American Empire Surplus Lines Ins. Co. v State Farm Mut. Auto. Ins. Co.
2021 NY Slip Op 30700(U)
February 26, 2021
Supreme Court, New York County
Docket Number: 655441/2018
Judge: Nancy M. Bannon
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. NANCY M. BANNON** **PART** **IAS MOTION 42EFM**

Justice

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AMERICAN EMPIRE SURPLUS LINES INSURANCE COMPANY,

Plaintiff,

- v -

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, SPRING SCAFFOLDING, LLC,SKYLINE RESTORATION, INC, MANGUILIBE PITANG, AVEGNIDOU PITANG, BEACON BROADWAY COMPANY, LLC,BEACWAY OPERATING, LLC

Defendants.

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INDEX NO. 655441/2018

MOTION DATE 09/02/2020, 09/02/2020, 09/02/2020, 09/02/2020

MOTION SEQ. NO. 001 002 003 004

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 135, 139, 149, 157

were read on this motion to/for PARTIAL SUMMARY JUDGMENT.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 137, 143, 144, 158

were read on this motion to/for PARTIAL SUMMARY JUDGMENT.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 136, 140, 145, 146, 147, 150, 152, 153, 154, 155, 159, 160

were read on this motion to/for SUMMARY JUDGMENT.

The following e-filed documents, listed by NYSCEF document number (Motion 004) 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 138, 141, 142, 151, 156, 162

were read on this motion to/for SUMMARY JUDGMENT.

MOT SEQ 001, 002, 003 and 004 are decided in accordance with the attached memorandum Decision and Order.

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

3/4/2021
DATE

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

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

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AMERICAN EMPIRE SURPLUS LINES INSURANCE COMPANY,

Plaintiff,

DECISION AND ORDER

Index No. 655441/18

- v -

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, SPRING SCAFFOLDING, LLC, SKYLINE RESTORATION, INC, MANGUILIBE PITANG, AVEGNIDOU PITANG, BEACON BROADWAY COMPANY, LLC, BEACWAY OPERATING, LLC

MOT SEQ 001, 002, 003, 004

Defendants.

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NANCY M. BANNON, J.:

I. INTRODUCTION

This declaratory judgment action arises from a construction site accident where the injured worker was standing in the flatbed of a truck when he fell and concerns a dispute between the property owners and two insurance carriers regarding duty to defend in the underlying personal injury action.

Plaintiff American Empire Surplus Lines Insurance Company ("American Empire") commenced the action seeking declarations that it has no duty to defend or indemnify defendants Beacon Broadway Company, LLC and Beacway Operating, LLC (collectively "the Owners") or Skyline Restoration, Inc. ("Skyline") in the underlying personal injury action, and that defendant State Farm Mutual Automobile Insurance Company ("State Farm") has a duty to

defend and indemnify the Owners and Skyline. The underlying action is Manguilibe Pitang v Beacon Broadway Company, LLC et al., Index No. 27350/2017 currently pending before the Supreme Court, Bronx County. American Empire further seeks an award of damages against State Farm in the amount of costs American Empire has already incurred defending the Owners and Skyline.

State Farm counterclaims for a declaration that it has no duty to defend or indemnify the Owners or Skyline, and that American Empire has a duty to defend and indemnify those parties. State Farm also counterclaims for attorneys' fees in defending this action.

The Owners counterclaim for a declaration that American Empire has a duty to defend and indemnify them, and cross-claim for a declaration that State Farm also has a duty to defend and indemnify them.

The Owners now move pursuant to CPLR 3212 for partial summary judgment seeking (1) a declaration that American Empire has a primary and non-contributory duty to defend them, (2) reimbursement for costs incurred in connection with their defense in the underlying action and statutory interest plus the costs of this motion, and (3) to stay the portions of this action relating to claims for indemnification pending a determination in the underlying action (MOT SEQ 001). The Owners

also move for the same relief as against State Farm (MOT SEQ 002).

American Empire and State Farm oppose the Owner's motions as directed against them. State Farm also moves for summary judgment dismissing American Empire's complaint and the cross-claim against it (MOT SEQ 003). American Empire opposes that motion as well and moves for summary judgment on its complaint (MOT SEQ 004). The Owners and State Farm oppose that motion.

