

Tiffany St., LLC v Hayden Bldg. Maintenance Corp.

2007 NY Slip Op 34603(U)

February 1, 2007

Supreme Court, New York County

Docket Number: 112804/04

Judge: Martin Shulman

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 1**

-----X
TIFFANY STREET, LLC and UNITED STATES
FIRE INSURANCE COMPANY,

Index No.: 112804/04

Plaintiffs,

**Decision, Order
and Judgment**

-against-

HAYDEN BUILDING MAINTENANCE CORPORATION
and ADMIRAL INSURANCE COMPANY,

Defendants.

-----X
Shulman, J.:

This declaratory judgment action stems from an underlying personal injury action in which an employee of non-party Metropolitan Transit Authority ("MTA") claims to have been injured when she slipped on a cleaning substance at 331 Tiffany Street, Bronx, New York (the "underlying action"). In motion sequence 003, defendant Admiral Insurance Company ("Admiral") moves for summary judgment pursuant to CPLR 3212 declaring that since plaintiff Tiffany Street, LLC ("Tiffany") is not an additional insured under Admiral's insurance policy issued to co-defendant Hayden Building Maintenance Corporation ("Hayden"), Tiffany is not entitled to defense and indemnity from Admiral in the underlying action.

In motion sequence 004, plaintiffs Tiffany and United States Fire Insurance Company ("U.S. Fire") move for summary judgment pursuant to CPLR 3212 declaring that Tiffany is an additional insured under Hayden's policy with Admiral entitled to defense and indemnity from Admiral in the underlying action. Alternatively, to the extent that the court determines that Tiffany is not entitled to additional insured status, plaintiffs move for summary judgment declaring that Hayden breached its contractual obligation to

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procure liability insurance for Tiffany's benefit, was requiring Hayden to reimburse Tiffany for the amounts it has incurred and continues to incur in defense of the underlying action.

BACKGROUND

On Monday, July 22, 2002, Maxine Halpern ("Halpern"), an MTA worker in charge of overseeing the rehabilitation of a one-story building located at 331 Tiffany Street, Bronx, New York (the "premises" or "building"), was injured when she slipped on the residue of a cleaning substance defendant Hayden's workers allegedly left behind. On the date of Halpern's accident, Tiffany owned the premises which it leased to MTA for use as a warehouse facility. The lease between Tiffany and MTA required Tiffany to make certain renovations to the premises. Tiffany then hired Hayden, a commercial roofing contractor, to perform certain roofing work pursuant to three separate contracts dated January 31, 2000, November 12, 2001 and November 19, 2001. The Stegla Group, Inc. ("Stegla"), another non-party, was the construction manager for the project.

At her deposition, Halpern testified that a week prior to her alleged accident she noticed pitch or tar had seeped from the roof of the building through the warehouse ceiling to the concrete floor. Believing the tar leak to be the result of Hayden's earlier work on the roof, Halpern contacted Hayden and arranged for Hayden's workers to clean it. To clean the floor, Hayden advised it would have to manually scrape the tar off the floor and then use a solvent to remove the tar residue. Halpern then made arrangements with the building's security personnel to allow Hayden's workers to enter the premises over the weekend just prior to Halpern's accident to perform the clean-up work. Halpern stated she slipped on a greasy film left on the floor section where

Hayden's workers removed the tar. Halpern also stated that after her accident she noticed a residue or stain on her pants.

Halpern's supervisor, Richard Hamilton ("Hamilton") testified at his deposition that he inspected the floor after Halpern's accident and noticed a waxy residue on it. Hamilton stated that he believed Halpern tripped on this residue left behind after the tar removal. Prior to Halpern's accident, Hamilton noticed droplets of tar from the roof on the floor. Michael McGuire, who testified on behalf of Stegla, also stated that he had observed tar on the floor of the premises about two weeks prior to Halpern's accident, and he had contacted Hayden to remove it.

Jan Siedlecki ("Siedlecki"), a service technician and former roofer for Hayden, testified at his deposition that he participated in the removal of the tar droplets from the floor of the warehouse located to the left and back on the Tiffany Street side of the premises during the weekend before plaintiff's alleged accident. He noted that after examining the floor and finding dust and droplets of tar, Hayden workers scraped the tar from the area, cleaned the area with orange cleaner and then rinsed the area with water.

