

**Dicicco v Stack McWilliams, LLC**

2008 NY Slip Op 33475(U)

December 16, 2008

Supreme Court, Nassau County

Docket Number: 18221/06

Judge: William R. LaMarca

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**SHORT FORM ORDER**

**SUPREME COURT - STATE OF NEW YORK  
COUNTY OF NASSAU - PART 17**

**Present: HON. WILLIAM R. LaMARCA  
Justice**

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**ANTHONY DICICCO and KAREN DICCIO,  
Plaintiffs,**

**Motion Sequence #2  
Submitted October 24, 2008  
INDEX NO: 18221/06**

**-against-  
STACK MCWILLIAMS, LLC, STAMACK  
CONSTRUCTION, LLC and 55<sup>th</sup> CLINTON  
ASSOCIATES, LLC, CURTIS PARTITION  
CORP., THE RELATED COMPANIES, INC.  
and THE RELATED COMPANIES, L.P.,  
Defendants.**

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**STACK MCWILLIAMS, LLC and STAMACK  
CONSTRUCTION LLC,  
Third-Party Plaintiff,**

**-against-  
GREATER NEW YORK MUTUAL INSURANCE  
COMPANY,  
Third-Party Defendant.**

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**The following papers were read on this motion:**

**GNY Notice of Motion.....1  
STACK Affirmation in Opposition.....2  
CURTIS Affirmation in Partial Support of Motion.....3  
Plaintiffs Affirmation in Partial Support of Motion.....4  
GNY Reply Affirmation.....5**

Third-party defendant, GREATER NEW YORK MUTUAL INSURANCE COMPANY  
(hereinafter referred to as "GNY"), moves for an order, pursuant to CPLR §3211(a)(1)(3)  
and (7), dismissing the third-party complaint by defendants, STACK McWILLIAMS, LLC

(hereinafter referred to as "STACK") and STAMACK CONSTRUCTION LLC (hereinafter referred to as "STAMACK") or, in the alternative, severing the third-party insurance coverage action from the plaintiffs' negligence action. Counsel for STACK and STAMACK opposes the motion, which is determined as follows:

This is a personal injury action by a construction worker. On July 18, 2003, defendant, STACK, entered into a "Master Subcontractor Agreement" with defendant, CURTIS PARTITION CORP. (hereinafter referred to as "CURTIS"). The master agreement was to cover a number of commercial construction projects, the individual terms of which were to be contained in a series of "purchase orders." Among other obligations, the subcontractor was "at all times [to] keep the work area and premises free from debris and unsafe conditions resulting from the work". Additionally, the subcontractor was to indemnify the contractor and owner of the project and hold them harmless from any claims for personal injury resulting from the performance of the work, except as to claims for their own negligence.

On May 28, 2004, STACK issued CURTIS a purchase order to perform the drywall and acoustical ceiling work for a project located at John Jay College in Manhattan for a price of \$870,000. The purchase order required CURTIS to obtain commercial general liability insurance in the amount of \$1,000,000 per occurrence. The policy was to contain a "blanket contractual liability" provision, insuring the "indemnification obligations of the [master] agreement."

CURTIS had a commercial general liability policy issued by third-party defendant, GNY, which covered the period from December 31, 2003 to December 31, 2004. The policy contains an "additional insured endorsement" which refers to a schedule "on file with

the company.” The policy also contains a “GNY 037” endorsement, providing for “additional” or “return” premium, depending upon the type of work performed on individual construction projects.

Plaintiff, ANTHONY DICICCO, was employed as a foreman for Quantum Electric Company, which was performing the electrical work for the John Jay project. On August 6, 2004, DICICCO slipped on some construction debris in the main stairwell and sustained injury. On August 12, 2004, Genatt Associates, CURTIS’ insurance broker, issued a certificate of insurance stating that STACK was an additional insured with respect to the commercial general liability policy issued by GNY and an excess liability policy issued by St. Paul Insurance Company.<sup>1</sup> The certificate is on a standard form bearing a legend that it was issued “as a matter of information only and confers no rights upon the certificate holder”.

On March 22, 2005, DICICCO commenced an action, Index No. 4351/05, against STACK, STAMACK and defendant, 55<sup>th</sup> CLINTON ASSOCIATES, LLC., the owner of the project.<sup>2</sup> DICICCO’s wife, KAREN, asserted a claim for loss of services. On December 11, 2006, STAMACK commenced a third-party action against CURTIS under the same index number. STAMACK asserted a claim for contractual indemnity and a claim for breach of contract, alleging that CURTIS failed to procure “sufficient insurance coverage” as required by the purchase order. GNY, as CURTIS’ insurer, undertook to defend

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<sup>1</sup>The certificate also lists certain other companies as additional insureds, apparently with respect to other construction projects.

