[* 1]

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

PRESENT: HON. JOAN A. MADDEN J.S.C. Justice PART 11

Index Number : 109968/2010
MCR RESTORATION CORP.
VS.
UTICA FIRST INS. CO.
SEQUENCE NUMBER : 001
DISMISS ACTION

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

this motion to/for _____

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

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion is determined in accordance with the annexed decision/order.

FILED

JUL 19 2011

NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: July 8, 2011

HON. JOAN A. MADDEN J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: I.A.S. PART 11

----------X

MCR RESTORATION CORP. and COLONY INSURANCE COMPANY,

Plaintiffs,

-against-

Index No. 109968/10

UTICA FIRST INSURANCE CO. and CYBERPOL, INC.,

DECISION AND ORDER

Defendants.

----------X

JOAN A. MADDEN, J.;

Defendant Utica First Insurance Co. (Utica First) moves, pursuant to CPLR 3211 (a) (1) and (7), to dismiss the complaint.

Plaintiffs MCR Restoration Corp. (MCR), and its insurer, Colony Insurance Company (Colony) bring this action to recover their defense and settlement costs in an underlying personal injury action, entitled *Rafal Siemieniewicz and Ewelina Siemieniewicz v Quincy Marcus 504 Development Corp. and MCR Restoration Corp.* (Index No. 33432/07, Supreme Court, Kings County) (the Underlying Action).

In the Underlying Action, plaintiffs Rafal Siemieniewicz (Siemieniewicz) and his wife, Ewelina, sought damages for injuries Siemeiniewicz sustained on August 29, 2007, in a construction site accident. The accident occurred during a gut renovation of a six-unit apartment building located at 336 Throop Avenue, Brooklyn, New York (the Premises). Siemieniewicz, an employee of a subcontractor, was injured as he was cutting beams on the unfinished first floor of the Premises and fell into the basement of the building.

Quincy Marcus 504 Development Corp. (Quincy) was the owner of the Premises and

MCR was the general contractor hired by Quincy to perform the rehabilitation construction work at the Premises. MCR subcontracted a portion of the initial demolition and remodeling work to Cyberpol, Inc. (Cyberpol), pursuant to a written subcontract agreement dated August 27, 2007 (the Subcontract). Cyberpol and/or another company it worked with, Jozef Wolosz d/b/a Carpentry & Home Improvements (Jozef Wolosz), had hired Siemieniewicz.

On September 4, 2007, Siemieniewicz commenced the Underlying Action against Quincy and MCR, alleging violations of New York Labor Law, sections 240 and 241. On June 26, 2008, Quincy and MCR commenced a third-party action against Cyberpol and Jozef Wolosz, seeking indemnification under both the common law, and pursuant to the Subcontract between MCR and Cyberpol.

The Subcontract required that Cyberpol obtain insurance policies in the form and amounts stipulated in the Subcontract documents. Pursuant to the Subcontract, Cyberpol was to hold MCR harmless of any claims and name MCR as an additionally insured on insurance polices (Zane Aff., Ex. J, at 5).

Cyberpol obtained insurance from Utica First. A copy of that policy is annexed to Utica First's moving papers (Zane Aff., Ex. 1) (the Utica First Policy). The Utica First Policy contains a "Blanket Additional Insured" endorsement which includes "Any person or organization whom you are required to name as an additional insured on this policy under a written contract or written agreement" (Zane Aff., Ex. 1 form BAI-1 Ed.1.1). Utica First has not argued that MCR is not an additional insured under the Utica First Policy.

However, the Utica First Policy contains certain exclusions from coverage, including an exclusion for injuries sustained by employees of any insured, and by contractors and employees

of contractors hired or retained by, or for, any insured (the Employee Exclusion), an exclusion for contractual liabilities (the Contractual Liability Exclusion) and an exclusion for injuries for which workers' compensation benefits were provided or were required to be provided (the Workers' Compensation Exclusion).

The endorsement providing for exclusion of injury to employees, attached to the policy, provides, in pertinent part, as follows:

> **Exclusion of Injury to Employees, Contractors, and Employees of Contractors**
>
> This insurance does not apply to:
>
> (i) bodily injury to any employee of any insured, to any contractor hired or retained by or for any insured or to any employee of such contractor, if such claim for bodily injury arises out of and in the course of his/her employment or retention of such contractor by or for any insured, for which any insured may become liable in any capacity;

(Zane Aff., Ex. A-1, XCNTR [1.0]).

In addition, the policy provides, under the heading "Exclusions That Apply To All Liability Coverages," in pertinent part, as follows:

> 3. **We** do not pay for **bodily injury, property damage, personal injury** or **advertising injury** which is assumed under a contract or agreement. This exclusion does not apply to:
>
> a. an **incidental contract**; or
> b. liability for damages that an insured would have in the absence of the contract or agreement.
>
> 10. **We** do not pay for **bodily injury** if benefits are provided or are required to be provided by an **insured** under a workers' compensation, non-occupational disability, occupational disease or like law

(Zane Aff., Ex. A-1 at 8) (emphasis in original).

Shortly after Siemieniewicz was injured, Cyberpol notified Utica First of the accident. Upon receipt of this notice, Utica First commenced an investigation and was informed by Cyberpol that Siemieniewicz was employed by Cyberpol at the time of the accident and that the accident had already been reported to Cyberpol's workers' compensation carrier.

By letter dated September 10, 2007, Utica First disclaimed coverage to Cyberpol for the accident based upon, among other things, the Employee Exclusion, the Contractual Liability Exclusion and the Workers' Compensation Exclusion.

