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SCAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. F. DANA WINSLOW,

Justice

TRIAL/IAS, PART 4
NASSAU COUNTY

TOCCI BUILDING CORP. OF NEW JERSEY, INC., ASN ROOSEVELT CENTER LLC, ARCHSTONE-SMITH OPERATING TRUST, ARCHSTONE-SMITH COMMUNITIES LLC and VIRGINIA SURETY COMPANY, INC.,

Plaintiffs,

-against-

DELOS INSURANCE COMPANY, DA VINCI CONSTRUCTION OF NASSAU, INC., and THE OHIO CASUALTY INSURANCE COMPANY,

Defendants.

MOTION SEQ. NO.: 007, 008
MOTION DATE: 2/16/11

INDEX NO.: 14813/08

The following papers having been read on the motion (numbered 1-4):

Notice of Motion.....1
Notice of Cross Motion.....2
Reply Affirmation.....3
Memorandum of Law.....4

Motion pursuant to CPLR 3212 by the plaintiffs Tocci Building Corp. of New Jersey, Inc., ASN Roosevelt Center, LLC, Archstone-Smith Operating Trust, Archstone-Smith Communities, LLC, Virginia Surety Company, Inc., for summary judgment, *inter alia*, declaring that they are additional insureds under a certain commercial general liability policy issued by the defendant Ohio Casualty Insurance Company.

Cross motion pursuant to CPLR 3212 by the defendant Ohio Casualty Insurance Company for summary judgment dismissing the complaint and all cross claims insofar as interposed against it.

In April of 2004, the plaintiff Tocci Building Corp. of New Jersey, Inc. ["Tocci"], entered into written "Construction Manager and Trade Contractor" agreement with Apro Construction Group Corp, Inc. ["Apro"](Fishman Aff., Exh., "J"). Pursuant to the agreement, Tocci was to act as a project construction manager and/or general contractor,

and Apro was to install vinyl siding and fiber reinforced cement siding work at premises known as "The Roosevelt" located in Westbury, New York and owned by Archstone-Smith Communities, LLC ["Archstone"](Agreement, § Article 1.1, at 1a).

Among other things, the Apro-Tocci contract requires Apro to purchase general liability coverage in stated amounts and to name both Archstone and Tocci as additional insureds thereunder (Agreement, ¶ 14.1.1-14.1.3; 14.2.1, at 16-17 *see also,* Rider, ¶ 24, at 3; Tocci Cmplt.,¶¶ 16-17). In conformity with this requirement, Apro obtained from defendant Ohio Casualty Insurance Company ["Ohio"] two separate polices: (1) a general liability policy (No. "BLO" 05 53125596); and (2) an excess/umbrella liability policy (No. "BXO" 05 53125596), which were to be effective, respectively, for the periods between August 8, 2004 and August 8, 2005, and August 27, 2004 and August 27, 2005 (Fishman Aff., Exhs "H", "I").

In April of 2005, Marco Yanza – a laborer who alleges he was employed by Apro Construction – allegedly sustained personal injuries when he slipped on sawdust and other debris while affixing a piece of exterior molding/siding to a second floor unit with a nail gun (Yanza Dep., 28-29; 34-35; Yanza Cmplt., ¶¶ 29-31; Tocci Cmplt.,¶¶ 16-17). In May of 2006, Yanza commenced an action in the Supreme Court, Queens County as against, *inter alia*, Archstone and Tocci setting forth claims grounded upon alleged violations of Labor Law §§ 200, 240[1] and 241[6](Fishman Aff., Exh., "A")(Yanza Dep., 7-9).

Among other things, the *Yanza* complaint alleges: (1) that Yanza was a laborer employed by Apro (actually denominated in the complaint as "Maximillard, Inc., d/b/a Apro Construction Group"; (2) that Apro was at the site performing work pursuant to its contract with Tocci; and (3) that in the course of his employment with Apro, Yanza sustained personal injuries (*e.g.*, Yanza Cmplt., ¶¶ 5-9; 10, 28-30, 35).

