IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

MASS. ELECTRIC CONSTRUCTION COMPANY	)	
	)	CIVIL ACTION NUMBER
Plaintiff	)	09C-01-138-JOH
v.	)	
SIEMENS BUILDING TECHNOLOGIES INC., and GERLING AMERICA INSURANCE COMPANIES	)	
Defendants	)	

Submitted: May 19, 2010
Decided: September 28, 2010

MEMORANDUM OPINION

Upon Motion of Mass. Electric for Summary Judgment Against Gerling American Regarding the Issue of the Duty to Defend - ***GRANTED***

Upon Motion of Gerling America for Summary Judgment Against Mass. Electric Regarding the Issue of the Duty to Defend - ***DENIED***

Upon Motion of Mass. Electric for Summary Judgment Against Gerling America Regarding the Duty to Indemnify - ***DENIED, Without Prejudice***

Upon Motion of Gerling America for Summary Judgment Against Mass. Electric Regarding on Issue of the Duty to Defend - ***GRANTED, Subject to the Provisions Provided***

Upon Motion of Mass Electric for Summary Judgment Against Siemens Building Technologies Regarding the Issue of Duty to Defend - ***GRANTED***

Upon Motion of Siemens Building Technologies Against Mass. Electric Regarding the Issue of the Duty to Defend - ***DENIED***

Upon Motion of Mass Electric for Summary Judgment against Siemens Building Technologies Regarding the issue of the Duty to Indemnify - ***DENIED, Without Prejudice***

Upon Motion of Siemens Building Technologies for Summary Judgment Against Mass. Electric - ***GRANTED, Subject to the Provisions Provided***

Appearances:

Thaddeus J. Weaver, Esquire, of Christie Parabue Mortensen & Young, Wilmington, Delaware, James W. Christie, Esquire, and Rex F. Brien, Esquire, of Christie Parabue Mortensen & Young, Philadelphia, Pennsylvania, Attorneys for Mass. Electric Construction Company

Robin M. Grogan, Esquire, of Bifferato Gentilotti, LLC, Wilmington, Delaware, and Bryon Friedman, Esquire, of Littleton Joyce Ughetta Park & Kelly, LLP, Purchase, New York, Attorneys for Siemens Building Technologies, Inc.

Francis J. Murphy, Esquire, and Kelley M. Huff, Esquire, of Murphy & Landon, Wilmington, Delaware, and Kenneth M. Labate, Esquire, and Aaron F. Fishbein, Esquire, of Mound Cotton Wollan & Greengrass, Attorneys for Gerling America Insurance Company

HERLIHY, Judge

This is a declaratory judgment action in which Mass. Electric Construction Co. seeks an order from this court that Siemens Building Technologies, Inc. ("SBT") and Gerling America Insurance Co. are compelled to provide coverage for defense costs and to indemnify it in a personal injury action. Each party has moved for summary judgment against the other.

Factual Background

The factual background of this dispute is largely uncontested. Mass. Electric is a Delaware Corporation and a general contractor which was awarded a bid to build a surveillance system for a series of bridges owned by the Delaware River Joint Toll Bridge Commission ("DRJTBC"). DRJTBC is a bi-state agency that operates a number of bridges connecting Pennsylvania and New Jersey over the Delaware River.

On June 7, 2006, DRJTBC issued a Request for Qualifications ("RFQ"). The RFQ solicited interested companies to submit their experience and qualifications for a specified job. Once the DRJTBC received answers to the RFQ, it was to decide which companies would be permitted to bid on the project.

Mass. Electric responded to the RFQ on June 28, 2006. DRJTBC allowed Mass. Electric and four other companies to submit bids for its surveillance project; this process is known as a "Request for Proposal" ("RFP"). Prior to answering the RFP, Mass. Electric and SBT, a Delaware Corporation, entered into a "teaming" agreement; a declaration that the two parties would attempt to enter into a mutually agreeable

subcontract in the event that Mass. Electric were awarded the DRJTBC prime contract. On September 24, 2007, DRJTBC orally awarded Mass. Electric the bid on its surveillance project and sent a notification letter that week. After negotiation, DRJTBC and Mass. Electric signed the prime contract in January 2007 to be effective October 30, 2007. The final price between DRJTBC and Mass. Electric was $17,617,000.

