SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. BARBARA JAFFE **PART** 12

Justice

Index Number : 156410/2014
SCOTTSDALE INSURANCE COMPANY
vs.
490 FULTON OWNER, LLC
SEQUENCE NUMBER : 002
SUMMARY JUDGMENT

INDEX NO. 156410/14
MOTION DATE _____
MOTION SEQ. NO. 002

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ **No(s).** _____

Answering Affidavits — Exhibits _____ **No(s).** _____

Replying Affidavits _____ **No(s).** _____

Upon the foregoing papers, it is ordered that this motion is

DECIDED IN ACCORDANCE WITH ACCOMPANYING DECISION / ORDER

FILED
AUG 15 2016
COUNTY CLERK'S OFFICE
NEW YORK

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 7/14/16

J.S.C.
BARBARA JAFFE
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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 12

----------x

SCOTTSDALE INSURANCE COMPANY,

Plaintiff,

-against-

490 FULTON OWNER, LLC, FULTON CORNER OWNER, LLC, FULTON JOINT VENTURE, LLC, KSK CONSTRUCTION GROUP, LLC, and KISKA DEVELOPMENT GROUP, LLC d/b/a KISKA CONSTRUCTION GROUP,

Defendants.

----------x

Index No. 156410/14

Motion seq. no. 002

DECISION AND ORDER

BARBARA JAFFE, J.:

For plaintiff:
Joanna L. Young, Esq.
Carroll, McNulty & Kull LLC
570 Lexington Ave., 8th fl.
New York, NY 10022
212-252-0004

For KSK and Kiska:
Ellen G. Margolis, Esq.
Tania A. Gondiosa, Esq.
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212-804-4200

By notice of motion, defendants KSK Construction Group, LLC and Kiska Development Group, LLC d/b/a Kiska Construction Group (movants) move pursuant to CPLR 3212 for an order granting them summary judgment and declaring that plaintiff has a duty to defend them in two personal injury actions, *Quinatoa v 484 Fulton Owner LLC et al.*, index No. 1843/11, Supreme Court, Kings County, and *Wages v 490 Fulton Owner LLC et al.*, index No. 18494/13, Supreme Court, Kings County, and pursuant to CPLR 3211(a)(7) for an order dismissing the remainder of the amended complaint as against them. Plaintiff opposes.

I. BACKGROUND

This declaratory judgment action arises based on a commercial general liability policy, effective January 17, 2010 through January 17, 2011, and issued by plaintiff to nonparty Steel

Toe, Inc., a subcontractor hired by movants, and whose employees were injured at a construction site in Brooklyn.

A policy endorsement defines an additional insured as:

> 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 be added as 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 or omissions of those acting on your behalf;
>
> in performance of your ongoing operations for the additional insured.

(NYSCEF 35, Exh. E). Upon written agreement between Steel Toe and the additional insured, the additional insured is covered. (*Id.*).

On or about September 7, 2010, movants and Steel Toe entered into a contract whereby the latter would provide demolition services for the construction project where the employees were injured. Steel Toe also agreed to indemnify movants and procure commercial general liability insurance naming them as additional insureds. (*Id.*, Exh. D). The agreement is signed by one Alan Brunner on behalf of Steel Toe. (*Id.*).

On or about January 24, 2011, a Steel Toe employee commenced a personal injury action against, among others, movants, alleging negligence and Labor Law violations (2011 action). In March 2011, the plaintiff amended his complaint to include Steel Toe as a defendant, and in November 2012, movants interposed an answer and asserted against Steel Toe a cross claim for indemnification. (*Id.*, Exhs. B, F).

By letter dated Februrary 16, 2012, movants tendered to plaintiff defense and indemnity

for the 2011 action. By letters dated April 3 and May 15, 2012, plaintiff accepted movants' tender and agreed to assume their defense, but reserved its rights, as pertinent here, "not to provide indemnification for damages that were not caused, in whole or in part by [Steel Toe]" or to withdraw its defense in the event that claims are not covered. By email dated July 20, 2012, movants accepted plaintiff's defense offer. (*Id.*, Exhs. H-I; NYSCEF 41).

