# SUPREME COURT OF THE STATE OF NEW YORK
# NEW YORK COUNTY

**PRESENT:** **HON. ARTHUR F. ENGORON** **PART** **37**

***Justice***

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ARCH INSURANCE COMPANY FOR ITSELF AND A/S/O PRISMATIC DEVELOPMENT CORP., URS-LIRO A JOINT VENTURE,

Plaintiff,

- v -

SELECTIVE INSURANCE COMPANY OF AMERICA, SOLAR ELECTRIC SYSTEMS INC., JOHN DOES 1-10, ABC CORPORATIONS 1-10,

Defendants.

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**INDEX NO.** 654093/2019

**MOTION DATE** 12/07/2023

**MOTION SEQ. NO.** 002

**DECISION + ORDER ON MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 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, 52, 53, 54, 55, 56, 67, 68, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104

were read on this motion for PARTIAL SUMMARY JUDGMENT.

Upon the foregoing documents, and after oral argument held on April 18, 2024, and for the reasons stated hereinbelow, plaintiff's motion, pursuant to CPLR 3212(e), for partial summary judgment is granted.

Background

The Underlying Action

On January 29, 2010, Prismatic Development Corporation ("Prismatic"), as general contractor, entered into a Subcontractor Agreement ("the Subcontract") with Solar Electric Systems Inc. ("Solar"), as subcontractor, to perform construction and renovation work at the North Shore Marine Transfer Station. NYSCEF Doc. No. 34. Pursuant to the Subcontract, Solar agreed to procure commercial general liability and umbrella liability coverage, including as additional insureds Prismatic and the site's construction manager, URS-LIRO, a Joint Venture ("URS-LIRO"). Id. The Subcontract obligates Solar to "defend, indemnify, and hold harmless [Prismatic and URS-LIRO] to the fullest extent permitted by law … from and against all claims, damages liability, loss or expense … arising out of or in any way connected with [Solar's] work." Id.

On November 17, 2010, Solar purchased from defendant Selective Insurance Company of America ("Selective") a commercial package insurance policy ("the Selective Policy"), including a general liability coverage part ("GL Part") and an umbrella liability coverage part ("UL Part"). NYSCEF Doc. No. 38. Pursuant to the GL Part, Selective provided additional insured coverage to "any person or organization whom [Solar] ha[s] agreed in a written contract … to add as an

additional insured on [Solar's] policy." Id. Under the UL Part, Selective provided coverage to "any additional insured[s] under any policy of 'underlying insurance.'" Id. In addition, Arch Insurance Company ("Arch") issued a commercial general liability policy to Prismatic. NYSCEF Doc. No. 37.

On February 16, 2011, non-party Nawful Elhathat ("Elhathat"), an employee of Solar, allegedly slipped on ice and sustained injuries while performing work at the construction site. NYSCEF Doc. Nos. 38, 35. On September 20, 2013, Elhathat sued Prismatic and URS-LIRO, asserting negligence claims and various Labor Law violations ("the Underlying Action"). NYSCEF Doc. No. 35.

On November 14, 2013, Prismatic and URS-LIRO impleaded Solar in the Underlying Action ("the Third-Party Action"). NYSCEF Doc. No. 36.

By letters dated June 12, October 17, and November 22, 2013, Arch and Solar urged Selective to agree to provide contractual defense, indemnification, and additional insured coverage on behalf of Prismatic and URS-LIRO in the Underlying Action. NYSCEF Doc. Nos. 39, 40. Initially, Selective agreed to provide defense and indemnification pursuant to a reservation of rights: "if it is determined through discovery that URS-LIRO and Prismatic were solely responsible for th[e] loss, Selective reserves its right to withdraw coverage in its entirety." NYSCEF Doc. No. 42. However, Selective soon withdrew its reservation of rights, noting in its claim file that its obligation to provide defense and indemnification "is required under the contract signed by [Solar]." NYSCEF Doc. Nos. 43, 44, 46.

On June 2, 2014, in return for providing a defense, Prismatic and URS-LIRO agreed to Selective's request to discontinue the Third-Party Action against Solar. NYSCEF Doc. Nos. 44, 45. On or about March 12, 2015, Selective notified Arch that it was obligated to cover any amounts incurred upon exhaustion of the Selective Policy's GL Part. NYSCEF Doc. No. 33. On or about May 28, 2015, in response to Selective's refusal to apply their UL Part, Arch demanded that Selective reinstate the Third-Party Action against Solar. Id.

On November 11, 2016, Selective filed a second third-party complaint against Solar, one-and-a-half years after Arch's request. NYSCEF Doc. No. 29 ¶ 61.

