SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

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JP MORGAN CHASE BANK, N.A.,

Plaintiff,

Index No. 158154/2014

-against-

DECISION/ORDER

ZURICH AMERICAN INSURANCE COMPANY and TRUGREEN LANDCARE, L.L.C.,

Defendant.

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HON. CYNTHIA S. KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for :_____

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	1
Affidavits in Opposition.....	2
Affidavits in Reply.....	3
Exhibits.....	4

Plaintiff commenced the instant action against defendants Zurich American Insurance Company ("Zurich") and Truegreen Landcare, L.L.C. ("TureGreen") seeking, *inter alia*, defense and indemnification from defendants in an underlying personal injury action. Defendant Zurich American Insurance Company ("Zurich") moves for an Order pursuant to CPLR § 3212 granting it summary judgment dismissing plaintiff's complaint against it. For the reasons set forth below, Zurich's motion is granted.

The relevant facts are as follows. On or about October 1, 2006, TrueGreen entered into an agreement with Washington Mutual, Inc. ("WaMu") to perform snow and ice removal

services at the WaMu bank branch located at 693-695 East Tremont Avenue, Bronx, NY (the "premises") (the "agreement"). The agreement was an addendum to the parties Master Independent Contractor's Agreement (the "master agreement") for landscape and lot sweeping services at the premises entered into in March of 2005, and incorporated all terms and conditions contained therein. Thereafter, during the financial collapse of 2008, WaMu banking subsidiaries were closed by the Federal Office of Thrift Supervision and placed into receivership of the FDIC. In September 2008, WaMu's assets were sold to plaintiff herein JP Morgan Chase ("Chase") pursuant to a "Purchase and Assumption Agreement" (the "assumption agreement"). Pursuant to section 4.8 of the assumption agreement, Chase was deemed to have assumed any existing agreements with WaMu for the rendering of services if it failed to give timely notice that it elected not to assume the agreements. Chase alleges that it purportedly did not provide any notice regarding the agreement or master agreement herein at issue, thus, it assumed the same.

After Chase purchased WaMu's assets, sometime in 2009, a personal injury action was commenced against WaMu and Chase (collectively referred to herein as the "Chase Defendants") wherein the plaintiff sought damages for injuries she allegedly sustained on December 24, 2008, when she slipped and fell on a snow and ice condition on the sidewalk located in front of the premises (the "underlying action"). Thereafter, on September 12, 2011, Chase Defendants filed a third-party complaint against TrueGreen asserting claims for breach of contract, contractual and common law indemnity and contribution. TrueGreen moved to dismiss the third-party complaint in its entirety. By decision/order dated August 18, 2014, the Honorable Howard H. Sherman granted TrueGreen's motion only to the extent of dismissing the third-party claims for contribution and common-law indemnification. Specifically, in denying the portion of

TrueGreen's motion for summary judgment dismissing the claim for contractual indemnification, the court found as follows:

> However, to the extent that TrueGreen's agreement with WaMu required the contractor to indemnify WaMu and its successor to the fullest extent permitted by law, from and against all claims "arising out of, to [sic] the performance directly or indirectly of Contractor, or by reason of Contractor's breach of this Agreement," the third-party defendant fails to demonstrate as a matter of law that the Chase Defendants are not entitled to contractual indemnification resulting from the breach of the agreement to provide snow removal services.

Thereafter, on September 7, 2010, Liberty Mutual, on behalf of Chase, issued a tender of defense letter on TrueGreen. It is not clear on the record before the court what TrueGreen's response was to said letter, if any. The following year, on September 10, 2011, Chase issued a tender of defense to Zurich requesting contribution and indemnification as agreed to in the master agreement. Thereafter, in October of 2012, Chase issued a second tender to Zurich. In a letter dated May 23, 2014, Zurich denied the tender.

Thereafter, or about August 20, 2014, Chase commenced the instant action seeking defense and indemnification in the underlying action from defendants. Specifically, plaintiff seeks a declaratory judgment that Zurich's insurance policy with TrueGreen was in full force and effect on the day of the subject accident in the underlying action; that it was and is an additional insured under the Zurich policy; that it is entitled to insurance coverage from Zurich on a primary non-contributory basis; that Zurich is obligated to assume the defense and indemnification of it in the underlying action pursuant to its agreement with TrueGreen; and that Zurich compensate Chase for all attorneys' fees, disbursements, costs and expenses incurred by it in defense of the underlying action. Zurich now moves for summary judgment dismissing the action. Zurich aruges that this action should be dismissed as it is based on the improper

allegation that Chase is a party to the master agreement between TrueGreen and WaMu. Specifically, Zurich contends that TrueGreen never entered into a contractual agreement with Chase and Chase's alleged assumption of its master agreement with WaMu is void as WaMu failed to give notice to TrueGreen of the assignment pursuant to the terms of the master agreement. Specifically, Zurich relies on Section 16 of the master agreement, entitled "Assignment," which provides as follows:

> Neither party may assign or otherwise transfer the Agreement, or any provision hereof, without the prior written consent of the other party, provided, however, that Owner may assign or otherwise transfer its rights and obligations under this Agreement to its parent, affiliate or subsidiary companies, including any successor by merger, upon written notice to the other party. Any assignment in contravention of this Article 16 shall be null and void. This agreement shall be binding in all respects upon the parties and their agents, heirs, legal representatives, successors and assigns and shall inure to the benefit of all the same.

