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

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LEHR CONSTRUCTION COMPANY and 40 WEST 53RD ASSOCIATES LP,

Plaintiffs,

-against-

CONTINENTAL CASUALTY COMPANY,

Defendant.

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Index No.: 115807/08

DECISION

**CAROL ROBINSON EDMEAD, J.:**

**FACTUAL BACKGROUND**

Plaintiffs Lehr Construction Company (Lehr) and 40 West 53rd Associates, LP (40 West) (together, Lehr)[1] move, pursuant to CPLR 3212, for summary judgment declaring that defendant Continental Casualty Company (Continental) has a duty to defend and indemnify plaintiffs with respect to the action entitled *Thomas Murphy and Susan Ann Murphy v 40 West 53rd Associates LP, The West 53rd Condominium, Tony Capini, Clifford Chance, American Craft Museum and Lehr Construction*, index No. 104990/06, Supreme Court, New York County. Continental cross moves, pursuant to CPLR 3211 and 3212, to dismiss the complaint.

In the underlying personal injury action, Thomas Murphy (Thomas) alleges that, on March 22, 2004, he was injured when he

[1] The motion is made on behalf of both Lehr and 40 West, but in the papers both sides only refer to Lehr. In the decision, in order to conform to the parties' arguments, the court will refer to Lehr and 40 West as "Lehr."

was working at the premises at 40 West 53rd Street, New York, New York, as a journeyman-electrician, providing voice and data communication work for Forest Electric Corp. (Forest). The accident occurred while Thomas, who had been testing data terminations on the ninth floor of the premises, was exiting the restroom and tripped on tarp on the corridor floor. The underlying personal injury action was allegedly settled in January, 2009, for $600,000, with defense costs allegedly incurred by Lehr of $89,371.25.

Lehr was the general contractor for the renovation project at the premises, owned by 40 West, that are the subject of this action, and subcontracted the electrical work to Forest by means of a purchase order agreement. The agreement between Lehr and Forest included the following indemnification clause:

> "Subcontractor [Forest] shall hold harmless, indemnify and defend Contractor [Lehr] . . . and others as requested by contractor from and against any and all claims, damages, liabilities, losses and expenses, including reasonable attorney's fees arising out of or occasioned by, or in any way connected with the work called for by this Purchase Order. This indemnity agreement shall survive the completion of this project."

The agreement between Lehr and Forest also required Forest to obtain commercial general liability insurance, and to name Lehr as an additional insured under that policy.

Continental issued a commercial general liability insurance policy to Forest as the primary insured (Continental policy). Motion, Tract Aff., Ex. E. Lehr was named as an additional

insured under this policy. Motion, Epstein Aff., Ex. B. The Continental policy contains two additional insured endorsements. The first such endorsement provides:

> "WHO IS AN INSURED (Section II) is amended to include as an insured the person or organization shown in the Schedule, but only with respect to liability arising out of 'your work' for the insured by or for you."
>
> The "Schedule" referred to states "as required by contract."
>
> The second endorsement appearing in the policy states:
>
> "A. WHO IS AN INSURED (Section II) is amended to include as an insured any person or organization (called an additional insured) whom you are required to add as an additional insured on this policy under:
> 1. A written contract or agreement; or
> 2. An oral contract or agreement where a certificate of insurance showing that person or organization as an additional insured has been issued; . . .
> B. The insurance provided to the additional insured is limited as follows:
> 1. That person or organization is only an additional insured with respect to liability arising out of:
> a. Your premises;
> b. 'Your work' for that additional insured; or
> c. Acts or omissions of the additional insured in connection with the general supervision of 'your work.'
> * * *
> 3. Except when required by contract or agreement, the coverage provided to the additional insured by this endorsement does not apply to:
> * * *
> b. 'Bodily injury' or 'property damage' arising out of acts or omissions of the additional insured other than in connection with the general supervision of 'your work.'"
>
> The Continental policy goes on to provide:
> "2. Exclusions
> This insurance does not apply to:
> * * *
> 'Bodily injury to:
> (1) An 'employee' of the insured arising out of and in the course of:
> (a) Employment by the insured; or

(b) Performing duties related to the conduct of the insured's business;...

