

**TJM Constr. Corp. v AWCI Ins. Co. Ltd.**

2011 NY Slip Op 33012(U)

November 15, 2011

Sup Ct, NY County

Docket Number: 108211/08

Judge: Judith J. Gische

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SCANNED ON 11/17/2011  
SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. JUDITH J. GISCHE

PART 10

Index Number : 108211/2008  
TJM CONSTRUCTION CORP.  
vs.  
AWCI INSURANCE CO., LTD.  
SEQUENCE NUMBER : 003  
REARGUMENT/RECONSIDERATION

INDEX NO. \_\_\_\_\_

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

MOTION SEQ. NO. \_\_\_\_\_

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

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

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

**MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION.**

**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: NOV 15 2011

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

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

SUPREME COURT OF THE STATE OF NEW YORK  
 COUNTY OF NEW YORK: PART 10

-----X  
 TJM CONSTRUCTION CORP. and QBE :  
 INSURANCE CORP., :

Plaintiffs, :

-against-

AWCI INSURANCE COMPANY, LTD.,  
 (related to an underlying action  
 entitled *Gilbert Gonzalez v. TJM  
 Construction Corp., et al.*)

Defendant. :

Decision and Order  
 Index No. 108211/08  
 Motion Seq. No. 003

**UNFILED JUDGMENT**

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 141B).

-----X

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 (RR) w/HBA affirm (sep back), exhs . . .	1,2
Def's opp w/JMC affirm . . . . .	3
Reply w/HBA affirm, exhs . . . . .	4

Hon. Judith J. Gische, J.:

This lawsuit arises from an insurance coverage dispute  
 between a general contractor, TJM Construction Corporation (TJM),  
 as an alleged additional insured, and AWCI Insurance Company, Ltd.  
 (AWCI), the issuer of a commercial general liability policy to  
 Construction Services Corp. (Construction Services), a  
 subcontractor for TJM at a Queens construction site. TJM filed  
 its complaint for declaratory judgment that AWCI was, and is,  
 obligated to defend and indemnify TJM in an underlying personal  
 injury action (*Gilbert Gonzalez v TJM Construction Corp.*, Index

No. 25318/05 [Supreme Court, Kings County]). In that action, an employee for Construction Services sought monetary damages from TJM for alleged injuries sustained at the Queens construction site on November 4, 2004. Following TJM's motion for summary judgment, the court, on April 6, 2010, held in favor of AWCI and denied the motion, finding that genuine issues of material fact exist (prior order).

Before the court is a motion by TJM and QBE Insurance Corp. (QBE), TJM's insurer, seeking leave to reargue the prior motion, pursuant to CPLR 2221 (d), contending that the court overlooked or misapprehended the facts and the law when making its decision. TJM makes a two-pronged challenge to the court's judgment: (1) it contends that the court overlooked the fact that an oral contract existed between TJM and Construction Services prior to the date of loss, triggering coverage; and (2) that TJM is entitled to coverage because the accident arose out of Construction Services' work, within the meaning of AWCI's insurance policy.

AWCI responds that there is no written or oral agreement that provides coverage for TJM and, therefore, it has no duty to defend TJM in the underlying personal injury lawsuit. A motion for leave to reargue may be granted on a showing that the court overlooked or misapprehended the facts or the law (CPLR 2221; Williams P. Pahl Equip. Corp. v. Kassis, 182 A.D.2d 22 [1<sup>st</sup> Dept. 1992]).

For the reasons that follow, plaintiffs' motion for leave to

reargue is granted and upon reargument the underlying summary judgment motion is decided in favor of plaintiffs on the issue of liability.

**BACKGROUND**

TJM was the general contractor for the Queens construction project, and Construction Services was awarded a subcontract for the cement masonry and restoration work at the site sometime in June 2004. Under this subcontract, TJM was to be included under Construction Services' commercial general liability insurance policy (CGL) as an additional insured, and Construction Services was to furnish proof of such coverage before beginning work.

On October 6, 2004, Construction Services furnished TJM with a Certificate of Insurance, dated October 4, 2004. The certificate names TJM as an additional insured on Construction Services' policy. On the accident date, Construction Services was insured by AWCI under CGL policy number 08-GL AIC11-03, effective December 15, 2003 through December 15, 2004.

