

City of New York v Nova Cas. Co.

2011 NY Slip Op 32468(U)

September 7, 2011

Sup Ct, NY County

Docket Number: 402711/10

Judge: Barbara Jaffe

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

PRESENT: BARBARA JAFFE Justice
J.S.C.

PART 5

City of New York

INDEX NO. 402711/10

-v-
NOVA CASUALTY CO.

MOTION DATE _____

MOTION SEQ. NO. 001

MOTION CAL. NO. 16

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

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).

**DECIDED IN ACCORDANCE WITH
ACCORDANT JUDGMENT / ORDER**

Dated: 9-7-11
SEP 07 2011

BARBARA JAFFE 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 5

-----X
THE CITY OF NEW YORK,

Plaintiff,

-against-

Index No. 402711/10

Argued: 6/21/11
Motion Seq. Nos.: 001,

DECISION & ORDER

NOVA CASUALTY COMPANY, TOWER
INSURANCE COMPANY OF NEW YORK, and
CASTLEPOINT INSURANCE COMPANY,

Defendants.

-----X
NOVA CASUALTY COMPANY,

Third-Party Plaintiff,

Third-Party Index No. 591094/10

-against-

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).

HARLEYSVILLE WORCHESTER INSURANCE
COMPANY,

Third-Party Defendant.

-----X
BARBARA JAFFE, JSC:

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Michael A. Cardozo
Corporation Counsel
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By notice of motion dated December 6, 2010, plaintiff City moves pursuant to CPLR

3212 for an order granting it summary judgment against defendant Nova Casualty Company (Nova). Nova opposes and, by amended notice of cross motion dated February 9, 2011, seeks a judgment against City and defendants Tower Insurance Company of New York (Tower) and Castlepoint Insurance Company (Castlepoint) declaring that it has no duty to defend City and that Tower and Castlepoint must defend City. By notice of cross motion dated March 22, 2011, Tower and Castlepoint move pursuant to CPLR 3212 for an order granting them summary judgment and a judgment against City declaring that they have no duty to defend City, and a judgment against Nova declaring that Nova has a duty to defend City. Nova and City oppose Tower and Castlepoint's motion. By letter dated March 31, 2011, Tower and Castlepoint withdrew their cross motion as against City only.

By notice of motion dated March 28, 2011, City moves pursuant to CPLR 3212 for an order granting it summary judgment against Tower and Castlepoint. By notice of cross motion dated April 13, 2011, Tower and Castlepoint move pursuant to CPLR 3212 for an order granting it summary judgment and a judgment against City declaring that they have no duty to defend City. City opposes.

By notice of motion dated April 5, 2011, Nova moves pursuant to CPLR 3212 for an order granting it a judgment against third-party defendant Harleystown Worchester Insurance Company (Harleystown) declaring that Harleystown has a duty to defend City. Harleystown opposes.

The motions are consolidated for decision.

I. BACKGROUND

A. General Background

This action arises from an incident whereby James Regno was allegedly injured on August 15, 2008 while performing construction work on behalf of his employer Bruno Grgas, Inc. (Grgas) at 650 West 57th Street, a/k/a 780-786 12th Avenue in Manhattan (premises) pursuant to a construction project commenced by City (project), when an unsecured and/or inadequately secured duct fell on him. (Affirmation of Ari Biernoff, ACC, dated Dec. 6, 2010 [Biernoff Dec. Aff.], Exh. 3).

In an action filed on or about October 14, 2008 to recover damages for his personal injuries, Regno sued Tully Construction Co., Inc., Tully Industries Inc., Dart Mechanical Corp. (Dart), Bovis East, Inc., Bovis Lend Lease, Inc., Bovis Construction Corp., J.H. Electric of New York, Inc., Almar Plumbing & Heating Corp. (Almar), and Coastal Sheet Metal Corp. (Biernoff Dec. Aff., Exh. 3). In his complaint, Regno alleges that Dart was the general contractor for the project and Almar the construction manager, that both were negligent, and that their negligence led to his injuries. (*Id.*).

On or about July 1, 2009, Regno commenced a second action against City and the New City Department of Sanitation (DOS). (*Id.*, Exh. 4). By decision and order dated November 16, 2009, the two actions were consolidated (Regno action). (*Id.*, Exh. 5).

