

**Bovis Lend Lease LMB, Inc. v Great American
Insurance Company**

2006 NY Slip Op 30384(U)

April 4, 2006

Supreme Court, Nassau County

Docket Number: 0602739/2003

Judge: Carol R. Edmead

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

PRESENT: HON. CAROL EDMEAD

PART 35

Index Number : 602739/2003

BOVIS LEND LEASE LMB, INC.

vs

GREAT AMERICAN INS. CO.

Sequence Number : 003

SUMMARY JUDGMENT

INDEX NO.

602739/03

MOTION DATE

12/2/05

MOTION SEQ. NO.

003

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause – Affidavits – Exhibits ...

Answering Affidavits – Exhibits _____

Replying Affidavits _____

FILED

APR 06 2006

COUNTY CLERK'S OFFICE
NEW YORK

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

This motion (motion sequence 003) is decided in accordance with the accompanying Memorandum Decision. It is hereby

ORDERED that the motion of plaintiffs (as modified by plaintiffs) Bovis Lend Lease LMB, Inc., Dormitory Authority of the State of New York, the City of New York and Illinois National Insurance Company, for an order, pursuant to CPLR 3212, granting summary judgment in their favor declaring that defendants Liberty Insurance Underwriters, Inc., United National Insurance Corp., and Westchester Fire Insurance Company are each obligated to defend and indemnify Bovis, DASNY and the City against the claims asserted by the Estate of Joao Goncalves in the wrongful death action pending in the Supreme Court of the State of New York, Bronx County, captioned Maria Goncalves v Dormitory Authority of the State of New York et al., Index No. 21460/04 to the extent of, and in accordance with, the terms of the applicable insurance policies (motion sequence number 003), is granted. It is further

Dated: _____

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

ORDERED that the motion of defendant/third-party plaintiff United for an order, pursuant to CPLR 3212, granting summary judgment in its favor, declaring that: (a) the insurance coverage afforded to the Bovis plaintiffs by QBE, Liberty, Great American Insurance Company (Great American) and Illinois is primary in nature; (b) the insurance coverage afforded to the Bovis plaintiffs by Westchester and United is excess in nature; and (c) the latter excess coverage by Westchester and United will apply on a pro rata basis above the primary policies, only after exhaustion of the primary policies' limits (motion sequence number 004), is denied. It is further

ORDERED that the motion of defendant Liberty (as modified by Liberty), for an order, pursuant to CPLR 3212, granting summary judgment in its favor, declaring that: (a) QBE is obligated - - as it has now agreed - - to fully defend the Bovis plaintiffs and Stonewall Contracting Corp. in the Goncalves Action, and to indemnify said parties for amounts up to the limits of its liability (\$1 million) on a primary basis without any contribution from any other general liability insurance; (b) United is next obligated to indemnify the Bovis plaintiffs and Stonewall, for amounts in excess of the \$1 million owed by QBE, up to United's limit of liability of \$4 million; and (c) Liberty is obligated to indemnify the Bovis plaintiffs and Stonewall for the \$1 million limit of liability afforded under its policy, only after the combined coverage afforded by QBE and United is exhausted (motion sequence number 005), is granted. It is further

ORDERED that counsel for plaintiffs shall serve a copy of this order with notice of entry within twenty days of entry, upon all counsel for all parties.

FILED

APR 06 2006

COUNTY CLERK'S OFFICE
NEW YORK

Dated 4/4/06

ENTER: [Signature] J.S.C. -

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 35

BOVIS LEND LEASE LMB, INC., DORMITORY
AUTHORITY OF THE STATE OF NEW YORK,
THE CITY OF NEW YORK and ILLINOIS
NATIONAL INSURANCE COMPANY,
Plaintiff,

Index No. 602739/03

-against-

DECISION/ORDER

GREAT AMERICAN INSURANCE COMPANY,
QBE INSURANCE CORPORATION, LIBERTY
INSURANCE UNDERWRITERS, INC, UNITED
NATIONAL INSURANCE CORP.,
WESTCHESTER FIRE INSURANCE COMPANY
(*pertaining to an underlying construction accident
involving Joao Goncalves*),
Defendants.

UNITED NATIONAL INSURANCE CORP.,
Third-Party Plaintiff,

Third-Party
Index No. 590088/05

-against-

COMMERCE AND INDUSTRY INSURANCE
COMPANY and ST. PAUL FIRE AND MARINE
INSURANCE COMPANY,
Third-Party Defendants.

FILED
APR 06 2006
COUNTY CLERKS OFFICE
NEW YORK

EDMEAD, J.:

MEMORANDUM DECISION

Motion sequence numbers 003, 004 and 005 are herewith consolidated for
disposition.

This is an action for declaratory judgment with respect to insurance defense
and coverage in a wrongful death lawsuit arising out of a construction accident.

Plaintiffs Bovis Lend Lease LMB, Inc. (Bovis), Dormitory Authority of the

[*4]

State of New York (DASNY), the City of New York (the City) (collectively, the Bovis plaintiffs) and Illinois National Insurance Company (Illinois), move for an order, pursuant to CPLR 3212, granting summary judgment in their favor declaring that defendants Liberty Insurance Underwriters, Inc. (Liberty), United National Insurance Corp. (United), and Westchester Fire Insurance Company (Westchester) are each obligated to defend and indemnify Bovis, DASNY and the City against the claims asserted by the Estate of Joao Goncalves in the wrongful death action pending in the Supreme Court of the State of New York, Bronx County, captioned Marja Goncalves v Dormitory Authority of the State of New York et al., Index No. 21460/04 (Goncalves Action) to the extent of, and in accordance with, the terms of the applicable insurance policies (motion sequence number 003).

Defendant/third-party plaintiff United moves for an order, pursuant to CPLR 3212, granting summary judgment in its favor, declaring that: (a) the insurance coverage afforded to the Bovis plaintiffs by QBE, Liberty, Great American Insurance Company (Great American) and Illinois is primary in nature; (b) the insurance coverage afforded to the Bovis plaintiffs by Westchester and United is excess in nature; and (c) the latter excess coverage by Westchester and United will apply on a pro rata basis above the primary policies, only after exhaustion of the primary policies' limits (motion sequence number 004).

Liberty moves for an order, pursuant to CPLR 3212, granting summary judgment in its favor, declaring that: (a) QBE is obligated -- as it has now agreed -- to fully defend the Bovis plaintiffs and Stonewall Contracting Corp. (Stonewall) in the Goncalves Action, and to indemnify said parties for amounts up to the limits of its liability (\$1 million) on a primary basis without any contribution from any other general liability insurance; (b)

United is next obligated to indemnify the Bovis plaintiffs and Stonewall, for amounts in excess of the \$1 million owed by QBE, up to United's limit of liability of \$4 million; and (c) Liberty is obligated to indemnify the Bovis plaintiffs and Stonewall for the \$1 million limit of liability afforded under its policy, only after the combined coverage afforded by QBE and United is exhausted (motion sequence number 005).

To the extent discussed below, plaintiffs' motion for summary judgment is granted, Liberty's motion for summary judgment is granted, and United's motion for summary judgment is denied.

BACKGROUND

This action arises out of a fatal accident which occurred on June 10, 2003, at a construction site located at the Bronx County Criminal Courthouse, at 266 East 162nd Street, Bronx, New York (Bronx Project). It is alleged that Joao Goncalves, an employee of J & A Concrete Inc. (J & A), died after he fell through an elevator shaft opening on the seventh floor of the Bronx Project while pouring concrete. In August 2004, the Goncalves estate commenced the Goncalves Action.

DASNY and/or the City are the owners of the property in question. By agreement with DASNY, Bovis is the construction manager of the Bronx Project.

DASNY entered into trade contracts with several contractors for work on the Bronx Project. One such contractor was Stonewall, which, by trade contract dated December 18, 2001, agreed to perform general construction work at the Project.

Under the trade contract, Stonewall was required to procure commercial

* 6]
general liability insurance with a combined single limit of at least \$5 million per occurrence and aggregate. The Stonewall contract also required Stonewall to name Bovis, DASNY and the City as additional insureds on the policy, and that said policy be "primary" with respect to additional insureds' policies, without any contribution therefrom.

At Stonewall's request, Liberty issued policy number EGL-NY-079042-013, effective May 11, 2003 to May 11, 2004, which provided liability insurance to Stonewall, and to "all Certificate of Insurance Holders [Stonewall] agreed to include as an insured prior to an occurrence or offense." Liberty, Stonewall and/or their respective agents issued, maintained and provided to the Bovis plaintiffs a Certificate of Insurance naming the Bovis plaintiffs as additional insureds. An endorsement to the Liberty policy entitled "Special Conditions for Subcontractors Endorsement" states that the coverage thereunder is in excess of any general liability coverage maintained by subcontractors. That provision states:

Commercial General Liability coverage maintained by subcontractors shall be primary and this policy shall be excess of limits of liability of such insurance, notwithstanding the language of the Other Insurance provisions of this policy.

At Stonewall's request, Westchester issued commercial umbrella liability insurance policy numbered CUN716578, effective May 11, 2003 to May 11, 2004, affording Stonewall excess or umbrella coverage over and above Liberty's underlying insurance coverage. The Westchester policy provides coverage to Stonewall and to "any person [or] organization' . . . that has obligated [Stonewall] by written contract to provide

the insurance that it afforded by this policy," provided that the claim arises out of Stonewall's work. The Westchester policy also provides additional insured coverage to individuals and organizations insured under Liberty's underlying policy.

On April 8, 2003, Stonewall entered into a subcontract with J & A, whereby J & A agreed to perform certain work at the Project. The subcontract incorporated and made binding upon J & A "Article 15 of the Supplemental General Conditions" of the Stonewall prime contract. This provision, as incorporated, obligated J & A to provide \$5 million coverage for Bovis, DASNY and the City.

At J & A's request, QBE Insurance Company (QBE) issued commercial general liability insurance policy, number HBG00261-2, effective April 11, 2003 to April 11, 2004. The QBE policy provided liability insurance to J & A and to all entities that J & A agreed by contract to insure. This coverage is limited to claims arising out of J & A's work.

At J & A's request, United issued a commercial umbrella liability insurance policy, number CU0082377, effective 4/11/03 to 4/11/04, to J & A, affording excess or umbrella coverage over and above the QBE policy. The United policy provides coverage to J & A and "to any person or organization qualifying as an insured under any policy of underlying insurance" issued by QBE.

Additionally, J & A has a workers' compensation policy with Commerce & Industry Insurance Company (Commerce).

At Bovis' request, Illinois issued a general liability policy, effective June 30, 2002 to June 30, 2003, to Bovis in the amount of \$1 million per occurrence/\$3 million

aggregate for bodily injury. The Illinois policy provides that the policy, subject to certain exceptions not here applicable, "is excess over any of the other insurance whether primary, excess, contingent or on any other basis." There were various other additional policies in place, issued to other contractors/subcontractors.

This declaratory judgment action seeks relief as to the obligations to defend and indemnify by and between various insurers that may afford insurance coverage with respect to the underlying claim. This action was commenced by Bovis, DASNY and the City, and Bovis' insurer, Illinois, against Great American, QBE, Liberty, United, and Westchester, by service of a summons and second amended complaint, dated February 9, 2004 (Complaint). By third-party complaint, dated on or about January 25, 2005 (Third-Party Complaint), United commenced the third-party action against Commerce and St. Paul Fire & Marine Insurance Company (St. Paul).¹

Following commencement of this action, QBE agreed to afford a defense and indemnification up to the \$1 million limit in the QBE policy to the Bovis plaintiffs with regard to the Goncalves Action. Consequently, plaintiffs have discontinued this action against QBE.

Additionally, Commerce, J & A's workers' compensation carrier has agreed to defend J & A regarding common law contribution and indemnity claims. As the workers' compensation carrier, Commerce is responsible for providing coverage to J & A for 50% of the total amount of loss asserted against J & A for the indemnification and

¹ To date, St. Paul has not appeared in this action.

contribution claim. Thus, Commerce must contribute 50% with QBE until QBE's limits are exhausted, then 50% with each insurer in order of priority until each such insurer's limits are exhausted.

DISCUSSION

Resolution of this declaratory judgment action requires a determination as to:

(a) which insurers are obligated to indemnify the Bovis plaintiffs and Stonewall for any settlement or judgment in the Goncalves Action upon exhaustion of the \$1 million limit afforded by the QBE policy; and (b) the priority/"pecking order" of coverage as between the various applicable policies.

Plaintiffs contend that, since J & A agreed to insure the Bovis plaintiffs, and since Goncalves' accident occurred in the course of his employment with J & A, the accident constitutes a claim "arising out of" J & A's work. As such, plaintiffs assert that QBE (as it has now agreed to do), is obligated to fully defend and indemnify the Bovis plaintiffs in the Goncalves Action up to the \$1 million per occurrence limit of its policy. Plaintiffs further contend that, since the deceased, at the time of his accident, was engaged in his employment on behalf of J & A, which in turn was performing work for Stonewall, the accident arose out of Stonewall's work. Stated otherwise, an injury to a subcontractor's employee that occurs when the employee is on the job, arises out of the subcontractor's work as a matter of law, and, when the work is being performed as part of a subcontract with a primary contractor, the accident arises out of the prime contractor's work as well. Accordingly, plaintiffs contend that summary judgment is proper and should be granted against J & A's insurer United, and against Stonewall's insurers, Liberty and

Westchester.

United acknowledges that, as a result of QBE's concession that the Bovis plaintiffs are additional insureds under the QBE policy, the Bovis plaintiffs are also additional insureds under the United policy. However, United argues that it provides only excess coverage which is triggered only upon prior exhaustion of all of the primary policies (to wit, the policies issued by QBE, Liberty, Great American and Illinois). In this regard, United relies on State Farm Fire & Casualty Co. v LiMauro (65 NY2d 369 [1985]), for the proposition that insurance purchased as primary coverage will be obligated to cover a claim before policies specifically purchased as secondary or excess coverage will be triggered. Thus, United contends that summary judgment should be denied to plaintiffs, and instead granted in its own favor. United further submits that, to the extent that its coverage is triggered, it would share liability on a pro rata basis with Stonewall's excess insurer, Westchester.

Liberty takes yet another position. It contends that, in light of the provision in the Liberty policy, stating that the coverage maintained by Stonewall's subcontractors (which, by definition, includes J & A) "shall be primary and this policy shall be excess of limits of liability of such insurance," QBE and United, together, as J & A's general liability carriers, owe the first \$5 million of coverage for the Bovis plaintiffs and Stonewall on a primary basis in the Goncalves Action, and that any coverage that may be afforded to the Bovis plaintiffs by Liberty is specifically excess to exhaustion of the coverage afforded by QBE and United.

Liberty thus submits that, upon exhaustion of the limits of the QBE policy,

United is next obligated to indemnify the Bovis plaintiffs and Stonewall, and that, only after exhaustion of the combined coverage afforded by QBE and United, is Liberty obligated to indemnify the Bovis plaintiffs and Stonewall for the \$1 million limit of liability afforded under the Liberty policy.

Westchester agrees generally with Liberty's position. However, with respect to which insurance policy is triggered after exhaustion of the coverage afforded by QBE's, United's and Liberty's policies, Westchester contends that questions of fact exist, requiring partial denial of summary judgment. Specifically, Westchester argues that the priority of coverage cannot be fully resolved because it is unclear, in the Goncalves Action, which subcontractors may have had direct or indirect involvement in the accident, and whether the general contractor and/or the construction manager may have had any share of negligence in the accident.

Analysis

Courts will look to the terms of the available insurance policies and the relevant trade contracts of the parties to a construction project to determine the priority of the insurance policies (see Pecker Iron Works of New York, Inc. v Traveler's Ins. Co., 290 AD2d 426 [2d Dept 2002], affd 99 NY2d 391, 393 [2003]; see also Chelsea Associates, LLC v Laquila-Pinnacle, 21 AD3d 739 [1st Dept 2005]; Liberty Mut. Ins. Co. v Trystate Mechanical, Inc., 15 AD3d 236 [1st Dept 2005]; Royal Sun Alliance Ins. Co. v Travelers Ins. Co., 15 AD3d 563 [2d Dept 2005]; Tishman Constr. Corp. v American Manufacturers Mut. Ins. Co., 303 AD2d 323 [1st Dept 2003]).

Where the contract requires a subcontractor's insurance to apply on a

primary basis and the subcontractor's insurance policy states that it applies on a primary basis, courts hold that the subcontractor's insurance policy affords primary coverage for the additional insureds, particularly where the additional insureds' own insurance policies state that they shall be excess of insurance afforded on an additional insured basis (see Tishman Constr. Corp. v American Manufacturers Mut. Ins. Co., *supra*; Chelsea Associates, LLC v Laquila-Pinnacle, *supra*). Tishman Constr. Corp. v American Manufacturers Mut. Ins. Co., *supra*, directly supports Liberty's position. In that case, the First Department held that the owner's and the construction manager's primary policy was excess of their contractor's insurance policy where their own policy stated that it was excess of "any other primary insurance available to you covering liability for damages arising out of the premises or operations for which you have been added as an additional insured by attachment of an endorsement" (303 AD2d at 324). Likewise, in Royal Sun Alliance Ins. Co. v Travelers Ins. Co., *supra*, the Second Department held that the contractor's primary and excess policies both must be exhausted before the general contractor's/owner's policy could be triggered, where the underlying subcontract required that the contractor's policies be exhausted before implicating the general contractor's policy.

Here, plaintiffs, Westchester, and Liberty all agree that (a) QBE has the first level of coverage for the Bovis plaintiffs and Stonewall in the Goncalves Action, including a primary duty to defend and to indemnify up to its limit of liability of \$1 million; and (b) United has the next level of coverage for the Bovis plaintiffs and Stonewall in the Goncalves Action, with an obligation to indemnify for amounts up to \$ 4 million for any

settlements or judgments.² The above is in accord with applicable law and supported by the evidence.

United's opposition, particularly its claim that the United policy is excess to all other primary insurance policies, is rejected. United's position runs counter to settled law and fails to take into account the applicable language in the relevant policies. Upon review of the relevant law and the documentary evidence - - including the contracts and insurance policies - - the court concludes that United is second in line after QBE to indemnify the Bovis plaintiffs and Stonewall (Pecker Iron Works v Traveler's Insurance Co., *supra*; Chelsea Associates, LLC v Laquila-Pinnacle, *supra*; Tishman Constr. Corp. v American Manufacturers Mut. Ins. Co., *supra*).

Accordingly, the court grants Liberty's motion for summary judgment (as modified by Liberty), and denies United's motion for summary judgment.

For the reasons stated above, United's opposition to plaintiffs' summary judgment motion is likewise rejected. Liberty does not oppose plaintiffs' motion, taking into account each of these parties' minor concessions to one another. While Westchester does not dispute that the Bovis plaintiffs are additional insureds under each of the relevant policies, including the Westchester policy, it asserts, however, that factual issues exist with regard to the authenticity of certain documents and/or the fault or negligence by any of the parties. This claim is unsupported and unavailing as is its claim that the motion is premature because discovery is needed.

² Plaintiffs are in almost entire agreement with Liberty, except for one or two minor semantic items, which the parties have worked out on their own.

An additional insured under an insurance policy is entitled to coverage regardless of which party was at fault for the underlying accident (see O'Connor v Serge Elevator Co., 58 NY2d 655 [1982]; Impulse Enterprises/ F& V Mechanical Plumbing & Heating v St. Paul Fire & Marine Ins. Co., 282 AD2d 266 [1st Dept 2001]). Where, as here, an employee of a prime contractor's subcontractor is injured, his injury arises out of the prime contractor's work as a matter of law, regardless of how the accident occurred (Consolidated Edison Co. v United States Fid. & Guar. Co., 266 AD2d 9 [1st Dept 1999] [injuries to subcontractor's employee occurring in the course of his/her employment arise out of the prime contractor's work as a matter of law]). Thus, Westchester's argument that the Goncalves Action must proceed to determine culpability before Westchester's coverage can be determined, is without merit, and no discovery is needed on that issue. Moreover, the purported potential availability of other policies in no way vitiates Westchester's obligations to its insureds -- Westchester is independently contractually obligated to indemnify the Bovis plaintiffs regardless of the ultimate liability of the other carriers.

The court thus rejects Westchester's arguments in opposition to plaintiffs' motion. Accordingly, for the above stated reasons, plaintiffs' motion for summary judgment (as modified by plaintiffs) is granted.

Conclusion

Based on the foregoing, it is hereby

ORDERED that the motion of plaintiffs (as modified by plaintiffs) Bovis Lend Lease LMB, Inc., Dormitory Authority of the State of New York, the City of New York and Illinois

National Insurance Company, for an order, pursuant to CPLR 3212, granting summary judgment in their favor declaring that defendants Liberty Insurance Underwriters, Inc., United National Insurance Corp., and Westchester Fire Insurance Company are each obligated to defend and indemnify Bovis, DASNY and the City against the claims asserted by the Estate of Joao Goncalves in the wrongful death action pending in the Supreme Court of the State of New York, Bronx County, captioned Maria Goncalves v Dormitory Authority of the State of New York et al., Index No. 21460/04 to the extent of, and in accordance with, the terms of the applicable insurance policies (motion sequence number 003), is granted. It is further

ORDERED that the motion of defendant/third-party plaintiff United for an order, pursuant to CPLR 3212, granting summary judgment in its favor, declaring that: (a) the insurance coverage afforded to the Bovis plaintiffs by QBE, Liberty, Great American Insurance Company (Great American) and Illinois is primary in nature; (b) the insurance coverage afforded to the Bovis plaintiffs by Westchester and United is excess in nature; and (c) the latter excess coverage by Westchester and United will apply on a pro rata basis above the primary policies, only after exhaustion of the primary policies' limits (motion sequence number 004), is denied. It is further

ORDERED that the motion of defendant Liberty (as modified by Liberty), for an order, pursuant to CPLR 3212, granting summary judgment in its favor, declaring that: (a) QBE is obligated - - as it has now agreed - - to fully defend the Bovis plaintiffs and Stonewall Contracting Corp. in the Goncalves Action, and to indemnify said parties for amounts up to the limits of its liability (\$1 million) on a primary basis without any

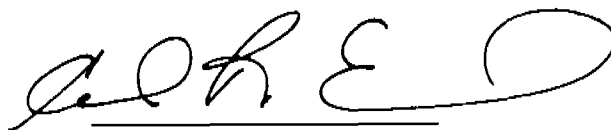
contribution from any other general liability insurance; (b) United is next obligated to indemnify the Bovis plaintiffs and Stonewall, for amounts in excess of the \$1 million owed by QBE, up to United's limit of liability of \$4 million; and (c) Liberty is obligated to indemnify the Bovis plaintiffs and Stonewall for the \$1 million limit of liability afforded under its policy, only after the combined coverage afforded by QBE and United is exhausted (motion sequence number 005), is granted. It is further

ORDERED that counsel for plaintiffs shall serve a copy of this order with notice of entry within twenty days of entry, upon all counsel for all parties.

This constitutes the decision and order of this court.

Dated: April 4, 2006

ENTER:



Carol Robinson Edmead
J.S.C.

FILED
APR 06 2006
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