

**Illinois Natl. Ins. Co. v American
Alternative Ins. Co.**

2007 NY Slip Op 30804(U)

April 5, 2007

Supreme Court, New York County

Docket Number: 0119440/2003

Judge: Emily Jane Goodman

Republished from New York State Unified Court
System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for
any additional information on this case.

This opinion is uncorrected and not selected for official
publication.

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

PRESENT. **EMILY JANE GOODMAN**

PART 17

Index Number : 119440/2003

ILLINOIS NATIONAL INSURANCE

vs
AMERICAN ALTERNATIVE

Sequence Number : 004

COMPEL

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

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 _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion *and cross motion*
be decided for appeal

WARNING
This judgment has not been filed with the County Clerk and notice of entry cannot be given as provided herein. To obtain entry, counsel or substituted representative must appear in person at the Judgment Clerk's Desk (Room 1210).

Dated: 4/17/07



EMILY JANE GOODMAN J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 17

-----X

ILLINOIS NATIONAL INSURANCE COMPANY, THE
NEW YORK CITY SCHOOL CONSTRUCTION
AUTHORITY, THE CITY OF NEW YORK, and
THE BOARD OF EDUCATION OF THE CITY OF
NEW YORK,

Plaintiffs,

Index No. 119440/03

-against-

AMERICAN ALTERNATIVE INSURANCE
CORPORATION,

Defendant

UPPER MERIDIAN COURT
This judgment has not been entered by the County Clerk
and notice of entry cannot be given based hereon. To
obtain entry, counsel or authorized representative must
appear in person at the Judgment Clerk's Desk (Room
1418).

-----X

EMILY JANE GOODMAN, J.S.C.:

Defendant American Alternative Insurance Corporation (AAIC) moves, pursuant to CPLR 3124, for an order compelling plaintiff to appear for a further examination before trial or, in the alternative, to preclude plaintiff from testifying at the time of trial. While AAIC does not specify which plaintiff it is moving against, it appears from the papers that AAIC seeks a further examination of the New York City School Construction Authority (SCA), and seeks preclusion as against all plaintiffs.

Plaintiffs cross-move, pursuant to CPLR 3212, for summary judgment declaring that AAIC has a duty to defend and indemnify them as additional insureds in the underlying action, *Jedrych v The City of New York* (Sup Ct, Queens County Index no. 32218/01). AAIC cross-moves for summary judgment dismissing the complaint on

the grounds that there is no material issue of fact in dispute, and that plaintiffs are not additional named insureds under the AAIC policy.

FACTS

This action seeks a declaratory judgment stating that AAIC is obligated to defend and insure plaintiffs SCA, the City of New York and the New York City Board of Education (collectively, the City Plaintiffs) as additional insureds under a policy issued to ETS Contracting Co. (ETS). Plaintiff Illinois National Insurance Company insures the City Plaintiffs, and seeks reimbursement for the money that it has expended defending them and in settling the underlying action, *Jedrych v The City of New York* (Sup Ct, Queens County Index no. 32218/01). A settlement in the amount of \$1 million was reached in September of 2004. Plaintiffs brought a third-party action against ETS, which was severed and is pending in Queens County.

The City Plaintiffs commenced this action alleging that they were additional insureds on ETS's policy with AAIC. Plaintiffs contend that ETS's proposal for the asbestos removal work "incorporated by reference" the SCA's standard "Terms and Conditions for Asbestos Subcontractor (Terms and Conditions)", which included an obligation on the part of ETS to procure insurance naming the City Plaintiffs as additional insureds. ETS was a subcontractor for Stealth Windows, which had contracted

with SCA to replace the windows at I.S. 74 in Queens. The written agreement between ETS and Stealth Windows did not include or refer to SCA's Terms and Conditions, which are purportedly included in SCA's solicitation bid documents. The proposal included a requirement that ETS obtain "\$5 million Asbestos Abatement Contractors General" coverage, but the three-page written contract does not include any requirement that ETS name the City Plaintiffs as additional insureds. Nor does it incorporate any other contract or conditions by reference. The AAIC policy that ETS procured provides that it includes as additional insureds only those who have a written contract with ETS requiring such insurance.

DISCUSSION

Summary Judgment

Plaintiffs maintain that the accident alleged in the *Jedrych* action arose out of ETS's asbestos abatement work, and that the court should look to the general nature of ETS's operations, and not the precise cause of the action. While plaintiffs spend several pages discussing this point, it is not at issue in this motion. The question presented is not whether the accident arose out of ETS's work, but whether the City Plaintiffs are additional insureds under the AAIC policy.

Plaintiffs next argue that an additional insured is entitled to enjoy the same protection as a named insured, and that the

duty to defend is broader than the duty to indemnify. Again, that is not at issue before the court. The question is whether there is any coverage for the City Plaintiffs at all.

Plaintiffs also raise arguments to demonstrate that AAIC's policy is primary to the Illinois National policy, both with respect to indemnity and to defending the City Plaintiffs. This again assumes that AAIC's policy covers the City Plaintiffs, which is the main issue in contention in this action.

Plaintiffs contend that they are entitled to summary judgment because all contractors who perform asbestos subcontracting work for SCA must agree to the Terms and Conditions as contained in the SCA standard bid documents. Thus, plaintiffs maintain that those terms and conditions were incorporated into the subcontract between Stealth Windows and ETS. Those terms and conditions required the insurance policy to name the City Plaintiffs as additional insureds. Plaintiffs argue that ETS had performed other asbestos removal jobs for SCA prior to this job, and was therefore aware of the requirement to obtain insurance, and had been provided with the standard terms and conditions a number of times on previous jobs. Plaintiffs maintain that so long as the parties agreed on the terms, there does not need to be a signed writing in order to bind the parties to the agreement. They contend that the parties' long-standing course of dealing which included the standard SCA insurance

requirements, which were in effect for the eight previous years, and the certificate of insurance provided by ETS to the SCA reflecting the additional insured coverage, demonstrate an intention to be bound by SCA requirements regarding additional insurance. While acknowledging that the issuance of a certificate of insurance is not dispositive, plaintiffs aver that the City Plaintiffs reasonably relied on the certificate to their detriment, by permitting ETS to continue working on the site. Further, they allege that the broker that issued the certificate was AAIC's agent, and therefore that AAIC is bound by the certificate.

AAIC contends that it is entitled to summary judgment because there is no written agreement in which ETS contracted to provide insurance naming the City Plaintiffs as named insureds. The insurance policy provides that it includes "as an 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." Spindler Affir. Ex. M. Without such a writing, there is no coverage.

Plaintiffs rely on what they term ETS's knowledge of what the standard terms and conditions are for asbestos subcontractors working for the SCA. However, if those terms and conditions were not supplied to ETS for a particular job, ETS is not bound by

them. ETS is under no obligation to determine whether those terms and conditions have been modified or dispensed with, or whether they are the same from one job to another. Rather, as is well settled, a party is bound by the plain meaning of the agreement that was signed (*Highland Sand & Gravel v Squicciarini*, 272 AD2d 375 (2d Dept 2000), not by the terms of another agreement. If ETS was never provided with the terms and conditions with respect to this project, and if an agreement including those terms and conditions was not signed by ETS for this job, ETS cannot be held to them. Any other result would countenance a court creating terms by implication, or rewriting a contract, neither of which is appropriate. *Bretton v Mutual of Omaha Ins. Co.*, 110 AD2d 46 (1st Dept), *affd for reasons stated* 66 NY2d 1020 (1985).

Furthermore, even if ETS were bound by the terms and conditions, that would in no way bind AAIC. AAIC has a contract with ETS which provides that it will include as a named insured a party where there is a signed agreement that the party will be included as an additional insured. Here there is no suggestion that such a written agreement exists. Without it, AAIC is not obligated to defend or indemnify. *See id.; Highland Sand & Gravel*, 272 AD2d 375, *supra*. A contract must be construed in accordance with its plain meaning. *Rehberger v Richtberg*, 295 AD2d 490 (2d Dept 2002). Here, the plain meaning requires that

there be a signed, written agreement in order for a party to be covered as an additional named insured. The City Plaintiffs have not entered into any such agreement with ETS. Nor has Stealth Windows required, in writing, that the City Plaintiffs be so named. Moreover, the undisputed deposition testimony confirms that there was no written contract with ETS that provides that the City Plaintiffs were to be added as additional insureds under the AAIC policy. Consequently, according to the plain language of the contract, the City Plaintiffs are not additional insureds. *Flores v Lower East Side Serv. Ctr., Inc.* (4 NY3d 363 [2005]) is inapposite as there, the Court of Appeals allowed the parties to resort to general contract law to establish an indemnification agreement, absent a written contract, because Workers Compensation Law Section 11 did not require that the indemnification agreement be in writing. Here, however, a written contract or agreement was required.

Plaintiffs' argument that the certificate of insurance should serve to estop AAIC from disclaiming coverage is not supported by the law. AAIC did not issue the certificate of insurance; it was issued by a local insurance broker. There is no evidence that the broker was an agent of or related to AAIC; plaintiffs' conclusory allegations to that effect are not supported by evidence. As such, the broker had no authority to bind the insurer, especially when the certificate of insurance

stated that it was "issued as a matter of information only and confers no rights upon the certificate holder," and that it "does not amend, extend or alter the coverage afforded by the policies." See *Armada Supply Inc. v Wright*, 858 F2d 842 (2d Cir 1988); *Taylor v Kinsella*, 742 F2d 709 (2d Cir 1984); *Kaufman v Puritan Ins. Co.*, 126 AD2d 702 (2d Dept 1987). Under such circumstances, it is the terms of the policy, not the certificate of insurance, that determines whether a party or occurrence is covered.

Plaintiffs' argument that AAIC has failed to produce an expert affidavit, and therefore that defendant has not made a prima facie entitlement to judgment, is devoid of merit. The cases upon which plaintiffs rely involve personal injury claims and product liability claims. However, this matter involves contract construction, which is the province of the court, and does not require expert testimony. *Hartford Acc. & Indem. Co. v Wesolowski*, 33 NY2d 169 (1973).

In sum, plaintiffs have not presented any evidence that the City Plaintiffs were additional insureds under the insurance policy, and AAIC has presented evidence that they were not additional insureds. Consequently, AAIC has no obligation to defend or indemnify plaintiffs with respect to the underlying

action.¹

Discovery Motion

AAIC seeks an order compelling plaintiff to produce a further witness for examination before trial, because the witness produced allegedly had insufficient knowledge about the contracts and insurance procurement provisions for the project. In view of the outcome of the summary judgment cross motions, this motion is denied as moot.

CONCLUSION

Accordingly, it is hereby

ORDERED that the motion to compel production of another witness for deposition is denied as moot; and it is further

ORDERED that plaintiffs' cross motion for summary judgment declaring that defendant is obligated to defend and indemnify them in the underlying action is denied; and it is further

ORDERED that defendant's cross motion for summary judgment is granted; and it is further

ADJUDGED AND DECLARED that defendant American Alternative Insurance Corporation has no obligation to defend or indemnify plaintiffs in the underlying action entitled *Jedrych v The City*

¹ Although defendant seeks to dismiss the complaint in its cross motion, the appropriate remedy is for the court to declare the rights of the parties, not to dismiss the complaint. See *Ward v County of Allegany*, 34 AD3d 1288 (4th Dept 2006); *Lyden Nursing Home v DeBuono*, 287 AD2d 490 (2d Dept 2001).

of New York, Sup Ct, Queens County Index no. 32218/01.

This Constitutes the Decision, Order and Judgment of the Court.

Dated: April 5, 2007

ENTER:



J.S.C.

EMILY JANE GOODMAN

UNRECORDED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).