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.

SUPREME COURT : STATE OF NEW YORK
COUNTY OF ROCKLAND
HON. ROBERT M. BERLINER, J.S.C.

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MAIN STREET AMERICA ASSURANCE COMPANY and SALAMON'S HOME IMPROVEMENT INC. d/b/a VALLEY FRAMERS,

Plaintiffs,

-against-

SENECA INSURANCE COMPANY, INC. and 4X4 GENERAL CONTRACTORS, INC.,

Defendants.

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SENECA INSURANCE COMPANY, INC.,

Third-Party Plaintiff,

-against-

4X4 GENERAL CONTRACTORS, INC. and OSCAR VENEGAS,

Third-Party Defendants.

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DECISION AND ORDER

Index No.: 036160/2018

Motion Sequence # 4

The following papers, numbered 1 to 8, were read on Defendant Seneca Insurance Company, Inc.'s motion for summary judgment dismissing Plaintiffs' Complaint and summary judgment on its counterclaim against Plaintiffs:

Notice of Motion/Affirmation in Support/Affidavit in Support(Roman)/ Affidavit in Support(Skadra)/Exhibits(A-K)/Memorandum of Law in Support 1-5
Affirmation in Opposition/Exhibits(A-C) 6
Reply Memorandum of Law/Affidavit in Further Support 7-8

Upon the foregoing papers, it is ORDERED that this motion is disposed of as follows:

Plaintiff Main Street America Assurance Company ("Main Street") and Plaintiff Salamon's Home Improvement Inc. d/b/a Valley Framers ("Valley") filed this action against Defendants 4x4 General Contractors, Inc. ("4x4") and Seneca Insurance Company, Inc. ("Seneca") alleging that they are required to defend and indemnify Plaintiffs in a personal injury action. By way of background, Oscar Venegas filed a personal injury action against various parties for damages he sustained, during the course of his employment, while constructing a roof on a project to build a two-family house ("Construction Project"). The general contractor of the Construction Project contracted with Valley to frame the home. Meanwhile, Valley contracted with 4x4 for the house framing. Venegas's accident occurred on September 17, 2015. He filed his summons and complaint on February 9, 2016 in Supreme Court, Rockland County, under index number 030446/2016 ("Underlying Action"). While Venegas named Valley and 4x4 as defendants in the Underlying Action, Seneca was not a party thereto.

Now, Valley and Main Street seek, *inter alia*, 4x4 and Seneca to defend and indemnify them for the defense of Valley in the Underlying Action. They allege that Main Street paid for all attorneys' fees, costs, and other expenses incurred by Valley in its defense of the Underlying Action. In their Complaint, Valley and Main Street allege that Valley and 4x4 entered into an Indemnification, Hold Harmless, and Insurance Agreement, wherein 4x4 agreed to defend and indemnify Valley for claims arising out of the performance of the work during the Construction Project ("Valley Agreement"). Valley and Main Street also allege that the Valley Agreement required 4x4 to obtain and keep an insurance policy to cover its liability for the benefit of Valley. Further, they contend that Seneca issued a general liability contractor agreement to 4x4, which included Valley as an additional insured ("Seneca Policy"). In their Complaint, Valley and Main Street allege causes of action sounding in: (1) breach of contract against both 4x4 and Seneca, as well as, a judgment declaring that they are required to provide coverage for defense and coverage pertaining to the Underlying Action for Main Street and Valley; (2) reimbursement from 4x4 and Seneca for Main Street's fees, costs, and expenses paid on behalf of Valley in its defense of the Underlying Action; (3) breach of contract against 4x4 for failing to purchase insurance for the benefit of Valley, as well as, a judgment declaring that 4x4 is required to defend and indemnify

Plaintiffs in the Underlying Action; (4) breach of contract against 4x4 for its failure to defend and indemnify Valley in the Underlying action; and (5) judgment against Seneca declaring that it is required to afford coverage to defend and indemnify Valley in the Underlying Action.

