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SHORT FORM ORDER

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INDEX No. 12-36820
CAL. No. 15-00957EQ

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 50 - SUFFOLK COUNTY

PRESENT:

HON. ANDREW G. TARANTINO, JR.
Acting Justice of the Supreme Court

MOTION DATE 5-19-15 (#002)
MOTION DATE 6-23-15 (#003)
ADJ. DATE 6-23-15
Mot. Seq. # 002 - MD
003 - XMG

----------X

FARMERS NEW CENTURY INSURANCE COMPANY,

Plaintiff,

- against -

EDWARD WYSOCKI and HECTOR E. CHAPETON-HERRERA,

Defendants.

----------X

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Upon the following papers numbered 1 to 38 read on this motion and cross motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 14 ; Notice of Cross Motion and supporting papers 15 - 29 ; Answering Affidavits and supporting papers 30 - 34 ; Replying Affidavits and supporting papers 35 - 38 ; Other ____; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by the plaintiff Farmers New Century Insurance Company for an order pursuant to CPLR 3212 granting summary judgment declaring that it is not obligated to provide insurance coverage for, defend or indemnify the defendant Edward Wysocki with respect to a certain underlying action is denied, and it is further

ORDERED that the cross motion by the defendant Edward Wysocki for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint and issuing a money judgment in his favor for the legal fees incurred in defending this action, and for declarations that he is entitled to coverage under the subject insurance policy and that the plaintiff Farmers New Century Insurance Company is obligated to defend and indemnify him in said underlying action is granted as set forth herein.

This declaratory judgment action seeks to determine the duties of the plaintiff Farmers New Century Insurance Company (the plaintiff) with regard to a personal injury action, *Chaperton-Herrara v Wysocki*, Index No. 15-07525, filed in the Supreme Court, Suffolk County. In the underlying action, the defendant Hector Chaperton-Herrara (Chaperton-Herrara) seeks damages for personal injuries he allegedly sustained on August 12, 2012, when he was caused to fall approximately 30 feet from the raised portion of a machine commonly called a "high lift" while assisting the defendant Edward Wysocki (Wysocki) in pruning and/or removing a tree at Wysocki's residence (the premises).

It is undisputed that the plaintiff issued a homeowners insurance policy to Wysocki covering the subject premises under policy number 93598-31-44, effective 1/09/12 to 12/20/12 (the policy). The machine involved in this incident is a model 844C rough terrain forklift manufactured by Lull International Inc. (the high lift), which is approximately eight feet high when the attached arm is not raised, with four wheels with tires approximately two and one-half feet in diameter, and two forks on the arm which are approximately three and one-half feet long and eight inches wide. It appears that the arm on the high lift extends and raises at least 30 feet in the air. By letter dated August 15, 2012, the plaintiff confirmed receipt of Wysocki's insurance claim regarding this incident. By letter dated September 12, 2012, the plaintiff timely disclaimed coverage under the policy based on an exclusion contained in Section II thereof.

The plaintiff commenced this declaratory judgment action on December 10, 2012, and now moves for summary judgment and a declaration that it is not obligated to defend or indemnify Wysocki in the underlying action. The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issue of fact (*see* ***Alvarez v Prospect Hospital***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). The burden then shifts to the party opposing the motion which must produce evidentiary proof in admissible form sufficient to require a trial of the material issues of fact (***Roth v Barreto***, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; ***Rebecchi v Whitmore***, 172 AD2d 600, 568 NYS2d 423 [2d Dept 1991]; ***O'Neill v Fishkill***, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]). Furthermore, the parties' competing interest must be viewed "in a light most favorable to the party opposing the motion" (***Marine Midland Bank, N.A. v Dino & Artie's Automatic Transmission Co.***, 168 AD2d 610, 563 NYS2d 449 [2d Dept 1990]).

