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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: CYNTHIA S. KERN J.S.C. PART 52

Index Number : 400141/2011

CITY OF NEW YORK

vs

ENDURANCE AMERICAN ISNURANCE

Sequence Number : 001

SUMMARY JUDGMENT

INDEX NO. 400141/11

MOTION DATE

MOTION SEQ. NO. 001

or

No(s).

Answering Affidavits — Exhibits No(s).

Replying Affidavits No(s).

FILED

JUL 08 2011

NEW YORK
COUNTY CLERK'S OFFICE

Upon the foregoing papers, it is ordered that this motion is

is decided in accordance with the annexed decision.

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

Dated: 7/6/11

CK, J.S.C.

CYNTHIA S. KERN J.S.C.

1. CHECK ONE: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION

2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☒ DENIED ☐ GRANTED IN PART ☐ OTHER

3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER

☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 52

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THE CITY OF NEW YORK,

Plaintiff,

-against-

ENDURANCE AMERICAN INSURANCE COMPANY,
Defendant.

----------x

Index No.40014/11

DECISION/ORDER

HON. CYNTHIA S. KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for :_____

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	1
Notice of Cross Motion and Answering Affidavits.....	2
Affirmations in Opposition to the Cross-Motion.....	
Replying Affidavits.....	3
Exhibits.....	

Plaintiff the City of New York (the "City") has commenced the present action against Endurance American Insurance Company ("Endurance") for a declaratory judgment that Endurance has a duty to defend the City in two personal injury actions. It has brought the present motion for summary judgment declaring that Endurance has a duty to defend it. As will be explained more fully below, the City's motion for summary judgment is denied.

The relevant facts are as follows. The City, through its agency the Department of Transportation, entered into a contract with Daidone Electric, Inc. ("Daidone") for the

performance of traffic signal maintenance in the City of New York. The contract appears to provide and the superintendent for Daidone has submitted an affidavit stating that the contract with the City calls for Daidone to repair traffic control signals and pedestrian signals on an as requested basis. According to the affidavit of Daidone's superintendent, Daidone receives electronic notification of a device in need of repair from the Department of Transportation situation room. The contract between the City and Daidone required Daidone to obtain insurance "against any claims for injuries to persons or damage to property which may arise from or in connection with the performance of the work in this Contract by the Contractor...." The contract also provided that the City should be named as an additional insured under the policy. Daidone did obtain an insurance policy from the defendant Endurance. Daidone is a named insured under the policy. The policy also contains an additional insured endorsement which provides as follows:

> Who is an Insured is amended to include as an insured any person or organization for whom you are performing operations when you and such person or organization have agreed in writing in a contract or agreement that such person or organization be added as an additional insured on your policy. Such person or organization is an additional insured only with respect to liability arising out of your ongoing operations performed for that insured. A person's or organization's status as an insured under this endorsement ends when your operations for that insured are completed.

On August 3, 2009, motor vehicles owned or operated by Gary P. Dhaiti and Richard Pacific allegedly collided and struck and injured several pedestrians. In April 2010, a complaint alleging personal injuries in connection with the accident was filed. Neither the City or Daidone were named as a defendants in that action. In June 2010, the driver of one of the vehicles involved in the accident commenced a third party action against the City and Daidone. That

complaint alleges that the City and Daidone were responsible for the inspection, maintenance and service of the traffic control device at the corner where the accident occurred, that the traffic device was broken and that on account of the City and Daidone's negligence in failing to inspect, maintain and service the traffic light, the accident occurred. The law department for the City provided Daidone with written notice of the complaint and demanded that it be provided a defense in the action. The City and Daidone were also named as direct defendants in another action commenced as a result of the same accident. This complaint alleged, inter alia, that as a result of the City and Daidone's negligence, including Daidone's negligence in performing the contracted work for the city in repairing the traffic device, the accident occurred. The law department also provided Daidone with written notice of this complaint and demanded a defense in that action. Before the City received a response from Endurance with respect to its demand for a defense, the City commenced the instant declaratory judgment action seeking a declaratory judgment that Endurance was obligated to defend it in both of the personal injury actions. Endurance subsequently disclaimed coverage and has refused to provide a defense to the City.

