

**Vissas v Simon Agency N.Y. Inc.**

2013 NY Slip Op 30332(U)

February 7, 2013

Supreme Court, New York County

Docket Number: 112704/11

Judge: Louis B. York

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SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY

PRESENT: H. York  
Justice

PART 2

Missas, et al,  
-v-  
Simon Agency N.Y. Inc.

INDEX NO. 112704/11  
MOTION DATE 11/9/12  
MOTION SEQ. NO. 602

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_ | No(s). \_\_\_\_\_

Answering Affidavits — Exhibits \_\_\_\_\_ | No(s). \_\_\_\_\_

Replying Affidavits \_\_\_\_\_ | No(s). \_\_\_\_\_

Upon the foregoing papers, it is ordered that this motion is

**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

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

Dated: 2/7/13

Loy, J.S.C.

1. CHECK ONE: .....  CASE DISPOSED  NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: ..... MOTION IS:  GRANTED  DENIED  GRANTED IN PART  OTHER
3. CHECK IF APPROPRIATE: .....  SETTLE ORDER  SUBMIT ORDER
- DO NOT POST  FIDUCIARY APPOINTMENT  REFERENCE

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 2

-----X  
JAMES VISSAS, 14-33/35 ASTORIA BLVD. LLC  
and PARMA TILE MOSAIC & MARBLE CO. INC.,

Plaintiffs,

-against-

Index № 112704/11

SIMON AGENCY N.Y. INC., HERMITAGE INSURANCE  
COMPANY, SOUTHWEST MARINE AND GENERAL  
INSURANCE COMPANY, and ST. PAUL FIRE AND  
MARINE INSURANCE COMPANY A/K/A TRAVELERS,

Defendants.

-----X  
LOUIS B. YORK, J.:

In this insurance dispute, defendant St. Paul Fire and Marine Insurance Company a/k/a Travelers (St. Paul/Travelers) moves for an order, pursuant to CPLR 3212, granting summary judgment and dismissing all claims and cross claims against it. Defendant Hermitage Insurance Company (Hermitage) cross-moves for an order, pursuant to CPLR 3212, granting summary judgment, dismissing all claims against it and declaring that Hermitage has no duty to defend or indemnify plaintiffs or any other party under its policy of insurance for the underlying actions. Defendant Southwest Marine and General Insurance Company (Southwest) cross-moves for an order, pursuant to CPLR 3212, declaring that its is not obligated to defend and indemnify plaintiffs in the underlying actions, or to reimburse plaintiffs for costs or attorneys' fees incurred in defending the underlying actions.

The underlying facts, as relevant to the motion and cross motions, are as follow.

Plaintiff James Vissas (Vissas) is the owner and principal of co-plaintiff entities 14-33/35 Astoria Blvd LLC (Astoria LLC) and Parma Tile Mosaic & Marble Co. Inc. (Parma Tile). Astoria LLC

owns property located at 14-33/35 Astoria Boulevard (the Premises) and has, at all relevant times, been insured by nonparty U.S. Underwriters Insurance Company (Underwriters).

By signed letter agreement, dated September 30, 2006 and countersigned on October 28, 2006, Vissas engaged Anthony Hatziiioannou, A.I.A. (Hatziiioannou) to provide architectural services for a proposed vertical addition (the expansion project) to the existing one-story building on the Premises (Hatziiioannou Agreement). The agreed-upon fee for Hatziiioannou's services, including a \$5,000.00 retainer, was \$21,000.00.

On or about July 23, 2008, plaintiffs received a written proposal from nonparty George's Home Improvement Corp. (GHI), a Queens County based construction contractor owned by nonparty George Sifounios (Sifounios), for construction work related to the expansion project (GHI Proposal). The written proposal contained terms, conditions and estimated prices for elements of the proposed work (GHI Proposal), and in or about October 2008, Astoria LLC and Parma Tile hired GHI to do the work. Although the proposal was not converted in to a signed, written agreement, GHI purportedly agreed to insure its work at the Premises and to list Astoria LLC and Parma Tile as additional insureds on its policy of insurance.

In October 2008, GHI obtained a Hermitage general liability insurance policy, under policy number HGL/548217-08 (Hermitage Policy),<sup>1</sup> through insurance brokers Surrey Agency and Simon Agency N.Y. Inc. (Simon).<sup>2</sup> The Hermitage Policy, which covers GHI as the named insured, extended from October 23, 2008 until October 23, 2009, and covered work classified

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<sup>1</sup>As noted in the complaint, Hermitage has since been acquired by Tower Group, Inc. While the parties use the names of Hermitage and Tower interchangeably, for purpose of consistency, the court will refer to this defendant only as Hermitage.

