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

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Steelfab , Inc.,

Plaintiff

-against-

Lancer Insurance Company ,

Defendant

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Lancer Insurance Company ,

Plaintiff

-against -

Mark Riccardi, Kelly Riccardi, and
Rock Equipment Corporation ,

Defendants

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Decision and Order

Index No. 308284/10

Nassau Co. Index No.
005207-2010

Howard H. Sherman
J.S.C.

Facts and Procedural History

In the first-entitled action plaintiff Steelfab Inc. ("Steelfab") seeks a declaration that it is an insured under a policy of commercial auto insurance issued by Lancer Insurance Company ("Lancer") to Speedway Transportation , Inc., ("Speedway"), and as such, the insurer has a duty to defend against liability and indemnify Steelfab in connection with a personal injury action commenced by Mark Riccardi ("Riccardi") .

In the second above-entitled action[1] commenced in Nassau County, the insurer seeks a declaration that the Speedway policy does not provide coverage to Rock Equipment Corporation ("Rock") in connection with the Riccardi action. Rock has defaulted in the action.

Underlying Personal Injury Action

It is alleged that at a public school renovation project while off-loading steel railings he was employed to install , Riccardi fell from a trailer. The causative defect alleged is the dangerous condition of the trailer itself, specifically , its floor, which contained holes , and was missing planks [Verified Complaint ¶ 39] . The trailer was owned by Rock Equipment Corporation ("Rock")[2], and the railings, which Riccardi was off-loading for later installation[3] in a safety ramp, were fabricated and then loaded onto the flatbed trailer by Steelfab employees at its Newburgh, New York facility. Steelfab had retained Speedway[4] to use its tractor to haul the loaded trailer to the Bronx County worksite. At the time of the unloading, which was performed by plaintiff, and Dutchess

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[1] By order of the Supreme Court , Nassau County, Lancer's declaratory judgment action was removed to this county to be tried jointly with that of Steelfab .

[2] Rock is wholly owned by John Notaro, Steelfab's sole owner and president, and it shares the same Newburgh business address. At the time of the accident, Rock owned three trailers that were stored at Steelfab's facility . There was no written lease or storage agreement between the corporations, with Notaro testifying that Steelfab's "use of the trailers is the agreement " [EBT: 16-19]. Rock did not insure its trailers [Id. 45].

[3] Riccardi was employed by Steelfab's sub-contractor, Dutchess Iron Works ("Dutchess Iron").

[4] Speedway is a federally licensed motor carrier (see, 49 CFR 376.2[k]).

Iron co-workers, and one Steelfab employee, Rock's trailer was attached to Speedway's tractor , parked at the worksite.

Riccardi commenced an action in this court against the City of New York, and its Construction Authority, and both its Board and Department of Education, as well as the general contractor , Andron Construction Corporation ("Andron"), and Steelfab, Rock,and Speedway, alleging that his injuries had resulted from their negligence, and violations of Labor Law §§200, 240(1), and 241(6) [5] .

In pertinent part, the complaint alleges that **Steelfab** directed or controlled the renovation project, and as a contractor, or an agent of the owner, was required by the statute , to furnish devices for plaintiff's protection , and failed to do so. The common law negligence claim alleges that Steelfab maintained the subject " premises " in a defective and unsafe condition, and failed to provide lifting or hoisting equipment, or safety devices to prevent falls , or a safe means by which to access the materials to be unloaded [Twentieth -Fourth Cause of Action , ¶¶ 209-214].

The negligence causes of action asserted against **Rock** and **Speedway** are identical to each other and to that asserted against Steelfab, with the additional allegation that each provided an unsafe and defective trailer [Twenty-Fifth and Twenty-Sixth Cause of Action].

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[5] Index No. 307803/08

Lancer Policy of Insurance

Lancer issued a policy of insurance to Speedway effective 06/16/2008 to 6/16/2009 extending coverage for commercial autos. By its terms the insurer was required to "pay all sums an 'insured' legally must pay as damages because of 'bodily injury' or 'property damage' to which this insurance applies, caused by an 'accident' and resulting from the ownership, maintenance or use of a covered 'auto' ." [Section II - Liability coverage - A. Coverage].

Subdivision 1 of Part A of Section II - Liability Coverage defines an insured to include the following .

1. Who is An Insured

The following are "insureds":

a You for any covered "auto".[6]

b. Anyone else while using with your permission a covered "auto" you own, hire or borrow **except** (emphasis added) :

• • • •

[6]It is undisputed that the subject tractor was included among the declaration's schedule of Speedway's covered "automobiles."