With respect to the subcontract between Mass. Electric and SBT, the record indicates that negotiations began before DRJTBC awarded Mass. Electric the bid. On December 18, 2006, Mass. Electric forwarded a copy of the its standard subcontract to SBT. On January 8, 2007 SBT returned the subcontract with Addendum I included, which contained SBT's proposed changes to the subcontract.[1] Mass. Electric returned its comments to Addendum I on January 24, 2007. It had accepted all the provisions except one concerning indemnity.[2] Among those provisions being negotiated in late 2006 and early 2007 was the additional insured clause. SBT proposed and, by not rejecting it, Mass. Electric agreed to a provision requiring SBT to name it and the DRJTBC as additional insureds.

In September 2007, SBT began to supply Mass. Electric with documentation required to begin working under the subcontract. It provided insurance certificates and performance and payment bonds.

---

[1] This included the critical "Additional Insured" clause found in § 10 of Addendum I.

[2] The indemnity provision changed from SBT would require indemnification for any loss to indemnification for loss arising, in whole or in part, to SBT's negligence.

On November 12, 2007, Mass. Electric submitted a subcontract to SBT for signature. As delegated by the subcontract, SBT was responsible for video survey and traffic control. In order to perform this task, SBT had sub-subcontracted its "Maintenance of Traffic" portion of its subcontract to Efficient Traffic Control, Inc. ("ETC"). One of the bridges within DRJTBC is the I-80 bridge at the Delaware Water Gap, connecting Pennsylvania to New Jersey. It is undisputed that John Chatley, an employee of ETC, was injured in an automobile accident on November 13, 2007, while working on the I-80 portion of the project, on the New Jersey side (the "Chatley Accident"). ETC was at the time acting as SBT's sub-subcontractor.

Mass. Electric and SBT began to negotiate the remaining indemnification and other terms again, and SBT started to demand a lower indemnity liability cap. Throughout November and December of 2007, the parties exchanged emails concerning the indemnity cap and other issues. Mass. Electric also expressed reservation in "teaming" with SBT and considered terminating the agreement.

After the liability cap issue was resolved, in either late 2007 or early 2008, SBT and Mass. Electric signed the subcontract with a total price of $3.4 million. In it, they stated that the subcontract was "made" on November 19, 2007. This was six days after the Chatley Accident.

Defendant, Gerling America Insurance Co., a New York Corporation, issued a general commercial liability policy to SBT. As discussed below, that insurance required

that Gerling extend coverage to other parties to the extent of a written agreement. The policy period was October 1, 2007 to October 1, 2008.[3]

John and Stacy Chatley filed suit in the Pennsylvania Court of Common Pleas in and for Bucks County against DRJTBC, Mass. Electric, SBT and others for injuries stemming from the accident, alleging their negligence ("Chatley Litigation"). Mass. Electric filed a claim with Gerling seeking additional insured status and Gerling denied it. Mass. Electric then filed in this Court seeking a declaratory judgment that Mass. Electric is an additional insured on the Gerling policy and that SBT must defend Mass. Electric and pay its defense costs. SBT and Mass. Electric have presented cross summary judgment motions, as well as Mass. Electric and Gerling.

Parties' Contentions

In their respective motions for summary judgment, Defendants Gerling and SBT contend that Mass. Electric is not an additional insured under the insurance contract. According to Gerling, Manuscript Endorsement #35 of the insurance contract required a "written agreement" in order for a company to be included as an additional insured under the policy.[4] Defendants argue that the term "written agreement," should only be interpreted to mean an executed agreement. The subcontract between SBT and Mass. Electric was not executed until November 19, 2007, six days after the Chatley accident.

---

[3] J. Ex. 3 at HDI 00001.

[4] J. Ex. 3 at HDI 00119.

Defendants argue that since the Mass. Electric/SBT subcontract unambiguously states that it was "made" on November 19, 2007, no parol evidence may be considered that would contradict the clear terms of this agreement. According to defendants, Mass. Electric proceeded with construction at its own risk before the subcontract was executed, precluding Mass. Electric from benefits as an additional insured, and relieving SBT from the responsibility of representing Mass. Electric in the Chatley Litigation.

