

**Zurich Am. Ins. Co. v Burlington Ins. Co.**

2016 NY Slip Op 30568(U)

April 4, 2016

Supreme Court, New York County

Docket Number: 651383/14

Judge: O'Neill Kelly Levy

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 19

-----X  
ZURICH AMERICAN INSURANCE COMPANY,

Plaintiff,

DECISION/ORDER  
Mot. Seq. 001

-against-

THE BURLINGTON INSURANCE COMPANY,

Index No. 651383/14

Defendant.  
-----X

**KELLY O'NEILL LEVY, J.:**

This is an action for a declaratory judgment pursuant to which plaintiff Zurich American Insurance Co. (Zurich) seeks a declaration that The Burlington Insurance Company (TBIC) has a duty to defend CCA Civil-Halmar International, LLC (CCA) as an additional insured in the underlying action entitled *Cappellino v Metropolitan Transportation Auth.* (Index No. 150143/13 [Sup Ct, NY County 2013]) (the *Cappellino* action), pursuant to the terms of TBIC commercial general liability policy number HGL0028805 (the TBIC Policy), issued to Achilles Construction Co., Inc./Achilles Steel Fabricators, Inc. (Achilles).

Zurich now moves, pursuant to CPLR 3212, for an order awarding it partial summary judgment and (1) declaring that TBIC has a duty to defend CCA as an additional insured in the *Cappellino* action; and (2) awarding Zurich attorneys' fees, costs and expenses of this action.

For the reasons set forth below, Zurich's motion for partial summary judgment is granted.

**FACTS**

***The Achilles Contract***

On December 9, 2010, CCA entered into a contract with Achilles (the Achilles contract [see aff of Courtney Pasquariello, Esq., exhibit 1]), pursuant to which Achilles was to perform

work on a construction project, including the mining and lining of the shaft and construction of a two-story ventilation building structure at Site L Number 7 (Flushing) Line Extension “A” Division (IRT) in Manhattan (the Project). The term “Contractor” in the Achilles contract is defined as CCA, and “Subcontractor” is defined as Achilles (*see id.* at 3). The Achilles contract contains the following insurance procurement provisions:

“12. **INSURANCE AND INDEMNIFICATION:** The Subcontractor shall purchase and maintain insurance of the following types of coverage and limits of liability:

- 1) Commercial General Liability (CGL) coverage with limits of Insurance of not less than \$2,000,000 each occurrence and \$2,000,000 of Annual Aggregate.

\* \* \*

- c) Contractor, Owner and all other parties who Contractor is required to name as additional insureds by any contract, shall be included as insureds on the CGL, using ISO Additional Insured Endorsement CG 20 10 11 85 or an endorsement providing equivalent or broader coverage to the additional insureds. The coverage provided to the additional insureds under the policy issued to the Subcontractor shall be at least as broad as the coverage provided to the Subcontractor under the policy. Coverage for the additional insureds shall apply as Primary and Non-Contributing Insurance before any other insurance or self-insurance, including any deductible, maintained by, or provided to, the additional insureds”

(*id.* at 11).

### ***The TBIC Policy***

Pursuant to its obligations under the Achilles contract, Achilles obtained from TBIC the TBIC policy, a commercial general liability policy, with effective dates from September 30, 2011 to September 30, 2012, with policy limits of \$1,000,000 for each occurrence, and \$2,000,000 in the aggregate (*see Pasquariello aff*, exhibit 2). Under the terms of the TBIC policy, the terms

“you” and “your” refer to Achilles, the named insured (*see id.*).

Specifically, the TBIC policy contains the following additional insured endorsement:

“A. Section II - Who is an Insured is amended to include as an additional insured any person or organization for whom you are performing operations when you and such person or organization have agreed in writing in a contract or agreement that such person or organization be added as an additional insured on your policy. Such person or organization is an additional insured only with respect to liability for ‘bodily injury’, ‘property damage’ or ‘personal and advertising injury’ caused, in whole or in part, by:

- 1. Your acts or omissions; or
- 2. The acts or omissions of those actions on your behalf;
  - in the performance of your ongoing operations for the additional insured.

A person’s or organization’s status as an additional insured under this endorsement ends when your operations for that additional insured are completed.

B. With respect to the insurance afforded to these additional insureds, the following addition exclusions apply:

This insurance does not apply to:

\* \* \*

2. ‘Bodily injury’ or ‘property damage’ occurring after:

- a. All work, including materials, parts or equipment furnished in connection with such work, on the project (other than service, maintenance or repairs) to be performed by or on behalf of the additional insured(s) at the location of the covered operations has been completed; or
- b. That portion of ‘your work’ out of which the injury or damage arises has been put to its intended use by any person or organization other than another

contract or subcontractor engaged in performing operations for a principal as a part of the same project”

(*id.*).

