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

PRESENT: JUDITH J. GISCHE PART 10
Justice

Tauck Insurance Company of New York

-v-

Citywide Interior Contractors Inc., et al.

INDEX NO. 112672/09

MOTION DATE

MOTION SEQ. NO. 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

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).

motion (s) and cross-motion(s) decided in accordance with the annexed decision/order of even date.

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

Dated: 9/2/11

HON. JUDITH J. GISCHE J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

Supreme Court of the State of New York

County of New York: Part 10

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Tower Insurance Company of New York,

Plaintiff,

-against-

Citywide Interior Contractors, Inc., Madison Park Owner, LLC, G Builders IV, LLC, National Interiors Contracting, Inc. and Paul Britez,

Defendants.

---x

Decision/Order

Index No.: 115672/09

Seq. No. : 001

Present:

Hon. Judith J. Gische

J.S.C.

UNFILED JUDGMENT

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

Recitation, as required by CPLR 2219 [a], of the papers considered in the review of this (these) motion(s):

Papers	**Numbered**
Pltf's n/m [3215(a), 3212] w/TAG affirm, exhs	1
Pltf's JDK affid, exhs [sep back]	2
Pltf's LA affid, exhs [sep back]	3
Def [National] n/X-Mo [3126(3), 3124] w/ SMZ affid good faith, in supp X-Mo w/SMZ affirm, in supp X-Mo w/GK affid, aff in opp pltf's mo w/SMZ affirm, exhs	4
Def [Madison, G-Builders] n/X-Mo [3042(c),3126] w/DRD affirm, exhs	5
Def [Madison, G-Builders] aff in opp pltf's mo w/DRD affirm, exhs	6
Def [Citywide] aff in opp pltf's mo w/JL affirm, SF affid, exhs	7
Pltf's reply and in further supp against Citywide w/ exhs	8
Pltf's aff in opp against National, Madison, G-Builders	9

Hon. Gische, J.S.C.:

Upon the foregoing papers, the decision and order of the court is as follows:

This is an action by Tower Insurance Company of New York ("Tower" or "Plaintiff") for a declaratory judgment against the defendants, Citywide Interior Contractors, Inc. ("Citywide"), Madison Park Owner, LLC ("Madison"), G Builders IV, LLC ("Builders"), National Interiors Contracting, Inc. ("National"), and Paul Britez ("Britez"). Defendants are the parties to an underlying action entitled Paul Britez v. Madison Park Owner, LLC, et al., Index No. 112928/2008, pending in the New York State Supreme Court, New York County ("underlying action"). Plaintiff moves this Court for: (I) a default judgement, CPLR § 3215(a), against defendants Citywide and Britez; (ii) summary judgment, CPLR § 3212, against all the defendants declaring that Tower has no duty to defend or indemnify Citywide, National, Madison, Builders and Britez in the underlying action, pursuant to (a) the Independent Contractors Exclusion in its policy and (b) the late notice by the parties; and (iii) a declaration that Britez failed to provide Tower with timely notice of the occurrence and claim.

Defendant Britez has failed to appear in this matter. Defendants Madison, Builders and National oppose Tower's motion and have interposed cross motions, *infra*. Defendant Citywide opposes Tower's motion and references a "cross-motion" to file a late answer.[1] Tower opposes all the cross-motions. Since the note of issue has not yet been filed, the time restrictions of CPLR § 3212 have not been triggered, consequently these motions can be

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[1] Although Citywide references a cross-motion to file a late answer in its opposition, Tower claims that it has not been served with any such cross-motion and no cross-motion was paid for or filed with the Court.

considered on the merits. Brill v. City of New York, 2 N.Y.3d 648 (2004).

Arguments Presented

Defendants are the parties to an underlying action arising from alleged negligence and violations of the Labor Laws. Britez is the plaintiff in that action and reportedly the employee of Pecci Construction ("Pecci"). Pecci was a sub-contractor of the Tower named insured Citywide. Pecci was hired by Citywide to perform spackling at a construction/renovation project at 15-19 East 25th Street, New York, New York, on January 15, 2008. Citywide was hired by National to assist with the sheetrock installation.

