SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

HON. LANCE EVANS, JSC

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TARLOCHAN SINGH,

-against-

HARIOHM REALTY LLC and DISTINCTIVE MAINTENANCE COMPANY, INC.,

and a Third-Party Action.

x

Index Number 713451 2020

Motion Date May 27, 2021

Motion Seq. No. 6

The following numbered papers were read on this motion by plaintiff seeking the striking of the answers of Distinctive Maintenance Company, Inc. (Distinctive), and third-party defendants, JIT Construction Corp. (JIT), Catlin Specialty Insurance Company (Catlin), Starstone U.S. Services, Inc. (Starstone), and Kingstone Insurance Company (Kingstone), pursuant to CPLR 3126; on this cross motion by third-party defendant, Starstone, seeking dismissal of the third-party complaint and all cross claims against it, pursuant to CPLR 3216; and on this cross motion by third-party defendant, Catlin, seeking, among other things, a declaration that defendant, Hariohm Realty, LLC (Hariohm), is not entitled to a defense or indemnification from Catlin in the underlying action, pursuant to CPLR 3212 and 3001.

	Papers Numbered
Notice of Motion - Affirmation - Exhibit	E8-E11
Notices of Cross Motion - Affirmations - Exhibits	E12-E31
Answering Memorandum of Law and Affirmations - Exhibits	E32-E46
	E49-E56
Reply Memorandum of Law	E47

Upon the foregoing papers, it is ordered that the instant motion, and two cross motions, are determined as follows:

This is the sixth (6) motion in this 2016 action.

The underlying action seeks damages for personal injuries allegedly sustained by plaintiff, Tarlochan Singh, in a work-related accident on October 25, 2015, at 138-68 94th Avenue, Jamaica, New York. Hariohm, the owner of the subject property, hired JIT to do work thereat. Plaintiff was employed by JIT, when he fell off a ladder and was injured. Plaintiff commenced an action against Hariohm and Distinctive for violations of Labor Law §§ 200, 240, and 241, and Rule 23 of the NY Industrial Code (§§ 22, 26, 30, and 34). Hariohm brought a third-party action against Distinctive, JIT, Catlin, Starstone, and Kingstone, claiming entitlement to a defense and/or indemnification

pursuant to either the terms of a commercial general liability policy, an excess liability policy, a lease agreement, or lack of negligence on Hariohm's part.

There was a Preliminary Conference Order in this case on 5/13/16, as well as a Compliance Conference Order on 10/3/17. On 5/31/17, a Note of Issue and Jury Demand were filed. On November 16, 2017, pursuant to a stipulation entered into in open court, depositions and times for summary judgment motions were set. Plaintiff's and Hariohm's depositions were completed, but the remaining third-party defendants' depositions were not held for reasons unknown to the Court. The Court does not view Preliminary Conference Orders or Compliance Conference Orders as "mere formalities that may be ignored" by the parties. Nor may parties fail to honor their own discovery stipulations.

On May 17th and May 19th, 2019, Starstone served 90-day notices on Hariohm and plaintiff, respectively, seeking a resumption of their actions. No response was received from either party.

Discovery and 90-Day Notices

Plaintiff moves to either strike the answers of Distinctive, and of the third-party defendants, or, "in the alternative," to order their appearance for deposition, for failing to comply with discovery. "Resolution of discovery disputes and the nature and degree of the penalty to be imposed pursuant to CPLR 3126 are matters within the sound discretion of the motion court" (*Hasan v 18-24 Luquer St. Realty, LLC*, 144 AD3d 631, 632 [2d Dept 2016], quoting *Richards v RP Stellar Riverton, LLC*, 136 AD3d 1011, 1011 [2d Dept 2016]; *see U.S. Bank N.A. v Sirota*, 189 AD3d 927 [2d Dept 2020]; *Chowdhury v Hudson Val. Limousine Serv., LLC*, 162 AD3d 845 [2d Dept 2018]). Striking a pleading, pursuant to CPLR 3126, for failure to comply with disclosure is a drastic remedy, and is only appropriate where there is a clear showing that the failure to comply was willful, contumacious or in bad faith (*see Nash v MRC Recovery, Inc.*, 172 AD3d 1213 [2d Dept 2019]; *JNG Constr., Ltd. v Roussopoulos*, 170 AD3d 1136 [2d Dept 2019]). It may be inferred that a party's conduct is willful and contumacious when said party repeatedly fails to comply with court orders compelling disclosure without providing an adequate, reasonable excuse for said party's noncompliance, over an extended period of time (*see Empire Enters. I.J.J.A., Inc. v Daimler Buses of N. Am., Inc.*, 172 AD3d 819 [2d Dept 2019];, *Candela v Kantor*, 154 AD3d 733 [2d Dept 2017]; *Desiderio v GEICO Gen. Ins. Co.*, 153 AD3d 1322 [2d Dept 2017]).

