SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

P R E S E N T : HON. GEORGE R. PECK
JUSTICE

----------X **TRIAL/IAS PART 21**

TEMPLE BETH SHALOM FOUNDATION, INC. and PHILADELPHIA INDEMNITY INSURANCE COMPANY,

Plaintiffs,

- against -

Index No. 11335-11
Mot. Seq. 001
Mot. Date 12-8-15

T.G. NICKEL & ASSOCIATES, INC., LIBERTY INTERNATIONAL UNDERWRITERS, INC.
(Pertaining to an underlying action entitled; Luis Duran and Fanny Arreaga Duran v. Temple Beth Shalom, et al.),"

Defendants.
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The following papers were read on this motion: Papers Numbered

Notice of Motion, Affidavits (Affirmations), Affirmation in Opposition, Memorandum of Law, Exhibits Annexed..... 1

Motion by defendant, Liberty International Underwriters, Inc. ("Liberty") for an Order of this Court, pursuant to CPLR §3212, granting defendant's motion for summary judgment declaring that Liberty has no obligation to defend or indemnify the plaintiff, Temple Beth Shalom Foundation, Inc. ("Beth Shalom") or reimburse Beth Shalom or plaintiff, Philadelphia Indemnity Insurance Company ("Philadelphia") for past defense costs in the underlying lawsuit; and dismissing the complaint in its entirety against Liberty.

FACTUAL AND PROCEDURAL BACKGROUND

The instant motion arises from an underlying personal injury action filed in this Court by

plaintiffs, Luis Duran and Fanny Duran, against Beth Shalom and *T.G. Nickel & Associates, LLC* ("Nickel""), captioned *Duran v. Temple Beth Sholom, Inc. and T.G. Nickel & Associates, LLC*, Index No. 10-018173. In June, 2009, the plaintiff, Luis Duran, was working for Boyle Services, Inc., whom co-defendant, Nickel, hired to perform lead and asbestos removal on Beth Shalom's premises. While working on the construction project, Duran sustained injuries when he fell from an elevated height. He commenced the underlying personal injury action in this Court in September, 2010.

The construction contract between Beth Shalom and Nickel, obligated Nickel to purchase commercial general liability insurance covering claims for injuries sustained in the performance of duties relative to the construction project. Liberty issued the requisite insurance policy on Nickel's behalf, naming it as an insured. Beth Shalom then demanded that Liberty assume its obligation and indemnify it against the underlying *Duran* action.

It is undisputed that in January, 2011, that Liberty agreed to accept Beth Shalom's tender to "accept the defense and indemnification of under the complete terms of the policy and a reservation of rights therein, as well as under the terms of the agreement entered into between the Insured, T.G. Nickel and Associates, and Temple Beth Shalom". According to the plaintiffs, the defendant did not reserve its rights in the acceptance.

The relevant terms of the STANDARD FORM OF AGREEMENT BETWEEN OWNER AND CONSTRUCTION MANAGER provides in relevant part:

> "...ARTICLE [11] INSURANCE AND BONDS...
>
> 11.1 1 CONTRACTOR'S LIABILITY INSURANCE
>
> 11.11 The Contractor shall purchase from and maintain...such insurance as will protect the Contractor from claims set for the below which may arise out of or result from the Contractor's operations under the Contract and for which the Contractor may be legally liable, whether such operations be by the Contractor or by a Subcontractor or by anyone directly or indirectly employed by any of them, or by anyone for whose acts any of them may be liable

1. claims under workers' compensation, disability benefit and other similar employee benefit acts which are applicable to the Work to be performed.

2. claims for damages because of bodily injury,.... of the Contractor's employees,

3. claims for damages because of bodily injury...of any person other than the Contractor's employees,...

...

...11.3 PROJECT MANAGEMENT PROTECTIVE LIABILITY INSURANCE

11.3.1 Optionally, the Owner may require the Contractor to purchase and maintain Project Management Protective Liability insurance from the Contractor's usual sources as primary coverage for the Owner's, Contractor's and Architect's vicarious liability for construction operations under the Contract. Unless otherwise require by the Contract Documents, the Owner shall reimburse the Contractor by increasing the Contract Sum to pay the cost of purchasing and maintaining such optional insurance coverage and the Contractor shall not be responsible for purchasing any other liability insurance on behalf of the Owner...

11.3.3 The Owner shall not require the Contractor to include the Owner, Architect or other person or entities as additional insureds on the Contractor's liability Insurance coverage..."

In August, 2011, Beth Shalom and its commercial liability insurer, Philadelphia, commenced a declaratory proceeding seeking an Order compelling Liberty to defend and indemnify Beth Shalom in the underlying action and to reimburse Philadelphia for defense costs associated therewith. Moreover, the plaintiffs alleged that Liberty tendered the Beth Shalom's defense to Boyle's commercial general liability insurer, Commerce & Industry Insurance Company, and demanded indemnity from Commerce in the *Duran* matter. Commerce undertook

the defense of the action in June, 2012. The plaintiffs also alleged that Philadelphia tendered defense on their behalf in the *Duran* matter. In May, 2014, Liberty issued a letter to Beth Shalom disclaiming coverage.

