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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 42

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LIBERTY MUTUAL FIRE INSURANCE COMPANY

Plaintiff

v

PACIFIC INDEMNITY COMPANY,

Defendant.

(and a third-party action)

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Index No. 159742/2013

DECISION AND ORDER

MOT SEQ. 001

BANNON, J.

I. INTRODUCTION

This is an action for a judgment declaring that the defendant, Pacific Indemnity Company (Pacific), was obligated, as the primary insurer, to defend and indemnify Grubb & Ellis Management Services, Inc. (Grubb), and Grubb's employee, Lee Pilizota, in an underlying personal injury action entitled Dalcamo v Grubb & Ellis Mgt. Servs., Inc., commenced in the Supreme Court, New York County, under Index No. 107169/2007 (the underlying action), and to recover the costs of providing a defense to Grubb and Pilizota in that action. The plaintiff moves for summary judgment declaring that Pacific is so obligated and on the cause of action to recover those costs. The court concludes that Pacific was obligated to defend Grubb and Pilizota and, accordingly, is liable to the plaintiff for the costs of

their defense that were incurred by the plaintiff in the underlying action.

II. BACKGROUND

On December 22, 2006, Gerard Dalcamo, while working for Capital Moving & Storage Company, Inc. (Capital), was allegedly injured in the course of moving a heavy marble table within premises owned by 550 Madison Avenue Trust, Ltd. (MAT), and Sony Corporation of America (Sony). Grubb managed the subject premises on behalf of MAT and Sony. The property management agreement between Sony and Grubb gave broad authority to Grubb to implement Sony's property management determinations, and expressly provided that Grubb

> "shall directly select, supervise and engage in [Sony's] name in its capacity as agent of [Sony], all independent contractors, suppliers and vendors, in the operation, repair, maintenance and servicing of the [subject] Property, including, but not limited to those necessary for . . . services deemed necessary by [Grubb] for the operation of the Property."

Pilizota allegedly directed the work performed by Dalcamo. There was no specific written contract between Capital and Sony referable to the moving services undertaken by Capital within the premises. Rather, according to Capital, the work was undertaken on an ongoing, daily basis pursuant to verbal requests. Despite the absence of a written contract, Capital generated a bill of lading for the moving job that it performed on the date of the

accident, which identified not only Sony as both shipper and consignee for the intrabuilding move, but also identified Grubb's employee, Pilizota, as its customer, acting in the capacity of both shipper and consignee.

In May 2007, Dalcamo and his wife commenced the underlying action against MAT, Sony, Grubb, and Pilizota. In the course of the underlying action, Liberty Mutual Fire Insurance Company (Liberty), which had issued a policy of liability insurance to Grubb, incurred the cost of defending both Grubb and Pilizota. Liberty undertook the defense despite a provision in its policy that "if other valid and collectible insurance is available to the insured for a loss" covered under the subject endorsement, Liberty's obligations are limited to providing coverage "excess" to the other insurance if that other insurance continued in effect after the "retroactive date" identified in the Liberty policy, or where, as here, the Liberty policy did not identify such a retroactive date. In an order dated September 14, 2011, MAT and Sony were dismissed from the underlying action.

Liberty eventually learned that Pacific had issued Capital a liability insurance policy designated as number 3579-83-40 WBO, with a policy period from October 5, 2006 to October 5, 2007. Pacific's policy expressly provided that all designated owners, lessees, or contractors were "insureds" under the policy, and also provided "BLANKET" coverage, as additional insureds, for

"ALL OWNERS, REAL ESTATE MANAGING AGENTS, AND/OR LESSEES WITH RESPECT TO MOVES PERFORMED BY THE NAMED INSURED . . . with respect to their liability as owner, lessee or contractor arising out of [Capital's] ongoing operations performed for that insured." The certificate of liability insurance issued by Pacific to Capital expressly denominated "Grubb & Ellis Management Services Inc. As Agent for Owner" as an additional insured under the Pacific policy. Despite several requests by Liberty to Pacific, made between March 9, 2010, and November 3, 2010, that Pacific defend and indemnify Grubb and Pilizota, Pacific disclaimed coverage. Pacific informed Liberty that, in the absence of an express agreement naming Grubb or Grubb's employees as additional insureds, neither Grubb nor its employees would be deemed to be additional insureds under the policy and that, in any event, the "ongoing operations" conducted by Capital were on behalf of Sony, the owner, rather than Grubb, as Sony's managing agent.

