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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. GEOFFREY J. O'CONNELL

Justice

TRIAL/IAS, PART 6
NASSAU COUNTY

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

Plaintiff(s),

-against-

INDEX No. 6050/03
XXX

MOTION DATE: 4/28/04

AMERICAN CASUALTY COMPANY OF READING, PA,
LAWMAN HEATING & COOLING, INC. and JOHN TEBO,

Defendant(s).

MOTION SEQ. No. 1-MOD
2-MD
3-MG

The following papers read on this motion:
Notice of Motion/Affirmation/Exhibits
Memorandum of Law
Notice of Cross Motion/Affirmation/Exhibits
Memorandum of Law
Reply
Notice of Cross Motion/Affirmation
Memorandum of Law
Reply

Plaintiff BRIGHTON CENTRAL SCHOOL DISTRICT applies for an order granting summary judgment declaring that (1) BRIGHTON CENTRAL SCHOOL DISTRICT is entitled defense by and indemnification from Defendant AMERICAN CASUALTY COMPANY OF READING, P.A. with respect to an action against it brought by Defendant JOHN TEBO; (2) Plaintiff NEW YORK SCHOOLS INSURANCE FOUNDATION is entitled to be fully reimbursed by Defendant AMERICAN CASUALTY for all defense costs incurred to date; or, in the alternative (3) that BRIGHTON CENTRAL SCHOOL

DISTRICT is entitled to indemnification by Defendant LAWMAN HEATING & COOLING by virtue of the latter's breach of its contractual obligation to secure insurance coverage for the benefit of the school district.

Defendant AMERICAN CASUALTY cross moves for an order granting (1) Summary Judgment dismissing the Complaint or, alternatively, (2) for a declaration that AMERICAN CASUALTY has no duty to defend , or (3) that any duty to defend is not primary.

Factual Setting

Plaintiff BRIGHTON CENTRAL SCHOOL DISTRICT entered into a written contract dated June 12, 2001 with Defendant LAWMAN HEATING & COOLING for additions and alterations to the Brighton Senior High School. Article 11 of the contract required LAWMAN to secure insurance coverage including general liability insurance and subparagraph 11.1.4 provided; "The Owner, the Construction Manager, and the Architect shall each be named as a 'primary additional insured' under the Contractor's policies with limits equal to, or in excess of, the limits in Subparagraph 11.1.3 above." LAWMAN obtained a commercial general liability policy from Defendant AMERICAN CASUALTY in which BRIGHTON CENTRAL SCHOOL DISTRICT was identified as an "additional insured".

The policy issued by Defendant AMERICAN CASUALTY to LAWMAN included a "Contractor's Blanket Additional Insured Endorsement." Section "B" of that endorsement provided in pertinent part:

"The insurance provided to the additional insured is limited as follows:

1. That person or organization is only an additional insured with respect to liability arising out of:
   a. Your premises;
   b. "Your work" for that additional insured; or
   c. Acts or omissions of the additional insured in connection with the general supervision of "your work."

* * *

3. Except when required by contract or agreement, the coverage provided to the additional insured by this endorsement does not apply to:

   * * *

   b. "Bodily injury" or "property damage" arising out of acts or omissions of the additional insured other than in connection with the general supervision of "your work."

There was present in Brighton Central High School a device variously described as an elevator, hoist or lift dating from the 1930's. According to deposition of Kevin Ghyzel, Mechanical Services Supervisor for BRIGHTON CENTRAL SCHOOL DISTRICT, the device consisted of a platform connected by brackets to two steel rails mounted on a wall. Across the top of the brackets connecting the device to the wall-mounted rails was another piece of steel to which there was attached the cable that raised and lowered the platform. The other end of the cable was bolted to a steel drum which turned to spool and unspool the cable raising and lowering the platform. A plate on the crossbar indicated that the device had a capacity of 750 pounds. There were rails on either side of the platform but the side opposite the wall was open. The device traveled fourteen feet and five inches between the basement boiler room and the ground floor and was used by the school district to move equipment stored in the basement. School district employees were instructed that the device was for freight only and not people, but there were no signs posted. One employee had been caught riding the device and was warned not to do it again. The contractors working on the addition and alteration who asked to use the device were permitted to do so, but they were told that it was not to be ridden by passengers.

