[* 1]

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

PRESENT: GOODMAN Justice PART 17

TURNER CONSTRUCTION COMPANY

- v -

KLEINKNECHT ELECTRIC INC

INDEX NO. 401348/10

MOTION DATE

MOTION SEQ. NO. ~~002~~ 001

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 is decided per attached decision and order

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).

Dated: 6/29/11

EMILY JANE GOODMAN J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

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 17

----------X

TURNER CONSTRUCTION COMPANY,

Plaintiff,

-against-

Index No.: 401348/10

KLEINKNECHT ELECTRIC, INC., LIBERTY INTERNATIONAL UNDERWRITERS, INC., I.T.S. HOLDINGS LLC, HARTFORD INSURANCE COMPANY, I.P.C. INFORMATION SYSTEMS, INC., and FEDERAL INSURANCE COMPANY,

Defendants.

----------X

EMILY JANE GOODMAN, J.S.C.:

This is an action for a declaratory judgment concerning insurance coverage for plaintiff Turner Construction Company in a pending personal injury civil action brought by Albert Donohoe (Donohoe) and his wife against plaintiff, and others, in the Queens County Supreme Court, under Index number 05836/07 (the Underlying Action). In the Underlying Action, Donohoe, an electrician, alleges that he was injured in a building in which Turner was performing work for Time, Inc. (the Building) in July 2005.[1] Time, Inc. is not a party to this action.

Defendant Kleinknecht Electric, Inc. (Kleinknecht) is an electrical contractor. Defendants I.T.S. Holdings LLC (ITS) and I.P.C. Information Systems, Inc. (IPC) do or did perform telecommunications work. Defendant Hartford Insurance Company (Hartford) insures ITS. Defendant Liberty International Underwriters, Inc. (LIU) insures Kleinknecht.

---

[1]The amended complaint in this action, in addition to seeking the declaratory relief previously discussed, also alleges that ITS failed to procure insurance for Turner pursuant to their contractual agreements (Ninth Cause of Action).

Turner seeks summary judgment in its favor concerning its claims that LIU and Hartford have a duty to defend and indemnify Turner and to reimburse Turner, as well as a declaration that Turner is named as an additional insured under the Hartford and LIU insurance policies, and that Turner's insurance policy (Turner's Policy) is excess over those policies. In the alternative, Turner seeks a declaration that LIU and Hartford are obligated to assume all liability incurred by Turner in the Underlying Action in the event that Turner prevails on its claims for indemnity from Kleinknecht, ITS and IPC in that action. Turner also seeks an order setting down this matter for an inquest on the issue of damages that Turner has already incurred, including legal fees, disbursements, costs and expenses.

Hartford, ITS, Kleinknecht and LIU oppose Turner's motion and cross-move for summary judgment. Hartford seeks dismissal of the complaint and a declaration that it does not have a duty to defend or indemnify Turner as an additional insured. LIU seeks a declaration that Turner does not qualify as an additional insured under LIU's policy for the claims alleged in the Underlying Action. Kleinknecht also cross-moves for dismissal of Turner's claims against it and for a declaration that Turner is not qualified as an additional insured under LIU's policy for the claims in the Underlying Action. These defendants also seek costs and disbursements.

Background

In his complaint against Turner, Time, Inc. and Rockefeller Center North in the Underlying Action, Donohoe alleges that on June 14, 2005, he was an employee of Kleinknecht, working as an electrician, and hired to work on a renovation of the fourth and fifth floors of the Building, where Time, Inc. is located. Donohoe contends that, during the course of his employment, he fell while descending a staircase from the fifth to the fourth floor of the Building

carrying his ladder, tools and materials. Donohoe alleges that he was not provided with a safe place to work and has sued under the Labor Law and for negligence.

In Donohoe's second supplemental verified bill of particulars in the Underlying Action, he states that on the date of the incident, as an employee of Kleinknecht, he was working on a speaker system punch list for a "restack" project. Donohoe further states that he fell on debris at the end of his work day, while taking his materials, ladder and tools from the fifth floor to the fourth floor, where all materials were stored, in gang boxes, as instructed by Turner (Sparling Aff., Exh. G, ¶¶ 7, 22-23).

It is undisputed that Turner was the contractor for a project on the fourth floor of the Building where ITS was the subcontractor for telecommunications work, pursuant to a subcontractor work order with Turner. Kleinknecht was not the electrical subcontractor on the fourth- floor project. Donohoe has testified that he was performing work on the fifth floor of the building on the date of the incident on a project on which defendant ITS was the subcontractor for the telecommunications work. Thus, the record evidence demonstrates that ITS was the telecommunications subcontractor on both the fourth and the fifth floor of the Building on the date of the incident.

Donohoe testified that the last time he had done work on the fourth-floor project was on the Saturday before the accident, that he was working on only the fifth floor on the date of the incident, which had no relation to the work being conducted on the fourth floor, and having completed his work on the fifth floor, was heading home when he entered onto the staircase (*id.*, Exh. AA, at 182-187). Donohoe also testified that the plan was that he would return to work on the fifth floor project the next day (*id.* at 182).

