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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 37

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ASPEN SPECIALTY INSURANCE COMPANY,

Plaintiff,

- against -

IRONSHORE INDEMNITY INCORPORATED and TRANSEL ELEVATOR, INC.,

Defendants.

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Index Number: 160353/2013

Sequence Number: 001

Decision and Order

Arthur F. Engoron, Justice

In compliance with CPLR 2219(a), this Court states that the following papers, numbered 1 to 4, were used on defendants' motion, pursuant to CPLR 3211(1) and (7), to dismiss the complaint, and plaintiff's cross-motion, pursuant to CPLR 3212, for partial summary judgment:

Papers Numbered:

Notice of Motion - Affirmation - Exhibits 1
Affirmation in Opposition 2
Notice of Cross-Motion - Affirmation - Affidavit - Exhibits 3
Affirmation in Further Support of Motion and in Opposition to Cross-Motion 4

Upon the foregoing papers, defendants' motion is granted in part and plaintiff's cross-motion is granted.

Background

An elevator repairman was injured while working at a hotel pursuant to a maintenance and repair contract between his employer and the hotel owner, and he sued the hotel owner to recover for his alleged injuries. This insurance declaratory judgment action followed. The Court is now asked to determine whether the insurer for the elevator maintenance and repair company (the injured repairman's employer) must defend and indemnify the hotel owner in the underlying lawsuit.

The pertinent, undisputed facts are as follows. Defendant Transel Elevator Inc. ("Transel") maintained and repaired three passenger elevators at the hotel owned by non-party Alphonse Hotel Corp. ("Alphonse") pursuant to a written contract that contained an insurance procurement provision requiring Transel to name Alphonse as an Additional Insured on Transel's commercial general liability policy ("cgl policy"). Ironshore insured Transel, as Named Insured, under a cgl policy for the period from November 2012 through November 2013 (bearing policy number 000420803). Ironshore's policy defines an Additional Insured as:

> ... any ... organization for whom you are performing operations when you and such organization have agreed in writing in a contract or agreement that such person or organization be added as an additional insured on your policy. Such person or organization is an additional insured only with respect to liability for "bodily injury" ... caused, in whole or in part, by:
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> 1. Your acts or omissions; or
> 2. The acts or omissions of those acting on your behalf;
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> in the performance of your ongoing operations for the additional insured.

On October 12, 2012, Michael Patalano, an elevator repairman employed by Transel, allegedly sustained injuries while working at Alphonse's hotel. By summons and complaint filed on May 7, 2013, Patalano sued Alphonse to recover for his injuries (Patalano v Alphonse Hotel Corp., Supreme Court New York County Index No. 154217/2013 [the "Patalano Action"]). In his complaint, Patalano alleges that, while performing work for Transel at the hotel on October 12, 2012, he descended an interior flight of stairs that collapsed, causing him to fall and sustain injuries. By letter dated July 22, 2013, Alphonse tendered its defense and indemnity in the Patalano Action to Ironshore. By letter dated October 22, 2013, Ironshore denied Additional Insured status to Alphonse upon the grounds that: (1) Patalano's accident occurred when he was descending an interior stairway, and therefore the incident was "unrelated to" Transel's work, did not arise out of any Transel's "acts or omissions," and coverage was not triggered; and (2) the complaint in the Patalano Action alleges that Alphonse was solely negligent. One year later, on October 22, 2014, Alphonse's insurer, Aspen, commenced the instant declaratory judgment action against Transel and Ironshore, for a declaration that: Alphonse is an Additional Insured on Ironshore's cgl policy (first cause of action); Ironshore must, on a primary, non-contributory basis, defend Alphonse in the Patalano Action (second cause of action) and indemnify Alphonse therein (third cause of action); and for breach of contract for failure to procure insurance (fourth cause of action).

Defendants now move, pursuant to CPLR 3211(1) and (7), to dismiss the complaint, upon the same grounds set forth in Ironshore's disclaimer, to wit: Additional Insured coverage for Alphonse has not been triggered under Ironshore's policy because Patalano's fall down faulty stairs at the hotel is "unrelated" to Transel's work, and the Patalano complaint alleges sole negligence on the part of Alphonse. Aspen opposes defendants' motion and cross-moves for partial summary judgment on its first and second causes of action, upon the ground that the phrase "caused by" in Ironshore's policy is not materially different from "arising out of" and, thus, the mere fact that Patalano was injured while working at the hotel (regardless of how the injury actually occurred) is sufficient to trigger Additional Insured coverage.

Discussion

It is well settled that summary judgment should be granted where the movant has demonstrated the absence of any material issues of fact and established entitlement to judgment as a matter of law. CPLR 3212(b); See Alvarez v Prospect Hosp., 68 NY2d 320 (1986).

Defendants have failed to meet their burden of establishing, prima facie, that Alphonse is not entitled to Additional Insured coverage under Ironshore's cgl policy for the Patalano Action. Defendants are incorrect in their argument that coverage is not triggered for Alphonse because (a) Ironshore's Additional Insured endorsement insures Aspen only for liability "caused, in whole or in part, by" Transel's "acts or omissions ... in the performance of [its] ongoing operations for [Alphonse]"; and (b) the underlying loss, caused by a faulty stairway outside of Transel's control, did not arise out of Transel's negligent acts or omissions.

