SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: I.A.S. PART 42

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RLI INSURANCE COMPANY FOR ITSELF AND AS SUBROGEE/ASSIGNEE OF TECHNO CONSULT INC. and WILLIAM DOBSON

DECISION AND ORDER

Plaintiffs,

Index No. 650162/2017

- v -

MOT SEQ 001

THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY,

Defendant.

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NANCY M. BANNON, J.:

I. INTRODUCTION

In this insurance coverage action arising from a multi-car accident, the defendant, The Port Authority of New York and New Jersey, moves pursuant to CPLR 3212 to dismiss the complaint as against it, and for a judicial declaration (i) that it is not required to defend and indemnify defendants Techno Consulting, Inc. (Techno) and William T. Dobson (Dobson) in four underlying actions and (ii) that the plaintiff is required to defend and indemnify the defendant in those underlying actions. The four underlying actions, consolidated for discovery and trial in the Supreme Court of Nassau County, are: (i) Daniel DaSilva v Port Authority of New York and New Jersey, William T. Dobson. and Techno Consult. Inc., Supreme Court, Nassau County, Index No. 3793/2016; (ii) Anthony DeToma v William T. Dobson, Joseph

DeFelice and The Port Authority of New York & New Jersey, (originally filed in Supreme Court, New York County under Index No. 159961/2016, now venued in Supreme Court, Nassau County under Index No. 609109/2017); (iii) Joseph DeFelice v William T. Dobson, The Port Authority of New York and New Jersey and Techno Consult. Inc., (originally filed in Supreme Court, Bronx County under Index No. 28711/2016E, now venued in Supreme Court, Nassau County under Index No. 610060/2017); and (iv) Josue Almonte Sanchez v The Port Authority of New York and New Jersey, Techno Consult. Inc., William T. Dobson and Joseph DeFelice, (originally filed in Supreme Court, Queens County under Index No. 715404/2016, now venued in Supreme Court, Nassau County, Index No. 608402/2017). The plaintiff opposes the motion and cross-moves for summary judgment dismissing the defendant's counterclaims, a judicial declaration that the defendant must defend and indemnify defendants William T. Dobson (Dobson) and Techno Consulting Inc. (Techno) in the underlying actions in which they are named, and to reimburse the plaintiff for the costs it incurred in defending Dobson and Techno in the underlying actions. The defendant's motion is granted. The plaintiff's cross-motion is denied.

II. BACKGROUND

The defendant is a bi-state agency created by interstate compact between the States of New York and New Jersey and with the consent of the United States Congress. Techno was an engineering consultant for the defendant. Dobson was a Techno employee. On the morning of January 12, 2016, Dobson was driving an automobile owned by the defendant in and around John F. Kennedy Airport in Jamaica, New York in the course of his employment for Techno. At the time of the accident, Dobson was travelling eastbound on Rockaway Boulevard near that road's intersection with Guy R. Brewer Boulevard. Dobson attempted to make a left turn onto Guy Brewer Blvd. and crashed with a vehicle driven by Joseph DeFelice, a Port Authority police officer. Daniel DaSilva, also a Port Authority police officer, was a passenger in the vehicle driven by Joseph DeFelice. The force of the crash caused DeFelice's vehicle to spin and strike two other vehicles occupied by Josue Almonte Sanchez and Anthony DeToma, respectively. DaSilva, DeFelice, DeToma, and Sanchez each initiated individual and separate personal injury actions against the defendant, Dobson, and Techno. By court order, dated June 23, 2017 the cases were consolidated for purposes of joint discovery and joint trial.

The dispute in this action centers around whether the defendant must defend and indemnify Dobson and Techno, inasmuch as Dobson was driving one of the defendant’s vehicles, or, on

the other hand, whether the plaintiff is required to defend and indemnify Dobson, Techno, and the defendant pursuant to an October 1, 2014 agreement between the defendant and Techno. That agreement states in relevant part:

> "[Techno] assumes the following distinct and several risks to the extent arising from the negligent or willful intentional acts or omissions of [Techno] or its subconsultants in the performance of services hereunder:
>
> D. The risk of claims, just or unjust, by third persons made against [Techno] or its subconsultants or the Authority on account of injuries (including wrongful death loss or damage of any kind whatsoever arising in connection with the performance of services hereunder…
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> [Techno] shall indemnify the Authority against all claims described in subparagraphs A through D above and for all expense incurred by it in the defense, settlement or satisfaction thereof including expenses of attorneys."

