

**Canada Dry Bottling Co. of N.Y. v
Nationwide Mut. Fire Ins. Co.**

2007 NY Slip Op 33124(U)

September 24, 2007

Supreme Court, New York County

Docket Number: 0602843/2003

Judge: Martin Shulman

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

PRESENT: **MARTIN SHULMAN**
J.S.C.
Justice

PART 1

Canada Dry

INDEX NO. 602843103

MOTION DATE _____

MOTION SEQ. NO. 01

MOTION CAL. NO. _____

Nationwide

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

1
2, 3
4, 5, 6, 7

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the attached decision and order.

UNFILED 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).



SEP 24 2007

Dated: _____

MARTIN SHULMAN
J.S.C. 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):

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 1

-----X
CANADA DRY BOTTLING COMPANY OF NEW YORK,
Plaintiff,

-against-

Index No.
602843/2003

NATIONWIDE MUTUAL FIRE INSURANCE CO.,
NATIONWIDE INSURANCE COMPANY, TRAVELERS
INSURANCE COMPANY, THE TRAVELERS
PROPERTY-CASUALTY CO., JKH CONTRACTING
INC., H & H BUILDERS, INC., and BARONE
STEEL FABRICATORS, INC.,

Defendants.

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

-----X
PEPSI-COLA BOTTLING COMPANY OF NEW
YORK, INC.,
Plaintiff,

-against-

Index No.
601983/2004

NATIONWIDE MUTUAL FIRE INSURANCE CO.,
THE TRAVELERS INDEMNITY COMPANY OF
AMERICA, JKH CONTRACTING INC.,
H & H BUILDERS, INC., and BARONE STEEL
FABRICATORS, INC.,

Defendants.

-----X
SHULMAN, J.:

Motion sequence numbers 001 and 002 in Pepsi-Cola Bottling Company of New York v Nationwide Mutual Fire Insurance Co., et al., Index No. 601983/2004 (the "Pepsi Declaratory Judgment Action") and motion sequence numbers 001, 002, and 003 in Canada Dry Bottling Company of New York v Nationwide Mutual Fire Insurance Co., et al., Index No. 602843/2003 (the "Canada Dry Declaratory Judgment Action") are hereby consolidated for disposition.

In these actions, plaintiff Pepsi-Cola Bottling Company of New York, Inc. ("Pepsi") and plaintiff Canada Dry Bottling Company of New York ("Canada Dry") seek a

declaration of their respective rights under insurance policies issued by defendants Nationwide Mutual Fire Insurance Company ("Nationwide")¹ and The Travelers Indemnity Company of America ("Travelers")², with respect to a recently consolidated wrongful death/personal injury suit currently pending in the Supreme Court, Kings County, under the caption Marietta Small, as the Public Administrator for the Estate of Gonzalo Mero, Deceased v Canada Dry Bottling Company of New York, A New York Limited Partnership, Pepsi Cola Bottling Company of New York, Inc., Prime Contracting Design Corp., JKH Contracting, Inc., H & H Construction Associates, Inc., and H & H Construction Corp., Index No. 50273/2002 (the "Consolidated Underlying Suit").

In motion sequence number 001 of the Pepsi Declaratory Judgment Action, Pepsi moves for summary judgment declaring that both Travelers and Nationwide are obligated to defend and indemnify Pepsi, as an additional insured, in the Consolidated Underlying Suit. In motion sequence number 002, Travelers moves for summary judgment in its favor with respect to all claims and cross claims asserted against it. Nationwide and its named insureds, defendants JKH Contracting Inc. ("JKH") and H&H Builders, Inc. ("H&H"), cross-move for summary judgment dismissing all claims and cross claims asserted against them, and for a declaration that Pepsi is not entitled to coverage, as an additional insured, under Nationwide's policy. Defendant Barone Steel Fabricators, Inc. ("Barone"), Travelers' named insured, also cross-moves for summary

¹ Nationwide is also sued incorrectly in the Canada Dry Declaratory Judgment Action as Nationwide Insurance Company.

² Travelers is sued incorrectly in the Canada Dry Declaratory Judgment Action as Travelers Insurance Company and The Travelers Property-Casualty Co.

judgment dismissing Pepsi's complaint, and for a declaration that Travelers is obligated to defend and indemnify Barone with respect to the Consolidated Underlying Suit.

In motion sequence number 001 of the Canada Dry Declaratory Judgment Action, Travelers moves for summary judgment in its favor with respect to all claims and cross claims asserted against it. In motion sequence number 002, Nationwide, JKH, and H&H move for summary judgment dismissing all claims and cross claims asserted against them; for a declaration that Canada Dry is not entitled to coverage, as an additional insured, under Nationwide's policy; and, for a declaration that Travelers is obligated to defend JKH and H&H, as additional insureds, in the Consolidated Underlying Suit. In motion sequence number 003, Canada Dry moves for summary judgment declaring that Travelers is obligated to defend and indemnify it, as an additional insured, in the Consolidated Underlying Suit.

Background

On November 17, 2000, Gonzalo Mero, an employee of defendant Barone, was fatally injured when he fell from a height while working on a construction project at 112-02 15th Avenue in College Point, New York (the "premises" or "property"). At the time of the occurrence, Barone was performing certain steel work at the site pursuant to a written agreement with Pepsi (see Thymius Affirm. in Support [Pepsi Declaratory Judgment Action], Exh. D). Defendant H&H also was performing work at the site, pursuant to a separate written agreement with Pepsi (see id., Exh. J). Defendant JKH was present at the site as the construction manager on the project, pursuant to a written construction management agreement with Pepsi (see id., Exh. I). Although Pepsi signed each of these contracts as "owner" of the premises, it appears that

Canada Dry was the actual owner of the property. Pepsi is a limited partner of Canada Dry.

