

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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SHERWOOD LUMBER CORP.,

Plaintiff,

-against-

MEMORANDUM & ORDER
03-CV-5327(JS)(JO)

PENNSYLVANIA LUMBERMENS MUTUAL
INSURANCE COMPANY,

Defendant.

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Appearances:

For Plaintiff

Thomas J. McNamara, Esq.
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For Defendant

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SEYBERT, District Judge:

On October 23, 2003, Plaintiff Sherwood Lumber Corp. ("Plaintiff" or "Sherwood") commenced this action against Defendant Pennsylvania Lumbermens Mutual Insurance Company ("Defendant" or "PLMIC") for a declaratory judgment that PLMIC was obligated to defend and indemnify Sherwood with respect to a wrongful death action commenced in state court. Pending before the Court are the Parties' cross-motions for summary judgment.

BACKGROUND

The following statement of facts is derived from the Parties' Rule 56.1 Statements and the evidence submitted.

Sherwood is a lumber wholesaler that imports lumber products from mills located throughout the world. (Def.'s R. 56.1

Statement ¶ 2.) PLMIC is an insurance provider. In 1999, PLMIC began providing insurance services to Sherwood. (Def.'s 56.1 ¶ 1.) PLMIC insured Sherwood through 2003. This action concerns PLMIC's duties to Sherwood pursuant to the terms of an insurance policy covering the time period September 6, 2002 through September 6, 2003 ("Policy"). (Pl.'s Rev. 56.1 Statement ¶ 1.) Before discussing any specific provisions or exemptions of the Policy, the Court provides a brief recitation of the underlying accident that served as the impetus for this dispute.

The "Connecticut Action"

On January 13, 2003 Michael Ryckman died in an accident at a warehouse facility operated by Logistic U.S.A., Inc. ("Logistec"). (Def.s' 56.1 ¶ 6; Pl.'s 56.1 ¶ 3.) The warehouse was located in New London, Connecticut. (Pl.'s 56.1 ¶ 2.) Ryckman was an employee of Norwest Express, Inc., a company Sherwood retained to deliver a load of plywood to a New Jersey customer. Ryckman was killed when a bundle of Sherwood's lumber fell on top of him. (Def.'s 56.1 ¶ 10.) The lumber fell from a forklift operated by a Logistec employee, Scott Barlow; Barlow was unloading lumber from a delivery truck when the accident occurred. (Id.) There were no Sherwood employees at the scene of the accident. (Def.'s 56.1 ¶ 7.)

On March 14, 2003, Sherwood received from Logistec a notice of potential claim concerning the accident. (Pl.'s 56.1 ¶ 2.) On March 18, 2003, Sherwood forwarded the notice of claim to

PLMIC. In a letter dated March 19, 2003, PLMIC disclaimed coverage. PLMIC cited the fact that the Policy did not cover products or completed operations. (Def.'s 56.1 ¶ 12.)

On August 11, 2003, Sherwood notified PLMIC that it had been named by Logistec as a third-party apportionment defendant in an action commenced by Ryckman in the United States District Court for the District of Connecticut, Estate of Michael Ryckman v. Logistec, USA, Inc, et al., No. 03-CV-1123(CFD) (the "Connecticut Action"). (Pl.'s 56.1 ¶ 5.) Logistec's Third-party Complaint charged Sherwood with recklessly or negligently causing Ryckman's injury. (Pl.'s 56.1 ¶ 7; Logistec Third-party Compl. ¶ 29.) Specifically, the Third-party Complaint alleged that:

Sherwood, its agents, servants or employees
. . .

