SHORT FORM ORDER

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SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU

Present: HON. ZELDA JONAS
Justice

TRIAL/IAS PART 19

SANDY CREEK CENTRAL SCHOOL DISTRICT and NEW YORK SCHOOLS INSURANCE FOUNDATION as attorney-in-fact for NEW YORK SCHOOLS INSURANCE RECIPROCAL,

Plaintiffs,

Index No. 14944/03

- against -

Sequence No. 1 & 2
Motion Date: July 5, 2005

UNITED NATIONAL INSURANCE COMPANY, EDWARD SCHALK & SON, INC., ROYAL & SUNALLIANCE USA and DOUGLAS SCRANTON,

Defendants.

The following papers read on this motion:

Notice of Motion & Memorandum of Law ..... 1 - 2
Affirmation in Opposition 3
Notice of Cross-Motion 4
Attorney Affirmation in Opposition 5
Reply Affirmation 6

The motion by plaintiffs and the cross-motion by United National Insurance Company ("United") and Edward Schalk & Son, Inc. ("Schalk"), collectively referred to herein as the defendants, are decided as hereinafter indicated.

Plaintiffs, Sandy Creek Central School District ("School District") and New York Schools Insurance Foundation as attorney-in-fact for New York Schools Insurance

Reciprocal ("NYSIR"), commenced this action to seek a declaration of rights and obligations of the parties involved in connection with a separate action ("the underlying action") seeking damages for bodily injury allegedly sustained by Douglas Scranton ("Scranton"). Scranton is named as a defendant herein.

Scranton alleges he was injured on December 28, 2001 when he slipped and fell while on School District property. At the time, Scranton was a drywall finisher employed by Schalk. Schalk had been hired as a subcontractor by School District's contractor, Murnane Building Contractors. As part of its contract, Schalk had liability insurance with School District to be named as an additional insured. School District subscribed to NYSIR. Schalk had its commercial general liability policy with United. United disclaimed coverage on the sole ground that the loss occurred in an area that was not the construction area. Plaintiffs argue the injury was incidental to Scranton's work as an employee of Schalk since, in order to get from the construction site to the parking lot where the workers were told to park, Scranton had to walk across the area where he fell.

Defendants argue that Scranton was injured in the school parking lot (allegedly while walking to his car at lunchtime), and they contend that this is not a bodily injury that occurred solely out of Scranton's work as a Sheetrock finisher. Defendants argue that there was no connection between Scranton's injury and the work of subcontractor Schalk.

Defendants further argue that Schalk had nothing to do with the condition of the parking lot where Scranton fell, and they argue the indemnification clause is inoperative. The Court must disagree.

An additional insured's coverage is as broad as that afforded the named insured (*Pecker Iron Works of New York, Inc. v. Traveler's Ins. Co.*, 99 N.Y.2d 391).

It is appropriate as a matter of risk allocation to contractually shift the risk of liability from the owner to the contractor or subcontractor performing the work giving rise to liability (*Greater New York Mutual Insurance Co. v. Mutual Marine Office, Inc.*, 3 A.D.3d 44).

Where an indemnification clause or insurance policy covers claims made against a general contractor for liability arising out of a subcontractor's work, such a clause or policy includes claims made by an employee of the subcontractor who was injured on the job as a result of the negligence of a party other than the subcontractor (*Structure Tone, Inc. v. Component Assembly Systems*, 275 A.D.2d 603).

In determining the scope of contractual obligations, the reasonable expectation of the parties is a factor to be considered, and any interpretation of an insurance contract implicates as a standard the reasonable expectation and purpose of the ordinary businessman when making an ordinary business contract (*Greater New York Mutual Insurance Co. v. Mutual Marine Office, Inc., supra*).

Insurance coverage has been extended to cover an area where an employee/worker used to reach and leave the workplace as illustrated by the following cases.

The use of a construction site bathroom by a subcontractor's employee was a necessary and unavoidable activity that arose in the course of a construction project, entitling the general contractor to additional insured status under the subcontractor's general liability policy with respect to a personal injury action brought by a subcontractor's employee, based on the injuries he allegedly sustained in a slip and fall on the bathroom floor (*Turner Construction Co. v. Pace Plumbing Corp.*, 298 A.D.2d 146).

