

**The Allen-Stevenson School v Burlington Ins. Co.**

2008 NY Slip Op 30962(U)

March 31, 2008

Supreme Court, New York County

Docket Number: 0603036/2006

Judge: Carol R. Edmead

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PRESENT: HON. CAROL EDMEAD  
Justice

PART 35

Allen - Stevenson School

INDEX NO. 603036/06

MOTION DATE 12/4/07

MOTION SEQ. NO. 001

MOTION CAL. NO. \_\_\_\_\_

- v -

Burlington Insurance Co.

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for Summary judgment

PAPERS NUMBERED

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

Answering Affidavits - Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

**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).

Upon the foregoing papers, It is ordered that this motion

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

In accordance with the accompanying Memorandum Decision, it is hereby

ORDERED that plaintiffs' motion for summary judgment and declaratory judgment is granted solely to the extent that it is:

ORDERED and DECLARED that the Burlington Policy affords primary additional insured coverage to Sciamé for the claims against them in the underlying Vrezzio action; and it is further

ORDERED and DECLARED that the Burlington Policy affords primary additional insured coverage to Allen-Stevenson; and it is further

ORDERED and DECLARED that Burlington is obligated to defend and indemnify Sciamé in the underlying Vrezzio action; and it is further

ORDERED and DECLARED that Burlington is obligated to defend and indemnify Allen-Stevenson in the underlying Vrezzio action; and it is further

ORDERED and DECLARED that the Zurich Policy affords coverage to Sciamé that is excess to the coverage afforded to them by Burlington Insurance Company; and it is further

ORDERED and DECLARED that the Zurich Policy affords coverage to Allen-Stevenson that is excess to the coverage afforded to them by Burlington Insurance Company; and it is further

Dated: \_\_\_\_\_

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

ORDERED that the branch of plaintiffs' motion for a declaration that Zurich American Insurance Company is entitled to an award in the amount of the defense costs incurred since December 9, 2005 together with any indemnity payment made on behalf of Sciame, with interest is denied; and it is further

ORDERED that the branch of plaintiffs' motion for a declaration that Zurich American Insurance Company is entitled to an award in the amount of the defense costs incurred since December 9, 2005 together with any indemnity payment made on behalf of Allen-Stevenson, with interest is denied; and it is further

ORDERED that the cross-motion by defendant Burlington Insurance Company seeking summary judgment dismissing the complaint is granted solely as to the claims by Zurich American Insurance Company, and the Complaint is dismissed as to Zurich American Insurance Company; and it is further

ORDERED that Burlington Insurance Company shall serve a copy of this order with notice of entry on all parties.

The Clerk may enter judgment accordingly.

The foregoing constitutes the decision and order of the Court.

**UNFILED JUDGMENT**  
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Page 2 of 2

Dated 3/31/08

ENTER:  J.S.C.

HON. CAROL EDMOAD

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

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

-----X  
THE ALLEN-STEVENSON SCHOOL,  
F.J. SCIAME CONSTRUCTION CO., INC., and  
ZURICH AMERICAN INSURANCE COMPANY,

Index No. 603036-2006

Plaintiffs,

-against-

DECISION/ORDER

BURLINGTON INSURANCE COMPANY and  
G.C.D.M. IRON WORKS, INC., d/b/a G.C. IRONWORKS

Defendants.  
-----X

**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).*

MEMORANDUM DECISION

Plaintiffs F.J. Sciamе Construction Co., Inc. ("Sciamе"), The Allen-Stevenson School ("Allen-Stevenson" or "the School"), and Zurich American Insurance Company ("Zurich"), Sciamе's general liability carrier, (collectively "plaintiffs") move for an order granting summary judgment declaring that defendant Burlington Insurance Company ("Burlington") owes additional insured coverage to Sciamе and Allen-Stevenson for an underlying personal injury action pursuant to a general liability policy Burlington issued to defendant Gold Coin Iron Works, Inc. ("Gold Coin") (the "Burlington Policy"). Specifically, plaintiffs request that this Court issue an order declaring that: (i) the Burlington Policy affords primary additional insured coverage to Sciamе and Allen-Stevenson for the claims against them in the underlying action; (ii) Burlington is therefore obligated to defend and indemnify Sciamе and Allen-Stevenson in the underlying action; (iii) the Zurich Policy affords coverage to Sciamе and the School that is excess to the coverage afforded to them by Burlington; and (iv) plaintiffs are entitled to an award in the amount of the defense costs incurred since December 9, 2005 together with any indemnity

payment made on behalf of Sciame and the School, with interest.

