Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: Honorable **RICHARD G. LATIN** IA PART 40
Justice

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CORASTER HOLDINGS COMPANY, Individually, and SENECA INSURANCE COMPANY, INC. a/s/o CORASTER HOLDINGS COMPANY,

Plaintiffs,

-against-

STATE FARM FIRE AND CASUALTY COMPANY,

Defendant.

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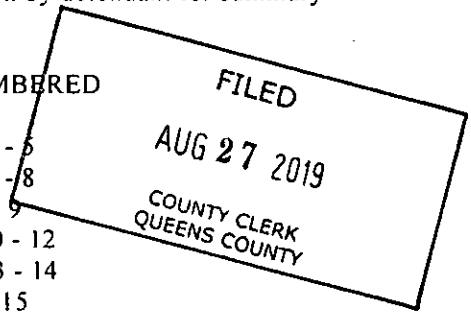
Index No.: 713852/17
Motion Date: 6/27/19
Motion Cal. No.: 10
Motion Seq. No.: 1

The following numbered papers read on this motion by plaintiffs and cross-motion by defendant for summary judgment.

PAPERS	NUMBERED
Notice of Motion-Affidavits-Exhibits	1 - 5
Notice of Cross-Motion-Affirmation in Opposition-Affidavits-Exhibits	6 - 8
Memorandum of Law in Support	9
Affirmation in Opposition-Replying-Affidavits-Exhibits	10 - 12
Replying	13 - 14
Memorandum of Law in Support	15



Upon the foregoing cited papers, it is ordered that plaintiffs' motion and defendant's cross-motion, for summary judgment, are determined as follows:

BACKGROUND FACTS:

Plaintiffs, CORASTER HOLDINGS COMPANY, Individually, and SENECA INSURANCE COMPANY, INC. a/s/o CORASTER HOLDINGS COMPANY (CORASTER), owns the premises located at 100-07 through 100-11 Astoria Boulevard, Astoria, New York. CORASTER entered into a lease (Lease) with non-party Grand Central Donuts, Inc. (DONUTS) for a certain premises located at 100-09 Astoria Boulevard, East Elmhurst, New York 11369-2039 (Premises), with the adjoining parking lot, and basement, if any. Pursuant to the Lease and its rider, dated November 30, 1998 (1998 Lease & Rider), DONUTS was required to procure general liability insurance naming CORASTER as an additional insured, and to indemnify CORASTER. Subsequently, Defendant, State Farm Fire and Casualty Company, issued DONUTS a commercial general liability insurance policy (Policy), which specifically named CORASTER as an additional insured.

On or about April 30, 2015, Nieves Rosario commenced a personal injury action, captioned *Nieves Rosario v. Corastor Holding Company Inc. and Grand Central Donuts, Inc.*, bearing Index Number 5353/2015, in the Supreme Court, Queens County

against CORASTER and DONUTS (Underlying Action). Rosario sought to recover for injuries she allegedly sustained in a trip-and-fall accident, which occurred on April 6, 2015 in the parking lot, more particularly on the blacktop next to the sidewalk, of the property adjacent to the Premises. On or about February 14, 2018, Seneca Insurance Company, Inc. (SENECA), on behalf of CORASTER, settled the Underlying Action for $123,612.89. Furthermore, SENECA paid $39,599.50 in defense of CORASTER in the Underlying Action.

CORASTER commenced the instant action seeking a declaratory judgment that Defendant is obligated, as primary insurer, to defend and indemnify CORASTER in the Underlying Action. CORASTER moves for summary judgment. Defendant cross-moves for summary judgment claiming that the additional insured provision of the Policy was not triggered, as the insured, DONUTS, had no duty to maintain the parking lot.

DISCUSSION:

The proponent of a summary judgment motion has the initial burden of establishing entitlement to judgment as a matter of law, submitting evidence in admissible form demonstrating the absence of any triable issues of fact (*see Giuffrida v. Citibank Corp.*, 100 NY2d 72 [2003]; *see also Alvarez v. Prospect Hosp.*, 68 NY2d 320 [1986]). "Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers" (*Alvarez*, 68 NY2d at 324). Only when the movant satisfies its prima facie burden will the burden shift to the opponent "to lay bare his or her proof and demonstrate the existence of triable issues of fact" (*Alvarez*, 68 NY2d at 324; *see also Zuckerman v City of New York*, 49 NY2d 557 [1980]; *Chance v. Felder*, 33 AD3d 645, 645-46 [2d Dept 2006]).