Discussion

"The proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law" (*Dallas-Stephenson v Waisman*, 39 AD3d 303, 306 [1st Dept 2007]). Upon proffer of evidence establishing a prima facie case by the movant, "the party opposing a motion for summary judgment bears the burden of produc[ing] evidentiary proof in admissible form sufficient to require a trial of material questions of fact" (*People v Grasso*, 50 AD3d 535, 545 (1st Dept 2008) [citation and quotation marks omitted]). If there is any doubt as to the existence of a triable issue of fact, summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223 [1978]).

A threshold issue is whether or not Turner is included as an insured under the terms of the respective policies. "[A] party that is not named an insured or an additional insured on the face of the policy is not entitled to coverage" (*Tribeca Broadway Assoc. v Mount Vernon Fire Ins. Co.*, 5 AD3d 198, 200 [1st Dept 2004]), in which case the insurer has no duty to defend (*Seavey v James Kendrick Trucking*, 4 AD3d 119, 119 [1st Dept 2004]). "An additional insured endorsement is an addition rather than a limitation of coverage" and if a claim falls outside a policy's coverage, the carrier is not required to disclaim (*National Abatement Corp. v National Union Fire Ins. Co. of Pittsburgh, Pa.*, 33 AD3d 570, 571 [1st Dept 2006]; *Tribeca*, 5 AD3d at 200). "[T]he unambiguous provisions of an insurance policy, as with any written contract, must be afforded their plain and ordinary meaning, and that the interpretation of such provisions is a question of law for the courts" (*Broad St., LLC v Gulf Ins. Co.*, 37 AD3d 126, 130 [1st Dept 2006]).

i. The LIU Policy

The LIU policy, issued to Kleinknecht, states: "WHO IS AN INSURED (Section II) is amended to include as an insured any person or organization with whom you have agreed to add as an additional insured by written contract but only with respect to liability arising out of your operations or premises owned by or rented to you" (Sparling Mov. Aff., Exh. Q [Endorsement No. 4]). Turner moves for summary judgment, claiming that there are no issues of fact that it is an additional insured on the LIU and Hartford policies, that Donohoe's alleged injuries arose out of both Kleinknecht and ITS's work at the Building, and that his claim falls within the coverage of respective LIU and Hartford policies, thereby triggering the insurers' duty to defend and indemnify Turner in the Underlying Action. LIU argues that Turner does not qualify as an additional insured because Kleinknecht did not agree to add Turner as an additional insured by written contract and Turner's liability could not have arisen out of Kleinknecht's operations as Kleinknecht did not operate as a subcontractor at the time of the incident.

Both parties rely on the Master Agreement to support their positions, Article I of which states:

> "Article I. The Subcontractor shall perform and furnish all the work, labor, services, materials, plant, equipment, locks, scaffolds, appliances, and other things necessary for completion of all requirements under this Agreement (hereinafter variously called the REQUIREMENTS or the WORK) at various projects authorized and defined in Job Orders (hereinafter called the J.O.) to be issued and mutually executed by and Turner (*sic*) so as to be made part of this Agreement.

DESCRIPTION OF WORK (hereinafter called the Work) for and at the various projects so defined in such J.O.
(hereinafter called the Project), located on premises as so defined in such J.O.
(hereinafter called Premises), as shown and described in and strict accordance with the Plans, Specifications, General Conditions and Addenda thereto prepared by individual or firms
(hereinafter called the Architect) and with the terms and provisions of the General Contract (herein-after called General Contract) between Turner and

other parties
(hereinafter called the Owner) dated so defined in such J.O.
and in strict accordance with the additional Provisions, page(s) 3A thru 3B, Exhibit A annexed hereto and made a part hereof"

(Smyth Aff., Exh.A & B, at 1 [Art. I]).[2]

Article XXIII of the Master Agreement provides that:

> "The Subcontractor hereby assumes entire responsibility and liability for any and all damage or injury of any kind or nature whatever . . . to all persons, whether employees of any tier of the Subcontractor or otherwise . . . caused by, resulting from, arising out of or occurring in connection with the execution of the Work, or in preparation for the Work, or any extension, modification, or amendment to the Work by change order or otherwise.
>
> . . .
>
> Before commencing the Work, the following Insurance coverages from insurance companies satisfactory to TURNER shall be in place and maintained until completion and Final Acceptance of the Work
>
> . . .
>
> 2. COMMERCIAL GENERAL LIABILITY INSURANCE INCLUDING COMPLETED OPERATIONS, CONTRACTUAL LIABILITY INSURANCE AGAINST THE LIABILITY ASSUMED HEREINABOVE, and including INDEPENDENT CONTRACTORS LIABILITY INSURANCE if the Subcontractor sublets to another all or any portion of the Work, Personal Injury Liability . . . with the following minimum limits . . .
>
> Combined Single Limit $5,000,000.00.
>
> Before commencing the Work, the Subcontractor shall furnish a certificate, satisfactory to Turner from each insurance company showing that the above insurance is in force, stating policy numbers, dates of expiration, and limits of liability thereunder . . . . TURNER . . . shall be named as an additional insured under these policies of insurance. It is expressly agreed and understood by and between Subcontractors and TURNER that the insurance afforded the additional insured shall be primary insurance and that any other insurance carried by TURNER shall be excess of all other insurance carried by the Subcontractor"

---

[2]Article I is a form agreement with spaces left open, that has been reproduced here as faithfully as was possible.

