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SHORT FORM ORDER

INDEX No. 12-1032

COPY

SUPREME COURT - STATE OF NEW YORK
I.A.S. COMMERCIAL PART 45 - SUFFOLK COUNTY

PRESENT:

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE 7/11/12
ADJ. DATES 8/17/12
Mot. Seq. # 001 - MD
Mot. Seq. # 002 - XMD
CDISP Y____ N X

DELANEY ASSOCIATES, LP,

Plaintiff,

-against-

REGAN AGENCY, INC., NATIONAL FIRE INSURANCE COMPANY OF HARTFORD and CNA FINANCIAL CORPORATION,

Defendants

GOLDBERG & CONNOLLY, ESQS.
Attys. For Plaintiff
66 No. Village Ave.
Rockville Centre, NY 11570

COLLIAU, CARLUCCI, KEENER ET AL
Attys. For Defendant National Fire Ins. Co.
125 Broad St.
New York, NY 10004

DEVITT, SPELLMAN, BARRETT, LLP
Attys. For Defendant CNA Financial Corp.
50 Route 111
Smithtown, NY 11787

WILSON, ELSER, MOSKOWITZ, ET AL
Attys. For Defendant Regan Agency
3 Gannett Dr.
White Plains, NY 10604

Upon the following papers numbered 1 to 18 read on this motion for partial summary judgment and cross motion for summary judgment; Notice of Motion/Order to Show Cause and supporting papers 1 - 3; Notice of Cross Motion and supporting papers 4-6; Answering Affidavits and supporting papers 7; 8-10; Replying Affidavits and supporting papers 11-12; ; Other 13-14 (memorandum); 15 (memorandum); 16 (memorandum); 17-18 (memorandum); ~~(and after hearing counsel in support and opposed to the motion)~~ it is,

ORDERED that this motion (#001) by the plaintiff for partial summary judgment on those portions of its First cause of action wherein it seeks a judicial declaration that defendants, National Fire Insurance Company of Hartford and CNA Financial Corporation, are obligated to assume the defense of certain indemnitees of the plaintiff who are defendants in a personal injury action pending in New York County, is considered under CPLR 3212 and Insurance Law § 3420 and is denied; and it is further

ORDERED that pursuant to CPLR 3212(b), the court hereby declares that defendant, National Fire Insurance Company of Hartford, is not required to defend the plaintiff or its indemnitees against the claims pending against said indemnitees in the personal injury action entitled ***Texiera v City of New York*** (Index # 10-106707), pending in NYS Supreme Court, New York County; and it is further

ORDERED that the cross motion (#002) by the defendant, National Fire Insurance Company of Hartford, for summary judgment against the plaintiff by the issuance of a declaration that defendant National Fire Insurance Company of Hartford is not obligated to provide a defense to the plaintiff's indemnitees in the underlying personal injury action is considered under CPLR 3212 and Insurance Law §3420 and is denied.

The plaintiff commenced this action to obtain a judgment against defendants, National Fire Insurance Company of Hartford [hereinafter "National"] and CNA Financial Corporation [hereinafter "CNA"] declaring each are obligated to provide the plaintiff's contract indemnitees with both a defense and indemnity if necessary, with respect to claims asserted in a personal injury action commenced against certain municipal defendants whom the plaintiff agreed to insure against liability claims under the terms of construction contract with such municipal defendants. The plaintiff further seeks recovery of money damages against defendant, Regan Agency, Inc. [hereinafter "Regan"], an insurance agency that provided insurance coverage and other services to the plaintiff. Advanced in the record adduced on the instant motions are the following facts deemed material to the court's resolution of such applications.

In February of 2008, the plaintiff entered into a contract with the City of New York and therein promised to perform construction work to repair collapsed or broken storm, sanitary or combined sewer drains, water mains and the like. Under the terms of that contract, the plaintiff was allegedly required to obtain insurance coverage in the form of General Liability Insurance Coverage and Business Automobile Insurance Coverage so as to provide the City with a defense against liability claims asserted against it and indemnity in the event any such claim was successfully prosecuted by injured persons. The plaintiff allegedly advised defendant Regan of its contractual insurance obligations under the City contract and directed Regan to obtain insurance providing the coverages specified.

