SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. GERALD LEBOVITS PART IAS MOTION 7EFM
Justice

----------X INDEX NO. 150402/2017

CHELSEA PIERS L.P., CHELSEA PIERS MANAGEMENT INC., MOTION SEQ. NO. 001 & 002

Plaintiffs,

- v -

COLONY INSURANCE COMPANY, ENDURANCE AMERICAN SPECIALTY INSURANCE COMPANY, & EPS IRON WORKS, INC.

DECISION AND ORDER

Defendants.

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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, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 56, 57, 58, 59

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

The following e-filed documents, listed by NYSCEF document number (Motion 002) 27, 28, 29, 55, 61

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

LEBOVITS, J.:

Motion sequences 01 and 02 are consolidated for disposition.

Plaintiffs Chelsea Piers L.P. and Chelsea Piers Management Inc. (collectively, Chelsea) bring this action seeking additional insured coverage under insurance policies defendants Colony Insurance Company (Colony) and Endurance American Specialty Insurance Company (Endurance) issued to defendant EPS Iron Works, Inc. (EPS). The complaint asserts three claims: declaratory judgement declaring that Colony and Endurance each have a duty to defend and/or to indemnify Chelsea, as well as to reimburse Chelsea for past defense costs, in connection with an underlying personal injury action (Underlying Action), as an additional insured under the respective insurance policies (first cause of action); and breach of contract against Colony and Endurance for their refusal to defend and indemnify Chelsea in the Underlying Action (second and third causes of action, respectively). The complaint does not assert any causes of action against EPS, which "is joined in this action as a nominal party so that complete relief can be afforded with respect to all parties that may have an interest herein." (Complaint, ¶ 7.)

Colony filed its answer on February 16, 2017. Endurance filed its answer on May 5, 2017. EPS has not appeared in this action.

Colony and Endurance now move (in motion sequence numbers 001 and 002, respectively) for summary judgment declaring that they do not have a duty to defend or indemnify Chelsea in the Underlying Action. Chelsea cross-moves for summary judgment against Colony and Endurance and for default judgment against EPS.

I. Background

Colony issued a commercial general liability policy, policy number 103 GL 0002936-03, to EPS for the policy period March 18, 2014 to March 18, 2015 (Colony Policy). The Colony Policy contains an additional ensured endorsement (Additional Insured Endorsement), which provides, in pertinent part, as follows:

> "A. **SECTION II - WHO IS AN INSURED** is amended to include as an additional insured any person or organization for whom you are performing operations when you and such person or organization have agreed in writing in a contract or agreement that such person or organization is an additional insured on your policy. Such person or organization is an additional insured only with respect to liability for 'bodily injury,' 'property damage' or 'personal and advertising injury' caused, in whole or in part, by:
>
> "1. Your acts or omissions, or
>
> "2. The acts of omissions of those acting on your behalf;
>
> "in the performance of your ongoing operations for the additional insured."

(Stephens affirmation, exhibit I at C34.)

Endurance issued an umbrella liability policy, policy number ELD10004685400, to EPS for the policy period March 18, 2014, to March 18, 2015 (Endurance Policy). The Endurance Policy follows form to the primary Colony Policy and is, therefore, subject to the same agreements, exclusions, definitions and conditions as the Colony Policy, unless the Endurance Policy's terms provide otherwise. In one notable departure from the Colony Policy, the Endurance policy provides as follows:

> "**III. DEFENSE**
>
> "A. We will not be required to pay for or assume charge of the investigation of any claim or defense of any suit against you.

> "B. We will have the right, but not the duty to be associated with you or your underlying insurer or both in the investigation of any claim or defense of any suit which in our opinion may create liability to our policy for 'loss.' If we exercise such right, we will do so at our own expense, but will have no such expense obligation or liability once the Limits of Insurance are exhausted."

(Vollweiler affirmation, exhibit A at END 0074.)

On June 9, 2014, EPS sent Chelsea a proposal to furnish and install structural steel at the premises known as Chelsea Piers, Pier 59 Event Center, New York, New York (Premises). Attached to the proposal was a certificate of insurance, dated March 13, 2014. The certificate of insurance lists EPS's policies, but the "Description of Operations" and the "Certificate Holder" blocks are blacked out. (Stephens affirmation, exhibit L.)

