SHORT FORM ORDER

INDEX No. 10-30502
CAL. No. 12-01996CO

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 33 - SUFFOLK COUNTY

PRESENT:

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE 3-5-13 (#001)
MOTION DATE 4-22-13 (#002)
ADJ. DATE 4-22-13
Mot. Seq. # 001 - MG; CASEDISP
002 - XMD

JOHN G. APISSON, Plaintiff, - against - LONG ISLAND EYE SURGICAL CARE, P.C. and THE HARTFORD INSURANCE COMPANY, Defendants.	PETER T. CONNOR, ESQ. Attorney for Plaintiff 77 North Centre Avenue, Suite 315 Rockville Centre, New York 11570 CHURBUCK CALABRIA JONES, et al. Attorneys for Defendants 43A East Barclay Street Hicksville, New York 11801

Upon the following papers numbered 1 to 33 read on this motion and cross motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 22; Notice of Cross Motion and supporting papers 23 - 27; Answering Affidavits and supporting papers 28 - 29; 30 - 33; Replying Affidavits and supporting papers ____; Other ____; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the cross motion by plaintiff for summary judgment in his favor is denied; and it is

ORDERED that the motion by defendants for summary judgment in their favor on the complaint and a declaration that defendant Trumbull Insurance Company, s/h/a The Hartford Insurance Company, does not have a duty to defend or indemnify plaintiff in a related personal injury action entitled *Irene Schlesinger, plaintiff, against Ajay Berdia, M.D., Port Neurology Realty, Inc., and John G. Apisson, M.D., defendants*, assigned index number 25698/2007, is granted.

On September 11, 2006, Irene Schlesinger allegedly was injured when she tripped and fell while walking in a parking lot on commercial property known as 640 Belle Terre Road, Port Jefferson, New

York. Developed as a medical complex, the property is improved with several buildings and a large parking lot used in common by the tenants and their visitors. Plaintiff John Apisson, a medical doctor, owns Building G, and nonparty P.J. Complex, Inc., allegedly owns the parking lot. Prior to Schlesinger's accident, in June 2004, defendant Long Island Eye Surgical Care, P.C., entered into a written agreement with Apisson to lease Building G for a three-year period running from July 1, 2004 to June 30, 2007. The lease agreement required, among other things, that Long Island Eye Surgical Care maintain liability and property damage insurance naming Apisson, as "Lessor," as an additional insured "against any and all liability occasioned by Lessee's negligence, accident or disaster in or about the demised premises or any part thereof . . . or adjoining sidewalks, curbs, vaults and vault space, if any, streets or ways, or any appurtenances thereto," and that it indemnify and hold Apisson harmless against "all liabilities . . . resulting from any negligent act or omission of Lessee."

Approximately one year after her accident, Schlesinger commenced an action against Apisson, Dr. Ajay Berdia, and Port Neurology Realty, Inc. Berdia, a neurologist, is a shareholder of Port Neurology, P.C., which is the owner of Building H at 640 Belle Terre Road. Schlesinger alleges Apisson, Berdia, and Port Neurology Realty owned or maintained the parking lot at the complex, that her injuries were caused by a dangerous condition in the parking lot, and that they created or had notice of such condition. At a deposition conducted in July 2010, Schlesinger testified that she and her husband had gone to the subject property on the date of the accident, because her husband had an appointment with Berdia. She testified that after the appointment, she and her husband walked from Berdia's office building to the space where their vehicle was parked, and that she tripped and fell to the ground when her left foot got caught in a crack on the surface of the parking lot.

Upon learning he was a named a defendant in the lawsuit brought by Schlesinger, Apisson allegedly filed a claim under a commercial insurance policy, known as the Spectrum Business Owner's Policy, issued to Long Island Eye Surgical Care by defendant Trumbull Insurance Company, s/h/a The Hartford Insurance Company. Trumbull Insurance disclaimed liability by correspondence to Apisson dated December 16, 2008. Thereafter, in September 2010, Apisson commenced this action for a judgment declaring that Long Island Eye Surgical Care or Trumbull Insurance is obligated to defend and indemnify him for any liability related to the Schlesinger action. The Court notes that in July 2011, the parties in the Schlesinger action entered into a mediated settlement agreement, and Apisson agreed to pay $2,500 of the settlement amount.