<sup>2</sup> By order dated May 21, 2012, plaintiffs' complaint was dismissed as against Simon.

\* 4]  
and described as “painting - interior - buildings or structures” (code no. 98305) and “dry wall or wallboard installation” (code no. 92338).

The expansion project, as designed by Hatzioannou, required the installation of structural steel. On or about May 5, 2008, subcontractor Papas Iron Works, Inc. (Papas Iron) prepared and forwarded to Vissas/Parma Tile a written proposal for the structural steel work indicated in Hatzioannou’s plans. After adding and initialing a requirement that “all work is based on the approved plans,” both Sotiri Papas for Papas Iron and Vissas for Parma Tile signed off at the bottom of the two-page document (Papas Proposal/Contract). The Papas Proposal/Contract also states, in relevant part: “[s]teel work shall include all supply and installation of structural steel,” and “Papas [] will provide client with all insurances as required and welding license” for a “total contract amount” of \$219,641.00 (*see* Papas Proposal/Contract §§ 1 and 4, Exhibit 3 to Southwest Notice of Motion).

Papas Iron procured a commercial general liability policy from Southwest through the Stratford Insurance Agency, LLC (Stratford). The effective dates for the policy, number GL00008008, extended from October 4, 2008 to October 4, 2009 (Southwest Policy). According to plaintiffs, the Southwest Policy included additional insurance blanket provisions, which covered them as additional insureds by virtue of the Papas Proposal/Contract.

It is undisputed that between October 2008 and December 7, 2008, GHI performed construction work at the Premises and Papas Iron provided and installed the necessary structural steel. It is also undisputed that on December 7, 2008, one day after GHI and Papas Iron completed work on an approximately 30-foot long by 10-foot high exterior wall, the wall collapsed onto an adjacent building at 14-37 Astoria Boulevard. The collapse caused damage to

the building which was owned by nonparty Polis, Inc., and injury to two individuals who were inside the building at the time of the incident. As a result, plaintiffs were named as defendants in approximately 10 separate lawsuits (the Lawsuits) and plaintiffs' insurer, Underwriters, sought indemnification and coverage from both Hermitage and Southwest with respect to the Lawsuits. Following defendants' respective denials of coverage, plaintiffs commenced the instant action against Hermitage, Southwest, and Hatzioannou's insurer, St. Paul/Travelers, charging each with breach of contract and breach of the covenant of implied good faith and fair dealing. Plaintiffs also seek a judicial declaration that each defendant is obligated to provide plaintiffs with a defense and indemnification in the Lawsuits. After issue was joined and discovery was pursued, defendants served the instant motions for summary judgment.

The Hermitage Motion

According to plaintiffs, when, in or about October 2008, GHI contracted with Hermitage for general liability insurance, a material term of their agreement was for Astoria LLC and Parma Tile to be covered as additional insureds under the policy. When the policy was issued, plaintiffs were assured that they had been added as additional insureds, rendering them third-party beneficiaries of the agreement and entitling them to enforce the insurance contract.

Following the wall collapse, by letter dated December 10, 2008, Sifounios, on behalf of GHI, informed the Surrey Agency of what had occurred three days earlier and requested that the proper liability insurance company be notified immediately. On December 17, 2008, a "First Report of Claim" was provided to Hermitage via the Simon Agency (see Exhibit A to Aff. of Lowell Aptman). Hermitage responded by letter dated January 13, 2009, advising Sifounios/GHI that it was denying coverage for the December 7, 2008 loss, and explaining that:

\* 6]

[o]n December 6, 2008, your company built a concrete block wall which you describe as 30 feet long and 10 feet high. On December 7, 2008, the wall was blown over by heavy winds. The blocks from the wall fell on the adjacent property 14-33/35 (sic) causing the property damage that gives rise to this claim.

Hermitage further advised Sifounios/GHI that the policy contains a "Classifications Limitation" which expressly limited coverage to listed operations, and that the only operations listed in the policy were: "painting - interior buildings or structures" and "dry wall or wallboard installation." Hermitage concluded that there could be no coverage under the policy because the loss did not stem from either of these operations, but was "due to masonry work" instead.

Approximately 14 months later, by letter dated March 10, 2010, counsel for Underwriters sought the help of Sifounios/GHI's insurance agent (Surrey Agency) to provide Hermitage with notice of tender on behalf of Astoria LLC with respect to three specific actions arising from the collapse. The basis of the request was the ACORD Certificate of Liability Insurance issued by the Simon Agency on December 28, 2008. That certificate named "George's Home Improvement Corp." as the insured and, according to plaintiffs, named "Astoria LLC," "14-35 Astoria Blvd.," and "Parma Tile" as additional insureds, entitling them to coverage under the Hermitage Policy.