"If the credibility of court orders and the integrity of our judicial system are to be maintained, a litigant cannot ignore court orders with impunity" (*Kihl v Pfeffer*, 94 NY2d 118, 123 [1999]; *see Deutsche Bank Natl. Trust Co. v Baquero*, 192 AD3d 660 [2d Dept 2021]). "If a party refuses to obey an order for disclosure ... the court may make such orders with regard to the failure or refusal as are just" (*Smith v County of Nassau*, 138 AD3d 726, 728 [2d Dept 2016]).

In addition, Section 202.20-f (a) of the Uniform Rules requires the parties, to the maximum extent possible, to resolve discovery disputes through informal procedures, such as conferences,

as opposed to motion practice. And once resolved by agreement, that agreement ought to be honored by the subscribing parties, to avoid the result in this case.

It is **ORDERED** that the non-complying third-party defendants shall appear for depositions within twenty-one (21) days of the filing of this Decision and Order on NYSEF (E-File), and, if not, their answers shall be stricken for non-compliance with the two Court discovery orders as well as their own stipulation in this matter. There shall be no extensions or adjournments of this time period in this 2016 matter, as they have had more than sufficient time to comply, and have failed to do so. Should any discovery non-compliance occur, the party seeking the depositions shall E-File an affirmation attesting to their non-compliance, along with an order striking the non-compliant parties' pleadings for the signature of the Court. This Order is final as against the non-disclosing parties.

Third-party defendant, Starstone, cross-moves for "dismissal of plaintiff's and Hariohm's claims as against Starstone ... based on their respective failure to resume prosecution of their claims despite being served with a 90-demand (sic) to resume prosecution." A Note of Issue was filed in this matter, and Plaintiff and Hariohm's depositions were completed. It has been held that CPLR Rule 3216 is "extremely forgiving of litigation delay." (*Baczkowski v. D.A. Collins Construction Co., Inc.*, 89 N.Y.2d 499, 503 [1997].) Accordingly, it is **ORDERED** that Starstone's cross-motion is denied in accordance with the foregoing order. Any other requested relief pursuant to CPLR 3216 is likewise denied as without legal efficacy.

As to the remaining cross-motions seeking discovery, or dismissal based on outstanding discovery, it is hereby **ORDERED** that all remaining discovery in this matter shall be completed in this matter within sixty (60) days of the filing of this Decision and Order on NYSEF (E-File), and, if not, the pleading of the non-compliant party or parties shall be stricken for non-compliance with these discovery directives as well as their own stipulation in this matter. There shall be no extensions or adjournments of this time period in this 2016 matter, as they have had more than sufficient time to comply, and have failed to do so. Should any discovery non-compliance occur, the party seeking the disclosure shall E-File an affirmation attesting to their non-compliance, along with an order striking the non-compliant parties' pleadings for the signature of the Court. This Order is final as against any non-disclosing party or parties. The parties could have cooperated and set their own discovery schedule, but, having failed to do so, and having failed to honor their stipulation, they have abdicated their discovery obligations to this Court, which shall now impose a stringent remedy to rectify the situation, and hopefully prevent its reoccurrence.