Motion Sequences 001, 002, 003, and 004 are granted in part.

II. BACKGROUND

A. The Complaint in the Underlying Action

The complaint in the underlying action alleges, in relevant part, that Manguilibe Pitang ("Pitang") was injured on September 8, 2014 while working at a construction project located at 2130 Broadway Street in Manhattan. The Owners owned the building and Metropolitan East LLC ("Metropolitan"), Pitang's employer, was retained to erect scaffolding at the worksite.

The complaint further alleges that on the day of his injury, Pitang was standing on the back of a truck passing wooden planks from the top of the truck to workers on the 'bridge' of the scaffolding. The complaint also alleges that no

safety equipment was provided to Pitang and that, in order to increase his reach when passing the wooden planks to his co-workers, Pitang stood on a stack of the wooden planks in the bed of the truck. These wooden planks are alleged to have 'flipped' while Pitang was trying to pass the other planks to his co-workers causing him to fall approximately 11 feet onto the pavement below, causing injury. The complaint in the underlying action, filed on August 8, 2017, asserts five causes of action for breach of Labor Law §§ 200, 240, 241(6), damages arising from medical malpractice subsequent to Pitang's injuries, and a claim for loss of services by Pitang's wife as against the Owners.

During discovery in the underlying action, Pitang's deposition was taken, and he admitted that he was not passing wooden planks at the time of his accident. Pitang testified that following a lunch break he was asked by a co-worker then on the scaffolding to hand him a cup of soda that had been left on the flatbed and, as Pitang attempted to hand his co-worker the cup, the wooden planks that he was standing on flipped, causing his fall and injury. Discovery is ongoing in that action.

B. The Owners' Third-Party Complaint

On or about August 7, 2018, the Owners filed a third-party complaint in the underlying action against defendant Skyline

Restoration, Inc. ("Skyline"). The third-party complaint alleges that, to the extent the Pitang's injuries were not caused by his own carelessness, recklessness, and negligence, then Pitang's injuries were caused by Skyline. The third-party complaint asserts causes of action against Skyline for common-law and contractual indemnification, contribution, and breach of contract for failure to procure insurance.

C. Facts Relevant to the Instant Action

It is undisputed that the Owners contracted with Skyline to perform construction work at the premises pursuant to an AIA Standard Form Agreement dated June 21, 2013. The contract required Skyline to procure commercial general liability insurance for bodily injury and to name the Owners as additional insureds on a primary and non-contributory basis.

Skyline in turn subcontracted with defendant Spring Scaffolding, LLC ("Spring") to install the scaffolding necessary for the construction project. Pursuant to a master contract agreement between Skyline and Spring dated January 1, 2014, Spring was obligated to procure and maintain general liability insurance for bodily injury and to name the Skyline and the Owners as additional insureds on a primary and non-contributory basis. Spring then entered into a subcontract with Metropolitan for the scaffolding installation.

American Empire issued commercial general liability policies to both Skyline and Spring, policy numbers 14CG0185218 and 13CG0180431, respectively ("the American Empire policies"). These policies each include a commercial general liability coverage form CG00010413, which provides that American Empire will pay "sums that the insured becomes legally obligated to pay as damages because of 'bodily injury' or 'property damage' to which the insurance applies" and that American Empire has a duty to defend the insureds under the policy against any suit seeking those damages.

Pursuant to an additional insured coverage schedule form CG20100413 executed with each policy, form CG00010413 was modified to include, as additional insureds, "[a]ll entities required by written contract to be included for coverage as additional insureds in respect to operations performed by the Named Insured or on their behalf...only with respect to liability for 'bodily injury'...caused, in whole or in party by, [the insured's] acts or omissions."

The American Empire policies also include form SLG 2088 which provides: "[t]he insurance afforded to any additional insured on this policy is primary insurance, but only with respect to 'bodily injury' or 'property damage' liability arising out of [the named insured's] operations. Furthermore,

the insurance maintained by the additional insured shall be non-contributing. However, this coverage extension applies only if: 1. [The named insured is] required by an 'insured contract' to provide primary and non-contributory status."

