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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER
Acting Supreme Court Justice

JERICHO ATRIUM ASSOCIATES,

Plaintiff,

- against -

THE TRAVELERS PROPERTY CASUALTY COMPANY OF AMERICA d/b/a TRAVELERS INSURANCE COMPANY and d/b/a TRAVELERS,

Defendant.

TRIAL/IAS PART 32
NASSAU COUNTY

Index No.: 8831/11
Motion Seq. Nos.: 01, 02
Motion Dates: 09/21/11
10/25/11

The following papers have been read on these motions:

	Papers Numbered
Notice of Motion (Seq. No. 01), Affirmation, Affidavits and Exhibits and Memorandum of Law	1
Notice of Cross Motion (Seq. No. 02), Affirmation, Affidavit and Exhibits and Memorandum of Law	2
Affirmation in Opposition to Cross-Motion and in Further Support of Motion	3
Reply Affirmation to Opposition to Cross-Motion	4

Upon the foregoing papers, it is ordered that the motions are decided as follows:

Defendant moves (Seq. No. 01), pursuant to CPLR § 3212, for an order granting it summary judgment and dismissing plaintiff's Third-Party Complaint; and moves, pursuant to CPLR § 3001, for an order declaring that defendant has no obligation to defend or indemnify plaintiff in connection with the underlying lawsuit brought by Mary and Joseph Bozzello in Nassau County Supreme Court, under Index No. 984/10 ("Bozzello Action").

Plaintiff opposes defendant's motion and cross-moves (Seq. No. 02), pursuant to CPLR § 3001, for an order declaring that defendant has a duty to defend plaintiff in the Bozzello Action and that defendant has improperly disclaimed its obligation to defend plaintiff in the Bozzello Action; for an order that defendant is responsible for all legal expenses expended by plaintiff in defending the Bozzello Action, directing defendant to reimburse plaintiff for attorneys' fees and legal costs incurred in defense of the Bozzello Action to date and directing defendant to take over the defense of the Bozzello Action immediately; and for an order declaring that if plaintiff is found liable to the Bozzellos in the underlying lawsuit, then defendant is liable to plaintiff in the above captioned action on a theory of contractual indemnity. Defendant opposes the cross-motion.

By way of the underlying lawsuit, the Bozzello Action, Mary and Joseph Bozzello seek monetary damages for the bodily injuries allegedly sustained by Mary Bozzello on August 10, 2007, when she slipped and fell on or about the premises known as 500 North Broadway, Jericho, County of Nassau, State of New York ("subject premises"). The instant action was commenced by plaintiff against defendant via Third-Party Complaint seeking a declaration that defendant is required to defend and indemnify plaintiff in the Bozzello Action. Defendant has counterclaimed against plaintiff in the instant action, seeking a declaration that defendant is not obligated to provide coverage to plaintiff under the policy of insurance, Travelers General Liability Policy No. YPNY-630-8172B182-TIL-07 ("Travelers policy"), that defendant issued to National Birchwood Corp. ("National")/plaintiff with regard to the Bozzello Action.

In its summary judgment motion (Seq. No. 01), defendant submits that it provided coverage for the subject premises until July 31, 2007, at which time the subject premises was

removed from coverage under the Travelers policy, at the request of plaintiff. Plaintiff had allegedly advised defendant that it was selling the subject premises and that it would not own said premises as of July 31, 2007. Defendant argues that, since the subject premises was not insured under the Travelers policy on the date of loss (August 10, 2007), plaintiff is not entitled to any coverage under the Travelers policy. Defendant adds that the insuring agreement of the Travelers policy has not been triggered because the subject premises would have had to be scheduled on said policy as a covered location and, as of July 31, 2007 it was not. Defendant contends that the burden is on plaintiff to prove that it is entitled to coverage under the Travelers policy, which, defendant argues, it is unable to do. Defendant submits the Affidavit of Kirk Plevka, a Technical Specialist for Travelers, as evidence that the subject premises was removed from the Travelers policy by Endorsement ILT0070987, effective July 31, 2007. Defendant additionally submits the Affidavit of Joan Grant, an Executive Officer for Travelers, as evidence that the subject premises was deleted from coverage effective July 31, 2007, at the request of National/plaintiff and that defendant was advised that National/plaintiff was selling the property and would no longer own it as of that date. In conjunction with the removal of the subject premises and other related properties from the Travelers policy, defendant refunded premium to National/plaintiff.

