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SUPREME COURT OF THE STATE OF NEW YORK
I.A.S. PART 9 SUFFOLK COUNTY

INDEX NO.: 40390-08

PRESENT:
HON. DANIEL MARTIN

Motion Date: 10/5/10, 11/30/10
Submitted: 12/14/10
Motion Sequence Nos.: 02 **-MotD**
03 **-MotD**

ESSEX INSURANCE COMPANY,

Plaintiff,

-against-

GEORGE E. VICKERS JR. ENTERPRISES, INC., *Et al.*

Defendants.

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The following named papers have been read on this motion:

Order to Show Cause/Notice of Motion	X
Cross-Motion	X
Answering Affidavits	X
Replying Affidavits	X

On January 1, 2004 defendant 99 Lynn Avenue, LLC ("99 Lynn"), as owner of 99 Lynn Avenue, Hampton Bays, New York, and defendant 105 Lynn Avenue, LLC ("105 Lynn"), as owner of 105 Lynn Avenue, Hampton Bays, New York, entered into separate contracts with defendant George E. Vickers Jr. Enterprises, Inc. ("Vickers"), a general contractor, for the construction of custom homes on each of the properties. Pursuant to the contracts, Vickers was required to purchase and maintain liability insurance for the duration of the construction projects in order to protect against any claims against 99 Lynn and 105 Lynn which may arise out of or result from the construction projects at the said properties.

Plaintiff, Essex Insurance Company ("Essex"), first issued to Vickers a commercial liability insurance policy bearing number 3CL1867 effective March 25, 2003 and expiring on March 25, 2004. This policy contained five numbered endorsements, the second of which was effective as of January 27, 2004 and added "99 Lynn Avenue, LLC and 105 Lynn Avenue, LLC" as additional insureds for an additional $200.00 premium. An invoice dated March 22, 2004 was sent to Vickers indicating that the total amount due was $208.00 and same was paid with a 99 Lynn Ave LLC check dated April 2, 2004. Two Endorsements numbered "4" were included in the policy, both issued on November 5, 2004 and effective from March 25, 2003. One stated, in pertinent part, "In consideration of no additional premium Provided By: Essex Insurance Co. 100.00% It is agreed that as of the effective date hereof, the policy is hereby amended in the following particulars: Additional Insured added per Endorsement #2 (99 Lynn Avenue, LLC & 105 Lynn Avenue, LLC) are amended to show status as: Project Owners". The other indicated that based upon an audit the total premium for the policy would increase by $2,546.00 for a total of $30,926.00. Thereafter, on June 1, 2005 endorsement numbered "5" was issued, was effective from January 27, 2004, and stated, in pertinent part, "In consideration of no additional premium Provided By: Essex Insurance Co. 100.00% It is agreed that as of the effective date hereof, the policy is hereby amended in the following particulars: Additional Insured added per Endorsement #2 (99 Lynn Avenue, LLC & 105 Lynn Avenue, LLC) are amended to show status as: Project Owners . . . (This Endorsement [*sic*] voids & replaces Endorsement [*sic*] #4 issued 11/05/04. Audit Endorsement [*sic*] #4 issued 11/05/04 remains unchanged.)"

A second or subsequent renewal policy bearing policy number 3CM7502 was automatically issued by Essex to Vickers on November 5, 2004 (the same date that the above referenced endorsement was issued for the first policy adding 99 Lynn and 105 Lynn as additional insureds for no consideration), with a total premium of $32,472.00 (including the audit premium) which included no endorsements adding additional insureds or referencing ownership of the property. This policy was effective March 25, 2004 through March 25, 2005. Finally, renewal policy number 3CR1604 with an effective date of March 25, 2005 through March 25, 2006 was automatically issued to Vickers by Essex. This policy contained two endorsements with effective dates of March 25, 2005, the first adding the Town of Southampton as an additional insured for an additional $250.00 premium and the second adding an animal exclusion and breach of contract endorsement to the policy. It contained a third endorsement, effective December 14, 2005 which added an additional insured, Robert A. Olstein for an additional $250.00 premium. Thereafter, on April 22, 2005, a Certificate of Insurance was issued for policy 3CR1604 which indicated that Essex was a company affording coverage and that "99 LLC 99 Lynn Avenue" was a certificate holder (a separate similar

Certificate of Insurance was issued on April 22, 2005 regarding "105 LLC 105 Lynn Avenue"). The premium for this third policy was $34,534.00.

