

**Bovis Lend Lease LMB, Inc. v Virginia Surety  
Ins. Co.**

2008 NY Slip Op 32937(U)

October 22, 2008

Supreme Court, New York County

Docket Number: 107326/07

Judge: Joan A. Madden

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

PRESENT: HON. JOAN A. MADDEN  
Justice

PART 11

Bovis Lend Lease LMB Inc.

Plaintiff,

- v -

Virginia Sundry Ins. Co.

Defendant.

INDEX NO: 107326/07

MOTION DATE:

MOTION SEQ. NO: 001

MOTION CAL. NO:

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

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_

Answering Affidavits — Exhibits \_\_\_\_\_

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


PAPERS NUMBERED

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion is decided  
in accordance with the awarded memorandum Decision + order

**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  
631B).

Dated: Oct 22, 2007



J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 11

----- X  
BOVIS LEND LEASE LMB, INC. and ZURICH  
AMERICAN INSURANCE COMPANY,

Plaintiffs,

-against-

Index No. 107326/07

VIRGINIA SURETY INSURANCE COMPANY and  
RSUI INDEMNITY CO. (pertaining to multiple  
underlying actions commenced by Thomas Garanti  
William Alter; Daniel Carpluck; and Gilberto  
against Bovis Lend Lease LMB, Tower 31 LLC

Defendants.

----- X  
**MADDEN, J:**

In this action for a declaratory judgment as to insurance coverage, plaintiffs Bovis Lend Lease LMB, Inc. (Bovis) and its insurer, Zurich American Insurance Company (Zurich) seek, inter alia, a determination as to the rights and obligations of the parties under policies of insurance issued by defendant Virginia Surety Insurance Company (Virginia Surety). The underlying personal injury actions arise out of a construction accident in which Bovis was the general contractor on the project. Virginia Surety is the insurer for one of the subcontractors, GM Crocetti Flooring, Inc. (Crocetti).

Virginia Surety originally moved for an order dismissing plaintiffs' claims pursuant to CPLR 3211 (a) (7), or alternatively, awarding it summary judgment pursuant to CPLR 3211 (c) and 3212. Virginia Surety also sought, in the alternative, an order issuing a mandatory injunction directing counsel for plaintiffs, the law office of Newman Fitch Altheim Myers PC, to transfer their complete legal files with respect to certain of the underlying claims/actions to Virginia Surety's assigned counsel. At a conference held on November 15,

**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  
1418).

2007, this court converted Virginia Surety's motion to a motion for summary judgment pursuant to CPLR 3212.

For the reasons set forth below, Virginia Surety's motion for summary judgment or a mandatory injunction is denied.

### FACTS

The underlying personal injury actions stem from an accident which occurred on December 1, 2005 during work on a construction project at 9 West 31<sup>st</sup> Street, New York, N.Y., when the elevator in which multiple construction workers were riding fell from the 15<sup>th</sup> floor to the building's basement, injuring the workers.<sup>1</sup> The claimants include Thomas Garrett (Garrett), William Alter (Alter), Curtis Edwards (Edwards), Gilberto Rosario (Rosario), David Carpluck (Carpluck) and Nelly Rodriguez (Rodriguez). Of the underlying claimants, Garrett, Alter, Edwards, Carpluck and Rosario were employees of Crocetti, which was hired by Bovis as the flooring contractor for the construction project. Rodriguez was not a Crocetti employee at the time of the accident.

Virginia Surety contends that Crocetti had no responsibility for the maintenance, operation or control of the elevator in question, and that the elevator was installed and maintained, pursuant to contract, by non-party Fujitec New York (Fujitec). Virginia Surety also contends that Bovis was operating the elevator on the day of the elevator accident.

Bovis contends that Crocetti "had 14 men on the elevator car causing the elevator to be 'overcapacity' and potentially causing the accident alleged by claimants," and in support

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<sup>1</sup>As the parties do not submit copies of the complaints in the underlying actions, the court has relied on the undisputed descriptions of relevant claims provided in the parties' papers.

points to accident reports by Bovis and Crocetti (Altman Affirmation dated September 24, 2007, ¶ 11).

