[* 1]

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

PRESENT: MANUEL J. MENDEZ PART 13
Justice

333 FIFTH AVENUE ASSOCIATES, LLC and KHEDOURI ASSOCIATES, LLC,
Plaintiffs,

-against-

UTICA FIRST INSURANCE COMPANY, SPN INC., TOWER INSURANCE COMPANY OF NEW YORK PERFUME VALLEY GIFT SHOP, INC. and MANUEL MENDIETA,
Defendants.

INDEX NO. 116261/09
MOTION DATE 02-29-2012
MOTION SEQ. NO. 001
MOTION CAL. NO.

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).

The following papers, numbered 1 to 10 were read on this motion to/for summary judgment and cross-motions for summary judgment

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1 - 4 , 5 - 6, 8 - 9
Answering Affidavits — Exhibits ____cross motion	7
Replying Affidavits	10

Cross-Motion: X Yes No

Upon a reading of the foregoing papers cited papers, it is ordered that TOWER INSURANCE COMPANY OF NEW YORK's motion for summary judgment, is granted. UTICA FIRST INSURANCE COMPANY's cross-motion for summary judgment is granted. Plaintiffs' cross-motion for summary judgment, is denied.

An underlying bodily injury action was commenced by co-defendant Manuel Mendieta in Supreme Court, Kings County, under Index #21904/05. He sought to recover damages for personal injuries sustained on March 2, 2005, as a result of a fall down an elevator shaft while employed by SPN, Inc. (hereinafter referred to as "SPN"). An employee of Perfume Valley Gift Shop, Inc. (hereinafter referred to as "Perfume Valley") provided the elevator key to SPN's employee. SPN did not have the elevator key although it was given one from the plaintiffs and borrowed Perfume Valley's key to access its storage area in the basement. The elevator key opened the doors on the ground floor. Manuel Medieta started to enter through the opened doors, but failed to notice the elevator was not there and fell to the basement of the building.

On September 15, 2009, the Appellate Division, Second Department determined that Indemnification Agreements between the plaintiffs, SPN and Perfume Valley, for the use of the elevator key violated General Obligations Law §5-321, and were unenforceable (Mot. Exh. J). On November 18, 2009, plaintiffs brought this declaratory judgment based on provisions in the leases (Mot. Exh. A).

On October 21, 2010, a settlement agreement was reached in the personal injury action for $600,000.00 (Mot. Exh. K). Tower Insurance Company of New York (hereinafter referred to as "Tower") is the carrier for SPN. Utica First Insurance

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

Company (hereinafter referred to as "Utica First"), is the insurance carrier for Perfume Valley. Utica Mutual Insurance Company (hereinafter referred to as "Utica Mutual"), is the insurance carrier for the plaintiffs. Pursuant to the settlement agreement, each carrier agreed to provisionally fund $200,000.00 to settle the underlying action. The settlement agreement states that this declaratory judgment action will determine each insurance carrier's ultimate share of the total settlement amount, the respective duties to defend and indemnify the landlord, and the priority of available insurance coverage for the benefit of the landlord.

The settlement agreement also states that the landlord's claims against SPN and Perfume Valley and all cross-claims asserted by or against SPN and Perfume Valley in this declaratory judgment action, will be discontinued with prejudice.

Tower seeks summary judgment because the plaintiffs do not qualify as an additional insured and there is no duty to defend or indemnify. Tower claims it timely and properly disclaimed coverage.

Utica First cross-moves for summary judgment claiming that the plaintiffs were not insured as part of their primary policy, only the umbrella policy. Utica First also claims that its umbrella or excess policy only applies to claims over the one million dollar primary policy issued by Utica Mutual and there is no coverage.

Plaintiffs oppose both Tower and Utica First's motions and cross-move for summary judgment based on Tower and Utica First's duty to defend and indemnify pursuant to the lease.

In order to prevail on a motion for summary judgment pursuant to CPLR §3212, the proponent must make a prima facie showing of entitlement to judgment as a matter of law, through admissible evidence, eliminating all material issues of fact (Klein v. City of New York, 89 N.Y. 2d 833, 675 N.E. 2d 548, 652 N.Y.S. 2d 723 [1996] and Alvarez v. Prospect Hospital, 68 N.Y. 2d 320, 501 N.E. 2d 572, 508 N.Y.S. 2d 923 [1986]). Once the moving party has satisfied these standards, the burden shifts to the opponent to produce contrary evidence in admissible form, sufficient to require a trial of material factual issues (Amatulli v. Delhi Constr. Corp., 77 N.Y. 2d 525, 571 N.E. 2d 645; 569 N.Y.S. 2d 337 [1999]).