Robert Hayden ("Mr. Hayden"), vice president and senior estimator for Hayden, testified at his deposition that the initial roof work at the building was performed pursuant to a contract that took effect in January or February of 2000, with the work taking place over the course of a year. Pursuant to this contract, Hayden removed the old cold tar pitch roof down to the decking and installed a new isocyanate roof, which required building up layers of felt sealed by asphalt. Mr. Hayden asserted that the leaking tar did not result from the new roofing that Hayden installed, but rather resulted from residue left behind from the removal of the original roof. Mr. Hayden explained that after the new

roof was installed, the offices beneath it were t~~aken~~ down. When workers from Manhattan Demolition Company, Inc. ("Manhattan Demolition") removed the walls, they created screw holes in the roof's decking area. Due to summer heat, the old roof's cold tar pitch, which had settled beneath the decking area, melted and dripped through the holes and onto the floor.

Mr. Hayden further stated that Hayden employees used orange cleaner to clean the tar droplets from the floor, but was unaware that the orange cleaner left behind a residue when used. Mr. Hayden further asserted that the clean-up work that Hayden performed just prior to plaintiff's accident was not performed pursuant to any contractual obligation. Mr. Hayden also testified that Tiffany hired Hayden to do a smaller job at the premises toward the end of the year 2001, which entailed installing a new roof as part of an addition being built over a loading dock.

Peter O'Connor ("O'Connor"), Tiffany's representative and property manager, testified at his deposition that he was responsible for ensuring the building was watertight, and that the tenant properly maintained the facility. O'Connor stated that Hayden's roofing work was done in two phases. In phase I, performed on the exterior of the building, Hayden removed the cold tar pitch roof and installed a hot tar pitch roof. Hayden was the only contractor to perform this work. The work performed for phase I was done pursuant to a contract between Tiffany and Hayden dated January 31, 2000, with a substantial completion date of April 31, 2000 [sic].

In phase II, performed on the interior of the building, Hayden was responsible for cutting the warehouse back from 400,000 square feet to 375,000 square feet. In this second phase of the project, Hayden was responsible for re-roofing that section of the

building which was cut back in order to make the building watertight. O'Connor stated that the phase II work was not confined to one particular area of the warehouse, and it entailed making cuts into the roof membrane to add such things as HVAC units and roof drains. The phase II work was performed pursuant to the contract between Tiffany and Hayden dated November 12, 2001, with a substantial completion date of February 2002. O'Connor noted that work on the portion of the roof where the tar dripped could have been performed under either the phase I or phase II contracts. In addition, small droplets of tar were found scattered throughout the entire warehouse. O'Connor further noted that on July 22, 2002, the date of plaintiff's accident, Hayden was performing repairs on the east side of the roof.

O'Connor further testified that Tiffany requires all contractors and subcontractors working at the building to procure insurance for Tiffany, and that the contracts between Tiffany and Hayden required Hayden to procure insurance naming Tiffany as an additional insured. However, when presented with a copy of the January 31, 2000 contract for phase I of the project and a copy of the November 12, 2001 contract for phase II of the project, O'Connor acknowledged that the contracts did not contain any provision requiring Hayden to procure insurance on Tiffany's behalf.

The January 31, 2000 Contract

The January 31, 2000 contract (the "2000 contract") between Tiffany and Hayden required Hayden to obtain insurance to cover any liability for bodily injury or property damage as a result of its work, providing in pertinent part:

Article 16 INSURANCE

- 16.1 [Hayden] shall purchase from and maintain in a company or companies lawfully authorized to do business in the jurisdiction in which the Project is located insurance for protection from claims under workers' compensation acts and other employee benefit acts which are applicable, claims for damages because of bodily injury, including death, and claims for damages, other than to the Work itself, to property which may arise out of or result from [Hayden's] operations under the Contract, whether such operations be by [Hayden] or by Subcontractor or anyone directly or indirectly employed by any of them...

(Admiral's Notice of Motion, Exhibit B).