By letter dated April 9, 2010, Hermitage replied, stating that it had reviewed the matter and that, for the reasons set forth in the January 13, 2009 letter, it was reiterating its disclaimer of coverage and denying a defense and indemnification to its insured (GHI) with respect to actions emanating from the wall collapse. Specifically, Hermitage was denying coverage for the December 7, 2008 loss because the collapse of the masonry wall did not fall within the scope of risks covered under the Hermitage Policy, as required under the Classification Limitation (*see*

[\* 7]

HIC form 3000 0105 at 160 [3/90]), and because Sifounios/GHI did not properly notify it of the resulting lawsuits as soon as practicable. Hermitage also determined that there was no coverage available to Astoria LLC because it did not qualify as an additional insured under the “Additional Insured Limitation” which provides: “[t]his insurance does not provide coverage for an additional insured unless the Company gives their express written consent to add coverage for a specified entity to this policy” (HIC form 118 [04/98], Exhibit A to Jones Affidavit). Hermitage concluded that because it “did not give express written consent to add coverage for Astoria to the policy . . . [it] is not an insured under the policy [and] no coverage is available for it in this matter” (April 9, 2010 letter at 4).

Plaintiffs claim that, by refusing to provide coverage to Astoria LLC and Parma Tile with respect to the Lawsuits, Hermitage breached the insurance contract and the implied duty of good faith and fair dealing. These breaches allegedly caused plaintiffs to incur costs in procuring a legal defense, and exposed them to the risk of liability from the Lawsuits. Plaintiffs, therefore, seek both an award of damages and costs, and a judicial declaration that Astoria LLC and Parma Tile are additional insureds under the Hermitage Policy.

Hermitage insists that there is no coverage for plaintiffs under general liability insurance policy number HGL/548217-08, either as named insureds or as additional insureds, and it seeks a declaration that it is not obligated to defend or indemnify plaintiffs or any other party with respect to the December 7, 2008 loss. In support of its motion, Hermitage submits copies of the policy, the ACORD certificate of liability insurance, claim notifications, tender letters, denials of coverage, and the sworn affidavits of Lowell Aptman (Aptman), the Managing Vice President of Liability Claims, of Natalia Jones (Jones), an underwriting supervisor for Tower, and of Eric

Chappe (Chappe), an investigator for ICS Claims.

In his affidavit, Aptman states that he personally reviewed Hermitage's records on this matter and that:

[t]he disclaimer was based upon the Classification Limitation endorsement (HIC 160 3/90), which limits coverage under the policy to the "operations described in the Schedule of Insurance." Since the Hermitage Policy designates classification codes 98305 - "painting - Interior Building or Structures" and 92338 - "Drywall or Wallboard Installation," and the loss involved the collapse of an exterior masonry wall constructed by GHI . . . involving operations outside the scope of the policy's coverage (Aptman Aff., ¶ 6).

Aptman then refers to Chappe's affirmation, which annexes a copy of the written statement he (Chappe) obtained from Sifounios on March 22, 2010, as part of the ICS Claims investigation. In the presence of his attorneys, Sifounios acknowledged that GHI, in conjunction with Papas Iron, built the masonry wall out of cinder blocks, concrete and steel rebar, and that the wall collapsed the day after it was completed (*see* Chappe Affidavit, Exhibit A - Statement of George Sifounios).

With respect to the issue of insured status, Aptman reiterates that plaintiffs were not identified as either a named insured or additional insured on the Hermitage Policy. He directs plaintiffs and the court to the Jones affidavit which, at paragraph five, quotes the policy's "Additional Insured Limitation" endorsement. That endorsement states: "[t]his insurance does not provide coverage for an additional insured unless the Company gives their written consent to add coverage for a specified entity to this policy." Jones then avers, at paragraph six, that "Hermitage did not give its consent to add coverage for or to include plaintiffs, Vissas, Astoria, Parma Tile or any other entity as additional insureds under the Hermitage Policy."

Aptman explains that there is no merit to plaintiffs' claim for coverage despite their

names appearing on the front page of the ACORD certificate of liability insurance because not only does the certificate identify Astoria LLC and Parma Tile as “certificate holders,” rather than as “additional insureds,” but because the certificate states, in bold print at the top of the front page, that it “is issued as a matter of information only and confers no rights upon the certificate holder. This certificate does not amend, extend or alter the coverage afforded by the policies below.”

According to Hermitage, these documents establish, as a matter of law, that plaintiffs have no enforceable rights under the policy as they are neither parties to, nor third-party beneficiaries of, the insurance contract/policy. The insurer also asserts that where, as here, the alleged breach of the implied covenant of good faith and fair dealing is based on the same allegations underlying the alleged breach of the insurance contract, and it seeks the same measure of damages, the cause of action is redundant, and subject to dismissal.

