SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. LOUIS L. NOCK** **PART** **IAS MOTION 38EFM**

Justice

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INDEX NO. 159600/2017

AVR-POWELL C DEVELOPMENT CORP. and POWELL COVE ASSOCIATES LLC,

Plaintiffs,

MOTION DATE 03/15/2019, 05/05/2020, 09/24/2020

MOTION SEQ. NO. 001 003 005

- v -

AMERICAN STATES INSURANCE COMPANY,

Defendant.

DECISION + ORDER ON MOTION

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AMERICAN STATES INSURANCE COMPANY,

Third-Party Plaintiff,

Third-Party
Index No. 595980/2018

- v -

FARM FAMILY CASUALTY INSURANCE COMPANY,

Third-Party Defendant.

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LOUIS L. NOCK, J.

The following e-filed documents, listed by NYSCEF document number (Motion 001) 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 55, 56, 57, 58, 59, 73, and 150

were read on this motion for DISCOVERY & CROSS-MOTION f/S/J.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 100, and 101

were read on this motion to AMEND CAPTION/PLEADINGS.

The following e-filed documents, listed by NYSCEF document number (Motion 005) 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 151, 152, 153, 154, 155, 156, 157, and 158

were read on this motion for SUMMARY JUDGMENT & CROSS-MOTION f/S/J.

Upon the foregoing documents, and after argument, it is ordered that the above motions are consolidated for disposition as follows.

Motion Sequence No. 005:

Defendant/third-party plaintiff AMERICAN STATES INSURANCE COMPANY ("American States") moves (motion seq. no. 005) for an Order, pursuant to CPLR 3212, granting partial summary judgment against third-party defendant FARM FAMILY CASUALTY INSURANCE COMPANY ("Farm Family") and determining and declaring that Farm Family owes plaintiffs AVR-POWELL C DEVELOPMENT CORP. ("AVR") and POWELL COVE ASSOCIATES LLC ("Powell Cove") a primary duty to defend for the claims alleged in the action entitled *Vincent Zukowski, Sr. and Patricia Zukowski v. Powell Cove Estates Home Owners Association, Inc., Kaled Management Corp., AVR-Powell C. Development, Corp. and Powell Cove Associates, LLC,* Index No. 700468/2012, pending in the Supreme Court of the State of New York, Queens County (the "Underlying Action"). Farm Family issued a Business Liability policy to A-One Landscaping Management, Inc. ("A-One Landscaping"). This liability policy contains an endorsement that specifically names AVR and Powell Cove as additional insureds for claims of "liability arising out of '[A-One Landscaping's] work [.]'" A-One Landscaping is a third-party defendant in the Underlying Action, and has moved for summary judgment in the Underlying Action, which motion was denied.

In response to said motion, Farm Family cross-moves for summary judgment dismissing the third-party complaint.[1]

[1] In motion sequence no. 001, American States moves to compel certain discovery from AVR and Powell Cove. In response, AVR and Powell Cove cross-move against American States for a judgment in the amount of the defense costs they incurred in the Underlying Action. In motion sequence no. 003, American States moves for leave to file an amended answer which would add an eighteenth affirmative defense asserting that coverage under its policy is precluded commensurate with a "Multi-Unit and Tract Housing" policy exclusion.

