SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS Part 8

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Turner Construction Company and
MSG Holdings, L.P.,

Plaintiffs,

-against-

Commerce and Industry Insurance Company,

Defendants.

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DECISION AND ORDER
Index Number: 153956/2012
Motion Seq. No.: 001

KENNEY, JOAN M., J.

Recitation, as required by CPLR 2219(a), of the papers considered in review of this motion for summary judgment.

Papers	**Numbered**
Notice of Motion, Affirmations, Exhibits, and Memo of Law	1-26
Opposition Affirmation and Exhibits	27-31
Reply Memo of Law	32-33

In this declaratory judgment action, plaintiffs Turner Construction Company (Turner) and MSG Holdings, L.P., (MSG) move for an Order, pursuant to CPLR 3212, granting summary judgment declaring that defendant Commerce and Industry Insurance Company (Commerce) is obligated to defend and indemnify plaintiffs in an underlying personal injury action.

Factual Background

This declaratory judgment action arises out of a personal injury action currently pending in Supreme Court, New York County, entitled *John Barton and Tammy Barton v. Madison Square Garden, Inc., and Turner Construction Company v. LVI Environmental Services*, under Index #107288/2011 (the Barton action).

The Barton Action

It is alleged in the Barton action that on May 27, 2011, John Barton sustained personal

injuries while working at the Madison Square Garden construction site located at 2 Pennsylvania Plaza, New York, New York. At the time of Barton's injury, he was an employee of Falcon Steel Company, Inc.

At the time of the incident, Barton was moving an A-frame cart with the assistance of two co-workers when the cart tipped over after striking a divot in the floor. LVI had previously removed the floor tile in the area where Barton alleges his accident to have occurred with a chipping gun. The utilization of the chipping gun to remove ceramic floor tiles created divots and other damage to the underlying concrete. LVI was also on the same floor performing further demolition operations and cleaning up debris for months after the accident.

On or about June 22, 2011, Barton commenced a personal injury action against Turner and Madison Square Garden. On or about September 26, 2011, a stipulation was negotiated discontinuing the underlying action as against MSG. On or about January 24, 2012, Turner commenced a third-party action against LVI.

The LVI Contract

Prior to the date of Barton's injury on May 27, 2011, Turner had in effect a contract with LVI Environmental Services, Inc. (LVI), which is Commerce's insured, to perform demolition work at the Madison Square Garden construction site. According to the contract, the demolition work encompassed "Floor and Ceiling Demolition," which is defined as "the removal of all floor finishes, including but not limited to: tile, stone, wood, carpet and VCT scheduled to receive new finishes and/or in rooms shown to be demolished on plans." The contract was in full effect on May 27, 2011.

Pursuant to the contract, LVI agreed to defend, indemnify and name MSG and Turner as

additional insured under the Commerce policies. Under the General Conditions of the Agreement, LVI is required to defend, indemnify, and hold harmless, Turner, MSG, the ownership entities, against any and all claims arising out of, or from the performance of LVI Services' work or the work of its employees. (See Turner/LVI Contract, Plaintiffs' Exhibit C). Furthermore, Article XXIII of the contract provides that LVI Services is to name Turner and MSG as additional insureds on the policies of insurance. (See id.)

The Commerce Insurance Policy

Commerce issued a commercial general liability insurance policy to LVI for the period of July 1, 2010 through July 1, 2011. The Commerce policy provided additional insured coverage for bodily injury to any person or organization with whom LVI is required to include as an additional insured on the policy by a written contract or written agreement for liability arising out of LVI's work. Commerce's policy contains an additional endorsement provision, which provides in pertinent part:

> Additional Insured/Primary Coverage Endorsement:
> In consideration of an additional premium of $INCLUDED it is hereby agreed that the following is included as an Additional Insured as respects Coverage A and B but only as respects liability arising out of your work for the Additional Insured by or for you.
>
> Additional Insured:
> BLANKET WHERE REQUIRED BY WRITTEN CONTRACT
>
> As respects the coverage afforded the Additional Insured, this insurance is primary and non-contributory, and our obligations are not affected by any other insurance carried by such Additional Insured whether primary, excess, contingent, or on any other basis.

