SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

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M&M REALTY OF NEW YORK, LLC, and TOWER INSURANCE COMPANY OF NEW YORK,

Plaintiffs,

-against-

THE BURLINGTON INSURANCE COMPANY, and L&M RESTORATION, INC.,

Defendants.

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**DECISION/ORDER**

Index No.: 153949/2016

Mot Seqs. 001 & 002

**HON. CAROL R. EDMEAD, J.S.C.:**

**MEMORANDUM DECISION**

This is an action for declaratory judgment. In motion sequence 001, plaintiff Tower Insurance Company of New York ("Tower") now moves pursuant to CPLR 3212 for summary judgment of its amended complaint ("Complaint") against defendant The Burlington Insurance Company ("Burlington"), declaring, *inter alia*, that Burlington reimburse Tower for all reasonable amounts Tower incurred defending and indemnifying plaintiff M&M Realty of New York, LLC ("M&M") in the matter entitled *Pedro Lucero v. M&M Realty of New York*, Index No. 155318/2013 (the "underlying action"). In motion sequence 002, Burlington moves for summary judgment of its cross-claim pursuant to CPLR 3212 declaring that Burlington is not obligated to defend or indemnify M&M and Tower in the underlying action.

*Factual Background*

Plaintiff in the underlying action, Petro Lucero ("Lucero"), was injured while working at M&M's premises (the "premises"). The underlying complaint alleges that M&M hired L&M, Lucero's employer, to paint a fire escape on the premises pursuant to a work proposal/contract.

At the time of the accident, Tower insured M&M; L&M was insured by Burlington under a Commercial General Liability Policy (the "Burlington Policy"). In his affidavit supporting summary judgment in the underlying action, Lucero claimed that while working on a twelve-foot extension ladder, the ladder moved, slipped and fell, causing him to be injured. Lucero testified that the ladder slipped because it was leaning on a portion of the wall that had wet paint on it. Lucero filed the underlying complaint alleging that M&M, as the owner of the premises, was liable for his injuries under Labor Law §§ 200, 240(1)-(3) and 241(6). In his complaint, Lucero alleged that "[h]e was caused to fall from said ladder by reason of the negligence of the defendant [M&M] . . . . " (Gershweir Aff., Ex. J, ¶ 26).

By letter dated May 1, 2013, to Burlington and L&M, Tower demanded that they defend and indemnify M&M in the underlying action as an additional insured on the Burlington Policy. On June 24, 2013, Burlington denied Tower's tender, arguing that the proposal/contract does not contain language conferring additional insured status on M&M. On July 28, 2016, the court in the underlying action granted Lucero's motion for partial summary judgment against M&M as to liability under Labor Law § 240(1). On February 16, 2017, Tower settled the underlying action on M&M's behalf for $500,000.

Tower filed the Complaint prior to the settlement of the underlying action seeking recovery against Burlington for the amounts Tower spent and would spend defending and indemnifying M&M in the underlying action.

*Tower's Motion*

In support of its motion, Tower argues that M&M qualifies as an "additional insured" under the Burlington Policy since the proposal/contract requires that it be included on L&M's policy. Specifically, the proposal/contract states that L&M must procure "all necessary insurance," and L&M provided M&M with a Certificate of Insurance indicating that M&M was

an additional insured on the Burlington Policy. Tower contends that the proposal/contract and Certificate of Insurance should be read together the same agreement, since the proposal/contract by itself fails to establish the type of insurance required. Tower further contends that the proposal/contract is ambiguous with respect to the insurance requirement, and extrinsic evidence should be permitted to determine whether its intent was to include M&M as an additional insured on the Burlington Policy. Moreover, Tower argues that since L&M drafted the proposal/contract, the ambiguous language requiring insurance should be construed against it.

