

<b>Best Buy Co., Inc. v Sage Elec. Contr., Inc.</b>
2009 NY Slip Op 30208(U)
January 23, 2009
Supreme Court, New York County
Docket Number: 600781/2006
Judge: Carol R. Edmead
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. CAROL EDMEAD

PART 35

Index Number : 600781/2006  
**BEST BUY CO.**  
 VS.  
**SAGE ELECTRICAL CONTRACTING**  
 SEQUENCE NUMBER : 001  
 SUMMARY JUDGMENT

INDEX NO. \_\_\_\_\_

MOTION DATE 9/17/08

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

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

**MOTION IS DECIDED IN ACCORDANCE WITH THE ATTACHED MEMORANDUM DECISION.**

**FILED**  
 JAN 28 2009  
 COUNTY CLERK'S OFFICE  
 NEW YORK

Dated: 1/23/09



**HON. CAROL EDMEAD**<sup>S.C.</sup>

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 35

-----x  
BEST BUY CO., INC., YUCO REAL ESTATE COMPANY,  
INC., SCHIMENTI CONSTRUCTION COMPANY, LLC and  
TRANSCONTINENTAL INSURANCE COMPANY,

Plaintiffs,

-against-

SAGE ELECTRICAL CONTRACTING, INC. and  
UTICA NATIONAL INSURANCE COMPANY,

Defendants.

-----x  
HON. CAROL ROBINSON EDMEAD, J.S.C.

MEMORANDUM DECISION<sup>1</sup>

Index No. 600781/2006

DECISION/ORDER

**FILED**  
JAN 28 2009  
COUNTY CLERK'S OFFICE  
NEW YORK

In this declaratory judgment action, plaintiffs, Best Buy Co., Inc. ("Best Buy"), Yuco Real Estate Company, Inc. ("Yuco"), Schimenti Construction Company, LLC ("Schimenti"), and Schimenti's insurer, Transcontinental Insurance Company ("Transcontinental") (collectively, "plaintiffs") move for summary judgment against Sage Electrical Contracting, Inc. ("Sage") and Sage's insurer, Utica National Insurance Company ("Utica") (collectively, "defendants"), declaring that they are entitled to defense and additional insured coverage status under a certain policy issued by Sage to Utica. Utica also moves for summary judgment declaring that it has no obligation to defend or indemnify plaintiffs.

Factual Background

*Best Buy Lease*

In May 2004, Best Buy entered into a lease with Moklam Enterprises, Inc. ("Moklam"), the owner of the premises located at 622 Broadway, New York, New York (the "premises") for

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<sup>1</sup> Motions sequence 001 and 002 are consolidated for disposition and decided herein.

use and occupancy of the premises (the "Best Buy Lease").

The Best Buy Lease requires that Best Buy provide:

8. . . . general public liability insurance in standard form in favor of Owner [Moklam] and Tenant [Best Buy] against claims for bodily injury . . . occurring in or upon the demised premises, effective . . . during the term of the lease. . . .

The Rider to the Best Buy Lease further provides that

47.1 Tenant shall defend, indemnify and save harmless Owner [Moklam] and its agents against and from (a) any and all claims, losses, liabilities, damages, demands, actions . . . arising from or in connection with: (i) the conduct of business in or management of the Premises or any work or thing whatsoever done . . . during the term of this Lease . . . .

47.2 Without limiting Tenant's liability under the indemnity provided for in this Article, Tenant shall provide . . . throughout the term of this Lease, for the benefit of the Owner and Tenant, insurance of the kinds and in the limits hereinafter specified against any liability whatsoever occasioned by an occurrence in, or about, or resulting from the use, operation and/or maintenance of, the Premises . . . .

Consequently, Best Buy obtained a commercial general liability policy from National Union Fire Insurance Company of Pittsburgh, P.A. (the "National Union Policy"), which contains an "Other Insurance" provision explaining its obligations to provide primary or excess coverage.<sup>2</sup>

Yuco and Yuco Management, Inc., the managing agent for the premises, are affiliated

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<sup>2</sup> The National Union Policy provides as follows:

4. Other Insurance

If other valid and collectible insurance is available to the insured for a loss we cover under Coverages A. or B. of this Coverage Part, our obligations are limited as follows:

a. Primary Insurance

This insurance is primary except when b. below applies. If this insurance is primary, our obligations are not affected unless any of the other insurance is also primary. Then, we will share with all that other insurance by the method described in c. below.

b. Excess Insurance

This insurance is excess over:

- (2) Any other primary insurance available to you covering liability for damages arising out of the premises or operations for which you have been added as an additional insured by attachment of an endorsement.

with the same real estate development and management company.

*Best Buy-Schimenti Contract*

On July 6, 2004, Best Buy and Schimenti entered into a contract (the "Best Buy-Schimenti Contract") for Schimenti, the general contractor, to perform certain construction work at the premises. This contract contains the following insurance procurement provisions:

ARTICLE 17. INSURANCE

. . . the Contractor shall provide Owner with Certificates evidencing the existence of insurance policies issued by carriers . . . for himself and all subcontractors. Insurance shall be written as outlined and for limits not less than shown on Schedule "C" . . .

\* \* \* \* \*

Schedule C, entitled "Insurance," provides:

1. Comprehensive General Liability insurance required shall be written on a Comprehensive General Liability form, including coverage for Premises and Operations; Owners' and Contractors' Protective . . . Blanket Contractual . . . Broad Form Property Damage, Personal Injury with Exclusion C deleted. This insurance shall be written for not less than the following limits of liability:
  - a) Bodily Injury and Personal Injury, minimum of \$ 1,000,000 combined single limit per occurrence.

\* \* \* \* \*

3. For purposes of all insurance required under Part 1 of this Schedule, the Additional Named Insured shall be Best Buy Stores, L.P., their affiliates, subsidiaries AND OTHERS DESIGNATED BY Best Buy Stores, L.P.
4. A Certificate of Insurance in form and substance acceptable to the Owner and evidencing all the above . . . shall be filed with the Owner prior to the commencement of any work . . .

ADDITIONAL INSURANCE REQUIREMENTS

1. The Contractor shall require the same minimum insurance requirements, as listed above, from its Subcontractors and Suppliers . . . and they shall also comply with the additional requirements listed herein.

