

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

2009 NY Slip Op 32349(U)

October 9, 2009

Supreme Court, New York County

Docket Number: 113011/07

Judge: Carol R. Edmead

Republished from New York State Unified Court  
System's E-Courts Service.

Search E-Courts (<http://www.nycourts.gov/ecourts>) for  
any additional information on this case.

This opinion is uncorrected and not selected for official  
publication.

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

PRESENT: **HON. CAROL EDMEAD**

PART 35

Index Number : 113011/2007  
**BIERZO CONSTRUCTION**  
VS.  
**EVEREST NATIONAL INSURANCE**  
SEQUENCE NUMBER : 004  
SUMMARY JUDGMENT

INDEX NO. \_\_\_\_\_  
MOTION DATE 9/18/09  
MOTION SEQ. NO. 004  
MOTION CAL. NO. \_\_\_\_\_

in this motion to/for \_\_\_\_\_

PAPERS NUMBERED \_\_\_\_\_

Notice of Motion/ Order to Show Cause ~~with~~ Affidavits — Exhibits  
Answering Affidavits — Exhibits \_\_\_\_\_  
Replying Affidavits \_\_\_\_\_

**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).

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

Based on the accompanying Memorandum Decision, it is hereby

ORDERED that the motion by defendant/third-party plaintiff Everest National Insurance Company for summary judgment dismissing the Complaint and declaring that Everest is not obligated to defend and indemnify plaintiff Bierzo Construction Corporation for the underlying action for wrongful death is granted; and it is further


ORDERED and DECLARED that Everest National Insurance Company is not obligated to defend and indemnify plaintiff Bierzo Construction Corporation for the action entitled *Gloria Anjelica Barajas, et al. v Bierzo Construction Corp., 765 Amsterdam Housing Corp. and Samson Management LLC and 765 Amsterdam Housing Corp. and Samson Management LLC v Port-Land Construction Corp.*, bearing Index No. 17068/2007 in Supreme Court, Bronx County; and it is further

ORDERED that Everest National Insurance Company serve a copy of this 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: 10/09/09

  
**HON. CAROL EDMEAD** J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

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

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

-----X  
BIERZO CONSTRUCTION CORPORATION,

Index No. 113011/07

Plaintiff,

-against-

THE EVEREST NATIONAL INSURANCE COMPANY,

Defendant.

-----X  
EVEREST NATIONAL INSURANCE COMPANY,

Third-Party Plaintiff,

Third-Party Index No.  
590785/08

-against-

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

Third-Party Defendants.

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

MEMORANDUM DECISION

In this insurance declaratory judgment action, defendant/third-party plaintiff Everest National Insurance Company ("Everest") moves for summary judgment dismissing the Complaint and declaring that Everest is not obligated to defend and indemnify plaintiff Bierzo Construction Corporation ("Bierzo") for the underlying wrongful death action (the "underlying action").<sup>1</sup>

---

<sup>1</sup> The underlying action is entitled *Gloria Anjelica Barajas, et al. v Bierzo Construction Corp., 765 Amsterdam Housing Corp. and Samson Management LLC and 765 Amsterdam Housing Corp. and Samson Management LLC v Port-Land Construction Corp.*, Index No. 17068/2007 and is currently pending in Supreme Court, Bronx County.

[\* 3]

*Factual Background*

Samson Management LLC ("Samson") hired Bierzo as contractor to perform work at 765 Amsterdam Avenue, New York, New York (the "premises"), which were owned by Amsterdam Housing Corp. Bierzo obtained a liability insurance policy from Everest (the "Everest Policy"). Thereafter, Bierzo and Port-Land entered into a subcontract agreement (the "Subcontract") for Port-Land to perform work at the premises. On October 7, 2006, Erasmo Sanchez, an employee of Port-Land, was involved in a workplace accident at the premises and an action against, *inter alia*, Bierzo and Port-Land ensued.

Bierzo then commenced this declaratory action against its insurer Everest for defense and indemnification in connection with the underlying action. In turn, Everest commenced a third-party action against Port-Land for contractual indemnification against any judgment against Everest, and against Port-Land's liability insurer, Utica First Insurance Company ("Utica First") for additional insured status under Utica's policy with Port-Land, and a declaration that Utica First is obligated to indemnify Port-Land for the full amount of any judgment that Port-Land is obligated to indemnify Everest.<sup>2</sup>

*Everest's Motion*

Everest contends that upon receipt of notice of the October 7, 2006 accident, Everest, by its claims adjusting service, UTC Risk Management Services, Inc. ("UTC") began an investigation into the accident. By letter, dated April 26, 2007, UTC, on Everest's behalf, disclaimed coverage to Bierzo pursuant to the exclusion entitled "Injury and Liability Resulting

---

<sup>2</sup> Although Port-Land is a third-party defendant, and has appeared in the underlying action, Port-Land did not appear in this action; as such, by Order dated February 4, 2009, this Court granted a default judgment in favor of Everest and against Port-Land.

[\* 4]

From or Caused by the Work of a Contractor, Subcontractor and/or Sub-Subcontractor Including Without Limitation Injuries to the Employee of a Contractor, Subcontractor and/or Sub-Subcontractor" contained in the Everest Policy (the "Subcontractor Exclusion"). Everest contends that the Subcontractor Exclusion provides in Section A that the insurance does not apply to bodily injury arising out of work performed on behalf of Bierzo by a subcontractor, such as Port-Land, that provides labor, services and/or materials with respect to any construction, alteration, demolition or repair of real property, where Bierzo's subcontractor, here Port-Land, fails to have in force commercial general liability insurance, including contractual liability coverage for the benefit of Port-Land and Bierzo, for indemnification and contribution claims, to the fullest extent permitted by law. According to Everest, the required contractual liability insurance must provide coverage in the event of a loss, including any claim or suit arising out of any loss suffered by an employee of the contractor or subcontractor (*i.e.*, Erasmo Sanchez), regardless of whether Bierzo would be partially negligent and excluding only liability created by Bierzo's sole and exclusive negligence.

Everest asserts that the Subcontractor Exclusion contains an exception set forth in Section C, in which the Subcontractor Exclusion would not apply where the subcontractor had agreed in writing to indemnify and hold the contractor harmless and where the subcontractor had in force commercial general liability insurance for the benefit of the subcontractor and the insured.

Port-Land was insured by Utica First (the "Utica First Policy"). By letter, dated March 27, 2007, Utica First disclaimed coverage to Port-Land for the underlying action under, *inter alia*, the employee and contractual liability exclusions contained in the Utica First Policy. Subsequently in 2008, Utica First moved for summary judgment dismissing the third-party complaint on the

grounds, *inter alia*, that the Employee Exclusion in the Utica Policy barred coverage, which Everest and Bierzo opposed. This Court held, *inter alia*, that Utica First was not obligated to defend and indemnify Bierzo or Port-Land under the Utica First Policy for the underlying action pursuant to the Employee Exclusion in the Utica First Policy.

Everest argues that the Subcontractor Exclusion in the Everest Policy unambiguously excludes coverage for claims by employees of subcontractors, such as Port-Land, while working on behalf of Bierzo, if the subcontractor fails to have in force coverage for the benefit of Bierzo, and Port-Land does not have in-force liability coverage in favor of Bierzo. It is also undisputed that Bierzo understood the Subcontractor Exclusion and agreed to its terms by signing the Endorsement. Port-Land did not have in-force liability coverage in favor of Bierzo in effect at the time of the underlying incident.

Therefore, since Everest's disclaimer is based on clear exclusionary policy language, the Court should grant summary judgment in favor of Everest and hold that Everest does not owe Bierzo any defense or indemnity for the underlying action.

#### *Plaintiff's Opposition*

In opposition, plaintiff contends that under Section C of the exclusion relied on by Everest, the exclusion does not apply if plaintiff has a contract with the subcontractor requiring indemnification and if plaintiff is covered by the subcontractor's general liability insurance. There is a contract between Bierzo and the subcontractor requiring indemnification as required. Further, a certificate of insurance was issued by Utica First, listing Bierzo as an additional insured under the general liability insurance contract which included "personal and adv injury." Based upon the contract and the certificate of insurance, the exclusion relied upon by Everest does not apply.