On June 13, 2014, EPS entered into a purchase order with Chelsea (Purchase Order), which is executed by Chelsea only. The Purchase Order provides, in pertinent part as follows:

> "Vendor, Contractors and/or Supplier shall Indemnify Chelsea Piers Management against all claims arising from the work covered by this Purchase Order. . . .
>
> "Lessee's, contractors, vendors, etc. general liability insurance shall apply on a primary and non-contributory basis with respect to all protection provided to Chelsea Piers thereunder. In addition, the general liability insurance shall provide that no act or omission of lessee, contractor or vendor will in any way effect or reduce the insurance coverage available to Chelsea Piers thereunder. Such policy shall also contain a waiver of subrogation with respect to any coverage afforded to Chelsea under that policy. Policy shall also provide that the policy shall not be cancelled, non-renewed or any material change made in any policy term or condition without at least 30 Days advance written notice being provided to Chelsea Piers thereunder."

(Id., exhibit B.)

EPS subcontracted work to Sterling Iron Works LLC (Sterling). The Underlying Action arises out of a July 16, 2014, accident, involving Otis McRae (McRae), a Sterling employee who was working at the Premises. More than three months after the accident, EPS provided Chelsea with a certificate of insurance, dated October 28, 2014, listing Chelsea as an additional insured. (*See id.*, exhibit J.)

On June 30, 2015, McRae commenced the Underlying Action, entitled *McRae v EPS Iron Works, Inc., Chelsea Piers, L.P. Chelsea Piers Mgt. Inc. and John Doe Corp.* (index No.

156554/2015), in Supreme Court, New York County. The complaint in the Underlying Action alleges, among other things, that the defendants were "negligent in the ownership, operation, maintenance, management, supervision and control of the [Premises] and the construction work being performed thereat . . . ." (*Id.*, exhibit D, ¶ 16.) On August 4, 2015, EPS filed a third-party action against Sterling. (*See id.*, exhibit C.)

By letter dated November 20, 2015, enclosing a previously misdirected letter dated August 26, 2015, Chelsea tendered its defense and indemnification to Colony and Endurance. (*See id.*, exhibit F.) By email dated September 11, 2015, Endurance responded that it follows form of the primary insurance policy and its coverage is, therefore, dependent on Colony's determination. (*See* Fishman affirmation, exhibit H.) By letter dated January 7, 2016, Colony declined coverage on the grounds that the Purchase Order fails to expressly state that EPS must procure additional insured coverage and is signed by Chelsea only. (*See id.*)

On January 18, 2017, Phillip Strocchia, EPS's principal, was deposed in the Underlying Action. When asked, based on his understanding of the Purchase Order, whether EPS was required to add Chelsea as an additional insured on its policies, Strocchia responded: "Well, according to the insurance certificate, it states, in that box, additional insured, so yes." (*Id.*, exhibit B at 58:23-59:10.)

On September 28, 2017, Chelsea deposed Strocchia in the instant action. During the deposition, Strocchia testified that it was his understanding that he did not need to name Chelsea as an additional insured, because the work described in the Purchase Order only took a few days and additional insured coverage is not typically required for such small jobs. (*See* Stephens affirmation, exhibit J at 45:17-46:3; 47:6-24; 56:8-11.) He also testified that he believed that EPS provided the October 28, 2014, certificate of insurance to Chelsea in connection with a different job, unrelated to the Purchase Order. (*See id.* at 59:3-12.) But he did not have any records or specific recollections about what this different job entailed. (*See id.* at 59:13-18.)

II. Analysis

A. Summary Judgment

Colony contends that it is entitled to summary judgment because, contrary to the requirement of its Additional Insured Endorsement, the Purchase Order fails to expressly state that EPS is required to procure additional insured coverage for Chelsea. At best, Colony argues, the language is ambiguous, and the ambiguity must be resolved against Chelsea, as the drafter of the Purchase Order. In addition, Colony argues that the Purchase Order does not give rise to additional insured coverage because it is not executed by both parties. Colony also contends that the October 28, 2014 certificate of insurance, issued more than three months after the accident, and Strocchia's deposition demonstrate that Chelsea did not require EPS to procure additional insured coverage before the accident.

Endurance incorporates Colony's arguments, adding only that under the express terms of the Endurance Policy, it has no duty to defend or to reimburse for past defense costs.

