Southwest Marine & Gen. Ins. Co. v Preferred Contractors Ins. Co.
2015 NY Slip Op 30544(U)
April 13, 2015
Supreme Court, New York County
Docket Number: 153861/2014
Judge: Robert R. Reed
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[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: I.A.S. PART 43

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SOUTHWEST MARINE AND GENERAL INSURANCE COMPANY, SOILSOLUTION INDUSTRIES, INC., EXXONMOBIL CORPORATION, and ROUX ASSOCIATES, INC.,

DECISION/ORDER

Plaintiffs,

-against-

Index No.: 153861/2014

PREFERRED CONTRACTORS INSURANCE COMPANY and GILMAR DESIGN CORPORATION,

Defendants.

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ROBERT R. REED, J.:

This is an action for a declaratory judgment and damages in which the plaintiffs, Southwest Marine and General Insurance Company (Southwest Marine), SoilSolution Industries, Inc. (SoilSolution), ExxonMobil Corporation (ExxonMobil) and Roux Associates, Inc. (Roux), seek a declaration regarding the obligations of defendant Preferred Contractors Insurance Company (PCIC) under an insurance policy PCIC issued to defendant Gilmar Design Corporation (Gilmar). Plaintiffs claim that SoilSolution, ExxonMobil and Roux are entitled to additional insured status under PCIC's policy with respect to a bodily injury claim brought by nonparty Voloaymyr Vengrenyuk (Vengrenyuk), an employee of Gilmar.

In motion sequence 001, PCIC moves to dismiss the complaint, pursuant to CPLR 3211 (a) (1) and (7), or, in the alternative, for summary judgment pursuant to CPLR 3211 (c) and 3212. In motion sequence 002, plaintiffs move for summary judgment in their favor.

FACTUAL ALLEGATIONS

This matter arises out of an underlying personal injury action captioned *Vengrenyuk v*

ExxonMobil Oil Corp., et al., Index No. 30488/10, venued in Kings County Supreme Court. The complaint in the underlying action alleges that Vengrenyuk fell from a scaffold and injured himself on November 2, 2009 while working for Gilmar at premises located at 28-38 Varick Street in Brooklyn, New York. ExxonMobil was the owner of the premises where Vengrenyuk was allegedly injured. ExxonMobil allegedly contracted with nonparty I'll Go, Inc. to perform work as a general contractor at the site. I'll Go, Inc. allegedly subcontracted with Roux, a New York corporation doing business in Islandia, New York, and SoilSolution, located in Neponsit, New York, to perform work and services at the site. SoilSolution allegedly subcontracted with Gilmar, located in Brooklyn, New York, to perform certain work and services at the site.

The subcontract between SoilSolution and Gilmar is dated May 19, 2009 (*see* Odelson affirmation, Ex. F). Citing section 4.6 of the Gilmar subcontract, plaintiffs contend that Gilmar was required to indemnify and hold harmless ExxonMobil, SoilSoution and Roux from all claims arising out of Gilmar's work. Plaintiffs also allege that a rider to the Gilmar subcontract required Gilmar to procure and maintain insurance that would protect all entities that Gilmar was contractually required to indemnify and hold harmless, and that the insurance was to be primary and non-contributory (*see* Pls. Mem. of Law at 4). However, it is not clear where these insurance requirements come from since there is no rider attached to the Gilmar subcontract. While plaintiffs submit two other contracts: (1) a rather voluminous "Standard Procurement Agreement For Downstream or Chemical Services With Incidental Good" between ExxonMobil and Roux effective September 1, 2007 and August 31, 2012 (the ExxonMobil agreement) (*see* Odelson affirmation, Ex. H); and (2) a 13-page "Master General Subcontractor Agreement for Construction Projects," entered into by Roux and SoilSolution on or about January 10, 2009 (the

SoilSolution subcontract) (*id.*, Ex. G), it is not clear where the quoted language from plaintiffs' moving brief at page 4 is taken.

Vengrenyuk originally sued ExxonMobil, SoilSolution and Roux. ExxonMobil and Roux impleaded Gilmar in January 2012, and a second third-party action against Gilmar was brought in June 2012. In the third-party actions, ExxonMobil, SoilSolution and Roux seek common-law and contractual indemnification and contribution from Gilmar, and assert a breach of contract claim for failure to procure insurance on their behalf. These plaintiffs obtained default judgments on liability against Gilmar in September 2012 and June 2013.