(Smyth Aff., Exh. A & B, at 8-9 [Art. XXIII]).

The resolution of this dispute rests in the language employed by the parties in the Master Agreement. The interpretation of unambiguous contracts is a matter of law for the court's determination (*805 Third Avenue Corp. v M.W. Realty Associates*, 58 NY2d 447 [1983]). It is settled that "'when parties set down their agreement in a clear, complete document, their writing should ... be enforced according to its terms'" (*South Road Associates, LLC v International Business Machines Corporation*, 4 NY3d 272, 277 [2005], quoting *Vermont Teddy Bear Company v 538 Madison Realty Company*, 1 NY3d 470, 475 [2004]).

> "The fundamental rule of contract interpretation is that agreements are construed in accord with the parties' intent, and [t]he best evidence of what parties to a written agreement intend is what they say in their writing. Thus, a written agreement that is clear and unambiguous on its face must be enforced according to the plain meaning of its terms, and extrinsic evidence of the parties' intent may be considered only if the agreement is ambiguous [internal citations and quotation marks omitted]"

(Riverside South Planning Corp. v CRP/Extell Riverside, L.P., 60 AD3d 61, 66 [1st Dept 2008], *affd* 13 NY3d 398 [2009]). The Court of Appeals has "held that the reasonable expectation and purpose of the ordinary business [person] when making an ordinary business contract will be considered in construing a contract" (*BP A.C. Corp. v One Beacon Ins. Group*, 8 NY3d 708, 716 [2007] [citation and quotation marks omitted]). Generally, a writing is ambiguous only when, without resort to extrinsic evidence, it is reasonably susceptible to more than one interpretation (*see Van Wagner Adv. Corp. v S & M Enters.*, 67 NY2d 186 [1986]).

In contending that there is no written contract requiring that Kleinknecht add Turner as an additional insured, LIU argues that the Master Agreement, by its terms, only applies to projects authorized and defined in job orders issued and executed by both contracting parties. LIU

submits the testimony of Turner's project manager for the fourth-floor project, Kathleen Smyth, that another electrical subcontractor, and not Kleinknecht, was the electrical subcontractor on the fourth-floor project, and that Kleinknecht was not a subcontractor at the project for Time, Inc., but that ITS performed the teledata work there. LIU also submits the affidavit of Kleinknecht's resident, Lisa Canty, who avers that Kleinknecht was not a contractor or subcontractor on the project, that no job order was ever issued to Kleinknecht with respect to the Turner project, and that Kleinknecht has not performed work on projects for which Turner issued job orders to it since 2003. Canty further avers that no other written agreement was ever executed between Turner and Kleinknecht regarding the construction work on the Turner project.

In opposition to LIU's motion, Turner argues that it purposefully enters into standard form Master Agreements with each of its subcontractors to ensure that any subcontractor performing work on a Turner project, or whose work could even potentially impute liability to Turner, has procured insurance naming Turner as an additional insured. Turner maintains that the Master Agreement does not state that the application of its provisions is contingent upon the issuance of a job order, and that the job orders referred to in the Master Agreement are meant to facilitate Turner's ability to control which subcontractors are performing work on its projects, and not to limit its rights under the Master Agreement.

For support of the proposition that the job orders are not intended to limit Turner's rights, Turner points to a provision in the Master Agreement that provides that the subcontract agreement, and other contract documents, are intended and should be interpreted to compliment each other, with, in the event of conflict, the provision that imposes the greater duty or obligation on the subcontractor governing. While Turner's argument that job orders were not intended to

limit Turner's rights under the Master Agreement may be correct, it is beside the point as there is no dispute that Turner did not issue a job order to Kleinknecht for the fourth-floor project. Thus, there is no conflict between documents.