In opposition to the motion, plaintiffs submit the sworn affidavit of Vissas, together with copies of the GHI Proposal, the report prepared for the Department of Buildings on December 8, 2008, by Miltiadis Leptourgos, P.E. (Leptourgos), a licensed professional engineer, and the ACORD Certificate of Liability Insurance in support of their request that the court search the record and declare them to be additional insureds under the policy.

In his affidavit, Vissas states that he was assured that Astoria LLC and Parma Tile had been named as additional insureds on the policy with respect to the expansion project. He also states that the ACORD certificate of liability insurance constitutes proof that Hermitage had approved them as additional insureds, and that they were covered at the time of the wall collapse.

With respect to the issue of “scope of coverage,” Vissas contends that, because the

construction of the masonry wall was part of GHI's responsibilities, its omission from the list of covered risks should not serve as a basis for denying coverage to Astoria LLC or to Parma Tile. He references those aspects of the engineering report in which Leptourgos blames the wall collapse on the "unprofessional manner" in which it had been constructed, and details the deficiencies in the work performed by the general contractor, the steel/iron contractor and the architect which resulted in the flawed construction of the unstable wall (Aff. in Opp. to Defendant Hermitage, Exhibit B). Vissas concludes, and asks the court to conclude, that under these circumstances, it would be unjust to hold that Hermitage has no duty to defend Astoria LLC and Parma Tile in the underlying Lawsuits.

It is well settled that "[t]he party claiming insurance coverage has the burden of proving entitlement" and that "[a] party that is not named an insured or additional insured on the face of the policy is not entitled to coverage" (*Moleon v Kreisler Borg Florman Gen. Constr. Co.*, 304 AD2d 337, 339 [1<sup>st</sup> Dept 2003]).

Hermitage has established, through competent proof, that while the policy was in effect at the time of the incident, the claims arising from the wall collapse fall outside the scope of the policy's coverage, that none of the plaintiffs were named as either an insured or an additional insured on the face of the policy, and that they are not third-party beneficiaries of the Hermitage insurance contract/policy. In response, plaintiffs have failed to "show facts sufficient to require a trial of any issue of fact" as to coverage (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; CPLR 3212 [b]).

Plaintiffs' assertions notwithstanding, the ACORD Certificate of Liability Insurance does not constitute proof that Hermitage had approved them as additional insureds. As it states, it is

an informational document. At best, the certificate “is only evidence of a carrier’s intent to provide coverage . . . [and it] is not a contract to insure the designated party nor is it conclusive proof, standing alone, that such a contract exists” (*Tribeca Broadway Assoc. v Mount Vernon Fire Ins. Co.*, 5 AD3d 198, 200 [1<sup>st</sup> Dept 2004]).

Plaintiffs have also failed to produce any evidence that they were intended to be third-party beneficiaries, rather than incidental beneficiaries, of the insurance contract/policy.

In order for a third party to enforce a policy of insurance, it must be demonstrated that the parties intended to insure the interest of [the parties] who seek[] to recover on the policy. As with other contracts, unless it is established that there is an intention to benefit the third party, the third party will be held to be a mere incidental beneficiary, with no enforceable rights under the contract. The intention to benefit the third party must appear from the four corners of the instrument. The terms contained in the contract must clearly evince an intention to benefit the third [party] who seeks the protection of the contractual provisions

(*Stainless, Inc. v Employers Fire Ins. Co.*, 69 AD2d 27, 33 [1<sup>st</sup> Dept 1979], *affd* 49 NY2d 924 [1980]). Even if, as is claimed, Sifounios agreed and/or promised Vissas that he/GHI would obtain coverage for the expansion project, that agreement is not reflected in the Hermitage Policy. As they are not third-party beneficiaries of the Hermitage Policy, plaintiffs have no enforceable rights under the contract of insurance between GHI and Hermitage, and the breach of contract cause of action must be dismissed.