Burlington opposes the motion, and cross moves for summary judgment declaring that it has no obligation to defend or indemnify Sciame or the School in the underlying action.

### Background

By agreement dated January 1, 2004, Allen-Stevenson, as Project Owner, contracted with Sciame to act as the General Contractor regarding a "Courtyard Addition/Renovation" project located at 132 East 78th Street in New York City ("the Project"). By contract dated January 26, 2004, Sciame, in turn, subcontracted certain structural steelwork with Gold Coin (the "Subcontract"). Sciame's Subcontract with Gold Coin expressly required Gold Coin to obtain liability insurance with a \$2,000,000 per occurrence combined single limit for bodily injury and property damage liability. The Amendment to General Conditions of the Subcontract further required Gold Coin to name Allen-Stevenson and others identified on Schedule A to the subcontract as additional insureds. The Supplement to Subcontract specifically states that "Contractor [Sciame] shall be included as an Additional Insured under the Amendment to General Conditions and Schedule A thereto."

Consequently, Burlington issued a general liability policy to Gold Coin effective from May 16, 2004 to May 16, 2005 with a \$1,000,000 per occurrence limit (the "Burlington Policy"). The Burlington Policy contains a blanket additional insured endorsement entitled "Additional Insured—Owners, Lessees or Contractors—Automatic Status when Construction Agreement With You" (the "Endorsement"). This Endorsement provides in part:

Section II—Who Is an Insured is amended to include 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. Such person or organization is an additional insured only with respect to liability arising out of your ongoing operations performed for that insured. A person's or organization's status as an insured under this endorsement ends when your operations for that insured are completed.

#### The Underlying Personal Injury Action

On November 11, 2004, James Vrezzio ("Vrezzio"), a Gold Coin employee, allegedly was injured when he fell from a ladder while performing work pursuant to Gold Coin's subcontract with Sciame. Vrezzio and his wife commenced a personal injury action against Allen-Stevenson, Sciame Development, Inc., and Sciame (the "Vrezzio action" or "underlying action") for damages Vrezzio allegedly sustained from the incident.

By letter dated December 9, 2005, plaintiff Zurich, tendered Vrezzio's claim to Burlington for contractual indemnity and defense on behalf of Sciame and Allen-Stevenson in accordance with the Subcontract. Zurich advised that the claimant, Vrezzio, was an employee of Gold Coin. According to plaintiffs, Zurich's correspondence included copies of the Gold Coin subcontract, the certificate of insurance, and the Vrezzio complaint. Burlington received the letter on December 12, 2005.

Nearly two months later, by letter dated February 7, 2006, Burlington issued a disclaimer letter to Zurich, denying coverage on the grounds that: (1) there is no evidence that Vrezzio's injury arose out of Gold Coin's ongoing operations; (2) the Cross Liability Exclusion bars coverage; (3) the Workers' Compensation Exclusion bars coverage; and (4) the Employer's Liability Exclusion bars coverage.

This declaratory judgment action ensued.

[\* 6 ]

Instant Motion

Plaintiffs contend that the unambiguous language of the Burlington Policy and related documentary evidence establish that Allen-Stevenson and Sciame are additional insureds under the Burlington Policy. Looking to the plain meaning of the policy language, Burlington agreed in its policy to “pay those sums that the insured becomes legally obligated to pay as damages *i.e.*, to indemnify its insureds because of ‘bodily injury’ and that it had the “duty to defend any ‘suit’ seeking those damages.” In addition to the coverage afforded to Gold Coin, the Burlington Policy also provides blanket additional insured coverage for entities “for whom [Gold Coin is] performing operations when [Gold Coin] 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 [Gold Coin’s] policy.”

Plaintiffs contend that the Subcontract between Sciame and Gold Coin required Gold Coin to name Allen-Stevenson and Sciame as additional insureds on Gold Coin’s liability policy. Gold Coin provided Sciame with a certificate of insurance confirming that it had complied with this contractual requirement. Sciame would not have allowed Gold Coin to begin work at the Project if Gold Coin did not first contractually agree in writing to obtain additional insured coverage for both Sciame and the School and provide Sciame with evidence that it had purchased the required insurance. To do so would have contravened both Sciame’s obligations under the construction management agreement with the School and Sciame’s own corporate practices.