PCIC issued a Commercial General Liability Policy, number PC71043-MA, to Barat Gilmar/Gilmar Design Group for the period February 25, 2009 to February 25, 2010 (the PCIC policy). The PCIC policy, as submitted to the court by PCIC (*see* Suben affirmation, Ex. A), contains three "additional insured" endorsements, all designated as Endorsement No. 10. The first endorsement appears at page 70 of the PCIC policy. Under the heading "**ADDITIONAL INSUREDS**," this endorsement provides in full:

> "As of the date of the Endorsement, the **Policy** is hereby amended to provide the person or organization shown in this Schedule with coverage as if the person or organization was a **Member**, but only; (1) with respect to liability arising out of your ongoing operations performed for the original **Member** listed on the Declarations of the Policy; and (2) only providing that the **Additional Insured** performs all obligations required under the **Policy**.
> Additional Insured: _____
> Scheduled Project: _____
> Policy no.: PC71043-MA
> Date: 2/25/2009
> Time: **12:01 a.m.**"

(*id.*, Ex. B at 70 [bold in original]). This endorsement is signed by "Phillip Salvagio," identified thereon as an authorized representative of PCIC. Notably, the spaces to identify any "Additional

Insured" and "Scheduled Project" are blank.

The second Endorsement No. 10 appears immediately after page 85 of the PCIC policy. It is identical in almost all respects to the first Endorsement No. 10. The only four differences are: (1) different pagination; (2) different formatting; (3) there is no line for "Scheduled Project: _____" as in the first Endorsement No. 10; and (4) PCIC's URL address appears at the bottom center of the page. However, both of these endorsements state that they are "Form 20 05 17 06."

The third Endorsement No. 10 is the very last page of the PCIC policy. This endorsement is entitled "**BLANKET ADDITIONAL INSURED**." It provides as follows:

> "As of the date of the Endorsement, the **Policy** is hereby amended to provide the person or organization shown in this Schedule with coverage as if the person or organization was a **Member**, but only; (1) with respect to liability arising out of your ongoing operations performed for the original **Member** listed on the Declarations of the **Policy**; (2) only for the **Scheduled Project** listed below; and (3) only providing that the Additional Insured performs all obligations required under the **Policy**.
>
> Company (Member): Gilmar Design Corp
> Policy Number: PC71043-MA
> Effective Date: 2/25/2009
> Time: 12:00AM"

(*id.* at undated last page). This endorsement is not signed by Mr. Selvaggio, or any other representative of PCIC. It follows directly behind the two-page insurance binder, also dated February 25, 2009 and also signed by Mr. Selvaggio. In that binder, the insured is listed as "Gilmar Design Corp" and the box for "Special Conditions/Other Coverages" is blank.

By correspondence dated February 8, 2011, Southwest Marine's agent[1] tendered the defense and indemnification of ExxonMobil in the underlying action to Gilmar and PCIC (*see* Odelson affirmation, Ex. J). This letter allegedly enclosed a copy of a certificate of insurance dated May 26, 2009, issued by "Max J. Pollack & Sons Inc." which names ExxonMobil and Roux as additional insureds on the PCIC policy and names SoilSolution as the certificate holder (*id.*, Exs. I and J). By correspondence dated April 2, 2012, Southwest Marine again allegedly tendered the defense of ExxonMobil, as well as Roux and SoilSolution, in the underlying action to PCIC (*id.*, Ex. K). By correspondence dated May 2, 2012 from Network Adjusters, Inc., PCIC acknowledged receipt of the tender of the Vengrenyuk claim on behalf of SoilSolution only, making no mention of ExxonMobil or Roux (*id.*, Ex. L). In this letter, PCIC's representative stated that the insurance company was denying coverage, because SoilSoution does not qualify as an additional insured under the PCIC policy. Citing the additional insured endorsements, PCIC advised that:

> "The Policy provides additional insured coverage, if at all, only to a party identified as an additional insured in the schedule in Endorsement No. 10. SoilSolution is not identified in the schedule or anywhere else in the Policy. Although the tender correspondence states that 'Certificates of Insurance provided by Gilmar Design Corporation for this project . . . indicate Roux Associates, Exxon Mobil Corporation and SoilSolution Industries, Inc. are to be additional insureds on your Commercial General Liability policy,' such is not reflected in the Policy. Moreover, a certificate of insurance in itself confers no rights to coverage on the certificate holder . . . "

(*id.* at 3).