In the present action, Tower seeks a declaration from the Court that it has no obligation to defend or indemnify Citywide, National, Madison or Builders in the underlying action, under the commercial general liability insurance policy ("Tower Policy") that it issued to Citywide, based on the Tower Policy's Independent Contractors Exclusion and claim of late notice. Tower alternatively seeks a declaration that National is not an additional insured under the Tower Policy. Tower also seeks a declaration that Britez failed to provide Tower with timely notice of the occurrence and claim. Tower now moves for a default judgment against defendants Citywide and Britez and summary judgment against the defendants based on the Independent Contractors Exclusion in its policy and late notice. Tower also seeks a declaration that Britez did not timely notify Tower of the occurrence.

Citywide provides the sworn affidavit of Sal Fescina ("Fescina"), its owner, who states that Britez was not an employee of Citywide, that Citywide did not supervise or control Britez' work and that Pecci, Britez' employer, was a sub-contractor of Citywide.

In its opposition, National contends that Tower is not entitled to summary judgment because (1) the motion is premature for want of adequate discovery (CPLR § 3212(f)); (2) the additional insured endorsement relied upon by Tower in disclaiming coverage in facially

deficient; (3) Tower's disclaimer of coverage was untimely, and therefore, invalid; (4) the Independent Contractor Exclusion is inapplicable to the underlying action; (5) Tower erroneously relied upon the employee/employer exclusions in disclaiming coverage; and (6) Citywide and National complied with the notice provisions of the Tower Policy. In its cross-motion for discovery sanctions, National contends that the Court should strike Tower's Complaint for its willful, deliberate, and contumacious failure to comply with discovery (CPLR § 3126[3]), or alternatively, that the Court compel Tower to respond to National's combined demands and demand for a verified bill of particulars and to provide an unredacted copy of the sworn statement of Fescina (CPLR § 3124).

In their opposition, Defendants Madison and Builders contend that Tower is not entitled to summary judgment for the following reasons: (1) the motion is premature for want of adequate discovery (CPLR § 3124); (2) the motion should be denied because the following questions of fact remain: (A) whether Citywide purchased a policy of insurance naming Builders and Madison as additional insureds, (B) whether Citywide provided Tower with late notice, whether Citywide had a reasonable belief of nonliability so as to excuse the late notice, (C) whether Tower received notice of the accident from the broker before December 18, 2008 when Tower claims it received first notice. In their cross-motion, Defendants Madison and Builders seek an order of preclusion against Plaintiff, for failure to supply a bill of particulars (CPLR § 3042[c]) and an order striking Plaintiff's complaint (CPLR § 3126).

Discussion

Citywide's Default

It is unrefuted that Citywide was served with Tower's complaint (BCL § 306). Nor does Citywide deny that it did not answer the complaint until March 18, 2011, when it

attempted to serve an answer. Citywide's sole defense to this action is that because Tower provided it with a defense in the underlying action, it had every reason to believe such defense would continue. Citywide also claims Tower's motion is "late" because Tower waited more than a year to bring it. Citywide argues that Tower should be equitably estopped from denying it a defense, because Citywide would be severely damaged if it has to now assume its own cost of defense in the underlying action.

This action was commenced on November 5, 2009. Citywide was served November 10, 2009 and the instant motion by Tower was brought on December 7, 2010, within one year of Citywide's default in answering (CPLR § 3215). Furthermore, this motion was already pending when, more than three months later, Citywide attempted to serve its late answer. By making this timely motion for a default, Tower preserved its objection to the timeliness of Citywide's efforts to interpose a late answer, and cannot be said to have waived it (J.Q. Dedicated Medical, P.C. v. State Farm Mut. Auto. Ins. Co., 23 Misc.3d 144(A) (N.Y.Sup.App.Term, 2009); see Katz v. Perl, 22 A.D.3d 806 [2nd Dept. 2005]; see CPLR § 2101).

Citywide defaulted in timely answering the summons and complaint and must now meet the requirements of CPLR § 5015 for the court to accept it. Citywide must show excusable default and meritorious defense (CPLR § 5015 [a] [1]; Benson Park Associates, LLC v. Herman, 73 A.D.3d 464 [1st Dept. 2010]). Although Citywide references a cross-motion to file a late answer, it made no such motion. Rather, this relief is merely referenced in the opposition. Regardless of this technical defect, Citywide has not established a legal basis for the court to require Tower to accept its late answer.

