SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. TANYA R. KENNEDY PART 63
Justice

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COMMERCE AND INDUSTRY INSURANCE COMPANY,

Plaintiff,

INDEX NO. 655598/2017

MOTION SEQ. NO. 001

DECISION

- v -

ONE WHITEHALL, L.P., THE TOPPS COMPANY, JRM CONSTRUCTION MANAGEMENT, LLC, TITAN CONTRACTING GROUP, INC. and GALO GUAMAN,

Defendants.

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The decision on Plaintiff's motion for an order (a) pursuant to CPLR 3212 and 3001, granting summary judgment issuing a declaration that plaintiff owes no duty to defend or indemnify defendant Titan Contracting Group. Inc. ("Titan") in connection with an underlying personal injury action pending in Supreme Court, Queens County and (b) pursuant to CPLR 3215 for entry of a default judgment against defendant Titan, is as follows:

FACTUAL AND PROCEDURAL BACKGROUND

In this action, Plaintiff seeks a declaration that it has no duty to defend or indemnify defendant Titan in connection with an underlying personal injury action (underlying action) commenced by Galo Guaman ("Guaman").

Plaintiff issued a Workers' Compensation and Employers' Liability Insurance Policy ("Commerce Policy") to Titan, effective from March 8, 2011 to March 8, 2012. The Commerce Policy provides that it will cover the insured against claims or suits brought by third parties resulting from injury to an employee of the insured, but only "where recovery is permitted by law" (*see* Ex. I, p. 3 of 7, §B[1]). The Commerce Policy further provides that it does not cover "liability assumed under a contract" (*id.* at p. 3 of 7, §C[1]).

On or about May 11, 2011, Titan's employee, Guaman, commenced the underlying action against One Whitehall, L.P. ("One Whitehall") in Supreme Court, Queens County, under Index No. 12247/2011, seeking monetary damages for injuries allegedly sustained from a construction site accident at One Whitehall Street, New York, New York on April 12, 2011.

Guaman then commenced a separate action against The Topps Company ("Topps") and JRM Construction Management, LLC (JRM) in Supreme Court, Queens County, under Index No. 23088/2012 on or about November 6, 2012. The Court (Siegal, J.S.C.) issued an order, dated September 26, 2013, consolidating both actions into a single action, under Index No. 12247/2011.

On or about May 5, 2014, Topps commenced a third-party action against Titan within the underlying action, setting forth causes of action for breach of contract, contractual indemnity, common-law indemnity, and contribution. Guaman served five verified bills of particulars in the underlying action in which he collectively alleged, among other things, that during the course of his employment with Titan, he sustained an injury to his left shoulder and arm which required arthroscopic surgery, cervical injury, lumbar spine injury requiring lumbar laminectomy and partial discectomy (*see* Ex. E).

Plaintiff agreed to contribute to the defense of the third-party action against Titan while expressly reserving its right to withdraw from the defense if there was no coverage under the Commerce Policy. On or about October 19, 2016, Titan received a letter from JRM's general liability insurance carrier, Travelers Indemnity Company ("Travelers"), indicating that Titan was legally required to name various entities, including One Whitehall, JRM and Topps as additional insureds on Titan's general liability policy (*see* Ex. G). Although Travelers's letter was not addressed to Plaintiff, Titan forwarded such letter to Plaintiff. Plaintiff then advised Titan that claims arising from contract, such as those contemplated by Travelers's letter, were excluded from coverage under the Commerce Policy (*see* Ex. H).

Plaintiff maintains that the Commerce Policy does not cover the common-law claims against Titan since Guaman did not sustain a "grave injury." As such, Plaintiff argues that it owes no duty to defend or indemnify Titan because Titan cannot, as a matter of law, be held liable for common-law indemnity or contribution in the underlying action. Plaintiff also argues that the claims against Titan for contractual indemnity and breach of contract are not covered by the Commerce Policy, which explicitly provides no coverage for any claims arising from a contract.

According to Plaintiff, Titan's liability for breach of contract and contractual indemnity, if any, would arise from Titan's contract regarding the construction project at One Whitehall Street. As such, Plaintiff moves for an order granting summary judgment issuing a declaration that it owes no duty to defend or indemnify Titan in connection with an underlying personal injury action pending in Supreme Court, Queens County.

Titan has not appeared in this action and Plaintiff also moves for an order to enter a default judgment against Titan[1].