A plain reading of the Master Agreement reveals that it required subcontractors that executed it to add Turner as an additional insured under the commercial general liability and other insurance policies that the subcontractor was required to obtain before the subcontractor's commencement of "the Work." "The Work" is a term twice defined in Article I of the agreement. The first definition in the Master Agreement essentially describes the Work as the scope of the work, labor and materials of the agreement. However, the agreement does not contain any description of any actual work or requirements, or a specific project to be performed by a subcontractor. Accordingly, concerning the subcontractor's obligation to obtain insurance before commencing the Work, employing the Master Agreement's first definition of "the Work" alone results in a nonsensical interpretation, as such an interpretation leaves undefined the work for which the subcontractor was to procure insurance. An interpretation that defines "the Work" as that work included in the job order, the second definition in the Master Agreement, provides for a scope of work, that is, a project upon which work was to be performed, and for which insurance would be procured, and therefore permits the harmonious interpretation of the agreement as a whole.[3]

Other provisions of the Agreement demonstrate that the Master Agreement is not fairly

---

[3]Assuming that Turner seeks an interpretation of the Master Agreement that defines the Work as the subcontractor's performance and furnishing of all the work, labor, equipment, materials and other things required under the Master Agreement, without regard to whether or not a job order was in place, the agreement would have required the subcontractor to procure insurance prior to the agreement's execution.

[* 11]

interpreted as requiring indemnification and the procurement of insurance without some agreement for particular work to be done, as would be defined in a job or work order. For example, the Master Agreement contains a provision whereby the subcontractor assumes entire responsibility and liability for any and all damage or injury of any kind or nature whatever caused by, resulting from, arising out of or occurring in connection with the Work's performance, preparation for it or extensions, modification, or amendments to the Work by change order or otherwise. If the Master Agreement is interpreted to apply in the absence of a job order or agreement specifying some actual work to be done, there is nothing to be extended, modified or amended. In addition, the Master Agreement, as a form contract with a blank space for a description of the Work, makes sense overall if the term "the Work" is interpreted as the work described in job orders, because the agreement is intended to be about work, and without a job order, the agreement contains no work to be performed. Furthermore, had Turner intended that the subcontractor procure insurance absent a job order, the Master Agreement easily could have been so worded.

Finally, to obtain summary judgment, Turner was required to demonstrate how the language of the Master Agreement reasonably could be interpreted to reflect the contracting parties' objective expectations that the subcontractor was required to purchase insurance adding Turner as an additional insured in the absence of a job order. Turner does not explain how the plain language of the agreement supports such an interpretation. Turner's only discussion of the language of the agreement was its argument, discussed above, that job orders are not intended to limit Turner's rights, which is not supported by the language of the Master Agreement. The court notes that neither party argues that the Master Agreement is ambiguous.

Therefore, as Turner does not point to a job order for work at the Building, Kleinknecht was not required to procure insurance under the Master Agreement and, consequently, was not required to name Turner as an additional insured on those policies. Turner also argues that ITS procured labor from Kleinknecht for its work, but has not demonstrated how this would change the result here.

For these reasons, Turner's motion is denied as to LIU. Consequently, it is unnecessary to reach LIU's argument that Turner is not an additional insured because the underlying claim does not arise out of Kleinknecht's operations. It is also unnecessary to reach LIU's argument that summary judgment is premature due to the LIU policy's $25,000.00 self-insured retention. Because LIU's denial of coverage is based upon a lack of coverage for Turner as an additional insured, Turner's untimely disclaimer argument fails (*see Hunter Roberts Constr. Group, LLC v Arch Ins. Co.*, 75 AD3d 404, 407 [1st Dept 2010]).

Kleinknecht moves for summary judgment on the complaint and a declaration that Turner is not entitled to indemnification from Kleinknecht and its insurer, LIU. Regarding a declaration concerning LIU, LIU has moved for dismissal, which has been granted, making Kleinknecht's motion moot.

To support its argument that it has no duty to indemnify Turner because there was no job order, Kleinknecht points to the Master Agreement, and the previously discussed testimony of Canty and Smyth. Kleinknecht contends that its only connection to this action is that it provided labor to IPC/ITS pursuant to a labor pool agreement, but that its records reflect that Donohoe was

working for ITS on the date of the incident, with Kleinknecht's only involvement to issue Donohoe a paycheck, after money was wired to Kleinknecht's account from IPC for his pay.[4]

Turner asserts that it has moved for summary judgment on claims against Kleinknecht for contractual and common-law indemnification in the Underlying Action, indicating that this issue is being adjudicated therein. This court will not adjudicate a claim or issue which is currently before another State court, which might lead to inconsistent judgments. Therefore, Kleinknecht's motion is denied without prejudice to bringing a later motion, if it demonstrates that the issue and claim of its duty to indemnify Turner is not currently before the Supreme Court in Queens as part of the Underlying Action.

ii. The Hartford Policy

Turner and ITS each move for relief concerning the Hartford policy. Turner claims that it is an additional insured on the policy and is entitled to defense and indemnification. ITS seeks dismissal of the complaint against it and a declaration that Hartford does not have a duty to defend or indemnify Turner.

Turner bases its claim on a provision in the Hartford Policy which states:

> "Section II - WHO IS AN INSURED
>
> . . .
>
> 6. The following are also an insured when you 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 Paragraph a. through d. above, but only with respect to [ITS's] operations [or] 'your work' . . ."

---

[4]Stated differently, Kleinknecht argues that it performed payroll processing for the work that Donohoe was performing, but that Donohoe's work was for ITS.

(Sparling Aff., Exh. P [Commercial General Liability Coverage Form, at 10-11 of 16]).

The Hartford policy defines "your work" as work or operations performed by ITS, or on ITS's behalf, and materials, parts or equipment furnished in connection with such work or operations (*id.* [Exh. P], at 16 of 16]).

Turner also contends that it originally entered into a Master Agreement with IPC, but that, in 2004, IPC transferred the agreement to ITS, as part of IPC's sale of the assets of its former ITS division to ITS. Turner asserts that ITS assumed IPC's obligations under the Master Agreement.

In the Master Agreement that was executed by IPC and Turner, there are additional provisions stating that the subcontractor was required to provide comprehensive general liability insurance naming Turner as an additional insured (Smyth Aff, Exh. A, Special Provisions for All Subcontractors, at 15). Turner also points to a "Subcontract Work Order" (SWO), dated November 1, 2004, which states:

"1. Project: TIME INC Tranche IV

2. Premises: 1271 Avenue of the Americas, New York, NY 10020

. . .

4. Owner: Time Inc.

5. Date of General Contract: TBD

. . .

10. Insurance requirements:

. . .

2. General Liability: $ 5,000,000.00 combined single limit."

A. All Insurance coverages shall be provided by insurance companies selected by the Subcontractor.

. . .

4. Additional Insured: Turner Construction Company, see attached insurance certificate"

(Smyth Aff., Exh. C, at 1). The SWO has an attachment, dated August 30, 2004, which, in its general provisions section, states that the subcontract is for the furnishing of, among other things, labor and materials for six specified floors of the Time, Inc. project, including the fourth floor of the Building. The fifth floor is not included as one of the six specified floors of the Building.

ITS does not dispute that it is a party to the SWO. Turner also submits two insurance certificates, each dated October 6, 2004, which include reference to commercial general liability coverage. ITS does not dispute Turner's assertion that these certificates were provided by ITS. Based on these documents, Turner argues that it is entitled to coverage as an additional insured under the Hartford policy.

ITS argues that the Hartford policy only extends additional insured coverage if ITS, in a written agreement, agreed to add another organization as an additional insured. ITS further argues that it did not agree to add Turner as an additional insured for ITS's work on the fifth floor, and therefore Turner is not an additional insured under the Hartford policy for the Underlying Action. In support of its cross motion, ITS submits Turner's contract with Time, Inc., dated September 1, 2004, which, like the SWO, is for work on six specified floors of the Building, which includes the Building's fourth floor, but not the fifth floor. ITS also submits the affidavit of its former member, Thomas Carino, who avers that the SWO did not encompass work on the Building's fifth floor. Carino also avers that while part of the IPC/ITS asset purchase agreement required ITS to complete specific IPC jobs that were then in progress, ITS did not enter into a Master Agreement with Turner, and that agreement was not transferred to ITS. IPC's sale of its ITS division to ITS occurred in mid 2004, and the SWO was not entered until

November 2004.

ITS relies on Donohoe's testimony that he was working only on the fifth floor on the date of the incident, that the work being performed on the fourth floor work had nothing to do with the work on the fifth floor, and that his paycheck was issued by Kleinknecht. ITS also submits Turner's summary judgment motion papers from the Underlying Action, in which Turner seeks asserts that it was not the general contractor for the fifth floor work at the Building..

The parties do not dispute that the SWO required ITS to name Turner as an additional insured. In fact, ITS acknowledges this in its brief. Thus, Turner had a contract with ITS in which ITS was required to name Turner as an additional insured. The SWO does not limit the additional insured insurance requirement to only those floors of the Building listed therein.

Turning to the policy, and the issue of the duty to defend,

> "[a]n insurer's duty to defend its insured is exceedingly broad. An insurer will be called upon to provide a defense whenever the allegations of the complaint suggest ... a reasonable possibility of coverage. If [a] complaint contains any facts or allegations which bring the claim even potentially within the protection purchased, the insurer is obligated to defend. This standard applies equally to additional insureds and named insureds"

(*Regal Constr. Corp. v National Union Fire Ins. Co. of Pittsburgh, PA*, 15 NY3d 34, 37 [2010] [citations and quotation marks omitted]; *Fitzpatrick v American Honda Motor Co.*, 78 NY2d 61, 63 [1991] ["It is well established that a liability insurer has a duty to defend its insured in a pending lawsuit if the pleadings allege a covered occurrence, even though facts outside the four corners of those pleadings indicate that the claim may be meritless or not covered"]). In other words, if there is a potential possibility of coverage, the duty is triggered (*BP A.C. Corp.*, 8 NY3d 708, *supra*). This duty to defend extends to an additional insured (*Worth Constr. Co., Inc. v*

Admiral Ins. Co., 10 NY3d 411 [2008]), and, generally, an adjudication of liability that gives rise to a duty to indemnify the additional insured is not required in order for the duty to defend to attach (*see BP A.C. Corp.*, 8 NY3d 708, *supra*).

