SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 37

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ZURICH AMERICAN INSURANCE COMPANY,

Plaintiff,

-against-

ACE AMERICAN INSURANCE COMPANY; PROGRESSIVE CASUALTY INSURANCE COMPANY; DRIVE NEW JERSEY INSURANCE COMPANY; UTICA NATIONAL INSURANCE COMPANY OF TEXAS; RSUI INDEMNITY COMPANY; SCOTTSDALE INSURANCE COMPANY; and ENDURANCE AMERICAN SPECIALTY INSURANCE COMPANY,

Defendants.

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Index Number: 651579/2016

Sequence Number: 001

Decision and Order

Arthur F. Engoron, Justice

In compliance with CPLR 2219(a), this Court states that the following papers, numbered 1 to 3, were used on plaintiff's motion, pursuant to CPLR 3212, for partial summary judgment:

	Papers Numbered:
Notice of Motion - Affirmation - Exhibits	1
Affirmation in Opposition - Exhibits	2
Reply Affirmation - Exhibit	3

Upon the foregoing papers, plaintiff's motion for partial summary judgment as against defendant ACE American Insurance Company ("ACE") is granted.

Background

Two construction workers, Kevin Quinn and Peter Lobozza, were injured while working at a Hudson Yards construction project, and they sued non-parties Tutor Perini Corporation and Tutor Perini Joint Venture (collectively, "TP"), the general contractors, and The Related Companies, L.P. ("Related"), apparently the owner or manager of the property or project, to recover for their alleged injuries. This insurance declaratory judgment action followed, wherein this Court is asked to determine whether the policy issued by plaintiff, Zurich American Insurance Company ("Zurich"), or defendant ACE, covers the loss in the underlying personal injury actions commenced by Quinn and Lobozza.

The pertinent facts are as follows. In February 2013, TP entered into a written contract ("TP Contract") with Hudson Yards Construction LLC ("Hudson"), the executive construction manager, for TP to perform certain construction work for a project located at Hudson Yards in Manhattan ("Project"). Pursuant to the TP Contract, the parties agreed that the Project would be insured through an Owner Controlled Insurance Program ("OCIP"), administered by ESIS (Employee State Insurance Scheme), a provider of managed claim services, that provides to "enrolled parties" commercial general liability insurance and excess liability insurance in connection with a construction project, along with workers' compensation and employer's liability insurance. In exchange, the OCIP requires that "enrolled parties" maintain certain primary levels of liability insurance coverage, plus additional insurance.

In accordance with OCIP, Zurich issued a commercial auto liability insurance policy to TP ("Zurich Auto Policy"), and ACE issued a commercial general liability insurance policy to Related ("ACE CGL Policy"). The Zurich Auto Policy, bearing policy number BAP-6542362-03, covered the policy period May 31, 2014 to May 31, 2015, with limits of $2,000,000 per accident, subject to a $1,000,000 deductible. The ACE CGL Policy, bearing policy number HDO

G2458843, covered the policy period September 30, 2013 to September 30, 2014, with limits of $2,000,000 per occurrence and a $4,000,000 general aggregate, subject to a $1,000,000 deductible. Zurich alleges that Related is an additional insured under its auto policy, and that TP is/should be an additional insured on the ACE CGL Policy.

On or about July 8, 2013, B&R Rebar Consultants Inc./Rebar Steel Corp., a joint venture ("BRJV"), entered into a written subcontract ("BRJV Subcontract") with TP, wherein BRJV agreed to provide certain construction work on the Project. Pursuant to the Subcontract, the work was to be insured through the OCIP. It is undisputed that Quinn was employed by BRJV. On the other hand, due to conflicting documentary evidence, the parties dispute whether Lobozza was employed by TP or BRJV.

