SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. LOUIS L. NOCK** **PART** **38M**

Justice

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ZURICH AMERICAN INSURANCE COMPANY,

Plaintiff,

- v -

ALTERRA AMERICA INSURANCE COMPANY and BAROCO CONTRACTING CORP.,

Defendants.

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INDEX NO. 653540/2021

MOTION DATE 01/26/2023, 01/26/2023

MOTION SEQ. NO. 001 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document numbers (Motion 001) 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 91, 93, 97, 98, 99, 101, and 104

were read on this motion by plaintiff for PARTIAL SUMMARY JUDGMENT.

The following e-filed documents, listed by NYSCEF document numbers (Motion 002) 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 92, 94, 95, 96, 100, 102, and 105

were read on this motion by defendant Alterra America Ins. Co. for SUMMARY JUDGMENT.

LOUIS L. NOCK, J.

In this insurance coverage dispute, plaintiff Zurich American Insurance Company ("Zurich") seeks coverage on behalf of its insureds, nonparties RC Dolner, LLC ("RC Dolner"); 15th Street, LLC ("15th Street"); and BRK Garage, LLC ("BRK," and together with 15th Street, the "Owners"). RC Dolner served as construction manager for a construction project located at 422-430 West 15th Street, New York, New York (the "Project"), in conjunction with which it hired defendant Baroco Contracting Corp. ("Baroco") to replace the sidewalk and concrete curb. Baroco, in turn, subcontracted laborers from nonparty Fine Line Carpentry and Renovations ("Fine Line"), including one, Nelson Reyes ("Reyes"). In the course of his work on the project, Reyes was injured when he struck an underground power line. Reyes commenced a personal

injury action against, *inter alia*, RC Dolner, the Owners, and Baroco, captioned as *Reyes v BRK Garage Co., LLC, et al.*, bearing index number 154309/2016, and pending in this court before Hon. Paul A. Goetz. That action underlies the present dispute, as herein, Zurich seeks a declaratory judgment requiring defendant Alterra American Insurance Company ("Alterra") to provide excess coverage in the underlying action pursuant to the excess policy it issued to Baroco.

Presently before the court are the parties' competing motions for summary judgment. In motion sequence number 001, Zurich seeks partial summary judgment declaring that Alterra wrongfully denied coverage to RC Dolner, the Owners, and Baroco, as well as dismissing Alterra's fourteenth, sixteenth, and seventeenth affirmative defenses.[1] In motion sequence number 002, Alterra seeks dismissal of the entire complaint.[2] Motion sequence numbers 001 and 002 are hereby consolidated for disposition in accordance with the following memorandum.

Background

RC Dolner and Baroco entered into a subcontract for certain masonry and sidewalk work, for which Baroco was to furnish "all the work, labor, services, materials, plans, equipment, tools, scaffolds, appliances, coordination, engineering, design and all other things necessary for the completion of the Work" (subcontract, NYSCEF Doc. No. 46, § 2.1). Baroco agreed to "indemnify, defend and hold harmless [15th Street], RC Dolner . . . from and against any and all losses . . . directly or indirectly arising out of, alleged to arise out of, or in connection with or as a consequence of the performance or non-performance of the Work" (*id.*, § 22.1). In addition,

[1] Alterra does not oppose dismissal of these affirmative defenses (Alterra memorandum of law, NYSCEF Doc. No. 97 at 2 n 1), and that branch of the motion is granted without opposition. In addition, at argument, counsel for Zurich conceded that Zurich is no longer seeking relief as to the Owners (tr of proceedings, NYSCEF Doc. No. 106 at 7-8).
[2] Baroco has not answered or otherwise appeared in this action.

Baroco agreed to procure primary insurance naming the Owners and RC Dolner as additional insureds (*id*., § 23.1), as well as commercial umbrella/excess coverage (*id.*, Exhibit D, § 4).

