IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

LIBERTY MUTUAL INSURANCE COMPANY, a corporation organized and doing business under the laws of the State of Massachusetts,	)	
Plaintiff,	)	
v.	)	C.A. No. N09C-10-081 PLA
JBR CONTRACTORS, INC., a Delaware corporation	)	
Defendant.	)	

UPON DEFENDANT'S
MOTION FOR PARTIAL SUMMARY JUDGMENT
DENIED

Submitted: September 29, 2010
Decided: December 2, 2010

This 2nd day of December, 2010, it appears to the Court that:

1) This debt action presents a dispute as to whether a workers' compensation insurer may unilaterally increase a contractor-policyholder's premium based upon the contractor's hiring of an uninsured subcontractor. In the spring of 2008, Defendant JBR Contractors, Inc. ("JBR") was hired as the general contractor for an apartment building project in Connecticut. Plaintiff Liberty Mutual Insurance Company ("Liberty Mutual") provided

JBR's workers' compensation policy for the project. JBR subcontracted with a Connecticut company known as Pires Construction, LLC ("Pires") to complete on-site work. According to JBR, its contract with Pires required Pires to obtain its own workers' compensation insurance. JBR therefore informed Liberty Mutual that it would not need coverage for Pires under its policy.

2) While JBR's policy application was pending, Liberty Mutual notified JBR in writing that it would add the class code for carpentry to the application to reflect JBR's hiring of a subcontractor, "even if they are insured."[1] Liberty Mutual initially set the premium estimate for that class code at $0, with the understanding that JBR would submit a certification of insurance for Pires as proof that Pires possessed its own workers' compensation policy.

3) Pires applied for workers' compensation coverage with Hannan Insurance Agency ("Hannan") in Connecticut. Hannan in turn supplied JBR with a document entitled "Certificate of Liability Insurance," which was dated April 23, 2008.[2] The certificate reported a policy number for Pires' commercial general liability policy, as well as coverage limits and the policy

[1] Pl.'s Resp., Ex. P2C.

[2] Def.'s Mot. for Partial Summ. J., Ex. A.

period. In the coverage information for Pires' workers' compensation policy, the certificate noted "App submitted to NCCI," and did not provide a policy number.

4) After the project was completed, Liberty Mutual audited JBR's policy. The audit revealed that Pires' workers' compensation policy had never gone into effect because its check for the policy premium bounced. Liberty Mutual increased JBR's policy premium by $44,898.04, based upon what it considered additional exposures due to Pires' uninsured status. In increasing JBR's premium, Liberty Mutual relied upon the remuneration provision of JBR's policy, which stated as follows:

> Premium for each work classification is determined by multiplying a rate times a premium basis. Remuneration is the most common premium basis. This premium basis includes payroll and other remuneration paid or payable during the policy period for the services of:
> 1. all your officers and employees engaged in work covered by this policy; and
> 2. *all other persons engaged in work that could make us liable under Part One (Workers Compensation Insurance) of this policy*. If you do not have payroll records for these persons, the contract price for their services and materials may be used as the premium basis. This paragraph 2 will not apply if you give us proof that the employers of these persons lawfully secured their workers compensation obligations.[3]

[3] Pl.'s Resp., Ex. P4 (emphasis added).

Liberty Mutual calculated the premium increase based upon the amounts paid by JBR to Pires pursuant to the subcontract.

5) JBR disputed the increased premium amount, and sent a letter to Liberty Mutual arguing that "we have upheld our responsibility in making sure our subcontractors carry workers compensation. . . . Not being an insurance specialist we had no idea that [Pires' application for coverage] could be rejected or canceled for a bounced check."[4] On October 8, 2009, Liberty Mutual instituted the instant debt action against JBR for $50,278.00 in unpaid premiums.