On or about September 27, 2010, City commenced the instant action, seeking a judgment declaring that all three defendants have a duty to defend it in the Regno action. (*Id.*, Exh. 9). On or about November 17, 2010, Tower and Castlepoint served their answer with a cross-claim against Nova. (*Id.*, Exh. 10). On or about December 1, 2010, Nova served its answer with a

cross-claim against Tower and Castlepoint. (*Id.*, Exh. 11).

By decision and order dated September 30, 2010, I dismissed Almar's third-party complaint against Grgas in the Regno action, finding that there was no agreement that required Grgas to indemnify Almar.

On October 6, 2010 at an examination before trial held in the underlying action, Regno testified that, as pertinent here, he was at the premises covering the plumbing pipes with insulation at the time of the accident. (Affirmation of Michael F. Panayotou, Esq., dated Feb. 7, 2011 [Panayotou Aff.], Exh. A).

B. Background related to Nova

Sometime in 2002, City, through DOS, entered into a contract with Dart after successfully bidding to perform construction work at the premises. While the bid documents require that "The City of New York Department of Sanitation" be named as an additional insured on all insurance policies, the contract requires Dart to obtain an occurrence-based commercial general liability insurance policy covering all of its work naming "the City" as an additional insured, and in the definitions section of the contract, "City" is defined as The City of New York. (Bierhoff Dec. Aff., Exh. 1).

As pertinent here, Dart obtained a commercial general liability insurance policy from Nova, effective from January 1, 2008 to January 1, 2009, which includes an additional insured endorsement ("Additional Insured - Owners, Lessees or Contractors - Automatic Status When Required in Construction Agreement With You - Primary Insurance"), providing as follows:

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 . . .

(*Id.*, Exh. 2).

On or about March 16, 2005, Dart entered into a subcontract with Grgas whereby Grgas agreed to furnish and install thermal insulation systems at the premises. (Panayotou Aff., Exh.

B).

On or about May 6, 2010, City sent Nova a copy of Regno's complaint against it (*id.*, Exh. 6) and, receiving no response, faxed Nova a letter referencing the letter, attaching the complaint, and demanding that Nova defend and indemnify it in the Regno action. (*Id.*, Exh. 7).

By letter dated July 2, 2010, Nova declined as follows:

In review of the [Dart] contract, it requires that we name the New York City Department of Sanitation as an additional insured on Dart Mechanical's policy. However, there is no requirement that we name the City of New York. Therefore, the City of New York is not entitled to additional insured coverage under Dart Mechanical's policy.

Furthermore, the plaintiff was an employee of Bruno Grgas and was performing work on this job when he was injured. Bruno Grgas entered into a contract with Dart Mechanical and also had a separate contract for this job with Almar Plumbing. At the time of this incident, it is believed that the plaintiff was performing work under the contract with Almar Plumbing, not Dart Mechanical. If that is the case, this incident in question did not arise out of Dart Mechanical's operation or the operation of their sub-contractor and therefore, the New York City Department of Sanitation is not entitled to additional insured coverage or indemnification in this matter.

(*Id.*, Exh. 8).

C. Background related to Tower and Castlepoint

On or about March 3, 2003, City and Almar entered into a contract for construction work at the premises. The agreement is identical to that between City and Dart, including the provision requiring that Almar obtain insurance naming City as an additional insured. (Panayotou

Aff., Exh. E). Sometime during the project, Almar furnished Grgas with a purchase order for it to install insulation at the premises. (*Id.*, Exh. F).

Almar obtained a commercial general liability policy from Castlepoint, effective from April 1, 2008 to April 1, 2009, and including an endorsement, entitled (“Additional Insured - Owners, Lessees or Contractors,” providing that an insured under the policy includes “any person or organization the named insured is required to name by virtue of a written contract on a primary ‘non-contributory basis,’” but only as to liability arising out of the named insured’s work. It also requires that the insured give Castlepoint notice as soon as practicable of an occurrence which may result in a claim or of a lawsuit against the insured, and to send it immediately a copy of any legal papers received. (Affirmation of Ari Biernoff, ACC, dated Mar. 28, 2011 [Biernoff Mar. Aff.], Exh. 2).

