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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: SALIANN SCARPULLA Justice

PART 19

Index Number : 403335/2003
CITY OF NEW YORK
vs.
WELSBACH ELECTRICAL
SEQUENCE NUMBER : 013
SUMMARY JUDGMENT

INDEX NO. 403335/03

MOTION DATE

MOTION SEQ. NO. 013

The following papers, numbered 1 to ____, were read on this motion to/for SUMMARY JUDGMENT

Notice of Motion/Order to Show Cause — Affidavits — Exhibits ____ | No(s). ____

Answering Affidavits — Exhibits ____ | No(s). ____

Replying Affidavits ____ | No(s). ____

Upon the foregoing papers, it is ordered that this motion is DETERMINED IN ACCORDANCE WITH THE ACCOMPANYING DECISION/ORDER.

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

Dated: 12/14/12

SALIANN SCARPULLA, J.S.C.

1. CHECK ONE: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION

2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER

3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER

☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 19

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THE CITY OF NEW YORK,

Plaintiff,

- against -

WELSBACH ELECTRIC CORP. AND INSURANCE COMPANY OF NORTH AMERICA,

Defendants.

---------- X

Index Number: 403335/03
Submission Date: 9/5/12

DECISION and ORDER

For Plaintiff:
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New York, NY 10007
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For Defendant Insurance Company of North America/CIC:
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For Defendant Welsbach Electric Corp.:
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Papers considered in review of this motion for summary judgment/cross-motion for summary judgment:

Notice of Motion/Affirm. of Counsel in Supp.....1
Memo. of Law in Opp. to Motion/Affirm. of Counsel in Opp.....2
Reply Brief in Supp 3

HON SALIANN SCARPULLA, J.:

In this action, plaintiff The City of New York (the "City") seeks indemnification from defendants Welsbach Electric Corp. ("Welsbach") and Insurance Company of North America, now known as Century Indemnity Corp. ("CIC"), to recover losses from a tort damages judgment rendered against the City. CIC now moves for summary judgment dismissing the City's complaint pursuant to CPLR § 3212.

Background

A. Insurance Policy

On or about October 1, 1992, the City and Welsbach entered into a written contract, in which Welsbach agreed to maintain certain traffic signal lights in Queens County (the "Contract"). As part of the Contract, Welsbach agreed to obtain insurance coverage to protect against "injuries to persons or damage to property which may arise from or in connection with the performance of the work" by Welsbach.

In particular, the Contract required Welsbach to obtain a commercial general liability (CGL) insurance policy to "protect the City, the Department of Transportation and the Contractor and his/her subcontractors performing work at the site from claims for property damage and/or bodily injury which may arise from operations under this contract." The Contract also required Welsbach to name the City of New York and Department of Transportation as additional insureds. The Contract stated that Welsbach must maintain the CGL policy "during the life of the contract" from October 1, 1993 to October 1, 1994.

In accordance with the Contract, Welsbach obtained a CGL policy from Insurance Company of North America, CIC's predecessor corporation, in the amount of $2 million dollars, effective October 1, 1993 to October 1, 1994 (the "Policy"). Section I of the Policy entitled "Coverage A. Bodily Injury and Property Damage Liability" provides that CIC "will pay those sums that the Insured becomes legally obligated to pay as damages

because of 'bodily injury' or 'property damage' to which this insurance applies." Coverage A also contains a list of fourteen exclusions under which CIC is not obligated to pay bodily injury or property damage claims.

The Policy contains an Endorsement 4, which amends "Who Is An Insured (section II)" to include, as an additional insured, any municipality or corporation to which Welsbach is "obligated by virtue of a written contract to provide insurance as provided hereunder, but only as respects liability arising out of your [Welsbach's] operation."

B. Instant Action

Pursuant to its duties under the Contract, Welsbach performed and completed repairs on a traffic signal light on October 10, 1993. The next day, on October 11, an accident occurred between two vehicles involving a signal light repaired by Welsbach. The driver and passenger from one of the vehicles, who suffered bodily injuries from the accident, commenced a tort action against the City (*Angerome v. City of New York*, New York Supreme Court, Queens County, Index No. 007728/94). In that action, a damages judgment was rendered against the City, based on the jury's finding that the plaintiffs' injuries were caused by the defective traffic signal light. The City then filed the instant action against Welsbach and CIC for indemnification of its losses from the tort damages judgment.

In its motion for summary judgment, CIC argues that the City's complaint should be dismissed because: (1) the Policy does not provide coverage to the City as an

additional insured for its "completed operations" claim; and (2) CIC had no statutory obligation to disclaim coverage under Insurance Law § 3420(d).

CIC's first argument is that the Policy only covers claims for bodily injury that occurred during Welsbach's "ongoing operations" but it does not cover claims for those that occurred after Welsbach "completed operations." To support this argument, CIC claims that the Contract language only required Welsbach to obtain insurance coverage for claims that occur while Welsbach was "performing work at the site." In addition, CIC argues that because the Contract did not require Welsbach to obtain products liability coverage, there is no coverage for completed operations claims.

In opposition, the City argues that: (1) the Policy covers the City as an additional insured for its "completed operations" claim which occurred during the policy period; and (2) CIC has a statutory obligation to disclaim coverage under Insurance Law § 3420(d).

Discussion

A movant seeking summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law and offer sufficient evidence to eliminate any material issues of fact. *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 (1985). Once a showing has been made, the burden shifts to the opposing party to demonstrate the existence of a triable issue of fact. *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986); *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980).

In an insurance coverage action, the insured bears the initial burden of showing that the "insurance contract covers the loss for which the claim is made." *Kidalso Gas Corp. v. Lancer Ins. Co.*, 21 A.D.3d 779, 780-81 (1st Dep't 2005). The burden then shifts to the insurer to demonstrate that a policy exclusion defeats the insured's claim. *Monteleone v. Crow Constr. Company*, 242 A.D.2d 135, 139 (1st Dep't 1998).

