

**Skanska USA Bldg Inc. v Burlington Ins. Co.**

2010 NY Slip Op 31954(U)

July 15, 2010

Supreme Court, New York County

Docket Number: 112575/2007

Judge: Joan A. Madden

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

PRESENT: **HON. JOAN A. MADDEN**

PART 11

**J.S.C.**  
*Justice*

Index Number : 112575/2007

**SKANSKA USA BUILDING INC.,**

VS.

**BURLINGTON INSURANCE COMPANY**

SEQUENCE NUMBER : # 001

SUMMARY JUDGMENT

INDEX NO. 112575-07

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. #001

MOTION CAL. NO. \_\_\_\_\_

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 *and cross-motion are*  
*deferred in accordance with the annexed*  
*decision, order and judgment.*

**UNFILED JUDGMENT**  
 This Judgment has not been entered by the County Clerk  
 and notice of entry cannot be served hereon. To  
 obtain entry, counsel or authorized representative must  
 appear in person at the Judgment Clerk's Desk (Room  
 141B).

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

Dated: July 15, 2010

*J*  
 \_\_\_\_\_  
**HON. JOAN A. MADDEN**  
**NON-FINAL DISPOSITION**  
 J.S.C.

Check one:  FINAL DISPOSITION

Check if appropriate:  DO NOT POST

REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK : LAS PART 11

-----X  
SKANSKA USA BUILDING INC.,

Plaintiff,

-against-

Index No. 112575/2007

THE BURLINGTON INSURANCE COMPANY,

Defendant.

-----X

**Joan A. Madden, J.:**

Plaintiff Skanska USA Building Inc. moves, pursuant to CPLR 3212, for an order granting summary judgment declaring that defendant The Burlington Insurance Company bears a contractual obligation to defend and indemnify Skanska in the underlying consolidated personal injury actions. Burlington opposes the motion and cross-moves for summary judgment in its favor.

This declaratory judgment action arises out of Burlington's refusal to defend and indemnify Skanska in the actions captioned *Barrios v City of New York, Skanska USA Bldg., Inc. & Spearin, Preston & Burrows, Inc.* [Sup Ct, Richmond County, index No. 13776/04] and *Barrios v New York City Economic Dev. Corp., Barney Skanska Inc., & Barney Skanska Constr. Co.* [Sup Ct, Queens County, index No. 24482/06]). These actions have been consolidated in Supreme Court, Richmond County (the *Barrios* action).

In the *Barrios* action, plaintiff Flor Barrios alleges that she sustained personal injury on May 11, 2004 when she fell from a defective scaffold at the construction project located at the St. George Ferry Terminal, in Staten Island, New York. Pursuant to contract dated March 10, 2000,

the New York City Economic Development Corp. (the EDC), the project owner, hired Skanska to act as a consultant and project construction manager on the project (the EDC/Skanska contract). Pursuant to contract dated September 15, 2003, the EDC also hired Transcontinental Steel Corp. (TSC), a New Jersey corporation, to perform certain steel work on the project (the EDC/TSC contract).

Upon discovering that certain steel members were coated with lead paint, TSC hired defendant Safeway Environmental Corp., Barrios' employer, to abate the hazard, pursuant to contract dated April 15, 2004 (the TSC/Safeway contract), before TSC could complete its work. The TSC/Safeway contract provides, in relevant part, that Safeway was responsible for the removal of the environmental hazards and would be working under Skanska's direct supervision, that TSC would have no supervisory capacity over Safeway's work, and that TSC's sole function with regard to Safeway's work would be to serve as a payment vehicle, in accordance with the EDC/TSC prime contractor agreement. In the *Barrios* action, Barrios alleges that she was injured while performing TSC's work on the project.

The EDC/TSC contract required TSC to obtain commercial general liability insurance naming Skanska, among others, as an additional insured (*see* EDC/TSC Contract Art. 10 [e]). TSC purchased a commercial package insurance policy from Burlington (the TSC/Burlington policy). There is no dispute that the policy was in full force and effect on the date of Barrios' accident.