Each of the policies contained the following provisions:

> 5. EXCLUSIONS
> Where there is no coverage under this policy, there is no duty to defend. This insurance does not apply to any claim, suit, cost or expense arising out of:
> . . .
> E. HIRING AND/OR SUPERVISION:
> Charges or allegations of negligent hiring, training, placement or supervision.
> . . .
> G. ERRORS, OMISSIONS, ACTS, PROFESSIONAL LIABILITY, MALPRACTICE:
> Any type error, omission, act, rendering of or failure to render any type professional service, unless specifically endorsed onto this policy.
> . . .
> K. INDEPENDENT CONTRACTORS/SUBCONTRACTORS (Applies if you are a Contractor or Builder):
> (1) "Bodily injury," "personal injury" or "property damage" caused by acts of independent Contractors/subcontractors contracted by you or on your behalf unless you obtain Certificates of Insurance from them providing evidence of at least like coverage and limits as provided by this policy;
> (2) nor does this insurance apply to "bodily injury," "personal injury" or "property damage" sustained by any contractor, independent contractor, or subcontractor, or any employee, leased worker, temporary or volunteer help of same.

Paul Michael Contracting Corp. ("Paul Michael") had contracted with Vickers to perform the masonry work at the 99 Lynn job site. On June 25, 2005 defendant Miguel Pinon ("Pinon"), while employed by defendant Paul Michael as a mason's helper, worked at 99 Lynn Avenue, Hampton Bays, New York. After working as a mason's helper that morning, Pinon ate his lunch and then proceeded to "cool off" by taking a swim in the bay located approximately 100 feet behind the area in which he was working at 99 Lynn Avenue. To his detriment, he dove into the water and broke his neck. As a result of the injuries he allegedly sustained during that swim, Pinon and his wife, defendant Patricia Pinon, brought a lawsuit ("the Pinon lawsuit") in Supreme Court, Suffolk County bearing index number 23798/08 against 99 Lynn, 105 Lynn, B&L Management Co. LLC, Alfred Caiola, Ben Caiola III and Rose Caiola, as Tenants in Common, Alfred Caiola, Paul Michael Contracting Corp., Vickers, Nicholas A. Vero, Architect, P.C., Cardo Site Development Inc., Land Use Ecological Services, Inc. for their alleged negligence, breach of contract and/or assumed duties, launch of a force of harm, and/or malpractice and loss of services.

Essex filed and served a complaint upon those defendants named in the Pinon lawsuit seeking a judgment declaring that it is not obligated under the Policy to defend the policyholder in the Pinon lawsuit or to pay any judgments which may be rendered against the policyholder in the Pinon lawsuit. Defendants 99 Lynn, 105 Lynn, B&L Management Co. LLC, Alfred Caiola, Ben Caiola III and Rose Caiola, as tenants in common, and Alfred

Caiola ("the moving defendants") interposed an answer with counterclaims seeking reformation of the subject insurance policy so as to reflect the intent of the parties therein, naming 99 Lynn and 105 Lynn as additional named insureds, and seeking a judgment declaring that the moving defendants are entitled to defense and indemnification coverage in connection with the Pinon lawsuit. Essex now seeks an order granting summary judgment pursuant to CPLR §3212 on the relief sought in its complaint. The moving defendants cross move for an order granting summary judgment pursuant to CPLR §3212 seeking a dismissal of Essex's motion and grant of the relief sought in their counterclaim.

