

**Illinois Ntl. Ins. Co. v General Star
Indem. Co.**

2008 NY Slip Op 32822(U)

October 13, 2008

Supreme Court, New York County

Docket Number: 604466/05

Judge: Jane S. Solomon

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

PRESENT: Solomon

PART 55

Index Number : 604466/2005

ILLINOIS NATIONAL INSURANCE

INDEX NO. _____

vs

GENERAL STAR INDEMNITY

MOTION DATE 4/14/08

Sequence Number : 002

MOTION SEQ. NO. _____

SUMMARY JUDGMENT

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

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

Notice of Removal
Answering Affidavits -- Exhibits _____

PAPERS NUMBERED

1-4
5-9
10-12

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

is decided in accordance with the enclosed memorandum decision, order, declaration and ~~judgment~~ partial judgment.

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

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).

Dated: 10/13/08

JANE S. SOLOMON
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK: PART 55

-----X
ILLINOIS NATIONAL INSURANCE COMPANY,
THE NEW YORK CITY SCHOOL CONSTRUCTION
AUTHORITY, THE CITY OF NEW YORK and
J.A. JONES CONSTRUCTION GROUP, LLC,

Index No.: 604466/05

Plaintiffs,

-against-

DECISION, ORDER,
DECLARATION AND
PARTIAL JUDGMENT

GENERAL STAR INDEMNITY COMPANY,

UNFILED JUDGMENT

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obtain entry, counsel or authorized representative must
appear in person at the Judgment Clerk's Desk (Room
141B).**

JANE S. SOLOMON, J.:

Plaintiffs seek declaratory judgment that an insurance policy issued by defendant General Star Indemnity Company (General Star) provides coverage for a claim asserted in another lawsuit. Plaintiffs' motion for summary judgment is granted, and General Star's cross-motion for summary judgment is denied, for the reasons below.

General Star issued a general liability insurance policy to Core Tech Associates (Core Tech). Core Tech was in the construction business, and it was awarded a sub-contract to perform work on a project at a New York City public school, I.S. 137, located in South Ozone Park in Queens. Plaintiff City of New York owns the property. The general contractor, plaintiff J.A. Jones Construction Group, LLC (J.A. Jones), hired Core Tech pursuant to a written contract dated November 1, 2001 (Subcontract annexed to Notice of Motion at Ex. E). J.A. Jones in turn was hired by plaintiff New York City School Construction

Authority (NYCSCA).

On March 12, 2002, a Core Tech employee named Marcos Rivera (Rivera) allegedly slipped and fell from a ladder on the roof of I.S. 137 in the course of his job, suffering serious injuries. Rivera commenced a lawsuit against J.A. Jones, NYCSCA and the City of New York in the Supreme Court, Queens County, index number 26246/2002 (hereinafter referred to as the underlying action), seeking damages for his injuries under theories of negligence and violation of Labor Law sections 200, 240 and 241. Plaintiffs seek indemnification in the underlying action from General Star under Core Tech's insurance policy. General Star has already acknowledged its obligation to provide a defense.

NYCSCA purchased an owner's controlled insurance program (OCIP), under which all contractors and sub-contractors on the I.S. 137 project were enrolled, provided that they were qualified by NYCSCA to participate. Plaintiff Illinois National Insurance Company (Illinois National) provides general liability coverage under the OCIP. As relevant here, the Illinois National policy included an "other insurance" provision which states that Illinois National's coverage is excess to any other primary insurance (Illinois National Policy, annexed to Notice of Motion at Ex. K, section IV [4]). The copy of the Illinois National policy submitted on the motion differs from the copy it

produced to General Star in discovery, which presents an issue addressed below.

The Subcontract provides that Core Tech will indemnify J.A. Jones and NYCSCA from claims arising from Core Tech's work, and that Core Tech would procure insurance (Subcontract, paragraphs 6 and 7). The insurance provision refers to Exhibit A to the Subcontract, which specifies the insurance Core Tech was obligated to procure.

Exhibit A to the Contract states that Core Tech's minimum insurance limits for workers compensation, employer liability and comprehensive general liability coverage are "-0- Part of OCIP." It further provides that Core Tech name J.A. Jones and NYCSCA as additional insureds on Core Tech's insurance policy, such insurance to be primary to any other insurance carried by J.A. Jones and NYCSCA. Exhibit A further states that all subcontractors must be approved to be a part of the OCIP, and "it is imperative that the insurance form be submitted prior to beginning work at the site."

The General Star general liability policy issued to Core Tech provides that any person or organization for whom Core Tech is performing operations under a written agreement is added as an additional insured under the General Star policy, but only for occurrences that take place after the written contract, and before Core Tech completes its work on the project (General Star

Policy, annexed to Notice of Motion, Ex. E, Additional Insured Endorsement).

Three months after Core Tech entered into the Subcontract, NYCSCA disapproved Core Tech as a sub-contractor (see Subcontractor Disapproval Letter, dated 2/12/02, annexed to Affirmation of Christopher J. McGuire, Esq. In Opposition to Motion and In Support of the Cross-Motion, at Ex. C). As a result, Core Tech was not enrolled as an OCIP participant.

