

**City of New York v Continental Cas. Co.**

2010 NY Slip Op 30025(U)

January 5, 2010

Supreme Court, New York County

Docket Number: 107048-2009

Judge: Judith J. Gische

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

PRESENT: HON. JUDITH J. GISCHE

PART 10

*Justice*

The City of New York  
Plaintiff (s),

INDEX NO.

107048-09

MOTION DATE

MOTION SEQ. NO.:

001

MOTION CAL. NO.

- v -  
Continental Casualty Company

Defendant(s)

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  No

Upon the foregoing papers, It is ordered that this motion

**FILED**

JAN 11 2010

NEW YORK  
COUNTY CLERK'S OFFICE

**MOTION IS DECIDED IN ACCORDANCE WITH  
THE ACCOMPANYING MEMORANDUM DECISION**

*and AC scheduled for  
Feb 11, 2010 at 9:30 am in Part 10  
60C Room 232*

Dated: JAN 05 2010

Hon. Judith J. Gische, 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 10**

-----x  
 The City of New York,  
  
 Plaintiff (s),  
 -against-  
 Continental Casualty Company,  
  
 Defendant (s).  
 -----x

**DECISION/ORDER**  
 Index No.: 107048-2009  
 Seq. No.: 001  
  
**PRESENT:**  
Hon. Judith J. Gische  
 J.S.C.

Recitation, as required by CPLR 2219 [a], of the papers considered in the review of this (these) motion(s):

**FILED**  
 JAN 11 2010  
 NEW YORK  
 COUNTY CLERK'S OFFICE

Papers	Numbered
City's n/m [partial 3212] w/SDS affirm, exhs	1
CCC opp w/EAF affirm, BC affid, exhs	2
City's reply w/SDS affid	3

Upon the foregoing papers, the decision and order of the court is as follows:

**Gische J.;**

Plaintiff, The City of New York ("the City"), seeks a declaratory judgment that defendant Continental Casualty Company ("Continental") has to defend the City in a personal injury action brought against it by an injured worker (Klewinowski v. City of New York, Amman & Whitney Consulting Engineers, P.C., Welsbach Electric Corp., Consolidated Edison Company of New York, Inc., Supreme Court, N.Y. Co., Index No. 110740-2008) ("personal injury action") now pending and also assigned to this judge.

Issue was joined in this case and the City seeks partial summary judgment against Continental, declaring that Continental has an obligation to defend the City in the personal injury action and Continental has a duty to reimburse the City for post-

tender defense costs, with interest. Since a motion for summary judgment can be made after issue is joined and the note of issue has not yet been filed, this motion complies with the requirements set forth in CPLR 3212 [a] and it will be decided on the merits.

### **Arguments**

Zenon Klewinowski ("Klewinowski"), the plaintiff in the personal injury action, alleges he was injured on March 20, 2008 while working near the center island of the Houston Street Reconstruction project New York, New York ("the project") when a light pole was knocked down and struck him. He was in a coma eight (8) days and sustained numerous fractures, including a broken pelvis.

The area under construction is a public street owned by the City. The City had a contract with Tully Construction ("Tully"), the City's general contractor for that project. Klewinowski was employed by Tully at the time of his accident. The other named defendants in the personal injury action are the City's engineers, Con Ed, and Welsbach Electric Corp. ("Welsbach"), Tully's subcontractor for electrical work.

According to Klewinowski's complaint and bill of particulars, another Tully employee was operating a "boom" to hoist a 20 foot long pipe when the pipe and boom struck an overhead cable attached to a vertical light pole. The cable and pole were installed by Welsbach several weeks before the accident. The force of the boom hitting the cable caused the temporary light pole to come crashing down, hitting Klewinowski.

Klewinowski alleges that the City, Con Ed and Welsbach were negligent in the installation and maintenance of the cable and pole. Specifically, Klewinowski alleges that Welsbach violated various sections of the Industrial Code Regulations by installing

the cable too low and with insufficient clearance for the work being performed below. Klewinowski also claims Welsbach was responsible for making sure the cable and pole were properly maintained, pointing out that the fact that the pole toppled over is evidence that it was improperly installed in the first place.