In support of his motion, the plaintiff submits, among other things, the pleadings, a copy of the policy, the transcript of Wysocki's deposition testimony, and its disclaimer letter dated September 12, 2012. At his deposition, Wysocki testified that he obtained the high lift approximately nine months to one year before Chaperton-Herrara's accident in a barter with his friend Robert Pflueger, who delivered the machine by tractor-trailer to his residence. He stated that a bill of sale or other paperwork was not exchanged in the transaction, that the high lift did not have license plates when delivered to him, and that he never contacted the New York State Department of Motor Vehicles (DMV) to determine whether license plates were required or if the machine needed to be registered with the DMV. He indicated that the high lift "could be called a forklift, but its not really a forklift" because the arm is "on a boom," that it is used for the same purposes as a forklift, and that it is bigger than a forklift and used for "big jobs." Wysocki further testified that he never drove the high lift on any street, and that he never moved it off the backyard of his residence. He stated that he used the high lift to move precast concrete cesspool

material, "high beams," lumber and brush while acting as the general contractor in constructing a new residence on his property. He indicated that Chaperton-Herrara was a landscaper who came to his residence as a friend to help prune a tree on his property on the day of this incident, that it was decided that the tree had to be removed, and that they used the high lift to attempt to remove the tree. Wysocki further testified that he had used the high lift to remove a dozen trees on the premises prior to this incident.

By letter dated September 12, 2012, from Frances Kilcullen, Zone Manager, National Liability Claims Unit, the plaintiff notified Wysocki that it was disclaiming coverage with respect to the August 12, 2012 occurrence based on an express policy exclusion, stating:

> A review of the facts as we understand them indicates that this incident involved injuries which may have been sustained as a result of your ownership, operation and/or use of a vehicle on your property. The information we have to date indicates that this vehicle was not a recreational vehicle, a vehicle used to service your residence, a vehicle designed to assist the handicapped, nor was it in dead storage on your property. Coverage for the use of vehicles on your property is specifically excluded under your homeowner policy, subject to the limited exceptions noted above. If you carry a separate policy of insurance on the Lull "high/low" lift, please notify that insurer immediately of this incident.

When an insurance company intends to exclude certain coverage from its obligation under a policy, the insurance company must use clear and unmistakable language (***Belt Painting Corp. v TIG Ins. Co.***, 100 NY2d 377, 763 NYS2d 790 [2003]; ***242-44 E. 77th St., LLC v Greater N.Y. Mut. Ins. Co.***, 31 AD3d 100, 815 NYS2d 507 [1st Dept 2006]). In addition, "[s]uch exclusions or exceptions from policy coverage must be specific and clear in order to be enforceable, and they are ... to be accorded a strict and narrow construction (***Lee v State Farm Fire & Casualty Co.***, 100 NY2d 377, 763 NYS2d 790 [2003]; *see also* ***Pioneer Tower Owners Assn. v State Farm Fire & Cas. Co.***, 12 NY3d 302, 880 NYS2d 885 [2009]; ***MDW Enters. v CNA Ins. Co.***, 4 AD3d 338, 772 NYS2d 79 [2d Dept 2004]).

It is also well settled that a court addressing an insurance coverage dispute must initially look to the language of the subject policy (***Raymond Corp. v National Union Fire Ins. Co.***, 5 NY3d 157, 162, 800 NYS2d 89 [2005]; ***State of New York v Home Indem. Co.***, 66 NY2d 669, 671, 495 NYS2d 969 [1985]). The policy is construed "in a way that affords a fair meaning to all of the language employed by the parties in the contract and leaves no provision without force and effect" (***Raymond Corp. v National Union Fire Ins. Co.***, *supra* at 162, quoting ***Consolidated Edison Co. of N.Y. v Allstate Ins. Co.***, 98 NY2d 208, 221-222, 746 NYS2d 622 [2002]). "Unambiguous provisions of a policy are given their plain and ordinary meaning" (***Lavanant v General Acc. Ins. Co.***, 79 NY2d 623, 629, 584 NYS2d 744 [1992]) and ambiguous provisions are construed "against the insurer who drafted the contract" (***State Farm Mut. Auto Ins. Co. v Glinbizzi***, 9 AD3d 756, 757, 780 NYS2d 434 [3d Dept 2004]; ***White v Continental Cas. Co.***, 9 NY3d 264, 267, 848 NYS2d 603 [2007]). In construing an insurance contract, the tests to be applied are "common speech" and "the reasonable expectation and purpose of the ordinary

businessman" (***Ace Wire & Cable Co. v Aetna Cas. & Sur. Co.***, 60 NY2d 390, 398, 469 NYS2d 655 [1983]; *see also* ***Pepsico, Inc. v Winterthur Intl. Am. Ins. Co.***, 13 AD3d 599, 788 NYS2d 142 [2d Dept 2004]; ***MDW Enters. v CNA Ins. Co.***, *supra*).

