

IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION

CONSTRUCTURAL DYNAMICS, :
INC. :
v. :
LIBERTY MUTUAL INSURANCE :
COMPANY AND ISRAEL :
SANTIAGO :

NOVEMBER TERM, 2012
NO. 01715
COMMERCE PROGRAM
CONTROL NO. 13102633
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ORDER

AND NOW, this *6th* day of *December*, 2013, upon consideration of the cross-motions for summary judgment of plaintiff, Constructural Dynamics, Inc., and defendant, Liberty Mutual Insurance Company, it is hereby

ORDERED

that plaintiff's motion for summary judgment is **GRANTED**. It is further

ORDERED

that the cross-motion for summary judgment of defendant, Liberty Mutual Insurance Company, is **DENIED**.

BY THE COURT:

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C. HART
CIVIL ADMINISTRATION

Glazer, J.

GLAZER, J.

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**IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION**

CONSTRUCTURAL DYNAMICS, INC.	:	NOVEMBER TERM, 2012
v.	:	NO. 01715
LIBERTY MUTUAL INSURANCE COMPANY AND ISRAEL SANTIAGO	:	COMMERCE PROGRAM
	:	CONTROL NO. 13102633

OPINION

GLAZER, J.

December 6, 2013

Before the court are the cross-motions for summary judgment of plaintiff, Constructural Dynamics, Inc., and defendant, Liberty Mutual Insurance Company. For the reasons set forth below, plaintiff's motion for summary judgment is granted and the cross-motion for summary judgment of defendant, Liberty Mutual Insurance Company, is denied.

FACTS AND PROCEDURAL BACKGROUND

Plaintiff, Constructural Dynamics, Inc. (hereinafter "CDI") commenced the current declaratory judgment action seeking declaration that Liberty Mutual Insurance Company, (hereinafter "Liberty Mutual") is required to defend and indemnify CDI in an underlying litigation. The underlying litigation, Israel Santiago v. Elevator Construction and Repair Company, Riverside Complex, Inc., Constructural Dynamics, Inc. & PKB Contractors, Inc., June Term, 2011, No. 3297, (hereinafter "underlying litigation") arises out of an accident involving defendant Israel Santiago (hereinafter "Santiago").

CDI leased a space to Clarence J. Venne, LLC (hereinafter “Venne”) in the Riverside Industrial Complex. The lease required Venne to obtain commercial general liability insurance, “with a Two Million (\$2,000,000) Dollar combined single limit” and required Venne to name CDI as an additional named insured. See Complaint, Exhibit A. Moreover, “[a]ll insurance carried by Tenant pursuant to [the] Lease shall be primary, not contributory with, and not in excess of, any coverage which Landlord may carry in Landlord’s sole discretion.” Id.

The lease further provides:

17. INDEMNITY BY TENANT; EXONERATION

(a) Tenant hereby agrees to indemnify, defend and hold Landlord harmless from and against any and all claims, actions, damages, losses, liability, penalties, fines, costs and expenses, including reasonable attorneys’ fees and other professional fees and court costs, to the extent arising directly or indirectly from (i) any loss of life, personal injury or property damage occurring (a) in the Building or at the Complex other than in, on, or upon the Premises, to the extent caused, directly or indirectly, by any act or omission of Tenant, its officers, employees, agents, invitees, licensees or contractors; or (b) in, on, or the Premises extent caused, directly or indirectly, by any act or omission of Tenant its officers, employees, agents, invitees, licensees or contractors...

Id.

Moreover, Paragraph 17(d) of the lease provides:

(d) It is the intention of the parties that the provision of this Section 17 shall require Tenant to indemnify and hold Landlord harmless with regard to acts, including negligence of Tenant (and negligence of Landlord, solely in connection with any work-related injury or illness suffered by an employee of Tenant due to Landlord’s negligence where such injury or illness is typically treated as a workman’s compensation claim), which result in harm to any employee of Tenant. This Provision shall be deemed to fulfill the requirements requiring or permitting contribution or indemnity as set forth in, and constitutes an express waiver of defenses and/or immunity afforded Tenant by, the Pennsylvania Workers’ Compensation Act, 77 P.S. Section 481(b), or any similar provision of any similar act.

Id.

Subsequently, Venne obtained commercial general liability insurance policy no. YY7-Z31-509641-029 (hereinafter “the policy”) which provides that, “SECTION II – WHO IS AN INSURED is amended to include as an insured any manager or lessor of premises leased by you in which the written lease agreement obligates you to procure additional insured coverage.” Id. at Exhibit E. Although Venne did not name CDI as an additional named insured, as required by the lease, the policy named CDI as an additional insured. Id. The policy had a coverage period from April 1, 2009 through April 1, 2010. The policy further provides that, “[i]f the written agreement to indemnify an additional insured requires that you indemnify the additional insured for its sole negligence, then coverage for the additional insured shall conform to that agreement.” Id. Moreover, the policy provided that the policy will not be excess and will be primary if a “written agreement ... requires that the insurance provided for the additional insured be primary concurrent or primary non contributory.” Id.