Although TJM is not specifically named or identified as an additional insured under that CGL policy, the policy does contain a "contractor's blanket additional insured endorsement" provision. The additional insured coverage extends to and includes:

as an insured any person or organization called additional insured) whom you Construction Services] are required to add as an additional insured on this policy under:

- 1) A written contract or agreement; or
- 2) An oral contract or agreement where a

certificate of insurance [shows] that the person or organization as an additional insured has been issued.

Following the accident, TJM tendered the defense and indemnification of the personal injury law suit to AWCI as an additional insured. AWCI refused coverage. Subsequently, TJM and QBE, TJM's liability carrier, commenced this declaratory judgment action against AWCI for defense and indemnification.

TJM moved for summary judgment to declare that AWCI was obligated to defend and indemnify TJM in the *Gonzalez* action, based on either oral or written contractual obligations.

By decision and order dated April 6, 2011, this court denied the motion, finding questions of fact as to "whether the parties were bound by a contract on the date of loss" and whether the accident in the underlying action "arose out of" Construction Services' work for TJM.

**DISCUSSION**

The court has granted TJM leave to reargue the underlying motion because the court misapprehended the facts and misapplied the law.

In connection with the prior motion, TJM argued that there was a written and oral agreement between Construction Services and AWCI. Although TJM has produced a written twenty page subcontract pursuant to which Construction Services (defendant AWCI's insured) agreed *inter alia* to maintain insurance for TJM's benefit, the copy produced is unsigned. Thus, no written contract has ever

been proven.

TJM also contends that on the date of Gonzalez's accident, it had an oral subcontract agreement with Construction Services for it do work on the Queens construction project. TJM contends further that Construction Services agreed to obtain insurance for its benefit and that this agreement is corroborated or evidenced by a Certificate of Insurance identifying "TJM Construction Corp" as an additional insured on the policy AWCI issued to Construction Services, the named insured. Thus, according to TJM, it has satisfied the only requirements for coverage under the CGL policy, which is that there be an agreement - written or oral -- between its insured (Construction Services) and a certificate of insurance naming the third party as an additional insurance.

In connection with its underlying motion for summary judgment, TJM provided a letter sent by its president, Robert Slochover, to the president of Construction Services. In the letter, Slochover refers to "our agreement in the lump sum of \$600,000 to perform all new masonry [work]..." Slochover states that a subcontract agreement will be prepared for Construction Services and forwarded to Construction Services for its signature. On the underlying motion TJM also provided daily work logs. The logs show that Construction Services worked on the Queens project and was at the work site as early as September 7, 2004. Construction Services also submitted payment applications to TJM, requesting payment - and being paid - for work it did prior to

October 20, 2004. The application for payment provided by TJM indicates on the upper right hand corner that it is the third such application for payment.

In opposition to the underlying motion, AWCI provided the sworn affidavit of Ken Swan, the president of Construction Services. Swan stated that: "Construction Services, USA agreed to perform work [on the Queens project] pursuant to a Purchase Order..." however, the "Purchase Order detailed the work to be performed and materials needed. It did not include any language regarding indemnification." Swan stated further that no one signed a contract on behalf of Construction Services prior to November 14, 2004<sup>1</sup> ..." and that although he received a copy of a subcontract agreement from TJM on December 27, 2004, he did not sign it." In reply, TJM provided Slochover's sworn affidavit that "TJM would not have allowed Construction Services to have performed work [on the Queens project] if Construction Services had not entered into and agreed to all of the terms of the agreement..." and that "Construction Services performed work [on the Queens project] pursuant to the subcontract prior to November 4, 2004."

Then, as now, AWCI's principal opposition to TJM's motion is that the blanket additional insured endorsement in its insured's policy was never triggered because there is no proof of a written

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<sup>1</sup>Presumably, this is a reference to the date of the accident which was on November 4, 2004.

contract between TJM and Construction Services, let alone proof that Construction Services agreed to name TJM an additional insured on its policy.

AWCI maintains that the certificate of insurance does not satisfy the additional insured endorsement because a certificate of insurance does not confer coverage, nor status as an additional insured (see e.g. *Halmar Bldrs. of N.Y., Inc. v Team Star Contrs., Inc.*, 13 AD3d 581 [2d Dept 2004]; *American Motorist Ins. Co. v Superior Acoustics*, 277 AD2d 97 [1<sup>st</sup> Dept 2000]). TJM, however, replies that it is not claiming that the certificate of insurance qualifies as a valid written contract under the additional insured endorsement, but that the certificate serves as documentary confirmation that Construction Services agreed to provide coverage for TJM and, therefore, the additional insured endorsement is triggered in that manner. Put differently, the certificate of insurance is offered as evidence of a contractual relationship between TJM and Construction Services which, under Construction Services' policy, qualifies TJM as an additional insured.

