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

PRESENT: MARCY S. FRIEDMAN PART 57

Index Number : 117250/2007
GERSHON COMPANY
VS.
NY MARINE & GENERAL INSURANCE
SEQUENCE NUMBER : 002
OTHER RELIEFS

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. 002
MOTION CAL. NO. _____

this motion to/for summary judgment

	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 and cross motion are

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION/ORDER

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: 1/4/11

MARCY S. FRIEDMAN

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: I.A.S. PART 57

----------X

GERSHON COMPANY, INC., 242 EAST 25TH STREET ASSOCIATES, LLC, and 242 EAST 25TH STREET CORPORATION,

Plaintiffs,

-against-

NEW YORK MARINE AND GENERAL INSURANCE CO.,

Defendant.

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Index No. 117250/07

DECISION, ORDER & DECLARATORY JUDGMENT

FRIEDMAN, J.:

Plaintiffs Gershon Company, Inc., 242 East 25th Street Associates, LLC and 242 East 25th Street Corporation (242/Gershon) move, pursuant to CPLR 3212, for summary judgment on their claims for defense and indemnity and breach of an insurance policy. Defendant New York Marine and General Insurance Co. (New York Marine) cross-moves, pursuant to CPLR 3211 (a) (1), for dismissal of the complaint on the ground that this action is barred by the policy exclusions, and for summary judgment, pursuant to CPLR 3212, declaring that New York Marine is not required to defend or indemnify 242/Gershon in the underlying property damage actions brought by the owner and manager of an adjacent building located at 240 East 25th Street in Manhattan.

BACKGROUND FACTS

New York Marine issued a commercial general liability insurance policy to 242/Gershon, No. MMO 34083LP204, for the period from July 12, 2004 to January 12, 2006, covering the premises located at 242 East 25th Street in Manhattan. The policy was specifically issued in

contemplation of the construction of a 54-unit, 13-story residential building at the site.

On or about August 31, 2005, an action for property damage was commenced by the owner of the adjacent building located at 240 East 25th Street, entitled 234-240 East 25th Street Assocs., L.P. v 242 East 25th Street Assocs., L.L.C., C. Gershon Company, Inc., et al., Index No. 603117/05, Supreme Court, NY County (initial property damage action). Also named as defendants were 242/Gershon's construction manager, J.E. Levine Builder, Inc. (Levine), and other contractors and subcontractors working on the construction project.

The complaint in this action contained the following allegations regarding the timing and nature of the damage sustained to the adjacent building:

> "13. At or around March of 2004, defendants contracted for the performance of excavation, construction and/or demolition work to be performed at defendant's premises, including but not limited to the excavation and removal of earth and rock as well as engineering, surveying, testing and inspection services.
>
> 14. In or after March of 2004, defendants, their agents, servants and/or employees were engaged in a construction project at defendant's premises involving the excavation and removal of earth and rock.
>
> 15. As a result of the excavation and removal of earth and rock, plaintiff's premises has suffered and continues to suffer extensive physical damage including movement, cracking, shifting; breach of foundations, floors, ceilings and exterior and interior walls; wracking [sic] of windows and doors; and breakage and other damage to diverse fixtures, movables and appurtenances within the property.
>
> * * *
>
> 20. In or around May of 2004, the excavation project was commenced and included the installation of underpinning beneath the foundation of plaintiff's premises.
>
> * * *
>
> 22. During the course of the subject excavation at defendant's premises, 242 failed to take the necessary steps and precautions mandated by law to protect plaintiff's premises from injury and damage.
>
> 23. As a result of the aforementioned, plaintiff's premises sustained severe damage which was directly and proximately caused by 242's failure to comply with Title 27 of the Building Code of the City of New York.

* * *

25. As a direct and proximate result of the aforementioned excavation, the damage to plaintiff's premises is continuing and will continue indefinitely into the future."

(Pls. Ex. A: Complaint, ¶¶ 13-15, 20, 22-23, 25.) The third cause of action against Levine alleged:

"38. Upon information and belief, in or around June 2004, LEVINE served as the general contractor and/or construction manager at defendant's premises pursuant to a contract with 242 and/or GERSHON.

* * *

41. In or around June of 2004, the excavation project at defendant's premises included the installation of underpinning beneath the foundation of plaintiff's premises."

(Id., ¶¶ 48, 41.)

242/Gershon tendered the defense of this action to New York Marine. By letter dated September 14, 2005, New York Marine declined coverage. The letter gave, as the reason for the declination, that the plaintiff alleged that it sustained damage in the period from March to June 2004, before the policy went into effect. (Pls. Ex. I.)