The covenant of good faith and fair dealing cause of action must also be dismissed. In order to maintain this cause of action, plaintiffs must “demonstrate the existence of a valid contract from which such a duty [towards them] would arise (*Schorr v Guardian Life Ins. Co. of Am.*, 44 AD3d 319, 319 [1<sup>st</sup> Dept 2007]), and, for the reasons set forth above, they have not made this showing. Furthermore, even if plaintiffs did have a valid breach of contract claim against

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Hermitage, their claim for breach of the implied covenant of good faith and fair dealing would be dismissed because plaintiffs have alleged in both claims that they “have been damaged in that they have incurred costs in procuring a legal defense and are exposed to risk of liability from the Lawsuits.” Where, as here, the claim for breach of the implied duty of good faith and fair dealing “is intrinsically tied to the damages allegedly resulting from the breach of the insurance contract, those claims are redundant” and under New York law, subject to dismissal (*Trustees of Princeton Univ. v National Union Fire Ins. Co. of Pittsburgh, Pa.*, 15 Misc 3d 1118 [A], \*7, 2007 Slip Op 50753[U] [Sup Ct, NY County 2007], *affd* 52 AD3d 247 [1<sup>st</sup> Dept 2008], *lv denied* 11 NY3d 847 [2008]); *Levi v Utica First Ins. Co.*, 12 AD3d 256, 257 - 258 [1<sup>st</sup> Dept 2004]).

Finally, there is no merit to plaintiffs’ argument that Hermitage’s motion is premature on the ground that there may be underwriters’ policies and guidelines which might not have been followed in this case, requiring further discovery. Not only are conclusory and unsupported assertions insufficient to defeat a motion for summary judgment (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 325 [1986]), but plaintiffs do not demonstrate in what way discovery into the guidelines followed by Hermitage underwriters was likely to affect the outcome (*see Interested Underwriters at Lloyd’s v H.D.I. III Assoc.*, 213 AD2d 246, 248 [1<sup>st</sup> Dept 1995]).

#### The Southwest Motion

The Southwest Policy, which covered bodily injury and property damage for incidents involving Papas Iron and was in effect at the time of the wall collapse, contained an “Additional Insured - Blanket” endorsement on document “SM 0065” (Blanket Endorsement). This endorsement states:

[i]t is agreed that this Policy shall include as additional insureds any person or

organization to whom the Named Insured has agreed by written contract to provide coverage, but only with respect to operations performed by or on behalf of the Named Insured and only with respect to occurrences subsequent to the making of such written contract.

Following the wall collapse, nonparty Galsan Associates, Inc. (Galsan), on behalf of Underwriters, tendered the defense and indemnification of Underwriters' insured, Astoria LLC, to Southwest with respect to one of the Lawsuits which had been commenced by the adjoining property owner. Together with the tender letter was a copy of the ACORD Certificate of Liability Insurance, dated December 23, 2008, which identified Astoria LLC both as a certificate holder and as additional insured under Southwest Policy number GL00008008.

By letter, dated February 19, 2009, Southwest denied Underwriters' tender on the grounds that: (1) Astoria LLC is not a named insured and does not qualify as an insured under the policy; (2) Astoria LLC has not provided Southwest with a copy of a written contract which meets the requirements set forth in the Blanket Endorsement to trigger coverage; and (3) the listing of Astoria LLC as a certificate holder and as an additional insured is not binding because "a certificate of insurance is not part of the policy, and if it states there is coverage but the policy does not, the policy controls" (February 19, 2009 letter at 5, Exhibit 6 to Southwest's Notice of Cross Motion).

By letter dated April 6, 2011, counsel for Underwriters tried tendering to Southwest the defense and indemnification of Astoria LLC and Vissas for several of the Lawsuits which had been commenced against plaintiffs. The second tender letter included a copy of the signed Papas Proposal/Contract. On June, 8, 2011, counsel for plaintiffs also sent a tender letter to Southwest seeking a defense for Astoria LLC as an additional insured under the policy issued to Papas Iron.

By letter dated June 14, 2011, Southwest informed counsel for Underwriters that there was no coverage for the December 7, 2008 loss because the Southwest Policy had been "flat cancelled effective October 4, 2008." As a result of Southwest's continuing refusal to provide coverage, plaintiffs named it as a defendant in this action.

In support of its motion, Southwest offers copies of the Southwest Policy, the Blanket Endorsement, the above referenced tender letters and responses, and the sworn affidavit of its Claims Analyst Liesl M. De Martini (De Martini), dated July 12, 2012, explaining Southwest's position. With respect to the Papas Proposal/Contract, Southwest disputes whether the document constitutes a binding contract rather than just a work proposal. Alternatively, Southwest asserts that even if the Papas Proposal/Contract constitutes a "written contract," it, nevertheless, fails to meet the conditions precedent for coverage under the terms of the Blanket Endorsement because it does not identify either the parties or the type of insurance under which such parties would be afforded coverage as additional insureds. Moreover, in the accompanying affidavit, De Martini states that plaintiffs do not qualify for coverage as additional insureds because they have not provided Southwest with a written contract obligating Papas Iron to provide plaintiffs with general liability insurance. De Martini also explains that plaintiffs cannot be additional insureds under the policy because Southwest rescinded the policy and issued an endorsement cancelling the policy effective October 4, 2008, and six months later, refunded Papas Iron's policy premium on or about April 24, 2009.

