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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: SALIANN SCARPULLA _____ PART 19

Justice

Index Number : 603743/2009
NEW YORK UNIVERSITY
vs.
ARMA SCRAP METAL CO INC
SEQUENCE NUMBER : 004
SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

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

decided per the memorandum decision dated 1/23/13 which disposes of motion sequence(s) no. 004 and 005.

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

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

Dated: 1/23/13

SALIANN SCARPULLA, J.S.C.

SALIANN SCARPULLA

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: IAS PART 19

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NEW YORK UNIVERSITY,

Plaintiff,

-against-

ARMA SCRAP METAL CO., INC., NORTHFIELD INSURANCE COMPANY, NATIONAL CONTINENTAL INSURANCE COMPANY, NATIONAL UNION FIRE INSURANCE COMPANY, PA, GLENN HAMER and DENISE HAMER,

Defendants.

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Index No. 603743/09
Submission Date: 8/15/12

DECISION AND ORDER

For Plaintiff:
The Chartwell Law Offices, LLP
One Battery Park Plaza, 35th Floor
New York, NY 10004

For Defendant Northfield Insurance Company:
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Buffalo, NY 14203

For Defendant National Union Fire Insurance Company, P.A.:
Law Offices of Beth Zaro Green
12 Metrotech Center, 28th Floor
Brooklyn, NY 11201

HON. SALIANN SCARPULLA, J.:

Motion sequence numbers 004 and 005 are consolidated for disposition.

In this action, plaintiff New York University ("NYU") seeks, inter alia, a declaratory judgment that defendants Northfield Insurance Company ("Northfield") and National Union Fire Insurance Company, PA ("National Union") are obligated to defend and indemnify NYU in a personal injury action currently pending in the Supreme Court, Kings County. *See Glenn Hamer and Denise Hamer v. New York University* (Index No. 11388/2009) (the" Underlying Action").

In motion sequence number 004, Northfield moves for summary judgment dismissing NYU's complaint, and for a declaratory judgment that Northfield has no duty to defend or indemnify NYU in the Underlying Action.

In motion sequence number 005, NYU moves for summary judgment declaring that defendants Northfield and National Union are each obligated to defend and indemnify NYU, as an additional insured, in the Underlying Action.

In a belated cross motion, National Union moves for summary judgment declaring that it has no duty to defend or indemnify NYU in the Underlying Action.

BACKGROUND

The following facts are not in dispute.

On December 11, 2008, defendant Glenn Hamer, an employee of defendant Arma Scrap Metal Co., Inc. ("Arma"), was injured while working on a construction project at certain premises owned by NYU. At the time of the occurrence, Arma was performing demolition work at the premises pursuant to a written agreement with NYU. The provisions of that agreement required Arma to obtain a commercial general liability insurance policy endorsed to include NYU as an additional insured in connection with any work to be performed under the agreement.

On the date of the occurrence, Arma was covered by a "Commercial General Liability" policy issued by Northfield (policy number WS016844) for the coverage period between April 23, 2008 and April 23, 2009. An endorsement to that policy specifically

names NYU, and its directors, officers, employees, subsidiaries, and affiliates, as additional insureds under the policy. Arma also was covered by an excess policy of insurance issued by National Union. As asserted by NYU, the National Union policy "provides excess insurance coverage to NYU in the event that the Northfield policy is determined to provide primary coverage."[1]

The Northfield policy provides commercial general liability coverage for those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" caused by an "occurrence" during the policy period. However, the policy contains numerous exclusions to such coverage, including an "Employee, Leased Worker, Temporary Worker, Volunteer Worker, Or Contracted Persons" exclusion (the "Contracted Persons exclusion"), which was added to the policy's other exclusions of coverage for bodily injury and property damage liability in a separate endorsement. When read in conjunction with exclusion provision of the policy's coverage part, the Contracted Persons exclusion provides as follows:

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[1]As argued by NYU in its memorandum of law, "National [Union]'s obligation to provide excess coverage flows directly from Northfield's obligation to provide primary coverage. Therefore, if Northfield is found to owe NYU a defense under the policy, National [Union] will also be obligated to provide coverage on an excess basis."

