Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: Honorable, **ALLAN B. WEISS** IAS PART 2
Justice

MAXWELL PLUMB MECHANICAL CORP. and ZYGMUNTJAN SKOCZEK,

Plaintiffs,

-against-

NATIONWIDE PROPERTY and CASUALTY INSURANCE CO., STATE FARM MUTUAL AUTOMOBILE INSURANCE CO., YOSHIYASU TAGO and ROBERT L. GINSBERG,

Defendants.

Index No: 13400/11

Motion Date: 2/29/12

Motion Cal. No.: 11

Motion Seq. No.: 2

The following papers numbered 1 to 26 read on this motion by plaintiffs pursuant to CPLR 602(a) for an Order consolidating the instant action with the underlying personal injury action pending in the Supreme Court, New York County under Index No. 107643/09, staying the personal injury action until final determination of this motion and granting summary judgment in favor of plaintiffs; and cross-motion by defendants, Nationwide Property and Casualty Insurance Co. (Nationwide) and Robert L. Ginsberg, (Ginsberg) for summary judgment dismissing the complaint.

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Upon the foregoing papers it is ordered that this motion and cross-motion are determined as follows.

On April 20, 2009, Yoshiyasu Tago, a pedestrian, sustained personal injuries when he was struck by a truck owned by Maxwell Plum Mechanical Corp.(Maxwell) and operated by Maxwell's employee the defendant, Skoczek,. On May 29, 2009, Tago, commenced an action in New York County against Maxwell and Skoczek to recover for the personal injuries he sustained. State Farm Mutual Automobile Insurance Co. (State Farm), Maxwell's automobile insurer, provided Maxwell and Skoczek the defense in that action.

Patrick M. Murphy, Maxwell's defense attorney in the personal injury action, by letter dated September 1, 2009, notified Nationwide of the Tago action and requested coverage under Maxwell's Nationwide "excess/umbrella policy..... under policy number 66 612-007". Nationwide, by letter dated September 17, 2009, disclaimed coverage under Commercial Umbrella Liability Policy Nationwide issued to Maxwell on the grounds, inter alia, that auto accidents are excluded pursuant to the Auto Liability Exclusion Endorsement Form Cas 3262 1-86 of the policy. There is no indication that there were any further communications between Mr. Murphy and Nationwide regarding coverage.

Tago obtained summary judgment in his favor on the issue of liability by order dated December 23, 2010. State Farm offered the entire $100,000.00 available under its policy in settlement of Tago's claim. The offer was rejected.

On June 3, 2011 plaintiffs commenced this action against Nationwide and Ginsberg seeking a judgment declaring that Nationwide or, in the alternative, Ginsberg, is obligated to indemnify plaintiffs in the underlying personal injury action for any judgment in excess of $100,000.00 obtained by Tago against plaintiffs in the underlying personal injury action.

The plaintiffs' complaint alleges that plaintiff, Maxwell sought to purchase an umbrella policy to cover general liability claims against Maxwell as well as automobile and truck liability claims in excess of the $100,000/$300,000 coverage afforded by its State Farm automobile insurance policy; that defendant, Ginsberg, a Nationwide Insurance Agent, sold Maxwell a $5 million Nationwide "umbrella" insurance policy which Ginsberg assured Maxwell would cover Maxwell's plumbing business and cars and trucks. The complaint did not further identify the "umbrella policy" to which the complaint referred and a copy was not attached to the complaint.

The plaintiffs now move for summary judgment in their favor and defendants cross-move for summary judgment in their favor dismissing the complaint.

In support of their motion, the plaintiffs claim that Nationwide improperly disclaimed since the Nationwide policy in their possession does not contain the an automobile exclusion. In support, plaintiff asserts that during discovery, Nationwide served plaintiffs with a Notice to Admit dated September 16, 2011, seeking plaintiffs' admission that the Nationwide Commercial Umbrella Policy issued to Maxwell Policy, # 66CU-612-007-3002, covering the period of December 15, 2008 - December 15, 2009 is the subject of this action. In response, plaintiffs denied that said policy was the subject of this action and attached a Nationwide Blanket Protection Commercial General Liability Insurance Policy # 66PR612007-3001M, asserting that it is the "true" umbrella policy and that it does not contain the Auto Liability Exclusion Endorsement Form Cas 3262 1-86 which was the basis of Nationwide's disclaimer. In addition, the plaintiffs submitted the affidavit of Kirk Seubert, Maxwell's president. Seubert asserts that he obtained automobile insurance from State Farm for its trucks and an "umbrella" policy from Nationwide to provide additional coverage for Maxwell's employees and trucks which Seubert believes was for $5 million.

