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

PRESENT: LOUIS B. YORK J.S.C. Justice

PART 2

Index Number : 602680/2006

SKANSKA USA BUILDING

VS.

ARCH INSURANCE COMPANY

SEQUENCE NUMBER : # 002

PARTIAL SUMMARY JUDGMENT

INDEX NO. 602680-06

MOTION DATE

MOTION SEQ. NO. #002

MOTION CAL. NO.

read on this motion to/for

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

MOTION IS [illegible]
WITH ACCOMPANYING MEMORANDUM DECISION.

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).

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

Dated: 9/2/08

LOUIS B. YORK J.S.C.

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: I.A.S. PART 36

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SKANSKA USA BUILDING, INC. and PAV-LAK INDUSTRIES, INC.,

Plaintiffs,

Index No.
602680/06

-against-

ARCH INSURANCE COMPANY, ADMIRAL INSURANCE COMPANY, B&J WELDING & IRON WORKS, n/k/a MID ISLAND STEEL CORP., and RANGER STEEL CORP., [pertaining to an underlying action Arnold v Pav-Lak],

Defendants.

LOUIS B. YORK, J.:

Plaintiff Pav-Lak Industries, Inc. (Pav-Lak) moves, pursuant to CPLR 3212, for a judgment declaring that (I) defendant Arch Insurance Company (Arch) affords primary additional insured coverage for claims asserted against Pav-Lak in an underlying personal injury action, Arnold v Pav-Lak Industries, Inc. (Supreme Court, New York County, Index No. 106915/05) (the Arnold Action), under a commercial general liability policy Arch issued to defendant B&J Welding & Iron Works (B&J), n/k/a Mid Island Steel Corp. (the Arch Policy); (ii) the liability policy issued by Admiral Insurance Company (the Admiral Policy) providing excess coverage to B&J above the Arch Policy affords coverage for the claims asserted against Pav-Lak

in the Arnold Action for any settlement or judgment against Pav-Lak in that action in excess of the primary Additional Insurance coverage provided by Arch; (iii) Arch is obligated to defend and indemnify Pav-Lak in the Arnold Action; (iv) Arch is required to reimburse Pav-Lak for any defense costs and any indemnity payments incurred on behalf of Pav-Lak, with statutory interest; (v) Admiral is obligated to indemnify Pav-Lak in the Arnold Action for a settlement or judgment amount against Pav-Lak in that action in excess of the primary Additional Insured coverage provided to Pav-Lak by the Arch Policy; (vi) Admiral is required to reimburse Pav-Lak for any indemnity payment, in excess of the primary Additional Insured coverage afforded under the Arch Policy, incurred on behalf of Pav-Lak, with statutory interest.

Defendant Arch cross-moves for a judgment declaring that the Arch Policy does not afford coverage to Pav-Lak in the Arnold Action and that Arch has no duty to defend or indemnify Pav-Lak in the Arnold Action. Alternatively, if this court finds that the Arch policy applies to Pav-Lak in the Arnold Action, Arch cross-moves for a judgment declaring that under its policy's Endorsement No. 13 (the Deductible Endorsement), a $1 million deductible applies in the Arnold Action and must be paid by Pav-Lak before Arch pays any damages or expenses in the Arnold

Action.

Defendant Illinois Union Insurance Company (Illinois Union) cross-moves for summary judgment dismissing the complaint asserted against it, and all cross claims by Arch.

Plaintiffs Skanska USA Building, Inc. and Pav-Lak cross-move, pursuant to CPLR 3212, for a judgment declaring that: (1) plaintiffs are entitled to additional insurance coverage from Illinois Union for the claims alleged against them in the Arnold action; (2) Illinois Union has waived the right to deny coverage by failing to timely respond to plaintiffs' tender for additional insured coverage, or alternatively, (3) pursuant to CPLR 3212 (f), directing that the issue of whether plaintiffs are additional insureds under the Illinois Union policy with respect to the Arnold Action is a question of fact that cannot be resolved by summary judgment without completion of discovery.

On March 20, 2002, Pav-Lak, as general contractor for a construction project (the Project) known as the Manhasset Library Project in Manhasset, New York, entered into a contract with B&J for steel fabrication and erection at the Project (the Contract). B&J performed the steel fabrication, and subcontracted the steel erection to defendant Ranger Steel Corp. (Ranger).