If an entity has such a written contract with Gold Coin, then it is an additional insured under the Burlington Policy Endorsement “with respect to liability arising out of [Gold Coin’s] ongoing operations performed for that insured.” Plaintiffs contend that it is undisputed that Gold

Coin had not completed its operations, and thus, they were “ongoing” when Vrezzio was injured. It is equally clear that, Vrezzio’s injury “arose out of” Gold Coin’s operations: Vrezzio was injured, while on the site, during working hours, doing the work that Gold Coin had contracted to perform. Since Vrezzio was an employee of the named insured and was injured performing a named insured’s work at the job site, the “arising out of [the named insured’s] operations” language in the Burlington Endorsement requires coverage for the additional insured.

Plaintiffs argue that this is so regardless of who is at fault in causing the accident and regardless of whether the additional insured is partially or completely at fault. The additional insured language at issue defines coverage not in terms of negligence by the named insured, but based on the scope of the named insured’s work. As long as the claim against the additional insured arises out of the named insured’s work, coverage is provided under the Endorsement regardless of who is at fault in causing the accident. Here, Gold Coin’s Subcontract required Sciamme and Allen-Stevenson to be covered as additional insureds by Gold Coin’s liability insurance while Gold Coin was performing work under the Gold Coin Subcontract. Plaintiffs argue that the intent of such insurance procurement provisions is to protect the general contractor and owner (*i.e.*, Sciamme and Allen-Stevenson) for all liability in connection with the operations for which the insurance is required (*i.e.*, Gold Coin’s work under the Gold Coin Subcontract). Accordingly, plaintiffs are entitled to summary judgment and a declaration that Sciamme and the School are additional insureds under the Burlington Policy.

As the Burlington Policy affords primary additional insured liability coverage to plaintiffs “with respect to liability arising out of [Gold Coin’s] ongoing operations performed for that insured” and the underlying action arose out of Gold Coin’s ongoing operations performed for

Sciame, the Vrezzio claim falls within the policy's coverage terms. Accordingly, pursuant to Insurance Law § 3420(d), Burlington was required to issue a timely disclaimer of coverage. Because it has failed to do so, Burlington is now barred from disclaiming coverage based upon a policy exclusion.

By letter dated December 9, 2005, plaintiffs notified Burlington of the underlying action and demanded that Burlington assume the defense and indemnity of Sciame and Allen-Stevenson. By intra-company email correspondence, dated February 1, 2006, Nicholas Parisi, a Branch Manager of Burlington, wrote to James Miele, stating "[n]ot sure why you have not issued a declination letter to Zurich for Sciame by now. Unless I am missing the point here, we are now past 30 days from receipt and this is a NY loss." However, it was not until February 7, 2006, seven days after this email and a total of 57 days since Burlington received Zurich's tender, that Burlington finally issued its disclaimer letter to Zurich based on the purported applicability of several exclusions. Plaintiffs maintain that Burlington has no justification for its prolonged delay in disclaiming coverage. The basis for Burlington's assertion of the Cross Liability exclusion in its denial letter is the fact that the claimant, Vrezzio, is an employee of Gold Coin. Burlington was advised with the initial tender documents that Vrezzio was a Gold Coin employee. As a result of its 57-day delay in this case, Burlington has waived its right to assert any policy exclusions or conditions as defenses to coverage under the Burlington Policy.

Additionally, plaintiffs argue that the plain and unambiguous language of the policies establishes that the Burlington Policy provides primary coverage and the Zurich Policy provides excess coverage to Sciame and the School for the underlying action. The Burlington Policy's General Liability Conditions state that Burlington's coverage is "primary except when b. below

applies” and that “if this insurance [*i.e.* the Burlington insurance] is primary, our obligations are not affected unless any of the other insurance is also primary.” No exception under subsection b. is applicable. Section IV.4.b.(2) of the Zurich Policy provides that it is excess over any other primary policy to which Sciame has been added as an additional insured, which includes the Burlington Policy in this case. Thus, the respective policies establish that the additional insured coverage under the Burlington Policy affords primary coverage to Sciame and the School for Vrezzio’s claims against them in the Vrezzio action and that the Zurich Policy only affords excess coverage to them. Therefore, plaintiffs are entitled to a declaration that the coverage afforded to Sciame and the School under the Zurich Policy is excess to the coverage afforded to them by the Burlington Policy, and Burlington should be directed to fully reimburse Zurich for the costs incurred by Zurich to defend and indemnify them in the Vrezzio action.