PCIC also maintained, in this letter, the following additional arguments: (1) that pursuant

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[1] According to the complaint in this action, Southwest Marine issued a commercial general liability policy to ExxonMobil, Roux and SoilSolution (complaint, ¶ 48).

to Endorsement No. 23, entitled "Action Over," the limit of liability was $10,000, an argument that PCIC has since withdrawn (*see* PCIP's Mem. of Law in Opp. at 2); (2) the PCIC policy applies only to "a claim made for a Covered Loss not covered by other insurance;" and (3) the "other insurance" provisions in the PCIC policy provide that it is excess coverage where there is other insurance available to the insured for this loss, namely SoilSolution's own policy issued by Southwest, and thus there is no duty to defend the Vengrenyuk claim.

This action was commenced on April 22, 2014. In their complaint, plaintiffs seek a declaration that ExxonMobil, Soilsolution and Roux are entitled to additional insured coverage under the PCIC policy. Plaintiffs also seek a declaration that the PCIC policy provides primary coverage, and that Southwest Marine's policy, identified in the complaint as commercial general liability "policy number 430425LP09, in effect for the policy period January 7, 2009 to January 7, 2010" (complaint, ¶ 48),[2] is excess to the PCIC policy.

DISCUSSION

PCIC contends that Montana law applies to this dispute by virtue of Section XII of the PCIC policy. However, PCIC does not refute that New York law must be applied pursuant to Insurance Law § 3103 (b), which provides that no policy of insurance delivered in New York insuring activity in New York shall provide that it be governed by the laws of another state. In addition, New York's choice-of-law approach generally dictates that a contract of liability insurance be governed by the law of the state which the parties understood to be the principal

[2] In support of plaintiffs' cross motion, they submit an insurance policy issued by Southwest Marine to SoilSolution, however the policy number identified thereon is "GL00031709" (*see* Odelson affirmation, Ex. M).

location of the insured risk (*Zurich Ins. Co. v Shearson Lehman Hutton*, 84 NY2d 309, 318 [1994]; *Certain Underwriters at Lloyd's, London v Foster Wheeler Corp.*, 36 AD3d 17, 21-22 [1st Dept 2006], *affd* 9 NY3d 928 [2007]).

CPLR 3211 (a) (1) provides for dismissal where "a defense is founded upon documentary evidence" if the documentary evidence "conclusively establishes a defense to the asserted claims as a matter of law" (*Leon v Martinez*, 84 NY2d 83, 88 [1994]) and "resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim" (*Fortis Fin. Servs. v Fimat Futures USA*, 290 AD2d 383, 383 [1st Dept 2002]).

PCIC argues that the documentary evidence, namely the PCIC policy and its three additional insured endorsements, unambiguously provides that additional insured coverage, if any, extends only to "the person or organization shown in this Schedule." Since the schedule in the two "**ADDITIONAL INSUREDS**" endorsements is left blank and the schedule in the "**BLANKET ADDITIONAL INSURED**" endorsement identifies only Gilmar, and none of the plaintiffs, PCIC maintains that none of the plaintiffs is an additional insured under its insurance policy. Plaintiffs disagree, and argue that they are entitled to coverage under the "**BLANKET ADDITIONAL INSURED**" endorsement, because this type of endorsement provides automatic coverage to entities that a named insured is required by contract to add as an additional insured under its insurance policy. Plaintiffs argue that the PCIC policy is ambiguous, because it contains both blanket coverage and coverage pursuant to a schedule, and thus the policy must be construed against PCIC. Plaintiffs rely heavily on *Ames Constr., Inc. v Intermountain Indus., Inc.* (712 F Supp 2d 1160 [D Montana 2010], *affd* 445 Fed Appx 971 [9th Cir 2011]). At the very least, plaintiffs argue that PCIC's motion to dismiss is premature, and that they should be

entitled to obtain discovery regarding the issuance of the certificate of insurance and obtain a copy of PCIC's underwriting file.

In *Ames*, a commercial general liability insurance policy obtained by a subcontractor contained an endorsement for additional insured coverage that provided, in pertinent part:

> **"ADDITIONAL INSURED—OWNERS, LESSEES OR CONTRACTORS**
>
> **Blanket as required by written contract and only if certificate of insurance has been provided to Company prior to date of loss.**
>
> **A. Section II—Who Is An Insured** is amended to include as an insured the person or organization shown in the Schedule, but only with respect to liability out of your ongoing operations performed for that insured."