2. All insurance coverages required as herein set forth shall be at the sole cost and expense of the contractor, subcontractor, or suppliers . . . .

Schimenti obtained a commercial general liability policy from Transcontinental (the "Transcontinental Policy"), which contains an "Other Insurance" provision regarding primary and excess coverage.<sup>3</sup> Schimenti also provided Best Buy with a Certificate of Insurance naming Best Buy and Moklam c/o Yuco Management, Inc. as additional insureds under this Policy.

*Schimenti-Sage Subcontract*

On August 26, 2004, Schimenti entered into a subcontract with Sage for certain electrical wiring at the premises (the "Sage Subcontract"). The Sage Subcontract contains an addendum dated August 11, 2004 entitled "JOB #2468 - Best Buy #609 NoHo (New York, NY) Electrical Scope of Work Clarification 8/11/04," which states that "Sage will provide Insurance Coverages, Insurance Certificates, Performance Bonds, and license information as required by Best Buy & Schimenti Construction Company." The Sage Subcontract incorporates by reference a certain "Terms and Conditions" Addendum revised May 8, 2003. The Terms and Conditions Addendum includes the following indemnification provision:

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<sup>3</sup> The Transcontinental Policy provides:

4. Other Insurance  
If other valid and collectible insurance is available to the insured for a loss we cover under Coverages A. or B. of this Coverage Part, our obligations are limited as follows:
- a. Primary Insurance  
This insurance is primary except when b. below applies. If this insurance is primary, our obligations are not affected unless any of the other insurance is also primary. Then, we will share with all that other insurance by the method described in c. below.
- b. Excess Insurance  
This insurance is excess over:
- (2) Any other primary insurance available to you covering liability for damages arising out of the premises or operations for which you have been added as an additional insured by attachment of an endorsement.

- 5. To the fullest extent permitted by law You shall defend, indemnify and hold Us, the Owner, and the agents and employees of the foregoing harmless, of and from any and all claims, suits, losses or expenses . . . arising out of or in consequence of performance of this Purchase Order, including without limitation, wrongful death, bodily injury, property damage, and contractual and all claims by any person, firm or corporation. This indemnity shall not extend to claims, costs, losses, or expenses for bodily injuries or property damage to the extent that such claims, costs, losses, or expenses arise out of or are the consequences of the negligence of one or more indemnities or its agents or employees.

The Terms and Conditions Addendum also contains the following insurance provision:

- 21. Unless otherwise specified, sub-contractor shall provide at all times the following insurance as approved by contractor as follows:

\* \* \* \* \*

- c) Public liability and insurance in an amount not less than \$1 million combined single limit or \$1 million per occurrence/\$2 million per project annual aggregate to cover bodily injury, accidental death and property damage. This policy shall name Schimenti Construction Company, LLC as an additional insured.

Sage obtained a commercial general liability insurance policy from Utica (the "Utica Policy"), which provides the following additional insured endorsement:

- 11. ADDITIONAL INSURED - BY CONTRACT, AGREEMENT OR PERMIT . . .

The following is added to SECTION II - WHO IS AN INSURED

- a. Additional Insureds - By Contract, Agreement or Permit
  - (1) Any person or organization with whom you have entered into a written contract, agreement or permit requiring you to provide insurance such as is afforded by this Commercial General Liability Coverage Form will be an additional insured, but only:
    - (a) To the extent that such additional insured is held liable for your acts or omissions arising out of and in the course of ongoing operations performed by you or your subcontractors for such additional insured;

\* \* \* \* \*

The insurance afforded any additional insured under this paragraph

a.(1) will be subject to all applicable exclusions or limitations described in paragraphs b.(1), (2), (3) and (4) and in c.(1), (2), (3), (4), (5) and (6) below.

- (2) Such insurance as is provided by paragraph a.(1) above for any additional insured will be primary, if so required by the written contract, agreement or permit. Any other insurance available to such person or organization shall be excess over this insurance.
- (3) A person's or organization's status as an additional insured in connection with a written contract, agreement or permit under paragraphs a.(1), (2) and (3) ends when your operations for that additional insured are completed or the written contract, agreement or permit is terminated or expires.

The Utica Policy also contains the following "Other Insurance" provision:

#### SECTION IV - COMMERCIAL GENERAL LIABILITY CONDITIONS

##### 4. Other Insurance

If other valid and collectible insurance is available to the insured for a loss we cover under Coverages A or B of this Coverage Part, our obligations are limited as follows:

- a. **Primary Insurance**  
This insurance is primary except when b. below applies. If this insurance is primary, our obligations are not affected unless any of the other insurance is also primary. Then, we will share with all that other insurance by the method described in c. below.
- b. **Excess Insurance**  
This insurance is excess over:
  - (2) Any other primary insurance available to you covering liability for damages arising out of the premises or operations for which you have been added as an additional insured by attachment of an endorsement.

Sage provided Schimenti with a Certificate of Insurance, which states:

Best Buy Company, Inc., their affiliates, subsidiaries, others designated by Best Buy Company, Inc. are included as additional insureds as respects general liability when required by written contract prior to loss.

*Underlying Action*

On January 24, 2005, Michael Hurley ("Hurley"), an employee of Sage, was allegedly injured when he was struck by a light fixture that came loose from a chain from which it was suspended (the "Hurley Accident"). Consequently, Hurley commenced an action against Best Buy, Moklam Enterprises, Inc. and Schimenti (the "Hurley Action").

On or about June 13, 2005, Transcontinental tendered Best Buy, Yuco and Schimenti's claim for defense, indemnification and additional insured coverage to Utica. Thirty-five days later, by letter dated July 18, 2005, Utica disclaimed coverage as to Schimenti, claiming that Schimenti was not entitled to additional insured status under the Utica Policy and that Schimenti's claim was barred based on late notice.

Hurley moved for summary judgment on the issue of liability based upon Best Buy, Yuco and Schimenti's alleged violation of Labor Law § 240(1). Best Buy, Yuco and Schimenti also moved for summary judgment seeking contractual indemnity from Sage. By Decision and Order filed on January 4, 2008, the Court denied Hurley's motion. In its Decision, this Court stated, *inter alia*, that "[t]he indemnity provision to which Sage agreed is broad, as it obligates Sage to indemnify defendants and Schimenti against 'all claims ... arising out of or in consequence of the performance of this Purchase Order.'"

