

**Gilbane Bldg. Co. v Travelers Prop. Cas.
Co. of America**

2009 NY Slip Op 30059(U)

January 13, 2009

Supreme Court, New York County

Docket Number: 109872/06

Judge: Jane S. Solomon

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

JANE S. SOLOMON

PRESENT: _____

PART 55

Justice

Index Number : 109872/2006

GILBANE BUILDING

INDEX NO. _____

vs
TRAVELERS PROPERTY CASUALTY

MOTION DATE 8/12/08

Sequence Number : 003

MOTION SEQ. NO. _____

SUMMARY JUDGMENT

MOTION CAL. NO. _____

this motion to/for _____

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

1-3

4-5

6

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

is decided in accordance with the amended memorandum decision, order and declaratory judgment.

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: 1/13/09

JANE S. SOLOMON J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate

DO NOT POST

REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 55

-----X
GILBANE BUILDING COMPANY, GILBANE, INC.,
U.W. MARX/GILBANE BUILDING COMPANY,
a Joint Venture, THE UNIVERSITY AT
ALBANY FOUNDATION, THE STATE UNIVERSITY
OF NEW YORK and STATE OF NEW YORK,

Plaintiffs,

-against-

TRAVELERS PROPERTY CASUALTY COMPANY
OF AMERICA, STONE BRIDGE IRON AND STEEL,
INC., ILLINOIS UNION INSURANCE COMPANY
and FAST TREK STEEL, INC.,

Defendants.

INDEX NO. 109872/06

DECISION, ORDER and
DECLARATORY JUDGMENT

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk
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appear in person at the Judgment Clerk's Desk (Room
141B).

JANE S. SOLOMON, J.

Plaintiffs seek judgment declaring that they are entitled to be provided a defense and indemnification under policies issued by defendants Travelers Property Casualty Company of America (Travelers) and Illinois Union Insurance Company (Illinois Union). Plaintiffs' claim arises from a construction site accident in which three workers sustained serious injuries. Those workers have commenced lawsuits, now venued in the Supreme Court, Albany County and the Court of Claims. In motion 03, plaintiffs seek summary judgment, and in motion 04, Travelers seeks summary judgment declaring that Illinois Union is obligated to defend and indemnify Traveler's insured, defendant Stone Bridge Iron and Steel, Inc., in the underlying lawsuits. The motions are granted as follows.

[* 8]

Plaintiff The University At Albany Foundation (UAF), as the owner, entered into a contract with plaintiff U.W. Marx/Gilbane Building Company, a Joint Venture (Joint Venture) and an architect, to manage construction of cancer research center to be constructed at East Campus, One University Place, in Rensselaer, New York (see Construction Management Contract, Aff. of Tania A Gondiosa, Esq. In Support of Motion, Ex. O). Section 8.1.1 of this contract requires Joint Venture to indemnify "Owner" against bodily injury claims.

Joint Venture hired defendant Stone Bridge Iron and Steel, Inc. (Stone Bridge) as a structural steel contractor. Their contract included a Schedule A with insurance specifications, requiring Stone Bridge to obtain comprehensive commercial general liability (CGL) insurance and to provide insurance certificates naming UAF, the State of New York (State), the Joint Venture, plaintiff Gilbane Building Company (Gilbane), and others, as additional insureds on Stone Bridge's insurance policy (Stone Bridge Contract, Gondiosa Aff., Ex. P). Stone Bridge in turn hired Fast Trek Steel, Inc. (Fast Trek) to erect the steel structure. Pursuant to the terms of their subcontract, Fast Trek was obligated to procure CGL insurance naming the prime contractor, owner, architect and Stone Bridge as additional insureds (see, Sub-Contract, Gondiosa Aff., Ex. Q, Article 7). The Sub-Contract also requires Fast Trek to abide by the terms of

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Stone Bridge's contract with the Joint Venture, and makes specific reference to the insurance specifications in Schedule A to that contract (id., Subcontract Attachment #3).

Travelers issued a CGL policy to Stone Bridge, and Illinois Union issued a CGL policy to Fast Trek. The policies provide that additional insured coverage is extended to any person to whom such coverage is required under a written contract executed prior to the loss for liability arising from their immediate insured's work.