Under the written agreement between Barone and Pepsi (the Barone/Pepsi Agreement), Barone was required to procure general liability and workers' compensation insurance, among other insurance, and to provide Pepsi with a signed certificate evidencing all required policies. The agreement further required that this certificate:

list Pepsi-Cola Bottling Company of New York & Canada Dry Bottling Company of New York as "additional insureds" for all coverages except workers' compensation

(id., Exh. D).

At the time of the occurrence, Barone was covered by a Contractors Policy issued by Travelers, policy # I-680-835D386-3-TIA-99 (see Toman Affirm. in Support [Canada Dry Declaratory Judgment Action]), Exh. F). The policy contained a Blanket Additional Insured Endorsement to the policy's Commercial General Liability Coverage Part, which provided:

WHO IS AN INSURED (Section II) is amended to include as an insured any person or organization (called hereafter "additional insured") whom you have agreed in a written contract, executed prior to loss, to name as additional insured, but only with respect to liability arising out of "your work" or your ongoing operations for that additional insured performed by you or for you

(id.).

At the time of the occurrence, both JKH and H&H were covered by a single Contractors Policy issued by Nationwide, policy # 66 AC 577-925-3001 M (Thymius

Affirm. in Support [Pepsi Declaratory Judgement Action], Exh. H). The Nationwide policy contained an Additional Insured Endorsement, which provided:

WHO IS AN INSURED is amended to include as an insured the Person or Organization in the Schedule, but this insurance with respect to such Person or Organization applies only to the extent that such Person or Organization is held liable for your acts or omissions arising out of and in the course of operations performed for such Person or Organization by you or your subcontractor

(id.). Pepsi was listed as an additional insured in the policy's schedule, effective July 28, 2000; Canada Dry was listed as an additional insured in the policy's schedule, effective February 26, 2001 (id.).

The notice provisions in the Travelers policy required Barone, the named insured, to "see to it that we are notified as soon as practicable of an 'occurrence' or an offense which may result in a claim," and to "[n]otify us as soon as practicable" if "a claim is made or 'suit' is brought against any insured" (see Toman Affirm. in Support [Canada Dry Declaratory Judgment Action], Exh F: Commercial Liability Coverage Part, Section IV, ¶2). In addition, these provisions provided that the named insured and any other involved insured must:

- (1) [i]mmediately send us copies of any demands, notices, summonses or legal papers received in connection with the claim or 'suit'

(id.). The notice provisions in the Nationwide policy were identical (see Thymius Affirm. in Support [Pepsi Declaratory Judgment Action], Exh. H: Contractors Liability Coverage Form, Section E, ¶2).

On November 27, 2000, within 10 days of the fatal occurrence, plaintiffs' counsel sent notice of the occurrence to both Nationwide and Travelers (see Thymius Affirm. in Support [Pepsi Declaratory Judgment Action], Exh. E and K). The notices requested

that each of these insurers acknowledge that it “will fully defend, indemnify and hold harmless Pepsi-Cola Bottling Co. of NY, Inc. in any action or proceeding arising out of this occurrence” (*id.*). The notices contained no explicit reference to Canada Dry.

On December 13, 2000, Nationwide sent its own notice to Travelers, tendering the defense and indemnification of JKH and H&H to Travelers (see John Affirm. in Support [Canada Dry Declaratory Judgement Action], Exh. A). Nationwide based its tender on Barone’s alleged duty to indemnify JKH and H&H under the Barone/Pepsi Agreement (*id.*).³ It is undisputed that Barone, Travelers’ named insured, did not send a notice of occurrence to Travelers.

On November 27, 2002, the Public Administrator of Kings County (“Administrator”) commenced the first of three successive suits arising out of the fatal occurrence, on behalf of the Estate of Mero. The Administrator named Canada Dry

³ Specifically, the Barone/Pepsi Agreement contained a “Hold Harmless” provision, in which Barone had agreed:

[t]o the fullest extent permitted by law, to indemnify and hold harmless the Owner and their agents and employees from and against all claims, damages, losses and expenses, including but not limited to attorneys’ fees, arising out of or resulting from the performance of the Work, provided that any such claim, damage, loss or expense (i) is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (other than the Work itself) including the loss of use resulting therefrom and (ii) IS CAUSED IN WHOLE OR IN PART BY ANY NEGLIGENT ACT OR OMISSION OF THE CONTRACTOR, ANY SUBCONTRACTOR, ANYONE DIRECTLY OR INDIRECTLY EMPLOYED BY ANY OF THEM OR ANYONE FOR WHOSE ACTS ANY OF THEM MAY BE LIABLE, REGARDLESS OF WHETHER OR NOT IT IS CAUSED IN PART BY A PARTY INDEMNIFIED HEREUNDER

(see Thymius Affirm. in Support [Pepsi Declaratory Judgment Action], Exh. D).

and non-party Prime Contracting Design Corp. ("Prime Contracting"), another contractor on the project, as the sole defendants in that suit (the "Mero/Canada Dry Suit").

On June 11, 2003, plaintiffs' counsel transmitted notice of the Mero/Canada Dry Suit, with copies of the summons and complaint, to Nationwide and Travelers (Thymius Affirm. in Support [Canada Dry Declaratory Judgment Action], Exh. F). The notice indicated that plaintiffs had not received the papers in that suit until June 10, 2003, i.e., the day before the notice of suit was sent (*id.*). The notice requested defense and indemnification for Pepsi, although Canada Dry was the only one actually named as a defendant in that suit.

On July 28, 2003, Nationwide mailed Travelers a second request for defense and indemnification on behalf of its named insureds (*see* John Affirm. in Support [Canada Dry Declaratory Judgment Action], Exh. B). This time, Nationwide based its request on "the contract between JKH Contracting, H and H Contracting and Barone Steel Fabricators" (*id.*). It is undisputed that Barone did not send Travelers notice of the Mero/Canada Dry Suit at this time.