In response to Valley and Main Street's Complaint, Seneca filed an Answer with a counterclaim and a Third-Party Complaint against 4x4 and Oliver Venegas. Seneca's counterclaim seeks a judgment declaring that it is not obligated to defend and indemnify Valley and Mainstreet, under the Seneca Policy, with respect to the claims set forth in their Complaint. Seneca's Third-Party Complaint alleges causes of action sounding in: (1) judgment against 4x4 declaring that it has no obligation to defend or indemnify 4x4 in the Underlying Action based upon a violation of a condition precedent to coverage and the contractual liability exclusion under the Seneca Policy; and (2) judgment against Venegas declaring that it has no obligation to satisfy any verdict or judgment that Venegas may secure against 4x4 in the Underlying Action. The Court notes that 4x4 and Venegas have failed to interpose an answer or otherwise appear in this action. While entering this decision, the Court is simultaneously granting Seneca's motion for default judgment against 4x4 and Venegas as well as summary judgment against 4x4 on its Third-Party Complaint. Now, before the Court is Seneca's motion for summary judgment dismissing Valley and Main Street's causes of action against it and for summary judgment on its counterclaims against Valley and Main Street.

In support of its motion, Seneca provides, *inter alia*, a copy of the Seneca Policy which was issued to 4x4 and in effect from October 16, 2014 to October 16, 2015. Seneca alleges that on or around October 17, 2018, it first received notice of the Underlying Action when defense counsel for Valley forwarded a copy of the summons and complaint, bill of particulars and draft of the instant summons and complaint. On October 19, 2018, Seneca wrote to 4x4 acknowledging receipt of the claim and advised that it was investigating and analyzing its coverage under the Seneca Policy. Seneca alleges that it attempted to contact 4x4 multiple times to learn more about the underlying claim but never received a response. On November 20, 2018, Seneca disclaimed coverage for 4x4 as it failed to satisfy a condition precedent of timely notice of the Underlying Action/claim. On the same day, Seneca disclaimed coverage and any duty to defend or indemnify Valley in the Underlying Action as Valley was neither an insured nor an additional insured under

the policy. As such, Seneca moves for summary judgment on the basis that the Seneca Policy does not include Valley as an additional insured and, therefore, Valley is not entitled to coverage thereunder. Furthermore, Seneca alleges that because it is not obligated to defend and indemnify Valley, Main Street is not entitled to reimbursement for its defense of Valley in the Underlying Action.

In opposition, Valley and Main Street argue that the underlying contract, the Valley Agreement between Valley and 4x4, required 4x4 to include Valley as an additional insured on the Seneca Policy. Additionally, they argue that they received a Certificate of Liability Insurance indicating Valley Framers as an additional insured of the Seneca Policy. Relying on the Valley Agreement and Certificate of Liability Insurance, they argue that Seneca is required to contractually indemnify them. Valley and Main Street further contend that they are entitled to common law indemnification.

In reply, Seneca argues that the Valley Agreement imposes no legal obligation upon the Seneca and that because Valley is a stranger to the Seneca Policy, Valley has no rights thereunder. Seneca further argues that the Certificate of Liability Insurance is not binding upon Seneca as it was created by AVS Insurance Agency, who is not an agent of Seneca. It also argues that the Certificate contains disclaimer language in bold letters indicating that the certificate is a matter of information only and confers no rights upon Valley as the certificate holder.

"As we have stated frequently, the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers." *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986][internal citations omitted]. "Summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a material and triable issue of fact." *Anyanwu v Johnson*, 276 AD2d 572 [2d Dept 2000]. Issue finding, not issue determination, is the key to summary judgment. *Krupp v Aetna Casualty Co.*, 103 AD2d 252 [2d Dept 1984]. In deciding such a motion, the Court must view the evidence in the light most favorable to the non-moving party. *See Kutkiewicz v Horton*, 83 AD3d 904 [2d Dept 2011].