In opposition to plaintiffs' motion and in support of their cross-motion defendants submitted, inter alia, Ginsberg's affidavit, a copy of the Nationwide Commercial Umbrella Policy #66CU-612-007-3002, certified by Robin Eckert, Nationwide's records custodian, as being a true and accurate copy of the policy issued to Maxwell for the relevant time period. Nationwide contends that plaintiffs have repeatedly demanded coverage under the "umbrella" policy with $5 million in coverage and have never more clearly identified the policy under which they seek coverage. Nationwide further asserts that the policy plaintiffs produced in response to their Notice to Admit is not an umbrella policy, rather, it is the General Liability policy issued to Maxwell for December 15, 2008 - December 15, 2009 providing coverage for $1 million per occurrence with a maximum aggregate of $2 million. Finally, defendants assert that plaintiffs are also not entitled to coverage under the Commercial General Liability policy contained in their moving papers and which they claim is the "true" umbrella policy since it also contains an auto liability exclusion.

When an insurer wishes to exclude certain coverage from its policy obligations, it must do so in clear and unmistakable language (see Seaboard Sur. Co. v. Gillette Co., 64 NY2d 304,

311[1984]). If the exclusion clause is ambiguous, then the insurer has the burden to demonstrate that it applies in a particular case and that it is subject to no other reasonable interpretation (see Seaboard Sur. Co. v. Gillette Co., supra, at 311). However, the plain meaning of a policy's language may not be disregarded to find an ambiguity where none exists (see Yangtze Realty, LLC v. Sirius America Ins. Co., 90 AD3d 744, 745 [2011]; Richner Development, LLC v. Burlington Ins. Co., 81 AD3d 705, 706 [2011]; Howard & Norman Baker, Ltd. v. American Safety Cas. Ins. Co., 75 AD3d 533, 534 [2010]).

The defendants established their prima facie entitlement to summary judgment as a matter of law. The policy Nationwide produced and which plaintiffs claim is a "false" policy is the Commercial General Umbrella Policy #66CU-612-007-3002, and provides Maxwell with coverage up to $5 million. This policy contains the Auto Liability Exclusion Endorsement Form Cas 3262 1-86. In addition, the declarations page of this policy in the Schedule of Underlying Insurance designates Nationwide's Commercial General Liability Policy #66PR612007-3001M as the only policy for which it provides "excess" coverage.

The Nationwide Policy which plaintiffs produced and claim is the "true" umbrella policy is the Commercial General Liability Coverage Policy #66PR612007-3001M sold to Maxwell providing $1 million/$2 million coverage. This policy does not contain the Auto Liability Exclusion Endorsement Form Cas 3262 1-86. Contrary to plaintiffs' claims, however, the Commercial General Liability which plaintiffs claim clearly states on the declarations page that commercial auto coverage is "not included". In addition, the auto exclusion is fully and clearly set forth in Section I, subdivision 2(g) of the portion of the Commercial General Liability identified as form CG 00 01 12 07. Thus, even under plaintiffs' proffered policy, commercial auto coverage is excluded, albeit such exclusion is set forth on a form different from that contained in the Commercial General Umbrella Policy #66CU-612-007-3002.

The plaintiffs have failed to rebut National's prima facie showing that the auto exclusion was part of each policy. In reply to defendants' motion, plaintiffs submitted only their attorney's affirmation asserting that Maxwell was never given the umbrella policy produced by Nationwide. It is well settled, however, that the affirmation of an attorney who lacks personal knowledge of the facts is of no probative value and insufficient to raise a triable issue of fact (see JMD Holding Corp. v. Congress Fin. Corp., 4 NY3d 373, 384-385 [2005]; US Nat. Bank Ass'n as Trustee v. Melton, 90 AD3d 742, 743 [2011]; 9394, LLC v. Farris, 10 AD3d

708, 710-711 [2004]) and Seubert, in his affidavit, does not claim that he did not receive a copy of the Commercial General Umbrella Policy #66CU-612-007-3002. Counsel's claim that there is no automobile exclusion in the Commercial General Liability policy which plaintiffs admit was given to Maxwell is clearly erroneous.

Plaintiffs' reliance upon Farm Family Cas. Ins. Co. v. Habitat Revival, LLC, 91 AD3d 903 [2012] is misplaced. The issue of coverage in Farm Family Cas. Ins. Co. was based upon the court's finding of an ambiguity with regard to the definition of "employee" in the exclusionary clause. In the instant case, the plaintiffs have neither claimed nor identified any ambiguity, nor has the court found any, in the automobile exclusion endorsement in either policy. Plaintiffs claim here is that there is no automobile exclusion in the policy which they claim is the "umbrella" policy. The absence of a provision in a contract does not render the contract ambiguous, and is merely an omission (see Bazin v. Walsh 240 Owner, LLC, 72 AD3d 190 [2010]).

The defendants' have also established, prima facie, their entitlement to summary judgment with respect to the claim against Ginsberg. An insurance agent has a common-law duty to obtain the requested coverage for a client within a reasonable time based upon the specific terms of the client's request or to inform the client of the inability to do so (see Murphy v. Kuhn, 90 NY2d 266, 270 [1997]; Loevner v. Sullivan & Strauss Agency, Inc., 35 AD3d 392 [2006], lv denied 8 NY3d 808 [2007]). Absent a specific request for coverage not already in a client's policy or the existence of a special relationship with the client, an insurance agent or broker has no continuing duty to advise, guide, or direct a client to obtain additional coverage (see Hoffend & Sons, Inc. v. Rose & Kiernan, Inc., 7 NY3d 152, 157-158 [2006]; Murphy v. Kuhn, supra at 270-271; Madhvani v. Sheehan, 234 AD2d 652, 654 [1996]).