On or about October 11, 2013, a second Steel Toe employee commenced a personal injury action against, among others, movants (2013 action), and on March 14, 2014, movants commenced a third-party action against Steel Toe asserting claims of contractual and common law indemnification, a failure to procure insurance, and attorney fees. (*Id.*, Exhs. C, G).

At his deposition held on March 24, 2014 in the 2011 action, Steel Toe's principal testified that he and movants came to a "verbal understanding" for debris removal at the job site, not demolition, that their agreement was never reduced to writing, that he had sole authority to enter contracts on behalf of Steel Toe, and that to the extent that there was a written agreement, it was signed by Brunner, who had no authority. He also denied that Steel Toe ever performed demolition work, and asserted that the address printed on the written agreement was that of Brunner, not Steel Toe. When confronted with a document identifying Brunner as Steel Toe's foreman, he denied that Brunner was a foreman for Steel Toe or that he ever performed any work on Steel Toe's behalf at the project or held himself out as an officer or employee of Steel Toe. (NYSCEF 42).

By letter dated June 30, 2014, plaintiff disclaimed coverage based on the deposition testimony that there was no written agreement as to coverage, and on July 1, commenced this action for a declaratory judgment. (*Id.*, Exh. K; NYSCEF 1). By decision and order dated July

15, 2015, I granted plaintiff's motion for leave to amend its complaint. (NYSCEF 26).

II. DISCUSSION

A. Contentions

In support of their motion, movants argue that plaintiff's disclaimer of coverage was improper as its duty to defend, distinct from its duty to indemnify, is triggered by the pleadings in the underlying actions and is unaffected by extrinsic evidence, here, the deposition testimony. They contend that the agreement and plaintiff's policy and endorsements establish that they are additional insureds, and that coverage was triggered by the direct claims of negligence in the underlying actions arising from Steel Toe's work. (NYSCEF 34).

Movants also contend that any declaration as to plaintiff's duty to indemnify them is premature absent a determination in the underlying actions of the validity of the agreement, the nature of the work to be performed under it, and the nature of the work actually performed by Steel Toe's employees at the time of their accidents. As both this and the underlying matters turn on the same issue, they argue, dismissal of this action will prevent separate trials and potentially inconsistent rulings. (*Id.*).

In opposition, plaintiff denies that it may not rely on extrinsic evidence to escape its duty to defend, as the extrinsic facts here, which movants do not dispute, eliminate any basis for finding that movants are additional insureds under its policy. It claims that testimony establishes that there is no written agreement under which movants may claim additional insured coverage, Steel Toe did not perform demolition work, and other than Steel Toe's principal, no other person was authorized to enter contracts on its behalf. Thus, it argues, movants fail to establish their status as additional insureds, and defense counsel's affirmation, devoid of first-hand knowledge,

has no probative value. (NYSCEF 38, 44).

Plaintiff also denies that this action is premature since it has attempted to explore issues respecting the agreement in discovery, and that movants have ignored its discovery requests and instead brought this motion. By the same token, it argues, movants' motion is premature absent the completion of discovery. (*Id.*).

In reply, movants reiterate their positions, emphasizing that plaintiff may only rely on extrinsic evidence if it conclusively rules out any factual or legal basis on which it may be obligated to indemnify them, and here, the testimony at best raises issues of fact as to the agreement's validity. Movants reiterate their remaining contentions. (NYSCEF 45).

B. Analysis

1. Applicable law

To prevail on a motion for summary judgment dismissing a cause of action, the proponent must establish, *prima facie*, its entitlement to summary judgment as a matter of law, providing sufficient evidence to demonstrate the absence of any triable issues of fact. (*Jacobsen v New York City Health & Hosps. Corp.*, 22 NY3d 824, 833 [2014]; *Oddo v Queens Vil. Comm. for Mental Health for Jamaica Community Adolescent Program, Inc.*, 135 AD3d 211, 217 [1st Dept 2015]). If the moving party meets this burden, the opponent must offer evidence in admissible form to demonstrate the existence of factual issues that require a trial, as "mere conclusions, expressions of hope, or unsubstantiated allegations or assertions are insufficient." (*Amatulli v Delhi Constr. Corp.*, 77 NY2d 525, 533 [1991]; *McGinley v Mystic W. Realty Corp.*, 117 AD3d 504, 505 [1st Dept 2014]).