In 2013, Liberty commenced this action against Pacific seeking to recover defense costs already incurred on behalf of Grubb and Pilizota, and a judgment declaring that Pacific was obligated, as the primary insurer, to defend and indemnify Grubb and Pilizota. On August 31, 2015, Liberty moved for summary judgment on the complaint in this action. On December 17, 2015, a jury found in favor of Grubb and Pilizota in the underlying

action, and the complaint was thereupon dismissed against them in that matter.

III. DISCUSSION

Since the jury's verdict rendered academic the issue of Pacific's obligation to indemnify Grubb or Pilizota, Liberty's motion is now limited to its causes of action for a judgment declaring that Pacific was obligated to defend Grubb and Pilizota and to recover the costs it incurred as an excess insurer in defending them. See Bradley v Earl B. Feiden, Inc., 8 NY3d 265, 274 (2007). Liberty contends that the language of the two policies in issue are unambiguous, and that Capital's performance of ongoing operations "for" Sony, as owner, triggered coverage for Grubb, as Sony's managing agent, and for Grubb's employees acting in the course of their employment with Grubb. Alternatively, Liberty contends that the subject accident occurred in the course of Capital's ongoing operations "for" Pilizota, who was named as a customer on the bill of lading, and, hence, "for" Grubb, as his employer. Liberty thus contends that, under either interpretation of the policy language, coverage under the Pacific policy was triggered, making Pacific the primary insurer and Liberty the excess insurer.

In opposition, Pacific contends that there was no contract for the provision of moving and storage services between Capital

and Grubb, but only between Capital and Sony and, hence, any work performed by Dalcamo in the course of his employment for Capital was performed for Sony. Pacific further contends that neither Grubb nor Pilizota directed the work of Dalcamo or Capital, that Grubb and Pilizota did not control the means and methods of that work, and did not possess authority to stop any unsafe work practices that may have been committed by Dalcamo and Capital. Pacific thus argues that the "ongoing operations performed" by Dalcamo and Capital were not "for" Grubb or Grubb's employees and, thus, coverage under the Pacific policy was never triggered. Pacific further contends that, since the jury found in favor of Grubb and Pilizota, no finding of fact was ever made as to their relationship with Capital and Dalcamo. The court rejects Pacific's contentions and its tortured construction of the Pacific policy, and agrees with Liberty that coverage under the Pacific policy was triggered.

Where the claims asserted against a defendant in a personal injury action are within policy coverage, the insurer must defend irrespective of ultimate liability. A declaration that an insurer is without obligation to defend a pending action may be made only if it could be concluded as a matter of law that there is no possible factual or legal basis on which the insurer might eventually be held to be obligated to indemnify the insured under any provision of the insurance policy. See Servidone Constr.

Corp. v Security Ins. Co., 64 NY2d 419, 423-424 (1985); Spoor-Lasher Co. v Aetna Cas. & Sur. Co., 39 NY2d 875, 876 (1976); see also Seaboard Sur. Co. v Gillette Co., 64 NY2d 304 (1984); Lionel Freedman, Inc. v Glens Falls Ins. Co., 27 NY2d 364, 368 (1971). Where, as here, all applicable policies have been made available for review (cf. Liberty Mut. Ins. Co. v Trystate Mech., Inc., 15 AD3d 236, 237 [1st Dept 2005]), priority of coverage can be determined as a matter of law. See 1515 Broadway Fee Owner, LLC v Seneca Ins. Co., Inc., 90 AD3d 436, 437 (1st Dept 2011); Sport Rock Intl. v Am. Cas. Co. of Reading, Pa., 65 AD3d 12, 21 (1st Dept 2009). An insurance policy, as a contract, must be construed to give effect to all of its terms. See Chase Manhattan Bank v New Hampshire Ins. Co., 25 AD3d 489, 490 (1st Dept 2006). Any ambiguity in the language of an insurance policy must be construed against the insurer and in favor of coverage. See Ace Wire & Cable Co. v Aetna Casualty & Surety Co., 60 NY2d 390, 398 (1983); Marshall v Tower Ins. Co. of N.Y., 44 AD3d 1014, 1015 (2nd Dept 2007).

There is no dispute that the Pacific policy falls within the Liberty policy's definition of "other insurance," and that, if coverage under the Pacific policy has been triggered, the Pacific policy, which provides for additional insured coverage, is primary in the underlying action, and the Liberty policy is excess. See Tishman Constr. Corp. of N.Y. v American Mfrs. Mut.

Ins. Co., 303 AD2d 323, 324 (1st Dept 2003); see also Pav-Lak Indus., Inc. v Arch Ins. Co., 56 AD3d 287, 288 (1st Dept 2008); Harleysville Ins. Co. v Travelers Ins. Co., 38 AD3d 1364, 1365 (4th Dept 2007).