*Instant Declaratory Judgment Action*

Plaintiffs filed the instant action, seeking a declaration that Utica is required to defend and to indemnify Best Buy, Yuco and Schimenti in the Hurley Action as additional insureds under the Utica Policy issued to Sage. Plaintiffs also seek a ruling that Utica is not entitled to rely on its disclaimer based on late notice, as it was not timely issued and was only issued to

Schimenti in any event.

Plaintiffs' Motion

Plaintiffs argue that the additional insured endorsement contained in the Utica Policy dictates that Best Buy, Yuco and Schimenti are entitled to additional insured status thereunder with respect to the Hurley Action. The insurance procurement and indemnification provisions of the Lease and the Best Buy-Schimenti Contract were to be incorporated into the Sage-Subcontract. Pursuant to Articles 44.3.5 and 47.2 the Lease, Best Buy agreed to defend and indemnify Moklam and its agents (*i.e.*, Yuco), was obligated to maintain insurance as required by the Lease, and agreed to name the "Owner, Owner's managing agent" as additional insureds on all insurance policies. The Best Buy-Schimenti Contract required that Schimenti provide insurance naming "Best Buy Stores, L.P., their affiliates, subsidiaries AND OTHERS DESIGNATED BY Best Buy Stores, L.P." as additional insureds. The Certificate of Insurance provided by Schimenti to Best Buy designates Best Buy and Moklam c/o Yuco Management as additional insureds under the Transcontinental Policy. Thus, Schimenti understood its obligation, as required by the Lease which was incorporated into the Best Buy-Schimenti Contract, to provide additional insured coverage to Best Buy, Moklam and Yuco.

Moreover, the Best Buy-Schimenti Contract (Articles 9.2 and 9.4) requires any contract between Schimenti and a subcontractor to conform to the Best Buy-Schimenti Contract. Additionally, Article 17 requires that Schimenti provide Best Buy with certificates of insurance for itself and all subcontractors evidencing insurance policies as required by Best Buy.

The Sage-Subcontract expressly requires that Sage will provide insurance coverage and certificates as required by Best Buy and Schimenti. The Terms and Conditions Addendum to the

Sage-Subcontract also provides evidence of Sage and Schimenti's intent to incorporate the insurance and indemnification requirements of the Lease and Best Buy-Schimenti Contract into the Sage-Subcontract: Article 4 of the Terms and Conditions Addendum states "When work is performed pursuant to a change order to an existing Contract, the insurance and all other requirements of the Contract shall be complied with." This provision of the Sage-Subcontract indicates an understanding that Sage was to comply with all requirements set forth in the Best Buy-Schimenti Contract, including any requirements regarding insurance.

Furthermore, Article 5 of the Terms and Conditions Addendum to the Sage-Subcontract requires Sage to indemnify and hold Schimenti and Best Buy and its affiliates harmless from any claims, suits, losses or expenses arising out of or in consequence of the performance of the Sage-Subcontract. Article 18 mandates that Sage perform its work in a manner so as to enable Schimenti to comply with the Best Buy-Schimenti Contract and holds Sage liable for any damages arising out of a breach of the Sage-Subcontract, noting that "Any claim against You for breach of this Purchase Order may be asserted by Us or by Owner directly." This provision clearly evidences an understanding that Sage was to be performing its work under the Sage-Subcontract for the benefit of a third party, namely, Best Buy. Finally, Article 21 of the Terms and Conditions Addendum requires that Sage purchase specific insurance for the Project and name Schimenti as an additional insured. Although the Sage-Subcontract does not indicate that Best Buy and Yuco were also to be named as additional insureds, the certificate of insurance obtained by Sage specifically states that additional insured coverage is provided to others designated by Best Buy when required by written contract. Thus, Sage understood that such insurance was to be obtained for the benefit of Best Buy and Yuco.

Because the Best Buy Lease required Best Buy to provide insurance coverage for Moklam and its agents, Yuco is entitled to additional insured coverage under the Utica Policy issued to Sage. It is clear that the Sage-Subcontract contains an insurance procurement requirement in which Sage agreed to obtain insurance for Best Buy, Yuco and Schimenti as additional insureds.

Additionally, given that this accident arose out of Sage's ongoing operations, Best Buy, Yuco, and Schimenti are entitled to additional insured coverage under the Utica Policy issued to Sage. It is undisputed that Hurley was allegedly injured when a light fixture, that Sage had been retained to install, fell from a chain and struck him in the head. Sage employees installed the light fixture which struck Hurley, and Sage's work had not yet been completed.

Furthermore, the Utica Policy provides primary coverage to plaintiffs as additional insureds. The "Other Insurance" provisions contained in the Transcontinental Policy and the National Union policies issued to Best Buy, Yuco and Schimenti clearly state that such insurance policies provide excess coverage if Best Buy, Yuco and Schimenti are entitled to additional insured status on another policy of insurance. By comparison, the Utica Policy provides primary Insurance. Because plaintiffs are additional insureds under the Utica Policy, the clear and unambiguous language of the Utica Policy requires Utica to pay its policy limits on a primary basis without contribution from Transcontinental.

Finally, Utica cannot rely on its disclaimer based on late notice because it was untimely as to Schimenti. Utica's reasons for disclaiming would have been apparent upon receipt of plaintiffs' tender and, as a result, Utica's delay of thirty-five days is unreasonable as a matter of law. Even assuming that Schimenti did not timely notify Utica of Hurley's accident, Utica

waived its right to assert a late notice defense to coverage. Thus, Utica is obligated to defend and indemnify Schimenti with respect to this claim.

Furthermore, the disclaimer only referred to Schimenti's claims, and thus, is invalid as to Best Buy and Yuco. Utica also cannot claim that Best Buy and/or Yuco's claims are barred based upon late notice (or any policy exclusion) as it waived the right to assert this defense as it failed to address these entities' claims in its disclaimer. Here, the defense and indemnification of Best Buy and Yuco were tendered to Utica at the same time that Schimenti provided notice of the claim and requested a defense and indemnification. Yet, Utica disclaimed coverage solely to Schimenti and failed to set forth any grounds for a denial of coverage as to Best Buy or Yuco. As a result, the disclaimer must be found invalid and ineffective with respect to plaintiffs Best Buy and Yuco.