Declaratory Judgment

"The general purpose of the declaratory judgment is to serve some practical end in quieting or stabilizing an uncertain or disputed jural relation either as to present or prospective obligations" (*James v Alderton Dock Yards*, 256 NY 298, 305 [1931]; *see 159 MP Corp. v Redbridge Bedford, LLC*, 160 AD3d 176 [2d Dept 2018]). An action for declaratory judgment may be utilized only for a justiciable controversy, *i.e.*, where the court has jurisdiction over the subject matter of the

action, and the dispute is genuine, rather than academic, between parties with a stake in the outcome (*see Matter of Hargraves v City of Rye Zoning Bd. of Appeals*, 162 AD3d 1072 [2d Dept 2018]; *DiGiorgio v 1109-1113 Manhattan Ave. Partners, LLC*, 102 AD3d 725 [2d Dept 2013]; *Chanos v MADAC, LLC*, 74 AD3d 1007 [2d Dept 2010]). A declaratory judgment action, brought by a disclaiming insurer, would be the appropriate vehicle to test the insurer's right to disclaim coverage or deny liability (*see McDonald v Shore*, 100 AD3d 602, 603 [2d Dept 2012]; *see Iacobellis v A-1 Tool Rental, Inc.*, 65 AD3d 1015 [2d Dept 2009]; *Monoghan v Meade*, 91 AD2d 1014 [2d Dept 1983]), and, here, "the allegations of the (motion) were sufficient to invoke the court's power to render a declaration resolving a justiciable controversy between the parties" (*Beach 50th St. LLC v Peninsula Rockaway, Ltd.*, 187 AD3d 1114, 1116 [2d Dept 2020}; *see Congregation Erech Shai Bais Yosef, Inc. v Werzberger*, 189 AD3d 1165 [2d Dept 2020]; *Neuman v City of New York*, 186 AD3d 1523 [2d Dept 2020]).

"Generally, it is the insured's burden to establish coverage and the insurer's burden to prove the applicability of an exclusion." *(Rhodes v Liberty Mut. Ins. Co.*, 67 AD3d 881, 882 [2d Dept. 2009]). "As with the construction of contracts generally, 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. "(*Vigilant Ins. Co. v Bear Stearns Companies, Inc.*, 10 NY3d 170, 177 [2008]). Moreover, the Court's interpretation of policy language must "afford[] a fair meaning to all of the language employed by the parties in the contract and leave no provision without full force and effect." (*Consolidated Edison Co. of NY v Allstate Ins. Co.*, 98 NY2d 208, 221-222 [2002]). However, where a provision is ambiguous in a particular case, the ambiguity is resolved against the insurer absent clear evidence of a contrary intent. (*Lachs v. Fidelity & Cas. Co. of New York*, 306 NY 357 [1954], *Tishman Construction Corp. of New York v. CNA Ins. Co.*, 236 AD2d 211 [1st Dep't 1997]).

Hariohm's third-party complaint claims, in relevant part, that plaintiff, Singh, was employed by JIT, which company was engaged by Hariohm to perform waterproofing work at the subject property. Catlin issued a policy of insurance to Hariohm, and Hariohm claims that Catlin was under a contractual duty, per the policy, to indemnify (Fourth Cause of Action) and to defend (Fifth Cause of Action) Hariohm for damages recovered by Singh for bodily injuries. Catlin's answer to the third-party complaint contains two "exclusionary" affirmative defenses, *i.e.*, first, that the "Construction Operations Endorsement" of the policy excludes coverage for bodily injury arising out of designated construction "ongoing operations," expressly including "painting" of the building/structure, and, second, that the "Contractors Coverage Limitation Endorsement," excludes coverage for personal injuries to "employees of independent contractors" arising in the performance of duties in the conduct of Hariohm's business.