The contract between Bovis and Crocetti required Crocetti to purchase and maintain commercial general liability insurance for Bovis, naming it as an additional insured on Crocetti's insurance policy. Virginia Surety issued a commercial general liability policy to Crocetti (Policy No. 2CG0000050086202) as the named insured. Under that policy, Bovis would qualify as an additional insured "only with respect to liability arising out of 'your work' [i.e. Crocetti's work] for that insured by or for you" (see Aff. of Kenneth R. McGuire, Esq., Exh E). Defendant RSUI Indemnity Company (RSUI) issued an umbrella commercial general liability insurance policy to Crocetti affording excess coverage of up to \$5 million per occurrence over and above the coverage afforded by Virginia Surety's primary policy.

To date, only six claimants have brought underlying claims with respect to the elevator accident -- Garrett, Alter, Edwards, Carpluck, Rosario and Rodriguez. However, as many as 14 Crocetti employees were riding in the elevator and thus at least eight more claims may exist. Because all the claims arise from a single occurrence -- the fall of the elevator -- the presiding justice in the underlying action, the Honorable Walter B. Tolub, ordered that all of the actions be consolidated. The order of consolidation expressly provides that "only one verdict or decision shall be rendered, and that there be but one judgment with a single bill of costs" (Order of Consolidation, ¶ 2 [Aff. of Howard B. Altman, Esq., Exh B]).

Following initiation of the underlying claims against Bovis and the other defendants, Bovis's general liability carrier, Zurich, tendered the defense and indemnity of its insured to Virginia Surety and co-defendant RSUI. Zurich assigned the law office of Newman

[ 5 ]

Fitch Altheim Myers, PC (Newman Fitch) to defend the underlying personal injury actions. Virginia Surety eventually agreed to accept Zurich's tender, without reservation, as to the underlying claims by Crocetti employees Edwards, Rosario, Alter, Garrett and Carpluck. However, Virginia Surety refused to defend and indemnify Bovis with respect to Rodriguez's claim, on the ground that because Rodriguez was not a Crocetti employee at the time of the accident, Virginia Surety has no duty to defend the Rodriguez claim.

Virginia Surety also took the position that Bovis must split its defense in the underlying consolidated action and retain White, Quinlan and Staley, LLP, Virginia Surety's assigned counsel, to defend the five claims asserted by the Crocetti employees, and a second, separate attorney to try the Rodriguez claim. Virginia Surety then requested that the office of Newman Fitch transfer their complete legal files with respect to those five claims to Virginia Surety's assigned counsel. Plaintiffs refused on the ground that the splitting of defense counsel is improper, and insisted that Virginia Surety must assume defense and indemnity obligations for all claims stemming from the incident.

Bovis and Zurich then initiated this declaratory judgment action, which seeks to enforce Virginia Surety's and RSUT's obligations with respect to affording primary coverage, defense and indemnity with respect to all of the personal injury claims stemming from the December 1, 2005 incident.

#### **DISCUSSION**

In support of its motion for summary judgment and its alternative motion for a mandatory injunction ordering the transfer of the legal files of the five Crocetti claimants to its assigned counsel, Virginia Surety contends that it has a right to control the defense of the

underlying litigation based upon the right of an insurer to protect its financial interests and that as to Rodriguez, Virginia Surety argues that as the accident did not arise out of Crochetti's work, it has no obligation to defend that action. Conversely, Bovis contends that Virginia Surety is required to defend the Rodriguez action as the accident rose out of Crochetti's work since Crochetti's employees caused the elevator to be "overcapacity." Thus, Bovis contends a conflict of interest exists between it and Virginia Surety such that Bovis is entitled to counsel of its own choosing.

It is well settled "that an Insurer's 'duty to defend [its insured] is exceedingly broad and an insurer will be called upon to provide a defense whenever the allegations of the complaint suggest . . . a reasonable possibility of coverage' (citation omitted). 'The duty to defend [an] insured [ ] . . . is derived from allegations of the complaint and the terms of the policy. If [a] complaint contains any facts or allegations which bring the claim even potentially within the protection purchased, the insurer is obligated to defend.'" BP Air Conditioning Corp. v One Beacon Insurance Group, 8 NY3d 708, 714 (2007). "This standard applies equally to additional insureds and named insureds." (citations omitted). Worth Construction Co., Inc., v Admiral Insurance Co., 10 Ny3d 411, 415 ((2008). Here, the additional insured endorsement states that Bovis is an additional insured only with respect to liability "arising out of" Crochetti's work for Bovis. "Arising out of" has been interpreted to "mean originating from, incident to, or having connection with" (citations omitted) and requires only that there be some casual connection between the injury and the risk for which coverage is provided." (citation omitted). Id. The allegations that Crochetti's employees caused the elevator to be overcapacity resulting in its freefall, provide a sufficient basis to conclude that the accident had a connection with

[\* 7 ]

Crocetti's work and that there is some casual relationship between the injury and the risk for which coverage is provided.