Nonparty Scottsdale Insurance Company ("Scottsdale") issued a commercial general liability policy to Baroco as required by the subcontract (the "Scottsdale Policy"). The Scottsdale Policy is primary insurance for Baroco (Scottsdale Policy, NYSCEF Doc. No. 47, AAIC000048, § 4[a]). The Scottsdale Policy applies to each named insured "as if [they] were the only named insured," and "separately to each insured against whom claim is made or 'suit' is brought" (*id.* at AAIC000062, § IV[7]). Finally, there is an additional insured endorsement that expands coverage to "any person or organization for whom you are performing operations when you and such person or organization have agreed in writing in a contract or agreement that such person or organization be added as an additional insured" (*id.* at AAIC000073, § II[A]).

Alterra issued the excess policy to Baroco. As relevant to the present dispute, the policy preamble defines "you" and "your" as referring to "the Named Insured shown in the Declarations *and any other person or organization* qualifying as an insured under [the Scottsdale Policy]" (Alterra policy, NYSCEF Doc. No. 48, AIC000290 [emphasis added]). The Alterra policy is subject to the same provisions as the Scottsdale Policy, except where any such provision conflicts with the Alterra policy (*id.*, § I[1][b]). The policy includes an endorsement titled "Insurance Requirement All Work Performed on Behalf of Any Insured," which provides that "You . . . will require by written contract that all sub-contractors working on your behalf maintain primary insurance naming you as an additional insured" (*id.* at AAIC000309, § A). There is no coverage under the policy unless the conditions of the Insurance Requirement endorsement are satisfied.

RC Dolner tendered the defense of the underlying action to Scottsdale, who has been providing a defense to RC Dolner and the Owners since March 9, 2017 (Nationwide letter, NYSCEF Doc. No. 52). Alterra, however, has denied both Baroco and Zurich's requests for excess coverage, on the grounds that Baroco failed to satisfy the "Insurance Requirement" endorsement. Specifically, Alterra took the position that Baroco did not have a contract with Fine Line (Reyes' employer) and, therefore, it did not comply with the terms of the endorsement (Baroco Tender Denial, NYSCEF Doc. No. 53; Zurich Tender Denials, NYSCEF Doc. Nos. 55, 57, 60, 63, 65). Because Baroco did not comply with the endorsement, Alterra took the position that no other party was entitled to coverage either (*id.*). The instant declaratory judgment action followed.

Standard of Review

Summary judgment is appropriate where there are no disputed material facts (*Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). The moving party must tender sufficient evidentiary proof to warrant judgment as a matter of law (*Zuckerman v City of N.Y.*, 49 NY2d 557, 562 [1980]). "Failure to make such prima facie showing requires denial of the motion, regardless of the sufficiency of the opposing papers" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986] [internal citations omitted]). Once a movant has met this burden, "the burden shifts to the opposing party to submit proof in admissible form sufficient to create a question of fact requiring a trial" (*Kershaw v Hospital for Special Surgery*, 114 AD3d 75, 82 [1st Dept 2013]). "[I]t is insufficient to merely set forth averments of factual or legal conclusions" (*Genger v Genger*, 123 AD3d 445, 447 [1st Dept 2014] [internal citation omitted], *lv denied* 24 NY3d 917 [2015]). Moreover, the reviewing court should accept the opposing party's evidence as true (*Hotopp Assocs., Ltd. v Victoria's Secret Stores, Inc.*, 256 AD2d 285, 286-287 [1st Dept 1998]), and give

the opposing party the benefit of all reasonable inferences (*Negri v Stop & Shop, Inc.*, 65 NY2d 625, 626 [1985]). Therefore, if there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (*Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 [1978]).