(712 F Supp 2d at 1163 [bold in original]). As here, even though a certificate of insurance issued by the subcontractor's's insurance agent named the general contractor, Ames Construction, Inc. (Ames), as the certificate holder and additional insured, the policy did not contain any schedule that listed the general contractor Ames or any additional insureds. The insurance company denied coverage to Ames, not because there was no schedule naming it as an additional insured, but because, inter alia, it "did not have a Certificate of Insurance on file listing Ames as an additional insured" (712 F Supp 2d at 1164). Indeed, the insurance company's representative "described this as a 'scribners error,' [sic] and stated that the Policy was referring to the Certificate of Insurance, not a Schedule" (*id.*).

Nevertheless, in ruling for Ames, the district court found that the endorsement was ambiguous, because it "uses two conflicting terms for the type of coverage provided: it states there is blanket coverage . . . and coverage that includes 'as an insured the person or organization shown in the Schedule,' although there is no such schedule attached to the Policy" (*Ames*, 712 F

Supp 2d at 1166). The district court went on to hold that:

> "It is inconsistent for the Policy to refer to both blanket coverage and coverage pursuant to a schedule since the terms 'blanket' and 'schedule' refer to different types of coverage. See e.g. Lee R. Russ & Thomas F. Segalla, *Couch on Insurance* vol. 3, § 40:29 (West 1997). Blanket coverage 'generally provides coverage for any person or organization to whom or to which the named insured is obligated to name as an additional insured,' in contrast to a schedule, which specifically lists additional insured parties. *Id.* Endorsement # 4 is thus subject to two interpretations as to the type of coverage it offers, and the ambiguity must be construed in favor Ames to provide the type of coverage it contracted for: blanket coverage"

(712 F Supp 2d at 1167).

Ames is not persuasive authority, because the additional insured endorsement at issue in that case is very different from the additional insured endorsements to the PCIC policy. The *Ames* endorsement included the language: "**Blanket as required by written contract**," while the PCIC policy endorsement lacks any language to the effect that the insurer was extending coverage to persons or organizations that Gilmar was obligated to name as an additional insured by contract. For example, while plaintiffs rely on *140 Broadway Prop. v Schindler El. Co.* (73 AD3d 717 [2d Dept 2010]), that case involved "an additional insured endorsement which provided coverage to any entity [the insured subcontractor] had agreed by written contract to insure" (*id.* at 718), a more typical additional insured endorsement (*see also West 64th St., LLC v Axis U.S. Ins.*, 63 AD3d 471 [1st Dept 2009]). The only words in the PCIC endorsement to suggest blanket coverage in its usual sense is the word "Blanket" in the heading of the endorsement. Thus, the question is whether that one word makes the PCIC policy ambiguous.

Insurance contracts are to be interpreted according to the reasonable expectations and purposes of an ordinary businessperson when making ordinary business contracts (*General Motors Acceptance Corp. v Nationwide Ins. Co.*, 4 NY3d 451, 457 [2005]; *Belt Painting Corp. v*

TIG Ins. Co., 100 NY2d 377, 383 [2003]; *J.P. Morgan Sec. Inc. v Vigilant Ins. Co.*, 126 AD3d 76, *5, 2 NYS3d 415, 419 [1st Dept 2015]). In *Baker v Nationwide Mut. Ins. Co.* (158 AD2d 794, 796-97 [3d Dept 1990]), the court held that the terminology "Blanket Accident Insurance" appearing on the face of the policy *as a title* was a descriptive term that the insured was entitled to rely on and implied that the coverage contracted for was broad in scope and not limited in the manner argued by the insurance company.

Citing *Ames* and other New York case law, plaintiffs argue that since the PCIC policy endorsements are ambiguous, they must be construed by the court in favor of coverage and against the insurer who drafted the policy (*see e.g. City of New York v Evanston Ins. Co.*, 39 AD3d 153, 156 [2d Dept 2007]). However, courts will only resolve ambiguities against the insurer after available extrinsic evidence has been gathered and examined. As the Court of Appeals explained:

> "Generally, the courts bear the responsibility of determining the rights or obligations of parties under insurance contracts based on the specific language of the policies. If, however, the language in the insurance contract is ambiguous and susceptible of two reasonable interpretations, the parties may submit extrinsic evidence as an aid in construction, and the resolution of the ambiguity is for the trier of fact. On the other hand, if the tendered extrinsic evidence is itself conclusory and will not resolve the equivocality of the language of the contract, the issue remains a question of law for the court. Under those circumstances, the ambiguity must be resolved against the insurer which drafted the contract"

(*State of New York v Home Indem. Co.*, 66 NY2d 669, 671 [1985] [citations omitted]).