* * *

"4. Other Insurance

* * *

a. Primary Insurance
This insurance is primary except when b. below applies. If this insurance is primary, our obligations are not affected unless any of the other insurance is also primary. Then, we will share with all that other insurance by the method described in c. below.

* * *

b. Excess Insurance
Except where the insurance afforded by the policy is required by contract to be primary insurance, this insurance is excess over:
(1) Any of the other insurance, whether primary, excess, contingent or on any other basis: . . . ."

The policy also amends the "Other Insurance" provision as follows, in pertinent part:

"b. Excess Insurance
The insurance is excess over:
Any other valid and collectible insurance available to the additional insured whether primary, excess, contingent or on any other basis unless a contract specifically requires that this insurance be either primary or primary and noncontributing. Where required by contract, we will consider any other insurance maintained by the additional insured for injury or damage covered by this endorsement to be excess and noncontributing with this insurance."

"Travelers" issued a commercial general liability insurance policy to Lehr (Motion, Ex. A to Whitmore Aff.), which provides:

"Primary or excess other insurance

* * *

However, we will apply this agreement as excess insurance over the part or parts of any primary or excess insurance which provide:
property or similar coverage for property damage to your work;
property or similar coverage for property damage to premises that you rent, lease or borrow from others, other

than premises you rent for a period of seven or fewer days; aircraft, auto, or watercraft bodily injury or property damage or coverage; or
protection for you, or any other protected person, as an additional insured or additional protected person."

On October 27, 2006, Travelers, on behalf of plaintiffs, contacted Continental to demand that Continental defend and indemnify Lehr in the underlying personal injury action. On March 8, 2007, Continental responded to this demand, in which it agreed to defend plaintiffs under a reservation of rights, but it undertook no action to assume the defense or to disclaim coverage on any specific grounds. Motion, Whitmore Aff., Ex. D. Therefore, Travelers, as plaintiffs' insurer, continued to defend them in the underlying personal injury action.

Lehr thereafter instituted a third-party action against Forest for contractual indemnification, which was dismissed by this court by order dated October 23, 2008. In that dismissal, the court noted that the provision in the agreement between Lehr and Forest regarding contractual indemnification was unenforceable because it purported to indemnify Lehr for its own negligence (in violation of General Obligations Law ["GOL"]), and Lehr could not show that it was free of negligence. Motion, Tracy Aff., Ex. B. Also, in that decision, this court determined that Forest did not place or maintain the tarp over which Thomas tripped, because the tarp was totally within the control of Lehr. As an aside, the court indicated that the injury was not caused

by Forest's work. Specifically, the court said:

> "Accordingly, [Thomas'] injuries, which arose as a result of [Thomas] tripping on the tarp, could not have arisen out of, or resulted from, Forest's work under the subcontract." [Decision, p. 6].

The instant action was commenced on November 24, 2008, and on December 5, 2008, Continental, for the first time, disclaimed coverage based on this court's decision of October 23, 2008, stating that the accident did not arise out of Forest's work for Lehr. Motion, Whitmore Aff., Ex. E.

**Plaintiffs' Contentions.**

In support of their motion, plaintiffs argue that the circumstances of Thomas' injuries confer coverage on plaintiffs as additional insureds. A corporation, such as Forest, can only act by its employees, and it is undisputed that Thomas was working as a Forest employee at the time of his alleged injury. Continental's policy grants additional coverage to any entity to whom Forest is required to provide such coverage with respect to liability arising out of Forest's work. As Thomas suffered injuries while in the course of his employment for Forest, and Forest agreed to provide additional insured coverage for loss arising out of its work, plaintiffs are entitled to defense and indemnification from Continental.

Plaintiffs further contend that the court's earlier determination that Forest was not obligated to indemnify Lehr contractually in the underlying personal injury action does not

preclude a finding that Continental is obligated to defend and indemnify plaintiffs as additional insureds pursuant to the terms of its policy with Forest. Plaintiffs argue that the contractual indemnification language in the underlying action required Forest to provided indemnification for Lehr's "negligent" acts or omissions, whereas Continental's policy is not so worded. Continental's policy provided for defense and indemnification where the loss arises out of Forest's work.