This insurance does not apply to:

***

Leased or Contracted Persons

(1) Any "employee", "leased worker", "temporary worker", or "volunteer worker";

(2) Any person who is contracted with you or with any insured for services; or

(3) Any person who is employed by, leased to or contracted with any entity that is:

(a) Contracted with you or with any insured for services; or
(b) Contracted with others on your behalf for services.

On May 8, 2009, Hamer commenced his personal injury action against NYU, asserting causes of action for common law negligence and violations of Labor Law §§ 200, 240, and 241. Upon receipt of the pleadings in the Underlying Action, NYU tendered its defense of that action to Northfield, based on its status as an additional insured. By letters dated September 23, 2009 and November 25, 2009, Northfield disclaimed coverage based on the Contracted Persons exclusion. NYU subsequently commenced the instant action seeking, inter alia, a declaratory judgment that Northfield and National Union are obligated to defend and indemnify it as an additional insured under their respective policies.

NYU, Northfield, and National Union each now move for a declaration of their respective rights and obligations under their respective policies.

Northfield argues that its motion for summary judgment should be granted because the Contracted Persons Exclusion clearly and unambiguously precludes coverage of Hamer's bodily injury claims in the Underlying Action.

National Union argues that its cross motion for summary judgment should be granted because, to the extent that NYU is not entitled to coverage under the Northfield policy, it will not be entitled to coverage under National Union's excess policy.

NYU argues that its motion for summary judgment should be granted because the Contracted Persons exclusion is inapplicable to NYU's claim for coverage. NYU argues that, in addition to the endorsement that specifically names NYU as an additional insured (the "named additional insured endorsement"), the Northfield policy also includes a Blanket Additional Insured endorsement that modifies and expands the coverage afforded to an additional insured under the policy's "Commercial General Liability Coverage Part."[2] NYU argues that, because this endorsement includes its own specific limitations

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[2] This Blanket Additional Insured endorsement provides, in pertinent part:

> 1. **WHO IS AN INSURED - (SECTION II)** is amended to include any person or organization that you agree in a "written contract requiring insurance" to include as an additional insured on this Coverage Part, but:
>
> a. Only with respect to liability for "bodily injury", "property damage" or "personal injury"; and
>
> b. If, and only to the extent that, the injury or damage is caused by acts or omissions of you or your subcontractor in the performance of "your work" to which the "written contract requiring insurance" applies. The person or organization does not qualify as an additional

on the coverage available to an additional insured, and because these limitations directly conflict with the Contracted Persons exclusion invoked by Northfield to exclude coverage, the exclusion is not enforceable against NYU.

NYU additionally argues that, even if this court determines that the Contracted Persons exclusion does not directly conflict with the terms of the Blanket Additional Insured endorsement, the exclusion cannot be enforced against NYU because the exclusion itself is ambiguous and subject to multiple reasonable interpretations. NYU also argues that, because Northfield's interpretation of the scope and applicability of the exclusion exceeds the intended purpose of such employee exclusions, which is to prevent duplication of workers' compensation coverage, the exclusion should not be enforced in the manner espoused by Northfield.

DISCUSSION

In resolving an insurance coverage dispute, a court first looks to the language of the policy. *See Raymond Corp. v. National Union Fire Ins. Co.*, 5 N.Y.3d 157, 162

> insured with respect to the independent acts or omissions of such person or organization

This endorsement further limits the insurance provided to such additional insureds by limiting the Limits of Insurance to the limits of liability required by the "written contract requiring insurance"; by providing that the insurance does not apply to "bodily injury," "property damage," or "personal injury" arising out of the rendering of, or failure to render, any professional architectural, engineering or surveying services; and, by providing that the insurance does not apply to "bodily injury' or "property damage" caused by "your work" and included in the "products-completed operations hazard," unless otherwise required in the "written contract requiring insurance."