A general liability policy of the type contemplated by the plaintiff's contract with the City affording coverage to the City as an additional insured is alleged to have been in effect from November 1, 2008 through November 1, 2009 under a policy issued by the Arch Insurance Company. Automobile insurance coverage which extended to the City as an additional insured was in place as of November 1, 2008 through November 1, 2009 under a policy issued by defendant National.

On October 9, 2009, Joao Texiera, an employee of the plaintiff was injured while in the plaintiff's employ. Within a month of his accident, Texiera filed a Notice of Claim against the City and its departments of Transportation and Environmental Protection alleging therein that he sustained personal injuries due to an "obstructed, cracked, uneven raised, depressed missing portion of the roadway adjacent to a sewer grate which was deteriorated and/or in a state of disrepair and/or state of improper repair (*see* Notice of Claim attached as Exhibit 2 to the Affirmation of attorney Kroeger submitted in support of plaintiff's moving papers). The roadway surface defect was described as situated on Allen Street in lower Manhattan. An inquiry of Texiera of the type contemplated by the hearing provisions of § 50-h of the General Municipal Law was held on March 24, 2010 (*see* ¶ 7 of the Complaint attached as Exhibit 3 to Kroeger's affirmation).

Four days after Texiera's fall, the plaintiff completed an Employer's Report of Work-Related Injury on a form (C-2) provided by the New York State Workers' Compensation Board. The report included allegations that Texiera's fall occurred at 10:00 p.m. on October 9, 2009. In that report, a partner of the plaintiff who prepared the report described the accident as occurring as follows: "employee was retrieving equipment from work van to begin work when he turned and twisted his right knee" (*see* Section D, ¶ 10 C-2 Report attached as Exhibit 3 of the affidavit of Kenneth Delaney submitted in support of plaintiff's moving papers). The information set forth in the report was allegedly derived, not from the injured employee Texiera, but from his immediate supervisor, who is also an employee of the plaintiff (*see* ¶ 19 of the Affidavit of Kenneth J. Delaney submitted in support of the plaintiff's moving paper). Immediately

following its preparation, the report was allegedly forwarded to defendant Regan, the insurance agent of the plaintiff. While defendant Regan allegedly timely notified the Workers' Compensation Board of Texiera's accident, it allegedly failed to timely notify either the plaintiff's general liability insurer, Arch Insurance Company, or defendant National, the plaintiff's automobile liability insurer.

In May of 2010, Texiera filed suit against the City and the utility, Con-Edison, seeking recovery of money damages for the injuries allegedly sustained in the fall on Allen Street on October 9, 2009. Therein, Texiera alleged that he was a pedestrian walking on Allen Street when "he was caused to trip and/or fall as the result of large pothole/depression/uneven pavement" (*see* ¶ 25 of Texiera's Complaint attached as Exhibit 3 to the affirmation of attorney Kroeger submitted in support of plaintiff's moving papers). By the time of the institution of Texiera's lawsuit by the filing on May 21, 2010, the City had tendered Texiera's claim to the plaintiff by correspondence dated May 3, 2010, therein demanding both a defense and indemnity from the plaintiff. On May 4, 2010, the plaintiff notified defendant Regan of Texiera's claim against the City indemnitees. On May 4, 2010, defendant Regan allegedly tendered the claim to Arch Insurance Company, who promptly denied coverage on the grounds of exclusions, late notice, no coverage and others reserved in its correspondence dated May 7, 2010. Following the City's issuance to Arch of a direct demand for a defense in June of 2010, the plaintiff retained counsel to provide a defense to the City defendants in the Texiera action.

