Bovis Lend Lease LMB, Inc. v Lexington Ins. Co.
2009 NY Slip Op 31215(U)
June 2, 2009
Supreme Court, New York County
Docket Number: 114269/06
Judge: Carol R. Edmead
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SCANNED ON 6/5/2009

[* 1]

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

PRESENT: HON. CAROL EDMEAD PART 35
Justice

Bovis Lend Lease LMB Inc., et al

INDEX NO. 114269/06

MOTION DATE

- v -

MOTION SEQ. NO. 002

Lexington Insurance Company

MOTION CAL. NO.

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

PAPERS NUMBERED

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

Answering Affidavits — Exhibits

Replying Affidavits

Cross-Motion: ☑ Yes

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).

Upon the foregoing papers, it is ordered that this motion

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

The instant motion and cross motion are decided in accordance with the annexed Memorandum Decision. It is hereby

ORDERED that the motion (sequence number 002) of plaintiffs Bovis Lend Lease LMB, Inc., the City of New York, and Zurich American Insurance Company for summary judgment is granted only as to the duty to defend and indemnify under the umbrella policy upon exhaustion of the primary policy up to $4 million and as to reimbursement of attorneys' fees and costs expended by Bovis and Zurich in defending the underlying action, and is otherwise denied; and it is further

ADJUDGED and DECLARED that defendant Lexington Insurance Company is obligated to defend and indemnify plaintiffs Bovis Lend Lease LMB, Inc. and the City of New York in the action styled *Rawlings v City of New York*, filed in Supreme Court, Kings County, under Index No. 14774/06, pursuant to the umbrella policy issued to Atlantic Heydt Corporation (Policy No. 7021909), upon exhaustion of the primary policy, up to $4 million; and it is further

ADJUDGED and DECLARED that defendant Lexington Insurance Company is obligated to reimburse litigation expenses, including reasonable attorney's fees, incurred in defending the underlying action in excess of the $100,000 self-insured retention; and it is further

Dated: ______ ______ J.S.C.

Check one: ☐ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

ORDERED that the parties are directed to confer as to the amount of defense costs, and if they cannot agree, either party shall make an application to the court for a determination of the amount to be awarded as reimbursement for such fees; and it is further

ORDERED that the cross motion of defendant Lexington Insurance Company is denied; and it is further

ORDERED that plaintiffs Bovis Lend Lease LMB, Inc. and the City of New York are permitted to select counsel for their defense in the underlying action; and it is further

ORDERED that counsel for plaintiffs shall serve a copy of this order with notice of entry within twenty days of entry on all counsel.

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 6/2/09   ENTER: ________, J.S.C.

HON. CAROL EDMEAD

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 35
---X
BOVIS LEND LEASE LMB, INC., THE CITY OF NEW YORK and ZURICH AMERICAN INSURANCE COMPANY,

Plaintiffs,

-against-

Index No. 114269/06

LEXINGTON INSURANCE COMPANY
(*related to an underlying action entitled Rawlings v. The City of New York, et al.*),

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

MEMORANDUM DECISION

This is a declaratory judgment action for defense and indemnification with respect to an action arising out of a construction site accident, entitled *Rawlings v City of New York*, filed in Supreme Court, Kings County, under Index No. 14774/06 (hereinafter, the *Rawlings* or underlying action).

Plaintiffs Bovis Lend Lease LMB, Inc. (Bovis), the City of New York (the City), and Zurich American Insurance Company (Zurich) move, pursuant to CPLR 3212, for summary judgment: (a) declaring that, upon exhaustion of the $100,000 self-insured retention of the primary policy, defendant Lexington Insurance Company is obligated to defend and indemnify Bovis and the City in the underlying action pursuant to the primary and umbrella policies issued to Atlantic-Heydt Corporation; and (b) declaring that defendant must reimburse any attorneys' fees and costs expended by Bovis and Zurich in defending the underlying action in excess of the $100,000 self-insured retention. Plaintiffs also move for an order, to the extent that the $100,000

self-insured retention is exhausted, setting the matter down for an inquest to hear and determine the amount of legal fees that defendant is obligated to pay to Bovis and Zurich to reimburse them for legal fees and disbursements heretofore paid by Bovis and Zurich, but which are, in fact, owed by defendant.

