SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 17

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ARCH INSURANCE COMPANY,

Plaintiff,

-against-

OLD REPUBLIC INSURANCE COMPANY and INDIAN HARBOR INSURANCE COMPANY (pertaining to an underlying action entitled Heydet v Lawrence Street Borrower, LLC, et. al.),

Defendants.

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Index No.: 157377/13
Motion Seq. No.: 003

DECISION AND ORDER

SHLOMO S. HAGLER, J.S.C.:

Plaintiff Arch Insurance Company ("Arch") moves, pursuant to CPLR 3212, for partial summary judgment against defendant Old Republic Insurance Company ("Old Republic") seeking a declaration that Old Republic is obligated to defend and indemnify Bovis Lend Lease, LMB, Inc. ("Bovis") in the underlying action titled *Louis Heydet and Carol Heydet v Lawrence Street Borrower, LLC, et. al.* (Supreme Court, Bronx County, Index No. 308003/09) (the "Underlying Action"). Further, Arch seeks a declaration that Old Republic is required to reimburse Arch for its equitable proportion of any and all costs, including attorney's fees in connection with Arch's defense of Bovis in the Underlying Action. Old Republic opposes the motion.

BACKGROUND

Plaintiff Louis Heydet ("Heydet") in the Underlying Action alleges that in the course of his employment with the parent company of EFCO, K&M Architectural Window Products, Inc. ("K&M"), he sustained injuries while working on a construction project located at 111 Lawrence Street, Brooklyn, New York on September 15, 2009. K&M was a sub-subcontractor hired by EFCO Corporation ("EFCO") to install windows. EFCO was a subcontractor of Bovis, the

general contractor on the project (Notice of Motion, Exhibit "A" [Complaint, ¶¶ 8-11]). Plaintiffs therein commenced the Underlying Action seeking damages for violations of Labor Law and for common law negligence (Notice of Motion, Exhibit "E" [Verified Complaint in Underlying Action]).

The Complaint

The subject Old Republic policy, a general liability policy which ran from September 1, 2009 until September 1, 2010, was taken out by the parent company of subcontractor EFCO[1] naming Bovis as an additional insured under the policy (the "Old Republic Policy"). The Old Republic Policy contains a $1,000,000 self-insured retention. The self-insured retention provides, among other things, that Old Republic's "obligations under the Coverages of the policy to pay damages . . . apply in excess of the 'self insured retention'" (Affirmation of Daniel Mevorach [the "Mevorach Affirmation"], Exhibit "O", ¶ A). It also provided that "[r]egardless of the Other Insurance provisions in this policy, this insurance is excess over the 'self-insured retention'" (*id.*, ¶ 4).

Arch argues that the self-insured retention endorsement was overridden by a "primary and non-contributory" endorsement, which was added to the policy on February 21, 2011 and made effective retroactive to September 1, 2009. Said endorsement provides:

> "[a]s respects any person(s) or organization(s) included as an additional insured and with whom you have agreed in a written contract, agreement or permit to provide primary insurance on a non-contributory basis, this insurance will be primary to and non-contributory with any other insurance available to such person(s) or organization(s)"

(Mevorach Affirmation, Exhibit "N").

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[1]The policy was taken out by EFCO's parent, Pella Corporation.

Arch contends that the contractual condition of the primary and non-contributory endorsement is met because the contract between Bovis and EFCO required EFCO to take out liability insurance for which Bovis is an additional insured and which is "primary as respects coverage afforded to Additional Insureds" (Mevorach Affirmation, Exhibit "C" to Exhibit "H"). Further, Arch argues that the self-insured retention and the primary and non-contributory endorsement plainly contradict each other and that the endorsement was made to conform the policy to EFCO's contract with Bovis.

DISCUSSION

"Summary judgment must be granted if the proponent makes 'a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact,' and the opponent fails to rebut that showing" (*Brandy B. v Eden Cent. School Dist.*, 15 NY3d 297, 302 [2010], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). However, if the moving party fails to make a prima facie showing, the court must deny the motion, "'*regardless of the sufficiency of the opposing papers*'" (*Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008], quoting *Alvarez*, 68 NY2d at 324).

Coverage

Arch begins with the proposition that an insurer's duty to defend its insured is "exceedingly broad and an insurer will be called upon to provide a defense whenever the allegations of the complaint suggest . . . a reasonable possibility of coverage" (*BP A.C. Corp. v One Beacon Ins. Group*, 8 NY3d 708, 714 [2007] [internal quotation marks and citation omitted]). Arch refers to the Old Republic Policy and argues that the duty to defend is implicated because the underlying accident arose out of EFCO's work.