Citywide has provided no excuse for not timely answering the complaint, nor does it show a meritorious defense. Although Tower has provided Citywide a defense in the

underlying action, clearly Tower's complaint shows that it preserved its rights by timely seeking a declaration in this action that it has no duty to defend or indemnify Citywide. Moreover, in its disclaimer (See Lowell Aptman Affid., Exh. C) Tower expressly advised Citywide that it was preserving its rights as follows:

> "...[W]e hereby disclaim coverage of this matter.
>
> We will defend you in this lawsuit, through assigned counsel, subject to resolution of a declaratory-judgment action that we will commence against you to confirm the propriety of our disclaimer. If the court confirms that we have no duty to defend or indemnify you, then counsel will be asked to withdraw and you will be obligated to obtain your own defense counsel."

The disclaimer was sent within a reasonable period of time and Citywide had ample notice that its continued defense was conditioned on the outcome of this instant action. (See Structure Tone, Inc. v. Burgess Steel Products Corp., 249 A.D.2d 144 [1st Dept. 1998]). Therefore, based on the submitted papers, Citywide has failed to establish a right for the court to excuse the later service of an answer.

Summary Judgment

Even were the court persuaded that the late answer should be accepted, Tower would still be entitled to judgment against Citywide, based upon its alternative request for summary judgment. Tower seeks summary judgment against all of the defendants based on its allegations that (1) Britez falls under the Independent Contractors Exclusion of the Tower Policy, as well as, (2) upon the failure of the defendants to give Tower timely notice of the incident pursuant to the Tower Policy.

"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. " Zuckerman v. City of New York, 49 N.Y.2d 557, 562

(1st Dept. 1980); Winegrad v. New York Univ. Med. Ctr., 64 N.Y.2d 851, 853 (1985). Only when the proponent of the motion makes a *prima facie* showing of entitlement to summary judgment does the burden then shift to the party opposing the motion who must then demonstrate, by admissible evidence, the existence of a factual issue requiring a trial of the action. Zuckerman v. City of New York, *supra* at 562. If the proponent fails to make out its *prima facie* case for summary judgment, the motion must be denied, regardless of the sufficiency of the opposing papers. Alvarez v. Prospect Hospital, 68 N.Y.2d 320 (1986); Ayotte v. Gervasio, 81 N.Y.2d 1062 (1993). If the proponent meets its burden, then the opposition must lay bare its proof to raise real issues of fact and not just shadowy semblances.

Where the language of an insurance contract is clear and unambiguous, interpretation of that contract and construction of its provisions are questions of law that should be resolved by summary adjudication. Loblaw, Inc. v. Employers' Liability Assurance Cas. Corp., 57 N.Y.2d 872 (1982); Sheehan v. State Farm Fire and Cas. Co., 239 A.D.2d 486 (2d Dept. 1997).

Where a party opposed to summary judgment contends that discovery is incomplete, the court may consider whether the motion is premature because the information necessary to fully oppose the motion remains under the control of the proponent of the motion. CPLR § 3212 (f); Lewis v. Safety Disposal System of Pennsylvania, Inc., 12 A.D.3d 324 (1st Dept. 2004); Global Minerals and Metals Corp. v. Holme, 35 A.D.3d 93 (1st Dept 2006) (internal citations omitted). Preliminarily, the court rejects the contentions that additional discovery is needed. The mere hope that the parties can uncover useful evidence is an insufficient reason to postpone consideration of plaintiff's motion, and the defendants have failed to demonstrate how further discovery might yield material facts that would warrant the denial

of summary judgment at a later time. Seelig v. Burger King Corp., 66 A.D.3d 986 (2d Dept 2009). Therefore, this motion is not premature although brought before discovery is complete.

Summary Judgment Against Citywide

Tower was not properly noticed in the underlying action

Tower requests summary judgment, granting it a declaration that it has no obligation to defend or indemnify the defendants in the underlying action, on the ground that they breached the conditions of the Tower Policy requiring timely notice of the occurrence, claim and suit. Tower claims, and Citywide affirms (through the affidavits of Fescina), that Citywide knew of Britez' accident the day it occurred. Citywide, however, did not immediately notify Tower of this occurrence. Although, the summons and complaint of the underlying action were filed with the county clerk on September 23, 2008, and Citywide was served November 10, 2009, Citywide did not notify Tower of the occurrence until December 18, 2009, through the Morston Agency, over three months after the suit was commenced. Tower maintains that it timely disclaimed coverage based on Britez being an employee of Pecci, thus triggering, *inter alia*, the Independent Contractors Exclusion, and also because of the late notice by Britez, Citywide and National.

