Lachs v Best Buy Stores, Co., Inc.
2008 NY Slip Op 32489(U)
September 9, 2008
Supreme Court, New York County
Docket Number: 0106035/2006
Judge: Emily Jane Goodman
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SCANNED ON 9/12/2008

[* 1]

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

PRESENT: EMILY JANE GOODMAN PART 17
Justice

Index Number : 106035/2006

LACHS, GEOFFREY

vs.

BEST BUYS STORES CO.INC.

SEQUENCE NUMBER : 002

OTHER

INDEX NO. ____

MOTION DATE ____

MOTION SEQ. NO. ____

MOTION CAL. NO. ____

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 and cross motion are decided per attached

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

FILED
SEP 12 2008
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 9/9/08

EMILY JANE GOODMAN 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; PART 17

---x

GEOFFREY LACHS,

Plaintiff,

Index No.: 106035/06

-against-

BEST BUY STORES, CO., INC., BEST BUY STORES L.P., TOWER CLEANING SYSTEMS, INC. D/B/A U.S. MAINTENANCE, and ATLAS SNOW,

Defendants.

---x

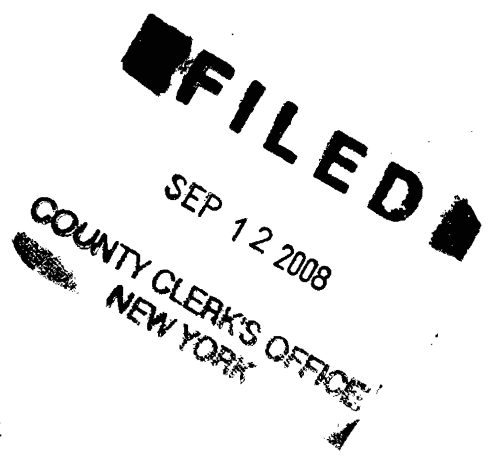
TOWER CLEANING SYSTEMS, INC. D/B/A U.S. MAINTENANCE, and U.S. MAINTENANCE,

TP Index No.: 590612/06

Third-Party Plaintiffs,

-against-

THOMAS POLSINELLI, ATLAS SNOW, ATLAS ROLL-OFF CORP., ATLAS ROLL-OFF CONTAINER CORP., ATLAS ROLL-OFF CONSTRUCTION, ATLAS TRANSIT MIX CORPORATION, ATLAS CONCRETE BATCHING CORP., MARKEL AMERICAN INSURANCE COMPANY, THE MARKEL GROUP OF COMPANIES; MARKEL CORPORATION, MARKEL INSURANCE COMPANY, ESSEX INSURANCE COMPANY, and MARKEL INTERNATIONAL,



Third-Party Defendants.

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BEST BUY STORES CO., INC. and LIBERTY INTERNATIONAL UNDERWRITERS, as a subrogee of BEST BUY STORES CO., INC.

Second TP Index No. 590824/07

Second Third-Party Plaintiffs,

-against-

THOMAS POLSINELLI, ATLAS SNOW, ATLAS ROLL-OFF CORP., ATLAS ROLL-OFF CONTAINER CORP., ATLAS ROLL-OFF CONSTRUCTION, ATLAS TRANSIT MIX CORPORATION, ATLAS CONCRETE BATCHING CORP., and MARKEL AMERICAN INSURANCE COMPANY,

Second Third-Party Defendants.

---x

EMILY JANE GOODMAN, J.S.C.:

The principal action is commenced by plaintiff Geoffrey Lachs (Lachs) against Best Buy Stores, Co., Inc.; Best Buy Stores L.P. (collectively, Best Buy); Tower Cleaning Systems, Inc. d/b/a U.S. Maintenance (Tower); and Atlas Snow (Atlas). According to his complaint, Lachs was injured when he slipped and fell in Best Buy's parking lot when he visited the store located at 50-01 Northern Boulevard, Queens, New York (the Parking Lot). The record reflects that Best Buy contracted with Tower to provide snow and ice removal services at the Parking Lot. Tower then subcontracted with Atlas and its owner Thomas Polsinelli (Polsinelli) for such services (the Subcontract). Atlas and Polsinelli are insured under a general liability policy (the Insurance Policy) issued by Markel Insurance Company (Markel).

