

**American Empire Surplus Lines Ins. Co. v
Endurance Am. Specialty Ins. Co.**

2016 NY Slip Op 30036(U)

January 7, 2016

Supreme Court, New York County

Docket Number: 159963/14

Judge: Cynthia S. Kern

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

-----X
AMERICAN EMPIRE SURPLUS LINES INSURANCE
COMPANY,

Plaintiff,

Index No. 159963/14

-against-

DECISION/ORDER

ENDURANCE AMERICAN SPECIALTY INSURANCE
COMPANY,

Defendant.
-----X

HON. CYNTHIA KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion
for : _____

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	1,2
Answering Affidavits	3,4
Replying Affidavits.....	5,6
Exhibits.....	7

Plaintiff American Empire Surplus Lines Insurance Company (“American”) commenced the instant declaratory judgment action against defendant Endurance American Specialty Insurance Company (“Endurance”) arising out of a separate personal injury action in which American is providing a defense to the defendant in that action. Plaintiff now moves for an Order pursuant to CPLR § 3212 granting it partial summary judgment on its complaint. Defendant separately moves for an Order pursuant to (1) CPLR § 3212 for summary judgment; and (2) CPLR § 3211 dismissing any contractual indemnity claims against Endurance. The motions are consolidated for disposition and are resolved as set forth below.

The relevant facts are as follows. In or around 2014, non-party Marcos Rene Sosa (“Sosa”) commenced an action against non-party Dayton Towers Corporation (“Dayton”) to

recover for personal injuries Sosa allegedly sustained when he slipped and fell due to ice and snow on the roof of a building while performing construction work (the “incident”) at the premises located at 105-00 Shorefront Parkway, Queens, New York (the “subject premises”) (hereinafter referred to as the “underlying action”). Prior to the incident, Dayton, the owner of the subject premises, contracted with Skyline Restoration, Inc. (“Skyline”), as general contractor, to perform work at the subject premises. Thereafter, in an agreement dated March 22, 2013, Skyline contracted with All Day Restoration Inc. (“All Day”), Sosa’s employer, to perform restoration work on the exterior facades at the subject premises (the “All Day Subcontract”).

After All Day and Skyline entered into the All Day Subcontract, defendant Endurance issued Commercial General Liability Policy No. IL DS 00 09 07 to All Day, for the period from May 10, 2013 to May 10, 2014 (the “Endurance Policy”). Additionally, plaintiff American issued Commercial General Liability Policy No. 13CG0176303 to Skyline for the period from June 26, 2013 until June 26, 2014 (the “American Policy”). Following the commencement of the underlying action, on or about June 10, 2014, American tendered the defense and indemnification of Dayton as an additional insured under the Endurance Policy to All Day and Endurance. On or about June 13, 2014, American assumed Dayton’s defense in the underlying action. On or about July 7, 2014, August 11, 2014 and September 4, 2014, counsel for American sent further letters demanding that Endurance accept the tender of Dayton’s defense in the underlying action. When Endurance failed to accept the tender, American commenced the instant declaratory judgment action seeking (1) a declaration that Endurance is obligated to defend and indemnify Dayton as an additional insured on a primary basis in the underlying action and that American’s obligations, if any, with respect to the defense and indemnification of

Dayton in the underlying action, are excess to those of Endurance; (2) a declaration that Endurance must indemnify and hold Dayton harmless in the underlying action based upon All Day's contractual obligation to Dayton; and (3) a declaration that Endurance must reimburse American for all defense costs incurred in connection with Dayton's defense, with interest, until Endurance assumes Dayton's defense relative to the underlying action.

On a motion for summary judgment, the movant bears the burden of presenting sufficient evidence to demonstrate the absence of any material issues of fact. *See Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986). Summary judgment should not be granted where there is any doubt as to the existence of a material issue of fact. *See Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980). Once the movant establishes a *prima facie* right to judgment as a matter of law, the burden shifts to the party opposing the motion to "produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim." *Id.*

The court first turns to plaintiff's motion for summary judgment on its first cause of action for a declaration that Endurance is obligated to defend Dayton as an additional insured in the underlying action and finds that it must be denied on the ground that Dayton is not an additional insured under the Endurance Policy. "It is well established that the party claiming insurance coverage bears the burden of proving entitlement, and, as we have recently held, a party that is not named an insured or an additional insured on the face of the policy is not entitled to coverage." *Tribeca Broadway Associates, LLC v. Mount Vernon Fire Ins. Co.*, 5 A.D.3d 198 (1st Dept 2004). "A provision in a construction contract cannot be interpreted as requiring the procurement of additional insured coverage unless such a requirement is expressly and

