

**Metropolitan 810 7th Ave. v Royal Indem.  
Co.**

2009 NY Slip Op 31051(U)

May 6, 2009

Supreme Court, New York County

Docket Number: 105462/06

Judge: Emily Jane Goodman

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

PRESENT: EMILY JANE GOODMAN

PART 17

Index Number : 105462/2006  
**METROPOLITAN 810 7TH AVENUE**  
 VS.  
**ROYAL INDEMNITY CO.**  
 SEQUENCE NUMBER : 002  
 SUMMARY JUDGMENT

INDEX NO. \_\_\_\_\_  
 MOTION DATE \_\_\_\_\_  
 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 \_\_\_\_\_

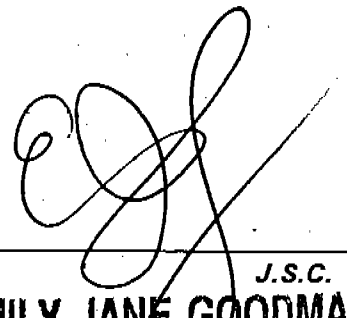
Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion *and all other motions*  
*are decided per attached*

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

**UNFILED JUDGMENT**  
 This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Dated: 5/6/09



J.S.C.  
**EMILY JANE GOODMAN**

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: IAS PART 17

-----X

METROPOLITAN 810 7<sup>TH</sup> AVENUE, 810 7<sup>TH</sup> AVE GP,  
LLC, 810 7<sup>TH</sup> AVE L.P., METROPOLITAN  
PARTNERS, LLC, METROPOLITAN OPERATING  
PARTNERSHIP, L.P., RECKSON ASSOCIATES  
REALTY CORP., and DIAMOND STATE INSURANCE  
COMPANY,

Plaintiffs,

Index No. 105462/06

-against-

ROYAL INDEMNITY COMPANY,

**UNFILED JUDGMENT**

**This judgment has not been entered by the County Clerk  
and notice of entry cannot be served hereon. To  
obtain entry, counsel or authorized representative must  
appear in person at the Judgment Clerk's Desk (Room  
141B).**

EMILY JANE GOODMAN, J.S.C.:

Defendant Royal Indemnity Company, now known as Arrowood  
Indemnity Company (Arrowood), moves, pursuant to CPLR 3212, for  
summary judgment dismissing the complaint and a declaration that  
the insurance contract entered into between Arrowood and nonparty  
New York Elevator does not obligate Arrowood to defend or  
indemnify any of the plaintiffs in the underlying personal injury  
action, or to reimburse plaintiff Diamond State Insurance Company  
for defense costs in that action. Plaintiffs cross-move for  
summary judgment on the issue of coverage.

FACTS

Plaintiffs Metropolitan 810 7<sup>th</sup> Avenue, 810 7<sup>th</sup> Ave GP, LLC,  
810 7<sup>th</sup> Avenue L.P., Metropolitan Partners, LLC, Metropolitan  
Operating Partnership, L.P. (collectively, the Metropolitan

Entities) and Reckson Associates Realty Corp. (Reckson) commenced this action seeking a declaration that they are additional insureds under an insurance policy issued to New York Elevator by Arrowood. Reckson and the Metropolitan Entities are defendants in an underlying personal injury action, commenced by Donald Miller (Miller), an employee of New York Elevator. *Miller v Metropolitan 810 7<sup>th</sup> Avenue, LLC*, index No. 101342/03, Sup Ct, NY County. Plaintiff Diamond State Insurance Company (Diamond) has been defending Reckson and the Metropolitan Entities in the underlying action. Miller was allegedly injured while performing work on an elevator located at 810 7<sup>th</sup> Avenue, New York, New York, on May 19, 2000. Reckson contracted with New York Elevator to perform the work on the elevators. Arrowood issued a general liability insurance policy to New York Elevator, which was allegedly in effect at the time of Miller's accident. Reckson and the Metropolitan Entities claim that they are entitled to additional insured status under the policy, pursuant to the terms of a contract between Reckson and New York Elevator.

At the time of the accident, according to the evidence in the underlying action, Miller was performing work for New York Elevator under the elevator modernization project contract. See Miller deposition tr., at 10, 18-21, 30-31, 187; Duthie affid., ¶ 8; Duggan affid., ¶ 5. Plaintiffs also acknowledged that Miller was doing work under the elevator modernization agreement dated

October 28, 1999, in their response to interrogatory number 2. The evidence further demonstrates that Metropolitan 810 7<sup>th</sup> Avenue, LLC was the sole owner of the building at the time of the accident. Duthie affid., ¶ 3; Duthie dep., at 9; interrogatory response number 11.

The Arrowood insurance policy provides that it will cover any entity for which the named insured is obligated to provide coverage under the terms of a written contract. In other words, if New York Elevator had a written contract that required it to provide coverage for plaintiffs, the Arrowood policy would cover them. Arrowood Policy, Additional Endorsement, Ex. J to Notice of Motion.

