J. Mullen & Sons, Inc. v Cincinnati Ins. Co.

2020 NY Slip Op 34780(U)

October 15, 2020

Supreme Court, Orange County

Docket Number: Index No. EF010096-2018

Judge: Robert A. Onofry

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SUPREME COURT-STATE OF NEW YORK
IAS PART-ORANGE COUNTY

Present: HON. ROBERT A. ONOFRY, J.S.C.

SUPREME COURT : ORANGE COUNTY
--X

J. MULLEN & SONS, INC.,
Plaintiff,

- against –

CINCINNATI INSURANCE COMPANY and RAYMOND VAZQUEZ,
Defendants.
--X

To commence the statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

Index No. EF010096-2018

DECISION, ORDER and JUDGMENT

Motion Date: September 9, 2020

The following papers numbered 1 to 12 were read and considered on (1) a motion by the Plaintiff, pursuant to CPLR §3212, for summary judgment and a declaratory judgment that the Defendant Cincinnati Insurance Company must defend and indemnify the Plaintiff in an underlying personal injury action, and reimburse it for costs and fees incurred in the action; and (2) a cross motion by the Defendant Cincinnati Insurance Company, pursuant to CPLR § 3212, to dismiss the action insofar as asserted against it.

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Upon the foregoing papers, it is hereby,

ORDERED, that the motion is granted, and the cross motion is denied.

Introduction

The Plaintiff J. Mullen & Sons, Inc. (hereinafter "J. Mullen") commenced this action, *inter alia*, to compel the Defendant Cincinnati Insurance Company, Inc. (hereinafter

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"Cincinnati") to provide a defense and indemnification in an underlying personal injury action commenced against it by the Defendant Raymond Vazquez. Cincinnati denied coverage on the ground that Vazquez was an employee (a "leased worker") for J. Mullen at the time of accident, which is a policy exclusion.

J. Mullen argues that the definition of a "leased worker" is ambiguous when contrasted with the definition of a "temporary worker," which are covered under the policy. Thus, it asserts, the disclaimer must be invalidated, and Cincinnati compelled to provide a defense and indemnification in the underlying accident.

J. Mullen moves for summary judgment.

Cincinnati cross moves to dismiss the complaint and all cross claims insofar as asserted against it.

The motion is granted and the cross motion denied.

Factual/Procedural Background

Certain basic background facts do not appear to be in dispute and may be summarized as follows.

J. Mullen is in the business of construction. At all relevant times, it was insured by Cincinnati.

On the date of the accident at issue, May 13, 2016, J. Mullen was performing construction work in Kingston, New York, pursuant to a contract with non-party Central Hudson Gas & Electric Company (hereinafter "Central Hudson").

J. Mullen had its own flaggers for projects. However, if it needed more flaggers, it would obtain them from the union or from non-party Ethan Allen, which provided temporary

workers.

At the time at issue, the Defendant Raymond Vazquez was working at the site as a flagger. Vazquez was employed by Ethan Allen. He had worked at Ethan Allen for approximately one month, and had worked on one other project for two to three days. Ethan Allen trained him as a flagger and provided him with equipment, including a helmet, radio, vest, paddle and flag. He passed a test and was issued a flagger certificate on April 13, 2016, one month before the accident. Ethan Allen would direct Vazquez to a job site with the instruction to find the foreman.

There was another Ethan Allen flagger with Vazquez for the job at issue. He worked at the site as a flagger for approximately three weeks before the accident. Vazquez was told that the project at issue was ongoing, and it was his understanding that he would be there for "several days." Vazquez was paid by Ethan Allen, and his time sheets were given to Ethan Allen.

J. Mullen did not provide Vazquez with any training. If J. Mullen was dissatisfied with his work, it would call Ethan Allen and Ethan Allen would replace him.

Vazquez was not eligible for any benefits offered to J. Mullen employees.

There was a written agreement between Ethan Allen and J. Mullen, dated August, 2012, concerning the provision of workers. The agreement provided that Ethan Allen would recruit, screen, train and interview "candidates interested in temporary employment." Further, the agreement states: "We [Ethan Allen] maintain an active workforce of temporary employees. These employees are assigned by us to support or supplement our client's workforce because of employee absences, skill shortages, seasonal workloads, special projects, temp to hire opportunities, or other client requirements."

In the underlying action, Vazquez alleges that he was seriously injured while performing his duties as a flagger when an excavator rolled backwards and crushed his foot and ankle, ultimately resulting in amputation. He seeks damages against J. Mullen and Central Hudson for negligence and Labor Law violations.