Defendant, National Fire and its parent company, defendant CNA, were notified of Texiera's accident by defendant Regan on July 20, 2010. Therein, Regan agents described the accident as occurring while unloading supplies from a work truck. An acknowledgment of its receipt of such notice was issued by CNA on July 21, 2010. By correspondence dated August 16, 2010, CNA on behalf of National, advised that it was investigating the facts underlying the claims and that all rights for denial of coverage were reserved (*see* Exhibit G attached to affirmation of National's counsel submitted in opposition to plaintiff's motion). On June 7, 2011, the attorneys retained by the plaintiff to provide a defense to the City defendants in the Texiera action demanded that National Fire and/or CNA provide such defense to the City defendants therein suggesting that the accident might have been the result of a covered occurrence. By letter dated, September 17, 2011, CNA on behalf of defendant National Fire, declined to provide such defense to the City defendants on several grounds, including no coverage for the occurrence and insufficient evidence as to the City defendants' status as additional insureds (*see* Exhibit 7 attached to the affirmation of Kroeger submitted in support of plaintiff's moving papers).

This action was commenced by the plaintiff in January of 2012 (*see* Exhibit A attached to National's attorney's affirmation in opposition to the plaintiff's motion). Issue was joined with respect to defendant National by the service and filing of its answer in February of 2012. The court has not been apprised of the joinder of issue with respect to the other defendants, including defendant, CNA.

By the instant motion, the plaintiff demands partial summary judgment on so much of its First cause of action, wherein the plaintiff seeks a declaration that defendants, National and CNA, are obligated, under the terms of National's automobile insurance policy, to provide a defense to the City defendants in the Texiera action. In support of its motion, the plaintiff contends that because there is evidence that Texiera's accident occurred during his "use" of a vehicle insured by National, such use being Texiera's alleged retrieval of equipment from a van, and evidence that National and/or CNA were on notice of such use, these defendants are obligated to defend the City defendants in the Texiera personal injury action. To support these contentions, the plaintiff relies upon, among other things, the description of the accident set forth in the October 13, 2009 C-2 Workers Compensation Report prepared by the plaintiff's partner and CNA's July 21, 2010 acknowledgment of receipt of Regan's July 20, 2010 notice of Texiera, both of which noted the off-loading of equipment from a work truck or van, and the June 7, 2011 correspondence from the City

defendants' defense counsel to CNA alleging evidence that Texiera's injury was the result of a covered occurrence (*see* § II, ¶ C of plaintiff's memorandum of law in support of its motion and § I, ¶ A of reply memorandum).

Defendant National opposes the plaintiff's motion and cross moves for an accelerated judgment of this court declaring that National is not obligated to provide a defense to the plaintiff's indemnitees in the underlying Texiera action. Defendant CNA also opposes the plaintiff's motion therein demanding that the court award it reverse summary judgment on the plaintiff's First cause of action by declaring that CNA has no duty to defend the plaintiff's indemnitees due to a lack of coverage. For the reasons stated below, the motion-in-chief by the plaintiff is denied, but a declaration of no duty to defend herein issues in favor of National pursuant to CPLR 3212(b). The cross motion by National Fire Insurance Company of Hartford is separately denied.

It is well settled law that an insurer's duty to defend its insured is "exceedingly broad" (***Colon v Aetna Life & Cas. Ins. Co.***, 66 NY2d 6, 8, 494 NYS2d 688 [1985]). An insurer will thus be called upon to provide a defense whenever the allegations of an underlying complaint in an action against an insured suggest a reasonable possibility of coverage (*see* ***BP Air Conditioning Corp. v One Beacon Ins. Group***, 8 NY3d 708, 714, 840 NYS2d 302 [2007]). An insurer may not, however, use a third party's pleadings as a "formal fortress" to avoid its contractual duty to defend the insured (*see* ***Fitzpatrick v American Honda Motor Co.***, 78 NY2d 61, 571 NYS2d 672 [1991]). Consequently, where the underlying complaint does not allege a covered occurrence, but the insurer has actual knowledge of facts that indicate the lawsuit does involve a covered event, "wooden application of the 'four corners of the complaint' rule would render the duty to defend narrower than the duty to indemnify - clearly an unacceptable result" (*Id.* at 78 NY2d 68). In this regard, it has been held that "the question is not whether the injured party can maintain a cause of action against the insured, but whether, he can state facts which bring the injury within the coverage. If he states such facts the policy requires the insurer to defend irrespective of the insured's ultimate liability" (***International Paper Co. v Continental Cas. Co.***, 35 NY2d 322, 361 NYS2d 873 [1974], *quoting* ***Goldberg v Lumber Mut. Cas. Ins. Co. of New York,*** 297 NY 148, 4 NYS 704 [1948]).