[\* 6]  
Therefore, the motion for summary judgment should be denied.

*Everest's Reply*

Everest argues that the Court must look first to the language of the policy and give unambiguous provisions in the policy their plain and ordinary meaning, without looking to extrinsic evidence to create ambiguities not present on the face of the document.

Everest contends it is uncontested that (1) the Subcontractor Exclusion is stated in "clear and unmistakable language" and is "subject to no other reasonable interpretation"; (2) the Subcontractor Exclusion applies; (3) Bierzo signed this Exclusion prior to the issuance of the Everest Policy; and (4) that caselaw has already upheld a nearly identical exclusion contained in a similar Everest policy based on similar facts.

That Bierzo may have obtained a written indemnity agreement from Port-Land is not sufficient to satisfy the exception to the Subcontractor Exclusion because the exception applies only where both requirements are satisfied. Thus, Bierzo's argument that a certificate of insurance issued by Port-Land's broker establishes that the Subcontractor Exclusion does not apply lacks merit, and is insufficient. The language of the endorsement does not provide an exception to the exclusionary language of the endorsement when an insured has a certificate of insurance that is limited in its own right. A certificate of insurance is not evidence of insurance, and is insufficient to raise a factual issue as to the existence of insurance coverage. The bold-faced language of the certificate of insurance indicates that it is for information only. Since Port-Land's broker, not Utica First, issued the certificate of insurance, the certificate cannot bind Utica First. The certificate of insurance on which Bierzo now relies cannot alter the clear terms and conditions of the Everest policy. And, this Court's decision holding that Bierzo's

\* 7]

subcontractor, Port-Land, did not have in force commercial general liability insurance for the benefit of Port-Land and Bierzo, as required by the Subcontractor Exclusion; this Court's decision is the "law of the case," and no appeal was taken. Bierzo, which opposed Utica First's motion, is bound by that determination.

*Discussion*

In interpreting an insurance policy, "words and phrases are to be understood in their plain, ordinary, and popularly understood sense, rather than in a forced or technical sense" (*Hartford Ins. Co. of the Midwest v Halt*, 223 AD2d 204, 212, 646 NYS2d 589, 594 [4th Dept 1996]). 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.*, 5 NY2d 157, 162, 800 NYS2d 89, quoting *Consolidated Edison Co. of N.Y. v Allstate Ins. Co.*, 98 NY2d 208, 221-222, 746 NYS2d 622 [2002]; see also *United Stated Fid. & Guar. Co. v Annumiata*, 67 NY2d 229, 232, 501 NYS2d 790 [1986] ["Where the provisions of the policy "are clear and unambiguous, they must be given their plain and ordinary meaning, and courts should refrain from rewriting the agreement]). "Unambiguous provisions of a policy are given their plain and ordinary meaning" (*Lavanant v General Ace. Ins. Co.*, 79 NY2d 623, 629, 584 NYS2d 744 [1992]; *Seaport Park Condominium v Greater New York Mutual Ins. Co.*, 39 AD3d 51, 828 NYS2d 381 [1st Dept 2007]).

To negate coverage by virtue of an exclusion, 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 [1<sup>st</sup> Dept

1998]; *Continental Cas. Co. v Rapid-Am. Corp.*, 80 NY2d 640, 652, 593 NYS2d 966 [1993]; *see also Mazzuocolo v Cinelli*, 245 AD2d 245, 247 [1st Dept 1997]). “[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).

The Subcontractor Exclusion in Everest’s policy with Bierzo provides, in relevant part, as follows:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

The following exclusion is added to Paragraph 2.

