SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. LOUIS L. NOCK** **PART** **38M**

Justice

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UNION MUTUAL FIRE INSURANCE COMPANY,

Plaintiff,

- v -

JOHN LYMBERIS, JULIE LYMBERIS, DEO GLOBAL CORP., and JUAN JURADO,

Defendant.

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INDEX NO. 654866/2021

MOTION DATE 07/13/2022

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document numbers (Motion 001) 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, and 44

were read on this motion for SUMMARY JUDGMENT.

Upon the foregoing documents, the plaintiff's motion for summary judgment is granted for the reasons set forth in the moving and reply papers (NYSCEF Doc. Nos. 11-12, 42), and the exhibits attached thereto, in which the court concurs, as summarized herein. In this insurance declaratory judgment action, plaintiff Union Mutual Fire Insurance Company ("Union Mutual") seeks a declaration that it has no duty to defend or indemnify defendants John and Julie Lymberis (collectively "Lymberis") against defendant Juan Jurado ("Jurado") in an underlying personal injury action captioned *Jurado v Lymberis and Lymberis*, Index No. 723981/2020, pending in Supreme Court, Queens County (the "underlying action"). In doing so, Union Mutual relies on two provisions in its policy: the Independent or Sub-Contractors Conditions Endorsement ("Contractors Endorsement") and the Designated Ongoing Operations Exclusion. The Contractors Endorsement provides that coverage for "bodily injury" or "property damage" arising out of "work performed by independent contractors or subcontractors, included in the "products-completed operations hazard," or sustained by any "owner, partner, or employee of

any independent contractor or subcontractor" (policy, NYSCEF Doc. No. 13 at 80, ¶¶ 2-4). In order to avoid application of this exclusion, the independent contractor or subcontractor in question must carry insurance covering conduct that would otherwise be excluded under paragraphs 2-4, in an amount at least equal to the amounts covered by Union Mutual's policy, and naming Lymberis as an additional insured (*id.*, ¶ 1). Similarly, the Designated Ongoing Operations Exclusion operates to bar coverage for "[a]ny construction, renovation or repair work being performed at any insured location, except when performed by independent contractors and/or subcontractors who have met the conditions of the [Contractors Endorsement]" (*id.* at 90).

"The unambiguous provisions of an insurance policy, as with any written contract, must be afforded their plain and ordinary meaning" (*Broad St., LLC v Gulf Ins. Co.*, 37 AD3d 126, 130-31 [1st Dept 2006]). The policy should be read as a whole, and no particular words or phrases should receive undue emphasis (*Bailey v Fish & Neave*, 8 NY3d 523, 528 [2007]). Courts should give effect to every clause and word of an insurance contract (*Northville Indus. Corp. v National Union Fire Ins. Co. of Pittsburgh, Pa.*, 89 NY2d 621, 633 [1997]). An interpretation is incorrect if "some provisions are rendered meaningless" (*County of Columbia v Continental Ins. Co.*, 83 NY2d 618, 628 [1996]). It is the insured's burden to show that the provisions of a policy provide coverage (*BP A.C. Corp. v One Beacon Ins. Group*, 33 AD3d 116, 134 [1st Dept 2006]). Moreover, where the policy language offers no reasonable basis for a difference of opinion, the court should not find it ambiguous (*Breed v Insurance Co. of N.A.*, 46 NY2d 351, 355 [1978]). Provisions in a contract are not ambiguous merely because the parties interpret them differently (*Mount Vernon Fire Ins. Co. v Creative Housing Ltd.*, 88 NY2d 347, 352 [1996]).

The duty to defend under an insurance policy is exceedingly broad and extends beyond the limits of the duty to indemnify, covering any situation where the allegations of the complaint "suggest a reasonable possibility of coverage" (*Automobile Ins. Co. of Hartford v Cook*, 7 NY3d 131, 137 [2006] [internal quotations and citation marks omitted]). "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" (*id.*). "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" (*id.* [internal quotations and citation marks omitted]). The duty remains "even though facts outside the four corners of the pleadings indicate that the claim may be meritless or not covered" (*id.* [internal quotations and citation marks omitted]).