By letter dated June 27, 2003, Travelers disclaimed coverage for Pepsi with respect to the Mero/Canada Dry Suit (*see* Thymius Affirm. in Support [Canada Dry Declaratory Judgment Action], Exh. G). Travelers based its disclaimer on the apparent untimeliness of the June 11, 2003 notice of suit.

That same day, Travelers disclaimed coverage for Barone with respect to all claims arising out of the occurrence (*see* Toman Affirm. in Support [Canada Dry Declaratory Judgment Action], Exh. N). Travelers based this disclaimer on Barone's failure to provide Travelers with notice of either the occurrence or suit, as required

under its policy (id.). Travelers additionally indicated that coverage for Barone would be precluded, in any event, by an exclusion in the policy for bodily injury to an insured's employee.⁴

Travelers also disclaimed Nationwide's request for defense and indemnification, on behalf of JKH and H&H, by letter dated August 15, 2003 (John Affirm. in Support [Canada Dry Declaratory Judgment Action], Exh. C). In this disclaimer, Travelers stated that it was unaware of any written contract between JKH, H&H and Barone, and that,

⁴ Specifically, Section I, paragraph 2.e of the Travelers' Commercial General Liability Coverage Part, excludes coverage for:

"Bodily injury" to:

- (1) An "employee" of the insured arising out of and in the course of:
 - (a) Employment by the insured; or
 - (b) Performing duties related to the conduct of the insured's business;

This exclusion applies:

- (1) Whether the insured may be liable as an employer or in any other capacity; and
- (2) To any obligation to share damages with or repay someone else who must pay damages because of the injury.

This exclusion does not apply to liability assumed by the insured under an "insured contract"

(Toman Affirm. in Support [Canada Dry Declaratory Judgment Action], Exh. F). An "insured contract" is defined, in part, as:

[t]hat part of any other contract or agreement pertaining to your business (including an indemnification of a 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

(id., Section V, ¶18).

even if such a contract existed, coverage still would be disclaimed due to Nationwide's failure to provide timely notice of the claim on its insureds' behalf (id.).

Nationwide disclaimed additional insured coverage for both Pepsi and Canada Dry, with respect to the Mero/Canada Dry Suit, by letter dated July 29, 2003 (see Thymius Affirm. in Support [Pepsi's Declaratory Judgment Action], Exh. M).

Nationwide's denial of coverage for Canada Dry was based on the fact that Canada Dry was not listed as an additional insured on its policy schedule as of the date of the loss. Although Nationwide acknowledged that Pepsi was listed on the policy schedule as an additional insured on the date of the loss, Nationwide declined to provide either defense or indemnification to Pepsi, on the ground that any decision as to coverage would be premature. Nationwide indicated that the complaint in the Mero/Canada Dry Suit contained allegations of Pepsi's negligence, which, if true, would preclude additional insured coverage for Pepsi under the language of its additional insured endorsement (id.).

On August 28, 2003, Canada Dry commenced a third-party action against Barone seeking, *inter alia*, contractual and common-law indemnification and contribution in connection with the Mero/Canada Dry Suit. There is no indication that Barone provided Travelers with notice of, or copies of the summons and complaint in, this third-party suit.

On September 10, 2003, Canada Dry commenced the instant Canada Dry Declaratory Judgment Action against Nationwide, Travelers, and each of their named insureds, seeking a declaration of its rights under the two policies, with respect to the Mero/Canada Dry Suit. Thereafter, on November 7, 2003, Barone's counsel sent

Travelers a copy of the summons and complaint filed in the Canada Dry Declaratory Judgment Action, and demanded that Travelers defend Barone in "this action" (see Cavallo Affirm. in Support [Pepsi Declaratory Judgment Action], Exh. F).

Although the letter did not explicitly seek coverage for Barone in the underlying Mero/Canada Dry Suit, the letter did state that, notwithstanding Travelers' June 27, 2003 letter disclaiming all coverage to Barone for lack of notice, Travelers had received specific notice of the occurrence, as well as of the commencement of the Mero/Canada Dry Suit, through the two letters sent by Pepsi's counsel on November 27, 2000 and June 11, 2003 (id.). By letter dated November 24, 2003, Travelers disclaimed Barone's November 7, 2003 request for coverage, referencing the position it previously had outlined in its June 27, 2003 disclaimer letter (id., Exh. G).

Meanwhile, on November 5, 2003, the Administrator commenced its second of three suits on behalf of the Estate of Mero, this time naming JKH and H&H as the sole defendants (the "Mero/JKH and H&H Suit").⁵ Then, on March 18, 2004, the Administrator commenced its third and final suit on behalf of the Estate of Mero, naming Pepsi as the sole defendant (the "Mero/Pepsi Suit").

By letter dated March 31, 2004, plaintiffs' counsel sent notice of the Mero/Pepsi Suit to Travelers and Nationwide, demanding that they defend and indemnify Pepsi, as an additional insured (see Thymius Affirm. in Support [Pepsi Declaratory Judgment Action], Exh. F). By letter dated April 27, 2004, Travelers disclaimed coverage for

⁵ In July of 2004, JKH and H&H commenced a third-party action against Barone, seeking, *inter alia*, contractual and common-law indemnification in connection with the Mero/JKH and H&H Suit.

Pepsi in the Mero/Pepsi Suit (see Toman Affirm. in Support [Pepsi Declaratory Judgment Action], Exh. A). The letter directed attention to certain quoted portions of the notice provisions and employee exclusion in Travelers' policy, and then stated that "[b]ased on the above," Travelers would not defend or indemnify Pepsi in that suit (id.). Nationwide apparently did not issue any further response to Pepsi's request for additional insured coverage.