Finally, plaintiffs argue that since Burlington breached its duty to defend an action against a covered insured, they are entitled to reimbursement from Burlington for the defense costs incurred from the date of its original tender to the insurer. Burlington’s failure to acknowledge its coverage obligation was a breach of its contractual duty to afford coverage for plaintiffs, and also entitles plaintiffs to reimbursement from Burlington for any indemnity payment that may be made by plaintiffs in the Vrezzio action, with interest from the dates of payment. In addition, given Burlington’s breach of contract, plaintiffs are entitled to pre-judgment interest on both sums (defense and indemnity) from the date that the payments were made by plaintiffs when they should have been made by Burlington.

### Burlington's Opposition and Cross-Motion

In response, Burlington opposes plaintiffs' motion and cross moves for summary judgment dismissing the complaint.

Burlington argues that the "late disclaimer" provision of New York Insurance Law § 3420(d) does not apply to these facts. Plaintiffs' contention that Burlington waived any policy-based exclusion by virtue of issuing a late disclaimer pursuant to § 3420(d) is fatally flawed because §3420(d) does not apply when the tendering party is an insurance company, as is Zurich in this case. Burlington points out that this Court previously found that the disclaimer requirement of § 3420(d) did not apply when the party to whom disclaimer was submitted was another insurer.<sup>1</sup> Zurich tendered the defense and indemnity of Sciamé and the School to Burlington on December 12, 2005. Zurich has been providing the defense of Sciamé, and potentially School, in the underlying action. Zurich's ability to defend and indemnify Sciamé and School has not been affected by any alleged delay in learning of Burlington's position. Therefore, argues Burlington, Zurich "is not within the zone of interest which the statutory requirement of notice to the injured parties seeks to protect[,]" § 3420(d) has no application, and Burlington's disclaimer was not untimely. Nor has Burlington waived its exclusion-based defenses, and the applicability of such exclusions precludes any possible coverage obligation on the part of Burlington.

In addition, a determination as to Sciamé's and the School's status as an additional insured is premature. The language of Burlington's Endorsement is not satisfied because there

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<sup>1</sup> Defendant cites to *Tower Mineola Ltd. Partnership v Potomac Ins. Co. of Illinois* (14 Misc 3d 1238, 836 N.Y.S.2d 504 [Sup. Ct. New York County 2007]), a decision by Justice Doris Ling-Cohan.

has been no determination of liability to establish whether Vrezzio's injury "arose out of" Gold Coin's ongoing operations at the School. The underlying action is in its infancy and it is premature to determine whether Vrezzio's injuries arose out of the work Gold Coin contracted to perform.

Finally, even if it is ultimately determined that Vrezzio's injuries did in fact "arise out of" the work that Gold Coin performed, the Cross Liability Exclusions contained in the Burlington Policy applies to bar coverage. The Cross Liability Exclusion in the Burlington Policy provides that "[t]his insurance does not apply to any actual or alleged 'bodily injury' . . . to [a] present, former, future or prospective partner, officer, director, stockholder or employee of any insured." The Cross Liability Exclusion in the Burlington Policy is subject to only one reasonable interpretation-that is, the Burlington Policy does not apply in cases involving bodily injury to the employee of a named insured or additional insured under the Burlington Policy.

Burlington contends that at the time of the accident, Vrezzio was an employee of Burlington's named insured, Gold Coin. If it is ultimately determined that Vrezzio's accident arose out of the work of Gold Coin, School and Sciamè will be additional insureds on the Policy. This action arises from an underlying personal injury action brought by Vrezzio against School and Sciamè, in which Vrezzio alleges that he sustained bodily injury while working for Sciamè's subcontractor, Gold Coin. Because this case arises out of the bodily injury of an employee of an insured under the Burlington Policy, the plain and unambiguous language set forth in the Cross Liability Exclusion applies to exclude coverage. Thus, on the basis of the Cross Liability Exclusion alone, Burlington is entitled to summary judgment declaring that it has no obligation to provide coverage for the Vrezzio accident.