An insurer's duty to defend additional insureds and named insureds, "arise whenever the allegations within the four corners of the underlying complaint give rise to a covered claim"(Worth Constr. Co., Inc. v. Admiral Ins. Co., 10 N.Y. 3d 411, 888 N.E. 2d 1043, 859 N.Y.S. 2d 101 [2008]). An insurer is required to defend if there is a possibility of coverage, regardless of whether the claim is, "groundless, false or baseless" (Automobile Ins. Co. of Hartford v. Cook, 7 N.Y. 3d 131, 850 N.E. 2d 1152, 818 N.Y.S. 2d 176 [2006]). To be relieved of its duty to defend, an insurer has the burden of establishing that the causes of action are completely within an exclusion, there is no other reasonable interpretation and there is no factual or legal basis upon which the insurer may be obligated to indemnify the insured (Frontier Insulation Contrs.v. Merchants Mut. Ins. Co., 91 N.Y. 2d 169, 690 N.E. 2d 866, 667 N.Y.S. 2d 982 [1997]). The duty of an insurer to defend based on the possibility of liability is broader than the duty to indemnify. Indemnification is based on the insured's actual liability to a third party (Argo Corp. v. Greater N.Y. Mut. Ins. Co., 4 N.Y. 3d 332. 827 N.E. 2d 762, 794 N.Y.S. 2d 704 [2005]).

The complaint alleges that pursuant to the lease, both Perfume Valley and SPN were required to obtain and maintain an insurance policy naming the plaintiffs as additional insureds. Perfume Valley and SPN were to obtain and maintain an insurance policy providing general liability coverage applicable to all of the claims asserted by Manuel Mendieta in the personal injury action. The complaint also alleges that Perfume Valley and SPN 's primary policy require Tower and Utica First to provide coverage, defense and indemnification to the plaintiffs which was not provided (Mot. Exh. A).

The complaint relies on paragraph 8 of both Perfume Valley and SPN's lease to establish liability (Mot. Exhs. C & D). Pursuant to Paragraph 8 (b) of the leases the tenant is required to obtain Public Liability and Property Damage Insurance naming the plaintiffs as additional insureds. Paragraph 8(a) states in relevant part,

> "Landlord or its agents shall not be liable for any damage to property ...nor for any injury or damage to persons or property resulting from any cause of whatsoever nature, unless caused by or due to the negligence of Landlord, its agents, servants or employees..."

Tower's disclaimer relies on policy form CG 01 63 09 99, of its Commercial General Liability Coverage, which states in relevant part,

> "...1. Insuring Agreement
>
> a. We will pay those sums that the insured becomes legally obligated to pay as damages because of 'bodily injury'...to which this insurance applies. We will have the right and duty to defend the insured against any 'suit' seeking those damages...However, we will have no duty to defend the insured against any 'suit' seeking damages for 'bodily injury' or 'property damage' to which this insurance does not apply..."

Tower also relies on policy form CG 20 26 11 85, an endorsement which changes the terms of the policy concerning additional insured - designated persons, it states in relevant part,

> "WHO IS AN INSURED (Section II) is amended to include as an Insured the persons or organization shown in the Schedule as an insured but only with respect to liability arising out of your operations or premises owned by or rented to you."

(Aff. of Lowell Aptman, Exhs. A & B)

Tower claims that the additional insured endorsement is not triggered because Perfume Valley was not named as a defendant in Manuel Mendieta's personal injury action and there were no causes of action for negligence brought against Perfume Valley in the underlying action. It also claims Manuel Mendieta was SPN's employee, the elevator doors were opened by an employee of SPN and the accident did not occur on Perfume Valley's leased premises. The elevator and shaft were neither owned or rented by Perfume Valley. Perfume Valley was only brought into the Kings County action by the plaintiffs as third parties based on an indemnification agreement that was

found invalid by the September 15, 2009 Decision of the Appellate Division, Second Department (Mot. Exhs. H, I & J).

The Appellate Division Second Department found that the plaintiffs in this action were negligent in maintaining what they knew to be an unsafe condition on the premises and that Manuel Mendietta's accident was foreseeable. The decision also found that as to SPN's liability there remained an issue of fact as to whether Manuel Mendietta, acted in a manner that severed the, "... causal connections between the owners' alleged negligence and the plaintiff's (Manuel Mendietta's) injury" (Manuel Mendietta v. 333 Fifth Ave. Assn., 65 A.D. 3d 1097, 885 N.Y.S. 2d 350 [N.Y.A.D. 2nd Dept. 2009]).

