

<b>Omnibuild Constr. Inc. v State Natl. Ins. Co., Inc.</b>
2023 NY Slip Op 33842(U)
October 26, 2023
Supreme Court, New York County
Docket Number: Index No. 654380/2021
Judge: Nancy M. Bannon
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# SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

**PRESENT:** HON. NANCY M. BANNON **PART** **42**

*Justice*

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OMNIBUILD CONSTRUCTION INC., 16 EAST 39TH  
STREET LLC,

Plaintiffs,

**INDEX NO.** 654380/2021

**MOTION DATE** \_\_\_\_\_

**MOTION SEQ. NO.** 001 002

- v -

STATE NATIONAL INSURANCE COMPANY, INC.,  
TRAVELERS INDEMNITY COMPANY, WWI  
CONTRACTING CORP., ED ELECTRICAL INC.,

Defendants.

## DECISION + ORDER ON MOTION

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 39, 40, 41, 42, 43, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59

were read on this motion to/for JUDGMENT - DECLARATORY.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 32, 33, 34, 35, 36, 37, 38, 44, 45, 46, 47, 60

were read on this motion to/for CROSS MOTION.

In this declaratory judgment action, the plaintiffs, Omnibuild Construction Inc. (“Omnibuild”) and 16 East 39<sup>th</sup> Street, LLC (“16 East”), move pursuant to CPLR 3212 for partial summary judgment (1) declaring that defendants State National Insurance Company, Inc. (“State National”) and Travelers Indemnity Company (“Travelers”) are obligated to defend the plaintiffs in an underlying personal injury action (the “Su Action”) as additional insureds on, and in accordance with the terms of, the insurance policies that State National issued to co-defendant WWI Contracting Corp. (“WWI”) and that Travelers issued to co-defendant ED Electrical Inc. (“ED”); and (2) requiring State National and Travelers to reimburse the attorneys’ fees, costs and disbursements incurred by the plaintiffs or the plaintiffs’ insurer in the Su Action (MOT SEQ

001). State National and Travelers oppose the motion. Travelers also separately moves pursuant to CPLR 3212 for summary judgment declaring that it has no duty to defend or indemnify the plaintiffs in connection with the Su Action (MOT SEQ 002), which motion is opposed by both the plaintiffs and State National. The plaintiffs' motion is granted and Travelers' motion is denied.

It is well settled that the proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any triable issues of fact. See Winegrad v New York Univ. Med. Ctr., 64 NY2d 851 (1985). In opposition, the nonmoving party must demonstrate by admissible evidence the existence of a triable issue of fact. See Alvarez v Prospect Hospital, 68 NY2d 320 (1986); Zuckerman v City of New York, 49 NY2d 557 (1980).

In support of their motion, the plaintiffs submit, *inter alia*, the pleadings in the underlying Su Action, in which the plaintiff, Zhiben Su, asserts negligence and Labor Law claims against Omnibuild, 16 East, and WWI for injuries he allegedly sustained while performing work at premises in Manhattan (the "Premises") owned by 16 East, and further specifically alleges in his Verified Bill of Particulars that his injury was caused by the negligence of his employer, ED, for which he seeks to hold Omnibuild and 16 East vicariously liable<sup>1</sup>; the contract between Omnibuild, which 16 East retained as construction manager for the construction work at the Premises, and ED, a subcontractor retained by Omnibuild to perform electrical work at the Premises, pursuant to which ED was required to purchase and maintain commercial general liability insurance, naming Omnibuild and 16 East as additional insureds, which would be

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<sup>1</sup> In addition to the claims and allegations made by Su, the Su Action also involves a negligence counter-claim by WWI against ED, third-party actions by the plaintiffs herein alleging negligence against both WWI and ED, and a third-party action by ED alleging negligence against WWI.

primary and non-contributory to Omnibuild's and 16 East's own insurance; the contract between Omnibuild and WWI, a subcontractor retained by Omnibuild to perform carpentry work at the Premises, pursuant to which WWI was likewise required to purchase and maintain commercial general liability insurance, naming Omnibuild and 16 East as additional insureds, which would be primary and non-contributory to Omnibuild's and 16 East's own insurance; the commercial general liability insurance policy issued by State National to WWI for the period covering Su's alleged injury, which includes an endorsement providing for additional insured coverage to any entities that WWI agreed to name as such with respect to liability for injuries arising from operations performed by or on behalf of WWI; the commercial general liability insurance policy issued by Travelers to ED for the period covering Su's alleged injury, which likewise includes an endorsement providing for additional insured coverage to any entities that ED agreed to name as such with respect to liability for injuries arising from the acts or omissions of ED or its subcontractors; letters sent to State National (via WWI) and Travelers by Omnibuild and 16 East tendering to the insurers the defense and indemnification of Omnibuild and 16 East with regard to the claims asserted against them in the Su Action; and coverage denial letters issued by State National and Travelers.