On June 26, 2014, the date of the alleged accident, Quinn and Lobozza submitted personal injury claims to ESIS. ESIS investigated the accident site on the same date and obtained photographs and witness accounts. The ESIS investigation, the findings of which are contained in a report ("ESIS Report"), allegedly concluded that the accident "arose out of the use of an 'auto'," as Quinn and Lobozza's injuries occurred while they were unloading rebar cages from a flatbed trailer connected to a "truck cab." The ESIS Report also allegedly concluded that TP was the owner of the flatbed trailer and the lessor of the "truck cab." Lobozza's signed statement regarding the accident states that he was "unstrap[ping] the load of rebar" when it fell on him. The accident reports ("Accident Reports") TP submitted define the activity performed at the time of the accident as "unloading rebar cages." The Accident Reports also state that Lobozza is a TP employee, contrary to Lobozza's contention in his underlying action that he is a BRJV employee.

Quinn subsequently commenced an action in Kings County ("Quinn Action") against TP and Related alleging that he sustained personal injuries during the course of his employment for BRJV. Lobozza commenced an action in New York County ("Lobozza Action"; together with the "Quinn Action," collectively, "the Underlying Actions") against TP and Related alleging the same. The underlying complaints in these actions allege, inter alia, that Quinn and Lobozza are BRJV employees, that they sustained injuries due to Related and/or TP's negligence, and that their employers violated Labor Law §§200, 240, and 241(6).

TP, Related, and BRJV put Zurich, ACE, and other insurers on notice of the Underlying Actions and requested defense and indemnity. By email dated July 29, 2014, TP tendered its defense and indemnity for the Quinn Action to ESIS's claim department. ACE argues that TP did not timely tender its claim vis-a-vis the ACE CGL Policy because TP's tender to ESIS, its claim administrator, is not the same as tendering the claim to an ACE agent who deals specifically with insurance coverage requests. By letter dated July 31, 2014, ACE disclaimed coverage to TP, Related, and BRJV based on (1) the "auto" exclusion in the ACE CGL Policy, as, in ACE's view, the accident "arose out of the use of an "auto"; and (2) with respect to TP, its "employer's liability" exclusion, as it claims the Accident Reports demonstrate that Lobozza is a TP employee. Zurich argues that ACE improperly relied on extrinsic evidence, *i.e.*, the ESIS Report and Accident Reports, in disclaiming coverage. By letter dated February 20, 2015, Zurich tendered the defense and indemnity of TP, Related, and BRJV to ACE. By letter dated May 18, 2015, Zurich requested that ACE reconsider its coverage position in the Underlying Actions. ACE allegedly did not respond to Zurich's request. Zurich alleges that, pursuant to the Zurich Auto Policy, it has been, and is currently, providing for the defense and indemnity of TP, Related, and BRJV in the Underlying Actions.

Zurich alleges the following facts about the ACE CGL Policy: (1) the policy names TP as an "enrolled contractor," and Related as a named insured; and (2) ACE is obligated to "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." ACE, on the other hand, alleges that its CGL policy: (1) contains an "employer's liability" exclusion, which applies to an insured's employee's allegations of bodily injury arising out of and in the course of his/her employment; (2) contains an "auto" exclusion, which applies to claims of bodily injury arising out of the ownership, maintenance, use, or entrustment to others of an "auto" owned, operated, or rented to an insured; and (3) contains an "other insurance" provision, which provides that it is the primary insurer except, inter alia, if the loss arises out of the maintenance or use of an "auto," or if the insured has been added as an additional insured by attachment of an endorsement.

The parties disagree as to what the ACE CGL Policy's "Deductible Endorsement" provision establishes about who has primary coverage. Zurich argues that the provision states, "You (Related) and we (ACE) mutually agree that the [ESIS] will provide ... for the defense of all claims or 'suits' under the policy." ACE, on the other hand, argues that the provision states, "You (Related) agree with us (ACE) that we (ACE) shall not have any duty to defend any such 'suit' arising under this policy." In actuality, ACE's "Deductible Endorsement" provision contains both, albeit contradictory, statements that each party alleges it contains.