In December, 2014, Nickel moved this Court for a directed verdict in that the work that was being performed by Duran at the time of the accident, was additional work which was not a covered event, pursuant to an agreement with Beth Shalom. The Court granted Nickel's motion, and all cross claims as against it, were dismissed.

The subject policy provides in relevant part:

"ENDORSEMENT NO. 3

...

...ADDITIONAL INSURED-BY WRITTEN CONTRACT

WHO IS AN INSURED (Section II) is amended to include as an insured any person or organization with whom you have agreed to add as an additional insured by written contract but only with respect to liability arising out of your operations or premises owned or rented by you...

ENDORSEMENT NO. 4

...ADDITIONAL INSURED-OWNERS, LESSEES OR CONTRACTORS COMPLETED OPERATIONS...

Section II-**Who is an Insured** is amended to include as an insured the person or organization shown in the Schedule but only with respect to liability arising out of 'your work' at the location designated and described in the Schedule of this endorsement performed for that insured and included in the 'products-completed operations hazard...

ENDORSEMENT NO. 11...

NAMED INSURED

Item 1. Named Insured is hereby amended on the Policy Declarations Page to include the following:

T.G. Nickel & Associates

Sullivan & Nickel Construction Co. Inc.

Barrier Bay LLC..."

ARGUMENTS

The moving defendant argues, that not only did it reserve rights when it accepted Beth Shalom's tender, the Court determined that the work performed by Duran was not a covered event under the Agreement between Nickel and Boyle. As such, the defendant cannot be obligated to defend or indemnify the plaintiffs.

The plaintiffs contend that the defendant controlled the defense of the *Duran* action, and that the Certificate of Liability Insurance named Temple Beth Shalom as additional insured under the Liberty policy, pursuant to a written contract.

DISCUSSION

On a motion for summary judgment the movant must establish his or her cause of action or defense sufficient to warrant a court directing judgment in its favor as a matter of law (*Frank Corp. v. Federal Ins. Co.,* 70 N.Y.2d 966 [1988];*Rebecchi v. Whitmore,* 172 AD2d 600 [2nd Dept 1991]). The party opposing the motion, on the other hand, must produce evidentiary proof in admissible form sufficient to require a trial of material issues of fact" (*Frank Corp. v. Federal Ins. Co., supra,* at 967; *GTF Mktg. v. Colonial Aluminum Sales,* 66 NY2d 965 [1985]; *Rebecchi v. Whitmore, supra* at 601). Further, to grant summary judgment, it must clearly appear that no material triable issue of fact is presented.

In considering the movant's argument that they are not and/or no longer obligated to defend and/or indemnify Beth Shalom or reimburse Beth Shalom or Philadelphia, it is noted that there is a plethora of authority indicating that an insurer's duty to defend is broader than its duty to indemnify and such duty arises whenever the allegations of the complaint suggest a reasonable possibility of coverage (*Automobile Ins. Co. of Hartford v. Cook,* 7 NY3d 131[2006]).

Further, if any of the claims against an insured arguably arise from covered events, the insurer is required to defend the entire action (see *Town of Massena v. Healthcare Underwriters Mut. Ins. Co.*, 98 NY2d 435,[2002], *Bravo Realty Corp. v. Mt. Hawley Ins. Co.*, 33 AD3d 447[1st Dept 2006]).

Further, based on the particular facts of the instant matter, it is also well settled that when an insurer defends an action on behalf of an insured, in its stead, with knowledge of facts constituting a defense to the coverage of the policy, it is thereafter estopped from asserting that the policy does not cover the claim. By the same token, however, an insurer should not be charged with the obligation to reserve its rights against *unknown* (emphasis added) policy defenses.

A delay in giving notice of reservation of rights will be excused where it is traceable to the insurer's lack of actual or constructive knowledge of the available defense, especially where, in addition to such lack of knowledge, the insurer is misled by misrepresentations into defending the suit. Accordingly, where the insurer does not have knowledge of the insured's breach until after the insurer has commenced the defense of the action, there is no estoppel through delay where the insurer gives prompt notice upon obtaining such knowledge (see *Federated Dep't Stores, Inc. v. Twin City Fire Ins. Co.*, 28 AD3d 32, [1st Dept 2006] quoting *Couch on Insurance* § 202:60 [3d ed. 2005]).

An insurer may be relieved of its duty to defend only if it can establish, as a matter of law, that there is no possible factual or *legal basis upon which it might eventually be obligated to indemnify its insured* (emphasis added), or by proving that the allegations fall wholly within a policy exclusion (*City of New York v. Insurance Corp. of New York* 305 AD2d 443 [2nd Dept 2003]). Said another way, although Duran's claims, on their face, apparently fall within the scope of Liberty's and Nickel's obligation under the endorsement to the subject policy, thereby invoking the duty to defend, such obligation cannot obtain under the circumstances of the instant case.