A review of the policy reveals that it contains the following relevant language:

> Section II - LIABILITY COVERAGES
>
> COVERAGE E — Personal Liability
>
> If a claim is made or a suit brought against an "insured" for damages because of "bodily injury" or "property damage" caused by an "occurrence" to which this coverage applies, we will:
>
> 1. Pay up to our limit of liability for the damages for which the "insured" is legally liable. Damages include prejudgment interest awarded against the "insured"; and
>
> 2. Provide a defense at our expense by counsel of our choice, even if the suit is groundless, false or fraudulent. We may investigate and settle any claim or suit that we decide is appropriate ...
>
> * * *
>
> Section II - EXCLUSIONS
>
> 1. Coverage E — Personal Liability and Coverage F — Medical Payments to Others do not apply to "bodily injury" or "property damage":
>
> * * *
>
> f. arising out of:
>
> (1) The ownership, maintenance, use, loading or unloading of motor vehicles or all other motorized land conveyances, including trailers, owned or operated by or rented or loaned to an "insured";
>
> * * *
>
> This exclusion does not apply to:
>
> * * *
>
> (2) A motorized land conveyance designed for recreational use off public roads, not subject to motor vehicle registration and;
>
> (a) Not owned by an "insured" or

(b) Owned by an "insured" and on an "insured location";
(3) A motorized golf cart when used to play golf on a golf course;
(4) A vehicle or conveyance not subject to motor vehicle registration which is:
(a) Used to service an "insured's" residence;
(b) Designed for assisting the handicapped; or
(c) In dead storage on an "insured location";

The plaintiff contends that the high lift is a "motorized land conveyance within the policy exclusion," citing a New York case that a bulldozer is so considered, and cases from other states that treat forklifts as motorized land conveyances. It is determined for the purposes of this motion that the high lift is a motorized land conveyance. Thus, the question herein is whether said machine is subject to motor vehicle registration and, if not, whether it was used in servicing Wysocki's residence.

Vehicle and Traffic Law § 125 defines a "motor vehicle" as "[e]very vehicle operated or driven upon a public highway which is propelled by any power other than muscular power, except (a) electrically-driven mobility assistance devices operated or driven by a person with a disability ... farm type tractors and all terrain type vehicles used exclusively for agricultural purposes, or for snow plowing, other than for hire, farm equipment, including self-propelled machines used exclusively in growing, harvesting or handling farm produce, and self-propelled caterpillar or crawler-type equipment while being operated on the contract site." Vehicle and Traffic Law § 134 defines "public highway" as "[a]ny highway, road, street, avenue, alley, public place, public driveway or any other public way."

It has been held that a certain "hi-lo forklift" is not a motor vehicle as defined by Vehicle and Traffic Law § 125 and that, because it was not used on a public road, it did not need to be registered with the DMV (***Mangra v China Airlines, Ltd.***, 7 Misc3d 499, 790 NYS2d 370 [Civ Ct, Queens County 2005]; *see also* ***Titone v Lufthansa Cargo AG***, 2011 NY Slip Op. 33558[U] [Sup Ct, Suffolk County 2011]). Similarly, it has been held that a "crawler-type" excavator operated on private property did not qualify as a motor vehicle (***Masotto v City of New York***, 38 Misc3d 1226[A], 969 NYS2d 804 [Sup Ct, Kings County 2013]). However, where a forklift has been driven onto a public highway the courts have deemed them motor vehicles subject to registration pursuant to the Vehicle and Traffic Law (***Jebode v Golden Oldies, Ltd.***, 26 Misc3d 1237[A], 907 NYS2d 437 [Sup Ct, Queens County 2010]; ***Brill v Queens Lumber Co., Inc.***, 2013 WL 1290948 [EDNY 2013]).