On June 25, 2004, Pepsi commenced the instant Pepsi Declaratory Judgment Action against Nationwide, Travelers, and their named insureds, seeking a declaration of its rights, under the two policies, with respect to the Mero/Pepsi Suit. Travelers has since asserted a cross claim seeking indemnification against its co-defendants in both the Canada Dry and Pepsi Declaratory Judgment Actions. Nationwide, JKH and H&H also have asserted cross claims in each of these actions seeking, *inter alia*, declarations that JKH and H&H are additional insureds under Travelers' policy, and that Nationwide's coverage is excess to that provided by Travelers, or, alternatively, that Nationwide is entitled to co-insurance from Travelers. Barone has asserted two cross claims against Travelers in each action, seeking defense and indemnification in "the actions pending in the Supreme Court."

On November 22, 2004, approximately five months after the second of the instant declaratory judgment actions was filed, the Administrator moved, before the Kings County Supreme Court, to consolidate all three of the underlying Mero suits. The Administrator's motion was granted, without opposition, and the cases were fully consolidated in an order entered November 15, 2005 (see Thymius Affirm. in Opposition [Pepsi Declaratory Judgment Action], Exh. A).

In the Pepsi Declaratory Judgment Action, Pepsi now moves, in motion sequence number 001, for summary judgment declaring that Nationwide and Travelers are each obligated to defend and indemnify it in this now Consolidated Underlying Suit. Nationwide argues that Pepsi's motion should be denied as premature and cross-moves for summary judgment dismissing Pepsi's complaint, and declaring that Pepsi is not entitled to additional insured coverage from Nationwide, on the ground that the allegations contained in the complaint filed in the Mero/Pepsi Suit were insufficient to trigger Nationwide's duty to defend or indemnify Pepsi.

Travelers also argues that Pepsi's motion should be denied as premature. Travelers moves, in motion sequence number 002, for summary judgment dismissing Pepsi's complaint, and declaring that Pepsi does not qualify for additional insured coverage under its policy, on the ground that Pepsi failed to provide Travelers with timely notice of the Mero/Canada Dry Suit. Travelers also moves for summary judgment in its favor with respect to: (1) the cross claim asserted by JKH and H&H, seeking defense and indemnification in the Consolidated Underlying Suit, on the ground that neither of these parties has established its claim for coverage under the Travelers policy; (2) the cross claim asserted by Nationwide, seeking a declaration that its insurance is excess to that of Travelers, on the ground that the claim is refuted by the "other insurance" provisions in Nationwide's policy; and (3) the two cross claims asserted by Barone, seeking defense and indemnification in the Consolidated Underlying Suit, on the grounds that Barone failed to provide Travelers with timely notice of either the occurrence or suit, and any coverage would be precluded by the employee exclusion in its policy.

Barone argues that Travelers' motion should be denied, as Travelers had adequate notice of the occurrence and suit from Pepsi. Barone cross-moves for summary judgment declaring that Travelers is obligated to defend and indemnify Barone in the Consolidated Underlying Suit.

In the Canada Dry Declaratory Judgment Action, Travelers moves, in motion sequence number 001, for summary judgment in its favor with respect to Canada Dry's claim for additional insured coverage, on the grounds that Canada Dry: (1) does not qualify for additional insured coverage under its policy, and (2) failed to provide Travelers with separate, or timely, notice of either the occurrence or suit. Travelers also seeks summary judgment in its favor with respect to the cross claims asserted by Nationwide, H&H, JKH and Barone, on the same grounds as asserted in the Pepsi Declaratory Judgment Action.

Nationwide, JKH and H&H move, in motion sequence number 002, for summary judgment dismissing Canada Dry's complaint, and declaring that Canada Dry is not entitled to additional insured coverage from Nationwide, on the ground that Canada Dry was not named as an additional insured on the policy's schedule at the time of the occurrence. The Nationwide defendants further seek a declaration that JKH and H&H are entitled to additional insured coverage from Travelers in the Consolidated Underlying Suit.

Canada Dry moves, in motion sequence number 003, for summary judgment declaring that Travelers is obligated to defend and indemnify it, as an additional insured, in the Consolidated Underlying Suit.

DISCUSSION

A motion for summary judgment will be granted when the movant has tendered sufficient evidence to establish entitlement to such relief as a matter of law (CPLR 3212; Winegrad v New York Univ. Med. Ctr., 64 NY2d 851 [1985]). Once the movant has established such entitlement, the party opposing the motion must tender evidentiary proof in admissible form, sufficient to require a trial of material questions of fact (Zuckerman v City of New York, 49 NY2d 557 [1980]).

The Pepsi Declaratory Judgment Action

Pepsi has established prima facie entitlement to summary judgment declaring that Nationwide is obligated to defend it in the Consolidated Underlying Suit. There is no dispute that Pepsi was named, as an additional insured, on the schedule of Nationwide's policy on the date of the loss. It is well settled that an insurer's duty to defend an additional insured is triggered "whenever the allegations of the [underlying] complaint 'suggest . . . a reasonable possibility of coverage'" (BP Air Conditioning Corp. v One Beacon Ins. Group., 8 NY3d 708, 714 [2007], quoting Automobile Ins. Co. of Hartford v Cook, 7 NY3d 131, 137 [2006] [citations omitted]). Here, the complaints comprising the Consolidated Underlying Suit contain allegations that JKH and H&H breached their duty to ensure a safe and protected workplace, by reason of which, Mero sustained fatal injury. As the allegations against JKH and H&H "form a 'factual [and] legal basis on which [the insurer] might eventually be held to be obligated to indemnify'" its additional insured (id. at 715, quoting Servidone Const. Corp. v Security

Ins. Co. of Hartford, 64 NY2d 419, 424 [1985]), they are sufficient to have triggered Nationwide's duty to defend.

