SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

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J.T. MAGEN & COMPANY, INC., Index No.: 150761/2015

Plaintiff, **DECISION & ORDER**

-against-

ATLANTIC CASUALTY INSURANCE COMPANY, et al.,

Defendants.

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JENNIFER G. SCHECTER, J.:

Defendant Arch Specialty Insurance Company (Arch) moves, pursuant to CPLR 3212, for summary judgment against plaintiff J.T. Magen & Company. Plaintiff opposes. For the reasons that follow, Arch's motion is granted in part.

Background

Unless otherwise indicated, the following facts are undisputed.

In this action, plaintiff seeks to compel various insurance companies to provide a defense and indemnity in an underlying action, *110 Central Park S. Corp. v 112 Central Park S., LLC*, Index No. 652098/2010 (Sup Ct, NY County) (the Underlying Action). The Underlying Action concerns plaintiff's role as general contractor on a construction project at 112 Central Park South, a residential building (the Building).

This motion only concerns one of the defendant carriers, Arch. Arch issued primary and excess commercial general liability policies to one of plaintiff's subcontractors, Piermount Iron Works, Inc. (Piermount), with a policy period of April 11, 2005 to April 11, 2006. *See* Dkt. 261 (the Primary Policy); Dkt. 262 (the Excess Policy) (collectively, the Arch Policies).[1] The

[1] References to "Dkt." followed by a number refer to documents filed in this action on the New York State Courts Electronic Filing system (NYSCEF).

Primary Policy contains an endorsement providing that to qualify as an additional insured, there must be "a ***written contract*** with the Named Insured." *See* Dkt. 261 at 43 (the Written Contract Requirement) (emphasis added). The Excess Policy provides that additional insureds under the Primary Policy "automatically" become insured under the Excess Policy. *See* Dkt. 262 at 13.

Plaintiff seeks coverage as an additional insured based on a "Purchase Order" dated February 1, 2005 that plaintiff issued to Piermount, which sets forth the scope of Piermount's work and which plaintiff maintains constitutes the "written contract with the Named Insured." *See* Dkt. 249. At the bottom of the Purchase Order, there are signature lines. *See id.* However, there are no signatures on those lines. *See id.* On the "reverse side" of the Purchase Order are its "Terms and Conditions," which include a requirement that Piermount name plaintiff as an additional insured on its general liability policies. *See* Dkt. 250. Piermount obtained certificates of insurance setting forth that plaintiff was an additional insured on its commercial general liability policies. Dkt 251.

Arch refused to provide coverage to plaintiff because the Purchase Order is not signed.

Arch also refused to provide coverage based on exclusions in the Arch Policies. It denied coverage based on the Primary Policy's "Residential and Residential Conversion Exclusion" (Primary Policy Exclusion), which provides:

> This insurance does not apply to and we will have no duty to investigate or defend or provide coverage ***for any suit*** brought against ***you***, or pay any costs or expenses of such investigation and defense for liability, claims, damage or loss ***arising out of***:
>
> 1. the development or construction, in whole or in part, or existence of a ***non-commercial*** dwelling or residence; or
>
> 2. the development or construction of any building, in whole or in part, which has been converted, in whole or part, to a ***non-commercial*** dwelling or residence at any time after the inception date of this insurance policy.

> For purposes of this endorsement, non-commercial dwellings or residences shall include, but are not limited to, homes, cooperatives, town homes, lofts and condominiums.
>
> However, this exclusion does not apply to the construction, management or ownership of apartment buildings, hotels or motels by you.
>
> All other terms and conditions of this Policy remain unchanged.

Dkt. 261 at 51 (emphasis added).[2] The Excess Policy contains a virtually identical exclusion (Excess Policy Exclusion) and exception to the exclusion, but with one critical difference: its scope is ***not*** limited to matters brought against "you". *See* Dkt. 262 at 44. Rather, it provides that the Excess Policy does not apply to, and Arch has "no obligation to pay for, investigate, settle, or defend, ***any*** claim or 'suit'" for construction of non-commercial dwellings, defined identically as in the Primary Policy Exclusion. *See id.* (emphasis added).

Plaintiff commenced this action in January 2015. Dkt. 1. Its 31st and 32nd causes of action are asserted against Arch and allege breach of contract and entitlement to a declaratory judgment. *See id.* at 57-58. Arch answered in October 2015. *See* Dkt. 117. On September 28, 2017, Arch made this motion for summary judgment.

Analysis

Summary judgment may be granted only when it is clear that no triable issue of fact exists. *Alvarez v Prospect Hosp.*, 68 NY2d 320, 325 (1986). The burden is on the moving party to make a prima facie showing of entitlement to summary judgment as a matter of law. *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). Failure to make a prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers.

[2] It is undisputed that the Building is a residential building.