In opposition, plaintiffs argue that Papas Iron's May 5, 2008 proposal became a binding and enforceable written contract when Sitiri Papas and Vissas executed it, acknowledging their acceptance of the proposed terms. Plaintiffs offer the sworn affidavit of Vissas and the sworn

deposition testimony of Sitiri Papas as evidence that both men understood the language in the Papas Proposal/Contract as requiring Papas Iron to provide coverage to plaintiffs as additional insureds under a commercial general liability policy for the work they were undertaking at the Premises. For his part, Sitiri Papas testified that he agreed to provide liability and disability insurance to plaintiffs and that he/Papas Iron did so by naming Parma Tile as an additional insured under the Southwest Policy. Vissas, similarly, stated that he was informed by Papas Iron that Astoria LLC and Parma Tile had been added as additional insureds to the policy.

With respect to Southwest's purported cancellation of the policy "ab initio," plaintiffs argue that any misrepresentations made to the insurer by Papas Iron should not be attributed to them or render the policy void as to their coverage because each additional insured is to be treated as if separately covered under the policy (citing *Lufthansa Cargo, AG v New York Mar. & Gen. Ins. Co.*, 40 AD3d 444 [1<sup>st</sup> Dept 2007]; *Greaves v Public Serv. Mut. Ins. Co.*, 5 NY2d 120, 124 [1959]; and *Admiral Ins. Co. v Joy Contrs., Inc.*, 81 AD3d 521 [1<sup>st</sup> Dept 2011]).<sup>3</sup> Furthermore, plaintiffs object to Southwest's belated efforts to cancel the policy after tender was made, and argue that it would be inappropriate to grant summary judgment in Southwest's favor because material questions of fact exist as to the purported cancellation, as to whether the Papas Proposal/Contract meets the preconditions set in the Blanket Endorsement, and whether they are

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<sup>3</sup> The aspect of the decisions relied upon by plaintiffs was abrogated by the Court of Appeals in *Admiral Ins. Co. v Joy Contrs., Inc.* (19 NY3d 448, 461 [2012]). The Court of Appeals determined that it would be illogical to leave in place coverage for a third party where a policy has been rescinded, stating, in relevant part, "these other parties [would be] permitted to rely on the terms of a policy that . . . may be deemed never to have existed to create coverage in the first place. In short, 'additional' insureds, by definition, must exist in addition to something; namely, the named insureds in a valid existing policy" (internal quotation marks and emphasis omitted).

entitled to coverage under the policy.

Upon review of its terms and conditions, it is clear that Papas Iron's May 5, 2008 written proposal became an enforceable written contract when the parties executed the document, acknowledging their mutual assent to, and intent to be bound by, the terms and conditions contained therein (*see* 22 NY Jur 2d, Contracts § 9). The contract, nevertheless, does not meet all of the preconditions for plaintiffs to be deemed additional insureds under the policy because the language used by Papas and Vissas is vague and ambiguous with regard to insurance. The Papas Proposal/Contract requires, at paragraph 4, that Papas Iron "provide client with all insurances as required and welding license," without differentiating between types of insurance coverage, and without specifying, by name, which entity or entities were intended to be covered by such policy or policies.

It is well settled that

[a] provision in a construction contract cannot be interpreted as requiring the procurement of additional insured coverage unless such a requirement is expressly and specifically stated. In addition, contract language that merely requires the purchase of insurance will not be read as also requiring that a contracting party be named as an additional insured

(*Trapani v 10 Ariel Way Assoc.*, 301 AD2d 644, 647 [2<sup>nd</sup> Dept 2003]; *Mangano v American Stock Exch.*, 234 AD2d 198, 199 [1<sup>st</sup> Dept 1996]).

Neither Vissas's nor Sitiri Papas's stated intentions, nor their respective understandings, remedy this failure or the inherent ambiguity in the phrase "provide client with all insurances as required and welding license." This lack of specificity is fatal to plaintiffs' claims for coverage under the Southwest Policy.

There is also no merit to plaintiffs' argument that the inclusion of Astoria LLC's name on

the ACORD certificate of liability insurance entitles it to coverage as an additional insured, nor does it raise a question of fact as to coverage for this entity which is sufficient to forestall summary judgment. As stated above, a certificate of liability insurance “is only evidence of a carrier’s intent to provide coverage but is not a contract to insure the designated party nor is it conclusive proof, standing alone, that such a contract exists” (*Tribeca Broadway Assoc. v Mount Vernon Fire Ins. Co.*, 5 AD3d at 200). Furthermore, a party who has not been named as an insured or as an additional insured on the face of the policy is not entitled to coverage (*Moleon v Kreisler Borg Florman Gen. Constr. Co.*, 304 AD2d at 339).

