SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 15

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VALIANT INSURANCE COMPANY,

Plaintiff,

- against-

UTICA FIRST INSURANCE COMPANY,

Defendant.

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Index No. 655687/2016

Motion Sequence 001
DECISION AND ORDER

MELISSA ANNE CRANE, J.S.C.:

At issue is whether defendant Utica First Insurance Company ("Utica") has a duty to defend and indemnify nonparties CS Wall Street LLC ("CS Wall") and Wonder Works Construction Corp. ("Wonder Works"), its additional insureds ("the Additional Insureds"), in an action captioned *Samir Kadric v Wonderworks Construction Corp., and CS Wall Street LLC*, Sup Ct, Kings County, Index No. 4659/2014 (the Underlying Action), on a primary and non-contributing basis.

Plaintiff Valiant Insurance Company ("Valiant"), that covers the Additional Insureds on a primary basis under CGL policy no. VCGL042538, also seeks reimbursement of the costs of defense of the Underlying Action. First Mercury Insurance Company succeeds Valiant in interest, (referred to jointly as "Valiant").

In the Underlying Action, the plaintiff Samir Kadric ("Kadric") seeks damages for alleged personal injuries after he fell from a ladder while on scaffolding on June 14, 2011, in the course of his employment with Certified Drywall, Inc. ("Certified Drywall"). Certified Drywall is a defendant in a third-party action brought by Wonder Works. The alleged incident occurred at a construction site at 23 Wall St., New York, New York. CS Wall owned the site. CS Wall had retained Wonder Works as its general contractor and construction manager.

Plaintiff Valiant Insurance Company ("Valiant") issued CGL Policy No. VCGL042538 ("the Valiant Policy") to Wonder Works and CS Wall. Utica issued Contractors Special Insurance Policy No. ART 131218204 ("the Utica Policy") to Certified Drywall. The Utica Policy contains a blanket additional insured endorsement, that provides for additional insured status of "[a]ny person or organization whom [Certified Drywall is] required to name as an additional insured under a written contract or written agreement" (Exh F to DuBroff affirmation). The endorsement limits the liability to a claim arising from work by Certified Drywall for Wonder Works. The endorsement contains many exclusions, including for "bodily injury" (*id.*).

Wonder Works entered a subcontract (Complaint, Exh D; the Subcontract) with Certified Drywall, that requires that additional insureds include CS Wall and Wonder Works under the Utica Policy (Dubroff aff, Exh F).

Article XXI of the Subcontract requires Certified Drywall to defend and indemnify Wonder Works and CS Wall "to the extent that [Certified Drywall] utilizes . . . scaffolding . . . for any losses" including attorneys' fees incurred both in enforcing the indemnity provision, and in the defense of the Underlying Action (*id.*). The only provision in the parties' submissions governing procurement of insurance is in Article XXI of the Subcontract, that requires Certified Drywall to

> "furnish a certificate, satisfactory to [Wonder Works] from each insurer showing that the insurance coverages required of [Certified Drywall] are in full force and effect, stating policy numbers, dates of expiration, and limits of liability . . ."

(DuBoff Aff in support, exh E).

The certificate of insurance furnished ("the Certificate") describes the Utica Policy as a commercial general liability ("CGL") policy with personal injury limits of $1 million per occurrence, and lists Wonder Works and CS Wall as additional insureds. The Utica First policy

is not denominated **as** a CGL policy, but rather a Contractors Special Policy. With an annual premium under $5,000, the Utica Policy is not priced as a CGL policy on a construction risk. The Certificate states that it is issued as a matter of information only, and confers no rights on the Certificate holder. Further, the Certificate "does not affirmatively or negatively amend, extend or alter the coverage provided by the policies below" (DuBoff aff, Exh K).

The court in the Underlying Action granted Kadric's motion for summary judgment, and also granted Wonder Works' motion for summary judgment on its claim for contractual indemnity from Certified Drywall, (DuBroff Aff, Exh D). That court held that defendants had failed to raise a factual question about how the accident happened. The court credited plaintiff's testimony as to whether proper protection was provided. That court also denied Wonder Works' motion for summary judgment on its breach of contract claim in the second cause of action, in the third-party complaint. This claim alleges that Certified Drywall agreed in the Subcontract to maintain

> "comprehensive general personal injury and property damage liability [sic] against claims for bodily injury, death and property damage, under which Wonder Works is named as an additional insured"

(DuBoff Aff, Exh B, ¶ 17). Furnishing a satisfactory certificate, as far as this record shows, is the extent of Certified Drywall's insurance procurement obligation, The Subcontract did not expressly require Certified Drywall to procure a CGL policy.