In this case, there is simply not enough evidence in the record on these motions to determine the meaning of the three different additional insured endorsements. PCIC has not met its burden of conclusively demonstrating that none of the plaintiffs is an additional insured under the PCIC policy. PCIC offers no explanation for the existence of three different endorsements,

nor does it explain why the word "Blanket" appears in the heading of the third endorsement if blanket coverage in its usual sense was not intended. Indeed, if the intent was only to cover specifically listed entities for specifically listed projects, why does the third endorsement exist at all? PCIC's interpretation would render the word "Blanket" in that third endorsement meaningless. "An insurance contract should not be read so that some provisions are rendered meaningless" (*County of Columbia v Continental Ins. Co.*, 83 NY2d 618, 628 [1994]). In addition, the PCIC policy was issued in February 2009, and yet the Gilmar subcontract was not signed until May of that year. The record is wholly unclear how or whether, without blanket coverage, the PCIC policy or its "Schedule(s)" was to be amended to include new construction projects. The production of PCIC's underwriting file may clear up this mystery.

A summary determination is also inappropriate in light of the existence of a certificate of insurance issued by "Max J. Pollack & Sons Inc." naming ExxonMobil and Roux as additional insureds and SoilSolution as the certificate holder (*see Herrnsdorf v Bernard Janowitz Constr. Corp.*, 96 AD3d 1011, 1013 [2d Dept 2012] [certificate of insurance naming a party raised a triable issue of fact as to whether that party was an additional insured under the policy]; *Horn Maintenance Corp. v Aetna Cas. & Sur Co.*, 225 AD2d 443, 444 [1st Dept 1996] [certificate of insurance is "evidence of a contract for insurance" and can raise a triable issue of fact to defeat summary judgment "especially where additional factors exist favoring coverage"]). Furthermore, in the event that "Max J. Pollack & Sons Inc." is an agent of PCIC, it may be estopped from denying coverage where there is reasonable reliance to the detriment of the certificate holder (*Sevenson v Envtl. Servs., Inc. v Sirius Am. Ins. Co.*, 74 AD3d 1751, 1753 [4th Dept 2010]; *Tribeca Broadway Assoc. v Mount Vernon Fire Ins. Co.*, 5 AD3d 198, 200 [1st Dept

2004]; *Lenox Realty v Excelsior Ins. Co.*, 255 AD2d 644, 645-646 [3d Dept 1998]).

The parties raise the following additional arguments in support of their respective positions. Plaintiffs maintain that PCIC's coverage, if found to exist, is primary and non contributory, citing the Gilmar subcontract and the following language of the Southwest Marine policy:

> "b. Excess Insurance
> (1) This insurance is excess over:
> * * *
> (b) Any other primary insurance available to you covering liability for damages arising out of the premises or operations, or the products and completed operations, for which you have been added as an additional insured by attachment of an endorsement"

(Odelson affirmation, Ex. M at 11). PCIC, for its part, contends that, even if the plaintiffs were found to qualify as additional insureds, the PCIC policy unambiguously applies only where there is no other coverage for the loss. PCIC cites to Section III, entitled "**COVERAGE AFFORDED**," which states in pertinent part:

> "Notwithstanding any other provisions contained in this **Policy**, the coverages set forth are limited to:
>
> (A) A claim made for a **Covered Loss** not covered by other insurance;"

(Suben affirmation, Ex. A at 10). PCIC further argues that even if the court disregarded this clause, known as an "escape" or "no liability" clause (*see generally State Farm Fire & Cas. Co. v LiMauro*, 65 NY2d 369, 373 [1985]; 4 Bruner & O'Connor Constr. Law § 11:173 at 1 [2015]), the PCIC policy also contains its own "other insurance" or excess provision, which unequivocally makes the PCIC policy excess over all other insurance, whether collectible or not. This provision reads:

"**XI. OTHER INSURANCE**

> If there is other insurance covering the **Covered Loss**, the **Risk Retention Group** will only cover the amount of the **Covered Loss** in excess of the amount due from that other insurance, whether the **Named Insured and/or Insured** can collect on it or not. The **Risk Retention Group** will not pay more than the **Aggregate Limit** under any circumstance. This **Policy** shall be deemed to be an excess **Policy**"

(Suben affirmation, Ex. A, at 52 [bold in original]).