The Certificate of Insurance, dated July 9, 2010, provided by LVI indicates that MSG and Turner are named as additional insureds with respect to all policies except workers compensation

and professional liability as required by written contract.

On or about August 5, 2011, plaintiffs notified LVI and Commerce of the occurrence and tendering the defense and indemnification of MSG and Turner in the Barton action pursuant to the contract between Turner and LVI. On September 9, 2011, Chartis, the claims administrator for Commerce responded to the tender letter, denying coverage on the basis that Barton was not an employee of LVI and because LVI was not named in Barton's complaint. On November 30, 2011, plaintiffs again wrote a tender letter, to which Chartis again denied by letter dated February 14, 2012.

Procedural History of the Declaratory Judgment Action

On or about June 21, 2012, plaintiffs filed the declaratory action now before this Court pursuant to the provisions of the contract between plaintiffs and LVI as well as the provisions of the Commerce policy regarding additional insureds.

Arguments

Plaintiffs contend that they are entitled to defense and indemnification from Commerce in the underlying action because Turner and MSG are named as additional insureds under the commercial general liability policy issued to Commerce as required by written contract between Turner and LVI.

Defendant Commerce argues that plaintiffs' motion must be denied on the basis that, because there are triable issues of fact as to whether Barton's accident "arose out of" the work performed, Commerce has no duty defend and/indemnify Turner and MSG as additional insureds.

Discussion

Pursuant to CPLR 3212(b), "a motion for summary judgment shall be supported by affidavit, by a copy of the pleadings and by other available proof, such as depositions and written admissions. The affidavit shall be by a person having knowledge of the facts; it shall recite all the material facts; and it shall show that there is no defense to the cause of action or that the cause of action of defense has no merit. The motion shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party. Except as provided in subdivision 'c' of this rule the motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact. If it shall appear that any party other than the moving party is entitled to a summary judgment, the court may grant such judgment without the necessity of a cross-motion."

The rule governing summary judgment is well established: "The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case." (*Winegrad v New York University Medical Center*, 64 NY2d 851 [1985]; *Tortorello v Carlin*, 260 Ad2d 201 [1st Dept 1999]).

It is well settled that an insurer's duty to defend its insured is exceedingly broad. "A liability insurer has a duty to defend its insured in a pending lawsuit if the pleadings allege a covered occurrence, even though facts outside the four corners of those pleadings indicate that the claim may be meritless or not covered." (*Fitzpatrick v American Honda Motor Co., Inc.*, 78 NY2d 61 [1991]). "Insurer's duty to defend arises whenever the allegations of the complaint, for which the insured may stand liable, fall within the risk covered by the policy, or, in other words,

where there is a reasonable possibility of recovery under the policy." (*City of NY v Certain Underwriters at Lloyd's of London, England*, 15 AD3d 228 [1st Dept. 2005]). "If a complaint contains any facts or allegations which bring the claim even potentially within the protection purchased, the insurer is obligated to defend." (*Technicon Elecs. Corp. V. American Home Assur. Co.,* 74 N.Y.2s 66, 73, 544 N.Y.S.2d 531, 542 N.E.2d 1048 [1989]). "Moreover, while 'insurers [cannot] look beyond the [underlying] complaint's allegations to avoid their obligation to defend, extrinsic evidence may be used [by the insured] to expand the insurer's duty to defend'." (*Village of Morrisville v. Alea North America Ins. Co.,* 2013 WL 1783470 (N.Y.Sup.), quoting *Fitzpatrick v. Am. Honda Motor Co., Inc.* 78 N.Y.2d 61, 66 [1991]; *Durant v. N. Country Adirondack Co-op. Ins. Co.,* 24 A.D.3d 1165, 1166 [3d Dept 2005]).

The "standard for determining whether additional named insured under...insurance policy was entitled to defense was same standard that was used to determine if named insured was entitled to defense." (*BP Air Conditioning Corp. v One Beacon Ins. Group*, 8 NY3d 708 [2007]; *Sport Rock Intern., Inc. v American Cas. Co. of Reading, PA*, 65 AD3d 12 [1st Dept. 2009]). "[T]he well-understood meaning of the term [additional insured] is an entity enjoying the same protection as the named insured." (*BP Air Conditioning*, 65 AD3d 12 [1st Dept. 2009]).