Plaintiffs argue that they are entitled to coverage under the additional insured provision, and that such coverage is primary to all other insurance. General Star contends that Core Tech's contract with J.A. Jones did not require Core Tech to procure insurance and to add J.A. Jones and NYCSCA as additional insureds; and second, that additional insured coverage is not triggered because Rivera's accident occurred after Core Tech's obligations under the subcontract had been extinguished by NYCSCA's disapproval letter.

General Star's argument that Core Tech was not obligated to procure insurance, and therefore was under no obligation to name a plaintiff as an additional insured, fails because the Subcontract clearly obligates Core Tech to procure insurance and to name J.A. Jones and NYCSCA as additional insureds on the policy. While the "minimum limits" of insurance are stated as zero under the OCIP, the obligation to procure

insurance is clear and unambiguous. Core Tech did procure insurance from General Star, with limits that (unsurprisingly) exceed the minimums required under the Subcontract. Indeed, Exhibit A makes clear that Core Tech was required to seek approval from NYCSCA to participate in its OCIP, and its enrollment was not automatic. In this context, the requirement for Core Tech to obtain its own insurance is not mere surplusage.

General Star's argument that the Rivera claim does not fall within the additional insured endorsement because the accident happened after Core Tech completed its work under the subcontract also fails. It is undisputed that Rivera was present on the roof as an employee of Core Tech in connection with work Core Tech agreed to do under the Subcontract. In determining whether a claim falls within an additional insured endorsement, courts look to the general nature of the operation in the course of which the injury was sustained (Consolidated Edison Co. of New York, Inc., v Hartford Ins. Co., 203 AD2d 83 [1st Dept 1994]). The claim in the underlying action arose out of Core Tech's work under the Subcontract, which work was performed for the benefit of NYCSCA. Whether Core Tech would have been within its rights to walk off the job after receiving NYCSCA's disapproval letter is not before the court.

Finally, General Star argues that if it is obligated to defend and indemnify the defendants other than Illinois National,

a question of fact remains as to whether its obligation is limited to that of a co-primary insurer. In support of this argument, General Star contends that Illinois National provided a copy of its OCIP policy in response to discovery demands that is materially different from the copy of the policy attached to plaintiffs' motion. According to General Star, the copy produced in discovery does not include J.A. Jones as a named insured, and therefore the policy's "other insurance" provision is not triggered with respect to the underlying action. The "other insurance" provision is identical in both copies (see, policy produced to General Star, McGuire Aff., Ex. G), but General Star contends that J.A. Jones would not be a named insured under the copy produced in discovery, as opposed to the copy plaintiffs submitted in the motion. In reply, plaintiffs submit the affidavit of Thomas Morrissey, a senior underwriter employed by AIG, who claims personal knowledge of the policies. He states that the policy produced in discovery was a computer archived version, and the one submitted on the motion was the actual policy. They are indeed different. However, the language identified by General Star as relevant to this dispute - the other insurance and named insured provisions - are the same. Mr. Morrissey states that NYCSCA and general contractors are deemed named insureds, and J.A. Jones is a general contractor within the meaning of the policy. General Star's reply, submitted after Mr.

Morrissey's affidavit was served, does not dispute his contentions. On the face of it, it appears that no material discrepancy exists. Accordingly, it hereby is

ORDERED that plaintiffs' motion for summary judgment is granted, and defendant's cross-motion for summary judgment is denied; and it further is

ADJUDGED and DECLARED that

(1) Defendant General Star Indemnity Company has the primary obligation to defend and indemnify, up to its policy limits, plaintiffs City of New York, NYCSCA and J.A. Jones in the underlying action known as Rivera v. NYCSCA, et al., in the Supreme Court of the State of New York for the County of Queens, index no. 26246/2002;

(2) The Illinois National policy is excess over the General Star policy for Rivera's claims in the underlying action;

(3) General Star must reimburse Illinois National for defense costs, including reasonable attorneys fees, incurred on behalf of plaintiffs City of New York, NYCSCA and J.A. Jones in the underlying action; and it further is

ORDERED that the issue of the amount General Star is obligated to reimburse to Illinois National for defense costs, including reasonable attorneys fees and interest, is severed and referred to a Special Referee to hear and report with recommendations, except that, in the event of and upon the filing

of a stipulation of the parties, as permitted by CPLR 4317, the Special Referee, or another person designated by the parties to serve as referee, shall determine the aforesaid issue; and it is further

ORDERED that the part of this motion seeking to recover defense costs in the underlying action shall be held in abeyance pending the report and recommendations of the Special Referee and a motion pursuant to CPLR 4403 or receipt of the determination of the Special Referee or the designated referee; and it further is

ORDERED that a copy of this decision, order, declaration and judgment shall be served on the referee clerk in the motion support office, Room 119, to arrange a date for the reference to a Special Referee.

Dated: October 13, 2008

ENTER



JANE S. SOLOMON

UNFILED JUDGMENT
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