The American Empire Policies also contain an exclusion for Aircraft, Auto or Watercraft, which provides that coverage is excluded for "'[b]odily injury'...arising out of the ownership, maintenance, use or entrustment to others of any ...'auto'...owned or operated by or rented or loaned to any insured. Use includes operation and 'loading or unloading.'"

It is undisputed that the truck that Pitang was standing on when he was injured was a 2001 Volvo flatbed provided to Metropolitan by Spring, and that that vehicle was covered by an auto insurance policy issued by State Farm.

The State Farm auto policy contains a liability coverage section that provides that "[State Farm] will pay... damages an insured becomes legally liable to pay because of: (1) bodily injury to others...caused by an accident that involves a vehicle for which that insured is provided liability coverage by this policy" and further provides that State Farm has a "duty to defend an insured in any claim or lawsuit...for damages payable under this policy's liability coverage."

The policy also includes form 6030AF, which modifies the policy by adding as an insured: "any other person or organization vicariously liable for the use of a vehicle by an insured" only to the extent that "the vehicle is neither owned by, nor hired by, that other person or organization." The policy further provides that it "applies as primary coverage for an insured who sustains bodily injury while occupying your car." Occupying is defined as "in or upon or entering into or alighting from" the insured vehicle.

American Empire commenced this action in November 2018, the parties completed discovery and a Note of Issue was filed on November 27, 2019. These motions ensued, as described above.

III. DISCUSSION

On a motion for summary judgment, the moving party must make a *prima facie* showing of its entitlement to judgment as a matter of law by submitting evidentiary proof in admissible form sufficient to establish the absence of any material, triable issues of fact. See CPLR 3212(b); Jacobsen v New York City Health & Hosps. Corp., 22 NY3d 824 (2014); Alvarez v Prospect Hosp., 68 NY2d 320 (1986); Zuckerman v City of New York, 49 NY2d 557 (1980). Once such a showing is made, the opposing party, to defeat summary judgment, must raise a triable issue of fact by

submitting evidentiary proof in admissible form. See Alvarez, supra; Zuckerman, supra.

A. Motion Sequence 001

The portion of the Owners' motion for partial summary judgment declaring that American Empire has a primary and noncontributory duty to defend them in connection with the underlying action is granted.

In interpreting a duty to defend clause the Court of Appeals has long held that the duty to defend is broader than the duty to indemnify. See Fitzpatrick v Am. Honda Motor Co., 78 NY2d 61 (1991). To establish entitlement to a declaration seeking to enforce an insurer's duty to defend, a party must demonstrate i) that they are insureds subject to an applicable a duty to defend clause under the policy, and ii) that the allegations against them give rise to a reasonable possibility of recovery under the policy. Id at 65.

It is also well settled that the duty to defend exists "whenever the allegations in a complaint state a cause of action that gives rise to the reasonable possibility of recovery under the policy." Id.; see also Frank v Cont'l Cas. Co., 123 AD3d 878 (2nd Dept. 2014). "If any of the claims against an insured arguably arise from covered events, the insurer is required to defend the entire action." Frank v Cont'l Cas. Co., supra at

880. Recently, in Wesco Ins. Co. v Hellas Glass Works Corp., 188 AD3d 476 (1st Dept. 2020), the Appellate Division, First Department, addressed this issue and held that documents and testimony and other factors outside the complaint may also be considered in determining a duty to defend. As also significant here, the Court also addressed the ordering of pro rata sharing of defense costs in a mixed claim potentially involving both a general liability policy and an automobile liability policy. In Wesco, the Court explained:

> "Although the duty to defend is primarily determined by the complaint (see Greenwich Ins. Co. v City of New York, 122 AD3 470, 471 [1st Dept. 2014]), 'wooden application of the four corners of the complaint rule would render the duty to defendant narrower than the duty to indemnify (Fitzpatrick v Am. Honda Motor Co., [supra]). Based on the pleading in the underlying action and third-party action, as well as documents and testimony, and the fact that discovery and depositions in the underlying action are still ongoing, it cannot be said that there is no possible factual or legal basis on which either Wesco's automobile policy or MBIC's general liability policy might eventually be held to afford indemnity coverage (see Greenwich Ins. Co., 122 AD3d at 471). Further, "the pro rata sharing of defense costs may be ordered when more than one policy is triggered by a claim" (Travelers Cas. & Sur. Co. v Alfa Laval Inc., 100 AD3d 451, 452 (1st Dept. 2012])."