a. manufactured, distributed, sold, and/or shipped bundles of plywood with inaccurate, insufficient or misleading markings concerning their characteristics, nature, weight, and/or dimensions, which precluded Defendants from making reasoned, informed decisions regarding the equipment necessary to handle the plywood;

b. manufactured . . . or shipped bundles of plywood under manifests with inaccurate, insufficient or misleading information concerning the characteristics . . . of the plywood bundles, which resulted in Mr. Ryckman's truck being overweight, thereby necessitating the unloading operation;

c. failed and refused to permit Mr. Ryckman to remove only a sufficient number of the plywood bundles to bring his truck within weight limitations . . . ;

d. maintained that the manifested weight of the plywood bundles was accurate despite the contradictory certified weight information Mr. Ryckman obtained from the weigh station and directed Mr. Ryckman to either take the entire consignment or none at all, necessitating the unloading operation; and

e. knew or should have known that the foregoing actions (a-d) would expose Mr. Ryckman to additional, unnecessary dangers and risks associated with the unloading of his truck and/or the operation of an overweight truck.

(Logistec Third-party Compl. ¶ 29.)

In a letter dated August 13, 2003, PLMIC once again denied any obligation to defend or indemnify Sherwood. (Def.'s 56.1 ¶ 12; Pl.'s 56.1 ¶ 6.) PLMIC relied upon the fact that Sherwood's Policy did not cover products liability. (Def.'s 56.1 ¶ 12.)

The Estate of Michael Ryckman then filed a complaint directly against Sherwood. (See Ryckman Compl.) The Ryckman Complaint's factual allegations were based upon the allegations found in Logistec's Third-party Complaint. The Ryckman Complaint alleged that Sherwood was made aware that the plywood was "inaccurately marked," but refused to allow any of the wood to be removed from Ryckman's truck. (Id. ¶¶ 9-10.) The Ryckman Complaint further provides that, "If the allegations of the defendant Logistec are proven true, then the plaintiff's decedent's injuries and death were caused by the negligence and carelessness of the defendant Sherwood . . ." (Id. ¶ 14.) The Ryckman

Complaint contains two claims: common law negligence, and common law recklessness. On January 27, 2004, PLMIC issued a letter denying coverage with respect to the Ryckman Complaint. (Def.'s 56.1 ¶ 13.)

Pertinent Policy Provisions

Sherwood argues that the Policy required PLMIC to defend and indemnify Sherwood with respect to both claims presented in the Connecticut Action. Sherwood relies upon the following provisions of the Policy to support its declaratory judgment application:

Section I - Coverages

1. Insuring Agreement

a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies. We will have the right and duty to defend the insured against any "suit" seeking those damages.

b. This insurance applies to "bodily injury" and "property damage" only if: (1) The "bodily injury" or "property damage" is caused by an "occurrence" that takes place in the "coverage territory."

Section V - Definitions

4. "Coverage Territory" means:

a. The United States of America (including its territories and possessions), Puerto Rico and Canada. . . ."

(Policy at 1, 13.)

PLMIC proffers two bases for disclaiming coverage.

First, PLMIC relies upon the "Products-completed operations hazard" exclusion:

16. "Products-completed operations hazard":

a. Includes all "bodily injury" and "property damage" occurring away from premises you own or rent and arising out of "your product" or "your work" except:

(1) Products that are still in your physical possession or;

(2) Work that has not yet been completed or abandoned. However, "your work" will be deemed completed at the earliest of the following times:

(a) When all the work called for in your contract has been completed.

(b) When all of the work to be done at the job site has been completed if your contract calls for work at more than one job site.

(c) When that part of the work done at a job site has been put to its intended use by any person . . . other than another contractor . . . working on the same project.

b. Does not include "bodily injury" or "property damage" arising out of:

(1) The transportation of property, unless the injury or damage arises out of a condition in or on a vehicle not owned or operated by you, and that condition was created by the "loading or unloading" of the vehicle by any insured.

(Policy at 15.)

In addition, PLMIC relies upon a "classification" found in the Declarations that Sherwood apparently executed in connection

with the Policy. The classification reads: "Buildings or Premises - Office - Premises Occupied by Employees of the Insured," and contains a reference code - "61224." (Commercial General Liability Coverage Pt., Am. Declarations ("Declarations") at 5.) According to PLMIC, the classification 61224 limits PLMIC's coverage to events occurring at Sherwood's headquarters in Islandia, New York. PLMIC supplies (1) a footnote from a webpage that states "classification [61224] applies to premises primarily occupied by the employees of the insured and not generally open to the insured's customers or the general public" (PLMIC Ex. G), (2) the affidavit of a PLMIC Claims Supervisor (Refsin Aff.), and (3) the affidavit of a PLMIC Underwriter (Koch Aff.) to demonstrate the significance of the 61224 classification.

