

<b>Burlington Ins. Co. v Utica First Ins. Co.</b>
2008 NY Slip Op 33075(U)
November 10, 2008
Supreme Court, Nassau County
Docket Number: 8605/08
Judge: Thomas P. Phelan
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**SHORT FORM ORDER**

**SUPREME COURT - STATE OF NEW YORK**

**Present:**

**HON. THOMAS P. PHELAN,**

*Justice*

TRIAL/IAS PART 5  
NASSAU COUNTY

THE BURLINGTON INSURANCE COMPANY and  
MANLYN DEVELOPMENT CORP.,

Plaintiff(s),

-against-

UTICA FIRST INSURANCE COMPANY,

Defendant(s).

ORIGINAL RETURN DATE:08/08/08

SUBMISSION DATE: 10/22/08

INDEX No.: 8605/08

MOTION SEQUENCE #1,2

The following papers read on this motion:

Notice of Motion.....	1
Cross-Motion.....	2
Answering Papers.....	3
Reply.....	4

Motion by defendant to dismiss the complaint is denied. Cross-motion by plaintiffs for summary judgment is denied.

This is an action for a declaratory judgment that defendant is obligated to defend and indemnify an additional insured under a contractors special policy of insurance.

Plaintiff Manlyn Development Corp. ("Manlyn") was the construction manager for the renovation of a commercial building located at 86 Bowery in Manhattan. The building is owned by CCJ Realty Corp. Manlyn had a commercial general liability policy issued by plaintiff Burlington Insurance Company ("Burlington") for the period February 8, 2003, to February 8, 2004. The policy contained personal injury coverage in the amount of \$1,000,000.

Manlyn subcontracted the drywall and ceiling work in connection with the project to New York Interiors, Ltd. The subcontract was memorialized in a purchase order which provided that the work was to be performed in accordance with drawings and specifications prepared by an architect and at a price of \$93,250. The purchase order required New York Interiors to

carry general liability insurance in a minimum amount of \$1,000,000. The purchase order further provided that Manlyn was to be named as an additional insured on the certificate of insurance.

New York Interiors had a contractors special insurance policy issued by defendant Utica First Insurance Company ("Utica") for the period January 4, 2003, to January 4, 2004. The policy provided commercial liability coverage, including bodily injury, of up to \$1,000,000 per occurrence. The policy contained a blanket additional insured endorsement, providing that "insured" includes any person or organization whom the insured is required to name as an additional insured on the policy "under a written contract or written agreement." The written contract or agreement must be "currently in effect or becoming effective during the term[] of this policy; and executed prior to the bodily injury..." The additional insured endorsement provides that the insurance is limited to liability arising out of "Your work" for the additional insured, i.e. work performed for the additional insured by New York Interiors. The annual premium for the policy was \$2,242, and there was no additional premium for the blanket additional insured endorsement.

New York Interiors obtained a certificate of insurance, naming Manlyn as an additional insured on the Utica policy. The certificate of insurance is dated June 3, 2003. Although the purchase order itself is dated June 26, 2003, it was not signed and authorized by Manlyn until July 9, 2003. The purchase order was signed by New York Interiors on July 23, 2003.

On June 27, 2003, a pedestrian, Wah Cheong Chow ("Chow"), fell through an open sidewalk cellar door, which led to the basement of the premises. The accident occurred one day after the date of the purchase order but before it was actually signed by the contracting parties. Chow commenced a personal injury action against Manlyn and New York Interiors in Supreme Court, New York County, on May 18, 2006. After the action was commenced, Burlington agreed to defend Manlyn, and Utica agreed to defend New York Interiors. On June 30, 2006, Manlyn's attorneys retained by Burlington requested that Utica undertake Manlyn's defense. On March 12, 2007, Utica refused to defend Manlyn on the ground that the New York Interiors contract with Manlyn was not executed prior to the date of the loss. In December 2007, Burlington settled Chow's action for \$62,500. Burlington incurred legal fees and expenses of \$56,122.85 defending Manlyn in the underlying action.