On November 3, 2008, Almar’s broker sent Castlepoint notice of an occurrence/claim for Regno’s lawsuit against Almar along with a copy of the summons and complaint. (Affidavit of Nancy Hicks, dated Apr. 13, 2011 [Hicks Affid.], Exh B).

By letter dated November 26, 2008, Castlepoint disclaimed coverage on the grounds that Almar had failed to notify it timely of Regno’s claim until November 2008 notwithstanding its awareness of the accident on August 15, 2008, and that if the accident had occurred during certain operations, those operations were excluded under the policy. Without waiving its disclaimer, Castlepoint assigned an attorney to represent Almar in the Regno action. (Hicks Affid., Exh. D). It then subsequently retracted its disclaimer and now defends Almar in the Regno action. (Hicks Affid.).

By letter dated July 14, 2010, City sent Castlepoint a copy of Regno’s complaint, which

was received by Tower/Castlepoint on July 20, 2010. (*Id.*, Exh. E). Upon receipt of City's letter, Castlepoint's claims examiner investigated City's claim by obtaining and reviewing Almar's insurance policy and contract with City, reviewing information to determine whether Regno's accident resulted from Almar's work, and obtaining a copy of the affidavit of service of Regno's complaint on City to determine whether City's notice was timely. (Hicks Affid.). On August 3, 2010, the examiner completed her investigation, discussed it with coverage counsel, and the following day, drafted a proposed disclaimer and submitted it to her supervisor for review, after which it was sent to an insurance coverage supervisor/attorney, who conducted an independent review of the claim and proposed disclaimer for final approval. (Hicks Affid.).

By letter dated August 18, 2010 and sent the following day, Castlepoint disclaimed coverage on the grounds that if Regno was working for Dart when he was injured, Almar would not be liable for negligence arising from its work for City and thus, City would not qualify as an additional insured under the policy, and that City had failed to notify it as soon as practicable of Regno's claim against it despite knowing of his accident on or about the date it occurred and failed to forward Regno's summons and complaint to it immediately despite being served with it on or after July 6, 2009. (*Id.*, Exh. F; Biernoff Mar. Aff., Exh. 11).

D. Background related to Harleysville

By agreement dated March 16, 2005, Dart hired Grgas to perform work for the project, and Grgas agreed to procure insurance "for the same coverage, conditions, additional insureds and limits as are required of Dart" in the prime contract or, as pertinent here, the amount of comprehensive general liability insurance stated in the Grgas contract, whichever was greater. The amount is left blank. The agreement also provides that the prime contract is that between

Dart and City for the project. (Affirmation of Michael F. Panayotou, Esq., dated Apr. 5, 2011 [Panayotou Apr. 5 Aff.], Exh. A).

Grgas obtained a commercial liability policy from Harleysville, effective from June 9, 2008 to June 9, 2009, providing that an additional insured includes “any person or organization for whom [the insured] is 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.” (*Id.*, Exhs. M, N).

II. CITY’S MOTION AGAINST NOVA AND NOVA’S CROSS MOTION AGAINST CITY

A. Contentions

City argues that as its contract with Dart required that Dart name it as an additional insured, and as Nova’s insurance policy for Dart provides additional insured coverage for any organization for which Dart performed when Dart and such organization had agreed in writing that such organization be added as an additional insured, Nova is required to defend City in the Regno action. It contends that as Regno alleges in his complaint that he was injured while performing work for Dart, Nova may not disclaim coverage based on its speculation that Regno was working for Almar and not Dart. It denies that it and DOS are legally distinct entities and thus maintains that Nova’s assertion that only DOS is entitled to additional insured status is frivolous. (Mem. of Law, dated Dec. 6, 2010).

Nova denies that City is entitled to additional insured status based on Regno’s testimony that he was working for Almar, not Dart, and that his accident thus did not arise from Dart’s operations at the premises and it has no duty to defend City. It also alleges that the contract is ambiguous as to whether City or DOS must be named as an additional insured, and that such

ambiguity must be construed against City, the contract's drafter. (Panayotou Aff).

