SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 43

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NEW HAMPSHIRE INSURANCE COMPANY,

Plaintiff,

-against- Index No. 155525/16

JVA INDUSTRIES INC., TACONIC BUILDERS, INC., CPW PARK VIEWS, LLC, NEW YORK MARINE AND GENERAL INSURANCE, EVEREST NATIONAL INSURANCE COMPANY and LUIS CRUZ,

Defendants.

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REED, J.:

In this insurance coverage action, plaintiff New Hampshire Insurance Company moves, pursuant to CPLR 3001 and 3212, for an order awarding it summary judgment, and declaring that it has no duty to defend or indemnify any party in connection with the underlying personal injury action entitled *Luis Cruz v Taconic Builders, Inc. v JVA Industries*, index No. 307751/2010 (Sup Ct, Bronx County). Plaintiff also moves, pursuant to CPLR 3215, for an order entering a default on the non-appearing parties, defendants JVA Industries, Inc. (JVA) and Luis Cruz (Cruz).

Defendant Everest National Insurance Company (Everest) cross-moves, pursuant to CPLR 3124, for an order compelling plaintiff's responses to Everest's outstanding discovery demands.

For the reasons set forth below, plaintiff's motion is granted, and Everest's cross motion is denied.

FACTS

The underlying action was commenced by Cruz against, inter alia, defendants Taconic Builders, Inc. (Taconic) and CPW Park Views, LLC (CPW), seeking money damages for

personal injuries sustained as a result of a construction site accident occurring on August 20, 2010 at 15 Central Park West, New York, New York (the Premises). CPW owned the Premises, and Taconic was the general contractor of the construction project at the Premises. Cruz was employed by JVA, a subcontractor, at the time of the accident. Cruz alleges that, on the day of the accident, he fell from a ladder while working at the Premises. In the underlying action, Cruz asserts causes of action against the defendants for negligence, violations of New York Labor Law §§ 240 (1), 241 (6) and 200, and violation of New York Industrial Code Rule 23.

On February 3, 2011, Taconic commenced a third party action against JVA. On July 1, 2014, CPW commenced a second third party action against JVA. Both third-party actions contain the same four causes of action against JVA: (1) common law indemnification; (2) contribution; (3) contractual indemnification; and (4) breach of contract to procure insurance.

According to the bill of particulars served by Cruz in the underlying action (*see* aff of Andrew Zajac, exhibit D), Cruz sustained personal injuries to his back, including a herniation of the L3-L4 disc, a herniation of the C3-C4 disc, and a fractured right ring finger (bill of particulars, ¶ 8). Cruz also alleges that he has sustained a "head injury, concussion, post concussive syndrome [and] post traumatic mood disorder" (*id.*).

On January 16, 2017, Cruz testified in his deposition that he has returned to work since the accident (*see* Zajac aff, exhibit I, at 12-14 [testifying that he is currently employed by Janis Company, whose business is construction]).

Plaintiff issued a policy of Workers' Compensation and Employers' Liability Insurance to JVA, policy number WC 009-87-2033, with effective dates of November 18, 2009 though November 18, 2010 (*see* Zajac aff, exhibit J). Under Coverage Part Two - Employers' Liability

Insurance, coverage is specifically excluded for "liability assumed under a contract" (*see id.* at 3, exclusion no. 1).

Defendant New York Marine and General Insurance (New York Marine) issued a policy of general liability insurance to Taconic. Defendant Everest National Insurance Company (Everest) issued a policy of excess insurance to Taconic.

On May 22, 2013, Chartis Claims, Inc. (Chartis), the claim administrator handling claims under the New Hampshire policy, wrote to JVA regarding the claims in the underlying action and the third-party action commenced by Taconic. Chartis advised JVA that it would participate in JVA's defense against the claims in the underlying action and in the first third-party action, subject to a reservation of rights and partial disclaimer of coverage. Specifically, plaintiff reserved its rights to disclaim coverage under the exclusion in Coverage Part Two for all claims based on liability assumed under a contract (*see* aff of Rebecca A. Du Boff, exhibit B).