An endorsement to the Old Republic Policy provides that

> "Who is an Insured" section is amended to include as an insured any person or organization for whom you [EFCO] are performing operations when you and such person or organization [Bovis] have agreed in writing in a contract or agreement that such person or organization [Bovis] be added as an additional insured on your policy" (Mevorach Affirmation, Exhibit "M").

Arch argues that the first condition is satisfied given that the contract between Bovis and EFCO (the "Bovis-EFCO Contract") requires EFCO to purchase additional insured coverage for, among other entities, Bovis (Mevorach Affirmation, Exhibit "H").

The subject endorsement to the Old Republic Policy also provides that "such person or organization [Bovis] is an additional insured only with respect to liability arising out of your [EFCO] ongoing operations performed for that insured" (Mevorach Affirmation, Exhibit "M"). Arch argues that the requirement of liability "arising out of" ongoing operations is satisfied as it is uncontroverted that plaintiff in the Underlying Action was injured in the course of employment with EFCO's subcontractor K&M. "The phrase 'arising out of' in an additional insured clause [has been interpreted] to mean 'originating from, incident to, or having connection with. It requires 'only that there be some causal relationship between the injury and the risk which coverage is provided" *Regal Constr. Corp. v National Union Fire Ins. Co. of Pittsburgh, PA*, 15 NY3d 34 [2010]. As plaintiff in the Underlying Action was employed by EFCO's subcontractor K&M, the underlying action arises out of EFCO's work (*Id.*). In opposition, Old Republic "assum[es] without admitting that [Bovis] qualifies as an additional insured on the Old Republic Policy for the [Underlying] Action" (Affirmation of Paul Howansky at ¶ 4).

Arch concedes that the Old Republic Policy's self-insured retention endorsement (making the policy excess over the 'self-insured retention'), and subsequent primary and non-contributory endorsement (rendering the Old Republic Policy in this matter, primary and non-contributory) are

plainly contradictory, as the policy cannot be primary and non-contributory and still be excess over the self-insured retention. Arch cites to *Home Fed. Sav. Bank v Sayegh* (250 AD2d 646, 647 [2d Dept 1998]) for the proposition that "[i]t is a fundamental principle of contract interpretation that when a handwritten or typewritten provision conflicts with the language of a preprinted form document, the former will control, as it is presumed to express the latest intention of the parties" (internal quotation marks and citation omitted).

Arch also contends that the primary and non-contributory endorsement was added to extinguish the self-insured retention in order to conform the policy to the requirements of the Bovis-EFCO Contract, which required EFCO to purchase a combined single limit commercial general liability policy in the amount of $5,000,000 naming Bovis as an additional insured, where such additional insured coverage was to be primary (Mevorach Affirmation, Exhibit "C" to Exhibit "H").

In opposition, Old Republic argues that the plain language of the self-insured retention makes clear that it applies to coverage afforded to additional insureds. Old Republic cites to *Fieldston Prop. Owners Assn., Inc. v Hermitage Ins. Co., Inc.* (16 NY3d 257, 264 [2011]), which holds that "[i]f the plain language of the policy is determinative, we cannot rewrite the agreement by disregarding that language."

As to the primary and non-contributory endorsement, Old Republic argues that it does not override the retention. Specifically, Old Republic contends that Arch's reading would provide more coverage for additional insureds like Bovis than it provides to the named insured. Old Republic cites in support of this proposition to *Pecker Iron Works of N.Y. v Traveler's Ins. Co.* (99 NY2d 391, 393 [2003]), which noted that the term 'additional insured/ is broadly understood to mean "an entity enjoying the same protection as the named insured" (internal quotation marks and citation omitted). Old Republic also argues that Arch fails to make a prima facie showing

that primary and non-contributory endorsement has been triggered, as the agreement between EFCO and Bovis is silent as to the contributory or non-contributory nature of the coverage.

The primary and non-contributory endorsement has clearly been triggered by the contract between EFCO and Bovis, which required EFCO to procure insurance which makes Bovis an additional insured on a primary basis (*see William Floyd School Dist. v Maxner*, 68 AD3d 982, 986 [2d Dept 2009] [holding that a primary and non-contributory provision was triggered by an agreement to provide additional insured coverage on a primary basis]). Arch's argument that silence in the Bovis-EFCO Contract regarding the contributory or non-contributory nature of the primary coverage, fails to trigger the primary and non-contributory endorsement, is unavailing. It is equally clear that the policy's self-insured retention and the primary and non-contributory endorsements are contradictory. A policy cannot afford coverage to an additional insured that is primary and non-contributory and at the same time require that the additional insured itself spend $1,000,000 before the policy provides any coverage (*see generally Guercio v Hertz Corp.*, 40 NY2d 680, 684 [1976] [holding that "self-insurance is not insurance"].