In August of 2007 – and on behalf of the various named plaintiffs herein, the third-party administrator for Tocci's insurance carrier (co-plaintiff Virginia Surety Company, Inc.), tendered the defense of the *Yanza* action to Ohio (Spira Aff., Exh., "J"). After receiving no written response to the August 7 letter, the author of the tender letter – claims adjuster Marisol Molina – sent a second, follow-up letter to Ohio dated September, 2006. In her September 2007 letter, Molina inquired whether Ohio would be providing coverage under the subject policies (Spira Aff., Exhs., "J", "K"; Fishman Reply Aff., ¶¶ 24-26).

By letter dated January 5, 2007, some five months after the August 7 tender, Ohio's claims adjuster, Patricia Rakowski responded in writing and informed Molina that Ohio's coverage attorney "has been reviewing this matter" since several issues were still outstanding.

Among the outstanding issues identified by Rakowski was the one-year delay which ensued between the April, 2005 accident and Molina's August, 2006 tender. Moreover, Rakowski claimed that Ohio had, to date, been unable to confirm that Yanza's accident actually resulted from "Apro's operations performed for Tocci" and/or that Yanza was an "Apro employee"(Spira Exh., "L" [Rakowski Aff., ¶¶ 3-5]). Further, and according to Rakowski, the named insured listed in Ohio's policy was "Apro Construction Group, Inc" – not "Maximillard, Inc.," the entity referenced in the plaintiff's complaint (Letter at 2). Significantly, corporate records filed with the Virginia Commission of Corporations, reveal that a corporate entity known as "JKN, Inc., d/b/a Apro Construction Group, Inc." was created in June of 2004, but terminated by the Commission in October of 2005 for non-payment of corporate registration fees due and owing (Spira Aff., Exh., "M"). It is unclear why the *Yanza* complaint refers to Apro through reference to the corporate name, "Maximillard, Inc."

By letters dated January 15, 2007 and April 19, 2007, Rakowsky wrote, respectively to Apro's owner, Patrick Choi, and then later to Molina, requesting further information relating to the claim. Rakowski asserts that she "never received a response of any kind to these letters" – although she apparently spoke to Molina telephonically on at least two occasions after she sent her January, 2007 letter (Rakowski Aff., ¶¶ 4-5).

In November of 2007, the Supreme Court, Queens County (Kelly, J), resolved certain pending motions in the underlying *Yanza* action by, dismissing Yanza's Labor Law § 240[1] claims and certain – but not all – claims advanced pursuant to Labor Law § 241[6]. The Court, however, denied Tocci's motion to dismiss the Labor Law § 200 claims and also denied Yanza's cross motion for summary judgment (Spira Aff., Exh., "P").

Shortly thereafter, in December of 2007, the plaintiffs commenced the within declaratory judgment action against Ohio, and some months later in August of 2007, commenced a second action against another carrier (Delos Insurance Company) – both

of which were later consolidated by stipulation dated December 2008 (Fishman Aff., Exhs., " A"-"C").

With respect to Ohio, the Tocci complaint alleges *inter alia*, that Tocci, Archstone and ASN are additional insureds under the Ohio general liability policy; (Cmplt., ¶¶ 31-36); that the foregoing entities requested that Ohio defend them but that Ohio refused and/or failed to timely respond to their tender (Cmplt., ¶¶ 38-44); and that the plaintiffs have therefore incurred costs and expenses by virtue of Ohio's refusal to undertake their defense (Cmplt., ¶¶ 48-51).

Based upon these claims and others, the plaintiffs have interposed four causes of action alleging breach of the duty to defend and indemnify. The fourth cause of action is predicated on the theory that Ohio failed to disclaim coverage in a timely fashion, thereby violating Insurance Law § 3042[d] and waiving its defenses to the action (Cmplt., ¶¶ 82-88). It bears noting that the plaintiffs' complaint appears to refer to, and rely exclusively on, the Ohio general liability policy – which is described in the complaint as the "Casualty Policy" – and then identified by the letter prefix and policy number assigned to the general liability policy (Cmplt., ¶¶ 23-25; General Liability Policy No. "BLO" 05-53125596 *see also*, Umbrella Policy "BXO" 05-53125596).

Ohio has answered, denied the material allegations of the complaint and interposed a series of affirmative defenses (Fishman Aff., Exh., "D").