Defendant cross-moves for an order: (a) compelling Bovis and the City to transfer their defense in the underlying action to the law firm of French & Rafter, LLP; or alternatively (b) determining that Bovis and the City have waived their right to coverage under the policies.

BACKGROUND

This action arises out of an accident that occurred on November 9, 2005, at a construction project at Brooklyn Borough Hall, located at 209 Joralemon Street, Brooklyn, New York. Bernard Rawlings, an employee of Atlantic-Heydt Corporation (Atlantic), allegedly fell approximately 12 feet while removing and/or dismantling a temporary roof truss at the project. Rawlings claims that he fractured two vertebra as a result of the accident. Rawlings and his wife thereafter commenced an action against Bovis and the City, seeking recovery pursuant to Labor Law §§ 200, 240 (1), 241 (6) and for common-law negligence. The City and Bovis subsequently impleaded Atlantic for contractual and common-law indemnification.

The City is the owner of the property in question. The City, acting through its Department of Citywide Administrative Services, hired Bovis as a construction manager on the project. Bovis, in turn, entered into a trade contract with Atlantic to perform temporary roof work on the project.[1]

[1]Bovis obtained a commercial general liability insurance policy from Zurich. Zurich is currently providing coverage to Bovis, as a named insured, and the City, as Bovis's indemnitee, and is currently defending Bovis and the City in the *Rawlings* action.

The Trade Contract and Policies

Under the trade contract, Atlantic was required to procure commercial general liability (CGL) insurance as follows:

> "Commercial General Liability ("CGL") with a combined single limit for Bodily Injury, Personal Injury and Property Damage of at least $5,000,000 per occurrence and aggregate. The general aggregate limit shall apply on a per project basis. The limit may be provided through a combination of primary and umbrella/excess liability policies."

(Sabillon Affirm., Exh. E). Atlantic was also required to name Bovis and the City as additional insureds, and the coverage was to be primary to any coverage procured by Bovis and the City (*id.*).

Atlantic purchased a primary CGL policy (Policy No. 7365462) with an "each occurrence limit" of $1 million and general aggregate limit of $2 million from defendant (*id.*, Exh. L, Declarations Page). Coverage under the primary policy is subject to a $100,000 self-insured retention (*id.*, Endorsement #001). Atlantic also purchased an umbrella liability policy (Policy No. 7021909) which had a per occurrence limit of $10 million "in excess of (1) the amount covered under the underlying insurance (which is defined to include the primary policy), or (2) $100,000 ultimate net loss in respect of each occurrence not covered by said underlying insurance" (*id.*, Exh. M, Declarations Page). Both policies were effective from July 31, 2005 through August 1, 2006 (*id.*, Exhs. L, M, Declarations Pages).

The primary policy provides as follows:

> "We will pay those sums that the insured becomes legally obligated to pay as damages because of 'bodily injury' or 'property damage' to which this insurance applies. We will have the right and duty to defend against any 'suit' seeking those damages."

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(*id.*, Exh. L, § I [A] [1] [a]).

An endorsement naming Bovis and the City as additional insureds provides as follows:

"**SCHEDULE**
Name of Person or Organization

A. **Section II-Who is an Insured** is amended to include as an insured the person or organization shown in the Schedule, but only with respect to liability arising out of your ongoing operations performed for that insured."

(*id.*, Exh. L, Endorsement # 005).

The primary policy also contains the following provision:

"4. Other Insurance

a. Primary Insurance
This insurance is primary except when b. Excess Insurance, below, applies. If this insurance is primary, our obligations are not affected unless any other insurance is also primary. . .

b. Excess Insurance
This insurance is excess over:

(1) Any other insurance whether primary, excess, contingent or on any other basis:

(a) That is Fire, Extended Coverage, Builder's Risk, Installation Risk or similar coverage for "your work";

(b) That is Fire insurance for premises rented to you or temporarily occupied by you with permission of the owner;

(c) That is insurance purchased by you to cover your liability as a tenant for "property damage" to premises rented to you or temporarily occupied by you or with permission of the owner; or

(d) If the loss arises out of the maintenance or use of the aircraft, "autos" or watercraft to extent not subject to Exclusion g. of Section I- COVERAGES,

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COVERAGE A. BODILY INJURY AND PROPERTY DAMAGE LIABILITY.