The primary and non-contributory endorsement must control over the self-insured retention, as it was added later and must be assumed to express the latest intentions of the parties (*see e.g. Er-Loom Realty, LLC v Prelosh Realty, LLC*, 77 AD3d 546, 548 [1st Dept 2010]; *Home Fed. Sav. Bank v Sayegh*, 250 AD2d at 647). As the primary and non-contributory endorsement is controlling, Arch is entitled to a declaration that Old Republic is obligated to defend and indemnify Bovis in the Underlying Action.

Method of Sharing

Arch notes that all relevant policies must be examined before determining the priority of coverage issue. *See BP A.C. Corp. v One Beacon Group*, 8 NY3d at 716; *Bovis Lend Lease LMB, Inc. v Great Am. Ins. Co.*, 53 AD3d 140, 147-148 [1st Dept 2008]. A primary insurance

policy provided by AIG to Bovis as a named insured is explicitly excess to any applicable insurance where Bovis is an additional insured.[2] Thus, Arch concedes that the AIG policy is excess to its own. However, Arch argues that the other insurance provisions in Arch's own policy and Old Republic's policy cancel each other out.

Both provisions state that the coverage provided is excess to "[a]ny other primary insurance available to you covering liability for damages arising out of the premises or operations, for which you have been added as an additional insured by attachment of an endorsement" (Mevorach Affirmation, Exhibit "J", Commercial General Liability Coverage From at 11 of 16; Exhibit "K", Commercial General Liability Coverage Form, at 11 of 15). Citing to *Great N. Ins. Co. v Mount Vernon Fire Ins. Co.* (92 NY2d 682, 687 [1999]), Arch notes that it is well-settled that when other insurance clauses would leave the insured without primary coverage, the clauses are deemed to cancel each other. Arch notes that both policies direct the same "equal amounts" method, which provides that "each insurer contributes equal amounts until it has paid its applicable limit of insurance or none of the loss remains, whichever comes first" (Mevorach Affirmation, Exhibit "J", Commercial General Liability Coverage From at 12 of 16; Exhibit "K", Commercial General Liability Coverage Form, at 11 of 15).

In opposition, Old Republic fails to make an argument as to what the method of sharing should be, although it does, without elaboration, characterize Arch's approach as flawed. Arch's approach, however, is appropriate. The attempt of both policies to be excess over other primary

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[2]The AIG policy provides that coverage is excess over any of the other insurance whether primary, excess, contingent or on any other basis (1) unless such insurance is specifically purchased to apply as excess of this policy, or (2) you are obligated to provide primary insurance (Mevorach Affirmation, Exhibit "L", 'Amendment of Other Insurance' Endorsement). In addition, the coverage afforded to Bovis under the AIG policy is subject to a $1 million per "occurrence" self-insured retention (Mevorach Affirmation, Exhibit "L", Self-Insured Retention Endorsement). In opposition, Old Republic does not address the AIG policy.

policies is mutually nullifying (*See Murnane Bldg. Contrs., Inc. v Zurich Am. Ins. Co.*, 107 AD3d 674, 676 [2d Dept 2013]; *Hausman v Royal Ins. Co.*, 153 AD2d 527, 529 [1st Dept 1989]). Since both primary policies provide for sharing by equal amounts, that is the appropriate method of sharing here.

CONCLUSION

Based on the foregoing, it is

ORDERED, that plaintiff Arch Insurance Company's motion for partial summary judgment is granted; and it is further

ADJUDGED and DECLARED, that defendant Old Republic Insurance Company is obligated to defend and indemnify Bovis Lend Lease, LMB, Inc. in the underlying action titled *Louis Heydet and Carol Heydet v Lawrence Street Borrower, LLC, et. al.*, Bronx County, Supreme Court, index No. 308003/09; and it is further

ADJUDGED and DECLARED, that plaintiff Arch Insurance Company and Old Republic Insurance Company must provide primary coverage to Bovis Lend Lease, LMB, Inc. in the underlying matter using the equal parts method of sharing; and it is further

ADJUDGED and DECLARED, that Old Republic Insurance Company reimburse Arch Insurance Company for its equitable proportion of any and all costs, including attorneys' fees, in connection with the defense of Bovis Lend Lease, LMB, Inc. in the Underlying Action, subject to discovery and a hearing, if necessary, on the issue of attorneys' fees.

Dated: July 21, 2016

ENTER:

J.S.C.

SHLOMO HAGLER
J.S.C.