The TBIC policy contains the following endorsement, which modifies the “Other Insurance” provision contained in the Commercial General Liability Coverage Form:

“AMENDMENT - OTHER INSURANCE (PRIMARY AND NON-CONTRIBUTORY COVERAGE)

This endorsement modified insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

Schedule of Additional Insured(s):

Any person or organization with whom you have agreed, in a written contract, that such person or organization should be added as an additional insured on your policy, provided such written contract is fully executed prior to an “occurrence” in which coverage is sought under this policy.

With respect to the insurance afforded to the additional insured(s) scheduled above, Paragraph 4. Other Insurance of Section IV - Commercial General Liability Conditions is deleted and replaced by the following:

4. Other Insurance

Notwithstanding other valid and collectible insurance available to the insured for a loss we cover under Coverages A and B of this Coverage Part, this insurance is primary and non-contributory.

However, this endorsement:

- A. Applies only when you are required by contract, agreement or permit to provide primary and non-contributory coverage for the additional insured, provided such written contract, agreement or permit is fully executed prior to an “occurrence” in which coverage is sought under this policy,

and

- B. Does not apply to any claim, loss or liability due to the sole negligence of the additional insured”

(*id.*).

***The Underlying Cappellino Action***

This action arises out of a construction accident that occurred on July 25, 2012, in which Luigi Cappellino, an employee of Achilles, was injured when struck by a falling object while performing work at the Project. As a result of the accident, Cappellino commenced the *Cappellino* action, in which he asserts claims of negligence, carelessness and recklessness, in that defendants (the Metropolitan Transit Authority (MTA), the New York City Transit Authority (NYCTA), CCA and Achilles) and their contractors, agents and employees allegedly failed to ensure that the plaintiff would not be struck by falling objects, failed to secure objects against slippage and/or collapse, and failed to erect catchalls, safety nets and other safety devices to prevent workers from being struck by falling objects. The complaint in the *Cappellino* action (*see Pasquariello* aff, exhibit 3) asserts violations of New York Labor Law §§ 200, 240 and 241 (6), and various sections of the New York Industrial Code Rule 23. Cappellino seeks relief for conscious pain and suffering, loss of enjoyment of life, medical expense, both past and future, and lost wages and benefits, both past and future.

***Tenders***

Zurich has been defending CCA, the MTA and the NYCTA in the *Cappellino* action, as insured or additional insureds, since on or before January 25, 2013, pursuant to a Zurich commercial general liability policy issued to CCA.

By letter dated January 25, 2013, Zurich tendered the defense and indemnity of the *Cappellino* action to Achilles on behalf of CCA, and requested contractual indemnification and additional insured coverage.

On March 25, 2013, TBIC notified Zurich that CCA did not qualify as an additional insured under its policy. On May 6, 2013, Zurich emailed TBIC to follow up on its tender of the *Cappellino* action for indemnity and defense on behalf of CCA. TBIC replied that it provided its coverage position in its March 25, 2013 correspondence.

By letter dated September 9, 2013, Coughlin Duffy LLP, coverage counsel for Zurich, wrote to TBIC renewing Zurich's prior tender to Achilles and TBIC for the defense and indemnification of CCA for the *Cappellino* action, under both the Achilles contract and the TBIC policy.

#### **DISCUSSION**

“[T]he proponent of a summary judgment motion must 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” (*Ayotte v Gervasio*, 81 NY2d 1062, 1062 [1993]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]). “Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers” (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d at 853; *see also Lesocovich v 180 Madison Ave. Corp.*, 81 NY2d 982 [1993]).

The party opposing summary judgment has the burden of presenting evidentiary facts sufficient to raise triable issues of fact (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *CitiFinancial Co. [DE] v McKinney*, 27 AD3d 224, 226 [1st Dept 2006]). The court is

required to examine the evidence in a light most favorable to the party opposing the motion (*Martin v Briggs*, 235 AD2d 192, 196 [1<sup>st</sup> Dept 1997]). Summary judgment may be granted only when it is clear that no triable issues of fact exist (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]), and “should not be granted where there is any doubt as to the existence of a triable issue” of fact (*American Home Assur. Co. v Amerford Intl. Corp.*, 200 AD2d 472, 473 [1st Dept 1994]).