(4) Anyone other than your "employees", partners (if you are a partnership), members (if you are a limited liability company), a lessee or borrower or any of their "employees", while moving property to or from a covered "auto."

c. The owner or anyone else from whom you hire or borrow a covered "auto" that is a "trailer" while the "trailer" is connected to another covered "auto" that is a power unit, or, if not connected:

(1) is being used exclusively in your business as a "trucker"; and

(2) is being used pursuant to operating rights granted to you by a public authority.

. Also as pertinent here, the policy provides the following definition for symbol "46"

- "Specifically Described 'Autos'" :

Only those "autos" described in Item Three of the Declarations For which a premium charge is shown (and for Liability Coverage any "trailers" you don't own while attached to any power unit described in Item Three).

Contentions of the Parties

Both Speedway and Lancer move for dispositive relief, and the motions are consolidated for purposes of disposition.

Steelfab contends that it is an insured because it was permissively "using" the tractor-trailer at the time of the accident. To the extent that the insurer employed that term

as opposed to more restrictive ones such as "operation ", Steelfab argues that the term must be construed against the insurer, in favor of coverage in accordance with the broad interpretation recognized by such appellate authority as Hertz Corp. v. GEICO, 250 A.D.2d 181, 683 N.Y.S.2d 483 [1st Dept. 1998] , and New York State Supt. of Ins. v. New York Cent. Mut. Fire Ins. Co., 98 A.D.3d 856, 951 N.Y.S.2d 1 [1st Dept. 2012]. With respect to the criteria argued to have been established by such precedent , Steelway argues that both are met here , i.e., 1) that the tractor -trailer was clearly operated to serve Steelfab's purposes, and 2) the vehicle was under the supervision and control of Steelfab in so much as its employee "was present at all times to oversee the unloading of the steel." (Memorandum of Law pp.6-7).

Steelfab , which is being defended in the underlying action by NGM Insurance Company under the terms of a contractor's policy that includes coverage for general liability and hired and non-owned auto liability, also maintains that upon comparison of its policies , for purposes of the *Riccardi* litigation, as a matter of law, the coverage to which it is entitled under the Lancer policy, is primary, and the NGM, excess.

Lancer contends that it is entitled to judgment as a matter of law declaring that neither Rock nor Steelfab is an insured under the terms of the Speedway auto policy.

Concerning the former, Lancer notes that **Rock** has defaulted in the action, [7] but

[7] By order of the Supreme Court, Nassau County (Sher, J.) entered September 1, 2010, Lancer's motion for a default judgment was granted, and plaintiff was directed to submit judgment on

in light of the co-defendants' contention that Rock is also an insured under the policy, seeks an award of summary judgment declaring that it has no duty to defend or to indemnify Rock.

It is the insurer's contention that the policy covers five categories of insureds: 1) the named policy-holder, Speedway; 2) certain permissive users of covered autos; 3) the owner of a covered trailer while attached to a covered tractor; 4) the owner of certain tractors, and 5) someone vicariously liable for the acts of another insured.

Lancer argues that the only category of insured under which Rock could claim coverage would be the third category, i.e., "c" of the "Who is an Insured " definition[8], and on the record here , it cannot as a matter of law qualify because there is no evidence to raise a triable issue of fact that Speedway leased the trailer from Rock, or paid the owner for the use of it, or entered into any separate agreement by which the owner authorized the hauler to use the trailer for its own purposes. Having been hired to deliver a manufacturer's loaded trailer, and in so doing, Speedway asserts that it neither borrowed nor hired Rock's trailer (see, Fisher v. Tyler, 284 Md. 100 394 A.2d 1199 [Court of Appeals, Md. 1978]; Pennsylvania Threshermen & Farmers Casualty Ins.Co v. Hartford Accident &

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notice. It is unclear as to whether such judgment was submitted and/or entered. However, Lancer continues to defend Rock in the underlying action. For purposes of dispositive relief, it is noted that the individual defendants interposed an answer.

[8] c. The owner or anyone else from whom you hire or borrow a covered "auto" that is a "trailer"while the "trailer" is connected to another covered "auto" that is a power unit ...

Indemnity Co., 310 F.2D 618 [4th Cir. 1962]; see also, 5 A.L.R.4th 636).