The courts have noted that the duty to defend is not an inflexible rule but, rather, one of expedience (Atlantic Mut. Ins. Co. v. Terk Technologies Corp., 309 A.D.2d 22, 30 [1st Dept. 2003]; see generally Kajima Constr. Serv. v. CATI, Inc., 302 A.D.2d 228 [1st Dept. 2003]), which duty, expressly arises out of the insurance contract. Here, the Tower Policy contains the following notice conditions, at section IV - Commercial General Liability Conditions, paragraph 2:

2. Duties in The Event Of Occurrence, Offense, Claim or Suit.

a. You must see to it that we are notified as soon as practicable of an "occurrence" or an offense which may result in a claim. To the extent possible, notice should include:

(1) How, when and where the "occurrence" or offense took place;

(2) The names and addresses of any injured persons and witnesses; and

(3) The nature and location of any injury or damage arising out of the "occurrence" or offense.

b. If a claim is made or "suit" is brought against any insured, you must:

(1) Immediately record the specifics of the claim or "suit" and the date received; and

(2) Notify us as soon as practicable.

You must see to it that we receive written notice of the claim or "suit" as soon as practicable.

c. You and any other involved insured must:

(1) Immediately send us copies of any demands, notices, summonses or legal papers received in connection with the claim or "suit";

(2) Authorize us to obtain records and other information;

(3) Cooperate with us in the investigation or settlement of the claim or defense against the "suit"; and

(4) Assist us, upon our request, in the enforcement of any right against any person or organization which may be liable to the insured because of injury or damage to which this insurance may also apply.

d. No insured will, except that insured's own cost, voluntarily make a payment, assume any obligation, or incur any expense, other that for first aid, without our consent.

C. The following is added as Paragraph e. to the Duties in The Event Of Occurrence, Offense, Claim or Suit Condition (Paragraph 2. Of Section IV-Commercial General Liability

Conditions):

2. Duties in The Event Of Occurrence, Offense, Claim or Suit

> e. Notice given by or on behalf of the insured, or written notice by or on behalf of the injured person or any other claimant, to any agent of ours in New York State, with particulars sufficient to identify the insured, shall be considered to be notice to us.

The notice provision in a general liability policy operates as a condition precedent to coverage, and absent a valid excuse, failure to comply with the requirement vitiates the contract (Sorbara Const. Corp. v. AIU Ins. Co., 41 A.D.3d 245, 247 [1st Dept 2007] citing Great Canal Realty Corp. v. Seneca Ins. Co., Inc., 5 N.Y.3d 742, 743 [2005]; National Union Fire Ins. Co. of Pittsburgh, PA v. Great American E & S Ins., 86 A.D.3d 425 [1st Dept. 2011]).

None of the defendants timely notified Tower of an occurrence. Citywide did not notify Tower until December 18, 2011, months after the incident. National did not notify Tower until January 23, 2008, months after the incident. Britez did not notify Tower of the occurrence until he served the Summons and Complaint in the underlying negligence action on December 8, 2008, over one year after his accident. A party's own duty to provide notice to the excess insurer is not negated by the insurer's actual knowledge acquired from another source (Sorbara Const. Corp. v. AIU Ins. Co., 41 A.D.3d 245, 246 [1st Dept. 2007] citing Ocean Partners, LLC v North Riv. Ins. Co., 25 AD3d 514, 515 [1st Dept. 2006]; Travelers Ins. Co. v Volmar Constr. Co., 300 AD2d 40 [1st Dept. 2002]). Moreover, notice under a workers' compensation policy does not constitute notice under a liability insurance policy (Sorbara Const. Corp. v. AIU Ins. Co., 41 A.D.3d 245, 246 [1st Dept. 2007]; see Nationwide Ins. Co. v Empire Ins. Group, 294 AD2d 546, 548 [2nd Dept. 2002]). A protracted delay in giving defendant insurer the requisite contractual notice relieves the insurer of its obligation to defend or indemnify its insured (Sorbara Const. Corp. v. AIU Ins. Co., 41 A.D.3d 245, 246

[1st Dept. 2007]).