An insurer's duty to defend is thus triggered whenever the allegations of a complaint, liberally construed, suggest a reasonable possibility of coverage or where the insurer has actual knowledge of facts establishing a reasonable possibility of coverage (*see* ***Automobile Ins. Co. of Hartford v Cook***, 7 NY3d 131, 818 NYS2d 176 [2006]; ***Fitzpatrick v American Honda Motor Co.***, 78 NY2d 61, *supra*; ***Bruckner Realty, LLC v. County Oil Co., Inc.***, 40 AD3d 898, 838 NYS2d 87 [2d Dept 2007]). Conversely, the duty is not triggered where it may be concluded, as a matter of law, that there is no possible factual or legal basis upon which the insurer might eventually be held to be obligated to indemnify the claimant under any provision of the insurance policy (*see* ***City of New York v Evanston Ins. Co.***, 39 AD3d 153, 830 NYS2d 299 [2d Dept 2007]).

Generally, it is for the insured to establish coverage and for the insurer to prove that an exclusion in the policy applies to defeat coverage (*see* ***Consolidated Edison Co. of N.Y. v Allstate Ins. Co.***, 98 NY2d 208, 218, 746 NYS2d 622 [2002]; ***Barkan v New York Schools Ins. Reciprocal***, 65 AD3d 1061, 886 NYS2d 414 [2d Dept 2009]). An additional insured is a recognized term in insurance contracts, which means an entity enjoying the same protection as the named insured (*see* ***Regal Constr. Corp. v National Union Fire Ins. Co.***, 15 NY3d 34, 904 NYS2d 338 [2010]; ***BP Air Conditioning Corp. v One Beacon Ins. Group***, 8 NY3d 708, *supra*). One claiming coverage as or on behalf of an additional insured must thus establish that such person or entity qualifies as an additional insured under the subject policy and that the allegations of the complaint in the underlying action by the injured party fall within the scope of the coverage afforded under the policy (*see* ***City of New York v Philadelphia Indem. Ins. Co.***, 54 AD3d 709,

864 NYS2d 454 [2d Dept 2008]). Once these factors are established, the burden shifts to the insurer to establish the absence of coverage (*see* ***Stout v 1 East 66th St. Corp.***, 90 AD3d 898, 935 NYS2d 49 [2d Dept 2011]; ***Matter of Allstate Ins. Co. v Berger***, 47 AD3d 708, 710, 851 NYS2d 584 [2d Dept 2008]).

Here, the risk insured under the National automobile liability policy was the risk of injury arising out an accident resulting from the ownership, maintenance or use of a covered vehicle. While terms, such as operation and use, have been construed as including the loading and off-loading of a covered vehicle, where the accident occurs away from, and incidental to a covered vehicle, the insured's duty to defend and ultimately indemnify must be closely related to the use the vehicle (*see* ***Elite Ambulette Corp. v All City Ins. Co.***, 293 AD2d 643, 740 NYS2d 442 [2d Dept 2002]). Appellate case authorities have repeatedly instructed that "[a]lthough the [vehicle] itself need not be the proximate cause of the injury ...[n]egligence in the use of the vehicle must be shown, and that negligence must be a cause of the injury" (***Zaccari v Progressive Northwestern Ins. Co***, 35 AD3d 597, 827 NYS2d 204 [2d Dept 2006] [internal quotations omitted]; ***Somers Cent. School Dist. v Lumbermens Mut. Cas. Co.***, 6 AD3d 606, 607, 774 NYS2d 824 [2d Dept 2004]; ***Progressive Cas. Ins. Co. v Yodice***, 276 AD2d 540, 714 NYS2d 715 [2d Dept 2000]). The determination of whether an accident has resulted from the use or operation of a covered vehicle has thus been held to require consideration of whether, among other things, the accident arose out of the inherent nature of the vehicle and whether the vehicle itself produced the injury (*see* ***Empire Ins. Co. v Schliessman***, 306 AD2d 512, 763 NYS2d 65 [2d Dept 2003]).