specifically stated.” *Trapani v. 10 Arial Way Assoc.*, 301 A.D.2d 644 (2d Dept 2003). Further, it is well-settled that the trade contract must “clearly evince” an intent to name another party as an additional insured. *See id.* at 388-89 (“Where a third party seeks the benefit of coverage, the terms of the contract must clearly evince such intent”). Here, it is undisputed that the additional insured endorsement in the Endurance Policy issued to All Day unambiguously provides that additional insured coverage will be provided to entities as “required by written contract.” It is also undisputed that there is a written contract, the All Day Subcontract, pursuant to which All Day explicitly and expressly agreed to provide additional insured coverage to Skyline, the general contractor. However, nowhere in the All Day Subcontract does it expressly or explicitly state that All Day shall provide additional insured coverage to Dayton. Indeed, Dayton is not mentioned at all. Thus, as there is no written contract requiring All Day to name Dayton as an additional insured in its insurance policy, this court finds that Dayton is not an additional insured under the Endurance Policy and therefore, Endurance is not obligated to defend Dayton in the underlying action.

Plaintiff’s reliance on Section 1.2 of the All Day Subcontract to establish that Dayton is an additional insured under the Endurance Policy is misplaced. Pursuant to Section 1.2 of the All Day Subcontract,

Except to the extent of a conflict with a specific term or condition contained in the Subcontract Documents, the General Conditions governing this Subcontract shall be the edition of AIA Document A201, General Conditions of the Contract of Construction, current as of the date of this Agreement.

Section 11.1.4 of the standard form AIA Document A201 – 2007 General Conditions of the Contract for Construction (the “AIA Document A201”), which is the current AIA Document

A201 as of the date of the Subcontract, provides, in relevant part, as follows:

The Contractor Shall cause the commercial liability coverage required by the Contract Documents to include (1) the Owner, the Architect and the Architect's Consultants as additional insureds for claims caused in whole or in part by the Contractor's negligent acts or omissions during the Contractor's operations;...

Plaintiff asserts that this language clearly provides Dayton, as the owner of the subject premises, with additional insured status as the language is incorporated into the All Day Subcontract and that there is no conflict between the All Day Subcontract and the AIA Document A201 as the language in the AIA Document A201 simply adds the obligation to provide Dayton with additional insured coverage and does not change or differ from any of the terms and conditions of the Subcontract. However, such reliance is misplaced as the AIA Document A201 is not a "written contract" requiring Dayton to be named as an insured.

Further, plaintiff's assertion that Dayton is an additional insured under the Endurance Policy based on the alleged intention of both Skyline and All Day is without merit. Specifically, plaintiff relies on the affidavit of Rygo E. Foss, Esq., Skyline's General Counsel, in which Mr. Foss states that "[t]he intent of the parties to the [All Day] Subcontract... - both Skyline and All Day - was to provide both Skyline and the owner of the property - Dayton Towers Corporation... - with additional insured coverage" and that "[i]n Skyline's longstanding relationship with All Day, the parties' general practice was always to provide additional insured coverage to Dayton." However, it is well-settled that the question of whether additional insured coverage is owed is only determined by the language of the policy and the relevant contract documents if the contract is unambiguous. *See N. Kruger, Inc. v. CAN Ins. Co.*, 242 A.D.2d 566 (2d Dept 1997). Moreover, New York courts have strictly enforced the requirement of an

additional insured endorsement that the contract to insure be in writing and have refused to extend additional insured coverage under such an endorsement even where there is evidence that there was an intent to extend coverage beyond that stated in the contract. See *National Abatement Corp. v. National Union Fire Ins. Co. of Pittsburgh, PA*, 33 A.D.3d 570 (1st Dept 2006) (“we find the subject provision unambiguous, and reasonably susceptible to only one meaning, leaving no occasion to consider parol evidence of the parties’ course of conduct”)(internal citations omitted). As this court has already found that the additional insured endorsement in the Endurance Policy unambiguously provides that additional insured coverage is only extended to those entities as required by written contract and that it is undisputed that the written contract at issue only requires All Day to provide additional insured coverage for Skyline and not Dayton, the court will not consider the parol evidence introduced in the form of Mr. Foss’ affidavit. Based on this court’s determination that Dayton is not an additional insured under the Endurance Policy, Endurance’s motion for summary judgment declaring that it has no duty to defend or indemnify Dayton as an additional insured in the underlying action is granted.

The court next turns to that portion of defendant’s motion to dismiss plaintiff’s second cause of action for a declaration that Endurance must indemnify and hold Dayton harmless in the underlying action based upon All Day’s contractual obligation to Dayton and finds that it must be granted. Plaintiff’s second cause of action requests that the court determine the contractual obligations between All Day and Dayton. However, such a request is improper as All Day and Dayton are not parties to the instant action. Indeed, the issue of whether All Day is contractually obligated to indemnify Dayton in the underlying action should be determined in the underlying action or in a separate action in which All Day and Dayton are parties. Thus, as the