SBT and Gerling argue that should a contract exist, their duty to indemnify cannot now be determined since SBT has not been found or determined to be at fault. They contend only when such a determination is made is there a duty to indemnify. Thus, the issue of indemnification is not ripe for this Court to rule.

Mass. Electric counters these arguments by noting that the express terms of the insurance contract only require a *written* agreement, and make no mention of an executed agreement. Mass. Electric offers evidence to show that both Mass. Electric and the DRJTBC were intended to be included as additional insureds pursuant to the insurance contract, and that the parties solidified the details of this agreement as early as January 2007. Mass. Electric argues that a binding contract existed prior to November 13, 2007. According to Mass. Electric, the subcontract was mailed to SBT on November 12, 2007. The subcontract was subsequently executed, and the date of November 19th was picked by a Mass Electric employee who had no power or role in contract negotiation, making, it contends, the November 19th date irrelevant to the actual date the subcontract with SBT

was enforceable. Mass. Electric alleges that it is common in construction matters to begin work on a site before the contract is executed, and it should not be penalized for starting the project on the November 9th date agreed upon with SBT. Because the insurance certificate was filed before the Chatley Accident, Mass. Electric claims a valid written subcontract existed, and SBT and/or Gerling are liable for the costs incurred in defending Mass. Electric in the Chatley Litigation. It also asserts that the Court should now rule on SBT and Gerling's duty to indemnify.

Applicable Standard

Summary judgment is properly granted when no genuine issues of material fact exist, and the moving party is entitled to judgment as a matter of law.[5] The burden in on the moving party to prove that no issues of material fact remain.[6] The Court must view the evidence in the light most favorable to the non-moving party, and resolve any doubts regarding the existence of issues of material fact against the moving party.[7]

There are four motions for summary judgment. Where there are cross motions for summary judgment, the parties have implied there is no factual conflict.[8] However, the filing of a cross motion for summary judgment does not preclude the moving party from

---

[5]*Roche v. Ugly Duckling Car Sales, Inc.*, 879 A.2d 785, 789 (Pa. Super. 2005).

[6]*Id.* at 789.

[7]*Id.* at 789.

[8]*Browning-Ferris v. Rockford Enters.,* 642 A.2d 820, 823 (Del. 1993).

arguing that there is a factual issue preventing summary judgment.[9]

Discussion

Once again, judicial resources are expended straightening out what appears to have been preventable mishandling of key components of a business transaction. Courts exist, as this one does, to provide such a post-fact resolution when earlier care may have avoided this entire controversy, costing the parties additional expense and adding to the cost of doing business.

Pennsylvania Law Applies

In determining whether a conflict of law exists, Delaware courts follow the Restatement (Second) of Conflict of Laws, and usually apply the law of the state with "the most significant relationship to the parties and the occurrence giving rise to the suit."[10] However, when the law of those states would all produce the same result in the dispute, there is no real conflict, and an in-depth choice of law analysis is considered by Delaware courts to be "superfluous."[11] The current matter has three potential jurisdictions whose law may be applied: Pennsylvania, New Jersey, and Delaware. The same general principles of contract interpretation have been adopted in these jurisdictions. Because the Prime Contract between Mass. Electric and SBT contains a choice of Pennsylvania law provision,

---

[9] *United Vanguard Fund, Inc. v. Takecare, Inc.*, 693 A.2d 1079 (Del. 1997).

[10] *Great Am. Opportunities, Inc. v. Cherrydale Fundraising, LLC,* 2010 WL 338219 at *8 (Del. Ch. 2010).

[11] *Id.* at *8.

and the subcontract at issue was negotiated in Pennsylvania, this Court has applied Pennsylvania law in its analysis, despite the fact that there is technically no conflict of law, and an in-depth choice of law analysis is unnecessary. Further, the parties have essentially agreed that Pennsylvania law applies.