The agreement also obligated Techno to procure Commercial General Liability Insurance as set forth in Section 26 of the Agreement, which states in pertinent part as follows:

> "Commercial Liability Insurance: 1) [Techno] shall take out and maintain at his own expense Commercial General Liability Insurance including but not limited to Premises-Operations, Completed Operations and Independent Contractors' coverages in limits of not less than $5,000,000.00 combined single limit per occurrence for Bodily Injury Liability and Property Damage Liability. And if vehicles are to be used to carry out the performance of this Agreement, then the Consultant shall also take out, maintain and pay the premiums on Automobile Liability Insurance covering all owned, non-owned and hired autos in not less than $5,000,000.00 combined single limit per accident for bodily injury and property damage… In addition, the liability policies (other than Professional Liability) shall include the Authority and its related wholly-owned entities as additional insureds… *Furthermore,*

> *[Techno's] insurance shall be primary with respect to the above additional insureds. Any insurance or self-insurance maintained by the above additional insureds shall not contribute to any loss or claim."* (emphasis added).

Following the execution of the Agreement, Techno took out an insurance policy with the plaintiff (Policy No. PSB0003124). Part of an endorsement to Techno's insurance policy is entitled "RLI Pack for Professionals Blanket Additional Insured Endorsement," which defines an "insured" to include "as an additional insured any person or organization that you agree in a contract or agreement requiring insurance to include as an additional insured on this policy, but only with respect to liability for bodily injury, property damage or personal and advertising injury caused in whole or in part by [Techno] or those acting on [Techno's] behalf… in the performance of ongoing operations."

Consistent with the agreement between the defendant and Techno, the endorsement provides that the policy shall be "primary and non-contributory" and that "this insurance is primary to other insurance that is available to such additional insured which covers such additional insured as a normal insured, and we will not share with that other insurance." The professional endorsement also contains an anti-subrogation clause which states: "We [RLI Insurance Co., on behalf of

Techno] waive any rights of recovery we may have against any person or organization because of payments we make for bodily injury, property damage or personal and advertising injury arising out of [Techno's work], or on [Techno's] behalf, under a contract or agreement with that person or organization. We waive these rights only where [Techno] has agreed to do so as part of a contract or agreement with such person or organization entered into by you before the bodily injury or property damage occurs."

Techno's insurance policy also contains an endorsement for "RLI Pack Hired Auto and Non-Owned Auto Liability." This auto liability endorsement also contains a section specifically laying out the parameters for coverage for hired and non-owned auto liability, stating in relevant part:

> "Each of the following is considered an insured to the extent that it is: a. [Techno]; b. Any other person using a "hired auto" with [Techno's] permission; c. For a "non-owned auto": 1. Any partner or "executive officer" of [Techno]; or 2. Any "employee" of [Techno]; d. Any other person or organization, but only for their liability because of acts or omissions of an insured under a. b. or c. above."

By letter dated May 20, 2016, the defendant tendered a demand for defense and indemnification from Techno and the plaintiff in two of the underlying actions (the DeToma and DaSilva actions). The defendant requested the same on May 23, 2016 in the third action (the DeFelice action). A fourth tender

request was made by the defendant on September 15, 2016 for the final action (the Sanchez action). By letter dated June 22, 2016 to the defendant, the plaintiff denied coverage for the first three claims as they related to defense and indemnification for the defendant, and then similarly denied coverage for the claim regarding the fourth action on September 27, 2016. The plaintiff disclaimed coverage on the ground that the automobile being driven by Dobson, Techno's employee, was a non-owned vehicle.

The plaintiff then submitted to the defendant a notice of claim on November 16, 2016, asserting that the defendant is statutorily required to defend and indemnify Techno and Dobson for all actions arising from the January 12, 2016 accident. The defendant denied this claim via letter dated January 5, 2017, on the grounds that there was no contractual obligation between the defendant and either Techno or Dobson requiring the defendant to provide defense or indemnification.

This action ensued. The plaintiffs filed the complaint on January 10, 2017. The defendant asserted in its verified answer two counter-claims against the plaintiff alleging that the defendant was entitled to insurance coverage and contractual indemnification based on its agreement with Techno.