Chelsea counters that the Purchase Order need not be countersigned to be effective and argues that it is entitled to summary judgment because: (1) the Purchase Order requires additional insured coverage for Chelsea; and (2) the accident occurred while EPS's subcontractor was performing work pursuant to the Purchase Order. Chelsea points to Strocchia's deposition in the Underlying Action as evidence that EPS understood that it was required to procure additional insured coverage under the Purchase Order.

Pursuant to CPLR 3212 (b), "[t]o obtain summary judgment, the movant 'must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact.'" (*Madeline D'Anthony Enters., Inc. v Sokolowsky*, 101 AD3d 606, 607 [1st Dept 2012], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986].) Once the movant satisfies its burden, the opposing party must "'produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action.'" (*Id.*, quoting *Alvarez*, 68 NY2d at 324.)

"[T]he unambiguous provisions of an insurance policy, as with any written contract, must be afforded their plain and ordinary meaning, and . . . 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].)

> "A contract of insurance is ambiguous if the language therein is susceptible of two or more reasonable interpretations, whereas, in contrast, a contract is unambiguous if the language has a definite and precise meaning, unattended by danger of misconception in the purport of the [agreement] itself, and concerning which there is no reasonable basis for a difference of opinion."

(*Gilbane Bldg. Co./TDX Constr. Corp. v St. Paul Fire & Mar. Ins. Co.*, 143 AD3d 146, 151 [1st Dept 2016], *affd* 31 NY3d 131 [2018] [internal quotation marks and citation omitted].) "A reviewing court must decide whether, afford[ing] a fair meaning to all of the language employed by the parties in the contract and leav[ing] no provision without force and effect, there is a reasonable basis for a difference of opinion as to the meaning of the policy." (*Fed. Ins. Co. v Intl. Bus. Machs. Corp.*, 18 NY3d 642, 646 [2012] [internal quotation marks and citations omitted].)

Here, the Purchase Order satisfies the Additional Insured Endorsement's requirement of a written agreement requiring EPS to name Chelsea as an additional insured on its policies.

First, that the Purchase Order is not signed by both parties is of no consequence, where, as here, "defendant's policy merely requires a 'written' contract, not a 'signed' one." (*Zurich Am. Ins. Co. v Endurance Am. Speciality Ins. Co.*, 145 AD3d 502, 503 [1st Dept 2016].) Colony's reliance on *National Abatement Corp. v National Union Fire Ins. Co. of Pittsburgh, Pa.* (33 AD3d 570 [1st Dept 2006]) for the contrary proposition is misplaced, as "the issue in *National Abatement* was whether a written contract existed at the time of the accident, not whether the written contract also had to be signed." (*Zurich Am. Ins. Co.*, 145 AD3d at 504 [internal citation omitted].)

Second, the Purchase Order's language does not lend itself to more than one interpretation, but unambiguously provides that Chelsea shall have coverage under the contractor's general liability insurance. Colony argues that, while this appears to be the presumption, because the Purchase Order fails to "expressly and specifically" state so, no additional insured coverage is available. (*Trapani v 10 Arial Way Assoc.*, 301 AD2d 644, 647 [2d Dept 2003] [stating that "[a] provision in a construction contract cannot be interpreted as requiring the procurement of additional insured coverage unless such a requirement is expressly and specifically stated"].) It also argues that "contract language that merely requires the purchase of insurance will not be read as also requiring that a contracting party be named as an additional insured." (*Id.* [denying additional insured coverage where contract merely required contractor to provide a certificate of insurance demonstrating that contractor had certain types of coverage]; *accord Mangano v Am.n Stock Exch.*, 234 AD2d 198, 198-199 [1st Dept 1996] [finding no contractual obligation to procure insurance coverage for fourth-party plaintiff, where contract required fourth-party defendant to obtain insurance without requiring it to name fourth-party plaintiff as an insured].)

But, here, the Purchase Order makes express reference to Chelsea and states that Chelsea is to be covered under the contractor's general liability policy. To interpret it as merely requiring EPS to procure coverage for itself, would render meaningless large portions of the Purchase Agreement, namely:

> "Lessee's, *contractors*, vendors, etc. *general liability insurance shall apply* on a primary and non-contributory basis with respect to all protection provided *to Chelsea Piers* thereunder. In addition, *the general liability insurance shall provide* that no act or omission of lessee, contractor or vendor will in any way effect or reduce the insurance *coverage available to Chelsea Piers thereunder*."