In support of MOT SEQ 001, the Owners submit, *inter alia*, the policies issued by American Empire to Skyline and Spring, forms CG00010413 and CG20100413 to the policies, the AIA form contract between the Owners and Skyline dated June 21, 2013, the master agreement between Skyline and Spring dated January 1, 2014, and the summons and complaint and third-party complaint in the underlying action.

These submissions demonstrate that the Owners are insureds subject to an applicable duty to defend clause under both American Empire policies. See Vargas v City of New York, 158 AD3d 523 (1st Dept. 2018). Form CG20100413 to each policy provides that "entities required by written contract to be included for coverage as additional insureds" are to be considered additional insureds under the policy. The AIA form contract between the Owners and Skyline and the master agreement between Skyline and Spring each require that Skyline and Spring procure insurance naming the Owners as additional insureds on a primary and non-contributory basis. Form CG00010413 to each policy provides that American Empire has a duty to defend insureds under the policies against any suit seeking damages for bodily injuries caused, in whole or in part, by the acts or omissions of the named insureds or those acting on their behalf.

The allegations in the underlying complaint and third-party complaint are also sufficient to trigger a duty to defend. The underlying lawsuit alleges that Pitang was injured when he fell from a truck while passing scaffolding materials to a co-worker at the construction site. It further alleges that the Owners and their agents, employees, and contractors negligently breached a duty to provide Pitang with a safe workplace. The third-party complaint alleges that Skyline, as contractor, caused Pitang's injuries through their own recklessness, carelessness, or negligence by failing to provide Pitang with a safe work environment. These allegations give rise to a "reasonable possibility of recovery under the policy" inasmuch as they implicate the Owners for Pitang's injuries based upon potential acts or omissions made by Skyline and Spring while acting as the Owners contractors. See Fitzpatrick v Am. Honda Motor Co., supra at 65; see Wesco Ins. Co. v Hellas Glass Works Corp., supra.

Thus, the Owners have established, *prima facie*, that American Empire has a duty to defend them in the underlying action. In opposition, American Empire argues that there is no duty to defend under form CG00010413, as there are no allegations in the underlying complaint that Pitang's injuries were caused by Skyline or Spring. American Empire further argues that the Owners cannot establish a duty to defend based upon the

allegations that they made in their own third-party complaint. Both arguments are without merit.

While it is true that neither Skyline nor Spring were named in the underlying complaint, it is alleged that the Owners' contractors were responsible for Pitang's injuries. As Skyline and Spring were both the Owners' contractors and involved with Pitang's work, a reasonable possibility of recovery under the policy exists such that American Empire's duty to defend arose. See Wesco Ins. Co. v Hellas Glass Works Corp., supra.

Moreover, contrary to American Empire's contentions, where the allegations of a third-party pleading allege a reasonable possibility that the third-party plaintiff is entitled to coverage, a duty to defend arises. See Indian Harbor Ins. Co. v Alma Tower, LLC, 165 AD3d 549 (1st Dept. 2018); Mt. Hawley Ins. Co. v Am. States Ins. Co., 168 AD3d 558 (1st Dept. 2019); All State Interior Demolition Inc. v Scottsdale Ins. Co., 168 AD3d 612 (1st Dept. 2019).

American Empire also argues in opposition that the exclusion for Aircraft, Auto or Watercraft, relieves them of any duty to defend. That exclusion is for all "'[b]odily injury'...arising out of the ownership, maintenance, use or entrustment to others of any ...'auto'...owned or operated by or rented or loaned to any insured. Use includes operation and

'loading or unloading.'" The term 'loading and unloading' covers 'the entire operation of making commercial pickups and deliveries...' See Wagman v American Fidelity & Casualty Co., 304 NY 490 (1952); see also Lamberti v Anaco Equipment Corp., 16 AD2d 121 (1st Dept. 1962).

If an insurer relies upon a policy exclusion to be relieved of a duty to defend, the insurer "bears the heavy burden of demonstrating that the allegations of the complaint cast the pleadings wholly within that exclusion, that the exclusion is subject to no other reasonable interpretation, and that there is no possible factual or legal basis upon which the insurer may eventually be held obligated to indemnify the insured under any policy provision." Frontier Insulation Contractors, Inc. v Merchs. Mut. Ins. Co., 91 NY2d 169, 175 (1997).