In addition, plaintiffs also maintain that Continental waived any reliance on any exclusions or conditions in its policy due to its failure to timely disclaim coverage, pursuant to Insurance Law § 3420 (d). This argument is based on Continental's first written disclaimer, dated December 5, 2008, almost two years after the initial demand for defense and indemnification was proffered.

Lastly, plaintiffs aver that Continental's insurance coverage is primary to Travelers' policy.

**Continental's Contentions and Opposition.**

In its opposition and cross-motion, Continental asserts that this court's earlier decision determined that Lehr was solely and exclusively responsible for Thomas' injuries, and that, if the purchase order was intended to have Forest indemnify Lehr for Lehr's own negligence, it would be void and unenforceable as

against public policy.[2] Continental states that there is no indication that Forest intended to indemnify Lehr for the types of employee claims barred against employers under the Workers' Compensation Law, and Lehr cannot avoid its obligation to maintain a safe workplace (for example, under the Labor Laws) or avoid liability (by indemnifying against its own negligence in contravention of the GOL) by shifting the burden to Thomas' employer, Forest, and the employer's insurer, Continental. Continental maintains that, for the same reasons that there is no basis for Forest to indemnify Lehr, because Thomas' injuries did not arise out of Forest's work, there is no basis for Continental to insure Lehr as an additional insured.

Continental also argues that, pursuant to the terms of the insurance policy itself, Lehr would only be entitled to indemnification if Thomas' injuries arose out of Forest's work. Continental avers that the earlier decision of this court specifically said that Forest was not liable for Thomas' injuries in the underlying personal injury action, and that his injuries did not arise out of Forest's work for Lehr. Therefore, Continental avers, Lehr is not entitled to indemnification.

In addition, Continental says that even if Lehr were deemed

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[2] The court notes that the earlier decision did not address any claim based on the insurance policy itself. In dismissing the third-party complaint, the decision only held that Forest was in no way responsible for Thomas' accident.

to be an additional insured, the insurance policy excludes employee claims.[3]

**Plaintiffs' Reply.**

In reply to Continental's opposition, plaintiffs contend that it is undisputed that Thomas' accident occurred when he tripped and fell on a tarp while exiting a restroom while working on a construction project for Forest. Hence, according to Lehr, Thomas' injuries arose while engaged in performing Forest's work at the job site. As a consequence, Continental is obligated to defend and indemnify plaintiffs as additional insureds pursuant to its insurance policy with Forest.

Plaintiffs further state that the court's earlier decision with respect to contractual indemnification is not a bar to finding that, pursuant to the terms of the insurance policy rather than the contract between Lehr and Forest, Continental is obligated to defend and indemnify plaintiffs in the underlying action.

Lastly, plaintiffs maintain that, because Continental failed to raise the employee exclusion provision in its denial letter, it is now precluded from avoiding defense and indemnification obligations based on that exclusion, and, regardless, that provision is not applicable to additional insureds, only the

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[3] The court notes that this provision of the insurance policy was not mentioned in Continental's disclaimer.

named insured under the policy, in this instance, Forest.

**DISCUSSION**

"The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case [internal quotation marks and citation omitted]." *Santiago v Filstein*, 35 AD3d 184, 185-186 (1st Dept 2006). The burden then shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact." *Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 (1st Dept 2006); *see Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied. *See Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 (1978).

The thrust of Continental's position, and the threshold issue for the court's determination, is that Continental is relieved of all defense and indemnification obligations because plaintiffs cannot prove that they qualify as additional insureds under the policy.