As to Virginia Surety's argument, that as Rodriguez is not employed by Crocetti, her accident cannot arise out of Crocetti's work, it is without merit.<sup>2</sup> It is well-settled that an injury can arise out of a contractor's work, triggering coverage under an insurance policy, regardless of whether the injured party was employed by the contractor (see BP Air Conditioning Corp. v One Beacon Ins. Group, 8 NY3d 708 [2007] [plaintiff's allegations that Alfa Piping spilled oil upon which he fell was sufficient, in and of itself, to establish that the claim arose out of Alfa's work, despite the fact that plaintiff was employed with Karo Sheet Metal, not Alfa]; Lim v Atlas-Gem Erectors Co., 225 AD2d 304 [1<sup>st</sup> Dept 1996] [where plaintiff, an employee of Bovis, was caused to fall on steel rod provided by Atlas-Gem, the accident arose out of Atlas-Gem's work, thus triggering coverage under its policy, regardless of the fact that the plaintiff was a Bovis employee]).

The issues of whether Virginia Surety or Bovis has the right to control the defense and whether Bovis has a right to select counsel turn on whether a conflict exists between Bovis and Virginia Surety. Generally, absent a showing that there is a conflict of interest between a

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<sup>2</sup>In making the argument that the Rodriguez claim does not arise out of Crocetti's work, Virginia Surety relies solely upon the decision of AIU Ins. Co. v American Motorists Ins. Co. (292 AD2d 277 [1<sup>st</sup> Dept 2002]). However, in the Appellate Division's decision in BP Air Conditioning Corp. v One Beacon Ins. Group (33 AD3d 116 [1<sup>st</sup> Dept 2006], mod on other grounds 8 NY3d 709 [2007]), the First Department explicitly rejected the AIU decision to the extent that it could be interpreted as requiring an employment relationship to satisfy the "arising out of" standard, holding that such an interpretation is "inconsistent with the definition of 'additional insured' adopted by the Court of Appeals" and by the First Department (id. at 126, citing Pecker Iron Works of N.Y. v Traveler's Ins. Co., 99 NY2d 391 [2003]; Wong v New York Times Co., 297 AD2d 544 [1<sup>st</sup> Dept 2002]).

liability insurer and the insured, an insurer has the right to control the defense of an action brought against the insured (Ottaviano v Genex Co-op., Inc., 15 AD3d 924 [4<sup>th</sup> Dept 2005]; Desriusseau v Val-Roc Truck Corp., 230 AD2d 704 [2d Dept 1996]). However, where “a conflict of interest exists between an insured and the insurer which is obligated to defend, the remedy is to permit the insured to select defense counsel, with the reasonable cost of the defense to be borne by the insurer” (Ladner v American Home Assur. Co., 201 AD2d 302, 304 [1<sup>st</sup> Dept 1994]; City of New York v Clarendon Natl. Ins. Co., 309 AD2d 779, 779 [2d Dept 2003] [“It is well settled that where a conflict of interest is probable ... the insured is entitled to an attorney of its own choosing”]; Nelson Elec. Contr. Corp. v Transcontinental Ins. Co., 231 AD2d 207, 209 [3d Dept], lv denied 91 NY2d 802 [1997] [“Where .. the interests of the insured are at odds with those of its insurer, the former is entitled to select independent counsel to conduct the defense so that, inter alia, tactical decisions will ‘be in the hands of an attorney whose loyalty to [the insured] is unquestioned’”] [citation omitted]; see also First Jeffersonian Assocs. v Insurance Co. of N. Am., 262 AD2d 133 [1<sup>st</sup> Dept 1999] [same]; 69<sup>th</sup> St. & 2<sup>nd</sup> Ave. Garage Assocs. L.P. v Ticor Title Guar. Co., 207 AD2d 225 [1<sup>st</sup> Dept], lv denied 87 NY2d 802 [1995] [same]).

“Inherent in this rule is the axiom that when such a conflict exists, the interests of the insured are paramount” (Nelson Elec. Contr. Corp. v Transcontinental Ins. Co., 231 AD2d at 21, citing Feliberty v Damon, 72 NY2d 112, 120 [1988]).