Long Island Eye Surgical Care and Trumbull Insurance now move for an order granting summary judgment in their favor, arguing that, under the terms of the lease agreement, Long Island Eye Surgical Care had no duty to maintain or repair the parking lot or to indemnify Apisson for accidents that occurred in the parking lot. Defendants also argue that Schlesinger's fall in the parking lot did not trigger the additional insured provision of the insurance policy issued to Long Island Eye Surgical Care by Trumbull Insurance, as the parking lot was not part of the demised premises under the lease agreement. Defendants' submissions in support of the motion include copies of the pleadings filed in this action and in the Schlesinger action; transcripts of deposition testimony given in the Schlesinger action; a copy of the lease agreement between Apisson and Long Island Eye Surgical Care; and a copy of

the property and liability policy issued by Trumbull Insurance to Long Island Eye Surgical care for the period from October 1, 2005 to October 1, 2006. Apisson opposes the motion and cross-moves for summary judgment in his favor and a declaration that both Long Island Surgical Eye Care and Trumbull Insurance owe a duty to defend and indemnify him for the claim raised in the underlying personal injury action brought by Schlesinger.

Apisson's cross motion for summary judgment is denied. CPLR 3212(a) provides that if no date for making a summary judgment motion has been set by the court, such a motion "shall be made no later than one hundred twenty days after the filing of the note of issue, except with leave of court on good cause shown." Absent a showing of good cause for the delay in filing a summary judgment motion, a court lacks the authority to consider even a meritorious, non-prejudicial application for such relief (*see* ***Miceli v State Farm Mut. Auto. Ins. Co.***, 3 NY3d 725, 786 NYS2d 379 [2004]; ***Brill v City of New York***, 2 NY3d 648, 781 NYS2d 261 [2004]). Although the statutory 120-day period for making a summary judgment motion in this case expired on February 12, 2013, Apisson did not make his motion for summary judgment until April 15, 2013 (*see* CPLR 2211). As there is no explanation in the cross-moving papers for Apisson's delay in seeking summary judgment, his motion must be denied as untimely (*see* ***Miceli v State Farm Mut. Auto. Ins. Co.***, 3 NY3d 725, 786 NYS2d 379; ***Brill v City of New York***, 2 NY3d 648, 781 NYS2d 261; ***Bicounty Brokerage Corp. v Burlington Ins. Co.***, 101 AD3d 778, 957 NYS2d 161 [2d Dept 2012]; ***Teitelbaum v Crown Hgts. Assn. for the Betterment***, 84 AD3d 935, 922 NYS2d 544 [2d Dept 2011]).

As to the summary judgment motion by Long Island Eye Surgical Care and Trumbull Insurance, "[t]he duty of an insurer to defend its insured arises whenever the allegations within the four corners of the underlying complaint potentially give rise to a covered claim, or when the insurer 'has actual knowledge of facts establishing a reasonable possibility of coverage'" (***Frontier Insulation Contrs. v Merchants Mut. Ins. Co.***, 91 NY2d 169, 175, 667 NYS2d 982 [1997]; *see* ***Continental Cas. Co. v Rapid-American Corp.***, 80 NY2d 640, 593 NYS2d 966 [1993]; ***Bruckner Realty, LLC v County Oil Co., Inc.***, 40 AD3d 898, 838 NYS2d 87 [2d Dept 2007]). To be relieved of its "exceedingly broad" duty to defend (***Colon v Aetna Life & Cas. Ins. Co.***, 66 NY2d 6, 8, 494 NYS2d 688 [1985]), an insurer must establish as a matter of law that there is no possible factual or legal basis upon which it may be obligated to indemnify its insured under any policy provision (***Allstate Ins. Co. v Zuk***, 78 NY2d 41, 45, 571 NYS2d 429 [1991]; *see* ***State Farm Fire & Cas. Co. v Joseph M.***, 106 AD3d 806, 964 NYS2d 621 [2d Dept 2013]; ***Physicians' Reciprocal Insurers v Giugliano***, 37 AD3d 442, 830 NYS2d 225 [2d Dept 2007]; ***George A. Fuller Co. v United States Fid. & Guar. Co.***, 200 AD3d 255, 613 NYS2d 152 [1st Dept 1994]). Distinct from, and more narrow than, the duty to defend, an insurer's duty to indemnify is determined by the actual basis for the insured's liability to a third-party (***Servidone Constr. Corp. v Security Ins. Co. of Hartford***, 64 NY2d 419, 424, 488 NYS2d 139 [1985]). Furthermore, in a dispute over insurance coverage, the insured or additional insured bears the initial burden of establishing coverage (*see* ***Dreyer v New York Cent. Mut. Fire Ins.***, 106 AD3d 685, 964 NYS2d 251 [2d Dept 2013]; ***L&D Serv. Sta., Inc. v Utica First Ins. Co.***, 103 AD3d 782, 962 NYS2d 187 [2d Dept 2013]; ***Bread & Butter, LLC v Certain Underwriters at Lloyd's, London***, 78 AD3d 1099, 913 NYS2d 246 [2d Dept 2010]), while the insurer challenging an indemnity claim bears the burden of proving that the loss