DISCUSSION

The Court first sets forth the appropriate standards of review and then discusses the merits of the Parties' motions. For the reasons explained below, the Court GRANTS Sherwood's motion and DENIES PLMIC's motion.

I. Standard Of Review On A Motion For Summary Judgment

"Summary judgment is appropriate where there is no genuine dispute concerning any material facts, and where the moving party is entitled to judgment as a matter of law." Harvis Trien & Beck, P.C. v. Fed. Home Loan Mortgage Corp (In re Blackwood Assocs., L.P.), 153 F.3d 61, 67 (2d Cir. 1998)(citing Fed. R. Civ.

P. 56(c)); see also Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986).

"The burden of showing the absence of any genuine dispute as to a material fact rests on the party seeking summary judgment." McLee v. Chrysler Corp., 109 F.3d 130, 134 (2d Cir. 1997); see also Adickes v. S.H. Kress & Co., 398 U.S. 144, 157, 90 S. Ct. 1598, 26 L. Ed. 2d 142 (1970). "In assessing the record to determine whether there is a genuine issue to be tried as to any material fact, the court is required to resolve all ambiguities and draw all permissible factual inferences in favor of the party against whom summary judgment is sought." McLee, 109 F.3d at 134.

II. Standards Governing Interpretation Of The Policy

In interpreting the Policy and its scope, the Court relies upon traditional rules of contract interpretation, and those specific rules that apply to insurance contracts. The Parties agree that New York law governs the dispute.

In determining the scope of a contract, the Court is required to "ascertain the parties' intent based on the language they used." Consarc v. Marine Midland Bank, N.A., 996 F.2d 568, 573 (2d Cir. 1993); see Paine Webber, Inc. v. Bybyk, 81 F.3d 1193, 1199 (2d Cir. 1996). A court interprets a contract by looking at the document as a whole. See W.W.W. Assocs., Inc. v. Giancontieri,

77 N.Y.2d 157, 163, 565 N.Y.S.2d 440, 443, 566 N.E.2d 639, 642 (1990); Delduca v. Delduca, 304 A.D.2d 610, 611, 758 N.Y.S.2d 145, 146 (2d Dep't 2003). Undergirding a court's construction of any contract is the manifest purpose of the agreement. See Williams Press, Inc. v. State of New York, 37 N.Y.2d 434, 440, 373 N.Y.S.2d 72, 77, 335 N.E.2d 299, 302 (1975).

Contracts must be interpreted so as to give effect to the contract's primary purpose and conflicting provisions should be read in harmony, if possible. See Schlaifer Nance & Co. v. Estate of Andy Warhol, 119 F.3d 91, 100 (2d Cir. 1997). Where the strict reading of one provision will render another provision meaningless, or without effect, such reading should be rejected. See Manley v. Ambase Corp., 337 F.3d 237, 250 (2d Cir. 2003)

"An insurance policy should be read 'in light of 'common speech' and the reasonable expectations of a businessperson." Pepsico, Inc. v. Winterthur Intern. America Ins. Co., 13 A.D.3d 599, 600, 788 N.Y.S.2d 142 (2d Dep't 2004) (quoting Belt Painting Corp. v TIG Ins. Co., 100 N.Y.2d 377, 383, 763 N.Y.S.2d 790, 795 N.E.2d 15 (2003)). Unambiguous provisions are afforded their plain and ordinary meaning. State Farm Automobile Ins. Co. v. C. Glinbizzi, 9 A.D.3d 756, 757, 780 N.Y.S.2d 434 (3d Dep't 2004). "The wording of limitations or qualifications, as in all language found in insurance policies should be examined in light of the business purposes sought to be achieved by the parties and the

plain meaning of the words chosen by them to effect those purposes. With respect to exclusions from coverage, the same must be set forth clearly and unmistakably, not be subject to any other reasonable interpretation, and fit the particular case." Mount Vernon Fire Ins. Co. v. Belize NY, Inc., 277 F.3d 232, 237 (2d Cir. 2002) (internal quotations, citations omitted).