Pursuant to the Contract, B&J agreed to purchase $6

million in general liability insurance coverage, naming Pav-Lak as an additional insured (Arch's Exhibit A, the Contract, "Insurance Requirements/Indemnification Agreement" dated 8/23/04). B&J obtained the Arch Policy with a $1 million per occurrence limit (Arch's Exhibit B, the Policy), and the Admiral Policy with a $5 million aggregate limit.

On May 18, 2005, Derek Arnold (Arnold), a Ranger employee, filed the Arnold Action, seeking to recover damages for personal injuries he allegedly sustained on April 4, 2005, while working at the Project's site. In letters dated January 23, 2006, Zurich, Pav-Lak's insurance carrier, requested that Arch, B&J's primary insurance carrier, and Admiral, B&J's excess insurance carrier, defend and indemnify Pav-Lak in the Arnold Action (Pav-Lak's Exhibit J, letters dated 1/23/06 from Zurich to Arch and Admiral). Due to the absence of any response denying or confirming coverage for Pav-Lak in the Arnold Action, the instant action was commenced against Arch and Admiral, seeking, inter alia, a declaration of their respective duties to defend and indemnify Pav-Lak in the Arnold Action. Admiral served its answer to the second amended complaint on September 12, 2006, and Arch interposed its amended answer to the second amended complaint on April 27, 2007.

The parties now move for summary judgment for various relief. The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact (Winegrad v New York Univ. Med. Ctr., 64 NY2d 851 [1985]). Once a prima facie showing has been made, the burden then shifts to the opposing party, who must proffer evidence in admissible form establishing that an issue of fact exists, warranting a trial of the action (Alvarez v Prospect Hosp., 68 NY2d 320 [1986]).

In support of its motion, Pav-Lak initially seeks a declaration that Arch affords primary coverage for the claims asserted against it in the Arnold Action, arguing that Pav-Lak is an additional insured under the Arch Policy. It is well settled that a party seeking insurance coverage is obligated in the first instance to demonstrate entitlement to coverage (Tribeca Broadway Associates, LLC v Mount Vernon Fire Insurance Company, 5 AD3d 198 [1st Dept 2004]).

To demonstrate that it is an additional insured under the Arch Policy, Pav-Lak refers to its endorsement titled "Additional Insured-Designated Entity Endorsement Deductible Version", which provides as follows:

> "WHO IS AN INSURED is amended to include as an additional insured the person(s) or organization(s) designated in the Schedule below, but only with respect to liability arising out of your operations, 'your work,' or premises owned by or rented to you. As used in this endorsement, the words "you" and "your" refer to the Named Insured.

(Pav-Lak's Exhibit C, Additional Insured - Designated Entity Endorsement Deductible Version) (Endorsement 24). While Arch acknowledges that Pav-Lak is designated in the aforementioned endorsement's schedule, it contends that Pav-Lak does not qualify as an additional insured with respect to the Arnold Action, because the injuries sustained by the plaintiff in the Arnold Action did not arise out of B&J's operations or work, but rather during the course of his work for his employer, Ranger.

Courts have the responsibility of determining the rights and obligations of parties under insurance contracts, using the specific language of the policy itself (see Sanabria v American Home Assur. Co., 68 NY2d 866 [1986]). "As with the construction of contracts generally, 'unambiguous provisions of an insurance contract must be given their plain and ordinary meaning, and the interpretation of such provisions is a question of law for the court'" (Vigilant Ins. Co. v Bear Stearns Companies, Inc., 10 NY3d 170, 177 [2008], quoting White v

Continental Cas. Co., 9 NY3d 264, 267 [2007]).