Utica moves for summary judgment dismissing the complaint and declaring that it has no duty to defend or indemnify the Additional Insureds in the Underlying Action, based on exclusions in its policy. Utica argues that there is no coverage for any party because the Utica Policy contains an exclusion for "bodily injury to an employee of an insured if it occurs in the course of employment" [DuBroff Aff, Exh F, Exclusions, ¶ 8]).

Valiant cross-moves for a declaration that Insurance Law § 3420 (d) (2) bars Utica from relying upon exclusions in its policy. Valiant reasons Utica did not timely disclaim coverage, and it did not disclaim directly to the Additional Insureds (*see JT Magen v Hartford Fire Ins. Co.*, 64 AD3d 266 [1st Dept 2009]).

It is undisputed that CS Wall and Wonder Works are additional insureds under the Utica Policy. Therefore, both are entitled to the same protections as a named insured, including timely notice of disclaimer (*Sierra v 4401 Sunset Park, LLC*, 101 AD3d 983, 985 [Dept 2012], *affd* 24 NY3d 514 [2014]).

As the following series of letters conclusively demonstrates, Utica's disclaimers are untimely as a matter of law (*see First Fin. Ins. Co. v Jetco Contr. Corp.*, 1 NY3d 64, 66, [2003]). *First Financial* held that a 48-day delay to disclaim is unreasonable as a matter of law, where the disclaiming insurer has sufficient factual knowledge to disclaim.

Notice is also required for additional insureds where a primary insurer tenders the defense and indemnification to an insurer that

> "issued a certificate of insurance to the parties, indicating that they are additional insureds [;] that insurer must comply with the disclaimer requirements of Insurance Law 3420(d)(2) by providing written notice of disclaimer of coverage to the additional insureds"
> (*Sierra*, 101 AD3d at 985).

By letter dated June 11, 2014 (Dubroff Aff on cross-motion, Exh H), Valiant tendered the defense and indemnification of Wonder Works in the Underlying Action to Certified Drywall, but not to Utica.

By letter dated July 25, 2014 (*id.*, Exh I), Utica advised its insured, Certified Drywall, that it had received the claim in the Underlying Action, and its investigation had determined that there is no coverage or defense available to Certified Drywall, citing numerous exclusions in the

policy, including "bodily injury to an employee of an insured if it occurs in the course of employment" (*id.*).

By letter dated October 14, 2014 (*id.*, Exh J), counsel for Wonder Works tendered the same demand for defense and indemnification in the Underlying Action to Utica.

By letter dated April 8, 2016, counsel for Valiant wrote to Utica, asserting that Utica failed to comply with Insurance law ¶ 3420 (d) because Utica's July 25, 2014 disclaimer letter does not disclaim directly to its additional insureds, First Wall and Wonder Works (*id.*, Exh L).

By letter dated April 12, 2016, Utica wrote to Wonder Works, CS Wall, Valiant and its counsel, stating that First Utica has completed its investigation and determined that there is no liability or defense for Certified Drywall or any other party for the Underlying Action, quoting the numerous exclusions in the Utica Policy for bodily injury (*id.*, Exh L).

By letter dated May 4, 2016, counsel for Valiant wrote to Utica reiterating its tender and stating the basis for Utica's duty to defend and indemnify the Additional Insureds. Valiant also argued that Utica had failed to disclaim coverage within 30 days under Insurance Law § 3420 (d), and, therefore, could not invoke any of the exclusions in its policy.

The substantial delay between the June 11, 2014 tender by Valiant and the April 12, 2016 notice Utica sent to the Additional Insureds does not satisfy the reasonableness requirement of Insurance Law 3412 (d) (2).

