

**D.H.I. Constr. Servs., Inc. v Nacirema  
Envtl. Servs. Co., Inc.**

2008 NY Slip Op 32398(U)

August 21, 2008

Supreme Court, Nassau County

Docket Number: 1695-07/

Judge: Michele M. Woodard

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

This opinion is uncorrected and not selected for official  
publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NASSAU

-----X  
D.H.I. CONSTRUCTION SERVICES, INC.,

Plaintiff,

-against-

NACIREMA ENVIRONMENTAL SERVICES  
COMPANY, INC., KRZYSZTOF KACPERSKI,  
BEACH POINT CLUB, INC., and MT. HAWLEY  
INSURANCE COMPANY,

Defendants.  
-----X

**MICHELE M. WOODARD**  
**J.S.C.**  
TRIAL/IAS Part 16  
**Index No.: 001695/07**  
**Motion Seq. Nos.: 02 & 03**

**DECISION AND ORDER**

**Papers Read on this Motion:**

Plaintiff's Notice of Motion	02
Defendant Mt. Hawley Insurance's Notice of Cross-Motion	03
Plaintiff's Affirmation in Opposition	xx
Plaintiff's Reply Affirmation	xx
Defendant Mt. Hawley Insurance's Reply Affirmation	xx
Defendant Mt. Hawley Insurance's Memorandum Of Law	xx

The Plaintiff D.H.I. Construction moves for summary judgment against Mt. Hawley Insurance Company pursuant to Civil Practice Law and Rules § 3212, declaring that Mt. Hawley is obligated to defend and indemnify the Plaintiff for an incident which occurred on November 13, 2003, in which Defendant Krzysztof Kacperski was injured. The Defendant Mt. Hawley cross-moves for a determination that the Plaintiff is not an additional insured of the policy of liability insurance issued to Nacirema Environmental Services, Inc.

**BACKGROUND**

D.H.I. Construction Services, Inc. was a general contractor performing work at Beach Point Club, Inc., in Mamaroneck, New York. It appears that on November 13, 2003, Kacperski, an employee of Naricema, was injured when struck by a hammer attached to a bobcat operated by a fellow employee. Kacperski commenced an action against D.H.I and BEACH POINT. D.H.I. sought to tender its defense to Mt. Hawley Insurance Company by letter dated November 1, 2005.<sup>1</sup> By response dated February 13, 2006, Mt. Hawley denied coverage to Nacirema based on their

---

<sup>1</sup> Exh. "K" to Motion.

failure to provide copies of an incident report, their workers' compensation file, and an executed agreement between Nacirema and D.H.I. <sup>2</sup>

Nacirema had a general liability policy of insurance with Mt. Hawley effective May 1, 2003. In conjunction with the performance of the demolition and excavation work at Beach Point Club, they were required to provide insurance coverage to D.H.I. <sup>3</sup> Mt. Hawley disputes the import of the language, contending that it means only that Nacirema was required to show D.H.I. proof of insurance.

Nacirema sought to have D.H.I. named as an additional insured by making application through their broker. <sup>4</sup> Mt. Hawley takes the position that the language of the additional insured endorsement precludes coverage. <sup>5</sup> It states as follows:

**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 executed prior to the claim or "suit" 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.

Mt. Hawley relies upon the language which requires that the agreement be in writing and executed prior to the claim or suit. They allege that the purchase order agreement between D.H.I. and Nacirema <sup>6</sup> was never signed by Nacirema, and therefore D.H.I. never became an additional insured under the Nacirema policy.

D.H.I.'s response is twofold. The affidavit of Mark Trojan, the controller of Nacirema, does not explicitly state that the purchase order was actually signed, but claims that a change order was signed by both D.H.I. and Nacirema, and that this confirms the existence of the original agreement, in part by stating that "(a)ll work to be performed under the same terms and conditions

---

<sup>2</sup> Exh. "L" to Motion.

<sup>3</sup> Exh. "C" to Motion at ¶ 1.

