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SHORT FORM ORDER

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE SIDNEY F. STRAUSS IA Part 11
Justice

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FLUSHING TERRACE, LLC and CRITERION DEVELOPMENT GROUP, LLC,

Index No.: 21943/2010

Motion Date: May 16, 2012

Plaintiffs,

Cal. No.: 10
Seq. No.: 2

NATIONWIDE MUTUAL FIRE INSURANCE COMPANY, ET. AL.,

Defendants.

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The following papers numbered 1 to 21 read on this motion by plaintiffs Flushing Terrace, LLC ("Flushing Terrace") and Criterion Development Group, LLC ("Criterion") for an order granting summary judgment against General Casualty Insurance Company of Wisconsin ("General Casualty"), declaring that plaintiffs are entitled to a defense and indemnification, as additional insureds, in the underlying action entitled *Janusz Ginter v Park Avalon Condominium Board of Managers*, *et.al.*, (Index No. 11050/2008). Defendant General Casualty cross moves for an order granting summary judgment declaring that it is not obligated to defend or indemnify the plaintiffs in the underlying action.

	PAPERS NUMBERED
Notice of Motion-Affirmation-Exhibits (A-V).....	1-4
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Upon the foregoing papers the motion and cross motion are determined as follows:

In this action for declaratory judgment, plaintiffs Flushing Terrace and Criterion seek, among other things, a declaration that they are additional insureds under the commercial general liability insurance policy issued by General Casualty to M & V Concrete Contracting Corp. ("M & V"), and

that General Casualty has a duty to defend and indemnify Flushing Terrace and Criterion in the underlying action, entitled *Janusz Ginter v Park Avalon Condominium Board of Managers*, *et.al.*, (Index No. 11050/2008).

Background: The Underlying Action

Plaintiff Flushing Terrace, the owner of real property known as 140-21 32nd Avenue, Flushing, New York, retained Criterion as a general contractor for the construction a residential building. Criterion entered into separate written subcontracts with S & J Industrial Corp.("S & J") for the plumbing; with M & V for the concrete; and with Teddy Bosko Builders LLC ("Bosko") for the masonry.

On February 16, 2008, Janusz Ginter, a plumber employed by S & J, sustained personal injuries during the course of his employment at the subject premises when he was hit in the back of the head, neck and shoulder with a piece of construction debris identified as a concrete cinder block, brick, or stone. On May 1, 2008, Mr. Ginter commenced a personal injury action entitled *Janusz Ginter v Park Avalon Condominium Board of Managers, et.al.*, (Index No. 11050/2008 and asserted claims for common-law negligence and for violations of Labor Law §§ 200, 240(1) and 241(6)). The complaint alleged that Flushing Terrace, as the owner of the premises, Park Avalon Condominium Board of Managers, and Monarch Mechanical Inc., were each responsible for Ginter's injuries.

Flushing Terrace was served with process on May 12, 2008, and served an answer on June 18, 2008. On May 15, 2008, Criterion was served with process and on September 17, 2008, Ginter filed a supplemental summons and amended complaint, adding Criterion as a defendant. Flushing Terrace and Criterion thereafter served answers to the amended complaint. Mr. Ginter, pursuant to a stipulation dated April 6, 2009 and filed on April 21, 2009, discontinued the action against Park Avalon Condominium Board of Managers. Park Avalon, pursuant to a stipulation dated April 16, 2009 and filed on April 21, 2009, discontinued its cross claims against Flushing Terrace. Mr. Ginter obtained an order granting a default judgment as to Monarch Mechanical on May 27, 2009.

On April 2, 2009, Flushing Terrace and Criterion commenced a third party action against M & V and S & J. On April 5, 2010, Ginter commenced a separate action against M & V.

On May 21, 2010, M & V commenced a third party action against Bosko. On June 18, 2010, Flushing Terrace and Criterion commenced a third party action against Bosko. On July 21, 2010, Ginter commenced separate actions against M & V and Bosko. In each of these actions the named defendants served an answer.

In a so-ordered stipulation dated February 16, 2011, Ginter's action against M & V, and each of the third-party actions were consolidated under Index No. 11050/2008, and the third party claims against M & V were converted to cross claims.

In an order dated March 22, 2012, this court consolidated the parties' motions and cross motions and granted S & J's motion to dismiss Flushing Terrace and Criterion's fifth and sixth causes of action for common-law contribution and indemnification, and to dismiss the seventh and eight causes of action for contractual contribution and contractual indemnification; granted S & J's request to dismiss all cross claims against it; granted Flushing Terrace's cross motion for summary judgment dismissing the complaint and all cross claims, and for alternative relief, solely to the extent that Ginter's cause of action for negligence and a violation of Labor Law § 200 was dismissed; granted Bosko's cross motion for summary judgment dismissing Ginter's complaint, M & V's second third-party complaint, and Flushing Terrace and Criterion's third third-party complaint; and denied Ginter's cross motion for summary judgment on his Labor Law claims.

