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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 50(formerly Part 57)
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THE CITY OF NEW YORK,

Plaintiff,

-against-

Index No. 450491/13

LEXINGTON INSURANCE COMPANY and NEW HAMPSHIRE INSURANCE COMPANY,

Defendants.
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Peter H. Moulton, J.S.C:

In this declaratory judgment action, plaintiff asserts that it is covered by defendants' commercial general liability insurance policies for a slip and fall accident which occurred at a municipal parking garage on February 9, 2011.[1] Defendant New Hampshire Insurance Co. ("NH") moves for summary judgment dismissing the complaint against it on the basis that plaintiff is not an additional insured under its policy due to a gap in coverage from February 2, 2011 through February 15, 2011. Plaintiff The City of New York ("plaintiff" or the "City") cross-moves for summary judgment, seeking a declaration that NH has a duty to defend the City in the underlying slip and fall action pending in the Bronx.

Background

It is undisputed that starting in 2005, plaintiff had multiple

[1]By Decision and Order dated March 14, 2014, the court dismissed the complaint against co-defendant Lexington Insurance Company.

written contracts (including renewals) with Parking Systems Plus, Inc. ("PSP"), to operate a municipal parking garage. PSP is the named insured under policy number 021778148 with defendant New Hampshire Insurance Company ("NH"). The policy was effective October 27, 2010 through October 27, 2011 and contained an additional insured endorsement (discussed below). As is relevant here, the 2005 contract between plaintiff and PSP, as renewed, expired on February 2, 2011 at 11:59 p.m (the "2005 Contract"). The succeeding contract (the "2011 Contract") provides that it was "made and entered into this 16 day of February, 2011." It was signed by PSP on February 4, 2011 (five days before the accident) and on February 16, 2011 by plaintiff's designee.

Endorsement # 004 to the policy (the "endorsement") is entitled ADDITIONAL INSURED REQUIRED BY WRITTEN CONTRACT and provides in relevant part that:

> **A. Section II-Who is An Insured** is amended to include any person or organization you are required to include as an additional insured on this policy by a written contract or written agreement in effect during the policy period and executed prior to the "occurrence" or the "bodily injury" or "property damage."

Arguments

NH asserts under the endorsement, a "written contract" is "executed" only when the contract is signed by both parties or when it is fully performed. To support this interpretation, NH cites the Appellate Division, First Department cases *Cusumano v Extell Rock, LLC* (86 AD3d 448 [1st Dept 2011]), *Nicotra Group, LLC v American*

Safety Indem. Co. (48 AD3d 253 [1st Dept 2008]), *Rodless Props., L.P. v Weschester Fire Ins. Co.* (40 AD3d 253 [1st Dept 2007]), and *National Abatement Corp. v National Union Fire Ins. Co. Of Pittsburgh, Pa.* (33 AD3d 570 [1st Dept 2006]). NH also cites two Appellate Division, Second Department cases, *Burlington Ins. Co v Utica First Ins. Co.*, 71 AD3d 712 [2d Dept 2010]) and *Empire Bldrs. & Devs., Inc.* v *Delos Ins. Co.* (78 AD3d 759 [2d Dept 2010]).

Plaintiff cross-moves for summary judgment and opposes NH's motion. Plaintiff asserts that it is an additional insured under its 2005 Contract with PSP (which contained the same insurance requirements as contained in the 2011 Contract). The City argues that the 2005 Contract qualifies as a written contract executed by both parties prior to the accident satisfying the additional insured endorsement. Had NH wished to require that the written contract be in effect on the date of the occurrence, as opposed to during the term of the policy, the policy would have substituted the words "in effect on the date of the occurrence" in place of the words "in effect during the policy period."

Additionally, plaintiff asserts that it is an additional insured under the 2011 Contract. Plaintiff is an additional insured because the 2011 Contract was "executed" by PSP prior to the occurrence, because PSP was required to obtain insurance under all contracts, and because PSP continuously operated the garage before and after the 2011 Contract, including on the date of the accident.

The City further asserts that the term "executed" is not defined in the policy and is ambiguous. The requirement, the City argues, that it had to have signed the 2011 Contract prior to the accident in order to be covered is a "ministerial act" and a "formality of an additional signature" which is not required by the "slippery" word "executed." NH cannot "myopically focus on just one of several possible meanings of the term executed' - signed by both parties, or "fully executed." (Mem of Law In Opp and In Support at 15). The City asserts that any ambiguity as to the existence of coverage resulting from interpretation of the term "executed" (where the term is not followed by the words "by all parties") must be resolved in favor of the insured, citing *Handelsman v Sea Ins. Co.* (85 NY2d 96 [1994]).

