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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. JOAN A. MADDEN** J.S.C. PART 11
Justice

Index Number : 105793/2011
TRAVELERS INDEMNITY CO
vs.
FIRST MERCURY INS. CO.
SEQUENCE NUMBER : 001
DEFAULT JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____
Answering Affidavits — Exhibits _____ | No(s). _____
Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is determined in accordance with the annexed decision, order and judgment.

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Dated: October 5, 2013

_____, J.S.C.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

1. CHECK ONE: ..... ☒ CASE DISPOSED ☐ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☒ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 11

----------X

The Travelers Indemnity Company, Gilbane Building Company and Gilbane/TDX Joint Venture,

Plaintiffs,

-against-

First Mercury Insurance Company, Plante Security Group and Pam Farley,

Defendants.

----------X

Index No. 105793/11

Joan A. Madden, J.:

In this action for a declaratory judgment as to insurance coverage, plaintiffs The Travelers Indemnity Company (Travelers), Gilbane Building Company and Gilbane/TDX Joint Venture (collectively "Gilbane"), move, pursuant to CPLR 3212, for summary judgment: 1) declaring that defendant First Mercury Insurance Company (First Mercury) has a duty to defend and indemnify Gilbane, the City of New York and the New York City Health and Hospitals Corporation (collectively "the City"), in the action entitled Pam Farley v. Gilbane Building Company, et al (Index No. 18178/09, Sup Ct, Kings Co) (the "underlying action"); and 2) compelling First Mercury to reimburse Travelers for the costs incurred in defending those partes in the underlying action.

Defendant First Mercury opposes the motion and cross-moves, pursuant to CPLR 3212, for summary judgment, declaring that it has no duty to defend or indemnify Gilbane or the City in the

underlying action.

The following facts are not disputed unless otherwise noted. Gilbane was hired to perform construction management services at 451 Clarkson Avenue, Brooklyn, New York in connection with a construction project at Kings County Hospital. At the time of the underlying accident, Gilbane was insured by Travelers under a commercial general liability insurance policy (number DT-CO-964K6445-IND-07), effective from July 1, 2007 to July 1, 2008.

Pursuant to a written subcontract dated November 22, 2005, Gilbane hired defendant Alante Security Group (Alante) to provide security services at the construction site. The subcontract required Alante to procure commercial general liability insurance, which included, *inter alia*, an "[e]ndorsement naming the Dormitory Authority State of New York, NYC Health and Hospitals Corporation, Kings County Hospital, Gilbane/TDX Joint Venture as Additional Insureds." The subcontract also required such insurance to provide primary coverage to any other insurance maintained by the additional insureds, and the additional insureds' insurance to be excess coverage. At the time of the underlying accident, Alante was insured by defendant First Mercury under a commercial general liability insurance policy (number FMM I003781-3, as a renewal of FMM I003781-2), effective January 20, 2007 to January 20, 2008. It is undisputed that the First Mercury policy included a Broad Form Blanket Additional

Insured Endorsement ("blanket additional insured endorsement" or "blanket endorsement"), which stated in relevant part as follows:

> WHO IS AN INSURED (Section II) provision of the Policy is amended to include as an insured any person or organization (called "additional insured") to whom you are obligated by valid written contract to provide such coverage, but only with respect to liability for "bodily injury" or "property damage" arising solely out of "your work" on behalf of said additional insured for which coverage is provided by this policy.
>
> It is agreed that such insurance as is afforded by this policy for the benefit of the additional insured shall be primary insurance as respects any claims, loss or liability arising directly from the Named Insured's [Aliant's] operation and any other insurance maintained by the additional insured shall be excess and non-contributory with the insurance provided hereunder.

On September 28, 2007, Pam Farley, the plaintiff in the underlying action, was employed by Alante as a security guard at the construction site, and alleges that while on her rounds checking that the site was secure, she was injured when she tripped and fell on debris near the security guard station booth. Farley alleges that the debris had been placed at the location by Gilbane, as part of its work on the site. In or about June 2008, Farley subsequently commenced the underlying action, seeking damages for personal injuries based on defendants' alleged negligence in the ownership, operation, maintenance, management, control and supervision of the premises.

