SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU: I.A. PART 13

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THE WYNDHAM EAST CONDOMINIUMS AT GARDEN CITY,

Plaintiff,

- against -

DECISION AND ORDER

Index No: 00337/12

THE BRICKMAN GROUP LTD., LLC and ACE AMERICAN INSURANCE COMPANY,

Motion Seq. No: 001, 003 & 004
Original Return Date: 04-06-12

Defendants.

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P R E S E N T :
HON. JOEL K. ASARCH,
Justice of the Supreme Court.

The following named papers numbered 1 to 14 were submitted on these Motions and Cross-Motions on May 25, 2012:

	Papers numbered
Notice of Motion and Affirmation (Seq. 001)	1-2
Memorandum of Law in Support	3
Notice of Cross Motion, Affirmation and Memorandum of Law (Seq. 003)	4-6
Affirmation and Affidavits (2) in Opposition of Cross Motion and in Further Support of Second Cross-Motion	7-9
Memorandum of Law in Opposition to Plaintiffs	10
Reply Affirmation	11
Notice of Cross Motion (Seq. 004)	12
Memorandum of Law in Further Support	13
Affirmation in Opposition	14

The motion by defendant The Brickman Group Ltd., LLC (Brickman) pursuant to CPLR 3211(a)(4) for an Order dismissing the complaint as to said defendant (Motion Sequence 001); and

the cross-motion by plaintiff Wyndham East Condominiums at Garden City (Wyndham) pursuant to CPLR 3212 for an Order granting summary judgment in favor of plaintiff, declaring that plaintiff is entitled to insurance coverage, defense and indemnification by defendant American Insurance Company (ACE), and reimbursement of the amount expended in defense against the underlying personal injury action (Motion Sequence 003); and the cross-motion by defendant ACE pursuant to CPLR 3212 for summary judgment declaring that plaintiff Wyndham does not qualify as an additional insured under the policy of insurance issued by defendant ACE to defendant Brickman and dismissing the complaint (Motion Sequence 004), are decided as follows:

This action arises in connection with a lawsuit against Wyndham, the plaintiff herein, brought by an employee of defendant Brickman (Wilver Chavez)[1]. Wilver Chavez allegedly sustained injuries on December 5, 2007 when he fell off a ladder while installing holiday lights on trees located at The Wyndham East Condominium complex pursuant to a work authorization entered into by Wyndham and Brickman on November 29, 2007. The theories of liability set forth in the complaint are based on negligence and violations of Labor Law §§ 200, 240 and 241. On August 12, 2010, plaintiff Wyndham filed a third-party complaint against Brickman in the underlying *Chavez* action, asserting claims sounding in contribution, common law indemnity, contractual indemnity and breach of contract.

Due to the failure of defendant ACE to assume the defense of Wyndham in the underlying personal injury action, plaintiff Wyndham commenced the instant declaratory judgment action on January 12, 2012, seeking a declaration that plaintiff Wyndham is an additional insured on the

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[1] The action, *Wilver Chavez v Wyndham East of Garden City,* was commenced in Supreme Court: Nassau County on March 16, 2010 under Index No. 5217/10.

general liability insurance policy issued by defendant ACE to defendant Brickman (bearing policy No. *********6725R); that pursuant to said policy, defendant ACE is required to defend, insure and indemnify plaintiff Wyndham *vis-a-vis the Chavez* action, and reimburse plaintiff for any and all sums paid by plaintiff in defending against the *Chavez* action; and defendant Brickman is obligated to indemnify plaintiff Wyndham for any judgment awarded against plaintiff herein in the *Chavez* action based on an insurance procurement clause contained in the Rider to the Landscape Maintenance Agreement dated as of November 18, 2005.

Defendant Brickman has moved to dismiss the complaint pursuant to CPLR 32121(a)(4) predicated on the grounds that the claims asserted against defendant Brickman are duplicative of the claims asserted against said defendant by plaintiff Wyndham in the second and third causes of action of the third-party complaint interposed by Wyndham in the *Chavez* action.