Shortly before interposing its answer – and by letter dated January 24, 2008 addressed to Apro – Ohio formally disclaimed coverage as to that entity on the grounds that, *inter alia*: (1) notice of the accident was never provided specifically by Apro; (2) the policy does not cover "Maximillard, Inc., d/b/a Apro Construction Group" or "JKN, Inc., d/b/a Apro Construction Group, Inc" since the named insured was actually "Apro Construction Group, Inc"; (3) Apro failed to cooperate with Ohio by providing timely responses to inquiries and/or by failing to supply requested information (*see also*, Letters of January 15, 2007; February 4, 2008]).

As to the identity of the named insured, Ohio claimed that Apro was never an incorporated entity; rather, "Apro" was merely a fictitious trade name used by another corporate entity; namely, "JKN, Inc" – a Virginia corporation later terminated by the Virginia authorities October of 2005 (Rakowski Aff., ¶¶ 22-24; Exh., "D").

In June of 2010, Ohio moved for leave to amend its answer so as to interpose

a defense predicated in part on Apro's alleged making of false statements in its underlying insurance application, *i.e.*, Ohio argued, in substance, that Apro was not a corporation and/or that it also misrepresented the nature and scope of its general business activities.

By order dated October 19, 2010, this Court denied Ohio's motion, concluding that the proposed defense was plainly lacking in merit (*see*, Order of Winslow, J., dated October 19, 2010, at 2-3). In doing so, the Court relied on case law holding that each individual additional insured is to be treated as if separately covered by the policy, "even where * * * the policy is issued based on a material misrepresentation by the primary insured" (*Lufthansa Cargo, AG v. New York Marine and General Ins. Co.*, 40 AD3d 444, 445 *see also, Greaves v. Public Serv. Mut. Ins. Co.*, 5 NY2d 120, 124, 181 [1959]). Notably, and pursuant to this line of authority, any misrepresentations made by Apro would not be attributable to the plaintiffs, even if, in fact, "the policy had been issued based upon a misrepresentation * * * and was void as to" Apro (*Lufthansa Cargo, AG v. New York Marine and General Ins. Co., supra,* 40 AD3d at 445 *see also, Admiral Ins. Co. v. Joy Contractors, Inc.*, 81 AD3d 521, 523; *BMW Fin. Servs. v. Hassan*, 273 AD2d 428; *233 East 17th Street, LLC v. L.G.B. Development, Inc.*,78 AD3d 930, 932 *cf., Morgan v. Greater New York Taxpayers Mut. Ins. Ass'n*, 305 NY 243, 249 [1953]).

The parties now move and cross move respectively, for summary judgment on their opposing claims. The plaintiffs' motion should be granted to the extent indicated below. The cross motion is **denied.**

It is settled that an insurer's duty to defend its insured is "exceedingly broad" (*Regal Const. Corp. v. National Union Fire Ins. Co. of Pittsburgh, PA,* 15 NY3d 34, 37 [2010]; *BP A.C. Corp. v. One Beacon Ins. Group*, 8 NY3d 708, 714 [2007]; *Automobile Ins. Co. of Hartford v. Cook*, 7 NY3d 131, 137 [2006]; *Nationwide Insulation & Sales, Inc. v. Nova,* 74 AD3d 1297). Additionally, if "[a] complaint contains any facts or allegations which bring the claim even potentially within the protection purchased, the insurer is obligated to defend" (*Technicon Elecs. Corp. v American Home Assur. Co.,* 74 NY2d 66, 73 [1989] *see, BP A.C. Corp. v. One Beacon Ins. Group, supra*, 8 NY3d at 714; *Frontier Insulation Contrs. v. Merchants Mut. Ins. Co.*, 91 NY2d 169, 175 [1997]; *Allstate Ins. Co. v. Mugavero*, 79 NY2d 153, 159 [1992]; *City of New York v. First Nat. Ins. Co. of America*, 79 AD3d 789, 790;

Burlington Ins. Co. v. Galindo & Ferreira Corp., 78 AD3d 1102, 1103).

Indeed, whenever the allegations of the complaint suggest a reasonable possibility of coverage the insurer must defend – and this is generally the case "no matter how baseless the allegations * * * may be" and "even though a claim may ultimately prove to be meritless" (*Automobile Ins. Co. of Hartford v. Cook*, *supra*, 7 NY3d at 137; *Bovis Lend Lease LMB Inc. v. Garito Contracting, Inc.*, 65 AD3d 872, 874 *see, Regal Const. Corp. v. National Union Fire Ins. Co. of Pittsburgh, PA, supra,* 15 NY3d at 37).