The insurer also argues that under the terms of the policy, the trailer is covered only so long as it is attached to the covered power unit, and the allegations against Rock devolve not from that period, but from the owner's conduct preceding it, specifically, in inadequately maintaining the trailer [9], and providing it to plaintiff and his co-workers in an unsafe condition.

2) Lancer contends that **Steelfab** does not qualify as an insured because it was, in essence, a shipper, hiring a motor carrier to haul its product. The manufacturer was not using the covered vehicle to perform the transportation, nor otherwise controlling or possessing it such as to qualify as a permissive user (see, Kolby v.Northwest Produce Co., 505 N.W.2d 648 [Minn.Ct.App. 1993]). The fact that Steelfab chose the delivery destination does not rise to the level of supervisory control sufficient to support a finding that the shipper was "using" the tractor-trailer at the time of the accident.

With respect to the precedent cited by Steelfab, Lancer argues that while the term "use" in automobile insurance policies is to be broadly interpreted, the facts in Hertz Corp. v. GEICO, op. cit., and New York State Superintendent of Insurance v. New York Central Mutual Ins. Co., op.cit., each concerning the legal responsibility for the use of a leased vehicle by a party absent from that vehicle at the time of the accident, are

[9] Twenty-Fifth Cause of Action, ¶¶ 215-220

distinguishable . There is here no evidence that Steelfab leased the covered vehicle, or exercised any control over designating the driver or the hauling route. Neither the appellate authority cited, nor other controlling precedent support Steelfab's assertion that even without such indicia of control over the vehicle , it can still be found to have been using the covered auto simply because it had been operated by the insured for Steelfab's benefit.

Moreover, even had the complaint alleged that Steelfab was responsible for the accident due to its culpable conduct in loading[10]/unloading of the trailer , which it has not, this activity, respectively performed by Steelfab employees , and by Dutchess Iron employees, as assisted by a Steelfab employee, fall within the 1. b (4) policy exclusion , a restriction expressly permitted under New York Law (see , 11 NYCRR 60-1.1 [c] [3] [iii]).

Discussion and Conclusions

Upon its review, the court is required first to look " to the language of the policy [ ] " , and to " construe [ ] the policy 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 [ ] ", while "not disregard [ing] clear provisions which the insurers inserted in the policies and the insured accepted, [ ] equitable considerations will not allow an

[10] As it is undisputed that the loading of the trailer was completed by Steelfab's employees prior to its attachment to the tractor, Lancer also maintains that even in the absence of the exclusion , there can be no claim of coverage for liability with respect to negligent loading.

extension

of coverage beyond its fair intent and meaning in order to obviate objections which might have been foreseen and guarded against." Raymond Corp. v. Nat'l Union Fire Ins. Co., 5 N.Y.3d 157, 833 N.E.2d 232 [2005] , and "it is '[t]he four corners of an insurance agreement [that] govern who is covered ' (Sixty Sutton Corp. v Illinois Union Ins. Co., 34 AD3d 386, 388, 825 NYS2d 46 [1st Dept 2006]) " Sumner Builders Corp. v. Rutgers Cas. Ins. Co., 101 A.D.3d 417, 418, 955 N.Y.S.2d 568 [1st Dept. 2012]

In addition, an insurer " may look to the pleadings in an underlying action to determine whether a claim falls within the parameters of the policy *(2619 Realty v Fidelity & Guar. Ins. Co.*, 303 A.D.2d 299, 756 N.Y.S.2d 564 [2003]). "ABC, Inc. v. Countrywide Ins. Co., 308 A.D.2d 309, 310, 764 N.Y.S.2d 244 [1st Dept. 2003]

With respect to the specific exclusion addressed here, it has been held that the "phrase 'moving property to or from a covered auto' can be likened to the phrase 'loading and unloading [] ' ",and a "clause limiting coverage to lessees, borrowers and the employees of the named insured during loading and unloading is permissible and will be upheld." Coburn v. Aetna Casualty & Surety Co., 212 A.D.2d 752, 753, 623 N.Y.S. 2d 599 [1st Dept. 1995]; see also, Redland Select Ins. Co. v. Washington, 2010 U.S. Dist. LEXIS

Rock Equipment Corporation

Upon review of the submissions and upon consideration of the applicable law it is the finding of this court that Lancer has demonstrated as a matter of law that Rock is not an insured under the terms of the Speedway policy and has no duty to defend or indemnify Rock in the Riccardi litigation .