does not fall within the policy (*see* ***Servidone Constr. Corp. v Security Ins. Co. of Hartford***, 64 NY2d 419, 445, 488 NYS2d 139; ***Stellar Mech. Servs. of N.Y., Inc. v Merchants Ins. of N.H.***, 74 AD3d 948, 903 NYS2d 471 [2d Dept 2010]; ***New York City Hous. Auth. v Commercial Union Ins. Co.***, 289 AD2d 311, 734 NYS2d 590 [2d Dept 2001]).

As an additional insured, Apisson enjoys the same protections under the subject insurance policy as the named insured (*see* ***Pecker Iron Works of N.Y., Inc. v Traveler's Ins. Co.***, 99 NY2d 391, 756 NYS2d 822 [2003]). Nevertheless, Trumbull Insurance's submissions establish a prima facie case that the allegations in the complaint do not fall within the scope of the commercial insurance policy it issued to Long Island Eye Surgical Care. The declarations portion of the business owner's policy issued by Trumbull Insurance, which includes business property and business liability coverage, states that the policy applies to five different locations operated by Long Island Eye Surgical Care, one of which is Building G at 640 Belle Terre Road, Port Jefferson. The business liability portion of the insurance policy states at Section A, entitled "Coverage," that the insurer will pay those sums the insured becomes legally obligated to pay because of bodily injury, and that it will have the right and duty to defend the insured against any suit seeking damages for bodily injury, but that it has no duty to defend the insured against any action for bodily injury "to which this insurance does not apply." Section A also states, in relevant part, that the liability coverage applies to bodily injury only if such injury "is caused by an 'occurrence' that takes place in the 'coverage territory' . . . during the policy period," and Section G states "'[o]ccurrence' means an accident." Further, Section C (2)(f) of the policy, entitled "Additional Insureds by Contract, Agreement or Permit," states that included within the definition of "insured" is "[a]ny person or organization with whom you agreed, because of a written contract . . . to provide insurance such as is afforded under this Business Liability Coverage Form, but only with respect to your operations, 'your work,' or facilities owned or used by you."

Article 1 of the lease agreement between Apisson and Long Island Eye Surgical Care defines the demised premises as "(a) all the land (the 'Land') described in Exhibit A hereto (b) all buildings, structures and other improvements . . .now or hereafter located on the Land . . . and all rights of way or of use, servitudes, licenses, tenements, appurtenances and easements." Exhibit A states the demised premises is Building G at 640 Belle Terre Road, Port Jefferson. Article 3 of the lease states that "the demised premises is part of a maintenance association known as Port Jefferson Professional Complex, which maintains the parking lot area, snow removal, etc.," and that the Lessee, in addition to rental payments, "will be responsible for the maintenance payments due to the association, which such payments shall constitute an additional rent." Article 5 states that "Lessor shall make all structural repairs and structural replacements to the demised premises which shall include, but not be limited to the roof, exterior walls and foundation," and Article 6, states that "Lessee . . . shall keep the demised premises . . .and the adjoining sidewalks, curbs, vaults and vault space, if any, streets and ways, and all appurtenances to the Demised Premises, in good and clean order and condition . . . and promptly shall make all necessary or appropriate interior or exterior non-structural repairs." In addition, Article 14 of the lease, entitled "Indemnification by Lessee," provides as follows:

> Lessee shall indemnify and hold Lessor harmless from and against all liabilities, obligations, claims . . . including reasonable attorneys' fees . . . imposed upon or incurred by or asserted against Lessor or the Demised Premises by reason of the occurrence or existence of any of the following, resulting from any negligent act or omission of the Lessee: ownership of the Demised Premises . . . any accident, injury or death of persons . . . occurring, or claimed to have occurred, on or about the Demised Premises or any part thereof . . . or the adjoining sidewalks, curbs, vaults or vault spaces, if any, streets or ways, or appurtenances thereto.