In the underlying complaint, Santiago alleges that on August 31, 2009, during the course of his employment with Venne, he was injured while moving “skids loaded with heavy boxes from the first floor to the second floor using freight elevators at the Subject Premises.” Id. at Exhibit B, ¶ 30. Santiago brought suit against defendants, Elevator Construction and Repair Company, Riverside Industrial Complex Inc., PKB Contractors Inc. and CDI, for various counts of negligence. Venne was not a party to the underlying litigation. Moreover, the underlying litigation settled and thus determinations of the duty to indemnify and the duty defend are both ripe.

DISCUSSION

I. Standard of Review

The court shall enter judgment whenever there is no genuine issue of any material fact as to a necessary element of the cause of action or defense that could be established by additional discovery. Pa.R.C.P. 1035.2. A motion for summary judgment is based on an evidentiary record that entitles the moving party to a judgment as a matter of law. Note to Pa.R.C.P. 1035.2. When considering the merits for summary judgment, a court views the record in the light most favorable to the non-moving party, and all doubts as to the existence of a genuine issue of material fact must be resolved against the moving party. Jones v. SEPTA, 565 Pa. 211, 772 A.2d 435, 438 (Pa. 2001). Further, the court may grant summary judgment only where the right to such a judgment is clear and free from doubt. Marks v. Tasman, 527 Pa. 132, 589 A.2d 205, 206 (Pa. 1991).

Interpretation of an insurance contract is generally performed by a court rather than by a jury. See Gonzalez v. United States Steel Corp., 484 Pa. 277, 398 A.2d 1378 (1979). “Where a provision of a policy is ambiguous, the policy provision is to be construed in favor of the insured and against the insurer, the drafter of the agreement.” Gene & Harvey Builders v. Pennsylvania Manufacturers Assoc. Ins. Co., 517 A.2d 910, 913 (Pa. 1986), *citing* Mohn v. American Casualty Co. of Reading, 458 Pa. 576, 326 A.2d 346 (1974). However, where “the language of the contract is clear and unambiguous, a court is required to give effect to that language.” Id., *citing* Pennsylvania Manufacturers’ Ass’n. Insurance Co. v. Aetna Casualty & Surety Insurance Co., 426 Pa. 453, 233 A.2d 548 (1967).

“The duty to defend is a distinct obligation, separate and apart from the insurer’s duty to provide coverage.” Am. & Foreign Ins. Co. v. Jerry’s Sport Ctr., Inc., 948 A.2d 834, 845 (Pa.

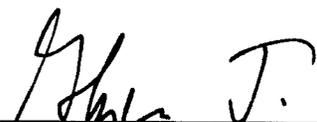
Super. 2008). In Pennsylvania, an insurer's duty to defend is determined by comparing the four corners of the complaint with the relevant policy of insurance. Kvaerner U.S., Inc. v. Commer. Union Ins. Co., 589 Pa. 317, 908 A.2d 888, 896 (2006). Additionally, "if parties intend to include within the scope of their indemnity agreement a provision that covers losses due to the indemnitee's own negligence, they must do so in clear and unequivocal language." Ruzzi v. Butler Petroleum Co., 588 A.2d 1, 4 (Pa. 1991).

Plaintiff argues that pursuant to paragraph 17(d) of the lease, Liberty Mutual is obligated to defend and indemnify it. Conversely, Liberty Mutual alleges that the lease, "does not address whether there is an indemnity obligation if the injury to an employee of Tenant Venne, such as Mr. Santiago, is caused by the sole negligence of Landlord CDI." See Liberty Mutual's brief in opposition to plaintiff's motion for summary judgment, pp. 20. However, this court finds Liberty Mutual's argument to be meritless as the language of the policy is clear and unambiguous. The lease provides that Venne will indemnify CDI for the negligence of CDI, "solely in connection with any work-related injury or illness suffered by an employee of" Venne. See Complaint at Exhibit A. The underlying complaint alleges that Santiago was hurt in the course of his employment by the negligence of CDI and thus coverage is triggered.

CONCLUSION

In light of the evidence, plaintiff's motion for summary judgment is granted and the cross-motion for summary judgment of defendant, Liberty Mutual Insurance Company's is denied. Moreover, judgment is entered in favor of plaintiff Constructural Dynamics, Inc. and Constructural Dynamics, Inc. is entitled to primary non-contributory coverage as an additional insured in the underlying litigation.

BY THE COURT:



GLAZER, J.