Pursuant to CPLR 3211(a)(4), a Court has broad discretion as to the disposition of an action when another action is pending. *Morgan Barrington Fin. Servs., Inc., v Nahzi*, 85 AD3d 1135 [2nd Dept 2011]. To warrant dismissal, the two actions must be sufficiently similar and the relief sought must be the same or substantially the same. *Simonetti v Larson*, 44 AD3d 1028 [2nd Dept 2007]. In considering whether to dismiss a later filed action in deference to one filed earlier, it is not necessary that the precise legal theories presented in the first action also be presented in the second action. *Cherico, Cherico & Assoc. v Midollo*, 67 AD3d 622 [2nd Dept 2009]. Rather, the critical element is that the pleadings in both actions are based on the same actionable wrongs. *DAIJ, Inc. v Roth*, 85 AD3d 959, 960 [2nd Dept 2011]. A difference in the parties in the two competing lawsuits will not defeat a CPLR 3211(a)(4) motion where both suits arise out of the same subject matter and series of alleged wrongs. *ACE Fire Underwriters Ins. Co. v ITT Indus., Inc.*, 14 Misc 3d 1211(A),

affirmed 44 AD3d 408 [1st Dept]. 2007]. While complete identity of parties is not a necessity for dismissal under CPLR 3211(a)(4), there must be, at least, a substantial identity of parties, i.e., at least one plaintiff and one defendant common in each action. *Proietto v Donohue*, 189 AD2d 807 [2nd Dept 1993].

Given the substantial identity of parties, seeking the same, or substantially the same relief in both the third-party complaint in the *Chavez* action and the action presently before this Court, defendant Brickman's motion pursuant to CPLR 3211(a)(4) to dismiss the complaint herein as to said defendant is granted. A comparison of the complaint in this action with the third-party complaint establishes that both arise from the same actionable wrong and plaintiff's indemnification and breach of contract claims against defendant Brickman in this action are substantially similar, if not identical, to the indemnification and breach of contract claims asserted by Wyndham against defendant Brickman in the third-party complaint in the *Chavez* action.

Since the plaintiff Wilver Chavez was injured while performing work as an employee of defendant Brickman pursuant to defendant Brickman's contract with plaintiff Wyndham, Wyndham contends that defendant ACE is obligated to defend it the *Chavez* action.

Despite due demand by plaintiff Wyndham's insurance carrier,[2] defendant ACE has refused to honor its alleged obligation to defend and indemnify plaintiff, contending that the work authorization was not a part of the Landscape Management Agreement and, therefore, was not covered by the terms and conditions of that agreement.

In support of its cross-motion for summary judgment declaring that it is entitled to insurance

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[2]Plaintiff Wyndham is named as a certificate holder on a certificate of insurance dated June 20, 2007 issued by defendant ACE.

coverage, defense and indemnification by defendant ACE, plaintiff relies on the Rider to the Landscape Management Agreement wherein defendant Brickman agreed:

> "to indemnify, defend and hold harmless Owner, his Managing Agent, their respective employees and agents from any and all claims, suits, damages, liabilities, professional fees, including attorney's fees, costs, court costs, expenses and disbursements related to death, personal injury or property damage."

Plaintiff Wyndham asserts that since Wilver Chavez was injured while performing work as an employee of defendant Brickman at the Wyndham premises pursuant to Brickman's contract with plaintiff herein, defendant ACE is required to insure and defend Wyndham under the general liability insurance policy issued by ACE to Brickman, on which plaintiff Wyndham is an additional insured. In this regard, plaintiff Wyndham asserts that if a complaint contains any facts or allegations which bring the claim even potentially within the protection purchased, the insured is obligated to defend.

Defendant ACE opposes the Wyndham's cross-motion and has moved for summary judgment dismissing plaintiff's complaint. Defendant argues that defendant Brickman was not obligated to obtain insurance coverage naming plaintiff as an additional insured *vis-a-vis* the installation of holiday lights by defendant Brickman at the Wyndham complex pursuant to the work authorization dated November 29, 2007. Defendant ACE further argues that there is no provision in the work authorization, an entirely separate and distinct contract from the Landscape Management Agreement, requiring defendant Brickman to procure liability insurance naming plaintiff Wyndham as an additional insured nor a provision which incorporates the insurance procurement provision of the Landscape Management Agreement into the work authorization.

While defendants ACE and Brickman maintain that plaintiff Wyndham is not entitled to coverage under the ACE policy as an additional insured because defendant Brickman did not

perform the holiday light work under a contract or agreement that required defendant Brickman to procure liability insurance naming plaintiff as an additional insured, the argument is unavailing.