The insured bears the burden of establishing that coverage exists (*Platek v Town of*

Hamburg, 24 NY3d 688, 694 [2015]; *Lend Lease [U.S.] Constr. LMB Inc. v Zurich Am. Ins. Co.*, 136 AD3d 52, 56 [1st Dept 2015]), and a party "is not entitled to coverage if not named as an insured or an additional insured on the face of the policy" (*Natl. Abatement Corp. v Natl. Union Fire Ins. Co. of Pittsburgh, Pa.*, 33 AD3d 570, 571 [1st Dept 2006]).

2. Duty to defend

"An insurer's duty to defend its insured is exceedingly broad. . . . [and the] insurer will be called upon to provide a defense whenever the allegations of the complaint suggest . . . a reasonable possibility of coverage." (*Regal Constr. Corp. v Natl. Union Fire Ins. of Pittsburgh, PA*, 15 NY3d 34, 37 [2010] [internal citations omitted] [internal quotation marks omitted]; *Axis Surplus Ins. Co. v GTJ Co., Inc.*, 139 AD3d 604, 604 [1st Dept 2016]). The insurer's duty to defend is unaffected by the existence of "facts outside the four corners of [the] pleadings indicat[ing] that the claim may be meritless or not covered," and the insurer may be required to defend an action for which it may ultimately have no duty to indemnify. (*Auto. Ins. Co. of Hartford v Cook*, 7 NY3d 131, 137 [2006]; *Cumberland Farms, Inc. v Tower Group, Inc.*, 137 AD3d 1068, 1070 [2d Dept 2016]; 70A N.Y. Jur 2d, Insurance § 2100 ["the insurer may not rely on extrinsic facts" to escape duty to defend]). The rule applies equally to named and additional insureds. (*Regal Constr. Corp.*, 15 NY3d at 38; *Sport Rock Intl., Inc. v Am. Cas. Co. of Reading, Pa.*, 65 AD3d 12, 17 [1st Dept 2009], *appeal withdrawn* 14 NY3d 796 [2010]).

However, the insurer may escape its duty to defend "if it establishes as a matter of law that there is no possible factual or legal basis on which it might eventually be obligated to indemnify its insured under any policy provision." (*Allstate Ins. Co. v Zuk*, 78 NY2d 41, 45 [1991]; *Burgund v ESP Café, Inc.*, 84 AD3d 849, 850-851 [2d Dept 2011]; *Great N. Ins. Co. v*

Kobrand Corp., 40 AD3d 462, 463 [1st Dept 2007], *lv dismissed* 10 NY3d 781 [2008]). To that end, extrinsic facts may be considered. (*Eg, Northville Indus. Corp. v Natl. Union Fire Ins. Co. of Pittsburgh, Pa.*, 89 NY2d 621, 635 [1997] ["court may look to judicial admissions in the insured's responsive pleadings in the underlying tort action or other formal submissions in the current or underlying litigation to confirm or clarify the nature of the underlying claims"]; *Gibbs v CNA Ins. Cos.*, 263 AD2d 836, 837 [3d Dept 1999], *lv denied* 94 NY2d 755 [notwithstanding that pleading was framed in terms of negligence, court turned to extrinsic facts showing that acts at issue were, as a matter of law, "intentionally caused within the meaning of the policy exclusion"]; *Town of Moreau v Orkin Exterminating Co., Inc.*, 165 AD2d 415, 418-419 [3d Dept 1991] [court permitted extrinsic proof of prior judicial determination that acts at issue were intentional and thus outside coverage]).

Here, the underlying pleadings, the agreement, and the insurance policy and endorsements referencing the agreement, all establish, *prima facie*, that movants were additional insureds under plaintiff's policy. (*See 492 Kings Realty, LLC v 506 Kings, LLC*, 88 AD3d 941, 942 [2d Dept 2011] [documentary proof submitted by defendants, including contract with primary insured, insurance policy, and underlying pleadings, demonstrated *prima facie* that defendants were additional insureds under policy and underlying allegations came within scope of coverage]). Given that plaintiff otherwise concedes that the allegations in the underlying actions come within the scope of coverage, movants demonstrate that plaintiff has a duty to defend them.