Since this priority dispute is dependent upon a finding that ExxonMobil, SoilSolution and Roux are covered, as additional insureds, under the PCIC policy, it would it be premature for the court to make any rulings as to the priority of the PCIC and Southwest Marine policies. This is particularly the case since, in the court's view, neither party has adequately briefed the relevant law on the enforceability of the type of escape clause found in the PCIC policy and how to reconcile it with each policy's excess clauses. For example, citing its escape clause, PCIC merely argues that it is enforceable under Montana law. Plaintiffs, for their part, do not even address the escape clause in the PCIC policy. In New York, where one insurance policy has an escape clause and the other insurance policy has an excess clause, the general rule is that the escape clause is not given effect (*see Kipper v Universal Underwriters Group*, 304 AD2d 62, 65 [4th Dept 2003]; *Utica Mut. Ins. Co. v Travelers Ins. Co.*, 213 AD2d 983, 984 [4th Dept 1995]; *Mosca v Ford Motor Credit Co.*, 150 AD2d 656, 658 [2d Dept 1989]). Although the Southwest Marine policy does, in fact, have an excess clause, so too does the PCIC policy, which begs the question as to which policy is excess to the other.

And while plaintiffs argue that Gilmar was contractually obligated to obtain additional insured coverage that was primary and non-contributory, as noted above, there is nothing in the Gilmar subcontract, or at least the version attached to the plaintiffs' moving papers (*see* Odelson

affirmation, Ex. F) about insurance coverage for any of the plaintiffs. Even assuming that this fact was established on this record, it is not dispositive of the issue. Recent case law has now clarified that looking to the terms of the relevant trade contracts in determining the priority of co-insuring insurance policies is a "mistaken approach" (*Bovis Lend Lease LMB, Inc. v Great Am. Ins. Co.*, 53 AD3d 140, 145 [1st Dept 2008]).

> "An insurance policy is a contract between the insurer and the insured. Thus, the extent of coverage (including a given policy's priority vis-à-vis other policies) is controlled by the relevant policy terms, not by the terms of the underlying trade contract that required the named insured to purchase coverage"

(*id.* at 145; *see also Travelers v Indem. Co. v American & Foreign Ins. Co.*, 286 AD2d 626 [1st Dept 2001]). Only if the policy itself expressly provides that the terms of the underlying trade contracts determine if coverage is primary or excess, as was the case in *Pecker Iron Works of N.Y. v Traveler's Ins. Co.* (99 NY2d 391, 394 [2003]), would the insurance requirements of the Gilmar subcontract come into play. If it is determined that ExxonMobil, SoilSolution and Roux are entitled to additional insured coverage under the PCIC policy, the court must consider "'the purpose each policy was intended to serve as evidenced both by its stated coverage and the premium paid for it, as well as upon the wording of its provision concerning excess insurance'" (*Bovis Lend Lease LMB, Inc. v Great Am. Ins. Co.*, 53 AD3d at 148, quoting *State Farm Fire & Cas. Co. v LiMauro*, 65 NY2d at 374). The record is not sufficiently developed on these motions to make such a determination.

PCIC's motion to dismiss the complaint pursuant to CPLR 3211 (a) (1) and (7) is denied. Since a modicum of discovery is needed to resolve this coverage dispute, the court declines to convert PCIC's motion into a motion for summary judgment pursuant to CPLR 3212 (c). For the same reasons, plaintiffs' cross motion for summary judgment is their favor is also denied.

CONCLUSION AND ORDER

For the foregoing reasons, it is hereby

ORDERED that defendants' motion (seq. no. 001) to dismiss the complaint and/or for summary judgment is denied; and it is further

ORDERED that plaintiffs' motion (seq. no. 002) for summary judgment is also denied; and it is further

ORDERED that defendants are directed to serve and file an answer to the complaint within twenty (20) days of service of a copy of this order with notice of entry.

Dated: April 13, 2015

ENTER:

J.S.C.

HON. ROBERT R. REED
J.S.C.