

**Bierzo Constr. Corp., LLC v Everest
Natl. Ins. Co.**

2009 NY Slip Op 30826(U)

April 14, 2009

Supreme Court, New York County

Docket Number: 113011/07

Judge: Carol R. Edmead

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. CAROL EDMEAD
Justice

PART 35

Bierzo Construction

INDEX NO.

113011/07

MOTION DATE

11/21/09

MOTION SEQ. NO.

001

MOTION CAL. NO.

The Everest National Insurance

- v -

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

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause

Answering Affidavits - Exhibits

Replying Affidavits

APPLIED JUDGMENT
The 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).

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

In accordance with the accompanying Memorandum Decision, it is hereby

ORDERED that the motion by Utica pursuant to New York Insurance Law 3420 and CPLR 3211(a)(1) and (7) to dismiss the third-party claim and all cross-claims asserted against it is granted; and it is further

ORDERED that the request by Utica that the Court treat its motion as one for summary judgment pursuant to CPLR 3211(c) and declare, pursuant to CPLR §3001, that Utica is not obligated to indemnify Port-Land in the third-party action, and/or defend and indemnify plaintiff in the underlying action is granted; it is further

ORDERED and DECLARED that Utica is not obligated to indemnify Port-Land in the third-party action, and/or defend and indemnify plaintiff in the underlying action; and it is further

ORDERED that Utica serve a copy of this decision and order with notice of entry upon all parties within 20 days of entry; and it is further

ORDERED that the Clerk may enter judgment accordingly.

This constitutes the decision and order of the Court.

Dated: 4/14/2009


HON. CAROL EDMEAD J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

-----X
BIERZO CONSTRUCTION CORPORATION, LLC,

Plaintiff,

Index No. 113011/07
Sequence No. 001

-against-

THE EVEREST NATIONAL INSURANCE
COMPANY,

Defendant.

-----X
THE EVEREST NATIONAL INSURANCE COMPANY,

Third-Party Index No.
590785/08

Third-Party Plaintiff,

-against-

PORT-LAND CONSTRUCTION CORP. and
UTICA FIRST INSURANCE COMPANY,

Third-Party Defendants.

-----X
HON. CAROL EDMEAD, J.S.C.

MEMORANDUM DECISION

This insurance coverage action arises out of an underlying action (the “underlying action”), wherein it is alleged that on October 7, 2006, Erasmo Sanchez Lopez (“Mr. Lopez”) was fatally struck by a falling brick while working at a construction-site.¹

Plaintiff, Bierzo Construction Corporation, LLC (“plaintiff” or “Bierzo”), a defendant in the underlying action, commenced this action against its insurer, The Everest National Insurance

¹ The wrongful death action is entitled, *Gloria Anjelica Barajas, and Maria Marquina as the Co-Administrator of the Goods, Chattels and Property of Erasmo Sanchez Lopez a/k/a Erasmo Sanchez and Gloria Anjelica Barajas, Individually v Bierzo Construction Corp., 765 Amsterdam Housing Corp. and Samson Management LLC*, and is venued in the Supreme Court, Bronx County.

Company (“Everest”), seeking a declaration that Everest is obligated to defend and indemnify plaintiff in the underlying action.

In turn, Everest commenced a third-party action against, Mr. Lopez’ employer, Port-Land Construction Corp. (“Port-Land” or the “Subcontractor”) and Port-Land’s insurer, Utica First Insurance Company (“Utica”). Everest seeks, *inter alia*, a declaration that Utica is obligated to indemnify Port-Land in the event that Everest is deemed to owe a defense and indemnification to plaintiff, and a declaration that Utica is obligated to defend and indemnify plaintiff in the underlying action based on plaintiff’s status as an additional insured under a certain insurance policy issued by Utica to Port-Land. Everest alleges a claim against Port-Land for breach of contract for failing to procure insurance.

Utica now moves pursuant to New York Insurance Law §3420 and CPLR 3211(a)(1) and (7) to dismiss the third-party claim and all cross-claims asserted against it. Utica also requests that the Court treat its motion as one for summary judgment pursuant to CPLR 3211(c) and declare, pursuant to CPLR §3001, that Utica is not obligated to indemnify Port-Land in the third-party action, and/or defend and indemnify plaintiff in the underlying action.

Factual Background²

Plaintiff was hired to perform work at 765 Amsterdam Avenue, New York, New York (the “construction site”) and obtained a Commercial General Liability Insurance Policy from Everest (the “Everest Policy”).