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

(*id.*, § V [4]).

The umbrella policy states that "Persons insured" means, among other things:

> "Any person, organization, trustee or estate to whom or to which the Named Insured is obligated by virtue of a written contract to provide insurance such as is afforded by this policy, but only with respect to operations conducted by the Named Insured or on the Named Insured's behalf or to the facilities of or used by the Named Insured. The Insurance extended by this definition shall in no event be broader in scope or limits than the obligation imposed upon the Named Insured by the written contract."

(*id.*, Exh. M, Definitions- ¶ 7 [d]).

By letters dated November 28, 2005 and June 28, 2006, the City demanded that defendant assume its defense, and demanded indemnification from defendant pertaining to the claims in the underlying action (*id.*, Exh. G). By letter dated June 7, 2006, Zurich, on behalf of Bovis and the City, also demanded defense and indemnification from Atlantic and defendant (*id.*, Exh. H). However, defendant never responded to these formal demands. This action ensued.

THE PARTIES' CONTENTIONS

In support of their motion for summary judgment, plaintiffs argue that they are entitled to defense and indemnification because the claims in the *Rawlings* action "arise out of" Atlantic's ongoing operations. Additionally, plaintiffs contend that defendant's policies are primary to Bovis and the City's own coverage.

Defendant contends, in opposition to the motion and in support of its own cross motion,

that this action, and plaintiff's motion, are moot. In the underlying action, the court granted a motion by Bovis and the City for contractual defense and indemnification over and against Atlantic pursuant to the terms of the trade contract (Fishman Affirm., Exh. D, at 13-15). Defendant maintains that, thereafter, by letter dated October 8, 2008, it acknowledged that Bovis and the City are additional insureds under the primary policy, and agreed to defend Bovis and the City without any reservation of rights under the primary policy (*id.*, Exh. A). In that letter, defendant designated the law firm French & Rafter, LLP (French & Rafter)[2], to defend Bovis and the City in the underlying action, and requested that plaintiffs' counsel provide unredacted copies of invoices pertaining to defense costs incurred on behalf of Bovis and the City so that they could be reviewed and processed for payment (*id.*). The letter indicated that Atlantic tendered the balance of the self-insured retention to defendant (*id.*).

Defendant further contends that it conceded, in a letter dated October 28, 2008, that Bovis and the City are additional insureds under the umbrella policy, but only up to a limit of $4 million per occurrence, based upon the definition of "persons insured" in the umbrella policy (*id.*, Exh. B). Since the trade contract only obligated Atlantic to procure insurance with limits of $5 million, defendant's obligation to Bovis and the City is limited to the $1 million limits of the primary policy, plus $4 million of the limits of the umbrella policy (*id.*). According to defendant, Bovis and the City do not contend that defendant's coverage analysis is incorrect, but rather, by letter dated November 13, 2008, advised defendant that plaintiffs' counsel will not relinquish its representation of Bovis and the City, because the *Rawlings* plaintiffs made a settlement demand in excess of $5 million (*id.*, Exh. C). Moreover, as argued by defendant, plaintiffs' counsel does

[2]French & Rafter also represents defendant in this action.

not claim that there is a conflict which would require defendant to obtain separate counsel for Bovis and the City (*id.*). Defendant argues that if plaintiffs continue to refuse to transfer their defense, they should be deemed to be in violation of the policies, and, therefore, should not be entitled to coverage thereunder.

In reply and in opposition to the cross motion, plaintiffs state that, by letters dated November 13th and December 17th, 2008, they advised defendant that they would not transfer their defense to defendant's assigned counsel because of a conflict of interest (Sabillon Affirm. in Reply, Exh. E). Defendant fails to point out that French & Rafter represents Atlantic in the underlying action. Plaintiffs contend that conflicts of interests exist because: (1) defendant is seeking to minimize its covered liabilities, while plaintiffs are seeking to obtain as much coverage as possible; (2) if the *Rawlings* plaintiffs obtain a judgment in excess of $5 million, French & Rafter would be required to seek contractual indemnification from its own client, Atlantic; and (3) French & Rafter has sought to sever the underlying third-party action from the main action, and Bovis opposes severance (Portela Affirm., ¶ 8). Plaintiffs argue that, because of the conflicts of interests, Bovis and the City have the right to be defended by counsel of Bovis's choosing, and Bovis wishes to continue with its own counsel (*id.*, ¶¶ 10, 11). They also request a declaration that defendant be required to satisfy any verdict or judgment against Bovis or the City up to the $10 million umbrella policy limits, or alternatively, that non-conflicted counsel be designated to aggressively pursue the award of contractual indemnity in the underlying action against Atlantic. Finally, plaintiffs contend that defendant has failed to establish that they breached their duty to cooperate. In this regard, plaintiffs point out that they agreed to transfer their defense to French & Rafter, if defendant offered the entire $10 million umbrella policy, and

also suggested that defendant select non-conflicted counsel for the defense of the underlying action (*id.*, ¶ 12).

DISCUSSION

"'The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case'" (*Santiago v Filstein*, 35 AD3d 184, 185-186 [1st Dept 2006], quoting *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Once this showing has been made, the burden shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact" (*Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006]). "[T]he court's role is solely to determine if any triable issues exist, not to determine the merits of any such issues" (*F. Garofalo Elec. Co. v New York Univ.*, 300 AD2d 186, 188 [1st Dept 2002], citing *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, *rearg denied* 3 NY2d 941 [1957]).

As noted above, in letters dated October 8th and 28th, 2008, defendant has conceded that Bovis and the City are additional insureds under both the primary and umbrella policies (Fishman Affirm., Exhs. A, B). Defendant also agreed to defend and indemnify Bovis and the City without any reservation of rights under the primary policy (*id.*). Additionally, defendant conceded that Bovis and the City are additional insureds up to a limit of $4 million per occurrence under the umbrella policy (*id.*).

CPLR 3001 authorizes a court to declare "the rights and other legal relations of the parties to a justiciable controversy." As noted by the First Department, however, "the courts are not empowered to render advisory opinions, or determine abstract, moot, hypothetical, remote or

academic questions" (*Matter of Ideal Mut. Ins. Co.*, 174 AD2d 420, 421 [1st Dept 1991] [internal quotation marks and citation omitted]; *see also* Siegel, NY Prac § 436, at 706 [3d ed]). Here, defendant has agreed to defend and indemnify Bovis and the City under the primary policy. Therefore, plaintiffs' motion for such a declaration is now moot.

With respect to the umbrella policy, it is well settled that an insurer's duty to defend and indemnify its insured under an umbrella or excess policy is triggered only upon exhaustion of the primary policy (*see General Motors Acceptance Corp. v Nationwide Ins. Co.*, 4 NY3d 451, 456 [2005]). Defendant has conceded that Bovis and the City are additional insureds up to $4 million, based upon the definition of "persons insured" in the umbrella policy. Where the terms of an insurance contract are clear and unambiguous, they must be given their plain and ordinary meaning, and the interpretation of such terms is an issue of law for the court (*see City of New York v Continental Cas. Co.*, 27 AD3d 28, 31 [1st Dept 2005]; *see also Broad St., LLC v Gulf Ins. Co.*, 37 AD3d 126, 131 [1st Dept 2006], quoting *Breed v Insurance Co. of N. Am.*, 46 NY2d 351, 355 [1978], *rearg denied* 46 NY2d 940 [1979] ["contract is unambiguous if the language has 'a definite and precise meaning, unattended by danger of misconception in the purport of the [agreement] itself, and concerning which there is no reasonable basis for a difference of opinion'"]). Pursuant to the umbrella policy, "[t]he Insurance extended by this definition shall in no event be broader in scope or *limits* than the obligation imposed upon the Named Insured by the written contract" (Sabillon Affirm., Exh. M, Definitions- ¶ 7 [d] [emphasis supplied]). Given that the trade contract only required that Atlantic procure CGL insurance of $5 million (*id.*, Exh. E), plaintiffs are only entitled to defense and indemnification up to $4 million under the umbrella policy (since the primary policy has a limit of $1 million). Accordingly, plaintiffs are entitled to