In addition, the phrase "Used to service" an insured's residence is not defined in the policy. The plaintiff contends that the use of the high lift by Wysocki in constructing his new residence establishes that the machine "was intended to be used for heavy construction and is not a vehicle that would be used to 'service' a residence" citing ***Cookson v Liberty Mutual Fire Ins. Co.***, 34 A3d 1156 [Me. 2011]. In *Cookson*, the Court found that a tractor, occasionally driven on the public highway, was subject to motor vehicle registration based on the type of vehicle it was and not on whether it would actually be registered. The Court noted that the relevant Maine statute "provides for the registration of tractors and therefore it did not fall within the exclusion's exception." In dicta the Court then stated that the tractor was not the type of machine "commonly employ[ed]" by the average homeowner in servicing his or her

residence. However, *Cookson* involved a property damage claim by the insured after his tractor was destroyed in a fire, and there is no indication in the reported facts that the insured used the tractor for anything other than construction of a residence on his property. It is undisputed that Wysocki was using the high lift in a manner unrelated to such construction at the time of this incident. It is determined that the phrase 'used to service an insured's residence" is ambiguous and should be construed against the plaintiff (***State Farm Mut. Auto Ins. Co. v Glinbizzi***, *supra*).

It is well settled that an insurer has the burden of proving that an exclusion to coverage in an insurance policy is applicable (***Platek v Town of Hamburg***, 24 NY3d 688, 3 NYS3d 312 [2015]; ***Copacabana Realty, LLC v Fireman's Fund Ins. Co.***, 130 AD3d 771, 15 NYS3d 357 [2d Dept 2015]). Here, the plaintiff has failed to establish its prima facie entitlement to summary judgment and a declaration that it is not obligated to defend or indemnify Wysocki in the underlying action. Accordingly, the plaintiff's motion is denied.

Wysocki now cross moves for an order granting summary judgment dismissing the complaint and for declarations that he is entitled to coverage under the policy, and that the plaintiff is obligated to defend and indemnify him in the underlying action. In support of his motion, Wysocki submits, among other things, the pleadings, the complaint in the underlying action, a copy of the policy, and his affidavit and that of Robert Pflueger. In his affidavit, Wysocki swears to essentially the same facts as set forth in his deposition testimony. He states that his residence is typical of the rural north fork of Long Island, that it includes two structures on approximately two and one-quarter acres, and that there are "large amounts of growth, trees, brush, and foliage ... that requires plenty [of] maintenance." He indicates that he has known Robert Pflueger (Pflueger) for more than 25 years, and that he obtained the high lift from Pflueger for his personal use.[1]

In his affidavit, Pflueger swears that he does not have personal knowledge as to how this accident happened, that the north fork of Long Island is somewhat rural, and that it is not uncommon for local residents to use machines similar to the high lift to maintain and service their residences. He states that he obtained the high lift several years before he transferred it to Wysocki, that it was transported to his place of business on a tractor-trailer, and that it never was driven on a public road. He indicates that the high lift never had license plates, that it never had to be registered with the DMV, and that no paperwork was exchanged with Wysocki when he bartered the high lift.

Although the insurer has the burden of proving the applicability of an exclusion, it is the insured's burden to establish coverage and to demonstrate that an exception to the exclusion has been satisfied (***Platek v Town of Hamburg***, *supra*; ***Copacabana Realty, LLC v Fireman's Fund Ins. Co.***, *supra*). Here, the defendant has established his prima facie entitlement to summary judgment herein.

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[1] The plaintiff contends that Wysocki's affidavit should not be considered as it raises a feigned issue of fact regarding its motion for summary judgment. It is determined that the issue is academic as said motion has been denied. In any event, the contention is without merit.

It is now incumbent upon the plaintiff to produce evidence in admissible form sufficient to require a trial of the material issues of fact (***Roth v Barreto***, *supra*; ***Rebecchi v Whitmore***, *supra*; ***O'Neill v Fishkill***, *supra*). In opposition to this motion, the plaintiff submits the affirmation of its attorney, a copy of the operators and safety manual for the Model 884C high lift, and an excerpt from the deposition testimony of Chaperton-Herrara. At his deposition, Chaperton-Herrara testified that he arrived at Wysocki's residence to "cut the tree," that he was about to bring a ladder from his truck to do so, and that Wysocki insisted that they use the high lift because it would be easier.

