SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. LAURENCE LOVE** **PART** **63M**

Justice

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ZURICH AMERICAN INSURANCE COMPANY

Plaintiff,

- v -

HISCOX INSURANCE COMPANY, INC.,

Defendant.

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INDEX NO. 657129/2020

MOTION DATE May 4, 2020

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34

were read on this motion to/for SUMMARY JUDGMENT (AFTER JOINDER).

Upon the foregoing documents, it is

The following read on plaintiff – Zurich American Insurance Company's ("Zurich") motion for an order per CPLR 3212 - summary judgment, and CPLR 3001 – declaratory judgment, that Rosen, Gluck and May, LP ("RGM"), Koeppel Rosen, LLC ("Koeppel"), and Rosen Group Properties, LLC ("Rosen Group") (collectively "Rosen Group") are I) *additional insured* under the general liability policy issued to Nouveau Elevator Industries, Inc. ("Nouveau Elevator") by defendant – Hiscox Insurance Company ("Hiscox"), in regards to the claims made in two (2) personal injury actions, i) *Lorena Duran v. Rosen, Gluck & May, Nouveau Elevator Industries Inc. and Koeppel Rosen LLC*, Index No. 516178/2017 (N.Y. Sup. Ct.) ("Duran Action"), and ii) *Frank Sepulveda v. Nouveau Elevator Industries, Inc., Koeppel Rosen, LLC, Rosen, Gluck & May, LP, and Rosen Group Properties, LLC,* Index No. 28342/2017E, filed in (Bronx Sup. Ct) and transferred to (Kings Sup. Ct.) Index No. 507629/2018 ("Sepulveda Action"). Collectively these two (2) actions are referred to as the ("Nouveau Actions"); II) Hiscox has a *duty to defend* the Rosen Entities on a primary and non-contributory basis in the

Sepulveda Action; III) Hiscox is obligated to reimburse Zurich for the defense costs in has incurred defending the Rosen Entities in the Nouveau Actions; and IV) pursuant to its additional insured coverage obligations, Hiscox is obligated to indemnify Zurich for the $30,000 payment that it made to settle the Duran Action on behalf of RGM and Koeppel.

CPLR § 3212 (b) states that, "the [summary] motion shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party."

"The proponent of a motion for summary judgment carries the initial burden of presenting sufficient evidence to demonstrate as a matter of law the absence of a material issue of fact." *Alvarez v. Prospect Hospital*, 68 NY2d 320 (1986).

Plaintiff's affirmation states, "[t]his declaratory judgment action arises out of an alleged freight elevator accident that occurred on April 5, 2017 in a building located at 1 East 33rd Street, New York, NY. As a result of Hiscox's failure to acknowledge its additional insured coverage obligations, [Zurich] defended the Rosen Entities in connection with the two (2) underlying actions stemming from the accident, the Duran Action and the Sepulveda Action. After the Nouveau Actions were consolidated, the Duran Action was settled in February 2020, while the Sepulveda Action remains pending in Kings County Supreme Court. Koeppel, as agent for the Rosen Entities, retained Nouveau pursuant to an Elevator Maintenance Agreement ("EMA") to maintain the freight elevator whose failure allegedly caused the accident at the building. The EMA required Nouveau to obtain commercial general liability insurance naming the Rosen Entities as additional insureds. Nouveau obtained a commercial general liability policy from defendant Hiscox that contains multiple additional insured provisions, including

endorsements which provide additional insured coverage to the Rosen Entities for the claims made in the Nouveau Actions" (see NYSCEF Doc. No. 17 Pars. 4 – 6).

Plaintiff submits a document called "Full Service Preventive Maintenance Agreement" and refers to this document as the EMA (see NYSCEF Doc. No. 21).

Plaintiff's affirmation continues, "[p]rior to the accident, Nouveau, as "Contractor," and Koeppel (acting as agent for RGM), as "Owner," entered into the Elevator Preventive Maintenance Agreement, effective August 1, 2016 (the "EMA"). Hiscox issued Commercial General Liability Policy No. MPL1691135.16 to Nouveau, providing coverage for the policy period January 31, 2016 to July 31, 2017, with limits of $1,000,000 per occurrence and $2,000,000 in the aggregate" (see NYSCEF Doc. No. 17 Pars. 16, 19). Plaintiff submits the Hiscox Insurance for General Liability document (see NYSCEF Doc. No. 22). "Nouveau also furnished a Certificate of Liability Insurance ("COI") which provides that the Rosen Entities are 'additional insured[s] with respect to Commercial Liability on a primary and non-contributory basis as required by written contract' under the Hiscox Policy identified therein" (see NYSCEF Doc. No. 17 Par. 20). Plaintiff submits the Certificate of Liability Insurance document (see NYSCEF Doc. No. 23).

"Once the proponent has met its burden, the opponent must now produce competent evidence in admissible form to establish the existence of a triable issue of fact." *Zuckerman v City of New York*, 49 NY2d 557 (1980).