6) JBR now moves for partial summary judgment as to the portion of Liberty Mutual's claim arising from Pires' failure to obtain workers' compensation coverage, which JBR contends is non-recoverable under Delaware's Workers' Compensation Act ("the Act"). Specifically, JBR relies upon § 2311(a)(5) of the Act, which sets forth a contractor's duty to obtain verification of insurance in force from subcontractors, as well as the consequences under the Act if the contractor fails to do so:

> Any contracting entity shall obtain from an independent contractor or subcontractor and shall retain for three years from the date of the contract the following: a notice of exemption of executive officers or limited liability company members and/or a certification of insurance in force under this chapter. If the

[4] Pl.'s Resp., Ex. P7.

> contracting entity shall fail to do so, the contracting entity shall not be deemed the employer of any independent contractor or subcontractor or their employees but shall be deemed to insure any workers' compensation claims arising out of this chapter.

JBR contends that Pires' failure to obtain insurance rendered it liable "not for additional premium, but for any workers' compensation claims made during the policy."[5] Because no workers' compensation claims actually arose from Pires' work on the project, JBR argues that 19 *Del. C.* § 2311(a)(5) "prohibits Liberty Mutual from recovering workers' compensation premiums as a result of Pires having been uninsured."[6]

7) Liberty Mutual's response suggests that JBR's reliance on § 2311 is misplaced because the parties' dispute concerns whether JBR is liable for a premium increase under the terms of the parties' contract—a matter not addressed by the Act. Liberty Mutual reads the policy language to require that JBR "pay premiums for . . . persons engaged in work that could make [it] liable," a category which Liberty Mutual contends must include the otherwise uninsured Pires workers. As a policy matter, Liberty Mutual argues that if § 2311(a)(5) were read to bar insurance companies from assessing additional premiums against contracting entities in like situations, "insurance companies would not be able to adequately address

[5] Def.'s Mot. for Partial Summ. J. ¶ 8.

[6] *Id.* ¶ 13.

contractor risk, liabilities, or estimate premiums prior to writing a workers compensation insurance policy."[7]

8) When considering a motion for summary judgment, the Court examines the record to ascertain whether genuine issues of material fact exist and to determine whether the moving party is entitled to judgment as a matter of law.[8] Initially, the burden is placed upon the moving party to demonstrate that his legal claims are supported by the undisputed facts.[9] If the proponent properly supports his claims, the burden "shifts to the non-moving party to demonstrate that there are material issues of fact for resolution by the ultimate fact-finder."[10] Summary judgment will not be granted if, after viewing the evidence in the light most favorable to the non-moving party, there are material facts in dispute or if judgment as a matter of law is not appropriate.[11]

9) Based upon the legislative history of § 2311, the Court agrees with Liberty Mutual that the parties' dispute must ultimately be resolved by reference to their contract. Contrary to JBR's arguments, § 2311(a)(5) does

[7] Pl.'s Resp. ¶ 16.

[8] Super Ct. Civ. R. 56(c).

[9] *E.g.*, *Storm v. NSL Rockland Place, LLC*, 898 A.2d 874, 879 (Del. Super. 2005).

[10] *Id.* at 880.

[11] *Id.* at 879-80.

not prohibit an insurance company from requiring a policyholder to pay premiums based upon the insurer's exposure to risk from an uninsured subcontractor—but neither does it require such a result.

10) JBR claims that language in the final sentence of § 2311(a)(5) stating that a contracting entity "shall not be deemed the employer of any . . . subcontractor or their employees" if the subcontractor fails to obtain its own workers' compensation insurance is intended to bar the very type of premium increases Liberty Mutual seeks to impose. Because Pires' workers cannot be considered JBR's employees, JBR reasons that it became responsible only for any actual claims brought by Pires employees. However, the Court cannot find a basis in the legislative history or case law to support JBR's reading of § 2311(a)(5).