BACKGROUND

The Underlying Action

On or around March 20, 2012, Vincent Zukowski, Sr. ("Zukowski") and his wife commenced the Underlying Action by filing a Summons and Verified Complaint against AVR, Powell Cove, Powell Cove Estates Homeowners Association, Inc., and Kaled Management Corp. (See Affirmation of Erica R. Sanders, sworn to on August 31, 2020 [the "Sanders Aff."] Exh. "6".) In his Verified Complaint, Zukowski seeks damages for bodily injuries he allegedly sustained on March 1, 2010 while purportedly employed by Jaman Development, LLC ("Jaman") (the "Accident"). (*See* Sanders Aff. Exh. "6" ¶18.) In the Verified Complaint, Zukowski alleges that the Accident occurred at 123-10 Lax Avenue, College Point, in Queens New York (the "Project Site"). (*See* Sanders Aff. Exh. "6" ¶11.) In the Verified Complaint, Zukowski alleges that AVR and Powell Cove, along with the other defendants, are liable for negligence in their "ownership, operation, direction, supervision, possession, control, construction, rehabilitation and/or alteration" of the Project Site. (*See* Sanders Aff. Exh. "6" ¶18.) On or around April 25, 2012, AVR and Powell Cove commenced a third-party action against Jaman and A-One Landscaping (the "Third-Party Complaint"). (*See* Sanders Aff. Exh. "7".) In the Third-Party Complaint, AVR and Powell Cove allege that Jaman and A-One Landscaping contracted with AVR to perform work at the Project Site. (*See* Sanders Aff. Exh. "7" ¶¶14 & 25.) In the Third-Party Complaint AVR and Powell Cove allege that any injuries sustained by Zukowski were caused by the "carelessness, recklessness, negligence, culpability and/or acts or omissions" of Jaman and A-One Landscaping. (*See* Sanders Aff. Exh. "7" ¶¶15 & 26.) AVR and Powell Cove therefore seek to hold both Jaman and A-One Landscaping liable for the claims made by Zukowski in his Verified Complaint.

On July 6, 2017, A-One Landscaping moved for summary judgment, seeking to dismiss all claims pending against it in the Underlying Action. (*See* Sanders Aff. Exh. "10".) By an Order dated April 6, 2018 and entered on April 18, 2020 the Court in the Underlying Action denied A-One Landscaping's motion in its entirety. (*See* Sanders Aff. Exh. "11" p. 7.) That Order was modified by the Appellate Division, Second Department (NYSCEF Doc. No. 191 in *Zukowski v Powell Cove Estates Home Owners Assn, Inc.*, index No. 700468/2012 [Sup Ct Queens County]), to the extent of *granting* A-One's motion for summary judgment as to contractual indemnification (and as to its procurement of insurance) but allowing said Order to remain intact as to the claim for common law indemnification. As to that claim, the Appellate Division concluded that "A-One was not entitled to dismissal of the cause of action for common-law indemnification, as it may yet be found at trial that A-One, and not the defendants, was at fault" (*id.*, at 5).

The A-One Landscaping Agreement

On or about July 17, 2008, A-One Landscaping (as "Vendor") and AVR (as "Builder") entered into a Vendor Agreement (the "A-One Landscaping Agreement") for the performance of landscaping work at the Project Site. (*See* Sanders Aff. Exh. "12".) Regarding insurance, the A-One Landscaping Agreement provides, in relevant part, the following provision:

> 17. INSURANCE. Before Vendor begins any Work, Vendor shall maintain at its expense, and provide Builder with, certificates indicating coverage of insurance as outlined in attached Exhibit C which is made a part of this contract.

Exhibit "C" of the A-One Landscaping Agreement, entitled "Vendor Insurance Agreement," provides, in relevant part, as follows:

> Vendor shall, at its own cost and expense, but for the mutual benefit of Vendor and property owner, keep in full force and effect from and after the work commencement date, a policy of general liability and worker's compensation insurance with respect to the premises where the work is to be performed.

***

All policies (except Workers Compensation) shall be endorsed to name the Builder and Owner as Additional Insureds[.]

Coverages	Minimum Limits
1. Workman's Compensation	Statutory and Employers liability
2. General Liability (per project)	Bodily Injury/Property Damage Combined Single $1,000,000-Each Occurrence (per project) $2,000,000-Gen. Agg. (per project)
a. Premises/Operations	
b. Independent Contractors & Subcontractors	
c. Products & Complete Operations	
d. Broad form Property Damage	
e. Additional Insureds Endorsement as required above	

The Farm Family Policy

Farm Family issued a Business Liability policy, No. 3141X0060, with a policy period from February 19, 2010 to February 19, 2011, to A-One Landscaping as the Named Insured (the "Farm Family Policy"). (*See* Sanders Aff. Exh. "13".) The Farm Family Policy is subject to an Each Occurrence Limit of $1 million and an Aggregate Limit of $2 million. The Farm Family Policy contains an insuring agreement that provides, in relevant part, as follows:

> COVERAGES
> 1. Business Liability. We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "advertising injury" to which this insurance applies. No other obligation or liability to pay sums or perform acts or services is covered unless explicitly provided for under COVERAGE EXTENSION – SUPPLEMENTARY PAYMENTS.
>
> a. This insurance applies only:
> (1) To "bodily injury" or "property damage";
> (a) That occurs during the policy period; and
> (b) That is caused by an "occurrence". The "occurrence" must take place in the "coverage territory."

