SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. JOEL M. COHEN **PART** IAS MOTION 45

Justice

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NEW YORK CITY SCHOOL CONSTRUCTION AUTHORITY

Plaintiff,

- v -

NEW SOUTH INSURANCE COMPANY,

Defendant.

INDEX NO. 656691/2016

MOTION DATE 10/16/2018

MOTION SEQ. NO. 001

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 34, 37, 38, 39, 40

were read on this motion to/for SUMMARY JUDGMENT.

Upon the foregoing documents, it is

This automobile insurance coverage case presents a straightforward question of contract interpretation. Plaintiff New York City School Construction Authority ("NYCSCA") seeks a declaratory judgment that Defendant New South Insurance Company ("New South") is obligated to defend and indemnify NYSCSA in connection with a personal injury action filed against NYSCSA by a third party. New South moves for summary judgment dismissing that claim pursuant to CPLR 3212. NYCSCA cross-moves for summary judgment.

New South's motion is granted. NYCSCA's motion is denied.

The insurance policy at issue provides, *inter alia*, that New South "will settle or defend as we consider appropriate, any claim or suit asking for damages, except punitive or exemplary damages, for which an Insured is legally liable because of bodily injury and property damage caused by an accident and arising out of the ownership, maintenance or use of [Sukhman

Construction Inc.'s][1] insured auto." The policy defines "Insured" to include, in pertinent part, the policyholder (Sukhman), "[a]ny person or organization with respect only to the legal liability of that person or organization for acts or omissions of any person covered under this part while driving [Sukhman's] insured auto"; or "[a]nyone else driving [Sukhman's] insured auto with [Sukhmany's] expressed permission and within the scope of that expressed permission."

There is no dispute as to the salient facts. The incident giving rise to the insurance claim occurred on February 22, 2014, during the course of construction being performed at P.S. 277 in the Bronx. The injured party, Carlos Cordero, was employed by the insured Sukhman. Mr. Cordero alleges that after parking one of Sukhman's insured vehicles (a flatbed truck), he began loading planks, frames, pipes, and clamps onto the flatbed. Thereafter, while standing on the flatbed and receiving steel frames from other workers to load, a frame struck Mr. Cordero's head, causing bodily injury. Mr. Cordero brought suit against NYCSCA, the City of New York, and the New York City Department of Education in Bronx County Supreme Court (the "Cordero Action").

On or about February 27, 2015, NYCSCA requested that New South assume the defense of NYCSCA in the Cordero Action. New South notified NYCSCA that it would not do so because the defendants in the Cordero Action were not "Insureds" under the terms of the insurance policy. NYCSCA commenced the instant action seeking a declaration that New South was required to defend and indemnify NYCSCA in the Cordero Action.

New South seeks summary judgment on the ground that Mr. Cordero's accident did not occur "while driving" the insured truck, and thus NYCSCA is not an Insured under the policy. For its part, NYCSCA cross-moves for judgment, mainly on the ground that insurance coverage

[1] NYCSCA notes that the correct name of the insured is *Sukhmany* Construction Inc. Given that the policy at issue references "Sukhman," the Court will use that name for purposes of this opinion.

for loading and unloading a vehicle is clear under the contract (as an incident of ownership, maintenance or use of the vehicle) and required by law.

Discussion

Both parties agree that the dispute can be resolved, on summary judgment, as a matter of law. The Court agrees.

"As with any contract, unambiguous provisions of an insurance contract must be given their plain and ordinary meaning, and the interpretation of such provisions is a question of law for the court." *White v. Continental Cas. Co.*, 9 N.Y.3d 264, 267 (2007). A contract is unambiguous "if the language it uses has a 'definite and precise meaning, unattended by danger of misconception in the purport of the [agreement] itself, and concerning which there is no reasonable basis for a difference of opinion.'" *Id.* "Thus, if the agreement on its face is reasonably susceptible of only one meaning, a court is not free to alter the contract to reflect its personal notions of fairness and equity." *Greenfield v. Philles Records*, 98 N.Y.2d 562, 569-70 (2002).