Ayotte v Gervasio, 81 NY2d 1062, 1063 (1993). If a prima facie showing has been made, the burden shifts to the opposing party to produce evidence sufficient to establish the existence of material issues of fact. *Alvarez*, 68 NY2d at 324; *Zuckerman*, 49 NY2d at 562. The papers submitted in support of and in opposition to a summary judgment motion are examined in the light most favorable to the party opposing the motion. *Martin v Briggs*, 235 AD2d 192, 196 (1st Dept 1997). The motion must be denied if there is any doubt as to the existence of a triable issue of fact. *Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 (1978). Mere conclusions, unsubstantiated allegations or expressions of hope, however, are insufficient to defeat a summary judgment motion. *Zuckerman*, 49 NY2d at 562.

The Written Contract Requirement

Where, as here, an insurance policy provides that a condition precedent to becoming an additional insured is a written agreement between the named insured and the additional insured, the existence of an ***unsigned*** purchase order can satisfy this condition. *Zurich Am. Ins. Co. v Endurance Am. Speciality Ins. Co.*, 145 AD3d 502, 503 (1st Dept 2016) (defendant's policy required "a 'written' contract not a 'signed' one"). There is no contrary controlling authority. Arch's reliance on *Cusumano v Extell Rock, LLC*, 86 AD3d 448 (1st Dept 2011), is misplaced as that case involved a policy that expressly required an "executed" agreement. *Id.* at 449; *see Zurich*, 145 AD3d at 503-04 ("As the motion court in *Cusumano* found, the insurer analogous to defendant in the case at bar expressly included the word '***executed***' in[ ] its Policy, thereby requiring that any agreement . . . be memorialized in a ***signed*** contract") (emphasis added). The Arch Policies have no such requirement; they merely require a written agreement, not an executed agreement. Likewise, while the policy in *Nat'l Abatement Corp. v Nat'l Union Fire*

Ins. Co. of Pittsburgh, PA, 33 AD3d 570, 571 (1st Dept 2006), "like the subject policy, merely required a 'written contract' ... the issue in *National Abatement* was whether ***a written contract existed at the time of the accident***." *Zurich*, 145 AD3d at 504 (emphasis added). Here, the Purchase Order is dated February 1, 2005 and predates the Arch Policies by more than two months.

That said, the Purchase Order provides spaces for signatures. Though the Arch Policies do not require signatures, Arch suggests that the absence of any signatures establishes that plaintiff and Piermount never formed a binding contract. Arch is wrong. As plaintiff explains, an unsigned purchase order can evidence a binding agreement if there is evidence that the parties intended to be bound by the unsigned writing. *See LMIII Realty, LLC v Gemini Ins. Co.*, 90 AD3d 1520, 1521 (4th Dept 2011) ("The purchase order was an enforceable agreement despite the fact that it was unsigned because the evidence in the record establishes that the parties intended to be bound by it."); *see also Netherlands Ins. Co. v Endurance Am. Specialty Ins. Co.*, 157 AD3d 468, 468-69 (1st Dept 2018) (holding that "Bid Proposal Document" evidencing agreement in which contractor was obligated to name owner as additional insured satisfied policy's "written contract" requirement). Plaintiff submitted evidence from which a reasonable finder of fact could conclude that the Purchase Order reflects the terms of a binding agreement with Piermount. *See* Dkt. 240 at 11 ("Piermount provided certificates of insurance indicating that [plaintiff] was an additional insured on the Arch [Polcies]": "Piermount performed the work on the Project and was paid for the same"); Dkt 251. Arch, by contrast, proffers no dispositive evidence to the contrary. Plaintiff, therefore, at the very least has raised a question of fact regarding whether it had the "written contract" required by the Arch Policies.

The Excess Policy Exclusion

Arch correctly contends that, regardless of whether plaintiff is an additional insured under the Arch Policies, the Excess Policy Exclusion applies and precludes coverage under the Excess Policy.

Principles of contract interpretation apply to an insurance agreement and unambiguous provisions must be given their plain and ordinary meaning. *Universal Am. Corp. v Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 25 NY3d 675, 680 (2015); *see Oppenheimer AMT-Free Municipals v ACA Fin. Guar. Corp.*, 110 AD3d 280, 284 (1st Dept 2013) ("policies of insurance [] should be analyzed in accordance with general principles of contract interpretation and insurance law"). "Ambiguity in a contract arises when the contract, read as a whole, fails to disclose its purpose and the parties' intent or where its terms are subject to more than one reasonable interpretation." *Universal*, 25 NY3d at 680. "[T]he test to determine whether an insurance contract is ambiguous focuses on the reasonable expectations of the average insured upon reading the policy and employing common speech." *Id.*, quoting *Mostow v State Farm Ins. Cos.*, 88 NY2d 321, 326-27 (1996), and citing *Cragg v Allstate Indem. Corp.*, 17 NY3d 118, 122 (2011).

