SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 02TR

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WESCO INSURANCE COMPANY,

Plaintiff,

- v -

333 W. 46TH STREET CORP., OLIVERO QUINTERO,

Defendant.

INDEX NO. 157785/2021

MOTION DATE N/A

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

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HON. LORI S. SATTLER:

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, 22, 23, 24, 25, 37, 38, 39, 40, 41, 42, 43, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56

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

In this declaratory judgment action, Plaintiff Wesco Insurance Company moves for summary judgment on its cause of action for a declaration that it has no duty to defend or indemnify defendant 333 W. 46th Street Corp. ("333 W. 46th Street") in a pending action, *Olivero Quintero v 333 W. 46th Street Corp.*, Index No. 159849/2018 ("Underlying Action"). 333 W. 46th Street and nonparties Federal Insurance Company ("Federal") and ACE American Insurance Company ("ACE") oppose the motion. Defendant Olivero Quintero has appeared in this action but has not filed any opposition papers.

In the Underlying Action, Olivero Quintero alleges that he fell from a ladder and was injured while disassembling a large commercial tent in a parking lot owned by 333 W. 46th Street on June 5, 2018. The tent was installed for an event that took place that day, Taste of Times Square, that was organized by another defendant in the Underlying Action, nonparty the Times Square Alliance. It is undisputed that the tent was forty feet wide by one hundred feet long,

required extensive assembly, and photographs show scores of people dancing underneath it. Quintero seeks recovery against 333 W. 46th Street and other parties under Sections 200, 240(1), and 241(6) of the Labor Law. Federal and ACE are the insurers for the Times Square Alliance.

Prior to this incident, Wesco issued a Commercial General Liability policy to 333 W. 46th Street, effective from June 7, 2017 to June 7, 2018 ("the Policy"). The Policy contains the following Construction Exclusion endorsement:

> This insurance does not apply to "bodily injury" or "property damage" or "personal and advertising injury" arising out of any of the following:
> (1) Change, alteration or modification of the size of any building or structure;
> (2) Movement of any building or structure;
> (3) Construction or erection of any new building or structure;
> (4) Demolition of any building or structure . . .

(NYSCEF Doc. No. 20 at 100).

Quintero commenced the Underlying Action on October 24, 2018. Wesco maintains that it first received notice of the incident and Quintero's claim on November 29, 2018. On December 28, 2018, Wesco's managing agent, AmTrust North America, Inc. ("AmTrust"), sent a letter to 333 W. 46th Street in which it stated that it disclaimed, *inter alia*, any claims in the Underlying Action involving "any injuries arising out of the movement, construction, erection or demolition of any building or structure" and referred to the Construction Exclusion when making this disclaimer (NYSCEF Doc. No. 22).

In the same letter, Wesco told 333 W. 46th Street that it had assigned counsel to defend the action without waiving its position that certain coverage was disclaimed. In February 2019, Federal agreed to defend 333 W. 46th Street as an additional insured and provided for substitution of counsel (NYSCEF Doc. No. 48). ACE agreed to defend 333 W. 46th Street as an additional insured in a September 2020 letter (NSYCEF Doc. No. 49). However, ACE also informed 333 W. 46th Street that it would "not make payment under the Excess Policy until the other valid and

collectible insurance which includes any and all AmTrust policies issued to [333 W. 46th Street] has been used up" (*id*. at 3).

Wesco commenced this action on August 19, 2021, seeking declaratory judgment that it has no duty to defend or indemnify 333 W. 46th Street in the Underlying Action. It maintains that all claims in the Underlying Action arise from work covered by the Construction Exclusion and therefore there is no coverage for Quintero's claims. It now moves for summary judgment, arguing that there is no dispute of material fact as to whether the tent that Quintero was disassembling was a "structure" within the meaning of the Construction Exclusion and that any injuries arising from work performed on the tent are therefore not covered by the Policy. Wesco argues, *inter alia*, that the Court should interpret the Construction Exclusion in this manner because a tent has been found to be a "structure" for the purposes of Labor Law § 240(1) (*Faldetta v State*, 7 Misc 3d 1018[A] [Ct Cl 2005]).

The opposing parties argue that Insurance Law § 3420(d)(2) bars Wesco from disclaiming coverage, as it purportedly did not provide written notice to 333 W. 46th Street as soon as reasonably possible. They maintain that the letter of December 28, 2018 amounted to a mere reservation of rights and not a disclaimer, and that Wesco only purported to disclaim coverage when it brought this action in 2021.

Even if the disclaimer was effective, they argue that the Construction Exclusion does not apply here as the tent on which Quintero was working was not a "structure" for the purposes of the Exclusion. They contend that the Court should not find the definition of "structure" under the Labor Law dispositive in interpreting the Construction Exclusion because the statute's liberal construction is incompatible with the strict and narrow construction of insurance policy exclusions. Federal and ACE further argue that the lack of discovery in this action has prevented the Court

from considering extrinsic evidence that could have bearing on the interpretation of the Construction Exclusion. Specifically, they argue that correspondence between Wesco and 333 W. 46th Street, Wesco's underwriting file, and 333 W. 46th Street's application for coverage may have bearing on the Construction Exclusion's purpose and scope.

On a motion for summary judgment, a movant must make a prima facie showing that they are entitled to judgment as a matter of law by tendering sufficient evidence to demonstrate the absence of any issue of material fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). After the movant makes this showing, "the burden shifts to the party opposing the motion . . . to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact" such that trial of the action is required" (*id.*). The opposing party may not defeat summary judgment with "mere speculation or conjecture" (*Cillo v Resjefal Corp.*, 16 AD3d 339 [1st Dept 2005]). The Court must view the facts "in the light most favorable to the non-moving party" (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]).