On or about July 8, 2005, a separate action had been commenced by the same adjacent building owner (hereinafter referred to as 240 East), together with the company that manages 240 East against their own carrier, entitled Orchard Management, Inc. and 234-240 East 25th Street Associates, L.P. v Insurance Company of Greater New York, Index No. 602476/05, Supreme Court, NY County (the Orchard action). 242 East 25th Street Corporation and 242 East 25th Street Associates, L.L.C. were added as third-party defendants to the Orchard action on or about March 31, 2006. A second third-party action was commenced against C. Gershon Company, Inc., Levine and others on April of 2007. A motion to consolidate the initial property damage

action and the Orchard action was granted by order of this court (Goodman, J.S.C.), dated July 10, 2007. (The initial property damage action and Orchard action are hereafter collectively referred to as the property damage action, Index No. 602476/05.)

An amended complaint was filed on August 3, 2007 in the property damage action, naming 242/Gershon as direct defendants. Also named as a direct defendant was Golden Vale Construction Company (Golden Vale), the company retained by Levine to perform the excavation and underpinning work. This amended complaint alleges that excavation work involving the removal of earth and rock occurred "[i]n or after March 2004," but that the underpinning work was performed "[i]n or around Fall of 2004." (Pls. Ex. E: Amended Complaint, ¶¶ 19, 34.) This pleading also states that "[o]n or before November 7, 2004, and continuing thereafter while the [INSCO] policy was in full force and effect, plaintiffs' [sic] suffered damages to its building as a result of construction in an adjacent lot." (Id., ¶ 25.) These changes regarding timing apparently stem from the April 24, 2007 deposition testimony of Lawrence Zombeck, who was deposed on behalf of 240 East. Zombeck testified that the first time he became aware of the damage to 240 East's building was in November 2004, when an inspection was performed by Mr. Choudhry Yusaf, P.E. on November 7, 2004 in connection with unrelated construction work being performed at 240 East by a waterproofing contractor. (Pls. Ex. Q: Zombeck 4/24/07 EBT, at 21, 68-73, 78-82.)

242/Gershon allege that, by certified letter dated May 31, 2007 addressed to Charles Lu at New York Marine, their counsel again tendered the defense of the initial property damage and Orchard actions to New York Marine (Pls. Ex. J), claiming that the date of loss is November 7, 2004. New York Marine denies receiving this letter.

When New York Marine did not respond to the alleged May 2007 tender, 242/Gershon's counsel again wrote to Charles Lu at New York Marine on October 2, 2007. In this letter, 242/Gershon's counsel acknowledges that the initial pleadings alleged "a date of loss as of March-May 2004," but advised that the "new date of loss" that plaintiffs alleged is November 7, 2004. (Downing Aff., Ex. A.)

By letter dated October 8, 2007, Charles Lu responded to the October 2nd letter. (Pls. Ex. K.) Mr. Lu noted that the underlying plaintiffs now alleged a date of loss of November 7, 2004, but advised that there was "no coverage" under the policy based on three provisions. First, he cited Endorsement No. 2, which states that the policy "applies solely with respect to the following designated Projects: . . . ground up construction of the thirteen story 54 units [sic] rental apartment building by a general contractor on behalf of the named Insured." He further stated that "the alleged property damage was caused by the excavation work, which is not 'ground up construction', as limited by the policy." Second, he stated that coverage "may also be excluded" by Endorsement No. 6, the "continuous damage exclusion." Third, citing Endorsement No. 20, he stated that "[t]here is also a potential coverage issue arising out of subcontracted work."

In response to this denial of coverage, 242/Gershon commenced the instant declaratory judgment action on December 31, 2007. The first cause of action seeks monetary damages for New York Marine's breach of contract. The second cause of action seeks a declaratory judgment that New York Marine is required to defend and indemnify 242/Gershon. The third cause of action also seeks declaratory relief on the ground that New York Marine waived its right to disclaim coverage pursuant to Insurance Law § 3240 and common law.

After this motion was filed, but before it was fully briefed and submitted to the court, Justice Goodman issued a decision on April 5, 2010 in the property damage action (Goodman Order) in which she ruled that Levine is required to defend and indemnify 242/Gershon from the claims in those actions. (Goodman Order, at 9.) Justice Goodman's ruling also states that both Levine and Golden Vale obtained insurance naming 242/Gershon as an additional insured. (Id., at 8-9.)

DISCUSSION

Mootness

As a threshold issue, New York Marine argues that the Goodman Order granting summary judgment in favor of 242/Gershon on their claim for contractual indemnification against Levine renders the claims against New York Marine in this action unnecessary and moot. New York Marine further contends that Justice Goodman held that the responsible parties for the damage to 240 East's building are Levine and Golden Vale, both of whom had insurance coverage for 242/Gershon.