On April 7, 2008, Travelers wrote to Alante "demanding on behalf of our insured [Gilbane], owner and all additional insureds, defense, indemnification and reimbursement of any and

all costs incurred by or on behalf of our insured, owner and all additional insureds in the potential defense of the claim presented." Travelers stated that "[i]t is our belief that you [Alante] are contractually obligated to defend and indemnify our policyholder [Gilbane] and owners against the claim presented pursuant to the applicable contract for the project," and that "you are obligated to have our policyholder and owners named as an additional insured under any and all commercial general liability and commercial excess liability policies held by your company." As Alante's insurer, First Mercury, responded by letter dated July 17, 2008, denying Travelers' request for coverage for the additional insureds, explaining that "the policy does specifically exclude any injury or damages alleged by an insured employee which also applies to any additional insured under the policy."

On November 29, 2010, after Alante was impleaded as a third-party defendant in the underlying action, Travelers wrote to First Mercury asserting that First Mercury's prior denial was untimely, and "once again demanding that First Mercury revise their position and provide defense and indemnification for New York City, New York City Health & Hospitals Corporation and Gilbane/TDX, JV."

By letter dated March 11, 2011, First Mercury advised Travelers that it "continues to deny coverage" and also that

Travelers' "tender is premature." First Mercury explained, *inter alia*, that under the Blanket Additional Insured Endorsement,

> the liability of Gilbane/TDX and the Tendering Parties must solely arise out of Alante's work for Gilbane/TDX and the Tendering Parties on behalf of Alante. Plaintiff [Pam Farley] has made no allegations in the Gilbane Lawsuit that the incident arises out of Alante's work and has made no allegations that Gilbane/TDX and the Tendering Parties may only have vicarious liability. Notably there are no New York State Labor Law violations alleged. Instead, the claim pled is for the Tendering Parties' negligence. Given the lack of any allegations and any known facts indicating that the Tendering Parties' liability solely arises out of Alante's work, First Mercury has no coverage obligations . . .

On May 17, 2011, Travelers and Gilbane commenced the instant action for a judgment declaring that "First Mercury has a duty to provide a defense and indemnification to Gilbane, Gilbane/TDX, NYCHHC and the City in connection with the Underlying Action," and that "First Mercury is obligated to reimburse Travelers, Gilbane, Gilbane/TDX, NYCHHC and the City for any and all defense and related costs incurred in connection with the Underlying Action." The complaint quotes the portion of the blanket additional insured endorsement referring to "liability for 'bodily injury' or 'property damage' arising solely out of 'your work' on behalf of such additional insured," and asserts that such provision is "ambiguous," and that the underlying accident "arose out of Alante's work."

Travelers is now moving and First Mercury is cross-moving for summary judgment. In support of its motion, Travelers

relies on two separate endorsements to establish that Gilbane is entitled to coverage as an additional insured under the First Mercury Policy. One endorsement expressly names Gilbane as an additional insured, and the other is the blanket additional insured endorsement. Travelers contends that Gilbane qualifies as an additional insured under the blanket endorsement since Gilbane's written subcontract with Alante required Alante to name Gilbane as an additional insured.

In opposing the motion and in support of its cross-motion, First Mercury objects that the endorsement expressly naming Gilbane as additional insured was not included as part of the policy in effect from January 2007 to January 2008, the time of the underlying accident, and such endorsement was in effect for only for 2006. First Mercury also contends that Gilbane is not covered under the blanket additional insured endorsement, since Farley's injuries did not arise "solely" out of her work for Alante. First Mercury argues that the use of the phrase "arising solely out of 'your work'" means that Alante must be "solely", i.e. 100%, responsible for Farley's injuries, with no negligence on the part of any other defendant, whose liability can only be vicarious, as under New York Labor Law. First Mercury asserts that since Farley specifically alleges that all defendants in the underlying action were negligent, "there is no question that there is no possible set of circumstances under which Alante may

be *solely* responsible for Ms. Farley's injuries" (emphasis added).

A party seeking summary judgment must make a prima facie showing that it is entitled to judgment as a matter of law by proffering sufficient evidence to demonstrate the absence of any material issue of fact. See Alvarez v Prospect Hosp., 68 NY2d 320, 324 (1986). Once the movant meets its burden, then the opposing party must produce evidentiary proof in admissible form sufficient to raise a triable issue of material fact. See Zuckerman v City of New York, 49 NY2d 557, 562 (1980).