On a few occasions the device had malfunctioned. While stopped the drum had continued to turn unspooling the cable so that it was slack. On those occasions Kevin Ghyzel would correct the problem. He also maintained and lubricated the device. No outside company was engaged to perform these services. In the mid 90's Ghyzel replaced the original cable with a new steel cable of the same dimensions merely because of the age of the original.

According to his testimony at a 50h hearing, JOHN TEBO was employed by LAWMAN on November 20, 2001 as a sheet metal mechanic, and was assigned to the Brighton Central High School project. While working in a classroom TEBO and his foreman, Shawn Lawler, were asked to move a 300 to 350 pound air handler. TEBO and Lawler went to the boiler room by means of stairs to obtain the only available cart upon which the air handler could be moved. TEBO visually inspected the elevator or hoist to assure himself it was in working order because it was old, but conducted no test of its operability. No one had told him not to ride on the device and he had seen others ride on it, but not while any school employees were present. Shawn Lawler operated the device from a wall-mounted control panel while TEBO rode with the cart up to ground level. After removing the cart from the platform of the device, TEBO stepped back and fell instantly. KEVIN Ghyzel was in the basement at the time and arrived at the scene within minutes. He observed the empty deck or platform of the device and cable lying about it on the floor. There was cable still on the steel spool, but the

cable was no longer attached to the top bar of the device. Mr. Ghyzel observed no damage in the cable or clamps used to attach it, but replaced them before putting the device back in service.

JOHN TEBO completed a notice of claim dated Jan. 25, 2002 which was served on Plaintiff DISTRICT on Feb. 14, 2002. Thereafter, on Feb. 7, 2003 a summons and complaint for an action entitled *John Tebo against Brighton Central School District*, bearing Monroe County Index Number 03/1265 was served. By letter dated April 4, 2003, Plaintiff NEW YORK SCHOOLS INSURANCE RECIPROCAL tendered defense of the claim to Defendant American Casualty. American Casualty disclaimed coverage in a letter dated Sept. 7, 2003 citing Section 3. b. of the "Contractor's Blanket Additional Insured Endorsement" which is quoted above.

Coverage

At the time of his accident JOHN TEBO was engaged in an effort to move an air handler at the direction of his employer as part of the work LAWMAN had contracted to perform. Defendant AMERICAN CASUALTY nevertheless contends that TEBO's claim excluded from coverage because the claimed liability arises solely "out of acts or omissions of the additional insured other than in connection with the general supervision of [the work covered by the contract]."

It has been consistently held that "any negligence by the additional insured in causing the accident underlying the claim is not material to the application of the additional insured endorsement. (*Consolidated Edison v United States Fidelity and Guaranty*, 263 AD2d 380, 382 [1st Dept, 1999]). In construing an additional insured endorsement the focus is upon the general nature of the operation from which liability may arise. (*Consolidated Edison v Hartford Insurance*, 203 AD2d 83 [1st Dept, 1994]; *Tishman Construction v CNA*, 236 AD2d 211 [1st Dept, 1997]). Sophisticated commercial entities are free to allocate by contract the risk of liability to third parties by the procurement of liability insurance for their mutual benefit. (*Morel v City of New York*, 192 AD2d 428, 429 [1st Dept, 1993]).

The underlying accident involved a subcontractor's employee engaged in the performance of the contract to which the insurance contract and additional insured endorsement related. At least some of the negligent acts or omissions on the part of Plaintiff DISTRICT specified by John McAulay, Jr., AMERICAN CASUALTY's expert consulting engineer, relate to its interactions with the contractors. Thus, AMERICAN

CASUALTY has failed to meet its "heavy burden of demonstrating that the allegations of the complaint cast the pleadings wholly within that exclusion, that the exclusion is subject to no other reasonable interpretation, and that there is no possible factual or legal basis upon which the insurer may eventually be held obligated to indemnify the insured under any policy provision" (*Frontier Insulation Contractors v Merchants Mutual Ins. Co.,* 91 NY2d 169, 175 (1997); *Morse Diesel International v Olympic Plumbing & Heating,* 299 AD2d 276, 277 [1st Dept, 2002]).

