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SHORT FORM ORDER

INDEX No. 12-20745

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 17 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. PETER H. MAYER
Justice of the Supreme Court

MOTION DATE 1-20-15 (#001)
MOTION DATE 3-3-15 (#002)
MOTION DATE 3-2-15 (#003)
ADJ. DATE 3-3-15
Mot. Seq. # 001 - MG
002 - MotD
003 - MG

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THE OUTER MARKER, LLC and PARK LINE ASPHALT MAINTENANCE, INC.,

Plaintiffs,

- against -

ASPEN SPECIALTY INSURANCE COMPANY, ASPEN SPECIALTY INSURANCE MANAGEMENT, ASPEN INSURANCE UK LIMITED, CAPACITY GROUP OF NY, LLC, CAPACITY GROUP OF WESTBURY, LLC and AMWINS BROKERAGE OF NEW YORK, INC.

Defendants.

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Upon the reading and filing of the following papers in this matter: (1) Notice of Motion/Order to Show Cause by the defendant Aspen, dated December 22, 2014, and supporting papers; by the defendant Capacity, dated January 15, 2015; (2) Notice of Cross Motion by the plaintiff Outer Marker, dated February 6, 2015 and supporting papers; (3) Affirmation in Opposition by the defendant Capacity, dated February 12, 2012, and supporting papers; by the defendant Capacity, dated February 27, 2015 (including Memorandum of Law dated February 27, 2015); by the plaintiff Outer Marker, dated February 23, 2015; (4) Reply Affirmation by the defendant Aspen, dated February 27, 2015, and supporting papers; by the plaintiff Outer Marker, dated February 28, 2015; by the plaintiff Outer Marker, dated February 27, 2015 (5) Other ___ (~~and after hearing counsels' oral arguments in support of and opposed to the motion~~); and now

UPON DUE DELIBERATION AND CONSIDERATION BY THE COURT of the foregoing papers, the motion is decided as follows: it is

ORDERED that the motion by Aspen Speciality Insurance Company, Aspen Speciality Insurance Management, and Aspen Insurance UK Limited for summary judgment dismissing plaintiffs' complaint and the cross claims of Capacity Group of NY LLC and Capacity Group of Westbury, LLC is granted; and it is further

ORDERED that the motion by The Outer Marker, LLC for summary judgment in its favor against Capacity Group of NY, LLC and Capacity Group of Westbury, LLC is granted; and it is further

ORDERED that motion for discovery by Capacity Group of NY, LLC and Capacity Group of Westbury, LLC is granted.

Plaintiffs commenced this action for a declaratory judgment and money damages regarding insurance coverage for two separate accidents which occurred in the course of construction of a hanger at Gabreski Airport in Westhampton Beach, New York. Plaintiff, The Outer Marker[1], LLC ("Outer Marker") leased the airport property. Plaintiff, Park Line Asphalt Maintenance, Inc. ("Park Line") was the project contractor. On April 27, 2010, Lesvin Bolaj filed a personal injury action in the Bronx County Supreme Court which has been transferred to Suffolk County entitled *Lesvin Bolaj v Park Line Asphalt Maintenance Inc., The Outer Marker LLC, and Valdas Visinsk d/b/a Valdas Painting*, Index No. 37376/2011. Aspen Specialty Insurance Company, Aspen Specialty Insurance Management and Aspen Insurance UK Limited (collectively "Aspen") disclaimed coverage on multiple grounds to both Park Line, as the general contractor, and Outer Marker as lessee. Capacity Group of NY, LLC and Capacity Group of Westbury, LLC (collectively "Capacity") are retail insurance brokers. AmWins Brokerage of New York, Inc. is a wholesale insurance broker. Bolaj alleged that on October 11, 2009, while employed by Valdas Painting he was injured when he fell from a defective and improperly placed and broken scaffold in violation of Labor Law §§200, 240 and 241. Aspen disclaimed coverage to Outer Marker, as it was not an insured under the Aspen policy on the date of the accident.

In a separate accident, Rodolfo Urena Corral alleged that on November 28, 2009, he was injured while engaged in the erection of a hanger and using a defective hoist or lift which was hazardous. Corral asserted causes of action based upon Labor Law §§200, 240 and 241. That matter was filed in the United States District Court for the Eastern District of New York, entitled *Rodolfo Urena Corral and Maria Urena v The Outer Marker LLC, Global Stell, Inc., The County of Suffolk, Jamin Jackson d/b/a Jackson Steel, and Cesar Pineda d/b/a Horizon Erectors,* 10 Civ 1162. In a related action, Outer Marker sought a declaration that Aspen was required to defend, indemnify and reimburse it for all costs. Unlike the Bolaj action, Outer Marker was an insured under the Aspen policy on the date of Corral's accident but Aspen disclaimed coverage on the grounds of untimely notice. The coverage action was settled by Outer Marker and Park Line in exchange for Aspen reimbursing $37,213.75 in defense costs and Aspen's agreement to defend and indemnify (*The Outer Marker v Aspen Specialty Insurance Company, Aspen Specialty Insurance Management, Inc. and Aspen Insurance UK Limited)*. Thereafter, Outer Marker and Park Line obtained summary judgment against plaintiffs in the Corral action, and paid no damages.

