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

PRESENT: HON. EILEEN A. RAKOWER PART 15

Index Number : 102721/2010

LAWRENCE RUBEN COMPANY, INC.

VS

ADMIRAL INDEMNITY COMPANY

Sequence Number : 001

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits	2
Replying Affidavits	3
	4

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

DECIDED IN ACCORDANCE WITH ACCOMPANYING DECISION / ORDER

FILED

JUN 28 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 6/24/11

HON. EILEEN A. RAKOWER

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

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 15

----------X

LAWRENCE RUBEN COMPANY, INC. DUIT REALTY CORP. and TOWER PLAZA ASSOCIATES, L.P.,

Plaintiffs,

- against -

ADMIRAL INDEMNITY COMPANY,

Defendants.

----------X

Index No. 102721/10

DECISION and ORDER

Mot. Seq. 001

HON. EILEEN A. RAKOWER

Tower Plaza Associates ("Tower") is the owner of the building located at 885 2nd Avenue in New York County ("the building"). Duit Realty Corp. ("Duit") was the owner of the building prior to Tower. Lawrence Ruben Company ("Lawrence Ruben") is the property manager of the building. Tower, LRC, and Duit (collectively "Plaintiffs") bring this action for an order directing Admiral Indemnity Company ("Admiral") to provide a defense to Plaintiffs in the action titled *Bolivar Amill v. Lawrence Ruben Company, Inc., Duit Realty Corp., Blair Perrone Steakhouse Corp., and Tower Plaza Associates, L.P., and Four Little Ones, LLC*, Index No. 107464/07, filed in Supreme Court, New York County, on May 29, 2007 (the "*Amill* action"). Presently before the court are opposing motions for summary judgment.

Bolivar Amill was a dishwasher who worked in the Blair Perrone Steakhouse ("the restaurant") located in the subject building. The restaurant was owned by Four Little Ones, LLC ("Four Little Ones"), and operated by the Blair Perrone Steakhouse Corp. ("Blair Perrone"). Four Little Ones leased the restaurant space from Tower. In the *Amill* action, Amill alleged that, on September 20, 2006, while working at the restaurant, he was caused to fall off a ladder while retrieving a box of glasses from a mechanical room located above the kitchen of the restaurant. The restaurant space was leased by Tower to Four Little Ones. Amill testified at his deposition that there were two ladders leading to the mechanical room: a stationary

ladder, and an extension ladder alongside it. He ascended the ladders and went into the mechanical room without incident, where he retrieved the box. He then took a single step on the extension ladder with his left foot to go back down into the kitchen when the ladder slipped, causing him to fall to the kitchen floor.

Pursuant to the lease agreement between Tower and Four Little Ones, the latter was required to obtain a valid insurance policy naming Plaintiffs as additional insureds on a primary basis with a combined single limit of $5,000,000. Pursuant to its obligations Four Little Ones obtained an insurance policy from Admiral, naming Tower and Lawrence Ruben as additional insureds. The endorsement provides that Plaintiffs are additional insureds "only with respect to liability arising out of the ownership, maintenance or use of that part of the premises leased to you and shown in the Schedule." Plaintiffs argue that coverage under the Admiral policy as additional insureds is triggered because Amill's accident arose out of "the ownership, maintenance or use of that part of the premises leased" by Four Little Ones.

Plaintiffs further argue that they are entitled to coverage under the Admiral Policy because their own policy under Travelers Insurance ("Travelers") contains an "Other Insurance" clause which provides that the Travelers policy is excess over "[a]ny other primary insurance available to you covering liability for damages arising out of the premises or operations for which you have been added as an additional insured by attachment of an endorsement."

In opposition to Plaintiffs' motion and in support of its cross-motion, Admiral first argues that it was under no duty to cover Plaintiffs because any potential liability did not arise out of the premises leased to Four Little Ones, but rather, arose out of the use of the mechanical room, which was not a portion of the demised premises.

Further, Admiral argues that, even assuming *arguendo* that coverage attached, Admiral and Travelers would be required to contribute on a 50-50 basis, since both plans contain "other insurance" clause rendering their respective polices in excess over any other policy in effect.

