SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 17

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CITY OF NEW YORK and
TURNER CONSTRUCTION COMPANY,

Plaintiffs,

Index No.
153442/2012

-against-

SECURITAS SECURITY SERVICES USA, INC. and
XL INSURANCE AMERICA INC.,

DECISION AND ORDER

Defendants.

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Recitation (CPLR 2219 [a]) of papers used on this motion for summary judgment:

PAPERS	EXHIBITS
Plaintiffs	
Notice of Motion for Summary Judgment	
Sparling Affirmation	A-R
Curry Affidavit	A-C
McCormack Affidavit	A-B
Dickerson Affidavit	A
Strauss Affirmation in Further Support	A
Supplemental Strauss Affirmation in Further Support	A-B
Supplemental McCormack Affidavit in Further Support	A-C
Memorandum in Support of Summary Judgment	
Defendants	
Glassman Affirmation	A-B
Steele Affidavit (with Certificate of Conformity)	A
Memorandum in Opposition to Summary Judgment	
Transcript of 1/6/2014 Oral Argument	

HON. SHLOMO S. HAGLER, J.S.C.:

This declaratory judgment action concerns the underlying action by an employee of defendant Securitas Security Services USA, Inc. ("Securitas"), Yolanda Lovett ("Lovett"), who allegedly sustained an injury on September 3, 2010, while working as a security guard during the deconstruction of the Old Yankee Stadium near River Avenue in the Bronx, New York (the

"Project"). In the underlying action, Lovett seeks recovery from plaintiffs herein, the City of New York ("City") and Turner Construction Company ("Turner"), alleging that her injury occurred in the course of her employment when she tripped and fell off a curb at the Project. *(Yolanda Lovett v City of New York and Turner Construction Company*, Index No. 301445/11, Supreme Court of the State of New York, County of Bronx [the "Lovett Action"]).

The City and Turner brought this action for a declaration that plaintiffs are: (i) entitled to defense and indemnification from Securitas and XL Insurance America Inc. ("XL") in the Lovett Action; (ii) additional insured under two liability policies issued by XL on behalf of Securitas; (iii) entitled to reimbursement from defendants for all prior legal fees and expenses incurred in defending the Lovett Action; (iv) covered by their own insurance on an excess basis over that of the XL policies, and without an obligation of contribution; (v) entitled to counsel of their own choosing, paid by Securitas, and separate from counsel for Securitas in the Lovett Action; and (vi) entitled to an inquest on the issue of damages they incurred, including but not limited to legal fees, disbursements, costs and expenses.

Upon this motion, plaintiffs move for summary judgment declaring that the defendants have a duty to defend, indemnify, and reimburse plaintiffs for all prior legal fees and expenses, confirming that the plaintiffs are additional insured under an XL Policy No. US00005451II10A (the "XL Policy") issued in favor of Securitas (Exhibit "D" to the Affidavit of John Sparling, Esq., sworn to on May 24, 2013 ["Sparling Aff."]), confirming that the plaintiffs are also additional insured under a Master General Liability Policy No. SE00000429LI10A issued by XL to Securitas ("XL Master Policy") (*Id.*), confirming that the plaintiffs' own general liability policy is excess to either the XL Policy or the XL Master Policy, without any obligation of contribution, and setting the matter down for an inquest on damages.

BACKGROUND

Securitas contracted with Turner to provide security services for Turner during the deconstruction of the Old Yankee Stadium in 2009 ("Turner Contract"). (Exhibit "C" to the Sparling Aff.). The Turner Contract provides for security services for "Turner Field Office Trailers located in Parking Lot 7 at 800 River Avenue from July 1, 2009 thru July 1, 2010 (Start date is Approximate, time frame may shift slightly)." *(Id.* at Art. 3). The Turner Contract also provides that "Security Services shall commence as directed by Turner and conclude approximately July 1, 2010. The overall time frame may shift slightly, depending on the exact start date." *(Id.* at Art. 4).

With regard to modification, the Turner Contract provides that it "may be modified or amended only by written instrument signed by the parties hereto and Provider's compensation and time of performance of the Agreement shall be adjusted if they are materially affected by such modification of [sic] amendment." *(Id.* at Art. 6).