Pav-Lak relies on several cases that looked to the language of additional insured provisions in liability insurance policies obtained by a subcontractor to determine whether these provisions provided coverage to general contractors for injuries sustained by an employee of a subcontractor or a sub-subcontractor, in the course of the employee's work (Structure Tone, Inc. v Component Assembly Systems, 275 AD2d 603 [1st Dept 2000]; Consolidated Edison Co. of New York, Inc. v Hartford Ins. Co., 203 AD2d 83 [1st Dept 1994]). In each of these cases, the general contractor was held to be an additional insured under the subcontractor's policy, finding that the additional insured language focused not upon the "precise cause of the accident, ... but upon the general nature of the operation in the course of which the injury was sustained" (Consolidated Edison Co. of New York, Inc., 203 AD2d at 83; see also Structure Tone, Inc. v Component Assembly Systems, 275 AD2d 603, supra).

Here, the additional insured endorsement of Arch's Policy limited coverage to "liability arising out of your operation, 'your work,'..." (Pav-Lak's Exhibit C, Endorsement 24), with "your" referring to the Named Insured. The policy defines "your work" as "(a) work or operations performed by you

or on your behalf; and (2) materials, parts or equipment furnished in connection with such work or operations" (Plaintiff's Exhibit C, the Policy, § V, ¶ 22 [a] [1 & 2]). Thus, in determining whether coverage under the instant additional insured endorsement was triggered, the issue is whether the accident arose out of B&J's work or its subcontractor's work performed by it for B&J at the Project's site (see Structure Tone, Inc. v Component Assembly Systems, 275 AD2d 603, supra). Here, Arnold, an employee of Ranger, a subcontractor hired by B&J, was injured while performing work required by B&J under the Contract. Therefore, the language of the subject endorsement covers the present situation (see id.), and Pav-Lak is an additional insured under Arch's Policy.

Alternatively, Arch argues that, even if Pav-Lak qualifies as an additional insured under Endorsement 24, the Arch Policy is subject to a $1 million deductible under its "Subcontractor Endorsement-Deductible Policy Version" (Endorsement No. 13) resulting from its insured's breach of condition no. 3 therein.

Endorsement No. 13 provides, in relevant part, as follows:

[t]he Conditions of this policy are amended

> to included the following:
> 3. The Named Insured, and any other insured under the policy for whom the "subcontractor" is working will be named as additional insured on all of the "subcontractors" Commercial General Liability policy(s)... .
>
> If any one of the above conditions is not satisfied, a deductible of $1,000,000 per "occurrence" or offense will apply to any claim or "suit" under this policy seeking damages for "bodily injury," "property damage," "personal injury and advertising injury" arising out of work performed by the "subcontractor" for the insured.
>
> For the purposes of this endorsement only, "subcontractor" or "subcontractors" means any person or entity who is not an employee of an insured and does work or performs services for or on behalf of the Insured

(Arch's Exhibit 5, Endorsement 13). Arch notes that B&J was not named as an additional insured on Ranger's commercial liability policy issued by Illinois Union (Arch's Exhibit 6, Ranger's insurance policy with Illinois Union) (the Illinois Union Policy). It thus argues that, since one of the conditions of the Deductible Endorsement was not satisfied, the $1 million deductible is applicable to the Arnold Action, and its obligation, if any, to pay damages and expenses applies only to the amount of damages and expenses in excess of the $1 million deductible.

Arch notes that Pav-Lak argues, in its moving papers,

that Arch waived any defenses to coverage by failing to assert its defenses in a disclaimer letter. Arch, however, maintains that the requirement, under New York Insurance Law § 3420 (d), to issue a disclaimer applies only to defenses based on exclusions, and not to Endorsement 13, a provision limiting its liability.

Pav-Lak does not dispute that the Illinois Union Policy does not list B&J as an additional insured or address Arch's argument that the failure to list B&J on that policy triggers the deductible in Endorsement 24. Pav-Lak instead argues that Arch waived its right to rely on Endorsement 13, based on its failure to assert an alleged breach of any Endorsement 13 conditions, pursuant to Insurance Law § 3420 (d), until it served its amended answer on April 27, 2007, approximately 15 months after Pav-Lak's tender.