J. Mullen demanded Cincinnati provide a defense and indemnification in the underlying action.

By letter dated July 12, 2017, Cincinnati disclaimed coverage.

Cincinnati noted that the policy did not provide coverage for an "employee" of J. Mullen, which included a "leased worker," but not a "temporary worker." According to the Cincinnati policy: "'Leased worker' means a person leased to you by a labor leasing firm under an agreement between you and the labor leasing firm, to perform duties related to the conduct of your business. 'Leased worker' includes supervisors furnished to you by the labor leasing firm. 'Leased worker' does not include a 'temporary worker.'

The policy defines temporary worker as: 'Temporary worker' means a person who is furnished to you to substitute for a permanent 'employee' on leave or to meet seasonal or short-term workload conditions."

Here, Cincinnati asserted, Vazquez was a "leased worker" at the time of the accident.

Based on these definitions, Cincinnati concluded an exclusion applied and J. Mullen was not entitled to a defense or indemnification in the underlying action.

Motion and Cross Motion

J. Mullen moves for a judgment declaring that Cincinnati must defend and indemnify it in the underlying personal injury, and reimburse all costs and expenses incurred.

In support of the motion, J. Mullen submits an affirmation from counsel, Kimberly Hunt Lee.

Lee argues that there is no meaningful distinction between the two phrases "temporary worker" and "leased worker" and, therefore, the terms are ambiguous and must be construed against Cincinnati.

Moreover, she argues, Vazquez clearly falls within the definition of a temporary worker, as he was furnished to J. Mullen by Ethan Allen to meet seasonal or short-term workload conditions.

Indeed, she argues, there is a Second Department case directly on point, to wit: *Nick's Brick Oven Pizza, Inc. v. Excelsior Ins. Co.*, 61 A.D.3d 655 [2d Dept., 2009], which should be followed.

The Defendant Vazquez joins in J. Mullen's motion based upon the same arguments.

In support of the motion, Vazquez submits his own affidavit.

Vazquez asserts that, upon information and belief, he was "placed [at J. Mullen] to meet short term - and seasonal - deficiencies." He was told that he was ineligible to be hired by J. Mullen because they never hired anyone Ethan Allen supplied. His worker's compensation benefits were not paid by J. Mullen. He never received any specific instructions from J. Mullen. He met with the foreman who advised him of his work assignment. "[F]or the most part," he worked by myself, and "was assigned to take care of all pedestrian and car traffic." He had "a choice of where to work within reason."

Cincinnati cross moves to dismiss the complaint and all cross claims insofar as asserted against it.

In support of its cross motion, and in opposition to the motion, Cincinnati submits an affirmation from counsel, Christopher Lattuca.

Lattuca notes that Central Hudson had filed its own declaratory judgment action against Cincinnati, which is also assigned to this Court under Index No. EF003567-2019. Central Hudson seeks analogous relief, and has also moved for summary judgment.

Lattuca argues that Cincinnati properly disclaimed coverage in the underlying action because Vazquez was a "leased employee" within the meaning of the policy. That is, from the moment Vazquez arrived at the job site until his accident three weeks later, he was under the complete authority and control of J. Mullen.

Lattuca asserts that the agreement between J. Mullen and Ethan Allen– The Ethan Allen Personnel Group Staffing Fee Agreement– operates as a lease agreement between J. Mullen and Ethan Allen. The agreement sets forth that Ethan Allen will provide employees to J. Mullen for projects. In the "Temporary Staffing Services and Fees" section, Ethan Allen notes that it does not supervise employees sent to clients. Rather, the clients supervised the employees and it was the client's responsibility to ensure the quality of the work done by the employees. The client also assumed all liability for all acts or omissions of the temporary employees within the scope of assignment to the client.

After 500 hours of labor, the agreement allows J. Mullen to permanently hire a leased worker, upon payment of a liquidation fee.

Here, he asserts, J. Mullen did not intend to retain Vazquez for a "short" period, as the temporary worker exception requires. In fact, he contends, J. Mullen envisioned retaining Vazquez until the conclusion of the outdoor construction season—approximately six months.

Accordingly, he argues, pursuant to the clear and unambiguous terms of the policy, Vazquez was not a "temporary worker."