Here, American Empire fails to meet this burden. It argues that, according to the underlying complaint, Pitang was injured by unloading the truck, casting it within the policy exclusion. However, American Empire does not establish that Pitang's alleged use of the truck - standing on the bed of the truck and a stack of wooden planks and using it essentially as a staging platform to pass other wooden planks to those working on nearby scaffolding – constitutes 'loading and unloading' under the terms of the policy. Nothing in the underlying complaint states

that Pitang was unloading the truck, or that the wooden planks were picked up and subsequently delivered using that truck such that Pitang's actions necessarily constitute unloading. Rather, the allegations in the underlying complaint merely state that Pitang was standing on the truck to pass wooden planks to his co-workers. Furthermore, also to be considered is Pitang's deposition testimony in that action that he was not passing any wooden planks to co-workers when he fell but rather was passing a cup. See Wesco Ins. Co. v Hellas Glass Works Corp., supra.

Moreover, as correctly noted by the Owners, such an exclusion is irrelevant to the claims under Skyline's policy, as there are no allegations that Skyline owned the vehicle.

Therefore, the Owners are entitled to a declaration that American Empire is required to defend them in the underlying action, with the amount owed to the Owners to be determined at trial. To the extent that the Owners seek a declaration that the duty to defend is primary and non-contributory, the Owners are correct that pursuant to form SLG 2088 of the respective policies American Empire's duty to defend is primary and non-contributory.

As to the portion of the Owners' motion seeking attorney's fees, they fail to establish their entitlement to that relief. Generally, in a cause of action seeking attorneys' fees, such

fees are merely incidents of litigation and are not recoverable absent a specific contractual provision or statutory authority. See Flemming v Barnwell Nursing Home and Health Facilities, Inc., 15 NY3d 375 (2010); Coopers & Lybrand v Levitt, 52 AD2d 493 (1st Dept. 1976); see also Goldberg v Mallinckrodt, Inc., 792 F2d 305 (2nd Cir. 1986); Rich v Orlando, 108 AD3d 1039 (4th Dept. 2013). Here, the Owners fail to point to any contractual or statutory provision, nor do they even discuss their entitlement to such relief in their papers.

As to the portion of the Owners motion seeking a stay of any determination regarding the indemnification claims in this action pending resolution of the underlying matter, the Owners are correct that a determination as to any duty to indemnify would be premature. While the duty to defend is measured against the possibility of a recovery, "the duty to pay is determined by the actual basis for the insured's liability to a third person." Servidone Constr. Corp. v Security Ins. Co., 64 NY2d 419, 424 (1985); see Frontier Insulation Contractors, Inc. v Merchants Mut. Ins. Co., 91 NY2d 169 (1997); Atlantic Mut. Ins. Co. v Terk Technologies Corp., 309 AD2d 22, 28 (1st Dept. 2003). As any determination to the parties' respective claims for indemnification requires a determination as to liability, relief under such claims cannot be granted at this time.

However, instead of the stay sought by the Owners in their notice of motion, the court finds it more prudent to deny the portions of the instant motions that seek declarations relating to a duty to indemnify, without prejudice to renew upon a determination in the underlying matter. See Axis Surplus Ins. Co. v GTJ Co., 139 AD3d 604, 605 (1st Dept. 2016) ("It is after the resolution of that [tort] action where the extent of plaintiff's indemnification obligations can be fully determined.").

B. Motion Sequence 002

The portion of the Owners' motion for partial summary judgment declaring that State Farm has a primary and non-contributory duty to defend them in connection with the underlying action is granted in part.

In support of Motion Sequence 002, the Owners submit, *inter alia*, the State Farm Insurance Policy, form 6030A (Business Named Insured), the master agreement between Skyline and Spring, and the underlying complaint.

As to whether the Owners are additional insureds subject to an applicable duty to defend clause, the auto policy contains a liability coverage section that provides that "[State Farm] will pay... damages an insured becomes legally liable to pay because of: (1) bodily injury to others" and further provides that State

Farm has a "duty to defend an insured in any claim or lawsuit... for damages payable under this policy's liability coverage."