"Insurance Law § 3420 (d) requires an insurer disclaiming coverage to do so 'as soon as is reasonably possible'; failure to do so in such timely manner 'precludes effective disclaimer' [citation omitted]" (Paul M. Maintenance, Inc. v Transcontinental Ins. Co., 300 AD2d 209, 212 [1st Dept 2002]). Contrary to Pav-Lak's argument, the time requirements for disclaiming coverage, under Insurance Law § 3420 (d), do not apply in the instant action, since the deductible provision in

Endorsement 13 does not bar coverage under the Arch Policy, nor implicate policy exclusions (see Power Authority of State of New York v National Union Fire Ins. Co. of Pittsburgh, 306 AD2d 139 [1st Dept 2003]). Endorsement 13 instead limits the coverage to be provided under the Arch Policy, under certain conditions. Thus, Arch did not waive Endorsement 13 by failing to timely notify Pav-Lak that the deductible applied (see Pav-Lak Industries, Inc. v Arch Ins. Co., Sup Ct, NY County, December 21, 2007, Lehner, J., Index No. 600382/06).

The issue of whether plaintiffs and/or B&J are additional insureds under the Illinois Union Policy is raised in applications by plaintiffs and Illinois Union for declaratory relief with respect to this policy.

In support of its application, Illinois Union argues that the Illinois Union Policy does not provide additional insured coverage to plaintiffs. It notes that, under the policy's blanket additional insured endorsement, in order for additional coverage under its policy to be triggered, there must be in existence, prior to the occurrence, a written contract between its insured and a third party specifically requiring additional insured coverage (the Illinois Union Policy) (Illinois Union's Exhibit K, the Illinois Union Policy, "Additional

Insured-Owners, Lessees or Contractors - (Form B)" Endorsement). Illinois Union further acknowledges that there is a written one-page agreement between its insured, Ranger, and Pav-Lak's subcontractor, B&J, but also notes that it is devoid of any language requiring any entity to be named as an additional insured (Illinois Union's Exhibit J, Agreement between Ranger and B&J dated 8/18/04) (the Subcontract).

In opposition to Illinois Union's application, and in support of their application for summary judgment, plaintiffs submit three pages that they claim were part of the Subcontract, that require Ranger to procure insurance for Pav-Lak. They submit excerpts from the deposition of Carter Manz, B&J's president and owner, to demonstrate that Manz recognized his signature on the Subcontract, and identified the three additional pages (Plaintiffs' Exhibit 5, Carter Manz's deposition held on 6/4/07). They also note that Manz does not remember whether these additional pages were part of the agreement. Plaintiffs argue that if Manz's testimony is insufficient to demonstrate that Ranger and B&J had an additional insured requirement in their contract, as provided for in the additional pages, then such testimony is sufficient to raise a question of fact concerning the "'written contract' requirement" (Plaintiffs'

counsel's affidavit, at 9).

In reply, Illinois Union initially argues that plaintiffs' applications, first as a second summary judgment motion, and subsequently as an "Amended Notice of Cross-Motion," were untimely, since they were not served with the required time necessary to give it adequate notice under CPLR 2214 (b) and 2215. Illinois Union further maintains that the additional pages submitted by plaintiffs are not dated, or executed by any entity. It further notes that the pages do not reference the Project, nor does the Subcontract reference the additional pages relied on by plaintiffs. Additionally, Illinois Union contends that, in his deposition, Manz never stated that the additional pages were part of the Subcontract.

While Illinois Union demonstrates that plaintiffs did not timely serve their applications for relief against it, pursuant to CPLR 2214 (b) and 2215, the failure to comply with these provisions may be excused in the absence of prejudice (Walker v Metro-North Commuter R.R., 11 AD3d 339 [1st Dept 2004]). A review of the record demonstrates, while the cross-motion was mailed on November 6, 2007 with a return date of November 7, the submission date of the motion was adjourned to November 15, 2007, thus giving Illinois Union adequate

opportunity to prepare a response to plaintiffs' application for declaratory relief against it, which it did. Thus, in the absence of any prejudice, plaintiffs' failure to comply with CPLR 2214 (b) and 2215 is excused (id.).

As argued by Illinois Union, the blanket additional insured endorsement contained in the Illinois Union Policy provides for such coverage only "as required by contract, provided the contract is executed prior to loss" (Illinois Union's Exhibit K, the Illinois Union Policy, "Additional Insured-Owners, Lessees or Contractors - [Form B]" Endorsement). There is no dispute that the one-page Subcontract submitted by Illinois Union was the agreement executed by B&J and Ranger. Further, Manz's deposition discloses that he identified the Subcontract in the record, as being the "standard contract between [B&J] and [Ranger] for the subcontracting of the steel erection" (Manz' Deposition, at 13) and testified that he recognized one of the signatures as his, on behalf of B&J, and the other as William Coyne, Ranger's president (id. at 13-14). As argued by Illinois Union, the Subcontract fails to include any language requiring Ranger to procure insurance naming B&J or plaintiffs as additional insureds.