#### Opposition

Utica argues that the plaintiffs are not entitled to additional insured coverage under the Utica Policy. For a party to be afforded additional insured coverage, the named insured must have entered into a written contract with a party that requires it to procure insurance coverage for that party. The Utica Policy provides coverage to any "organization with whom you [Sage] have entered into a written contract . . ." as an additional insured. Sage never entered into a direct written contract with Best Buy or Yuco; Sage *only* entered into a written subcontract with Schimenti. Therefore, plaintiffs failed to satisfy an essential requirement for additional insured coverage under the Utica Policy.

Nor are the Best Buy Lease and the Best Buy-Schimenti Contract incorporated into the Sage-Subcontract. The Sage-Subcontract provision, which plaintiffs argue incorporates the Best

Buy-Schimenti Contract and Best Buy Lease, provides that Sage will provide insurance coverage as required by Best Buy and Schimenti. Such provision makes no reference to another contract or a lease and does not even reference any other written document. There is no document that demonstrates what exactly is "required by Best Buy and Schimenti." There is no clear evidence that Sage agreed to be bound by the Best Buy-Schimenti Contract and/or the Best Buy Lease. The Sage-Subcontract does not expressly reference *any* contract or document, and its vague reference to "as required by Best Buy" falls far short of the high standard for "incorporation by reference."

Further, Utica timely disclaimed coverage. The fact that Utica did not issue a disclaimer letter directly to Best Buy or Yuco is of no consequence because they are not additional insureds under the Utica Policy. Although Insurance Law §3420(d) requires timely disclaimers for policy exclusions, disclaimer pursuant to §3420(d) is not required where a clause limits the circumstances in which a party is an additional insured under an insurance policy and the underlying claim falls outside the limited coverage provided. Because plaintiffs did not enter into a contract with Sage and there is no insurance procurement requirement in the Sage-Subcontract, the Utica Policy afforded no coverage in the first instance to Best Buy and Yuco and Utica was not required to issue a disclaimer letter to Best Buy and Yuco.

Even if the Court finds Best Buy and Yuco to be additional insureds under the Utica policy, Utica properly and timely disclaimed coverage to Schimenti, Best Buy and Yuco based on late notice with regard to the Hurley Action when it sent the disclaimer letter to CNA, on behalf of Transcontinental, the real party in interest. Having tendered on behalf of all plaintiffs, Transcontinental was a proper party to receive the disclaimer on their behalf. Plaintiffs'

opposition papers indicate that “. . . Transcontinental, *on behalf* of Best Buy, Yuco and Schimenti, tendered the defense and indemnification of the underlying personal injury action to Utica . . .” Thus, the disclaimer letter sent to CNA was sufficient to provide all parties with notice of disclaiming coverage.

And, the disclaimer letter sent by Utica was timely. Utica disclaimed coverage on various grounds (late notice, no additional insured endorsement naming plaintiffs, and the claim did not arise out of Sage's acts or omissions). On June 17, 2005, Betty Winkler, a claims representative for Utica, received the tender letter from CNA. On July 18, 2005, Utica disclaimed coverage. Since the timeliness of a disclaimer is measured from the time the insurer first learns of the grounds on which it is disclaiming, 31 days is reasonable. The defenses noted in the disclaimer letter required investigation on the part of Utica to review all of the relevant policies and contracts and to obtain information surrounding the circumstances of the accident, such as when the plaintiffs learned of the accident and how exactly the accident occurred. Thirty-one days is a reasonable time for Utica to properly and thoroughly investigate this claim and the demand for additional insured coverage on behalf of all parties.

Also, the Certificate of Insurance issued by Sage's broker, Sterling and Sterling, Inc., does not confer additional insured coverage upon the plaintiffs. A Certificate of Insurance is insufficient, by itself, to show that such insurance has been purchased. The fact that Best Buy was named on the Certificate of Insurance is irrelevant; since the Certificate of Insurance was issued by Sage's broker, and not of an agent of Utica, the certificate is not binding on Utica. Moreover, the Certificate of Insurance, which states that "this certificate is issued as a matter of information only and confers no rights upon the certificate holder. This certificate does not

amend, extend or alter the coverage afforded by the policies below” does not even name Yuco.

Therefore, the plaintiffs have failed to demonstrate that the disclaimer issued by Utica was late and therefore the Utica disclaimer remains in effect, as to all grounds, against all plaintiffs. Alternatively, there is at least an issue of fact as to the timeliness of Utica's disclaimer.

Lastly, if plaintiffs are afforded coverage under the Utica Policy, the Utica Policy would be co-primary as to Best Buy and Yuco. The "Other Insurance" clause of the Utica policy states that “this insurance is primary except when ... any other primary insurance [is] available to you ....” The Transcontinental Policy issued to Schimenti states that “this insurance is primary except ... [it] is excess over any other primary insurance available to *you* covering liability for damages arising out of the premises or operations for which you have been added as all additional insured by attachment of an endorsement.” The Transcontinental Policy states that it is excess only to other primary insurance available to you or for which you have been named an additional insured by endorsement. The Transcontinental policy defines "you" as the "named insured shown in the Declarations, and any other person or organization qualifying as a Named Insured under the policy." In light of the foregoing, the Utica policy would only be excess as to Schimenti, Transcontinental's named insured, to which the Transcontinental "Other Insurance" provision applies.

As between Utica and Transcontinental, and the coverage for Yuco and Best Buy, the policies contain similar "other insurance" provisions and the policies are thus co-primary. Since Best Buy and Yuco were not added as additional insureds by attachment of an endorsement, at the very least, the insurers for Best Buy and Yuco would be co-primary with Utica.