The Instant Action

On March 24, 2016, Zurich commenced this action against defendants to recover for the costs it has allegedly incurred in defending TP, Related, and BRJV in the Underlying Actions. Zurich alleges causes of action against ACE for: (1) breach of contract, (2) breach of the duty to defend and indemnify, (3) reimbursement of costs and damages paid by Zurich, and (4) equitable contribution. Zurich argues that the ACE CGL Policy exclusions are not applicable here, and, hence, that ACE must provide coverage for TP, Related, and BRJV in the Underlying Actions. ACE argues that its "auto" and "employer's liability" exclusions apply. The other named defendants have also e-filed answers to the complaint, asserting various counterclaims and cross-claims, which the Court will not discuss in detail at this time, as this motion seeks judgment as against ACE only.

Zurich now moves, pursuant to CPLR 3212, for partial summary judgment as against ACE, requesting the Court to declare that ACE is obligated to defend and indemnify TP, Related, and BRJV in the Underlying Actions on a primary, non-contributory basis, and to direct ACE to reimburse Zurich for post-tender costs from July 29, 2014 to the present, with 9% interest. On September 21, 2016, ACE opposed the motion. The parties submit, inter alia: the TP Contract; the Subcontract; the Zurich Auto Policy; the ACE CGL Policy; Lobozza's underlying complaint; Quinn's underlying complaint; the ESIS Report; the Accident Reports; discovery responses; photographs depicting the accident site; the disclaimers in accordance with their respective policies; and attorney affirmations.

Discussion

A court may grant summary judgment where there is no genuine issue of material fact, and the moving party has made a prima facie showing of entitlement to a judgment as a matter of law. See Alvarez v Prospect Hosp., 68 NY2d 320, 324 (1986); see generally American Sav. Bank v Imperato, 159 AD2d 444, 444 (1st Dept 1990) ("The presentation of a shadowy semblance of an issue is insufficient to defeat summary judgment"). The moving party's burden is to tender sufficient evidence to demonstrate the absence of any material issue of fact. See Ayotte v Gervasio, 81 NY2d 1062 (1993). Once this initial burden has been met, the burden then shifts to the party opposing the motion to submit evidentiary proof sufficient to create material issues of fact requiring a trial; mere conclusions and unsubstantiated allegations are insufficient. See Zuckerman v City of New York, 49 NY2d 557, 562 (1980).

To prove that an insurance policy obligates an insurer to provide a defense for its insured in an underlying action, the plaintiff must show that the underlying complaint alleges a factual or legal basis that would bring the action within the purview of the policy. See Seaboard Sur. Co. v Gillette Co., 64 NY2d 304, 312 (1984) ("A declaration that there is no obligation to defend could now properly be made only if it could be concluded as a matter of law that there is no possible factual or legal basis on which [the insurer] might eventually be held to be obligated to [defend the insured] under any provision of the insurance policy"). When the same risk is covered by two different insurance policies, a priority of coverage analysis is governed by the terms of each policy, specifically, the "other insurance" provisions. See Sport Rock Intl., Inc. v American Cas. Co. of Reading, Pa., 65 AD3d 12, 18 (1st Dept 2009) ("Where the same risk is covered by two or more policies, each of which was sold to provide the same level of coverage, priority of coverage among the policies is determined by comparison of their respective 'other insurance' clauses") (internal citations omitted); but see Bovis Lend Lease LMB, Inc. v Great Am. Ins. Co., 53 AD3d 140, 144 (1st Dept 2008) ("priority of coverage among the subject policies is dictated by the terms of the underlying [construction contracts], even if an examination of the terms of the various insurance policies would yield a different result").

Zurich has established its entitlement to partial summary judgment as against ACE. On the record, the main question before the Court is whether the ACE CGL Policy is the primary insurance applicable for the Underlying Actions. In order to determine whose coverage is primary, the Court must determine, as a matter of law, whether the accident "arose out of the use of an 'auto," and whether the accident occurred during the "loading or unloading" of an "auto."