On July 2, 2014, plaintiff wrote to JVA in response to its receipt of the second third-party verified complaint. Plaintiff advised JVA that it would participate in JVA's defense against the claims in the second third-party action, subject to a reservation of rights and partial disclaimer of coverage. Specifically, plaintiff disclaimed coverage under the exclusion in Coverage Part Two for all claims based on liability assumed under a contract (*see* Du Boff aff, exhibit C).

On July 1, 2016, plaintiff filed the complaint in this action. The complaint contains four causes of action, each seeking a declaration that plaintiff has no duty to defend or indemnify JVA for the causes of action for contractual indemnification (first cause of action), common law contribution (second cause of action), common law indemnification (third cause of action) or breach of contract to purchase insurance (fourth cause of action), as set forth in the first and

second third-party complaints in the underlying action.

On December 23, 2016, Everest served plaintiff with a First Notice of Discovery and Inspection, seeking, among other things, a copy of plaintiff's claim files, and a copy of all non-privileged, relevant documents in plaintiff's possession relating to the claims in the underlying action, the third-party action, and this coverage action. On January 17, 2017, plaintiff responded to Everest's discovery demands by producing only a certified copy of the New Hampshire policy, and refusing to produce the contents of its claim file, on the ground of privilege. Plaintiff also refused to produce any documents relating to the claims in the underlying action, third-party action and this coverage action, on the ground of relevancy.

Neither JVA nor Cruz has properly appeared in this action, and are now in default.

DISCUSSION

Plaintiff owes no duty to defend or indemnify any party for any of the claims raised in the underlying personal injury action. First, with respect to the claims for contractual indemnification (first cause of action) and breach of contract to purchase insurance (fourth cause of action), the New Hampshire policy contains an exclusion for "liability assumed under a contract." Accordingly, New Hampshire has no duty to defend or indemnify any party in relation to the claims for contractual indemnification, and breach of contract to purchase insurance (*Preserver Ins. Co. v Ryba*, 10 NY3d 635, 642 [2008] ["since the policy explicitly excludes coverage for any liability assumed under a contract, [plaintiff] must neither defend nor indemnify [defendant] for the contractual indemnification or breach of contract causes of action"]; *National Union Fire Ins. Co. of Pittsburgh, PA v 221-223 W. 82 Owners Corp.*, 120 AD3d 1140, 1141 [1st Dept 2014] [plaintiff not obligated to defend or indemnify defendant for "the underlying

contractual indemnification claim, since its policy clearly excludes coverage for 'liability assumed under a contract'"]; *Liberty Mut. Ins. Co. v Insurance Co. of the State of Pa.*, 43 AD3d 666, 668 [1st Dept 2007] [finding that the policy afforded coverage for "common-law liability only" given the exclusion for "'liability assumed under a contract'"]).

In opposition to the motion, defendants Everest, JVA, Taconic, CPW and New York Marine contend that plaintiff's motion for summary judgment should be denied because it has not tendered sufficient evidence to demonstrate the absence of any material issue of fact as to whether it issued a timely and proper disclaimer to JVA based on the contractual claims exclusion, as required by Insurance Law § 3420 (d). Plaintiff first disclaimed coverage on May 22, 2013, over 33 months after Cruz's accident, and over 26 months after Taconic commenced the third-party against JVA. Defendants argue that Plaintiff's failure to issue a timely disclaimer to JVA will waive and/or estop plaintiff from asserting any policy defenses as a matter of law. The court rejects this argument.

New York Insurance Law § 3420 (d) provides that when a liability policy is "delivered or issued for delivery in this state, [if] an insurer shall disclaim liability or deny coverage for death or bodily injury . . . it shall give written notice as soon as is reasonably possible." "Insurance Law § 3420 (d) requires timely disclaimer only for denials of coverage for 'death or bodily injury'" (*Ryba Ins. Co.*, 10 NY3d at 642; *accord Key Span Gas E. Corp. v Munich Reins. Am., Inc.*, 23 NY3d 583, 590 [2014]; *see also Travelers Indem. Co. v Orange & Rockland Utils., Inc.*, 73 AD3d 576, 577 [1st Dept 2010]). Thus, the requirement of a timely disclaimer under Insurance Law § 3420 (d) does not apply to claims for breach of contract or contractual indemnity (*see e.g. Ryba*, 10 NY3d at 642 [insurer "not required by Insurance Law § 3420 (d) to

make timely disclaimer of coverage" for breach of contract claim]; *Johnson v Atlantic Cas. Ins. Co.*, 2015 WL 5021953, * 5 [WD NY 2015] ["section 3420 (d) is not applicable" to claim for "contractual indemnification"]).