Here, as the parties claiming coverage as additional insureds, plaintiffs bear the burden of proving that Gilbane qualifies as an additional insured within the meaning of the additional insured endorsement(s) of the First Mercury policy in effect on the date of the underlying accident, September 28, 2007. See Tribeca Broadway Assocs LLC v. Mount Vernon Fire Insurance Co, 5 AD3d 198, 200 (1st Dept 2004). A party not named as an insured or an additional insured on the face of the policy is not entitled to coverage. See Moleon v. Kreisler Borg Florman General Construction Co, Inc, 304 AD2d 337, 339 (1st Dept 2003).

"An insurance contract is to be interpreted by the same general rules that govern the construction of any written contract and enforced in accordance with the intent of the parties as expressed in the language employed in the policy."

Throgs Neck Bagels, Inc v. GA Insurance Co, 241 AD2d 66, 69 (1st Dept 1998). Accordingly, where the provisions of a policy are "clear and unambiguous", they should be "given their plain and ordinary meaning," United States Fidelity & Guaranty Co v Annunziata, 67 NY2d 229, 232 (1986), reading the policy "in light of common speech . . . according to the reasonable expectations and purposes of ordinary businesspeople when making ordinary business contracts," DMP Contracting Corp v. Essex Insurance Co, 76 AD3d 844 (1st Dept 2010) (quoting City of New York v. Evanston Insurance Co, 39 AD3d 153, 156 [2nd Dept 2007]).

Applying these principles, the court is unable to conclude as a matter of law that Gilbane is entitled to coverage based on the additional insured endorsement that expressly names Gilbane as an additional insured. First Mercury submits an affidavit from John Bures, Senior Vice President of CoverX, the underwriting agent for First Mercury. Bures states that the endorsement was part of the policy in effect for 2006, but "was never placed onto the 2007 Policy," because First Mercury "never received any request from the insured [Alante] and/or its broker to add" this endorsement to the 2007 policy. In reply, First Mercury submits an attorney's affirmation that the endorsement at issue "was pulled from the Underwriting File for four policies written by First Mercury for Alante Security, and not the actual 2007 Policy," a "true and correct" copy of the "actual" 2007

policy is annexed to the cross-motion, and it "does not contain the 'Scheduled AI Endorsement' relied upon by plaintiffs."

On its face the endorsement states that it is "effective on November 20, 2006," and "forms a part of Policy No. FMM1003781." It undisputed that First Mercury exchanged the endorsement in discovery, in response to Travelers' request for the policy in effect on the date of the underlying accident. Despite such exchange, First Mercury now claims for the first time in opposition to plaintiffs' motion, that the inclusion of such indorsement was essentially in error. Notably, an examination of the policy Travelers received from First Mercury, and the version now submitted with Travelers' cross-motion papers, shows that the policy exchanged in discovery was also incomplete.

Under these circumstances, where material issues are raised as to the actual content of the relevant policy, and plaintiffs have not had an opportunity to explore those issues in discovery, the record is insufficient to resolve all factual questions as to whether coverage exists under the additional endorsement expressly naming Gilbane as an additional insured.

Notwithstanding the foregoing conclusion, since the parties do not dispute that the policy in effect on the date of the underlying accident included a blanket additional insured endorsement, the court will determine whether Gilbane is entitled to coverage under that provision.

As quoted above, the blanket additional insured endorsement states that an additional insured is "any person or organization" to whom Alante is "obligated by valid written contract to provide such coverage, but only with respect to liability for 'bodily injury' or 'property damage' arising solely out of 'your work' [Alante's work] on behalf of said additional insured for which coverage is provided by this policy." It is undisputed that Alante's written subcontract with Gilbane required Alante to procure commercial general liability insurance naming Gilbane, among others, as an additional insured. The issue is whether Farley suffered bodily injury "arising solely out of" Alante's work for Gilbrane.

Generally, "the focus of the inquiry under an 'arising out of' clause is not on the precise cause of the accident but on the general nature of the operation in the course of which the injury was sustained." Hunter Roberts Construction Group, LLC v. Arch Insurance Co, 75 AD3d 404, 408 (1st Dept 2010). The Court of Appeals explains that "we have interpreted the phrase 'arising out of' in an additional insured clause to mean 'originating from, incident to, or having connection with.' It requires 'only that there be some causal relationship between the injury and the risk for which coverage is provided.'" Regal Construction Corp v. National Union Fire Insurance Co, 15 NY3d 34, 38 (2010) (quoting Maroney v. New York Central Mutual Fire Insurance Co, 5

NY3d 467, 472 [2005]) (internal citations omitted).