Aspen now seeks summary judgment (001) dismissing plaintiffs' complaint and Capacity's cross claims, a judgment declaring that Aspen has no duty to defend, indemnify or reimburse Outer Marker regarding the Bolaj action and that Aspen has no obligation to defend, indemnify or reimburse

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[1] An outer marker usually identifies the final approach to an airport runway.

Outer Marker and Park Line in the Corral action and the previous declaratory judgment action. In support of the motion, Aspen submits among other things, a stipulation of discontinuance, the pleadings, the deposition transcript of Richard Mailand, president of Park Line and a member of Outer Marker, the deposition transcript of Robert Salem, owner of Capacity, and responses to a notice to admit. Outer Marker and Park Line agreed that Aspen has no liability and executed a stipulation of discontinuance. All parties have also discontinued the action against AmWins Brokerage of New York, Inc., the wholesale broker. Capacity "partially" opposes the motion. Capacity admits, "that the Court may certainly determine that Aspen is entitled to summary judgment based upon evidence that Aspen and/or its agent AmWins did not receive a change of endorsement adding Outer Marker as a named insured or additional insured under the policy." Capacity however reserves its rights to assert other points of declination contained in the Aspen disclaimer and to make a future motion for summary judgment.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issue of fact (*see* ***Alvarez v Prospect Hospital***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). The burden then shifts to the party opposing the motion which must produce evidentiary proof in admissible form sufficient to require a trial of the material issues of fact (***Roth v Barreto***, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; ***Rebecchi v Whitmore***, 172 AD2d 600, 568 NYS2d 423 [2d Dept 1991]; ***O'Neill v Fishkill***, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]).

Here, as to the Bolaj action, Aspen has demonstrated its entitlement to summary judgment as to Outer Marker and on the cross claim by Capacity, in that Outer Marker was not a named insured or additional insured at the time of the Bolaj accident. Capacity has not disputed this fact and its "partial"opposition is not relevant to this issue. Accordingly, Aspen's motion to dismiss the complaint and all cross claims as asserted against it by Outer Marker and Capacity is granted. Aspen has no duty to defend, indemnify, or reimburse Outer Marker in connection with the Bolaj action (*see* ***South Hylan, LLC v CNA Ins. Co.***, 89 AD3d 719, 931 NYS2d 704 [2d Dept 2011]).

As to the Corral action and the related Corral coverage action, Aspen has settled with Outer Marker and Park Line for $37,213.75 in past defense costs and the Corral action was resolved through summary judgment in defendants favor. As Outer Marker and Park Line have provided releases, Aspen has no further coverage obligation to them. Accordingly, the complaint and any cross claim regarding the Corral action and/or the Corral coverage action as asserted against Aspen by Outer Marker, Park Line and Capacity are dismissed.

Outer Marker moves for summary judgment (002) against Capacity seeking indemnification and defense costs in the Bolaj action, attorney fees in the Corral action, attorney fees in the worker's compensation branch of the Bolaj action and attorney fees in this action. In support of the motion Outer Marker submits, among other things, an affidavit from Richard Mailand, the Worker's Compensation decisions, and the deposition transcript of Robert Salem. In opposition, Capacity indicates that it intends to move for summary judgment in the future and relies on additional points of declination that Aspen served on Outer Marker, and argues that attorney fees are not recoverable.

Outer Marker has demonstrated its prima facie entitlement to summary judgment as a matter of law. Outer Marker has demonstrated that Capacity failed to add Outer Marker to the Aspen policies, and Capacity does not *now* dispute this fact. Instead, Capacity argues that summary judgment is premature as Capacity is entitled to rely on additional points of disclaimed coverage made by Aspen in its letter of April 20, 2010. These include a contractual liability exclusion; that Outer Marker may be deemed an employer of Bolaj; and that the policy excludes damages that a subcontractor is obligated to pay. As Aspen correctly points out, "[i]t is no accident that the Aspen defendants did not move for summary judgment on the grounds that Capacity seeks to use to excuse its own acts and omissions." Aspen defended Park Line in the Bolaj action. "But for Capacity's failure to procure insurance for The Outer Marker, Aspen UK would have defended The Outer Marker in the Bolaj Action just as it provided a defense to Park Line." "Aspen does not dispute its obligation to indemnify Park Line by virtue of any other policy exclusion on which Capacity relies." The exclusions that Capacity relies upon do not bar coverage. The contractual liability exclusion does not bar coverage as the Bolaj action is based on common law negligence and statutory liability under the Labor Law. An exclusion for an independent contractor's liability does not bar coverage for Outer Marker's own liability. Moreover, as Bolaj was not an employee of Outer Marker, the employer's liability exclusion also does not apply. Put simply, the exclusions Capacity rely upon to disclaim coverage do not apply and but for Capacity's failure to procure insurance for Outer Marker, Outer Marker would have been entitled to a defense and indemnification.