Plaintiff's Reply and Opposition to Cross-Motion

In reply, plaintiffs argue that Burlington's conclusory claim that Sciamè and the School are not additional insureds because Vrezziò's injury did not "arise out of" Gold Coin's work is contrary to caselaw. The Burlington Policy affords coverage for the additional insured's liability "arising out of the named insured's ongoing operations," and the "arising out of Gold Coin's ongoing operations" requirement is satisfied because Vrezziò was injured while performing work under Gold Coin's Subcontract.

Also, Burlington does not dispute that its disclaimer based on the Cross Liability Exclusion is untimely under Insurance Law § 3420(d). It is undisputed that section 3420(d) applies to Sciamè and the School, as the insureds. Burlington did not timely disclaim based on such Exclusion to them. Additionally, an additional insured tender made by an insurer as the agent for its insured implicates the timely disclaimer requirements of section 3420(d). Here, Sciamè used Zurich as its agent for purposes of notifying insurers from which Sciamè seeks the additional insured coverage required by its contracts for itself and the School, and Zurich tendered the claim directly to Burlington under Burlington's Policy and pursuant to the Sciamè contract. Thus, Burlington's disclaimer was untimely, and thus, it has waived its right to assert the Cross Liability Exclusion.

Furthermore, the Zurich Policy provides excess coverage to Sciamè and the School for the underlying action.

### Analysis

The proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, by advancing sufficient “evidentiary proof in admissible form” to demonstrate the absence of any material issues of fact (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Silverman v Perlbinde*r, 307 AD2d 230, 762 NYS2d 386 [1<sup>st</sup> Dept 2003]; *Thomas v Holzberg*, 300 AD2d 10, 11, 751 NYS2d 433, 434 [1<sup>st</sup> Dept 2002]). Thus, the motion must be supported “by affidavit [from a person having knowledge of the facts], by a copy of the pleadings and by other available proof, such as depositions” (CPLR § 3212[b]). A party can prove a *prima facie* entitlement to summary judgment through the affirmation of its attorney based upon documentary evidence (*Zuckerman, supra*; *Prudential Securities Inc. v Rovello*, 262 AD2d 172 [1st Dept 1999]).

Alternatively, to defeat a motion for summary judgment, the opposing party must show facts sufficient to require a trial of any issue of fact (CPLR §3212[b]). Thus, where the proponent of the motion makes a *prima facie* showing of entitlement to summary judgment, the burden shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action, or to tender an acceptable excuse for his or her failure to do so (*Vermette v Kenworth Truck Co.*, 68 NY2d 714, 717 [1986]; *Zuckerman v City of New York, supra*, 49 NY2d at 560, 562; *Forrest v Jewish Guild for the Blind*, 309 AD2d 546, 765 NYS2d 326 [1<sup>st</sup> Dept 2003]). Like the proponent of the motion, the party opposing the motion must set forth evidentiary proof in admissible form in support of his or her claim that material triable issues of fact exist (*Zuckerman, supra* at 562). Opponent “must assemble and lay

bare [its] affirmative proof to demonstrate that genuine issues of fact exist” and “the issue must be shown to be real, not feigned since a sham or frivolous issue will not preclude summary relief” (*Kornfeld v NRX Technologies, Inc.*, 93 AD2d 772 [1st Dept 1983], *affd*, 62 NY2d 686 [1984]).

Gold Coin’s policy with Burlington, under which plaintiffs claim additional insured coverage, contains an Additional Insured endorsement which states:

Who Is An Insured is amended to include as an insured any person or organization for whom you [Gold Coin] 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*. Such person or organization is an additional insured only *with respect to liability arising out of your ongoing operations performed for that insured*. . . .  
(Emphasis added)

Plaintiffs Allen-Stevenson, Sciamé, and Zurich, Sciamé’s general liability carrier, maintain that Allen-Stevenson and Sciamé are additional insureds under the Burlington Policy. It is uncontested that (1) Gold Coin was contractually required to name Allen-Stevenson and Sciamé as additional insureds, and (2) Burlington’s Policy provides coverage for the entities with whom Gold Coin is contractually obligated to provide coverage. It is also undisputed that Vrezzio was an employee of Gold Coin, the named insured. Moreover, the record indicates that Vrezzio’s accident occurred during his performance of work pursuant to Gold Coin’s ongoing operations under its Subcontract with Sciamé. Therefore, Allen-Stevenson and Sciamé are additionally insureds under the Burlington Policy. Any liability issues raised in the underlying action “need not be determined for purposes of determining coverage” (*Bovis Lend Lease, LMB v Garito Contracting*, 38 AD3d 260 [1<sup>st</sup> Dept 2007]).