Although an employee elevator operator was on his lunch break when the accident occurred, because his work necessarily required him to use the elevator to perform his job and to reach and leave his workplace, the injuries in the action (a visitor was struck by a descending elevator door operated by the employee) arose out of the work performed by the employee's employer for the owner of the building, and the employer's insurance company was required to defend the owner in the personal injury action (*Daily News LP v. OCS Security*, 280 A.D.2d 576).

Although the sidewalk where the injured plaintiff fell was not specifically named in the endorsement as the leased premises, the use was incidental to the covered premises as a means of getting from the rooms within the school to the fields where the event was being held, and although the insurance coverage was for a dog show in a field area, the court found the coverage included the sidewalk near the field (*Ambrosio v. Newburgh Enlarged City School District*, 5 A.D.3d 410).

In the above-entitled action, United would bear the responsibility for damages for bodily injury to a worker, such as Scranton, due to a fall near his vehicle while at or near

the job site. The additional insured clause in a subcontractor's liability policy, adding the school district or general contractor as an insured, focuses not on the precise cause of the accident for which coverage was sought but upon the general nature of the operation in the course of which the injury was sustained (*Tishman Construction Corp. of New York v. CNA Insurance Co.*, 236 A.D.2d 211).

In construing the expression "arising out of" in context of a liability policy exclusion which excludes injuries arising out of ownership, maintenance, or use of a motor vehicle, case law has held such a phrase to mean "originating from, incident to, or having a connection with the use of the vehicle" (*Cone v. Nationwide Mutual Fire Ins. Co.*, 75 N.Y.2d 747). There is no reason to accord the language a less expansive interpretation when relating to an additional insured definition herein. Here, Scranton's fall was, from an objective point of view, incidental to his job.

The Court finds that an employee's use of the parking lot where his car is located on the job site is a necessary and unavoidable activity which arises in the course of the construction work. Common sense dictates that an injury which occurs under these circumstances is an injury which arose in connection with the execution of the work.

As to defendants' argument of School District's alleged negligence, excluding coverage, any exclusionary provisions are subject to strict and narrow construction (*Belt Painting Corp. v. TIG Ins. Co.*, 100 N.Y.2d 377).

In order for an insurer to negate coverage through an exclusion in an insurance policy, it must establish that the exclusion is set forth in clear and unmistakable language, that it is subject to no other reasonable interpretation, and that it applies to the

facts of the particular case (*Continental Cas. Co. v. Rapid-American Corp.*, 80 N.Y.2d 640).

Here, the plaintiff was included as an additional insured on the United National policy which contained a Blanket Additional Insured endorsement. If the parties intended to exclude coverage arising out of the negligence of School District, such language could have been easily added to the subject endorsement.

Defendants have not shown any provision in the insurance policy (between Murnane and Schalk) which excludes coverage on account of School District's negligence. Since such coverage is not barred by G.O.L. § 5-322 (*Tishman Construction Corp. of New York v. CNA Ins. Co., supra*). United is therefore obligated to provide insurance coverage for School District in the underlying action, which is to include providing School District with a defense in that action and paying School District's liability up to the policy limits regardless of whether Scranton's injuries were caused by School District's negligence.

Defendants' argument that Scranton's injuries were caused by School District's negligent maintenance of the parking lot and that, under G.O.L. § 5-322-1, School District may not be indemnified is unavailing. Here, in this declaratory judgment proceeding, it is not for this Court to make a determination as to whether Scranton's injuries were caused by School District. That matter is to be decided in the underlying action. Clearly, from the record herein, School District's negligence, if any, has not been established.

Thus, the record reflects that the United policy is primary, and the NYSIR policy is excess coverage for the incident herein.

Accordingly, School District is entitled to a complete defense and indemnification (up to the policy limits) in the underlying Scranton action from United, and NYSIR is entitled to be fully reimbursed by United for all defense costs incurred to date in connection with the defense and potential indemnification of School District in the Scranton action.

Dated: 7/25/05

J.S.C.