III. PLMIC's Reliance On The Policy's Exclusions

As explained above, PLMIC proffers two bases for disclaiming coverage: (1) the Products-completed operations hazard exclusion; and (2) the 61224 classification. The Court considers each exclusion in turn.

A. The Products-Completed Operations Hazard Exclusion

PLMIC argues that the Products-completed operations hazard provision plainly excludes coverage for liability arising from products liability suits against Sherwood. PLMIC maintains that, irrespective of the labeling of the claims against Sherwood in the Connecticut Action, such claims are actually products liability claims. PLMIC points out Sherwood's admitted decision not to obtain products liability coverage because it is not a manufacturer of lumber. (PLMIC Mem. of Law at 7,9; Schlosser Dep. at 34-35.)

Sherwood contends that the Products-completed operations hazard exclusion is inapplicable because: (1) the claims alleged in the Connecticut Action are not products liability claims; (2)

Sherwood was in possession of the lumber when the accident occurred; and (3) Sherwood had not "completed" its work when the accident occurred. Of these three proffered reasons, the Court finds the third most compelling. Because the Court finds the exclusion inapplicable because Sherwood had yet to complete its work, the Court need not address Sherwood's other arguments.

The purposes of a products hazard exclusion is to "preclude the insurer's liability for events that occur after its insured's product is placed in the stream of commerce." Matter of Frontier Insulation Contractors v. Merchants Mutual Ins. Co., 91 N.Y. 2d 129, 690 N.E.2d 866, 667 N.Y.S. 2d 982 (1997). One of the key inquiries, therefore, is whether the insured's performance is completed. See Logan's Silo Sales & Svc., Inc. v. Nationwide Mutual Fire Ins. Co., 185 A.D.2d 651, 652, 585 N.Y.S.2d 646 (4th Dep't 1992) (finding exclusion applicable where product had been put to use by the purchaser).

PLMIC repeatedly cites to the fact that Ryckman was injured at a location remote from Sherwood's worksite as evidence that the products hazard exclusion is applicable. PLMIC, however, ignores the fact that Sherwood's work was not "completed" when the injury occurred. The Policy defines "your work" as "(1) work or operations performed by you or on your behalf." (Policy at 15, ¶ 22(a).) Here, Sherwood contracted with Norwest Express to deliver plywood to its New Jersey counter-party, U.S. Lumber at 662 South

Evergreen Avenue, Woodbury Height, New Jersey 08097. (Sherwood Ex. 3). It is not disputed that delivery of the plywood was Sherwood's responsibility under the contract with U.S. Lumber. Therefore, Sherwood's performance was not completed until the goods were delivered. Under a plain reading of the Policy the products hazard exclusion is inapplicable. See Martindale Lumber Co. v. Bituminous Casualty Co., 625 F.2d 618, 622-23 (5th Cir. 1980).

PLMIC asks the Court to draw a distinction because Sherwood retained Norwest through the use of a broker. PLMIC asks the Court to deem Sherwood's work "completed at that point in time when the broker agreed to perform its brokerage services." (PLMIC Opp. at 10.) PLMIC does not proffer any legal or factual basis to support this distinction and the Court finds no reason to find one. Until Sherwood's plywood was delivered to U.S. Lumber, "all the work" in Sherwood's contract had yet to be completed and the products hazard exclusion was inapplicable.

B. Coverage Territory Limitation: Classification 61224

PLMIC argues that its obligation to defend and/or indemnify Sherwood was limited by a policy classification found in a Declaration executed in connection with the Policy. It is not seriously disputed that classification 61224 indicates that "no off premises liability coverage was procured." (PLMIC's Mem. of Law at 16.)