The Insurance Contract Between Gerling and SBT Does Not Require an Executed Contract to Extend Additional Insured Status on Mass. Electric

Gerling and SBT argue that before Mass. Electric can be considered an additional insured, an executed contract must have existed. They contend that because the subcontract was "made" on November 19, 2007, Mass. Electric was not an additional insured on November 13, 2007, the day of the Chatley accident. Therefore, according to Gerling and SBT, because Mass. Electric was not an additional insured on that date, neither is obligated to provide Mass. Electric defense or indemnification.

Mass. Electric rebuts to assert that the language of the contract did not require an executed agreement, but rather a written agreement. It argues that there was a valid, enforceable written agreement between it and SBT as of January 24, 2007. Mass. Electric contends that this agreement contained a requirement that it be considered an additional insured on SBT's insurance policies, including Gerling's. This, it asserts, satisfied the written agreement requirement under the insurance contract.

The dispute centers around the insurance contract's manuscript endorsement #35. It is titled, "**BLANKET ADDITIONAL INSURED,**" and states:

> Who is an insured is amended to include an as insured any person whom you are required to add as an additional insured on this policy under a written agreement. The insurance coverage provided to such additional insured applies only to the extent required in the written agreement.[12]

The Court holds that the plain meaning of the language of the contract controls. "Written agreement" simply means an agreement in writing. It does not require an executed agreement.

When the Court interprets a contract its primary goal is to give effect to the intent of the parties.[13] The words of the contract are given great weight when attempting to ascertain the parties' intent when the contract was agreed upon.[14] Courts must consider the whole instrument when deciding whether the clause or language in dispute is ambiguous.[15] Ambiguous language is that which is susceptible to more than one reasonable interpretation.[16] However, simply because two or more parties disagree on the interpretation during the litigation does not render it ambiguous.[17] When a contract's terms are not ambiguous the Court will use the plain meaning of those terms to direct its interpretation. A court will not rewrite the parties' contract and will avoid an

---

[12] J. Ex. 3 at HDI 00119.

[13] *LJL Transp., Inc. v. Pilot Air Freight Corp.,* 962 A.2d 639, 647 (Pa. 2009).

[14] *Id. at 647.*

[15] *Murphy v. Duquesne Univ. of The Holy Ghost*, 777 A.2d 418, 429 (Pa. 2001).

[16] *Murphy,* 777 A.2d at 430.

[17] *Samuel Rappaport Family P'ship v. Meridian Bank,* 657 A.2d 17, 22 (Pa. Super.1995).

interpretation that renders other portions of the contract meaningless or contradictory.[18]

In support of its position that a written agreement must mean an executed agreement, Gerling directs the Court to *National Abatement Corp. v. National Union Fire Insurance Company of Pittsburgh, Pa.*[19] The court there held that "Contrary to plaintiffs' understanding, the fact that an unsigned contract may be enforceable if there is objective evidence the parties intended to be bound or the eventual writing was intended to be valid retroactively has no bearing on the whether there is 'written contract' pursuant to the policy endorsement."[20] While this Court agrees with *National Abatement's* finding that the contract in that case was unambiguous because it only led to one reasonable conclusion,[21] it declines to accept holding of the New York Supreme Court's Division of Appeals in that there is an "executed agreement" requirement in this case.

The provision cited from the Gerling insurance policy leads to only one reasonable interpretation: that an agreement must be reduced to a writing in order to create an additional insured. It does not mention a requirement for an executed agreement, and the Court will not interpose such a requirement. To do so would be, in effect, changing the bargaining positions of the parties to the contract. This Court also finds that adding such

---

[18] *LJL Transp.,* 962 A.2d at 647-648.

[19] 824 N.Y.S.2d 230 (N.Y. App. Div. 1st Dept. 2006).

[20] *Id.* at 232.

[21] *See id.*

a requirement would be adding additional condition to a contract and is reluctant to do so. Had Gerling wanted the policy to only become effective upon an executed agreement it could have expressly included such a provision.[22] Manuscript Endorsement #35 is not ambiguous and the plain language of the contract requires that there was a written agreement be in place, and there was. The fact that SBT and Gerling now claim their intent was that only an *executed* contract would suffice is rejected. The fact that the SBT and Gerling now state a different intent existed is not to be considered because the Court will not look to any evidence other than the four corners of the document when interpreting an unambiguous contract.[23] Therefore, if there was a valid written agreement in place on November 13, 2007, then Mass. Electric and DRJTBC should be an additional insured under the Gerling Policy.