Plaintiff Wyndham contends, and this Court agrees, that the work authorization is not a separate and distinct contract. Rather, it is a written order for additional work to be performed by defendant Brickman to which the provisions of the Rider to the Landscape Management Agreement apply as set forth in paragraph 5, which provides as follows:

> "It is the intent of this contract that Contractor provide all materials, equipment and labor necessary to perform the work. If the Owner orders, from time to time, additional work or changes, by altering, adding to, or deducting from the work, the provisions of this Agreement shall apply to such additional work. No order for additional work or changes given to the Contractor (and no cancellation or any such order) shall be deemed authorized or to bind or obligate the Owner in any way unless same shall have been previously signed by Owner."

In general, it is the Court which bears the responsibility of determining the rights and obligations of the parties under an insurance contract in accordance with the specific language of the particular policy. *Jahier v Liberty Mut. Group*, 64 AD3d 683, 684 [2nd Dept 2009]. Unambiguous provisions must be given their plain and ordinary meaning. *Herrnsdorf v Bernard Janowitz Const. Corp.*, 96 AD3d 1011 [2nd Dept 2011]. It is the insured's burden to establish coverage and the insurer's burden to prove the applicability of an exclusion. *Rhodes v Liberty Mut. Ins. Co.*, 67 AD3d 881, 881 [2nd Dept 2009]. An insurer's duty to defend, which is broader than its duty to indemnify, arises whenever the allegations in the complaint against the insured fall within the scope of the risk undertaken by the insured, regardless of how false or groundless those allegations might be. *Rhodes v Liberty Mut. Ins. Co.*, 67 AD3d 881, 882 [2nd Dept 2009].

To be relieved of its duty to defend on the basis of a policy exclusion, an insurer must

establish that the exclusion is stated in clear and unmistakable language, is subject to no other reasonable interpretation and applies in the particular case. *Great Am. Restoration Servs., Inc. v Scottsdale Ins. Co.*, 73 AD3d 773, 776 [2nd Dept 2010] (citations and quotation marks omitted). Any ambiguity in an exclusionary clause must be construed most strongly against the insurer. *Ace Wire & Cable Co. v Aetna Cas. & Sur. Co.*, 60 NY2d 390, 398 [1983]; *Lancer Ins. Co. v Marine Motor Sales, Inc.*, 84 AD3d 1318 [2nd Dept 2011], *lv to appeal denied* 17 NY3d 714 [2011]. The test for ambiguity is whether the language of the insurance contract is susceptible of two reasonable interpretations. *State of New York v Home Indem. Co.*, 66 NY2d 669, 671 [1985].

Although, as defendant ACE alleges, there is nothing in the work authorization that requires defendant Brickman to procure liability insurance naming plaintiff Wyndham as an additional insured in connection with the holiday lighting installation, the quoted language of paragraph 5 of the Rider clearly states that the provisions of the Landscape Management Agreement apply to additional work performed pursuit to a written work order. As such, defendant ACE's argument that plaintiff Wyndham is not entitled to coverage as an additional insured because defendant Brickman did not perform the holiday light work under a contract and/or pursuant to an agreement that required defendant Brickman to procure liability insurance naming plaintiff Wyndham as an additional insured lacks merit. Similarly lacking merit are its contentions that the work authorization is a separate contract and defendant Brickman's performance of holiday lighting work under the work authorization does not fall within the ambit of the "scope of the work" provision of the Landscape Management Agreement, which includes: "maintenance, care and housekeeping of all landscaped areas, but specifically excludes paved areas, lights, signs and fences." The language on which defendant ACE relies does not clearly and unmistakenly exclude from coverage the

installation of holiday lights pursuant to a written work authorization for additional work as provided for in the Landscape Management Agreement.

Accordingly, after due deliberation, it is

ORDERED, that the motion by defendant Brickman to dismiss the complaint against it is **granted**, as is the cross-motion by plaintiff for summary judgment. Since the work related to the installation of holiday lighting is part of the scope of work covered by the terms of the Landscape Management Agreement, **it is hereby declared** that plaintiff Wyndham qualifies as an additional insured under the ACE policy issued to defendant Brickman and said plaintiff is entitled to indemnification and defense from defendant ACE in the *Chavez* action and to be reimbursed for the amount expended thus far in defense against the *Chavez* action. The cross-motion by defendant ACE for summary judgment is **denied**.

Settle judgment.

This constitutes the Decision and Order of the Court.

Dated: Mineola, New York
July 25, 2012

ENTER:

JOEL K. ASARCH, J.S.C.

Copies mailed to:

Hammill, O'Brien, Croutier, Dempsey, Pender & Koehler, P.C.
Attorneys for Plaintiff

Sedgwick, LLP
Attorneys for Defendants