As this court previously determined, in pertinent part, Flushing Terrace and Criterion had failed to eliminate all questions of fact as to their own alleged negligence, and that with respect to Criterion, triable issues of fact exist as to whether it was negligent and either caused or contributed to the plaintiff's accident.

In dismissing Ginter's Labor Law §§ 240 and 241 claims against M & V, this court determined that there was no evidence that M & V had the authority to supervise and control the work performed by the Criterion or the other trades, and that there was no evidence that such authority had been delegated to M & V or to any other subcontractor who in turn delegated that authority to M & V.

In dismissing Ginter's negligence and Labor Law §200 claims, this court determined that the evidence submitted was insufficient to establish liability on the part of M & V. Although M & V was working in the building on the morning of the accident, this court found that there was no evidence that M & V negligently removed or tossed debris from the building, and that there was no evidence that M & V was responsible for, or had the authority to control, the activities bringing about Mr. Ginter's injuries. In addition, this court determined that there was no evidence that M & V's employees committed any acts or omissions that caused or contributed to Ginter's accident, and that although M & V's employees were working in the building's upper floors, there was no evidence that there were any cinder blocks on the floors where they were working, or that they were performing any cleaning just prior to Ginter's accident. This court also determined that there was no evidence that M & V's employees accidently caused any material or debris to fall, or that they deliberately threw materials or debris off the upper floor of the building.

With respect to Flushing Terrace and Criterion's cross claim against M & V for contractual indemnification, this court found that there was no evidence that Ginter's injuries arose out of M & V's work, or that M & V, or its employees, committed a negligent act that contributed, in whole or part, to the plaintiff's injuries.

The Within Action for Declaratory Judgment

On August 27, 2010, Flushing Terrace and Criterion commenced the within action for declaratory judgment against Nationwide Mutual Fire Insurance Company, S & J, General Casualty, M & V, Bosko and Scottsdale Insurance Company[1], and asserted twelve causes of action in their complaint. With respect to M & V and General Casualty, plaintiffs allege that they tendered notice to General Casualty of their claims for additional insurance coverage, defense and indemnity, in letters dated June 11, 2008 and May 21, 2009, and that although the insurer reserved its rights in a letter dated June 19, 2009, it did not disclaim coverage.

Plaintiffs, in their second cause of action, seek a declaration to the effect that General Casualty is obligated to provide additional insured coverage to Criterion and Flushing Terrace from the date of the initial tender. The fifth cause of action seeks a declaration to the effect that General Casualty has a duty to defend Criterion and Flushing Terrace in the underlying action and to reimburse them for all defense fees that have been incurred in that action, plus statutory interest. The eighth cause of action seeks a declaration that General Casualty has a duty to indemnify Criterion and Flushing Terrace in the underlying lawsuit. The eleventh cause of action seeks a declaration that M & V breached its contract to procure insurance naming Flushing Terrace and Criterion as additional insureds and obtain indemnity coverage, and therefore is obligated to defend plaintiffs in the underlying action. General Casualty and M & V have served a verified answer and interposed nine affirmative defenses.

The Within Motion and Cross Motion

Plaintiffs now move for summary judgment and seeks a declaration to the effect that General Casualty has a duty to defend and indemnify plaintiffs in the underlying action and to pay the defense costs that were incurred by Flushing Terrace and Criterion in the underlying action. Defendant General Casualty cross moves for an order granting summary judgment and seeks a declaration to the effect that it does not have a duty to defend and indemnify plaintiffs in the underlying action.

The motion and cross motion were timely served, and will be considered on the merits (CPLR 3212). The court notes that although the initial motion and cross motion were served prior to the court's March 22, 2012 order in the underlying action, the parties have had ample opportunity to address the import of said order prior to the date the motion and cross were fully submitted.

The Subcontract and the Subject Insurance Policy

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[1] Scottsdale Insurance Company's motion to dismiss the plaintiffs' complaint was granted by this court in an order dated March 31, 2011, and a judgment dated May 9, 2011. Plaintiffs, pursuant to a stipulation dated March 5, 2012 and filed on April 2, 2012 discontinued the within action against Bosko.