Despite the "made and entered into" date, and the fact that plaintiff signed the 2011 Contract after the occurrence, plaintiff asserts that "[t]he parties clearly considered the 2011 Contract binding and effective prior to the additional formality of the City's signature on February 16, 2011" because PSP was continuously operating the garage and because plaintiff retroactively registered the contract (*id.*). Plaintiff asserts that the requirement that a written contract must be executed prior to the occurrence is intended to prevent the situation where an insured could wait to obtain insurance until after an accident has occurred, inviting fraud or collusion. Because PSP signed the 2011 Contract before the

accident, plaintiff contends that this situation does not apply. Plaintiff contends that because no New York appellate or federal court has squarely addressed whether a contract is executed within the meaning of an insurance policy when the insured signs a written agreement to procure coverage prior to the occurrence, a Texas appellate court decision is persuasive and on point.

In opposition to plaintiff's cross-motion and in support of its motion, NH points to the fifth paragraph of the endorsement which provides in relevant part that:

> This insurance does not apply to "bodily injury" or "property damage" arising out of "your work" or "your product" included in the "products completed operations hazard" unless you are required to provide such coverage by written contract or written agreement and then only for the period of time required by the written contract or written agreement and in no event beyond the expiration date of the policy.

Thus, by its terms, the endorsement requires that there exist a written contract obligating the insured to procure coverage, and if that exists, such coverage is only for the period of time required by the written contract. The 2005 Contract provides that such insurance is for "the performance of work in this Contract" and that "[t]his insurance policy shall be maintained during the term of this Contract."[2] Given that the term of the 2005 Contract

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[2]The Insurance provisions of the 2005 Contract (located at NYSCEF 24 Bates Numbers NYC000235-236) and the 2011 Contract (located at NYSCEF 26 at Bates Number NYC000610) state in relevant part:
D. <u>Commercial General Liability Insurance</u>: Before performing any

expired on February 2, 2011 at 11:59 pm, plaintiff's argument fails. Similarly, NH asserts that plaintiff's argument fails because the endorsement defines an insured to include any person or organization that "you are required to include as an additional insured." PSP, NH argues, was not required to include plaintiff as an additional insured on the date of the accident, under a contract whose term had expired. The endorsement did not, NH points out, define an insured to include any person or organization that you "were" required to include as an additional insured. NH further asserts that "As a matter of law, the instrument drafted by the City and presented to PSP for its signature, was not an 'offer,' that could ripen into a written executed contract upon PSP's signature" (Padua Aff In Opp and In Support at 27). NH points to the "made and entered into" language on the face page of the 2011 Contract and to the existence of the signatures lines for both parties. Thus, NH argues "the

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work on this Contract, the Contractor shall procure Commercial General Liability Insurance in the Contractor's name and adding the City of New York and the Department of Transportation as additional insureds thereunder and endorsed to cover the liability assumed by the Contractor under the indemnity provisions of this Contract. This insurance policy shall be maintained during the term of this Contract and shall protect the City of New York, the Contractor and/or its Subcontractors performing Work under this Contract from claims for property damage and/or bodily injury, including death which may arise from operations under this Contract, whether such operations are performed by the Contractor or anyone directly or indirectly employed by the Contractor. The Coverage provided shall not be less than provided for in Schedule A. The Coverage provided hereunder must be "*occurrence*" based; "*claims-made*" coverage will not be accepted.

CITY, remained master of its offer and retained the power to impose conditions on the acceptance of the offer, specify the manner of acceptance, or reject the offer up until the date that the CITY's authorized representative signed" (*id.* at 28).

In its reply memorandum, plaintiff reiterates its arguments and distinguishes NH's cited cases. Plaintiff further cites *Matter of Municipal Consultants & Publs., Inc. v Town of Ramapo* (47 NY2d 144 [1979]) to support its argument that the requirement of the City's signature was a ministerial act which was unnecessary to render the 2011 Contract enforceable. Additionally, the City argues that NH's attempt to limit coverage to a written agreement which is in effect during a corresponding policy period (i.e., 10/27/10 to 10/27/11) is a "temporal, existential mandate" which is not supported by the language of the insurance policy.[3]

In NH's reply memorandum, NH reiterates its argument regarding the correct interpretation of the endorsement which it contends mandates that a written instrument be signed by both parties prior to the occurrence. NH further asserts that plaintiff's alternative argument regarding the 2005 Contract has no merit because the term of that contract had expired, and therefore the insured was under no written obligation to obtain or maintain insurance during the gap period.

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[3]In reply, plaintiff reverses the order of the arguments under the 2005 Contract and the 2011 Contract, presumably based upon plaintiff's assessment of the arguments' strengths.

Discussion

The proponent of a motion for summary judgment has the burden of establishing that there are no material issues of fact in dispute, thus entitling it to judgment as a matter of law (*DeRosa v City of New York*, 30 AD3d 323, 325 [1st Dept 2006]). Once that party establishes a prima facie entitlement to such relief as a matter of law, the burden shifts to the opposing party to present facts, in admissible form, demonstrating that genuine, triable issues exist precluding the grant of summary judgment (*id.*). The party claiming insurance coverage has the burden of proving entitlement and a party that is not named an insured or additional insured on the face of the policy is not entitled to coverage (*see Moleon v Kreisler Borg Florman Gen. Constr. Co.*, 304 AD2d 337, 339 [1st Dept 2003]). An unambiguous policy provision must be accorded its plain and ordinary meaning, and the court may not disregard the plain meaning of the policy's language in order to find an ambiguity where none exists (*see Bassuk Brothers, Inc. v Utica First Insurance Co.*, 1 AD3d 470, 471 [2d Dept 2003]).

