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

PRESENT: HON. CAROL EDMEAD PART 35

Index Number : 115389/2005

CUSUMANO, FRANK

VS

EXTELL ROCK, LLC

Sequence Number : 009

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE 3/26/10

MOTION SEQ. NO. 009

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 ☑ No

Upon the foregoing papers, it is ordered that this motion

The instant motion (sequence 009) is decided in accordance with the accompanying Memorandum Decision. It is hereby

ORDERED and ADJUDGED that the branch of the motion by Twin City Fire Insurance Company for summary judgment dismissing the second fourth party complaint of second fourth-party plaintiff, Hard Rock Café International Inc. is granted, and the second fourth party complaint of second fourth-party plaintiff, Hard Rock Café International Inc. is hereby severed and dismissed. The Clerk of the Court is hereby directed to enter judgment accordingly; and it further

ORDERED that the branch of the motion by Twin City Fire Insurance Company for severance of the fourth party action from the main action pursuant to CPLR § 603 and § 1010 is denied as moot; and it is further

ORDERED that the cross-motion by Hard Rock for summary judgment against Twin City, declaring that Twin City's disclaimer of coverage for Hard Rock is invalid is denied; and it is further

ORDERED that the Twin City Fire Insurance Company shall serve a copy of this order with notice of entry upon all parties within 20 days of entry.

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

Dated: 4/7/10

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: PART 35

----------X

FRANK CUSUMANO and LINA CUSUMANO,

Index No.: 115389/05

Plaintiffs,

- against -

EXTELL ROCK, LLC, ABCO MANAGEMENT CORP., and REGIONS FACILITY SERVICES, INC.,

Defendants.

----------X

EXTELL ROCK, LLC,

Third-Party Plaintiff,

-against-

HARD ROCK CAFÉ INTERNATIONAL INC.,

Third-Party Defendant.

----------X

HARD ROCK CAFÉ INTERNATIONAL, INC.,

Second Third-Party Plaintiff,

-against-

REMCO MAINTENANCE, LLC,

Second Third-Party Defendant.

----------X

REGIONS FACILITY SERVICES, INC.,

Third Third-Party Plaintiff,

-against-

REMCO MAINTENANCE, LLC, and "JOHN and JANE DOE NO. 1 through 10" (said names being false and fictitious, as the names of these other Defendants are unknown at this time).

Third Third-Party Defendants.

----------X

----------X

HARD ROCK CAFÉ INTERNATIONAL, INC.,

Second Fourth-Party Plaintiff,

-against-

TWIN CITY FIRE INSURANCE COMPANY,

Second Fourth-Party Defendant,

----------X

HON. CAROL. R. EDMEAD, J.S.C.

MEMORANDUM DECISION

In this personal injury and insurance declaratory judgment action, second fourth-party defendant, Twin City Fire Insurance Company ("Twin City") moves for summary judgment dismissing the second fourth party complaint of second fourth-party plaintiff, Hard Rock Café International Inc. ("Hard Rock"), and for severance of the fourth party action from the main action pursuant to CPLR § 603 and § 1010.

Factual Background

Plaintiff Frank Cusumano ("Cusumano") commenced this action against Extell Rock, LLC ("Extell"), ABCO Management Corp., and Regions Facility Services, Inc. ("Regions") for injuries he allegedly sustained when he slipped and fell on August 18, 2005 at premises leased by Hard Rock while employed with Remco Maintenance LLC ("Remco"). Thereafter, defendant Extell commenced a third-party action against Hard Rock seeking, *inter alia*, common-law and contractual indemnification. Regions had an insurance policy from Twin City, which provides commercial general liability coverage (the "Policy"). Thus, Hard Rock brought a second fourth party action against Regions's insurer Twin City, seeking (1) a declaration that Twin City is

covered as an additional insured of Twin City's Policy with Regions and that Twin City is obligated to defend and indemnify Hard Rock in this action, and (2) a money judgment for all defense and indemnity costs.

In support of dismissal of the second fourth party complaint, Twin City argues that Hard Rock is unable to meet its burden of establishing that it is an insured under the Policy. The Policy extends coverage to persons/organizations that Regions agreed in a written contract or agreement should be added as an additional insured "provided the injury or damage occurs subsequent to the execution of the contract or agreement." Twin City asserts that in order for Hard Rock to qualify as an insured under the Policy, Hard Rock and Regions must have entered into a written, executed agreement before August 18, 2005, which required Regions to add Hard Rock on Region's Policy. Twin City argues that Cusumano's injury took place on August 18, 2005 before the existence of any executed contract between Regions and Hard Rock that purports to add Hard Rock as an additional insured under Twin City's Policy.