(*See* Sanders Aff. Exh. "13" at FF00172.)

The Farm Family Policy also specifically designates AVR and Powell Cove as additional insureds. The endorsement entitled "ADDITIONAL INSURED, OWNERS, LESSORS OR CONTRACTORS" provides, in relevant part, as follows:

> BUSINESS LIABILITY COVERAGE FORM SCHEDULE
> Name of Person or Organization: ALLAN V ROSE/AVR POWELL C DEV CO/POWELL COVE ASSOC
>
> ***
>
> WHO IS AN INSURED (Who Is An Insured For General Liability And Medical Expense Coverage) is amended to include as an insured the person or organization named above but only with respect to liability arising out of "your work" for that insured by or for you.

(*See* Sanders Aff. Exh. "13" at FF00204.)

DISCUSSION

The Duty to Defend

An insurer's "duty to defend is triggered by the allegations contained in the underlying complaint." (*BP Air Conditioning Corp. v OneBeacon Ins. Grp.*, 8 NY3d 708, 714, 840 [2007]). An insurer's duty to defend is "exceedingly broad." (*Continental Cas. Co. v Rapid-American Corp.*, 80 NY2d 640, 648 [1993]; *see also GMM Realty, LLC v St. Paul Fire & Marine Ins. Co.*, 129 AD3d 909, 909 [2d Dept 2015] [allegations must be "construed liberally" and an insurer will owe a duty of a defense if the allegations "suggest a reasonable possibility of coverage"]). "If the allegations of the complaint are even potentially within the language of the insurance policy, there is a duty to defend." *Frank v Continental Cas. Co.*, 123 AD3d 878, 880 [2d Dept 2014]). An insurer owes a duty to defend as long as "the pleadings allege a covered occurrence, even though facts outside the four corners of those pleadings indicate that the claim may be meritless or not covered." (*Fitzpatrick v American Honda Motor Co., Inc.*, 78 NY2d 61, 66 [1991]). While an insurer cannot rely on extrinsic facts outside the four corners of a complaint to deny

coverage, such extrinsic evidence can be used to bring a claim within the policy's indemnity coverage. (*See id.* ["where the insurer is attempting to shield itself from the responsibility to defend . . . wooden application of the 'four corners of the complaint' rule would render the duty to defend narrower than the duty to indemnify – clearly an unacceptable result. For that reason, courts and commentators have indicated that the insurer must provide a defense if it has knowledge of facts which potentially bring the claim within the policy's indemnity coverage"].)

Here, the language in the Farm Family Policy states that AVR and Powell Cove are covered for any claim "arising out of" A-One Landscaping's work. With such language, the duty to defend is triggered wherever the underlying claim is "incident to" or "having connection with" the works or acts of a putative additional insured. (*Regal Constr. Corp. v National Union Fire Ins. Co.*, 15 NY3d 34, 38 [2010].) The allegations in a third-party complaint may also trigger the duty to defend, even where an insured is not named as a direct defendant. In *All State Interior Demolition Inc. v Scottsdale Ins. Co.* (168 AD3d 612, 613 [1st Dept 2019), the underlying action arose out of injuries alleged by a construction worker employed by United Interior Renovations, LLC ("United"). The construction manager for the project hired All State Interior Demolition Inc. ("All State") to perform construction work at the project who then entered into a subcontract with United. The subcontract required United to name All State as an additional insured on its insurance policy. After the alleged injury occurred, the United employee sued the project's owner and All State. All State then impleaded United as a third-party defendant, claiming that United was culpable for the alleged injuries. All State also filed a declaratory judgment action against United's insurer, Scottsdale Insurance Company ("Scottsdale"), seeking coverage for the underlying action as an additional insured. In holding

that United's inclusion in the underlying action as a third-party defendant was enough to trigger Scottsdale's duty to defend, the Appellate Division, First Department, reasoned as follows:

> Moreover, the third-party complaint brought in the underlying action by plaintiffs herein against United, incorporates the underlying complaint by reference, alleges that United was negligent, and seeks indemnification from United, and is therefore sufficient to trigger Scottsdale's obligation to defend All State.
>
> ***
>
> Even if there were issues of fact whether the underlying plaintiff was working for United, as Scottsdale contends, Scottsdale would have a duty to defend All State in the underlying action, because it failed to establish that there is no possibility that it will be obligated to do so.