However, it is also uncontested that Burlington’s Policy contains a Cross Liability

Exclusion. It is well settled that “whenever an insurer wishes to exclude certain coverage from its policy obligations, it must do so ‘in clear and unmistakable’ language” (242-44 East 77th Street, LLC v. Greater New York Mut. Ins. Co., 31 AD3d 100, 815 NYS2d 507 [1<sup>st</sup> Dept 2006]). Any such exclusions from policy coverage must be specific and clear in order to be enforced, and are to be accorded a strict and narrow construction (*Id.*). Indeed, before an insurance company is permitted to avoid policy coverage, it must satisfy the burden of establishing that the exclusions apply in the particular case, and that they are subject to no other reasonable interpretation (*Id.*, citing *Seaboard Sur. Co. v Gillette Co.*, 64 NY2d 304, 311 [1984]).

An Endorsement to the Burlington Policy, entitled “Exclusion Cross Liability” states in relevant part that “This insurance does not apply to any actual or alleged ‘bodily injury’, ‘property damage’, ‘personal injury’ or ‘advertising injury’ to . . . [a] present, former, future or prospective . . . employee of any insured; . . . .

Such Cross Liability Exclusion is clear and unambiguous, in that it is subject to only one reasonable interpretation, and thus, must be enforced as written. Such Exclusion excludes coverage for bodily injury to any employee of any insured. Thus, the Exclusion unambiguously applies to bar coverage to an additional insured, against a claim by an employee, *i.e.*, Vrezzio, of the primary insured Gold Coin (*see Tardy v Morgan Guar. Trust Co. of New York*, 213 AD2d 296, 624 NYS2d 34 [1<sup>st</sup> Dept 1995] [holding that a policy which excludes coverage for “bodily injury to any employee of any named insured,” unambiguously applies to bar coverage to an additional insured, such as appellants, against a claim by the primary insured's employee]).

Plaintiffs’ contention that Burlington waived its right to raise such a defense due to its failure to comply with the requirement of timely notice pursuant to Insurance Law § 3420, is

valid as to Sciamé and Allen-Stevenson, but lacks merit as to Zurich.

New York Insurance Law 3420(d) provides as follows:

If under a liability policy delivered or issued for delivery in this state, an insurer shall disclaim liability or deny coverage for death or bodily injury arising out of a motor vehicle accident or any other type of accident occurring within this state, it shall give written notice as soon as is reasonably possible of such disclaimer of liability or denial of coverage *to the insured and injured person or any other claimant*.  
(Emphasis added.)

However, section 3420(d) does not apply where one insurer is seeking defense and indemnity of an underlying bodily injury action from another insurer (*Sixty Sutton Corp. v Illinois Union Ins. Co.*, 34 AD3d 386, 825 NYS2d 46 [1<sup>st</sup> Dept 2006]). Furthermore, Zurich has been providing for the defense of the underlying action since 2005. Whether it seeks contribution or full coverage, Zurich is not within the zone of interest which the statutory requirement of notice to the injured parties seeks to protect. Thus, it cannot be said, as a matter of law, that Burlington waived its right to disclaim coverage, or that its disclaimer was untimely pursuant to Insurance Law §3420(d) as to Zurich (*Sixty Sutton Corp. v Illinois Union Ins. Co.*, 34 AD3d 386, *supra*).

However, the same cannot be said as to the additional insureds, Allen-Stevenson and Sciamé, the insureds for whom the section was intended to protect.