III. DISCUSSION

It is well settled that the movant on a summary judgment motion "must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case." See Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 (1985). The motion must be supported by evidence in admissible form, and the pleadings and other proof such as affidavits, depositions, and written admissions. See Zuckerman v City of New York, 49 NY2d 557 (1980); CPLR 3212. The "facts must be viewed in the light most favorable to the non-moving party." Vega v Restani Constr. Corp., 18 NY3d 499, 503 (2012) (internal quotation marks and citation omitted). Once the movant meets its burden, it is incumbent upon the non-moving party to establish the existence of material issues of fact. See id., *citing* Alvarez v Prospect Hosp., 68 NY2d 320 (1986).

In support of its motion, the defendant submits, *inter alia*, the agreement between Techno and the defendant and the insurance policy that Techno procured from the plaintiff in accordance with that agreement. These submissions demonstrate, *prima facie*, that the plaintiff has the primary duty to defend and indemnify Techno and Dobson, that the defendant is an additional insured under the policy, that the defendant has no obligation to defend or indemnify any party to the underlying

actions, and to the contrary, that the defendant is entitled to defense and indemnification from the plaintiff as well.

The agreement between Techno and the defendant expressly obligated Techno to obtain a commercial general liability insurance policy, name the defendant as additional insured, and have that policy be primary coverage for any incident covered thereby. The defendant is an additional insured under the policy that Techno purchased as the policy expressly provides that an additional insured is "any person or organization that you agree in a contract or agreement requiring insurance to include as an additional insured on this policy, but only with respect to liability for bodily injury, property damage or personal and advertising injury caused in whole or in part by [Techno] or those acting on [Techno's] behalf… in the performance of ongoing operations." Furthermore, the agreement between the defendant and Techno demonstrates that Techno was to "include the Authority and its related wholly-owned entities as additional insureds" under the insurance that it procured.

The endorsements to the policy provide that the policy shall be "primary and non-contributory" and that "this insurance is primary to other insurance that is available to such additional insured which covers such additional insured as a normal insured, and [the plaintiff] will not share with that

other insurance." The endorsement also contains an anti-subrogation clause which states: "We [RLI Insurance Co., on behalf of Techno] waive any rights of recovery we may have against any person or organization because of payments we make for bodily injury, property damage or personal and advertising injury arising out of [Techno's work], or on [Techno's] behalf, under a contract or agreement with that person or organization. We waive these rights only where [Techno] has agreed to do so as part of a contract or agreement with such person or organization entered into by you before the bodily injury or property damage occurs." As it is undisputed that the accident occurred with respect to liability for bodily injury, caused in whole or in part by Techno's employee, Dobson, in the performance of Techno's operations, and that Techno, in its agreement with the defendant, was to procure insurance, name the defendant as an additional insured, and indemnify the defendant for any injury arising from its work, the defendants demonstrate their entitlement to summary judgment as a matter of law.

In opposition, and in support of its cross-motion dismissing the defendant's counterclaims and for a judicial declaration that the defendant must defend and indemnify Techno and Dobson in the underlying action, the plaintiff incorrectly argues that the plaintiff's obligation to indemnify and defend the defendant was abrogated by Vehicle & Traffic Law (VTL)

Section 388(1), which states, in part: "Every owner of a vehicle used or operated in this state shall be liable and responsible for death or injuries to person or property resulting from negligence in the use or operation of such vehicle, in the business of such owner or otherwise, by any person using or operating the same with the permission, express or implied, of such owner."

However, this argument was rejected by the Court of Appeals, in Morris v Snappy Car Rental, [84 NY2d 21 (1994)], which held that with regard to the issue of vehicle owners' responsibility pursuant to VTL § 388 and indemnification, Section 388, is to be narrowly construed as there is "no basis for inferring that the Legislature, in its desire to ensure that owners 'act responsibly,' intended to go so far as to abrogate the right of indemnification." It is further well settled under New York law that a party may protect itself from losses resulting from liability from others' negligence, as well as from one's own active negligence by means of insurance agreements and indemnity agreements. See Great Northern Ins. Co. v Interior Const. Corp., 7 NY3d 412 (2006). Thus, the defendant is entitled to indemnification from the plaintiff on a contractual basis and any liability imputed to the defendant under VTL § 388 is superseded the policy that the plaintiff

issued to Techno, under which the defendant is an additional insured. See Morris v Snappy Car Rental, supra.