When analyzing a dispute over insurance coverage, courts should look first to the language of the policy (*Raymond Corp. v National Union Fire Ins. Co. of Pittsburgh, Pa.*, 5 NY3d 157, 162 [2005]; *Consolidated Edison Co. of N.Y. v Allstate Ins. Co.*, 98 NY2d 208, 221 [2002]). As with the construction of all contracts, “unambiguous provisions of an insurance contract must be given their plain and ordinary meaning, and the interpretation of such provisions is a question of law for the court” (*White v Continental Cas. Co.*, 9 NY3d 264, 267 [2007] [internal citation omitted]; see also *Vigilant Ins. Co. v Bear Stearns Cos., Inc.*, 10 NY3d 170, 177 [2008]). In the context of an insurance coverage dispute, “[g]enerally it is for the insured to establish coverage and for the insurer to prove that an exclusion in the policy applies to defeat coverage” (*Consolidated Edison Co. of N.Y., Inc.*, 98 NY2d at 218; see *York Restoration Corp. v Solty’s Constr., Inc.*, 79 AD3d 861, 862-863 [2d Dept 2010]).

“[A]n insurer’s duty to defend is broader than its duty to indemnify, and arises whenever the allegations in the complaint in the underlying action, construed liberally, suggest a reasonable possibility of coverage, or where the insurer has actual knowledge of facts establishing such a reasonable possibility” (*Rhodes v Liberty Mut. Ins. Co.*, 67 AD3d 881, 882 [2d Dept 2009]; accord *BP A.C., v One Beacon Ins. Group.*, 8 NY3d 708, 714 [2007]; *Automobile Ins. Co. of*

*Hartford v Cook*, 7 NY3d 131, 137 [2006]). The determination as to whether the duty of an insurer to defend under a policy is triggered “depends on the facts which are pleaded” (*Allstate Ins. Co. v Mugavero*, 79 NY2d 153, 162 [1992]). “[Only] where it can be determined from the factual allegations that ‘no basis for recovery within the coverage of the policy is stated in the complaint, [may a court] . . . sustain [the insurer’s] refusal to defend’” (*id.* at 163 [citation omitted]; see e.g. *Morse Diesel Intl. v Olympic Plumbing & Heating Corp.*, 299 AD2d 256 [1<sup>st</sup> Dept 2002] [finding that an insurer owed a duty to defend where it failed to meet its heavy burden of demonstrating that the allegations of the complaint cast the pleadings wholly within the exclusions of the additional insured endorsement]).

The sole issue in this action is whether TBIC is obligated to defend CCA as an additional insured in the *Cappellino* action under the TBIC policy. Application of the above principles to the underlying complaint and the language of the insurance policies makes clear that TBIC is obligated to defend CCA in the underlying action. As more fully set out below, because CCA is an additional insured under the TBIC policy, and because the allegations contained in the complaint filed in the *Cappellino* action are potentially covered under the TBIC policy, TBIC must defend CCA in the *Cappellino* action.

New York courts have held that the extent to which additional coverage is owed is determined by the terms of the policy and the contract clauses requiring the party to procure insurance (*American Ref-Fuel Co. of Hempstead v Resource Recycling*, 248 AD2d 420, 423 [2d Dept 1998]; *Penske Truck Leasing Co. v Home Ins. Co.*, 251 AD2d 478, 479 [2d Dept 1998]).

Here, the additional insured endorsement provides that “an additional insured” is “any person or organization for whom you [Achilles] are performing operations when you and such

person or organization [CCA] have agreed in writing in a contract or agreement that such person or organization be added as an additional insured on your policy.” Under the Achilles contract, Achilles agrees that the “Contractor,” i.e., CCA, “shall be included as insured on the CGL.” Therefore, Achilles agreed to name CCA as an additional insured, and the additional insured endorsement is applicable (*see LMII Realty, LLC v Gemini Ins. Co.*, 90 AD3d 1520, 1521 [4<sup>th</sup> Dept 2011] [finding that the additional insured endorsement applied where there was a written agreement between the named insured and purported additional insured]).

The endorsement further provides that “[s]uch person or organization is an additional insured only with respect to liability for ‘bodily injury’ . . . **caused, in whole or in part, by . . .** your acts or omissions . . . in the performance of ***your ongoing operations*** for the additional insured.”