There may be outstanding factual questions regarding the details of the incident, but the fundamental allegations of what happened as set forth in the underlying complaints is not disputed. On January 22, 2004, Fast Trek was erecting steel for the project. Steel beams were being hoisted by a Fast Trek crane operator. While a beam was being lowered, it hit a structural steel column already in place, knocking it over into another beam, and causing four or five other beams to fall over domino-style. Fast Trek workers Scott Dixon and Jeffrey Cleveland were injured by the falling steel, as was Stone Bridge worker Robert Rocco.

Dixon and Cleveland commenced lawsuits in April and June 2004 alleging negligence and violations of Labor Law sections 200, 241(6) and 240(1) in the Supreme Court, New York County. In November 2004, Rocco brought a similar suit in

Supreme Court, Albany County. All three workers brought lawsuits in the Court of Claims; Dixon and Cleveland named the State University of New York (SUNY) as defendant, and Rocco sued only the State. Dixon's and Cleveland's Supreme Court actions were consolidated and transferred to Albany County where they were consolidated with Rocco's Supreme Court action (Decision and Order of Justice Stein, Supreme Court, Albany County, dated October 18, 2005, annexed to Traveler's Notice of Motion, Ex. I).

Plaintiffs Gilbane, UAF and Joint Venture sue Stone Bridge and Fast Trek for breach of contract in failing to procure the proper insurance. Alternatively, plaintiffs seek a declaration that Travelers and Illinois Union are obligated to defend and indemnify plaintiffs in the underlying actions as additional insureds under (1) the CGL policy issued by Travelers to Stone Bridge, and (2) the CGL policy issued by Illinois Union to Fast Trek. Travelers cross-claimed against Illinois Union for a declaration that to the extent that Travelers must defend or indemnify plaintiffs in the underlying actions, such obligation is subject to Illinois Union's participation as the primary or co-insurer.

In this motion, plaintiffs move under motion sequence 03 for summary judgment on their claims against Travelers and Illinois Union, and Travelers moves under motion sequence 04 for summary judgment declaring that it is not obligated to

plaintiffs, and for the relief sought in its cross-claim. Before this motion was fully submitted, Travelers and plaintiffs settled their dispute, leaving both motions for relief against Illinois Union only.

At issue is whether plaintiffs are entitled to primary insurance coverage under the Illinois Union policy as additional insureds. Illinois Union's opposition is fourfold. First, it argues that discovery has not been completed in the underlying actions, so a determination of liability here that relies upon a finding that the incident arose from Fast Trek's work is premature. Second, it argues that additional insured coverage is not triggered in favor of Stone Bridge for the Rocco claim because he was not Fast Trek's employee, and it is not clear that his injury arises from Fast Trek's work. Third, it argues that Fast Trek's contract did not require that SUNY and State be named as additional insureds, so no such coverage is extended to those plaintiffs. And fourth, it argues that if it is determined that additional insured coverage is triggered, coverage should be on a co-primary or excess basis with Travelers.

The argument that these motions are premature is not persuasive because the accident occurred six years ago, and the lawsuits are now four to five years old. Illinois Union presents no basis for suggesting that the events did not occur essentially as alleged, at least to the extent that the incident arose from

the steel erection work that Fast Trek was engaged to perform.

As a result, there is no question of fact to impede holding that Illinois Union must provide additional insured coverage for any party required to be covered under the Sub-Contract between Stone Bridge and Fast Trek. Such coverage must be provided with respect to claims by all three workers. Even though Rocco was not employed by Fast Trek, there is no factual dispute as to whether he alleges an injury arising from Fast Trek's work.

Illinois Union contends that Fast Trek had no contractual obligation to name SUNY and the State as additional insureds on its policy. However, the Sub-Contract specifically incorporates by reference the obligation to provide additional insured coverage to those parties named in Schedule A to the Stone Bridge contract, including Gilbane, the Joint Venture, UAF and the State (see, Carlisle SoHo East Trust v Lexington Ins. Co., 49 AD3d 272 [1st Dept 2008]). SUNY is not specified in the Sub-Contract or in Schedule A, but it is not clear from the papers submitted that it is a discrete entity whose liability is not subsumed within that of the State or UAF (the issue is not briefed on these motions). Accordingly, summary judgment is not granted with respect to SUNY's coverage as an additional insured.