The Court first finds that Wesco timely provided its notice of disclaimer under Section 3420(d)(2) of the Insurance Law. The December 28, 2018 letter states that Wesco "*hereby disclaim[s] coverage* of any claims for . . . any injuries arising out of the movement, construction, erection or demolition of any building or structure" and that it would not indemnify 333 W. 46th Street with respect to such claims (NYSCEF Doc. No. 22 [emphasis added]). Contrary to the opposing parties' assertion that it was merely a reservation of rights, the letter expressly announces Wesco's intent to disclaim coverage for Quintero's claim and therefore constitutes "unequivocal, unambiguous written notice" (*Norfolk & Deadham Mut. Fire Ins. Co. v Petrizzi*, 121 AD2d 276, 277 [1st Dept 1986]; *see also QBE Ins. Cor; v Jinx-Proof Inc.*, 22 NY3d 1105, 1107-1108 [2014] [finding disclaimer of certain claims effective even though letters also contained reservation of

rights language]). Furthermore, Wesco timely communicated its disclaimer less than a month after receiving 333 W. 46th Street's claim and promptly investigating the claim (*cf. GPH Partners, LLC v American Home Assur. Co.*, 87 AD3d 843, 844 [1st Dept 2011]).

This is a case of first impression regarding whether a tent falls within the definition of "structure" within the meaning of a Construction Exclusion. It is well-established that "the unambiguous provisions of an insurance policy, as with any written contract, must be afforded their plain and ordinary meaning, and that the interpretation of such provisions is a question of law for the court" (*Broad St., LLC v Gulf Ins. Co.*, 37 AD3d 126, 130 [1st Dept 2006], citing *2619 Realty v Fidelity & Guar. Ins. Co.*, 303 AD2d 299, 300 [1st Dept 2003]). An insurer seeking to deny coverage based on a policy exclusion "must demonstrate 'that the exclusion is stated in clear and unmistakable language, is subject to no other reasonable interpretation, and applies in the particular case'" (*Lend Lease (US) Constr. LMB inc. v Zurich Am. Ins. Co.*, 136 AD3d 52, 59 [1st Dept 2015], quoting *J.P. Morgan Sec. Inc. v Vigilant Ins. Co.*, 126 AD3d 76, 83 [1st Dept 2015]). "Policy exclusions are given a strict and narrow construction, with any ambiguity resolved against the insurer" (*242-44 E. 77th St., LLC v Greater N.Y. Mut. Ins. Co.*, 31 AD3d 100, 105 [1st Dept 2006]).

Wesco's motion for summary judgment is granted. Here, the Court finds that the Construction Exclusion is unambiguous and that when looking to its plain and ordinary meaning, a tent may be classified as a structure. "Structure" has been defined as "something made up of a number of parts that are held or put together in a particular way" (American Heritage Dictionary 1718 [4th ed 2000]), "something that has been made or built from parts, especially a large building" (Cambridge Dictionary, structure [https://dictionary.cambridge.org/dictionary/english/structure]), or "something (such as a building) that is constructed" (Merriam-Webster, structure

[https://www.merriam-webster.com/dictionary/structure]). The tent is described in the Underlying Action as being built from numerous parts and there is ample testimony that deconstructing the tent involved the removal of variously interlinked support pipes and joint pieces that had previously been installed to support the tent canvas (*see* NYSCEF Doc. No. 41, Enriquez-Avila EBT excerpts; NYSCEF Doc. No. 42, Louie EBT excerpts).

The definition of "tent" further supports a finding that a tent may be considered as a structure. "Tent" has been defined as "a structure made of metal poles and cloth . . ." (Cambridge Learner's Dictionary, tent [https://dictionary.cambridge.org/dictionary/learner-english/tent]) and as a "temporary building" and "dwelling" (Merriam-Webster, tent [https://www.merriam-webster.com/dictionary/tent]). Furthermore, the disjunctive phrasing of the relevant language in the Construction Exclusion – "any building *or* structure" – indicates that it is intended to encompass work performed on a variety of assembled objects.

The Court also notes that, while not dispositive, the Labor Law definition of "structure" also supports the proposition that a tent can constitute a structure. The Court of Appeals has defined "structure" for the purposes of Section 240(1) of the Labor Law as "any production or piece of work artificially built up or composed of parts joined together in some definite manner" (*Joblon v Solow*, 91 AD2d 457, 464 [1998], quoting *Lewis-Moors v Contel of N.Y.*, 78 NY2d 942, 943 [1991] [internal quotation marks omitted]). This definition has been applied to a tent in the context of a Labor Law § 240(1) claim (*Faldetta*, 7 Misc 3d at 1018[A]). For the reasons set forth above, the Court finds that Wesco has met its prima facie burden of showing no dispute of material facts as to the applicability of the Construction Exclusion to the circumstances alleged in the Underlying Action.

The opposing parties fail to raise any triable issues of material fact. 333 W. 46th Street merely argues in conclusory fashion that Quintero was not working on any building or structure at the time of the accident. Federal and ACE's argument that the lack of discovery prevents the use of extrinsic evidence to interpret the Construction Exclusion and that additional information is needed with respect to the features and use of the tent is unavailing based on this Court's finding that it is unambiguous.

Accordingly, it is hereby:

ORDERED that the motion is granted; and it is further

ORDERED, ADJUDGED and DECLARED that Wesco Insurance Company has no duty to defend or indemnify 333 W. 46th Street Corp. in the action pending in Supreme Court, New York County, captioned *Olivero Quintero v 333 W. 46th Street Corp.*, bearing the Index Number 159849/2018.

4/11/2023
DATE

LORI S. SATTLER, 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**