The certificate of insurance appears to name Metropolitan 810 7<sup>th</sup> Avenue, LLC and Metropolitan Operating Partnership, LLC and their affiliated or subsidiary companies as additional insureds, and Metropolitan 810 7<sup>th</sup> Avenue, LLC c/o Reckson as certificate holders. The certificate of insurance was issued on April 4, 2003, almost three years after the accident occurred, but refers to policies which were in effect 7/1/99 through 10/01/2000. The certificate provides that it is for information only and does not confer any rights upon the certificate holder, or amend, extend or alter the coverage provided by the policies. It further provides that it covers the additional insureds "only to the extent required by written contract and only to the extent

that coverage is afforded under these policies." Notice of Cross Motion, Ex. B, at 3.

Plaintiffs include a copy of the "Maintenance Contract and Specifications for the Vertical Transportation System at 810 Seventh Avenue, New York, New York 10019." Notice of Cross Motion, Ex. C. It appears that New York Elevator entered into two contracts regarding the elevators. One was for the modernization of the elevators, the other for the maintenance. Plaintiffs do not dispute that Miller was involved in modernization work when he was injured. Therefore, the specifications regarding maintenance are irrelevant to the inquiry before the court. Only those relating to the modernization project will be discussed.

#### DISCUSSION

Arrowood contends that its policy does not provide additional insured coverage for any of plaintiffs, because they are not named as additional insureds, and do not meet the requirement under the policy of being included by virtue of a written contract or agreement that requires their being included as additional insureds. Plaintiffs maintain that they are included, because the specifications for the work include such a requirement, and New York Elevator was bound by the terms of the specifications.

A party seeking insurance coverage bears the burden of

proving that is entitled to coverage. *Tribeca Broadway Assoc. v Mount Vernon Fire Ins. Co.*, 5 AD3d 198, 200 (1<sup>st</sup> Dept 2004).

Furthermore, a construction contract is not construed to require additional insured coverage unless that requirement is expressly and specifically stated. *Trapani v 10 Arial Way Assoc.*, 301 AD2d 644 (2d Dept 2003). Thus, in order to prove their entitlement to coverage, under the terms of the insurance policy, plaintiffs must demonstrate that they entered into a written agreement with New York Elevator which required New York Elevator to procure insurance naming them as additional insureds.

The modernization contract between New York Elevator and Reckson (the contract) provides, under Article I, (entitled THE WORK OF THIS CONTRACT) that New York Elevator would "execute the entire Work described in the Contract Documents." Directly underneath is the statement "Refer to Joe Neto & Associates specifications including alternate 2, 3 & 4." Notice of Motion, Ex. D., Article 1. Notably, the contract does not state that New York Elevator is bound by all the terms of the specifications, but only that it is responsible for the work described therein. The contract also contains a separate provision regarding insurance requirements. See *id.*, Article 17. However, the contract does not require New York Elevator to name the owner or any other entity as a named insured under its policy. *Id.*

The specifications document that is referred to includes a

"General Conditions" section, a "Schedule of Required Insurance" section (stating that "owner of building to be named as an additional insured"), an "Equipment Description" section, a "Scope of Work" section, a "Performance Requirements" section, and an "Alternates" section. Reply Affirm., Ex. B. In view of the contract specifying that New York Elevator was responsible for the work described in the specifications, rather than all of the terms of those specifications, there is no reason to construe the contract to include the insurance requirements stated in the "Schedule of Required Insurance." Had the parties intended the insurance requirements of the specifications to apply, they could easily have provided for that in the contract. The limitation in the contract, referring only to the work required by the specifications, combined with the stated insurance requirements included in the contract, lead to the conclusion that New York Elevator was not required to obtain insurance that would include the Metropolitan Entities as additional insureds.

Consequently, Arrowood is entitled to a declaration that it is not obligated to defend or indemnify any of the plaintiffs in the underlying personal injury action, nor is it obligated to reimburse plaintiff Diamond for defense costs in that action. In view of this outcome, it is unnecessary for the court to consider the parties' alternate arguments.

#### CONCLUSION

Accordingly, it is hereby

ORDERED that defendant's motion for summary judgment is granted, and the complaint is dismissed with costs and disbursements to defendant as taxed by the Clerk of the Court upon the submission of an appropriate bill of costs; and it is further

ORDERED that plaintiffs' cross motion for summary judgment on the issue of liability is denied; and it is further

ADJUDGED AND DECLARED that defendant Royal Indemnity Company, now known as Arrowood Indemnity Company, has no obligation to defend or indemnify any of the plaintiffs in the underlying personal injury action, *Miller v Metropolitan 810 7<sup>th</sup> Avenue, LLC*, index No. 101342/03, Sup Ct, NY County, or to reimburse plaintiff Diamond State Insurance Company for defense costs incurred in the defense of that action; and it is further  
**This Constitutes the Decision, Order and Judgment of the Court.**

Dated: May 6, 2009

ENTER:



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