Thereafter, by letter dated October 27, 2007, MCR provided Utica First with a copy of the summons and complaint in Underlying Action and tendered the defense and indemnity of MCR to Utica First and Cyberpol. By letter dated October 31, 2007, Utica disclaimed coverage to MCR for the accident and the Underlying Action based upon the above exclusions.

The Underlying Action was settled on April 10, 2010 for $830,000. The third-party action against Cyberpol and Jozef Wolosz was severed. Thereafter, MCR and Colony commenced the within action on July 28, 2010.

Utica First moves to dismiss the complaint on the ground that the exclusions in the policy preclude coverage. Plaintiffs oppose the motion on several grounds: First, plaintiffs contend that the Employee Exclusion contained in Utica First's policy is ambiguous and against public policy. Second, plaintiffs assert that even if Utica First's coverage was limited by the policy exclusions, it nonetheless had a duty to defend MCR as a named insured in the underlying action. Third, plaintiffs contend that Rafal Siemieniewicz was not an employee at the job site and lacked the

legal capacity to be an employee at the project.

As to plaintiffs' argument that the Employee Exclusion is ambiguous, the First Department has held that another, similar exclusion in a Utica First insurance policy, which excluded coverage for "bodily injury to an employee of an insured if it occurs in the course of employment," was not ambiguous. The Court stated that: "New York courts have held that employee exclusionary clauses containing the same or similar language are plain and unambiguous and that such a clause applies to exclude coverage to an additional insured where, as here, the main action is brought against such additional insured by the employee of a named insured" (*Moleon v Kreisler Borg Florman Gen. Constr. Co.*, 304 AD2d 337, 340 [1st Dept 2003], citing *Rivera v St. Regis Hotel Joint Venture*, 240 AD2d 332, 334 [1st Dept 1997]; *Tardy v Morgan Guar. Trust Co. of N.Y.*, 213 AD2d 296, 296 [1st Dept 1995]; *see also Consolidated Edison Co. of N.Y. v United Coastal Ins. Co.*, 216 AD2d 137 [1st Dept 1995]).

With respect to plaintiffs' contention that the Employee Exclusion violates public policy, the courts of this state have found that it does not (*Utica First Ins. Co. v Santagata*, 66 AD3d 876 [2d Dept 2009]). As the Court of Appeals has stated: "The 'public policy of this state when the legislature acts is what the legislature says that it shall be.' Conversely, when statutes and Insurance Department regulations are silent, we are reluctant to inhibit freedom of contract by finding insurance policy clauses violative of public policy" (*Slayko v Security Mut. Ins. Co.*, 98 NY2d 289, 295 [2002], quoting *Messersmith v American Fid. Co.*, 232 NY 161, 163 [1921]).

Further, the First Department has held that an identical employee exclusion exempted Utica from providing coverage to an insured's employee, and that Utica was, therefore, not required to defend or indemnify the general contractor for that employee's claim (*see Sixty Sutton*

Corp. v Illinois Union Ins. Co., 34 AD3d 386 [1st Dept 2006], *see also Moleon v Kreisler Borg Florman Gen. Constr. Co.*, 304 AD2d 337, *supra.*

Plaintiffs' argument that Utica First is nonetheless liable for MCR's defense in the Underlying Action is without foundation. Plaintiffs rely on a clause in the Utica First Policy which provides, in part, that: "[W]e pay the medical expenses defined below for bodily injury caused by accidents: . . . 3. arising out of your operations" (Zane Aff., Ex. 1, at 5). Plaintiffs assert that, as a result of this clause, Utica First was liable for Siemieniewicz's medical expenses and, therefore, had a duty to defend MCR in the Underlying Action.

> It is 'elementary' that 'clauses of a contract should be read together contextually in order to give them meaning' (*HSBC Bank USA v National Equity Corp.*, 279 AD2d 251, 253 [1st Dept 2001]). 'It is a cardinal rule of construction that a court adopt an interpretation that renders no portion of the contract meaningless' (*Matter of Wallace v 600 Partners Co.*, 205 AD2d 202, 206 [1st Dept 1994], *affd* 86 NY2d 543 [1995] [internal quotation marks and citation omitted])

(*Diamond Castle Partners IV PRC, L.P. v IAC/InterActiveCorp.*, 82 AD3d 421, 918 NYS2d 73, 75 [1st Dept 2011]). Accordingly, as a matter of contract construction, the above clause may not be interpreted so as to negate the Employee Exclusion. It must be read together with the Employee Exclusion, and is, therefore, not applicable to medical expenses for bodily injuries suffered by an excluded employee.

Finally, plaintiffs have alleged in their complaint that Siemieniewicz was on the job site without legal status to be employed and, therefore, was not an employee at the job site. The status of a worker as an undocumented alien does not render him a non-employee. An injured worker's status does not, for example, prohibit an award of workers' compensation benefits (*see*

Matter of Ramroop v Flexo-Craft Print., Inc., 11 NY3d 160, 168 [2008]). In addition, New York Labor Law applies to all workers in qualifying employment situations, regardless of their immigration status (*Balbuena v IDR Realty LLC*, 6 NY3d 338 [2006]).

In addition, it is undisputed that Siemieniewicz received Workers' Compensation benefits. As noted above, the Workers' Compensation Exclusion in the Utica First Policy precludes coverage "if benefits are provided . . . under a workers' compensation . . . law." Accordingly, coverage is precluded under this section.

Accordingly, based upon the foregoing, it is

ORDERED that the motion by defendant Utica First Insurance Co. to dismiss the complaint is granted, and the complaint is severed and dismissed in its entirety as against said defendant, and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that the action shall continue as to the remaining parties, who are directed to appear for a preliminary conference on August 18, 2011 at 9:30 a..m., Part 11, Room 351, 60 Centre Street.

DATED: July 8, 2011

ENTER:

J.S.C.