Virginia Surety concedes that such a conflict exists where the carrier’s “interests in minimizing its ... covered liabilities conflicts with the insured’s interest in minimizing all its liabilities” (Def Mem. of Law, at 2). In the instant case, Bovis is entitled to be defended by counsel of its own choosing as Virginia Surety and Bovis have divergent defense strategies and

goals in the underlying action. It is clear that in the underlying consolidated action, Virginia Surety seeks to minimize only its asserted covered liabilities, that is as to the Crocetti employees , while Bovis seeks to minimize its liabilities to all plaintiffs, the Crocetti employees as well as Rodriguez. Specifically, Virginia Surety's strategy as argued here is that Bovis, not Crocetti caused the accident as Bovis controlled the elevator at the time of the accident, and thus, the accident did not "arise out of" nor was it caused by Crocetti's work. Virginia Surety makes this argument so that it can avoid covering the Rodriguez action (see McGuire Aff., ¶ 20). Conversely, Bovis' strategy as argued here is to defend all theories of liability, and it has an interest in arguing that it bears no responsibility for the fall of the elevator (see Aff. of Joseph Portella, Bovis's general counsel, ¶ 8 ["Bovis's interests would be served by arguing that Bovis has no role in bringing about the incident" and by "pursuing risk transfer from all available contractors, including Crocetti, and doing so requires arguing that the incident did arise out of Crocetti's work"]). Clearly a conflict exists between Bovis and Virginia Surety interests based on the foregoing arguments.

This conflict is also apparent in the relief Virginia Surety's seeks to sever the underlying actions and try them separately, so as to minimize its liability for the Rodriguez action (see McGuire Aff., ¶ 18). On the other hand, Bovis's interests are best served by abiding by Justice Tolub's consolidation order, and minimizing its exposure, litigation expenses and witness inconvenience, as well as the possibility of inconsistent verdicts (see Portella Aff., ¶¶ 5, 7). Bovis and Virginia Surety have different goals, objectives and strategies, and those differences create a conflict of interest entitling Bovis to be defended by counsel of its own choosing (see Public Service Mut. Ins. Co. v Goldfarb, 53 NY2d 392, supra; Ladner v American Home Assur.

Co., 201 AD2d 302, supra).<sup>3</sup>

Accordingly, Virginia Surety's motion to dismiss this action on the ground that it is entitled to choose plaintiffs' counsel, as well as its alternative motion for a permanent injunction ordering the transfer of the legal files of the five claimants employed by Crocetti, are both denied.

Virginia Surety also contends that it is entitled to summary judgment based upon plaintiffs' material breaches of the terms and conditions of the policy. Virginia Surety argues that Bovis has willfully refused to honor its acceptance of the tender of the defense of the Edwards, Rosario, Alter, Carpluck and Garrett claims, and has willfully refused to transfer the related legal files to Virginia Surety's assigned counsel. Thus, Virginia Surety concludes, this constitutes a clear material breach of Bovis's obligations, as an additional insured, to cooperate and assist Virginia Surety in defending against the underlying claims, and it is consequently entitled to a dismissal of plaintiffs' claims against it.

Contrary to Virginia Surety's arguments, there is a strong presumption in New York against finding a failure to cooperate. Although an insurer may disclaim coverage where an insured deliberately fails to cooperate with its insurer as required by an insurance policy (City of New York v Continental Cas. Co., 27 AD3d 28 [1<sup>st</sup> Dept 2005]), New York courts have consistently held that "the burden of proving the lack of co-operation is a heavy one indeed" (Thrasher v United States Liability Ins. Co., 19 NY2d 159, 168 [1967]; Empire Mut. Ins. Co. v Stroud, 36 NY2d 719 [1975]).

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<sup>3</sup>Based on this conclusion and the determination that Virginia Surety has a duty to defend the Rodriguez claim, the issue as to whether Bovis is entitled to counsel of its own choosing based on Virginia Surety's refusal to defend the Rodriguez claim is academic.

Here, Virginia Surety has not sustained the “heavy” burden set forth in Thrasher (see Country-Wide Ins. Co. v Henderson, \_\_\_ AD3d \_\_\_, 2008 WL 1054957 [2d Dept 2008]; Matter of St. Paul Travelers Ins. Co. [Keibich-D’Angelo], 48 AD3d 1009 [3d Dept 2008]). In order to establish a lack of cooperation, an insurer must demonstrate that (1) it acted diligently in seeking to bring about the insured’s cooperation; (2) its efforts were reasonably calculated to obtain the insured’s cooperation; and (3) the attitude of the insured, after its cooperation was sought, was one of willful and avowed obstruction (Thrasher v United States Liability Ins. Co., 19 NY2d 159, *supra*; City of New York v Continental Cas. Co., 27 AD3d 28, *supra*; Utica First Ins. Co. v Arken, Inc., 18 AD3d 644, 645 [2d Dept 2005]).