<sup>2</sup> STACK and STAMACK are affiliated companies. For ease of reference, the two (2) companies will be collectively referred to hereinafter as “STAMACK.”

CURTIS in the action.

Meanwhile, in November 2006, DICICCO commenced another action, Index No. 18221/06, asserting a claim against CURTIS directly. The two (2) actions have been consolidated under the above caption. On April 10, 2008, counsel for STAMACK requested GNY to undertake STAMACK's defense in the action. GNY did not respond to STAMACK's tender. A Note of Issue was filed by plaintiffs, on August 14, 2008. On September 10, 2008, STAMACK commenced a third-party action against GNY requesting a declaratory judgment that the insurer is obligated to defend and indemnify it in the underlying action.

Third-party defendant, GNY, moves to dismiss the third-party complaint pursuant to CPLR §3211 on the grounds of a defense founded upon documentary evidence, lack of capacity, and failure to state a cause of action. GNY argues that STAMACK is not an additional insured, and, alternatively, that it failed to give timely notice of the action. In the alternative, GNY requests that the declaratory judgment action be severed from the main action.

A "blanket policy" insures a class of things or properties against a defined risk, as opposed to insuring those things or properties which are individually named (Webster's Dictionary). A blanket policy is written upon the "risk as a whole," whereas a "specific policy" allocates the risk by assigning a "stated value" to each of the items covered by the policy (Appleman, Insurance Law and Practice, § 3912). In the construction industry, contractual provisions requiring a subcontractor to indemnify the general contractor or owner, and to obtain insurance for their benefit, are commonplace. To fulfill its obligation, the subcontractor may carry a blanket policy, covering all its jobs, or a specific policy,

insuring only individual construction projects. To protect against fraud, a blanket policy will frequently contain a provision that the subcontract must have been executed prior to the date of the loss (see, *Rodless Properties v Westchester Fire Ins.*, 40 AD3d 253, 835 NYS2d 154 [1<sup>st</sup> Dept 2007]).

On a motion to dismiss, pursuant to CPLR §3211, the pleading is to be afforded a liberal construction. The court must accept the allegations of the complaint as true and provide plaintiff the benefit of every possible favorable inference (*AG Capital Funding Partners v State Street Bank and Trust Co.*, 5 NY3d 582, 808 NYS2d 573, 842 NE2d 471 [C.A.2005]). GNY argues that STAMACK cannot be an additional insured because the certificate of insurance was issued after the accident. Nevertheless, the certificate was issued "as a matter of information only", and coverage is determined by the terms of the policy. From the terms of the additional insured and GNY 037 endorsements, it appears that GNY issued CURTIS a specific policy, with the premium based on the risk allocated to individual construction projects. The court notes that GNY has not submitted the schedule of additional insureds "on file with the company." While the GNY 037 endorsement identifies the individual projects by "location number," the location numbers have not been explained. STAMACK's allegation that CURTIS failed to "maintain sufficient insurance" perhaps implies that STAMACK was not listed as an additional insured. However, the third-party cause of action in which the allegation is contained is alternative to STAMACK's contractual indemnity claim (see CPLR §3014). On this motion to dismiss, the court must assume that John Jay is one of the projects covered by the policy and that CURTIS applied for the insurance before the date of the loss. Thus, the court must give STAMACK the benefit of the favorable inference that it is an additional insured on the GNY

policy.

The policy provides that the insured must notify the insurer of a claim or suit “as soon as practicable” after the date of the loss. The common law rule is that a notice provision in a primary insurance policy is a condition precedent to filing a claim, and the insurer may disclaim for late notice without a showing of prejudice (*Argo Corp. v Greater New York Mutual Ins. Co.*, 4 NY3d 332, 794 NYS2d 704, 827 NE2d 762 [C.A. 2005]).<sup>3</sup> The purpose of the notice provision is to give the carrier an opportunity to investigate claims while evidence is fresh, to make an early estimate of potential exposure, and to establish adequate reserves. Requiring strict compliance with the notice provision also protects the carrier against fraud (*Id.*).

