage (*Servidone Construction Co v Security Insurance Company of Hartford,* 64 NY2d 419). The term "arising out of" is understood to mean "originating from, incident to, or having connection with" the insured event and whether the Levine loss comes within the policy must yet be determined (*Torres Construction Co v Kemper Insurance Company,* 341 Fed Appx 684 [USCA, 2nd Cir, 2009]).

In the instant motion for summary judgment where the language of a contract is ambiguous, its construction presents a question of fact which may not be resolved by the Court in a motion for summary judgment (*Pepco Construction of New York, Inc v CNA Insurance Company,* 15 AD3d 464).

The insurance policy, a document of hundreds of pages, indicates on the first page of the section enumerated as Building and Personal Property Coverage Form, under "COVERED PROPERTY" provides that the building and "property if within 1000 feet of the" premises is covered as long as it is improved [p. 1]. While the language used in the contract of insurance may be considered opaque, it is sufficient to preclude the granting of summary judgment (*Pepco Construction of New York, Inc v CNA Insurance Company, supra*).

Where, as here, the language of a contract is ambiguous its construction presents a question of fact which must be resolved by the trier of fact and not of a motion for summary judgment (*Lachs v Fidelity Casualty Company of New York,* 306 NY 357, 364 *rehear denied* 306 NY 941; *Morey v Security Mutual Insurance Co,* 245 AD2d 852).

Accordingly, the plaintiff s' motion seeking summary judgment on the instant complaint is denied.

So Ordered.

Dated: May 3, 2010

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Robert J. McDonald, J.S.C.