SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ARTHUR F. ENGORON **PART** IAS MOTION 37EFM

Justice

----------X

SOUTHWEST MARINE AND GENERAL INSURANCE COMPANY, ABRAHAM DEVELOPMENT CORP.,

Plaintiffs,

- v -

MAIN STREET AMERICA ASSURANCE COMPANY,

Defendant.

----------X

INDEX NO. 154076/2016

MOTION DATE 04/16/2018, 05/31/2018

MOTION SEQ. NO. 002, 003

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 002) 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 99, 100, 101, 102, 107

were read on this motion /for SUMMARY JUDGMENT.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 103, 104, 105, 106, 108, 109

were read on this motion for SUMMARY JUDGMENT.

Upon the foregoing documents, it is hereby ordered that defendant's motion for summary judgment and plaintiff's motion for partial summary judgment are both denied.

Background

In this insurance coverage dispute, plaintiffs, Southwest Marine and General Insurance Company ("Southwest") and Abraham Development Corp. ("ADC"), seek a declaration that ADC is entitled to additional insurance coverage from Defendant, Main Street America Assurance Company ("MSA"). MSA had declined coverage, asserting that ADC does not qualify as an additional insured under the MSA policy.

The facts, simply stated, are as follows: Non-party Emmett Laffey retained ADC to construct a single-family dwelling at 5 West Gate Road, Lloyd Harbor, New York ("the project"). ADC contracted with Northstar Flooring Inc. ("Northstar") to install floors at the project. Northstar then subcontracted with Beauty Floors Inc. ("Beauty Floors") to perform finishing work on the project. MSA provided commercial general liability insurance coverage to Northstar as a named insured. On June 15, 2013, two days after Beauty Floors began its work on the project, Beauty Floors employee Alison Duarte was injured in the course of his employment for Beauty Floors when he fell from a height at the project (the "underlying accident").

On July 16, 2013, Southwest, ADC's general liability insurer, tendered the defense and indemnification of Duarte's potential claim against ADC to MSA, seeking additional coverage

for ADC for the underlying accident. With its tender, ADC provided a copy of its written subcontract between ADC and Northstar. On September 18, 2013, MSA denied Southwest's tender on behalf of ADC, stating that Duarte had not yet commenced an action to recover damages for the underlying accident.

Unsurprisingly, on July 1, 2015, Duarte sued ADC and other defendants. On October 29, 2015, counsel for ADC retendered ADC's defense and indemnification to MSA. Subsequently, on December 15, 2015, ADC "renewed its tender" and provided MSA Duarte's supplemental complaint. By letter dated January 12, 2015, MSA yet again denied ADC's tender, asserting that there was no evidence that Northstar's, or its subcontractor's, negligence caused the underlying accident, and that ADC did not qualify as an additional insured on the MSA policy.

MSA now moves for summary judgment, declaring that MSA has no obligation to defend and indemnify ADC as an additional insured on the policy it issued to Northstar. ADC now cross-moves for partial summary judgment on its claim that MSA is obligated to defend and indemnify ADC in Duarte's lawsuit.

Northstar's Primary Commercial General Liability Insurance Policy from MSA

The Primary Commercial General Liability Insurance Policy MSA issued to Northstar includes a "Contractors Extension Endorsement" that adds as additional insureds, in pertinent part:

1. Any person(s) or organization(s) for whom you are performing operations is also an additional insured, 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", "property damage", "personal and advertising injury" caused in whole or part by:
    a. Your acts or omissions; or
    b. The acts or omissions of those acting on your behalf.

Discussion

It is well-settled that an insurer's duty to defend is broader than its duty to indemnify. See International Paper Co. v Continental Cas. Co., 35 NY2d 322, 326-327 (1974). As aptly summarized by the Court of Appeals in Automobile Ins. Co. of Hartford v Cook, 7 NY3d 131, 137 (2006), this legal maxim

> ... is "exceedingly broad" and an insurer will be called upon to provide a defense whenever the allegations of the complaint "suggest . . . a reasonable possibility of coverage" (*Continental Cas. Co. v Rapid-American Corp.*, 80 NY2d 640, 648 [1993]). "If, liberally construed, the claim is within the embrace of the policy, the insurer must come forward to defend its insured no matter how groundless, false or baseless the suit may be" (*Ruder & Finn v Seaboard Sur. Co.*, 52 NY2d 663, 670 [1981]).