Insurance "[c]overage extends only to named entities and/or individuals defined as insured parties under the relevant terms of the policy. Where the insurance contract does not name, describe, or otherwise refer to the entity or individual seeking the benefit thereof as an insured, there is no obligation to defend or indemnify." *Catholic Health Servs. of Long Is., Inc. v National Union Fire Ins. Co. of Pittsburgh, P.A.*, 46 AD3d 590, 592 [2d Dept 2007][internal citations and quotation marks omitted]; *see State v American Mfrs. Mut. Ins. Co.*, 188 AD2d 152, 155 [3d Dept 1993]. "The notice provision in the policy is a condition precedent to coverage and, absent a valid excuse, the failure to satisfy the notice requirement vitiates the policy." *Travelers Ins. Co. v Volmar Constr. Co.*, 300 AD2d 40, 42 [1st Dept 2002][internal citations omitted].

Here, Seneca established its prima facie entitlement to summary judgment dismissing the claims against it and for summary judgment on its counterclaims against Valley and Main Street. In reviewing the Seneca Policy, the Court finds that Valley is not an insured, additional insured, or otherwise described or referred to as an entity seeking the benefit of the Seneca Policy. Indeed, the Seneca Policy includes a contractual liability limitation endorsement, which revised the definition of an "insured contract" covered under the Seneca Policy; the Valley Agreement does not fall within that definition. *See American Ins. Co. v Schnall*, 134 AD3d 746, 748 [2d Dept 2015]. Additionally, the Valley Agreement in which Seneca was not a party to does not impose any obligation upon Seneca to defend or indemnify Valley.

Although Valley and Main Street argue that the Certificate of Liability Insurance requires Seneca to indemnify them, the same is insufficient to raise an issue of fact as it was issued by 4x4's insurance agent, AVS Insurance Agency, and not Seneca itself. *See Harco Constr., LLC v First Mercury Ins. Co.*, 148 AD3d 870, 872 [2d Dept 2017]. Seneca established that AVS is not and was never an agent of Seneca and, therefore, Seneca "is not bound by the representations made in the certificate of insurance." *Structure Tone, Inc. v National Cas. Co.*, 130 AD3d 405, 406 [1st Dept 2015]. Also, "a certificate of insurance which expressly states that it is 'issued as a matter of information only and confers no rights upon the certificate holder,' as does the certificate in this case, is insufficient, by itself, to show that such insurance had been purchased[.]" *Empire Ins. Co. v Insurance Corp. of N. Y.*, 40 AD3d 686 [2d Dept 2007][citing to *Penske Truck Leasing Co. v Home Ins. Co.*, 251 AD2d 478, 479-80 (2d Dept 1998)].

Furthermore, Seneca established that it was not notified of any claim with respect to the Underlying Action until October 17, 2018, more than 3 years after Venegas's accident and more than 2.5 years after he commenced the Underlying Action. After being notified of the Underlying Action via electronic correspondence by Valley's defense counsel, Seneca timely disclaimed any coverage for 4x4 based upon its failure to satisfy a condition precedent. Even if Valley was claiming contractual rights under the Seneca Policy through 4x4, as opposed to as an additional insured, 4x4's failure to satisfy the condition precedent to coverage operates as a bar to one claiming rights through 4x4 as an insured. *See Hartford Acci. & Indem. Co. v CNA Ins. Cos.*, 99 AD2d 310 [1st Dept 1984]. Because Seneca is not obligated to defend or indemnify Valley, it is also not obligated to reimburse Main Street for any fees or costs associated in its defense of Valley in the Underlying Action. In opposition to Seneca's prima facie showing to judgment as a matter of law, Valley and Main Street failed to raise a triable issue of material fact. Accordingly, the Court grants Seneca's motion for summary judgment on Valley and Main Street's claims against it and its counterclaims against Valley and Main Street.

Based upon the foregoing, it is

ORDERED that Seneca's motion for summary judgment is granted in its entirety; and it is further

ORDERED that Valley and Main Street's Complaint is dismissed as against Seneca; and it is further

ORDERED that Seneca submit a declaratory judgment on its counterclaim against Valley and Main Street.

The foregoing constitutes the Decision and Order of the Court.

Dated: New City, New York
August 17, 2021

ENTER

Robert M. Berliner

HON. ROBERT M. BERLINER, J.S.C.

To:

Counsel of Record via NYSCEF