This action for a declaratory judgment that Utica was obligated to defend and indemnify Manlyn as an additional insured was commenced by Burlington and Manlyn on May 9, 2008. Utica is moving to dismiss the complaint pursuant to CPLR 3211 on the grounds that a defense is founded upon documentary defense and failure to state a cause of action. Utica requests that the motion be treated as one for summary judgment and a declaratory judgment be issued that Utica has no duty to defend or indemnify Manlyn in connection with the underlying action. Utica asserts that Manlyn was not an additional insured under the terms of the policy because the New York Interiors contract was executed after the date of the accident.

Plaintiffs cross-move for summary judgment declaring that Manlyn is an additional insured under the Utica policy. Plaintiffs assert that although the purchase order was not signed, all of the essential terms had been agreed to and New York Interiors had begun work on the day of the accident. Plaintiffs argue that partial performance renders a contract executed within the meaning of the policy.

On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction. The court must accept the allegations of the complaint as true and provide plaintiff the benefit of every possible favorable inference (*AG Capital Funding Partners v. State Street Bank and Trust Co.*, 5 NY3d 582, 591 [2005]).

The court reads an insurance policy in light of “common speech” and the reasonable expectations of a businessperson (*Belt Painting Corp. v. TIG Ins. Co.*, 100 NY2d 377, 383 [2003]). An insurer’s duty to defend is “exceedingly broad” and applies “whenever the allegations of the complaint suggest a reasonable possibility of coverage” (*BP Air Conditioning Corp. v. One Beacon Ins. Group*, 8 NY3d 708, 714 [2007]). To negate coverage by virtue of an exclusion, “an insurer must establish that the exclusion is stated in clear and unmistakable language, is subject to no other reasonable interpretation, and applies in the particular case” (*Belt Painting Corp. v. TIG Ins. Co.*, 100 NY2d at 377).

Utica argues that the New York Interiors’ contract with Manlyn was not executed prior to the accident because it had not been signed. However, the term executed may have a variety of different meanings depending upon the context in which it is used. The term “executed contract” may refer to one that has been fully performed by the parties (Black’s Law Dictionary, 6<sup>th</sup> Ed. 1990). However, to “execute” a contract may also mean “to perform all the necessary formalities, as to make and sign the contract” (Id). Unless the contract is within the statute of frauds, a writing is not one of the formalities necessary to the formation of the contract. Thus, where the parties discuss a writing, they may intend not to be bound until the writing is executed, or the writing may serve as a convenient memorial of an agreement already reached (*Wise & Co. v. Wecoline Products, Inc.*, 286 NY 365 [1941]).

A reasonable businessperson would expect that, under the blanket additional insured endorsement, other contractors would be additional insureds if New York Interiors was contractually obligated to obtain insurance for their benefit. The purpose of the prior written contract provision is simply to prevent a fraudulent scheme where the contractors agree to name one of the parties as an additional insured after the accident. The New York Interiors contract with Manlyn did not expand the liability assumed by Utica because of the blanket additional insured endorsement. Indeed, an insurer may assume even liabilities which arose before the policy date, provided there is no fraud or concealment by the insured (Appelman Insurance Law and Practice § 4266). A fortiori, provided there is no fraud by the named insured and the other contractor, a writing memorializing a prior agreement to name an additional insured may be signed within a reasonable time after the loss.

RE: BURLINGTON INSURANCE v. UTICA

Page 4.

In arguing that the agreement must be signed before the loss occurs, Utica relies primarily upon *Rodless Properties v. Westchester Fire Ins.*, 40 AD3d 253 [1<sup>st</sup> Dep't 2007]. In *Rodless*, a construction worker fell from a scaffold and sued the owner of the project. The general contractor's insurance policy contained an additional insured provision that the contract requiring the other party to be named as an insured must be executed prior to the loss. When the general contractor's insurer refused to defend the owner, the owner brought a declaratory judgment action. The Appellate Division granted summary judgment to the insurer, declaring that it was not obligated to defend or indemnify the owner of the project. However, there was no proof of an oral contract to name the owner as an additional insured because the certificate of insurance was issued as a matter of information only and was tendered after the loss.