The City tendered its defense in the personal injury action to Tully's insurer, Zurich American Insurance Company ("Zurich"), and Zurich is presently providing a defense to the City in that action. The City also tendered its defense to Continental with whom Welsbach has a commercial general liability policy. By letter dated December 19, 2008, Continental denied the City's tender seeking coverage as an additional insured.

In its letter (and also in opposition to the present motion by the City for summary judgment), Continental contends it does not owe the City a defense for several reasons, including that Welsbach installed the cable and temporary light pole five (5) weeks before the accident and Welsbach had no control over either the cable or pole thereafter. Continental argues that Welsbach strung the cable at the right height and properly installed the light pole. Thus, according to Continental, Klewinowski's injuries did not "arise out of" Welsbach's work because Welsbach had no duty to perform ongoing inspections and Welsbach had no employees at the job site after the cable was installed.

The City argues that it is entitled to a defense by Continental because Welsbach agreed to indemnify defend and hold harmless Tully (the City's GC) and also the City. There is also a certificate of insurance listing Tully as an additional insured for the period covering the accident and in its denial letter Continental specifically

"acknowledges that, per the endorsement in the [commercial general liability policy], the City is an additional insured for losses arising out of Welsbach's work on the project" and the only reason coverage is being denied is "Welsbach's work had nothing to do with Mr. Klewinowski's injuries." The City contends this is an incorrect statement of fact and law because the claims against Tully, the City, Con Ed and Welsbach all allege violations of the Labor Law (sections 200, 240, 241 [6]) and therefore the GC (Tully) and the City are exposed to statutory liability.

The City argues that even if the allegations in the complaint are baseless and Welsbach is ultimately exonerated, the claims "arise from/out of" work that Welsbach did for Tully and the City, therefore, Continental must provide the City with an immediate defense even if the City is not entitled to indemnity. Thus, the City separates Welsbach's duty to defend from its duty to indemnify, arguing the former is broader than the latter. The City contends that even if the policy has a deductible, or Zurich is providing it with a defense, this makes no difference because Continental's status as a primary insurer is not contingent on any future factual determination. The City argues that it is entitled to reimbursement of its defense costs to date, with interest, because Continental breached its duty to defend the City in the personal injury action.

In opposition to the City's motion for summary judgment, Continental argues (much as it stated in its letter denying coverage) that Welsbach's work had nothing to do with Klewinowski's injuries, and therefore Welsbach has no duty to defend and indemnify the City. In the sworn affidavit of Welsbach's project manager ("Cheval"), Cheval states that Welsbach was responsible for "installing temporary street lights, traffic signals, poles and overhead cables to allow the street lights and traffic signals to

operate during the course of Tully's work . . . and had no obligation to patrol or inspect the cables [etc.] after the installation . . . or to return to a location to perform additional work unless specifically requested to do so by Tully . . ."

Continental argues further that the City is already being defended by Zurich and there is no need for another carrier to get involved, particularly since there is \$350,000 deductible under the Continental policy and until the deductible is met, any request by the City for defense is premature.

According to Continental, even if the City qualifies as an additional insured, the Continental coverage is excess to Zurich's not primary based on language in one of the endorsements in the policy.

In reply, the City argues that even if Continental is right, and the endorsement applies, the Continental policy still affords primary - not excess - coverage to the City, because an additional insured enjoys the same protection as the "Named Insured," unless the liability policy expressly contains a limitation to the contrary.

The contract between Tully and Welsbach dated May 25, 2005 ("Tully/Welsbach contract") requires that Welsbach indemnify the owner and contractor (the City and Tully, respectively). This language is contained in paragraph 7 of the contract:

"[Welsbach] . . . shall indemnify and save harmless the Contractor [Tully] and/or the Owner [The City] . . . from all damages or liability to which the Contractor and/or the Owner may be subjected [to] by reasons of injury, including death, at any time resulting therefrom, to the person or property of others resulting from the performance of the work of the Subcontractor [Welsbach] hereunder, or through the negligence, act or omission of the Owner, Contractor, or Subcontractor or any of their agents, servants or employees

or any other person on or near the site of the project with the consent of the Subcontractor, or through any improper or defective machinery, implements or appliances used by the Subcontractor."