Moreover, Tower argues that the underlying complaint and the evidence demonstrate that Lucero's injuries were caused, at least in part, by L&M's acts or omissions, thereby triggering Burlington's duty to defend and indemnify M&M. Tower contends that Lucero's complaint triggered Burlington's duty to defend the action because it alleges that M&M is vicariously liable for L&M's conduct. Further, Tower argues that Burlington has a duty to indemnify M&M, since M&M was found vicariously liable for L&M's conduct. Specifically, Tower contends that the sole basis for M&M's liability was Labor Law section 240(1), which imposes vicarious liability.

*Burlington's Opposition and Motion*

In opposition to Tower's motion and in support of its motion for summary judgment, Burlington first argues that the proposal/contract was unexecuted at the time of Lucero's accident. Moreover, the proposal/contract does not include language requiring that M&M be added as an additional insured under the Burlington Policy. Specifically, Burlington contends that the contract does not reference the terms "additional insured" or indemnification. Burlington further argues that the Certificate of Insurance issued by L&M's agent/broker cannot confer additional insured status. Burlington further argues that the use of extrinsic evidence would run afoul of the requirement in the Burlington Policy that written agreement confer additional insured status.

Further, Burlington argues that Tower is unable to prove that the underlying plaintiff's injuries were caused by the acts or omissions of L&M. Specifically, Tower's reference to the underlying complaint and the summary judgment decision against M&M in the underlying case is insufficient, because L&M was not a party to the underlying action, and thus, the court in the underlying action did not adjudicate L&M's negligence.

*Tower's Reply and Opposition*

Tower first argues that the contract is still enforceable even if M&M failed to deliver the fully executed copy of the proposal/contract to L&M. Tower contends that there was no provision in the proposal/contract requiring that it be delivered in order to be binding. Tower argues that the Burlington Policy did not require that the proposal/contract be executed, only that the agreement be in writing. Further, Tower argues that the proposal/contract was executed prior to underlying plaintiff's accident. Moreover, Tower contends that the parties acted in conformity with requirements of the proposal/contract. Additionally, Tower reiterates its argument that the provision requiring L&M to procure all necessary insurance, without explaining what insurance is "necessary." Tower argues that extrinsic evidence is required to determine the parties' intent regarding the insurance provision.

*Burlington's Reply*

In reply, Burlington argues that in order to confer additional insured status under the Burlington Policy, the proposal/contract had to be executed. Moreover, Burlington argues that only an oral contract was formed, since there was an offer by L&M in the form of the proposal, but there was no written acceptance by M&M. Next, Burlington argues that the contract/proposal does not contain any provision requiring L&M to add M&M as an additional insured to indemnify any party. Burlington contends that the proposal/contract only requires that L&M procure insurance.

*Discussion*

"[T]he 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 demonstrate the absence of any material issues of fact. Failure to make such *prima facie* showing requires denial of the motion, regardless of the sufficiency of the opposing papers" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986] [internal citations omitted]). Once *prima facie* entitlement has been established, in order to defeat the motion, the opposing party must " 'assemble, lay bare, and reveal his [or her] proofs in order to show his [or her] defenses are real and capable of being established on trial. . . and it is insufficient to merely set forth averments of factual or legal conclusions' " (*Genger v Genger*, 123 AD3d 445, 447 [1st Dept 2014], quoting *Schiraldi v U.S. Min. Prods.*, 194 AD2d 482, 483 [1st Dept 1993]). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]).

The party claiming insurance coverage bears the burden of proving entitlement to such coverage (*Natl. Abatement Corp. v Natl. Union Fire Ins. Co. of Pittsburgh, Pa.*, 33 AD3d 570, 570 [1st Dept 2006]). In addition, "the party asserting that someone other than a named insured is an insured under the policy bears the initial burden of submitting proof in evidentiary form that the alleged insured is, in fact, an insured within the meaning of the policy" (*Preferred Mutual Ins. Co. v Ryan*, 175 AD2d 375, 378 [3d Dept 1991]). There is no duty to defend when the party asserting coverage is not an insured under the policy (*Seavey v James Kendrick Trucking*, 4 AD3d 119, 119 [1st Dept 2004]). Further, the duty to indemnify on the part of an insurer requires a determination that the insured is liable for a loss that is covered by the policy (*see Servidone Constr. Corp. v. Security Ins. Co. of Hartford,* 64 N.Y.2d 419 [1985]; *see e.g., Lehrer McGovern Bovis, Inc. v. Halsey Const. Corp.*, 254 A.D.2d 335 [2d Dept 1998]).