"The party claiming insurance coverage bears the burden of proving entitlement, and is not entitled to coverage if not named as an insured or an additional insured on the face of the policy

[internal citation omitted]." *National Abatement Corp. v National Union Fire Insurance Company of Pittsburgh, Pa.*, 33 AD3d 570, 570-571 (1st Dept 2006); *Kidalso Gas Corp. v Lancer Insurance Company*, 21 AD3d 779 (1st Dept 2005); *Seavey v James Kendrick Trucking, Inc.*, 4 AD3d 119 (1st Dept 2004). Continental asserts that Lehr cannot meet this burden, based on this court's previous decision regarding Lehr's third-party action for contractual indemnification against Forest, in which the court said that Thomas' injuries did not arise out of his work for Forest. Hence, if Lehr cannot establish entitlement to additional insured status, Continental has no duty to defend or indemnify it in the underlying personal injury action. *Sanabria v American Home Assurance Company*, 68 NY2d 866 (1986).

At the outset, it is noted that the court's earlier decision, saying that the provision in the purchase order regarding contractual indemnification is void as against public policy, is not determinative of the validity and enforceability of the insurance procurement provision.

> "[A]n agreement to purchase insurance coverage is clearly distinct from and treated differently from the agreement to indemnify. Furthermore, while an indemnification provision in a contract that seeks to indemnify a party for its own negligence is void as against public policy, insurance procurement provisions are valid and enforceable and are not proscribed by General Obligations Law § 5-322.1."

*Longwood Central School District v American Employers Insurance*

*Company*, 35 AD3d 550, 551 (2d Dept 2006).

> "An insurance policy is a contract between the insurer and the insured. Thus, the extent of coverage (including a given policy's priority vis-a-vis other policies) is controlled by the relevant policy terms, not by the terms of the underlying trade contract that required the named insured to purchase coverage. As the Court of Appeals has stated, New York law 'recognize[s] the right of each insurer to rely upon the terms of its own contract with its insured [internal quotation marks and citations omitted]."

*Bovis Lend Lease LMB, Inc. v Great American Insurance Company*, 53 AD3d 140, 145 (1st Dept 2008).

Therefore, the court must look to the four corners of the insurance policy itself to determine whether Lehr qualifies as an additional insured. *Id.; see Sanabria v American Home Assurance Company*, 68 NY2d 866, *supra*.

The Continental policy provides that a party is "an additional insured with respect to liability arising out of . . . 'Your [Forest's] work' for that additional insured [Lehr]." Therefore, in order for Lehr to be considered an additional insured under the Continental policy, Thomas' accident must have arisen out of Forest's work.

The facts of the instant case are strikingly similar to the situation in *Turner Construction Company v Pace Plumbing Corp.* (298 AD2d 146 [1st Dept 2002]), in which the employee of a subcontractor slipped and fell on the floor while exiting the construction site bathroom. After the underlying personal injury action was settled, the general contractor sought a declaratory

judgment that the subcontractor's insurer had a duty to defend and indemnify it as an additional insured under the subcontractor's general commercial liability insurance policy. The Appellate Division stated that the relevant issues were:

> "whether the injured employee's use of the bathroom facilities located at the job site was a necessary and unavoidable activity that arose in the course of the construction project and whether the employee's injury therefore arose in connection with the execution of [the subcontractor]'s work for [the contractor]. .... The dismissal of [the contractor]'s third-party complaint and any resulting implication that [the contractor] was negligent have no bearing upon whether [the contractor] may assert the rights of an additional insured under the policy at issue."

*Id.* at 147.

The appellate court held for the contractor, saying that having an accident while using the restroom facilities while at the job site constitutes an occurrence arising out of the employee's work. *See Chelsea Associates, LLC v Laquila-Pinnacle*, 21 AD3d 739 (1st Dept 2005)(employee injured while entering the job site en route to work deemed, as a matter of law, to have arisen out of the work).

> "The sole focus in determining whether coverage under the additional insured endorsement was triggered, thus obligating [Continental] to indemnify [Lehr], is whether the accident arose out of [Forest]'s work ... at the construction site. Even though [Thomas] was a[n electrical] subcontractor who fell on [a tarp], the language of the endorsement is sufficiently broad to cover the present situation."

*Structure Tone, Inc. v Component Assembly Systems*, 275 AD2d 603, 603-604 (1st Dept 2000); *David Christa Construction, Inc. v*

*American Home Insurance Company*, 59 AD3d 1136 (4th Dept 2009).