In his affirmation, counsel for the plaintiff contends, among other things, that the high lift is a forklift "not commonly used to service a residence," and that the exception to the policy exclusion "is triggered only by the use of certain vehicles which are expected to be used to service an insured's vehicle." Counsel for the plaintiff does not indicate the reason that a particular motorized land conveyance must be one "commonly used" to service an insured's residence, or whose expectation regarding such use should govern. Generally, in construing an insurance contract "the reasonable expectation and purpose of the ordinary businessman" governs (***Ace Wire & Cable Co. v Aetna Cas. & Sur. Co.***, 60 NY2d at 398, 469 NYS2d at [1983]). The plaintiff has failed to submit any evidence that Wysocki was not using the high lift in service of his residence on a regular basis or at the time of this incident. In addition, the language of the policy does not support the subject contentions. Moreover, the plaintiff has not offered any evidence that Wysocki's expectation that he would have bodily injury coverage while using the high lift was unreasonable.

Counsel for the plaintiff further contends that Plueger's affidavit should not be considered by the undersigned as his offices had served the appropriate papers seeking to depose Pflueger in this action, and that his office was informed that Pflueger was not available due to health issues. Counsel does not indicate who informed his offices of the problem with Pflueger's appearance. In addition, counsel for Wysocki indicates that his office was ready to proceed with the subject deposition until it was informed by the office of the plaintiff's counsel that Pflueger was unavailable. Thus, as is obvious, the undersigned has considered the subject affidavit.

The plaintiff has failed to raise an issue of fact requiring a trial of this action. Accordingly, Wysocki's cross motion for an order granting summary judgment dismissing the complaint and a declaration that the plaintiff is obligated to defend and indemnify him in the underlying action is granted.

Thus, the sole remaining issue to be determined is whether Wysocki is entitled to recover the amount of legal fees that he has paid to his attorneys to defend him in this action. In general, an insured who is "cast in a defensive posture by the legal steps an insurer takes in an effort to free itself from its policy obligations," and who prevails on the merits, may recover attorneys' fees incurred in defending against the insurer's action (***Mighty Midgets v Centennial Ins. Co.***, 47 NY2d 12, 416 NYS2d [1979]). However, it has been held that the right to recover attorneys' fees is only available where the dispute involves the insurer's duty to defend (***New York Marine and Gen. Ins. Co. v Lafarge North America, Inc.***, 599 F3d 102 [2d Cir 2010]; ***Liberty Surplus Ins. Corp. v Segal Co.***, 420 F3d 65 [2d Cir 2005]; ***Insurance Co. of Greater N.Y. v Clermont Armory***, 84 AD3d 1168, 923 NYS2d 661 [2d Dept 2011]).

A review of the record reveals that the plaintiff has provided Wysocki a defense in the underlying action. Nonetheless, Wysocki is entitled to recover his attorneys' fees in this action as the plaintiff had a duty to defend Wysocki in the underlying action (***U.S. Underwriters Ins. Co. v City Club Hotel, LLC***, 3 NY3d 592, 789 NYS2d 470 [2004]), and the plaintiff disputed that issue in commencing this action.

In support of this branch of Wysocki's motion, counsel for Wysocki submits an "A/R Transaction Listing" and copies of invoices for legal services rendered to Wysocki regarding this action in the amount of $22,123.71. A review of the submission reveals that the plaintiff should have the opportunity to raise issues, if any, regarding the submission. Accordingly, Wysocki is entitled to a hearing to determine the amount of his attorneys' fees in defending this action, and entry of judgment declaring that the plaintiff is obligated to afford coverage, defend, and indemnify the defendant Edward Wysocki in the underlying action.

The parties are directed to appear in **Part 50 for a conference at the Supreme Court Building, One Court Street, Room 237, Riverhead, New York at 9:30 a.m. on February 23, 2016**, and Wysocki is directed to produce appropriate documentation to support the amount of attorneys' fees sought as reimbursement from the plaintiff.

The parties are directed to settle judgment in accordance with this order. However, the Court directs that settlement of said judgment be held in abeyance pending the determination of the amount of attorneys' fee due from the insurer.

Dated: JAN 07 2016

A.J.S.C.

____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**