(*Id.* at 613 [citations omitted]; *see also City of N.Y., v Evanston Ins. Co.*, 39 AD3d 153, 158 [2d Dept 2007] ["Here, the third-party complaint plainly alleges that Scala's negligence caused or contributed to Lamb's accident. Thus, there is at least a reasonable possibility that Scala, in the underlying action, will be found wholly or partially at fault in the happening of the accident, and that the City will be found to bear no responsibility for it, triggering Evanston's obligation to indemnify the City under the policy."]).

Farm Family Owes AVR and Powell Cove a Duty to Defend

American States has submitted evidence establishing that Farm Family owes AVR and Powell Cove a duty to defend the Underlying Action. This evidence includes the A-One Landscaping Agreement, the Summons and Verified Complaint in the Underlying Action, the Third-Party Complaint in the Underlying Action, and the Farm Family Policy. This evidence demonstrates that AVR and Powell Cove are additional insureds under the Farm Family Policy, and that the allegations in the Underlying Action fall within the scope of the risks undertaken by Farm Family. The Underlying Action alleges claims within the Farm Family Policy's insuring agreement. The insuring agreement covers claims for "bodily injury" that are caused by an

"occurrence" within the "coverage territory." (*See* Sanders Aff. Exh. "13" at FF00172.) The Farm Family Policy defines "coverage territory" as the United States and an "occurrence" as an accident. (See Sanders Aff. Exh. "13" at FF00180 & 182.) Here, in the Underlying Action, Zukowski alleges that his injuries arose when he slipped and fell on ice and snow at the Project Site in Queens, New York, due to improper ice and snow removal. (*See* Sanders Aff. Exh. "8".) These allegations of an accident bring the claims in the Underlying Action squarely within the insuring agreement.

Pursuant to the ADDITIONAL INSURED, OWNERS, LESSORS OR CONTRACTORS endorsement, AVR and Powell Cove are specifically named as additional insureds for claims "arising out of '[A-One Landscaping's] work [.]'" (*See* Sanders Aff. Exh. "13" at FF00204.) The Third-Party Complaint in the Underlying Action plainly alleges that the claims arise out of A-One Landscaping's work. Thus, there is a possibility that A-One Landscaping, in the Underlying Action, will be found wholly or partially at fault in the occurrence of the Accident, triggering Farm Family's duty to defend AVR and Powell Cove under its policy. The Appellate Division decision referenced hereinabove, finding that A-One may yet be found at trial to be liable, as opposed to AVR and Powell Cove (*see* NYSCEF Doc. No. 191 in the Underlying Action, index No. 700468/2012 [Sup Ct Queens County], at 5) cannot be ignored as an indication that A-One Landscaping might very well bear liability in that action.

The above-cited cases (*All State Interior Demolition Inc., supra; City of N.Y., supra)* indicate that an insurer (such as Farm Family) can bear a duty to defend a named insured (such as A-One Landscaping) even though that named insured is not a direct defendant in an action. In said above-cited cases, the named insured was impleaded by the putative additional insured. The allegations of the third-party complaints were held sufficient to give rise to a duty to defend. The

reasonable possibility of A-One Landscaping's liability for Zukowski's injuries is evidenced by the fact that the Court in the Underlying Action denied A-One Landscaping's motion for summary judgment seeking to dismiss the claims against it (*See* Sanders Aff. Exh. "11" at 7), and the Appellate Division, Second Department, affirmed that denial, at least with regard to the claim against it for common law indemnification (*see* NYSCEF Doc. No. 191, index No. 700468/2012, at 4-5).[2] That procedural posture in the Underlying Action demonstrates that a triable issue of fact exists concerning A-One Landscaping's liability. Such a possibility gives rise to Farm Family's duty to defend A-One Landscaping in the Underlying Action. (*See, e.g.*, *Fitzpatrick, supra,* 78 NY2d at 66.)