Rather, as correctly argued by Aspen, under controlling First Department authority the phrase "caused by" in an Additional Insured endorsement does not materially differ from the phrase "arising out of." See National Union Fire Ins. Co. of Pittsburgh Pa. v Greenwich Ins. Co., 103 AD3d 473, 474 (1st Dep't 2013) ("The phrase 'caused by' does not materially differ from the phrase, 'arising out of'"); W&W Glass Sys., Inc. v Admiral Ins. Co., 91 AD3d 530, 530-531 (1st Dep't 2012) ("Contrary to defendants' argument that the 'caused by' language in the policy is 'narrower' than the 'arising out of' language ... the phrase 'caused by your ongoing operations performed for that insured,' does not materially differ from the general phrase, 'arising out of.'"). And, it is well-settled that the phrase "arising out of" means "originating from, incident to, or having connection with." Worth Constr. Co., Inc. v Admiral Ins. Co. 10 NY3d 411, 415 (2008); Regal Constr. Corp. v National Union Fire Ins. Co. of Pittsburgh Pa., 64 AD3d 461, 463 (1st Dep't 2009) (same). Thus, where, as here, an employee is injured while performing the named insured's work pursuant to a written contract between the named insured and additional insured, "there is sufficient connection to trigger" additional insured coverage and "fault is immaterial." Hunter Roberts Constr. Group, LLC v Arch Ins. Co., 75 AD3d 404, 408 (2010).

It follows therefore that Aspen has met its burden of establishing on its cross-motion that there are no issues of fact and, as a matter of law, it is entitled to judgment declaring that Alphonse is an Additional Insured on Ironshore's cgl policy for the Patalano Action, and that Ironshore must defend Alphonse therein, by submitting Ironshore's cgl policy, the pertinent terms of which are set forth above, and the complaint in the Patalano Action, which alleges the Patalano sustained injuries while "working within the scope of his employment" with Transel. Indeed, defendants admit in their reply papers that Patalano's accident occurred during Transel's "ongoing operations" at the hotel (i.e., "repair of the elevator"). That Patalano's alleged injuries were caused by a defective interior stairway over which Transel had no control, as opposed to an "act or omission" on the part of Transel in the performance of its elevator repairs, is irrelevant and does not preclude coverage. See National Union Fire Ins. Co. of Pittsburgh Pa. v Greenwich Ins. Co., supra (because accident occurred while injured worker "was acting on behalf of [named insured] in the performance of its ongoing operations ... the condition set forth in the additional insured endorsement was satisfied, and summary judgment should have been granted"); Hunter Roberts Constr. Group, LLC v Arch Ins. Co., supra (additional insured coverage triggered where injured electrical worker tripped and fell on hole in floor when walking to field office to get spray paint, and hole not caused or created by worker's employer); see also Automobile Ins. Co. of Hartford v Cook, 7 NY3d 131, 137 (2006) (insurer's duty to defend "is 'exceedingly broad' and insurer will be called upon to provide a defense whenever the allegations of the complaint 'suggest . . . a reasonable possibility of coverage'").

In the absence of a copy of Aspen's policy, however, this Court can not determine whether Ironshore's policy provides Alphonse with coverage on a primary or excess basis for the Patalano

Action. See Sport Rock Intern., Inc. v American Cas. Co. of Reading, Pa., 65 AD3d 12, 18 (2009) ("Where the same risk is covered by two or more policies, each of which was sold to provide the same level of coverage (as is the case here), priority of coverage (or, alternatively, allocation of coverage) among the policies is determined by comparison of their respective "other insurance" clauses."). The Affidavit of Marvin Roblano, Aspen's Senior Casualty Claims Examiner, which states that the "Aspen Policy contains an Other Insurance provision that when compared to the Ironshore Policy renders the Aspen Policy excess over any other primary insurance available to Alphonse," is insufficient to establish the precise language of Aspen's other insurance clause for comparison to the Ironshore policy.

Given the Court's finding that Ironshore must provide Additional Insured coverage for Aspen in the Patalano Action, the fourth cause of action in the instant declaratory judgment complaint, for breach of contract for Transel's failure procure insurance, is subject to dismissal and defendants' motion to dismiss is granted only to that extent.

The Court has considered the parties' other arguments and finds them to be unavailing.

Conclusion

Defendants' motion is granted only to the extent of dismissing the fourth cause of action, and Aspen's cross-motion is granted. The clerk is directed to enter judgment (1) declaring that Alphonse Hotel Corp. is an Additional Insured on Ironshore Indemnity Incorporated's commercial general liability insurance policy (bearing policy number 000420803) for the personal injury action entitled Patalano v. Alphonse Hotel Corp., Supreme Court, New York County Index No. 154217/2013 (the "Patalano Action"), and that Ironshore Indemnity Incorporated is obligated to defend Alphonse Hotel Corp. in the Patalano Action; and (2) dismissing the fourth cause of action, for breach of contract for failure to procure insurance.

Dated: July 7, 2015

Arthur F. Engoron, J.S.C.