“[T]he phrase ‘caused by’ . . . does not materially differ from the . . . phrase ‘arising out of’” (*W & W Glass Sys., Inc. v Admiral Ins. Co.*, 91 AD3d 530, 530 [1<sup>st</sup> Dept 2012]). Thus, under New York law, the “caused [by] . . . acts or omissions” language in an additional insured endorsement is analyzed under the broader “arising out of” standard (*National Union Fire Ins. Co. of Pittsburgh, PA v Greenwich Ins. Co.*, 103 AD3d 473, 474 [1<sup>st</sup> Dept 2013]; *accord Burlington Ins. Co. v NYC City Tr. Auth.*, 132 AD3d 127 [1<sup>st</sup> Dept 2015]).

The term “arising out of” in an additional insured endorsement means “originating from, incident to, or having connection with” and requires “only that there be some causal relationship between the injury and the risk for which coverage is provided” (*Regal Constr. Corp. v National Union Fire Ins. Co. of Pittsburgh, PA*, 15 NY3d 34, 38 [2010]). There need only be a “connection between the accident and [the named insured’s] work” (*id.*). The focus of the

inquiry in the “arising out of” additional insured analysis “is not on the precise cause of the accident but the general nature of the operation in the course of which the injury was sustained [internal quotation marks and citation omitted]” (*id.* at 38-39).

Here, because Cappellino was an employee of Achilles performing work under the Achilles contract, his injuries necessarily arose out of the acts of Achilles (*see (W & W Glass Sys., Inc., 91 AD3d at 531 [holding that because the claim involved an employee of the subcontractor who was injured while performing the subcontractor’s work under the subcontract, additional insured coverage was owed to the subcontractor])*).

Further, it is clear that Cappellino was injured while performing “ongoing operations,” as set forth in the endorsement, as an employee of Achilles. Courts construe the term “ongoing operations” broadly (*see Town of Fort Ann v Liberty Mut. Ins. Co., 69 AD3d 1261, 1262-1263 [3d Dept 2010] [“the term ‘ongoing operations’ is interpreted broadly in New York”]; see also Wausau Underwriters Ins. Co. v Cincinnati Ins. Co., 198 Fed Appx 148, 150 [2d Cir 2006] [rejecting narrow definition of “ongoing operations” for purposes of insurance coverage]*). In New York, “courts focus not on whether the injury occurs while actions are currently in progress, but rather whether it occurs before the work has been completed” (*Liberty Mut. Fire Ins. Co. v EE. Cruz & Co., 475 F Supp 2d 400, 411 [SD NY 2007]*). Thus, TBIC’s duty to defend CCA under the TBIC policy encompasses any claim against CCA that originates from, is incident to, or has a connection with, any of Achilles’ extant duties under the Achilles contract at the time of the accident.

The claims asserted against CCA in the *Cappellino* action arise out of Achilles’ “ongoing operations” under the Achilles contract, and thus trigger TBIC’s duty to defend CCA under the

TBIC policy. The complaint in the *Cappellino* action alleges that Achilles was a contractor at the Project by virtue of the Achilles contract with CCA. The complaint further alleges that Cappellino, an employee of Achilles, was injured when struck by a falling object while performing work at the Project. Finally, the complaint alleges that all defendants, including Achilles, caused the accident by acts of negligence and violations of the Labor Law. Therefore, Cappellino's injuries were allegedly caused, in whole or in part, by Achilles' acts or omissions, during Achilles' ongoing operations for CCA. Accordingly, CCA is an additional insured under the TBIC policy.

TBIC's policy also provides that coverage afforded to any additional insured is primary and non-contributory, notwithstanding other valid and collectible insurance available to the additional insured, when the contract providing for the additional insurance is fully executed prior to an "occurrence" for which coverage is sought under the contract. Here, the Achilles contract required that Achilles provide primary non-contributory coverage to CCA (*see* Achilles contract at 11). Further, the Achilles contract was executed on December 9, 2010, prior to the date of Cappellino's accident on July 25, 2012. Therefore, the coverage afforded to CCA under the TBIC policy is primary and non-contributory to any insurance available to CCA, including coverage provided by the Zurich policy.

In opposition to the motion, TBIC does not address the substance of the summary judgment motion, but rather, focuses only on procedural issues. First, TBIC argues that because Zurich failed to offer the sworn affidavit of a CCA or Achilles representative in support of the Achilles contract, but rather only attached it to an attorney affirmation, the contract is inadmissible.

