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

NGM INSURANCE COMPANY	:	August Term, 2011
and	:	Case No. 003261
VALLOR CORPORATION, INC.	:	
Plaintiffs	:	
v.	:	
C&H SERVICES, LLC	:	Commerce Program
and	:	
SELECTIVE WAY INSURANCE CO.	:	
and	:	
GARRET HAMPSON AND MARY HAMPSON, H/W	:	Control No. 11110172
Defendants	:	

ORDER

AND NOW, this 31st day of January, 2012, upon consideration of the Preliminary Objections of Selective Way Insurance Co. and C&H Services, LLC, the responses of Plaintiffs, NGM Insurance Company and Vallor Corporation, Inc. and their "Motion to Dismiss the Preliminary Objections," the respective memoranda of law, the reply of Defendant Selective Way Insurance Co. and the sur-reply of Plaintiffs, it is **ORDERED** that the Preliminary Objections are **SUSTAINED** as to Defendant Selective Way Insurance Co. and **OVERRULED** as to Defendant C&H Services, LLC.

By The Court,

ALBERT JOHN SNITE, JR., J.

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GARRET HAMPSON AND MARY HAMPSON, H/W	:	
Defendants	:	

OPINION

The Preliminary Objections of Defendants Selective Way Insurance Company and C&H Services, LLC require this Court to determine whether Plaintiff Vallor Corporation, Inc. is an insured under a General Commercial Liability Policy purchased by Defendant C&H Services, LLC. For the reasons below, Plaintiff Vallor Corporation, Inc. is not an insured under the policy purchased by Defendant C&H Services.

Background[1]

[1] Unless specifically noted, the facts herein are gleaned from the allegations contained throughout the

Plaintiff, NGM Insurance Company ("NGM Insurance,") is a Florida-based insurance provider licensed to sell policies in Pennsylvania. Plaintiff, Vallor Corporation, Inc. ("Vallor,") is a Pennsylvania business engaged in the construction trade. At all times relevant to this action, Vallor was general contractor at a construction project owned by an entity named Smurfit-Stone Container Enterprises, Inc. ("Smurfit.") The construction project was in Philadelphia, Pennsylvania. Defendant C&H Services, LLC ("C&H,") is a construction business located in Philadelphia, Pennsylvania. At all times relevant to this action, C&H operated as a subcontractor to Vallor. Defendant, Selective Way Insurance Co. ("Selective Insurance,") is an insurance company based in New Jersey and licensed to sell policies in Pennsylvania. Defendant Garrett Hampson ("Mr. Hampson,") is an individual residing in Philadelphia, Pennsylvania. At all times relevant to this action, Mr. Hampson was employed by C&H and was performing construction work at the Smurfit site. In addition to being a defendant in the instant action, Mr. Hampson is also plaintiff in an underlying action (the "Underlying Action,") filed against Vallor and Smurfit.

On 10 October, 2007, Smurfit entered into a construction contract with Vallor. Pursuant to the contract, Vallor agreed to act as agent and general contractor on behalf of Smurfit, "in connection with the construction of a building ... located at Smurfit's manufacturing site," in Philadelphia, Pennsylvania.[2]

On 19 October 2007, Vallor, as general contractor of Smurfit, entered into a sub-

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Declaratory Judgment Complaint of instant Plaintiffs, NGM Insurance Company and Vallor Corporation, Inc., and the underlying complaint, Hampson v. Vallor Corporation, Inc. and Smurfit-Stone Container Enterprises, Inc., Case No. 0809-03493, Court of Common Pleas, Philadelphia County.

[2] Hampson v. Vallor Corporation, Inc. and Smurfit-Stone Container Enterprises, Inc., Case No. 0809-03493, ¶ 17.

contract with C&H (the "Sub-contract.") The Sub-contract stated in part:

> 14. Injuries to Subcontractors or Employees
>
> Subcontractor agrees to:
> Obtain adequate business liability insurance that will cover job and any injuries to Sub-contractors or employees....
>
> * * *
>
> NOTE: VALLOR CORPORATION MUST BE LISTED AS A **NAMED INSURED.**
>
> **CERTIFICATE OF INSURANCE MUST BE SENT TO VALLOR BEFORE THE START OF ANY WORK.**[3]

Following execution of the Sub-contract, C&H obtained insurance from Selective Insurance, for the period beginning 1 February 2008, and ending 1 February 2009. Although the Sub-contract specifically required C&H to list Vallor as a "named insured," Vallor was not listed as a "named insured" anywhere in the declarations page of the policy.[4]

On 14 June 2008, while construction proceeded—

> Mr. Hampson (employed by C&H,) was requested by ... Vallor ... to cut through some steel beams on the job site to create a large door opening ... to get from the old building to the new addition at The Smurfit Site.[5]

An insulation panel, weighing approximately 75 lbs., was affixed to the wall of the old building, at a height of eight feet. Allegedly, the panel was fastened improperly upon the wall. While Mr. Hampson was cutting the wall-opening requested by Vallor, the improperly fastened panel fell to the ground and struck Mr. Hampson in the hand.