The affidavit of Thomas Pepe, Manlyn's President, states that, "Interiors was allowed to begin its work, notwithstanding the fact that the Manlyn/Interiors Contract had not been signed, because both Interiors and Manlyn understood just what Interiors' work was to entail." In the construction industry, a purchase order frequently serves to memorialize a subcontract covering a portion of the project (*BP Air Conditioning Corp. v. One Beacon Ins. Group*, 8 NY3d at 711). In order to facilitate the orderly progress of the work, it may sometimes be necessary to sign the purchase order after the work has already been commenced. On this motion to dismiss, the court must give the plaintiffs the benefit of every favorable inference. Thus, the court must assume that there was no fraud on the part of Manlyn and New York Interiors and the parties did in fact agree to name Manlyn as an additional insured prior to the loss. Accordingly, defendant Utica's motion to dismiss the complaint for failure to state a cause of action or a defense founded upon documentary evidence is denied.

A court is required to give adequate notice to the parties before treating a motion to dismiss as one for summary judgment (CPLR 3211(c)). However, in the case at bar, where defendant has asked that its motion be treated as one for summary judgment, and plaintiffs have cross-moved for that relief, no further notice is necessary. On a motion for summary judgment, it is the proponent's burden to make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact (*JMD Holding Corp. v. Congress Financial Corp.*, 4 NY3d 373, 384 [2005]). Failure to make such a prima facie showing requires denial of the motion, regardless of the sufficiency of the opposing papers (Id). However, if this showing is made, the burden shifts to the party opposing the summary judgment motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial (*Alvarez v. Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

On this motion for summary judgment, it is plaintiffs' burden to establish prima facie that 1) there was no fraud in the agreement to name Manlyn as an additional insured, and 2) the accident arose from work performed by New York Interiors for Manlyn. The affidavit of Thomas Pepe alleges that Manlyn and New York Interiors agreed before the accident to name Manlyn as an additional insured. Thus, plaintiffs have established prima facie that there was no fraud in the agreement. Presumably because of lack of knowledge on the part of Chow, the

complaint in the underlying action is drawn in a conclusory fashion and does not allege the manner in which the accident took place. Nevertheless, Stephen Greaney, the owner of New York Interiors, testified that the hatch, or cellar door, was opened by New York Interiors in order to deliver materials to the site (Def. Ex. E, EBT pp. 25, 49-50). Thus, the complaint in the underlying action contains allegations which bring the claim "potentially within the protection purchased," regardless of whether New York Interiors was negligent (*BP Air Conditioning Corp. v. One Beacon Ins. Group*, 8 NY3d at 714). The court concludes that plaintiffs have carried their prima facie burden that the accident arose from work performed by New York Interiors for Manlyn. Thus, the burden shifts to defendant to come forward with evidence showing a triable issue of fact.

Although defendant purports to reserve the arising out of issue for trial, defendant offers no evidence as to how the accident took place (Zane Aff. Opp. ¶15). Since Utica was New York Interiors' insurer, it presumably investigated and obtained information as to the circumstances of the accident. Accordingly, it is deemed established for all purposes that the accident arose from work performed by New York Interiors for Manlyn (See CPLR 3212(g)).

However, based upon defendant's submissions, the court concludes that there is a triable issue as to whether Manlyn and New York Interiors fraudulently agreed to name Manlyn as an additional insured on New York Interiors' policy. While the certificate of insurance is dated over three weeks before the purchase order, there is no evidence as to when the certificate was tendered to Manlyn. Moreover, the purchase order is dated only one day before the accident. Because of the unusual chronology of the documents, the court cannot conclude as a matter of law that no fraud took place. Accordingly, plaintiffs' cross-motion for summary judgment is denied.

To insure the expeditious completion of disclosure in this action, a Preliminary Conference shall be held.

Counsel are directed to appear on November 25, 2008 at 9:30 A.M. in the Preliminary Conference area, lower level of this courthouse, to obtain and fill out a Preliminary Conference Order.

This decision constitutes the order of the court.

Dated: 11-10-08

HON THOMAS P. PHELAN  
**ENTERED**  
J.S.C.  
NOV 17 2008  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE

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**RE: BURLINGTON INSURANCE v. UTICA**

**Page 6.**

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