The courts have interpreted the phrase

> "'arising out of' in an additional insured clause to mean originating from, incident to or having connection with. It requires only that there be some causal relationship between the injury and the risk for which coverage is provided [internal citation omitted]."

*Hunter Roberts Construction Group, LLC v Arch Insurance Company*, ___ NY3d ___, 904 NYS2d 52, 56 (1st Dept 2010).

Based on the foregoing, the court concludes that Thomas' injuries arose from Forest's work for Lehr, and, therefore, Lehr qualifies as an additional insured under Continental's policy with Forest.

The primary argument proffered by Continental against this finding is its misplaced reliance on some of this court's wording appearing in the earlier decision. However, the court is not inclined to be bound by previous dicta when the provisions of the instant insurance policy were not before it.

In the earlier case between Lehr and Forest, the sole contention argued by the parties was whether the contractual indemnification clause of the purchase order agreement violated the provisions of the GOL. The question for the court to be resolved in that case was whether the general contractor, Lehr, was negligent; indeed, Forest's participation in the occurrence was irrelevant to the court's determination as to whether the indemnification provision was void as against public policy.

*Brown v Two Exchange Plaza Partners,* 146 AD2d 129 (1st Dept 1989) *affd* 76 NY2d 172 (1990). Hence, any suggestion regarding Forest's work or obligations was no more than surplusage in that earlier decision, and is not determinative of the applicability of the additional insured provisions of the general commercial liability insurance policy under scrutiny in the present action.

Having determined that Lehr qualifies as an additional insured under the policy, the court must now examine Continental's arguments to ascertain whether any exclusions would preclude defense and indemnification coverage.

Lehr contends that Continental's failure to make a timely disclaimer of coverage precludes it from denying coverage at this time. Insurance Law § 3420 (d); *Hereford Insurance Company v Mohammod,* 7 AD3d 490 (2d Dept 2004).

Continental argues that it had no duty to disclaim coverage, based on its assertion that Lehr is not an additional insured. However, as an alternative argument, Continental indicates that the employee exclusion provision of the insurance policy cited above would, in and of itself, exclude coverage for Thomas' injuries. *Essex Insurance Company v Michael Cunningham Carpentry,* 74 AD3d 733 (2d Dept 2010); *Sixty Sutton Corp. v Illinois Union Insurance Company,* 34 AD3d 386 (1st Dept 2006).

Where the denial of coverage is "based on a 'lack of inclusion' rather than 'by reason of exclusion', ... the

defendant insurer [is] not required to deny coverage where none existed." *Hargob Realty Associates, Inc. v Fireman's Fund Insurance Company,* 73 AD3d 856, 858 (2d Dept 2010)(plaintiff failed to evidence that it qualified as an additional insured under the policy). Under such circumstances, disclaimer under Insurance Law § 3420 (d) is unnecessary. *Matter of Worcester Insurance Company v Bettenhauser,* 95 NY2d 185 (2000); *Solomon v United States Fidelity & Guaranty Company,* 43 AD3d 333 (1st Dept 2007).

However, where it is determined that the movant does qualify as an additional insured under the policy, to avoid defense and indemnification obligations, the insurer must make a timely disclaimer, asserting the policy exclusions upon which the disclaimer is based. *Hunter Roberts Construction Group, LLC v Arch Insurance Company,* ___ NY3d ____, *supra.*

Insurance Law § 3420 (d) (2) provides:

> "If under a liability policy delivered or issued for delivery in this state, an insurer shall disclaim liability or deny coverage for death or bodily injury arising out of a motor vehicle accident or any other type of accident occurring within this state, it shall give written notice as soon as reasonably possible of such disclaimer of liability or denial of coverage to the insured and the injured person or any other claimant."

Further, "the notice of disclaimer must promptly apprise the claimant with a high degree of specificity of the ground or grounds on which the disclaimer is predicated." *Hereford*

*Insurance Company v Mohammod,* 7 AD3d 490 (2d Dept 2004). "Failure to comply with section 3420 (d) precludes denial of coverage based on a policy exclusion." *Matter of Worcester Insurance Company v Bettenhauser,* 95 NY2d 185, 189 (2000).