a declaration that defendant is obligated to defend and indemnify Bovis and the City under the umbrella policy up to $4 million, upon exhaustion of the primary policy. Where, as here, an insurer has a duty to defend its insured, the insurer is obligated to reimburse its insured for legal fees incurred in the insured's defense of the underlying action (*see Serio v Public Serv. Mut. Ins. Co.*, 7 AD3d 277, 279 [1st Dept 2004]; *ACP Servs. Corp. v St. Paul Fire & Mar. Ins. Co.*, 224 AD2d 961, 963 [4th Dept 1996]). If the parties cannot agree on defense costs, either party shall make an application to the court to set a reasonable amount of such fees.

Therefore, the issue is whether Bovis and the City (the insureds), on the one hand, or defendant (the insurer), on the other hand, has the right to control the defense and select counsel. "'As a general rule, a liability insurer has the right to control the defense of underlying litigation against its insured based on the right of the insurer to protect its financial interests'" (*Staats v Wegmans Food Mkts., Inc.*, 48 AD3d 1115, 1116 [4th Dept 2008], quoting *Ottaviano v Genex Coop., Inc.*, 15 AD3d 924, 925 [4th Dept 2005]). However, when conflicts of interest between the insurer and the insured arise, such that a question as to the loyalty to that insured is raised, the insured is entitled to select its own counsel, with reasonable fees to be paid by the insurer (*see Prashker v United States Guar. Co.*, 1 NY2d 584, 593 [1956]; *Ladner v American Home Assur. Co.*, 201 AD2d 302, 304 [1st Dept 1994] ["When a conflict of interest exists between an insured and the insurer which is obligated to defend, the remedy is to permit the insured to select defense counsel, with the reasonable cost of the defense to be borne by the insurer"]; *Nelson Elec. Contr. Corp. v Transcontinental Ins. Co.*, 231 AD2d 207, 209-210 [3d Dept], *lv denied* 91 NY2d 802 [1997] ["Where, as here, the interests of the insured are at odds with those of its insurer, the former is entitled to select independent counsel to conduct the defense so that, *inter alia*, tactical

decisions will 'be in the hands of an attorney whose loyalty to [the insured] is unquestioned'"] [citations omitted]). "Inherent in this rule is the axiom that when such a conflict exists, the interests of the insured are paramount" (*id.* at 210).

Given the existence of actual and potential conflicts of interests, Bovis and the City are entitled to defense counsel of their choosing. First, if the *Rawlings* plaintiffs obtain a judgment or settlement in excess of $5 million, French & Rafter would be required to seek contractual indemnification from its own client, Atlantic (*see Ottaviano*, 15 AD3d at 925 [conflict of interest existed between owner and worker's employer, which was contractually obligated to indemnify owner for its liability to the injured worker]). Second, Atlantic also has different strategies in how the underlying action should be defended. As pointed out by plaintiffs, Atlantic has sought to sever the underlying third-party action from the main action. Bovis is averse to doing so, and wishes to have one judgment in one action (Portela Affirm., ¶¶ 8, 9). That Bovis, the City, and Atlantic are united in attempting to defeat the *Rawlings* plaintiffs' claims does not negate the conflict (*see 69th St. & 2nd Ave. Garage Assoc. v Ticor Tit. Guar. Co.*, 207 AD2d 225, 227 [1st Dept], *lv denied* 87 NY2d 802 [1995] [while both parties had the same interest in defeating the claim, there were divergent interests in how to proceed]).

Defendant contends that plaintiffs have breached their duty of cooperation by failing to transfer their defense to French & Rafter. In order to establish a failure to cooperate, an insurer must establish the following: (1) it acted diligently in seeking to bring about the insured's cooperation; (2) that its efforts were reasonably calculated to obtain the insured's cooperation; and (3) that the attitude of the insured, after cooperation was sought, was one of "willful and avowed obstruction" (*City of New York*, 27 AD3d at 32; *Matter of New York Cent. Mut. Fire Ins.*

Co. (Salomon), 11 AD3d 315, 316 [1st Dept 2004]). The burden of proving a lack of cooperation is a "heavy one" (*Thrasher v United States Liab. Ins. Co.*, 19 NY2d 159, 168 [1967]). With respect to the third element, the facts must support an inference that the failure to cooperate was deliberate (*Matter of State Farm Indem. Co. v Moore*, 58 AD3d 429, 430 [1st Dept 2009]; *Matter of Liberty Mut. Ins. Co. v Roland-Staine*, 21 AD3d 771, 773 [1st Dept 2005]; *Matter of New York Cent. Mut. Fire Ins. Co. (Salomon)*, 11 AD3d at 316). Mere inaction by the insured is insufficient (*Matter of Liberty Mut. Ins. Co.*, 21 AD3d at 773).