Here, the language of the New South policy is straightforward. To the extent its benefits are sought by a party other than the policyholder (Sukhman), such as NYCSCA, that party must demonstrate that it comes within the definition of "Insured" under the New South insurance contract. Given that the accident at issue in the Cordero Action occurred while the subject vehicle was parked, and thus not "while driving," NYCSCA is not an Insured. Accordingly, under the clear and unambiguous terms of the contract, it is not entitled to be defended or indemnified by New South.

NYCSCA's arguments to the contrary are unavailing. The fact that the policy generally covers injuries "arising out of the ownership, maintenance, or use of [the] insured auto" is

irrelevant. Even assuming, as NYCSCA argues, that such language includes loading and unloading the vehicle, by its terms it describes the coverage that is available *to an Insured.* Because NYCSCA is not an Insured, the scope of coverage that might be available to Sukhman (for example) is not available to NYCSCA. Similarly, even assuming NYCSCA is correct that New York law requires that an auto insurance contract cover events such as loading and unloading, this contract satisfies that requirement because it provides such coverage to *Insureds*. There is no requirement that *all* insurance contracts must extend such coverage to *all* third parties who may be sued in connection with an incident involving an insured vehicle.[2] Finally, the fact that NYCSCA may not be fully covered for Mr. Cordero's injury by its other insurance policies cannot serve to expand New South's obligations under its policy.

The bottom line is that New South agreed to a policy that broadly covers its customer (Sukhman) for liabilities arising out of the ownership, maintenance, or use of its covered vehicles. Its agreement specifically defines third parties that are covered as Insureds under that policy. NYSCSA plainly does not meet that definition in the context of the instant case. The Court sees no basis for expanding the agreed upon scope of the coverage.[3]

[Continued on Next Page]

[2] *Argentina v. Emery World Wide Delivery Corp.*, 93 N.Y.2d 554 (1999), upon which NYCSCA relies, is not to the contrary. In that case, the court held – on a question certified from the Second Circuit – that loading and unloading a vehicle constitutes "use or operation" of the vehicle for purposes of Vehicle and Traffic Law §388(1). Accordingly, the court found that "a vehicle's *owner* can be vicariously liable under §388(1) for injuries resulting from a permissive user's negligent loading and unloading." *Id.* at 560 (emphasis added.) The court did not hold that all auto insurance policies must extend such coverage to third parties such as NYCSCA (as opposed to vehicle owners/named insureds such as Sukhman), particularly where the plain language of the policy makes clear that such coverage was not included.

[3] Plaintiff argues that because Defendant's denial letter did not discuss "driving" or "loading" Defendant is precluded from denying its claim. An insurer's justification for denying coverage is strictly limited to those grounds stated in the notice of disclaimer. *2540 Assoc., Inc. v Assicurazioni Generali, S.p.A.*, 271 A.D.2d 282, 284 (1st Dep't 2000). Defendant denied coverage on March 23, 2016 on the grounds that NYCSCA was not an "Insured". That is the same ground on which it currently relies and the ground on which this court grants dismissal, *i.e.*, that NYCSCA does not meet the definition of "Insured" under the policy and is, therefore, not covered.

Therefore it is:

ORDERED that Defendant's Motion for Summary Judgment is granted; it is further

ORDERED that Plaintiffs' Cross-Motion for Summary Judgment is denied; it is further

ORDERED that the Complaint is dismissed with prejudice.

This constitutes the Decision and Order of the Court

HON. JOEL M. COHEN
J.S.C.

11/7/2018
DATE

JOEL M. COHEN, J.S.C.

CHECK ONE:	X	CASE DISPOSED			NON-FINAL DISPOSITION		
	X	GRANTED		DENIED	GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE