

**City of New York v Zurich American Insurance Co.**

2004 NY Slip Op 30139(U)

February 20, 2004

Supreme Court, New York County

Docket Number: 0402240/2003

Judge: Doris Ling-Cohan

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SUPREME COURT OF THE STATE OF NEW YORK - NEW YORK COUNTY

PRESENT: Hon. DORIS LING-COHAN, Justice

PART 62

THE CITY OF NEW YORK,

Plaintiff

- v -

ZURICH AMERICAN INSURANCE COMPANY,

Defendant.

402240-2003

INDEX NO. 402240/03  
MOTION DATE  
MOTION SEQ. NO. 001  
MOTION CAL. NO.

The following papers, numbered 1 to 3 were read on this motion to/for : Summary Judgment

FILED  
MAR 02 2004  
NEW YORK COUNTY CLERK

Papers Numbered

Notice of Motion/Order to Show Cause - Affidavits - Exhibits

1,2

Answering Affidavits - Exhibits (Memo)

3

Replying Affidavits (Reply Memo)

Cross Motion: [ ] Yes [X] No

Upon the foregoing papers, it is ordered that the motion by plaintiff City of New York for summary judgment is denied, for the reasons set forth below.

Background

This is a declaratory judgment action brought by the City of New York (City), seeking, among other things, an order declaring that defendant Zurich American Insurance Company (Zurich) is obligated to defend and indemnify it in an underlying action entitled, *Melia Rothfelder and Abraham Rothfelder v City of New York und American Bridge Company, Sup Ct Bronx County*, Index No 21891102 (the *Rothfelder* action). The City asserts that it is entitled to coverage as an additional insure under Commercial General Liability Policy number GLO 8322075-02 issued by Zurich to American Bridge Company (ABC), as the named insured, effective from June 1, 2001 to June 1, 2002 (the Zurich Policy).

The City's declaratory judgment complaint alleges that ABC entered into a contract with the New York Transit Authority (NYCTA) in connection with the construction and alteration of

communication rooms at the elevated subway station located on Broadway and West 231<sup>st</sup> Street in the Bronx (Declaratory Judgment Complaint, at ¶ 5, Affirmation of Richard J. Costa, Esq. in Support of City’s Motion [Costa Affirm.], Ex. A). The City’s complaint further alleges that, in connection with its work for the NYCTA, ABC obtained permits from the New York City Department of Transportation (DOT), including building operation permits to place materials and equipment on the street and street opening permits (Decl. Judgment Complaint at ¶ 5). The City emphasizes that the DOT’s Highway Rules require permit applicants to obtain a commercial general liability insurance policy, in the amount of \$1,000,000.00 per occurrence naming the City and DOT as additional insureds (34 RCNY § 2-02[a] [3] [i] [A] and [B]). The Highway Rules further provide that the coverage provided by the policy shall be “broad enough to cover all operations adjacent to the work site or premises, including roadways and sidewalks providing access to the work site or premises” (34 RCNY § 2-02 [a] [3] [i] [E]). The verified complaint in the *Rothfelder* action alleges, among other things, that the City granted to ABC a contract or permit to perform work at the intersection of Broadway and West 231<sup>st</sup> Street and that the plaintiff, Melia Rothfelder, was injured on or about September 1, 2001, when she tripped and fell on cracked and uneven pavement, in an area where ABC was performing work, while crossing that intersection (*Rothfelder* verified complaint, Costa Affirm., Ex. F).

The City moves for summary judgment, asserting that it is entitled to defense and indemnification in the *Rothfelder* action, as an additional insured under the Zurich Policy, based upon the policy’s language, the certificate of insurance issued to the City and an acknowledgment in a letter written by Zurich. The City further asserts that the allegations in the complaint of the *Rothfelder* action come within the coverage of the Zurich Policy. This Court concludes that the City is not entitled to summary judgment, as it has failed to establish, as a matter of law, that it is covered as an additional insured under the Zurich Policy, for the reasons discussed below.