Reply

The Best Buy-Schimenti Contract expressly requires that any subcontractors working on the project purchase insurance naming Best Buy as an additional insured. In addition, the Best Buy-Schimenti Contract incorporates the insurance requirement provisions included in the Best Buy Lease with respect to the premises. The insurance procurement provisions of the Best Buy Lease are incorporated into the Best Buy-Schimenti Contract and Schimenti understood and agreed to be bound by the same. Indeed, Schimenti's obligation to procure insurance for the benefit of Best Buy, Moklam and its agent, Yuco, is evidenced by the Certificate of Insurance Schimenti provided to Best Buy, which confers additional insured coverage to Best Buy and Yuco.

In accordance with the Lease and Best Buy-Schimenti Contract, Sage agreed to provide "insurance coverages, insurance certificate, performance bonds, and license information as required by Best Buy and Schimenti Construction Company." It is evident that Sage understood its obligations and agreed to abide by the insurance procurement provisions contained in the Lease and Best Buy-Schimenti Contract.

In fact, the Certificate of Insurance that Sage provided to Schimenti further demonstrates Sage's understanding and intention to comply with the insurance procurement requirements of the Sage-Subcontract, which incorporated the insurance procurement requirements of the Best Buy-Schimenti Contract and Lease. Plaintiffs' merely rely upon the Certificate of Insurance to demonstrate Sage's understanding and intention to name Best Buy, Moklam (including its agent, Yuco) and Schimenti as additional insureds under the Utica Policy.

Additionally, pursuant to the "Other Insurance" provisions contained in the Utica,

Transcontinental, and National Union, Utica policies, the Utica Policy provides primary coverage to the plaintiffs.

Therefore, although Best Buy and Yuco did not enter into a written contract with Sage directly, because Sage entered into the Sage-Subcontract with Schimenti, Sage was bound by the conditions of the Best Buy-Schimenti Contract. Furthermore, because the Best Buy-Schimenti Contract incorporated the Lease between Best Buy and Moklam, Yuco, as an affiliate of Moklam's managing agent, is entitled to additional insured coverage from Best Buy, Schimenti and Sage.

Utica cannot rely upon its disclaimer of coverage as it was untimely, in that Utica failed to provide written notice of disclaimer on the ground of late notice as soon as reasonably possible after it first learned of Hurley's accident or of grounds for disclaimer of liability. Ms. Winkler's Affidavit does not indicate that Utica required any investigation into the claim prior to issuing its disclaimer. Thus, Utica's counsel's conclusion that Utica's defenses required investigation, unsupported by personal knowledge or evidentiary materials, lacks evidentiary value. As a result, Utica's argument that its disclaimer was timely because it was not solely based on late notice of claim but included additional grounds for denying coverage is unsupported.

Furthermore, Utica was required to issue a disclaimer to Best Buy and Yuco, since Best Buy and Yuco are entitled to additional insured coverage under the Utica Policy. Moreover, plaintiffs do not claim that Utica failed to provide independent notice to Best Buy, Yuco and Schimenti; plaintiffs claim that Utica's disclaimer as to Best Buy and Yuco has been rendered invalid because Utica failed to address Best Buy and Yuco's claims independently of Schimenti's claim for defense and indemnification. Plaintiffs are not claiming that issuance of the disclaimer

to Transcontinental was inappropriate; instead, Utica's failure to disclaim to Best Buy and Yuco, in addition to disclaiming to Schimenti, now precludes them from doing the same.

Although the defense and indemnification of Best Buy and Yuco were tendered at the same time that Schimenti provided notice of the claim and requested a defense and indemnification, Utica disclaimed coverage solely to Schimenti, based on Schimenti's late notice of claim. Utica's disclaimer fails to set forth any grounds for a denial of coverage as to Best Buy or Yuco. Thus, the disclaimer is ineffective as to Best Buy and Yuco.

Finally, Utica's claim that it disclaimed coverage on the ground that the Hurley Action did not arise out of Sage's acts or omissions lacks merit. The Court granted contractual indemnification to Best Buy, Yuco and Schimenti against Sage, stating that "[t]he indemnity provision to which Sage agreed is broad, as it obligates Sage to indemnify defendants and Schimenti against 'all claims ... arising out of or in consequence of the performance of this Purchase Order.'" The Court recognized that the contractual indemnification clause in the Sage-Subcontract was triggered because Hurley was injured while engaged in performing work for Sage, which work fell within the scope of the Sage-Subcontract. Thus, it is clear that Utica's disclaimer was untimely and is therefore invalid as to Schimenti.

In addition, because Best Buy and Yuco are entitled to additional insured coverage under the Utica Policy, Utica was required to disclaim coverage to those parties independently of its disclaimer to Schimenti. Utica failed to address Best Buy and Yuco's claims for defense and indemnification in the Hurley Action in its disclaimer and as such, Utica is obligated to provide a defense and indemnification to Best Buy, Yuco and Schimenti on a primary basis.

### Utica's Motion

Defendant Utica also moves for summary judgment, arguing that there is no coverage afforded to Yuco and Best Buy. Utica's named insured, Sage, only entered into a contract with Schimenti. In applying the narrow language in the Utica Policy, Yuco and Best Buy would not qualify as additional insureds, as Utica's named insured did not enter into a written contract with those entities. Moreover, although the Schimenti-Sage Contract required that Sage will provide insurance coverage as required by Best Buy and Schimenti, it did not require that Yuco should be named as an additional insured.

Even assuming that the Schimenti-Sage Contract required that Sage procure insurance policies specified in the Best Buy-Schimenti Contract, and therefore, Best Buy and Schimenti were to be named as additional insureds, there would be no additional insured coverage to Yuco, because neither contracts required Sage to procure insurance for Yuco. Thus, as there is no insurance procurement clause that specifies that the promisee be named as an additional insured, there is no additional insured coverage for Yuco.

Also, there is no coverage to plaintiffs because they breached the Utica Policy by failing to provide timely notice of the Hurley occurrence, claim and suit to Utica. On June 13, 2005, CNA, on behalf of Transcontinental, notified Utica of Hurley's occurrence and suit, requesting that Utica defend and indemnify plaintiff in that action. On June 17, 2005, Utica received the tender letter, which was the first notice of the Hurley Action. On July 18, 2005, Utica disclaimed coverage to the plaintiffs on the ground that there was no additional insured endorsement listing plaintiffs as additional insureds, and that Hurley's accident did not arise out of Sage's acts or omissions. Utica also disclaimed coverage based on the plaintiffs' failure to notify Utica of

Hurley's accident "as soon as practicable."