In addition, Gerling's declaration sheet says the policy period is October 1, 2007 (prior to Chatley's Accident) to October 1, 2008. Its current disclaimer argument is at best "curious."

A Written, Accepted Contract Existed between Mass. Electric and SBT Prior to the Chatley Accident, making Mass. Electric and DRJBTC Additional Insureds on the Gerling Policy before November 13, 2007

Since the Court has determined that an *executed* contract was not required to confer

---

[22] *See* J. Ex. 1 at HDI 00013 (condition of the insurance contract that is triggered only upon an executed contract).

[23] *Murphy,* 777 A.2d at 429.

additional insured status upon Mass. Electric, the Court must now determine whether there was a written agreement between Mass. Electric and SBT requiring coverage for Mass. Electric under the Gerling policy at the time of the Chatley Accident.

It is one of the most basic principles of contract law that dictates that "a contract is enforceable when the parties reach mutual agreement, exchange consideration, have outlined the terms of their bargain with sufficient clarity."[24] Courts should not try to fix contractual terms inconsistent with the intent of the parties.[25] A contract is "made" when "the last act legally necessary to bring it into force takes place."[26] Even if the parties omit certain material terms does not invalidate the contract as long as the parties settled "all the essential terms and intended the contract to be binding upon them."[27] "It is well settled that all the terms contemplated by an agreement need not be fixed with complete and perfect certainty for an agreement to constitute a contract."[28] Even if parties disagree on the meaning of the language or the proper construction of a contract terms does not mean the disputed language is ambiguous.[29] Additionally, such a disagreement will not prevent

---

[24] *Greene v. Oliver Realty, Inc.*, 526 A.2d 1192, 1194 (Pa. Super. 1987).

[25] *Id.* at 1194.

[26] *Ruhlin v. N.Y. Life Ins. Co.,* 106 F.2d 921, 922 (3d. Cir. 1939).

[27] *Bredt v. Bredt*, 231 Pa. Super. 65, 71, 326 A.2d 446, 449 (Pa. Super. 1974).

[28] *Interpace Corp. v. Penbrook Hauling Co., Inc.*, 389 F. Supp. 560, 565 (M.D. Pa. 1975) *aff'd*, 535 F.2d 1246 (3d Cir. 1976).

[29] *Pappas v. UNUM Life Ins. Co. of Am.,* 856 A.2d 183, 187 (Pa. Super. 2004).

disposition of the parties' claims on summary judgment.[30]

Pennsylvania law also recognizes that a contract can be accepted and thus rendered legally binding by performance.[31] "If the parties agree upon essential terms and intend them to be binding, a contract is formed even though they intend to adopt a formal document with additional terms at a later date."[32] Further, "an offer may be accepted by conduct and what the parties do pursuant to the offer is germane to show whether the offer is accepted."[33] The Court "may enforce an indefinite contract if its terms have become definite as a result of partial performance. One or both parties may perform in such a way as to make definite that which was previously unclear."[34]

Language of the subcontract fixed the essential terms with regard to the issue of additional insureds. Although the formal cover page of the subcontract stated that the subcontract was "made" on November 19, 2007; six days after the Chatley Accident, other sections of the subcontract demonstrate that the parties had clearly come to an agreement regarding the terms prior to this date.[35] The record indicates that Mass. Electric offered

---

[30] *Pappas,* 856 A.2d at 187.

[31] *Hartman v. Baker*, 766 A.2d 347, 351 (Pa. Super. 2000).

[32] *Id*. (citations omitted).

[33] *Hartman*, 766 A.2d at 347 (citing *Schreiber v. Olan Mills*, 627 A.2d 806, 808 (Pa. Super. 1993)); *see also Accu-Weather, Inc. v. Thomas Broadcasting Co.*, 625 A.2d 75, 76 (Pa. Super. 1993).