An additional insured has an implied duty, independent of that of the named insured, to provide the insurer with notices required by the policy (*Jackson Realty Assoc. v Nationwide Mut. Ins. Co.*, 53 AD3d 541, 863 NYS2d 35 [2d Dept 2008]). The fact that an insurer may have received notice of the claim from the primary insured, or from another source, does not excuse an additional insured’s failure to provide notice (*Id.*). However, where two (2) or more insureds are defendants in the same action, notice of the occurrence or of the lawsuit provided by one insured will be deemed notice on behalf of both insureds if the two parties are “united in interest or ... there is no adversity between them” (*Id.*).

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<sup>3</sup>Insurance Law § 3420(a)(6) has been amended, effective January 17, 2009, to require the insurer to show prejudice in order to disclaim for late notice (See *1700 Broadway v. Greater N. Y. Mut. Ins.*, 54 AD3d 593, 863 NYS2d 434 [1<sup>st</sup> Dep’t 2008]).

GNY presumably received notice from CURTIS shortly after commencement of the main action in November and the third-party action in December 2006. Indeed, the insurer probably received notice from CURTIS promptly after the incident. Thus, GNY had an opportunity to investigate the accident, set up a reserve, and take other action necessary to protect its interests. The court notes that counsel for CURTIS delayed in providing counsel for STAMACK with a copy of the GNY policy as well as the schedule of additional insureds. Counsel's failure to provide these documents promptly may have been due to a misplaced sense of loyalty to the carrier. In any event, the court must give STAMACK the benefit of the favorable inference that CURTIS and STAMACK are "united in interest," so that notice by CURTIS may be deemed notice by STAMACK. Accordingly, GNY's motion to dismiss the third-party complaint on the grounds of a defense founded upon documentary evidence, lack of capacity, and failure to state a cause of action is denied.

It is generally recognized that, even where common questions exist, it is prejudicial to insurers to have the issue of insurance coverage tried before the jury that considers the underlying claims (*Paramount Ins. Co. v Rosedale Gardens, Inc.*, 293 AD2d 235, 743 NYS2d 59 [1<sup>st</sup> Dep't 2002]). Accordingly, third-party defendant's motion to sever the third-party action, seeking a declaratory judgment that GNY is obligated to defend and indemnify STAMACK in the main action, is granted. The main action and the third-party action shall be tried separately.

It is therefore

**ORDERED**, that GNY's motion for an order dismissing the third-party complaint is denied; and it is further

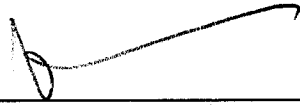
**ORDERED**, that the portion of GNY's motion for an order severing the third-party action from the action in chief is granted. GNY is directed to serve a formal answer to the third-party action, in conformity with CPLR §3014, upon third-party-plaintiff, by January 16, 2009, with a reply, if any, to follow in accordance with the CPLR; and it is further

**ORDERED**, that the third-party action is hereby set down for a Preliminary Conference before the Differentiated Case Management (DCM) at 100 Supreme Court Drive, Mineola, New York on January 22, 2009 at 9:30 A.M. to schedule discovery proceedings. A copy of this order shall be served on all parties and on DCM Case Coordinator Richard Kotowski. **There will be no adjournments**, except by formal application pursuant to 22 NYCRR §125.

All further requested relief not specifically granted is denied.

This constitutes the decision and order of the court.

Dated: December 16, 2008

  
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WILLIAM R. LaMARCA, J.S.C.

**ENTERED**  
DEC 23 2008  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE

TO: Dell & Little, LLP  
Attorneys for Plaintiffs  
1274 RexCorp Plaza  
Uniondale, NY 11556

David D. Hess, Esq.  
Attorney for Third-Party Defendant Greater New York Mutual Insurance Company  
200 Madison Avenue  
New York, NY 10016

O'Connor, O'Connor, Hintz & Deveney, LLP  
Attorneys for Defendants Stack McWilliams, LLC Stamack Construction, LLC  
One Huntington Quadrangle, Suite 3C01  
Melville, NY 11747

Charles X. Connick, PLLC  
Attorneys for Defendant Curtis Partition Corp.  
114 Old Country road, Suite 208  
Mineola, NY 11501

Fiedelman & McGraw, Esqs.  
Attorneys for Defendants 55<sup>th</sup> Clinton Associates, LLC and the Related  
Companies LP  
2 Jericho Plaza  
Jericho, NY 11753

dicicco-stackmcwilliams;stackmcwilliams-greaternewyorkmutual.#2/cplr