Discussion

"The unambiguous provisions of an insurance policy, as with any written contract, must be afforded their plain and ordinary meaning" (*Broad St., LLC v Gulf Ins. Co.*, 37 AD3d 126, 130-31 [1st Dept 2006]). The policy should be read as a whole, and no particular words or phrases should receive undue emphasis (*Bailey v Fish & Neave*, 8 NY3d 523, 528 [2007]). Courts should give effect to every clause and word of an insurance contract (*Northville Indus. Corp. v National Union Fire Ins. Co.*, 89 NY2d 621, 633 [1997]). An interpretation is incorrect if "some provisions are rendered meaningless" (*County of Columbia v Continental Ins. Co.*, 83 NY2d 618, 628 [1996]). It is the insured's burden to show that the provisions of a policy provide coverage (*Consolidated Edison Co. of N.Y., Inc. v Allstate Ins. Co.*, 98 NY2d 208 [2002]). Moreover, where the policy language offers no reasonable basis for a difference of opinion, the court should not find it ambiguous (*Breed v Insurance Co. of North America*, 46 NY2d 351, 355 [1978], *rearg denied* 46 NY2d 940 [1979]).

Zurich argues that Alterra's denial of coverage to RC Dolner and Baroco is unsupported by the terms of the policy.[3] Central to that argument are two questions: whether Baroco complied with the Insurance Requirement endorsement, and whether RC Dolner's entitlement to

[3] Alterra also argues that Zurich lacks standing to challenge the denial of coverage to Baroco, as Zurich is a stranger to the contract between Baroco and Alterra. However, courts have held that a party may properly commence a declaratory judgment action seeking resolution of a coverage issue against a subcontractor's insurance carrier under the circumstances presented herein (*Lang v Hanover Ins. Co.*, 3 NY3d 350, 353 [2004]; *POFI Constr. Corp. v Rutgers Cas. Ins. Co.*, 189 AD3d 465, 466 [1st Dept 2020] ["Plaintiff was not required to obtain a judgment against the subcontractor before bringing this action"]).

coverage must be determined separate and apart from Baroco's compliance or noncompliance with the policy conditions. All parties agree that Baroco did not have a written contract with Fine Line, and under the terms of the Insurance Requirement endorsement, Baroco was required to have written contracts with its subcontractors requiring them to purchase insurance. Zurich asserts that the endorsement does not apply, however, on the grounds that Fine Line should not be considered a subcontractor for purposes of the endorsement, having only provided laborers and having no control over any of the work that Reyes was doing when he was injured. The policy does not define the term "subcontractor."

Zurich relies on *Gemini Ins. Co. v Titan Constr. Servs., LLC* (2019 WL 4023719 [SD NY Aug. 27, 2019, 17-cv-8963]), in which the court, faced with a similar question as to whether an entity was a subcontractor under the terms of the relevant policy, elected to refer to the Construction Industry Fair Play Act (the "CIFPA"), codified at Labor Law § 861 *et seq.*, which sets forth 12 factors in determining whether a construction employee is a direct employee of the entity doing the work, or is employed by another entity who is a subcontractor (Labor Law § 861-c[2]). An employee is generally presumed to be directly employed by the prime contractor unless the separate business entity satisfies all 12 factors, making it a subcontractor (*id.*; *Matter of Barrier Window Sys., Inc.*, 149 AD3d 1373, 1375 [3d Dept 2017] ["Notably, in each test, all of the criteria must be met to overcome the statutory presumption of an employment relationship"]). Zurich argues that Fine Line fails to meet multiple statutory criteria, as set forth in the CIFPA, to be considered a separate business entity, and, for that reason, should not be considered a "subcontractor."

Alterra, in opposition, states that the CIFPA is not applicable here, as its sole purpose was to prevent employer misclassification of employees as independent contractors. Rather, Alterra

asserts, the court should apply the plain and ordinary meaning of the term "subcontractor" which, Alterra posits, is more simply stated in section 2(10) of the Lien Law, specifically: "a person who enters into a contract with a contractor and/or with a subcontractor for the improvement of such real property or such public improvement or with a person who has contracted with or through such contractor for the performance of his contract or any part thereof" (*see also, A&J Buyers, Inc. v Johnson, Drake & Piper, Inc.*, 25 NY2d 265, 270 [1969], *citing* Lien Law § 2[10]).

Zurich, in reply, observes that the Lien Law definitions are accompanied by the phrase "when used in this chapter" (*see generally* Lien Law § 2) and argues that the court should not extend those definitions beyond the Lien Law itself.