After the conclusion of discovery, by motion dated September 20, 2007 (Sequence number 002), Best Buy and Tower (collectively, BB-Tower) seeks an order of this court declaring that (1) Polsinelli, Atlas, Atlas Roll-Off Corp., Atlas Roll-Off Container Corp., Atlas Roll-Off Construction, Atlas Transit Mix Corporation and Atlas Concrete Batching Corp. (collectively, Polsinelli-Atlas), as well as Markel, have a contractual and common law obligation to indemnify and hold harmless BB-Tower for all claims against BB-Tower arising out of the slip and fall accident; (2) Polsinelli-Atlas and Markel have a contractual and common law obligation to reimburse BB-Tower for all fees, costs

and disbursements incurred in defending the slip and fall action; and (3) Markel must provide insurance coverage to BB-Tower, as additional insured, under the Insurance Policy. In the same motion, BB-Tower also seeks summary judgment dismissing plaintiff's complaint, as well as any and all cross claims and counterclaims against BB-Tower.

By cross motion dated December 6, 2007, Polsinelli-Atlas seeks summary judgment dismissing plaintiff's complaint. Moreover, Polsinelli-Atlas and Markel, represented by the same counsel, also oppose the declaratory reliefs sought by BB-Tower.

In response, plaintiff opposes both the motion and the cross motion that seek summary dismissal of the complaint, but takes no position regarding the declaratory reliefs sought by BB-Tower, the third party plaintiffs, against Polsinelli-Atlas and Markel, the third party defendants.

For the reasons set forth herein, the motion for summary judgment of BB-Tower is denied, the cross motion for summary judgment by Polsinelli-Atlas dismissing plaintiff's complaint is granted, and the various forms of declaratory relief sought by BB-Tower are denied.

Background

Plaintiff alleges that the accident occurred in the Parking Lot at or about 9:15 A.M. on December 11, 2005 when he visited the Best Buy store located in Queens. Plaintiff admits that he did not observe the ground conditions of the Parking Lot

prior to the accident, and that he slipped on a hard and untreated patch of ice in the Parking Lot that became readily visible to him after he fell.

The undisputed record reflects that on December 9th, two days before the accident, a snow storm struck the New York City area, but there was no subsequent precipitation through and including the day of the accident. Plaintiff's retained expert, Mark Kramer, opined in his affidavit that the ice patch which caused plaintiff's slip and fall had existed for a period of time prior to the accident, and that it was formed from the melt-freeze cycles as a result of day-night temperature fluctuations (the Kramer Affidavit). The undisputed record also reflects that Atlas last serviced the Parking Lot on December 9th, and that no services were rendered by it on December 10th and 11th. While it is not entirely clear as to the procedures or protocol under which Atlas was to provide snow/ice removal services at the Parking Lot (as more fully discussed below), the record indicates that Polsinelli-Atlas was not accessible or reachable on the day of the accident, and that a different snow/ice removal vendor named "Lawn And Order" was retained by BB-Tower on an exigent basis after occurrence of plaintiff's slip and fall accident.

Discussion

In setting forth the standards for granting or denying a motion for summary judgment, pursuant to CPLR 3212, the Court of Appeals noted, in *Alvarez v Prospect Hospital* (68 NY2d 320,

324 [1986]}, the following:

> As we have stated frequently, 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. Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers. Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary support in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action [internal citations omitted].

Following the foregoing guidance, the courts uniformly scrutinize motions for summary judgment, as well as the facts and circumstances of each case, to determine whether relief may be granted. *Giandana v Providence Rest Nursing Home*, 32 AD3d 126, 148 (1st Dept 2006)(because entry of summary judgment "deprives the litigant of his day in court, it is considered a drastic remedy which should only be employed when there is no doubt as to the absence of triable issues"); *Martin v Briggs*, 235 AD2d 192, 196 (1st Dept 1997)(in considering a motion for summary judgment, "evidence should be analyzed in the light most favorable to the party opposing the motion"). However, conclusory allegations unsupported by competent evidence are insufficient to defeat a summary judgment motion. *Alvarez, supra*, 68 NY2d at 324-325. Also, summary judgment is generally granted in favor of the movant if there are no material and triable issues of fact. *Francis v Basic Metal, Inc.*, 144 AD2d 634 (2nd Dept 1988).