While plaintiffs attempt to demonstrate that the three

additional pages produced, during Manz's deposition, were part of the Subcontract, these pages do not contain the signatures or initials of either B&J nor Ranger. Further, there is no indication in the Subcontract that there were additional pages attached thereto, and, conversely, these pages fail to make any reference to the Subcontract. Additionally, while Manz identified these pages as ones that B&J started adding to its contracts, he did not remember whether they were part of the Subcontract, nor whether he saw signed copies of these pages (Manz's deposition, at 14-16, 33). Inasmuch as Manz's testimony is equivocal, and plaintiffs offer only surmise and conjecture regarding these additional pages, they fail to raise any questions of fact which could defeat Illinois Union's application for summary judgment (Zuckerman v City of New York, 49 NY2d 557 [1980]; Martinez v Higher Powered Pizza, Inc., 43 AD3d 670 [1st Dept 2007]). Therefore, in the absence of a written contract as required by the Illinois Union Policy, there existed no additional insured coverage for B&J or plaintiffs at the time of the occurrence (National Abatement Corp. v National Union Fire Ins. Co. of Pittsburgh, PA, 33 AD3d 570 [1st Dept 2006])

Accordingly, Illinois Union's application for summary judgment dismissing the complaint as asserted against it, and all

cross claims against it is granted. Plaintiffs' application for summary judgment and declaratory relief against Illinois Union is denied in its entirety.

In light of the foregoing, one of the conditions in the Deductible Endorsement of the Arch Policy has not been complied with, and accordingly, the $1 million deductible is applicable. The Arch Policy provides, in pertinent part, that "[t]he insured is responsible for all payments within the deductible amount," and that Arch's obligation to pay damages and expenses "applies only to the amount of damages and expenses in excess of the deductible amounts" (Arch's Exhibit 12, Deductible Liability Endorsement). Thus, Arch's obligation to indemnify Pav-Lak is subject to any damages and expenses in excess of the $1 million deductible.

Therefore, that branch of Pav-Lak's motion and Arch's cross motion for declaratory relief regarding Arch's obligations under the Arch Policy is decided to the extent of declaring that (1) the Arch Policy provides primary additional insured coverage to Pav-Lak in the Arnold Action; (2) Arch is obligated to defend Pav-Lak in the Arnold Action; and (3) Arch is obligated to indemnify Pav-Lak if Pav-Lak is subject to any damages and expenses in excess of the $1 million deductible.

Pav-Lak also moves for declaratory relief with respect to the Admiral Policy. In support of its application, Peter Pavlakis, Pav-Lak's vice president, alleges that the Admiral Policy provides Pav-Lak with excess additional coverage as an additional insured, relying on the certificate of insurance provided to it by B&J, and the plain language of the Admiral Policy. It notes that the certificate of insurance lists the Admiral Policy as B&J's excess liability policy, and states that Pav-Lak is an additional insured on a primary basis.

Pavlakis also asserts that Pav-Lak uses its liability insurer, Zurich, as its agent for purposes of notifying insurers from which Pav-Lak seeks the additional insured coverage required by its contracts; that Zurich, on behalf of Pav-Lak, tendered the underlying claim by Arnold directly to Admiral under the Admiral Policy on January 23, 2006; and that Admiral's failure to respond to its tender with a confirmation or denial of coverage for the claims asserted in the Arnold action results in Admiral's waiver of any defenses to coverage.

In opposition, Admiral raises several arguments. It maintains that the certificate of insurance referred to by Pav-Lak is not dispositive of Pav-Lak's status as an additional insured, in that it was issued by a broker and not Admiral, and

also indicates that it is being issued "as a matter of information only and confers no rights upon the certificate holder" (Pav-Lak's Exhibit F, Certificate of Liability Insurance dated 11/18/04). It further claims that Pav-Lak is not an insured or additional insured under the Admiral Policy in connection with the underlying personal injury claim, since an endorsement in the Admiral Policy excludes coverage for bodily injury sustained during structural steel erection; and that it did not waive its defenses to coverage, including the structural steel operations exclusion.