"Exclusions from coverage in an insurance policy are to be accorded strict and narrow construction ... (and) an insurer seeking to rely on a policy exclusion bears the burden of establishing that the exclusion is stated in clear and unmistakable language, 'subject to no other reasonable interpretation' " (*Rego Park Holdings, LLC v Aspen Specialty Ins. Co.*, 140 AD3d 1147, 1148 [2016], quoting *Pioneer Tower Owners Assn. v State Farm Fire & Cas. Co.*, 12 NY3d

302, 307 [2009]). "The unambiguous terms of an insurance contract must be given their plain and ordinary meaning, and the interpretation of such terms is a question of law for the court' (*Hudson Shore Assoc., L.P. v Praetorian Ins. Co.*, 172 AD3d 830, 830 [2d Dept 2019], quoting *Anghel v Urica Mut. Ins. Co.*, 127 AD3d 897, 899 [2d Dept 2015]). Here, no party asserts that Catlin's disclaimer was not timely served, nor is there any argument that Singh was an "employee" of JIT.

Catlin's contention that the insurance policy excludes the activity Singh was "engaged in" at the time of his injury, is based upon Singh's characterization of such activity as that of "painting waterproofing sealer" onto brick walls. The subject policy does not define "painting."

An insurer who seeks to avoid defending an insured because of an exclusion faces the "heavy burden" of demonstrating that the subject exclusion eliminates all possibility of coverage. (*See Frontier Insul. Contrs. Inc. v. Merchants Mut. Ins. Co.*, 91 N.Y.2d 169, 175 [1997]; *Westpoint Intern., Inc. v. American Intern. South Ins. Co.*, 71 AD3d 561 [1st Dep't 2010]). Further, "an exclusion from coverage must be specific and clear in order to be enforced' and an ambiguity in an exclusionary clause must be construed most strongly against the insurer." (*Guachichulca v Laszlo N. Tauber & Associates, LLC*, 37 A.D.3d 760, 761, 831 N.Y.S.2d 234 [2d Dept. 2007] and citations therein). As such, plaintiff's activity at the time of the injury has not been sufficiently demonstrated to fall within the unambiguous terms of the insurance policy, and this branch of Catlin's cross motion to declare that Catlin has no duty to defend. under the "painting" exclusion only, is denied.

However, Catlin has demonstrated that Singh was employed by JIT, which was an independent contractor hired by Hariohm. Plaintiff has failed to raise an issue of fact in opposition to this contention. As such, said movant has demonstrated "the absence of all factual issues so that a determination as to the rights of the parties could be determined as a matter of law" (*Guthart v Nassau County*, 178 AD3d 777, 778 [2d Dept 2019]). Catlin's submissions in support of this branch of the cross motion established its right to the declarations sought (*see Ameriprise Ins. Co. v Kim*, 185 AD3d 995 [2d Dept 2020]). Therefore, the exclusion in the "Contractors Coverage Limitation Endorsement" applies, excluding this claim from coverage, and warranting the granting of this branch of Catlin's cross motion. As "[e]xclusions in policies of insurance must be read *seriatim*, not cumulatively, and if any one exclusion applies there can be no coverage since no one exclusion can be regarded as inconsistent with another" (*Ruge v Utica First Ins. Co.*, 32 AD3d 424, 426 [2d Dept 2006], quoting *Zandri Constr. Co. v Firemens's Ins. Co. of Newark*, 81 AD2d 106, 109 [3d Dept 1981]; *see Maroney v New York Cent. Mut. Ins. Co.*, 5 NY3d 467 [2005]; *Merritt Environmental Consulting Corp. v Great Divide Ins. Co.*, US Dist Ct, ED NY, 17 CV 7495, Shields, J., 2018), Catlin's cross motion is granted based upon this exclusion, and the case is dismissed against it.

Accordingly, it is **ORDERED** and **DECLARED** that Catlin has no duty to defend or indemnify Hariohm for damages recovered by Singh for bodily injuries based upon its "Contractors Coverage Limitation Endorsement," which excludes coverage for personal injuries to "employees of independent contractors" arising in the performance of duties in the conduct of

Hariohm's business; and the action against it is dismissed.

The parties' remaining contentions, arguments, and requests for relief, are either without merit or need not be addressed in light of the foregoing determinations.

Dated: November 4, 2021

LANCE EVANS, J.S.C.