In opposition to American States' motion for summary judgment, Farm Family argues that American States lacks standing to maintain the third-party against Farm Family because it is not a party to the Farm Family Policy; nor is it identified in that policy as a third-party beneficiary thereof. However, an insurer (such as American States) who is called upon to defend or indemnify insureds (such as AVR and Powell Cove) has a right of co-insurance contribution against another insurer (such as Farm Family) who may also owe a duty to defend or indemnify the same insureds (such as AVR and Powell Cove). (*See U.S. Fire Ins. Co. v American Home Assur. Co.,* 19 AD3d 191, 192 [1st Dept 2005] ["Plaintiff was not in privity with defendant and its insured in the insurance policy, so plaintiff's proper remedy is to seek declaratory judgment for contribution"]; *Continental Cas. Co. v Employers Ins. Co.*, 85 AD3d 403 [1st Dept 2011]; *National Union Fire Ins. Co. v Hartford Ins. Co.*, 248 AD2d 78 [1st Dept 1998], *affd* 93 NY2d

[2] In opposition to A-One Landscaping's motion for summary judgment in the Underlying Action, AVR and Powell Cove submitted the deposition of Phillip Damico, president of A-One Landscaping. Mr. Damico, at his deposition, confirmed that A-One Landscaping performed snow and ice removal at the Project Site. (See Sanders Aff. Exh. "9" at 13-16.) Mr. Damico also testified that A-One Landscaping performed such services on February 26, 2010, mere days before the alleged March 1, 2010, Accident. (See Sanders Aff. Exh. "9" at 38).

983 [1999].) "An insurer has a right to seek contribution from an obligated coinsurer." (*Tops Markets, Inc. v. Maryland Cas.*, 267 AD2d 999, 1000 [4th Dept 1999].)

The cases cited by Farm Family to support its position that American States cannot bring the instant third-party action because it is not a subrogee of AVR or Powell Cove (*see* Farm Family Mem. [NYSCEF Doc. No. 148] at 9-10) are inapposite. American States is neither a representative or a successor in interest of AVR or Powell Cove. It does not bring its third-party action on AVR or Powell Cove's behalf, or as their subrogee. American States brings its third-party action based upon its own direct rights against Farm Family based upon its direct right of co-insurance contribution, as noted above. The cases cited by Farm Family to support its position that American States cannot bring this third-party action due to its lack of contractual privity (*see id.* at 7-9) are also inapposite. All of those cases cited by Farm Family involve breach of contract for alleged failures to perform work or provide promised services, brought by non-signatories to the contracts. None of those cases involves the issue of insurance coverage. None of those cases addresses an insurer's right to assert a claim for co-insurance contribution against another insurer who owes coverage to the same insured. Significantly, Farm Family does not dispute that it owes AVR and Powell Cove a duty to defend; nor does it dispute that said duty is primary to any such duty on American States' part. There is, thus, no reason not to conclude that American States has properly asserted a cause of action for co-insurance contribution against Farm Family.

In further opposition to American States' motion for summary judgment, Farm Family argues that the third-party action constitutes an improper attempt to assert a direct action against an insurer. American States' third-party cause of action for co-insurance contribution against Farm Family does not constitute an improper attempt to pursue a direct action. As described by

the Court of Appeals in *Lang v Hanover Ins. Co.* (3 NY3d 350 [2004]), a direct action is one in which "a stranger to the policy – an injured party who has sued a tortfeasor" attempts to bring an action "against a tortfeasor's insurance company." (*Id.* at 352.) American States is not an injured party seeking to hold Farm Family liable for its insured's torts. Rather, it is a putative co-insurer seeking a declaratory judgment regarding Farm Family's coverage obligations for the same asserted insureds – AVR and Powell Cove. The rights American States seeks to enforce are not rights against a tortfeasor; rather, they are direct rights for insurance coverage against Farm Family regardless of the liability of any alleged tortfeasor. Farm Family's argument flies in the face of established case law recognizing claims for co-insurance contribution. (*See, e.g., U.S. Fire Ins. Co., supra*, 19 AD3d at 192.)