As of September 3, 2010, Lovett was employed by Securitas as a security officer for purposes of providing such services when she allegedly tripped on a curb/street area located at 728 River Avenue, Bronx, New York. Lovett has testified that her security trailer was located at 728 River Avenue and that she was en route to her post when she stepped off a sidewalk and twisted her ankle.

On or about April 1, 2011, plaintiffs tendered their defense and indemnification for the Lovett Action to Securitas. (Exhibit "N" to the Sparling Aff.). Securitas eventually accepted tender "subject to the information available to date and *subject to [their] reservation of rights as to any facts that may come to light that would establish that the claims are outside the scope of [their] service contract* (emphasis added)." (Exhibit "S" to the Sparling Aff.).

STANDARD OF REVIEW

The drastic remedy of summary judgment is to be granted only when the movant establishes that there are no triable issues of fact. *(Andre v Pomeroy*, 35 NY2d 361 [1974]). Thus, Turner and the City must make a prima facie showing of entitlement to judgment as a matter of law. *(Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

Only if the plaintiffs make such a showing will the defendants be required to come forward with proof in evidentiary form establishing the existence of triable issues of fact, or an acceptable excuse for their failure to do so. *(Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Any doubt as to the existence of a triable issue of fact will be resolved in favor of the defendants. *(Freese v Schwartz*, 203 AD2d 513 [2d Dept 1994]). In all events, as non-movants, the evidence will be viewed in the light most favorable to the defendants, and the defendants will be given the benefit of all of the reasonable inferences which can be drawn from the evidence. *(Negri v Stop & Shop*, 65 NY2d 625 [1985]).

ARGUMENTS

Plaintiffs state that they are additional insureds under the XL Policy. As such, they assert that they are entitled to defense and indemnification in the Lovett Action. Plaintiffs argue that Lovett was working on September 3, 2010 for Securitas at the time of the injury, which triggered coverage. In addition, plaintiffs maintain that because they are "additional insured," they are entitled to primary and non-contributory coverage under the XL Policy and the XL Master Policy.

To underscore this latter position, Turner and the City refer to the Liberty Mutual Insurance coverage policy they established for the Project (Exhibit "A" to affidavit of John Curry, sworn to on May 2, 2013 [Curry Aff.]), which states that it 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 an endorsement." (Curry Aff. at Marsh00079).

Finally, plaintiffs argue that Securitas is contractually bound to hold Turner and the City harmless for all claims, losses, expenses and damages, including but not limited to attorney's fees, arising out of or resulting from the performance of its services under Securitas's contract with Turner. (Exhibits "E" and "L" to the Sparling Aff.). Thus, they claim that whether or not the Turner Contract technically expired, the continuation of the arrangements led to an ongoing defense and indemnification obligation.

In response to these arguments, defendants state that as the Turner Contract, by its own terms, expired at or around July 1, 2010, and it was not extended, the plaintiffs have not established the existence of a valid and enforceable contract requiring defendants to defend and indemnify them. Defendants also contend that there are significant specific questions of fact regarding whether the fall giving rise to the Lovett Action occurred in furtherance of the Turner Contract. In addition, defendants state that since there has been no exchange of documents in discovery and only limited depositions, this motion for summary judgment is premature and prejudicial to defendants.

ANALYSIS

Obligation to Defend and Indemnify Under the Turner Contract

The main issue in this action is whether the Turner Contract, and, therefore, the insurance coverage for Securitas, was in effect at the time of the Lovett's accident on September 3, 2010.

This Court holds that there exists a triable issue of fact as to whether the Turner Contract was in effect at the time of Lovett's accident as set forth below.

There are substantial ambiguities and sharp disputes relating to the term of the Turner Contract. The date of the Turner Contract was August 18, 2009, but it was not executed until almost four months later on December 2, 2009. The proposed starting date of July 1, 2009, pre-dates both the date of the Turner Contract and its subsequent execution.