B. Analysis

As Dart's insurance policy provides that an entity will be included as an additional insured if a contract between it and that entity requires that the entity be named as an additional insured, and as Dart's contract requires that it name City as an additional insured, City is entitled to additional insured status. (See *Stellar Mech. Servs. of New York, Inc. v Merchants Ins. of New Hampshire*, 74AD3d 948 [2d Dept 2010] [plaintiff established that it qualified as additional insured by submitting contract and indemnity agreement which required party to name plaintiff as additional insured under insurance policy, and insurance policy provided that any organization that party was required by contract to name as an insured was additional insured under policy]). And, although the bid documents reference DOS as an additional insured, there is no ambiguity within the contract itself, which references only City.

A duty to defend is broader than a duty to indemnify and arises whenever the allegations in a complaint "suggest a reasonable possibility of coverage" and, as Regno alleges that Dart's negligence caused his accident, it is possible that his injuries arose from Dart's operations at the premises, thereby triggering Nova's duty to defend City. (*BP Air Conditioning Corp. v One Beacon Ins. Group*, 8 NY3d 708, 714 [2007] [as plaintiff alleged in complaint that contractor was engaged in construction work at premises and that its negligence caused plaintiff's injuries, there was possibility that plaintiff's injuries arose from contractor's operations at premises and contractor's insurance provider had duty to defend additional insured regardless of merits of complaint]; *Stellar Mech. Servs. of New York, Inc.*, 74 AD3d at 952 [insurance carrier had duty to defend additional insured as complaint included allegations that worker's injuries were caused

by named insured's negligence, even if allegations ultimately shown to be unfounded]; *IBEX Constr., Inc. v Utica Natl. Assur. Co.*, 57 AD3d 245 [1st Dept 2008] [duty to defend triggered by allegations in complaint which brought claims potentially within scope of insurance coverage]).

III. CITY'S MOTION AGAINST TOWER/CASTLEPOINT AND TOWER/CASTLEPOINT'S MOTION AGAINST CITY

A. Contentions

City contends that given the allegation in Regno's complaint that Almar's negligence led to his injuries, City qualifies as an additional insured under Almar's policy, thereby triggering Tower/Castlepoint's duty to defend it. It also alleges that even if its notice to Tower/Castlepoint was late, Tower/Castlepoint's disclaimer was untimely and thus invalid. And, as Tower/Castlepoint is defending Almar in the Regno action, City argues that it must also defend it. (Mem. of Law, dated Mar. 29, 2011).

Tower/Castlepoint denies any duty to defend City as City's notice of the claim was late and its disclaimer was timely given its need to investigate. It also asserts that its defense of Almar does not require that it defend City. (Mem. of Law, dated Apr. 13, 2011).

In reply, City denies that Tower/Castlepoint's investigation excuses its untimely disclaimer, having failed to demonstrate that its investigation was related to the reasons for its disclaimer. (Reply Mem., dated Apr. 18, 2011).

In response, Tower/Castlepoint argues that before deciding whether City's notice was late, it was first required to investigate whether City qualified for additional insured status, which required a review of Regno's claim against Almar and the contract between Almar and City. It observes that the investigation took two weeks and that its disclaimer was sent to City within two

weeks thereafter. (Reply Mem., dated Apr. 19, 2011).

B. Analysis

Absent any dispute that City's notice to Tower/Castlepoint was late, the remaining issue is whether its disclaimer was timely. Pursuant to Insurance Law § 3420(d), if an insurer disclaims coverage, it must give the insured or claimant written notice of the disclaimer as soon as reasonably possible. The timeliness of a disclaimer is measured from the date that the insurer receives information that would disqualify the claim, not the date on which it received notice of the claim. (*First Fin. Ins. Co. v Jetco Contr. Corp.*, 1 NY3d 64 [2003]; *Ace Packing Co. Inc. v Campbell Solberg Assocs., Inc.*, 41 AD3d 12 [1st Dept 2007]; *2540 Assocs., Inc. v Assicurazioni Generali, S.p.A.*, 271 AD2d 282 [1st Dept 2000]).