"Exclusions from policy obligations must be in clear and unmistakable language and if the terms of a policy are ambiguous, any ambiguity must be construed in favor of the insured and against the insurer." *Oppenheimer* 110 AD3d at 284, citing *Pioneer Tower Owners Ass'n v State Farm Fire & Cas. Co.*, 12 NY3d 302, 307 (2009); *White*, 9 NY3d at 267. However, unambiguous exclusions "will be given their plain and ordinary meaning." *Country-Wide Ins.*

Co. v Excelsior Ins. Co., 147 AD3d 407, 408 (1st Dept 2017). And, "although the insurer has the burden of proving the applicability of an exclusion, it is the insured's burden to establish the existence of coverage." *Platek v Town of Hamburg*, 24 NY3d 688, 694 (2015). "Thus, '[where] the existence of coverage depends entirely on the applicability of [an] exception to the exclusion, the insured has the duty of demonstrating that it has been satisfied.'" *Id.*, quoting *Borg-Warner Corp. v Ins. Co. of N. Am.*, 174 AD2d 24, 31 (3d Dept 1992).

The Excess Policy Exclusion is not ambiguous. It provides that the Excess Policy "does not apply to, and [Arch] ha[s] no obligation to pay for, investigate, settle, or defend, any claim or 'suit'" for the construction of non-commercial dwellings or residences, such as the Building. *See* Dkt. 262 at 44. Aside from the critical omission of the word "you" (discussed further below), the scope of the Excess Policy Exclusion tracks the scope of the Primary Policy Exclusion, which precludes coverage "for any suit ... arising out of" construction of non-commercial dwellings or residences. Though both exclusions do not apply to certain listed exceptions, plaintiff does not claim that any exception applies.

Because the Underlying Action is a suit concerning construction work on a non-commercial building, the Excess Policy Exclusion precludes coverage. Plaintiff's argument that the Excess Policy Exclusion is ambiguous based on its use of the word "for" instead of words such as "related to" or "concerning" is unavailing. *Universal*, 25 NY3d at 680 ("parties cannot create ambiguity from whole cloth where none exists, because provisions are not ambiguous merely because the parties interpret them differently"). In fact, plaintiff does not proffer any competing reasonable interpretation. *See Perella Weinberg Partners LLC v Kramer*, 153 AD3d 443, 446 (1st Dept 2017) ("To be found ambiguous, a contract must be susceptible of more than

one commercially reasonable interpretation"). It merely professes confusion about the Excess Policy Exclusion's meaning highlighting the absence of "triggering language." It is clear, however, that the exclusion applies to claims related to construction of non-commercial dwellings and if this suit does not fall within the meaning of the Excess Policy Exclusion, it is hard to imagine what would. *See In re Viking Pump, Inc.*, 27 NY3d 244, 257 (2016) (insurance policies must be construed "in a way that affords a fair meaning to all of the language employed by the parties in the contract ***and leaves no provision without force and effect***") (emphasis added). Consequently, Arch is awarded summary judgment on the issue of whether the Excess Policy Exclusion bars plaintiff from seeking coverage under the Excess Policy for the claims asserted against it in the Underlying Action. It does.

The Primary Policy Exclusion

Arch, in contrast, is not entitled to summary judgment on plaintiff's claim under the Primary Policy. The Primary Policy Exclusion, unlike the Excess Policy Exclusion, only applies to claims "brought against ***you***." *See* Dkt. 261 at 51 (emphasis added). There is at least a material question of fact regarding whether "you" includes all insureds or only a Named Insured. It is undisputed that plaintiff is not a Named Insured. "Named Insured" and "Insured" are distinct defined terms under the Primary Policy. As discussed, there is a question of fact regarding whether plaintiff is an additional insured, which qualifies only as an "Insured", and which is defined to include parties who become additional insureds by complying with the Written Contract Requirement. *See* Dkt. 251 at 43. Indeed, even within the endorsement that sets forth the Written Contract Requirement, Insured and Named Insured are employed as distinct terms. *See id.* ("the words 'you' … refer[s] ***to the Named Insured.***") (emphasis added).

Likewise, the Primary Policy only defines "you" as the Named Insured. *See id.* at 5. Hence, a literal reading of the Primary Policy Exclusion is that it only applies to a Named Insured. If this were true, the Primary Policy Exclusion would not preclude plaintiff's coverage (assuming, of course, that plaintiff is an additional insured).

Consequently, there are two material questions of fact warranting denial of Arch's motion for summary judgment on plaintiff's claim under the Primary Policy: (1) whether plaintiff is an additional insured; and (2) whether the Primary Policy Exclusion applies to additional insureds. Plaintiff is only entitled to coverage if the answer to the first questions is yes and the answer to the second question is no.

Accordingly, it is

ORDERED that Arch's motion for summary judgment is granted in part only on plaintiff's claim under the Excess Policy, which is hereby dismissed; and it is further

ADJUDGED and DECLARED that Arch is not obligated to cover plaintiff under the Excess Policy; and it is further

ORDERED that Arch's motion is otherwise denied: and it is further

ORDERED that the remainder of the action is hereby severed and shall continue.

Dated: July 10, 2018

ENTER:

Jennifer G. Schecter, J.S.C.