It has been held that shorter delays than the one at bar, render the notice untimely (Brownstone Partners/AF & F, LLC v. A. Aleem Constr., Inc., 18 A.D.3d 204, 205 [1st Dept. 2005] [five month delay]; Paramount Ins. Co. v. Rosedale Gardens, 293 A.D.2d 235 [1st Dept. 2002] [seven month delay]). The court, therefore, finds that the notice given to Tower was late, as a matter of law.

Independent Contractors Exclusion

Tower also seeks a declaration that it has no obligation to defend or indemnify the defendants in the underlying Britez action, pursuant to the Independent Contractors Exclusion contained in the Tower Policy. The Court agrees for the following reasons:

The Tower Independent Contractor's Exclusion (form TG 43 06/00), modifying the insurance provided under the Commercial General Liability Coverage Part, provides that:

> It is agreed that this policy shall not apply to "bodily injury," "property damage" or "personal injury" arising out of operations performed for any insured by independent contractors or acts or omissions of any insured in connection with his general supervision of such operations.

Tower disclaimed coverage under this exclusion, on January 14, 2009, because it claimed that Britez was acting within the course of his employment[2] with Citywide's subcontractor when the accident occurred. Tower maintains that since the accident involving Britez falls squarely within the Tower Policy exclusion, there is no coverage available under the Tower Policy for any party under this loss.

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[2] In his Examination Before Trial Britez stated that he was an employee of Pecci at the time of the accident. Furthermore, Sal Fescina, owner of Citywide, states in his affidavit in opposition to the instant motion that "Mr. Britez was an employee of Mr. Pecci. Mr. Pecci controlled and supervised Mr. Britez' work. I did not own or erect the scaffold that Mr. Britez fell from."

Policy language, excluding coverage for bodily injury to a contractor or subcontractor had been held to be clear, unambiguous and enforceable by the courts. Alcon Builders Group, Inc. v. U.S. Underwriters Ins. Co., 2008 WL 2677253 (N.Y.Sup. 2008) citing U.S. Underwriters Ins. Co. V. 614 Constr. Corp., 142 F.Supp.2d 491 [494-495] (S.D.N.Y. 2001). "It is for the insured to establish coverage and for the insurer to prove that an exclusion in the policy applies to defeat coverage" (Consolidated Edison Co. of N.Y. v Allstate Ins. Co., 98 NY2d 208, 218 [2002]; Metropolitan Heat & Power Co., Inc. v. AIG Claims Services, Inc., 47 A.D.3d 621, 622 [2d Dept. 2008]).

The term "contractor" is a generic one encompassing both general contractors and subcontractors. York Hunter Constr. Servs. v. Great Am. Custom Ins. Servs., Inc., 2008 N.Y. Slip Op. 30112(U) [Sup Ct, NY Co 2008] (injured worker was employed by a subcontractor of insured); Alcon Bldrs. Group, Inc v U. S. Underwriters Ins Co., 20 Misc3d 1115(A) [Sup.Ct, NY Co 2008] (injured worker was an employee of electrical subcontractor hired by insured); Merchants Mut. Ins. Co. v. Rutgers Cas. Ins. Co., 2010 N.Y. Slip Op. 30506(U) (Sup. Ct, Richmond Co 2010). To determine whether an injury arose out of the work of an "independent" contractor, the courts will look to the method of the contractor's work and the extent of the control exerted over that work to determine whether the claim falls within the independent contractors exclusion. Metropolitan Heat & Power Co., Inc. v. AIG Claim Services, Inc., 47 A.D.3d 621 (2nd Dept. 2008).

Here, Citywide admits through the affidavit of its owner, Sal Fescina, that it hired Pecci, pursuant to a contract, to perform work on the project. Citywide admits that Britez was a Pecci employee and that Citywide did not control or supervise his work. Pecci performed the work according to its own methods without being subject to the Citywide's control, except as to the product or result of its work (Metropolitan Heat & Power Co., Inc. v. AIG Claims

Services, Inc., 47 A.D.3d 621, 622 [2d Dept. 2008]; see Matter of Beach v. Velzy, 238 NY 100, 103 [1924]; Favale v. M.C.P. Inc., 125 AD2d 536, 536 [2d Dept.1986]; G.D. Searle & Co. v Medicore Communications, Inc., 843 F Supp 895, 904-905 [1994]). Thus, Pecci was an independent contractor within the meaning of the Tower Policy. Since Britez was injured in the course of his employment with Pecci at the time of the accident, the accident arises out of Pecci's operations. (See AIU Ins. Co. v. American Motorists Ins. Co., 292 A.D.2d 277 [1st Dept 2002]; Consolidated Edison of New York , Inc. v. Hartford Ins. Co., 203 A.D.2d 83 [1st Dept 1994]). The actions of Pecci's employee, Britez, therefore, fall squarely within the terms of the Independent Contractors Exclusion of the Tower Policy. (ACC Const. Corp. v. Tower Ins. Co. of New York, 83 A.D.3d 443 (1st Dept. 2001). Summary judgement is against Citywide is granted.