(2005). The policy should be construed "'in a way that affords a fair meaning to all of the language employed by the parties in the contract and leaves no provision without force and effect.'" *Id.*, quoting *Consolidated Edison Co. of N.Y. v. Allstate Ins. Co.*, 98 N.Y.2d 208, 221–222 (2002). *See also County of Columbia v. Continental Ins. Co.*, 83 N.Y.2d 618, 628 (1994) ("An insurance contract should not be read so that some provisions are rendered meaningless"). While "unambiguous provisions of an insurance contract must be given their plain and ordinary meaning," ambiguous provisions of a policy "must be construed in favor of the insured and against the insurer." *White v. Continental Cas. Co.*, 9 N.Y.3d 264, 267 (2007).

It is well settled that "[i]n the absence of unambiguous contractual language to the contrary, an additional insured enjoys the same protection as the named insured." *William Floyd School Dist. v. Maxner*, 68 A.D.3d 982, 986 (2d Dept 2009) (internal quotations and citations omitted). Here, there is no dispute that NYU is named, specifically, as an additional insured in the named additional insured endorsement to the Northfield policy. Unlike the terms of the Blanket Additional Insured endorsement referenced by NYU, the named additional insured endorsement contains no conditions or additional limitations on the coverage afforded to the additional insured. NYU essentially concedes that, under the named additional insured endorsement, it is afforded the same coverage, and is subject to the same exclusions, as the named insured. Given the existence of the named additional insured endorsement, it is unnecessary to look to the Blanket Additional Insured

endorsement to determine either NYU's status as an additional insured, or the scope of coverage afforded NYU under the Northfield policy.

Even if the terms of the Blanket Additional Insured endorsement were applicable to this dispute, it is well settled that "in construing an endorsement to an insurance policy, the endorsement and the policy must be read together, and the words of the policy remain in full force and effect except as altered by the words of the endorsement." *County of Columbia*, 83 N.Y.2d at 628. While Northfield's Blanket Additional Insured endorsement includes its own specific conditions and limitations on the coverage afforded to such additional insured, there is no language in that endorsement that either alters or eliminates the exclusions to coverage for bodily injury or property damage liability contained in the policy.

NYU argues, however, that where an exclusion is inconsistent with the terms of a blanket additional insured endorsement, courts have determined that the exclusion is not enforceable to disclaim coverage. NYU relies on *LaBoutique NY, Inc. v. Utica Ins. Co.*, 18 Misc. 3d 1132 [A], 2008 NY Slip Op 50266 [U] (Sup. Ct. Richmond Co. 2008) and *Gofranullah v. 630 Realty, LLC*, 16 Misc. 3d 1122 [A], 2007 NY Slip Op 51544[U] (Sup. Ct. Kings Co. 2007). The defendant insurers in *LaBoutique NY* and *Gofranullah* had each sought to disclaim the coverage afforded under a blanket additional insured endorsement based on a contractual liability exclusion. The court in each case determined that the contractual liability exclusion, when read together with the blanket additional insured

endorsement, created an ambiguity as to the existence of coverage that must be resolved in favor of the insured.

Specifically, the court in *LaBoutique NY,* after reciting that any ambiguity in a policy must be resolved in favor of the insured and against the insurer, found that the insurer's

> contractual liability exclusion is inconsistent on its face with the terms of its Blanket Additional Insured endorsement, since the former purports to apply 'to all Liability Coverages,' and would therefore render the terms of the Blanket Additional Insured endorsement meaningless. Accordingly, the contractual liability exclusion cannot be applied to defeat any right to coverage which might have existed under the Blanket Additional Insured endorsement.

18 Misc 3d 1132 [A], 2008 NY Slip Op 50266 [U], *4.

Similarly, the court in *Gofranullah* found that the insurer's contractual liability exclusion was not applicable to exclude coverage afforded under its blanket endorsement,

> as it is inconsistent with and would negate the terms of the Blanket Endorsement. The only logical resolution of this ambiguity is that the Blanket Endorsement, which appears as a separately added endorsement, overrides and prevails over the Contractual Liability Exclusion, which appears under the "Exclusions That Apply to All Liability Coverages" section in the general policy, since to find otherwise would render the terms of the Blanket Endorsement meaningless and ineffective.