Regarding Tiffany's liability insurance coverage, paragraph 16.2 of the 2000 contract provides that "[t]he Owner [Tiffany] shall be responsible for purchasing and maintaining the Owner's usual liability insurance." In addition, paragraph 16.3.3 of the 2000 contract states that "[t]he Owner [Tiffany] shall not require the Contractor to include the Owner, Architect or other persons or entities as additional insured on the Contractor's Liability insurance under paragraph 16.1." In his affidavit of October 12, 2006, Mr. Hayden noted that the 2000 contract does not contain a provision requiring Hayden to name Tiffany as an additional insured on its policy. (See Zuniga Aff. in Partial Opp. to Plaintiffs' Motion for Summary Judgment, Exhibit D).

The 2000 contract also includes the following provision:

16.3 PROJECT MANAGEMENT PROTECTIVE LIABILITY INSURANCE

- 16.3.1 Optionally, [Tiffany] may require [Hayden] to purchase and maintain Project Management Protective Liability insurance from [Hayden's] usual sources as primary coverage for [Tiffany], [Hayden] and Architect's vicarious liability for construction operations under the Contract... and the Contractor shall not be responsible for purchasing any other liability insurance on behalf of Owner.

(*Id.*). In his affidavit of October 10, 2006, O'Connor stated that Tiffany did not require Hayden to obtain Project Management Protective Liability insurance and Hayden did not obtain such insurance. (See Odelson Aff. in Opp. to Admiral's Summary Judgment Motion, Exhibit A).

The November 12, 2001 Contract

The November 12, 2001 contract (the "2001 contract") between Tiffany and Hayden contains a similar insurance requirement provision as the 2000 contract, providing in pertinent part:

ARTICLE 11 INSURANCE AND BONDS

11.1 CONTRACTOR'S LIABILITY INSURANCE

[Hayden] shall purchase from and maintain in a company or companies lawfully authorized to do business in the jurisdiction in which the Project is located such insurance as will protect [Hayden] from claims set forth below which may arise out of or result from [Hayden's] operations under the Contract and for which [Hayden] may be legally liable, whether such operations be by [Hayden] or by a Subcontractor or by anyone directly or indirectly employed by any of them, or by anyone for whose acts any of them may be liable ...

(Admiral's Notice of Motion, Exhibit E). Article 11.3.3 of the 2001 contract, entitled "Project Management Protective Liability Insurance," also contains identical language as that contained in the 2000 contract.

The November 19, 2001 Contract

In response to a Notice to Admit, Tiffany representative O'Connor asserted that the November 19, 2001 contract was separate from the 2000 contract and the 2001 contract. Mr. Hayden further stated that the November 19, 2001 contract was for work which entailed installing a roof on an addition being built above the loading dock.

In his affidavit of October 12, 2006, Mr. Hayden noted that, after reviewing the November 19, 2001 contract between Tiffany and Hayden, he could state that this agreement was part of the 2001 contract, that both contracts involved the same roof work performed exclusively above the loading dock area, and that neither contract had anything to do with the roof work Hayden performed at the location of the warehouse where Halpern claims that she slipped and fell.

Specifically, the November 19, 2001 contract expressly required Hayden to perform the following roof work, which included providing new roofing material at the north west corner of the building and at the loading dock area:

Remove existing, capped curbs & close roof openings ... remove existing roofing & provide new roofing material at shaded area north west corner including removal of roof railing ... provide new roofing (including metal deck & insulation) and aluminum coping at southeast loading dock area ...

(Admiral's Notice of Motion, Exhibit H, at p. 3).

However, unlike the 2000 contract and the 2001 contract, the November 19, 2001 contract contains the following provision requiring Hayden to obtain insurance for Tiffany as an additional insured:

[Hayden] shall purchase from and maintain such insurances as will protect [Hayden], Tiffany, the Owner and any other persons designated in the Prime Contract, documents from such claims as are set forth in said documents and for which [Hayden] may be legally liable as a result of its operations under this Agreement or as a matter of law....