The Hartford policy is broadly worded, and more broadly worded than the provisions in the *Worth* (10 NY3d 411, *supra*) and the *Regal* (15 NY3d 34, *supra*) cases cited to by the parties, where each of the involved provisions provided for coverage of the additional insured only if the additional insured's liability arose out of the named insured's ongoing operations or work. The Hartford policy provides that a party is an additional insured if ITS agreed to name that party as an additional insured so long as the claim involved ITS's operations, its work or work performed on ITS's behalf. ITS acknowledges that Turner was named as an additional insured in the SWO, which was initialed on behalf of both signers, and dated after the undisputed sale of the IPC's ITS subdivision. Donohoe's amended complaint states that he was hired to work on the fourth and fifth floors of the Building. ITS does not dispute that it was the electrical subcontractor for both the fourth- and the fifth-floor projects, or Donohoe's assertion that he fell coming down the stairs from the fifth floor to the fourth to put away his tools there, where Turner was the contractor (*see* Sparling Aff., Exh. AA [Donohoe EBT], at 34, Exh. T [Alfano EBT], at 17). There is no dispute that even if he was a Kleinknecht employee,[5] Donohoe testified that he was working on an ITS operation, that is, performing work on an ITS job, or for ITS.

These circumstances fit the Hartford policy's requirement that the claim involve ITS's operations, its work or work performed on its behalf and therefore provide a basis for the

---

[5]ITS submits a workers' compensation determination for Donohoe in which Kleinknecht is listed as the employer, but the subject of the Board's adjudication was not whether or not Kleinknecht was Donohoe's employer, and ITS has not demonstrated that it may assert the determination, for issue preclusion purposes, or otherwise, against Turner.

potential possibility of coverage under the Hartford additional insured provision, which triggers Hartford's obligation to defend Turner (*Fitzpatrick*, 78 NY2d at 68 [carrier may not "construct a formal fortress of the [personal injury plaintiff's] pleadings, thereby successfully ignoring true but unpleaded facts within its knowledge that require it to conduct the insured's defense" (citation and quotation marks omitted)]). That "facts outside the four corners of [the] pleadings indicate that the claim may be meritless or not covered" is irrelevant (*id.* at 63).[6]

ITS argues that Turner's motion for summary judgment was premature because the Donohoe complaint does not contain allegations concerning ITS's work or operations. This ignores the other evidence discussed above, and that Turner was named as a defendant in the Underlying Action because of its contracts with ITS for work on the fourth floor. Although, in the Underlying Action, Turner has argued that it is not liable because it was not the general contractor for the work on the fifth floor does not change that Turner is entitled to a defense, as an insured's entitlement to a defense arises where there are facts and allegations that potentially bring the claim within the policy's embrace despite that the suit may turn out to be baseless (*Automobile Ins. Co. of Hartford v Cook*, 7 NY3d 131, 137 [2006]). As Hartford's obligation to indemnify Turner, however, necessarily turns on a liability determination against Turner in the Underlying Action, which is in turn dependent on findings of fact concerning Donohoe's work

---

[6]This case is not like *Worth*, cited to by ITS, wherein the Court determined that the contractor was not an additional insured under its subcontractor's insurance policy. The language of the additional insured provision in *Worth* was not the same at that of the Hartford policy, as the provision in the subcontractor's insurance policy in *Worth* provided for the inclusion of others as additional insureds only where the additional insured's *liability* arose out of the named insured's operations. The Court determined that the liability of the contractor, that sought coverage as an additional insured, did not arise out of the work of the named insured, the subcontractor, where the scope of the subcontractor's work included only the installation of a staircase and handrails, and the subcontractor was not conducting operations or work on the premises, at all, at the time the personal injury plaintiff was injured.

relationship to Turner's Project, the issue of indemnification will await proof at trial in the Underlying Action.[7]

Turner argues for indemnification from ITS directly, but its argument is premature as Turner has not demonstrated that the IPC Master Agreement, which contains indemnification language, was transferred, and does not point to indemnification language in the SWO.[8] While Turner submits sworn testimony that the Turner-IPC Master Agreement was transferred to ITS (Sparling Mov. Aff., Exh. T, at 99), in opposition, ITS submits the affidavit of one of its former members who avers that it was not. Turner's supplemental submissions (Sparling Sup. Aff., Exhibit F) contain a schedule of contracts transferred from IPS to ITS, which includes a list of agreements. One of the transferred agreements listed is for a job labeled as "JLS/Time Inc." While Turner acknowledges that the exhibit does not identify to which contracts the label "JLS/Time Inc." refers, it nonetheless concludes that this job encompasses the Turner-IPC Master Agreement, without sufficient support (Sparling Sup. Aff., ¶ 42). As the record reveals that IPC or ITS also performed work on the fifth floor of the Building on the Time, Inc. project, with a contractor named JLS, it is just as likely that the contract transferred was that one. In its

---

[7]In this case, the alleged loss for which the insured was sued involved a worker performing work for the named insured, ITS, on ITS's project. The Hartford policy does not contain "liability arising out of language" and, in fact, does not state that the work had to be the work performed at the location designated in the subcontract.