Upon application of the foregoing principles to the record adduced on the instant motions, the court finds that the plaintiff failed to establish coverage under the National policy. Not disputed is the fact that neither the allegations of the complaint served in the underlying Texiera action against the City defendants, nor the notice of claim which preceded such complaint, allege facts that suggest a reasonable possibility of coverage under the National policy (*see* ***Serrano v Republic Ins. Co.***, 48 AD3d 665, 852 NYS2d 288 [2d Dept 2008]; ***Belsito v State Farm Mut. Ins. Co.***, 27 AD3d 502, 811 NYS2d 762 [2d Dept 2006]). In both the notice of claim and the complaint served by Texiera in connection with his suit against the City defendants and Con Edison, vehicle involvement is nowhere mentioned as the facts underlying the claims advanced therein by Texiera sound only in premises liability claims due to a surface defect on a roadway which allegedly caused a fall and resulting injuries. A possibility of coverage under National's automobile liability policy is thus not discernible from Texiera's complaint.

Under these circumstances, it was incumbent upon the plaintiff to establish that the insurer defendants had actual knowledge of facts indicating that the Texiera lawsuit does involve a covered event (*see* ***Fitzpatrick v American Honda Motor Co.***, 78 NY2d 61, *supra*). A review of the submissions adduced on the instant application reveals, however, a failure on the part of the plaintiff to satisfy this burden. The record is devoid of proof in evidentiary form of Texiera's ability to state facts "which bring the injury within the coverage" (*see* ***International Paper Co. v Continental Cas. Co.***, 35 NY2d 322, *supra*) and that the insurer defendants had knowledge of any such facts (*see* ***Fitzpatrick v American Honda Motor Co.***, 78 NY2d 61, *supra*).

Unavailing is the plaintiff's reliance upon the descriptions of the Texiera's accident set forth in the C-2 Workers' Compensation Report, the description provided by defendant Regan's July 20, 2010 notice to CNA and CNA's July 21 2010 response acknowledging receipt thereof, and/or the description set forth in defense counsel's June 7, 2011 letter to CNA or the physician's affirmation attached thereto, all of which included references to the unloading of a vehicle. There is no evidence that any of the facts that comprise these descriptions were stated by Texiera, including the description of the accident set forth in the physician's affirmation attached to defense counsel's June 7, 2011 correspondence.

This court finds that an insurer may not be charged with actual knowledge of facts of a possible covered event simply by reason of its receipt of a notice of claim, prepared by one other than the injured claimant, which describes an occurrence as one within the sphere of coverage under a policy. To hold otherwise would require that a defense be provided simply because an accident is described by one, without personal knowledge of the facts, as an event which possibly falls within the coverage provisions of a policy.

Even if the plaintiff could successfully charge defendants National and CNA with knowledge of facts connoting possible coverage by reason of the plaintiff's description of Texiera's accident as occurring while Texiera was unloading equipment from a covered vehicle, the record is devoid of any evidence tending to establish negligence in the use of the vehicle and that such negligence was a cause of the injury (*see* ***Zaccari v. Progressive Northwestern Ins. Co.***, 35 A.D.3d 597, *supra*; ***Elite Ambulette Corp. v All City Ins. Co.***, 293 AD2d 643, *supra*; *see also* ***Progressive Northeastern Ins. Co. v Penn-Star Ins. Co.***, 89 AD3d 547, 934 NYS2d 93 [1st Dept 2011]). The failure to establish any nexus between the ownership, maintenance or use of the vehicle is fatal to the plaintiff's claims for an accelerated judgment based upon the insurer defendants' purported "actual knowledge" of facts indicating a covered event.