Southwest is entitled to a declaration that plaintiffs are not party to or third-party beneficiaries of the Southwest Policy, and Southwest is not obligated to defend and indemnify plaintiffs in the underlying Lawsuits. Although it did not specifically seek a dismissal of the claims against it, it is well settled that on a motion for summary judgment, the court may search the record and grant such relief where warranted with respect to causes of action which are the subject of the motions before the court (*see Dunham v Hilco Constr. Co.*, 89 NY2d 425, 429 - 430 [1996]; CPLR 3212 [b]). For the reasons set forth above, there is no basis for plaintiffs’ cause of action against Southwest for breach of contract or for breach of the covenant of good faith and fair dealing, and they are not entitled to a judicial declaration in their favor. Accordingly, this court does not need to reach issues pertaining to Southwest’s purported cancellation of the policy.

#### The St. Paul/Travelers Motion

Plaintiffs seeks coverage as additional insureds under the professional liability insurance policy issued by St. Paul/Travelers to Hatzioannou, under policy number QP03806491 (St.

Paul/Travelers Policy). The St. Paul/Travelers Policy lists "Anthony Hatzioannou Architect" as the named insured, and covers the period of May 22, 2007 to May 22, 2009. According to plaintiffs, after the wall collapse, Hatzioannou sought indemnification and insurance coverage under the policy with respect to that event. When St. Paul/Travelers refused, it deprived plaintiffs of their right to receive benefits under the policy.

Like cross movants, St. Paul/Travelers now seeks a summary judgment <sup>of</sup> dismissal of the claims pending against it on the ground that plaintiffs are not covered either as named insureds or as additional insureds under the terms of the policy. Specifically, St. Paul/Travelers asserts that: Hatzioannou is the only named insured under the policy; plaintiffs are not identified as additional insureds on the policy or on any endorsement to the policy; plaintiffs are not third-party beneficiaries of the policy; and plaintiffs' claim for breach of the implied duty of good faith and fair dealing is both baseless and duplicative of the breach of contract claim.

St. Paul/Travelers submits a complete copy of its policy, including the declarations and change/endorsement documents, to establish, as a matter of law, that there are no additional insureds on the policy. St. Paul/Travelers also submits a sworn affidavit from one of its underwriters, Katie Kegan (Kegan), who states, in relevant part, that neither Vissas, Astoria LLC nor Parma are listed as named insureds or as additional insureds. Kegan also states that plaintiffs do not qualify as an insured under the policy's provisions (*see* Exhibit 4 to St. Paul/Travelers Notice of Motion, "Insured means the Named Insured and:" at §§ 1 - 5; and "Item 1. in the Declarations") and that St. Paul/Travelers did not receive any requests for plaintiffs to be covered under the policy.

St. Paul/Travelers asserts that this evidence demonstrates its entitlement to judgment and

shifts the burden to plaintiffs to establish the existence of material questions of fact requiring a trial, or to demonstrate an acceptable excuse for failing to rebut its prima facie showing (*Zuckerman v City of New York*, 49 NY2d at 562; *Alvarez v Prospect Hosp.*, 68 NY2d at 324).

To this end, plaintiffs submit the sworn affidavit of Vissas in which he avers that, at some point after October 2006, he and Hatzioannou orally amended their contract to require coverage for Astoria LLC and Parma Tile as additional insureds under Hatzioannou's liability policy. He further avers that he was informed by Hatzioannou that Astoria LLC had been added to the policy, and that he was given an ACORD insurance certificate confirming this. Vissas, however, is unable to locate the certificate (*see* Exhibit C to Plaintiffs' Affirmation in Opposition).

Plaintiffs also argue that the Kegan affidavit does not constitute competent, admissible evidence because it was executed out of state and was not accompanied by the requisite certification (*see* CPLR 2309). They also claim that the policy is ambiguous regarding additional insureds, and that discovery is needed to uncover evidence establishing them as additional insureds under the policy. On this basis, plaintiffs seek discovery of any correspondence indicating that St. Paul/Travelers and Hatzioannou intended them to be covered and they suggest that depositions and responses to their currently outstanding discovery demands (dated after the notice of motion) might uncover such evidence.

Based upon an examination of both parties' submissions, including the re-submission of the Kegan affidavit with the requisite certificate of conformity (*see Matapos Tech. Ltd. v Compania Andina de Comercio Ltda*, 68 AD3d 672, 673 [1<sup>st</sup> Dept 2009]; CPLR 2309), the motion for summary judgment must be granted. Even viewing plaintiffs' papers in a more favorable light, as this court must (*see Martin v Briggs*, 235 AD2d 192, 196 [1<sup>st</sup> Dept 1997]),

plaintiffs, nevertheless, fail to raise a question of fact regarding their status as additional insureds and/or third-party beneficiaries under the policy.