The court rejects this argument. In support of this argument, TBIC relies on a single, inapposite case, *GTF Mktg. v Colonial Aluminum Sales* (66 NY2d 965 [1985]). Unlike in *GTF Marketing*, the attorney affirmation here does not serve to assert statements of fact that are unsupported by documentary evidence, but rather, the affidavit is simply being used to submit documentary evidence in support of the motion. Under New York law, an attorney affirmation may be used for that exact purpose – as a vehicle for admission of documentary evidence on a motion for summary judgment (*see DeLeon v Port Auth. of N.Y. and N.J.*, 306 AD2d 146, 146 [1<sup>st</sup> Dept 2003] [stating that “merely attaching the subject leases to the attorney’s affirmation was sufficient to admit the leases” on a motion for summary judgment]).

In any event, Zurich submits the affidavit of Zhigan Wu, vice president of CCA, in which he provides a sworn statement authenticating the Achilles contract (*see* 8/5/15 Wu aff, ¶ 6).

TBIC also argues that a determination of coverage for Zurich is premature, as there has been relatively little discovery in either the underlying action or this action. More specifically, TBIC argues that Achilles is not a direct defendant in the underlying action, and there is no evidence that Achilles was responsible in any way for the accident. TBIC further argues that it has not been established what Cappellino was doing at the time of the alleged accident, and that it is possible that he was not injured while performing work operations, but was injured simply while walking to get coffee.

In making this argument, TBIC ignores the fact that, under New York law, an insurer’s duty to defend is exceedingly broad, and “arises whenever the allegations in a complaint state a cause of action that gives rise to the *reasonable possibility* of recovery under the policy” (*Fitzpatrick v American Honda Motor Co.*, 78 NY2d 61, 65 [1991] [emphasis added]). The

complaint in the *Cappellino* action alleges that he was injured while lawfully on the project premises “as an employee of [Achilles]” (*Cappellino* complaint, ¶ 34). Thus, because *Cappellino* was injured while on the jobsite, even if *Cappellino* was walking to get a coffee or to go to the bathroom at the time of his injury, CCA is still entitled to a defense in the *Cappellino* action (*see Chelsea Assoc, LLC v Laquila-Pinnacle*, 21 AD3d 739, 740 [1<sup>st</sup> Dept 2005] [determinating that, where an employee was injured while entering a jobsite, the injury arose out of the work at the jobsite as a matter of law]; *Turner Constr. Co. v Pace Plumbing Corp.*, 298 AD2d 146, 147 [1<sup>st</sup> Dept 2002] [holding that the employer’s insurer had to defend and indemnify an additional insured where an employee was injured while using a bathroom located at a job site because use of the bathroom was an unavoidable and necessary activity that arose in the course of the employee’s work]).

Accordingly, this court finds that Zurich is entitled to judgment in its favor declaring that TBIC is obligated to defend CCA as an additional insured in the *Cappellino* action, on a primary non-contributory basis.

Zurich is also entitled to recoup its costs and fees in defending the *Cappellino* action. “[I]n the event of a breach of the insurer’s duty to defend, the insured’s damages are the expenses reasonably incurred by it in defending the action after the carrier’s refusal to do so” (*National Union Fire Ins. Co.*, 103 AD3d at 474 [citation omitted]). TBIC refused tender on March 25, 2013. TBIC’s failure to defend CCA in the *Cappellino* action required it to reimburse Zurich for the costs (including reasonable attorneys’ fees and costs) of providing that defense. TBIC’s breach runs from the date of Zurich’s tender on behalf of CCA through the time, if any, when TBIC assumes the defense of the underlying action (*see id.*).

The court has considered the remaining arguments, and finds them to be without merit.

Accordingly, it is

ORDERED that plaintiffs' motion for partial summary judgment is granted; and it is further

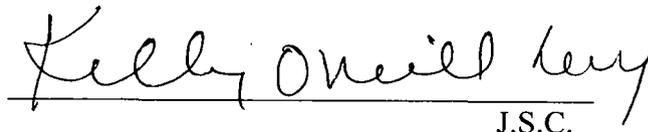
ADJUDGED AND DECLARED that defendant The Burlington Insurance Company is obligated to defend CCA Civil-Halmar International, LLC as an additional insured in the underlying action entitled *Cappellino v Metropolitan Transportation Auth.*, index No. 150143/13 (Sup Ct, NY County 2013); that the coverage afforded to CCA is primary and non-contributory to coverage afforded to CCA under the policy of Zurich American Insurance Company; and that Zurich is entitled to recoupment from TBIC of all reasonable costs and fees incurred in the defense of CCA in the *Cappellino* action, from the date of Zurich's tender of behalf of CCA; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

This constitutes the decision and order of the court.

Dated: April 4, 2016

ENTER:

  
J.S.C.

**HON. KELLY O'NEILL LEVY**