The plaintiffs' submissions establish, *prima facie*, that WWI and ED agreed to name Omnibuild and 16 East as additional insureds on their commercial general liability policies, and to provide them with primary, non-contributory coverage; that the allegations in the Su Action present a reasonable possibility that Su's purported injuries were caused, in whole or in part, by the acts or omissions of WWI, ED, and/or those acting on their behalf at the Premises; and that, by virtue of these facts, the additional insured endorsements in the State National and Travelers policies issued to WWI and ED, respectively, were triggered, extending coverage to Omnibuild

and 16 East as additional insureds, and entitling them to a defense by the insurers with respect to the claims asserted against them in the Su Action. As such, the plaintiffs have demonstrated their *prima facie* entitlement to judgment as a matter of law.

State National and Travelers, in opposition, both fail to demonstrate the existence of a triable issue of fact. Travelers argues that the motion should be denied because the plaintiffs did not submit the pleadings in the underlying Su Action as separate exhibits alongside their initial moving papers. However, the pleadings were provided by way of hyperlinked references to the relevant documents, as filed on the NYSCEF docket for the Su Action, within the body of the plaintiffs' moving brief, and separate copies of the relevant pleadings were subsequently annexed as exhibits to the plaintiffs' reply papers. The court will therefore disregard the plaintiffs' failure to annex the relevant pleadings to their initial motion papers as separate exhibits, given that no substantial right of a party has been impaired or prejudiced by the omission. See Sensible Choice Contracting, LLC v Rodgers, 164 AD3d 705, 706–07 (2<sup>nd</sup> Dept. 2018).

Travelers further argues that Omnibuild and 16 East do not qualify as additional insureds under the policy it issued to ED because there are no factual allegations in the underlying pleadings asserting that an act or omission of ED caused or contributed to Su's accident, for which the plaintiffs herein are alleged to be vicariously liable. To the contrary, however, the pleadings in the underlying Su Action seek to hold Omnibuild and 16 East vicariously liable for the negligence of their subcontractors, including ED. Indeed, in his Verified Bill of Particulars Su specifically asserts that his injuries were caused by ED's negligence, for which he seeks to hold Omnibuild and 16 East vicariously liable, and elaborates the various ways in which ED allegedly caused the subject accident, including its purported failure to examine the conditions at

the worksite and keep it free from hazards such as dirt and debris. These factual allegations, together with the third-party complaint brought in the underlying Su Action by plaintiffs herein against ED, alleging that ED was negligent, and seeking indemnification from ED, are sufficient to trigger Traveler's obligation to defend Omnibuild and 16 East. See Allied World Assurance Co. (U.S.) Inc. v Aspen Specialty Ins. Co., 192 AD3d 449, 450 (1<sup>st</sup> Dept. 2021); All State Interior Demolition Inc. v Scottsdale Ins. Co., 168 AD3d 612, 613 (1<sup>st</sup> Dept. 2019).

Travelers also relies on extrinsic evidence, such as an incident report concerning Su's accident, as proof that it did not cause or contribute to Su's alleged injuries. This reliance is misplaced. "[A]n insurer's duty to defend its insured 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 Am. Honda Motor Co., 78 NY2d 61, 65 (1991). "Even where there exist extrinsic facts suggesting that the claim may ultimately prove meritless or outside the policy's coverage, the insurer cannot avoid its commitment to provide a defense[.]" Id.

State National, for its part, argues that the contract between Omnibuild and WWI did not actually require WWI to obtain additional insured coverage for Omnibuild and 16 East. This contention is without merit. The contract unambiguously sets forth a list of entities that "must appear as additional insured's" on WWI's insurance. That list includes both Omnibuild and 16 East. The fact that the list includes subheadings identifying Omnibuild as a "certificate holder" and 16 East as one of a group of "additional holders" does not, as State National half-heartedly contends, mean that the contract merely required WWI to identify the plaintiffs as certificate holders rather than to name them as additional insureds. Such an interpretation is simply contrary to the contract's plain, unambiguous meaning.

State National further argues that even if it has a duty to defend the plaintiffs in the underlying Su Action, the court cannot declare that the coverage provided by State National is primary, and that State National must reimburse the plaintiffs or their insurer, non-party New York Marine & General Ins. Co. (“New York Marine”), the defense costs already incurred in the Su Action<sup>2</sup>, because the plaintiffs have not produced a copy of their New York Marine insurance policy. This argument is unavailing. The policy issued to WWI by State National contains a “Primary and Non-Contributory” endorsement, which provides that where, as here, WWI agreed in a written contract that the insurance provided to an additional insured must apply on a primary and non-contributory basis, then the State National policy “shall be primary to any insurance carried by an additional insured, and any insurance carried by such additional insured shall not be called upon to contribute to any claim covered under this [State National] policy[.]” The court notes that the Travelers policy issued to ED similarly contains an “Other Insurance – Additional Insureds” endorsement, which provides that where, as here, ED specifically agreed in a written contract that the insurance provided to an additional insured must apply on a primary and non-contributory basis, then the Travelers policy “is primary to other insurance that is available to such additional insured which covers such additional insured as a named insured, and we (Travelers) will not share with that other insurance[.]” Omnibuild and 16 East, as additional insureds on these policies, are thus entitled to receive primary, non-contributory coverage from State National and Travelers, to be provided a defense in the Su Action by these defendant insurers, and to be reimbursed defense costs already incurred therein.

