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

PRESENT: DEBRA A. JAMES PART 59
Justice

1515 BROADWAY FEE OWNER LLC and
SL GREEN REALTY CORP.,
Plaintiffs,

- v -

SENECA INSURANCE COMPANY, INC.,
Defendant.

Index No.: 603461/08
Motion Date: 05/21/10
Motion Seq. No.: 01
Motion Cal. No.: 141

The following papers, numbered 1 to 7 were read on this motion for summary judgment.

	PAPERS NUMBERED
Notice of Motion/Order to Show Cause -Affidavits -Exhibits	1, 2
Answering Affidavits - Exhibits	3, 4
Replying Affidavits - Exhibits	5 - 7

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers,

[The court notes that **all** the papers filed on this motion have an incorrect index number (603464/08) which corresponds to a different e-filed case. The court directs the parties to work with the Clerk to ensure that all papers filed in this action are recorded under the proper **Index Number: 603461/2008**.]

In this declaratory judgment action, defendant moves for partial summary judgment and plaintiffs cross-move for the same relief. For the following reasons, the motion is denied, and the cross motion is granted in part and denied in part.

Plaintiff 1515 Broadway Fee Owner LLC (1515 BFO), a foreign limited liability corporation licensed to do business in New

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

Check One: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

York, is the owner of a building (the building) located at 1515 Broadway in New York County. Plaintiff SL Green Realty Corp. (SLG), also a foreign corporation licensed to do business in New York, is the building's management company. Defendant Seneca Insurance Company, Inc. (Seneca) is New York State licensed insurance company.

On February 1, 2006, non-party SRJ Broadway (SRJ) assumed a lease (the SRJ lease) for the building's ground-floor commercial space, where it began to operate a restaurant called "Juniors." Pursuant to subsection 43.02 (a) of the SRJ lease, SRJ was obligated to obtain:

> A comprehensive policy of liability insurance naming [1515 BFO] and its designees as additional insureds [and] protecting [1515 BFO], its designees and [SRJ] against any liability whatsoever occasioned by [an] accident on or about the Premises or any appurtenances thereto.

Further, subsection 20.01 of the SRJ lease provides that:

> [SRJ] shall indemnify, defend and save Landlord harmless from and against any and all liability or expense arising from the use or occupation of the Premises by [SRJ], or anyone on the premises with [SRJ]'s permission, or from any breach of this lease.

On February 3, 2006, SRJ purchased a comprehensive general commercial property and liability insurance policy from Seneca (the Seneca policy) that named SLG as an additional insured. The policy endorsement numbered CG 20 11 01 96, and entitled "Additional Insured - Managers or Lessors of Premises," provides that SLG is an additional insured "with respect to liability

arising out of the ownership, maintenance or use of that part of the premises leased to [SRJ] and shown in the Schedule." The policy endorsement numbered CG 21 44 07 98, and entitled "Limitation of Coverage to Designated Premises or Project," provides that "this insurance applies only to 'bodily injury' ... and medical expenses arising out of . . . the ownership, maintenance or use of the premises shown in the Schedule and operations necessary or incidental to those premises." The "Schedule" mentioned in these endorsements as the "schedule of locations" or "designation of premises" refers to form CG DS 01 07 98, which lists "1515 Broadway" as "all premises you own rent or occupy," and classifies "restaurants" as the location at those premises to which the insurance applies.

On December 10, 2006, non-party SRJ employee Miguel Torres (Torres) suffered personal injuries, purportedly when he was descending a staircase from the building's main floor to a lower floor. On October 26, 2007, Torres commenced a personal injury/negligence action against 1515 BFO and SLG in the Supreme Court of the State of New York, Bronx County, under Index No. 302485/07 (the Torres action). 1515 BFO and SLG thereafter contacted Seneca to request that it provide them with a defense and indemnification in the Torres action. Seneca has presented copies of the letters, dated April 2 and June 26, 2008, respectively, by which it declined to provide said defense and

indemnification on the ground that Torres was injured in an area of the building that was not "part of the premises leased to [SRJ]."

Plaintiffs then commenced this action on November 25, 2008 by filing a complaint that sets forth causes of action for: 1) a declaration that Seneca is obligated to defend plaintiffs in the Torres action pursuant to the Seneca policy; 2) breach of contract (failure to defend pursuant to the Seneca policy); 3) breach of contract (failure to indemnify pursuant to the Seneca policy); and 4) a declaration that Seneca is obligated to indemnify plaintiffs for any liability in the Torres action pursuant to the Seneca policy. Seneca filed an answer on February 24, 2009. Seneca now moves for partial summary judgment to obtain a declaration that the Seneca policy does not obligate it to defend or indemnify plaintiffs in the Torres action, while plaintiffs cross-move for partial summary judgment to obtain a contrary declaration, as well as a declaration that Seneca's coverage is primary and a hearing to liquidate the amount of past defense costs (collectively, motion sequence number 001).