As to the Construction Agreement between Regions and Hard Rock, such Agreement recites on page one that it was made as of May 1, 2005, prior to the accident, and admittedly contains a provision requiring Regions to have its liability insurance carriers add Hard Rock as an additional insured. However, the Construction Agreement is unsigned, and there is no evidence or allegation that it was ever signed. Thus, the unexecuted Construction Agreement does not satisfy the Policy requirement of a written contract or agreement that was executed before Cusumano's alleged injury.

In addition, the Work Authorization agreement between Regions and Hard Rock apparently was signed by *Regions* on August 9, 2005, before Cusumano's alleged accident.

However, the Work Authorization was signed by *Hard Rock* on August 22, 2005, four days after Cusumano's accident. Thus, the Work Authorization also fails to satisfy the Policy requirement of a written contract or agreement to add Hard Rock as an additional insured that was executed prior to Cusumano's alleged injury. Nor does the Work Authorization include any provision requiring Regions to add Hard Rock as an additional insured; it does, however, refer to the unexecuted Construction Agreement. Hard Rock's Work Authorization is nothing more than an effort by Hard Rock to create coverage after the fact: after Cusumano was allegedly injured on August 18, 2005, Hard Rock scrambled to sign the Work Authorization days later, and then claimed it should be covered under the Policy. Twin City argues that insurance is intended to cover unknown losses, and parties should not be allowed to obtain insurance coverage after a loss happens by trying to enter into contracts that they did not actually enter into before the loss occurred.

Nor can Hard Rock rely on extrinsic, parol evidence concerning the alleged intent of Hard Rock and Regions to be bound and to require Regions to add Hard Rock as an additional insured. The enforceability of the Work Authorization and the Construction Agreement, as and between Hard Rock and Regions, has nothing to do with whether those documents satisfy the Policy condition. As caselaw has made clear, fashioning a written contract (between Regions and Hard Rock) based on parol evidence and course of conduct does not satisfy the Policy language requiring a written, executed contract to add a party as an additional insured.

Twin City argues in the alternative that if this Court does not grant it summary judgment, Hard Rock's claims against Twin City should be severed from Cusumano's action pursuant to CPLR § 603 and CPLR § 1010. Hard Rock's claims against Twin City do not involve questions

of fact or law similar to Cusumano's negligence claim. Also, Twin City would be prejudiced by litigating coverage claims in the same proceedings in which the underlying liability claims for which coverage is sought will be litigated. Both Hard Rock and Regions commenced actions against Remco for indemnification, but Hard Rock's action was discontinued without prejudice, and the Court dismissed Regions' action. Thus, the case before the Court consists of two remaining actions: Cusumano's action and Hard Rock's action against Twin City, and the issues in both the main and third-party actions will be passed upon by the same jury. The jury might be more disposed than otherwise, if it saw fit to render a verdict in favor of the plaintiff, to resolve the question of insurance coverage against the insurer, or, if the jury saw fit to resolve the question of insurance coverage against the insurer, knowing then that the insurer would be ultimately liable, it might be more disposed than otherwise to render a verdict, in favor of the plaintiff.

In opposition, Regions argues that Hard Rock qualifies as an additional insured under the Policy pursuant to the Work Authorization. Regions executed the Work Authorization before Cusumano's alleged injury, which incorporated by reference the Construction Agreement governing all projects on which Regions performed work for Hard Rock in the year 2005, and the Construction Agreement contained a provision adding Hard Rock as an additional insured on the Policy.

It is inconsequential that Hard Rock executed the Work Authorization after Cusumano's alleged injury. The Policy does not require anybody other than Regions - which is the party with the power to confer additional insured status - to have executed the Work Authorization before the injury occurred. There is no reported case law to the contrary and the *dicta* contained in

caselaw upon which Twin City relies does not address the issue presented herein. While the Construction Agreement was never signed, its insurance procurement requirement was incorporated by reference into the Work Authorization executed by Regions ten days before the accident. Parties to a contract may incorporate by reference and bind themselves to terms that may be found in other agreements and documents, even terms in an agreement to which neither party is a signatory.