"When an exclusion clause is relied upon to deny coverage, the burden rests upon the insurance company to demonstrate that the allegations of the complaint can be interpreted only to exclude coverage" (*Town of Massena v Healthcare Underwriters Mut. Ins. Co.*, 98 NY2d 435, 444 [2002]). More specifically,

> [t]o be relieved of its duty to defend on the basis of a policy exclusion, 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 Merchants Mut. Ins. Co.*, 91 NY2d 169, 175 [1997].)

Here, the parties do not dispute that the complaint in the underlying action alleges that on October 22, 2020, Jurado, an employee of independent contractor defendant DEO Global Corp. ("DEO"), suffered bodily injury while working on an ongoing construction project at Lymberis' premises (response to statement of material facts, NYSCEF Doc. No. 37, ¶¶ 12-14). The unambiguous provisions of the Union Mutual policy, specifically the Contractors Endorsement

and the Designated Ongoing Operations Exclusion, provide that coverage for such injuries is excluded unless DEO carried an insurance policy satisfying the conditions of paragraph 1 of the Contractors Endorsement. Contrary to Lymberis' argument, the policy language is not susceptible of multiple readings and, therefore, is not ambiguous (*Schulte Roth & Zabel LLP v Metropolitan 919 3rd Ave. LLC*, 202 AD3d 641, 641 [1st Dept 2022] ["A contract is ambiguous if on its face it is reasonably susceptible of more than one interpretation"] [internal citations and quotation marks omitted]).

Further, there is no meaningful dispute that DEO carried a policy of insurance from Utica First Insurance Company ("Utica First") when it began working on Lymberis' premises. However, Union Mutual submits a disclaimer of coverage from Utica First, in which Utica First states that the policy was canceled as of October 20, 2020, two days prior to Jurado's injury (Utica First disclaimer, NYSCEF Doc. No. 21 at 1).

In opposition, Lymberis fails to raise a material issue of fact requiring trial. While Lymberis correctly states that the Utica First policy is not in the record before the court, the terms of the policy are irrelevant where the policy was not in effect on the day of Jurado's injury. Moreover, Lymberis does not establish that facts "essential to justify opposition may exist but cannot [now] be stated" (CPLR 3212[f]; *Morales v Amar*, 145 AD3d 1000, 1003 [2d Dept 2016] [The "mere hope or speculation that evidence sufficient to defeat a motion for summary judgment may be uncovered during the discovery process is an insufficient basis for denying the motion"]).

Finally, Union Mutual established, by submission of an affidavit of service (NYSCEF Doc. No. 26), notice of additional mailing (NYSCEF Doc. No. 27), and the affirmation of its counsel Brian D. Barnas, Esq. (NYSCEF Doc. No. 11, ¶¶ 37-40) attesting to service of the

additional mailing and DEO's default, that DEO has defaulted in answering the complaint. In conjunction with the above discussion of the proof establishing Union Mutual's entitlement to summary judgment, Union Mutual is also entitled to a default judgment against DEO for the relief sought in the complaint.

Accordingly, it is hereby

ORDERED that the motion of plaintiff Union Mutual Fire Insurance Company for summary judgment on its complaint seeking a declaration that it is not obliged to provide a defense to, and provide coverage for, the defendants John and Julie Lymberis in the action of *Jurado v Lymberis and Lymberis*, Index No. 723981/2020, Queens County, is granted; and it is further

ADJUDGED and DECLARED that plaintiff herein is not obliged to provide a defense to, and provide coverage for, the defendants John and Julie Lymberis in the said action pending in Queens County.[1]

This constitutes the decision and order of the court.

Louis L. Nock

4/28/2023
DATE

LOUIS L. NOCK, J.S.C.

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

[1] The court declines to make a declaration with respect to plaintiff's present defense of Lymberis in the underlying action, as any relief sought in the form of withdrawal from the defense must be sought before the presiding judge therein.