An insurer's duty to defend its insured is triggered by allegations contained in the complaint in the Underlying Action suggest a reasonable possibility of coverage (*see McCoy v. Medford Landing, L.P.*, 164 AD3d 1436, [2d Dept 2018]; *One Reason Road, LLC v. Seneca Insurance Company, Inc.*, 163 AD3d 974, 975 [2d Dept 2018]; *Stellar Mechanical Services of New York, Inc. v. Merchants Ins. of New Hampshire*, 74 AD3d 948, 952 [2d Dept 2010]). "'An additional insured is entitled to the same coverage as if it were a named insured'" (*McCoy*, 164 AD3d at 1440, quoting *Chappaqua Cent. School Dist. v. Philadelphia Indem. Ins. Co.*, 148 AD3d 980, 982 [2d Dept 2017]).

Generally, an insurer will have a duty to indemnify an insured party when the underlying occurrence or accident falls within the scope of coverage afforded by the particular insurance policy in question (*see One Reason Road, LLC*, 163 AD3d at 976).

The following facts are undisputed: (1) the 1998 Lease & Rider required DONUTS to procure general liability insurance, against claims for bodily injury arising from or out of the occupancy by or under the Lease, naming CORASTER as an additional insured, and to indemnify CORASTER; (2) the 1998 Lease & Rider provided that CORASTER was leasing to

DONUTS the Premises with the adjoining parking lot, which is the parking lot where Rosario's accident occurred; (3) Defendant issued DONUTS a commercial general liability insurance policy (Policy), which specifically named CORASTER as an additional insured; and (4) at the time of the accident, DONUTS had a commercial general liability insurance policy (Policy) in effect with Defendant.

In support of the motion, Plaintiffs submit, inter alia, the 1998 Lease & Rider, the Policy, the complaint of the Underlying Action, an affidavit of Beverley Fraser-Ford, Senior Claims Examiner of Seneca Insurance Company, and a copy of the check paid to Rosario as settlement of the Underlying Action in the amount of $123,612.89. The Policy provides, inter alia, that CORASTER is entitled to additional insured coverage only with respect to liability arising out of the ownership, maintenance or use of the part of the [P]remises leased to [DONUTS] and shown in the Schedule." The Underlying Action's complaint contains claims that allege, inter alia, that DONUTS failed to properly maintain the subject parking lot in a reasonably safe manner, and that such failure caused her to trip-and-fall, resulting in her injuries.

CORASTER correctly argues that such allegations suggested a reasonable possibility of coverage in the Underlying Action for CORASTER under DONUTS' insurance Policy (*see McCoy*, 164 AD3d at 1440; *One Reason Road, LLC*, 163 AD3d at 975-76; *Stellar Mechanical Services of New York, Inc.*, 74 AD3d at 952). Therefore, the Court finds that the allegations in the complaint of the Underlying Action triggered Defendant's duty to defend CORASTER in that action, as an additional insured (*id.*). In opposition and in support of its cross-motion, Defendant failed to raise a triable issue of fact as to whether it was obligated to defend CORASTER in the Underlying Action (*id.*).

Here, the subject Policy named CORASTER as an additional insured, "but only with respect to liability arising out of the ownership, maintenance or use of the part of the [P]remises leased to [DONUTS] and shown in the Schedule." The phrase "rising out of" only requires that there be some casual relationship between the injury and the risk for which coverage is provided (*see One Reason Road, LLC*, 163 AD3d at 977). CORASTER's submissions demonstrate, as a matter of law, that the underlying accident occurred while Rosario was using a part of the subject Premises that had been leased to DONUTS (*see One Reason Road, LLC*, 163 AD3d at 977). Since CORASTER established, as a matter of law, that the underlying accident falls within the scope of coverage afforded to it under the Policy, it is entitled to a declaration that Defendant has a duty to indemnify it in the Underlying Action (*id.*). In opposition and in support of its cross-motion, Defendant failed to raise a triable issue of fact as to whether the accident in the Underlying Action did not occur within the subject parking lot that was leased to DONUTS (*id.*).

Accordingly, Plaintiffs' motion for summary judgment declaring that Defendant is obligated to defend and indemnify Plaintiffs in the Underlying Action is granted, and Defendant's cross-motion for summary judgment is denied; and it is further

ORDERED that this matter is set down for an inquest, for an assessment of Plaintiffs' attorneys' fees and costs arising out of the Underlying Action, on **October 25, 2019, at**

10:30 A.M., in Part 40 in courtroom B-10 of the courthouse located at 25-10 Court Square in Long Island City, Queens, New York; and it is further

ORDERED that on or before September 25, 2019, a copy of this order with notice of entry shall be served on all parties to the actions and on the Clerk of the Supreme Court, Queens County; and it is further

ORDERED that upon the payment of applicable fees, if any, and service of a copy of this order with notice of entry, the Queens County Clerk is directed to enter judgment in the amount of $123,612.89 against Defendant, State Farm Fire and Casualty Company.

This constitutes the decision and order of the Court.

Dated: August 20, 2019

RICHARD G. LATIN, J.S.C.

FILED
AUG 27 2019
COUNTY CLERK
QUEENS COUNTY