Exclusions of Section I -Coverage A - Bodily Injury And Property Damage Liability and Paragraph 2. , Exclusions of Section I - Coverage B -Personal Injury And Advertising Injury Liability:

- A. This insurance does not apply to "bodily injury", . . . arising out of work performed on behalf of the Named Insured by a contractor, subcontractor and/or sub-subcontractor of the Named Insured . . . :
- i. *when there is no prior written and signed contract entered into between the Named Insured and the contractor, subcontractor and/or sub-subcontractor requiring the contractor, subcontractor and/or sub-subcontractor to indemnify and hold harmless the Named Insured . . . in the event of a loss, including, but not limited to, any claim, suit, cost or expense arising out of any loss suffered by an employee of the contractor, subcontractor and/or sub-subcontractor . . . or*
  - ii. *when the Named Insured's contractor, subcontractor and/or sub-subcontractor fails to have in force commercial general liability insurance including contractual liability coverage for the benefit of the contractor, subcontractor and/or sub-subcontractor, as well as the Named Insured for indemnification and/or contribution claims . . . in the event of a loss, including, but not limited to, any claim, suit, cost or expense arising out of any loss suffered by an employee of the contractor, subcontractor and/or sub-subcontractor, regardless of whether the Named Insured is partially negligent and excluding only liability created by the Named Insured's sole and exclusive negligence.*
- B. In the event this insurance does not apply pursuant to Paragraph A(i) or (ii) above,

without limitation this policy will not provide coverage for "bodily injury" to the employees, agents or principals of the Named Insured's contractor's, subcontractors, or sub-subcontractors.

C. *This exclusion shall not apply if:*

i. *Prior to a loss the Named Insured had entered into a written and signed contract entered into between the Named Insured and the contractor, subcontractor, or sub-subcontractor requiring the contractor, subcontractor and/or sub-subcontractor to indemnify and hold harmless the Named Insured . . . in the event of a loss, including, but not limited to, any claim, suit, cost or expense arising out of any loss suffered by an employee of the contractor, subcontractor or sub-subcontractor regardless of whether the Named Insured is partially negligent and excluding only liability created by the Named Insured's sole and exclusive negligence; and also*

ii. *The Named Insured's contractor, subcontractor and/or sub-subcontractor has in force commercial general liability insurance including contractual liability coverage for the benefit of the contractor, subcontractor and/or sub-subcontractor, as well as the Named Insured for indemnification and/or contribution claims . . . . in the event of a loss, including, but not limited to, any claim, suit, cost or expense arising out of any loss suffered by an employee of the contractor, subcontractor and/or sub-subcontractor, regardless of whether the Named Insured is partially negligent and excluding only liability created by the Named Insured's sole and exclusive negligence.*  
(Emphasis added).

According to Section A above, insurance under the Utica First Policy does not apply to bodily injury arising out of work performed on behalf of Bierzo by Port-Land, if Bierzo does not have a contract with the Port-Land requiring indemnification Port-Land, or Port-Land fails to have in force commercial general liability insurance, including contractual liability coverage for the benefit of Port-Land and Bierzo, for indemnification and contribution claims, to the fullest extent permitted by law.

Here, there was a "prior written and signed contract entered into between the Named Insured [Bierzo] and the contractor, subcontractor [Port-Land] and/or sub-subcontractor requiring

the contractor, subcontractor [Port-Land] and/or sub-subcontractor to indemnify and hold harmless the Named Insured [Bierzo]" in accordance with section A, subsection (i) above. However, that Bierzo obtained a written agreement from Port-Land to indemnify Bierzo does not render the Exclusion inapplicable, because the Exclusion applies also where Bierzo's subcontractor, Port-Land, "fails to have in force commercial general liability insurance including contractual liability coverage for the benefit of" Bierzo and Port-Land.

In this regard, this Court's decision declaring that Utica First was not obligated to "defend and indemnify [Bierzo] in the underlying action" is the "law of the case," and Bierzo, which opposed Utica First's motion, is bound by that determination (*Dukett v Wilson*, 31 AD3d 865, 818 NYS2d 337 [3d Dept 2006] ["[a] grant of summary judgment establishes the law of the case as to the issues essential to that determination"]; *see also, Appolino v Delorbe*, 24 AD3d 252, 807 NYS2d 19 [1st Dept 2005] [declaration that party-insurer did not have duty to defend was "law of the case" and to be given effect on an attorney's motion to withdraw]). The Court's holding establishes that Port-Land's policy with its insurer Utica did not provide coverage in favor of Bierzo and Port-Land, as required under subsection (ii) above. Thus, the exception to Exclusion contained in Section C is not satisfied, and the Exclusion applies to preclude coverage under plaintiff's policy with Everest.