Further, Twin City's motion for severance must be denied as severance would deprive Regions the ability to seek to establish Hard Rock as an additional insured on the Policy, as per the commitment that Regions made to Hard Rock in the Work Authorization and Construction Agreement.

Hard Rock also opposes Twin City's motion and cross moves for summary judgment against Twin City, declaring that Twin City's disclaimer of coverage for Hard Rock is invalid,[1] and that Hard Rock is an additional insured under the Policy with respect to Cusumano's action.

Hard Rock likewise contends that its execution of the Work Authorization days after Cusumano's alleged injury is inconsequential. Notably, the sample Work Authorization annexed to the Construction Agreement as Exhibit B is an identical (but unsigned copy) of the Work Authorization that was executed by Regions on August 8, 2005. The Policy's "Who Is An Insured" provision is also ambiguous and must be construed in favor of Hard Rock. The "Who Is Insured" provision does not state that Hard Rock had to execute the contract or agreement. A

[1] The Court notes that other than disputing Twin City's claim that Hard Rock is not covered under the Policy as an additional insured on the ground that no agreement requiring such additional insured status was executed prior to Cusumano's alleged accident, Hard Rock offers no other explanation for why Twin City's disclaimer is invalid.

reasonable interpretation of the Policy is that just Regions, as the named insured whose agreement confers the additional insured status, is required to have executed the contract or agreement. Applying the rules of insurance policy construction, the Policy's "Who Is Insured" provision can be broken down into the following elements: Regions must have agreed to add another person/organization as an additional insured to the Policy and the provision does not require that the additional insured agree to anything whatsoever; such agreement must be contained in either a "contract" or an "agreement"; such contract or agreement must be "executed" and the provision does not say who it is that must execute it; the execution must take place before the injury occurs. Since the provision requires the affirmative agreement of Regions to confer additional insured status, but does not require the affirmative agreement of the additional insured (*i.e.*, an absentee owner that does not even know that its tenant has contracted with Region), it is reasonable to conclude that only Regions must execute the contract or agreement, and any other interpretation would be unreasonable. In this regard, the provision is analogous to various statutes of frauds, such as GOL §§ 5-701(a) and 5-703(2), which require that certain agreements be memorialized in a writing subscribed by the "party to be charged." This interpretation is bolstered by the fact that, under the Policy, Region's agreement to add Hard Rock as an additional insured was required to be memorialized in either a "contract" or an "agreement," neither of which word is defined. If Twin City intended that all parties to the contract or agreement must execute the contract or agreement, it would have been a simple matter for it to have said so. But it did not. The "Who Is Insured" provision does not say that the contract or agreement must be "fully executed" or that it be "executed by all parties" or that it be "executed by the additional insured." In the absence of such explicit language in the Policy, it is

reasonable for the average business person in the construction industry (in which the only contract is often a purchase order signed just by the contractor, and in which formal contracts are not necessarily executed by the principal until after the work begins) to conclude that the only party that must execute the contract or agreement to create additional insured coverage is the named insured.

The Work Authorization also provided that "Contractor shall commence the aforesaid Services upon the execution hereof" and Regions began its work before Hard Rock signed the Work Authorization. This is evident from the fact that Cusumano allegedly sustained injuries on August 18, 2005, whereas Hard Rock did not sign the Work Authorization until August 22, 2005. The execution of the Work Authorization was not necessary for there to be an enforceable contract and it is undisputed that a contract was in effect between Hard Rock and Regions on the date of the accident. While the Construction Agreement was never signed, its insurance procurement requirement was incorporated by reference into the Work Authorization executed by Regions before the accident.

Further, the cases cited by Twin City are unavailing, as the named insured in those cases did not agree in writing to procure additional insured coverage and the legal issue raised herein was not even addressed.

In any event, summary judgment in favor of Twin City is premature because in September 2009 and February 2010, this Court denied Hard Rock's request for paper discovery of Twin City with respect to the interpretation of its "Who Is An Insured Provision," and denied Hard Rock's request for a deposition of Twin City prior to the decision on this motion, respectively.

Finally, the fourth-party action should be severed for trial but remain part of the remainder of this litigation for all other purposes. Although the jury which decides the factual issues in the main and third-party actions should not also be informed of the existence of insurance coverage for any of the defendants, this is routinely addressed by severing the insurance coverage action from the remainder of the litigation for purposes of trial only. Otherwise, a complete severance would deprive Regions, the named insured of Twin City, the ability to establish that Hard Rock is an additional insured on the Policy.