The plaintiff further argues that the defendant, in moving for summary judgment seeking a declaration that it is entitled to defense and indemnification from the plaintiff, seeks relief beyond the scope of its counterclaims. However, as correctly argued by the defendant, the interposed counterclaims sufficiently allege that the plaintiff was required to defend and indemnify the defendant. Specifically, the defendant alleged in its counterclaims that:

> 13. At all times set forth in the Complaint, the Agreement requires Techno to procure a policy of insurance with regard to claims, such as the various claims arising out of the alleged accident, and to name the Port Authority as an additional insured on the policy of insurance for any and all claims that may be made against it, such as those asserted by the various lawsuits arising out of the alleged accident.
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> 14. Upon information and belief. Techno failed to procure appropriate insurance with regard to claims, such as the various claims referenced herein, and to name the Port Authority as an additional insured under a policy of insurance for any and all claims that may be made against it.
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> 15. The Port Authority duly tendered a letter dated May 20, 2016, to plaintiff RLI Insurance, the insurer of Techno Consult, Inc., requesting that RLI Insurance defend and indemnify it in matters arising out of this incident. The letters make reference to the Agreement containing the responsibility of Techno Consult, Inc. to defend, indemnify, and hold the Port Authority harmless for this action and to maintain general liability insurance naming the Port Authority as an additional insured. RLI Insurance denied acceptance of the tender on June 22, 2016.

These pleadings were sufficient to put the plaintiff on notice of the defendant's request for indemnification, defense, and coverage under the policy, and directly lay out that the plaintiff had an obligation to defend and indemnify the defendant under the terms of the policy and the defendant's agreement with Techno.

As such, the plaintiff's fail to raise a triable issue of fact in opposition to refute the defendant's *prima facie* showing of its entitlement to judgment as a matter of law. As such, the defendant's motion for summary judgment dismissing the complaint, and for a judicial declaration that (i) the defendant is not required to defend or indemnify Techno and Dobson and (ii) the plaintiff is required to defend and indemnify the defendant is granted. As summary judgment is granted, the plaintiff's cross-motion for summary judgment dismissing the defendant's counterclaims and for a judicial declaration that the defendant must defend and indemnify defendants in the underlying action is denied.

IV. CONCLUSION

Accordingly, it is hereby,

ORDERED that the motion of the defendant, The Port Authority of New York and New Jersey, for summary judgment pursuant to CPLR 3212 dismissing the complaint against it and for a declaratory judgment is granted in its entirety; and it is further,

ADJUDGED and DECLARED that the defendant, The Port Authority of New York and New Jersey, is not required to defend or indemnify William T. Dobson or Techno Consulting Inc. in the underlying actions Daniel DaSilva v Port Authority of New York and New Jersey, William T. Dobson. and Techno Consult. Inc., Sup. Ct. Nassau County., Index No. 3793/2016; Anthony DeToma v William T. Dobson, Joseph DeFelice and The Port Authority of New York & New Jersey, Supreme Court, Nassau County Index No. 609109/2017; Joseph DeFelice v William T. Dobson, The Port Authority of New York and New Jersey and Techno Consult. Inc., Supreme Court, Nassau County, Index No. 610060/2017); and Josue Almonte Sanchez v The Port Authority of New York and New Jersey, Techno Consult. Inc., William T. Dobson and Joseph DeFelice, Supreme Court, Nassau County, Index No. 608402/2017; and it is further,

ADJUDGED and DECLARED that the plaintiff, RLI Insurance Company, is required to defend and indemnify the defendant in the underlying actions Daniel DaSilva v Port Authority of New

York and New Jersey, William T. Dobson. and Techno Consult. Inc., Sup. Ct. Nassau County., Index No. 3793/2016; Anthony DeToma v William T. Dobson, Joseph DeFelice and The Port Authority of New York & New Jersey, Supreme Court, Nassau County Index No. 609109/2017; Joseph DeFelice v William T. Dobson, The Port Authority of New York and New Jersey and Techno Consult. Inc., Supreme Court, Nassau County, Index No. 610060/2017); and Josue Almonte Sanchez v The Port Authority of New York and New Jersey, Techno Consult. Inc., William T. Dobson and Joseph DeFelice, Supreme Court, Nassau County, Index No. 608402/2017; and it is further,

ORDERED that the cross-motion of the plaintiff, RLI Insurance Company, for summary judgment and a declaratory judgment is denied in its entirety.

This constitutes the Decision, Order, and Judgment of the Court.

Dated: June 2, 2020 ENTER:

NANCY M. BANNON, J.S.C.
HON. NANCY M. BANNON