Nationwide argues, however, that its duty to defend Pepsi was not triggered by the underlying allegations because, in this declaratory judgment action, Pepsi had requested defense and indemnification only with respect to the Mero/Pepsi Suit, i.e., the third suit filed by the Administrator on behalf of the Estate of Mero. Nationwide argues that, if this court "is inclined to look" only at the allegations within the "four corners" of the underlying complaint filed in that particular suit, then its motion for summary judgment should be granted, because there were no allegations implicating JKH or H&H in the occurrence within the complaint filed in that suit; thus, Nationwide's duty to defend was never triggered. Additionally, in further opposition to Pepsi's motion for summary judgment, Nationwide argues that, even if this court decides to look at all of the allegations contained within the now Consolidated Underlying Suit, Pepsi's motion for summary judgment should still be denied, because Nationwide's additional insured coverage is limited in scope, and provides coverage to Pepsi only for its vicarious liability. Thus, Nationwide argues, absent a determination of liability against JKH or H&H in the Consolidated Underlying Suit, Nationwide would have no duty either to defend or indemnify Pepsi in that suit.

To the extent that Nationwide is requesting that this court look solely at the allegations contained within the four corners of the underlying Mero/Pepsi complaint in deciding this motion, the request is denied. The request not only ignores the fact that the Mero/Pepsi Suit was the last of three suits that the Administrator filed on behalf of the Estate of Mero, arising out of the same occurrence, but the fact that all three of

these suits have now been consolidated. This court further notes that the motion to consolidate was granted without opposition, a clear acknowledgment by the parties that these suits were inter-related and should be litigated together. It is only appropriate, then, to consider all of the allegations in the now Consolidated Underlying Suit, in determining the instant coverage motions arising out of that suit.

As for Nationwide's contention, that there can be no coverage for Pepsi under its additional insured endorsement until after there has been a finding of liability against JKH and/or H&H in the Consolidated Underlying Suit, it is well-settled that an insurer's duty to defend its insured is broader than its duty to indemnify (see Fitzpatrick v American Honda Motor Co., Inc., 78 NY2d 61 [1991]). "If [a] complaint contains any facts or allegations which bring the claim even potentially within the protection purchased, the insurer is obligated to defend" (BP Air Conditioning Corp., 8 NY3d at 714, quoting Technicon Elecs. Corp. v American Home Assur. Co., 74 NY2d 66, 73 [1989]). "[A]n insurer may be required to defend under the contract even though it may not be required to pay once the litigation has run its course" (Automobile Ins. Co. of Hartford v Cook, 7 NY3d at 137).

Here, the coverage provided by Nationwide's additional insured endorsement applies:

to the extent that [the additional insured] is held liable for [the named insured's] acts or omissions arising out of and in the course of operations performed for [the additional insured] by [the named insured] or [its] subcontractor

(see Thymius Affirm. in Support [Pepsi Declaratory Judgment Action], Exh. H). As the allegations in the underlying complaints suggest a possibility that Pepsi could be held

vicariously liable for the acts or omissions of JKH or H&H “arising out of and in the course of operations [they] performed” for Pepsi, this court finds that the claim comes potentially within the protection purchased, and thus, that Nationwide’s duty to defend Pepsi was triggered.

However, to the extent that Pepsi also moves for a declaration that Nationwide is obligated to indemnify Pepsi in the Consolidated Underlying Suit, the motion is denied. As it has yet to be determined whether Mero’s accident resulted from any negligence of Nationwide’s named insureds, it cannot now be determined whether this claim actually falls within Nationwide’s additional insured endorsement (see Crespo v City of New York, 303 AD2d 166 [1st Dept 2003]). Therefore, Pepsi’s motion for summary judgment (seq. 001) against Nationwide will be granted solely to the extent of declaring that Nationwide is obligated to defend Pepsi in the Consolidated Underlying Suit, and the motion is otherwise denied. Nationwide’s cross motion for summary judgment (seq. 002) dismissing Pepsi’s complaint, and declaring that Pepsi is not entitled to coverage, as an additional insured, is denied.

Pepsi also has established prima facie entitlement to a declaratory judgment that Travelers is obligated to defend and indemnify it in the Consolidated Underlying Actions. The policy that Travelers issued to Barone extends additional insured coverage to:

any person or organization ... whom [Barone] ... agreed in a written contract, executed prior to loss, to name as additional insured, but only with respect to liability arising out of “your work” or your ongoing operations for that additional insured performed by you or for you

(see Toman Affirm. in Support [Canada Dry Declaratory Judgment Action]), Exh. F).

The Barone/Pepsi Agreement, which the parties agree was executed prior to the loss, establishes that Barone agreed to provide certificates of insurance "which must list Pepsi" as an additional insured for all coverages except workers' compensation. It is undisputed that the occurrence arose out of the work that Barone was performing for Pepsi under the Barone/Pepsi Agreement. Additionally, Pepsi has proffered evidence to show that it sent Travelers timely notice of the occurrence by letter dated November 27, 2000, and timely notice of the Mero/Pepsi Suit on March 31, 2004.

Nevertheless, Travelers argues that Pepsi's motion for summary judgment should be denied, and that Travelers' motion for summary judgment should be granted, because Travelers properly disclaimed coverage to Pepsi for its untimely notice of suit. Specifically, Travelers argues that Pepsi, in relying on the timeliness of its March 31, 2004 notice of the Mero/Pepsi Suit, has ignored the fact that Travelers previously disclaimed coverage to Pepsi on June 27, 2003, for failing to provide timely notice of the Mero/Canada Dry Suit. Travelers additionally argues that Pepsi's motion for summary judgment should be denied because, under the language of Travelers' additional insured endorsement, coverage is limited to situations where there is no negligence on the part of the additional insured. Travelers argues that, since the complaints in the Consolidated Underlying Suit contain allegations that Pepsi was negligent in maintaining, controlling, and supervising the job site, any determination regarding Pepsi's right to coverage must await a determination of those claims.