Accordingly, it is

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<sup>2</sup> Although the plaintiffs’ moving papers seek reimbursement of defense costs “made by Plaintiffs or Plaintiffs’ insurer with respect to the Underlying Action,” the plaintiffs have not submitted any evidence of defense costs borne directly by them rather than by New York Marine. To the contrary, the “Defense Bills” submitted by the plaintiffs consist entirely of billing reports prepared by the plaintiffs’ insurer.

ORDERED that the plaintiffs' motion pursuant to CPLR 3212 for partial summary judgment (MOT SEQ 001) is granted; and it is further

ORDERED that defendant Travelers Indemnity Company's motion pursuant to CPLR 3212 for summary judgment is denied; and it is further

ADJUDGED and DECLARED that defendants, State National Insurance Company, Inc. and Travelers Indemnity Company, are obligated to: (1) defend the plaintiffs, Omnibuild Construction Inc. and 16 East 39<sup>th</sup> Street, LLC, against the claims asserted in the underlying personal injury action, Zhiben Su v 16 East 39<sup>th</sup> Street LLC, Omnibuild Construction Inc., and WWI Contracting Corp., Index No. 522433/2019, currently pending in the Supreme Court of the State of New York, Kings County, to the extent of, and in accordance with, the terms of the applicable primary insurance policies issued by defendant State National Insurance Company, Inc. to co-defendant WWI Contracting Corp., and by defendant Travelers Indemnity Company to co-defendant ED Electrical Inc.; and (2) reimburse the attorneys' fees, costs and disbursements incurred by the plaintiffs or the plaintiffs' insurer, non-party New York Marine & General Ins. Co., in that underlying personal injury action; and it is further

ORDERED that a Judicial Hearing Officer ("JHO") or Special Referee shall be designated to hear and report to this Court on the following individual issues of fact, which are hereby submitted to the JHO/Special Referee for such purpose: (1) the appropriate amount of defense costs, including attorneys' fees, already incurred to be reimbursed by defendants State National Insurance Company, Inc. and Travelers Indemnity Company; and it is further

ORDERED that this matter is hereby referred to the Special Referee Clerk (Room 119M, 646-386-3028 or [spref@nycourts.gov](mailto:spref@nycourts.gov)) for placement at the earliest possible date upon which the calendar of the Special Referees Part (Part SRP), which, in accordance with the Rules of that Part



(which are posted on the website of this court at [www.nycourts.gov/supctmanh](http://www.nycourts.gov/supctmanh) at the “References” link under “Courthouse Procedures”), shall assign this matter to an available JHO/Special Referee to hear and report as specified above, and it is further

ORDERED that the parties shall immediately consult one another and counsel for plaintiffs shall, within 15 days from the date of this Order, submit to the Special Referee Clerk by fax (212-401-9186) or email, an Information Sheet (which can be accessed at the “References” link on the court’s website) containing all the information called for therein and that, as soon as practical thereafter, the Special Referee Clerk shall advise counsel for the parties of the date fixed for the appearance of the matter upon the calendar of the Special Referees Part, and it is further

ORDERED that the plaintiffs shall serve a proposed accounting within 24 days from the date of this order and the defendants shall serve objections to the proposed accounting within 20 days from service of plaintiffs’ papers and the foregoing papers shall be filed with the Special Referee Clerk at least one day prior to the original appearance date in Part SRP fixed by the Clerk as set forth above, and it is further

ORDERED that the parties shall appear for the reference hearing, including with all witnesses and evidence they seek to present, and shall be ready to proceed, on the date first fixed by the Special Referee Clerk subject only to any adjournment that may be authorized by the Special Referees Part in accordance with the Rules of that Part, and it is further

ORDERED that the hearing will be conducted in the same manner as a trial before a Justice without a jury (CPLR 4320[a]) (the proceeding will be recorded by a court reporter, the rules of evidence apply, etc.) and, except as otherwise directed by the assigned JHO/Special

Referee for good cause shown, the trial of the issues specified above shall proceed from day to day until completion, and it is further

ORDERED that any motion to confirm or disaffirm the Report of the JHO/Special Referee shall be made within the time and in the manner specified in CPLR 4403 and Section 202.44 of the Uniform Rules for the Trial Courts; and it is further

ORDERED that the Clerk shall mark the file accordingly.

This constitutes the Decision, Order and Judgment of the court.

  
NANCY M. BANNON, J.S.C.  
**HON. NANCY M. BANNON**

<u>10/26/2023</u>			
<b>DATE</b>			
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION	
	<input checked="" type="checkbox"/> <u>GRANTED</u> <input type="checkbox"/> DENIED	<input type="checkbox"/> GRANTED IN PART	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input checked="" type="checkbox"/> <u>REFERENCE</u>