Having considered the positions of the parties, the court finds Alterra's proposal to be more persuasive. As a general matter, "it is common practice for the courts of this State to refer to the dictionary to determine the plain and ordinary meaning of words to a contract" (*Lend Lease [U.S.] Constr. LMB Inc. v Zurich American Ins. Co.*, 136 AD3d 52, 57 [1st Dept 2015], *affd on other grounds* 28 NY3d 675 [2017]). Indeed, the Court of Appeals has previously utilized just such an approach to interpret undefined terms in an insurance contract (*e.g.*, *Universal American Corp. v Natl. Union Fire Ins. Co.*, 25 NY3d 675, 681 [2015] ["The term 'fraudulent' is not defined in the rider, but it refers to deceit and dishonesty (*see* Merriam–Webster Collegiate Dictionary 464 [10th ed. 1993])"]). Black's Law Dictionary defines "subcontractor" as "[s]omeone who is awarded a portion of an existing contract by a contractor, esp. a general contractor" (Black's Law Dictionary [11th ed 2019], subcontractor). Thus, the dictionary definition overlaps substantially with the Lien Law definition cited by Alterra, which

obviates any concern that the court is improperly expanding the Lien Law definition beyond the terms of the statute.

The court also notes the specific purpose for which the CIFPA, cited by Zurich, was enacted. According to the Legislative Findings section of CIFPA, "New York state's construction industry is experiencing dangerous levels of employee misclassification fraud," which "reduces government revenue, shifts tax and workers' compensation insurance costs to law-abiding employees, lowers working conditions and steals jobs from legitimate employers and their employees" (Labor Law § 861-a). The question, whether or not Fine Line qualifies as a subcontractor, simply does not implicate any of those concerns. Moreover, the CIFPA was enacted to "curb this underground economy, enforce long-standing employment laws, ensure compliance with essential social insurance protections and eliminate the unfair competitive advantage from contractors in the underground economy" (*id.*). Interpreting an insurance policy – which is what underlies this action and this motion practice – is not a goal toward which the CIFPA was enacted, per its very content and Legislative Findings (*see*, *id.*). By contrast, the definition of subcontractor embodied in the Lien Law serves to differentiate subcontractors and materialmen, or those who only provide materials for a construction project, for purposes of determining liability for unpaid contract prices (*A&J Buyers*, 25 NY2d at 268). Indeed, Zurich is attempting to argue that Fine Line should be considered something akin to a materialman, since it only provided laborers who worked under Baroco's control. However, since the court does not find Zurich's preferred method of determining subcontractor status to be persuasive, the court relies instead on the Court of Appeals' decision in *A&J Buyers*, which states that "a subcontractor is regarded as one who assumes performance of some part of the contract, so that labor or other service, and not merely the furnishing of materials, is involved" (*id.* at 271). This

definition is also in harmony with the dictionary definition cited above. As Fine Line furnished labor to the project, and, thus, was awarded a portion of Baroco's contract, it must be considered to be a subcontractor for purposes of the Alterra policy. Accordingly, as Fine Line and Baroco did not have a written contract as required by the Insurance Requirement endorsement, Alterra was within its rights to deny coverage to Baroco. Zurich's motion for partial summary judgment on the fourth cause of action must, therefore, be denied; Alterra's motion for summary judgment dismissing said cause of action should be granted; and the fourth cause of action should be dismissed.