Mere failure to respond to a carrier’s demands is not sufficient to establish a failure to cooperate. Rather, the insured must act with the intent of obstructing the carrier’s investigation of the claim (see Matter of New York Cent. Mut. Fire Ins. Co. v Salomon, 11 AD3d 315 [1<sup>st</sup> Dept 2004]; Mount Vernon Fire Ins. Co. v 170 E. 106<sup>th</sup> St. Realty Corp., 212 AD2d 419 [1<sup>st</sup> Dept], *lv denied* 86 NY2d 707 [1995]).

Virginia Surety has presented no evidence that Bovis had any intent to obstruct the defense of the underlying action. Indeed, Bovis contends that its only motivation in refusing to transfer the files is to have a unified defense of all portions of the action by a single counsel. An insured’s assertion of its right to be defended by counsel of its own choosing cannot constitute a failure to cooperate as a matter of law. For example, in City of New York v Clarendon Natl. Ins. Co. (309 AD2d 779, *supra*), the City sought coverage from Clarendon for an underlying wrongful death action brought against the City. Clarendon acknowledged that it was obligated to defend and indemnify the City in the underlying action, but then disclaimed

coverage based upon a “failure to cooperate” when the City rejected Clarendon’s choice of counsel. The trial court held, and the Second Department affirmed, that, due to a probable conflict of interest given the carrier’s reservation of rights, the City was entitled to be defended by counsel of its own choosing at Clarendon’s expense. Thus, the Court concluded, Clarendon “wrongfully disclaimed coverage on the ground of noncooperation when the City rejected Clarendon’s choice of counsel” (id. at 779).

Likewise, in Nelson Elec. Contr. Corp. v Transcontinental Ins. Co. (231 AD2d 207, supra), the Court held that the tactical decision of the insured’s counsel to not oppose the co-defendant’s motion for summary judgment on its indemnification claims against the insured did not breach the policy’s cooperation clause, where the counsel was an independent one that the insured was entitled to choose due to existence of conflict of interest between the insured and the insurer:

To hold, as defendant urges, that counsel, having been employed for the very purpose of safeguarding the interests of the insured, must nonetheless obtain the insurer’s consent before pursuing a course of action tailored to serve that end, or risk a loss of coverage for “failure to cooperate,” would be untenable; it would effectively enable the insurer to take control of the defense and subordinate the insured’s interests to its own.

Id. at 210.

Accordingly, Virginia Surety’s motion for summary judgment on the ground of failure of cooperation is denied.

Thus, Virginia Surety’s motion for summary judgment dismissing plaintiff’s claims for defense and indemnity with respect to the Rodriguez action is denied. When, as here, a defendant’s request for dismissal of a complaint seeking declaratory relief is denied, the proper

recourse is for the court to declare the rights of the parties (see Rivera v. Russi, 243 AD2d 161, 166 [1<sup>st</sup> Dept 1998]). Accordingly, as directed below, plaintiffs are entitled to a judgment to the extent of declaring that Virginia Surety is required to defend Bovis in the consolidated actions, including those claims by Nelly Rodriguez, and to provide Bovis with a counsel of its own choosing. However, plaintiffs' request that they be awarded the fees and costs incurred in opposing this motion is denied.

Accordingly, it is hereby

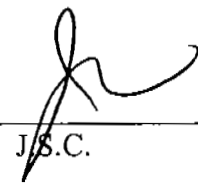
ORDERED that defendants' motion for summary judgment or for a permanent injunction is denied; and it is further

ADJUDGED AND DECLARED that defendants are obligated to defend Bovis Lend Lease LMB, Inc. in the consolidated actions, including with respect to the claims by Nelly Rodriguez, and to provide Bovis Lend Lease LMB, Inc. with counsel of its own choosing; and it is further

ORDERED that the remainder of the action shall continue; and it is further

ORDERED that the parties shall appear for a status conference in Part 11, room 351, 60 Centre Street, NY, NY on November 13, 2008, at noon.

Dated: October 22, 2008

  
\_\_\_\_\_  
J.S.C.

**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 1415).