Lattuca asserts that the distinction between a "leased" and "temporary" worker was meant to ensure that injured workers are reimbursed for their injuries, and that there was no double recovery. Typically, he contends, labor leasing firms maintain Workers' Compensation insurance, whereas temporary staffing agencies do not. Here, he asserts, Vazquez was reimbursed by Ethan Allen's Workers' Compensation insurance carrier, which further demonstrates why he should be considered a "leased employee" pursuant to the terms of the policy.

Moreover, he asserts, even if that exclusion did not apply, Vazquez would still not be covered under the policy because he was an employee of J. Mullen who was injured at his "workplace," and the policy excludes coverage for injuries otherwise covered by Workers' Compensation exclusion, to wit: The Workers' Compensation Law states that "special employees," or those in the general employ of another, who are under the direction and control of a "special employer," are treated the same as general employees for workers' compensation purposes." Here, he argues, Vazquez was a "special employee" of J. Mullen at the time at issue.

In sum, he asserts, coverage was properly disclaimed.

In opposition to the cross motion, and in reply, J. Mullen submits an affirmation from counsel, Kimberly Hunt Lee.

Initially, Lee argues, the cross motion is untimely because, at a conference held June 8, 2020, the Court directed that all motions in the declaratory judgment action be filed by August 12, 2020, and Cincinnati's cross-motion was not filed until September 23, 2020.

In any event, she argues, Cincinnati's cross motion actually proves J. Mullen's claim and highlights the ambiguity in the policy, to wit: Cincinnati uses the same facts as J. Mullen to argue a different result. "This makes the point, the policy language is ambiguous, *i.e.* subject to two reasonable interpretations. The definitions, as they relate to each other are ambiguous. For the reasons already argued, this establishes that J. Mullen was entitled to coverage under the Cincinnati policy."

In addition, she notes, although Cincinnati argues that Vazquez was a "leased" worker, and that the "Ethan Allen Personnel Group Staffing Fee Agreement" was a lease agreement, the word lease is never mentioned in the agreement.

Indeed, she notes, the agreement was signed in 2012, has no term, and is not about a particular employee, or even a class of employees. Moreover, she asserts, there is no evidence that the agreement applied to Vazquez in 2016.

Regardless, she argues, it is irrelevant to the Court's analysis as to whether Vazquez was a temporary worker or a leased worker, as the Court must construe the agreement according to its plain language.

Finally, Lee notes, in its untimely cross-motion, Cincinnati argues for the first time that Vazquez was a "special employee" of J. Mullen under the Workers' Compensation law. However, she argues, Cincinnati is precluded from raising the same as a defense, as Cincinnati did not disclaim on that ground.

In any event, she asserts, Vazquez was not a "special employee" of J. Mullen, and did not apply for Worker's Compensation benefits from J. Mullen. Nor was he provided with such benefits by J. Mullen.

Discussion/Legal Analysis

An insurer's duty to defend is "exceedingly broad," and is more extensive than its duty to indemnify. *Stout v. 1 East 66th Street Corp.*, 90 A.D.3d 898 [2nd Dept. 2011]. An insurer's duty to defend will be triggered by allegations in the complaint suggesting a reasonable possibility of coverage irrespective of the apparent merits of the allegations. *Seaboard Sur. Co. v. Gillette Co.*, 64 N.Y.2d 304; *Hansard v. Federal Ins. Co.*, 147 A.D.3d 734 [2nd Dept. 2017]; *Stout v. 1 East 66th Street Corp.*, 90 A.D.3d 898 [2nd Dept. 2011]. The burden to establish coverage and a duty to indemnify lies with the insured. *Stout v. 1 East 66th Street Corp.*, 90 A.D.3d 898 [2nd Dept. 2011].

In determining whether the insurer has a duty to defend, it is necessary to determine what a policy covers and whether any facts or grounds alleged in the complaint are within that coverage. *Hansard v. Federal Ins. Co.*, 147 A.D.3d 734 [2nd Dept. 2017]. Courts must examine the language of the policy and construe it in a way that affords a fair meaning to all of the language employed by the parties in the contract. *Hansard v. Federal Ins. Co.*, 147 A.D.3d 734 [2nd Dept. 2017]. As with any contract, unambiguous provisions of an insurance contract must be given their plain and ordinary meaning, and the interpretation of such provisions is a question of law for the court. *Roman Catholic Diocese of Brooklyn v. National Union Fire Ins. Co. of Pittsburgh, Pa.*, 21 N.Y.3d 139 (2013); *White v. Continental Cas. Co.*, 9 N.Y.3d 264 (2007); *Hansard v. Federal Ins. Co.*, 147 A.D.3d 734 [2nd Dept. 2017]. The Court must construe the policy in a way that affords a fair meaning to all of the language employed by the parties in the contract and leaves no provision without force and effect. *Roman Catholic Diocese of Brooklyn v. National Union Fire Ins. Co. of Pittsburgh, Pa.*, 21 N.Y.3d 139 (2013); *Stout v. 1 East 66th*