It is well settled that where there is any reasonable possibility of coverage, the duty of the insurance carrier to defend exists, as it is a very broad duty; and, to negate this coverage by virtue of an exclusion, an insurer must establish that the exclusion is stated in specific and clear language, is subject to no other reasonable interpretation, and that there is no possible factual or legal basis upon which the carrier may eventually be obligated to indemnify the insured (*see* ***BP Air Conditioning Corp. v One Beacon Ins. Group***, 8 NY3d 708, 840 NYS2d 302 [2007]; ***DMP Cont. Corp. v Essex Ins. Co.***, 76 AD3d 844, 907 NYS2d 487 [1st Dept 2010]; ***City of New York v Philadelphia Indem. Ins. Co.,*** 54 AD 3d 709, 864 NYS2d 454 [2d Dept 2008]; ***Almar, Inc. v Utica Mut. Ins. Co.***, 280 AD2d 624, 721 NYS2d 96 [2d Dept 2001]; ***Conrad R. Sump & Co. v Home Ins. Co.***, 267 AD2d 415, 701 NYS2d 103 [2d Dept 1999]). Similarly, an ambiguity in an exclusionary clause must be interpreted in favor of the insured and construed most strongly against the insurer (*see* ***State of New York v Home Indem. Co.***, 66 NY2d 669, 495 NYS2d969 [1985]; ***DMP Cont. Corp. v Essex Ins. Co.***, *supra*; ***Antoine v City of New York***, 56 AD3d 583, 868 NYS2d 688 [2d Dept 2008]; ***City of New York v Evanston Ins. Co.***, 39 AD3d 153, 830 NYS2d 299 [2d Dept 2007]), and, for the insurer to prevail, it must show that not only is its interpretation reasonable but that it is the only fair interpretation (*see* ***Antoine v City of New York***, *supra*; ***City of New York v Evanston Ins. Co.***, *supra*).

Here, the plaintiff argues that the contract clearly excludes coverage to the moving defendants since the plaintiff in the underlying lawsuit (Pinon) was an employee of the defendant subcontractor Paul Michael which situation, it alleges, falls under the "exclusionary" language of section 5 K (2) of the insurance policy. Defendants argue that the language excluding coverage in this situation is ambiguous since one could reasonably argue that Pinon was injured while acting outside the scope of his employment and, thus, was not an employee of the subcontractor at the time of his injury. In support of their argument, defendants provide copies of a Notice of Decision of State of New York Workers' Compensation Board filed November 8, 2005 and Memorandum of Board Panel Decision of the Legal Appeals Unit of the New York Workers' Compensation Board ("the Board") filed April 27, 2006 which found that Pinon was injured while on a lunch break, was not acting in the course of his duties as a laborer at the time he was injured, and denied his claim for workers' compensation benefits. While it is true that the courts have upheld such Workers' Compensation Board findings that lunchtime injuries may be deemed to occur outside the scope of employment except under limited circumstances (*see* ***Smith v City of Rochester***, 255 AD2d 863, 681 NYS2d 371 [3d Dept 1998]; ***Bennerson v Checker Garage Serv. Corp.***, 54 AD2d 1042, 388 NYS2d 374 [3d Dept 1976]), such determinations are not binding in a liability suit upon defendants who were not parties to the compensation proceedings (***Liss v Trans Auto Sys., Inc.***, 68 NY2d 15, 505 NYS2d 831 [1986]). In this case, it is clear that the findings of the Board will not necessarily be binding upon the defendants in the underlying Pinon lawsuit, however, given the determinations of the Board, this Court can reasonably conclude that there is an ambiguity as to the language in the insurance contract which is the subject of the within action. There is no definition of the word "employee" within the insurance policy and there exists another possible interpretation of the clause which excludes the "employees" of the subcontractor, *i.e.* that a worker acting outside the scope of his employment is not an "employee" within the meaning of the exclusion. Therefore, plaintiff has failed to demonstrate that it has no duty to defend and indemnify its insured as a matter of law.

Turning next to the issue of the parties covered by the policy issued to Vickers, the court notes that there is no question that defendant Vickers is a named and covered defendant for which Essex must provide a defense

(and indemnification if it is ultimately found that Pinon was not an employee pursuant to the terms of the contract and that Vickers was negligent in some manner that was not excluded by the policy). As to defendants B&L Management Company, LLC, Alfred Caiola, Ben Caiola III and Rose Caiola, as tenants in common and Alfred Caiola, defendants have offered no explanation or evidence as to Essex's obligation to defend and/or indemnify them. They are not, nor have they ever been named insureds on the policies issued by Essex, nor has it been alleged that any one of them is a subcontractor which obtained a certificate of insurance as was required by the terms of the policy. Accordingly, Essex has no duty to defend or indemnify defendants B&L Management Company, LLC, Alfred Caiola, Ben Caiola III and Rose Caiola, as tenants in common, and Alfred Caiola.