<sup>4</sup> Exh. "J" to Motion.

<sup>5</sup> Exh. "F" to Cross-Motion.

<sup>6</sup> Exh. "C" to Cross-Motion.

as specified in original contract unless otherwise specified.” Howard Dym, the president of D.H.I., reiterates that the purchase order required Nacirema to name D.H.I. as an additional insured and to hold them harmless. He is unable to locate a copy of the purchase order.<sup>7</sup>

Mt. Hawley’s responses to these affidavits on behalf of D.H.I. are that the language of the purchase order did not require that Nacirema name D.H.I. as an additional insured, and that, in any event, the agreement was not executed by Nacirema, a condition precedent to the naming of an additional insured under the terms of the endorsement.

### DISCUSSION

The Court finds that the language of Purchase Order # 866I, in which Nacirema agrees “to provide us with the required insurance coverage and certificates,” mandated the naming of D.H.I. as an additional insured under the policy with Mt. Hawley. While the language could have been clearer, there seems to have been little doubt that D.H.I. expected Nacirema to hold D.H.I. harmless, and to provide them with the liability insurance coverage. This was obviously also the interpretation of Nacirema, who undertook to have D.H.I. named as an additional insured.

The fact that a signed copy of the purchase order is not presently available does not mandate the conclusion that it never existed. If the signing of the purchase order by Nacirema is essential to create coverage, this is a factual question which precludes the issuance of summary judgment to either party. When presented with a motion for summary judgment, the function of a court is “not to determine credibility or to engage in issue determination, but rather to determine the existence or non-existence of material issues of fact.” To grant summary judgment, it must clearly appear that no material and triable issue of fact is presented. *Stillman v Twentieth Century-Fox Corp.*, 3 NY2d 395, 404 (1957). It is a drastic remedy, the procedural equivalent of a trial, and will not be granted if there is any doubt as to the existence of a triable issue. *Moskowitz v. Garlock*, 23 AD2d 94 (3d Dept. 1965); *Crowley’s Milk Co. v Klein*, 24 AD2d 920 (3d Dept 1965).

D.H.I. seeks to avoid the need to establish the existence of a signed copy of the purchase order by pointing to the fully executed Change Order # 1<sup>8</sup>, signed by Nacirema on December 20, 2003, as incorporating by reference the purchase order, and thereby constituting a single executed agreement which predated the claim or suit for which coverage is sought. The change order makes specific reference to Purchase Order # 866I, for Job # 2003-0866 and is signed by both D.H.I. and Nacirema, but is dated after the November 13, 2003 date of the accident. It also provides that “(a)ll work to be performed under the same terms and conditions as specified in the original contract unless otherwise stipulated.” The issue is whether this document constitutes compliance with the “executed agreement” requirement of the additional insured endorsement.

---

<sup>7</sup> Exh. “B” to Affirmation in Opposition to Cross-Motion at ¶¶ 5 — 6.

<sup>8</sup> Exh. “D” to Motion.

Mt. Hawley takes the position that while New York law permits incorporation by reference in construction subcontracts, it binds a subcontractor to the provisions of the prime contract only insofar as they relate to the scope, quality, character, and manner of the subcontractor's work.<sup>9</sup> Mt. Hawley Memorandum of Law, Point V at p. 10, citing *S. Leo harmonay, Inc. v Binks Manufacturing Company*, 597 F. Supp. 1014 (SDNY 1984); *Waitkus v Metropolitan Housing Partners*, 50 A.D.3d 260 (1st Dept 2008). But both of the cases upon which Mt. Hawley relies involve attempts to impress upon subcontractors the terms of agreements to which they were not parties. Unrelated prime contract provisions, such as dispute resolution, or, in this case, insurance obligations, are not incorporated by reference into the subcontract when the subcontractor was not a party to the prime contract.

However, in this case we are dealing with two documents, both between the same parties. Mt. Hawley seeks to minimize this fact by reliance on the position that Nacerima was not a "signatory" to the original purchase order, since, as they posit, they did not physically sign it. A reading of *Waitkus*, however, leads to the conclusion that the word "signatory," in the sense intended, relates to whether or not they were a party to the original agreement, not whether or not they physically signed it.

Where two different documents form part of a single agreement, and are intended to effectuate the same result, they must be read together, even though they were not executed on the same date, or may not even have been between all the same parties.<sup>10</sup> *TVT Records v The Island Def Jam Music Group*, 412 F 3d 82, 89 (2d Cir. 2005). In the present case, both the Purchase Order and Change Order # 1, are between the same parties, are intended to effectuate the same result, are dated within 34 days of one another, and the latter clearly identifies and relates back to the former. Under these circumstances, they constitute a single agreement as a matter of law.<sup>11</sup> *Id.*

Both the Movant and Cross-Movant implicitly assume that compliance with the Additional Insured Endorsement<sup>12</sup> requires that an agreement to provide coverage must precede the incident of November 13, 2003. But the definitions of "suit" and "claim" in the policy are to the contrary<sup>13</sup> "Suit" - shall mean a civil proceeding in which damages, because of a negligent act, error or omission to which this insurance applies, are alleged. 'Suit' includes an arbitration proceeding alleging such damages to which an 'insured' must submit or submits with our consent." The "suit" by Kacperski was filed on August 8, 2005, after execution of Change Order # 1, which

---

<sup>12</sup> Exh. "F" to Cross-motion.

<sup>13</sup> Exh. "H" to Motion at ¶ E, subparagraphs "4" and "5".

incorporated by reference the obligation to name D.H.I. as an additional insured.

The term "Claim" is defined in subparagraph 5 as "... a demand received by an 'insured' for money or services, including the services of suit or institution of arbitration proceedings, naming an 'insured' and a negligent act, 'administration' services." Neither of these terms, contained in the Additional Insured Endorsement, relate to an incident giving rise to a claim or suit. "Where the provisions of [a] policy 'are clear and unambiguous, they must be given their plain and ordinary meaning, and courts should refrain from rewriting the agreement (citations omitted).'" <sup>14</sup>*United States Fid. & Guar. Co. v Annunziata*, 67 NY 2d 229, 232 (1986). Even in the event of ambiguities in a policy of insurance, "they are to be resolved in the insured's favor and against the insurer (citations omitted)." <sup>15</sup>*Id.*

The single agreement, fully executed by Nacirema and D.H.I. as of December 20, 2003, preceded the "suit" for injuries sustained by Kacperski. But the record before the Court does not indicate whether or not it also preceded a "claim" so as to satisfy the "agreed in writing" language of the Additional Insured Endorsement. The purpose of the writing requirement in the endorsement is clear: insurers should not be compelled to provide coverage to parties in the absence of an agreement by the insured to do so. But the language of the policy, which is unambiguous on its face, requires only that the agreement predate the claim or suit, not the incident giving rise to one or the other.


Because there is no evidence of when a "claim," as opposed to a "suit" was made, the Court is confronted with a factual question as to whether or not a "claim" was interposed before December 20, 2003. If not, the agreement was executed before the interposition of a claim or suit, and D.H.I. would be entitled to coverage under the Mt. Hawley policy issued to Nacirema. Until this issue is resolved, the Court is compelled to deny both the Motion and Cross-motion and the are **denied**. It is hereby

**ORDERED**, that the parties are directed to appear for a Preliminary Conference in DCM on September 15, 2008 at 9:30 a.m.

This constitutes the **DECISION** and **ORDER** of the Court.

**DATED:** August 21, 2008  
Mineola, N.Y.

**ENTER:**

  
\_\_\_\_\_  
**HON. MICHELE M. WOODARD**  
**J.S.C.**

H:\DHI v Nacirema DJD.wpd

**ENTERED**

**AUG 26 2008**

**NASSAU COUNTY**  
**COUNTY CLERK'S OFFICE**