Street Corp., 90 A.D.3d 898 [2nd Dept. 2011]. Where the plain language of the policy is determinative, a court cannot rewrite the agreement by disregarding that language. *ABM Mgmt. Corp. v. Harleysville Worcester Ins. Co.*, 112 A.D.3d 763 [2nd Dept. 2013]; *Stout v. 1 East 66th Street Corp.*, 90 A.D.3d 898 [2nd Dept. 2011].

In construing policy provisions defining the scope of coverage, the courts first look to the language of the policy itself, reading it in light of common speech and the reasonable expectations of a business person, and in a manner that leaves no provision without force and effect. *ABM Mgmt. Corp. v. Harleysville Worcester Ins. Co.*, 112 A.D.3d 763 [2nd Dept. 2013]. Unambiguous provisions of an insurance contract must be given their plain and ordinary meaning. *ABM Mgmt. Corp. v. Harleysville Worcester Ins. Co.*, 112 A.D.3d 763 [2nd Dept. 2013]. The issue of whether policy language is ambiguous and the interpretation of ambiguous provisions are questions of law for the court. *Hansard v. Federal Ins. Co.*, 147 A.D.3d 734 [2nd Dept. 2017]; *ABM Mgmt. Corp. v. Harleysville Worcester Ins. Co.*, 112 A.D.3d 763 [2nd Dept. 2013]. The test to determine whether an insurance contract is ambiguous is whether the language in the insurance contract is susceptible of two reasonable interpretations in light of the reasonable expectations of the average insured upon reading the policy. *Hansard v. Federal Ins. Co.*, 147 A.D.3d 734 [2nd Dept. 2017]; *NIACC, LLC v. Greenwich Ins. Co.*, 51 A.D.3d 883 [2nd Dept. 2008]. A contract is unambiguous if the language it uses has a definite and precise meaning, unattended by danger of misconception in the purport of the agreement itself, and concerning which there is no reasonable basis for a difference of opinion. *White v. Continental Cas. Co.*, 9 N.Y.3d 264 (2007); *Hansard v. Federal Ins. Co.*, 147 A.D.3d 734 [2nd Dept. 2017]. Thus, the mere assertion by one party that contract language means something to him or her, where it is

otherwise clear, unequivocal and understandable when read in connection with the whole contract, is not in and of itself enough to raise a triable issue of fact. *ABM Mgmt. Corp. v. Harleysville Worcester Ins. Co.*, 112 A.D.3d 763 [2nd Dept. 2013].

As a general matter, when the provisions of the policy are ambiguous, the ambiguity must be construed in favor of the insured and against the insurer, especially when the ambiguity is found in an exclusionary clause. *Hansard v. Federal Ins. Co.*, 147 A.D.3d 734 [2nd Dept. 2017]. Indeed, whenever an insurer wishes to exclude certain coverage from its policy obligations, it must do so in clear and unmistakable language. *Hansard v. Federal Ins. Co.*, 147 A.D.3d 734 [2nd Dept. 2017]. Exclusions or exceptions are not to be extended by interpretation or implication, but are to be accorded a strict and narrow construction. *Hansard v. Federal Ins. Co.*, 147 A.D.3d 734 [2nd Dept. 2017]. The courts, however, are not free to disregard the plain meaning of the policy language to find an ambiguity where none exists. *Hansard v. Federal Ins. Co.*, 147 A.D.3d 734 [2nd Dept. 2017]. Moreover, an ambiguity does not arise from an undefined term in a policy merely because the parties dispute the meaning of that term. *Hansard v. Federal Ins. Co.*, 147 A.D.3d 734 [2nd Dept. 2017]. The courts may not make or vary the contract of insurance to accomplish its notions of abstract justice or moral obligation, given that equitable considerations will not allow an extension of the coverage beyond its fair intent and meaning in order to do raw equity and to obviate objections which might have been foreseen and guarded against. *Breed v. Insurance Co. of North America*, 46 N.Y.2d 351 (1978).

Before the rules governing the construction of ambiguous contracts are triggered, the court must first find that ambiguities, or an ambiguity, exist in the policy. *Breed v. Insurance Co. of North America*, 46 N.Y.2d 351 (1978).