Seneca's motion has the effect of requesting summary judgment dismissing plaintiffs' first and fourth causes of action, while the bulk of plaintiffs' cross-motion has the effect of requesting summary judgment on those causes of action. For the following reasons, the court finds that Seneca is not

entitled to the declarations that it seeks, and that plaintiffs are entitled to one of them.

Plaintiffs' first cause of action requests a declaration that the terms of the Seneca policy obligate Seneca to provide plaintiffs with a defense in the Torres action. In its motion, Seneca refers to policy endorsement number CG 20 11 01 96, which provides that SLG is an additional insured "with respect to liability arising out of the ownership, maintenance or use of that part of the premises leased to [SRJ] and shown in the Schedule." Seneca argues that it "has no duty to defend or indemnify as the alleged incident did not occur on the insured's leased space." Seneca then refers to the SRJ lease, which specifies that the "leased space" is comprised of: "(i) rentable portions of the ground floor; and (ii) rentable portions of the cellar space as defined by the hatch marks on the plan made part of the lease by 'Exhibit A.' Seneca finally notes that there are no hatch marks over the stairwell in question on said plan.

Plaintiffs respond first, by noting that "an insurer's duty to defend is greater than its duty to indemnify." Plaintiffs then argue that Seneca is obligated to defend them in the Torres action because policy endorsement number CG 21 44 07 98 provides that "this insurance applies only to 'bodily injury' . . . and medical expenses arising out of . . . the ownership, maintenance or use of the premises shown in the Schedule and operations

necessary or incidental to those premises." Plaintiffs conclude that, pursuant to the Court of Appeals' holding in ZKZ Assocs. LP v CNA Ins. Co. (89 NY2d 990, 991 [1997]), Seneca owes them a duty to defend because the subject stairway "was necessarily used for access in and out of" the leased space. The court finds plaintiffs' argument persuasive.

With respect to the first cause of action, which seeks a declaration that Seneca is obligated to provide a defense, plaintiffs are also correct to contend that an insurer's duty to defend is greater than its duty to indemnify. See e.g. Automobile Ins. Co. of Hartford v Cook, 7 NY3d 131 (2006); BP Air Conditioning Corp. v One Beacon Ins. Group, 33 AD3d 116 (1st Dept 2006), mod 8 NY3d 708 (2007). As the Court of Appeals has recently reiterated:

> 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." "If, liberally construed, the claim is within the embrace of the policy, the insurer must come forward to defend its insured no matter how groundless, false or baseless the suit may be."
> The duty remains "even though facts outside the four corners of [the] pleadings indicate that the claim may be meritless or not covered." For this reason, when a policy represents that it will provide the insured with a defense, we have said that it actually constitutes "litigation insurance" in addition to liability coverage. Thus, an insurer may be required to defend under the contract even though it may not be required to pay once the litigation has run its course.
> When an insurer seeks to disclaim coverage on the further basis of an exclusion, ... the insurer will be required to "provide a defense unless it can

> 'demonstrate that the allegations of the complaint cast that pleading solely and entirely within the policy exclusions, and, further, that the allegations, in toto, are subject to no other interpretation.'" In addition, exclusions are subject to strict construction and must be read narrowly.

Automobile Ins. Co. of Hartford v Cook, 7 NY3d at 137 (internal citations omitted). Here, plaintiffs argue that "Torres' alleged accident arose out of [SRJ]'s 'use' of the leased space within the meaning of the Additional Insured Endorsement" because "Torres fell while engaged in activity necessarily incidental to [SRJ]'s use of the leased space." Seneca responds that "the Additional Insured Endorsement . . . limits coverage to 'liability arising out of the ownership, maintenance or use of the part of the premises leased to [SRJ],'" and the SRJ lease "did not intend to include the common area stairwell as part of [SRJ]'s leased space." However, the court finds that Seneca's attempt to import terms from the SRJ lease is unwarranted. As the Court of Appeals has made clear, a court's task in determining whether a duty to defend exists is to construe the terms of the applicable insurance policy. Here, both the "additional insured" and "designated premises" endorsements to the Seneca policy refer to "the Schedule" when discussing limitations of coverage. That "Schedule," set forth on form CG DS 01 07 98, designates the entire building as "premises," and merely refers to "restaurant" as a covered "location." In addition, the "designated premises" endorsements specifically