Pursuant to paragraph 6 of the Tully/Welsbach contract requires that Welsbach indemnify and defend Tully in connection with personal injury actions, etc. In relevant part, that paragraph provides as follows:

"To the fullest extent allowed by law, the Subcontractor [Welsbach] agrees to indemnify, defend, and hold harmless the Tully companies . . . against all claims, suits, damages, liabilities, that arise out of or result from the Subcontractor's [Welsbach's] work. Including but not limited to professional fees, costs, expenses, and disbursements related to death, personal injuries, or property damages brought or against Tully by any person or firm by reason of or caused in whole or in part by any act or omission by Subcontractor [Welsbach]."

The Continental policy contains the following language (Endorsement #24) which Continental argues makes the Continental coverage excess to the Zurich coverage afforded to the City:

**"4. OTHER INSURANCE**

**b. EXCESS INSURANCE**

[...]

EXCEPT WHERE THE INSURANCE AFFORDED BY THE POLICY IS REQUIRED BY CONTRACT TO BE PRIMARY INSURANCE, THIS INSURANCE IS EXCESS OVER:

[...]

(2) ANY OTHER PRIMARY INSURANCE AVAILABLE TO YOU COVERING LIABILITY FOR DAMAGES ARISING OUT OF THE PREMISES OR OPERATION FOR WHICH YOU HAVE BEEN ADDED AS AN INSURED BY ATTACHMENT OF AN ENDORSEMENT...

WHEN THIS INSURANCE IS EXCESS, WE WILL HAVE NO DUTY... TO DEFEND THE INSURED AGAINST ANY "SUIT" IF ANY OTHER INSURER HAS A DUTY TO DEFEND THE INSURED AGAINST THAT SUIT. . .

WHEN THIS INSURANCE IS EXCESS OVER OTHER INSURANCE WE WILL PAY ONLY OUR SHARE OF THE AMOUNT OF THE LOSS, IF ANY, THAT EXCEEDS THE SUM OF:

(1) (2)THE TOTAL AMOUNT THAT ALL SUCH OTHER INSURANCE WOULD PAY FOR THE LOSS IN THE ABSENCE OF THIS INSURANCE; AND

(3) THE TOTAL OF ALL DEDUCTIBLE AND SELF-INSURED AMOUNTS UNDER ALL THAT OTHER INSURANCE."

Zurich's policy with Tully contains an endorsement applicable to additional insures. It provides that:

"[the] insurance provided by this endorsement is primary insurance and we will not seek contribution from any other insurance available to any additional insured person or organization unless the other insurance is provided by a contractor other than you for the same operations and job location. Then we will share with that other insurance by the method described in paragraph 4[c] of SECTION IV-COMMERCIAL GENERAL LIABILITY CONDITIONS."

The City argues that the Continental policy defines "you" and "your" as the "Named Insured on the declarations page" (CG 00 01 10 01 page 1 of 14) which, in this case, is Welsbach. The policy, however, differently defines an "Insured" as "any person or organization qualifying as such under Section II – Who is an Insured." That section lists many relationships that may result in a person, organization, being insured. Thus, it is the City's position that 4(b)(2) only applies to situations where there is other primary

insurance available to the "Named Insured," not to additional insureds like the City (and Tully).

The City also argues that Zurich is not a party to this action and, therefore, Continental cannot pursue its claim for co-insurance nor can the court rule on the priority of coverage for that reason.

The City maintains that even if Endorsement #32 establishes the deductible as \$350,000. It also provides that the deductible is subtracted from any amount of damages Continental is obligated to pay and Endorsement 33 clarifies that "the first Named Insured shall promptly reimburse us [Continental] for such part of the deductible as has been paid by us. It is further agreed that the additional insured shall have no responsibility for or be required to satisfy the reimbursement of any part of a deductible payment by us."

### **Discussion**

On a motion for summary judgment, it is the movant's burden to set forth evidentiary facts to prove its prima facie case that would entitle it to judgment in its favor, without the need for a trial (Zuckerman v. City of New York, 49 N.Y.2d 557, 562 [1980]). The party opposing the motion must demonstrate, by admissible evidence, the existence of a factual issue requiring a trial of the action, or tender an acceptable excuse for his/her/its failure so to do (Alvarez v. Prospect Hosp., 68 N.Y.2d 320 [1986]). For the reasons that follow, the court finds that the City is entitled to a defense by Continental because it is an additional insured, that the Continental policy is not an excess policy, and since Zurich is not a party to this action, any arguments by

Continental that it is entitled to a co-insurance ruling is not before this court to decide.