In reply, Twin City asserts that the First Department prohibits Hard Rock from piecing together a written contract (between Hard Rock and Regions) based on parole evidence and course of conduct in order to become an additional insured under the Policy. The Policy requires more than a written contract or agreement; it requires an executed contract or agreement. Hard Rock's contention, that a writing signed by Regions alone is enough to satisfy Twin City's policy, is directly contrary to the Policy language. Clearly, if a signed "writing" by Regions alone was enough to satisfy the Policy, the Policy would not also use the words "contract or agreement" and "execution." Hard Rock's claim that the Policy language is ambiguous is based on mischaracterizations of the Policy. In order to accept Hard Rock's interpretation of the Policy, the Court would have to ignore entire words and clauses in the Policy. It requires a contract or agreement "in writing" which, based on the use of commas in the policy, modifies the terms "contract or agreement." Moreover, the Policy also requires that the injury or damage occur subsequent to the "execution of the contract or agreement." It is unreasonable to suggest, as Hard Rock does, that this policy language merely requires a "writing signed by Regions" alone. Hard Rock's attempt to parse the words "contract or agreement" flies in the face of basic principles of

[* 11]

policy interpretation, which require courts to give "meaning . . . to every sentence, clause, and word of a contract of insurance." Otherwise, Twin City could be faced with potentially hundreds of additional insureds and claims in that every third party who receives a job proposal, a quote, a response to an RFP, or even a signed letter from Regions in connection with Regions' work, could claim additional insured status. The Policy plainly requires more than a writing signed by Regions. Further, Hard Rock's argument that the words "contract or agreement" and "executed" are ambiguous does not render the Twin City Policy ambiguous. Reading the "Who is an Insured" provision as whole, and giving meaning to each sentence and clause, there is no doubt that the Work Authorization signed by Regions alone fails to satisfy the Policy requirement for adding a third party as an "additional insured."

Twin City also adds that although Regions' opposition to Twin City's motion is virtually identical to the opposition/cross-motion submitted by Hard Rock, Regions has no legal right to pursue coverage for Hard Rock, and its "opposition" should be disregarded.

Nor is summary judgment premature. The Court denied Hard Rock's request for discovery concerning policy interpretation after oral argument, recognizing that such discovery was improper unless Hard Rock established that the Policy language was ambiguous. The Court encouraged Twin City's decision to move for summary judgment, after having reviewed the relevant caselaw presented by Twin City's counsel during the discovery conference.

Finally, Hard Rock and Regions both acknowledge that severance must be granted in this action. Hard Rock and Regions's claim that severance should be for trial purposes only, so as not to deprive Regions of the ability to establish that Hard Rock is an additional insured on the Twin City Policy is meritless. There are no similar witnesses, documents, experts or other

evidentiary issues between the main action and the action between Hard Rock and Twin City. Keeping these two separate actions together for further discovery and pretrial proceedings would unnecessarily complicate resolution of both cases. More importantly, Regions, which is not a party to the action brought by Hard Rock against Twin City, and has no legal right to pursue coverage for Hard Rock, has no justiciable interest in the controversy between Twin City and Hard Rock. The mere fact that Regions may incidentally benefit by having Twin City involved in the main action by keeping another "deep pocket" as a defendant in the litigation is not a legal basis to deny severance.

Discussion

As a defendant on this motion for summary judgment, Twin City must establish that the "cause of action . . . has no merit" (CPLR § 3212[b]), sufficient to warrant the court as a matter of law to direct judgment in its favor (*Bush v St. Claire's Hosp.*, 82 NY2d 738, 739 [1993]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Wright v National Amusements, Inc.*, 2003 N.Y. Slip Op. 51390 [U] [Sup Ct New York County, 2003]). Thus, Twin City must make a *prima facie* showing of entitlement to judgment as a matter of law, by advancing sufficient "evidentiary proof in admissible form" to demonstrate the absence of any material issues of fact (*Winegrad v New York Univ. Med. Ctr.*, *supra*; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Silverman v Perlbinder*, 307 AD2d 230, 762 NYS2d 386 [1st Dept 2003]; *Thomas v Holzberg*, 300 AD2d 10, 11, 751 NYS2d 433, 434 [1st Dept 2002]).