An insurer who delays a disclaimer bears the burden of justifying the delay, and time spent investigating whether to disclaim may justify the delay. (*First Fin. Ins. Co.*, 1 NY3d at 69). Where the grounds for the disclaimer are not apparent, the insurer must be given a reasonable time to investigate, but the investigation must be reasonably prompt, thorough, and diligent. (*U.S. Underwriters Ins. Co. v City Club Hotel, LLC*, 369 F3d 102 [2d Cir 2004]). Moreover, “[a]n insurer is not required to disclaim on timeliness grounds before conducting a prompt, reasonable investigation into other possible grounds for disclaimer; in fact, a reasonable investigation is preferable to piecemeal disclaimers.” (*Admiral Ins. Co. v State Farm Fire*, 86 AD3d 486 [1st Dept 2011], quoting *DiGuglielmo v Travelers Prop. Cas.*, 6 AD3d 344 [1st Dept 2004]; see also *Pub. Serv. Mut. Ins. Co. v Harlen Hous. Assocs.*, 7 AD3d 421, 423 [1st Dept 2004] [investigation permits disclaimer to be based on “concrete evidence”]).

Here, Tower/Castlepoint disclaimed coverage on two separate grounds: (1) that City did

not qualify as an additional insured because Regno was working for Dart and not Almar when he was injured, and (2) that City provided late notice of Regno's claim and failed to forward immediately Regno's summons and complaint. Thus, the issue is whether Tower/Castlepoint's investigation into these two grounds was reasonable and prompt.

When Tower/Castlepoint first received notice from City, it had to determine whether City was covered under the policy as the policy was neither issued to it nor was it a named insured. As City included only a copy of the summons and complaint, Tower/Castlepoint had to obtain and review the policy as well as the contract between City and Almar to determine whether City was covered. As those documents would have indicated that City may have qualified as an additional insured if Regno's accident involved or arose out of work he was performing for Almar, Tower/Castlepoint then had to investigate whether Regno had been performing work for Almar when he was injured.

That Tower/Castlepoint's investigation into this issue took two weeks to complete was not unreasonable (*see Silverite Constr. Co., Inc. v One Beacon Ins. Co.*, 61 AD3d 415 [1st Dept 2009] [approximate month-long delay in issuing disclaimer was timely as it followed brief investigation into whether plaintiffs qualified as additional insureds under policy]), nor was its additional two week delay for its attorney to review the proposed disclaimer (*see U.S. Underwriters Ins. Co. v 614 Constr. Corp.*, 142 F Supp 2d 491 [SD NY 2001], *aff'd* 23 Fed Appx 92 [2d Cir 2002] [45-day delay in disclaiming not untimely as insurer immediately began investigation after receiving claim and then waited for attorney to review disclaimer and sent disclaimer two days after receiving counsel's advice]; *McGinley v Odyssey Re [London]*, 15 AD3d 218 [1st Dept 2005] [39-day delay not untimely as insurer made diligent efforts to obtain

necessary information and sought independent legal advice to determine legal propriety of disclaimer]; *New York Cent. Mut. Fire Ins. Co. v Majid*, 5 AD3d 447 [2d Dept 2004] [31-day delay not unreasonable where insurer investigated claim, investigator's report was reviewed, and counsel was consulted before disclaimer letters sent]; *see also Pub. Serv. Mut. Ins. Co.*, 7 AD3d at 423 [27-day delay between insurer's receipt of investigation report and disclaimer timely as matter of law, and even if delay was 37 days, it was reasonable]).

Moreover, City cites no authority supporting its argument that Tower/Castlepoint is estopped from denying a defense to City based on its agreement to defend Almar. Rather, several courts have held that an insurer properly disclaimed coverage to an additional insured based on untimely notice notwithstanding the insurer's agreement to defend the named insured. (*See eg 23-08-18 Jackson Realty Assocs. v Nationwide Mut. Ins. Co.*, 53 AD3d 541 [2d Dept 2008]; *Judlau Contracting, Inc. v Westchester Fire Ins. Co.*, 24 Misc 3d 1228[A], 2009 NY Slip Op 51659[U] [Sup Ct, New York County 2009]; *see also City of New York v St. Paul Fire and Marine Ins. Co.*, 21 AD3d 978 [2d Dept 2005] [insurer not required to defend City as additional insured as it failed to provide timely notice, irrespective of whether primary insured had given notice]).