The undisputed evidence reveals that Speedway's principal drove the "covered tractor" to Steelfab's facility where he attached the trailer that had been both chosen and loaded by the manufacturer, and then proceeded to the worksite where the trailer was delivered for unloading by the installers. Speedway's principal played no role in that process. As such, there is no evidence to raise a triable issue of fact that in fulfilling its hauling agreement with Steelfab, Speedway entered into any separate agreement with Rock, or compensated Rock for the hauler's exclusive use or control of the trailer, sufficient to support a finding of a "hiring" of the trailer, nor evidence of any borrowing to raise an issue of fact as to Rock's status as a "1 (c) " insured under the Speedway policy.

Neither Rock nor the individual defendants come forward with any probative

evidence to raise an issue of triable fact to rebut Lancer's prima facie showing that the trailer owner was not an insured under the Speedway policy.

Steelfab Inc.,

As the party claiming insurance coverage, Steelfab has the burden of proving entitlement (see, Moleon v Kreisler Bork Florman Gen. Constr. Co., Inc., 304 AD2d 337, 339, 758 N.Y.S.2d 621 [1st Dept 2003]), and for purposes of its dispositive motion, to make such a showing that as a matter of law .

Upon review of the record here and on consideration of the applicable law, it is the finding of this court that Steelfab has failed to make such a showing, and upon a search of the record, it is the further finding of this court that Lancer has made a prima facie showing that Steelfab was not an insured under the terms of the Speedway policy , and that the insurer has no duty to defend or to indemnify Steelfab in connection with the *Riccardi* action.

While there is a evidence that the covered vehicle was operated by the hauler to serve Steelfab's purpose , it is the finding of this court that this showing alone is not dispositive of the issue of whether the manufacturer was a permissive user under the terms of the policy, and to qualify as such, Steelfab would also be required to establish that the covered vehicle was under its supervision and control. The court in Hertz Corporation

v. GEICO, op. cit., made findings that the non-driver , "as a renter of the van had the right of supervision and control" and upon evidence that there was "an agreement with [the driver] and the others to use the van for the purposes she intended, i.e., to assure her family members transport to the family reunion [ ] ", and that she "specifically authorized [the driver] with [another's] assistance to operate the van to carry out that purpose , thereby entrusting them with her authority over the van." Upon this showing the court concluded that the lessee "was using the van for a specific purpose and she exercised control over the use of the van for that purpose [citations omitted]." Id. at 187-188 Here, Steelfab offers no evidence that it exercised such indicia of control over the covered vehicle.

In light of the court's finding the issue of whether the Lancer policy is primary or excess need not be addressed, though it is worth noting that any determination of the the priority of coverage for concurrent insurers requires a consideration of a crucial criteria not raised by the movant here, i.e., the purposes of the policies covering the risk and whether they insure the same interest (see, Medical Malpractice Ins. Asso. v. Medical Liability Mut. Ins. Co., 86 A.D.2d 476, 478-479 , 450 N.Y.S.2d 191 [1st Dept. 1982], app.den. 57 N.Y.2d 604, 440 N.E.2d 800 [1982]. It would appear that the NGM contractor's general liability would be insuring against the risk associated with the allegations here, i.e., that

Steelfab failed to provide a safe workplace and adequate equipment , including 240(1) elevation-related safety devices , a risk distinct from that contemplated by Lancer's auto policy.

For the reasons above-stated, it is

ORDERED, DECLARED AND ADJUDGED that Steelfab Inc.'s motion for summary judgment against Lancer Insurance Company is denied , and upon a search of the record, summary judgment awarded in favor of defendant Lancer Insurance Company, and it is

ORDERED, DECLARED AND ADJUDGED that Lancer Insurance Company's cross- motion for summary judgment against defendants Mark and Kelly Riccardi, and Rock Equipment Corporation is granted, and it is

ORDERED, DECLARED AND ADJUDGED that Lancer Insurance Company has no duty to defend or indemnify Steelfab Inc., and Rock Equipment Corporation in the personal injury action entitled Mark Riccardi and Kelly Riccardi v. The City of New York, New York City School Construction Authority , The Board of Education of the City of New York, The New York City Department of Education, Andron Construction Corporation , Steelfab Inc., Rock Equipment Corp. , and Speedway Transporatiopn Inc. pending in the Supreme Court, Bronx County under index # 307803/08; and it is further

ORDERED that this constitutes the decision and order of the court.

Dated: May 9, 2014

Howard H. Sherman