[* 7]

BB-Tower's Motion For Summary Judgment Should Be Denied

In support of its summary judgment motion dismissing the complaint, BB-Tower argues that (1) it did not create the ice patch, and it did not have actual or constructive notice of the patch's alleged existence; (2) plaintiff has conceded that the patch of "black ice" that allegedly caused him to slip and fall was not even visible to him when he stepped on it; and (3) BB-Tower did not owe a duty of care to plaintiff because Polsinelli-Atlas has contractually assumed that duty under the Subcontract, and is thus liable in tort to third parties, including plaintiff.

These arguments are not persuasive for various reasons. First, BB-Tower has failed to submit an affidavit from a party with knowledge of the facts in support of its motion for summary judgment; it merely relies on an affirmation of counsel that BB-Tower had no actual or constructive notice of the ice patch. In such regard, the courts have held that an "attorney's affirmation that is not based upon personal knowledge is of no probative or evidentiary significance." *Warrington v Ryder Truck Rental Inc.*, 35 AD3d 455, 456 (1st Dept 2006), *citing JMD Holding Corp. v Congress Financial Corp.*, 4 NY3d 373, 384-385 (2005). Moreover, the courts have held that, in order for a defendant to prevail on a motion for summary judgment based on lack of notice, "it is defendant's burden to establish the lack of notice as a matter of law." *Giuffrida v Metro North Commuter R.R. Co.*, 279 AD2d 403, 403 (1st Dept 2001); *Raju v Cortlandt Town Center*, 38 AD3d 874,

874 (2nd Dept 2007) ("'[o]n a motion for summary judgment to dismiss the complaint for lack of notice, the defendant is required to make a prima facie showing affirmatively establishing the absence of notice as a matter of law'") *quoting Goldman v Waldbaum, Inc.*, 248 AD2d 436, 437 [2nd Dept 1998]).

BB-Tower has not submitted any evidence to support its lack of notice assertion, and thus has failed to sustain its burden. In contrast, plaintiff has submitted an affidavit of Mark Kramer, a meteorologist, who opines that, based on certified weather records, the ice patch was formed at least several hours prior to the accident, due to the melt-freeze cycles that took place after the December 9th snow storm. *See* Kramer Affidavit, Exhibit H to Plaintiff Affirmation Opposing BB-Tower's Summary Judgment Motion. Moreover, Best Buy's products manager, Ricardo Chorrillos, testified that store managers were required to report to work during the Christmas holiday period at about 4 A.M. to 5 A.M., which was several hours prior to the time of plaintiff's accident that occurred at or about 9:15 A.M. on December 11th. Chorrillos Deposition, Exhibit J (pages 34-35) to Plaintiff Affirmation. Based on the foregoing, and the discussions below, an issue of fact is raised as to whether plaintiff's accident was caused by ice existing for a sufficiently long period of time to hold BB-Tower liable for having actual or constructive notice of its presence. *Rodriguez v 326-338 East 100th Street Partners*, 40 AD3d 439 (1st Dept 2007) (affirming denial of summary judgment

motion because issues of fact existed as to whether ice on the sidewalk, under relevant weather conditions, was present long enough for defendants to discover and remedy its presence). Further, "a landowner," such as Best Buy, is "liable for a slip and fall on ice if it had actual or constructive notice of the icy condition or it created the condition." *Ricca v Almad*, 40 AD3d 728 (2nd Dept 2007)(reversing the grant of summary judgment in favor of defendant landlord because plaintiff raised a triable issue of fact as to defendant's notice of icy condition).

BB-Tower's alternative contention, to the effect that since plaintiff has conceded that he did not even see the "black ice" patch is a sufficient basis to grant summary dismissal of the complaint, is without merit. Plaintiff's failure to observe the ice patch merely raises an issue of comparative negligence, but is not a basis for dismissing the complaint in its entirety. In any event, plaintiff's failure to notice the ice patch, which was purportedly about 5 feet in diameter and about 40 feet from the store's entrance, does not mean that the ice patch did not exist. Indeed, an internal memo (akin to an incident report) of Best Buy does not negate its existence. Specifically, the memo stated, in relevant part, the following: "**Store's description of how injury occurred:** Customer was exiting car and slipped on patch of ice in parking lot. **Customer's description (if different from store):** Customer has the same description." Best Buy Internal Memo, Exhibit E to Plaintiff Affirmation. Further,

Tower's other contention that it is not liable to plaintiff, because Polsinelli-Atlas has assumed the duty of care to remove snow and ice from the Parking Lot pursuant to the Subcontract, is equally without merit. The Court of Appeals in *Espinal v Melville Snow Contractors, Inc.* (98 NY2d 136 [2002]), has identified limited situations in which a party who entered into a contract to provide services may be liable for injuries sustained by a third party. In *Espinal*, the plaintiff sued the contractor for negligently removing snow from a landowner's premises, which caused plaintiff to slip and fall. The Court of Appeals stated that the contractor might be said to "have assumed a duty of care" and thus became liable if, among other things, the contractor failed to exercise reasonable care in performing its duties and launched a force or instrument of harm, or the contractor has "entirely displaced the other [contracting] party's duty to maintain the premises safely." *Id.* at 140.

In the instant case, pursuant to the Services Agreement between Best Buy and Tower, a copy of which is annexed as Exhibit L to Plaintiff Affirmation, Tower has a comprehensive duty for snow and ice removal at the Parking Lot, and Tower has agreed to indemnify and hold harmless Best Buy for claims arising from Tower's performance or breach of the Agreement.[1] In turn, Tower and Polsinelli-Atlas entered into the Subcontractor Agreement and

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[1] It is apparent that due to the indemnity provision, Best Buy and Tower are represented by the same counsel in this action.

an amendment thereto (i.e. the Subcontract), copies of which are annexed as Exhibit M to Plaintiff Affirmation, pursuant to which Polsinelli-Atlas assumed Tower's responsibility for snow and ice removal services. Importantly, the Subcontract provides, among other things, that Atlas is "required to regularly inspect [the Parking Lot] during snow or ice events to determine what snow clearing or ice control operations need to commence," and that Atlas is "required to check in with onsite management before ice control operations begin." The Subcontract further provides that Atlas "shall be required to begin applying ice control products [e.g. salt or ice melts] upon approval from an onsite manager," and that a Tower account manager may also "authorize ice control to commence due to a request from a Best Buy Manager."

Under the express terms of the Subcontract, Polsinelli-Atlas has not "entirely displaced" Tower's duties in providing ice removal services, because Atlas was contractually required to obtain the prior approval of the onsite manager of Tower and/or Best Buy before commencing or applying ice control products. In such regard, and to the extent that BB-Tower retained control over the commencement or application of ice control procedures and products, there is no merit to the argument that BB-Tower has no duty at all in maintaining the safety of the Parking Lot, or no liability for plaintiff's slip and fall over the ice patch. Accordingly, BB-Tower's motion for summary judgment dismissing plaintiff's complaint is denied.

Polsinelli-Atlas' Summary Judgment Motion Should Be Granted

In the cross motion, Polsinelli-Atlas also seeks summary judgment dismissing the complaint. The cross movant argues that it is not liable to plaintiff because (1) it did not assume a duty of care to plaintiff under the Subcontract; (2) it was never advised of an icy condition at the Parking Lot, and had no duty to carry out ice control services; and (3) the Subcontract was not Atlas' undertaking to provide comprehensive and exclusive snow and ice removal services, so as to completely displace Best Buy's duty as the landowner, or Tower's duty as the primary contractor, to maintain the safety of the Parking Lot.