Alternatively, to defeat a motion for summary judgment, the opposing party must show facts sufficient to require a trial of any issue of fact (CPLR §3212[b]). Thus, where the proponent of the motion makes a *prima facie* showing of entitlement to summary judgment, the

burden shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action, or to tender an acceptable excuse for his or her failure to do so (*Vermette v Kenworth Truck Co.*, 68 NY2d 714, 717 [1986]; *Zuckerman, supra* at 560, 562; *Forrest v Jewish Guild for the Blind*, 309 AD2d 546, 765 NYS2d 326 [1st Dept 2003]).

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]).

Because the Work Authorization was never signed by Hard Rock before Cusumano's alleged accident, Hard Rock does not qualify as an additional insured under the Policy.

The Policy contains the following language concerning an additional insured:

Section II - WHO IS AN INSURED

6. The following are also an insured when you [Regions] have agreed, in writing, in a contract or agreement that another person or organization be added as an additional insured on your policy, *provided the injury or damage occurs subsequent to the execution of the contract or agreement*. . . .

e. Any other person or organization who is not an insured under paragraphs a. through d. above, but only with respect to your [Region's] operations, "your [Region's] work" or facilities owned or used by you [Region's].

See Exhibit C (Policy H 00 01 10 01, p. 10).

The Policy language is clear and unambiguous, and requires that the contract or agreement between Regions and Hard Rock be executed by both parties prior to Cusumano's alleged injuries. In *Nicotra Group, LLC v American Safety Indem. Co.* (48 AD3d 253, 850 NYS2d 455 [1st Dept 1996]), the Court held that plaintiff Nicoltra Group, LLC, was not afforded "additional insured" status under the insurance policies issued by Hanover and American Guarantee to the construction manager for the subject Hilton Hotel project. The Court stated, "No written contract was ever entered into whereby the construction manager agreed to insure Nicotra with respect to the former's work at the project. The only document relating to the work to be performed by the construction manager was a letter proposal, *which was never signed by Nicotra* and therefore *does not qualify as a 'written contract' that was 'executed' prior to the 'bodily injury,' within the meaning of the policies*" (*see also, Burlington Ins. Co. v Utica First Ins. Co.*, --- NYS2d ----, 2010 WL 819763 [2d Dept 2010] (the term "executed" in the additional insured endorsement does not render the policy ambiguous. "[T]hat the term 'executed' can be interpreted in two ways does not render the contract uncertain or ambiguous". . . Rather, the defendant demonstrated that the contract was not "executed" at the time of the alleged accident on June 27, 2003, since it was both unsigned and had not been fully performed at that time)).

Like the purported "additional insured" in *Nicoltra,* Hard Rock here seeks additional

insured status based on an agreement between Regions and Hard Rock, *i.e.*, the Work Authorization, which was not signed by Hard Rock prior to the injury allegedly sustained by Cusumano. On August 8, 2005, before Cusumano's alleged injury, Regions executed a Work Authorization by which it agreed to perform certain work and services for Hard Rock. However, it is uncontested that Hard Rock did not sign the Work Authorization until after Cusumano's alleged accident.

That the *named* insured in *Nicotra* did not execute a written contract or agreement to add the purported additional insured to the insurance policy that was the subject of the litigation, and the named insured herein, Regions, did, does not warrant a different result. The Construction Agreement containing the requisite language was not signed by either Hard Rock or Regions, and the agreement incorporating the Construction Agreement, was not signed by *both* parties (*see infra* p. 15). Hard Rock's interpretation of the Policy is inconsistent with *Nicotra* and does not render the Policy language ambiguous. Hard Rock acknowledges that the First Department in *Nicotra* stated only that a letter proposal, which *was never signed by the putative additional insured* "does not qualify as a 'written contract' that was 'executed' prior to the 'bodily injury" (*Nicotra*, 48 AD3d at 253).