Criterion entered into a separate subcontract with M & V, dated April 5, 2007, whereby said subcontractor agreed to defend, hold harmless, and indemnify Flushing Terrace and Criterion. Said construction subcontract incorporated by reference "Exhibit B" which sets forth the types of insurance policies M & V was required to procure, the amounts of each policy, and required that Criterion and Flushing Terrace be named as "Insurance Certificate Holders and Additional Insured". Thus, contrary to General Casualty's assertions, said construction subcontract required M & V to name Flushing Terrace and Criterion as additional insureds.

M & V obtained a "contractor's" insurance policy from General Casualty which provided, among other things, for commercial general liability with a limit of $1 million per occurrence for the period of January 11, 2008 through January 11, 2009. The subject policy names M & V as the insured and the additional insured endorsements name Capital Funding Group, a non-party, as the additional insured. Said "Contractor's Policy" however, also defines an additional insured as follows:

"The word 'insured' means any person or organization qualifying as such under section **C-WHO IS AN INSURED.**"
"**SECTION C-WHO IS AN INSURED"** provides, in pertinent part, as follows:
"**6.** Any organization (called additional insured) whom you are required to add as an additional insured on this policy under a written contract or written agreement; but the written contract or written agreement must be:
a. Currently in effect or becoming effective during the term of this policy; and
b. Executed prior to the 'bodily injury', 'property damage', or 'personal and advertising injury'.

The following additional provisions apply to the coverage described above:
a. Limitations
The insurance provided to the additional insured is limited as follows:
(1) That person or organization is an additional insured only with respect to liability for 'bodily injury' ... caused in whole or in part, by
(a) Your acts or admissions; or
(b) The act or admissions of those acting on your behalf,
in the performance of your operations for the insured."
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"(5) We have no duty to defend or indemnify an additional insured under this endorsement:
(a) For any liability due to negligence attributable to any person or entity other than you or those acting on your behalf in the performance of your operations for the additional insured;
(b) For any loss which occurs prior to our named insured commencing operations at the location of the loss; and
(c) Until we receive written notice of a claim or 'suit' from the additional insured as required in the **Duties In The Event of Occurrence, Offense, Claim or Suit Condition."**

The subject insurance policy provides, in pertinent part as follows:

" **Section E- LIABILITY AND MEDICAL EXPENSES GENERAL CONDITIONS**
6. Additional Insureds
An additional insured under this Coverage Part will as soon as practicable :
a. Give written notice of an occurrence or an offense to us which may result in a claim or 'suit' under this insurance; and
b. Agree to trigger or activate any other insurance which the additional insured has, which is primary, for a loss we cover under this Coverage Part by tendering a defense to the insurers of all other insurance"

The subject policy contains the following definition:
"**Section F Liability and Medical Expenses Definitions**
25. "Your work" includes
a. Work or operations performed by you or on your behalf; and
b. Materials, parts or equipment furnished in connection with such work or operations.
"Your work" includes:
a. Warranties or representations made at any time with respect to the fitness, quality, durability, performance or use of "your work"; and
b. The providing of or failure to provide warnings or instructions."

The subject policy's **"Contractor's Common Policy Conditions"** provides, in pertinent part, as follows:

"**H. OTHER INSURANCE**
1. If there is other insurance covering the same loss or damage, we will pay only for the amount of covered loss or damage in excess of the amount due from that other insurance, whether you can collect on it or not. But we will not pay more than the applicable Limit of Insurance."
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4. This insurance is excess over any other insurance naming the additional insured as an insured whether primary, excess, contingent or on any other basis unless the written contract or agreement described in **Section C-Who Is An Insured**, Item 6 specifically requires that this insurance be provided on either a primary basis or a primary and noncontributory basis."

The New York "additional changes" endorsement to the subject insurance policy provides, in pertinent part, as follows:

"B. 1. Contractors Liability
a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury"...to which this insurance applies. We will have the right and duty to defend the insured against any "suit" seeking those damages even if the allegations in the "suit" are groundless, false or fraudulent. However, we will have no duty to defend the insured against a "suit" seeking damages for "bodily injury" to which this insurance does not apply....".
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Discussion

As a threshold matter, General Casualty argues that plaintiffs' motion for summary judgment must be denied because it is supported only by an attorney's affirmation, and not by an affidavit from an individual with personal knowledge of the facts and contracts at issue . The argument is unpersuasive. Contrary to defendant's assertion, a plaintiff can establish a prima facie case through the affirmation of its attorney based upon documentary evidence (*Zuckerman v City of New York*, 49 NY2d 557, 563 [1980]; see also *Prudential Sec. v Rovello*, 262 AD2d 172 [1999]).

In the underlying action, this court reviewed the deposition transcripts, and in its order of March 22, 2012, made a determination on the merits with respect to Mr. Ginter's claims against M & V. To the extent that General Casualty complains that the same deposition transcripts submitted herein were not executed and therefore should not be considered, this issue is now moot. There is no need for this court to review these deposition transcripts in order to determine the within motion and cross motion.