Contrary to Pacific's contention, however, the absence of a contract between Grubb and Capital, or proof that Grubb actually directed or controlled the work of Dalcamo or Capital, is irrelevant to whether coverage was triggered here.

In the first instance, the bill of lading generated by Capital clearly indicated that, on the date of the accident, it was performing work "for" Pilizota as its customer. In a letter to its insurance adjuster, Pacific explained that that work was part of ongoing operations initiated by verbal requests. Hence, Grubb and Pilizota are covered as additional insureds under the Pacific policy. See Turner Constr. Co. v American Mfrs. Mut. Ins. Co., 2007 WL 2710114 (SD NY 2007). Moreover, Grubb was, at all relevant times, acting in its capacity as Sony's "managing agent" and, hence, was expressly identified as an additional insured under the Pacific policy. The Pacific policy enumerates owners, managing agents, and lessees as additional insureds (see Jenel Mgt. Corp. v Pacific Ins. Co., 55 AD3d 313 313 [1st Dept 2008]), and recites that coverage is triggered where a claim is made against an owner or lessee arising from operations conducted by Capital "for" that owner or lessee. The policy, however,

completely omits any discussion of when Capital's conduct or relationship with a managing agent triggers coverage for a managing agent. To the extent that this omission renders the policy language ambiguous, it must be construed in favor of coverage. In any event, effect must be given to all terms in the policy, including the term enumerating a managing agent as an additional insured. Pacific's strained construction would render that term meaningless and without effect. The Pacific policy must thus be read to cover claims against a managing agent such as Grubb where, as here, Capital conducted operations "for" the managing agent while the managing agent was acting on behalf of the owner, or where the named insured conducted operations "for" the owner through the managing agent. Work undertaken by Capital, whether "for" Pilizota directly, or "for" Sony, under Grubb's auspices as managing agent, gives rise to a reasonable expectation that Grubb and its employees would be deemed covered additional insureds under Pacific's policy in connection with claims against them that arose from that work. See Turner Constr. Co. v American Mfrs. Mut. Ins. Co., supra. This is so regardless of the jury's verdict finding that neither Grubb nor Pilizota negligently supervised the conduct that caused Dalcamo's injuries. See id.

Since Liberty established its prima facie entitlement to judgment as a matter of law on the cause of action for a judgment

declaring that Pacific was obligated to cover Grubb and Pilizota as the primary insurer in the underlying action, and Pacific failed to raise a triable issue of fact in opposition (see Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 [1985]; Zuckerman v City of New York, 49 NY2d 557, 560 [1980]), the court must grant that branch of Liberty's motion which is for summary judgment declaring that Pacific is so obligated.

Finally, Liberty correctly contends that it is entitled to reimbursement of all of the costs it has incurred in defending Grubb and Pilizota, from the commencement of the action until its duty to defend was discharged. Bradley v Earl B. Feiden, Inc., supra, at 275; Urban Resource Inst. v Nationwide Mut. Ins. Co., 191 AD2d 261, 262 (1st Dept 1993). Since Liberty established, prima facie, that it incurred $136,593.07 in defense costs through March 2014, and Pacific failed to raise a triable issue of fact in opposition, Liberty is entitled to summary judgment on its cause of action to recover that amount from Pacific.

IV. CONCLUSION

Accordingly, it is

ORDERED that those branches of the motion of Liberty Mutual Fire Insurance Company which are for summary judgment declaring that Pacific Indemnity Company was obligated, as the primary

insurer, to defend Grubb & Ellis Management Services, Inc., and Lee Pilizota, in an underlying personal injury action entitled Dalcamo v Grubb & Ellis Mgt. Servs., Inc., commenced in the Supreme Court, New York County, under Index No. 107169/2007, and on the cause of action to recover the costs of defending Grubb & Ellis Management Services, Inc., and Lee Pilizota in that action are granted, the motion is otherwise denied as academic, and it is declared that Pacific Indemnity Company was obligated to defend Grubb & Ellis Management Services, Inc., and Lee Pilizota, as the primary insurer in the underlying personal injury action, and is obligated to reimburse Liberty Mutual Fire Insurance Company, as the excess insurer, the sum of $136,593.07 for costs incurred in the defense of Grubb & Ellis Management Services, Inc., and Lee Pilizota in the underlying action; and it is further,

ORDERED that the Clerk of the court is directed to enter judgment accordingly.

This constitutes the Decision and Order of the court

Dated: July 28, 2016

J.S.C.

HON. NANCY M. BANNON