* * *

The limits of insurance, as well as any other coverage that the Subcontractor is required to carry under the terms of this Agreement, are set forth in Schedule "B" annexed to the Agreement... (*Id.* at pp. 12-13).¹

¹ It should be noted that a copy of Schedule B referred to in the November 19, 2001 contract is not included in the record.

The Admiral Policy

Admiral issued a comprehensive general liability policy to Hayden, policy number A02AG12258, in effect for the policy period of January 1, 2002 to January 1, 2003, and providing limits of \$1 million per occurrence (the "Admiral policy"). The Additional Insured Endorsement states that the Admiral policy includes as insureds "all persons or organizations as required by written contract," but only with respect to liability arising out of the insured's "ongoing operations" (Admiral's Notice of Motion, Exhibit N).

Specifically, the Admiral policy contains the following requirements for additional insured status:

- A. Section II-Who is Insured is amended to include as an insured the person or organization shown in the Schedule, but only with respect to liability arising out of your ongoing operations performed for that insured.

The Additional Insured Endorsement further provides:

2. Exclusions

This insurance does not apply to:

- (1) All work, including materials, parts or equipment furnished in connection with such work, on the project (other than service, maintenance and repairs) to be performed by or on behalf of the additional insured(s) at the site of the covered operations has been completed; or
- (2) That portion of "your work" out of which the injury or damage arises has been put to its intended use by any person or organization other than another contractor or subcontractor engaged in performing operations for a principal as a part of the same project.

(*Id.*).

The U.S. Fire Policy

U.S. Fire issued a comprehensive general liability policy to Tiffany, policy number 5410309221, in effect for the policy period June 17, 2002 to June 17, 2003, providing limits of \$1 million per occurrence (the "U.S. Fire policy"). In addition, the U.S. Fire policy contains an "other insurance" provision, which states that the insurance is excess over any of the other insurance ..." (Plaintiffs' Notice of Motion, Exhibit P, Employee Benefits Liability Coverage Section, at p. 4, ¶4).

The Underlying Action

In the pending underlying action, Maxine B. Halpern v. Tiffany Street, LLC, The Stegla Group, Inc., Hayden Building Maintenance Corporation, Tri-Star Interiors, Inc. and Manhattan Demolition Company, Inc. (Bronx County Index No. 27649/02), Tiffany moved for summary judgment dismissing Halpern's complaint, or in the alternative, for common law and contractual indemnification against Hayden and non-party Manhattan Demolition. Hayden moved for summary judgment seeking dismissal of the third-party complaint and cross-claims asserted against it. Hayden argued it did not create the condition that caused Halpern's alleged accident and was not negligent, thus warranting a dismissal of Tiffany's claims for indemnification. On March 3, 2006, the Bronx Supreme Court denied the motions, finding that there was an issue of fact as to whether Tiffany retained control over the area where the accident occurred and whether Hayden was responsible for the unsafe condition.

DISCUSSION

An award of summary judgment is appropriate when no issues of fact exist. See CPLR 3212(b); *Sun Yau Ko v. Lincoln Sav. Bank*, 99 A.D.2d 943, 473 N.Y.S.2d 397 (1st Dept., 1984), *aff'd* 62 N.Y.2d 938, 479 N.Y.S.2d 213 (1984); *Andre v. Pomeroy*, 35 N.Y.2d 361, 362 N.Y.S.2d 131 (1974). In order to prevail on a motion for summary judgment, the proponent must make a *prima facie* showing of entitlement to judgment as a matter of law by providing sufficient evidence to eliminate any material issues of fact. *Winegrad v. New York University Medical Center*, 64 N.Y.2d 851, 853, 487 N.Y.S.2d 316 (1985); *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324, 508 N.Y.S.2d 923 (1986). Indeed, the moving party has the burden to present evidentiary facts to establish his cause sufficiently to entitle him to judgment as a matter of law. *Friends of Animals, Inc. v. Associated Fur Mfrs., Inc.*, 46 N.Y.2d 1065, 416 N.Y.S.2d 790 (1979).