Plaintiff's argument that the 2011 Contract was executed prior to the occurrence, because it was signed by PSP as the party to be charged with obtaining insurance and because PSP continuously operated the garage, and its argument that term "executed" is ambiguous, is undermined by NH's cited cases. While it is true that

those cases predominantly involved instances where either no contract was signed by either party or where both parties signed after the accident, they nonetheless are instructive. As noted by plaintiff, Black's Law Dictionary does warn:

> [T]he term 'executed' is a slippery word. Its use is to be avoided except when accompanied by explanation . . . A contract is frequently said to be *executed* when the document has been signed, or has been signed, sealed, and delivered. Further, by executed contract is frequently meant one that has been fully performed by both parties.

However, the comment above speaks to ambiguity arising from whether sealing and delivery is contemplated, in addition to signing. The Appellate Division, First Department has already found that the term "executed" as used in substantially similar additional insured endorsements, is not ambiguous, and it means either signed or performed (*see e.g., Rodless Prop., L.P.*, 40 AD3d 253, *supra* [Rodless was not entitled to additional insured status where a contract between the general contractor and insured was never reduced to writing]; *National Abatement Corp.*, 33 AD3d 570, *supra* [a company was not entitled to additional insured status where neither party signed a contract requiring the procurement of insurance]).

However, the focus on the term "executed" alone is misleading. The endorsement requires that a "written contract" be in effect during the policy period and be "executed" prior to the occurrence. To create a binding contract, there must be a manifestation of

mutual assent sufficiently definite to assure that the parties are truly in agreement with respect to all material terms (*see Joseph Martin, Jr., Delicatessen v Schumacher*, 52 NY2d 105, 109 [1981]). Courts look to the basic elements of the offer and the acceptance to determine whether there is an objective meeting of the minds sufficient to give rise to a binding and enforceable contract (*Matter of Express Indus. & Terminal Corp. v New York State Dept. of Transp.*, 93 NY2d 584, 589 [1999]; *see also Silber v New York Life Ins. Co.*, 92 AD3d 436 [1st Dept 2012] [there was no "meeting of the minds" constituting the formation of a contract between the parties]).

The City offers no evidence that "[t]he parties clearly considered the 2011 Contract binding and effective prior to the additional formality of the City's signature on February 16, 2011" (Mem of Law In Opp and In Support at 15). To the contrary, the 2011 Contract reflects that the written agreement contemplated that all parties sign it before it became binding as the contract bears signature lines for both plaintiff and NH (*see, e.g, Cusumano*, 86 AD3d 448, *supra* [Hard Rock was not entitled to additional insured status where a construction agreement was not signed by either Hard Rock or the insured at the time of the accident and where a Work Authorization was signed by the insured, but "the signature page, which included a signature line for Hard Rock to sign, was not signed at the time of the accident"]; *Nicotra Group, LLC.*, 48 AD3d

253, *supra* [in addition to the fact that the letter proposal did not contain a requirement that Nicotra be named an additional insured, Nicotra was not entitled to such status because the proposal was not signed by Nicotra, which "therefore does not qualify a 'written contract' that was "executed" prior to the 'bodily injury'"]). *Manner of Municipal Consultants & Publs., Inc.* (47 NY2d 144, *supra*) does not dictate a contrary result. There the acceptance of the offer was evidenced by a town resolution which was passed after negotiations, and which authorized the superintendent to accept a specific proposal for a specific price, rendering his signature a ministerial act. Here, as noted above, the City has produced no evidence supporting its argument that the 2011 Contract was a legally binding contract prior to the date the City signed on February 16, 2011, where the contract bears the words "made and entered into" on that date.

Further, the 2005 Contract cannot provide the basis for additional insured status because that contract expired "February 2, 2011 at 11:59 pm" and the endorsement only provided insurance "for the period of time required by the written contract" which only required insurance during its term.

While the court does not doubt that plaintiff never intended to be left insured, the fact remains that until plaintiff signed the written contract, a fact within plaintiff's control, there was no enforceable contract, and therefore no "written contract" which was

"executed" prior to the occurrence. Accordingly, it is

ORDERED that the motion by New Hampshire Insurance Company for summary judgment dismissing the action against it is granted; and it is further

ORDERED that the cross-motion by plaintiff is denied as moot; and it is further

ORDERED that upon service of a copy of this Decision and Order on the Clerk of the Court by filing the appropriate efiling forms, the Clerk is directed to enter judgment in favor of New Hampshire Insurance Company dismissing the action, with costs and disbursements as taxed by the court.

This Constitutes the Decision and Order of the Court.

Dated: June 15, 2015

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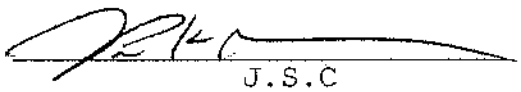

J.S.C

HON. PETER H. MOSLEY
J.S.C.