[34] *Greene,* 526 A.2d at 1194.

[35] In addition, the Court would like to note that the meaning word "made," in dispute by (continued…)

its subcontract to SBT on December 18, 2006. SBT responded to Mass. Electric's offer by proposing its Addendum I to the subcontract, on January 8, 2007. Addendum I, at Section 10, modified the original agreement concerning insurance to state, "Contractor [Mass. Electric] and Owner [DRJTBC] shall be included as additional insureds, except for Worker's Compensation."[36]

Because Pennsylvania accepts performance as acceptance, SBT's performance can be legally considered "the last act necessary" to bring the subcontract into force. This evidence within the subcontract proves that the contract was legally binding prior to the Chatley Accident.

After the subcontract and addendum were exchanged between Mass. Electric and SBT, SBT began to perform under the contract. It is clear from the subcontract that SBT had to produce an insurance certificate before it would be permitted to begin its work.[37] On October 24, 2007, SBT produced an insurance certificate to Mass. Electric that listed Gerling as the first insurer.[38] The record also contains a schedule of the Video/Infrastructure Survey to be completed for the entire project, with a start day for

---

[35](…continued)
the parties, is most frequently used to delineate the jurisdiction in which the contract was agreed upon, for uses in choice of law disputes. *See, e.g., Crawford v. Manhattan Life Ins. Co.,* 221 A.2d 877, 880 (Pa. Super. 1966).

[36] JT Ex. 12 at ME 04836, Section 10.

[37] JT Ex. 2 at ABT(DJ) 001583, Section 10.

[38] JT Ex. 29.

"maintenance of traffic" on November 13, 2007, for the Delaware Water Gap Bridge (the date and location of the Chatley Accident).[39] Also, by virtue of the fact that Chatley was injured while performing work called for in the contract between DRJTBC and Mass. Electric, and the contract between Mass. Electric and SBT on the date SBT listed as the day to perform such services at such location, SBT had begun to perform the contract as it was stated on prior to November 13, 2007.

Further, importantly, SBT billed Mass. Electric for the work begun before November 13th, and was paid for it. Attachment #1 to the subcontract shows that SBT submitted a continuation sheet for payment for work completed from Mass. Electric as early as November 6, 2007.[40]

The fact that SBT began to perform under the contract unambiguously indicates that it was accepted and that an enforceable, written, agreement existed. SBT took measures to hire a sub-subcontractor and also ensured that it produced an insurance certificate. The fact that there were still negotiations taking place on provisions not concerning those raised in these motions, or that the indemnity cap was not fully set forth does not make an otherwise written agreement unenforceable. All of the negotiations that occurred after SBT began to perform were simply attempts to modify an existing contract.

---

[39] JT Ex. 34. The schedule lists this as the first scheduled date for Video/Infrastructure Survey. However, it is unclear if it is the date that SBT started performing under the contract. The actual date of performance, under these circumstances, makes no legal distinction because the contract was accepted by performance before the Chatley Incident. *See*, *infra*.

[40] JT Ex. 2 at SBT(DJ)0001587 - 0001591.

Further, importantly, SBT billed Mass. Electric for the work done on November 13th, and was paid for it.

To the extent that Mass. Electric knew it was proceeding at its own risk because of the Limited Notice to Proceed issued by DRJTBC, that argument is misplaced. Mass. Electric, through the Limited Notice to Proceed, would not be permitted to attempt to hold DRJTBC liable for any damages it incurred while performing under the limited notice. However, that restriction would not impute beyond DRJTBC and Mass. Electric. SBT or Gerling are not able to argue that Mass. Electric had *no* insurance coverage from other sources because it was not permitted to hold DRJTBC liable.

Mass. Electric is an additional insured under the Gerling policy because it was required to be so under the terms of the subcontract, which was in force prior to the Chatley Accident. If SBT did not intend to be legally bound by the terms of the subcontract, it should not have begun performing its obligations under the subcontract. Due to the fact that an enforceable, written contract was binding at the time of the accident and that contract required SBT to cover Mass. Electric as an additional insured, Gerling must cover Mass. Electric as an additional insured under the policy it issued to SBT. It is also responsible to defend Mass. Electric in the Chatley Litigation.[41] It may eventually be responsible to indemnify Mass. Electric for damages, if any, in relation to the Chatley

[41] Because the contract existed prior to the Chatley Accident and Mass. Electric was an additional insured on SBT's insurance policy issued by Gerling, there is no "known loss" issue.