While the moving party has the initial burden of proving entitlement to summary judgment (*Winegrad v. N.Y. Univ. Med. Center*, 64 N.Y.2d 851, 487 N.Y.S.2d 316 (1985)), once such proof has been offered in support of the summary judgment motion, the opposing party must "show facts sufficient to require a trial of any issue of fact." CPLR 3212(b); *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562, 427 N.Y.S.2d 595, 597 (1980); *Freedman v. Chemical Const. Corp.*, 43 N.Y.2d 260, 401 N.Y.S.2d 176 (1977); *Friends of Animals, Inc. v. Associated Fur Mfrs., Inc.*, 46 N.Y.2d 1065, 416 N.Y.S.2d 790 (1979). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied. *Rotuba Extruders, Inc. v. Ceppos*, 46 N.Y.2d 223, 231 (1978); *Grossman v Amalgamated Housing Corp., Inc.*, 298 A.D.2d 224, 226 (1st Dept., 2002).

“[T]he party asserting that someone other than a named insured is an insured under the policy bears the initial burden of submitting proof in evidentiary form that the alleged insured is, in fact, an insured within the meaning of the policy” (*Preferred Mut. Ins. Co. v. Ryan*, 175 A.D.2d 375, 378, 572 N.Y.S.2d 447 [3rd Dept., 1991]; *Thomson v. Power Authority of State of New York*, 217 A.D.2d 495, 496, 629 N.Y.S.2d 760 [1st Dept., 1995]). There is no duty to defend when the party asserting coverage is not an insured under the policy (*Seavey v. James Kendrick Trucking, Inc.*, 4 A.D.3d 119, 770 N.Y.S.2d 865 [1st Dept., 2004]; *National General Ins. Co. v. Hartford Acc. and Indem. Co.*, 196 A.D.2d 414, 415, 601 N.Y.S.2d 4 [1st Dept., 1993]).

“A provision in a construction contract cannot be interpreted as requiring the procurement of additional insured coverage unless such a requirement is expressly and specifically stated (*Trapani v. 10 Arial Way Associates*, 301 A.D.2d 644, 647, 755 N.Y.S.2d 396 [2nd Dept., 2003]; *Tribeca Broadway Associates, LLC v. Mount Vernon Fire Ins. Co.*, 5 A.D.3d 198, 200, 774 N.Y.S.2d 11 [1st Dept., 2004]). In addition, contract language that merely requires the purchase of insurance will not be read as also requiring that a contracting party be named as an additional insured” (*Trapani v. 10 Arial Way Associates*, 301 A.D.2d at 647).

Here, to be considered an additional insured under the Admiral policy, Tiffany must demonstrate the existence of a written contract between Tiffany and Hayden requiring Tiffany to be named as an additional insured under the Admiral policy, and that Tiffany's liability arises out of Hayden's ongoing operations for Tiffany. Initially, it should be noted that the 2000 contract and the 2001 contract do not contain any provision which would have required Hayden to procure insurance for Tiffany as an additional insured.

Thus, Tiffany is not entitled to additional insured status for liability under these two contracts. However, the November 19, 2001 contract does contain such an insurance procurement requirement.

Initially, it must be determined whether the work Hayden performed pursuant to the November 19, 2001 contract caused Halpern's alleged accident. If Halpern's alleged accident resulted from work Hayden performed pursuant to the November 19, 2001 contract, it must also be determined whether Hayden's work was still ongoing and not yet completed for Tiffany to qualify as an additional insured under the Admiral policy.

Although a question of fact exists as to whether Hayden's work pursuant to the 2000, the 2001 or the November 19, 2001 contracts caused and created the unsafe condition, nonetheless, because Hayden's work under all three contracts was substantially completed at the time of Halpern's alleged accident and the MTA had put the premises to its intended use, Tiffany is not entitled to coverage as an additional insured pursuant to the Admiral policy requirements. Under the Admiral policy, additional insured status does not apply where work on a project has been completed or that portion of the work out of which the injury or damage arises has been put to its "intended use by any person or organization other than another contractor or subcontractor engaged in performing operations for a principal as a part of the same project."

