

**Stellar Mech. Servs. of N.Y., Inc. v Merchants Ins.
Co. of New Hampshire**

2009 NY Slip Op 33302(U)

January 8, 2009

Supreme Court, Queens County

Docket Number: 9105/2006

Judge: Lawrence Vincent Cullen

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE LAWRENCE V. CULLEN IA Part 6
Justice

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| STELLAR MECHANICAL SERVICES OF NEW YORK, INC., et al. | x | Index Number <u>9105</u> 2006 |
| Plaintiffs, | | Motion Date <u>September 23,</u> 2008 |
| - against - | | Motion Cal. Numbers <u>25 & 26</u> |
| MERCHANTS INSURANCE COMPANY OF NEW HAMPSHIRE, et al., | | Motion Seq. Nos. <u>2 & 3</u> |
| Defendants. | | |
| | x | |

The following papers numbered 1 to 8 read on this motion by defendant Merchants Insurance Company of New Hampshire, Inc. (Merchants New Hampshire) for summary judgment; a separate motion by plaintiffs to correct a misnomer in the summons and complaint and for summary judgment; and a cross motion by defendant Serge Duct Design (Serge) for summary judgment dismissing the action as against Serge.

| | <u>Papers Numbered</u> |
|---|----------------------------|
| Notices of Motion - Affidavits - Exhibits..... | 1-5 |
| Notice of Cross Motion - Affidavits - Exhibits... | 6 |
| Answering Affidavits - Exhibits..... | 7 |
| Reply Affidavits..... | 8 |

Upon the foregoing papers it is ordered that the motions and cross motion are consolidated for the purpose of disposition and are determined as follows:

This is an action for a judgment declaring that defendant Merchants New Hampshire is obligated to defend and indemnify plaintiff Stellar Mechanical Services of New York, Inc. (Stellar) in a personal injury action entitled Marsalona v Brighton Development, LLC, et al., pending in this court under Index No. 26333/03. Michael Marsalona, the plaintiff in the underlying action, allegedly was injured when he fell through an inadequately covered and unmarked opening on the roof of a building while

working on a construction project as an employee of nonparty JDA Restoration. The opening had been left intentionally by the concrete contractor to allow the ventilation systems that were to be installed to penetrate through the roof. Pursuant to an agreement with defendant Brighton Construction Corp., plaintiff Stellar was responsible for installing the heating, ventilation and air conditioning system for the project. Stellar subcontracted a portion of the work, including the installation of the ductwork for the ventilation system, to defendant Serge. The complaint herein alleges that Stellar is entitled to coverage as an additional insured under a commercial general liability policy issued by Merchants New Hampshire to Serge. Although the certificate of insurance provided to Stellar identified Merchants New Hampshire as the insurer affording commercial general liability coverage to Serge, the named insured, under policy number CMP9139816, it is now undisputed that said policy was issued by Merchants Mutual Insurance Company (Merchants Mutual), an affiliate company within Merchants Insurance Group.

While Stellar's tender of its defense in the underlying action pursuant to the subject policy was sent to Merchants New Hampshire, the letter denying coverage was printed on the letterhead of Merchants Insurance Group and refers to Merchants Mutual as having received the tender, being the insurer providing the policy under which coverage was claimed, and being the party denying the request for defense and indemnity. In addition, the answer served by Merchants New Hampshire admits the issuance of the subject policy by Merchants Mutual and requests declaratory relief in favor of Merchants Mutual. The instant motion by Merchants New Hampshire does the same. By seeking affirmative relief, Merchants Mutual has voluntarily submitted itself to the jurisdiction of the court. The facts herein thus demonstrate that (1) the court has acquired jurisdiction over the intended but mistakenly named defendant insurer; (2) Merchants Mutual was fairly apprised that it was the party the action was intended to affect; and (3) Merchants Mutual would not be prejudiced by allowing an amendment of the summons and complaint to correct the misnomer. (CPLR 305[c]; see, Holster v Ross, 45 AD3d 640 [2007]; Kingalarm Distribs. Video Insights Corp., 274 AD2d 416 [2000].) Accordingly, the part of plaintiffs' motion that seeks to correct the summons and complaint is granted to the extent that the summons and complaint are deemed amended to substitute Merchants Mutual in place of Merchants New Hampshire. Inasmuch as the instant motion by Merchants New Hampshire seeks a declaration of the rights of Merchants Mutual as well, the motion will be considered as if made by Merchants Mutual.

The underlying action was commenced on November 7, 2003. Stellar was added as a defendant therein by supplemental summons and amended complaint on or about August 17, 2005. After Stellar had tendered its defense to Merchants New Hampshire, a second

supplemental summons and second amended complaint filed on March 27, 2006, added Serge as a defendant, and generally alleged that Marsalona's accident and injuries were caused by defendants' negligence in the performance of their work. Insofar as pertinent here, the policy issued to Serge by Merchants Mutual included as an additional insured any person or organization Serge was required by written contract, agreement or permit to name as an insured but only with respect to liability arising out of Serge's work performed for that person or organization.