While insurance contracts have special features, they are still contracts to which the ordinary rules of contract interpretation apply (see *Matter of Covert*, 97 NY2d 68, 76 [2001]; *Loblaw, Inc. v Employers' Liab. Assur. Corp.*, 57 NY2d 872, 876 [1982]). In New York, courts utilize the well-accepted practice of examining the policy's language to give effect to the parties' intentions (see *Madawick Contracting Co. v Travelers Ins. Co.*, 307

NY 111, 119 [1954])). Hence, any determination that a party is an additional insured is necessarily dependent on the specific contract language.

Construction Services CGL policy with AWCI must be construed "in a way that affords a fair meaning to all of the language employed by the parties in the contract and leaves no provision without force and effect" (*Raymond Corp. v National Union Fire Ins. Co. of Pittsburgh, Pa.*, 5 NY3d 157, 162 [2005], quoting *Consolidated Edison Co. of N.Y. v Allstate Ins. Co.*, 98 NY2d 208, 221-222 [2002])). Unambiguous policy provisions must be accorded their plain and ordinary meaning (see *R/S Assoc. v New York Job Dev. Auth.*, 98 NY2d 29, 32 [2002]; *Lavanant v General Acc. Ins. Co. of Am.*, 79 NY2d 623, 629 [1992])), and when interpreting unambiguous provisions of a policy "[e]vidence outside the four corners of the document ... is generally inadmissible to add to or vary the writing" (*W.W.W. Assoc. v Giancontieri*, 77 NY2d 157, 162 [1990])). Consequently, TJM, as the party claiming insurance coverage, has the burden of proving entitlement to that coverage (*Moleon v Kreisler Borg Florman Gen. Constr. Co.*, 304 AD2d 337 [1st Dept 2003])). If TJM cannot establish entitlement to additional insured status, then AWCI has no duty to defend or indemnify it in the underlying personal injury action (see *Sanabria v American Home Assurance Co.*, 68 NY2d 866 [1986])).

The blanket additional insured endorsement in the AWCI policy clearly defines an insured as "any person or organization (called

additional insured) whom you [Construction Services] are required to add as an additional insured on this policy under..." a written contract or "[an] oral contract or agreement where a certificate of insurance [shows] that the person or organization as an additional insured has been issued."

Where the policy at issue provides two avenues for the creation of an additional insured, those alternatives are clearly distinguished (see e.g. *Vigilant Ins. Co. v Bear Stearns Companies, Inc.*, 10 NY3d 170, 177 [2008], quoting *White v Continental Cas. Co.*, 9 NY3d 264, 267 [2007] ["As with the construction of contracts generally, 'unambiguous provisions of an insurance contract must be given their plain and ordinary meaning ...'"]). Thus, under the CGL policy Construction Services has with AWCI, an oral agreement, along with a valid certificate of insurance naming TJM as an additional insured, establishes TJM's claim that it is an additional insured under AWCI's policy with its insured.

While a certificate of insurance, standing alone, is not conclusive proof of coverage, it is evidence of a carrier's intent to provide coverage, and, along with other factors, may be sufficient to bind the insurer (see *Superior Ice Rink, Inc. v Nescon Contracting Corp.* 52 AD3d 688 [2d Dept 2008]).

Although Judge Schmidt in the underlying personal injury action decided that there is a triable issue of fact "whether the indemnity and defense provision of the subcontract was in effect

at the time of plaintiffs accident, thus precluding summary judgment in TJM's favor on this issue..." the dispute at bar is not between TJM and its subcontractor (Construction Services) but its subcontractor's insurer. Consequently, any argument by Construction Services, that TJM has been already "told" by Judge Schmidt that its claim for defense and indemnification must await trial, is incorrect. The issues of collateral estoppel and res judicata are set forth in detail in the court's prior order and will not be repeated here. Briefly, however, Judge Schmidt's prior order of December 17, 2009 does not have a preclusive effect on whether TJM is owed a defense by AWCI. The contract that was the subject of the motion before Judge Schmidt is the alleged oral or written subcontract between TJM and Construction Services for work on the Queens project. Here, the contractual obligations in dispute involve the insurance policy AWCI issued to Construction Services, its insured, and whether the obligations of the policy extend to TJM because, as TJM claims, it is an additional insured.