On June 5, 2017, the court in the Underlying Action granted Elhathat's motion to sever the reinstated Third-Party Action against Solar, leaving Prismatic and URS-LIRO as the only defendants in the Underlying Action. NYSCEF Doc. No. 48.

On April 20, 2020, Elhathat, Prismatic and URS-LIRO settled and discontinued the Underlying Action for $2,500,000, with Selective paying $1,000,000 and Arch paying $1,500,000. NYSCEF Doc. No. 103. The Third-Party Action remains active.

The Instant Action

On July 17, 2019, plaintiff, Arch for itself and as the subrogee of Prismatic and URS-LIRO, commenced the instant action against defendants, Selective, Solar, John Does 1-10 and ABC Corporations 1-10, asserting six causes of action: (1) breach of contract against Selective for

failure to pursue Solar in violation of Selective's defense obligations to Prismatic and URS-LIRO as additional insureds under the insurance contracts; (2) breach of contract against Selective for failure to pursue Solar in violation of Selective's defense obligations to Prismatic and URS-LIRO as contractual indemnitees under the insurance contracts; (3) breach of contract against Solar for failure to defend fully, indemnify and save harmless Prismatic and URS-LIRO from the Underlying Action; (4) a declaratory judgment that the full limits of the GL and UL Parts of the Selective Policy are available to defend and indemnify Prismatic and URS-LIRO without any contribution from any other party or insurer; (5) a declaratory judgment that the Arch Policy is excess to the Selective Policy, which must be fully exhausted before the Arch Policy applies to the Underlying Action for the benefit of Prismatic and URS-LIRO; and (6) breach of implied covenant of good faith and fair dealing against Selective. NYSCEF Doc. No. 1.

On December 7, 2023, plaintiff moved, pursuant to CPLR 3212(e), for partial summary judgment, seeking damages incurred as a result of Selective's breach of its contractual obligations to defend fully and indemnify Prismatic and URS-LIRO under the Selective Policy. NYSCEF Doc. Nos. 25, 29, 30. Plaintiff does not seek summary judgment on its sixth and third causes of action for "bad faith/extra-contractual damages." NYSCEF Doc. No. 29 ¶ 3.

In opposition, defendants argue that plaintiff's claim for equitable contribution is premature, absent resolution of the contractual liability issue pending in the Third-Party Action. NYSCEF Doc. Nos. 70, 71. Defendants also argue that they complied with their obligations to defend Prismatic and URS-LIRO as additional insureds in the Underlying Action. Id.

In reply, plaintiff argues that the determination of liability in the Third-Party Action is unnecessary because Selective, by accepting a tender to provide defense and indemnification to Prismatic and URS-LIRO pursuant to the Selective Policy, had already acknowledged Solar's liability, and Prismatic and URS-LIRO's lack thereof. NYSCEF Doc. No. 94.

Discussion

In order to obtain summary judgment, the "movant must establish its defense or cause of action sufficiently to warrant a court's directing judgment in its favor as a matter of law. On the other hand, the party opposing the motion must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which the opposing claim rests. [M]ere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient for this purpose." Gilbert Frank Corp. v Fed. Ins. Co., 70 NY2d 966, 967 (1988) (internal citations omitted). Further, pursuant to CPLR 3212(e), "summary judgment may be granted as to one or more causes of action, or part thereof, in favor of any one or more parties, to the extent warranted, on such terms as may be just." CPLR 3212(e).

To prevail on a breach of contract claim, a party must establish "the existence of a contract, the plaintiff's performance thereunder, the defendant's breach thereof, and resulting damages." Harris v Seward Park Hous. Corp., 79 AD3d 425, 436 (1st Dept 2010). "Where the provisions of the policy are clear and unambiguous, they must be given their plain and ordinary meaning, and courts should refrain from rewriting the agreement," and the policy "must, of course, be construed in favor of the insured, and ambiguities, if any, are to be resolved in the insured's favor

and against the insurer." U.S. Fid. & Guar. Co. v Annunziata, 67 NY2d 229, 232 (1986) (internal citations and quotations omitted).

Here, the plain text of the Subcontract unambiguously establishes that "to the fullest extent permitted by law … [Solar] shall defend, indemnify and hold harmless [plaintiff]." NYSCEF Doc. No. 34. Further, the Selective Policy clearly states that Selective will provide additional insured coverage to any person or organization to which Solar has agreed in a written contract to cover, pursuant to its GL and UL Parts. NYSCEF Doc. No. 38.

An "insurer's duty to defend is 'exceedingly broad,' and it must defend 'whenever the four corners of the complaint suggest … a reasonable possibility of coverage.'" Davidson v Hilton Hotels Corp., 266 AD2d 336, 337 (2d Dept 1999) (internal citations omitted). "In defending a claim, an insurer is obligated to act with undivided loyalty; it may not place its own interests above those of its assured," and, further, "the primary carrier owes to the excess insurer the same fiduciary obligation which the primary insurer owes to its insured, namely, a duty to proceed in good faith." Hartford Acc. and Indem. Co. v Michigan Mut. Ins. Co., 93 AD2d 337, 341 (1st Dept 1983), affd, 61 NY2d 569 (1984).