With respect to the issue of whether Amill's accident triggered coverage of Plaintiffs as additional insureds under the Admiral policy, "[a]n insurer's duty to defend arises whenever the allegations within the four corners of the underlying complaint potentially give rise to a covered claim. . . . This standard applies equally to additional insureds and named insureds" (*Worth Constr. Co. v. Admiral Ins. Co.*, 2008 NY Slip Op 3992, *3 [2008]) (citations and internal quotations omitted). "The insured's right to representation and the insurer's correlative duty to defend suits, however groundless, false or fraudulent, are in a sense 'litigation insurance' expressly provided by the insurance contract"(*Hotel des Artistes, Inc. v. General Accident Ins. Co. of America*, 9 A.D.3d 181, 187 [1st Dept. 2004]) (citations omitted). An insurer may avoid the duty to defend under its policy "only if it could be concluded as a matter of law that there is no possible factual or legal basis on which the insurer might eventually be held to be obligated to indemnify the insured under any provision of the insurance policy" (*id.*) (citations omitted). Coverage of Plaintiffs under the Admiral policy was triggered because the *Amill* complaint "potentially [gave] rise" to a claim by Plaintiffs as additional insureds.

With respect to whether Admiral or Travelers (or both) had a duty to provide Plaintiffs coverage in the *Amill* action, the relevant portion of the Travelers policy is as follows:

> This insurance is excess over:
>
> (2) Any other primary insurance available to you covering liability for damages arising of the premises or operations for which you have been added as an additional insured by attachment of an endorsement.

The Admiral policy provides, in pertinent part:

> This insurance is excess over:
>
> (2) Any other insurance available to you covering liability for damages arising out of the premises or operations for which you have been added as an additional insured by attachment of an endorsement.

(3) Any other valid and collectible insurance, including its defense cost provisions. This insurance shall be specifically excess of any other policy by which another insurer has a duty to defend a 'suit' for which this insurance may also apply.

Plaintiffs cite to *Harleysville Insurance Company v. Travelers Insurance Company*, 2007 NY Slip Op 2378 [4th Dept. 2007]) in support of the proposition that Admiral was obligated to provide primary coverage to Plaintiffs in the *Amill* action. In *Harleysville*, Savarino Construction Services, Inc. ("Savorino") entered into a subcontract with W.C. Roberson Plumbing & Construction Corp. ("Roberson"). Pursuant to their contract, Savarino was added as an additional insured to Roberson's commercial general liability policy, issued by Harleysville. Savorino was named insured on a commercial general liability policy issued by Travelers. When an employee of Roberson commenced a personal injury action against Savorino, Harleysville provided a defense, and Savorino ultimately settled with the Roberson employee. Harleysville subsequently commenced an action against Travelers, arguing that the latter was obligated to share equally in the defense costs and settlement, relying on the fact that both policies contained provisions stating that they were excess of any other insurance policy in which the named insured is listed as an additional insured.

The Appellate Division affirmed the trial court's ruling that Travelers was only obligated to provide coverage in excess of Harleysville. The Court reasoned that the "other insurance" clauses in each policy did not "cancel each other out" because only the "other insurance" clause in the Travelers policy was implicated (*id.* at *2) ("Savarino is added as an additional insured on [Harleysville's] primary policy, and thus the excess clause is triggered in the Travelers policy but not in ["Harleysville's] policy.").

This matter differs from *Harleysville*, however, in that the court is not merely faced with two identical clauses providing that each policy is excess over any other insurance in which the named insured is an additional insured. As noted above, the Admiral policy provides that it is excess to "[a]ny other valid and collectible insurance, including its defense cost provisions," and "shall be specifically excess of any other policy by which another insurer has a duty to defend a 'suit' for which this insurance may also apply." Accordingly, while Traveler's excess policy is triggered by Plaintiffs' status as additional insureds on the Admiral policy, the Admiral policy's excess clause is also triggered by the

Traveler's policy, which conferred upon Traveler's a duty to defend the *Amill* action.

As a result, since both policies effectively cancel one another out, it is well settled that "both coverages must be treated as primary and each company is obligated to share in the cost of the settlement and the expenses" (*Federal Ins. Co. v. Atlantic National Ins. Co.*, 25 N.Y.2d 71, 75-76 [1969]).

Settle order on notice.

This constitutes the decision and order of the court. All other relief requested is denied.

Dated: June 24, 2011

EILEEN A. RAKOWER, J.S.C.