Pursuant to New York case law's definition of "arising out of the use of an 'auto'" and the "loading and unloading" of said "auto," the instant accident did not arise out of the use of an "auto." See Walton v Lumbermens Mut. Cas. Co., 88 NY2d 211, 215 (1996) ("The mere fortuity that plaintiff's injury occurred when he was engaged in unloading the truck does not support a claim for no-fault benefits because the vehicle itself was not a cause of the damage. The vehicle must be a proximate cause of the injury before the absolute liability imposed by the statute arises. Any other rule would permit recovery for claims based on back strains, slip-and-fall injuries, and other similar injuries occurring while the vehicle is being used but which are wholly unrelated to its use"). Here, the underlying complaints allege that Lobozza and Quinn were injured while they were "untying the load of rebar cages." The act of untying straps that just so happen to be located on an "auto" does not change the fact that the alleged injuries were not related to the "auto"'s intended use.

New York courts interpret "loading and unloading" to mean the complete operation of transporting goods between the vehicle and the place from or to which they are being delivered. See Wagman v American Fid. & Cas. Co., 304 NY 490, 494 (1952) ("'Loading' is interpreted ... as including only the immediate act of placing the goods upon the vehicle – excluding the preliminary acts of bringing the goods to the vehicle; and 'unloading' is taken to embrace only the operation of removing the goods from the vehicle to a place of rest"). Here, the ESIS Report states that Lobozza and Quinn were injured after they "unsecured the straps of the load," and the Accident Reports state that they were "untying the load of rebar cages" when the "load shifted and fell off the truck." Nowhere in the record is there mention of the underlying plaintiffs engaging in "the immediate act of placing the goods upon the vehicle," or "removing the goods from the vehicle to a place of rest." At most, Quinn and Lobozza engaged in the preliminary acts of loading and unloading. See ABC, Inc. v Countrywide Ins. Co., 308 AD2d 309, 311 (1st Dept 2003) ("The complete operation of transporting goods may include loading and unloading, but does not encompass acts in preparing goods for loading").

ACE seeks to disclaim coverage under its policy mainly by arguing that the accident falls within one of its exclusions. The crux of the issue is whether the allegations in the underlying complaints raise a reasonable possibility of coverage; if they do, ACE is obligated to defend and indemnify. ACE's arguments that disputed facts such as who Lobozza's employer is and whether TP was in fact named as an additional insured under the ACE CGL Policy should preclude summary judgment is unavailing. Although the record contains contradictory assertions, the fact that the underlying complaints allege that Lobozza is a BRJV employee, and the fact that the instant complaint alleges that TP is named as an additional insured, is enough to trigger coverage under the ACE CGL Policy. See Regal Constr. Corp. v National Union Fire Ins. Co. of Pittsburgh, PA, 15 NY3d 34, 37 (2010) ("If a complaint contains any facts or allegations which bring the claim even potentially within the protection purchased, the insurer is obligated to defend. This standard applies equally to additional insureds and named insureds") (internal citations omitted). The duty to indemnify is broader than the duty to defend. See BP A.C. Corp. v One Beacon Ins. Group, 8 NY3d 708, 714 (2007) ("it is well settled that an insurer's duty to defend its insured is exceedingly broad and an insurer will be called upon to provide a defense ... even though it may not be required to pay once the litigation has run its course"). Thus, ACE is obligated to defend TP and Related in the Underlying Actions and to indemnify Zurich for the costs it has incurred in the same.

The Court has considered ACE's other arguments and finds them unavailing.

Accordingly, Zurich's motion for partial summary judgment as against ACE is granted.

Conclusion

Motion granted. The clerk is hereby directed to enter partial summary judgment in favor of plaintiff, Zurich American Insurance Company, and against defendant ACE American Insurance Company *only*, declaring: that TP and Related qualify as insured under the ACE CGL Policy; that ACE has a duty to defend TP and Related in the Underlying Actions; and that Zurich is entitled to contribution and indemnification from ACE as the coverage provided by the ACE CGL Policy is primary to the Zurich Auto Policy.

Dated: July 21, 2017

Arthur F. Engoron, J.S.C.