Accordingly, it is evident plaintiff had no obligation to issue a timely disclaimer in relation to the claims for breach of contract and contractual indemnification. Thus, plaintiff is clearly entitled to a declaration that it owes no coverage to any party in the underlying action for these claims.

With respect to the claims for common law contribution (second cause of action) and common law indemnification (third cause of action), absent a "grave injury" within the meaning of § 11 of the Workers' Compensation Law, there is no coverage for such claims under an Employers' Liability policy like the one issued by plaintiff. Pursuant to Workers' Compensation Law § 11,

> "An employer shall not be liable for contribution or indemnity to any third person based upon liability for injuries sustained by an employee acting with the scope of his or her employment for such employer unless such third person proves through competent medical evidence that such employee has sustained a 'grave injury' which shall mean only one or more of the following: death, permanent and total loss of use or amputation of an arm, leg, hand or foot, loss of multiple fingers, loss of multiple toes, paraplegia or quadriplegia, total and permanent blindness, total and permanent deafness, loss of nose, loss of ear, permanent and severe facial disfigurement, loss of an index finger or an acquired injury to the brain caused by an external physical force resulting in total permanent disability."

"The grave injuries listed are deliberately both narrowly and completely described. The list is exhaustive, not illustrative; it is not intended to be extended absent further legislative action" (*Castro v United Container Mach. Group*, 96 NY2d 398, 402 [2001] [citation omitted];

accord Fleischman v Peacock Water Co., Inc., 51 AD3d 1203, 1204 [3d Dept 2008] ["(t)he Court of Appeals has clearly indicated that the grave injury categories listed in the statute are extremely limited and should be narrowly construed"]). The initial burden in moving for summary judgment on the absence of a "grave injury" can be met by means of a bill of particulars (*National Union*, 120 AD3d at 1140 ["National Union was entitled to rely on the underlying plaintiff's bill of particulars to make a prima facie showing that the ligament and meniscal tears he allegedly sustained do not qualify as 'grave injur(ies)' within the meaning of Workers' Compensation Law § 11"]; *see also Marshall v Arias*, 12 AD3d 423, 424 [2d Dept 2004]).

Here, the principal injuries alleged in the bill of particulars are a fractured ring finger and back injuries, which do not qualify as "grave injuries" within the meaning of § 11 of the Workers' Compensation Law (*see Spiegler v Gerken Bldg. Corp.*, 35 AD3d 715, 717 [2d Dept 2006] [back injuries]; *Aguirre v Castle Am. Constr., LLC*, 307 AD2d 901, 901 [2d Dept 2003] [back injury]; *see also Picchione v Sweet Constr. Corp.*, 60 AD3d 510, 512 [1st Dept 2009 [same]). Further, there is no allegation that Cruz permanently and totally lost the use of his arm or hand.

In addition to his orthopedic injuries, Cruz alleges that he sustained "head injury, concussion, post concussive syndrome, post traumatic mood disorder." The grave injury statute lists "an acquired injury to the brain caused by an external physical force resulting in total permanent disability." The allegations set forth in Cruz's bill of particulars do not fit this definition. Moreover, even if those allegations could be so construed, it is clear that a brain injury only "results in 'permanent total disability' under section 11 when the evidence establishes

that the individual worker is no longer employable in any capacity" (*Rubeis v Aqua Club, Inc.*, 3 NY3d 408, 413 [2004]). Thus, Cruz, who is currently working, could not have sustained a "grave injury."

Hence, plaintiff is entitled to a declaration that the injuries sustained by Cruz do not qualify as "grave injuries" within the meaning of Workers' Compensation Law § 11, and that, accordingly, plaintiff "has no obligation to defend or indemnify [defendants] for the underlying common-law indemnification and contribution claims" (*National Union*, 120 AD3d at 1141).