It is also clear that the Turner Contract would conclude approximately on July 1, 2010, and that the overall time frame may shift slightly, depending on the start date. In plaintiffs' moving papers, plaintiffs only aver without any documentary evidence that the Turner Contract continued past the proposed and approximate expiration of the Turner Contract on July 1, 2010, and was extant at the time of Lovett's accident on September 3, 2010. In opposition to the motion, defendants disputed that the Turner Contract was extended through September 3, 2010. (Affidavit of Hal Steele, sworn to on August 8, 2013 [Steele Aff.]). In its initial reply, plaintiffs contended that the Steele Aff. was procedurally defective, and not in admissible form, because it was executed outside of the state and lacked a certificate of conformity pursuant to CPLR 2309(c). Plaintiffs also made substantive arguments that since the conclusion date of the Turner Contract was not fixed and was approximate, and Lovett actually was employed by Securitas as a security officer on September 3, 2010, it logically follows that the Turner Contract was certainly extended through the date of the subject accident. Defendants then offered a certificate of conformity of the Steele Aff. to cure the procedural irregularity, which was accepted by this Court. Plaintiffs then submitted a supplemental reply in further support of plaintiffs' motion for summary judgment with permission[1] of this Court which included for the first time an invoice

[1] This Court has no independent recollection as to the necessity for a further submission as defendants merely removed a procedural hurdle by providing a certificate of conformity and did not

from Securitas to Turner indicating that Lovett was paid for services on September 3, 2010, possibly related to the Turner Contract because it utilized the same invoicing mechanisms, and the same Contract references. (Exhibit "B" to the Affidavit of Mike McCormack, sworn to on December 13, 2013 [McCormack Aff.], Invoice #E1806918 of 09/03/10-09/09/10 ["Invoice"]).

It is well established in New York state and federal courts that after the expiration of a contract, the parties may, through conduct, mutually assent to a new contract embracing the same provisions and terms as their prior contract. (*North Am. Hyperbaric Ctr. v City of New York*, 198 AD2d 148, 149 [1st Dept 1993]; see also *Martin v Campanaro,* 156 F2d 127, 129 [2d Cir], *cert. denied* 329 US 759 (1946), citing, *inter alia*, *New York Tel. Co.*, 282 NY at 365). Moreover, a contract as implicitly agreed to through the conduct of the parties "is just as binding as an express contract arising from declared intention, since in the law there is no distinction between agreements made by words and those made by conduct." (*Jemzura v Jemzura*, 36 NY2d 496, 504 [1975]) (citations omitted).

Plaintiffs rely on the assertion in *Richmor Aviation, Inc. v Sportsflight Air, Inc.* (82 AD3d 1423, 1424 [3d Dept 2011]) that "[w]here parties continue to perform after a contract expires, the courts look to the conduct of the parties to determine whether the terms of the written contract continue to apply (see *New York Tel. Co. v Jamestown Tel. Corp.*, 282 NY 365, 372 [1940]; *Monahan v Lewis,* 51 AD3d 1308, 1309-1310 [3d Dept 2008])." However, plaintiffs' overlook the clear holding that "the existence of such an implied contract will ordinarily be a

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change the substance of the Steele Aff. which was previously responded on the merits in the initial reply papers. In other words, defendants already substantively replied to the Steele Aff. Moreover, the only "new" part of the Steele Aff. was the certificate of conformity so, at the very most, plaintiffs could address that "new" item only. This Court is uncertain if plaintiffs should have been given a second opportunity to present further documentary evidence when they failed to do so in their initial reply papers, as defendants were not given an opportunity to oppose such evidence. As such, the scope of the new submission is dubious.

question of fact, as it involves an assessment of the parties' conduct and the extent to which such conduct demonstrates a meeting of the minds (*see Town of Webster v Village of Webster*, 280 AD2d at 934; *see also Lobosco v New York Tel. Co./NYNEX*, 96 NY2d 312, 316 [2001]; *Robinson v Sweeney*, 301 AD2d 815, 817 [2003]). (*Monahan v Lewis*, 51 AD3d at 1310; *Tanton v Lefrak SBN Limited Partnership*, 2103 Slip Op. 30126(U) [Sup. Ct, NY. Co., 2013] *aff'd* 110 AD3d 441 [1st Dept 2013]). Virtually all of the cases that plaintiffs cite for the proposition that they are entitled to summary judgment in this action are distinguishable because in those cases the fact-finder made findings *after* a hearing or trial, and not on a summary judgment motion, concluding that the disputed contract had continued. Moreover, in the case presented where summary judgment was sought, the Appellate Division denied relief stating "that after expiration of the contract, the parties conduct *could have* evidenced their mutual assent to a new contract embracing the same provisions and terms of their prior contract." (emphasis added)(*North Am. Hyperbaric Ctr. v City of New York*, 198 AD2d at 149).

