SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON.LYNN R. KOTLER, J.S.C. PART 5

THE CITY OF NEW YORK

INDEX NO. 452440/14

MOT. DATE

- v -

MOT. SEQ. NO. 001

CATLIN SPECIALTY INSURANCE COMPANY et al.

The following papers, numbered 1 to 6 were read on this motion to/for summary judgment

Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits	No(s). 1
Notice of Cross-Motion/Answering Affidavits — Exhibits	No(s). 2, 3
Replying Affidavits	No(s). 4, 5, 6

In this action, plaintiff The City of New York (the "City") seeks reimbursement for defense and settlement costs incurred in connection with a personal injury action. The City now moves for summary judgment in its favor on the first, second, third and fourth causes of action. Defendant Catlin Specialty Insurance Company ("Catlin") cross-moves for summary judgment in its favor dismissing the complaint and defendant/third-party plaintiff Security Fence Systems, Inc's ("SFS") cross-claims. SFS cross-moves for summary judgment on the City's fourth and fifth causes of action. Third-party defendant Omni Risk Management, Inc. ("Omni") has not taken a position with respect to the motion and cross-motions.

Since issue has been joined and note of issue has not yet been filed, summary judgment relief is available (CPLR § 3212[a]; *Brill v. City of New York*, 2 NY3d 648 [2004]). The court's decision follows.

The facts are largely undisputed. In 2005, the City, through the Fire Department of the City of New YOrk ("FDNY"), entered into a snow and ice removal contract (the "Contract") with SFS in connection with the FDNY's Borough Communication Offices and FDNY's Division of Training. The Contract was effective between October 3, 2005 and June 30, 2011. Among other things, the Contract required SFS to remove "Snow and ice from perimeter areas" of covered FDNY facilities, "including but not limited to parking lots, driveways, walkways, sidewalks, building frontage areas, building entrances and external stairs." The Contract also required SFS use calcium chloride melting agents ("salt") for "icing conditions in or on" such perimeter areas and to "continuously maintain ice-free conditions."

The Contract named the FDNY Staten Island Central Office, located at 65 Slossen Avenue, Staten Island, NY 10314 (the "Central Office") among those FDNY facilities SFS was required to service, but did not include FDNY headquarters at 9 Metro Tech Center, Brooklyn, New York.

Dated: March 7, 2016

HON. LYNN R. KOTLER, J.S.C.

1. Check one: ☐ **CASE DISPOSED** ☒ **NON-FINAL DISPOSITION**

2. Check as appropriate: Motion is ☐ **GRANTED** ☐ **DENIED** ☐ **GRANTED IN PART** ☒ **OTHER**

3. Check if appropriate: ☐ **SETTLE ORDER** ☐ **SUBMIT ORDER** ☐ **DO NOT POST**

☐ **FIDUCIARY APPOINTMENT** ☐ **REFERENCE**

With regard to insurance, the Contract required SFS to, *inter alia*, obtain a commercial general liability insurance policy in the amount of no less than $1,000,000 per occurrence and $2,000,000 in the aggregate, in which the City was named as an additional insured for all claims "for injuries to persons.. which may arise from or in connection with the performance of work" by SFS. The Contract further required liability insurance "covering all indemnity agreements and indemnification" and forbade "exclusions and endorsements, which are not acceptable to the City[.]" The Contract also requires SFS to "hold harmless and indemnify the City from liability upon any and all claims for damages" arising from "any act of omission or commission or error in judgment of any of its officers, trustees, employees, agents, servants or independent contractors[.]"

SFS obtained a series of commercial general liability polices, including but not limited to Catlin policy number 310020056, which was in effect from November 2, 2010 to November 2, 2011 (the "Policy"). The Policy contains several provisions relevant to Catlin's eventual disclaimer and the instant action, including:

1. And endorsement entitled "Additional Insured – Owners, Lessees Or Contractors – Scheduled Person or Organization" (the "Additional Insured Endorsement"), which, in relevant part, names the "New York Fire Department" as an additional insured "with respect to liability for 'bodily injury'...caused, in whole or part, by" Security Fence's acts or omissions "in the performance of [its] ongoing operations" at the "location(s) designated above[,]" identified as "9 Metro tech Center Brooklyn, NY 11201-3857."

2. Two exclusions entitled "Coverage Limitation – Scheduled Operations" and "Exclusion – Designated Ongoing Operations" (collectively, the "Operations Exclusions"), which, in relevant part, purport to exclude from coverage all of Security Fence's operations other than "snowplowing[.]"