A "written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms" (*Beinstein v Navani*, 131 AD3d 401 [1st Dept 2015]). "It is a court's task to enforce a clear and complete written agreement according to the plain meaning of its terms, without looking to extrinsic evidence to create ambiguities not present on the face of the document" (*150 Broadway N. Y. Assoc, L.P. v Bodner*, 14 AD3d 1, 6 [1st Dept 2004]; *see also Alf Naman Real Estate Advisors, LLC v Cape Sag Developers, LLC*, 113 A.D.3d 525 [1st Dept 2014]). Whether a contract is ambiguous is, of course, a question of law for a court (*Richard Feiner and Co. Inc. v. Paramount Pictures Corp.*, 95 AD3d 232 [1st Dept 2012]). A contract is ambiguous only if "on its face [it] is reasonably susceptible of more than one interpretation" (*Telerep, LLC v U.S. Intern. Media, LLC*, 74 AD3d 401 [1st Dept 2010], citing *Chimart Assocs. v. Paul*, 66 NY2d 570, 573 [1986]). When a contract is found to be ambiguous, a court may look to extrinsic evidence to resolve the ambiguity (*Chen v Yan*, 109 AD3d 727 [1st Dept 2013]).

*Whether M&M is an Additional Insured Under the Policy*

Here, Tower has demonstrated that M&M is an additional insured under the Burlington Policy. The Burlington policy states that:

> "[w]ho is an Insured is amended to include as an additional insured any person or organization for whom you [L & M] are performing operations when you and such person or organization have agreed in writing in a contract or agreement that such person or organization be added as an additional insured on your policy. Such person or organization is an additional insured only with respect to liability for 'bodily injury' . . . caused, in whole or in part by:
>
> 1. Your acts or omissions; or
> 2. The acts or omissions of those acting on your behalf;
>
> (Gershweir Moving Affirmation, Ex. N, 53, "Additional Insured - Owners, Lessees or Contractors - Automatic Status When Required in Construction Agreement with You").

The proposal/contract between M&M and L&M states, in relevant part: "Scope of Work: Provide all necessary materials, equipment, manpower and insurance to perform work." The Certificate of Insurance, which was issued only days after the agreement was signed, identifies M&M as an additional insured and designates M&M as the Certificate of Insurance holder.

The Burlington Policy indicates that to be considered an additional insured, L&M must enter into a written contract designating M&M an additional insured. A reading of the proposal/contract indicates that there is no requirement that L&M name M&M as an additional insured. Instead, the proposal/contract requires that "insurance" be provided. However, the provision is ambiguous, since the contract fails to define "necessary . . . insurance." Accordingly, the Court must look to the extrinsic evidence to determine the intent of the parties at the time of entering into the agreement.

Here, the deposition testimony demonstrates the parties' intent to confer additional insured status on L&M. Initially, the testimony of M&M's principal, Abraham Mussafi ("Mussafi"), demonstrates that M&M intended to be an additional insured under the policy. Mussafi testified that he contacted Costel Mirauti, L&M's Principal, and requested that M&M be an additional insured on the Burlington Policy (Gershweir Moving Affirmation, Ex. G, 29:3-30:15). Mussafi further testified that when he asked Mirauti to designate M&M as an additional insured, Mirauti instructed him to contact L&M's office and that "they'll give you [Mussafi] whatever you want" (*id.*) Mussafi indicated that he contacted L&M's office, wherein he requested that he be placed as an additional insured on the Burlington Policy. Mussafi testified that in response L&M sent him a copy of the Certificate of Insurance identifying him as an additional insured (*id.*). Mussafi additionally testified that he required that M&M was an

additional insured under L&M's policy before permitting L&M to perform any work (*id.*, 49:23-50:11).