No legal authority is cited to support this mootness argument, and Justice Goodman made no finding that Levine and Golden Vale were the sole responsible parties. (See Goodman Order, at 13 ["[T]he alleged damages to Plaintiffs' Building could be the result of negligence of various co-defendants in these cases, individually or collectively."].) Moreover, even assuming that 242/Gershon had other sources of indemnification and/or insurance coverage for the same liability, this would not moot their claim against their own carrier for insurance coverage, especially in absence of any determination of the damages sustained by 240 East's building or any showing that the other insurance coverage has adequate limits to fully protect 242/Gershon.

At the very least, it does not moot 242/Gershon's right to seek payment for the unreimbursed costs incurred in defending the property damage action for the years preceding Justice Goodman's ruling.

Validity of New York Marine's Initial Denial of Coverage

The first issue is whether New York Marine's initial denial of coverage, by the September 14, 2005 letter, is valid. 242/Gershon argue that the initial property damage complaint triggered coverage because it alleged that 240 East's building was damaged by the construction of the adjacent building at 242 East 25th Street, and because nothing in that pleading identified the length and duration of the project or limited the time of the damage. Rather, the August 2005 complaint alleged that "the damage to plaintiff's premises is continuing and will continue indefinitely into the future." (Pls. Ex. A: Complaint, ¶ 25.)

242/Gershon also contend that the construction was not actually commenced until sometime in late July, after the issuance of the New York Marine policy. They rely on the fact that their Construction Management Agreement with Levine is dated June 21, 2004 (Pls. Ex. G), and that this document was part of New York Marine's underwriting file. As proof that New York Marine knew that the construction project had yet to commence, they point to an exchange of emails between 242/Gershon's insurance broker and New York Marine's agent on July 7, 2004 that is also contained in New York Marine's underwriting file. In response to the agent's question: "Is the land already cleared or does demo work have to be done?", 242/Gershon's broker stated: "Land is clear. It was formerly a parking lot." (Pls. Ex. O: e-mails between Kevin Walsh of USI Northeast, Inc. and Kieran Xanthos of Mutual Marine Office, Inc.)

"[A]n insurer's duty to defend its insured arises whenever the allegations in a complaint

state a cause of action that gives rise to the reasonable possibility of recovery under the policy." (Fitzpatrick v American Honda Motor Co., 78 NY2d 61, 65 [1991].) However, "an insurance company's duty to defend is broader than its duty to indemnify. Indeed, the duty to defend 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.'" (Automobile Ins. Co. of Hartford v. Cook, 7 NY3d 131, 137 [2006], quoting Continental Cas. Co. v. Rapid-American Corp., 80 NY2d 640, 648 [1993].) "[I]f the insurer is to be relieved of a duty to defend, it must demonstrate that the allegations of the underlying complaint place that pleading solely and entirely within exclusions of the policy and that the allegations are subject to no other interpretation." (Baron v Home Ins. Co., 112 AD2d 391, 392 [2d Dept 1985]; see also County of Columbia v Continental Ins. Co., 83 NY2d 618, 627 [1994].)

However, an insurer may not "shield itself from the responsibility to defend" the lawsuit if it has "actual knowledge that the lawsuit involves a covered event." (Fitzpatrick v American Honda Motor Co., 78 NY2d at 66.) In Fitzpatrick, the Court of Appeals held that an insurer has a "duty to defend when the facts known to the insurer indicate coverage," but specifically stated that this does not imply a corollary duty to investigate. (78 NY2d at 67 n 2 [emphasis in original].)

The initial complaint in the property damage action, construed broadly, raised a reasonable possibility of coverage under the policy. The policy provides coverage of "property damage" if (1) the property damage is caused by an "occurrence" that takes place in the coverage territory and (2) the property damage occurs during the policy period. (Pls. Ex. H: Policy, § [I] [A] [1] [b] [1] and [2].) Occurrence is defined as "an accident, including continuous or repeated

exposure to substantially the same harmful conditions." (Id., § [V] [13].)

In Labate v Liberty Mut. Fire Ins. Co. (19 AD3d 652 [2d Dept 2005]), the defendant disclaimed coverage of a similar property damage lawsuit, arguing that the damage to the adjoining building occurred during the construction of its insured's new house, and thus pre-dated the effective date of the homeowner's policy in question by several years.[1] Citing the same definition of "occurrence" that is found in the New York Marine policy, the Second Department ruled:

> "[T]he language of the occurrence clause herein ascribes no temporal relevance to the causative event preceding the covered [property damage], but rather premises coverage exclusively upon the sustaining of specified [property damage] during the policy period". The complaint in the underlying action . . . contains allegations of property damage sustained, in part, during the policy period. It is immaterial whether the causative event happened during or before the policy period."