> The duty remains "even though facts outside the four corners of [the] pleadings indicate that the claim may be meritless or not covered" (*Fitzpatrick v American Honda Motor Co.*, 78 NY2d 61, 63 [1991]). For this reason, when a policy represents that it will provide the insured with a defense, we have said that it actually constitutes "litigation insurance" in addition to liability coverage (*see Seaboard Sur. Co. v Gillette Co.*, 64 NY2d 304, 310 [1984], quoting *International Paper Co. v Continental Cas. Co.*, 35 NY2d 322, 326 [1974]). Thus, an insurer may be required to defend under the contract even though it may not be required to pay once the litigation has run its course.

As liberally construed, the complaint Duarte filed sufficiently alleges facts triggering MSA's duty to defend. Duarte alleges Northstar's negligence caused him serious and severe bodily injuries. Therefore, as liberally construed, there is a "reasonable possibility" that MSA is obligated to cover ADC. MSA has not established on its instant motion that the Mr. Duarte's injuries were not the result of Northstar's or its subcontractor's negligence.

MSA argues that ADC and Northstar had to have executed a written subcontract agreement prior to the date of the underlying accident to obligate MSA to cover ADC as an additional insured. MSA further argues that, notwithstanding the date of June 3, 2013 that appears on the subcontract between ADC and Northstar, the subcontract agreement was not actually executed until a week and a half after the underlying accident. In support of this claim, MSA cites to the deposition testimony of Rone Barcelos, the owner and president of Northstar, who testified that he signed the subcontract agreement between ADC and Northstar when he first saw it, which was a week and a half after the underlying accident, and that the document was pre-dated when he first received it for signature.

ADC argues that the date that appears on the contract, June 3, 2013, evidences that the subcontract agreement was in place prior to the date of the underlying accident. ADC further argues, in the alternative, that there is no language in the policy MSA issued to Northstar that requires a contract be executed in writing by both parties, let alone that it be executed prior to the date of the underlying accident.

Contrary to the argument advanced by ADC, this Court finds that that clear and unambiguous language of the policy issued to Northstar by MSA requires that ADC and Northstar had to have executed a written subcontract agreement prior to the date of the underlying accident in order to trigger coverage for "[a]ny person(s) or organization(s) for whom you are performing operations." We reject MSA's reliance on Travelers Indemnity Co. of America v Royal Insurance Co. of America, 22 AD3d 252 (1st Dep't 2005), as persuasive on this issue. The policy language at issue in Travelers is distinguishable in that it had a comma between the phrase "written contract" and the word "agreement," leading the First Department to find ambiguity in the coverage requirements. This Court finds, as a majority of other jurisdictions have found, that use of the words "written contract or agreement" unambiguously requires a written document.

Persuasive on this issue is Quincy Mutual Fire Ins. Co. v. Imperium Ins., 636 F. App'x 602, 605 (3d Cir. 2016) (holding that "to read it otherwise would render 'written' meaningless").

However, an issue of fact remains as to when the written agreement between ADC and Northstar was executed, and accordingly, an issue of fact as to whether the additional coverage of Northstar's policy applies to ADC. MSA met its initial prima facie burden of demonstrating that the contract was executed after the underlying accident, by providing the deposition testimony of Mr. Barcelos, shifting the burden to ADC. However, ADC sufficiently rebutted such a showing by submitting the affidavit of its administrative assistant, Ms. Mehl, who asserts it was her custome and practice to date the documents on the date the subcontractor signs.

Accordingly, defendant's motion for summary judgment and plaintiff's motion for partial summary judgment are denied.

1/30/2019
DATE

ARTHUR F. ENGORON, J.S.C.

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