Plaintiff cross-moves (Seq. No. 02) for an order that defendant owes a duty to plaintiff to represent plaintiff in the Bozzello Action pursuant to the general liability policy issued by defendant. Plaintiff argues that "[d]efendant's obligation to defend Plaintiff in the Bozzello Action is obviated '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 indemnify

[the insured] under any provisions of the insurance policy' and it is premature for Travelers to assert, at this juncture, that there is no possible factual or legal basis upon which it might be obligated to defend and indemnify Plaintiff; and if, under any interpretation of the facts and pursuant to any legal theory, Plaintiff is found liable for Mary Bozzello's injury in the Bozzello Action, then Defendant, as Plaintiff's general liability insurer, is liable to indemnify Plaintiff for her injury pursuant to the same legal theory."

Plaintiff does not deny that, on or about July 31, 2007, title to the subject premises was transferred by its owner, plaintiff, to AGMB Jericho Atrium, LLC. It also does not deny that the subject premises was deleted from the Traveler's policy effective July 31, 2007. It further concurs that, on August 10, 2007, the date of Mary Bozzello's alleged accident, plaintiff did not own the subject premises.

Plaintiff submits that Mary Bozzello commenced the Bozzello Action against plaintiff seeking recovery for an injury which allegedly occurred on the subject premises on August 10, 2007, ten days after plaintiff had transferred ownership of said premises to AGMB Jericho Atrium, LLC. Plaintiff states that the "Court of Appeals has recognized that '[a]s a general rule, liability for dangerous conditions on land does not extend to a prior owner of the premises (citation omitted).' Bittrolff v. Ho's Development Corp., 77 N.Y.2d 896, 898; 571, N.E.2d 72 (1991). The narrow exception to the general rule is that courts have recognized is '[w]here there is an undisclosed condition, the vendee has no knowledge of this condition, or where the vendor actively conceals it, the liability remains with the vendor until the vendee has had a reasonable time to discover and remedy it (citations omitted).' Farragher v. City of New York, 26 A.D.2d 494, 496; 275 N.Y.S.2d 542 (1st Dept. 1966)."

Plaintiff asserts that Mary Bozzello is seeking recovery against plaintiff under the narrow

exception to the general rule ("the prior owner exception") where "liability may be imposed [against a prior owner] where a dangerous condition existed at the time of the conveyance and the new owner has not had a reasonable time to discover the condition, if it was unknown, and to remedy the condition once it was known (citations omitted). *See Bittrolff v. Ho's Development Corp., supra*. The allegations set forth in the Bozzello Action state a cause of action against plaintiff which falls under the narrow "prior owner exception" to the general rule of premises liability. Plaintiff submits that the Court of Appeals has clearly stated, "[i]f the complaint contains any facts or allegations which bring the claim even potentially within the protection purchased, the insurer is obligated to defend." *See Technicon Electronics Corp. v. American Home Assurance Co.*, 74 N.Y.S.2d 66, 544 N.Y.S.2d 531 (1989). Plaintiff argues that, "[w]hile denying any and all liability for Mary Bozzello's injury, Mary Bozzello has set forth allegations, which if found to be true by the trier of fact, fall under the 'prior owner exception' and would bring her claim within the liability protection purchased by plaintiff from defendant....Plaintiff respectfully submits that if the Bozzellos are entitled to recovery against Plaintiff for any conduct which it would have been engaged in during its ownership of the Premises when it was covered by the Policy, then Defendant is contractually liable to not only defend Plaintiff in the Bozzello Action pursuant to the terms of the Policy but ate liable to Plaintiff for indemnification of Bozzellos' claims. Given that the Bozzello Action Complaint states allegations which potentially bring the claim against Plaintiff within the protection purchased, as a matter of law, Defendant is obligated to defend Plaintiff in the Bozzello Action. It would work an injustice and be an unreasonable interpretation of prevailing case law for any court to find that a general liability insurance company has no duty to defend a prior owner of real property where the case law permits a claim to be asserted against a prior owner in certain circumstances for an injury on

premises that were sold when that prior owner was covered by a general liability insurance policy for the premises."

Plaintiff further contends that "[i]f under any interpretation of the facts and pursuant to any legal theory, Plaintiff is found liable for Mary Bozzello's injury in the Bozzello Action for any conduct on Plaintiff's part taken while it was owner of the Premises and insured by Defendant, then by extension, Defendant, as Plaintiff's general liability insurer for that period, is liable to indemnify Plaintiff for her injury pursuant to the same legal theory. While Plaintiff expects to prove that it is not liable to Mary Bozzello in the Bozzello Action under the "prior owner exception," which would, in turn, result in a finding that Defendant is not liable to indemnify Plaintiff in that action, it nevertheless would be premature for this Court to grant a declaratory judgment with respect to Defendant's duty to indemnify Plaintiff prior to any determination on Plaintiff's liability in the Bozzello Action."

In opposition to plaintiff's cross-motion, defendant reasserts its position that it has no coverage obligations to plaintiff in this matter because the insuring agreement of the Travelers policy has not been triggered. It once again submits that, once the subject premises was deleted from the Travelers policy, there was no liability coverage available at the subject premises, and more specifically, no liability coverage for plaintiff on the date of loss- August 10, 2007. As such, there is no coverage under the Travelers policy for the incident at issue in the Bozzello Action and defendant has no obligation to defend or indemnify plaintiff in the Bozzello Action.

Defendant additionally argues that plaintiff's cross-motion "fails as a matter of law because it begins with a faulty premise. Jericho relies on well settled law, recognizing the fact that an insurer's duty to defend is broader than its duty to indemnify, While this is certainly true as a general rule, Jericho completely misses the point that the insurer's obligation is only

triggered where facts are alleged within the coverage afforded by the policy. *See Lionel Feedman, Inc. v. Glens Falls Ins. Co.*, 27 N.Y.2d 364, 318 N.Y.S.2d 303 (1971)....The simple fact of this dispute is that there was no coverage afforded under the Travelers Policy on the date of the loss, as the Subject Premises were removed from coverage at the request of the plaintiff just ten days prior. This is an 'occurrence' based policy. In other words, coverage is only triggered by bodily injury or property damage which occurs during the policy period. Logic dictates, therefore, the question of whether there is a duty to defend or indemnify can never be reached, as there was no coverage in place on the date of the loss for the Subject Premises. The question of Jericho's potential liability to the plaintiff in the Underlying Action raised by counsel in opposition is irrelevant for the purposes of this coverage dispute. The fact that Jericho may or may not be responsible for a dangerous condition does not trigger coverage under the policy."

In reply to defendant's opposition, plaintiff asserts that "[d]efendant Travelers is obligated to defend Plaintiff in the Bozzello Action on the theory that the cause of the 'occurrence' which is the basis for (*sic*) Bozzello Action is allegedly the result of condition that arose during the policy period. If Plaintiff is liable to the Bozzellos for an injury caused by conditions that arose prior to the sale of the property where the injury occurred, then Defendant Travelers is liable to defend and indemnify Plaintiff for same."

In order to determine whether defendant is obligated to defend plaintiff in the Bozzello Action, an examination of the Complaint in that Action and the insurance policy between plaintiff and defendant is required. *See BP Air Conditioning Corp. v. One Beacon Ins. Group*, 8 N.Y.3d 708, 840 N.Y.S.2d 302 (2007).

"On a motion for summary judgment pursuant to CPLR § 3212, the proponent must make 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." *See Sheppard-Mobley v. King,* 10 A.D.3d 70, 778 N.Y.S.2d 98 (2d Dept. 2004), *aff'd as mod.*, 4 N.Y.3d 627, 797 N.Y.S.2d 403 (2005), *citing Alvarez v. Prospect Hospital,* 68 N.Y.2d 320, 508 N.Y.S.2d 923 (1986); *Winegrad v. New York University Medical Center*, 64 N.Y.2d 851, 487 N.Y.S.2d 316 (1985). "Failure to make such *prima facie* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers." *See Sheppard-Mobley v. King*, *supra* at 74; *Alvarez v. Prospect Hospital*, *supra*; *Winegrad v. New York University Medical Center*, *supra*. Once the movant's burden is met, the burden shifts to the opposing party to establish the existence of a material issue of fact. *Alvarez v. Prospect Hospital*, *supra* at 324. The evidence presented by the opponents of summary judgment must be accepted as true and they must be given the benefit of every reasonable inference. *See Demishick v. Community Housing Management Corp.*, 34 A.D.3d 518, 824 N.Y.S.2d 166 (2d Dept. 2006), *citing Secof v. Greens Condominium*, 158 A.D.2d 591, 551 N.Y.S.2d 563 (2d Dept. 1990).

"[I]t 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 whenever the allegations of the complaint 'suggest. . . a reasonable possibility of coverage.'" *See BP Air Conditioning Corp. v. One Beacon Ins. Group*, *supra* at 714, *quoting Automobile Ins. Co. of Hartford v. Cook*, 7 N.Y.3d 131, 818 N.Y.S.2d 176 (2006), *quoting Continental Cas. Co. v. Rapid-American Corp.*, 80 N.Y.2d 640, 593 N.Y.S.2d 966 (1993). *See also Pioneer Towers Owners Ass'n v. State Farm Fire & Cas. Co.*, 12 N.Y.3d 302, 880 N.Y.S.2d 885 (2009). "'The duty to defend [an] insured [ ] . . . is derived from the allegations of the complaint and the terms of the policy. If [a] complaint contains any facts or allegations which bring the claim even potentially within the protection purchased, the insurer is obligated to defend.'" *See BP Air Conditioning Corp. v. One Beacon*

Ins. Group, *supra* at 714, *quoting Technicon Electronics. Corp. v. American Home Assur. Co.*, 74 N.Y.2d 66, 544 N.Y.S.2d 531 (1989), *rearg. den.*, 74 N.Y.2d 893, 547 N.Y.S.2d 851(1989). *See also Franklin Development Co., Inc. v. Atlantic Mut. Inc.*, 60 A.D.3d 897, 876 N.Y.S.2d 103 (2d Dept. 2009); *Global Const. Co., LLC v. Essex Ins. Co.*, 52 A.D.3d 655, 860 N.Y.S.2d 614 (2d Dept. 2008). This is so even if the complaint against the insured advances "'additional claims which fall outside the policy's general coverage or within its exclusory provisions.'" *See BP Air Conditioning Corp. v. One Beacon Ins. Group*, *supra* at 714, *quoting Town of Massena v. Healthcare Underwriters Mut. Ins. Co.*, 98 N.Y.2d 435, 749 N.Y.S.2d 456 (2002). "The merits of the complaint are irrelevant" and therefore, "'an insurer may be required to defend under the contract even though it may not be required to pay once the litigation has run its course.'" *See BP Air Conditioning Corp. v. One Beacon Ins. Group*, *supra* at 714, *quoting Town of Massena v. Healthcare Underwriters Mut. Ins. Co.*, *supra* at 444 and *Automobile Ins. Co. of Hartford v. Cook*, *supra* at 137. *See also Franklin Development Co., Inc. v. Atlantic Mut. Inc.*, *supra*; *Global Const. Co., LLC v. Essex Ins. Co.*, *supra*. An insurer is relieved of its obligation to defend its insured only "'when "as a matter of law . . . there is no possible factual or legal basis upon which the insurer might eventually be held to be obligated to indemnify the claimant under any provision of the insurance policy" or 'when the only interpretation of the allegations against the insured is that the factual predicate for the claim falls wholly within a policy exclusion.'" *Franklin Development Co., Inc. v. Atlantic Mut. Inc.*, *supra*; *Global Const. Co., LLC v. Essex Ins. Co.*, *supra* at 900-901, *quoting Bruckner Realty, LLC v. County Oil Co., Inc.*, 40 A.D.3d 898, 838 N.Y.S.2d 87 (2d Dept. 2007); *City of New York v. Evanston Ins. Co.*, 39 A.D.3d 153, 830 N.Y.S.2d 299 (2d Dept. 2007); *Global Const. Co., LLC v. Essex Ins. Co.*, *supra* at 656 and *citing Automobile Ins. Co. of Hartford v. Cook*, *supra* at 137; *Bruckner Realty, LLC v. County*