The reasoning of the Third Department in *Nelson* (231 AD2d at 210) is instructive here:

> "To hold, as defendant urges, that counsel, having been employed for the very purpose of safeguarding the interests of the insured, must nonetheless obtain the insurer's consent before pursuing a course of action tailored to serve that end, or risk a loss of coverage for failure to cooperate, would be untenable; it would effectively enable the insurer to take control of the defense and subordinate the insured's interests to its own. This would not only defeat the purpose of assigning independent counsel, it would pose an ethical dilemma for the insured's attorney, who, being bound to exercise professional judgment solely on behalf of the client *** disregard[ing] the desires of others that might impair the lawyer's free judgment, cannot permit the insurer to direct or regulate his or her professional judgment in rendering such legal services."

(internal quotation marks and citations omitted; *see also City of New York v Clarendon Natl. Ins. Co.*, 309 AD2d 779 [2d Dept 2003] [insurer wrongfully disclaimed coverage for failure to cooperate when the City rejected insurer's choice of counsel due to a conflict of interest]).

Here, defendant has not submitted any evidence to establish that Bovis and the City breached their duty of cooperation. In any event, Bovis and the City contend here that they have not sought to obstruct the defense of the underlying action, but have merely sought to protect their own interests by declining to transfer their defense to French & Rafter (Portela Affirm., ¶ 12). Bovis and the City also note that, in order to resolve the matter, they notified defendant that

they would be amenable to having French & Rafter represent them if defendant offered the entire $10 million umbrella policy, and also suggested as an alternative that defendant retain non-conflicted counsel for their defense in the underlying action. Therefore, it cannot be said that defendant is relieved of its coverage obligations. Defendant's cross motion must, therefore, be denied.

CONCLUSION, ORDER AND JUDGMENT

Accordingly, it is

ORDERED that the motion (sequence number 002) of plaintiffs Bovis Lend Lease LMB, Inc., the City of New York, and Zurich American Insurance Company for summary judgment is granted only as to the duty to defend and indemnify under the umbrella policy upon exhaustion of the primary policy up to $4 million and as to reimbursement of attorneys' fees and costs expended by Bovis and Zurich in defending the underlying action, and is otherwise denied; and it is further

ADJUDGED and DECLARED that defendant Lexington Insurance Company is obligated to defend and indemnify plaintiffs Bovis Lend Lease LMB, Inc. and the City of New York in the action styled *Rawlings v City of New York*, filed in Supreme Court, Kings County, under Index No. 14774/06, pursuant to the umbrella policy issued to Atlantic Heydt Corporation (Policy No. 7021909), upon exhaustion of the primary policy, up to $4 million; and it is further

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ORDERED that the parties are directed to confer as to the amount of defense costs, and if

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ORDERED that the cross motion of defendant Lexington Insurance Company is denied; and it is further

ORDERED that plaintiffs Bovis Lend Lease LMB, Inc. and the City of New York are permitted to select counsel for their defense in the underlying action; and it is further

ORDERED that counsel for plaintiffs shall serve a copy of this order with notice of entry within twenty days of entry on all counsel.

Dated: June 2, 2009

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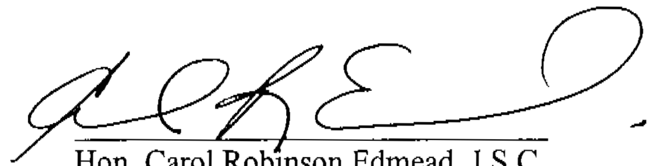

Hon. Carol Robinson Edmead, J.S.C.

HON. CAROL EDMEAD