Here, the complaint in the underlying suit against MSG and Turner alleges that the negligent ownership, operation, management, and control of the premises caused Barton to sustain severe injuries. The complaint, as well as deposition testimony of Barton and other employees, allege that a divot in the floor was the cause of Barton's accident. Commerce argues that, because the cause of Barton's accident has not yet been determined in the underlying action, the named additional insureds are not entitled to a defense. Commerce contends that the portion

of the additional insured endorsement that states that MSG and Turner are additional insureds only with "respect to liability arising out of [LVI's] work for the Additional Insured" requires a determination of liability for Barton's injuries before MSG and Turner are entitled to a defense.

MSG and Turner had a written contract with LVI that obligated LVI to obtain comprehensive general liability coverage on MSG and Turner's behalf naming them as additional insureds under Commerce policy's blank endorsement. Pursuant to the contract, LVI agreed to name Turner and MSG as additional insureds in LVI's commercial general liability policy and further agreed to indemnify and hold harmless Turner and MSG from any and all claims arising from LVI's work. The additional insured endorsement at issue here provides that MSG and Turner are additional insureds under the Commerce policy issued to LVI only with respect to "liability [that] arises out of LVI's work for Turner and/or MSG." The phrase "arising out of" has been interpreted to mean "originating from, incident to, or having connection with; it requires "only that there be some causal relationship between the injury and the risk for which coverage is provided." (*See Regal Constr. Corp. v. National Union Fire Ins. Co of Pittsburgh, PA*, 15 N.Y.3d 34 [2010], 930 N.E.2d 259, 904 N.Y.2d 338; *quoting Maroney v. New York Cent. Mut. Fire Ins. Co.*, 5 N.Y.3d 467, 472 [2005]).

Here, the complaint alleged, among other things, that Barton was engaged in work at the work site where he was injured, due to the negligent operation, management and control of the premises. Furthermore, the deposition testimony offers evidence that Barton was performing work in the area where LVI had previously performed demolition work and that a divot in the floor caused the A-frame cart Barton was pushing to overturn and cause him injuries. These allegations form a basis on which Commerce may be obligated to defend MSG and Turner as per

the insurance policy since there is a possibility that Barton's injuries arose out of LVI's ongoing demolition operations performed for MSG and Turner.

The duty to indemnify is determined by the actual basis for the insured's liability to a third person. (*Frontier Insulation Contractors, Inc. v. Merchants Mut. Ins. Co.*, 91 N.Y.2d 169, 667 N.Y.S.2d 982, 690 N.E.2d 866, 870 [N.Y. 1997]). To the extent that MSG and Turner assert claims for indemnification, because the underlying Barton action is still pending, any decision as to indemnify would be premature at this juncture, as the actual basis of liability has yet to be determined.

Plaintiffs have demonstrated their entitlement to a judgment declaring that Turner's Liberty Mutual insurance policy is excess to the Commerce policy. The Liberty Mutual policy provides that it is primary when other insurance is available, unless an "Excess Insurance" exception applies. The only relevant exception states: "This insurance is excess over any other primary insurance available to you covering liability for damages arising out of the premises or operations...for which you have been added as an additional insured by attachment of endorsement." (See **Affidavit of Louis Petrella, Exhibit A**). Here, MSG and Turner have been added as additional insureds on the Commerce policy, thereby triggering the excess clause in the Liberty Mutual policy. Thus pursuant to the terms of the policy, Turner's Liberty Mutual coverage is excess to Commerce's coverage. Accordingly, it is

ORDERED, that the part of plaintiff's motion seeking a declaration that defendant has a duty to indemnify plaintiffs at this juncture is denied; and it is further

ORDERED, that the part of plaintiffs' motion seeking a declaration that its own general liability policy will be excess over the Commerce policy is granted; and it is further

ORDERED, that the parties file their Note of Issue and Certificate of Readiness no later than July 31, 2014.

Dated: July 8, 2014

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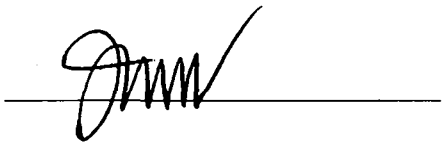

Joan M. Kenney, J.S.C.