refers to "operations necessary or incidental to those premises." Given this broad, inclusive language and the law's injunction to "liberally construe" policy terms, the court finds that the Seneca policy clearly contemplates coverage of activity that was "necessary or incidental" to SRJ's use of the premises. Further, Seneca has clearly failed to meet its legal burden to identify a specific exclusion from coverage in the Seneca policy that would apply to the Torres action. Its argument is based on incorporating terms of the SRJ lease, not drawn from any exclusions set forth in the Seneca policy itself. Because SLG is listed as an "additional insured" on the Seneca policy, it is incumbent on Seneca to provide SLG with a defense in the Torres action. Therefore, the court finds that plaintiffs are entitled to a declaratory judgment to that effect, and that Seneca is not entitled to the declaration that it seeks.

Accordingly, the court shall grant plaintiffs' cross-motion for partial summary judgment on their first cause of action and deny that the portion of Seneca's motion that seeks contrary relief.

Plaintiffs' fourth cause of action requests a declaration that the terms of the Seneca policy obligate Seneca to indemnify them in the Torres action. Seneca's motion requests a declaration that it is not required to do so for the same reasons as were discussed above - i.e., because "the alleged incident did

not occur on the insured's leased space." Plaintiffs respond that the time is not ripe for such a declaration, because "there has been no adjudication of any liability" in the Torres action as yet, and that, therefore, "there is no basis for ... [the court] to issue a declaratory judgment as to coverage for whatever liability may ultimately be adjudicated." The court finds that plaintiffs are correct to contend that it would be premature to determine whether or not Seneca is obligated to indemnify them in the Torres action at this juncture. In Liberty Mutual Ins. Co. v Trystate Mechanical, Inc. (15 AD3d 236, 237 [1st Dept 2005]), the Appellate Division, First Department, held that the existence of issues of fact regarding the alleged negligence in the underlying action compelled the finding that "any declaration as to the ultimate duty to indemnify, as well as whether coverage will be primary, must await adjudication of the underlying lawsuit." Here, there has as yet been no determination of negligence in the Torres action. Therefore, at this juncture, it would be premature to grant either Seneca's request for a declaration that it owes no duty to indemnify, or summary judgment upon plaintiffs' fourth cause of action (which seeks a contrary declaration regarding that duty). Both parties are free, however, to renew their applications for declaratory relief once the issue of negligence in the Torres action has been determined. Accordingly, the court finds that Seneca's motion,

and plaintiffs' cross motion, should both be denied without prejudice as regards plaintiffs' fourth cause of action.

The balance of plaintiffs' cross-motion seeks: 1) a declaration that the coverage afforded by the Seneca policy is primary; and 2) a hearing to liquidate the amount of its past defense costs in the Torres action. The court denies the former request as premature, pursuant to the Appellate Division, First Department's holding in Liberty Mutual Ins. Co. v Trystate Mechanical, Inc. (15 AD3d 236, supra). With respect to their application for a hearing on past defense costs, plaintiffs identify CPLR 3212 (c) as the ground for their request; however, neither their moving papers nor their reply papers set forth any argument as to why that request should be granted. Therefore, the court deems that plaintiffs have abandoned it and the balance of plaintiffs' cross-motion shall be denied.

Accordingly, it is hereby

ORDERED that the motion, pursuant to CPLR 3212, of defendant Seneca Insurance Company, Inc., is, in all respects, DENIED; and it is further

ORDERED that the cross-motion, pursuant to CPLR 3212 , of plaintiffs 1515 Broadway Fee Owner LLC and SL Green Realty Corp. is granted solely to the extent that plaintiffs are awarded partial summary judgment on their first cause of action for a declaratory judgment; and it is further

ORDERED, ADJUDGED AND DECLARED that defendant Seneca Insurance Company, Inc. is obligated to defend said plaintiffs in the action entitled Miguel Torres v 1515 Broadway Fee Owner LLC and SL Green Realty Corp. that is currently pending in the Supreme Court, Bronx County, under Index No.: 302485/07; and it is further

ORDERED that the balance of plaintiffs' cross-motion is denied without prejudice; and it is further

ORDERED that the balance of this action shall continue; and it is further

ORDERED that the parties are directed to attend a status conference on March 29, 2011 in IAS Part 59, Room 103, 71 Thomas Street, New York, NY 10013 at 2:30 P.M.

This is the decision and order of the court.

Dated: FEB 25 2011

ENTER:

J.S.C.