When the insurer relies on an exclusion clause to deny coverage, the burden rests upon the insurer to demonstrate that the allegations of the complaint can be interpreted only to exclude coverage. *Shoreham-Wading River Cent. School Dist. v. Maryland Cas. Co.*, 95 A.D.3d 987 [2nd Dept. 2012]. The insurer bears the heavy burden of demonstrating that the allegations of the complaint cast the pleadings wholly within that exclusion, that the exclusion is subject to no other reasonable interpretation, and that there is no possible factual or legal basis upon which the insurer may eventually be held obligated to indemnify the insured under any policy provision. *Shoreham-Wading River Cent. School Dist. v. Maryland Cas. Co.*, 95 A.D.3d 987 [2nd Dept. 2012]; *Antoine v. City of New York*, 56 A.D.3d 583 [2nd Dept. 2008]. For the insurer to prevail, it must demonstrate not only that its interpretation is reasonable but that it is the only fair interpretation. *City of New York v. Evanston Ins. Co.*, 39 A.D.3d 15 [2nd Dept. 2007].

Exclusions from coverage must be strictly construed and read narrowly. *Shoreham-Wading River Cent. School Dist. v. Maryland Cas. Co.*, 95 A.D.3d 987 [2nd Dept. 2012].

There is no definite time limit within which an insurer must disclaim coverage for its disclaimer to be deemed timely. *Insurance Law § 3420; First Fin. Ins. Co. v. Jetco Contr. Corp.*, 1 N.Y.3d 64; *Stout v. 1 East 66th Street Corp.*, 90 A.D.3d 898 [2nd Dept. 2011]. The Insurance Law provides only that an insurer must give notice of disclaimer "as soon as is reasonably possible." *Insurance Law § 3420[d][2]; Stout v. 1 East 66th Street Corp.*, 90 A.D.3d 898 [2nd Dept. 2011]. An insurer's delay is measured from the point at which it has sufficient knowledge of facts entitling it to disclaim, or knows that it will disclaim coverage. It is the insurer's burden to demonstrate a reasonable excuse for its delay in disclaiming coverage and an insufficient

explanation will render a delay unreasonable as a matter of law, even when the insured failed in the first instance to give timely notice of a claim. *Stout v. 1 East 66th Street Corp.*, 90 A.D.3d 898 [2nd Dept. 2011].

An insurer's explanation will be insufficient as a matter of law where the basis for denying coverage was or should have been readily apparent before the onset of the delay. *Stout v. 1 East 66th Street Corp.*, 90 A.D.3d 898 [2nd Dept. 2011]. Similarly, even where the basis is not apparent, an explanation will be inadequate as a matter of law unless the delay is excused by the insurer's showing that its delay was reasonably related to its completion of a thorough and diligent investigation into issues affecting its decision whether to disclaim coverage. *Stout v. 1 East 66th Street Corp.*, 90 A.D.3d 898 [2nd Dept. 2011].

Failure to raise a ground for disclaimer "as soon as is reasonably possible" precludes an insurer from later asserting it as a defense. *Roman Catholic Diocese of Brooklyn v. National Union Fire Ins. Co. of Pittsburgh, Pa.*, 21 N.Y.3d 139 (2013). A narrow exception to the timeliness requirement of section 3420(d) is that a notice of disclaimer is not required in the event there is no insurance at all and, therefore, no obligation to disclaim or deny. *Roman Catholic Diocese of Brooklyn v. National Union Fire Ins. Co. of Pittsburgh, Pa.*, 21 N.Y.3d 139 (2013). The notice requirement only applies to situations in which a policy of insurance that would otherwise cover the particular accident is claimed not to cover it because of an exclusion in the policy. *Roman Catholic Diocese of Brooklyn v. National Union Fire Ins. Co. of Pittsburgh, Pa.*, 21 N.Y.3d 139 (2013).

Here, the Court notes, as a threshold issue, there is no allegation that Cincinnati's disclaimer was not timely as it concerns the status of Vazquez as a "leased worker."

However, on the merits, the Court finds that Cincinnati did not meet its heavy burden of demonstrating that the allegations of the underlying action fall wholly within the policy exclusion for "leased workers," that the exclusion is subject to no other reasonable interpretation, and that there is no possible factual or legal basis upon which the insurer may eventually be held obligated to indemnify J. Mullen under any policy provision.[1]

The Cincinnati policy covers a "temporary worker" but not a "leased worker."