In reply, Pav-Lak argues, inter alia, that since Admiral failed to timely disclaim coverage based on the aforementioned exclusion or even raise it as a defense for almost two years, Admiral has waived it.

As previously noted, a party claiming insurance bears the burden of proving entitlement to coverage (see Moleon v Kreisler Borg Florman General Const. Co., Inc., 304 AD2d 337 [1st Dept 2003]). "A certificate of insurance is only evidence of a carrier's intent to provide coverage but is not a contract to insure the designated party nor is it conclusive proof, standing alone, that such a contract exists" (Tribeca Broadway Associates, LLC. v Mount Vernon Fire Ins. Co., 5 AD3d at 200).

Here, however, Pav-Lak also relies on the language of the Admiral Policy to demonstrate that it is an additional insured thereunder. The Admiral Policy defines "insured" to mean "any person or organization qualifying as such under the 'controlling underlying insurance'" (Admiral Policy, § IV [4]). The "controlling underlying insurance" is defined as "the policy or policies that are indicated as such on the schedule of 'underlying insurance'" (id., § IV [1]). "'Underlying insurance' means the coverage(s) afforded under insurance policies, for the limits shown, as designated in the schedule of 'underlying insurance,' and any renewals or replacements of those policies..." (id., § IV [9]). A review of the Admiral Policy discloses that it lists Arch as the controlling underlying liability insurance for commercial general liability (Arch's Exhibit E, "Schedule of 'Underlying Insurance'"). Therefore, since Pav-Lak is an additional insured under the Arch Policy, it is also an "insured" under the plain language of the Admiral Policy. Therefore, Pav-Lak qualifies as an additional insured under the Admiral Policy.

With respect to the excess liability coverage provided by the Admiral Policy, it states that:

Except to the extent any terms, definitions,

> limits of insurance, conditions or exclusions of the "controlling underlying insurance" are different from any terms, definitions, limits of insurance, conditions or exclusions of this policy, this policy will provide the same coverage for "ultimate net loss" as provided by the "controlling underlying insurance." If any terms, definitions, limits of insurance, conditions or exclusions of this policy are more restrictive than those of the "controlling underlying insurance," then this policy's terms, definitions, limits of insurance, conditions or exclusions will apply.

(Pav-Lak's moving papers, the Admiral Policy, § 1 [b]). As previously discussed, the controlling underlying insurance here is the Arch Policy, which provides coverage for "'bodily injury' or 'property damage' caused by an 'occurrence' that takes place in the 'coverage territory'; and ... occurs during the policy period" (Arch's cross motion, Exhibit 2, the Arch Policy, § 1 [b] [1] & [2]). "Occurrence" is defined as "an accident, including continuous or repeated exposure to substantially the same general harmful condition" (id., § V [13]). "Coverage territory" includes, inter alia, the United States of America (id., § V [13] [4] [a]). Thus, it is clear from its plain language utilized in this provision (see Vigilant Ins. Co. v Bear Stearns Companies, Inc., 10 NY3d 170, supra), that the Admiral Policy provides the same coverage as the Arch Policy, with the exception of those

exclusions in the Admiral Policy which are different from the Arch Policy.

Admiral, nonetheless, argues that the Admiral Policy precludes coverage for injuries arising from structural steel erection, and, that, therefore, the personal injury claims asserted in the Arnold Action fall outside the scope of the policy's coverage. It thus claims that a timely disclaimer was not required.