Farm Family's argument that the third-party action is somehow barred by the general six-year statute of limitations found in CPLR 213 is without merit.[3] However, "[a] cause of action based on an insurer's alleged breach of a contractual duty to defend accrues only when the underlying litigation brought against the insured has been finally terminated and the insurer can no longer defend the insured even if it chooses to do so." (*Ghaly v. First American Title Ins. Co.*, 228 AD2d 551, 552 [2d Dept 1996].) The Underlying Action is ongoing and AVR and Powell Cove are still defendants in the Underlying Action. Thus, contrary to Farm Family's position, the statute of limitations for American States to bring the instant third-party action against Farm Family has not begun to run.

Farm Family further argues that the instant third-party action is premature absent any actual payment by American States on behalf of AVR or Powell Cove. Although American States has disclaimed coverage to AVR and Powell Cove and has not paid any monies for their

[3] Farm Family argues that the third-party action, commenced December 5, 2018, is more than six years after any alleged breach by Farm Family to defend AVR or Powell Cove (*see* NYSCEF Doc. No. 148 at 13).

defense in the Underlying Action, American States may pursue its contingent claim for co-insurance contribution against Farm Family pursuant to CPLR 1007, which provides in relevant part as follows:

> After the service of his answer, a defendant may proceed against a person not a party who is or may be liable to that defendant for all or part of the plaintiff's claim against that defendant . . . .

This statute allows a defendant (such as American States in the within case-in-chief) to assert contingent claims against a third-party defendant (such as Farm Family in the within third-party action). (*See Krause v. American Guarantee & Liability Ins. Co.*, 22 NY2d 147 [1968].) Thus, a defendant insurer who has denied coverage (such as American States in the within case-in-chief) has the right to implead and bring a third-party action against another insurer (such as Farm Family in the within third-party action) who may also owe coverage. (*See American Bridge Co. v Acceptance Ins. Co.*, 293 AD2d 634 [2d Dept 2002].) In *Krause, supra*, the plaintiffs brought claims against their insurer for coverage under a broker's bond. "The insurers have not made any payments and, moreover, contest their liability under their respective bonds." (22 NY2d at 151.) The insurers impleaded American Express Company ("Amexco"), alleging that it caused the loss. "The third-party complaints demand judgment over against Amexco if the plaintiffs recover against the defendant insurance companies." (*Id.*) Amexco moved to dismiss the third-party complaint alleging that it failed to state a cause of action and that the insurer lacked the capacity to sue. In rejecting this argument, the Court of Appeals held as follows:

> The language of CPLR 1007 permits the defendant to implead any person 'who is or may be liable to him' and is certainly broad enough to encompass contingent claims based on subrogation. Logically, there is no difference in terms of maturity of an action based on subrogation, as opposed to indemnity, because in either situation the cause of action only accrues upon payment or the determination of liability. Moreover, a subrogee has as strong an interest in protecting its claim over as does an indemnitor.

> Nor can it be denied that to permit impleader is in full accord with the spirit of an advanced practice code which seeks 'the avoidance of multiplicity and circuity of action, and the determination of the primary liability as well as the ultimate liability in one proceeding, whenever convenient.'
>
> ***
>
> Moreover, whatever additional expense to the plaintiff there may be is more than balanced by the advantages of judicial efficiency and the extreme injustice to the subrogee or, in this case, the insurers, if they are required to await the disposition of the main claim before commencing a third-party action. . . .

(*Id.* at 152-55 [citations omitted].)

Here, AVR and Powell Cove brought a cause of action for coverage against American States. American States, similar to the insurers in *Krause*, has not made any payments and, moreover, contests its liability under its insurance policy. American States impleaded Farm Family and demands judgment over against Farm Family if AVR and Powell Cove recover against American States. This type of claim is allowable because the language of CPLR 1007 permits the defendant to implead any person "who is or may be liable to him" and is certainly broad enough to encompass American States' contingent claims against Farm Family for co-insurance contribution.