It is well settled law that an insurance company's duty to defend is broader than its duty to indemnify. Thus, an insurer will be called upon to provide a defense whenever the allegations of the complaint "suggest ... a reasonable possibility of coverage" (BP Air Conditioning Corp. v. One Beacon Ins. Group, 8 NY3d 708, 714 [2007]). If the claim is "within the embrace of the policy, the insurer must come forward to defend its insured no matter how groundless, false or baseless the suit may be" (Ruder & Finn Inc. v. Seaboard Sur. Co., 52 NY2d 663, 670 [1981]) and even if "facts outside the four corners of [the] pleadings indicate that the claim may be meritless or not covered" (Fitzpatrick v. American Honda Motor Co., 78 NY2d 61, 63 [1991]). Thus, where a policy represents that it will provide the insured with a defense, not only is that a statement as to liability coverage, it is also "litigation insurance" effectively shifting the cost of defense from one party to another (Automobile Ins. Co. of Hartford v. Cook, 7 NY3d 131, 137 [2006]).

Here, Welsbach was responsible for installing the cable and temporary light pole. There is no dispute that it installed the cable and pole several weeks before the accident. Although Welsbach contends it was not negligent in how it hung the cable or installed the temporary light pole, the complaint alleges the cable was hung too low and the pole was not installed properly. It is of no moment that Welsbach had no ongoing responsibility for the upkeep of the cable or pole in light of Klewinowski's claim the structures were improperly installed ab initio. The allegations of Industrial Code violations expose the owner and GC to statutory liability. Therefore, the claims in the

personal injury action against the City "arise out of" Welsbach's operations at the project and the blanket additional insured provisions of the Continental policy are triggered, requiring that Continental provide the City with defense, even if ultimately Welsbach is exonerated.

Endorsement #24 in the Continental policy applies to "Other Insurance." Reading the entire section and applying the definitions in the policy for the term "YOU," it is clear that this endorsement sets forth the limitations and terms of the *named insured's* excess coverage:

"THIS INSURANCE IS EXCESS OVER: (2) ANY OTHER PRIMARY INSURANCE AVAILABLE TO YOU COVERING LIABILITY FOR DAMAGES ARISING OUT OF THE PREMISES OR OPERATION FOR WHICH YOU HAVE BEEN ADDED AS AN INSURED BY ATTACHMENT OF AN ENDORSEMENT..."

The reference to "YOU" in 4[b][2] refers to the "named insured" whose name appear on the declarations page which is, in this case Welsbach. Thus, the City correctly argues that this endorsement does not make the Continental policy an excess policy as to an additional insured, but excess to any other primary insurance available to the named insured. This is further apparent by the language in section immediately preceding 4[b][2] which provides that where other insurance exists for the *insured* "[this] insurance is primary except when b. below applies. . ." "Insured" has the definition found in the "who is an insured" section; it is not the "named insured" identified on the declarations page.

Arguments by Continental that the City is entitled to less or different defense

than its named insured are clearly misplaced. It is well established law that the term "Additional insured" in an insurance policy refers to an entity or person enjoying the same protection as the "Named Insured" (Pecker Iron Works of New York, Inc. v. Traveler's Ins. Co., 99 NY2d 391 [2003]).

It is unrefuted that the City is an additional insured under Welsbach's policy with Continental. Moreover, Welsbach's contract requires that it name the City an additional insured. Endorsement #53 further provides that "any person, organization, corporation, municipality, [etc.] that you are required to name as an additional insured under any contract, or any certificate of insurance on file with us. . ." is an additional insured. Therefore, as additional insured, the City enjoys the same coverage as a named insured, unless unambiguously stated otherwise in the parties' agreement (Pecker Iron Works of New York, Inc. v. Traveler's Ins. Co., *supra*). Since Welsbach agreed to indemnify, defend and hold harmless Tully, the general contractor and Continental acknowledge the City is an additional insured, and there is no agreement that as an additional insured the City would only receive excess, as opposed to primary, the City is afforded primary coverage as an additional insured which includes a defense (Pecker Iron Works of New York, Inc. v. Traveler's Ins. Co., *supra*).