Plaintiffs Flushing Terrace and Criterion assert that coverage is available to them as additional insureds under the General Casualty contractor's general liability policy. Plaintiffs assert that even if they lose their appeal of the court's order of March 22, 2012 in the underlying action, General Casualty has a duty to reimburse them for their defense costs incurred in that action, from the date of tender to March 22, 2012. Plaintiffs further assert that General Casualty has waived its right to raise the excess condition as a defense to the duty to defend, as it failed to disclaim on this grounds in a timely fashion.

Defendant General Casualty asserts that as this court determined in the underlying action that no act or omission on the part of M & V, or those acting on its behalf, caused in whole or in part, Mr. Ginter's injuries, the insurance policy's additional insured provision has not been triggered, and that the insurer had no duty to defend and indemnify the plaintiffs. Defendant further asserts that with respect to additional insureds, the insurance policy issued by Scottsdale Insurance Company (Scottsdale) to Bosko, pursuant to Bosko's subcontract with Criterion, was primary, while General Casualty's policy provides for excess coverage. Scottsdale disclaimed coverage on the grounds of late notice and this court in its order of March 31, 2011, granted that insurer's motion to dismiss the within action against it. Plaintiffs assert that General Casualty was on notice of the Scottsdale coverage as of October 15, 2010, when that insurer moved to dismiss, and that General Casualty failed to reserve its rights at that time, and did not raise the issue of excess coverage until it served the within cross motion.

An insurer's duty to defend "'arises whenever the allegations in a complaint state a cause of action that gives rise to the reasonable possibility of recovery under the policy'" (*Fieldstone Prop. Owners Assn., Inc. v Hermitage Ins. Co., Inc.*, 16 NY3d 257, 264 [2011], quoting *Fitzpatrick v American Honda Motor Co.*, 78 NY2d 61, 65 [1991]; see *BP A.C. Corp. v One Beacon Ins. Group*, 8 NY3d 708 [2007]). This standard applies equally to additional insured and named insureds (*Worth Constr. Co., Inc. v Admiral Ins. Co.*, 10 NY3d 411, 415 [2008]; *BP A.C. Corp. v One Beacon Ins. Group*, 8 NY2d 708 [2007]). Here, General Casualty's policy defines an additional insured as any organization to whom M & V was obligated, by virtue of a

written contract, to provide liability insurance, but "only with respect to liability for 'bodily injury' ... caused in whole or in part, by **(a)** Your [M & V's] acts or admissions; or **(b)** The act or admissions of those acting on your [M &V's] behalf, in the performance of your [M & V's] operations for the insured." The portion of this provision limiting coverage to liability "Your [M & V's] acts or omissions" requires that there be "some causal relationship between the injury and the risk for which coverage is provided" (*Regal Constr. Corp. v National Union Fire Ins. Co. of Pittsburgh, PA*, 15 NY3d 34, 38 [2010] , quoting *Maroney v New York Cent. Mut. Fire Ins. Co.*, 5 NY3d 467, 472 [2005]; see *Worth Constr. Co., Inc. v Admiral Ins. Co.*, 10 NY3d 411, 415 [2008]).

Plaintiffs Flushing Terrace and Criterion cannot demonstrate, prima facie, the existence of such a causal relationship. In the underlying action, the injured plaintiff Mr. Ginter, was employed by another contractor, S & J, and not by the insured, and this court determined therein that there was no casual connection between Ginter's accident and the work performed by M & V. Where as here, the underlying action has been dismissed as against a "named insured," the insurer that issued a policy of insurance to the "named insured" is relieved of its duty to defend any "additional insured" in that action (see *Worth Constr. Co., Inc. v Admiral Ins. Co.*, *supra*; *Monadnock Constr., Inc. v DiFama Concrete, Inc.*, 70 AD3d 906, 907-908 [2010]). In view of the fact that the General Casualty policy cannot be triggered , whether said policy is an excess policy is irrelevant. General Casualty, thus, has no duty to defend, indemnify, or reimburse Flushing Terrace and Criterion in the underlying action.

Conclusion

Plaintiffs' Flushing Terrace and Criterion's motion for summary judgment is denied, and General Casualty's cross motion for summary judgment is granted, and it is ordered and adjudged that General Casualty does not have a duty to defend, indemnify or reimburse the Flushing Terrace and Criterion in the underlying action entitled *Janusz Ginter v Park Avalon Condominium Board of Managers*, *et.al.*, (Index No. 11050/2008).

Dated: July 23, 2012

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J.S.C.