Accident, subject to proper adjudication as to SBT's liability and after payment pursuant to the settlement or judgment is made by Mass. Electric.

SBT Must Defendant Mass Electric in the Chatley Litigation But the Indemnity Claim is Not Ripe at this Time

In their motions for summary judgment, Mass. Electric and SBT have not agreed on the scope of their cross motions. SBT argues that it cannot indemnify Mass. Electric until Mass. Electric has paid some judgment and SBT has been adjudicated to be liable to some degree. Mass. Electric is arguing that SBT is currently in breach of its duty to defend and must pay Mass. Electric's defense costs in the Chatley Litigation. Neither party specifically denies the other's position, and for good reason, both positions are correct. While SBT is now required to defend Mass. Electric in the Chatley Litigation, it is not now required to indemnify until after Mass. Electric pays part of the claim, or the matter is adjudicated and it is determined that SBT was liable.

Under Pennsylvania law, "the duty to defend is separate and distinct from the duty to indemnify."[42] A duty to defend is a broad one, and attaches immediately, "whenever the complaint filed by the injured party may potentially come within the policy's coverage.[43] The insurer has a responsibility to continue defending the matter until the claim

---

[42]*Jacobs Constructors, Inc. v. NPS Energy Servs., Inc.,* 264 F.3d 365, 376 (3d Cir. 2001).

[43]*Jacobs,* 264 F.3d at 376; *See also, Invensys Inc. v. Am. Mfg. Corp.,* 2005 WL 600297 at *4 (E.D.Pa. 2005).

is reduced to a recovery that the policy does not cover.[44] Mass. Electric is correct in its analysis, and since this court has declared Mass. Electric as an additional insured under the Gerling insurance policy, SBT must defend Mass. Electric in the Chatley Litigation.

Defendants are also correct in their analysis that Mass. Electric's demand for indemnification in the Chatley action is premature and not ripe for adjudication. "The duty to indemnify arises only when the insured is found to be liable for damages covered by the policy," and the insured has met the requisite burden of proof in showing that the claim is covered by the insurance policy.[45] Additionally, the duty to indemnify only arises after "payment pursuant to [the] underlying settlement or judgment has been made."[46] SBT is not required to indemnify Mass. Electric in the Chatley Litigation until a settlement is reached or judgment is entered against it in that action, and Mass. Electric proves the judgment was covered by the insurance policy, and makes payment pursuant to the settlement or judgment in that matter.

Conclusion

For the reasons stated herein:

1. Mass. Electric's motion for summary judgment against Gerling on the issue of the duty to defend is GRANTED;

---

[44]*Jacobs,* 264 F.3d at 376. (Citations omitted).

[45]*Jacobs,* 264 F.3d at 376.

[46]*Invensys,* 2005 WL 600297 at *4.

2. Gerling's motion for summary judgment against Mass. Electric on the issue of the duty to defend is DENIED;

3. Mass. Electric's summary judgment against Gerling on the duty to indemnify is DENIED without prejudice as not ripe; but with leave to re-file if appropriate;

4. Gerling's motion for summary judgment against Mass. Electric on the issue of the duty to defend is GRANTED subject to the provision in paragraph 3 above;

5. Mass Electric's motion for summary judgment against Siemens Building Technologies on the issue of duty to defend is GRANTED;

6. Siemens Building Technologies motion against Mass. Electric on the issue of the duty to defend is DENIED;

7. Mass Electric's motion for summary judgment against Siemens Building Technologies on the issue of the duty to indemnify is DENIED without prejudice, but with leave to refile if appropriate;

8. Siemens Building Technologies motion for summary judgment against Mass. Electric is GRANTED subject to the proviso in paragraph 7 above.

The Court retains jurisdiction.

IT IS SO ORDERED.

_____

J.