As to the duty to defend an insured,

> When a conflict of interest exists between an insured and the insurer which is obligated to defend, the remedy is to permit the insured to select defense counsel, with the reasonable cost of the defense to be borne by the insurer … such tactical decisions should be in the hands of an attorney whose loyalty to plaintiff is unquestioned and not an attorney employed by defendant with a potential for a conflict of interest.

Ladner v Am. Home Assur. Co., 201 AD2d 302, 304 (1st Dept 1994).

"A party's right to contractual indemnification depends upon the specific language of the relevant contract … the promise to indemnify should not be found unless it can be clearly implied from the language and purpose of the entire agreement and the surrounding circumstances." Khan v 40 Wall Ltd. Partnership, 205 AD3d 789, 791 (2d Dept 2022).

Here, the allegations in the Underlying Action brought the Third-Party Action within the scope of the Selective Policy and the Subcontract. NYSCEF Doc. No. 3. Yet, Arch provides evidence that Selective continuously delayed reinstating the Third-Party Action against Solar, despite plaintiff's numerous pleas to do so upon finding that Elhathat's claim would exhaust the GL Part and implicate the UL Part of the Selective Policy. NYSCEF Doc. No. 29 ¶¶ 40, 43, 46, 50, 52, 59. In addition, Selective denied plaintiff's request to retain independent counsel and continuously re-assigned plaintiff's defense to numerous counsel without notifying plaintiff. NYSCEF Doc. No. 29 ¶¶ 32, 44, 66, 74-75.

The Subcontract unambiguously required Solar to indemnify plaintiff from and against "all claims, damages, liabilities, losses and expenses … *arising out of or in any way connected* with

the performance or lack of performance of the work under the agreement." NYSCEF Doc. No. 34 (emphasis added). The evidence of record demonstrates that Elhathat's accident arose out of or was connected to the performance of Solar's work pursuant to the Subcontract. NYSCEF Doc. No. 29 ¶¶ 35-38, 46; Khan, 205 AD3d at 791-792 (available evidence satisfied defendants' prima facie burden that plaintiff's accident arose out of or was related to performance of the contractor's work). Although defendants contend that outstanding discovery pending in the Third-Party Action renders plaintiff's motion premature, defendants fail to offer an evidentiary basis to suggest that discovery might lead to relevant evidence. Guerrero v Milla, 135 AD3d 635, 636 (1st Dept 2016) ("mere hope that evidence sufficient to defeat a motion for summary judgment may be uncovered during the discovery process is insufficient to deny such a motion") (internal citation omitted). And, significantly, Selective's acceptance of plaintiff's tender to defend and indemnify Prismatic and URS-LIRO, after rescinding any reservation of rights, indicates Selective's acknowledgment that the incident arose out of or was connected to Solar's work. NYSCEF Doc. Nos. 30, 44.

Thus, Selective breached its obligations to plaintiff and Arch's motion for partial summary judgment must be granted.

Conclusion

Thus, the instant motion of plaintiff, Arch Insurance Company for itself and a/s/o Prismatic Development Corporation and URS-LIRO, a Joint Venture, for partial summary judgment against defendants Selective Insurance Company of America, Solar Electric Systems Inc., John Does 1-10 and ABC Corporations 1-10 is hereby granted, and it is hereby

ORDERED that Selective must defend and indemnify Prismatic and URS-LIRO up to the full limits of the general liability and umbrella liability coverage parts of the Selective Policy; and it is further

ORDERED that Selective's obligations are primary to any obligation of Arch under Arch's insurance policy; and it is further

ORDERED that Selective must reimburse plaintiff for the defense and indemnity payments made in connection with the underlying action, Nawful Elhathat v URS-LIRO, a Joint Venture, and Prismatic Development Corporation, Index No. 703995/2013, together with interest, including reimbursement for plaintiff's reasonable expenses and attorney's fees incurred in bringing the instant motion, in an amount to be determined at a hearing at the conclusion of this action; and the Clerk is hereby directed to enter judgment accordingly.

HON. ARTHUR F. ENGORON

7/3/2024
DATE

ARTHUR F. ENGORON, J.S.C.

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| APPLICATION: | | SETTLE ORDER | | | SUBMIT ORDER | | |
| CHECK IF APPROPRIATE: | | INCLUDES TRANSFER/REASSIGN | | | FIDUCIARY APPOINTMENT | | REFERENCE |