However, the parties dispute whether Skanska is covered as an additional insured under the TSC/Burlington policy, and whether any coverage afforded under the policy is primary or excess to the policy issued to Skanska by nonparty St. Paul Fire and Marine Insurance Company

(the Skanska/St. Paul Fire policy).

Barrios served a summons and complaint on Skanska in the Richmond County action in January 2005 and in the Queens County action in 2006. Skanska advised St. Paul Fire of the Barrios claim. By letter dated March 22, 2005, St. Paul Fire, on behalf of Skanska, advised Burlington of the claim, and tendered its defense and indemnification of Skanska in the *Barrios* action.

By letter dated May 31, 2005, Burlington acknowledged receipt of St. Paul Fire's notice of the loss and reserved its rights to disclaim coverage on the grounds of Skanska's failure to provide prompt notice of claim and failure to qualify as an additional insured. Burlington also advised that it would investigate the matter, and requested that Skanska provide documentation in support of its demand for coverage, including copies of the certificate of insurance referenced by St. Paul Fire, and the *Barrios* action pleadings.

By letter dated December 9, 2005, Skanska transmitted to Burlington certain documents, including the EDC/Skanska contract, the EDC/TSC contract, the TSC/Burlington policy, and the certificate of insurance issued by Skanska's insurance broker. Skanska once again requested that Burlington assume Skanska's defense and hold Skanska harmless in connection with the *Barrios* action.

By letter dated January 16, 2007, written in response to Skanska's verbal request for information regarding the December 2005 tender, Burlington advised that had not received any documents in support of the tender, and again requested such documentation. By letter dated February 5, 2007, Skanska forwarded to Burlington copies of the EDC/Skanska contract, the EDC/TSC contract, the *Barrios* action pleadings, the TSC/Burlington policy, and the insurance

certificate.

By letter dated March 7, 2007, almost two years after initially receiving notice of the *Barrios* action and claim against Skanska, Burlington denied Skanska's tender and formally disclaimed coverage, primarily on the grounds that Skanska is not an additional insured under the TSC/Burlington policy, and that Skanska failed to provide timely notice of claim.

Subsequently, in September 2007, Skanska commenced this declaratory judgment action against Burlington for a judgment declaring their rights and obligations under the TSC/Burlington policy.

Skanska now seeks a judgment declaring that it is an additional insured under the TSC/Burlington policy and that Burlington is obligated by the policy to provide Skanska with a defense and indemnification in the *Barrios* action.

In opposition, Burlington contends that the undisputed documentary evidence demonstrates that Skanska does not meet the threshold requirements to be an additional insured, as set forth in the policy.

Pursuant to the well-established rules of insurance policy construction, "[w]here 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.' The policy must . . . be construed in favor of the insured, and ambiguities, if any, are to be resolved in the insured's favor and against the insurer" (*United States Fid. & Guar. Co. v Annunziata*, 67 NY2d 229, 232 [1986] [internal citations omitted]). In addition, summary judgment is appropriate where the policy terms are unambiguous (*Hartford Acc. & Indem. Co. v Wesolowski*, 33 NY2d 169, 172 [1973]).

The TSC/Burlington policy additional insured endorsement sets forth the following

criteria that must be met by any corporation or individual claiming coverage as an additional insured under the policy:

Additional Insured – Owners, Lessees or Contractors – Automatic  
Status When Required in Construction Agreement with You  
Commercial General Liability Coverage Part

\* \* \*

A. Section II - Who Is An Insured is amended to include as an insured any person or organization for whom you are performing operations *when you and such person or organization have agreed in writing in a contract or agreement that such person or organization be added as an additional insured* on your policy. Such person or organization is an additional insured only with respect to liability arising out of your ongoing operations performed for that insured

(TSC/Burlington Ins. Policy, Additional Insured Endorsement [emphasis added]).

The unambiguous and unequivocal terms of the additional insured endorsement require that, in order for Skanska to qualify as an additional insured under the TSC/Burlington policy, TSC, the named insured, must have agreed in writing with Skanska to add Skanska as an additional insured on the policy. To hold otherwise would be to impermissibly rewrite the policy terms.