As to the issue of the timeliness of Pepsi's notice of suit to Travelers, this court notes that, although plaintiffs' counsel may have indicated that the June 11, 2003 notice of suit in the Mero/Canada Dry Suit was made on behalf of Pepsi, Pepsi was not named

as a party in that suit, and there is no evidence that Pepsi had received, or even would have been served, with the papers in that suit upon its commencement. In any event, even if this court were to hold that Pepsi, although not named as a party in that suit, still had a duty, although only an additional insured, to timely notify Travelers with respect to that suit, our courts have concluded that where, as here, an insured has provided the insurer with timely notice of the occurrence, a late notice of suit will not be given the same preclusive effect as a late notice of a claim, without some showing of prejudice, which Travelers has not alleged (City of New York v Continental Cas. Co., 27 AD3d 28 [1st Dept 2005]).

Travelers' additional argument, that Pepsi's right to coverage must await a determination of the claims of negligence asserted against it, also fails. Travelers' policy provides coverage to Pepsi with respect to liability "arising out of" Barone's work or ongoing operations for Pepsi performed by or for Barone. "When the duty to defend is at issue, a liability alleged to arise out of [the named insured's] ongoing operations is one 'arising out of' such operations within the meaning of the policy" (BP Air Conditioning Corp., 8 NY3d at 715).

As noted above, it is undisputed that Barone's employee sustained his fatal injury during work performed for Pepsi under their contract. Our courts consistently have held that where, as here, an additional insurance endorsement provides coverage for liability "arising out of" work or operations, "any negligence by the additional insured in causing the accident underlying the claim is not material to the application of the additional insured endorsement" (Tishman Const. Corp. of New York v American Mfrs. Mut. Ins. Co., 303 AD2d 323, 324 [1st Dept 2003], quoting Consolidated Edison Co. v

U.S. Fid. & Guar. Co., 263 AD2d 380, 382 [1st Dept 1999]; see also Lafarge Bldg. Materials, Inc. v J. Hall, Ltd., 3 AD3d 651 [3rd Dept 2004]). In light of the above, Pepsi's motion for summary judgment (seq. 001) declaring that Travelers is obligated to defend and indemnify Pepsi in the Consolidated Underlying Suit is granted, and Travelers' motion for summary judgment (seq. 002) in its favor is denied.

Travelers has, however, established its entitlement to summary judgment in its favor on the cross claim asserted by JKH and H&H, seeking a declaration that they are entitled to additional insured coverage from Travelers. As noted above, Travelers' policy extends additional insured coverage only to such person or organization "whom [Barone] ... agreed in a written contract, executed prior to loss, to name as additional insured" (see Toman Affirm. in Support [Canada Dry Declaratory Judgment Action], Exh. F). JKH and H&H have identified no provision in the contract between Barone and Pepsi that required Barone to list them as additional insureds. As neither JKH nor H&H has produced any other writing which might evidence an agreement to name them as additional insureds, this part of Travelers' motion for summary judgment (seq. 002) is granted.

Travelers also has established entitlement to summary judgment in its favor on the cross claim asserted by Nationwide, seeking a declaratory judgment that Nationwide's policy provides coverage that is excess to that of Travelers. The declaration page of Nationwide's policy, contained within the copy of the policy produced by Nationwide on these motions, lists form "ACP005 (A-11/96)" as one of the forms included in the policy that it issued to JKH and H&H. Although the copy of the policy produced by Nationwide fails to include this particular form, Travelers has

produced a copy of this standard form, which contains the "Other Insurance" provisions associated with this policy (see Toman Affirm. in Support [Pepsi Dry Declaratory Judgment Action], Exh. C). The form explicitly provides that Nationwide's coverage, under this insurance, is primary, except in certain circumstances, not applicable here, where it is excess. Nationwide apparently concedes as much, as it has submitted no evidence which might create an issue of fact in this regard, or submitted any response to this part of Travelers' motion. Accordingly, Travelers' motion for summary judgment (seq. 002) in its favor as to this particular cross claim is granted.

This court additionally finds that Travelers has established entitlement to summary judgment in its favor with respect to Barone's two cross claims, seeking a declaration that Travelers is obligated to defend and indemnify it in the Consolidated Underlying Suits. It is well established that the contractual obligations of an insured to provide notice of a claim to its liability insurer, as soon as practicable, serve as a condition precedent to coverage (see White v City of New York, 81 NY2d 955 [1993]). "Absent a valid excuse, a failure to satisfy the notice requirement vitiates the policy" (Security Mut. Ins. Co. of N.Y. v Acker-Fitzsimons Corp., 31 NY2d 436, 440 [1972]).

It is undisputed that Barone did not provide notice of either the occurrence or suit to Travelers prior to November 7, 2003, when it demanded coverage in the instant declaratory judgment actions. Nevertheless, Barone argues that Travelers is not entitled to disclaim coverage based on Barone's failure to provide timely notice of the occurrence and suit, because the record shows that Travelers actually received adequate notice of both the occurrence and the commencement of the Mero/Canada Dry Suit from Pepsi, the additional insured.

"The law is clear that an insured's obligation to provide timely notice is not excused on the basis that the insurer has received notice of the underlying occurrence from an independent source" (Travelers Ins. Co. v Volmar Const. Co., Inc., 300 AD2d 40, 43 [1st Dept 2002], citing American Mfrs. Mut. Ins. Co. v CMA Enterprises, Ltd., 246 AD2d 373 [1st Dept 1998]; see also Ocean Partners, LLC v North River Ins. Co., 25 AD3d 514 [1st Dept 2006]). Thus, generally, notice provided by one insured in accordance with the policy terms will not be imputed to another insured (see Roofing Consultants, Inc. v Scottsdale Ins. Co., 273 AD2d 933 [4th Dept], lv denied 95 NY2d 770 [2000] [neither notice provided by another insured nor the insurer's actual knowledge of the claim satisfies the contractual obligation of the insured to give timely notice]). As Barone has proffered no valid excuse for its failure to provide notice of either the occurrence or suit to Travelers, Travelers' motion for summary judgment (seq. 002) in its favor on Barone's two cross claims seeking coverage under the policy is granted, and Barone's cross motion for summary judgment (seq. 002) is denied.