Plaintiffs state that the disclaimer was improper based on the provisions of the lease. They claim Perfume Valley was negligent and liable because it provided the key to SPN's employee and the key was exclusively given to Perfume Valley. Plaintiffs also state that Tower waived its claim of timely disclaimer based on lack of notice.

Upon review of the papers submitted this Court finds that no claims of negligence were asserted against Perfume Valley in the underlying personal injury action brought by Manuel Mendietta. Plaintiffs have not established Perfume Valley was negligent. Plaintiffs have failed to establish that they were not negligent so that the lease provision would require coverage. Tower's policy does not cover the plaintiffs for the causes of action asserted in the underlying action and disclaimer was timely.

Utica First claims that the plaintiffs are only covered under their umbrella policy issued to SPN under policy number ULC 1244682 00. The umbrella policy does not apply to claims under one million dollars and since the case settled for $600,000.00 it has not been triggered. The Utica First primary policy issued to SPN under policy number BOP 1244681 00, does not contain an additional insured endorsement and there is no reference to the plaintiffs anywhere else on the policy, including the Declaration page (Utica First's Cross-Mot. Exh. A).

Plaintiffs state Utica First's primary policy includes the plaintiffs as an additional insured pursuant to the Certificate of Insurance and two letters identifying them as additional insured sent by Jeffrey Mount, a claims adjuster (Plaintiff's Cross-Mot. Exhs. O &Q). Plaintiff's also claim that indemnification under the lease agreement does not fall under the primary policy exclusions and they should be covered.

A party claiming insurance coverage has the burden of establishing entitlement. A party that is not named as an additional insured on the face of a policy is not entitled to coverage. A certificate of insurance does not confer coverage, or establish as conclusive proof that coverage exists. A carrier is not required to disclaim coverage when there is no coverage in existence (Tribeca Broadway Associates, LLC v. Mount Vernon Fire Ins. Co., 5 A.D. 3d 198, 744 N.Y.S. 2d 11 [N.Y.A.D. 1st Dept., 2004]).

Plaintiffs cannot establish based on the Certificate of Insurance alone that the primary policy included the plaintiffs as additional insureds. The lack of a policy exclusion does not establish that the plaintiffs were named as additional insureds under Utica First's primary policy. The claims adjuster did not bind the insurance company and his letters did not alter the fact that the primary policy does not have a provision naming plaintiffs as additional insureds.

Upon a review of all the papers submitted this Court finds that Utica First has met its burden of proof and the plaintiffs were not additional insureds under SPN's primary policy.

Accordingly, it is ORDERED that the TOWER INSURANCE COMPANY's motion for summary judgment, is granted, and it is further,

ADJUDGED and DECLARED that TOWER INSURANCE COMPANY was not required to provide coverage, indemnify or provide a defense to the plaintiffs in the Supreme Court, Kings County action filed under Index #21904/05, and it is further,

ADJUDGED and DECLARED that TOWER INSURANCE COMPANY may enter judgment against the plaintiffs for $200,000.00 provisionally paid towards settlement of the Supreme Court, Kings County action filed under Index #21904/05, together with costs and disbursements as taxed by the Clerk, and it is further,

ORDERED that the UTICA FIRST INSURANCE COMPANY's motion for summary judgment, is granted, and it is further

ADJUDGED and DECLARED that UTICA FIRST INSURANCE COMPANY may enter judgment against the plaintiffs for $200,000.00 provisionally paid towards settlement of the Supreme Court, Kings County action filed under Index #21904/05, together with costs and disbursements as taxed by the Clerk, and it is further,

ORDERED that the plaintiffs' cross- motion pursuant to CPLR §3212 for summary judgment, is denied, and it is further,

ORDERED that pursuant to stipulation the claims and cross-claims against SPN, INC. and PERFUME VALLEY GIFT SHOP have been discontinued with prejudice and there are no causes of action asserted against MANUEL MENDIETA, named a necessary party to this action, and as to these parties, the complaint is dismissed .

This constitutes the decision, order and judgment of this court.

Dated: April 13, 2012

ENTER:

MANUEL J. MENDEZ
J.S.C.

MANUEL J. MENDEZ
J.S.C.

Check one: X FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

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).