As to defendants 99 Lynn and 105 Lynn, the resolution of the issues is not as simple. There is no question that Essex named them as additional insureds on the policy numbered 3CL1867 effective March 25, 2003 and expiring on March 25, 2004. On January 27, 2004 Essex issued an endorsement adding them to the policy as additional insureds and charging an additional $200.00 for doing so. 99 Lynn did not receive an invoice for this additional endorsement until after March 2004, at or about the time the insurance policy was renewed for the March 25, 2004 through March 25, 2005 under policy number 3CM7502. After the renewals of the policy in March 2004, and on March 25, 2005 through March 25, 2006 under policy number 3 CR1604, on June 1, 2005 an endorsement was issued indicating that the "first" policy would include endorsements naming 99 Lynn and 105 Lynn as additional insureds with no additional premium. Certificates of Insurance for the March 25, 2005 thru March 25, 2006 policy numbered 3CR1604 naming 99 Lynn and 105 Lynn as certificate holders were issued on April 22, 2005. Essex now claims that it did not insure 99 Lynn and 105 Lynn under renewal policies numbered 3CM7502 and 3CR1604, the second and third renewals, since neither 99 Lynn nor 105 Lynn paid any additional premiums to be added as additional insureds other than on the 2003-2004 policy numbered 3CL1867. (No reference is made to the fact that the premium paid by Vickers increased annually by approximately $2,000.00.)

A party seeking reformation of an insurance contract is required to show its entitlement to such relief by clear and convincing evidence (***Koskey v Pacific Indem. Co.***, 270 AD2d 461, 704 NYS2d 656 [2d Dept 2000]) and that there was a mutual mistake such that the written instrument fails to embody the parties' true intentions or that there was a unilateral mistake coupled with fraud (*see* ***National Abatement Corp. v National Union Fire Ins. Co.***, 33 AD3d 570, 824 NYS2d 230 [1st Dept 2006]; ***Leavitt-Berner Tanning Corp. v American Home Assur. Company***, 129 AD2d 199, 516 NYS2d 992 [3d Dept 1987]). Given that Essex issued endorsements indicating that 99 Lynn and 105 Lynn would be added as additional insureds with no additional premium on June 1, 2005, that the annual premium increased each year, and that Certificates of Insurance were issued on April 22, 2005 naming 99 Lynn and 105 Lynn as certificate holders under renewal policy numbered 3CR1604 (the third policy in effect March 25, 2005 thru March 25, 2006), there is no question that they had a good faith belief that Essex had issued a policy insuring 99 Lynn and 105 Lynn which existed on the date of the June 25, 2005 Pinon incident. The only conclusion which can be reached from the documentation submitted is that Essex mistakenly omitted them from the subsequent policies. 99 Lynn and 105 Lynn have shown by clear and convincing evidence that they are entitled to coverage under the policy issued to Vickers by Essex.

Accordingly, Essex's motion for an order granting summary judgment and declaring that it is not obligated to defend or indemnify defendants George E. Vickers, Jr., Enterprises, Inc. or any other defendant with regard to the underlying Pinon action and declaring that it is not obligated to satisfy any judgment which may be obtained by Miguel or Patricia Pinon in their lawsuit is granted as to defendants B&L Management Company, LLC, Alfred Caiola, Ben Caiola III and Rose Caiola as tenants in common, Alfred Caiola; and, it is denied as to the remaining defendants. The motion of 99 Lynn Avenue, LLC, 105 Lynn Avenue, LLC, B&L Management Company LLC, Alfred Caiola, Ben Caiola III and Rose Caiola, as tenants in common and Alfred Caiola for an order granting summary judgment reforming the subject insurance policy so as to name 99 Lynn defendants as additional insureds is granted to the extent that 99 Lynn Avenue, LLC and 105 Lynn, Avenue, LLC shall be named as additional

insureds under the Essex policy issued for the period March 25, 2005 through March 25, 2006 (policy numbered 3CR1604), and Essex shall be obligated to defend 99 Lynn Avenue, LLC and 105 Lynn Avenue, LLC in the underlying Pinon action and to reimburse them for any defense costs already incurred on their behalf in the said action.

So Ordered.

Dated: April 26, 2011
Riverhead, NY

HON. DANIEL MARTIN, A.J.S.C.