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[3] Sub-contract agreement between Vallor and C&H, Exhibit C to the Preliminary Objections of Selective Insurance (emphasis supplied).
[4] Commercial Policy Common Declaration, attached as Exhibit F, part 1 to the Declaratory Action Complaint of Plaintiff Selective Insurance.
[5] Underlying Complaint, Case No. 0809-03493, ¶ 17.

The hand was severed at or above the wrist.[6]

In September 2008, Mr. Hampson and his wife filed the Underlying Action against Vallor and Smurfit. In the Underlying Action, Mr. Hampson asserted the claim of negligence against Vallor and Smurfit, and negligent training-and-supervision against Vallor alone. Mrs. Hampson asserted against Vallor and Smurfit the single claim of loss of consortium.[7]

On 25 August 2011, Vallor and its insurer, NGM Insurance, filed the instant Declaratory Judgment Action. The "Wherefore" clauses in the Complaint of Vallor and NGM seek a declaration that Selective Insurance owes a duty to defend and indemnify Vallor in the Underlying Action.

On 1 November 2011, more than two months after service of the Complaint, Selective Insurance filed the instant Preliminary Objections. On 8 November 2011, Defendant C&H joined in the Preliminary Objections of Selective Insurance, and incorporated in its pleading the objections raised by Selective Insurance. Plaintiffs Vallor and NGM Insurance timely filed their Response to the Preliminary Objections.

Discussion[8]

The standard for preliminary objections requires that

> All material facts set forth in the complaint as well as all inferences reasonably deducible therefrom are admitted as true.... The question presented by the demurrer is whether, on the facts averred, the law says with certainty that no

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[6] Underlying Complaint, Case No. 0809-03493. ¶ 28.

[7] Hampson v. Vallor Corporation, Inc. and Smurfit-Stone Container Enterprises, Inc., Case No. 0809-03493,

[8] Although the Preliminary Objections of Selective Insurance were untimely filed, "The court at every stage ... may disregard any error or defect of procedure which does not affect the substantial rights of the parties." Pa. R.C.P. 126. This Court will disregard the untimely filing and rule upon the Preliminary Objections. The substantial rights of the parties are not affected because the issues of law presented by the instant Preliminary Objections would be resolved the same way under any motion filed later in the action.

> recovery is possible. Where a doubt exists as to whether a demurrer should be sustained, this doubt should be resolved in favor of overruling it.[9]

I. Vallor is neither a "named insured" nor an "additional insured" under the policy issued by Selective Insurance.

In its Preliminary Objections, Selective Insurance asserts that Vallor was not a "named insured" under the policy purchased by C&H because Vallor's name appears nowhere in the Declarations page of the policy, or anywhere else therein. Selective Insurance also asserts that Vallor does not qualify as an "additional insured" under the policy because—

> the facts in the underlying complaint ... allege that [Mr.] Hampson' injuries were caused by Plaintiff Vallor's negligence, as opposed to C&H's ongoing operation....[10]

In the Response to the Preliminary Objections, NGM Insurance generally denies the assertions of Selective Insurance, but fails to specifically deny the assertion that the injury suffered by Mr. Hampson was not caused by the ongoing operation of C&H.[11] Thus, to determine whether Selective Insurance owes a duty to defend Vallor as an "additional insured," this Court will analyze the allegations raised by Mr. Hampson in the Underlying Complaint.

In Pennsylvania,

> An insurer's duty to defend and indemnify the insured may be resolved via declaratory judgment actions.... In such actions, the allegations raised in the underlying complaint alone fix the insurer's duty to defend.[12]

The Underlying Complaint filed by Mr. Hampson alleges as follows:

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[9] Emplrs. Ins. of Wausau v. DOT, 581 Pa. 381, 389; 865 A.2d 825, 830 (Pa. 2005).
[10] Preliminary Objections of Selective Insurance, ¶ 13.
[11] Response of Plaintiff NGM Insurance, ¶ 13.
[12] Penn-America Ins. Co. v. Peccadillos, Inc., 2011 Pa. Super 176; 27 A.3d 259, 265 (Pa. Super. 2011) (citing Erie Insurance Exchange v. Claypoole, 449 Pa. Super. 142, 673 A.2d 348, 355 (1996)).