In the alternative, Zurich contends that it is entitled to summary judgment dismissing plaintiff's complaint as against it as Chase is not an additional insured under its policy as a matter of law as there is no "written contract" that required TrueGreen to name Chase as an additional insured. Additionally, Zurich contends that the action should be dismissed as Chase breached the notice condition of the Zurich policy by providing untimely notice of the underlying lawsuit.

On a motion for summary judgment, the movant bears the burden of presenting sufficient evidence to demonstrate the absence of any material issues of fact. *See Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986). Summary judgment should not be granted where there is any doubt as to the existence of a material issue of fact. *See Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980). Once the movant establishes a *prima facie* right to judgment as a matter of law, the burden shifts to the party opposing the motion to "produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he

rests his claim." *Id.*

In the present case, Zurich is entitled to summary judgment dismissing this action as against it as it has made a *prima facie* showing that Chase is not an additional insured under its policy as a matter of law. The party claiming insurance coverage "bears the burden of proving entitlement to coverage if not named as an insured or an additional insured on the face of the policy." *National Abatement Corp. v. National Union Fire Ins. Co. of Pittsburg, Pa.*, 33 A.D.3d 570, 570-71 (1st Dept 2006) (internal citations omitted). "[W]here a third party seeks the benefit of coverage, the terms of the contract must clearly evince such intent." *Sixty Sutton Corp. v. Illinois Union Ins. Co.*, 34 A.D.3d 386, 388 (1st Dept 2006) (internal citation omitted). Further, where an insurance policy specifically provides that there must be a written agreement between the insured and the organization seeking coverage to add that organization as an additional insured, and no such agreement exists, such organization is not entitled to coverage as an additional insured. *See AB Green Gansevorrt, LLC v. Peter Scalamandre & Sons, Inc.*, 102 A.D.3d 425, 426 (1st Dept 2013).

In the present case, Chase cannot seek coverage under the Zurich policy as it cannot meet its burden of demonstrating that it is entitled to coverage under the Zurich policy as an additional insured. The Zurich policy extends additional insured status to: "Only those where required by written contract." No such contract exists here. The only contract relied upon by Chase to assert its right as an additional insured under the Zurich policy is the master agreement. However, contrary to Chase's contention, the master agreement does not require TrueGreen to name Chase as an additional insured. Rather, the master agreement identifies the "Owner" as the party to be named as an additional insured. Owner is defined as "WaMu," not Chase.

Thus, absent a contract requiring TrueGreen to name Chase as an additional insured, the plain terms of the Zurich policy have not been met and Chase cannot seek coverage from Zurich as an additional insured.

To the extent Chase contends that the master agreement is sufficient to comply with the plain terms of the Zurich policy as once Chase purchased WaMu's assets it became the "Owner" and beneficiary to the master agreement, such contention is without merit. While Chase arguably became WaMu's successor when it purchased WaMu's assets, the master agreement did not provide that TrueGreen name WaMu's successors as an additional insured. Rather, it provided only that TrueGreen was to name WaMu, as "Owner," and its "employees, subsidiaries and affiliates (and all beneficiaries, if any)." Thus, as Chase was not WaMu, WaMu's employee, subsidiary, affiliate or beneficiary at the time the master agreement was entered into, the plain and unambiguous terms of the master agreement did not require TrueGreen to name Chase as an additional insured and it is immaterial for the purposes of this motion that Chase eventually purchased WaMu's assets.

Further, to the extent Chase contends that Zurich's motion must be denied as it failed to include a certified copy of Zurich's policy in effect for the date of the underlying accident with its motion papers, such contention is without merit. The general rule is that a court may not consider evidence presented for the first time in reply papers. *See Matter of Kennelly v. Mobius Realty Holdings LLC*, 33 A.D.3d 380, 381 (1st Dept 2006). "This rule, however, is not inflexible, and a court, in the exercise of its discretion, may consider a claim or evidence offered for the first time in reply where the offering party's adversaries responded to the newly presented claim or evidence." *Id.* at 381-382. Here, while Zurich only presented a certified copy of the

policy in reply, such is not fatal to its motion as Chase was provided the opportunity to submit a sur-reply. Thus, Chase had an opportunity to respond to the certified policy and the court may consider the policy.

Additionally, to the extent Chase contends that summary judgment should be denied pursuant to CPLR § 3212(f) because discovery remains outstanding, such argument is unavailing. It is well settled that "a claimed need for discovery, without some evidentiary basis indicating that discovery may lead to relevant evidence, is insufficient to avoid an award of summary judgment." *Hariri v. Amper*, 51 A.D.3d 146, 152 (1st Dept 2008). Here, Chase has failed to put forth any evidentiary basis indicating that discovery may lead to relevant evidence. Indeed, no further evidence could change the fact that the master agreement did not require TrueGreen to name Chase as an additional insured.

Accordingly, Zurich's motion for summary judgment dismissing this action as against it is granted. It is hereby ORDERED that this action is dismissed as against Zurich. The clerk is directed to enter judgment accordingly. This constitutes the decision and order of the court.

Dated: 10/13/15

Enter: _____
J.S.C.

CYNTHIA S. KERN
J.S.C.