

DOCKETED

MAY - 4 2018

R. POSTELL
COMMERCE PROGRAM

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

VS CONSTRUCTION SERVICES, LLC	:	December Term, 2016
	:	No. 00136
<i>Plaintiff</i>	:	
	:	
v.	:	Commerce Program
	:	
MAIN STREET AMERICA ASSURANCE COMPANY,	:	
I.J.S., INC. d/b/a IAN STEWART,	:	
RHONDELL WARFIELD,	:	
ALLAN INDUSTRIES, INC.,	:	
CHEST—PAC ASSOCIATES, LP and	:	
GH PROPERTY MANAGEMENT, LLC	:	Control Nos. 18022677,
	:	18022961.
<i>Defendants</i>	:	

ORDER

AND NOW, this 4th day of May, 2018, upon consideration of the motion for partial summary judgment of plaintiff VS Construction Services, LLC, the motion for summary Judgment of defendant I.J.S., Inc. d/b/a Ian Stewart, and the parties' responses and *memoranda* of law, it is **ORDERED** as follows:

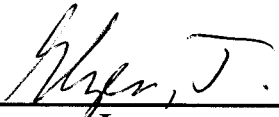
- I. Plaintiff's motion for partial summary judgment is **GRANTED** and plaintiff qualifies as an additional insured under insurance policy No. MPU9625E issued by defendant Main Street Assurance Company. Defendant Main Street Assurance Company is required to undertake the defense of herein plaintiff in the underlying action captioned Rhondell Warfield v. VS Construction Services, LLC et al., case No. 1510-01575, filed in the Court of Common Pleas, Philadelphia County.

Vs Construction Service-ORDOP



II. The motion for summary judgment of defendant I.J.S., Inc. d/b/a Ian Stewart is **GRANTED** and the claim of breach-of-contract asserted in Count II of the instant complaint is **DISMISSED**.

BY THE COURT,



GLAZER, J.

MEMORANDUM OPINION

The motion for partial summary judgment requires this court to determine whether plaintiff is an additional insured under a policy of insurance, and, if so, whether the insurer is obligated to defend plaintiff in an underlying action. For the reasons below, the court finds that plaintiff is an additional insured under the policy and the insurer is obligated to defend plaintiff in the underlying action.

The motion for summary judgment filed by defendant I.J.S., Inc. d/b/a Ian Stewart requires this court to determine whether the claim of breach-of-contract asserted by plaintiff in the instant action should be dismissed under the doctrine of *lis pendens*. For the reasons below, the court finds that the claim of breach-of-contract asserted by plaintiff in the instant action shall be dismissed pursuant to the doctrine of *lis pendens*.

BACKGROUND

Plaintiff VS Construction Services, LLC (“Contractor”), is a Pennsylvania company engaged in the management of construction projects. Defendant I.J.S., Inc. d/b/a Ian Stewart (“Subcontractor”), is a Pennsylvania corporation engaged in the construction trade. Defendant Main Street America Assurance Company (the “Insurer”), provides insurance policies to companies engaged in the construction trade.¹

On July 17, 2013, Contractor and Subcontractor entered into a SUBCONTRACT AGREEMENT (the “Agreement”). Pursuant to the Agreement, Subcontractor was

¹ In this action, plaintiff originally named other parties as defendants/insurers. Subsequently, the parties stipulated that Main Street America Assurance Company would take the place of such improperly-named defendants. See motion for summary judgment of defendant I.J.S., Inc. d/b/a/ Ian Stewart, ¶ 2 of motion control No. 18022961; admission of plaintiff VS Construction Services, LLC in its response in opposition at ¶ 2.

obligated to provide labor and materials to a construction project (the “Project”), located on the second and third floors of a building in Philadelphia, Pennsylvania (the “Premises”).² Under the terms of the Agreement, Subcontractor was also obligated to insure Contractor for a period that began with performance of the work and extended into the warranty period thereafter.³ The Agreement specifically set the minimum amount of commercial liability and personal injury insurance, to be no less than \$2,000,000.00 per each occurrence.⁴ Consistent with the requirements in the Agreement, Subcontractor obtained a policy of insurance, No. MPU9625E (the “Policy”), issued by the Insurer.⁵ The Policy named Contractor as an additional insured.⁶

On September 11, 2015, an individual named Rhondell Warfield (“Warfield”), commenced a slip-and-fall action against Contractor, Subcontractor, Insurer, and other parties (the “Underlying Action”). In the “Underlying Complaint,” Warfield specifically alleged that the slip-and-fall accident had occurred while Warfield, as a business invitee, was descending from the 7th to the 4th floor of the Premises. Warfield further averred that the fall, and the injuries suffered therefrom, had been caused by the presence of dirt, dust and debris upon the stairs.⁷ The complaint in the Underlying Action averred a single claim of negligence against all defendants, including Contractor.

On June 7, 2016, a representative of Contractor tendered to the Insurer a request for defense and indemnification in the Underlying Action.⁸ On July 20, 2016 and

² Subcontract Agreement, Exhibit, p. 1, Exhibit 2, to the complaint of Contractor and Exhibit D–SCOPE OF WORK.

³ Id., at L–INSURANCE REQUIREMENTS.

⁴ Id.

⁵ Policy, Exhibit D (Scope of Work), to the motion for summary judgment of Contractor, motion control No. 18022677.

⁶ Id. at Contract Extension Endorsement No. BPM 3105 1207.

⁷ Complaint in the Underlying Action, Exhibit 1 at ¶ 7.

⁸ E-mails, Exhibit 5 to the complaint.

August 3, 2016, Contractor forwarded two additional request for defense and indemnification.⁹ On September 19, 2016, the Insurer forwarded to Contractor a letter rejecting the tender of claim for defense and indemnification. The letter of rejection stated in part that—

[t]he complaint [filed by Warfield] states that ... [Warfield] was walking down the NE stairwell from the seventh floor to the fourth floor when she was caused to fall down because of dirt, dust and debris on the stairwell. Our investigation has determined that our insured [the Subcontractor] was hired to perform work on the second and third floors of the [P]remises and that they [sic] were working nowhere near the accident area or stairwell. Based on the above, the loss did not arise out of our insured's operations and therefore, our Contractors' Insurance Endorsement is not triggered nor is your client endorsed onto our policy as an additional insured. We must respectfully deny the tender request in its entirety.¹⁰

On October 25, 2016, Contractor filed in the Underlying Action an answer to the complaint with new matter, and asserted a cross-claim therein against Subcontractor. Through the cross-claim, Contractor seeks a ruling which would require Subcontractor to defend and indemnify Contractor.¹¹ The cross-claim specifically states as follows:

Pursuant to ... the terms and Conditions of the Agreement ... [Subcontractor] is obligated to defend and indemnify ... [Contractor] in this matter.¹²

On December 5, 2016, Contractor filed the instant declaratory judgment action against the Insurer, the Subcontractor, Warfield, and other parties. Contractor asserts in Count I of the complaint that the Insurer has a duty to defend and indemnify

⁹ Id.

¹⁰ Rejection-of-coverage letter, Exhibit 6 to the complaint.

¹¹ Answer to the Underlying Complaint with new matter and cross-claim asserted against I.J.S., Inc. d/b/a/ Ian Stewart at ¶ 23, dated October 25, 2016, case No. 1510-01575.

¹² Id.

Contractor in the Underlying Action.¹³ Count II of the instant complaint asserts a claim for breach-of-contract against the Subcontractor. Specifically, the wherefore clause in Count II avers that the Contractor—

demands judgment in its favor and against ...
[Subcontractor] and seeks an award of money damages
including the costs of defense in the Underlying Action and
indemnification for any judgment, settlement or damages
awarded against ... [Contractor] in the Underlying Action,
along with interest, costs of suit, attorney fees and any other
damages as the Honorable Court may find just.¹⁴

Finally, Count III of the complaint asks the court to rule that the Contractor is an additional insured under the Policy obtained by the Subcontractor.¹⁵

On February 19, 2018, Contractor filed a motion for partial summary judgment asking the court to issue two rulings: first, that Contractor qualifies as an additional insured under the policy, and second, that the Insurer has a duty to defend the Contractor in the Underlying Action.¹⁶ On February 20, 2018, the Subcontractor filed a motion for summary judgment asking the court to dismiss the Contractor's claim for indemnification on grounds that such a claim duplicates the claim which Contractor asserts as a cross-claim in the Underlying Action. In the alternative, the Subcontractor's motion for summary judgment asserts that the claim for indemnification in the instant action should be dismissed as legally premature. Finally, the Subcontractor's motion for summary judgment asserts that the Contractor's claim of breach of contract must be dismissed because the Subcontractor did procure insurance for the benefit of Contractor and did not breach such an obligation as required in the Agreement.