Moreover, L&M believed that it was conferring additional insured status when it furnished its customers, including M&M, with a certificate of insurance. L&M's office manager, Melanie Gazer ("Gazer"), testified that whenever a customer requested a certificate of insurance, "it was always implied that [the customer] is to be listed as an additional insured" (Gershweir Moving Affirmation, Ex. F, 21:21-22:17). Gazer testified that whenever L&M got a certificate of insurance for a job, she would include the customer as an additional insured (*id.*). Mirauti testified that it produced a certificate of insurance for every job. Importantly, Mirauti testified that he believed that the "necessary insurance" referred to in the proposal/contract is the insurance identified to in the certificate of insurance, in other words, the additional insured status (Gershweir Moving Affirmation, Ex. B, 28:3-29:8). Mirauti further testified that for every job, L&M would procure a certificate of insurance for its customers identifying the customer as an additional insured (*id.*, 25:19-24). Accordingly, M&M did not have to specifically ask to be added as an additional insured—all it had to ask for was a certificate of insurance, since L&M's understanding was the certificate confirmed additional insured status.

Burlington's argument that the proposal/contract should not be enforced because there was no written acceptance by M&M is unavailing. Mussafi testified that he signed the proposal/contract upon receiving it and before the accident. In any event, there is no requirement in the agreement that its enforceability was conditioned upon L&M's signature, and it is uncontested that all parties operated under the policy/contract (*Kowalchuk v Stroup*, 61 AD3d 118 [1st Dept 2009] ["an unsigned contract may be enforceable, provided there is objective

evidence establishing that the parties intended to be bound . . . unless, of course, the parties have agreed that their contract will not be binding until executed by both sides"]).

Burlington's reliance on *Trapani v 10 Arial Way Assoc*, 301 AD2d 644, 647 (2d Dept 2003) for the proposition that the proposal/contract may not be interpreted as requiring M&M to procure additional insured coverage is misplaced, since in *Trapani*, the work contract was unambiguous as to the insurance procurement obligations[1] (*see Pub. Adm'r of Bronx Cty. v Equitable Life Assur. Soc. of U.S.*, 198 AD2d 105, 106 [1st Dept 1993] [holding that the subcontract requiring the subcontractor to obtain insurance was unambiguous and did not include requirement that subcontractor procure additional insured]; *see also Clavin v CAP Equip. Leasing Corp.*, 156 AD3d 404, 405 [1st Dept 2017]; *Gen. Motors, LLC v. B.J. Muirhead Co.*, 120 AD3d 927, 928 [2d Dept 2014]; *140 Broadway Prop. v. Schindler Elevator Co.*, 73 AD3d 717, 718–719 [2d Dept 2010]).

Since M&M is an additional insured under the Burlington Policy, the Court must next determine whether M&M is entitled to coverage under the Burlington Policy.

*Whether M&M is Entitled to Additional Insured Coverage Under the Policy*

"An insurance policy is a contract between the insurer and the insured. Thus, the extent of coverage . . . is controlled by the relevant policy terms, not by the terms of the underlying

[1] In *Trapani*, the plaintiff was injured while performing work at a construction site on the owner's premises (*Trapani*, 301 AD2d at 647). The owner commenced an action against the employer's insurance provider seeking defense and indemnification as additional named insured under a general liability insurance policy that the insurer issued to the employer. The only reference to insurance requirements in the work contract between the employer and owner indicated: "General liability & workers compensation insurance certificates to follow" (*id.*, 646). In determining that the owner was not an additional insured under the policy, the court held that "[a] provision in a construction contract cannot be interpreted as requiring the procurement of additional insured coverage unless such a requirement is expressly and specifically stated. In addition, contract language that merely requires the purchase of insurance will not be read as also requiring that a contracting party be named as an additional insured" (*id.*, 647).

trade contract that required the named insured to purchase coverage" (*Bovis Lend Lease LMB, Inc. v Great Am. Ins. Co.*, 53 AD3d 140, 145 [1st Dept 2008]). "[T]he unambiguous provisions of an insurance policy, as with any written contract, must be afforded their plain and ordinary meaning, and . . . the interpretation of such provisions is a question of law for the court" (*Broad St., LLC v Gulf Ins. Co.*, 37 AD3d 126, 130 [1st Dept 2006]).