Capacity also argues that summary judgment is premature as it is entitled to further discovery. "[S]ummary judgment cannot be avoided by a claimed need for discovery unless some evidentiary basis is offered to suggest that discovery may lead to relevant evidence" (***Williams v D & J School Bus***, 69 AD3d 617, 893 NYS2d 133 [2d Dept 2010]; ***Panasuk v Viola Park Realty***, 41 AD3d 804, 939 NYS2d 520 [2d Dept 2007]; ***Gasis v City of New York***, 35 AD3d 533, 828 NYS2d 407 [2d Dept. 2006]). This is especially true when the facts which would support defendants' motion lies within the exclusive knowledge of the defendants. The mere hope or speculation that evidence sufficient to defeat a motion for summary judgment may be uncovered as a result of discovery is an insufficient basis for denying the motion (*see generally* ***Lauriello v Gallotta***, 59 AD3d 497, 873 NYS2d 690 [2d Dept 2009]; ***Kimyagarov v Nixon Taxi Corp***. 45 AD3d 736, 846 NYS2d 309 [2d Dept 2007]). Here, it is determined that summary judgment is not premature as there is no evidentiary basis offered to suggest that discovery could lead to relevant evidence in that defendants admit that they failed to list plaintiff as a named insured, and no exclusions to the policy apply.

Additionally, as a general principle, insurance brokers have a common law duty to obtain requested coverage for their clients within a reasonable time or inform the client of the inability to do so; however, they have no continuing duty to advise, guide or direct a client to obtain additional coverage (***American Bldg. Supply Corp. v Petrocelli Group, Inc.***, 19 NY3d 730, 955 NYS2d 854 [2012]). Here, a special relationship exists between the Robert Salem, Capacity's president and Richard Mailand, Outer Marker's managing member. Salem maintained that he was an expert in commercial insurance products, the parties worked together since 2002, the average premium per year was $250,000.00, and Mailand specifically relied on Salem's advice and expertise with regard to The Outer Marker, LLC and the building project at Gabreski airport. The facts here establish the exceptional situation where Mailand relied upon Salem's advice and given their relationship over an extended period of time, Salem was

objectively aware that his advice was being relied upon (*see* ***Voss v Netherlands Insurance Company***, 22 NY3d 728, 985 NYS2d 448 [2014]). Accordingly, summary judgment is granted in favor of Outer Marker and Capacity is directed to defend and indemnify.

Outer Marker also seeks attorney fees to defend the Bolaj matter, attorney fees and defense costs in the Worker's Compensation case, and attorney's fees in this action. In that Aspen has agreed to represent Park Line, the general contractor in the Worker's Compensation case, the Worker's Compensation portion of the Bolaj claim, is resolved. Moreover, it is conceded by plaintiffs that the cost of bringing and prosecuting the declaratory judgment action is not a recoverable expense against one's own carrier (***Mazzuoccolo v Cinelli***, 245 AD2d 245, 666 NYS2d 621 [1st Dept.1997]).

However, plaintiffs also seek attorney's fees pursuant to CPLR §3123 (c) under penalties for an unreasonable denial in a notice to admit. Capacity declined to admit that it never added Outer Marker to the Aspen general liability policy before the Bolaj accident in October of 2009. Yet Robert Salem testified during his deposition that he learned, after getting the incident report of the Bolaj accident, that his office had never added Outer Marker to the general liability policy. Salem learned that within a week of the accident. Accordingly, plaintiff is entitled to attorney's fees from May 1, 2014, the date of the false response to the notice of admission, the amount of which shall be determined at a hearing.

Capacity moves for discovery (003) regarding the Bolaj action. Pursuant to Capacity's notice for discovery and inspection, and in light of the court's decision herein that Capacity shall defend and indemnify Outer Marker, Outer Marker is directed to comply with Capacity's demands for discovery including all medical records, deposition transcripts, and other documentation. Capacity shall bear the expense of any coping charges but not "handling fees."

Submit Judgment.

Dated: September 10, 2015

Peter H. Mayer

PETER H. MAYER, J.S.C.