With these principles in mind the Court agrees, the plaintiffs have established their *prima facie* entitlement to judgment as a matter of law with respect to their duty to defend claims since the *Yanza* complaint contains factual allegations which plainly bring "the claim * * * potentially within the protection purchased, the insurer is obligated to defend" (*Technicon Elecs. Corp. v American Home Assur. Co., supra,* 74 NY2d at 73; *City of New York v. First Nat. Ins. Co. of America*, *supra*, 79 AD3d 789). Specifically, the operative *Yanza* averments are, *inter alia*, that Yanza was, in fact, an employee of Apro; that he sustained personal injuries at the work-site location identified in the contract materials; that he was performing contract work for Apro at the time; and that Apro was conducting construction work pursuant to its agreement with Tocci (Yanza Cmplt., ¶¶ 5-8, 35).

In response to the plaintiffs' *prima facie* showing, Ohio has failed to sustain its burden of demonstrating that the *Yanza* allegations fall completely outside the coverage afforded by the policy (*City of New York v. First Nat. Ins. Co. of America*, *supra*, 79 AD3d 789-790). Significantly, an "insured's right to representation and the insurer's correlative duty to defend suits "however groundless, false or fraudulent," "actually constitutes litigation insurance in addition to liability coverage" (*Automobile Ins. Co. of Hartford v. Cook*, *supra*, 7 NY3d at 137; *Servidone Constr. Corp. v. Security Ins. Co. of Hartford*, 64 NY2d 419, 423-424 [1985] *see, BP Air Conditioning Corp. v. One Beacon Ins. Group*, *supra*, 8 NY3d at 714, 716).

Ohio's apparent inability at the time to definitively satisfy itself that Yanza was a Apro employee performing authorized, Apro contract work – or its doubts about Apro's corporate status at the time – are not grounds which would negate the possibility of coverage for the purposes of triggering Ohio's "exceedingly broad" duty to defend (*Regal Const. Corp. v. National Union Fire Ins. Co. of Pittsburgh, PA,*

supra, 15 NY3d at 37 *see also*, *Automobile Ins. Co. of Hartford v. Cook, supra,* 7 NY3d at 137; *Stellar Mechanical Services of New York, Inc. v. Merchants Ins. of New Hampshire*, 74 AD3d 948, 952). This Court has previously rejected Ohio's theory that it possesses a viable defense to the plaintiffs' claims based on Apro's alleged misstatements in its application, *i.e.*, statements relating to the scope of its work functions and/or its corporate status (Order of Winslow, J., dated October 19, 2010, at 2-3).

Contrary to Ohio's contentions, the original August 2007 letter provides that the tender was being made not just on behalf of Tocci – but also for plaintiffs ASN and Archstone (Molina Letter at 1). Further, while Ohio asserts that the plaintiffs never provided Ohio with a copy of the *Yanza* complaint in violation of the policy's requirements, the January 5, 2007 letter authored by Ohio's claims examiner, expressly refers to the complaint, thereby establishing that Ohio was already in possession of that pleading complaint before the January 2007 letter was written (*see*, Rakowski Letter, dated January 5, 2007, at 1; Fishman Reply Aff., ¶¶ 23-26).

Assuming as Ohio claims, that the plaintiffs' delay in apprising Ohio of the *Yanza* action was material (*cf., Scordio Const., Inc. v. Sirius America Ins. Co.,* 51 AD3d 768, 769), "[a]n 'insurer's failure to provide notice as soon as is reasonably possible" pursuant to Insurance Law § 3420[d], "precludes effective disclaimer, even [where] the policyholder's own notice of the incident to its insurer is untimely" (*New York Cent. Mut. Fire Ins. Co. v. Aguirre*, 7 NY3d 772, 775 [2006] *see also*, *Continental Cas. Co. v. Stradford*, 11 NY3d 443, 449 [2008]; *First Fin. Ins. Co. v. Jetco Contr. Corp.*, 1 NY3d 64, 67 [2003]; *Bellavia v. Seneca Ins. Co., Inc.*, 78 AD3d 1153, 1155).