The case *Bovis Lend Lease LMB v Royal Surplus* (27 AD3d 84 [1<sup>st</sup> Dept 2005]), involving declaratory relief, is squarely on point. In *Bovis*, an employee of a subcontractor, Millennium Masonry, Inc. ("Millennium"), was injured while working at a construction site. Two commercial general liability insurance policies were in effect at the time of the employee's accident: one issued by plaintiff National Union Fire Insurance Company of Pittsburgh, PA ("National"), to Construction Manager Bovis, naming Columbia University (the Owner) as an

additional insured, and the other issued by defendant Royal Surplus Lines Insurance Company (“Royal”) to Millennium, naming Bovis and Columbia as additional insureds. In November 2002, the employee commenced an action against both Bovis and Columbia for, *inter alia*, Labor Law violations, and National Union undertook their defense. In February 2003, National Union tendered the defense and indemnification of Bovis and Columbia to Royal. In March 2003, Bovis and Columbia commenced a third-party action against Millennium. In May 2003, Royal rejected the tender, disclaiming liability based on an exclusion in Royal’s policy with Millennium. Meanwhile, in April 2003, plaintiff, National Union and its insureds Bovis and Columbia, had instituted the declaratory judgment action seeking a declaration that Royal was obligated under the policy to fully insure, defend and indemnify Bovis and Columbia in the still-pending personal injury action and to reimburse National Union for its attorneys’ fees, costs, and disbursements incurred in the defense of that action.

The First Department first held that Royal’s disclaimer notice to *Bovis and Columbia*, the additional insureds, was untimely as a matter of law, and thus, was of no effect. However, as to the issue of the applicability of section 3420(d) to National, the other insurer of Bovis and Columbia, the Court reasoned that the notice requirement of section 3420(d)

is designed to protect the insured and the injured person or other claimant against the risk, posed by a delay in learning the insurer’s position, of expending energy and resources in an ultimately futile attempt to recover damages from an insurer or forgoing alternative methods for recovering damages until it is too late to pursue them successfully (27 AD3d at 92).

The Court then held that as to National, section 3420(d) had no application, and thus, Royal’s disclaimer was not untimely. The Court proceeded to address the merits and applicability of the exclusion at issue.

As stated above, the Cross Liability Exclusion of coverage for Vrezzio's accident is unambiguous. Further, it cannot be said that summary judgment as to Zurich is premature (*see e.g. Physicians' Reciprocal Insurers v Giugliano*, 37 AD3d 442 [2007] [insurer entitled to summary judgment declaring no duty to defend or indemnify despite outstanding discovery]). Thus, based on the reasoning and holding in *Bovis Lend Lease LMB v Royal Surplus*, Burlington is obligated to defend and indemnify Allen-Stevenson and the School, and is not obligated to reimburse Zurich for defense costs arising from the Vrezzio Action.

Furthermore, the Burlington Policy provides primary additional insured coverage to the School and Sciamé, and Zurich's policy provides excess coverage to such parties. Section 4.b(2) of plaintiff Zurich Policy's "Other Insurance" Condition unambiguously provides in part, that such policy is excess over "[a]ny other primary insurance available to you [Sciamé and the School] covering liability for damages arising out of the premises or operations for which you have been added as an additional insured by attachment of an endorsement.

Based on the foregoing, it is hereby

ORDERED that plaintiffs' motion for summary judgment and declaratory judgment is granted solely to the extent that it is:

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ORDERED that the branch of plaintiffs' motion for a declaration that Zurich American Insurance Company is entitled to an award in the amount of the defense costs incurred since December 9, 2005 together with any indemnity payment made on behalf of Allen-Stevenson, with interest is denied; and it is further

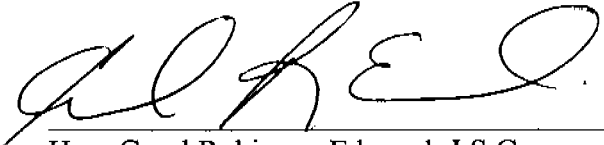
ORDERED that the cross-motion by defendant Burlington Insurance Company seeking summary judgment dismissing the complaint is granted solely as to the claims by Zurich American Insurance Company, and the Complaint is dismissed as to Zurich American Insurance Company; and it is further

ORDERED that Burlington Insurance Company shall serve a copy of this order with notice of entry on all parties.

The Clerk may enter judgment accordingly.

The foregoing constitutes the decision and order of the Court.

Dated: March 31, 2008



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Hon. Carol Robinson Edmead, J.S.C.