Hard Rock's reliance on *Flores v Lower East Side Service Ctr.* (4 NY3d 363 [2005]) and *Brown Bros. Elec. Contrs. v Beam Constr. Corp.* (41 NY2d 397 [1977]) for the proposition that the execution of the Work Authorization was not necessary for there to be an enforceable contract, is misplaced. For example, in *Flores*, the Court of Appeals held that there was no requirement that a contract be signed where the Worker's Compensation statute only required a written contract. According to the Court, "nothing in the language of the statute or its legislative

history provides a basis for us to conclude that, in addition to requiring a written indemnification clause, the Legislature intended to deviate from the common-law rule that written documents can be enforced even if they are not signed. Had the Legislature intended to alter this rule in the context of indemnification claims, it could easily have done so by including the word "signed" or "subscribed" prior to the phrase "written contract" in section 11." Here, Twin City expressly included the word "executed" into its Policy, thereby requiring that any agreement by Regions to add a person/organization as an additional insured be memorialized in a signed contract or signed agreement; absent all signatures to such a contract or agreement, such document does not constitute a signed agreement or contract. Neither Regions nor Hard Rock cites to any caselaw construing the Policy language herein as requiring solely the signature of the named insured.

As to the Construction Agreement, it is uncontested that the General Conditions portion of the Construction Agreement require that Regions add Hard Rock as an additional insured to its general liability insurance policy and also indemnify Hard Rock. The Construction Agreement provides the following:

> 10.1 Insurance. Contractor [Regions] will maintain and will require all Subcontractors of any tier to maintain the following insurance coverages on the forms and in amounts not less than specified during the term of the Agreement.
>
> * * *
>
> 10.1.5. Contractor will cause its General and Automobile Liability insurance carrier(s) to add Hard Rock Café International, Inc. . . . and its subsidiary, affiliated and related companies as additional insured. All policies will be primary and non-contributing with any insurance maintained by Hard Rock. . . .
> (Construction Agreement, General Conditions, 10.1.5 (underscoring added).

The General Conditions portion of the Construction Agreement identifies the sample Work Authorization as one of the "Contract Documents," and the Work Authorization at issue

herein is in identical in form to the Sample Work Authorization identified in the Construction Agreement. The General Conditions state that, "[t]he Contract Documents are complimentary, and what is required by any one will be binding as if required by all." Construction Agreement, General Conditions, 2.1.2.

Further, the Work Authorization incorporates by reference the terms of the Construction Agreement. The Work Authorization contains the following provisions:

> Pursuant to the *Master [Construction] Agreement* dated May 01, 2005 the Contractor agrees to perform additional services described below . . . and [T]his Work Authorization and the Services contemplated herein is, except as otherwise specifically provided herein, *subject to the terms and conditions of the Master [Construction] Agreement* . . . . Work Authorization, pp. 1-2. (Emphasis added)

Based on the above provisions, and contrary to Twin City's contention, the Work Authorization incorporates by reference the Construction Agreement (*see Carlisle SoHo East Trust v Lexington Ins. Co.*, 49 AD3d 272 [1st Dept 2008] (stating that the "[c]lear language in the relevant contract demonstrates the sub-subcontractor's agreement to be bound by the insurance requirements of the subcontract incorporated by reference)).

However, it is also uncontested that the Construction Agreement is unsigned, and there is no evidence or allegation that it was ever signed.

Although the Work Authorization incorporated by reference the unexecuted Construction Agreement, Hard Rock did not "execute" such Work Authorization until after Cusumano's alleged accident. In other words, and as demonstrated above, the agreement to incorporate the Construction Agreement, containing the required insurance procurement language, was not itself executed by Hard Rock until after the alleged accident.

Thus, as there was no executed contract or agreement between Regions and Hard Rock in

existence before Cusumano's alleged accident on August 18, 2005, which required Region to add Hard Rock as an additional insured on Region's policy, Hard Rock is not an additional insured under the Policy.

Severance

Based on the above, the branch of Twin City's motion which seeks severance in the event this Court denies it summary judgment is moot.

Conclusion

Based on the foregoing, it is hereby

ORDERED and ADJUDGED that the branch of the motion by Twin City Fire Insurance Company for summary judgment dismissing the second fourth party complaint of second fourth-party plaintiff, Hard Rock Café International Inc. is granted, and the second fourth party complaint of second fourth-party plaintiff, Hard Rock Café International Inc. is hereby severed and dismissed. The Clerk of the Court is hereby directed to enter judgment accordingly; and it further

ORDERED that the branch of the motion by Twin City Fire Insurance Company for severance of the fourth party action from the main action pursuant to CPLR § 603 and § 1010 is denied as moot; and it is further

ORDERED that the cross-motion by Hard Rock for summary judgment against Twin City, declaring that Twin City's disclaimer of coverage for Hard Rock is invalid is denied; and it is further

ORDERED that the Twin City Fire Insurance Company shall serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: April 7, 2010

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

HON. CAROL EDMEAD