The Canada Dry Declaratory Judgment Action

To the extent that Travelers seeks summary judgment (seq. 001) in its favor on Canada Dry's claim for defense and indemnification in the Consolidated Underlying Suit, this court finds that Travelers has not established its entitlement to this relief. Initially, Travelers argues that its motion for summary judgment should be granted because Canada Dry was not a party to the written contract between Pepsi and Barone, and thus, was not an additional insured under the Travelers policy. Additionally, Travelers notes that, although the Barone/Pepsi Agreement states that both Pepsi and Canada Dry were to be listed on the certificate of insurance evidencing all required

policies, the agreement also required Barone to provide insurance as per the requirements indicated on a "sample" certificate of insurance. Travelers notes that the sample certificate, provided by Pepsi, listed only Pepsi as an additional insured. Travelers argues that, since the actual certificate of insurance supplied by Barone matched the sample, and did not list Canada Dry as an additional insured, Canada Dry cannot be considered an additional insured under the endorsement.

Travelers further argues that Canada Dry, even if named as an additional insured, is not entitled to coverage under the policy, because Canada Dry failed to provide Travelers with separate notice of the occurrence or the Mero/Canada Dry Suit, as required under the policy. In any event, Travelers contends that Canada Dry does not fall within the coverage afforded by Travelers' policy, because its additional insured endorsement extends coverage only for liability arising out of its named insured's work or ongoing operations *for that additional insured*, and here, Barone's only agreement was to perform work for Pepsi, not Canada Dry.

For a person or organization to be considered an additional insured under Travelers' endorsement requires only that Barone have agreed, in a written contract, to name that person or organization as an additional insured. Here, Barone's written agreement with Pepsi expressly required that Canada Dry be listed as an additional insured; the fact that Canada Dry was not a signatory on the agreement is irrelevant. The fact that Canada Dry was not listed on the certificate of insurance procured by Barone also is not dispositive, as it is the language of the written contract, not the certificate, that controls Travelers' obligation under the terms of its endorsement.

While it is true that Canada Dry did not provide a separate notice of the occurrence or suit to Travelers, our courts have held that timely notice by one insured can constitute notice by an additional insured where the two parties are similarly situated and not adverse (see New York Telephone Co. v Travelers Cas. and Sur. Co. of Am., 280 AD2d 268 [1st Dept 2001]; see also Ambrosio v Newburgh Enlarged City School Dist., 5 AD3d 410 [2^d Dept 2004]; National Union Fire Ins. Co. of Pittsburgh, Pa. v Insurance Co. of North America, 188 AD2d 259 [1st Dept 1992], lv denied 81 NY2d 709 [1993]).

Here, Canada Dry and Pepsi are both sued in the same capacity, as the alleged “owner” of the property. Although Canada Dry is the actual owner of the property, Pepsi, a limited partner of Canada Dry, apparently was authorized to execute the contract as “owner.” The record reflects that Canada Dry and Pepsi were not adverse parties at the time that notice was given. Indeed, at the time that plaintiffs’ counsel sent Travelers notice of the Mero/Canada Dry Suit, only Canada Dry, not Pepsi, was named as a party in that suit. Given the relationship of these parties, the fact that they are sued in the same capacity, and the fact that Canada Dry was the only named defendant at the time that plaintiffs’ notice of the Mero/Canada Dry Suit was sent, this court finds that the notice of suit in the Mero/Canada Dry Suit should be deemed notice of suit from Canada Dry.⁶

⁶ It also appears that, by the time that Travelers sent follow-up letters to plaintiffs’ counsel on July 3 and July 8, 2003, about one week after issuing its June 27, 2003 notice of disclaimer, Travelers was aware that the notice of suit was being made on behalf of Canada Dry (see Thymius Affirm. in Support [Canada Dry Declaratory Judgment Action], Exh. G).

As for timeliness of the June 11, 2003 notice of suit, although the Mero/Canada Dry Suit was commenced on November 27, 2002, more than six months earlier, Canada Dry has submitted an affidavit from one of its vice presidents, averring that Canada Dry did not receive its first notice of the action until June 10, 2003. As Travelers has submitted no evidence to raise an issue of fact in this regard, and as it appears that the notice of suit was sent immediately upon Canada Dry's actual receipt of the papers, this court finds that the notice comported with the terms of the policy.

Finally, as for Travelers' contention that Canada Dry's claim does not fall within the coverage provided by the policy, in that the occurrence arose out of work and operations being performed for Pepsi, not for Canada Dry, again, the duty to defend is broader than the duty to indemnify. "If, liberally construed, the claim is within the embrace of the policy, the insurer must come forward to defend its insured no matter how groundless, false or baseless the suit may be" (Automobile Ins. Co. of Hartford v Cook, 7 NY3d at 137 [citation and internal quotation marks omitted]).

Here, the underlying complaints include allegations that Canada Dry entered into an agreement with Prime Contracting to perform construction work on the premises, and that, at the time of the occurrence, Barone was performing work on the premises pursuant to a subcontract with Prime Contracting. As these allegations bring the claim potentially within the protection purchased, they are sufficient to have triggered Travelers' duty to defend Canada Dry.

In light of the above, Travelers' motion for summary judgment (seq. 001) in its favor with respect to Canada Dry's claim for additional coverage is denied; Canada Dry's motion for summary judgment (seq. 003) is granted to the extent of declaring that

Travelers has a duty to defend Canada Dry in the Consolidated Underlying Suit. However, to the extent that Canada Dry also seeks summary judgment declaring that Travelers has a duty to indemnify Canada Dry in that suit, the motion (seq. 003) is denied.