As noted above, the Appellate Division, Second Department, has affirmed the denial of A-One's summary judgment motion in the Underlying Action to the extent of the claim against it for common law indemnification due to the possibility that it, and not AVR or Powell Cove, were at fault in bringing about the Accident. Accordingly, it is not premature for this court to determine whether Farm Family has a duty to defend AVR and Powell Cove in the Underlying Action, and that such duty to defend is primary to any such obligation that may be owed by American States. As observed above, Farm Family has not disputed that AVR and Powell Cove

qualify as additional insureds on Farm Family's policy and that Farm Family owes them primary coverage.

Consequently, the motion by American States (seq. no. 005) for an order declaring that Farm Family owes plaintiffs AVR and Powell Cove a primary duty to defend for the claims alleged in the Underlying Action is granted. Conversely, Farm Family's cross-motion to dismiss the third-party complaint is denied.

Motion Sequence No. 001:

In this motion, AVR and Powell Cove cross-move for summary judgment seeking a declaration that American States bears the duty to provide a defense for them in the Underlying Action. However, the court is informed that AVR has an insurance policy with non-party Mount Hawley Insurance Company which is, in fact, already providing such defense (*see* NYSCEF Doc. No. 27 ¶¶ 9-10; NYSCEF Doc. No. 101; NYSCEF Doc. 58 at 2, 8-9). Given that reality, AVR and Powell Cove are not the real parties in interest with regard to procurement of their defense in the Underlying Action. Rather, non-party Mount Hawley Insurance Company is, as it has elected to provide such defense (albeit, with apparent reservation of rights as implied from its demand letters to American States [*see* NYSCEF Doc. No. 27 ¶¶ 9-10]). So there is really no justiciable controversy as between the plaintiffs and American States; but rather, between Mount Hawley Insurance Company and American States. Because Mount Hawley Insurance Company is not a party to this action, it would be inappropriate for the court to opine on priority of coverage as between Mount Hawley Insurance Company and American States.[4]

The motion-in-chief within the context of motion seq. no. 001 is a motion by American States to compel certain discovery responses from plaintiffs. In view of the substantive

[4] This reasoning of this disposition stands independent of the disposition set forth herein with regard to motion seq. no. 005.

dispositions set forth herein, and the possible need for current status vis-a-vis the subject discovery, the issues raised in this motion will be determined through the means of a discovery videoconference to be arranged by the court for May 12, 2021, at 2:00 p.m., to be followed by an appropriate discovery order if necessary.

Motion Seq. No. 003

American States in this motion moves for leave to amend its answer to add an eighteenth affirmative defense on the basis of the "Multi-Unit and Tract Housing" Exclusion contained in its policy. Because of the possible application of that exclusion to the case at hand – due to the fact that the construction involved in the Underlying Action allegedly involved condominium development – and because of the liberal policy for amendment of pleadings under CPLR 3025 (b), the motion is granted without prejudice to plaintiffs' right, should they choose to do so, to move for dismissal of said defense on sufficient grounds. The proposed amended answer filed as NYSCEF Doc. No. 80 shall be deemed filed and served.

Conclusion

Accordingly, it is

ORDERED that the motion by defendant/third-party-plaintiff American States Insurance Company (seq. no. 005) for an order declaring that third-party defendant Farm Family Casualty Insurance Company owes plaintiffs a primary duty to defend against the claims alleged in the Underlying Action is granted, and the cross-motion by said third-party defendant to dismiss the third-party complaint is denied; and it is further

ORDERED that the cross-motion by plaintiffs (seq. no. 001) for an order declaring that defendant American States Insurance Company owes plaintiffs a primary duty to defend against the claims alleged in the Underlying Action is denied, and the motion of said defendant to

compel certain discovery responses from plaintiffs is reserved for disposition at a discovery videoconference to be arranged by the court for May 12, 2021, at 2:00 p.m., to be followed by an appropriate discovery order, if necessary; and it is further

ORDERED that the motion by defendant American States Insurance Company (seq. no. 003) to amend its answer to add its proposed eighteenth affirmative defense is granted, and is deemed filed, without prejudice to plaintiffs' rights to move against said defense should they so choose.

This will constitute the decision and order of the court.

ENTER:

4/9/2021
DATE

LOUIS L. NOCK, J.S.C.

CHECK ONE:		CASE DISPOSED		X	NON-FINAL DISPOSITION		
		GRANTED	DENIED		GRANTED IN PART	X	OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE