SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MANUEL J. MENDEZ *Justice* **PART** 13

TOWER INSURANCE COMPANY OF NEW YORK,

Plaintiff,

-against-

MORE RESTORATION CO. INC., H&B CONSTRUCTION NY INC., EEC GROUP TECH INC., KRAUS MANAGEMENT INC., FRANKLIN KITE HOUSING DEVELOPMENT FUND CORPORATION, ZBIGNIEW RUCINSKI, KADRYNA RUCINSKI, and SKYLIGHTS BY GEORGE, INC.

Defendants.

INDEX NO.	156407/2015
MOTION DATE	11/16//2016
MOTION SEQ. NO.	001
MOTION CAL. NO.	

The following papers, numbered 1 to 15 were read on this motion for summary judgment, and default motion.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1 - 6
Answering Affidavits — Exhibits	7 - 11
Replying Affidavits	12 - 13; 14 - 15

Cross-Motion: X Yes ☐ No

Upon a reading of the foregoing cited papers, it is Ordered that Plaintiff's motion for: (1) a default judgment against Defendants More Restoration Co. Inc. (herein "More"), H&B Construction NY Inc. (herein "H&B"), EEC Group Tech. (herein "EEC"), and Skylights By George, Inc. (herein "Skylights") (collectively herein "Defaulting Defendants"), and (2) summary judgment against Defendants Kraus Management Inc. (herein "Kraus"), Franklin Kite Housing Development Fund Corporation (herein "Franklin"), Zbigniew Rucinski (herein "Z. Rucinski"), and Kadryna Rucinski (herein "K. Rucinski") (collectively herein "Answering Defendants"), for an Order declaring that Plaintiff has no duty to defend and indemnify Defendant More Restoration Co. Inc., is denied with leave to renew.

Plaintiff Tower Insurance Company of New York (herein "Plaintiff Tower") commenced this action seeking a declaration that it has no obligation to defend or indemnify Defendant More in an underlying personal injury action brought by Defendants Z. Rucinski and K. Rucinski, in Bronx County Supreme Court under Index No. 303087/2012.

Tower asserts that in 2011, based on More's application (Aptman Aff. in Supp. Exh. 1), Tower issued commercial general liability insurance policy number CLC0001739 to Defendant More effective January 6, 2011 to January 6, 2012 (herein "the Policy"). That the Policy includes a Classification Limitation Endorsement which limits coverage to the specific classification codes listed in the Policy, and bars coverage for any classification code or operation performed by the Named Insured that is not specifically listed in the Declarations of the Policy. (Id. at Exh. 2). That in accordance with More's application, the policy classifications upon which the Policy premium was based were: (1) Carpentry-interior- 91341; (2) Painting-Interior-Buildings or Structures- 983305; and (3) Dry Wall or Wallboard Installation- 92338. (Id. at Exhs. 1 & 2).

Plaintiff also asserts that the Policy includes an "Exclusion-Designated Work" section which provides in relevant part that:

> Any EXTERIOR work performed on any building, structure, platform, ladder or scaffold at elevations greater than 2 stories (18 feet) in height. This exclusion also applies to any work performed using any crane, hoist, lift or other similar vertical lifting device at elevations greater than 2 stories (18 feet) in height.
>
> All operations related to roofing.
>
> This insurance does not apply to "bodily injury" or "property damage" or "personal and advertising injury" arising out of "your work" shown in the above Schedule.

(Id. at Exh. 2- Exclusion- Form CG921100806)

Tower now moves for summary judgment against the Answering Defendants

Tower contends that Defendant Skylights hired Defendant More in 2011 to install skylights on various buildings, including a five story building at 620 East 170th Street, Bronx, New York (herein "the Premises"). (Id. at Exh. 4). That Defendant More's owner, Roman Mosejcuk (herein "Mosejcuk") testified at his deposition that More's work consisted of demolishing the existing skylights to install new ones, and included removal of demolition debris by lowering the debris in bags from the roof with ropes owned by More. (Mot. Exh. A pp 42-44, 54-58, and 68). That in the underlying personal injury action Z. Rucinski asserts that, while in the course of his employment for Skylights at the Premises, he was stationed on a sidewalk bridge raised about one floor above the ground to receive the demolition debris being lowered from the roof, and that a piece of wood fell from the bundle striking him. (Id. at Exh. B).

Tower asserts that it first received notice of the accident on June 8, 2012, in a letter from Defendant EEC. (Aptman Aff. In Supp. Exh. 3). That Tower assigned an

investigator on June 12, 2012, that this investigator met with Mosejczuk who admitted that Skylights hired More to install the skylights, that Z. Rucinski was injured by debris being thrown off the roof, and that More performed its work solely on the roof of the Premises. That based upon the investigator's report, Tower timely disclaimed coverage on July 5, 2012, based partly on the classification limitation endorsement and designated work exclusion in the Policy. (Id. at Exh. 5).

Tower argues that demolition and installation of skylights is clearly outside the scope of the Policy classifications of dry wall, interior painting and interior carpentry. That Z. Rucinski's claims arise out of this demolition and installation work, and that because the claims are outside the scope of the Policy's classifications, Tower, therefore, has no duty to defend and indemnify. Tower also argues that it is entitled to summary judgment because the Policy excludes coverage for any exterior work performed at an elevation greater than two stories, and that the work giving rise to the accident occurred on the roof of the Premises that is a five story building.