#### Discussion

The proponent of a summary judgment motion, has the burden to “make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case” (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). The City, as the party claiming insurance coverage as an additional insured, has the burden of establishing its

entitlement to such coverage (*see Moleon v. Kreisler Borg Florman Gen. Constr. Co., Inc.*, 304 AD2d 337, 339 [1<sup>st</sup> Dept 2003]). The terms of the Zurich Policy determine whether the City is covered as an additional insured (*see Stainless, Inc. v Employers Fire Ins. Co.*, 69 AD2d 27, 31 [1<sup>st</sup> Dept 1979], *affid* 49 NY2d 924 [1980]). The portions of the Zurich Policy annexed to the City's motion papers do not contain any provision specifically designating the City as an additional insured. Therefore, the City's entitlement to coverage as an additional insured must be determined based upon the language of the Automatic Additional Insureds Endorsement, which defines the scope of additional insured coverage as follows, in pertinent part:

Any entity you are required in a written "insured contract" (hereinafter called additional insured) to name as an insured but only with respect to liability arising out of your premises, "your work" for the additional insured or acts or omissions of the additional insured in connection with the general supervision of "your work"...

(Zurich Policy, Costa Aff., **Ex. C**). The Zurich Policy defines the term "insured contract" as follows, in pertinent part:

That part of any other contract or agreement pertaining to your business (including an indemnification of municipality in connection with work performed for a municipality) under which you assume the tort liability of another party to pay for "bodily injury" or "property damage" to a third person or organization.

(Zurich Policy, Section V [9] [f]). The City has, however, omitted from its motion papers a copy of the contract between ABC and the NYCTA, describing the extent of ABC's responsibilities, including its obligations, if any, to indemnify the NYCTA, the City or any other entities for tort liability incurred in connection with work performed under the contract

The City asserts, however, that it is an additional insured under the Zurich Policy, not by virtue of the contract between the NYCTA and ABC but, rather, based upon the provisions of the DOT Highway Rules, which require an applicant for a DOT permit to obtain a commercial general liability policy naming the City and DOT as additional insureds (*see* City Reply Memorandum at 2). In support of this argument, the City cites the provision in the Zurich Policy defining the term, "insured contract", to include "(a)n obligation, as required by ordinance, to indemnify a municipality, except in connection with work for a municipality" (Zurich Policy, Section V [9] [d]). According to the City, the "ordinance" at issue in this matter encompasses the relevant provisions of the DOT Highway Rules. It is noted that

the City's motion papers omit copies of the permits allegedly issued by DOT authorizing ABC to perform work at the intersection where the accident involved in the *Rothfelder* action occurred, effective on the date of that accident. Leaving this omission aside, the City has failed to sustain its burden to establish coverage as an additional insured under the Zurich Policy, based upon the DOT Highway Rules, read in conjunction with the policy's language. Firstly, the provision of the definition of an "insured contract" relied upon by the City refers to an obligation "to indemnify a municipality" (Zurich Policy, Section V [9][d]). The term "indemnify", is broader than merely requiring a party to procure insurance naming an entity as an additional insured, as do the DOT Highway Rules (34 RCNY § 2-02[a][3][i][A]). Instead, the term "indemnify" requires a party to compensate another for a loss incurred, by payment or otherwise, or "(t)o save harmless; to secure against loss or damage; to give security for the reimbursement of a person in case of an anticipated loss falling on him" (Black's Law Dictionary 692 [5<sup>th</sup> ed 1979]).

Further, the City's argument ignores the limiting language in the Automatic Additional Insureds Endorsement of the Zurich Policy, covering an additional insured "only with respect to liability arising out of your premises, 'your work' for the additional insured or acts or omissions of the additional insured in connection with the general supervision of 'your work'...". The allegations in the *Rothfelder* complaint indicate that the injuries allegedly sustained by Melia Rothfelder did not occur on ABC's premises. Moreover, the underlying contract between the NYCTA and ABC, which is omitted from the City's motion papers, should indicate whether ABC performed any work for the City and whether the City was authorized to supervise ABC's work. Significantly, the City asserts, however, that ABC performed work for the NYCTA, rather than the City (City Decl. Judgment Complaint at ¶ 5, Costa Aff., Ex. A). Assuming that the City is correct, then the limiting language in the Automatic Additional Insureds Endorsement precludes the City from obtaining coverage as an additional insured in connection with the *Rothfelder* action.