On August 25, 2006, plaintiff entered into a Subcontract Agreement (the “Subcontract”) with Port-Land in connection with the construction project. Port-Land obtained an insurance

² The factual background is taken from the pleadings in this action and the underlying action.

policy from Utica (the "Utica Policy").³ On September 2, 2006, Port-Land's insurance broker, Katerina Theodorou ("Theodorou"), issued a Certificate of Insurance reflecting plaintiff as an additional insured under the Utica Policy. On October 7, 2006, Mr. Lopez, Port-Land's employee was injured while working at the construction site, and the underlying action ensued.

By letter dated January 29, 2007, Everest's representative UTC Risk Management Services, Inc. ("UTC") informed Port-Land of the underlying action and enclosed a copy of the Summons and Complaint in the underlying action.

By letter to UTC dated February 1, 2007, Port-Land's insurer, Utica, requested a copy of the contract between plaintiff and Port-Land. On March 13, 2007, Utica sent a second request to UTC for a response to the February 1, 2007 letter. On March 14, 2007, UTC forwarded a copy of the contract between plaintiff and Port-Land, along with a Certificate of Insurance.

On March 27, 2007, Utica disclaimed coverage to its insured, Port-Land, and to plaintiff for the accident and the resulting lawsuits based upon (1) an exclusion for bodily injuries sustained by Port-Land's employees (the "Employee Exclusion"), and (2) an exclusion for liabilities assumed under contract or agreement (the "Contractual Liability Exclusion") contained in the Utica Policy.

Thereafter, Utica received a copy of the third-party pleadings in the instant action on September 19, 2008, and by letter dated October 10, 2008, sent a supplemental disclaimer to Port-Land reminding Port-Land that Utica already disclaimed coverage for the accident, and any and all resulting lawsuits, and that Utica would not defend or indemnify it in the newly

³ Everest points out that Utica does not allege the policy accompanying its moving papers was the policy that was in effect on October 7, 2006.

commenced lawsuit by Everest based upon the above exclusions.

By separate letter dated October 10, 2008, Everest was also reminded that, by way of the March 27, 2007 letter, Utica already disclaimed defense and indemnity coverage to plaintiff for the accident and any and all resulting lawsuits.

Utica's Motion

Utica argues the third-party action should be dismissed against Utica because Everest lacks standing to prosecute its direct claims, and the exclusionary provisions apply to preclude coverage for Mr. Lopez's work-related injuries and the contractual claims against Port-Land.

Everest lacks standing to seek relief from or against Utica. Everest seeks indemnification from Utica for the accident and the underlying action, even though it has disclaimed coverage to plaintiff and is being sued by plaintiff as a result of this disclaimer. A stranger to an insurance contract, such as Everest vis-a-vis the Utica Policy, has no standing to commence an action against the insurance company based upon the policy unless and until it has obtained a judgment against the insured thereunder, and this judgment is left unsatisfied for thirty days or longer. Everest is neither an insured nor an additional insured under the Utica Policy, nor does it or any of its insureds have an unsatisfied judgment against Utica or any of Utica's insureds as is required to satisfy the conditions precedent to seeking any direct relief against Utica in accordance with the Insurance Law §3420, and case law.

Further, the Employee Exclusion in the Utica Policy precludes coverage obligations for the accident, the underlying lawsuit and the third-party action. It is undisputed that Mr. Lopez was injured during the course of his employment for Port-Land, and the Employee Exclusion is unambiguous as a matter of law. Employee exclusions such as the one at bar apply to preclude

coverage to insureds and additional insureds. Thus, even if plaintiff is an additional insured under the Utica Policy, and Everest has standing to adjudicate plaintiff's rights herein, the clear and unambiguous language of the Employee Exclusion precludes the instant third-party action, and the Court should declare that Utica has no obligation to defend or indemnify plaintiff or any party herein, including Port-Land, in connection with the accident and the resulting lawsuits.

Further, the Contractual Liability Exclusion, which precludes coverage for liabilities assumed under contract or agreement, precludes coverage by Utica. All of the claims asserted against Port-Land and Utica by Everest in the third-party action arise out of Port-Land's purported contractual obligations to plaintiff. Therefore, judgment must be entered in favor of Utica declaring that it has no obligation to defend or indemnify Port-Land.

Plaintiff's Opposition

Utica issued a Certificate of Insurance purporting to show plaintiff as an additional insured under the insurance contract which included "personal injury." Utica agreed to provide insurance coverage pursuant to a Certificate of Insurance with the intent that plaintiff rely upon it and it was justifiably relied upon by plaintiff. Therefore this fraudulent conduct should not allow Utica to avoid liability and the Court should deny Utica's motion.