The court has considered but rejects Continental's argument, that the City has to first meet the policy's \$350,000 deductible before Continental has any obligation to provide the City with a defense. Endorsement #33 of the policy requires that the name insured reimburse Continental for any payment it makes, and Continental is also allowed to subtract the deductible from any amounts paid. It is the name insured who is

responsible for reimbursing the insurer for the deductible, not the additional insured. In fact the endorsement specifies that the "additional insured shall have no responsibility for or be required to satisfy the reimbursement of any part of a deductible payment by us." Thus, the unmet deductible does not prevent Continental from immediately defending the City.

Continental does not address that branch of the City's motion seeking reimbursement from Continental for post-tender defense costs to date, or the City's demand for statutory interest on those defense costs. Instead, Continental argues that if the court decides the City is entitled to defense under Continental's policy, then this means both policies (i.e Continental and Zurich's) are primary and the court should decide how the costs of defense should be allocated between the insurers.

Although the Zurich policy is an exhibit to Continental's opposition, and therefore, technically before the court to examine, the City seeks a declaratory judgment that Continental has to provide the City with defense in the personal injury action. Zurich is not a named party to this action for a declaratory judgment and, therefore, the issues of allocation - if any- are not before the court to decide (BP Air Conditioning Corp. v. One Beacon Ins. Group, 8 NY3d 708 [2007]). It makes no difference, as argued by Continental, that Zurich is the "real party in interest" or the motivating force behind the City's motion. Since Zurich (and other insurance carriers) are not parties to this action, the court cannot rule on the issues of priority (see, BP Air Conditioning Corp. v. One Beacon Ins. Group, 8 NY3d at 716). Thus, the court decides that the City is entitled to a defense by Continental in the personal injury action and the excess insurance

provisions do not apply to the City who is an additional insured under the Continental policy.

The City has also proved that it has incurred defense costs which must be reimbursed by Continental because Continental incorrectly denied coverage but was obligated to defend the City. The City is also entitled to interest on those post-tender defense costs from the date first incurred (i.e. from April 2, 2008, the date the City tendered its defense in the Klewinowski action to Continental) to date. The City has not, however, proved the amount of those defense costs and, therefore, they will be decided at the time of trial.

The City has met its burden on this motion which is to prove it is an additional insured under the Continental commercial general liability policy and that the policy is primary, not excess. The defendant has not raised material issues of fact that require a trial. Although defendant has raised issues of law, they have been resolved (as they should be) without the need for a testimonial hearing (see, Hindes v. Weisz, 303 AD2d 459 [2<sup>nd</sup> Dept 2003]).

### **Conclusion**

The City's motion for summary judgment is granted. Continental must provide the City with defense in the underlying Klewinowski personal injury action.

Furthermore, the City is entitled to reimbursement from Continental for its defense costs to date, with statutory interest from April 2, 2008, the date Continental denied the City's tender of defense. The defense costs that Continental must reimburse the City for will be decided at the time of trial.

In accordance with the foregoing,

IT IS HEREBY

**Ordered** that plaintiff 's motion for partial summary judgment is hereby granted;  
and it is further

**Ordered Decreed and Adjudged** that defendant Continental Casualty Company has a duty to provide plaintiff with a defense in the Klewinowski action because the Continental policy affords additional insured coverage for the claims asserted against the plaintiff in that action; and it is further

**Ordered Decreed and Adjudged** that Continental has a duty to reimburse the City for its defense costs to date, with statutory interest from April 2, 2008, the date Continental denied the City's tender of defense; and it is further

**Ordered** that the defense costs that Continental must reimburse the City for will be decided at the time of trial; and it is further

**Ordered** that any relief not expressly addressed is denied; and it is further

**Ordered** that this case is scheduled for a status conference on **February 11, 2010 at 9:30 a.m.** in Part 10, 60 Centre Street, Room 232; and it is further

**Ordered** that this constitutes the decision, order and judgment of the court.

Dated: New York, New York  
January 5, 2010

ENTERED  
HON. JUDITH J. GISCH  
JSC

**FILED**  
JAN 11 2010  
NEW YORK  
COUNTY CLERK'S OFFICE