Britez' Default

Plaintiff has filed proof of service of the summons and complaint upon defendant Britez. Britez was properly served via substituted service. Plaintiff complied with the additional notice requirements of CPLR § 3215. Despite service, additional notice and service of this motion, Britez has failed to answer or appear in this action, nor has he opposed this motion. His time to do so has expired and not been extended by the court. This portion of the motion will be decided on default.

Plaintiff is entitled to a default judgment, provided it otherwise demonstrates that it has a *prima facie* cause of action. Gagen v. Kipany Productions Ltd., 289 A.D.2d 844 (3d Dept. 2001). A default in answering the complaint is deemed to be an admission of all factual allegations contained in the complaint and all reasonable inferences that flow from them (Woodson v. Mendon Leasing Corp., 100 N.Y.2d 62 [2003]). An application for a default judgment must be supported by either an affidavit of facts made by one with personal

knowledge of the facts surrounding the claim (Zelnick v. Biderman Industries U.S.A., Inc., 242 A.D.2d 227 [1st Dept. 1997]; and CPLR § 3215 [f]) or a complaint verified by a person with actual knowledge of the facts surrounding the claim (Hazim v. Winter, 234 A.D.2d 422 [2d Dept. 1996]; and CPLR § 105 [u]). Here, Britez has failed to answer or appear in his defense, thus he is in default of the declaratory judgment complaint pursuant to CPLR § 3215. Britez is, therefore, deemed to admit that he has failed to provide Tower with timely notice of the occurrence.

National was not an additional insured at the time of the incident

National argues that it has separate rights under the Tower Policy because it was an additional insured. The court, however, concludes it was not.

Tower disclaimed coverage to National in a letter dated February 27, 2009, stating that National was added, by endorsement, as an additional insured pursuant to the terms of policy form TG 42 09 00 and the other terms of the policy effective May 2, 2008. However, the alleged injuries occurred on January 15, 2008. Tower claims that since National was not an additional insured on the policy on the date of loss, no coverage is available to National under the policy for the matter. Tower claims that the named insured, designated in the policy declarations, is Citywide. Tower further claims that the policy contains an additional insured endorsement (form TG 42 9/00) which provides additional insured coverage as follows:

> **Who Is An Insured (Section II)** is amended to include as an additional insured the person or organization shown in the schedule, but only with respect to acts or omissions of the named insured, his agents, servants, and 'employees' for which the Additional insured may be held liable. This insurance does not apply to acts or omissions of the Additional insured nor liability imposed on the additional insured by statute, ordinance or law, or endorsements that would serve to extend coverage to National, or any other contractor, as insureds of additional insureds.

Citywide provided National with a Certificate of Insurance, dated May 2, 2008, which states that National is an additional insured under the Tower Policy for the project. Tower claims that pursuant to its policy number 5, National was added as an additional insured of the policy pursuant to the above endorsement, effective May 2, 2008, five months after the Britez accident.

National argues that it needs information contained within Towers' underwriting file and claims file establish when a request was made that National be added as an additional insured to the Tower Policy. Although Tower maintains that National was not added to the policy as an additional insured until May 2, 2009, National claims through the affidavit of Grant Kassap ("Kassap"), its vice president, that National had contracted with Citywide's predecessor B.W.C. for the performance of work at the accident site. He further claims that pursuant to an agreement B.W.C. was to add National as an additional insured under its policy. As attested to by Kassap, B.W.C. thereafter assigned its contractual obligations with National to Citywide in July 2007. National maintains that the sworn statement of Fescina, the co-owner of Citywide, supports its contention that there was a contract for the performance of work well before the January 15, 2008 injury and National's position that a request may have been made to Tower to add it as an additional insured well before the request was processed. National also provides a work authorization, a copy of a fax containing instructions relating to who was to be the additional insured, and a subcontractor partial waiver of lien.