The remaining issue is whether the coverage provided by Illinois Union is primary, as a co-insurer or excess to the

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Travelers policy. In order to determine the priority of coverage, the court must review and consider the relevant policies (BP Air Conditioning Corp. v One Beacon Ins Group, 8 NY3d 708 [2007]). The Illinois Union policy provides that it is primary unless certain conditions apply that are not relevant here (Illinois Union Policy, annexed to Aff. Of Glenn Milham, In Support of Travelers Motion, Ex. B-1, paragraph 4[a]). If there is other primary insurance, liability is shared. The Travelers policy has a similar provision (Milham Aff., Ex. A-1, paragraph 4), but that section is modified by an additional insured endorsement which states that the policy is excess to valid and collectible insurance available to Stone Bridge if it is added as an additional insured under another policy (Milham Aff., Ex. A-3), paragraph b[4]).

Since Stone Bridge agreed to procure insurance naming the State, AUF and the Joint Venture as additional insureds for claims arising from Stone Bridge's work, these plaintiffs are entitled to primary coverage from Travelers (which is Stone Bridge's carrier). Fast Trek was Stone Bridge's subcontractor, and the claims arise from work performed under Stone Bridge's contract with the Joint Venture. Fast Trek also agreed to add the State, AUF and the Joint Venture as additional insureds under its policy. Accordingly, Travelers and Illinois Union are co-insurers of these plaintiffs on a primary basis, and must share

the obligation to defend and indemnify them under the terms of their policies.

Under the Sub-Contract, however, Fast Trek is required to procure insurance naming Stone Bridge as an additional insured. The Illinois Union policy provides this coverage because the events alleged in the underlying lawsuits arose from Fast Trek's work. Therefore, Stone Bridge is entitled to a defense and indemnification under the Illinois Union policy under the same terms as a named insured (see, Pecker Iron Works of NY, Inc. v Traveler's Ins. Co., 99 NY2d 391 [2003]), and the Travelers policy is excess to that coverage.¹

Finally, upon searching the record, it is undisputed that Stone Bridge and Fast Trek procured insurance in accordance with the contracts, so the breach of contract claims (which are pleaded in the alternative to the declaratory judgment claims) are dismissed. Accordingly, it hereby is

ORDERED that the motions are granted as follows; and it further is

ADJUDGED and DECLARED that Travelers is obligated to defend and indemnify plaintiffs Gilbane, the Joint Venture, UAF and the State as additional insureds in the underlying actions as a primary co-insurer with Illinois Union; and it further is

¹ The serious nature of the claims indicates that Traveler's excess layer probably may be required.

ADJUDGED and DECLARED that Illinois Union is obligated to defend and indemnify plaintiffs Gilbane, the Joint Venture, UAF and the State as additional insureds in the underlying actions as a primary co-insurer with Travelers, and to defend and indemnify Stone Bridge as an additional insured in the underlying actions on a primary basis; and it further is

ORDERED, ADJUDGED and DECLARED that Illinois Union is not obligated to defend or indemnify plaintiff SUNY as an additional insured in the Cleveland and Dixon actions in the Court of Claims, and the complaint is severed and dismissed with respect to SUNY's claim; and it further is

DECLARED and ADJUDGED that Illinois Union is obligated to reimburse Travelers for the reasonable expenses and attorneys fees incurred in defending Stone Bridge in the underlying actions, and the issue of the amount of said obligation, including interest owed, if any, is 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 Travelers and Illinois Union, as permitted by CPLR 4317, the Special Referee, or another person designated by the parties to serve as a referee, shall determine the aforesaid issue; and it further is

ORDERED that entry of judgment on the issue of expenses and reasonable attorney's fees shall abide receipt of the report and recommendations and a motion pursuant to CPLR 4403 or receipt

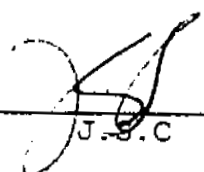
of the determination of the Special Referee or the designated referee; and it further is

ORDERED that Travelers shall serve a copy of this order with notice of entry upon the Referee Clerk, Room 119, to arrange a date for the reference to a Special Referee; and it further is

ORDERED that plaintiffs' claims against Stone Bridge and Fast Trek sounding in breach of contract are dismissed, and the Clerk of the Court is directed to enter judgment accordingly.

Dated: January 13, 2009

ENTER:



J.S.C.

JANE S. SOLOVICK