Plaintiff's production of a certificate of insurance fails to raise an issue of fact as to whether Port-Land had in force insurance including contractual liability coverage for the benefit of Port-Land and Bierzo. The certificate of insurance at issue indicates that it is issued "as a matter of information only and confers no rights on the certificate holder. This certificate does not amend, extend or alter the coverage afforded by the policies below." Further, the certificate of

insurance states that coverage is "subject to policy terms, conditions and exclusions."

A certificate of insurance, containing the disclaimer language above, is "only evidence of a carrier's intent to provide coverage but is not a contract to insure the designated party nor is it conclusive proof, standing alone, that such a contract exists" (*Tribeca Broadway Assocs., LLC v Mount Vernon Fire Ins. Co.*, 5 AD3d 198, 774 NYS2d 11 [1<sup>st</sup> Dept 2004] citing *Buccini v 1568 Broadway Assocs.*, 250 AD2d 466, 673 NYS2d 398; see also, *ALIB, Inc. v Atlantic Casualty Ins. Co.*, 52 AD3d 419, 861 NYS2d 28 [1st Dept 2008] [holding that certificate of insurance did not confer additional insured status under the policy]; *Moleon v Kreisler Borg Florman General Constr. Co.*, 304 AD2d 337, 339 [2003] [where "the certificate (of insurance) contains a disclaimer which states that this certificate is issued as a matter of information only and confers no rights upon the certificate holder [and] . . . does not amend, extend, or alter the coverage afforded by the policies" the certificate is insufficient to establish additional insured status]). Further, a certificate of insurance is insufficient to . . . raise an issue of fact as to coverage or is no evidence of coverage (see e.g., *Glynn v United House of Prayer*, 292 AD2d 319, 322 741 NYS2d 499 [1st Dept 2002]; see also *American Motorist Ins. Co. v Supervisor Acoustics, Inc.*, 277 AD2d 97, 98, 716 NYS2d 389, 390 [1st Dept 2000]). Therefore, the certificate of insurance on which plaintiff relies is insufficient to establish that the Bierzo's subcontractor Port-Land obtained an insurance policy providing coverage for plaintiff and Port-Land, and thus, is insufficient to raise an issue of fact as to whether the Subcontractor Exclusion in the Everest Policy does not apply.

#### *Conclusion*

Based on the foregoing, it is hereby

ORDERED that the motion by defendant/third-party plaintiff Everest National Insurance

[\*12]  
Company for summary judgment dismissing the Complaint and declaring that Everest is not obligated to defend and indemnify plaintiff Bierzo Construction Corporation for the underlying action for wrongful death is granted; and it is further

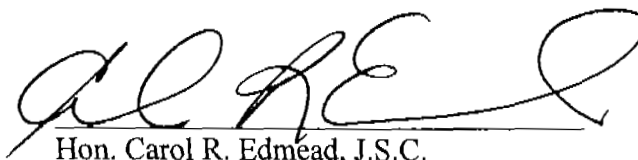
ORDERED and DECLARED that Everest National Insurance Company is not obligated to defend and indemnify plaintiff Bierzo Construction Corporation for the action entitled *Gloria Anjelica Barajas, et al. v Bierzo Construction Corp., 765 Amsterdam Housing Corp. and Samson Management LLC and 765 Amsterdam Housing Corp. and Samson Management LLC v Port-Land Construction Corp.*, bearing Index No. 17068/2007 in Supreme Court, Bronx County; and it is further

ORDERED that Everest National Insurance Company serve a copy of this 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.

October 9, 2009



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

**HON. CAROL EDMEAD**

**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).