The fundamental principle of contract interpretation is that an agreement is to be construed in accord with the parties intent (***Greenfield v Phillies Records***, 98 NY2d 562, 569, 750 NYS2d 565 [2002]). "The best evidence of what parties to a written agreement intend is what they say in their writing" (***Slamow v Del Col***, 79 NY2d 1016, 1018, 584 NYS2d 424 [1992]). Further, when a written contract is complete and its terms are unambiguous, the contract should be enforced in accordance with the plain meaning of its terms (*see* ***Consedine v Portville Cent. School Dist.***, 12 NY3d 286, 879 NYS2d 806 [2009]; ***Greenfield v Philles Records***, 98 NY2d 562, 750 NYS2d 565; ***W.W.W. Assoc. v Giancontieri***, 77 NY2d 157, 565 NYS2d 440 [1990]). "A contract is unambiguous if the language it uses has 'a definite and precise meaning, unattended by danger of misconception in the purport of the [agreement] itself, and concerning which there is no reasonable basis for a difference of opinion'" (***Greenfield v Philles Records***, 98 NY2d 562, 569, 750 NYS2d 565, *quoting* ***Breed v Insurance Co. of N. Am.***, 46 NY2d 351, 355, 413 NYS2d 352 [1978]). Conversely, ambiguity is present in a contract if the language used renders it susceptible to more than one reasonable interpretation (*see* ***Brad H. v City of New York***, 17 NY3d 180, 928 NYS2d 221 [2011]; ***Evans v Famous Music Corp.***, 1 NY3d 452, 775 NYS2d 757 [2004]).

As it is a question of law whether or not a contract is ambiguous (***W.W.W. Assoc. v Giancontieri***, 77 NY2d 157, 162, 565 NYS2d 440), a court must first determine whether the lease agreement at issue on its face is reasonably susceptible to more than one interpretation (*see* ***Chimart Assocs. v Paul***, 66 NY2d 570, 498 NYS2d 344 [1986]). The aim of a court interpreting a contract is to arrive at a construction that gives fair meaning to all of its terms and provisions, and to reach a "practical interpretation of the expressions of the parties so that their reasonable expectations will be realized" (***Joseph v Creek & Pines***, 217 AD2d 534, 535, 629 NYS2d 75 [2d Dept], *lv dismissed* 86 NY2d 885, 635 NYS2d 950 [1995], *lv denied* 89 NY2d 804, 653 NYS2d 543 [1996]; *see* ***G3-Purves St., LLC v Thomson Purves, LLC***, 101 AD3d 37, 953 NYS2d 109 [2d Dept 2012]; ***Eitan Ventures, LLC v Peeled, Inc.***, 94 AD3d 614, 943 NYS2d 449 [1st Dept 2012]; ***Zuchowski v Zuchowski***, 85 AD3d 777, 925 NYS2d 541 [2d Dept 2011]; ***Gutierrez v State of New York***, 58 AD3d 805, 871 NYS2d 729 [2d Dept 2009]). It is a cardinal rule of construction that a court should not interpret a contract in such a way as would leave one of its provisions substantially without force or effect (***Corhill Corp. v S.D. Plants, Inc.***, 9 NY2d 595, 599, 217 NYS2d 1 [1961]; *see* ***Beal Sav. Bank v Sommer***, 8 NY3d 318, 834 NYS2d 44 [2007]; ***Givati v Air Techniques, Inc.***, 104 AD3d 644, 960 NYS2d 196 [2d Dept 2013]; ***Zullo v Varley***,