According to Schimenti's response to Utica's interrogatories, Schimenti knew of the accident three days after the accident. In addition, Jim Sakolowski, a current Job Superintendent of Schimenti testified specifically that he became aware of the Hurley accident "a few days later." Moreover, he went on to testify that he learned about Hurley's accident when he was asked to fax an accident report generated by Sage with respect to the accident. Mr. Sakolowski also testified that subcontractors were required to report accidents of their employees to Schimenti, and that the accident report was prepared three days after the accident. Although plaintiffs knew that Utica was the insurer for Sage as of August 2, 2004, and became aware of Hurley's accident a few days after the January 24, 2005, accident, plaintiff did not notify Utica until almost five months after the accident. New York courts have held that relatively short periods of unexcused delay are unreasonable as a matter of law. As such, the plaintiffs breached the terms and conditions of the Utica Policy as a matter of law by failing to provide notice of the Hurley Accident to Utica as soon as practicable.

Furthermore, the insurer need not show prejudice to rely on this basis for disclaimer.

#### Opposition

Plaintiffs insist that they are entitled to additional insured coverage under the Utica Policy for the reasons noted above.

#### Analysis

To obtain summary judgment, the movant must establish its cause of action or defense sufficiently to warrant the court as a matter of law in directing judgment in its favor (CPLR § 3212 [b]), by advancing sufficient "evidentiary proof in admissible form" to demonstrate the

absence of any material issues of fact (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Silverman v Perlbinde*r, 307 AD2d 230, 762 NYS2d 386 [1<sup>st</sup> Dept 2003]). The motion must be supported “by affidavit [from a person having knowledge of the facts], by a copy of the pleadings and by other available proof, such as depositions” (CPLR § 3212 [b]). A party can prove a *prima facie* entitlement to summary judgment through the affirmation of its attorney based upon documentary evidence (*Zuckerman, supra*; *Prudential Securities Inc. v Rovello*, 262 AD2d 172 [1st Dept 1999]).

To defeat a motion for summary judgment, the opposing party must demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action, or to tender an acceptable excuse for his or her failure to do so (CPLR §3212 [b]; *Vermette v Kenworth Truck Co.*, 68 NY2d 714, 717 [1986]; *Zuckerman v City of New York, supra*, 49 NY2d at 560, 562; *Forrest v Jewish Guild for the Blind*, 309 AD2d 546, 765 NYS2d 326 [1<sup>st</sup> Dept 2003]). Like the proponent of the motion, the party opposing the motion must set forth evidentiary proof in admissible form in support of his or her claim that material triable issues of fact exist (*Zuckerman, supra* at 562).

When addressing an insurance coverage dispute, the court must look first to the language of the policy (*see Raymond Corp. v National Union Fire Ins. Co.*, 5 NY3d 157, 162, 800 NYS2d 89 [2005]; *State of New York v Home Indem. Co.*, 66 NY2d 669, 671, 495 NYS2d 969 [1985]). The policy must be construed “in a way that affords a fair meaning to all of the language employed by the parties in the contract and leaves no provision without force and effect” (*Raymond Corp. v National Union Fire Ins. Co., supra* at 162, 800 NYS2d 89, quoting *Consolidated Edison Co. of N.Y. v Allstate Ins. Co.*, 98 NY2d 208, 221-222, 746 NYS2d 622

[2002]). “Unambiguous provisions of a policy are given their plain and ordinary meaning” (*Lavanant v General Acc. Ins. Co.*, 79 NY2d 623, 629, 584 NYS2d 744 [1992]; *United States Fid. & Guar. Co. v Annunziata*, 67 NY2d 229, 232, 501 NYS2d 790 [1986]; *Seaport Park Condominium v Greater New York Mut. Ins. Co.*, 39 AD3d 51, 828 NYS2d 381 [1st Dept 2007]; *Roundabout Theatre Co. v Continental Cas. Co.*, 302 AD2d 1, 6, 751 NYS2d 4 [2002]).

Based on the plain language of paragraph 11a, “Additional Insureds,” of the Utica Policy issued to Sage, Utica agreed to provide additional insured coverage to any “organization with whom” Sage has entered into a written agreement, where such agreement requires Sage to obtain the insurance so provided.

#### *Schimenti*

It is undisputed that Sage entered into a written contract with Schimenti. Notably, Sage agreed, in its executed Subcontract with Schimenti, to “name Schimenti” as an additional insured on its liability insurance policy (§21.c). Thus, Schimenti is entitled to additional insured status under the Utica Policy insofar as (1) Sage’s Subcontract obligated it to procure insurance naming Schimenti as an additional insured and (2) the Utica Policy extends additional insured coverage to organizations who contracted in writing with Sage to be added as additional insureds (*see Brooklyn Hosp. Ctr. v One Beacon Ins.*, 5 Misc 3d 1029, 799 NYS2d 158 [Sup. Ct. New York County, Freedman, J.]).

As an additional insured under the Utica Policy, Schimenti is entitled to the same protection as the insured (*Pecker Iron Works of N.Y. v Traveler’s Ins. Co.*, 99 NY2d 391 2003]). It is undisputed that the Utica Policy provides primary coverage to its insured, Sage. Further, pursuant to the “Other Insurance” provisions (*i.e.*, 4.b) contained in the National and

Transcontinental Policies, such policies provide excess coverage if Schimenti is entitled to additional insured status on another policy of insurance. Since Schimenti is entitled to additional insured status under the Utica Policy, Schimenti is entitled to a declaration that the Utica Policy provides primary insurance.

By letter dated June 13, 2005, CNA, on behalf of its “Underwriting Company” Transcontinental, tendered the defense and indemnification of Schimenti to Utica. In its motion for summary dismissal, Utica claims that Schimenti failed to provide timely notice of Hurley’s Accident, as required under the Utica Policy. It is undisputed that Schimenti knew of Hurley’s Accident on January 24, 2005, three or four days after the accident, and that Utica was not notified of Hurley’s Accident until almost five months later. Courts have held that short periods of unexcused delay are unreasonable as a matter of law (*Deso v London & Lancashire Indemn. Co. of America*, 3 NY2d 127, 164 NYS2d 689 [1957] [51-day delay unreasonable]; *Goodwin Bowles Assoc. Ltd. v Eastern Mut. Ins. Co.*, 259 AD2d 381, 687 NYS2d 126 [1<sup>st</sup> Dept 1999] [two-month delay unreasonable]; *Power Auth. of the State of New York v Westinghouse Elec. Corp.*, 117 AD2d 336, 502 NYS2d 420 [1<sup>st</sup> Dept 1986] [53-day delay unreasonable as a matter of law]; *Republic New York Corp. v American Home Assurance Co.*, 125 AD2d 247, 509 NYS2d 339 [1<sup>st</sup> Dept 1986] [45-day delay unreasonable]; *Heydt Contracting Corp. v American Home Assurance Co.*, 146 AD2d 497, 536 NYS2d 770 [1<sup>st</sup> Dept 1989] [four-month delay unreasonable]). As the record discloses no mitigating factors in Schimenti’s favor so as to excuse the delay herein, Schimenti failed to comply with paragraph 15 (a) to the Endorsement of the Utica Policy, which requires that Schimenti “see to it that [Utica is] notified as soon as practicable of an ‘occurrence’ . . . .”

However, disclaimer of coverage based on late notice was not served until thirty-five days later. By letter dated July 18m 2005, CNA denied coverage on the grounds that (1) Schimenti is not a named insured or additional insured, (2) Hurley's accident did not arise out of Sage's acts or omissions, but arose out of the work performed by Schimenti, and (3) (five months') late notice.

An insurer must give written notice of disclaimer on the ground of late notice "as soon as is reasonably possible after it first learns of the accident or of grounds for disclaimer of liability" (*Hotel des Artistes v General Accident Ins. Co.*, 9 AD3d 181 [1<sup>st</sup> Dept 2004]). A failure by the insurer to give such notice as soon as is reasonably possible after it first learns of the accident or of grounds for disclaimer of liability or denial of coverage, precludes effective disclaimer or denial, and amounts to a waiver of the right to assert a late-notice defense (*Hartford Ins. Co. v Nassau County*, 46 NY2d 1028, 416 NYS2d 539 [1979]). Waiver is "a voluntary and intentional relinquishment of a known right" (*Albert J. Schiff Assocs., Inc. v Flack*, 51 NY2d 692, 698 [1980]) and in the insurance context, waiver may be found "where there is direct or circumstantial proof that the insurer intended to abandon the defense" (*id.*; see *Central General Hosp. v Chubb Group of Ins. Companies*, 90 NY2d 195, 659 NYS2d 246 [1997]).

Caselaw supports the position that a disclaimer based on late notice is untimely where the basis for the disclaimer is apparent from the documents forwarded to the insurer with the tender, and where the insurer needed to conduct an investigation before determining whether to disclaim (*cf. Gotham Const. Co., LLC v United Nat. Ins. Co.*, 35 AD3d 289, 829 NYS2d 5 [1<sup>st</sup> Dept 2006] [insurer's 50-day delay in issuing its disclaimer of coverage to plaintiffs for the underlying accident was unreasonable as a matter of law under Insurance Law § 3420 (d)]).

It has also been held that a short period of delay in serving a disclaimer is not

unreasonable, where the insurer undertook diligent efforts to obtain the information necessary to determine whether the claim fell within a policy exclusion (*see Public Service Mut. Ins. Co. v Harlem Housing Assocs.*, 7 AD3d 421, 777 NYS2d 438 [1st Dept 2004] [27-day delay in issuing a disclaimer was not unreasonable; “Even if we were to measure from the date on which plaintiff received the insured’s notice, January 8, 2002, the 37-day period is also reasonable; *McGinley v Odyssey Re London*, 15 AD3d 218, 790 NYS2d 13 [1<sup>st</sup> Dept 2005] [disclaimer issued 39 days after receipt of the claim was reasonable where insurer took diligent efforts to obtain the information and independent legal advice]; *Structure Tone, Inc. v Burgess Steel Products Corp.*, 249 AD2d 144, 672 NYS2d 33 [1<sup>st</sup> Dept 1998] [38-day delay not unreasonable where there was an unrefuted showing that insurer undertook fact investigation]).

Although discovery in this action revealed that Schimenti was on notice of the Hurley Accident in January 2005, the letter of tender to Utica also indicates that the May 10, 2005 Complaint in Hurley Action was Schimenti’s “first notice of claim.” Based on the tender and documents Utica received from CNA, it cannot be determined, at this juncture, whether the basis of Utica’s delay was apparent upon receipt of such documents. Further, Utica’s letter indicates that it conducted an “investigation” and determined, *inter alia*, that Hurley’s Accident was not the result of Sage’s work. Thus, an issue of fact exists as to whether Utica’s delay in disclaiming coverage was reasonable.

Given that an issue of fact exists as to whether Utica’s disclaimer is effective as to Schimenti, whether Schimenti’s late notice of the claim to Utica vitiates coverage cannot be determined at this juncture.

*Best Buy and Yuco*

It is undisputed there is no written contract or agreement between Sage and Best Buy or Yuco. Although the written agreement Sage executed with Schimenti states that the “attached TERMS & CONDITIONS (Rev. 5/8/03) are a part of this agreement,” and the attached conditions expressly state that “Sage will provide Insurance Coverages” and “Insurance Certificates” that Best Buy and Schimenti require (§13), there is no written agreement between Sage and Best Buy and Yuco, as required under the Utica Policy. That Best Buy required that Schimenti’s subcontractors, *i.e.*, Sage, obtain insurance on its behalf, does not obviate the requirement in the Utica Policy that there exist a written agreement between its insured, Sage, and the purported “additional insured” (*Brooklyn Hosp. Ctr. v One Beacon Ins.*, 5 Misc 3d 1029, *supra* [where insurer’s policy defined additional insured as organization with whom subcontractor worked when subcontractor and “such organization agreed in writing” that such organization be added as an additional insured, insurer was not required to extend coverage to plaintiff where there was no “written agreement specifically between” said plaintiff and subcontractor/insured requiring that said plaintiff be named as an additional insured]).

That Best Buy and “their affiliates” are named on the Certificate of Insurance provided by Sage, which was issued “as a matter of information only and confers no rights upon the certificate holder . . .” is inconsequential (*see Tribeca Broadway Associates, LLC v Mount Vernon Fire Ins. Co.*, 5 AD3d 198, 774 NYS2d 11 [1<sup>st</sup> Dept 2004] [a certificate of insurance is not a contract to insure]; *St. George v W.J. Barney Corp.*, 270 AD2d 171, 706 NYS2d 24 [1<sup>st</sup> Dept 2000]; *Buccini v 1568 Broadway Assocs.*, 250 AD2d 466 [1<sup>st</sup> Dept 1998]).

Furthermore, it cannot be said that the Best Buy-Schimenti Contract was incorporated by reference into Sage's Subcontract so as to constitute an agreement between Sage and Best Buy (and its agent) to obtain insurance on behalf of Best Buy (and its agent). Incorporation by reference "is appropriate only where the document to be incorporated is referred to and described in the instrument as issued so as to identify the referenced document "beyond all reasonable doubt "(*Shark Information Services Corp. v Crum and Forster Commercial Ins.*, 222 AD2d 251, 634 NYS2d 700 [1st Dept 1995]). "[I]ncorporation clauses in a construction subcontract, incorporating prime contract clauses by reference into a subcontract, bind the subcontractor only as to prime contract provisions relating to the scope, quality, character and manner of the work to be performed by the subcontractor" (*Bussanich v 310 East 55th St. Tenants*, 282 AD2d 243, 244, 723 NYS2d 444 [1st Dept 2001]; *Commercial Elec. Contr., Inc. v Pavarini Constr. Co., Inc.*, 5 Misc 3d 1002, 798 NYS2d 708 [Sup.Ct. 2004]). "Provisions other than scope, quality, character and manner of the work must be specifically incorporated to be effective against the subcontractor" (*CooperVision, Inc. v Intek Integration Technologies, Inc.*, 7 Misc 3d 592, 794 NYS2d 812 [Sup Ct 2005] citing 2 N.Y. PJI ¶ 4:1, comment, at 635 (2005)). Sage's Subcontract does not expressly incorporate any insurance provision of the Best Buy-Schimenti Agreement or of the Lease (*cf.*, *Carlisle SoHo East Trust v Lexington Ins. Co.*, 49 AD3d 272, 852 NYS2d 118 [1<sup>st</sup> Dept 2008] [the incorporated subcontract, which required, inter alia, that plaintiff be named as an additional insured under the subcontractor's general liability and umbrella policies, expressly stated that all insurance required thereunder was binding on a sub-subcontractor retained by the subcontractor]).

Accordingly, any failure to properly or timely disclaim coverage as to Best Buy and Yuco

is immaterial (*Brooklyn Hosp. Ctr. v One Beacon Ins.*, 5 Misc 3d 1029, *supra*). “Disclaimer pursuant to [Insurance Law] section 3420 (d) is unnecessary when a claim falls outside the scope of the policy's coverage portion. Under such circumstances, the insurance policy does not contemplate coverage in the first instance, and requiring payment of a claim upon failure to timely disclaim would create coverage where it never existed” (*Matter of Worcester Ins. Co. v Bettenhauser*, 95 NY2d 185, 188 [2000]).

In light of the above, Best Buy and Yuco are not entitled to additional insured status, or defense or indemnification under the Utica Policy.

#### Conclusion

Based on the foregoing, it is hereby

ORDERED that the branch of the motion by plaintiffs for summary judgment declaring that plaintiffs are entitled to additional insured coverage under the Utica Policy is denied as to Best Buy Co., Inc. and Yuco Real Estate Company, Inc. and granted as to Schimenti Construction Company, and it is hereby DECLARED that Schimenti Construction Company, LLC is entitled to Additional Insured status under a primary basis under the Utica Policy concerning the underlying Hurley Action; and it is further

ORDERED that the branch of the motion by plaintiffs for summary judgment declaring that Utica National Insurance Company is required to defend plaintiffs as additional insureds under the Utica Policy is denied as to Best Buy Co., Inc. and Yuco Real Estate Company, Inc. and granted as to Schimenti Construction Company, and it is hereby DECLARED that Utica has a duty to defend Schimenti Construction Company, LLC as an additional insured under the Utica

Policy; and it is hereby

ORDERED that the branch of the motion by plaintiffs for summary judgment declaring that Utica is not entitled to rely upon its disclaimer against Schimenti is denied; and it is further

ORDERED that the branch of the motion by plaintiffs for summary judgment declaring that Utica's disclaimer is ineffective and invalid with respect to Best Buy and Yuco is denied; and it is further

ORDERED that the branch of the motion (002) by Utica National Insurance Company pursuant to CPLR 3212 granting summary judgment and declaring that there is no coverage afforded to Best Buy Co., Inc. and Yuco Real Estate Company, Inc. under the Utica Policy, on the ground that they are not additional insureds, is granted, and it is hereby DECLARED that Utica National Insurance Company has no duty to defend or indemnify Best Buy Co., Inc. and Yuco Real Estate Company, Inc.; and it is further

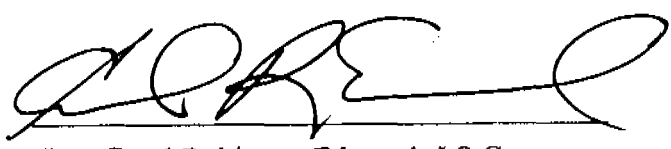
ORDERED that the branch of the motion (002) by Utica National Insurance Company pursuant to CPLR 3212 granting summary judgment against plaintiffs Best Buy Co., Inc., Yuco Real Estate Company, Inc. and Schimenti and declaring that Utica has no duty to defend or indemnify plaintiffs in the Hurley Action, on the ground that they breached the terms of the Utica

Policy is denied; and it is further

ORDERED that defendants serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: January 23, 2009



Hon. Carol Robinson Edmead, J.S.C.

**HON. CAROL EDMEAD**

**FILED**  
JAN 28 2009  
COUNTY CLERK'S OFFICE  
NEW YORK