It is established that "[d]isclaimer pursuant to section 3420 (d) is unnecessary when a claim falls outside the scope of the policy's coverage portion" (Matter of Worcester Ins. Co. v Bettenhauser, 95 NY2d 185, 188 [2000]). "Under those circumstances, the insurance policy does not contemplate coverage in the first instance, and requiring payment of a claim upon failure to timely disclaim would create coverage where it never existed" (id. at 188). "Conversely, a timely disclaimer pursuant to Insurance Law § 3420 (d), is required when a claim falls within the coverage terms but is denied based on a policy exclusion" (Markevics v Liberty Mut. Ins. Co., 97 NY2d 646, 648-649 [2001]). "An insurer's failure to comply with Insurance Law § 3420 (d) precludes it from denying coverage based upon a policy exclusion" (City of New York v St. Paul Fire and Marine Ins. Co.,

21 AD3d 978, 980-981 [2d Dept 2005]).

Here, the endorsement relied on by Admiral to exclude coverage is entitled "Exclusion - Designated Ongoing Operations" (Pav-Lak's moving papers, Exhibit E, Exclusion-Designated Ongoing Operations Endorsement), and states that it "modifies the insurance provided" under the "excess liability policy" as follows:

> This insurance does not apply to any injury or damage arising out of, resulting from, caused or contributed by the ongoing operations described in the Schedule of this endorsement, regardless of whether such operations are conducted by you or on your behalf or whether the operations are conducted for yourself or for others

(id.). The ongoing operations listed in the schedule is "structural steel erection" (id.).

The aforementioned endorsement, by its very terms, characterizes itself as an exclusion. Since the Admiral Policy provides the same coverage as the Arch Policy, but for those exclusions in the Admiral Policy which are different from the Arch Policy, and Arnold's personal injury claims are covered under the Arch policy, Admiral's reliance on the aforementioned exclusion to deny coverage required timely notice of disclaimer (see Matter of Worchester Ins. Co. v Bettenhauser, 95 NY2d 185,

supra). As previously noted, pursuant to Insurance Law § 3420 (d), an insurer is required to disclaim coverage "'as soon as is reasonably possible'; failure to do so in such timely manner 'precludes effective disclaimer' [citation omitted]" (Paul M. Maintenance, Inc. v Transcontinental Ins. Co., 300 AD2d 209, 212 [1st Dept 2002].

Relying on Bovis Lend Lease LMB, Inc. v Royal Surplus Lines Ins. Co. (27 AD3d 84 [1st Dept 2005]) (the Bovis case), Admiral argues that its obligation to disclaim, pursuant to Insurance Law § 3420 (d), was not triggered, since the request for Pav-Lak's defense and indemnification was made by Zurich, a co-insurer. In the Bovis case, the Court held, inter alia, 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

(the Bovis case, at 92). Relying on, inter alia, AIU Ins. Co. v Investors Ins. Co. (17 AD3d 259 [1st Dept 2005]), the Bovis Court discussed that other courts had found that Insurance Law § 3420 (d) did not apply to contribution requests between coinsurers,

and held that such inapplicability extends to requests for the defense and indemnity from a co-insurer (the Bovis case, at 93; see also Sixty Sutton Corp. v Illinois Union Ins. Co., 34 AD3d 386 [1st Dept 2006]). However, with respect to the insureds in the Bovis case, the Court applied the notice requirement of Insurance Law § 3420 (d), and found that the notice of disclaimer was untimely as a matter of law to the insureds, although notice of the claim was given by one co-insurer to the another co-insurer (see also Bovis Lend Lease LMB Inc. v Garito Contracting, Inc., 38 AD3d 260 [1st Dept 2007]). Thus, contrary to Admiral's argument, its obligation to disclaim was triggered under Insurance Law § 3420 (d) with respect to Pav-Lak, the insured for whom the section was intended to protect (see AIU Ins. Co. v Investors Ins. Co., 17 AD3d 259, supra).

Additionally, Admiral claims that its delay in disclaiming coverage was due to its inability to determine that it had any basis for disclaiming coverage based on the information contained in Pav-Lak's tender. It notes that it requested "complete information supporting [Pav-Lak's tender" in its acknowledgment letter from Zurich, but claims that Zurich never provided this information to it.

"'[T]imeliness of an insurer's disclaimer is measured

from the point in time when the insurer first learns of the grounds for disclaimer of liability or denial of coverage'" (First Financial Ins. Co. v Jetco Contracting Corp., 1 NY3d 64, 68-69 [2003], quoting Matter of Allcity Ins. Co. [Jimenez], 78 NY2d 1054, 1056 [1991]). "While Insurance Law § 3420 (d) speaks only of giving notice 'as soon as is reasonably possible,' investigation into issues affecting an insurer's decision whether to disclaim coverage obviously may excuse delay in notifying the policyholder of a disclaimer" (First Financial Ins. Co. v Jetco Contracting Corp., 1 NY3d at 69). The insurer bears the burden of justifying its delay (id.).