It has been held that "[t]he duty to defend arises whenever the underlying complaint alleges facts that fall within the scope of coverage and that the "same allegations that trigger a duty to defend trigger an obligation to pay defense costs" (*Federal Ins. Co. v. Kozlowski,* 18 A.D.3d 33 [1st Dept 2005]; *see also Hotel des Artistes, Inc. v. General Acc. Ins. Co. of America,* 9 AD3d 181 [1st Dept 2004], citing *Incorporated Village of Cedarhurst v. Hanover Ins. Co.,* 89 N.Y.2d 293 [1996]). "If the complaint contains any facts or allegations which bring the claim even potentially within the protection purchased, the insurer is obligated to defend" (*Hotel des Artistes, Inc.,* 9 A.D.3d at 298, citing *Technicon Electronics Corp. v. American Home Assurance Co.,* 74 NY2d 66, 73 [1991]).

The Court of Appeals recently held in *Burlington Ins. Co. v NYC Tr. Auth.*, 29 NY3d 313, 323-324 (2017) that "[w]here an insurance policy is restricted to liability for any bodily injury 'caused, in whole or in part,' as used in the endorsement, requires the insured to be the proximate cause of the injury giving rise to liability, not merely the 'but for' cause.' "

Here, Burlington did not have the duty to defend M&M in the underlying action. As noted previously, additional insured coverage under the Burlington Policy is limited to " 'bodily injury' . . . caused, in whole or in part by: [] [L&M's] acts or omissions; or [] [t]he acts or omissions of those acting on [L&M's] behalf . . . ." (Gershweir Moving Affirmation, Ex. N). As stated above, Lucero alleged in the underlying action that he was injured while performing work

at M&M's premises, which M&M hired L&M to perform. However, the underlying complaint does not allege that L&M acts or omissions caused Lucero's accident. In fact, it attributes the cause of the accident exclusively to M&M's negligence.

Further, Tower has not shown it is entitled to indemnification from Burlington. L&M was not a part to the underlying action, and whether its acts or omissions were the proximate cause of Lucero's injuries have not been determined as a matter of law (*see Vargas v. City of New York*, 158 AD3d 523, 525 [1st Dept 2018], citing *Burlington Ins. Co.*, 29 NY3d 323-324). Moreover, Tower has failed herein to make a showing that L&M proximately caused the accident in the underlying action. Thus, Tower's motion is denied.

**CONCLUSION**

Accordingly, it is

**ORDERED** that plaintiff Tower Insurance Company of New York's motion pursuant to CPLR 3212, for summary judgment seeking a declaration that M&M Realty of New York, LLC is entitled to a defense from The Burlington Insurance Company as an additional insured in the underlying action entitled *Pedro Lucero v. M&M Realty of New York*, Index No. 155318/2013 is denied. It is further

**ORDERED** that defendant The Burlington Insurance Company's motion pursuant to CPLR 3212, for summary judgment dismissing the complaint against defendants is granted, and the complaint is dismissed as against defendants The Burlington Insurance Company and L&M Restoration, Inc. It is further

**ADJUDGED and DECLARED** that The Burlington Insurance Company is not obligated to provide a defense to, and to provide coverage for M&M Realty of New York, LLC in the underlying action entitled *Pedro Lucero v. M&M Realty of New York*, Index No. 155318/2013. It is further

**ORDERED** that counsel for plaintiff Tower Insurance Company of New York shall serve on all parties a copy of this order with notice of entry within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: June 28, 2018

Hon. Carol Robinson Edmead, J.S.C.