[8]Turner has not cited to page numbers in contracts to which it refers and the court is not required to page through voluminous submissions in order to find language to support a party's arguments, a practice that would put the court in the position of assisting a party in making its arguments. While Turner complains that ITS did not exchange the schedules of assets transferred, despite a court order to do so, Turner did not seek to compel the exchange before making this motion. In any event, Turner has received these records, but they are not self-explanatory and further evidentiary support would be required in order to demonstrate that they mean what Turner states that they do.

supplemental papers,[9] Turner argues that the language of the ITS asset purchase and sales agreement demonstrates that contracting parties' intent to transfer the Master Agreement. However, Turner does not so much as point to what it claims demonstrates this in the asset purchase and sale agreement, which provides that the transferred contracts were to be listed on a particular schedule.[10]

Because the Master Agreement provides that it is between IPC and Turner, Turner needed to demonstrate that the contract was transferred to ITS in order to have the language in it deemed binding on ITS. It has not done so, and whether or not the Master Agreement was transferred to ITS remains a fact question for trial as, on this record, neither party has demonstrated that it is entitled to resolution of this issue on its behalf as a matter of law.[11] Therefore, at this juncture,

---

[9]The court permitted the parties to submit supplemental briefs directed at evidence obtained after this motion's submission date. Turner made arguments in its supplemental brief that were not about the newly obtained evidence. For example, Turner argued that the cross motions were defective. Such arguments will not be considered.

[10]In its moving papers, Turner states that "[p]ursuant to the terms of the Asset Purchase and Sale Agreement, ITS 'agreed to pay, perform and discharge all liabilities and obligations of IPC' after the closing date" (Turner Memo. of Law, at 19, quoting Sparling Aff., Exh. Y [ITS Sale Agreement). Although Turner does not reference a page number in the ITS Sale Agreement for its quote, page 3 states that ITS "agrees to pay, perform or discharge all liabilities and obligations arising on and after the Closing *relating to the Transferred Assets and the Business* [emphasis added]." The definition of "Transferred Assets" includes the agreements related to the Business set forth on the previously discussed schedule. "The Business" is defined as the Seller's engagement in the business of providing certain services concerning voice and data communications. While the Master Agreement may have been transferred as part of the "Business," Turner has not demonstrated that this is the case sufficiently to overcome ITS's opposition affidavit and in light of the fact that the schedule of transferred contracts does not list the IPC-Turner Master Agreement.

[11]Page 2 of the SWO includes a reference to "JLS Document List," but the meaning of this and whether or not it concerns work that JLS had been performing on the fifth floor is not addressed by the parties, and thus will not be addressed by the court. The parties also have not addressed the document attached to the SWO, dated August 30, 2004, that states that the Contract Documents include a "Turner Interiors Master Agreement form 36 NY Rev. March 12, 2001" or

only the language of the SWO, which does not contain contractual indemnification language, and not the Master Agreement, may be considered.

The court also notes that Turner maintains that the contractual indemnification issue is being decided as part of the Underlying Action, which was commenced prior to this action. Therefore, like Kleinknecht, Turner must also demonstrate that this claim is not before the Supreme Court in Queens County in order for this court to make a determination on this issue, and this portion of Turner's motion is denied without prejudice.

ITS's motion to dismiss Turner's claim for failure to procure insurance is also denied. ITS has not has not demonstrated that it has obtained the full amount of the insurance required under the SWO.

iii. Priority of Coverage

Coverage for additional insureds is presumed to be primary, unless unambiguously stated otherwise (*see Pecker Iron Works of N.Y. v Traveler's Ins. Co.*, 290 AD2d 426, 427 (2d Dept 2002), *affd* 99 NY2d 391 [2003]). "Where the same risk is covered by two or more policies, each of which was sold to provide the same level of coverage ... priority of coverage ... among the policies is determined by comparison of their respective 'other insurance' clauses" (*Sport Rock Intl., Inc. v American Cas. Co. of Reading, Pa.*, 65 AD3d 12, 18 [1st Dept 2009]; *Jefferson Ins. Co. of N.Y. v Travelers Indem. Co.*, 92 NY2d 363, 372 [1998]). When deciding which policies are primary and which are excess, courts will examine the language of the various "other insurance" provisions (*id.*).

Here, the "other insurance" clause of Turner's insurance policy provides:

---

the language in the SWO that states that the conditions of the "Master Subcontract dated 03/12/01" shall govern that order (Smyth Aff, Exh. C).