O'Connor explained that substantial completion would mean that "the project was completed to the point where the tenant could use the property for its intended purpose" (Plaintiffs' Notice of Motion, Exhibit H, at p. 37). Here, phase I and phase II were substantially completed in June 2002, the date the MTA took possession of the

premises. In addition, O'Connor testified that at the time the replacement of the original roof was substantially complete, which work started in the year 2000, he had not received any complaints regarding the roof. It should also be noted that a June 13, 2002 letter from MTA to Tiffany, which sets forth MTA's lease term for the premises from June 11, 2002 through June 30, 2012, establishes June 11, 2002 as the substantial completion date for the project.

Thus, as evidenced by O'Connor's statements, MTA's possession of the premises, as well as documents in the record reflecting the date that MTA took possession of the premises, Hayden's work was substantially completed and no longer "ongoing" at the time of Halpern's accident. In addition, Hayden's clean-up work was also not in the line of "service, maintenance and repairs," for which additional insured coverage might apply under the Admiral policy.

Tiffany also asserts that, at a minimum, Admiral has a duty to defend Tiffany in this case. An insurer may have a duty to defend an additional insured, even if a question of fact exists as to whether the insured's work or negligence caused the injury or if a jury ultimately determines that the insured was not negligent. See *BP Air Conditioning Corp. v. One Beacon Ins. Group*, 33 A.D.3d 116, 821 N.Y.S.2d 1 (1st Dept., 2006). "An insurer's duty to defend is broader than the duty to indemnify and arises where the allegations of the complaint against the insured fall within the scope of the risks undertaken by the insurer" (*Pavarini Const. Co., Inc. v. Liberty Mut. Ins. Co.*, 270 A.D.2d 98, 99, 704 N.Y.S.2d 72 [1st Dept., 2000]; *Frontier Insulation Contractors, Inc. v. Merchants Mut. Ins. Co.*, 91 N.Y.2d 169, 175, 667 N.Y.S.2d 982 [1997])[if any of the

claims against the insured arguably arise from covered events, the insurer is required to defend the entire action]).

However, although an insurer's duty to defend is broader than its duty to indemnify, the obligation to defend does not extend to claims not covered by the policy (*National General Ins. Co. v. Hartford Acc. and Indem. Co.*, 196 A.D.2d at 415). "An insurer may be relieved of its duty to defend only if it can establish, as a matter of law, that there is no possible factual or legal basis upon which it might eventually be obligated to indemnify its insured, or by proving that the allegations fall wholly within a policy exclusion" (*City of New York v. Ins. Corp. of New York*, 305 A.D.2d 443, 443-444, 758 N.Y.S.2d 817 [2nd Dept., 2003]).

Here, Tiffany is not a named insured under the Admiral policy and its liability does not arise from Hayden's ongoing operations. Thus, Tiffany does not qualify as an additional insured under the Admiral policy and Admiral has no duty to defend Tiffany in the underlying action.

In addition, plaintiffs submit three certificates of insurance that refer to Hayden as the insured, Admiral as the insurer and Tiffany as an additional insured in support of their argument that Tiffany is an additional insured under the Admiral policy. "A certificate of insurance is merely evidence of a contract for insurance, not conclusive proof that the contract exists, and not, in and of itself, a contract to insure" (*Horn Maintenance Corp. v. Aetna Cas. & Sur. Co.*, 225 A.D.2d 443, 444, 639 N.Y.S.2d 355 [1st Dept., 1996]); see also, *Tribeca Broadway Associates, LLC v. Mount Vernon Fire Ins. Co.*, 5 A.D.3d at 200; *Buccini v. 1568 Broadway Associates*, 250 A.D.2d 466, 469-470, 673 N.Y.S.2d 398

[1st Dept., 1998]). Further, when such a certificate of liability insurance contains language to the effect that it is for informational purposes and confers no rights, as in this case, the certificate has been held to be insufficient to establish that a party is an additional insured (*Moleon v Kreisler Borg Florman General Const. Co., Inc.*, 304 A.D.2d 337, 339, 758 N.Y.S.2d 621 [1st Dept., 2003]; *Trapani v. 10 Arial Way Associates*, 301 A.D.2d at 647; *American Ref-Fuel Co. of Hempstead v. Resource Recycling, Inc.*, 248 A.D.2d 420, 423, 671 N.Y.S.2d 93 [2nd Dept., 1998]).