There is no dispute that no such agreement exists.

Contrary to Skanska's contention, the EDC/TSC contract may not be held to constitute the written agreement required by the endorsement. While the contract between the EDC and TSC requires TSC to maintain insurance listing the EDC, Skanska, and other indemnified parties as additional insureds (*see* EDC/TSC Contract, Art. 10 [b], Attachment B), Skanska is not a party to that contract. Nothing in the TSC/Burlington policy may be interpreted as bestowing additional insured status upon an entity where there exists a written agreement calling for such coverage

that is not executed by both TSC and the entity. Rather, the policy expressly and explicitly requires a written agreement to procure insurance between the insured and the party seeking additional insured status, before such coverage will be found to exist.

The Acord certificate of liability insurance prepared on October 20, 2004 by TSC's insurance broker and listing Skanska as an additional insured fails to raise a genuine triable issue of material fact regarding the existence of coverage for Skanska under the TSC/Burlington policy. "A certificate of insurance is evidence of a contract for insurance, but is not conclusive proof that the contract exists and not, in and of itself, a contract to insure. Moreover, . . . the doctrine of estoppel may not be invoked to create coverage where none exists under the policy" (*Penske Truck Leasing Co., L.P. v Home Ins. Co.*, 251 AD2d 478, 479-480 [2d Dept 1998] [internal citations omitted]).

The certificate itself provides, in relevant part, that "this certificate is issued as a matter of information only and confers no rights upon the certificate holder. This certificate does not amend, extend or alter the coverage afforded by the policies below" (Acord Certificate of Liab. Ins., at 1 [capitalization omitted]). The certificate further provides that, "If the certificate holder is an ADDITIONAL INSURED, the policy(ies) must be endorsed. A statement on this certificate does not confer rights to the certificate holder in lieu of such endorsement(s)" (*id.*, at 2). As discussed above, no such endorsement has been produced.

In addition, the certificate was prepared by nonparty Dale Group, TSC's insurance broker, and, therefore, is not binding on Burlington. A certificate of insurance is not binding on the insurer when the certificate is issued by an insurance broker, inasmuch as the broker is an agent of the insured, and not the insurer (*James M. Inman Constr. Corp. v Cathedral Marble & Granite*

Co., 307 AD2d 955, 956 [2d Dept 2003]).

Last, the certificate does not reference the number of the TSC/Burlington policy in effect on the date of Barrios' accident, policy number HGL0003792. Instead, the certificate references other policies apparently in effect on that date. Therefore, it appears that the certificate is irrelevant to the dispute at bar.

Having found that Skanska is not an additional insured under the TSC/Burlington policy, this court need not reach the other issues raised by the parties, including whether Barrios was injured while performing TSC's work, whether Skanska's notice of claim was late, and whether Burlington's disclaimer of coverage was timely issued. Disclaimer "is unnecessary when a claim falls outside the scope of the policy's coverage portion. Under those circumstances, the insurance policy does not contemplate coverage in the first instance, and requiring payment of a claim upon failure to timely disclaim would create coverage where it never existed" (*Matter of Worcester Ins. Co. v Bettenhauser*, 95 NY2d 185, 188 [2000]).

For these reasons, Burlington is entitled to judgment as matter of law declaring that it is not obligated to provide a defense or indemnification to Skanska in the *Barrios* action. Summary judgment is appropriate when the case presents no genuine issue of material fact for the jury (*Hartford Acc. & Indem. Co. v Wesolowski*, 33 NY2d at 172).

Accordingly, it is

ORDERED that plaintiff's motion for summary judgment is denied and defendant's cross-motion for summary judgment is granted; and it is further

ADJUDGED AND DECLARED that plaintiff Skanska USA Building Inc. is not an additional insured under the policy issued by defendant The Burlington Insurance Company, and

The Burlington Insurance Company is not obligated to provide Skanska USA Building Inc. with a defense or indemnification in the underlying *Barrios* action.

DATED: July 5, 2010

ENTER:

  
J.S.C.

**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).