TJM has proved on reargument that it met the requirements of the CGL insurance policy that AWCI issued to Construction Services. The requirements are simply that its insured have either an oral or written contract prior to the date of loss, that its insured agreed to maintain insurance for the benefit of the entity it has the agreement with and that there is a certificate of insurance showing that the entity is an additional insured under the AWCI policy. TJM has proved through extrinsic evidence

that it has an oral contract with Construction Services to do work on the Queens project and that it agreed to maintain insurance for TJM's benefit (see *Bovis Lend Lease LMB Inc. v. Garito Contracting, Inc.*, 38 A.D.3d 260 [1<sup>st</sup> Dept 2007]). The proof consists daily logs, requests by Construction Services for payment and acceptance of the payments made by TJM, as well as the issuance of the certificate of insurance. By establishing these material elements of its claim, TJM has met its burden in proving that it is entitled to summary judgment in its favor, consisting of a declaration that AWCI has to provide a defense, etc., to TJM in connection with the Kings county personal injury action.

In opposition, AWCI has failed to demonstrate, by admissible evidence, the existence of a factual issue requiring a trial (*Zuckerman v. City of New York*, 49 NY2d 557 [1980]). The sworn affidavit of Construction Services' principal does not raise a triable issue of fact. When carefully examined, Swan merely states there was no written contract with TJM. He does not address, let alone explain, why there would daily logs for Construction Services prior to the date of the accident, if his company was not on site or why Construction Services requested payment, if it had not done work for TJM. He does not specifically deny that there is an oral agreement, but only states there was no written indemnification agreement. These statements are insufficient to defeat TJM's motion. Therefore, upon reargument, the court grants TJM's motion for summary judgment on

the issue of liability and finds that it is entitled to coverage as an additional insured under CGL's policy with AWCI.

The court has also reconsidered its decision, that an issue of fact exists as to whether Gonzalez's accident arose out of Construction Services' work. The terms "arising out of" and "arising from" in insurance contracts have a unique and legal meaning. They are contractual language, standing apart from the principles applicable to negligence actions and issues of liability. "Arising out of" has been interpreted broadly by the courts to mean "originating from, incident to, or having connection with" (see *Regal Construction Corp. v National Union Fire Ins. Co. of Pittsburgh, PA*, 15 NY3d 34, 38 [2010] [internal quotation marks and citation omitted]).

While the proximate cause of the accident may dictate who is liable in the context of a negligence action, where a policy of insurance is concerned, the focus is on whether the accident stems from the contractual services rendered by the named insured (see *Dayton Beach Park No. 1 Corp. v National Union Fire Ins. Co.*, 175 A.D.2d 854 [2<sup>nd</sup> Dept 1991]).

AWCI has not addressed or opposed this branch of TJM's motion for reargument. There is, therefore, no triable issue of fact that Gonzalez was working for Construction Services at the time of the accident and that his accident arose out of the subcontractor's work (*Consolidated Edison Co v Hartford Insurance Co.*, 203 AD2d 83 [1<sup>st</sup> Dept 1994]). Therefore, this branch of

TJM's motion is granted as well.

**CONCLUSION**

For the foregoing reasons, TJM's motion for leave to reargue is granted, and upon reargument, the court grants TJM's motion for summary judgment on the issue of liability. Since there are other claims in the complaint relating to damages, etc., they remain for trial. The parties are presently in Mediation on December 7, 2011. Thereafter, this case is ready for trial.

Accordingly, it is hereby

**ORDERED** that the motion by plaintiffs TJM Construction Corporation and QBE for leave to reargue their prior motion for summary judgment is granted; and it is further

**ORDERED** that, upon reargument, the court modifies its prior order, dated April 6, 2011, to grant them the declaratory relief they are seeking, as provided for in this decision/order; and it is further

**ADJUDGED** and **DECLARED** that defendant AWCI Insurance Company, Ltd., is obliged to provide a defense to, and provide coverage for, plaintiffs TJM Construction Corporation and QBE Insurance Corporation in the action captioned *Gilbert Gonzalez v TJM Construction Corp.*, Index No. 25318/05, in Kings County Supreme Court; and it is further

**ORDERED** that the remaining claims in the complaint, including damages, are ready to be tried after the upcoming Mediation scheduled for December 7, 2011; and it is further

ORDERED that any relief requested but not addressed is hereby denied; and it is further

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

Date: New York, New York  
November 15, 2011

E N T E R

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

**UNFILED JUDGMENT**

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