Oil Co., Inc., supra at 900. *See also Pioneer Towers Owners Ass'n v. State Farm Fire & Cas. Co., supra.*

In the Bozzello Action Complaint, Mary Bozzello is seeking recovery against plaintiff under the "prior owner exception" to the general rule that liability for dangerous conditions on land does not extend to a prior owner of the premises. The Bozzello Action Complaint asserts a cause of action against plaintiff in which liability may be imposed against plaintiff, as the prior owner of the subject premises, for an alleged dangerous condition, which existed at the time of the conveyance, and the new owner did not have a reasonable time to discover said condition, if it was unknown, and to remedy said condition once it was known. As the Court held in *BP Air Conditioning Corp. v. One Beacon Ins. Group, supra*, "[i]f [a] complaint contains any facts or allegations which bring the claim even potentially within the protection purchased, the insurer is obligated to defend." This Court finds that the Bozzello Action Complaint does indeed contain allegations which "bring the claim even potentially within the protection purchased." The Bozzello Action Complaint alleges that the condition which caused Mary Bozzello's injuries, for which plaintiff should be held liable, existed when plaintiff was covered by the Travelers policy. Since "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," the Court finds that defendant has a duty to defend plaintiff in the Bozzello Action.

Accordingly, defendant's motion (Seq. No. 01), pursuant to CPLR § 3212, for an order granting it summary judgment and dismissing plaintiff's Third-Party Complaint; and, pursuant to CPLR § 3001, for an order declaring that defendant has no obligation to defend or indemnify plaintiff in connection with the Bozzello Action is hereby **DENIED**.

Plaintiff's cross-motion (Seq. No. 02), pursuant to CPLR § 3001, for an order declaring that defendant has a duty to defend plaintiff in the Bozzello Action and that defendant has improperly disclaimed its obligation to defend plaintiff in the Bozzello Action; for an order that defendant is responsible for all legal expenses expended by plaintiff in defending the Bozzello Action; for an order directing defendant to reimburse plaintiff for attorneys' fees and legal costs incurred in defense of the Bozzello Action to date and directing defendant to take over the defense of the Bozzello Action immediately is hereby **GRANTED**.

Defendant is directed to defend plaintiff in the Bozzello Action in Nassau County Supreme Court, under Index No. 984/10, and to reimburse plaintiff for all attorneys' fees and legal costs incurred thus far in defending itself in that action. *See Sarin v. CNA Financial Corp., supra*. The Court additionally notes "an insurer's obligations to pay attorney's fees and costs in connection with a declaratory judgment action is incidental to the insurer's contractual duty to defend." *See National Grange Mut. Ins. Co. v. T. C. Concrete Const., Inc.*, 43 A.D.3d 1321, 843 N.Y.S.2d 877 (4th Dept. 2007).

With respect to plaintiff's application for order declaring that if plaintiff is found liable to the Bozzellos in the underlying lawsuit, then defendant is liable to plaintiff in the above captioned action on a theory of contractual indemnity, plaintiff's right to indemnification shall be determined upon the resolution of the Bozzello Action, Index No. 984/10 . *See Servidone Const. Corp. v. Security Ins. Co. of Hartford*, 64 N.Y.2d 419, 488 N.Y.S.2d 139 (1985).

After the trial/settlement of the Bozzello Action, an Inquest will be held to determine the amount defendant must pay to reimburse plaintiff for the attorneys' fees and costs incurred in defending itself in the Bozzello Action thus far.

All parties shall appear for a Certification Conference in Nassau County Supreme Court, IAS Part 32, at 100 Supreme Court Drive, Mineola, New York, on December 20, 2011, at 9:30 a.m.

This constitutes the Decision and Order of this Court.

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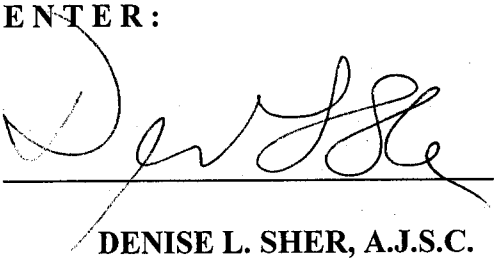

DENISE L. SHER, A.J.S.C.

Dated: Mineola, New York
November 30, 2011