Tower contends that an examination of the Tower Policy reveals multiple pages of policy declarations, however, the only declaration that names National as an additional insured also states at the top of the page "Amended Declarations Effective 05/02/2008."

This is the same effective date as policy change number 5, pursuant to which National was added as an additional insured. This also coincides with the date of the Certificate of Insurance upon which National based its tender of coverage to Tower.

An insurance policy is a contract, the unambiguous terms of which cannot be altered by extrinsic evidence (See Penske Truck Leasing Co. V. Home Insurance Co., 251 A.D.2d 478 [2d Dept. 1998]). Tower is entitled to have its contract of insurance enforced in accordance with its provisions and without a construction contrary to it express terms. (See White v. Continental Cas. Co., 9 N.Y.3d 264, 267 [Sup. Ct. N.Y. Co. 2007]; Breed v. Insurance Co. of N. Am., 46 N.Y.2d 351, 355 [1978]). The terms of the policy unequivocally set May 2, 2008 as the date National became an additional insured. The fact the National had a contract with B.W.C. to procure insurance is not a basis to disregard the policy itself.

In the same vein, the court rejects any argument that discovery of the Tower claim file and underwriting file is necessary, because the policy is clear on its face. See White v. Continental Cas. Co., 9 N.Y.3d 264 (2007).

The court finds that National does not qualify as an additional insured under the Tower Policy and, therefore, Tower has no obligation to defend or indemnify National in the underlying action.

Madison and Builders

In New York, it is well established that the party claiming insurance coverage has the burden of proving entitlement thereto (Moleon v Kreisler Borg Florman General Construction Co., Inc., 304 A.D.2d 337 [1st Dept. 2003]). Further, a party that is not named an insured or additional insured on the face of the policy is not entitled to coverage (id.; see also National Abatement Corp. v. National Union Fire Ins. Co. of Pittsburgh, PA, 33 A.D.3d 570, 571 [1st

Dept. 2006], Tribeca Broadway Associates, LLC v Mount Vernon Fire Insurance Company, 5 A.D.3d 198 [1st Dept. 2004]). Here, the only indorsement of an additional insured, in the Tower Policy, relates to National, and then, only from May 2, 2008 (which effective date is almost half a year after the Britez accident). Tower has proven that it has no obligation to defend or indemnify Madison and Builders because they are not additional insureds entitled to insurance coverage under Citywide's policy.

Conclusion

In accordance with the foregoing, it is hereby:

ORDERED, DECLARED AND ADJUDGED that plaintiff's motion for a default judgment against Paul Britez is granted; and it is further

ORDERED, DECLARED AND ADJUDGED that plaintiff's motion for a default judgment, or alternatively, summary judgment against Citywide Interior Contractors, Inc. is granted; and it is further

ORDERED, DECLARED AND ADJUDGED that plaintiff's motion for summary judgment against Madison Park Owner, LLC is granted and Madison Park Owner, LLC's cross-motion for discovery sanctions is denied; and it is further

ORDERED, DECLARED AND ADJUDGED that plaintiff's motion for summary judgment against G Builders IV, LLC is granted and G Builders IV, LLC's cross-motion for discovery sanctions is denied; and it is further

ORDERED, DECLARED AND ADJUDGED that plaintiff's motion for summary judgment against National Interiors Contracting, Inc. is granted and National Interiors Contracting, Inc.'s cross-motion for discovery sanctions is denied; and it is further

ORDERED, DECLARED AND ADJUDGED that Tower Insurance Company of New

York has no duty to defend or indemnify Paul Britez, Citywide Interior Contractors, Inc., Madison Park Owner, LLC., G Builders IV, LLC., National Interiors Contracting, Inc., in the personal injury action entitled Paul Britez v. Madison Park Owner, LLC., G Builders IV, LLC., National Interiors Contracting, Inc., Citywide Interior Contractors, Inc. pending in the Supreme Court, New York County under index # 112928/08; and it is further

ORDERED, DECLARED AND ADJUDGED Paul Britez failed to provide Tower Insurance Company of New York with timely notices of the occurrence and claim; and it further

ORDERED that any requested relief not otherwise expressly granted herein is deemed denied; and it is further

ORDERED that this constitutes the decision and order of the court.

Dated: New York, NY
September 21, 2011

So Ordered:

Hon. Judith J. Gische, J.S.C.

UNFILED JUDGMENT

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