Defendants Franklin and Kraus oppose the motion, and cross-move to compel Tower to provide full and complete responses to their discovery demands.

In order to prevail on a motion for summary judgment, the proponent must make a prima facie showing of entitlement to judgment as a matter of law, through admissible evidence, eliminating all material issues of fact. (Klein V. City of New York, 89 NY2d 833; Ayotte V. Gervasio, 81 NY2d 1062, Alvarez v. Prospect Hospital, 68 NY2d 320). Once the moving party has satisfied these standards, the burden shifts to the opponent to rebut that prima facie showing, by producing contrary evidence, in admissible form, sufficient to require a trial of material factual issues(Kaufman V. Silver, 90 NY2d 204; Amatulli V. Delhi Constr. Corp.,77 NY2d 525; Iselin & Co. V. Mann Judd Landau, 71 NY2d 420). In determining the motion, the court must construe the evidence in the light most favorable to the non-moving party(SSBS Realty Corp. V. Public Service Mut. Ins. Co., 253 AD2d 583; Martin V. Briggs, 235 192).

A policy's classification limitations of coverage define the activities included within the scope of coverage "in the first instance," and "[i]f the loss in question did not arise from activities within the classifications set forth on the declarations page, then coverage is lacking 'by reason of lack of inclusion...and 'the policy as written could not have covered the liability in question under any circumstances.'" (Black Bull Contr., LLC v. Indian Harbor Ins. Co., 135 A.D.3d 401, 23 N.Y.S.3d 59 [1st Dept. 2016], citing Zappone v. Home Ins. Co., 55 N.Y.2d 131, 432 N.E.2d 783, 447 N.Y.S.2d 911 [1982]; also citing Max Specialty Ins. Co. v. WSG Invs., LLC, 2012 WL 3150577 [EDNY 2012]- in applying New York Law, the Federal Court held that the policy covering those classifications set forth in the declarations for interior carpentry, drywall and wallboard installation, lacked coverage for liability arising from an activity outside of those classifications.)

Tower makes a prima facie showing of entitlement to judgment as a matter of law, and Defendants Franklin and Kraus fail to rebut this showing. Here, there is no coverage in the first instance as the work being performed by Z. Rucinski was not within the scope of classifications set forth in the Policy's Declarations. The Classification Limitation Endorsement specifically states that coverage is limited to the classification codes listed in the Policy, and that no coverage is provided for any classification code or operation performed which is not specifically listed in the Declaration of the policy. (Aptman Aff. In Supp. Exh. 2- Form CG921090806). Whether or not the exact nature or cause of Z. Rucinski's accident has been determined is of no consequence. The Policy specifically covered interior carpentry, painting, and drywall or wallboard installation. Z. Rucinski alleges that he was injured while demolition debris were being lowered from the roof. More's own witness testified that the work being done at the Premises was for demolition and installation of skylights. Therefore, coverage is lacking in the first instance, and the Policy could not cover the liability in question under any circumstance. (See Black Bull, Supra).

Tower also moves for a default judgment against the Defaulting Defendants. Plaintiff attaches the affidavits of service for the Summons and Complaint that were served through the Secretary of State, and the additional copies served by mail, showing proof of service. (Mot. Exhs. H, I, J, K, L & M). Attached to the Motion papers is also proof of service of this Motion on Defendants H&B, EEC and Skylights. Defendants H&B, EEC and Skylights have failed to answer, plead or otherwise appear in this action, and they do not oppose this motion. Defendant More has not answered, plead or otherwise appeared in this action, however, there is no affidavit of service providing proof of service of this Motion on Defendant More. Therefore, the entirety of this motion must be denied with leave to renew. The Complaint seeks a declaration that it has no duty to defend or indemnify More in the underlying personal injury action. Without proof that Defendant More was served with this motion for a default judgment, the relief cannot be granted.

Defendants Franklin and Kraus also fail to establish a basis to compel Tower to provide discovery. All discovery is stayed during the pendency of a summary judgment motion. Further, no Preliminary Conference has been held in this case, and there have been no prior Orders of this Court directing the parties to engage in discovery. Therefore, the cross-motion to compel discovery is denied.

ACCORDINGLY, it is hereby ORDERED that Plaintiff's motion for: (1) a default judgment against Defendants More Restoration Co. Inc., H&B Construction NY Inc., EEC Group Tech., and Skylights By George, Inc., and (2) summary judgment against Defendants Kraus Management Inc., Franklin Kite Housing Development Fund Corporation, Zbigniew Rucinski, and Kadryna Rucinski, for an Order declaring that Plaintiff has no duty to defend and indemnify Defendant More Restoration Co. Inc., is denied with leave to renew, and it is further,

ORDERED, that Defendants Franklin Kite Housing Development Fund Corporation, and Kraus Management Inc.'s cross-motion to compel discovery, is denied, and it is further,

ORDERED, that the parties appear for a Preliminary Conference, at IAS Part 13, 71 Thomas Street, Room 210, New York, New York 10013, on March 15, 2017, at 9:30 a.m.

ENTER:

Dated: January 12, 2017

MANUEL J. MENDEZ
J.S.C.

MANUEL J. MENDEZ
J.S.C.

Check one: ☐ **FINAL DISPOSITION** **X NON-FINAL DISPOSITION**

Check if appropriate: ☐ **DO NOT POST** ☐ **REFERENCE**