On a motion for summary judgment, the movant bears the burden of presenting sufficient evidence to demonstrate the absence of any material issues of fact. *See Wayburn v Madison Land Ltd. Partnership,* 282 A.D.2d 301 (1st Dept 2001). Summary judgment should not be granted where there is any doubt as to the existence of a material issue of fact. *See Zuckerman v City of New York,* 49 N.Y.2d 557, 562 (1980). Once the movant establishes a prima facie right to judgment as a matter of law, the burden shifts to the party opposing the motion to "produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim." *Id.*

The "party claiming insurance coverage bears the burden of proving entitlement...and is not entitled to coverage if not named as an insured or an additional insured on the face of the policy." *National Abatement Corp. v National Union Fire Ins. Company of Pittsburgh*, 33 AD3d 570 (1st Dept 2006). To determine whether someone not named as an additional insured in the policy is an additional insured under the policy, it is necessary to look to the policy itself and the underlying contract or agreement between the named insured and the entity seeking coverage as an additional insured. *See Greater New York Mutual Insurance Co. v Mutual Marine Office, Inc.*, 3 AD3d 44 (1st Dept 2003). In *Greater New York*, the court held that the owner of a building did not qualify as an additional insured under the policy issued by the insurance company to the operator of the garage for claims for damages to parked vehicles arising out of the collapse of the roof. The court noted that the lease between the operator of the garage and the owner of the building did not obligate the garage operator to make structural repairs to the garage. The policy between the garage operator and the insurance company provided that an entity would be qualified as an additional insured if the garage operator had "agreed by written contract to provide coverage, but only with respect to operations performed by or on behalf" of the garage operator. According to the court, in accordance with the lease terms and policy, the building owner would qualify as an additional insured under the policy only as to claims arising out of operations performed by or on behalf of the parking garage such as parking garage operations. Since the collapse of the parking garage roof did not arise out of parking garage operations but rather out of a structural defect, the owner of the building was not entitled to additional insured coverage under the policy. *Id.*

In the instant case, the City is not entitled to summary judgment declaring that Endurance

has a duty to defend it in the personal injury actions as there are disputed issues of fact as to whether the City is an additional insured under the policy issued by Endurance to Daidone. Since the City is not a named insured under the Endurance policy, the court must look to the policy itself and the agreement between Daidone and the City to determine whether the City is entitled to additional insured coverage. The policy issued by Endurance provides coverage to additional insured's only for liability arising out of Daidone's "ongoing operations." To meet its burden of establishing that it is entitled to coverage under Endurance's policy, the City is required to make a prima facie showing that the accident arose out of ongoing operations being performed by Daidone at the time and place of the accident. Although the City has submitted some evidence that a maintenance call was made regarding a signal post at the site of the accident three days before the accident, Endurance has submitted the affidavit of Daidone's superintendent which states that the call related to a malfunctioning pedestrian signal as opposed to the traffic light. Moreover, he has also stated in his affidavit that there was never any request made by the City for Daidone to repair or maintain the traffic signal at the site of the accident for three months prior to the accident. Based on the foregoing, there are clearly disputed issues of fact as to whether the liability in the underlying personal injury cases arose out of Daidone's "ongoing operations", especially in light of the fact that the contract between the City and Daidone only appears to require Daidone to repair traffic control devices on an as requested basis.

Moreover, there are outstanding discovery demands served by Endurance on the City which specifically request records regarding any requests made by the City for work to be performed at the traffic device in dispute. As the City has moved for summary judgment without

allowing Endurance to conduct discovery on the issue of whether there has been any ongoing operations by Daidone which would trigger additional endorsement coverage, its motion for summary judgment must also be denied on the ground that it is premature. *See* CPLR 3212(f).

In support of its motion for summary judgment, the City has cited to a number of cases which state the very well established principle that "an insurer's duty to defend its insured 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." *BP Air Conditioning Corp v One Beacon Insurance group*, 8 NY 3d 708, 714 (2007). *See also Fitzpatrick v American Honda Motor Co. Inc.*, 78 NY 2d 61(1991); *Continental Cas. Co. v Employers Ins. Co. of Wausau*, 60 AD 3d 128 (1st Dept 2008). However, the rule about only looking at the four corners of the complaint to determine whether there is a duty to defend only comes into play where there has been a determination that there is actually a policy which covers the entity seeking the defense. As the quote above makes clear, this broad duty to defend exists between an insurer and an insured. However, before any determination can be made as to whether an insurer has a duty to defend its insured, a determination must first be made as to whether the entity seeking the defense is actually an insured under the relevant policy. Therefore, the cases cited by the City are not applicable to the instant dispute as no determination has yet been made as to whether the City is an additional insured under the policy issued by Endurance to Daidone. The cases relied upon by the City would be applicable if an argument was being made that there was an exclusion from coverage under the policy or that the underlying personal injury claim was without merit but it is not applicable when the court is making the initial determination as to whether any insurance coverage exists in the first instance.

Based on the foregoing, the City is not entitled to summary judgment declaring that Endurance has a duty to defend it in the personal injury actions. This constitutes the decision and order of the court.

Dated: 7/6/11

Enter: _____
J.S.C.

CYNTHIA S. KERN
J.S.C.