16 Misc 3d 1122 [A], 2007 NY Slip Op 51544[U], *6.

Unlike the contractual liability exclusion at issue in *LaBoutique NY* and *Gofranullah*, the Contracted Persons exclusion at issue in this action does not negate or render the terms of the Blanket Additional Insured endorsement meaningless or

ineffective and, thus, is not inconsistent with the terms of that endorsement. Indeed, it is notable that the insurers in both *LaBoutique NY* and *Gofranullah* also had sought to disclaim coverage to their additional insureds based on employee exclusions in their policies, similar to the Contracted Persons exclusion at issue in this action. However, in neither case did the court determine that the employee exclusion was inconsistent with the blanket endorsement, and thus inapplicable to exclude coverage.

Alternatively, NYU argues that the Contracted Persons exclusion cannot apply to bar coverage to NYU in the Underlying Action, as the exclusion is itself ambiguous, and subject to multiple reasonable interpretations.

It is well settled that to disclaim coverage based upon an exclusion in an insurance policy, the exclusion must be specific and clear. *Nautilus Ins. Co. v. Matthew David Events, Ltd.*, 69 A.D.3d 457, 459 (1st Dept 2010). While "policy exclusions are given a strict and narrow construction, with any ambiguity resolved against the insurer," *Belt Painting Corp. v. TIG Ins. Co.*, 100 N.Y.2d 377, 383 (2003), the plain meaning of a policy's language may not be disregarded to find an ambiguity where none exists. *See Bassuk Bros. v. Utica First Ins. Co.*, 1 A.D.3d 470, 471 (2nd Dept 2003), *lv dismissed* 3 N.Y.3d 696 (2004).

The parties are in agreement that the only relevant portion of the Contracted Persons exclusion that applies to this dispute is subsection 3, which excludes coverage of bodily injury and property damage liability for "[a]ny person who is employed by, leased

to or contracted with any entity that is: (a) [c]ontracted with you or with any insured for services." NYU argues that this provision is ambiguous because it is unclear: (1) whether subdivision (a) of this section was intended to modify "any person" or "any entity;" and (2) whether the term "any entity" can be interpreted to include both Arma and NYU.

NYU argues that, even if subdivision (a) is found to modify the term "any entity," in order to negate coverage under this exclusion Northfield still "must show that Glenn Hamer was an employee of "any entity" that was contracted with any insured, i.e. NYU, for services." NYU argues that if the term "any entity" is interpreted to include both Arma and NYU, then the exclusion becomes open to multiple reasonable interpretations, and is therefore ambiguous. NYU argues that a fair reading of the Contracted Persons exclusion would exclude from the definition of "any entity," those entities that are specifically identified in the policy and referenced by the use of specifically defined terms. As so defined, the exclusion could not be applied to bar coverage of Hamer's bodily injury claims.

As to NYU's first contention, that it is not clear whether subdivision 3 (a) of this section was intended to modify "any person" or "any entity," this court finds that when basic rules of grammar and punctuation are applied to interpret this exclusion, it becomes clear that the phrase "[c]ontracted with you or with any insured for services" was intended to modify the term "any entity," and not "any person."

As to NYU's second contention, that it is not clear whether the term "any entity" should encompass Arma and NYU, it is well settled that "[u]nless otherwise defined by the policy, words and phrases are to be understood in their plain, ordinary, and popularly understood sense, rather than in a forced or technical sense." *Hartford Ins. Co. of Midwest v. Halt*, 223 A.D.2d 204, 212 (4th Dept 1996), *lv denied* 89 N.Y.2d 813 (1997). As the term "any entity" is not defined in the Northfield policy, it must be accorded its plain and ordinary meaning. The fact that Northfield's exclusion may be extremely broad, does not make it necessarily ambiguous. A court "should not find . . . language ambiguous on the basis of the interpretation urged by one party, where that interpretation would strain the contract language beyond its reasonable and ordinary meaning." *Consolidated Edison Co. of NY v. United Coastal Ins. Co.*, 216 A.D.2d 137, 137 (1995), *lv denied* 87 N.Y.2d 808 (1996) (citations and internal quotation marks omitted).