> On or around June 14, 2008, **Mr. Hampson (employed by C&H) was requested by Defendant Vallor ... to cut through some steel beams on the job site** to create a large door opening inward to get from the old building to the new addition at the Smurfit Site.
>
> * * *
>
> **At that time and without any prior warning, one of the insulation panels ... fell and severed [Mr. Hampson's] hand and wrist....**
>
> * * *
>
> **As a result and proximate result of Defendants' [Vallor and Smurfit] negligent conduct, Plaintiff [Mr. Hampson] was permanently injured....**[13]

This Court has not doubt: the allegations above do not assert that Mr. Hampson's injury was caused in any way by C&H; rather, the allegations assert that Mr. Hampson suffered injury stemming from work performed at the specific request of Vallor.

Thus, having determined that the Underlying Complaint asserts negligence exclusively against Vallor and not against C&H, this Court turns to the language of the policy to determine whether Vallor qualifies as an "additional insured." If Vallor qualifies as an "additional insured," Selective Insurance will have a duty to defend or indemnify Vallor in the Underlying Action.

> The task of interpreting an insurance contract is generally performed by a court rather than by a jury. The goal of that task is ... to ascertain the intent of the parties as manifested by the language of the written instrument. 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. Where, however, the language of the contract is clear and unambiguous, a court is required to give effect to that language.[14]

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[13] Underlying Complaint, ¶¶ 17, 28, 33 (emphasis supplied).
[14] Madison Constr. Co. v. Harleysville Mut. Ins. Co., 557 Pa. 595, 606; 735 A.2d 100, 106 (Pa. 1999).

The pertinent section of the insurance policy issued to C&H states:

> **THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.**
>
> * * *
>
> **WHO IS AN INSURED** is amended to include as an additional insured any person or organization with whom you have agreed in writing in a contract, agreement or permit 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" or "property damage" caused, in whole or in part, by:
>
> 1. Your **ongoing operations** performed for that person or organization, "your product," or premises owned or used by you....
> 2. **Your maintenance, operation or use of equipment**, other than aircraft, "auto" or watercraft, **leased to you by such person or organization**....
> 3. "Bodily injury" or "property damage" arising out of "your products" which are distributed or sold in the regular course of the vendor's business....[15]

This language is clear and unambiguous: under the policy, an "additional insured" is a person or organization whom C&H agreed in writing to include in the policy, **but only with respect to liability for bodily injury or property damage caused ... by [the] ongoing operations of C&H, or the maintenance and operation of equipment by C&H, or for bodily injury and property damage caused by the products of C&H**. The Underlying Complaint does not allege that the injury suffered by Mr. Hampson arose out of the "ongoing operations of C&H," or out of the "maintenance and operation of equipment by C&H", or out of "bodily injury or

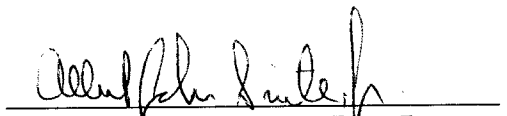
[15] ElitePac General Liability Extension, Policy No. 72 02 07 04, attached as Exhibit F to the Declaratory Judgment Complaint, p.5 of 8 (some emphasis supplied).

property damage caused by any products of C&H." Rather, the Underlying Complaint asserts that Mr. Hampson was performing work specifically requested by Vallor when he suffered catastrophic injury. Pursuant to the language in the Underlying Complaint, and upon a reading of the pertinent section of the insurance policy, this Court concludes that Vallor is not an insured thereunder. Vallor is not a "named insured" because its name is not listed as such anywhere in the policy; Vallor is not an "additional insured" because the injury suffered by Mr. Hampson did not arise out of any "ongoing operations," or the "maintenance and use of equipment," or any "products" of C&H.

The Preliminary Objections of Selective Insurance are sustained, and the Declaratory Judgment Complaint, as asserted against Selective Insurance, is dismissed. Selective has no duty to defend or indemnify Vallor in the Underlying Action captioned Garret Hampson and Mary Hampson, h/w, v. Vallor Corporation, Inc. and Smurfit–Stone Container Enterprises, Inc., Case No. 0809-03493, filed in the Court of Common Pleas, Philadelphia County.

The Preliminary Objections of Defendant C&H Services, LLC are overruled. A cause of action may lie against C&H Services for its failure to include Vallor as a "named insured," as required under the Vallor—C&H Services Sub-contract.

By The Court,



ALBERT JOHN SNITE, JR., J.