Even if this Court were to accept and consider the Invoice which may be somewhat compelling evidence that the Turner Contract continued, it is not conclusive documentary evidence that precludes a hearing "which involves an assessment of the parties' conduct." (*Monahan v Lewis*, 51 AD3d at 1310). In other words, the Invoice is not a signed agreement between the parties which expressly and explicitly either extended or modified the Turner Contract. While an inference may be drawn from the Invoice that the Turner Contract continued, it is only an inference which must be considered together with all other evidence of the conduct of the parties, and therefore insufficient to entitle plaintiffs to summary judgment in the face of a sworn statement denying that assertion. This Court need not address other alleged

triable issues such as whether the fall giving rise to the Lovett Action occurred in furtherance of the Turner Contract.

Insurance Coverage under the XL Policy and the XL Master Policy

Turning to the obligations of XL, the evidence presented shows that Securitas fulfilled its contractual obligations to procure insurance naming the plaintiffs as additional insured under the XL Policy and the XL Master Policy, both of which cover the period during which Lovett was allegedly injured.[2] Both policies appear to provide additional insured coverage for bodily injury to any person or organization SECURITAS was required to include as an additional insured on the policy by a written contract, for liability arising out of Securitas's operations, work, or facilities. (Exhibit D to the Sparling Aff.).

More specifically, the XL Policy contains the following additional insured endorsement provision in its commercial general liability coverage part:

> "Name of Additional Insured Person(s) or Organization(s)
> Any person or organization where required by written contract, but only to the extent that the named insured has agreed in writing prior to the occurrence or accident to provide insurance for such persons or organizations and then only with respect to liability for bodily injury or property damage caused by operations performed for such additional insured by or on behalf of the named insured.
>
> Section II – Who is An Insured is amended to include as an additional insured the person(s) or organization(s) shown in the Schedule, but only with respect to liability for "bodily injury" … caused in whole or in part, by your acts or omissions or the acts or omissions of those acting on your behalf:
> A. In the performance of your ongoing operations; or
> B. In connection with your premises owned by or rented to you."

(*Id.*, XL Policy at Marsh00103).

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[2] This too does not necessarily mean that the Turner Contract continued. There could be coverage pursuant a new contract with possibly different terms.

Meanwhile, the XL Master Policy states in endorsement No. 3:

> "Additional Insured – Designated Person or Organization
>
> It is understood and agreed that the Insured (as per the Schedule of the Policy) is amended to include as an additional insured any person or organization as defined below as an additional insured but only with respect to liability arising out of the Insured's operations or premises owned by or rented to the Insured . . . .
>
> Name of Person or Organization
>
> Any person or organization but only to the extent that the Insured has agreed in writing prior to the occurrence or accident to provide insurance for such persons or organizations and then only with respect to liability for ***Personal Injury*** or damage to ***Property*** arising out of operations performed for such additional insured by or on behalf of the Insured."

(*Id.*, XL Master Policy at Marsh 00026).

Given such language, and the legal broadness attendant to such obligations (*Regal Constr. Corp. v National Union Fire Ins. Co. of Pittsburgh, PA*, 15 NY3d 34, 37 [2010]), there can be no doubt of the right of the plaintiffs to be defended under the XL Policies, if the Turner Contract was continued. "If, liberally construed, the claim is within the embrace of the policy, the insurer must come forward to defend its insured no matter how groundless, false or baseless the suit may be." (citations omitted)(*Ruder & Finn v Seaboard Sur. Co.*, 52 NY2d 663, 670 [1981]); *see also Automobile Ins. Co. of Hartford v Cook*, 7 NY3d 131, 137 [2006]) ("insurer may be required to defend under the contract even though it may not be required to pay once the litigation has run its course"); *Seaboard Sur. Co. v Gillette Co.*, 64 NY2d 304, 310 [1984]) (duty to defend "is not contingent on the insurer's ultimate duty to indemnify should the insured be found liable, nor is it material that the complaint against the insured asserts additional claims which fall outside the policy's general coverage or within its exclusory provisions").