Steel Toe's self-serving denial of the existence of a written agreement or that Brunner was authorized to enter one, or that demolition work was ever performed, is controverted by the written agreement itself, and thus the testimony does not conclusively establish, as a matter of

law, a factual or legal basis relieving plaintiff of its duty to defend. (*See Vil. of Brewster v Virginia Sur. Co., Inc.*, 70 AD3d 1239, 1241-1242 [3d Dept 2010] [insurer's extrinsic evidence showing that property damage was unrelated to insured's work, "although supportive of its position that the claims may ultimately fall outside of its policy coverage, (did) not relieve it of its commitment to provide a defense"]).

3. Duty to indemnify

While the issue of the agreement's validity is dispositive to movants' cross claim and third-party claims in the underlying actions and will be decided there (*see eg, 2445 Creston Ave., LLC v Gold Star Gift Shop*, 117 AD3d 631, 632 [1st Dept 2014] [declaratory judgment action dependent on same factual issues litigated in underlying action]), the declaratory relief sought is not contingent on a future finding of liability (*cf. 87-10 51st Ave. Owners Corp. v Steadfast Ins. Co.*, 39 AD3d 700, 701 [2d Dept 2007] [CPLR 3211(a)(7) motion granted where "the policy at issue limited the (insurer's) liability . . . to those sums that (its insured) becomes legally obligated to pay . . . . (and h)ere, the plaintiff did not allege that (its insured) had been found legally obligated to pay any of the damages alleged"]). Rather, plaintiff denies the existence of an agreement to procure insurance. Thus, movants do not establish that plaintiff failed to state a cause of action.

However, to prevent duplicative discovery, discovery in this action is stayed pending resolution of movants' cross claim and third-party claims in the underlying actions (*see Greenwich Ins. Co. v City of New York*, 139 AD3d 615, 2016 NY Slip Op 04122, *2 [1st Dept 2016] [discovery and motion practice stayed in declaratory judgment action "pending resolution of the liability phases in the (underlying) actions"]), as plaintiff need only rely on the resolution

of those claims to prosecute this action.

4. Attorney affirmation

Counsel's affirmation was an appropriate vehicle for presenting the documentary evidence supporting movants' motion. (*See generally Zuckerman v City of New York*, 49 NY2d 557, 563 [1980] ["The affidavit or affirmation of an attorney, even if he has no personal knowledge of the facts, may, of course, serve as the vehicle for the submission of acceptable attachments which do provide evidentiary proof in admissible form . . . ." (internal quotation marks omitted)]).

III. CONCLUSION

Accordingly, it is hereby

ORDERED, that defendants KSK Construction Group, LLC's and Kiska Development Group, LLC d/b/a Kiska Construction Group's motion for a declaratory judgment is granted; it is further

ADJUDGED and DECLARED, that plaintiff is obliged to provide a defense to defendants KSK Construction Group, LLC and Kiska Development Group, LLC d/b/a Kiska Construction Group under the policy it issued to nonparty Steel Toe, Inc. (Policy no. CPS1138110) in the following actions: (1) *Quinatoa v 484 Fulton Owner LLC et al.*, index No. 1843/11, Supreme Court, Kings County, and (2) *Wages v 490 Fulton Owner LLC et al.*, index No. 18494/13, Supreme Court, Kings County; it is further

ORDERED, that defendants KSK Construction Group, LLC's and Kiska Development Group, LLC d/b/a Kiska Construction Group's motion for an order dismissing the amended complaint as against them is denied; and it is further

ORDERED, that all discovery in this action is stayed pending resolution of defendants KSK Construction Group, LLC's and Kiska Development Group, LLC d/b/a Kiska Construction Group's cross claim and/or third-party claims in the underlying actions.

ENTER:

Barbara Jaffe, JSC

DATED: July 14, 2016
New York, New York

Milton A. Tingling
clerk

FILED
AUG 15 2016
COUNTY CLERK'S OFFICE
NEW YORK

156410/14

Order + Judgment