Timeliness of Disclaimer

On April 4, 2002 the plaintiff BRIGHTON CENTRAL SCHOOL DISTRICT, by letter, tendered to AMERICAN CASUALTY the District's defense in the TEBO action based upon the policy purchased by LAWMAN. Attached to the letter was a copy of the notice of claim served upon the District by JOHN TEBO. The notice states in pertinent part;

> " 6. On or about November 26, 2001, at approximately 8:30 a.m., claimant entered a service elevator on respondent's premises being used by workers working on respondent's construction project. A few seconds after claimant stepped onto the aforesaid service elevator, it fell approximately 15 feet to the floor below.
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> * * *
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> 8. Negligence by the Brighton Central School District through its agents, employees and/or servants consisted of, but is not necessarily limited to, allowing claimant and other workmen on its construction site to utilize the aforesaid defective service elevator during the performance of their work duties, failing to warn claimant and other persons similarly situated of the danger create by such defective elevator, and otherwise failing to prevent the occurrence resulting in claimant's injuries."

AMERICAN CASUALTY disclaimed coverage in a letter dated September 7, 2002 on the grounds that the policy excluded coverage for the acts and omissions of the additional insured.

Insurance Law § 3420(d) requires that an insurance company denying coverage shall give written notice of its disclaimer "as soon as is reasonably possible." An unexplained failure by the insurer to give such notice as soon as is reasonably possible after it first learns of the accident or of grounds for disclaimer renders the disclaimer ineffective. (*Hartford Insurance Company v. County of Nassau,* 46 NY2d 1028 (1979)). A

delay of four months in disclaiming after the insurer is in possession of all the information necessary to make its determination has been held to be unreasonable as a matter of law. (*Matter of Aull v Progressive Casualty Ins. Co.*, 300 AD2d 302 [2d Dept, 2002]; *Bernstein v Allstate Ins. Co.*, 199 AD2d 358 [2d Dept, 1993]).

AMERICAN CASUALTY attributes the delay to the fact that it had no idea of the grounds of its disclaimer at the time of the tender and was forced to undertake its own investigation. It complains that it was not provided with a copy of the contract between BRIGHTON CENTRAL SCHOOL DISTRICT and LAWMAN. The essential facts upon which AMERICAN CASUALTY ultimately disclaimed coverage may be found in the TEBO notice of claim which was attached to the tender letter. There was no apparent need to uncover additional pertinent information, and there is no evidence that AMERICAN CASUALTY alerted the insured in a timely fashion to possible grounds for a disclaimer. (*Prudential Property and Casualty Insurance Company v. Mathieu*, 213 AD2d 408 [2nd Dept. 1995]). TEBO's contract hearing testimony was given on July 8, 2002, two months prior to the denial of coverage. AMERICAN CASUALTY has failed to allege any details of its "investigation" or explain how it was impeded by not having a copy of the contract between BRIGHTON CENTRAL SCHOOL DISTRICT and LAWMAN.

The proof demonstrates that the information which AMERICAN CASUALTY needed in making its determination to disclaim, including potential witnesses to the incident, was in its possession for an extended time period prior to its attempt to disclaim.

Based on the proof presented, the plaintiff's motion for summary judgment is Granted to the extent that AMERICAN CASUALTY is directed to defend and indemnify Plaintiff for its costs in the underlying TEBO action and reimburse Plaintiff for all defense costs to date. The question whether LAWMAN failed in its contractual duty with respect to insurance coverage is moot. Based on the foregoing, LAWMAN's motion for summary judgment is also Granted to the same extent. AMERICAN GENERAL's motion for summary judgment is Denied.

In the alternative, it seeks an Order finding that LAWMAN breached its contract with the District in failing to procure the proper requisite insurance, and awarding the DISTRICT and NYSIR, as an intended third party beneficiary, damages for the breach equaling the defense costs and possible indemnity payments.

It is, SO ORDERED.

Dated: June 30, 2004

HON. GEOFFREY J. O'CONNELL, J.S.C

ENTERED

JUL 02 2004

NASSAU COUNTY
COUNTY CLERK'S OFFICE