3. An exclusion entitled "Contractual Liability" (the "Contractual Liability Exclusion"), which states, in relevant part, that "[t]his insurance does not apply to...'bodily injury' for which the insured is obligated to pay damages by reason of the assumption of liability in a contract or agreement[,]" excluding liability "the insured would have in the absence of that contract or agreement."

On or about October 4, 2011, the City was served with a summons and complaint in an action entitled *Frank Gunther v. The City of New York*, Index No. 103822/11 (Supreme Court, Richmond County) (hereinafter the "Gunther Action"). The complaint in that action alleges that on or about February 1, 2011, Frank Gunther, an FDNY employee, was injured in the line of duty when he tripped and fell on a "slippery" temporary walkway at the Centra Office. The complaint further alleges that Gunther fell and was injured due to the City's alleged failure to "clean ice and snow" from the walkway and/or salt it.

In his 50-h hearing, Gunther testified that he fell after descending a stairs and taking two steps on pieces of plywood at the landing thereof. Gunther did not observe any "frozen precipitation", snow or ice on the plywood where he slipped. Nor did he observe any "salt or sand [] or snow melt chemicals on the plywood." At his deposition, Gunther testified concerning his accident as follows:

Q. There came a time that morning of February the 1st of '11 that you exited the trailers; is that correct?

A. Yes.

Q. And did you walk down the steps?

A. Yes.

Q. And at that time, did the steps have any wood on them?

A. The steps, no, sir.

Q. And the two pieces of plywood, did they have any railings next to them?

A. No.

Q. Or were they just two pieces of plywood laying flat on the ground?

A. yes.

Q. Did anything happen to you as you were walking down the steps in terms of falling or anything like that?

A. No, sir.

Q. So, it is correct then that you reached the bottom of the step without any incident occurring?

A. Correct.

...

Q. Did you then step onto the first piece of plywood?

A. Yes, sir.

Q. Did you take any full steps on that first piece of plywood before something happened to you?

A. I had stepped approximately one or two steps and that got me onto the larger piece of plywood and that is when my accident occurred.

Q. Were both of your feet on the larger piece of plywood when the accident occurred?

A. Yes.

Q. And had you taken any steps on that larger piece of plywood just before the accident occurred or had you just reached it and just got you two feet on it?

A. My two feet were on the larger piece of plywood.

Q. And I assume you were in the process of walking, you were moving; is that right?

A. Yes.

...

Q. Was there any snow on either of these pieces of plywood that morning as you were exiting the trailer and just before your accident happened?

A. Not that I recall.

Q. Was there any moisture on either of these pieces of plywood just after you exited the trailer and went down the steps?

A. I don't know.

Q. As you passed over the first piece of plywood, did it appear slippery or did it feel slippery to you?

A. No, sir.

Q. And when you got to the second piece of plywood, did that feel slippery to you?

...

A. I didn't feel it slippery.

In his affidavit of merit in support of a motion for a default judgment against SFS, Gunther stated that he "was caused to slip and fall on an warped (sic) and uneven, unsecured temporary walkway that was laid across an area that was muddy and denuded of grass, outside of the trailer in which [he] was stationed..."

By letter dated December 26, 2012, (the "Tender"), the New York City Law Department (the "Law Department") tendered the defense of the Gunther Action to Catlin via SFS. The Tender notified Catlin that the Gunther Action arose out of SFS's operations under the Contract and therefore should receive insurance coverage per the requirements of the Contract.

Catlin responded to the City' Tender on February 26, 2013, when it issued a disclaimer denying the City coverage under the Policy (the "Disclaimer"). In the Disclaimer, Catlin, referring to the Additional Insured Endorsement, contends that no coverage is available to the City because the Gunther Action "did not arise out of ongoing operations performed by [SFS]... at 9 Metro Tech Center, Brooklyn, NY 11201-3857. The Disclaimer further denies coverage on the basis of the unapproved Contractual Liability Exclusion, contending that under it no coverage is available to the City where Security Fence's liability is "incurred pursuant to contract[.]" Lastly, the Disclaimer denies coverage on the basis of the unapproved Operations Exclusions, contending that the Gunther Action did not concern Security Fence's ongoing snowplowing operations.