Here, a delay of five months in providing a written response to the plaintiffs' tender would be excessive upon the factual record presented (*e.g., 233 East 17th Street, LLC v. L.G.B. Development, Inc., supra,* 78 AD3d 930-931; *Burlington Ins. Co. v. Galindo & Ferreira Corp.*, 78 AD3d 1102, 1103; *Guzman v. Nationwide Mut. Fire Ins. Co.*, 62 AD3d 946, 947; *Modern Continental Const. Co., Inc. v. Giarola*, 27 AD3d 431, 433). In response, Ohio has not discharged its burden of explaining the delay in providing the written notice (*Magistro v. Buttered Bagel, Inc.*, 79 AD3d 822, 824-825; *Bellavia v. Seneca Ins. Co., Inc., supra*; *Tex Development Co., LLC v. Greenwich Ins. Co.*, 51 AD3d 775, 778).

More specifically, Ohio has not detailed precisely what efforts, if any, it undertook with respect to the claim during the period following its receipt of the August, 2006 tender letter. Nor has it been shown why whatever transpired during that period justified the delay which ensued prior to Ohio's January, 2007 written response. Rather, the opposing affidavit submitted by Ohio's claims examiner on the motion, primarily – if not exclusively – focuses on the events and occurrences which took place after the period of delay had already occurred (Spira Aff., ¶¶ 22-24 *e.g.*, Rakowski Aff., ¶¶ 3-4). The Court notes that the disclaimer ground based on the delay in providing notice of the underlying *Yanza* action would have been apparent upon Ohio's receipt of the original tender letter (*Matter of Firemen's Fund Ins. Co. of Newark v Hopkins*, 88 NY2d 836, 837-838 [1996] *see, First Fin. Ins. Co. v. Jetco Contr. Corp., supra*, 1 NY3d at 69).

However, that branch of the plaintiffs' motion which is for indemnification should be denied as premature at this juncture, inasmuch as questions relevant to the resolution of that matter have yet to be resolved in the underlying *Yanza* action (*see, Frontier Insulation Contractors, Inc. v. Merchants Mut. Ins. Co.*, 91 NY2d 169, 178 [1997]; *Bovis Lend Lease LMB Inc. v. Garito Contracting, Inc., supra,* 65 AD3d 872, 874-875;*City of New York v. Insurance Corp. of New York,* 305 AD2d 443, 444; *Deetjen v. Nationwide Mut. Fire Ins. Co.*, 302 AD2d 350, 351). Notably, the duty to indemnify is "distinctly different" from the duty to defend, since the former "is determined by the actual basis for the insured's liability to a third person" and "not measured by the allegations of the pleadings" (*Servidone Const. Corp. v. Security Ins. Co. of Hartford, supra,* 64 NY2d at 424 *see also, Frontier Insulation Contractors, Inc. v. Merchants Mut. Ins. Co., supra,* at 178 *see also, York Restoration Corp. v. Solty's Const., Inc.,* 79 AD3d 861, 863; *Hargob Realty Associates, Inc. v. Fireman's Fund Ins. Co.*, 73 AD3d 856; *KMAPS Corp. v. Nova Cas. Co.*, 53 AD3d 1043 *see generally, Zappone v. Home Ins. Co.*, 55 NY2d 131 [1982]).

The Court has considered the parties' remaining contentions and concludes that they do not support the granting of relief beyond that awarded above.

Accordingly, it is,

ORDERED that the motion by the plaintiffs Tocci Building Corp. of New Jersey, Inc., ASN Roosevelt Center, LLC, Archstone-Smith Operating Trust, Archstone-Smith Communities, LLC, Virginia Surety Company, Inc. is **granted** with

respect to the first and second causes of action to the extent consistent herewith, and it is further declared that the defendant is obligated to defend the plaintiffs in accordance herewith, and the motion is otherwise **denied**, it is further,

ORDERED that the cross motion pursuant to CPLR 3212 by the defendant Ohio Casualty Insurance Company for summary judgment dismissing the complaint and all cross claims insofar as interposed against it, is **denied.**

This constitutes the Order of the Court.

Dated: May 27

J.S.C.

ENTERED
JUN 23 2011
NASSAU COUNTY
COUNTY CLERK'S OFFICE