Canada Dry has argued that, since it was the actual owner of the property, any work being performed by Barone for Pepsi, pursuant to the Barone/Pepsi Agreement, also necessarily was performed for Canada Dry; thus, the claim falls squarely within the coverage afforded by Travelers' policy. This court notes, however, that Canada Dry has proffered no evidence that shows that the work being performed by Barone also was being performed for, or would benefit, Canada Dry. Plaintiffs also have produced no evidence that might establish the exact nature of the relationship that existed between Canada Dry and Pepsi with respect to this property, or to the work being done. Nor has Canada Dry identified any provision in the Barone/Pepsi Agreement that indicates that the work was being performed for Canada Dry, either directly or indirectly. Thus, plaintiff has failed to proffer evidence sufficient to establish its entitlement to indemnification under the endorsement.

As for the remainder of Travelers' motion (seq. 001), to the extent that Travelers moves for summary judgment in its favor with respect to the cross claims asserted by JKH, H&H and Barone, seeking defense and indemnification in the Consolidated Underlying Suit, the motion is granted for the reasons stated above with respect to the Pepsi Declaratory Judgment Action. For those same reasons, the motion by JKH and H&H (seq. 002), for summary judgment declaring that they are entitled to additional

insured coverage from defendant Travelers in the Consolidated Underlying Suit, is denied.

As for Nationwide's motion for summary judgment on its cross claim (seq. 002), seeking a declaration that Canada Dry is not an additional insured under the Nationwide policy, this court finds that Nationwide has established prima facie entitlement to such relief. Nationwide has proffered evidence sufficient to establish that Canada Dry was not added as an additional insured on Nationwide's policy until February 26, 2001, well after Mero's death. As Canada Dry has submitted no opposition to this part of Nationwide's motion, Nationwide's motion for summary judgment is granted with respect to this cross claim.⁷ In light of this determination, that portion of Travelers' motion (seq. 001), which seeks summary judgment in its favor on Nationwide's cross claim, seeking a declaratory judgment that Nationwide's coverage is excess to Travelers', is denied as moot with respect to coverage for Canada Dry.

Accordingly, it is

ORDERED that the motion for summary judgment by the plaintiff (motion sequence number 001) in Pepsi-Cola Bottling Company of New York v Nationwide Mutual Fire Insurance Co., et al., Index No. 601983/2004, is granted solely to the extent of ADJUDGING and DECLARING that (1) defendant Nationwide Mutual Fire Insurance Company is obligated to defend plaintiff, as an additional insured, in Marietta Small, as the Public Administrator for the Estate of Gonzalo Mero, Deceased v Canada Dry

⁷ The Nationwide defendants have withdrawn the portion of their motion that requested summary judgment declaring that JKH and H&H were not obligated to procure additional insured coverage for Canada Dry. The parties have agreed that this claim was never pleaded and forms no part of this declaratory judgment action.

Bottling Company of New York, A New York Limited Partnership, Pepsi Cola Bottling Company of New York, Inc., Prime Contracting Design Corp., JKH Contracting, Inc., H & H Construction Associates, Inc., and H & H Construction Corp., Index No.

50273/2002 (the "Consolidated Underlying Suit"), and (2) defendant The Travelers Indemnity Company of America is obligated to defend and indemnify plaintiff, as an additional insured, in said Consolidated Underlying Suit, and the motion is otherwise denied; and it is further

ORDERED that the motion for summary judgment by defendant Travelers Indemnity Company of America (motion sequence number 002) in Pepsi-Cola Bottling Company of New York v Nationwide Mutual Fire Insurance Co., et al., Index No. 601983/2004, is granted to the extent of ADJUDGING and DECLARING that (1) defendant Travelers has no obligation to defend or indemnify defendants JKH Contracting Inc., H & H Builders, Inc., or Barone Steel Fabricators, Inc. in said Consolidated Underlying Suit, and (2) the coverage provided by Nationwide Mutual Fire Insurance Company, in said suit, is not excess to the coverage provided by Travelers, and the motion is otherwise denied; and it is further

ORDERED that the cross motions asserted by defendants Nationwide Mutual Fire Insurance Company, JKH Contracting Inc., H & H Builders, Inc., and Barone Steel Fabricators, Inc. (motion sequence 002), in Pepsi-Cola Bottling Company of New York v Nationwide Mutual Fire Insurance Co., et al., Index No. 601983/2004 are denied; and it is further

ORDERED that the motion for summary judgment by the plaintiff (motion sequence number 003) in Canada Dry Bottling Company of New York v Nationwide

Mutual Fire Insurance Co., et al., Index No. 602843/2003, is granted to the extent of ADJUDGING and DECLARING that defendant Travelers Indemnity Company of America is obligated to defend plaintiff, as an additional insured, in said Consolidated Underlying Suit, and the motion is otherwise denied; and it is further

ORDERED that the motion for summary judgment by defendant Travelers Indemnity Company of America (motion sequence number 001) in Canada Dry Bottling Company of New York v Nationwide Mutual Fire Insurance Co., et al., Index No. 602843/2003, is granted to the extent of ADJUDGING and DECLARING that defendant Travelers has no obligation to defend or indemnify defendants JKH Contracting Inc., H & H Builders, Inc., or Barone Steel Fabricators, Inc. in the Consolidated Underlying Suit, and the motion is otherwise denied; and it is further

ORDERED that the summary judgment motion by defendants Nationwide Mutual Fire Insurance Co., JKH Contracting, Inc. and H & H Builders, Inc. (motion sequence number 002) in Canada Dry Bottling Company of New York v Nationwide Mutual Fire Insurance Co., et al., Index No. 602843/2003, is granted to the extent of ADJUDGING and DECLARING that Nationwide has no obligation to defend or indemnify plaintiff Canada Dry Bottling Company of New York in said Consolidated Underlying Suit, and the motion is otherwise denied.

This constitutes the decision and judgment of this court.

Dated: New York, New York
September 24, 2007



Hon. Martin Shulman, J.S.C.

~~UNFILED 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).