IV. NOVA'S MOTION AGAINST TOWER/CASTLEPOINT AND TOWER/CASTLEPOINT'S MOTION AGAINST NOVA

A. Contentions

Nova argues that if it is required to defend City, then Tower/Castlepoint must also do so as City qualifies as an additional insured under Tower/Castlepoint's insurance policy for Almar. It also contends that Tower/Castlepoint's disclaimer of City's claim is null and void as it

accepted Almar's claim and is defending it in the Regno action, observing that when City tendered its claim, City and Almar were not adverse to each other and were similarly situated. (Mem. of Law, dated Feb. 7, 2011).

Tower/Castlepoint denies having a duty to defend City as City provided it with late notice of Regno's claim, and contend that Almar's notice is irrelevant as City had an independent obligation to provide them with notice and as the interests of City and Almar were adverse to each other based on Regno's claim that both were negligent. (Mem. of Law, dated March 22, 2011).

In reply, Nova maintains that Tower/Castlepoint failed to establish that its disclaimer was valid, and that City and Almar's interests were not adverse when Almar gave notice to Tower/Castlepoint. (Affirmation of Michael F. Panayotou, Esq, dated Mar. 31, 2011).

B. Analysis

As Tower/Castlepoint's disclaimer of City's claim was timely (*supra*, II.), and given an additional insured's independent obligation to provide timely notice (*see Bovis Lend Lease LMB, Inc. v Travelers Prop. Cas. Co. of Am.*, 78 AD3d 405 [1st Dept 2010]; *23-08-18 Jackson Realty Assocs.*, 53 AD3d at 541; *City of New York v St. Paul Fire and Marine Ins. Co.*, 21 AD3d at 978; *Structure Tone, Inc. v Burgess Steel Prods. Corp.*, 249 AD2d 144, 145 [1st Dept 1998]; *Judlau Contr., Inc.*, 24 Misc 3d 1228[A], 2009 NY Slip Op 51659[U]; *Illinois Ntl. Ins. Co. v Illinois Union Ins. Co.*, 2008 WL 5197028, 2008 NY Slip Op 33225[U] [Sup Ct, New York County 2008]), Tower/Castlepoint validly disclaimed City's claim.

Moreover, notice provided by a named insured may be deemed notice by an additional insured only when the two parties are united in interest or their interests are not adverse. (*23-08-*

18 Jackson Realty Assocs., 53 AD3d at 541). As Regno alleges that both City and Almar were negligent and as they are both defendants in the consolidated Regno action, their interests are adverse and they are not united in interest. Almar's notice to Tower/Castlepoint is thus not notice by City. (*See Travelers Ins. Co. v Volmar Constr. Co.*, 300 AD2d 400 [1st Dept 2002] [insured that had provided notice had taken position adverse to co-insured in underlying litigation]; *Sayed v Macari*, 296 AD2d 396 [2d Dept 2002] [notice by primary insured did not excuse additional insured's failure to give timely notice as their positions were adverse]; *Ntl. Union Fire Ins. Co. of Pittsburgh, PA v State Ins. Fund*, 266 AD2d 518 [2d Dept 1999] [insured and additional insured had adverse interests in litigation]; *see also City of New York v Welsbach Elec. Corp.*, 49 AD3d 322 [1st Dept 2008] [as City and named insured were adverse parties in underlying litigation, City had independent duty to provide timely notice, and further discovery as to whether named insured had provided timely notice unnecessary]).

V. NOVA'S MOTION AGAINST HARLEYSVILLE

A. Contentions

Nova alleges that Harleysville has a duty to defend City in the Regno action as its policy for Grgas included City as an additional insured. (Panayotou Apr. 5 Aff.).

Harleysville denies that City is an additional insured under Grgas's policy as Grgas's agreement was with Dart only and not City, and alleges that the absence of coverage amounts in the agreement between Grgas and Dart reflects an absence of intent to cover City, that the term "prime contract" is undefined, and that Nova failed to submit a true and correct copy of Grgas's policy. (Affirmation of Daniel P. Mevorach, Esq., dated May 2, 2011).

In reply, Nova maintains that Grgas's contract with Dart explicitly defines prime contract

as the contract between Dart and City, that the insurance provision in the prime contract was expressly incorporated into Grgas's contract with Dart which explains why there are no coverage amounts, and that City is an additional insured under Grgas's policy, and observes that Harleysville did not deny that the policy submitted was a true and accurate copy. (Reply Affirmation, dated May 9, 2011).