A party is not entitled to insurance coverage unless named as an insured or an additional insured on the face of the policy. (See, National Abatement Corp. v National Union Fire Ins. Co. of Pittsburgh, Pa., 33 AD3d 570 [2006]; Tribeca Broadway Assocs., LLC v Mount Vernon Fire Ins. Co., 5 AD3d 198, 200 [2004].) Under the policy here, even assuming the requisite contractual obligation, there is additional insured coverage only with respect to liability arising out of Serge's work. Plaintiffs do not dispute the proof proffered by Merchants Mutual in support of its position that Marsalona's accident did not originate from or have any connection with Serge's work. (See, Worth Constr. Co., Inc. v Admiral Ins. Co., 10 NY3d 411 [2008]; see also, Maroney v New York Cent. Mut. Fire Ins. Co., 5 NY3d 467, 472 [2005].) Plaintiffs instead rely upon the general rule that an insurer's duty to defend is exceedingly broad and arises whenever the allegations of the complaint in an underlying action potentially give rise to a covered claim. (See, Frontier Insulation Contrs. v Merchants Mut. Ins. Co., 91 NY2d 169, 175 [1997]; Global Constr. Co., LLC v Essex Ins. Co., 52 AD3d 655 [2008].) Since it is alleged in the second amended complaint that Marsalona's injuries were caused by the negligence of Serge, among others, in the construction of the premises, plaintiffs conclude that the duty to defend Stellar as an additional insured was triggered. An insurer is relieved of the duty to defend, however, when it demonstrates as a matter of law that there is no possible factual or legal basis upon which it might eventually be obligated to indemnify the claimant under the policy. (See, Allstate Ins. Co. v Zuk, 78 NY2d 41, 45 [1991]; Global Constr. Co., 52 AD3d at 656.)

At the time Stellar made its demand for coverage, the second amended complaint asserting a claim against Serge had not been filed. The amended complaint received by Merchants Mutual from Stellar contained no allegations connecting the accident or the claim against Stellar to the work performed by Serge. Furthermore, neither plaintiffs nor codefendants, the other parties to the underlying action, have raised a triable issue of fact in opposition to Merchants Mutual's prima facie showing that Marsalona's accident did not arise out of or originate or result from Serge's work. Thus, it has been established as a matter of law that Stellar is not an additional insured under the subject

policy and that there is no basis upon which Merchants Mutual might eventually be liable to indemnify Stellar. (See, Worth Constr. Co., 10 NY3d at 416; Global Constr. Co., 52 AD3d at 656; National Abatement Corp., 33 AD3d at 570-571.) Under these circumstances, Merchants Mutual is relieved of its duty to defend. (See, Allstate Ins. Co. v Zuk, 78 NY2d at 45; Global Constr. Co., 52 AD3d at 656; see, e.g., Worth Constr. Co., 10 NY3d at 415-416; see also, Wronka v GEM Community Mgt., 49 AD3d 869 [2008].)

Plaintiffs' reliance upon the decision in BP A.C. Corp. v One Beacon Ins. Group (8 NY3d 708 [2007]) is misplaced. The Court of Appeals therein held that the same standard for determining the right to a defense exists for additional insureds as for named insureds, and that additional insured coverage is not contingent upon a liability finding where the possibility of coverage exists. Since questions of fact regarding the source of the patch of oil on which an injured worker fell made it uncertain whether any eventual judgment against the claimant would be within the scope of coverage for an additional insured under the policy at issue in BP, the Court determined that the insurer had a duty to defend. This ruling does not preclude determining additional insured status as a matter of law when the necessary parties are before the court and the unrefuted evidence establishes that there is no connection between the injured party's accident and the risk for which coverage is intended. (See, e.g., Worth Constr. Co., 10 NY3d at 416.) As stated above, the uncontested facts presented here demonstrate that Marsalona's accident was unrelated to Serge's work. (Cf., City of New York v Zurich Am. Ins. Co., 39 AD3d 239 [2007].)

The cross motion by Serge for summary judgment dismissing the complaint is denied. The complaint does not seek any relief against Serge with regard to the question of Serge's contractual obligation to indemnify Stellar and/or to procure insurance. In fact, it is specifically stated in the complaint that no affirmative relief is sought against Serge.

Accordingly, plaintiffs' motion is granted only to the extent indicated herein and is denied in all other respects, the cross motion is denied, the motion by Merchants Mutual is granted, and it is declared that Merchants Mutual is not obligated to defend or indemnify Stellar in the underlying action.

Dated: January 8, 2009

LAWRENCE V. CULLEN, J.S.C.