Everest's Opposition

Preliminarily, Utica moves for relief without any pre-trial discovery and before any factual determinations in the underlying wrongful death action are made. Everest is entitled to discovery on its causes of action. Plaintiff's opposition to Utica's motion alleges that there was an agency relationship between Theodorou and Utica, and Theodorou refuses to produce documents or information concerning the relationship between Theodorou and Utica. Under

certain circumstances, an insurance broker's issuance of a Certificate of Insurance can be binding upon insurer. Whether Theodorou had actual or apparent authority to bind Utica by issuing the Certificate of Insurance which names plaintiff as an additional insured and contradicts the Utica Policy, presents a fact question that warrants discovery. Theodorou provided an incomplete response to Everest's subpoena, refused to produce any documents concerning its communications with Port-Land or Utica, refused to produce its file relating to Port-Land, and refused to produce any documents relating to plaintiff. Everest learned from the documents that Theodorou provided that another non-party, BFA of NY, Inc. ("BFA") was involved in the placement of insurance and in Theodorou's request for coverage for Bierzo under the Utica Policy.

It is premature to declare the rights of the parties in the underlying action and the Utica Policy at this stage. This Court cannot declare that Utica has no defense or indemnity obligations in the underlying action until factual determinations are made in the underlying action and the parties are able to take discovery in the third-party action. Considering the status of discovery, lack of information presented and the law which flies in the face of Utica's position, the Court cannot make such a finding at this time.

In addition, Everest's standing to sue Utica is based on CPLR §1007, which allows a defendant to proceed "against a person not a party who is or may be liable to that defendant, for all or part of the plaintiff's claim against that defendant. . . ." An impleader action permits the third-party plaintiff to state a hypothetical cause of action, *to wit*: if defendant is liable to plaintiff, then third-party defendant is liable to defendant. The liability to be imposed upon a third-party defendant in a third-party action commenced pursuant to CPLR §1007 should arise

from or be conditioned upon the liability asserted against the third-party plaintiff in the main action. Because the issue of the third-party plaintiff's indemnity obligations is still pending, the third-party complaint is properly commenced. Moreover, CPLR §1007 encompasses contingent claims based on subrogation. If plaintiff prevails against Everest in the main action, Everest will become subrogated to plaintiff's right to bring suit against Utica and plaintiff's rights include coverage as an additional insured under the Utica Policy that Utica issued to Port-Land. Utica's motion, if granted, means Everest's could not assert the claims it may have should Bierzo prevail against Everest in the main action.

Unlike the cases relied on by Utica, Everest is not alleging that it is insured under the Utica Policy. Instead, Everest alleges that plaintiff is covered under the Utica Policy. The issue is whether plaintiff would have standing to sue Utica, and clearly plaintiff would. That plaintiff has delayed or neglected to avail itself of its rights against Utica does not affect Everest's right to protect its potential rights against Utica through this third-party action. An insured may bring an action against a disclaiming insurer and need not wait until a judgment is entered against it before proceeding against its insurer.

Further, the Contractual Liability Endorsement in the Utica Policy is ambiguous and unenforceable as a matter of law. Utica failed to bring to the Court's attention caselaw in which a Court held that the identical Contractual Liability Exclusion in the Utica Policy was ambiguous because it was inconsistent with and would negate the terms of the Blanket Endorsement. Thus, the Contractual Liability Exclusion relied upon by Utica herein is unenforceable to negate coverage. And, assuming the Subcontract is the entire agreement between parties concerning the construction project, the Subcontract between Port-Land and plaintiff satisfies the endorsement's

criteria for coverage because it was executed on August 25, 2006, before the October 7, 2006 accident and was in effect during the Utica Policy's policy term.

Moreover, Utica's disclaimer issued 55 days after receipt of Everest's tender was untimely pursuant to Insurance Law §3420(d) and it cannot rely on the Employee Exclusion. Utica's explanation for its delay is insufficient since the basis for denying coverage was readily apparent before the onset of the delay. UTC's letter included a copy of the complaint in the underlying action and specifically stated that: (a) an employee of Utica's named insured, Port-Land, was injured in an accident; and (b) a contract existed between plaintiff and Utica's named insured, Port-Land. UTC's therefore knew that a Port-Land employee was injured, potentially triggering the Employee Exclusion, and that Port-Land was obligated by contract to indemnify and hold plaintiff harmless, thereby triggering the Contractual Liability Exclusion. No further "investigation" was required. Further, the nature and scope of Utica First's investigation would be a subject for further discovery.

Everest also objects to the Court's treating Utica's motion as one for summary judgment as discovery would reveal facts warranting the denial of summary judgment.

Reply

Utica argues that since Portland has not opposed Utica's motion, judgment must be awarded to Utica on default, declaring that Utica has no coverage obligations to Portland.