57 AD3d 536, 868 NYS2d 290 [2d Dept 2008]; ***Petracca v Petracca***, 302 AD2d 576, 756 NYS2d 587 [2d Dept 2003]).

Furthermore, "[w]hen a party is under no legal duty to indemnify, a contract assuming that obligation must be strictly construed to avoid reading into it a duty which the parties did not intend to be assumed" (***Hooper Assocs. v AGS Computers***, 74 NY2d 487, 491, 549 NYS2d 365 [1989]; *see* ***Tonking v Port Auth. of N.Y. & N.J.***, 3 NY2d 486, 787 NYS2d 708 [2004]; ***Adesso Café Bar & Grill, Inc. v Burton***, 74 AD3d 1253, 904 NYS2d 490 [2d Dept 2010]). To determine the parties' intent, the language of such provision must be analyzed in light of the surrounding facts and circumstances (*see* ***Hooper Assocs. v AGS Computers***, 74 NY2d 487, 549 NYS2d 365; ***Margolin v New York Life Ins. Co.***, 32 NY2d 149, 344 NYS2d 336 [1973]). Stated differently, "[t]he language of an indemnity provision should be construed so as to encompass only that loss and damage which reasonably appear to have been within the intent of the parties. It should not be extended to include damages which are neither expressly within its terms nor of such character that it is reasonable to infer that they were intended to be covered under the contract" (***Niagra Frontier Trans. Auth. v Tri-Delta Constr. Corp.***, 107 AD2d 450, 453, 487 NYS2d 428 [4th Dept], *affd* 65 NY2d 1038, 494 NYS2d 695 [1985]).

As discussed above, Schlesinger alleged in the underlying negligence action that she was injured when she slipped and fell in the parking lot at 640 Belle Terre Road after her left foot got caught on a crack in the surface of the lot. Here, defendants demonstrated that the premises leased to Long Island Eye Surgical Care by Apisson in June 2004 constituted "Building G" and "all rights of way or of use, servitudes, licenses, tenements, appurtenances and easements." Apisson's contentions that the demised premises included the parking lot, and that Long Island Eye Surgical Care was contractually obligated to maintain the parking lot, are rejected. In addition to ignoring Exhibit A's description of the demised premises as Building G, adopting such an interpretation of the lease would render meaningless the language in Article 3 that "the demised premises is part of a maintenance association . . . which maintains the parking lot area" (*see* ***Perlbinder v Board of Mgrs. of 411 E. 53rd St. Condominium***, 65 AD3d 985, 886 NYS2d 378 [1st Dept 2009]; ***Zullo v Varley***, 57 AD3d 536, 868 NYS2d 290). Moreover, defendants demonstrated that the lease did not shift responsibility for repairing cracks in the parking lot at 640 Belle Terre Road to Long Island Eye Surgical Care (*see* ***Cucinotta v City of New York***, 68 AD3d 682, 892 NYS2d 352 [1st Dept 2009]; *cf.* ***Hall v Paez***, 77 AD3d 620, 909 NYS2d 105 [2d Dept 2010]). Rather, the lease unambiguously provided that Long Island Eye Surgical Care was responsible for maintaining the demised premises, as well as "adjoining sidewalks, curbs, vaults . . . streets and ways," in good and clean order, and for making "necessary or appropriate" non-structural repairs. Significantly, the lease expressly limited the areas of the property in addition to the demised premises that Long Island Eye Surgical Care must maintain to "sidewalks, curbs, vaults, vault space, if any, streets and ways," and further modifies such obligation by preceding the list with the word "adjoining." Conspicuously absent from the list of common areas to be maintained by Long Island Eye Surgical Care was the parking lot. Plaintiff's assertion that the parking lot is a street or appurtenance, therefore, is rejected as an improper attempt to re-write the lease agreement (*see* ***Tri-Messine Constr. Co. v Telesector Resources Group***, 287 AD2d 558, 731 NYS2d 648 [2d Dept 2001], *lv denied* 98 NY2d 606, 746 NYS2d 457 [2012]; *see also* ***Matter of Salvano v Merrill Lynch, Pierce, Fenner &***

Smith, 85 NY2d 173, 623 NYS2d 790 [1995]).

In opposition to defendants' motion, Apisson failed to submit evidence raising a triable issue as to whether Schlesinger's fall resulted from Long Island Eye Surgical Care's negligence, thereby triggering the indemnification provision of the lease agreement (*see* ***McLaughlin v Ann-Gur Realty Corp.***, __ AD3d __, 2013 NY Slip Op 04285 [1st Dept 2013]; ***Cucinotta v City of New York***, 68 AD3d 682, 892 NYS2d 352). Accordingly, summary judgment in favor of defendants is granted, and it is declared that Trumbull Insurance Company is not obligated to provide a defense or to indemnify plaintiff in the underlying personal injury action brought by Irene Schlesinger.

Submit judgment.

Dated: 7/10/13

THOMAS F. WHELAN, J.S.C.