The policy also includes form 6030AF, which modifies the policy by adding as an insured: "any other person or organization vicariously liable for the use of a vehicle by an insured" only to the extent that "the vehicle is neither owned by, nor hired by, that other person or organization."

The underlying complaint alleges that the Owners and their agents, employees, or contractors negligently breached a duty to provide Pitang with a safe workplace. To the extent that the underlying complaint does not allege any specific acts of negligence as against the Owners, the underlying action can be read as seeking to hold the Owners liable under the vicarious liability provisions of Labor Law §§ 240 and 241(6). Therefore, Owner is as an "insured" under the auto policy subject to the duty to defend clause therein.

There is also a reasonable possibility of coverage under the policy. The policy provides coverage for damages for bodily injury to others "caused by an accident that involves a vehicle for which that insured is provided liability coverage." Insurance coverage for injuries suffered as a result of "the use of a motor vehicle" arises when the use of the motor vehicle is "the proximate cause of the injury." See Wausau Underwriters

Ins. Co. v St. Barnabas Hosp., 145 AD2d 314 (1st Dept. 1988) citing Lumbermen's Mut. Cas. Co. v Logan, 88 AD2d 971 (2nd Dept. 1982). As the underlying complaint alleges that Pitang's accident arose while he was using the truck as an elevated platform from which he could pass wooden planks to his co-workers, that 'use' of the vehicle can reasonably be understood as the proximate cause of Pitang's injury. His deposition testimony shows that he was still on the flat bed of the vehicle when injured, albeit not when passing any wooden planks.

Moreover, while American Empire failed to meet its heavy burden in establishing as a matter of law that the truck was being used for loading or unloading for the purposes avoiding its duty to defend under its policies' auto exclusion, the complaint may also be read to as one in which Pitang's injuries arose while unloading the truck. An automotive insurance policy includes "bodily injury suffered during the loading or unloading of the vehicle" if there is a causal relationship between the vehicle and the injury. See ABC, Inc. v Countrywide Ins. Co., 308 AD2d 309 (1st Dept. 2003); Cosmopolitan Mut. Ins. Co. v Baltimore & Ohio R.R. Co., 18 AD2d 460 (1st Dept. 1963). Here, it is undisputed that Pitang's injury occurred as he stood on the flat bed of the truck using it as a makeshift platform. Thus, there is a causal relationship between Pitang's 'use' of the vehicle and the injury.

In opposition, State Farm submits Pitang's deposition testimony and argues that it establishes that he was not injured from the use of the vehicle, including its unloading, but rather from his own negligence in standing on the truck in order to pass a cup of soda to one of his co-workers. While this testimony may be considered, it must be viewed along with the allegations in the underlying complaint. See Wesco Ins. Co. v Hellas Glass Works Corp., supra.

Thus, the Owners have established State Farm's duty to defend, and the Owners are entitled to recover the costs incurred from defending the underlying action from State Farm with the amount to be determined at trial. However, to the extent that the Owners seek a declaration that State Farm's duty to defend is primary and non-contributory, the Owners establish only that the duty is primary. The policy states that it "applies as primary coverage for an insured who sustains bodily injury while occupying your car." As occupying is defined as "in or upon or entering into or alighting from" the insured vehicle, and Pitang was on the truck when the alleged injury occurred, the Owners' have established that State Farm's insurance is primary. However, nothing in the Owners submissions, including the State Farm policy, discuss whether a duty to defend under the policy is non-contributory. As such, the Owners fail to meet their burden as to that relief.

The portions of this motion seeking attorneys' fees and a stay of the indemnification claims in this action are denied as discussed in regard to the denial of the identical relief sought in MOT SEQ 001.

C. Motion Sequence 003 and 004

Based upon the foregoing, State Farm's motion for summary judgment dismissing American Empire's complaint and the Owners' cross-claim against it and American Empire's motion for summary judgment on its complaint are both granted in part.

The portion of State Farm's motion seeking to dismiss American Empire's complaint is granted inasmuch as the fifth and sixth causes of action seek a declaration that American Empire does not have a duty to defend the Owners and Skyline in the underlying action, and American Empire has such a duty.