Opposing Polsinelli-Atlas' argument that it did not owe a duty of care to plaintiff under the Subcontract, plaintiff contends that the icy conditions in the Parking Lot was created by Atlas, which caused him to slip and fall. In support of this contention, plaintiff pointed to the testimony of Polsinelli, who noted that since the Parking Lot did not have a lot of open space to pile the plowed snow, it could increase the likelihood of ice forming in areas where customers walked. Polsinelli Deposition, pages 44-45. A similar contention was dismissed by the Court of Appeals in *Espinal*. In particular, rejecting the argument that the snow removal activities of the defendant contractor created an icy condition that increased the risk of slip and fall, the Court of Appeals stated that "[p]laintiff's fall on the ice was not the result of [the contractor] having 'launched a force or

instrument of harm' ... By merely plowing the snow, [defendant contractor] cannot be said to have created or exacerbated a dangerous condition." 98 NY2d at 142. The Court further stated that because the defendant contractor did not "entirely displace" the other contracting party's duty to maintain the premises safely, the contractor "owed no duty of care to plaintiff and therefore cannot be held liable in tort." *Id.* at 141-142.

Based on *Espinal*, a significant and controlling decision which plaintiff has failed to address or distinguish, as well as the facts of this case, including this court's finding that the Subcontract did not entirely displace the duty of BB-Tower in maintaining the safety of the Parking Lot, the cross motion of Polsinelli-Atlas for summary judgment dismissing the complaint as to it should be granted.

Declaratory Reliefs Sought By Third Party Plaintiff BB-Tower

As noted above, BB-Tower seeks an order declaring that Polsinelli-Atlas has a contractual and common law obligation to indemnify BB-Tower for all claims arising out of plaintiff's slip and fall accident, and to reimburse BB-Tower for all fees, costs and disbursements incurred in defending the slip and fall action. Polsinelli-Atlas opposes the relief sought, arguing that the indemnity provisions of the Subcontract, as discussed below, are void as against public policy under New York's GOL § 5-322.1.

Under GOL § 5-322.1, an agreement or promise is void and unenforceable as against public policy, if it purports to

"indemnify or hold harmless the promisee against liability for damage arising out of bodily injury to persons ... caused by the negligence of the promisee, his agents or employees ... whether such negligence be in whole or in part." Construing the statute as rendering void a promise or an agreement where the promisee is fully or wholly indemnified even for its own negligence, the courts have affirmatively upheld agreements that contemplate only partial indemnification of the promisee. *Dutton v Charles Pankow Builders Ltd.*, 296 AD2d 321 (1st Dept 2002) (indemnity agreement prefaced by the clause "to the fullest extent permitted by applicable law" was held enforceable and permitted partial indemnification of the indemnitee for injuries to third parties partially caused by indemnitee's negligence); *accord Jackson v City of New York*, 38 AD3d 324 (1st Dept 2007); *Landgraff v 1579 Bronx River Ave., LLC*, 18 AD3d 385 (1st Dept 2005).

In the instant case, the indemnity provisions of the Subcontract state, in relevant part, that "[T]o the fullest extent permitted by applicable law, you [Polsinelli-Atlas] shall defend and hold harmless us [Tower] and our customers [Best Buy] ... from and against any and all liabilities, obligation, claims ... including, without limitation, costs, expenses and attorneys' fees ... arising out of ... your performance (or failure to perform) your duties under this agreement." Subcontract, ¶ 5B. Because the indemnity provision of the Subcontract contains the qualifying clause "to the fullest extent permitted by applicable

law," construing this provision as calling for or permitting partial indemnification of BB-Tower does not run afoul of the prohibition of GOB § 5-322.1. In light of *Jackson, Dutton* and *Landgraffe, supra*, this construction is sound and permissible.

The fact that the subject indemnity provisions are not void or unenforceable does not end the inquiry, as the issue of whether BB-Tower or Polsinelli-Atlas (or both) was negligent in failing to cause removal of the ice patch needs to be addressed. Under the Subcontract, Atlas was required "to regularly inspect the properties [i.e. the Parking Lot] during snow or ice events to determine what snow clearing or ice control operations need to commence," and "to check in with onsite management [of BB-Tower] before any ice control operations begin." The Subcontract also provides that, during ice storms or "icy conditions outside of a snow event" as determined by Atlas, if the "onsite manager deems the ice control application unnecessary," Atlas was "required to have the manager sign the work order confirming this." Notably, the Subcontract does not provide a definition of an "ice event" or clarify whether "an icy condition outside of a snow event" may be deemed an ice event. In such regard, although the Subcontract is clear that all ice control applications by Atlas required the prior approval of BB-Tower, it is not entirely clear when icy conditions existed outside of a snow event, whether Atlas was required to inspect the Parking Lot to determine (and to inform BB-Tower) as to when ice control operations would be required.