The burden now shifts to the plaintiffs, as the opponents of the instant motion, to submit proof of a triable issue of fact. Contrary to plaintiffs' argument, Liberty's letter did set forth a reservation of rights. However, if an insurer assumes the defense of an action and controls its

defense on behalf of an insured with knowledge of facts constituting a defense to the coverage of the policy without reserving its right to deny coverage, the insurer is estopped from denying coverage at a later time, even if mistaken on the requirement of coverage (see *Utica Mut. Ins. Co. v. 215 W. 91st St. Corp.*, 283 AD.2d 421 [2nd Dept 2001]). Also, the doctrine of estoppel precludes an insurance company from denying or disclaiming coverage where the proper defending party relied to its detriment on that coverage and was prejudiced by the delay of the insurance company in denying or disclaiming coverage based on the loss of the right to control its own defense (see *Liberty Ins. Underwriters, Inc. v. Arch Ins. Co.*, 61 AD3d 482 [1st Dept 2009]).

In light of the foregoing, the critical issue must be dispensed with. The issue as to whether the fact the Court granted Nickel's motion for a directed verdict, dismissing the cross claims against it, impacts the defendant's obligation to defendant and indemnify the claim as against Beth Shalom. The case, *QBE Ins. Corp. v. Jinx Proof Inc.*, 102 AD3d 508 (1st Dept 2014), is instructive. There, as in the *Duran* action, the complaint pleaded claims against the insured potentially within the scope of coverage. Therefore, the insurer was obligated to defend the entire action, including claims within the scope of the assault-and-battery exclusion until the potentially covered claims were dismissed.

In addition, at the time the insured issued its tender for the insurer to defend, the insurer had no right simply to disclaim any duty with regard to the claims falling within the scope of the exclusion. The insurer, therefore, had no choice, upon tender of the insured's defense, but to reserve its right to invoke the policy exclusions at such future time as it might become entitled to do so. Once the potentially covered claims were dismissed, the insurer had no further obligations to the insured (see *QBE Ins. Corp. v. Jinx Proof Inc.*, supra).

Here, the moving defendant, accepted Beth Shalom's tender in January, 2011 and Beth Shalom commenced the underlying declaratory action in August, 2011. Liberty answered the complaint in September, 2011, and its asserted defenses included, that the underlying suit did not allege injury caused by an "[o]ccurrence" under the policy, and that Beth Shalom was excluded from coverage. Further, therein, it reserved the right to assert affirmative defenses "once the

precise nature of the claims [were] ascertained".

Finally, notwithstanding the foregoing the plain language of the cited policy provisions and construction agreement, speak for themselves. The plaintiffs, in opposition, cite that the contractual agreement "may require the Contractor to purchase and maintain Project Management Protective Liability insurance from the Contractor's usual sources" but neglected to cite the following provision that set forth that " [t]he Owner shall not require the Contractor to include the Owner, Architect or other person or entities as additional insureds on the Contractor's liability Insurance coverage...".

The plaintiffs also rely on the Certificate of Liability Insurance, which named Beth Shalom as an additional insured; however, the certificate states that "this certificate is issued as a matter of information only and confers no rights upon the certificate holder [and that] this certificate does not amend, extend or alter the coverage afforded by the policies..." Accordingly, the certificate is insufficient to establish that Shalom is an additional insured under a policy especially where, as here, the policy itself makes no provision for coverage (*see Moleon v. Kreisler Borg Florman Gen. Const. Co.*, 304 AD.2d 337 [1st Dept 2003]).

The plaintiffs, in opposition, failed to raise a question of fact as to a continuing obligation. In sum, Liberty accepted tender of Beth Shalom's defense and indemnification regarding the *Duran* action, and Liberty then demanded tender from Commercial, which defended and the matter. Philadelphia also defended Beth Shalom in the *Duran* action. The Court granted Nickel's motion for a directed verdict, and the cross claims against it were dismissed. As such, Liberty is no longer obligated to tender defense and indemnify Nickel in the *Duran* action. As to reimbursement, the plaintiffs are not prejudiced thereby, notwithstanding the plaintiffs' implication that Liberty accepted tender and waited three years to disclaim coverage while controlling all aspects of the defense of the underlying action.

In light of the foregoing, the plaintiffs' claim that Liberty controlled the defense of Duran's claims, is unfounded. It is noted that a defense was tendered on their behalf by Philadelphia and Commerce. The foregoing severely undermines any claims of Liberty's control of the defense of the underlying action and/or any prejudice to the plaintiffs. Therefore, Beth

Shalom failed to establish that it lost all meaningful opportunity to control its defense (see Merchants Mut. Ins. Grp. v. Travelers Ins. Co., 24 AD3d 1179 [4th Dept 2005]).

Taken together, Liberty is not estopped from disclaiming an obligation to defend and indemnify Beth Shalom.

Accordingly, the defendant's motion is granted in its entirety and the complaint against it is dismissed.

The foregoing constitutes the decision and order of this Court. All applications not specifically addressed herein are denied.

Dated: February 5, 2016

Mineola, New York

ENTER:

HON. GEORGE R. PECK, J.S.C.