Whether Utica is precluded by Insurance Law § 3420 (d) (2) because of untimely disclaimer

> "depends on whether there was a lack of coverage in the first instance or a lack of coverage based on an exclusion. As the Court of Appeals elaborated . . . Disclaimer pursuant to section 3420 (d) [now § 3420 (d) (2)] is unnecessary when a claim falls outside the scope of the policy's coverage portion. Under those circumstances, the insurance policy does not contemplate coverage in the first

> instance, and requiring payment of a claim upon failure to timely disclaim would create coverage where it never existed. By contrast, disclaimer pursuant to section 3420 (d) [(2)] is necessary when denial of coverage is based on a policy exclusion without which the claim would be covered"

(*Black Bull Contracting, LLC v Indian Harbor Ins. Co.*, 135 AD3d 401, 403 [1st Dept 2016] [internal quotation marks omitted]).

Utica's policy lists "principal coverages," L & M, stating:

> "[w]e provide insurance for the following coverages . . . Coverage L - Bodily Injury Liability [and] Property Damage Liability [stating] We pay all sums which an insured becomes legally obligated to pay as damages due to bodily injury or property damage to which this insurance applies. The bodily injury or property damage must be caused by an occurrence [defined as an accident]"

(*id.*).

Coverage M in the Utica First Policy, captioned "Medical Payments," provides:

> "[w]e pay the medical expenses defined below for bodily injury caused by accidents . . . arising out of your operations . . . only if they are incurred and reported within one year of the accident" (DuBroff aff, exh F).

In contrast to coverages L and M, the Utica Policy states on its renewal declaration page that it also provides $1,000,000 per occurrence with a $2,000,000 aggregate for "personal and advertising liability" (Dubroff Aff in Opp, Exh F), but it defines "personal injury" as

> "injury *(other than bodily injury)* arising out of one or more of the following offenses: (a) oral or written publication of material . . . (b) false arrest . . . (B) wrongful entry into, or eviction of a person from a room, dwelling or premises that the person occupies [and] It does not include advertising, publishing, broadcasting or telecasting done by or for you [emphasis supplied; parentheses in original]"

(*id.*).

Because the coverage for personal and advertising liability excludes liability for bodily injury, by its definition, rather than by application of an exclusion, Utica's Policy would not require notice of disclaimer if this were the only basis for liability (*see Black Bull Contr.*, 135 AD3d at 403).

No such lack of inclusion by definition is presented in coverages L and M, both of which apply in the absence of exclusions.

Thus, only coverages L, bodily injury, and M, medical expenses, by their terms, have any applicability to indemnity in the Underlying Action. Both coverages are subject to numerous exclusions, that would, if applied, preclude coverage for either bodily injury or medical expenses, but, because Utica failed to disclaim in a timely fashion to the Additional Insureds, as Insurance Law 3420 (d) (2) requires, it is precluded from relying upon those exclusions. Therefore, Utica is obligated to indemnify Wonder Works in the Underlying Action because "denial of coverage is based on a policy exclusion without that the claim would be covered [citation omitted]" (*Matter of Worcester Ins. Co. v Bettenhauser*, 95 NY2d at 189.

Utica also has a duty to defend Wonder Works in the Underlying Action because it has not demonstrated, as a matter of law, that there is "no possible factual or legal basis upon that the insurer may eventually be held obligated to indemnify the insured under any policy provision" (*Frontier Insulation Contrs. v Merchants Mut. Ins. Co.*, 91 NY2d 169, 175 [1997]).

Accordingly, it is

ORDERED that the court denies Utica First Insurance Company's motion for summary judgment declaring that it has no duty to defend or indemnify non-party Wonder Works, LLC in the Underlying Action; and it is further

ORDERED that the court grants plaintiff Valiant Insurance Company's cross-motion for summary judgment; and it is further

ADJUDGED AND DECLARED that Utica Insurance Company has a duty to defend and indemnify Wonder Works, LLC in the action captioned *Samir Kadric v Wonderworks Construction Corp., and CS Wall Street LLC*, Sup Ct, Kings County, Index No. 4659/2014, and to reimburse Valiant for the costs of defense it has incurred; and it is further

ORDERED that the Clerk shall enter judgment accordingly.

Dated: 9/27/2018

ENTER:

HON. MELISSA A. CRANE, J.S.C.

HON. MELISSA A. CRANE
J.S.C.