DISCUSSION

The proponent of a summary judgment motion must make a prima facie entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Once this showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial of the action (*see Zuckerman v City of New York*, 49 NY2d 557 [1980]).

CPLR 3215(a) provides that "[w]hen a defendant has failed to appear, plead or proceed to trial of an action reached and called for trial * * * the plaintiff may seek a default judgment against him ***"

Claims for Common-Law Contribution and Indemnity

Section 11 of the Workers' Compensation Law provides that:

"[a]n employer shall not be liable for contribution or indemnity to any third person based upon liability for injuries sustained by an employee acting within the scope of his or her employment for such employer unless such third person proves through competent medical evidence that such employee has sustained a 'grave injury' which shall mean only one or more of the following: death, permanent and total loss of use or amputation of an arm, leg, hand or foot, loss of multiple fingers, loss of multiple toes, paraplegia or quadriplegia, total and permanent blindness, total and permanent deafness, loss of nose, loss of ear, permanent and severe facial disfigurement, loss of an index finger or an acquired injury to the brain caused by an external physical force resulting in permanent total disability."

[1] One Whitehall, Topps, JRM and Guaman have appeared in this action, but are nominal defendants.

The Court of Appeals acknowledged that the narrow interpretation of injuries which qualify as "grave" under Section 11 was consistent with the legislative intent to reduce the number of lawsuits against employers outside of limited, detailed circumstances (*see Rubeis v Aqua Club, Inc.*, 3 NY3d 408, 415-416 [2004]; *Castro v United Container Mach. Group, Inc.*, 96 NY2d 398, 401 [2001]). Further examining this legislative directive, the Court of Appeals held that, "[t]he grave injuries listed are deliberately both narrowly and completely described. The list is exhaustive, not illustrative; it is not intended to be extended absent further legislative action" (*Rubeis* at 415-416; *Castro* at 402 [internal citation and quotation marks omitted]).

Here, Guaman's alleged injuries to his left shoulder, cervical spine, and lumbar spine do not qualify as "grave" pursuant to Section 11 of the Workers' Compensation Law. The Commerce Policy provides that coverage only exists "where recovery is permitted by law," and absent a "grave injury," Section 11 does not permit coverage for Titan in the underlying action (*see generally, Liberty Mut. Ins. Co. v Ins. Co. of State of Pa.* 43 AD3d 666, 667-668 [1st Dept 2007]).

Claims for Breach of Contract and Contractual Indemnification

The Commerce Policy clearly excludes "liability assumed under a contract." Where, as here, a policy explicitly excludes coverage for liability assumed under a contract, such an exclusion is applicable to claims for contractual indemnity and breach of contract (*see Preserver Ins. Co. v Ryba*, 10 NY3d 635, 642 [2008]; *National Union Fire Ins. Co. of Pittsburgh, PA v 221-223 W. 82 Owners Corp.*, 120 AD3d 1140, 1141 [1st Dept 2014]). As such, Plaintiff has no obligation to defend or indemnify Titan regarding the breach of contract or contractual indemnity causes of action.

Therefore, considering the foregoing, it is

ORDERED that the branch of plaintiff's motion for summary judgment seeking a declaration that it is not obligated to provide a defense to, and provide coverage for, the defendant Titan Contracting Group, Inc. in the action of Galo Guaman v. The Topps Company, et al., Index No. 12247/2011, Supreme Court, Queens County, is granted, without opposition; and it is further

ADJUDGED and DECLARED that Plaintiff herein is not obligated to provide a defense to and provide coverage for, the defendant Titan Contracting Group, Inc. in the said action pending in Supreme Court, Queens County; and it is further

ORDERED that the branch of plaintiff's motion for entry of a default judgment against defendant Titan Contracting Group, Inc. is granted, and it is further

ORDERED that the Clerk of the Court is directed to enter judgment accordingly; and it is further

ORDERED that the balance of this action is severed and continued.

July 23, 2018
DATE

Hon. Tanya R. Kennedy
TANYA R. KENNEDY, J.S.C.
TANYA R. KENNEDY
J.S.C.

CHECK ONE:		CASE DISPOSED				NON-FINAL DISPOSITION	
	x	GRANTED		DENIED		GRANTED IN PART	x OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		DO NOT POST				FIDUCIARY APPOINTMENT	REFERENCE