Utica also notes that it neither concedes nor denies plaintiff's purported additional insured status, but instead claims that the Employee Exclusion precludes coverage. Case law consistently applies employee exclusions such as the one in the case to insureds and additional insureds alike under identical, substantially identical circumstances. As in such caselaw, the

underlying action involved injuries sustained by an employee of Utica's named insured, and the defendant/third-party plaintiff sought coverage under the Utica Policy for the underlying action based upon its status as an additional insured under the Utica Policy. Thus, Utica has no obligation to defend or indemnify Portland and/or plaintiff in the underlying action or the third-party action for Mr. Lopez' injuries, based upon the clear and unambiguous language of the Employee Exclusion.

Moreover, Utica does not argue that the Contractual Liability Exclusion precludes plaintiff's right to coverage or that plaintiff is not an additional insured under the Utica Policy. Rather, Utica has argued that since all of the claims against Portland in the instant action arise out of Portland's contractual obligations to plaintiff, there should also be no coverage for Portland based upon the Contractual Liability Exclusion. Therefore, Everest's claim that the Contractual Liability Exclusion is ambiguous so as to require Utica to provide coverage to plaintiff, is misplaced since Utica does not rely upon the Contractual Liability Exclusion as a basis to decline coverage to plaintiff. Importantly, Port-Land has not opposed Utica's motion on this basis, and Port-Land was never named as a direct defendant the underlying action. The only claims alleged against Port-Land in connection therewith are the third-party claims raised by Everest, and these claims arise out of Portland's alleged contractual obligations to plaintiff alone.

Utica further argues that as it relates to it insured, Port-Land, the timeliness of Utica's disclaimer is not an issue for two reasons. First, Port-Land did not oppose Utica's motion. Second, neither Port-Land nor its employee Mr. Lopez ever notified Utica of either the accident or the action, and Utica's only notice came from Everest's representative, UTC. Utica was first notified of the accident when it received the letter from UTC dated January 29, 2007. Thus,

Utica had no duty to disclaim to Port-Land in the first instance and, thus, cannot be said to have waived its right to assert a defense to coverage no matter how long an alleged delay between notice and disclaimer. In any event, argues Utica, it has a right and obligation to conduct an investigation prior to issuing its disclaimer, and its disclaimer, was timely. The measure of reasonableness with respect to a timely disclaimer does not begin with the insurer's first notice but, rather, commences at the time the insurer first becomes aware of "sufficient" facts that form the basis for the disclaimer. And, caselaw does not permit a non-cooperating insured to benefit from its own inaction by charging any delay attributable to this non-cooperation against the timeliness of the insurer's disclaimer. Utica began its investigation on the very next day after receiving its first notice by requesting a copy of the Subcontract. Utica diligently repeated its request for the Subcontract when UTC was non-responsive. Utica disclaimed coverage less than two weeks after receiving the Subcontract from UTC and completing its investigation. Since the Utica Policy contains the Contractual Liability Exclusion, and plaintiff's claimed entitlement to coverage in the first instance was based upon this alleged contract, Utica the Subcontract prior to taking making a coverage determination. This is particularly so since, plaintiff's status as an additional insured under the Utica Policy is based upon an endorsement contained within the Utica Policy called a "Blanket Endorsement." The Blanket Endorsement is only triggered if there is a written contract requiring Portland to name plaintiff as an additional insured under the Utica Policy. Without the Subcontract, Utica could not have known whether UTC's claim to additional insured coverage for plaintiff was valid, and Utica should not be penalized for conducting its investigation.

Further, the case Everest cites is distinguishable, since Utica's disclaimer of coverage to

its named insured was, in fact, validated, and the delay upon which the disclaimer to the additional insured was held invalidated was in excess of five months. Moreover, such case is not binding or instructive as it is issued out of the Supreme Court, Kings County, and runs counter to the more than ample legal authority.

Moreover, that Utica waited to assert its Employee Exclusion defense as a basis for non-coverage until after it completed its entire investigation so as to avoid the issuance of "piecemeal disclaimers" is not only proper, but is actually the judicially preferred course of conduct.

Further, no additional discovery is needed and Utica's motion is not premature. Regardless of plaintiff's additional insured status or any other document that the opposing parties seek to discover, Utica can have no coverage obligation to any party pursuant to the Employee Exclusion and Contractual Liability Exclusion.

Analysis

A party may move pursuant to CPLR 3211(a)(1), "for judgment dismissing one or more causes of action asserted against him on the ground that 'a defense is founded upon documentary evidence.'" The test on such a motion is whether the "documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law" (*Leon v Martinez*, 84 NY2d 83, 88, 614 NYS2d 972 [1994]; *Scott v Bell Atlantic Corp.*, 282 AD2d 180, 726 NYS2d 60 [1st Dept 2001]; *IMO Indus., Inc. v Anderson Kill & Olick, P.C.*, 267 AD2d 10, 11, 699 NYS2d 43 [1st Dept 1999]).

In determining a motion to dismiss pursuant to CPLR §3211(a)(7), the court's role is ordinarily limited to determining whether the complaint states a cause of action (*Frank v*

DaimlerChrysler Corp., 292 AD2d 118, 741 NYS2d 9 [1st Dept 2002]). The standard on a motion to dismiss a pleading for failure to state a cause of action is not whether the party has artfully drafted the pleading, but whether deeming the pleading to allege whatever can be reasonably implied from its statements, a cause of action can be sustained (*see Stendig, Inc. v Thorn Rock Realty Co.*, 163 AD2d 46 [1st Dept 1990]; *Leviton Mfg. Co., Inc. v Blumberg*, 242 AD2d 205, 660NYS2d 726 [1st Dept 1997] [on a motion for dismissal for failure to state a cause of action, the court must accept factual allegations as true]). When considering a motion to dismiss for failure to state a cause of action, the pleadings must be liberally construed (*see* CPLR §3026), and the court must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit into any cognizable legal theory" (*Nonnon v City of New York*, 9 NY3d 825 [2007]; *Leon v Martinez*, 84 NY2d at 87-88). However, in those circumstances where the bare legal conclusions and factual allegations are "flatly contradicted by documentary evidence," they are not presumed to be true or accorded every favorable inference [*Biondi v Beekman Hill House Apt. Corp.*, 257 AD2d 76, 81, 692 NYS2d 304 [1st Dept 1999], *affd* 94 NY2d 659, 709 NYS2d 861 [2000]), and the criterion becomes "whether the proponent of the pleading has a cause of action, not whether he has stated one" (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275, 401 NYS2d 182 [1977]; *see also Leon v Martinez, supra*); *Ark Bryant Park Corp. v Bryant Park Restoration Corp.*, 285 AD2d 143, 150, 730 NYS2d 48 [1st Dept 2001]).

Standing

Parties to an insurance contract, *i.e.*, the issuer, a named insured or a person claiming to be an insured under the policy, may bring a declaratory judgment action against each other when

an actual controversy develops concerning the extent of coverage, the duty to defend, or other issues arising from the insurance contract (*Lang v Hanover Insurance Co.*, 3 NY3d 350, 787 NYS2d 211 [2004]).

Although Everest is not a party to the Utica Policy, CPLR §1007 permits a defendant to implead “a person not a party who is or may be liable to him for all or part of the plaintiff’s claim against him” into the primary action by instituting a third-party action. The third-party complaint may contain alternative, hypothetical or inconsistent causes of action and such a pleading will be sustained as long as the facts alleged do not necessarily preclude liability on the primary defendant’s part (*BBIG Realty Corp. v Ginsberg*, 111 AD2d 91, 92, 489 NYS2d 224, 226 [1st Dept 1985] citing *George Cohen Agency v Perlman Agency*, 51 NY2d 358, 366 [1980]). Impleader is available even if the impleaded party owes no duty whatsoever to the primary plaintiff (*BBIG Realty Corp. v Ginsberg*, 111 AD2d at 92, citing *Garrett v Holiday Inns*, 58 NY2d 253, modfg 86 AD2d 469 [1985]).

Subrogation is the principle by which an insurer, having paid losses of its insured, is placed in the position of its insured so that it may recover from the third party legally responsible for the loss (*Winkelman v Excelsior Ins. Co.*, 85 NY2d 577, 584, 626 NYS2d 994, 998 [1995] citing 16 Couch, Insurance 2d § 61:1 [rev ed]). The doctrine is liberally applied to protect those who are its natural beneficiaries--insurers that have been compelled by contract to pay the loss caused by the negligence of another (*Winkelman v Excelsior Ins. Co.*, *supra*).

CPLR 1007 permits a third-party action based on subrogation even where no payment has been made (*Krause v American Guarantee & Liability Ins. Co.*, 22 NY2d 147, 152-3, 292 NYS2d 67, 71 [1968] [stating that “The language of CPLR 1007 permits the defendant to

implead any person “who is or may be liable to him” and is certainly broad enough to encompass contingent claims based on subrogation”). Thus, although Everest is not an issuer or an insured to the Utica Policy, its alleged insured Bierzo, is an alleged additional insured under the Utica Policy. In the event Everest is liable to or is compelled to make payment to Bierzo under the Everest Policy, Everest will become subrogated to Bierzo’s rights, and thus, no longer a stranger to the Utica Policy, and able to seek relief as an additional insured. Since a third-party complaint may contain a hypothetical cause of action, it cannot be said that Everest lacks standing to seek declaratory relief pursuant to the Utica Policy.

That Everest denies coverage and has not paid plaintiff under its policy to the plaintiff is not a bar to Everest’s third-party action, since its right to pursue a potential subrogation right is afforded by statute (*Consolidated Edison Co. of New York, Inc. v Royal Indem. Co.*, 72 Misc 2d 1075, 341 NYS2d 55 [Sup Ct New York County][1972][“While the policy language may provide for subrogation when payment is made, the insurer’s right to implead is founded on the statute which does not make it dependent on payment in the absence of a policy provision explicitly so limiting or precluding impleader]).

Further, Insurance Law §3420 does not deprive Everest of standing to seek relief against Utica. Insurance Law §3420 grants an injured party a right to sue the tortfeasor’s insurer after the injured party first obtains a judgment against the tortfeasor, and is not paid after 30 days of notice of the judgment to the insurer. Such section applies to “strangers” to insurance policies, *i.e.*, plaintiffs who suffer injuries resulting from the torts committed by insureds, without any potential subrogation rights (*see Univ. Garden Apartments, L.P. v Nationwide Mut. Ins. Co.*, 284 AD2d 975, 976, 726 NYS2d 901 [4th Dept 2001][since plaintiffs are strangers to the insurance

policy issued to Dickerson, they may not maintain a direct action against Nationwide to enforce Nationwide's obligation under that policy unless a judgment against Dickerson is rendered and remains unsatisfied]; *Abdalla v Yehia*, 246 AD2d 373, 374, 667 NYS2d 736 [1st Dept 1998] [where injured passengers sued the driver/owner of the vehicle in which they were riding, and the driver/owner of the offending vehicle, and plaintiffs' driver/owner impleaded co-defendant's insurer for indemnification, third-party plaintiff had no legally cognizable interest in the relationship between the co-defendant and his insurer]; *Clarendon Place Corp. v Landmark Ins. Co.*, 182 AD2d 6, 9-10, 587 NYS2d 311, 313 [1st Dept 1992] [the estates of 55 of the Happyland fire victims have no rights against the insurers unless and until a judgment is entered against the insureds in the underlying tort actions]).

Therefore, Utica's motion to dismiss Everest's claims against it on the ground that Everest lacks standing, is denied.

Contractual and Employee Liability Exclusions

As to the applicability of the exclusions at issue, an insurer bears the burden of demonstrating that a policy exclusion defeats an insured's claim by establishing that the exclusion is "stated in clear and unmistakable language, is subject to no other reasonable interpretation, and applies in the particular case" (*Monteleone v Crow Const. Co.*, 242 AD2d 135, 673 NYS2d 408 [1st Dept 1998]). To negate coverage by virtue of an exclusion, an insurer must establish that the exclusion is stated in clear and unmistakable language, and is subject to no other reasonable interpretations, and applies in the particular case" (*Sanginito v National Grange Mutual Ins. Co.*, 52 AD3d 267, 268, 859 NYS2d 431 [1st Dept 2008] citing *Continental Casualty Co. v Rapid American Corp.*, 80 NY2d 640, 652, 593 NYS2d 966 [1993]). "[P]olicy exclusions are given a

strict and narrow construction, with any ambiguity resolved against the insurer" (*Belt Painting Corp. v TIG Ins. Co.*, 100 NY2d 377, 383, 763 NYS2d 790, 792 [2003]; see *Monteleone v Crow Const. Co.*, 242 AD2d 135, *supra*).

As to the Contractual Liability Exclusion, this exclusion states:

We do not pay for bodily injury, property damage, personal injury or advertising injury which is assumed under a contract or agreement. This exclusion does not apply to:

- a. an incidental contract; or
- b. liability for damage that an insured would have in the absence of the contract or agreement.

However, the Utica Policy also contains a Blanket Additional Insured (Contractors)

Endorsement which states:

Item 7.d is added to the ADDITIONAL DEFINITIONS OF COMMERCIAL LIABILITY COVERAGES of the Contractors special Policy form AP-100.

7. Insured also includes:

- d. Any person or organization whom you are required to name as an additional insured on this policy under a written contract or written agreement.

The written contract or written agreement must be:

- (1) Currently in effect or becoming effective during the terms of this policy; and
- (2) Executed prior to the "bodily injury," "property damage," "personal injury," or "advertising injury."

The Contractual Liability Exclusion, when read together with the Blanket Endorsement, creates an ambiguity as a matter of law, which ambiguity must be resolved in favor of the insured, plaintiff, and potentially, its insured Everest (see *LaBoutique NY, Inc. v. Utica Ins. Co.*, 18 Misc 3d 1132 [Sup Ct Richmond County 2008] [finding that Utica's contractual liability exclusion was inconsistent with its Blanket Additional Insured endorsement, since the former purports to apply

“to all Liability Coverages,” and would therefore render the terms of the Blanket Additional Insured endorsement meaningless; thus, the contractual liability exclusion “cannot be applied to defeat any right to coverage which might have existed under the Blanket Additional Insured endorsement”]; *Gofranullah v 630 Realty, LLC*, 16 Misc 3d 1122, 847 NYS2d 901 [Sup Ct Kings County 2007] [finding that the Contractual Liability Exclusion, which appears under the “Exclusions That Apply to All Liability Coverages” section in the general policy, would render the terms of the Blanket Endorsement meaningless and ineffective and that the Contractual Liability Exclusion was inapplicable to exclude coverage under the Utica policy]). Therefore, Utica cannot rely on the Contractual Liability Exclusion to preclude coverage which falls under the Blanket Additional Insured Endorsement. Therefore, dismissal of the third-party action based on the Contractual Liability Exclusion is denied.

However, Utica met its burden of demonstrating that the Employee Exclusion is clear and unambiguous and that it precludes coverage of injuries suffered by any employee of an insured or additional insured. Notably, neither Everest nor plaintiff dispute that the Employee Exclusion is unambiguous. And, it is uncontested that Mr. Lopez was employed by Port-Land, the named insured under the Utica Policy. Thus, the Employee Exclusion would bar coverage for Lopez’ injuries and any resulting lawsuits.

Yet, in order to properly rely upon the exclusions upon which its disclaimer is based, Utica must have served written notice of its intent to disclaim coverage under its policy “as soon as is reasonably possible” (Insurance Law § 3420[d]).⁴

⁴Utica’s claim that it had no duty to disclaim to Port-Land is moot, since Port-Land does not oppose Utica’s application to dismiss Port-Land’s cross-claims against Utica.

As stated by the First Department:

There is no objective standard against which the time it takes an insurer to issue its disclaimer can be measured. It is a fact-sensitive inquiry that is based upon all of the surrounding circumstances and focuses on the period between when the insurer first learned of the grounds for the disclaimer and finally served its written notice disclaiming coverage on the insured. However, there is no doubt that the insurer has an obligation to expedite the process and act promptly, and it bears the burden of justifying any ensuing delay.

(*Those Certain Underwriters at Lloyds, London v Gray*, 49 AD3d 1, 4, 856 NYS2d 1 [1st Dept 2007]).

Although there is no objective standard with which to measure the timeliness of an insurer's disclaimer, the First Department has suggested that the moment from which the timeliness of an insurer's disclaimer is measured is the date on which it first receives information that would disqualify the claim, not the date on which it receives the insured's notice of the claim (*2540 Assos. v Assicurazioni Generali*, 271 AD2d 282, 707 NYS2d 59 [1st Dept 2000]).

As to Utica's disclaimer to Everest, the record indicates that Everest's representative tendered the defense and indemnity of plaintiff to Port-Land on January 27, 2007. The tender letter states that Mr. Lopez was a Port-Land employee *and* that the Subcontract obligated Port-Land to defend and indemnify Bierzo. Utica was also provided the Summons and Complaint in the underlying action. In response, Utica's declination letter explains: "In UTC's letter, it is alleged that Erasmo Lopez was an employee of Port Land Construction at the time he was injured and that his injuries arose out of, and during the course of, that employment. Because the policy excludes injuries to employees . . . it will not provide coverage for the claims asserted . . ." There is no indication that Utica performed any additional inquiry as to the employee status of Mr. Lopez after its receipt of the tender letter and pleadings in the underlying action (*cf. LaBoutique NY, Inc. v Utica Ins. Co.*, 18 Misc 3d 1132 [Sup Ct New York County

2008] [where investigator was directed to obtain information with regard to injured's status as an employee, the investigation was completed on May 16, 2005, and the written disclaimer was issued on May 17, 2005, Utica's 29-day delay in disclaiming coverage was not unreasonable]). Nor does Utica's reply indicate that its subsequent investigation included verifying Mr. Lopez's employment status. Yet, Utica asserted that the Employee Exclusion applied to disclaim coverage. Thus, it appears that Utica had sufficient information to assert the Employee Exclusion upon receipt of the tender letter and accompanying pleadings in the underlying action (*see Squires v Robert Marini Builders Inc.*, 293 AD2d 808, 739 NYS2d 777 [3d Dept 2002]).

However, the Employee Exclusion was not the sole basis for Utica's disclaimer. The record indicates that upon receipt of UTC's letter, Utica immediately sought proof of the basis on which Everest's claim was made, *i.e.*, that plaintiff was an additional insured under the Utica Policy based upon a written contract between plaintiff and Portland. Utica therefore requested a copy of the Subcontract from UTC on two occasions, and did not receive it until March 14, 2007. The Subcontract was necessary to assess the veracity of Everest's claim that it was entitled to coverage pursuant to the Subcontract and to assess whether the Contractual Liability Exclusion applied. Utica then disclaimed coverage based on *both* Exclusions within 13 days thereafter.

It is reasonable for an insurer to investigate before deciding to disclaim (*Public Service Mut. Ins. Co. v Harlen Housing*, 7 AD3d 421, 777 NYS2d 438 [1st Dept 2004] *citing Norfolk & Dedham Mut. Fire Ins. Co. v Petrizzi*, 121 AD2d 276, 278, 503 NYS2d 51, *lv. denied* 68 NY2d 611, 510 NYS2d 1025; *Public Serv. Mut. Ins. Co. v Harlen Housing Assocs.*, 7 AD3d 421, 777 NYS2d 438 [1st Dept 2004] [disclaimer issued only 27 days after insurer learned of the grounds for disclaimer is reasonable]). This allows the disclaimer to be based on "concrete evidence"

(see *Mount Vernon Fire Ins. Co. v Harris*, 193 F Supp2d 674, 678) and avoids “piecemeal disclaimers” (see *2540 Assocs. v Assicurazioni Generali, S.p.A.*, 271 AD2d at 283-84; *Admiral Indem. Co. v Pancas Restaurant, Inc.*, 9 Misc 3d 1121, 862 NYS2d 806 [Sup Ct New York County, 2005] [Admiral's delay in issuing the disclaimer was reasonable, where Admiral could not come to its late notice of claim determination without an investigation of the accident, the legal events following thereafter and *all potential grounds* for disclaimers] [emphasis added]). Since Utica's investigation to assess the applicability of Contractual Liability Exclusion was warranted, it cannot be said that Utica's disclaimer was untimely as a matter of law, since “piecemeal” disclaimer are to be avoided (see *2540 Assocs. Inc. v Assicurazioni Generali, S.p.A.*, 271 AD2d at 284)[a matter of policy, reasonable investigation is preferable to piecemeal disclaimers]). Thus, Utica's account for this delay, *i.e.*, to avoid piecemeal disclaimers while investigating the Contractual Liability Exclusion, is reasonable.

Notwithstanding the fact that this Court found that the exclusion that necessitated the investigation was ambiguous, that does not operate to discount Utica's need to have investigated that exclusion in formulating its coverage position. Since the Employee Exclusion bars coverage for Mr. Lopez's injuries and resulting lawsuits under the Utica Policy, and Utica's disclaimer was timely as a matter of law, Utica's motion to dismiss the third-party action is granted.

Based on the foregoing, and the undisputed fact that Mr. Lopez was an employee of the Port-Land, discovery is unwarranted. Thus, Utica's request that the Court treat its motion as one for summary judgment pursuant to CPLR 3211(c) and declare, pursuant to CPLR §3001, that Utica is not obligated to indemnify Port-Land in the third-party action, and/or defend and indemnify plaintiff in the underlying action, is granted.

Conclusion

Based on the foregoing, it is hereby

ORDERED that the motion by Utica pursuant to New York Insurance Law 3420 and CPLR 3211(a)(1) and (7) to dismiss the third-party claim and all cross-claims asserted against it is granted; and it is further

ORDERED that the request by Utica that the Court treat its motion as one for summary judgment pursuant to CPLR 3211(c) and declare, pursuant to CPLR §3001, that Utica is not obligated to indemnify Port-Land in the third-party action, and/or defend and indemnify plaintiff in the underlying action is granted; it is further

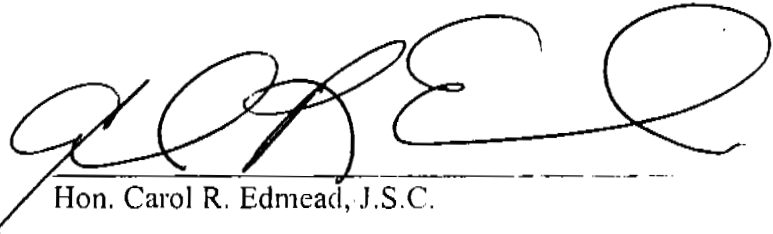
ORDERED and DECLARED that Utica is not obligated to indemnify Port-Land in the third-party action, and/or defend and indemnify plaintiff in the underlying action; and it is further

ORDERED that Utica serve a copy of this decision and order with notice of entry upon all parties within 20 days of entry; and it is further

ORDERED that the Clerk may enter judgment accordingly.

This constitutes the decision and order of the Court.

Dated: April 14, 2009


Hon. Carol R. Edmead, 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 141B).