11) Both parties have addressed *McKirby v. A & J Builders, Inc.*, in which this Court examined revisions to § 2311(a)(5) in concluding that a contractor that failed to obtain a certificate of insurance from its subcontractor was liable for a workers' compensation claim brought by the subcontractor's employee when the subcontractor was uninsured.[12] Prior to 2007, employees of a subcontractor were barred by § 2311 from pursuing

[12] 2009 WL 713887 (Del. Super. Mar. 18, 2009), *appeal dismissed,* 979 A.2d 1110 (Del. 2009).

workers' compensation claims against the prime contractor.[13] The General Assembly executed an about-face on this policy when it revised § 2311 in January 2007. This revision created § 2311(a)(5), which initially read as follows:

> Any contracting entity shall obtain, and retain for 3 years from the date of the contract, certification of insurance in force from any entity described in the preceding subsection. If the contracting entity should fail to do so, the contracting entity shall be deemed the employer for purposes of any workers' compensation claim arising from the transaction.[14]

Subsection (a)(5) was further amended a mere four months later in May 2007, resulting in the current version in force. In relevant part, the May 2007 revisions changed the final sentence of the subsection to state that "the contracting entity *shall not be deemed* the employer" of an uninsured subcontractor or its employees, "but shall be deemed to insure any workers' compensation claims arising under this chapter."[15]

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[13] 19 *Del. C.* § 2311(a) (2006) (amended 2007) ("No contractor or subcontractor shall receive compensation under this chapter, but shall be deemed to be an employer and all rights of compensation of the employees of any such contractor or subcontractor shall be against their employer and not against any other employer."); *see also Dickinson v. E. R.R. Builders, Inc.*, 403 A.2d 717 (Del. 1979); *Charley v. Lomascola*, 1995 WL 656800, at *2-3 (Del. Super. Sept. 21, 1995) ("[I]t is the clear policy of Delaware not to hold general contractor's [*sic*] liable for the worker's compensation benefits of their subcontractor's employees.").

[14] 19 *Del. C.* § 2311(a)(5) (Jan. 2007) (amended May 2007).

[15] 19 *Del. C.* § 2311(a)(5) (May 2007) (emphasis added).

12) Although JBR has relied upon *McKirby*, the case actually undermines its position by explaining that the most recent revision to § 2311(a)(5) does *not* address a general contractor's potential liability for premium increases based upon a subcontractor's uninsured status. As the Court explained in *McKirby*, the alteration to subsection (a)(5) that "clarified the lack of an employer-employee relationship with the contracting entity . . . was necessary to preserve tort liability claims by injured workers against third parties."[16] In the absence of this clarification, deeming the general contractor to be the "employer" of its uninsured subcontractor's employees could have supported "an argument . . . that traditionally permitted tort suits would be barred by the exclusivity provisions of the worker's compensation law," which was not the General Assembly's intent.[17] Accordingly, the Court cannot conclude that the May 2007 revision to § 2311(a)(5) related in any way to the question of whether a prime contractor could become liable to its insurer for premiums associated with a subcontractor's failure to obtain workers' compensation coverage.

13) Neither the plain language of the statute nor the authority cited by JBR indicate that § 2311(a)(5) intended to *prevent* a prime contractor

[16] 2009 WL 713887, at *3.

[17] *Id.*

from insuring the risk of an uninsured subcontractor. Thus, the Court agrees with Liberty Mutual that the real issue in this case concerns whether the parties' contract required JBR to prospectively secure such coverage in the absence of an actual claim, and thus to pay the concomitant premium increase. Liberty Mutual has not moved for summary judgment as to its understanding of the policy, and it would therefore be inappropriate for the Court to attempt a definitive interpretation of the relevant provisions; at this stage, it is sufficient to state that JBR has not demonstrated its entitlement to judgment as a matter of law and that a genuine issue of material fact persists as to JBR's liability based upon the remuneration clause of the policy, which stated that JBR's premiums would be calculated with reference not only to its own employees, but as to "all . . . persons engaged in work that could make [Liberty Mutual] liable" for workers' compensation claims.

14) For the foregoing reason, Defendant's Motion for Partial Summary Judgment is hereby **DENIED**.

IT IS SO ORDERED.

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Peggy L. Ableman, Judge

Original to Prothonotary
cc: Richard E. Berl, Esq.
Edward T. Ciconte, Esq.
Daniel C. Kerrick, Esq.