Zurich argues that, even if Baroco failed to comply with the endorsement, RC Dolner's entitlement to coverage must be determined separately from Baroco's. This question is much more straightforward, as the Alterra policy follows form to the Scottsdale primary policy, which, as set forth above, contains a separation of insureds provision (Scottsdale Policy, NYSCEF Doc. No. 47, AAIC000062, § IV[7]). Alterra argues that the endorsement, which commands "you," defined in the preamble to the policy to refer to any of the insureds under the policy, should be read to apply to "all insureds," making one insured's failure to comply with the endorsement determinative of coverage for all insureds. The plain language of the Alterra policy does not support this interpretation, as the preamble (NYSCEF Doc. No. 48 at AAIC000290) separately refers to Baroco (i.e., the "Named Insured") and any other insured "under the 'Underlying Insurance'" (i.e., the Scottsdale Policy) rather than more expansive articulations such as "any and all insureds," "all insureds," or similar language. Alterra's reliance on *DRK, LLC v Burlington Ins. Co.* (74 AD3d 693 [1st Dept 2010], *lv denied* 16 NY3d 702 [2011]) is misplaced, as there, the relevant coverage endorsement referred to injury to an employee of "any insured" (*id.* at 694). The logical reading of that language, which is different from the language of the Alterra

policy, is that an injury to one insured's employee barred coverage for all insureds. Moreover, Alterra does not argue that RC Dolner failed to fulfill the requirements of the Insurance Requirement endorsement. Thus, plaintiff's motion for partial summary judgment as to Alterra's rejection of coverage for RC Dolner is granted, and Zurich's motion for summary judgment to dismiss such a cause of action is denied with respect to RC Dolner.

The remainder of Alterra's motion seeks to dismiss the second, third, and fifth causes of action, seeking declaratory judgments as to priority of coverage and contractual indemnity, as well as a claim for breach of contract against Alterra for failing to provide coverage to Zurich's insured. However, Justice Goetz in the underlying *Reyes* action had denied RC Dolner's motion for summary judgment in said action (*see*, index No. 154309/2016, NYSCEF Doc. No. 185 at 15), thereby preventing a resolution now of Alterra's potential duty under Baroco's contract to indemnify RC Dolner. This will prevent summary judgment on the third cause of action with respect to RC Dolner. Zurich offered no opposition to the motion for summary judgment dismissing the fifth cause of action, and such motion is, therefore, granted.

As to the second cause of action regarding priority of coverage, Zurich asserts that Baroco's duty to indemnify RC Dolner could lead to the Alterra policy coming into play before the Zurich primary policy is triggered. As Alterra points out, however, where the underlying action is still ongoing, the primary policies are generally exhausted before the excess policies come into play (*see generally Bovis Lend Lease LMB, Inc. v Great American Ins. Co.*, 53 AD3d 140 [1st Dept 2008]). As the Appellate Division, First Department, held in *Bovis* (*supra*), "The rights and obligations of the insurers are governed by their respective insurance policies, not by the underlying trade contracts among the insureds" (*id.* at 155). Accordingly, Alterra's motion for summary judgment dismissing the second cause of action is granted.

Accordingly, it is hereby

ORDERED that Zurich's motion (Mot. Seq. No. 001) for partial summary judgment is granted with respect to RC Dolner; and it is further

ADJUDGED and DECLARED that RC Dolner qualifies as an additional insured under the Alterra Excess Policy in connection with the claims made against it in *Reyes v BRK Garage Co., LLC, et al.*, bearing index number 154309/2016, and pending in this court before Hon. Paul A. Goetz; and it is further

ORDERED that Alterra's motion (Mot. Seq. No. 002) for summary judgment is granted to the extent of dismissing the second, fourth, and fifth causes of action; and it is further

ADJUDGED and DECLARED that Alterra's obligation is to provide additional insured coverage to RC Dolner on an excess basis upon exhaustion of the Scottsdale Primary Policy and the Zurich Primary Policy; and it is further

ADJUDGED and DECLARED that Alterra does not owe coverage to its named insured Baroco in connection with the claims made against it in the Underlying Action upon exhaustion of the Scottsdale Primary Policy; and it is further

ORDERED that the remaining balance of the action is severed and continued.

This constitutes the decision and order of the court.

ENTER:

12/13/2023
DATE

LOUIS L. NOCK, J.S.C.

CHECK ONE: ☐ **CASE DISPOSED** ☒ **NON-FINAL DISPOSITION**
☐ **GRANTED** ☐ **DENIED** ☒ **GRANTED IN PART** ☐ **OTHER**