The record demonstrates Admiral's acknowledgment to Zurich in February 2006 that it received Pav-Lak's tender dated January 23, 2006 (Pav-Lak's cross motion, Exhibit J, fax cover sheet from Admiral to Zurich dated 2/14/06). Admiral did not confirm or disclaim coverage therein (see id.). Further, while Admiral interposed an answer in the instant declaratory judgment action, containing 39 affirmative defenses, it did not raise the aforementioned endorsement as a defense (Pav-Lak's Exhibit M, Admiral's answer dated 9/12/06). Admiral mentioned the aforementioned endorsement as a basis for disclaiming coverage for the first time in its opposition to Pav-Lak's instant

application (see Admiral's Memorandum of Law in opposition to Pav-Lak's motion for partial summary judgment against Admiral dated 10/12/07).

Admiral seeks to blame Zurich for its late disclaimer based on Zurich's alleged failure to provide Admiral with the information it requested in its acknowledgment letter. It has been held that when grounds for a disclaimer are not readily apparent, "the insurer has the right, albeit the obligation, to investigate, but any such investigation must be promptly and diligently conducted" (Those Certain Underwriters at Lloyds, London v Gray, 49 AD3d 1, 4 [1st Dept 2007]). In asking for additional information from Zurich, Admiral claims that it was unable to determine from Pav-Lak's tender whether grounds for a disclaimer existed. Therefore, it had the obligation to conduct its own investigation of Arnold's claim in a prompt and expeditious manner (id.). Here, there is no indication in the record that Admiral made any attempt to obtain information from other sources, including B&J, the named insured on the Admiral Policy, nor was any excuse provided for its failure to do so. Therefore, in the absence of any demonstration that Admiral conducted a prompt, diligent and good faith investigation of Arnold's claim, Admiral's excuse for its delay in disclaiming

coverage is not reasonable.

Thus, on the facts before us, Admiral's almost 20-month delay in disclaiming coverage based on the aforementioned exclusion was unreasonable as a matter of law, and it is barred from relying on the exclusion to disclaim coverage.

Therefore, Pav-Lak's application for declaratory relief regarding Admiral's obligations under the Admiral Policy is decided to the extent of declaring that the Admiral Policy provides excess liability coverage to Pav-Lak, as additional insured, in the Arnold Action; and that Admiral is obligated to indemnify Pav-Lak in the Arnold Action for a settlement or judgment against it in excess of the primary Additional Insured coverage afforded to Pav-Lak by Arch.

Accordingly, it is

ORDERED that plaintiffs' motion and Arch's cross motion for declaratory relief is decided to the extent of declaring that it is

ADJUDGED and DECLARED that the Arch Policy provides primary additional insured coverage to Pav-Lak in the Arnold Action; (2) Arch is obligated to defend Pav-Lak in the Arnold Action; and (3) Arch's obligation to indemnify Pav-Lak is subject to any damages and expenses in excess of the $1 million

deductible; and it is further

ORDERED that Illinois Union's cross motion is granted, dismissing the plaintiffs' sixth and seventh causes of action and Arch's cross claims, and it is

ADJUDGED AND DECLARED that the Illinois Union Policy does not afford additional insured coverage to plaintiffs, and that Illinois Union does not have a duty to defend and indemnify Pav-Lak for the claims asserted against it in the Arnold Action; and it is further

ORDERED that Pav-Lak's cross motion for declaratory relief against Admiral is granted to the extent of that it is

ADJUDGED AND DECLARED that the Admiral Policy provides excess liability coverage to Pav-Lak, as additional insured, in the Arnold Action; and that Admiral is obligated to indemnify Pav-Lak in the Arnold Action for a settlement or judgment against it in excess of the primary Additional Insured coverage afforded to Pav-Lak by Arch.

Dated: Sept 2, 2008

ENTER:

J. S. C.

LOUIS B. YORK J.S.C.