(Stephens affirmation, exhibit B [emphasis added].) While Colony insists that the language is, at best, ambiguous, Colony fails to provide an alternate interpretation. Therefore, defendants fail to demonstrate the absence of the requisite written contract. (*See Christ the King Regional High Sch. v Zurich Ins. Co. of N. Am.*, 91 AD3d 806, 808 [2d Dept 2012] [finding that the insurance policy's written agreement requirement for additional insured coverage was satisfied, where the named insured was contractually required to "to provide a '[c]ertificate of [i]nsurance *freeing [the plaintiff] of all liability*,'" because "the relevant contractual provision . . . refer[red] directly to the [plaintiff], [and could not] be interpreted as requiring only that [the named insured] obtain liability insurance for itself, as that would render the phrase 'freeing [the plaintiff] of all liability' meaningless".)

To the extent that Colony points to extrinsic evidence, including the October 28, 2014, certificate of insurance and Strocchia's deposition, to demonstrate that the Purchase Order did not require EPS to procure additional insured coverage for Chelsea, "[w]here, as here, the policy's terms are clear and unambiguous, the court should enforce its plain meaning and may not consider extrinsic evidence of the parties' understanding or intent." (*Katz v Am. Mayflower Life Ins. Co. of N.Y.*, 14 AD3d 195, 200 [1st Dept 2004], *affd sub nom Goldman v Metropolitan Life Ins. Co.*, 5 NY3d 561 [2005] [internal citation omitted].)

Chelsea fails to demonstrate its entitlement to summary judgment with respect to indemnity. Here, the Additional Insured Endorsement provides coverage for injury "caused, in whole or in part, by" either EPS's "acts or omissions" or "[t]he acts of omissions of those acting on [EPS's] behalf." (Stephens affirmation, exhibit I at C34.) Interpreting an identical provision, the Court of Appeals held that "'caused, in whole or in part,' as used in the endorsement, requires the insured to be the proximate cause of the injury giving rise to liability, not merely the 'but for' cause." (*Burlington Ins. Co. v NYC Tr. Auth.*, 29 NY3d 313, 324 [2017].) "Accordingly, when a policy limits coverage to an injury 'caused, in whole or part' by the 'acts or omissions' of the named insured, coverage is extended to an additional insured only when the damages are the result of the named insured's negligence or some other act or omission." (*Hanover Ins. Co. v Philadelphia Indem. Ins. Co.*, 159 AD3d 587, 588 [1st Dept 2018], citing *Burlington Ins. Co.*, 29 NY3d at 323.) Here, it has not been determined that EPS or its subcontractor, Sterling, was the proximate cause of McRae's injury. In the absence of such a determination, it is premature to decide whether Colony and Endurance have a duty to indemnify Chelsea as an additional insured. (*See Vargas v City of New York*, 158 AD3d 523, 525 [1st Dept 2018] [finding that "it was premature to declare that [insurer] [was] obliged to *indemnify* the [additional insureds]," where "[i]t ha[d] not yet been determined if [the named insured] was the proximate cause of plaintiff's injury," as required by the policy's endorsements].)

Nonetheless, Colony has a duty to defend Chelsea in the Underlying Action.

> "[I]t is well settled that an insurer's duty to defend [its insured] is exceedingly broad and an insurer will be called upon to provide a defense whenever the allegations of the complaint suggest . . . a reasonable possibility of coverage. . . . If [a] complaint contains any facts or allegations which bring the claim even potentially within the protection purchased, the insurer is obligated to defend. . . . [A]n 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."

(*BP A.C. Corp. v One Beacon Ins. Group*, 8 NY3d 708, 714 [2007] [internal quotation marks and citations omitted].) Here, the complaint in the Underlying Action alleges that the defendants, including EPS, were "negligent in the ownership, operation, maintenance, management, supervision and control of the [Premises] and the construction work being performed thereat . . . ." (Stephens affirmation, exhibit D, ¶ 16.) This allegation triggers the duty to defend. (*See Vargas*, 158 AD3d at 524-525, quoting *BP A.C. Corp.*, 8 NY3d at 714 [finding that the additional insured endorsements that limited coverage to injuries caused by the named insured, "[did] not vitiate [insurer's] duty to defend, where the second amended complaint "allege[d] that *all* defendants—which include[d] [the named insured]—operated, maintained, managed, and controlled the job site. . . . [and] were negligent and failed to provide a safe job site"].) Therefore, Colony has a duty to defend Chelsea in the Underlying Action.