Plaintiffs are not entitled to summary judgment declaring Tiffany to be an additional insured under the Admiral policy issued to Hayden. Accordingly, plaintiffs' motion is denied and Admiral's motion for summary judgment is granted and the complaint dismissed as to Admiral.

Failure to Procure Insurance

Hayden asserts that although it was not contractually obligated to procure a policy of insurance naming Tiffany as an additional insured, it gratuitously obtained a general liability policy naming Tiffany as an additional insured. Hayden then argues that it is not in breach of contract for not procuring such insurance. No cause of action lies for breach of an obligation to procure insurance when the record establishes that an insurance policy with the proper blanket endorsements was, in fact, procured (*see Perez v. Morse Diesel Intern., Inc.*, 10 A.D.3d 497, 498, 782 N.Y.S.2d 53 [1st Dept., 2004]).

However, the only evidence that Hayden proffers to demonstrate that it did, in fact, procure additional insured coverage for Tiffany is a copy of a Certificate of Liability Insurance from Admiral naming Tiffany as an additional insured. As a Certificate of Liability Insurance is merely evidence of a contract for insurance and not conclusive

proof that the contract exists, defendants have met their burden to defeat plaintiff's motion for summary judgment on this issue (see *Tribeca Broadway Associates, LLC v. Mount Vernon Fire Ins. Co.*, 5 A.D.3d at 200; *Buccini v. 1568 Broadway Associates*, 250 A.D.2d at 469-470).

Notwithstanding the foregoing, as previously noted, the 2000 and 2001 contracts between Hayden and Tiffany do not require Hayden to procure insurance for Tiffany's benefit. In addition, although the November 19, 2001 contract does contain such a provision, as Halpern's alleged accident was not caused by Hayden's ongoing operations, as required for Tiffany to be an additional insured under the Admiral policy, Hayden was not obligated to provide additional insured coverage for Tiffany's benefit at the time of Halpern's alleged accident. Thus, plaintiffs are not entitled to summary judgment declaring that Hayden breached its contractual obligation to procure liability insurance for Tiffany's benefit and the complaint must be dismissed as to Hayden.

CONCLUSION AND ORDER

For the foregoing reasons, it is hereby

ORDERED that plaintiffs Tiffany Street, LLC's and United States Fire Insurance Company's motion for summary judgment is denied in its entirety; and it is further

ADJUDGED AND DECLARED that plaintiffs Tiffany Street, LLC and United States Fire Insurance Company are not entitled to additional insured liability insurance coverage under the general liability insurance policy issued by Admiral Insurance Company to Hayden Building Maintenance Corporation, and thus, are not entitled to defense and indemnity from Admiral Insurance Company in the underlying action, Maxine B. Halpern v Tiffany Street, LLC., The Stegla Group, Inc., Hayden Building

Maintenance Corporation, Tri-Star Interiors, Inc. and Manhattan Demolition Company, Inc. (Index No. 27649/02); and it is further

ADJUDGED AND DECLARED that defendant Hayden Building Maintenance Corporation has not breached its contractual obligation to procure liability insurance for Tiffany Street, LLC's benefit, and thus, Hayden Building Maintenance Corporation is not required to reimburse Tiffany for the amounts it has incurred and continues to incur in defense of the underlying action; and it is further

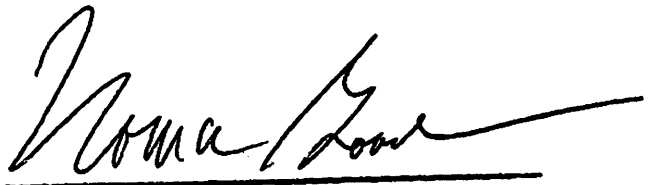
ORDERED that defendant Admiral Insurance Company's motion for summary judgment is granted in its entirety; and it is further

ORDERED that the complaint is dismissed.

The foregoing constitutes this court's Decision, Order and Judgment. Courtesy copies of this Decision, Order and Judgment have been provided to counsel for the parties.

Dated: New York, New York
February 1, 2007


Hon. Martin Shulman, J.S.C.


CLERK

FILED

FEB 22 2007

NEW YORK
COUNTY CLERKS OFFICE