Here, Farley alleges she was injured while walking through the work site checking to see if it was secured, when she tripped and fell on debris. Clearly, a connection exists between the accident and the insured's work, as the alleged injury was sustained by Aliant's own employee while performing her duties as a security guard at the work site. Since the loss involves an employee of the named insured, who was injured while performing the named insured's work under the subcontract, "there is a sufficient connection so to trigger the additional insured 'arising out of' operations'[or work] endorsement and fault is immaterial to this determination." Hunter Roberts Construction Group, LLC v. Arch Insurance Co, supra at 408.

First Mercury's reliance on the use of the word "solely" to narrow the meaning of the "arising out" clause is not persuasive. First Mercury submits no binding legal authority to support its position that the use of the word "solely" means that the insured, Alante, must be "solely" or 100% liable for Farley's injuries, and that Gilbane and the other defendants can only be vicariously liable.[1] Any negligence by Gilbrane or the other defendants in the underlying action, is not material to the

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[1]First Mercury cites an unreported decision from the U.S. District Court for the Northern District of Illinois, Leff Construction Rockford LLC v. Unite National Insurance Co, 2007 US Dist LEXIS 50521 (ND Ill, July 9, 2007).

application of the blanket additional insured endorsement. See Regal Construction Corp v. National Union Fire Insurance Co, supra at 38-39; Chelsea Assoc, LLC v. Laquila-Pinnacle, 21 AD3d 739 (1st Dept), lv app den 6 NY3d 742 (2005); Consolidated Edison Co v. United States Fidelity & Guaranty Co, 263 AD2d 380, 382 (1st Dept 1999).

In the one New York case involving the identical clause, "arising solely out of your work," the Appellate Division Second Department simply determined that the additional insured was entitled to a defense in the underlying personal injury action, without applying a different or more restrictive standard in interpreting the clause. Sandy Creek Central School District v. United National Insurance Co, 37 AD3d 812 (2nd Dept 2007). The only other New York case construing the word "solely" in an additional insured endorsement is not relevant to the instant action, since it involved a completely different clause requiring that the "claim, loss or liability is determined to be *solely the negligence or responsibility of the insured.*" City of New York v. Evanston Insurance Co, 39 AD3d 153 (2nd Dept 2007) (emphasis added).[2]

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[2]In City of New York v. Evanston Insurance Co, supra at 157, the Second Department held that the word "solely" was ambiguous, and construed the endorsement against the insurer, accepting the City's interpretation that the City would be an additional insured only if the insured "bears some responsibility for the happening of the accident and the City bears none." Id at 157.

For the foregoing reasons, the court concludes that Gilbrane qualifies as an additional insured under the blanket additional insured endorsement. Moreover, under the circumstances presented, it not premature to determine that First Mercury has a duty to defend and indemnify, and that First Mercury's coverage is primary.

Accordingly, it is

ORDERED that plaintiffs' motion for summary judgment is granted and defendant's cross-motion for summary judgment is denied; and it is further

ORDERED, ADJUDGED AND DECLARED that First Mercury Insurance Company has a duty to defend and indemnify Gilbane Building Company, Gilbane/TDX Joint Venture, the City of New York and the New York City Health and Hospitals Corporations in the underlying action entitled Pam Farley v. Gilbane Building Company, et al (Index No. 18178/09, Sup Ct, Kings Co); and it is further

ORDERED, ADJUDGED AND DECLARED that First Mercury Insurance Company is obligated to reimburse The Travelers Indemnity Corp for the costs incurred in defending said underlying action; and it is further

ORDERED, ADJUDGED AND DECLARED that with respect to Gilbane Building Company and Gilbane/TDX Joint Venture, the First Mercury policy is primary and the Travelers policy is excess; and with respect to the City of New York and the New York City Health and

Hospitals Corporations, the First Mercury policy and the Travelers policy are co-primary.

This constitutes the decision, order and judgment of this court.

DATED: October 15, 2013

ENTER:

J.S.C.

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).