B. Analysis

Absent any dispute that the submitted Grgas's policy is a true and accurate copy, and as the term "prime contract" is specifically defined in Grgas's contract with Dart, the contract required Grgas to obtain insurance that provided the same amount of coverage as Dart was required to obtain in its contract with City, which, among others, required that City be named as an additional insured. Thus, the prime contract was incorporated into Grgas's contract and Grgas was required to obtain insurance which named City as an additional insured. As the insurance provision in Grgas's contract required it to obtain insurance as set forth either in the prime contract or in Grgas's contract, the absence of coverage amounts in the latter is irrelevant.

Moreover, as the prime contract was incorporated into the Grgas's contract and requires that City be named as an additional insured in any insurance policy, and as Grgas's policy provides that an additional insured include any entity when a contract with that entity requires that it be added as an additional insured, City qualifies as an additional insured under Grgas's policy and Harleysville must defend City in the Regno action. (*See Carlisle SoHo E. Trust v Lexington Ins. Co.*, 49 AD3d 272 [1st Dept 2008] [as sub-subcontract required sub-subcontractor to be bound by subcontract which was incorporated by reference, and as subcontract required that plaintiff be named as additional insured in insurance policy, plaintiff was covered by policy

issued to sub-subcontractor which included as an additional insured “any person or entity that is required to be so named in a covered written contract with (the sub-subcontractor).”]; *Binasco v Break-Away Demolition Corp.*, 256 AD2d 291 [2d Dept 1998] [defendant required to defend party as additional insured as defendant’s subcontract incorporated prime contract and prime contract required all subcontractors to obtain insurance naming party as additional insured]; *Gilbane Bldg. Co. v Travelers Prop. Cas. Co. of Am.*, 2009 WL 121553, 2009 NY Slip Op 30059[U] [Sup Ct, New York County] [subcontract incorporated obligation to obtain additional insured coverage for parties named in main contract]).

VI. CONCLUSION

Accordingly, it is hereby

ORDERED, ADJUDGED and DECLARED, that plaintiff’s motion for summary judgment against defendant Nova Casualty Company is granted to the extent of declaring that defendant Nova Casualty Company is obligated to defend, as a co-insurer with Harleysville Worchester Insurance Company, the City of New York as an additional insured in the personal injury action entitled *Regno et al. v The City of New York, et al.*, pending in the Supreme Court, New York County, under Index No. 109524/09, and to reimburse plaintiff for defense costs incurred in defending the action from May 6, 2010 to the date on which Nova assumes the defense of City in that action; it is further

ORDERED, that Nova’s cross motion for a declaratory judgment against City is denied and its cross motion against Tower Insurance Company of New York and Castlepoint Insurance Company is denied; it is further

ORDERED, that Tower Insurance Company of New York and Castlepoint Insurance


Company's cross motion against Nova Casualty Company is denied as moot; it is further

ORDERED, that plaintiff's motion for summary judgment against Tower Insurance Company of New York and Castlepoint Insurance Company is denied; it is further

ORDERED, ADJUDGED and DECLARED, that Tower Insurance Company of New York and Castlepoint Insurance Company's cross motion against plaintiff is granted to the extent of declaring that Tower Insurance Company of New York and Castlepoint Insurance Company have no duty to defend the City of New York in the personal injury action entitled *Regno et al. v The City of New York, et al.*, pending in the Supreme Court, New York County, under Index No. 109524/09, and the complaint is severed and dismissed as to all claims against Tower Insurance Company of New York and Castlepoint Insurance Company; and it is further

ORDERED, ADJUDGED and DECLARED, that defendant Nova Casualty Company's motion for summary judgment against third-party defendant Harleysville Worchester Insurance Company is granted to the extent of declaring that Harleysville Worchester Insurance Company is obligated to defend, as a co-insurer with Nova Casualty Company, the City of New York as an additional insured in the personal injury action entitled *Regno et al. v The City of New York, et al.*, pending in the Supreme Court, New York County, under Index No. 109524/09.

ENTER:


Barbara Jaffe, JSC

BARBARA JAFFE
J.S.C.

DATED: September 7, 2011
New York, New York

SEP 07 2011

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).