Whereas the timeliness in disclaiming coverage is generally a question of fact, courts have held the following periods of delay in disclaiming coverage to be unreasonable as a matter of law: four months (*Saitta v New York City Transit Authority,* 55 AD3d 422 [1st Dept 2008]); 30 days (*West 16th Street Tenants Corp. v Public Service Mutual Insurance Company,* 290 AD2d 278 [1st Dept 2002]); 41 days (*Matter of Colonial Penn Insurance Company v Pevzner,* 266 AD2d 391 [2d Dept 1999]); (*Matter of Nationwide Mutual Insurance Company v Steiner,* 199 AD2d 507 [2d Dept 1993]); 42 days (*Squires v Robert Marini Builders,* 293 AD2d 808 [3d Dept 2002]).

The first time that Continental attempted to disclaim coverage based on a policy exclusion (the employee exclusion provision) was after the underlying personal injury action was settled and in response to the instant motion, not in a written notice of disclaimer, and more than four years after it was notified of the occurrence. Therefore, the court concludes that this attempted disclaimer by Continental fails to provide reasonable notice in a timely manner to Lehr so as to avoid its obligations to provide defense and indemnification to Lehr in the

underlying personal injury action. The court reaches this conclusion without addressing the merits of the argument that the employee exclusion provision would preclude such coverage if timely asserted.

Lastly, Lehr seeks a determination that Continental's policy provides primary coverage for the occurrence. However, the motion itself does not seek such relief; it merely requests summary judgment against Continental, declaring that Continental has a duty to defend and indemnify it in the underlying personal injury action. The request for a determination on the priority of coverage first appears in Lehr's reply memorandum of law, and therefore Continental did not have the opportunity to address this issue in its opposition papers to the instant motion. Consequently, the court declines to rule on a question not properly before it.[4] *Matter of Harleysville Insurance Company v Rosario*, 17 AD3d 677 (2d Dept 2005).

**CONCLUSION**

Based on the foregoing, it is hereby

ORDERED that plaintiffs' motion for summary judgment is granted; and it is further

ADJUDGED and DECLARED that Continental Casualty Company has

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[4] It is also noted that, whereas Lehr has provided what appears to be bills for attorney's fees, the motion does not ask for a specific dollar amount from Continental. Further, although Lehr asserts that the underlying personal injury action was settled, it has provided no proof of that assertion.

a duty to defend and indemnify plaintiffs in the underlying personal injury action entitled *Thomas Murphy and Susan Ann Murphy v 40 West 53rd Associates LP, The West 53rd Condominium, Tony Capini, Clifford Chance, American Craft Museum and Lehr Construction*, index No. 104990/06, Supreme Court, New York County; and it is further

ORDERED that defendant's cross-motion to dismiss the Complaint is denied; and it is further

ORDERED that plaintiffs 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 issue as to the amount Continental Casualty Company shall reimburse plaintiffs for sums expended in defending the underlying personal injury action entitled *Thomas Murphy and Susan Ann Murphy v 40 West 53rd Associates LP, The West 53rd Condominium, Tony Capini, Clifford Chance, American Craft Museum and Lehr Construction*, index No. 104990/06, Supreme Court, New York County is referred to a Special Referee to hear and report with recommendations, except that, in the event of and upon the filing of a stipulation of the parties, as permitted by CPLR 4317, the Referee, or Special Referee, or another person designated by the parties to serve as referee, shall determine the aforesaid issue; and it is further

ORDERED the movant shall move pursuant to CPLR 4403 within

30 days of receipt of the determination of the Special Referee or the designated referee; and it is further

ORDERED that counsel for plaintiffs shall serve a copy of this order with notice of entry on all parties and the Special Referee Clerk, Room 119M, within 30 days of entry to arrange a date for the reference to a Special Referee.

This constitutes the decision, order and judgment of the Court.

Dated: August 13, 2010

ENTER:

Carol Robinson Edmead, J.S.C.

CAROL EDMEAD
J.S.C.