The limiting language in the Automatic Additional Insureds Endorsement in the Zurich Policy is

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<sup>1</sup> The City is correct that the NYCTA is not a "municipality", but rather, is a public benefit corporation, an entity distinct from a municipal corporation, such as the City (see General Construction Law § 66 [1] and [2]; Public Authorities Law § 1201 [1]).

similar to the language of insurance policies at issue in other cases, in which courts have held that additional insured coverage is limited based upon the operations giving rise to the underlying injury. For example, in *Greater New York Mut. Ins. Co. v Mutual Marine Office, Inc.* (–AD2d–, 2003 NY Slip Op 19573 [1<sup>st</sup> Dept, Dec. 16, 2003]), the Appellate Division concluded that a building owner was not entitled to coverage for damage caused by roof collapse, as additional insured under policy issued to a lessee operating a parking garage, as such coverage was available only with respect to liability arising out of the garage operations performed by or on behalf of the lessee. In *Harriman Estates Dev. Corp. v General Acc. Ins. Co.* (309 AD2d 575 [1st Dept 2003]), the Appellate Division held that a subcontractor’s insurer was not required to cover a general contractor as an additional insured, as the injuries in the underlying action did not arise out of the subcontractor’s work for the general contractor. In *Glynn v United House of Prayer for All People* (292 AD2d 319, 323 [1<sup>st</sup> Dept 2002]), the Appellate Division concluded that the owner of premises damaged by fire was not entitled to coverage under the additional insured clause of a policy issued to a contractor, as the work which resulted in liability was not performed on behalf of the owner (*see also Consolidated Edison Co. of New York, Inc. v United States Fid. and Guar. Co.*, 263 AD2d 380 [1<sup>st</sup> Dept 1999]; *County of Orange v Hartford Acc. & Indem. Corp.*, 226 AD2d 578 [2d Dept 1996]; *Consolidated Edison Co. of New York, Inc. v Hartford Ins. Co.*, 203 AD2d 83 [1<sup>st</sup> Dept 1994]). The City has failed to establish, as a matter of law, that it satisfies the criteria of the Automatic Additional Insureds Endorsement in the Zurich Policy, by demonstrating that the ABC performed the work which allegedly resulted in the underlying accident for the City or that the City supervised this work.

The City’s other arguments in support of additional insured coverage under the Zurich Policy similarly lack merit. The Certificate of Liability Insurance furnished to the City specifically states that it “is issued as a matter of information only and confers no rights upon the certificate holder. This certificate does not amend, extend or alter the coverage afforded by the policies below”, which include the Zurich Policy (Costa Aff., Ex. D). The scope of the additional insured coverage available to the City is, thus, determined by the language of the Zurich Policy and the certificate of insurance, by itself, is insufficient to establish the existence of such coverage (*see Moleon v Kreisler Borg Florman*, 304 AD2d at 339; *Glynn v United House of Prayer*, 292 AD2d at 322-323; *American Motorist Ins. Co. v*

*Superior Acoustics, Inc.*, 277 AD2d 97 [1<sup>st</sup> Dept 20001; *St. George v W.J. Barney Corp.*, 270 AD2d 171 [1<sup>st</sup> Dept 20001).

Lastly, the City relies on the fact that Zurich acknowledged that the City was an additional insured under its policy in the declination and reservation of rights letter it wrote in response to the City's tender of the defense in the *Rothfelder* action (Costa Aff., **Ex. H**). Zurich disclaimed coverage on another ground, specifically that its investigation revealed that the underlying accident did not result from **work** performed by the named insured, ABC. Zurich did, however, cite the language of the Automatic Additional Insureds Endorsement in its letter and state that it was not waiving any of the rights, defenses, terms or conditions under the Policy. The law is clear that the statements in the Zurich letter do not create coverage for the City under the terms of the Policy, where none exists, nor does the letter waive the company's right to disclaim, based upon the lack of additional insured coverage under the Policy (*see Zappone v Home Ins. Co.*, 55 NY2d 131 [1982]; *Albert J. Schiff Assocs., Inc. v Flack*, 51 NY2d 692, 698 [1980]).

In view of the conclusion that the City has failed to establish, as a matter of law, that it qualifies as an additional insured under the Zurich Policy, it is not necessary to reach the other issues raised by the City

Accordingly, it is

ORDERED that the motion for summary judgment of plaintiff City of New York is denied; and it is further

ORDERED that, within thirty days of entry, defendant Zurich shall serve a copy of this order upon the City, with notice of entry.

This constitutes the Decision and Order of the Court.

**HON. DORIS LING-COHAN**

Dated: 2/25/04

ENTER: 

J.S.C.

Doris Ling-Cohan, JSC

Check One: [ ] FINAL DISPOSITION [X] NON-FINAL DISPOSITION

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