In support of this branch of their motion, defendants submitted the signed copy of Maxwell's initial application for insurance dated November 21, 2003, together with Ginsberg's affidavit which demonstrate that Ginsberg did not breach his duty to Maxwell since Maxwell did not seek auto coverage initially or at subsequent renewals and(see Motor Parkway Enterprises, Inc. v. Loyd Keith Friedlander Partners, Ltd., 89 AD3d 1069 [2011]).

In opposition, plaintiffs failed to raise a triable issue of fact. Seubert does not deny signing the application, and his conclusory allegation, unsupported by any evidence, that he specifically requested an "umbrella" policy which would provide

excess insurance to his State Farm Auto Policy is insufficient to rebut the defendants' prima facie showing or to raise a triable issue in this regard (see Ehrlich v. American Moninger Greenhouse Mfg. Corp., 26 NY2d 255, 259 [1970]; Structural Building Products Corp. v. Business Ins. Agency, Inc., 281 AD2d 617 [2001]; Spearmon v. Times Square Stores Corp., 96 AD2d 552, 553 [1983]).

After receiving an insurance policy, the insured is conclusively bound by the terms, conditions, and limits of coverage reflected in the policy, whether or not he reads them and cannot claim that he had coverage other than what was actually provided (see Metzger v. Aetna Ins. Co., 227 NY 411, 415-416 [1920]; Portnoy v. Allstate Indem. Co., 82 AD3d 1196, 1198 [2011]; Loevner v. Sullivan & Strauss Agency, Inc., supra). Even without reading the entire policy upon which plaintiffs rely, the declarations page alone clearly declares that commercial automobile coverage is not included and that the policy is not an umbrella policy. Seubert does not claim, much less demonstrate, that upon receiving the initial policy or at the time of any renewal during the five years before the subject accident, he ever complained or notified Ginsberg or National that his alleged request for automobile coverage was omitted or sought to add automobile coverage in any renewal policy (see Portnoy v. Allstate Indem. Co., supra at 1198).

With respect to Mr. Murphy's affirmation in opposition to the cross-motion, it is noted that he is not plaintiffs' attorney of record in this action and, thus, has no standing to oppose defendants' motion. Where, as here, a case does not involve special circumstances or highly complex litigation, a party may not be represented by more than one attorney of record (see Kitsch v. Riker Oil Co., 23 AD2d 502, 503 [1965]; see also Stinnett by Stinnett v. Sears Roebuck & Co., 201 AD2d 362 [1994] citing Chemprene, Inc. v. X-Tyal Intl. Corp., 78 AD2d 668 [1980], mod 55 NY2d 900 [1982]; Dobbins v. Erie County, 58 AD2d 733 [1977]).

In any event, his claims are without merit. Plaintiffs have repeatedly demanded coverage under the policy which they have identified as the "umbrella" policy providing $5 million in coverage. Furthermore, this action is also based upon a claim for coverage under the "umbrella" policy providing $5 million coverage. The plaintiffs have never sought coverage under the primary policy, and their erroneous and misleading identification of the policy under which coverage was demanded cannot be construed as a demand under the primary policy so as to trigger Nationwide's obligation to disclaim. Nor have plaintiffs submitted any evidence to support Mr. Murphy's conclusory

assertion of the existence of a "special relationship" between Maxwell and Ginsberg (see Hoffend & Sons, Inc. v. Rose & Kiernan, Inc., supra; Murphy v. Kuhn, supra).

The branch of plaintiffs' motion seeking to consolidate the instant action with the personal injury action pending in the Supreme Court, New York County under Index No. 107643/09 or, staying the personal injury action until final determination of this motion is denied as moot since the defendants have by this order obtained summary judgment in their favor.

The motion would, in any event, have been denied. Contrary to plaintiffs' claim the two actions sought to be consolidated , do not involve common issues of fact or law. Moreover, "even where common facts exist, it is prejudicial to insurers to have the issue of insurance coverage tried before the jury that considers the underlying liability claims" (Burlington Ins. Co. v. Guma Const. Corp., 66 AD3d 622, 625 [2009] quoting Christensen v. Weeks, 15 AD3d 330, 331 [2005]; see Kelly v. Yannotti, 4 NY2d 603[1958]).

Accordingly, the plaintiffs' motion for summary judgment is denied and the defendants' cross-motion for summary judgment is granted.

Defendants may enter judgment declaring that Nationwide and Ginsberg have no obligation to indemnify plaintiffs for any judgment against plaintiffs in excess of $100,000.00 obtained in the underlying personal injury action Yoshiyasu Tago v. Maxwell Plumb Mechanical Corp. and Zygmuntjan Skoczek, pending in Supreme Court, New York County under Index No. 107643/09.

Dated: May 14, 2012
D# 47

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J.S.C.