To the extent that defendants' opposition can be read to argue that a timely disclaimer was required with respect to the claims for common law indemnity and contribution as well, such a contention is devoid of merit. Absent a "grave injury," there is no coverage under an Employers' Liability policy in the first instance (*Liberty Mut. Ins. Co.*, 43 AD3d at 667-668). "Since the policy never provided coverage for these circumstances in the first place, the timeliness of plaintiff's disclaimer is irrelevant" (*State Farm and Cas. Co. v Guzman*, 138 AD3d 503, 503 [1st Dept 2016]).

Defendants also argue that plaintiff's motion for summary judgment must be denied as premature because outstanding discovery remains. The court rejects this argument. Defendants have produced no evidence indicating that further discovery will yield material and relevant evidence. "A grant of summary 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" (*Baily v New York City Tr. Auth.*, 270 AD2d 156, 157 [1st Dept 2000]; *see also National Union*, 120 AD3d at 1140-1141]). Summary judgment is entirely appropriate as it is clear that plaintiff has no duty to indemnify any party for any of the claims raised in the underlying personal injury

action. Conducting further discovery will not change that fact, and indeed, would be completely irrelevant (see *Citibank, N.A. v Villano*, 140 AD3d 553, 553 [1st Dept 2016] [granting pre-discovery summary judgment motion]).

Accordingly, plaintiff's motion for summary judgment is granted, and Everest's cross motion for an order compelling plaintiff's responses to Everest's outstanding discovery demands is denied as moot.

The branch of the motion seeking a default judgment against both Cruz and JVA is also granted. Cruz has never appeared in this action. Although JVA did serve an answer on March 29, 2017, that answer was filed at least seven months after JVA's time to answer expired. Consequently, JVA was already in default when it filed its answer.

Pursuant to CPLR 3215 (f), "[a]n applicant for a default judgment against a defendant must submit proof of service of the summons and complaint, proof of the facts constituting the claim, and proof of the defaulting defendant's failure to answer or appear" (*HSBC Bank USA, N.A. v Clayton*, 146 AD3d 942, 944 [2d Dept 2017]; *accord Bank of Am. N.A. v Agarwal*, 150 AD3d 651, 652 [2d Dept 2017]). The plaintiff can satisfy this requirement through an affidavit of a party with personal knowledge of the facts (*Reynolds Sec. v Underwriters Bank & Trust Co.*, 44 NY2d 568, 572-573 [1978]; *Goodman v New York City Health & Hosps. Corp.*, 2 AD3d 581, 581 [2d Dept 2003]). Plaintiff has satisfied this requirement by submitting the affidavit of Michael Robinson, the Complex Claims Director of AIG Property Casualty, of which plaintiff is a member underwriting company, in support of the motion for a default judgment. Accordingly, plaintiff is entitled to the entry of a default judgment against both Cruz and JVA.

JVA contends that it is not default because it has, in fact, answered the complaint. The

court rejects this argument. In order to defeat plaintiff's motion for a default judgment, JVA was required to demonstrate both a reasonable excuse for its default, and a potentially meritorious defense (*see U.S. Bank N.A. v Brown*, 147 AD3d 428, 429 [1st Dept 2017]). JVA has fulfilled neither of those requirements.

The court has considered the parties' remaining arguments, and finds them to be without merit.

Accordingly, it is

ORDERED that plaintiff's motion for the entry of a default judgment against defendants JVA Industries Inc. and Luis Cruz is granted, and the Clerk is directed to enter judgment on the complaint in favor of plaintiff and against said defendants; and it is further

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

ORDERED that the cross motion of defendant Everest National Insurance Company for an order compelling plaintiff's responses to Everest's outstanding discovery demands is denied; and it is further

ADJUDGED AND DECLARED that plaintiff has no duty to defend or indemnify any party in connection with the underlying personal injury action entitled *Luis Cruz v Taconic Builders, Inc. v JVA Industries*, index No. 307751/2010 (Sup Ct, Bronx County).

Dated: October 12, 2017

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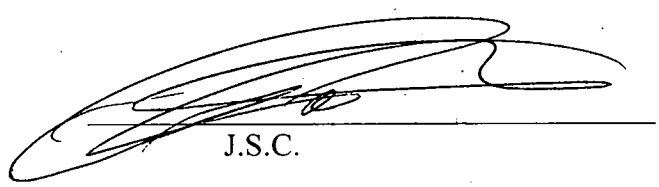

J.S.C.