In this case, it is undisputed that the snow storm occurred on December 9th, and that Atlas serviced the Parking Lot on that day. It is also undisputed that there was no snow fall or precipitation on December 10th and December 11th, and that Atlas provided no services on those days. Even though there was no subsequent snow fall, plaintiff's expert, Mark Kramer, opined that the ensuing day-night temperature fluctuations after the snow storm caused icy conditions at the Parking Lot due to the plowed snow's melt-freeze cycles. However, Polsinelli-Atlas argues that it was Best Buy's duty to inspect the Parking Lot for icy conditions and to contact Tower, who would then notify Atlas, as to when ice removal would be needed. According to Polsinelli-Atlas, because BB-Tower failed to inform Atlas of any icy condition prior to plaintiff's accident, BB-Tower is not entitled to contractual or common law indemnification for its negligence, even if the indemnity provisions are not void as against public policy or the GOL. Yet, certain statements made by Polsinelli during deposition raise issues as to the strength of the above argument. Specifically, the following colloquy took place:

> Q: If you have a situation with piled snow and you had a fluctuation in temperature, which would vary from below freezing to above freezing, would that be a condition that you as Atlas would monitor, or is that a situation that you were not at all concerned with and that you would wait to be called in to salt if the fluctuation in temperature resulted in the formation of ice?
>
> Ms. Kuovitz: Objection. You can answer.
>
> A. We would hit the salt again in the parking lot so

> that if we did have some runoff [i.e. melting from plowed snow], it still would not get to the freezing state which would prevent that condition.
>
> * * *
>
> Q. Was it the practice of Atlas after it performed snow plowing in this Best Buy parking lot, was it normal procedure to automatically lay salt in the lot after the lot was plowed of snow?
>
> A. Yes.
>
> Q. Was that something you did without being told to lay the salt?
>
> A. We did that automatically because the crew was there and we would spread salt and improve the cleanliness of the parking lot so it wouldn't melt on site.

Polsinelli Deposition, pages 40-42.

The foregoing testimony raises an issue that, in the event of icy "runoffs" from the plowed snow, whether Atlas would monitor such an event, or wait to be called, so that Atlas would "hit the salt again in the parking lot" to prevent the formation of icy patches. Polsinelli's testimony did not answer the question posed. Indeed, the procedures or protocol under which Atlas was to provide ice removal services is unclear, even though the Subcontract sets forth certain provisions that govern the parties' respective responsibilities. Because there are triable issues of fact as to the duties of the respective parties under the Subcontract, in the context of snow and ice removal and the alleged failure or negligence of a party or parties in carrying out such duties, BB-Tower's request for declaratory relief of indemnification and reimbursement by Polsinelli-Atlas is denied.

Prenderville v International Service Systems, Inc., 10 AD3d 334, 338 (1st Dept 2004)(indemnity claims could not be resolved until a determination was made as to whether the landowner or the snow removal contractor was free from negligence); *Linarello v City University of New York*, 6 AD3d 192 (1st Dept 2004)(affirming the denial of the construction manager's motion for conditional judgment because it failed to show its freedom from negligence).

Alternatively, BB-Tower seeks declaratory relief that Markel provide primary coverage to BB-Tower as additional insured under the Insurance Policy issued to Polsinelli-Atlas, a copy of which is annexed as Exhibit J to Michael DeCarlo's Affirmation in Support of BB-Tower's Motion for Summary Judgment. Notably, the Subcontract requires, among other things, that Polsinelli-Atlas purchase and maintain an insurance policy acceptable to Tower, and that such policy must name Tower and any specified designee as additional insured thereunder. However, an endorsement to the Insurance Policy, entitled "Additional Insured - Designated Person or Organization", does not specifically name or designate Tower or Best Buy as additional insured under such Policy. *See* Endorsement to Policy, Exhibit K to Michael DeCarlo Affirmation.