¹³ Compliant, Count I, wherefore clause.

¹⁴ *Id.*, ¶ wherefore clause to Count II.

¹⁵ *Id.*, Count III, wherefore clause.

¹⁶ Motion for summary judgment of Contractor, suggested Order.

DISCUSSION

The standards for summary judgment are well settled in Pennsylvania:

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.... Under the ... [Pennsylvania Rules of Civil Procedure], a motion for summary judgment is based on an evidentiary record that entitles the moving party to judgment as a matter of law.... In considering the merits of a motion 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.... Finally, a court may grant summary judgment only where the right to such judgment is clear and free from doubt.¹⁷

I. Contractor is an additional insured under the Policy.

In its motion for partial summary judgment, Contractor argues that it is an additional insured under the Policy and that the Insurer owes a duty to defend the Contractor in the underlying Action. To determine whether Contractor is an additional insured, the court turns to the pertinent language of the relevant documents –in this case, the Agreement and the Policy.¹⁸ Exhibit L to the Policy, titled “Insurance Requirements,” states that—

Subcontractor shall ... furnish and maintain ... at all times during its performance of the Work, including the Warranty Period ... the following insurance...

- (1) Commercial General Liability, including premises operations ... [and] personal injury....

All of the above insurance shall protect Owner, Contractor and Subcontractor from any claims that may arise out of, or result from, Subcontractor’s performance under the

¹⁷ Ario v. Ingram Micro, Inc., 965 A.2d 1194, 1199–200 (Pa. 2009).

¹⁸ “The task of interpreting a 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. Humberston v. Chevron U.S.A., Inc., 75 A.3d 504, 510 (Pa. Super. 2013).

Subcontract Agreement....

The minimum amounts of insurance coverage to be provide by Subcontractor under the Subcontract shall be ... the following minimum amounts:

(1) Commercial General Liability:

(a) General Aggregate (per project) — \$2,000,000.¹⁹

Next, the court turns its attention to the language of a specific endorsement within the Policy. The endorsement states as follows:

Contract Extension Endorsement

This endorsement modifies insurance provided under the following:

A. Additional Insured

Each of the following is added to paragraph C Who is an Insured....

1. Any person(s) or organization(s) for whom you [Subcontractor] are performing operations is also an additional insured when you and such a person or organization have agreed in writing in a contract ... that such a person or organization be added as an additional insured on your policy. Such person or organization is an additional insured only with respect to “bodily injury,” “property damage,” [etc.] caused in whole or in part by:

- a. Your acts or omissions....²⁰

The clear language in the Agreement and Policy leaves this court with no doubt:

Subcontractor agreed to include Contractor as an additional insured under the Policy,

¹⁹ Policy, Exhibit D to the motion for summary judgment of Contractor, motion control no. 18022677, at Exhibit L thereunder—Insurance Requirements.

²⁰ Id., at Contract Extension Endorsement No. BPM—3105—1207.

and the Policy clearly and unambiguously includes as an additional insured any organization for whom the Subcontractor was performing work. At the time of the slip-and-fall accident, Subcontractor was performing work on behalf of Contractor pursuant to the Agreement found at Exhibit 2 to the complaint. For these reasons the court finds that Contractor is an additional insured under the Policy.

II. The allegations in the Underlying Complaint comprehend an injury that is actually or potentially within the scope of the policy.