This right to defense applies equally to Turner and the City, as additional insureds under the XL Policies, as it does to Securitas, as the primary insured. *(Pecker Iron Works of N.Y. v Traveler's Ins. Co.*, 99 NY2d 391, 393 [2003]), accord *Regal Constr. Corp.*, 15 NY3d at 37; *see also BP A.C. Corp. v One Beacon Ins. Group*, 33 AD3d 116, 120-21 [1st Dept 2006], *mod* 8 NY3d 708 (2007); *see also Fitch v Turner Constr. Co.*, 241 AD2d 166, 171 [1st Dept 1998]) (there is no distinction between the coverage that is provided to the insured and the additional insured).

While the origin of the alleged defect that caused Lovett's injury has not been determined, that matter is not directly relevant to whether there is an obligation on the part of Securitas and XL to defend Turner and the City, if the Turner Contract was continued. With regard to whole obligation, including the obligation to indemnify, if there is some other party that contributed to the injury, it is for Securitas and XL to recover from that party in the course of their defense. As far as Turner and the City are concerned, the existence of a valid contract of defense and indemnification would be sufficient to enforce those obligations if the Turner Contract continued.

Priority of Coverage

To the extent that the plaintiffs are entitled to defense as additional insured, their own liability coverage is excess to that of the defendants. First, as noted above, the policy in question, from Liberty Mutual Insurance, explicitly states that it 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 an endorsement." (Curry Aff. at Marsh 00079). The Liberty Mutual Insurance policy would be excess coverage unless there are indications, and the defendants have offered none, to the

contrary in the other policies. *(Sport Rock Intl., Inc. v American Cas. Co. of Reading, Pa*, 65 AD3d 12, 18 [1st Dept 2009]) ("[w]here the same risk is covered by two or more policies . . . priority of coverage . . . among the policies is determined by comparison of their respective 'other insurance' clauses"); *see also Bovis Lend Lease LMB, Inc. v Great Am. Ins. Co.*, 53 AD3d 140, 145 [1st Dept 2008]) ("the extent of coverage [including a given policy's priority vis-à-vis other policies] is controlled by the relevant policy terms").

Second, from a practical and logical perspective, "[o]ne of the reasons additional insured status is sought is to avoid the necessity for the [additional insured] to use its own policy. If the [additional insured] is forced to have its own insurance defend a suit, the very purpose underlying additional insured status has been thwarted." *(BP A.C. Corp.*, v *One Beacon Ins. Group*, 33 AD3d at 124, quoting Malecki, Ligeros & Gibson, *The Additional Insured Book*, at 104 n 12 (5th ed 2004]). Here, the parties, in agreeing that the plaintiffs be named as additional insured, also agreed that the plaintiff's own insurance would be excess to that of the defendants.

This does not, however, automatically lead to indemnification. Indemnification requires a finding of liability, the evidence of which has not been submitted to this Court. (*79th Realty Co. v X.L.O. Concrete Corp.*, 247 AD2d 256, 257 [1st Dept 1998]) (even where there is a duty to defend as a matter of law, "a duty to indemnify . . . must await a determination of liability in the underlying personal injury action"). Indeed, as there has not been a final determination in the Lovett Action as to liability, summary judgment on indemnification is premature.

CONCLUSION

Accordingly, it is hereby

ORDERED, ADJUDGED and DECLARED, that plaintiffs' motion for summary judgment against defendants seeking a declaration that defendants have a duty to defend, indemnify, and reimburse plaintiffs for all prior legal fees and expenses related to the underlying action *Yolanda Lovett v City of New York and Turner Construction Company*, Index No. 301445/11, Supreme Court of the State of New York, County of Bronx, is denied as there exists issues of fact for trial; and it is further

ORDERED, ADJUDGED and DECLARED, that the plaintiffs *would* be additional insured under the XL Insurance policies issued in favor of Securitas, Policy No. US00005451II10A, and Securitas AB, Policy No. SE00000429LI10A, both of which are excess to any insurance held by plaintiffs, *if* it is found after trial that the Turner Contract was continued as more fully explained above;

ORDERED, that the parties are directed to appear for a preliminary conference in Room 335, at 60 Centre Street, on March 16, 2015, at 11 am.

Dated: January 16, 2015

Enter:

J.S.C.

SHLOMO HAGLER J.S.C.