But the same does not hold true for Endurance, whose policy expressly excludes the duty to defend. (*See* Vollweiler affirmation, exhibit A at END 0074; *accord Bovis Lend Lease LMB,*

Inc. v Great Am. Ins. Co., 53 AD3d 140, 145 [1st Dept 2008] [stating that "the extent of coverage . . . is controlled by the relevant policy terms . . ."].)

Colony's motion for summary judgment is denied in its entirety. Endurance's motion for summary judgment is granted to the extent it seeks a declaration that it has no duty to defend in the Underlying Action, and the motion is otherwise denied. Chelsea's cross-motion for summary judgment is granted to the extent it seeks a declaration that Colony is obligated to defend Chelsea in the Underlying Action and to reimburse it for past defense costs, and the cross-motion for summary judgment is otherwise denied.

B. Default Judgment

Chelsea contends that it is entitled to a default judgment against EPS, because it has failed to appear in this action. Colony responds that default judgment against EPS is unavailable, because the complaint does not assert any claims or seek any relief against EPS.

"CPLR 3215 does not contemplate that default judgments are to be rubber-stamped once jurisdiction and a failure to appear have been shown. Some proof of liability is also required to satisfy the court as to the prima facie validity of the uncontested cause of action." (*Joosten v Gale*, 129 AD2d 531, 535 [1st Dept 1987]; *accord Resnick v Lebovitz*, 28 AD3d 533, 534 [2d Dept 2006] [finding that a default "did not give rise to a 'mandatory ministerial duty' to enter a default judgment" and that the movants "were required to demonstrate that they at least had a viable cause of action"].)

Here, the complaint is devoid of any allegations or claims against EPS. Therefore, Chelsea's motion for a default judgment against EPS is denied.

Accordingly, it is hereby

ORDERED that the motion of defendant Colony Insurance Company for summary judgment (motion sequence number 001) is denied; and it is further

ORDERED that the motion of defendant Endurance American Specialty Insurance Company (motion sequence number 002) is granted to the extent that it seeks a declaration that it is not obligated to provide plaintiffs Chelsea Piers L.P. and Chelsea Piers Management Inc. a defense in the action of *McRae v EPS Iron Works, Inc., Chelsea Piers, L.P. Chelsea Piers Mgt. Inc. and John Doe Corp.*, index No. 156554/2015, New York County, with costs and disbursements to defendant, upon submission of an appropriate bill of costs, as taxed by the Clerk, and the motion is otherwise denied; and it is further

ADJUDGED and DECLARED that defendant Endurance American Specialty Insurance is not obliged to provide a defense to plaintiffs Chelsea Piers L.P. and Chelsea Piers Management Inc. in the action of *McRae v EPS Iron Works, Inc., Chelsea Piers, L.P. Chelsea Piers Mgt. Inc. and John Doe Corp.*, index No. 156554/2015, New York County,; and it is further

ORDERED that the cross-motion of plaintiffs Chelsea Piers L.P. and Chelsea Piers Management Inc. is granted to the extent of granting summary judgement on their first and second causes of action, to the extent that they seek a declaration that defendant Colony Insurance Company is obliged to provide a defense to the plaintiffs in the action of *McRae v EPS Iron Works, Inc., Chelsea Piers, L.P. Chelsea Piers Mgt. Inc. and John Doe Corp.*, index No. 156554/2015, New York County, with costs and disbursements to plaintiffs, upon submission of an appropriate bill of costs, as taxed by the Clerk, and the motion is otherwise denied; and it is further

ADJUDGED and DECLARED that that defendant Colony Insurance Company is obliged to provide a defense to plaintiffs Chelsea Piers L.P. and Chelsea Piers Management Inc. in the action of *McRae v EPS Iron Works, Inc., Chelsea Piers, L.P. Chelsea Piers Mgt. Inc. and John Doe Corp.*, index No. 156554/2015, New York County; and it is further

ORDERED that defendant Endurance American Specialty Insurance Company and plaintiffs Chelsea Piers L.P. and Chelsea Piers Management Inc. serve a copy of this decision and order on the County Clerk's office, which is directed to enter judgment accordingly; and it is further

ORDERED that counsel are directed to appear for a compliance conference in Part 7, room 345, at 60 Centre Street, on February 20, 2019, at 10:00 a.m.

11/27/2018
DATE

GERALD LEBOVITS, J.S.C.

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