The Court finds that the first aspect of the definition of a "temporary worker" to be clear and unambiguous, *i.e.*, a person who is furnished to the company as a substitute for a permanent employee who is on leave.

However, this is not alleged here.

By contrast, the Court concludes, and so finds, that there is a substantial, and inescapable, overlap between the second aspect of the definition of a "temporary worker" (*i.e.*, a person hired to meet seasonal or short-term workload conditions) and the definition of a "leased worker" (*i.e.*, "a person leased to you by a labor leasing firm under an agreement between you and the labor leasing firm"); one addresses the nature of the employee's longevity with the insured, and other the procedural mechanism for bringing the temporary worker on to the job site. Clearly, as is demonstrated by the current factual record, a person can be both a temporary worker and a leased worker. Indeed, this would appear to be necessarily the case, in general, whenever a temporary worker is obtained through an employment agency.

However, the plain language of the Cincinnati policy does not provide any reasonable and

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[1] Contrary to the contention of J. Mullen, this issue was not raised and decided in *Nick's Brick Oven Pizza, Inc. v. Excelsior Ins. Co.*, 61 A.D.3d 655 [2d Dept., 2009].

rational basis for the distinction nor a clearly articulated distinction, with any demonstrable clarity, upon which an insured might determine whether a temporary employee was a "temporary worker," who would be covered under the policy, or a "leased worker," who would not, where, as here, a person is hired to meet seasonal or short-term workload conditions under an agreement with a labor leasing firm.

Thus, it cannot be properly said that the challenged language is not susceptible of two reasonable interpretations in light of the reasonable expectations of the average insured upon reading the policy. Rather, the language used does not have a definite and precise meaning, unattended by the danger of misconception in the purport of the agreement itself, and concerning which there is no reasonable basis for a difference of opinion. Moreover, that lack of definiteness and precision is further compounded by the commercial context in which the Plaintiff does its business, i.e. the necessity for securing short term and temporary help.

In sum, the Cincinnati policy failed to exclude coverage for J. Mullen based on the status of Vazquez as a "leased worker" in clear and unmistakable language. Thus, the Court concludes, and so finds, that the disclaimer on that ground is invalid and must be set aside.

On this motion practice, Cincinnati also argues that coverage was properly disclaimed because Vazquez was a "special employee" of J. Mullen within the meaning of the Workers' Compensation law.

However, the Court notes, in its disclaimer letter, Cincinnati does not address the issue of whether Vazquez was a "special employee" of J. Mullen, or disclaim coverage on that ground. Indeed, the phrase "special employee" is not even mentioned.

Rather, the only reference in the disclaimer letter to the Workers' Compensation Law is a

policy exclusion for: "Any obligation of the insured under a workers' compensation, disability benefits or unemployment compensation law or any similar law."

Here, however, Vazquez is not seeking Workers' Compensation benefits from J. Mullen in the underlying action. Indeed, there is no evidence that Vazquez is seeking such benefits from J. Mullen in any other forum. Rather, from the record presented, it appears that Vazquez received such benefits from Ethan Allen.

In sum, Cincinnati is precluded from disclaiming coverage based on the status of Vazquez as a "special employee" of J. Mullen.

Concerning Cincinnati's cross motion, the Court notes that the timeliness of the cross motion is academic because the relief sought by Cincinnati– dismissal of the complaint insofar as asserted against it– must necessarily be decided in deciding J. Mullen's motion. Thus, the cross motion is not denied as untimely. However, for the reasons stated *supra*, the cross motion is denied on the merits.

Finally, the Court notes, although Vazquez is named as a Defendant herein, J. Mullen does not seek any relief as against him. Thus, the grant of relief herein concludes this action.

Accordingly, and for the reasons cited herein, it is hereby,

ORDERED, ADJUDGED and DECREED, that Plaintiff's motion is granted, and the cross motion is denied; and it is further,

ORDERED, ADJUDGED and DECREED, that the Defendant Cincinnati Insurance Company is obligated to defend the Plaintiff in an underlying personal injury action entitled *Vazquez v J. Mullen & Sons, Inc.*, pending in Orange County, Supreme Court, under Index No. EF004431-2017, and to reimburse J. Mullen & Sons, Inc. for any reasonable costs and fees, etc.

already incurred in the action.

The foregoing constitutes the decision and order of the court.

Dated: October 15, 2020
Goshen, New York

ENTER

HON. ROBERT A. ONOFRY, J.S.C.

VIA NYSCEF

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