(19 AD3d at 653-54, citing National Cas. Ins. Co. v City of Mount Vernon, 128 AD2d 332, 336 [2d Dept 1987] [further citations omitted].)

Here, the initial property damage complaint alleges that the damage to 240 East's building was continuing as of the commencement of the action in August 2005, a date clearly within the July 12, 2004 through January 12, 2006 policy period. In addition, New York Marine does not dispute 242/Gershon's showing that it had information in its underwriting file, as of July 2004, that excavation had not yet commenced. (See supra at 7.) Under these circumstances, the court holds that New York Marine's September 14, 2005 disclaimer of coverage was invalid.

The court notes that, in response to this action, New York Marine continues to assert that coverage "is barred pursuant to the policy period." (Pls. Ex. N [Response to Pls.' Demand for a

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[1] See Brief for Defendant-Appellant, 2005 WL 4124460.

Bill of Particulars] at ¶ 2.) Defendant challenges plaintiff's motion for summary judgment as premature, arguing that 242/Gershon have never submitted an affidavit from any engineer or person with personal knowledge as to when the alleged damage to 240 East's building actually first occurred.

In support of their motion for summary judgment, however, 242/Gershon submit an affidavit from Jeffrey Gershon in which he states that construction was performed between July 2004 and November 2005; that Levine entered into a contract with Golden Vale to construct the foundation for the new building on or about June 24, 2004; and that ground would not have been broken at the site until after the insurance policy went into effect. (Gershon 10/28/09 Aff., ¶¶ 9,13, 14.) In addition, 242/Gershon rely on the following evidence produced in the property damage action: that the construction management agreement with Levine was dated June 21, 2004 (Pls. Ex. G); that Levine project manager Moshe Lubling testified that excavation commenced after this contract was signed (Pls. Ex. U: Lubling EBT, at 43); that he first received a complaint of cracks in 240 East's building in October 2004 (id., Lubling EBT, at 192-194); that the subcontractor that performed the excavation work, Golden Vale, was not scheduled to start rock removal until September 17, 2004 (Pls. Ex. W, at 2); and that Golden Vale's proposal called for the underpinning work to start on July 12, 2004. (Id., at 3.) Levine's project superintendent, Joseph Edwards, testified, based on his review of Golden Vale's records, that Golden Vale started excavation on July 6, 2004. (Pls. Ex. T: Edwards EBT, at 145-146.)

New York Marine fails to challenge any of this evidence, and makes no showing that discovery is needed to defend 242/Gershon's motion for summary judgment. (CPLR 3212 [f].) Thus, New York Marine is required to defend and indemnify 242/Gershon against 240 East's

property damage claims unless coverage is defeated by any of the three policy endorsements cited in New York Marine's October 8, 2007 disclaimer letter.

Policy Endorsements

New York Marine relies on Endorsement No. 2, which is entitled "PROJECT LIMITATION - DESIGNATED PROJECTS ONLY." The endorsement reads as follows:

"**LIST OF DESIGNATED PROJECTS**

Ground up construction of the thirteen story 54 unit rental apartment building by a general contractor on behalf of the Named Insured.

PROJECT LOCATION

242 East 25th Street, New York, NY

THIS POLICY DOES NOT APPLY TO ANY OTHER PROJECT PERFORMED BY OR ON BEHALF OF THE NAMED INSURED."

(Pls. Ex. H: Policy, Endorsement No. 2.)

New York Marine argues that the alleged property damage was caused by excavation and underpinning work, which is not "ground up construction," and that there is therefore no coverage under the policy.

"As with any contract, unambiguous provisions of an insurance contract must be given their plain and ordinary meaning . . . , and the interpretation of such provisions is a question of law for the court." (White v Continental Cas. Co., 9 NY3d 264, 267 [2007] [internal citations omitted].) "That one party to the agreement may attach a particular, subjective meaning to a term that differs from the term's plain meaning does not render the term ambiguous." (Slattery Skanska Inc. v American Home Assur. Co., 67 AD3d 1, 14 [1st Dept 2009], citing Moore v Kopel, 237 AD2d 124, 125 [1st Dept 1997].)

