SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. CAROL EDMEAD
Justice

PART 35

Hermitage Insurance Company

-v-

INDEX NO. 151038/2013

MOTION DATE 7/13/2015

MOTION SEQ. NO. 001

TAC Blacktop, Inc.

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

In this declaratory judgment action, plaintiff Hermitage Insurance Company ("plaintiff") moves for summary judgment declaring that it has no duty to defend or indemnify defendant TAC Blacktop, Inc. ("TAC") under a policy (the "Policy") it issued to TAC concerning two underlying personal injury actions. The motion is granted.

According to Hermitage's senior underwriter, Christine Owens ("Owens"), TAC's application and related Survey Report stemming from plaintiff's interview of TAC's president, Tom Caramanno ("Caramanno"), TAC does "flat concrete" for residential homes and condominiums, as well as sidewalks, driveways, and pathways for "mainly small homeowners only." Therefore, plaintiff issued the Policy to TAC, with the classification "92215" applicable to "driveway, parking area or sidewalk-paving or repaving." The underlying motorcycle accident/personal injury actions for which TAC seeks coverage allegedly occurred due to a trench on a roadway along the service road of 440 West Shore Expressway, Staten Island. TAC paved over the trench (which was dug in order to install pipes for Con Edison). Hermitage argues that since the Policy's classification limitation precludes coverage for claims arising out of operations TAC performed outside its designated classification, Hermitage has no duty to defend or indemnify TAC in the underlying actions.

In opposition, Caramanno attests that he specifically stated on the application that it does "paving" work, because TAC is a paving company. TAC never limited the "work [the] company did to patios, driveways and sidewalks." TAC points out that the Survey report indicates that TAC "mainly" performed work for small homeowners, because he advised the interviewer that it also "did paving jobs for other contractors." TAC's work at issue involved "paving over a four foot wide trench; laying blacktop/asphalt over a one and a half inch deep area"; TAC was not

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

Dated: _____

_____, J.S.C.

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

repaving the entire roadway but only such portion as described. Plaintiff does not indicate any other classification applicable to TAC's activities. The report by plaintiff's interviewer overlooked the paving work TAC performs. The Declaration Page describes the activities covered in two areas: business description and classification. While both areas include terms different from each other, both list paving. TAC was engaged in a covered activity of paving at the time of the loss. Further, depositions are necessary to explore the discrepancies in this matter.

In reply, Hermitage points out that Owens also stated that the code 99321 applicable to "street or road paving or repaving, surfacing or scraping," would have covered the roadway paving work at issue, and that the Policy did not cover this work. Also, Hermitage has never provided such coverage to anyone because of the higher exposure it poses."

Discussion

The proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, by advancing sufficient "evidentiary proof in admissible form" to demonstrate the absence of any material issues of fact (*Madeline D'Anthony Enterprises, Inc. v Sokolowsky,* 101 AD3d 606, 607 [1st Dept 2012] *citing Alvarez v Prospect Hosp.,* 68 NY2d 320 [1986] and *Zuckerman v City of New York,* 49 NY2d 557, 562 [1980]).

The burden then shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action (CPLR 3212[b]; *Madeline D'Anthony Enterprises, Inc.*, 101 AD3d at 607). Mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient (*Alvord and Swift v Steward M. Muller Constr. Co.*, 46 NY2d 276, 281-82 [1978]; *Carroll v Radoniqi,* 105 AD3d 493 [1st Dept 2013]).

"'[C]ourts bear the responsibility of determining the rights or obligations of parties under insurance contracts based on the specific language of the policies' . . . whose unambiguous provisions must be given 'their plain and ordinary meaning'" (*Nautilus Ins. Co. v Matthew David Events, Ltd.*, 69 AD3d 457, 893 NYS2d 529 [1st Dept 2010]; *Oppenheimer AMT-Free Municipals v ACA Financial Guar. Corp.*, 110 AD3d 280, 971 NYS2d 95 [1st Dept 2013] ("Insurance policies are to be afforded their plain and ordinary meaning and interpreted in accordance with the reasonable expectations of the insured party")). "A contract is ambiguous 'if the provisions in controversy are reasonably or fairly susceptible of different interpretations or may have two or more different meanings'" (*Feldman v National Westminster Bank,* 303 AD2d 271 [2003], *lv denied* 100 NY2d 505 [2003]). However, mere assertion by a party that contract language means something other than what is clear when read in conjunction with the whole contract is not enough to create an ambiguity sufficient to raise a triable issue of fact (*Ruttenberg v Davidge Data Sys. Corp.,* 215 AD2d 191, 193 [1995]).