Here, the plain meaning of the Contracted Persons exclusion invoked by Northfield is that the policy does not provide coverage for bodily injury to any person employed by any entity that is contracted with any insured for services. There is no dispute that Hamer was employed by Arma, an entity that had contracted for services with NYU, a named additional insured under the Northfield policy. Thus, Hamer's underlying claim for bodily injury falls entirely within the scope of this exclusion.

Nevertheless, NYU argues that the Contracted Persons exclusion should not bar coverage to NYU, because Northfield's interpretation of the scope and applicability of

the exclusion exceeds the intended purpose of such employee exclusions, which is to prevent duplication of coverage that is afforded to employees under workers' compensation policies. NYU argues that, since Hamer was an employee of Arma, and not NYU, there is no potential for duplication of workers' compensation coverage. Therefore, as the intended purpose underlying this exclusion is not applicable, the exclusion is invalid and unenforceable as invoked against NYU.

However, even where, as here, an underlying action is brought against an additional insured by the injured employee of a named insured, New York courts consistently have determined that employee exclusions, similar to the Contracted Persons exclusion at issue in this action, are valid and enforceable to exclude coverage to such additional insured. *See Moleon v. Kreisler Borg Florman Gen. Constr. Co.*, 304 A.D.2d 337 (1st Dept 2003); *see also Utica First Ins. Co. v. Santagata*, 66 A.D.3d 876 (2nd Dept 2009); *Sixty Sutton Corp. v. Illinois Union Ins. Co.*, 34 A.D.3d 386 (1st Dept 2006).

As I find that the provisions of the Contracted Persons exclusion in the Northfield policy bar coverage to NYU in the Underlying Action, Northfield's motion for summary judgment is granted, and NYU's motion for summary judgment is denied. Further, because it is undisputed that National Union's obligation to provide coverage under its excess policy flows directly from Northfield's obligation to provide primary coverage, National Union's belated cross motion for summary judgment also is granted.

In accordance with the foregoing, it is hereby

ORDERED that defendant Northfield Insurance Company's motion for summary judgment (Motion Sequence Number 004) seeking a declaration that it has no obligation to defend or indemnify plaintiff New York University in the action *Glenn Hamer and Denise Hamer v. New York University*, Index No. 11388/2009, Kings County, is granted; and it is further

ADJUDGED and DECLARED that Northfield Insurance Company is not obligated to provide a defense to, and provide coverage for, plaintiff New York University in the said action pending in King' County, and it is further

ORDERED that plaintiff New York University's motion for summary judgment (Motion Sequence Number 005) seeking a declaration that defendant Northfield Insurance Company and defendant National Union Fire Insurance Company, PA are obligated to defend and indemnify plaintiff in the action of *Glenn Hamer and Denise Hamer v. New York University*, Index No. 11388/2009, Kings County, is denied; and it is further

ORDERED that defendant National Union Fire Insurance Company, PA's cross motion for summary judgment seeking a declaration that it has no obligation to defend or indemnify plaintiff in the action of *Glenn Hamer and Denise Hamer v. New York University*, Index No. 11388/2009, Kings County, is granted; and it is further

ADJUDGED and DECLARED that National Union Fire Insurance Company, PA is not obligated to provide a defense to, and provide coverage for, plaintiff New York University in the said action pending in King' County, and it is further

ORDERED that the remainder of this action is severed and will continue.

ORDERED that the Clerk is directed to enter judgment accordingly.

This constitutes the decision and order of the Court.

Dated: New York, New York
January 23, 2013

ENTER:

Saliann Scarpulla, J.S.C.