Atlas-Markel does not argue that BB-Tower is not entitled to be treated as additional insured under the Insurance Policy, as BB-Tower is not named in the endorsement. Instead, Atlas-Markel argues, based on its interpretation of the Policy

and the endorsement,[2] that BB-Tower would "only be entitled to additional insured coverage with respect to liability arising out of Atlas' negligence." Affirmation in Opposition, ¶ 39. In essence, Atlas-Markel argues that "as this occurrence [i.e. plaintiff's slip and fall] does not arise out of Atlas' negligence or operations, Tower and Best Buy are not entitled to primary coverage." *Id.* at ¶ 41.

In reply, BB-Tower contends that if the purpose of requiring Polsinelli-Atlas under the Subcontract to obtain insurance and to name BB-Tower as additional insured was only to protect BB-Tower from "vicarious liability" for the negligence of Atlas, BB-Tower "would have been sufficiently protected by the provision [requiring] Polsinelli-Atlas to obtain it's [sic] own insurance coverage, without further requiring Best Buy and Tower be included in Polsinelli-Atlas policy as named insureds." Affirmation in Reply, page 5. This argument is not persuasive. Notably, the courts have held that whether a third party was an additional insured under an insurance policy should be determined from the four corners of the policy, rather than from the contract or subcontract between the parties. *Superior Ice Rink, Inc. v Nescon Contracting Corp.*, 52 AD3d 688 (2nd Dept 2008), *citing Binasco v Break-Away Demolition Corp.*, 256 AD2d 291, 292

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[2] The endorsement provides, in relevant part, that: "WHO IS INSURED ... is amended to include as an insured the person or organization shown in the schedule as an insured but only with respect to liability arising out of your operations or premises owned by or rented by you."

(2nd Dept 1998). BB-Tower also contends that because Polsinelli-Atlas breached the Subcontract by failing to procure insurance coverage for BB-Tower, Polsinelli-Atlas is liable for any resultant costs and damages paid or incurred by BB-Tower in connection with this lawsuit. Affirmation in Reply, page 5.

This court does not have to decide, at the present time, whether Markel must be compelled to include BB-Tower as additional insured under the Policy. Instead, it is sufficient to repeat that there are triable issues of fact with regard to the alleged negligence of BB-Tower or Polsinelli-Atlas (or both) in carrying out their respective duties under the Subcontract, which, as urged by Atlas-Markel, may impact upon BB-Tower's entitlement to insurance coverage under the Policy. Thus, BB-Tower's request for declaratory relief, that Markel provide BB-Tower with additional insured coverage, is denied.[3]

Accordingly, it is

ORDERED that the motion for summary judgment dismissing plaintiff's complaint (sequence number 002) by Best Buy Stores, Co., Inc., Best Buy Stores L.P., and Tower Cleaning Systems, Inc. d/b/a U.S. Maintenance (collectively, BB-Tower) is hereby denied; and it is further

ORDERED that the cross motion for summary judgment dismissing plaintiff's complaint by Thomas Polsinelli, Atlas

[3] In any event, subject to any applicable defenses, Tower may have a breach of contract claim against Polsinelli-Atlas for failing to procure additional insured coverage for BB-Tower.

[* 21]

Snow, Atlas Roll-Off Corp., Atlas Roll-Off Container Corp., Atlas Roll-Off Construction, Atlas Transit Mix Corporation and Atlas Concrete Batching Corp. (collectively, Polsinelli-Atlas) is hereby granted; and it is further

ORDERED that the declaratory reliefs sought in the summary judgment motion (sequence number 002) by third party plaintiff BB-Tower against third party defendants Polsinelli-Atlas and Markel Insurance Company are hereby denied.

This constitutes the Decision and Order of the court.

Dated: September 9, 2008

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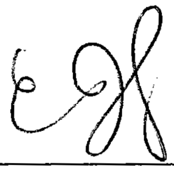

J.S.C.

EMILY JANE GOODMAN

FILED
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