Rejected as unmeritorious are the plaintiff's claims of an entitlement to summary judgment on the alternate grounds advanced, namely, that defendants National and/or CNA waived their rights to disclaim coverage due to their failures to comport with the requirements for disclaimers set forth in the applicable provisions of Insurance Law § 3420. It is well established that "where the issue is the existence or nonexistence of coverage (e.g., the insuring clause and exclusions), the doctrine of waiver is simply inapplicable" (***Albert J. Schiff Assoc., Inc. v Flack***, 51 NY2d 692, 435 NYS2d 972 [1980]). Issuance of a disclaimer is thus unnecessary when a claim falls outside the scope of a policy's coverage portion, since "requiring payment of a claim upon failure to timely disclaim would create coverage where it never existed" (***Worcester Ins. Co. v Bettenhauser***, 95 NY2d 185, 712 NYS2d 433 [2000]; *see* ***Markevics v Liberty Mut. Ins. Co.***, 97 NY2d 646, 735 NYS2d 865 [2001]; ***Zappone v Home Ins. Co.***, 55 NY2d 131, 134, 447 NYS2d 911[1982]; ***Hasbani v Nationwide Mut. Ins. Co.***, ___AD3d ___, 2012 WL 3204669 [2d Dept 2012]; ***York Restoration Corp. v Solty's Constr., Inc.***, 79 AD3d 861, 914 NYS2d 178 [2d Dept 2010]). Likewise rejected are any claims that National and/or CNA should be estopped from disclaiming coverage (*see* Insurance Law § 3420).

In view of the foregoing, the plaintiff's motion (#001) for partial summary judgment on its claims for a judicial declaration that defendants National and/or CNA are obligated to provide a defense to the City defendants in the underlying Texiera action is denied. The motion is also denied as to defendant CNA on the alternate ground of a failure on the part of the plaintiff to attach a copy of any answer by CNA and the absence of a copy of such answer in the opposing papers of CNA (*cf.*, ***Avalon Gardens Rehabilitation & Health Care v Morsello***, 97 AD3d 611, 948 NYS2d 377 [2d Dept 2012]; ***Crossett v Wing Farm, Inc.***, 79 AD3d 1334, 912 NYS.2d 751 [3d Dept 2010]). Since the record adduced on the instant motion reveals that, as a matter of law, neither National nor CNA are chargeable with a duty to defend the City defendants in the underlying Texiera action due to the absence of a reasonable possibility of coverage of Texiera's accident under the terms of the National automobile liability policy, the court hereby declares that defendants National and CNA have no obligation to provide such defense.

The cross motion by defendant, National, for summary judgment against the plaintiff on its First cause of action to the extent of determining that National is not required to defend nor indemnify the plaintiff or its indemnitees in the Texiera action is denied. The cross motion is singularly predicated upon claims that the National is not required to defend the plaintiff's indemnitees due to the issuance of a late notice of the claim by the plaintiff and/or the additional insureds, namely the City defendants. Although the motion appears to be supported by an affidavit by an agent of cross moving defendant National Fire, said affidavit

does not include evidence that the affiant was sworn by a notary. The cross motion is thus not supported by the affidavit called for by CPLR 3212(b), nor is it supported by the other proof contemplated by such rule. Accordingly, the court finds the moving papers to be insufficient to establish National's entitlement to a summary judgment on the grounds advanced in the cross moving papers, which differ markedly from those National advanced in opposition to the plaintiff's motion-in-chief. For these reasons, and in view of the court's declaration that National is not obligated to provide the plaintiff's indemnitees with a defense in the Texiera action due to the absence of coverage under the terms of the National automobile policy as set forth above, the court denies the cross motion (#002) by National for summary judgment against the plaintiff on its First cause of action.

Finally, the court denies the demand for reverse summary judgment interposed in the papers submitted by defendant CNA to the plaintiff's motion-in-chief, as the court is without a copy of an answer served by CNA to the plaintiff's complaint as required by CPLR 3212(b).

DATED: 9/5/12

THOMAS F. WHELAN, J.S.C.