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

PRESENT: CYNTHIA S. KERN J.S.C. Justice

PART 52

Index Number : 400030/2010
CITY OF NEW YORK
vs.
STARNET INSURANCE CO.
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT

INDEX NO. 400030/10

MOTION DATE

MOTION SEQ. NO. 001

MOTION CAL. NO.

n this motion to/for

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed decision.

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Dated: 6/21/10

CYNTHIA S. KERN J.S.C.
J.S.C.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 52

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THE CITY OF NEW YORK,

Plaintiff,

Index No. 400030/10

-against-

DECISION/ORDER

STARNET INSURANCE COMPANY,

Defendants.

----------x

HON. CYNTHIA S. KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for :

Papers	Numbered
Notice of Motion and Affidavits Annexed	1
Notice of Cross Motion and Answering Affidavits	2
Affirmations in Opposition to the Cross-Motion	3
Replying Affidavits	4
Exhibits	5

Plaintiff the City of New York (the "City") commenced this action seeking a declaratory judgment that defendant StarNet Insurance Company ("StarNet") has a duty to defend the City and to reimburse the City for attorneys' fees incurred in relation to a personal injury action against the City. The City now moves for summary judgment on all of its claims stated above and StarNet cross-moves for summary judgment dismissing the Complaint and seeking a declaration that StarNet has neither an obligation to defend nor indemnify the City in the underlying personal injury action.

The relevant facts are as follows. On or about February 2, 2005, Richmond Elevator ("Richmond") entered into a five-year contract (the "Contract") with the NYC Board of

Education (the "DOE") to maintain, service and repair elevators at certain New York City public schools. The Contract provides that Richmond must "indemnify and hold the [DOE] and the City harmless from any and all claims and judgments for damages and from costs and expenses" in the event that "persons or property of others sustain loss, damage or injury resulting directly or indirectly from [Richmond's or its subcontractor' work] in their performance of this contract." The Contract also requires that Richmond obtain "Public (General) Liability Insurance for Bodily Injury and Property Damage to protect [Richmond and its subcontractors]" from claims as well as an "Owner's (Contractors') Protective Liability Insurance Policy for Bodily Injury and Property Damage to protect the [DOE] and THE CITY" against claims. The instructions to bidders for the Contract specified that "the contractor must obtain and maintain separate insurance for Public (General) Liability and Owners' (Contractors') Protective Liability."

On or about May 1, 2008, StarNet's insurance broker issued a Certificate of Insurance to the City stating that the City and the DOE were additional insureds under Richmond's general liability insurance policy (which covered the period December 31, 2007 through December 31, 2008) (the "Policy") pursuant to a Blanket Additional Insured Endorsement. That endorsement provides that the policy included as an additional insured "any person or organization for whom you are performing operations if... the addition of the person or organization as an additional insured is required by the terms of a written contract... that is in effect... during the term of the policy..."

On or about April 18, 2008, April Bailey was allegedly injured when an elevator at one of the schools serviced by Richmond pursuant to the Contract misleveled. Ms. Bailey commenced

an action against the City and the DOE (the "Bailey Action") on or about June 2, 2009. By letter dated June 17, 2009, the New York City Law Department tendered the defense of the Bailey Action to StarNet. On June 23, 2009, Berkley Risk Administrators Company, LLC ("BRAC") disclaimed on StarNet's behalf, claiming that "there is no indication that our insured was negligent in any way." The City again attempted to tender the defense of the Bailey action to StarNet by letter dated July 2, 2009. BRAC again refused to defend the action on behalf of StarNet.

The City is entitled to summary judgment as it is covered by the terms of the Blanket Additional Insured Endorsement and is thus an additional insured under the Policy. That endorsement names as an additional insured "any person or organization for whom you are performing operations... if the addition of the person or organization as an additional insured is required by the terms of a written contract... that is in effect... during the term of the policy." Richmond was undoubtedly doing work for the City and the DOE. In addition, the Contract, which was in effect during the term of the Policy, required that the City and the Board be covered by insurance procured by Richmond for personal injury claims. Thus, the requirements of the endorsement are met.

StarNet's argument that the Contract does not require that the City and DOE be named as additional insureds to this particular policy but, rather, to an Owners' liability policy, is without merit. The First Department considered a similar issue in *New York City Housing Auth. v National Union Fire Ins. Co.*, 270 A.D.2d 123, 124 (1st Dept 2000). There, an elevator service contract required the contractor to procure "owner's liability insurance" and name the plaintiff as

an additional insured. The contractor obtained "comprehensive liability insurance" instead. The First Department held that "the fact that the insurance was denominated in the contract as owner's liability insurance rather than comprehensive liability insurance does not bring into question the parties' clear intent that plaintiff be provided with insurance protecting it against [personal injury] claims." The First Department went on to hold that plaintiff was therefore an additional insured under an endorsement much like the one at issue in the instant case. Although it is true, as StarNet points out, that *National Union* did not involve a requirement for two types or policies of insurance, the principle is the same. The "nomenclature" of the insurance policy is not determinative. It is the intent of the parties to protect the plaintiff from personal injury claims that controls. *See id.* In the instant case, as in *National Union*, it was the clear intent of the parties that plaintiff be protected from personal injury claims resulting directly or indirectly from Richmond's or its subcontractors' work pursuant to the Contract. Therefore, the fact that the endorsement at issue is part of a general commercial liability policy rather than an owner's protective liability policy is not determinative. Moreover, the requirement in the instructions to bidders that two separate insurance policies be procured is not controlling either. Rather, it is the language of the Contract itself, which requires both types of insurance but not specifically two separate policies, which governs. Finally, although the court finds the Contract unambiguous, to the extent it is ambiguous, "ambiguities in an insurance policy must be construed against the insurer." *Thomas J. Lipton, Inc. v. Liberty Mut. Ins. Co.*, 34 N.Y.2d 356, 357 (1974).

Accordingly, the City's motion for summary judgment for a declaratory judgment seeking a judicial declaration that StarNet has a duty to defend the City and to reimburse the City for attorney's fees and expenses incurred to date in the underlying *Bailey* action is granted.

StarNet's cross-motion for summary judgment is denied. This constitutes the decision, order and judgment of the court.

Dated: 6/21/10

Enter: _____
J.S.C.

CYNTHIA S. KERN
J.S.C.