In or around February 2015, the Gunther Action settled, whereby the City agreed to pay Gunther $750,000. The City commenced this action on October 10, 2014. In the amended complaint, the City has asserted the following causes of action: [1] a declaration that Catlin has a duty to defend the City (first COA); [2] reimbursement from Catlin for the City's defense costs at a rate of $250 an hour for attorney time and $75 an hour for paralegal time (second COA); [3] indemnification from Catlin (third COA); [4] breach of the Contract against SFS (fourth COA); and [5] contractual indemnification from SFS (fifth COA).

On May 27, 2015, SFS filed a Third-Party Summons and Verified Third-Party Complaint against Omni, alleging that the third-party defendant, Security Fence's insurance broker, is liable in the event the Policy does not meet the requirements of the Contract.

Parties arguments

The City argues that it has established "[e]ither the Policy provides such contractually-mandated coverage, in which case Catlin has breached its duty to defend and is liable for the City's defense costs, or [SFS] has breached the Contract by securing a policy that did not conform to the Contract's requirements, in which case [SFS] is liable for the defense costs resulting from its breach." The City further maintains that the settlement of the Gunther Action was reasonable.

In turn, Catlin and SFS maintain that the City was not an additional insured because the Gunther's injuries were not caused by SFS's acts or omissions in the performance of its ongoing operations for the City at the designated location. Catlin further contends that it timely disclaimed coverage. SFS also points to the stipulation of discontinuance in the Gunther Action which terminated that action "as to all parties, including all cross-claims and counterclaims, with prejudice and without costs or disbursements to any party", noting that the City had brought cross-claims against SFS for indemnity and contribution. Therefore, SFS argues that the City is barred from pursuing its claims against SFS in this action.

DISCUSSION

On a motion for summary judgment, the proponent bears the initial burden of setting forth evidentiary facts to prove a prima facie case that would entitle it to judgment in its favor, without the need for a trial (CPLR 3212; *Winegrad v. NYU Medical Center*, 64 NY2d 851 [1985]; *Zuckerman v. City of New York*, 49 NY2d 557, 562 [1980]). If the proponent fails to make out its prima facie case for summary judgment, however, then its motion must be denied, regardless of the sufficiency of the opposing papers (*Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]; *Ayotte v. Gervasio*, 81 NY2d 1062 [1993]). Granting a motion for summary judgment is the functional equivalent of a trial, therefore it is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue *(Rotuba Extruders v. Ceppos*, 46 NY2d 223 [1977]). The court's function on these motions is limited to "issue finding," not "issue determination" (*Sillman v. Twentieth Century Fox Film*, 3 NY2d 395 [1957]).

The court finds that the City's motion must be denied and the defendants' cross-motions for summary judgment must be granted. The City has wholly failed to establish that Gunther's accident occurred "in connection with the performance of [SFS's] work" thereby triggering SFS's obligation to procure insurance coverage on behalf of the City. Relatedly, the City has failed to establish that Catlin had an obligation to defend the City in connection with the Gunther Action. Based on Gunther's 50-h hearing and deposition testimony, there was no snow and/or icy condition. Indeed, Gunther's affidavit of merit filed in connection with his motion for a default judgment against SFS makes it clear that the defective condition was a "warped and uneven, unsecured temporary walkway."

Indeed, Catlin has established that it properly disclaimed coverage to the City based upon the fact that, *inter alia*, the underlying accident did not occur at 9 Metro Tech Center nor did it arise from SFS's performance of its work. Further, Catlin has established that its disclaimer was timely since Insurance Law § 3420[d] does not apply since the City was not an additional insured.

In light of the court's decision, the court declines to address the issues raised by SFS concerning whether the City is precluded from bringing these claims based upon the stipulation of discontinuance in the Gunther Action.

CONCLUSION

In accordance herewith, it is hereby:

ORDERED the City's motion for summary judgment is denied; and it is further

ORDERED that Catlin's cross-motion for summary judgment is granted; and it is further

ORDERED that Catlin is entitled to summary judgment on the first, second and third causes of action; and it is further

ORDERED, ADJUDGED AND DECREED that Catlin does not have a duty to defend or indemnify the City in connection with the Gunther Action; and it is further

ORDERED that SFS's cross-motion for summary judgment is granted to the extent that SFS is entitled to summary judgment dismissing the fourth and fifth causes of action; and it is further

ORDERED that the complaint is severed and dismissed.

Since the third-party complaint remains, this action is not finally disposed.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly rejected and this constitutes the decision and order of the court.

Dated: March 7, 2016
New York, New York

So Ordered

Hon. Lynn R. Kotler, J.S.C.