The Contractor also argues that the Insurer is required to provide a defense in the Underlying Action. To test whether such a duty exists, the court turns to a well-settled principle of law which states that—

[t]he insurer's obligation to defend is fixed solely by the allegations in the underlying complaint.... The duty to defend is limited to only those claims covered by the policy. The insurer is obligated to defend **if the factual allegations of the complaint on its face comprehend an injury which is actually or potentially within the scope of the policy.**²¹

In this case, the Underlying complaint avers that Warfield suffered injury as a result of the defendants' "failure to keep the stairwell/staircase clear of dirt, dusts and debris which made it unsafe ... to lawfully walk inside the Premises."²² The afore-quoted allegations from the Underlying Complaint comprehend an injury which is **actually or potentially** within the scope of the Policy. For this reason, the court finds that the Insurer is obligated to undertake the defense of Contractor in the Underlying Action.²³

²¹ Erie Ins. Exch. v. Muff, 851 A.2d 919, 926 (Pa. Super. 2004) (emphasis supplied).

²² Complaint in the Underlying Action, Exhibit 1 to the instant complaint at ¶7.

²³ In the response to the Contractor's motion for partial summary judgment, the Insurer argues that no duty to defend was triggered because the slip-and-fall accident occurred outside of the contractually designated work-area within the Premises. Essentially, the Insurer argues that Contractor may be deemed an "additional insured" only for work performed by Subcontractor in the "location designated" in the Agreement—that is, only on the 2nd and 3rd floor of the Premises. The Insurer concludes that in this case Contractor is not an "additional insured" because the accident allegedly occurred somewhere between the 4th and 7th floor of the Premises. See response of Insurer to the motion for summary

III. The complaint for declaratory judgment and breach of contract is dismissed as to defendant I.J.S., Inc. d/b/a Ian Stewart, herein Subcontractor.

In its motion for summary judgment, Subcontractor notes that Contractor filed in the Underlying Action a cross-claim for indemnification against Subcontractor.²⁴

Subcontractor notes that Contractor also advances a separate claim for indemnification against Subcontractor in Count II of the instant declaratory judgment/breach-of-contract action.²⁵ Subcontractor concludes that the instant claim for breach-of-contract must be dismissed under the doctrine of *lis pendens*.²⁶

Under Pennsylvania law—

to plead successfully the defense ... [based on] the pendency of a prior action, it must be shown that the prior case is the same, the parties are the same, and the relief requested is the same. The purpose of the *lis pendens* defense is to protect a defendant from harassment by having to defend several suits on the same cause of action at the same time. The doctrine of *lis pendens* requires that the prior action be pending. Under Pennsylvania law, the question of a pending prior action is purely a question of law determinable from an inspection of the pleadings.²⁷

Turning to the first pertinent pleading –that is, the pending cross-claim asserted by Contractor in the Underlying Action– the court notes that Contractor seeks to recover defense costs and indemnification from the Subcontractor.²⁸ Turning to the second pertinent pleading –in this case, Count II of the instant complaint– the court notes that Contractor seeks to recover from Subcontractor the costs of defense expended in the

judgment of Contractor, control No. 18022677. This argument is rejected because the court at this stage perceives the existence of disputed questions of fact, including whether airborne dust allegedly produced by the Subcontractor in the designated work-area, if any, was improperly or negligently allowed to migrate to the location where the slip-and-fall accident occurred.

²⁴ Motion for summary judgment of Contractor, control No. 18022961 at ¶ 5.

²⁵ *Id.*, at ¶ 6.

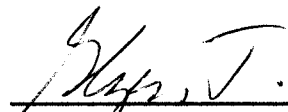
²⁶ *Id.*, at ¶ 7.

²⁷ *Crutchfield v. Eaton Corp.*, 806 A.2d 1259, 1262 (Pa. Super. 2002).

²⁸ Answer with new matter cross-claim against Subcontractor, at ¶ 23, *Rhondell Warfield v. VS Construction et al.*, case No. 1510-01575.

Underlying Action, and seeks indemnification for any damages as may be awarded against contractor.²⁹ Stated another way, Contractor seeks in the instant action the same relief which it seeks in the underlying cross-claim. In addition, the court finds not only that the parties in the two actions are the same, but also that the prior, pending cross-claim action is the same as the action asserted by Contractor in the instant complaint. Based on the foregoing, this court finds that Subcontractor has successfully pled the defense of *lis pendens*, and for this reason the motion for summary judgment of Subcontractor is granted and Count II of the instant complaint is dismissed.

BY THE COURT,



GLAZER, J.

²⁹ Count II of the instant complaint, wherefore clause.