Defendant submits the affidavit of John K. Jusu, Assistant Vice President of General Liability Claims at Hiscox Insurance Company, Inc., and "[has] direct knowledge of this matter as a supervisor of one of the claims handlers assigned to this litigation. The Rosen Entities did not at any time request that Hiscox defend them in the Duran or Sepulveda lawsuits and agree to

be defended by the law firm which Hiscox appointed to defend Nouveau. To the best of my knowledge, the Rosen Entities did not at any time agree in writing to cooperate in the defense of the Duran and Sepulveda lawsuits, or abide by Hiscox guidelines, or consent to dual representation with the law firm representing Nouveau. The Duran lawsuit was settled by Hiscox on behalf of Nouveau for $20,000. Hiscox and Zurich assumed the defense of their respective insured in the two lawsuits filed by Duran and Sepulveda. The Rosen Entities are additional insured under the Hiscox policy and are subject to the terms, conditions, retentions and limitations of the Hiscox policy. Nouveau and the Rosen Entities did not request that Hiscox conduct and control the defense of the Rosen Entities for the Duran and Sepulveda lawsuits. Nouveau and the Rosen Entities did not agree that Hiscox could assign the same counsel to defend both Nouveau and the Rosen Entities. The Rosen Entities did not agree in writing to follow the requirements of Section III.B of the General Terms and Conditions of the Hiscox policy. The Rosen Entities did not agree in writing to authorize Hiscox to conduct and control the defense of the Rosen Entities. Zurich and its coverage counsel sent tow letters to Hiscox attempting to tender the defense of the Rosen Entities. The Hiscox policy contains a $50,000 retention on the Declarations page which applies to settlement amounts. Hiscox and Zurich each agreed to fund a portion of a settlement of the Duran lawsuit on behalf of their respective insureds. The amount of Zurich's contribution on behalf of the Rosen Entities was $30,000. The amount of Hiscox's contribution on behalf of Nouveau was $20,000" (see NYSCEF Doc. No. 33). Defendant submits the policy of Insurance for General Liability (see NYSCEF Doc. No. 32).

A memorandum in opposition states, "[z]urich, in addition to seeking to avoid having to defend the Zurich Insureds under its duty to defend policy, is also seeking reimbursement of the

$30,000 settlement it agreed to pay to settle the Duran lawsuit. This $30,000 settlement payment is not covered under the Hiscox policy because Hiscox never consented to it as required by the policy and it is within the policy's $50,000 retention amount. Additionally, Zurich has not presented any facts which would justify either the reasonableness of the settlement amount nor any facts which demonstrate that the settlement was based on the negligence of Nouveau as required by the Hiscox policy. Moreover, Zurich fails to inform the Court that when it settled the Duran lawsuit on behalf of its insured, the Rosen Entities, Hiscox paid $20,000 in settlement on behalf of Nouveau, its insured" (see NYSCEF Doc. No. 29 p.8). The memorandum continues, "[t]he Hiscox policy also provides: '[w]e will pay up to the coverage part limit for damages' … The Declarations page lists the retention as $50,000. The $30,000 paid by Zurich is within the retention and therefore not covered by the Hiscox policy" (see NYSCEF Doc. No. 29 P. 9). "Hiscox paid $20,000 on behalf of Nouveau to settle Nouveau's alleged liability. Zurich offers no evidence whatsoever that Nouveau's alleged acts or omissions justified a settlement of any amount over the $20,000 paid by Hiscox" (see NYSCEF Doc. No. 29 P. 10).

The memorandum in opposition concludes, "[h]iscox is not obligated to reimburse Zurich for the defense fees in the Duran lawsuit as neither Nouveau nor the Rosen Entities complied with section II.B of the General Liability Coverage Part of the Hiscox policy. Therefore, under the unambiguous language of the Hiscox policy the duty to defend did not attach. For the same reasons, Hiscox is not obligated to defend the ongoing Sepulveda lawsuit. Further, Hiscox is not obligated to reimburse the $30,000 settlement of the Duran lawsuit because Hiscox did not consent to it, it is within the applicable retention amount, and because there are fact issues relating to the reasonableness of the settlement and whether or not there was any negligence on

the part of Nouveau justifying a settlement in excess of the $20,000 that Hiscox paid on behalf of Nouveau" (see NYSCEF Doc. No. 29 P. 11).

On summary judgment, "facts must be viewed in the light most favorable to the non-moving party." *Vega v Restani Constr Corp*, 18 NY3d 499, 503 (2012). "To grant summary judgment, it must clearly appear that no material and triable issue of fact is presented." *Glick & Dolleck Inc v Tri-Pac Export Corp*, 22 NY2d 439, 441 (1968). "Summary judgment should not be granted where there is any doubt as to the existence of a factual issue or where the existence of a factual issue is arguable." *Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 315 (2004).

There remain questions of fact that relate to the duty to defend and duty to indemnify. .

ORDERED that plaintiff's motion for summary judgment, CPLR 3212, and declaratory judgment, CPLR 3001 are DENIED.

11/9/2021
DATE

LAURENCE LOVE, 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