The submissions establish that TAC's application identified its work as consisting of "paving." In this regard, the "Nature of Business/ Description of Operations by Premises" on TAC's application states as follows:

"concrete Flat work, Driveways, Paving
No Subs Used"

The "Small Subcontractor's Survey" reflecting the interview of Caramanno notes that he "works along with his partner doing 'flat concrete' work for *private residential homes and condominiums*"; "mainly concrete *sidewalks, driveways, and pathways*"; "mainly does work for

small homeowners only"; will "replace broken and raised *sidewalks, walkways, driveways*" and "cement patios." Notably, Caramanno also stated that he would rope off and guard "the entire area to prevent *persons from walking* in finished areas" and that "*pedestrians* [would] be guided to the *sidewalk* on the other side of the street." (Emphasis added).

Consistent with the Survey report and application, the Policy's "Commercial General Liability Coverage Part Declarations" page clearly states under "Classification," "DRIVEWAY, PARKING AREA OR SIDE WALK - PAVING OR RE-PAVING" and lists the "Code No." as "92215." Further, plaintiff issued an endorsement to the Policy, which "changes the policy" as follows:

Classification Limitation HIC 160 (3/90)

"Coverage under this policy applies only to those operations described in The Schedule of Insurance coverage parts and/or endorsements made a part of this policy."

It is uncontested that TAC's work at the subject location was not a driveway, parking area or sidewalk. Therefore, although the work itself consisted of "paving," as TAC admits, the classification code limits coverage to "paving" work performed to the "Driveway, Parking Area or Side walk." As such, the Policy does not provide coverage for the alleged underlying incident. (*see Tower Ins. Co. of New York v. BCS Const. Services Corp.*, 118 A.D.3d 527, 988 N.Y.S.2d 145 [1st Dept 201] (finding no obligation to defend or indemnify its insured with "Business Description" as "Carpentry–Painting–Drywall–Plastering–Tile–Contractor" and work to be covered was separated into five separate "classifications," namely, "Carpentry– Interior," Painting–Interior–Structures," "Dry wall or wallboard install," "Plastering or stucco work," and "Tile, Stone–Interior construction."

Ruiz v State Wide Insulation & Constr. Corp., 269 A.D.2d 518, 703 N.Y.S.2d 257 [1st Dept 2000] (finding no obligation to defend or indemnify where the declarations page of the policy described insured's business as "painting" and insured was engaged in repairing their roof during the relevant period).

In opposition, TAC fails to raise an issue of fact as to coverage for the subject accident location. That TAC performs "paving jobs for other contractors" or "paving" generally is insufficient to raise an issue of fact as to whether the Policy provides coverage for TAC's paving activities at issue. The application, interview, and opposition papers do not indicate that TAC's activities involve paving work on a roadway. That neither "sidewalks" nor "the majority of the driveways" TAC "works on" (as listed under "Classification") are paved, does not render the Policy ambiguous. Nor is the fact that neither "sidewalk" nor "concrete" is mentioned on the application render the Policy ambiguous. The application coupled with the Survey report formed merely formed the basis of the Policy issued, and the unambiguous terms of the Policy controls.

Therefore, based on the foregoing, it is hereby

ORDERED that plaintiff Hermitage Insurance Company's motion for summary judgment is granted; and it is further

ORDERED, ADJUDGED and DECLARED that Plaintiff Hermitage Insurance Company has no duty to defend or indemnify defendant TAC Blacktop, Inc. in personal injury actions entitled *Robert Lorenzi v Consolidated Edison Company of New York, Inc. et al.* Index No. 1965/2011, and *Robert Lorenzi v Sicon Contractors, Inc., et al.*, Index No. 13058/2012, both pending in Supreme Court, Kings County; and it is further

ORDERED that said claim is severed and the Clerk of the Court shal enter judgment accordingly; and it is further

ORDERED that the remaining parties shall appear for a preliminary conference on September 29, 2015, 2:15 p.m.; and it is further

ORDERED that plaintiff shall serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated 8.12.2015 **ENTER:** _____ **J.S.C.**

HON. CAROL EDMEAD

Check one: ☐ **FINAL DISPOSITION** ☑ **NON-FINAL DISPOSITION**

Check if appropriate: ☐ **DO NOT POST** ☐ **REFERENCE**