"4. Other Insurance

If other valid and collectible insurance is available to the insured for a loss we cover under Coverage A or B of this coverage part, our obligations are limited as follows:

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 other insurance by the method described in c. below.

b. Excess Insurance

This insurance is excess over:

(1) Any of the other insurance, whether primary, excess, contingent or on any other basis:
(a) That is Fire, Extended Coverage, Builder's Risk, Installation Risk or similar coverage for "your work"

. . .

(2) Any other primary insurance available to you covering liability for damages arising out of the premises or operations for which you have been added as an additional insured by attachment of an endorsement"

(Rabb Aff., Exh. A [Liberty Mutual Insurance Company Policy], at15 of 23).

The Turner policy also has an endorsement that states:

"It is agreed that this policy is excess over that portion of the loss for which the insured has other valid collectible insurance, as an additional insured on a Liability Insurance policy issued to a subcontractor of the Named Insured whether such policy is on a primary, excess or contingent basis (emphasis added)"

(*id.*, [Liberty Mutual Insurance Company Policy, "End Serial No. 19"]; *see also* Exh. B [same], at 3]).

The Hartford policy provides:

"**4. Other Insurance**

> If other valid and collectible insurance is available to the insured for a loss we cover under Coverages **A** or **B** of this Coverage Part, our obligations are limited as follows:
>
> **a. Primary Insurance Including Primary Additional Insurance for Additional Insureds**
>
> 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 other insurance by the method described in **c.** below. When this insurance is primary, we will not seek contributions from other insurance available to any person or organization who is an insured under Paragraph 6. in Section II-Who Is An Insured.
>
> **b. Excess Insurance**
>
> This insurance is excess over:
>
> . . .
>
> (2) Any other primary insurance available to you covering liability for damages arising out of the premises or operations for which you have been added as an additional insured by attachment of an endorsement"

(Sparling Aff, Exh. P, [The Hartford Policy, Commercial General Liability Coverage Form], at 12 of 16).

Turner's policy provides that Turner's insurance is primary unless other insurance is available to Turner as an additional insured, in which case Turner's policy is excess. Regarding the Hartford policy, section (b) (2) of the "other insurance clause" applies to one that is an additional insured on another policy, but Turner is not an additional insured on the Turner policy, but the named insured. Thus, coverage under Turner's policy would be excess over coverage under the Hartford policy, because the excess clause in Turner's policy was triggered, as Turner is an additional insured on another policy. Conversely, the excess clause in the Hartford policy was

not triggered by virtue of Turner's status as the named insured on the Turner policy (*see Village of Brewster v Virginia Surety Company*, 70 AD3d 1239, 1243 [3d Dept 2010]).

Unfortunately, further review of Turner's submissions reveals that any determination of priority of coverage for all of the policies at issue here is premature, as Turner has not submitted a copy of the excess policy, and the court must review and consider the provisions of all of the applicable policies to determine the priority among them (*BP A.C. Corp.*, 8 NY3d at 716). Therefore the court will refrain, at this time, from issuing a declaration concerning priority of coverage.

Conclusion

Accordingly, it is

ORDERED that Kleinknecht Electric, Inc.'s motion for summary judgment is denied without prejudice; and it is further

ORDERED that plaintiff's motion for summary judgment as against the Hartford Insurance Company is granted to the extent that plaintiff seeks a judgment and declaration that Hartford is obligated to defend plaintiff in connection with the underlying lawsuit and is otherwise denied; and it is further

ADJUDGED AND DECLARED that Hartford Insurance Company has an obligation to defend plaintiff in connection with the underlying lawsuit against it entitled *Donohoe v Turner Construction Company* (Supreme Court, Queens County, Index No. 5836/07); and it is further

ORDERED that the issue as to the amount of legal fees and costs to which Turner is entitled from Hartford Insurance Company shall be determined at trial; and it is further

ORDERED that plaintiff's motion for summary judgment as against Liberty International

Underwriters, Inc. declaring that Liberty International Underwriters, Inc. is obligated to defend, indemnify and reimburse plaintiff in connection with the underlying lawsuit is denied; and it is further

ORDERED that Liberty International Underwriters, Inc.'s motion for summary judgment is granted and the complaint of plaintiffs is dismissed as against Liberty International Underwriters, Inc. with costs and disbursements to plaintiffs as taxed by the Clerk of the Court upon the submission of an appropriate bill of costs; and it is further

ADJUDGED AND DECLARED that plaintiff is not an additional insured under Liberty International Underwriters, Inc.'s policy for the claims alleged in the lawsuit entitled *Donohoe v Turner Construction Company* (Supreme Court, Queens County, Index No. 5836/07); and it is further

ORDERED that the Clerk of the Court shall enter judgment accordingly after severing Liberty International Underwriters, Inc. from the action; and it is further

ORDERED that the remaining parties are to appear for a discovery conference on July 28, 2011 at 10 am in Room 422 at 60 Centre Street.

Dated: June 29, 2011

ENTER:

J.S.C.

EMILY JANE GOODMAN

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).