The portion of American Empire's motion seeking a declaration that State Farm has a duty to defend the Owners and Skyline in the underlying action and to recover damages from State Farm for costs American Empire has incurred in defending the underlying action is granted to the extent that State Farm has a duty to defend in the underlying action and American Empire recover damages incurred, with the amount to be determined at trial.

The remainder of the motions are denied. To the extent that the motions seek a determination as to either American Empire or State Farm's duty to indemnify, those portions of the motions are denied without prejudice to renew upon a determination as to liability in the underlying action.

IV. CONCLUSION

Accordingly, it is hereby,

ORDERED that MOT SEQ 001 is granted to the extent that Beacon Broadway Company, LLC, and Beacway Operating, LLC are entitled to a declaration that the plaintiff American Empire Surplus Lines Insurance Company owes a primary and non-contributory duty to defend them in the underlying action Manguilibe Pitang v Beacon Broadway Company, LLC et al., Index No. 27350/2017, currently pending before the Supreme Court, Bronx County, and they are entitled to recover damages for costs incurred in their defense in the underlying action, with the amounts owed to be determined at a hearing or trial, and is otherwise denied; and it is further,

ORDERED that MOT SEQ 002 is granted to the extent that Beacon Broadway Company, LLC, and Beacway Operating, LLC are entitled to a declaration that the defendant State Farm Mutual

Automobile Insurance Company owes a primary duty to defend them in the underlying action Manguilibe Pitang v Beacon Broadway Company, LLC et al., Index No. 27350/2017, currently pending before the Supreme Court, Bronx County, and they are entitled to recover damages for costs incurred in their defense in the underlying action, with the amounts owed to be determined at a hearing or trial, and is otherwise denied; and it is further,

ORDERED that MOT SEQ 003 is granted to the extent that the fifth and sixth causes of action in American Empire Surplus Lines Insurance Company's complaint are dismissed to the extent that they seek a declaration that American Empire Surplus Lines Insurance Company does not have any duty to defend Beacon Broadway Company, LLC, and Beacway Operating, LLC, and the motion is otherwise denied, except to the extent that the portion of the motion seeking a declaration that American Empire Surplus Lines Insurance Company has a duty to indemnify Broadway Company, LLC, Beacway Operating, LLC, and Skyline Restoration, Inc. is denied without prejudice to renew upon a determination of liability in the underlying matter; and it is further,

ORDERED that MOT SEQ 004 is granted to the extent that American Empire Surplus Lines Insurance Company is entitled to a declaration that the defendant State Farm Mutual Automobile Insurance Company owes a primary duty to defend Broadway

Company, LLC, Beacway Operating, LLC, and Skyline Restoration, Inc. in the underlying action Manguilibe Pitang v Beacon Broadway Company, LLC et al., Index No. 27350/2017, currently pending before the Supreme Court, Bronx County, and American Empire Surplus Lines Insurance Company is entitled to recover damages for costs incurred in its defense in the underlying action, with the amounts owed to be determined at a hearing or trial, and the motion is otherwise denied, except to the extent that the portion of the motion seeking a declaration that American Empire Surplus Lines Insurance Company has a duty to indemnify Broadway Company, LLC, Beacway Operating, LLC, and Skyline Restoration, Inc. is denied without prejudice to renew upon a determination of liability in the underlying matter; and it is further,

ADJUDGED and DECLARED that American Empire Surplus Lines Insurance Company owes a primary and non-contributory duty to defend Beacon Broadway Company, LLC, Beacway Operating, LLC and Skyline Restoration, Inc. in the underlying action Manguilibe Pitang v Beacon Broadway Company, LLC et al., Index No. 27350/2017, currently pending before the Supreme Court, Bronx County; and it is further,

ADJUDGED and DECLARED that State Farm Mutual Automobile Insurance Company owes a primary duty to defend Beacon Broadway

Company, LLC, Beacway Operating, LLC and Skyline Restoration, Inc. in the underlying action Manguilibe Pitang v Beacon Broadway Company, LLC et al., Index No. 27350/2017, currently pending before the Supreme Court, Bronx County.

This constitutes the Decision and Order of the court.

Dated: 2/26/2021 ENTER:

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