Having not been named as an insured or as an additional insured on the face of the St. Paul/Travelers Policy, Astoria LLC is not entitled to coverage (*see Moleon v Kreisler Borg Florman General Constr. Co., Inc.*, 304 AD2d at 339), and, contrary to plaintiffs' bald accusation, the policy does not contain ambiguities as to who is an insured or an additional insured. The policy's "Declarations" page, as well as the "Policy Form List, form 40705 Ed.5-84," identifies "Antony Hatzioannou Architect AIA" as the named insured, and nowhere on the policy are plaintiffs listed as either named insureds or as additional insureds. A review of the "four corners of the instrument" also fails to reveal terms which "clearly evince an intention to benefit the [plaintiffs]" as third parties (*Stainless, Inc. v Employers Fire Ins. Co.*, 69 AD2d at 33).

As the party claiming insurance coverage, plaintiffs have not met their burden of proving entitlement to coverage (*National Abatement Corp. v National Union Fire Ins. Co. of Pittsburgh, Pa.*, 33 AD3d 570, 570 - 571 [1<sup>st</sup> Dept 2006]), nor have they "produce[d] evidentiary proof in admissible form sufficient to establish the existence of material issues of fact" as to whether they are covered, or were intended to be covered under the policy (*Alvarez v Prospect Hosp.*, 68 NY2d at 324). Hatzioannou's assurances notwithstanding, plaintiffs offer no competent evidence that they were, in fact, added to the policy, and the Vissas affidavit does not suffice for this purpose. Not only is it speculative, but Vissas's affidavit lacks any meaningful detail as to when, where and/or how Hatzioannou informed him that Astoria LLC and Parma Tile had been added to the policy as additional insureds. It also lacks detail as to when, where and/or how

Hatzioannou provided him with an ACORD certificate of professional liability insurance, or explain how, even if such a certificate were to be found, it would afford plaintiffs coverage when the policy clearly does not. Finally, the Vissas affidavit does not provide a basis for believing that correspondence exists which would prove that plaintiffs are entitled to coverage under the policy or how such correspondence, if it does exist, would affect the ultimate result (*see Interested Underwriters at Lloyd's v H.D.I. III Assoc.*, 213 AD2d at 248).

Plaintiffs' expressions of hope and unsubstantiated allegations that they had been added to the policy and/or that there exists correspondence which would show that there were intended to be additional insureds and third-party beneficiaries under the policy, do not rebut St. Paul/Travelers's a prima facie showing (*see Zuckerman v City of New York*, 49 NY2d at 562). Moreover, it would be inappropriate to deny a motion for summary judgment where the claimed lack of disclosure is based solely on conjecture as to what further discovery might yield (*see Auerbach v Bennett*, 47 NY2d 619, 636 [1979]).

Accordingly, it is

ORDERED that the motion of defendant St. Paul Fire and Marine Insurance Company a/k/a Travelers for summary judgment is granted and the complaint and cross claim against it are dismissed with costs and disbursements to said defendant as taxed by the Clerk of the Court upon the submission of an appropriate bill of costs; and it is further

ORDERED that the motion of defendant Hermitage Insurance Company, also known as Tower Group, Inc., for summary judgment is granted to the extent that it is entitled to a declaration that it is not obligated to provide a defense and indemnification for plaintiffs in any action stemming from the December 7, 2008 wall collapse; and it is hereby

ADJUDGED and DECLARED that Hermitage Insurance Company, also known as Tower Group, Inc., is not obligated to provide a defense or indemnification for plaintiffs in any action stemming from the December 7, 2008 wall collapse; and it is further

ORDERED that the complaint is dismissed with costs and disbursements to said defendant as taxed by the Clerk of the Court upon the submission of an appropriate bill of costs; and it is further

ORDERED that the motion of defendant Southwest Marine and General Insurance Company for summary judgment is granted to the extent that it is entitled to a declaration that it is not obligated to defend and indemnify plaintiffs in any action stemming from the December 7, 2008 wall collapse or to reimburse plaintiffs for costs or attorneys' fees incurred in defending those actions; and it is hereby

ADJUDGED and DECLARED that Southwest Marine and General Insurance Company is not obligated to provide a defense or indemnification for plaintiffs in any action stemming from the December 7, 2008 wall collapse or to reimburse plaintiffs for costs or attorneys' fees incurred in defending those actions; and it is further

ORDERED that the complaint and cross claim against it are dismissed with costs and disbursements to said defendant as taxed by the Clerk of the Court upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated:

2/7/13

ENTER:



J.S.C.