The term "ground up construction" is not a defined term in the policy. Nor does New York Marine contend or offer any evidence that it is a term of art in either the insurance or

construction industry. Construction of a new 13-story apartment building necessarily involves excavation, the underpinning of adjoining buildings, and the creation of a foundation. Yet, none of this work was expressly excluded from coverage under the policy. Endorsement No. 2, read as a whole, limits the covered project to the construction of the building at 242 East 25th Street. It does not exclude coverage for excavation incidental to ground up construction of the covered project. The court finds, therefore, that New York Marine has failed to meet its burden of establishing that the property damage claims asserted by 240 East are excluded from coverage pursuant to Endorsement No. 2.

To the extent that New York Marine claims that there is no coverage under Endorsement No. 6, this contention is also without merit. Endorsement No. 6 is entitled Continuous Damage Exclusion. It reads, in pertinent part:

> "[T]his policy shall not apply to any claim for 'property damage' arising out of 'your work' within the 'products-completed operations hazard' if:
> 1. The 'property damage' arises out of or is alleged to have arisen out of 'your work' at a 'single location' under a 'single contract', and
> 2. Such claim is at any time presented to a commercial general liability policy under which you are an insured that has an attachment date prior to the attachment date of this policy."

(Pls. Ex. H: Policy, Endorsement No. 6.) The term "products-completed operations hazard" is defined in Section V (16) of the policy as including "'property damage' occurring away from premises you own or rent and arising out of . . . 'your work' except . . . (2) [w]ork that has not yet been completed . . . . " This type of hazard does not apply in this case, as the undisputed facts show that the construction project was not completed at the time of the property damage to 240 East's building. (See Brake Landscaping & Lawncare, Inc. v Hawkeye-Security Ins. Co., ___ F3d ___, 2010 WL 4273244, *4 [8th Cir 2010] ["To be a products-completed operations hazard,

the damage must occur after the insured has completed its work."].)

In addition, Endorsement No. 3 states that: "In consideration of the premium charged, it is hereby agreed that this policy shall not apply to any . . . 'property damage' arising out of the 'products-completed operations hazard.'" As there is no coverage for this type of hazard, the further limitations on coverage for this hazard in Endorsement No. 6 are superfluous.

Finally, to the extent that New York Marine disclaims coverage based on Endorsement No. 20, the disclaimer is ineffective. Endorsement No. 20 is entitled Coverage Limitation - Subcontracted Work. This endorsement provides that the policy shall not apply to property damage "arising out of work performed on [242/Gershon's] behalf by a subcontractor," unless the subcontractor provides contractual indemnification or additional insured coverage to 242/Gershon.

In support of its motion for summary judgment, 242/Gershon makes a prima facie showing that the requirements and conditions of this endorsement have been met, because the construction project was managed by Levine, and paragraph 10.2 of the construction management agreement contains an indemnity provision running in favor of 242/Gershon. In addition, Justice Goodman has ruled that Levine, by the terms of its construction management agreement, is required to indemnify 242/Gershon, and that both Levine and Golden Vale obtained insurance naming 242/Gershon as an additional insured. (Goodman Order, at 8-9.) In opposition, New York Marine fails to make any showing that Levine and Golden Vale, the contractors whose work allegedly damaged 240 East's building, did not obtain the insurance

coverage required to satisfy this endorsement.[2]

CONCLUSION

The court holds that 242/Gershon have established, as a matter of law, their entitlement to a declaratory judgment that New York Marine's policy of insurance covers the claims asserted against 242/Gershon in the underlying property damage action.

ORDER AND DECLARATORY JUDGMENT

It is accordingly hereby

ORDERED that plaintiffs' motion for summary judgment is granted as to liability on plaintiff's first cause of action for breach of contract, and second cause of action for a declaratory judgment; and it is further

ORDERED that defendant's cross motion for dismissal of the complaint and summary judgment is granted only with respect to the third cause of action alleging waiver, which is dismissed as moot, and the cross motion is denied in all other respects; and it is further

ADJUDGED and DECLARED that defendant New York Marine and General Insurance Co. is obligated to defend and indemnify Gershon Company, Inc., 242 East 25th Street Associates, LLC and 242 East 25th Street Corporation against the property damage claims asserted against them in Orchard Management, Inc. and 234-240 East 25th Street Associates, L.P. v Insurance Company of Greater New York, et al., Index No. 602476/05 (Supreme Court, New York County); and it is further

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[2] In view of the court's holding that none of the endorsements on which New York Marine relies is a bar to coverage, the court need not reach the issue of whether New York Marine waived the right to disclaim based on the endorsements, as a result of its failure to cite the endorsements in its initial disclaimer letter of September 14, 2005.

ORDERED that plaintiffs' claim for monetary damages under the first cause of action is hereby severed and continued.

Dated: New York, New York
January 4, 2011

MARCY FRIEDMAN, J.S.C.