PLMIC relies upon Ruiz v. State Wide Insulation and

Contruction Corp., 269 A.D.2d 518, 703 N.Y.S.2d 257 (2d Dep't 2000) for the proposition that such classifications are part of the Policy and should be afforded their plain meaning. PLMIC points out that the initial sentence of the Policy states, "Various provisions in this policy restrict coverage. Read the entire policy carefully to determine rights, duties and what is not covered." (Policy at 1.) PLMIC insists that the Court must give the classification 61224 its fair meaning and find coverage limited to Sherwood's office in Islandia, New York.

A similar argument was raised in Mount Vernon Fire Insurance Company v. Belize New York, Inc, 277 F.3d at 237. There, the insurer argued that its risk was limited in accordance with a classification set forth in the policy. The Second Circuit noted that the "limitation [was] nowhere apparent in the plain meaning of the words chosen by the parties to effect the purpose sought to be achieved[;] . . . the Policy d[id] not contain any specific language indicating that the classifications determine the scope of the coverage." Applying New York law, the Second Circuit rejected the notion that a mere classification was sufficient to support a limitation of coverage. The Mount Vernon court explained:

Neither case [relied upon by the insurer] stands for [the] . . . assertion that classifications alone may serve to limit coverage. . . . The question before us is not whether an exclusion applies or whether the specific coverage provided does not include a particular risk. The question before us is whether the Policy's classification listings

themselves constitute a limitation.

[Adoption of the insurer's] argument would allow insurance companies to limit the scope of coverage based merely on the classifications contained in an insurance policy. This result would run contrary to the New York requirement that an exclusion must be stated in "clear and unmistakable language" that is not subject to another reasonable interpretation. The limitation argued for by [the insurer] is by no means stated in clear and unmistakable language, and no reasonable interpretation can make it so. The Policy simply fails to provide that the classifications define the covered risks.

[The insurer's] . . . argument would enable an insurer to limit its policy coverage through classification listings without alerting the insured to the limitation. Were we to accept this argument, insurers would be permitted to argue for limitations of all kinds by invoking the stand-alone words of classification not otherwise referred to in a policy. If Mount Vernon wished to limit the coverage based on classifications, it should have done so specifically. [The insurer] contends that it calculated its premiums based on the number of Belize's employees engaged in carpentry. However, it failed to include in its Policy any indication that it limited its risk to carpentry operations. It therefore is precluded from denying coverage here.

Mount Vernon, 277 F.3d 232, 238-39 (2d Cir. 2002) (relying on County of Columbia v. Continental Ins. Co., 83 N.Y.2d 618, 612 N.Y.S.2d 345, 634 N.E.2d 946 (1994)).

Here, the Policy plainly provided for a coverage territory of the "United States of America (including its territories and possessions), Puerto Rico and Canada. . . ." There was no language in the Policy or the Declaration indicating that

coverage was limited to Sherwood's headquarters in Islandia - only a classification "61224." Such a significant limitation should have been specifically provided in the language of the Policy. The failure to specifically include the exclusion/limitation renders it unenforceable. See Mount Vernon, 277 F.3d at 238-39.

Accordingly, the Court finds that PLMIC is obligated to defend and indemnify Plaintiff with respect to the Connecticut Action.

CONCLUSION

For the reasons explained above, Sherwood's motion for summary judgment is GRANTED and PLMIC's motion for summary judgment is DENIED. Sherwood's request for a declaratory judgment is GRANTED. The Court finds that, pursuant to the Policy, PLMIC has a duty to defend and/or indemnify Sherwood with respect to the Connecticut Action. To the extent Sherwood seeks damages pursuant to its second cause of action, the Court refers this matter to Magistrate Judge James Orenstein for a Report and Recommendation on the appropriate amount of damages.

SO ORDERED

/s/ JOANNA SEYBERT
Joanna Seybert, U.S.D.J.

Dated: March 29, 2006
Central Islip, New York