In interpreting an insurance policy, the court must enforce the plain and ordinary meaning of the policy when its provisions are clear and unambiguous. *Roundabout Theatre Co., Inc. v. Cont'l Casualty Co.*, 302 A.D.2d 1, 6 (1st Dep't 2002). The issue of whether a provision of an insurance policy is ambiguous is a question of law for the court. *Atlantic Mut. Ins. Co. v. Terk Technologies Corp.*, 309 A.D.2d 22, 28 (1st Dep't 2003).

Here, CIC has failed to demonstrate its entitlement to judgment as a matter of law. The City demonstrated that the Policy covers its alleged claim for the tort damages judgment, and CIC failed to show that the Policy excludes the City's claim for bodily injury because it occurred after Welsbach completed operations.

Coverage A of the Policy states that CIC will pay "sums that the Insured becomes legally obligated to pay as damages because of bodily injury." This insurance coverage is extended by Endorsement 4 to additional insureds, which include any municipality or corporation to which Welsbach has a written contract to provide insurance. Endorsement 4 extends insurance coverage to additional insureds to the extent of the written contract, but only with respect to "liability arising out of" Welsbach's operations.

The City's claim falls within Coverage A of the Policy. The City seeks indemnification for sums that it is legally obligated to pay as damages because of bodily injury suffered by the *Angerome* plaintiffs. The City qualifies as an additional insured under Endorsement 4 because it is a municipality to which Welsbach was obligated, under the Contract, to provide commercial liability insurance to "protect the City" from claims for "bodily injury which may arise from the operations" performed by Welsbach.

In addition, the City's alleged claim arises out of Welsbach's operations, as required by the Policy and the Contract. The phrases "arises out of" or "arise from" mean "originating from, incident to, or having connection with." *Regal Constr. Corp. v National Union Fire Ins. Co. of Pittsburgh*, 15 N.Y.3d 34, 38 (2010). Here, the City claims that the accident and resulting bodily injury arose out of Welsbach's negligent repair of the traffic signal light. If the City can prove at trial that Welsbach's negligent repair caused the defect in the traffic signal light, the *Angerome* plaintiffs' injuries would certainly "arise from" or "have a connection" with Welsbach's repairs, and would therefore fall within the coverage of the Policy.

In its motion, CIC argues that the Policy does not cover the City's claim because the injuries occurred after Welsbach "completed operations" and the Policy only covers injuries that occur during Welsbach's "ongoing operations." However, contrary to CIC's claims, the Policy and Contract make no distinction whatsoever between claims for bodily injury that occur during Welsbach's ongoing operations and those that occur after

Welsbach completed operations. The Policy and Contract only require that the bodily injuries "arise from" Welsbach's operations, such that "some causal relationship" must exist between the injuries and Welsbach's operations, not that the bodily injuries had to occur while Welsbach was actually performing its operations. *Regal Constr. Corp.*, 15 N.Y.3d at 38.

Moreover, although the Contract stated that Welsbach must obtain a CGL policy to "protect the City, the Department of Transportation and the Contractor and his/her subcontractors performing work at the site" – it is clear and unambiguous that the phrase "performing work at the site" specifically identifies the Contractor and subcontractors, and does not limit coverage to only those claims that occurred while Welsbach was performing work at the site.

In addition, the fact that Welsbach was not required to obtain products liability coverage does not operate to exclude "completed operations" claims from the Policy's commercial general liability coverage. Products liability insurance generally protects manufacturers from injuries caused by its defective products, and is a distinct type of coverage than the commercial general liability insurance at issue here, which covers injuries connected to maintenance and repair services provided by Welsbach. *See Frontier Insul. v. Merchants Mut. Ins.*, 91 N.Y.2d 169, 176 (1997).

Here, CIC failed to demonstrate a specific policy exclusion for "completed operations" claims. A policy exclusion must be established by the insurer in clear and

unmistakable language. *Continental Cas. Co. v Rapid-American Corp.*, 80 N.Y.2d 640, 652 (1993). Where the provisions of an insurance policy are clear and unambiguous – as is the case here – the court must enforce the contract as written and should not strain to superimpose an unnatural or unreasonable construction. *Moshiko, Inc. v. Seiger & Smith, Inc.*, 137 A.D.2d 170, 175 (1st Dep't 1988).

In its motion, CIC separately argues that it does not have a statutory obligation to disclaim coverage under Insurance Law § 3420(d) because the City is not an additional insured under the Policy. However, as discussed above, the Policy was written to cover the very situation for which the City made its claim. *Matter of Arbitration between State Farm Mut. Auto. Ins. Co. v. Merrill*, 192 A.D.2d 824, 825 (3rd Dep't 1993). Thus, CIC was required to disclaim coverage under the statute because the City's claim falls within the scope of the Policy. *Markevics v. Liberty Mut. Ins. Co.*, 97 N.Y.2d 646, 649 (1st Dep't 2001).[1]

Accordingly, CIC's motion for summary judgment dismissing the City's complaint pursuant to CPLR § 3212 is denied.

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[1] The issue of whether CIC made a timely disclaimer is an issue of fact to be decided at trial. *City of New York v. Welsbach Elec. Corp.*, 11 Misc.3d 1085(A), at *4 (April 24, 2006, Sup. Ct., Lehner, J.).

In accordance with the foregoing, it is

ORDERED that defendant CIC's motion for summary judgment dismissing the City's complaint pursuant to CPLR § 3212 is denied.

This constitutes the decision and order of this Court.

Dated: New York, New York
December 14, 2012

ENTER:

Saliann Scarpulla, J.S.C.