STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

VILLAGE OF MORRISVILLE and
NEW YORK STATE LOCAL GOVERNMENT
SERVICES as attorney in Fact for NEW YORK
MUNICIPAL INSURANCE RECIPROCAL,

Plaintiffs,

-against-

DECISION and ORDER
INDEX NO. 3797-11
RJI NO. 01-12-107528

ALEA NORTH AMERICA INSURANCE COMPANY,
ACE FIRE UNDERWRITERS INSURANCE COMPANY and
HARLEYSVILLE INSURANCE COMPANY OF NEW YORK,

Defendants.

Supreme Court Albany County All Purpose Term, April 2, 2013
Assigned to Justice Joseph C. Teresi

APPEARANCES:
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TERESI, J.:

In 2006, Georgius[1] commenced a property damage action against Morrisville[2] and Devincentis[3], captioned Georgius v. Morrisville, Et. Al.[4] Georgius sought to recover the damages his property[5] allegedly sustained from increased erosion, claiming it was caused by Devincentis' negligent installation of a sewer line for Morrisville. The action proceeded to trial and was dismissed, pursuant to CPLR §4401, at the close of Georgius' proof.

Plaintiffs commenced this action seeking a declaration that Defendants[6] owed Morrisville a duty to defend it in the Georgius v. Morrisville action[7] and to recover all of their costs, without contribution, in defending such action. Issue was joined by ACE[8] and ALEA[9], discovery is complete, a note of issue filed and a non-jury trial date certain is set (September 25, 2013).

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[1] David Russell Georgius, as trustee of the Georgius Family Trust will be referred to herein as "Georgius."

[2] The Village of Morrisville will be referred to herein as "Morrisville."

[3] G. Devincentis & Son Construction Company Inc will be referred to herein as "Devincentis."

[4] The actions was commenced in Supreme Court Madison County, under Index No. 06-1785, and will hereinafter be referred to as "Georgius v. Morrisville."

[5] Such property is located at 63 North Street, Morrisville, New York and will be referred to herein as "the property."

[6] Plaintiffs allege that they filed a Stipulation of Partial Discontinuance dismissing their claims against defendant Harleysville Insurance Company of New York, which claims will not be further addressed.

[7] Because Morrisville prevailed in the Georgius v. Morrisville action, any claim Morrisville made for indemnification in this action is now moot.

[8] ACE Fire Underwriters Insurance Company will be referred to herein as "ACE."

[9] ALEA North America Insurance Company will be referred to herein as "ALEA."

Plaintiffs now move for summary judgment on their declaratory judgment claims.[10] Both ACE and ALEA oppose Plaintiffs' motion, and cross move for declaratory relief in their favor. Plaintiffs oppose ACE and ALEA's motions. Because Plaintiffs demonstrated their entitlement to judgment as a matter of law on their claims against both ACE and ALEA, and no triable issue of fact was raised, Plaintiffs' motion is granted while ACE and ALEA's motions are denied.

It is well established that "the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law" (Barra v. Norfolk Southern Ry. Co., 75 AD3d 821, 822 [3d Dept. 2010], quoting Winegrad v. New York Univ. Med. Ctr., 64 NY2d 851 [1985]), "by proffering evidentiary proof in admissible form." (DiBartolomeo v. St. Peter's Hosp. of City of Albany, 73 AD3d 1326 [3d Dept. 2010]; Alvarez v. Prospect Hospital, 68 NY2d 320 [1986]). Only if the movant establishes its right to judgment as a matter of law will the burden shift to the opponent of the motion to establish, with admissible proof, the existence of a genuine issue of fact. (Zuckerman v City of New York, 49 NY2d 557 [1980]).

Here, Plaintiffs demonstrated, as a matter of law, ACE and ALEA's duty to defend Morrisville in the Georgius v. Morrisville action.

As is applicable to Plaintiffs' claims, "it is well settled that an insurer's duty to defend [its insured] is exceedingly broad and an insurer will be called upon to provide a defense whenever the allegations of the [underlying] complaint suggest . . . a reasonable possibility of coverage." (BP A.C. Corp. v One Beacon Ins. Group, 8 NY3d 708, 714 [2007], quoting Auto. Ins. Co. of Hartford v Cook, 7 NY3d 131 [2006]; Continental Cas. Co. v. Rapid-American Corp., 80 NY2d

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[10] Plaintiffs concede that a hearing is necessary to determine the amount of its defense costs in Georgius v. Morrisville.

640 [1993]). "[I]f the complaint contains any facts or allegations that bring the claim even potentially within the embrace of the policy, the insurer must defend its insured, no matter how groundless, false or baseless the suit may be." (Vil. of Brewster v Virginia Sur. Co., Inc., 70 AD3d 1239, 1241 [3d Dept 2010], quoting Auto. Ins. Co. of Hartford v Cook, supra [internal quotation marks omitted]). Moreover, while "insurers [cannot] look beyond the [underlying] complaint's allegations to avoid their obligation to defend" (Fitzpatrick v Am. Honda Motor Co., Inc., 78 NY2d 61, 66 [1991]), "extrinsic evidence may be used [by the insured] to expand the insurer's duty to defend." (Durant v N. Country Adirondack Co-op. Ins. Co., 24 AD3d 1165, 1166 [3d Dept 2005]; City of Kingston v Harco Nat. Ins. Co., 46 AD3d 1320 [3d Dept 2007]).

Once the insured shifts the burden, "[t]o avoid defending an action, the insurer bears the burden of showing that the [underlying] claim is not even potentially covered." (Lombardi, Walsh, Wakeman, Harrison, Amodeo & Davenport, P.C. v Am. Guar. And Liab. Ins. Co., 85 AD3d 1291, 1293 [3d Dept 2011]).

Plaintiffs first demonstrated Morrisville's status as a potential insured. In 2002, the Village contracted with Devincentis to perform excavation and construction services on the Village's sewer system.[11] Pursuant to the 2002 Contract, which Plaintiffs duly submitted, Devincentis was required to maintain general liability insurance and name Morrisville as an additional insured. Devincentis complied by first obtaining, from ACE, a commercial general liability insurance policy for the period September 30, 2002 through September 30, 2003. Thereafter, Devincentis obtained a similar insurance policy, from ALEA, for the two yearly

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[11] The Morrisville - Devincentis contract was dated April 23, 2002 and will be referred to herein as "the 2002 Contract."

periods between September 30, 2003 and September 30, 2005. All three policies were submitted and contained identical endorsements, which "include as an insured any... organization for whom [Devincentis was] performing operations when [Devincentis]... and such... organization have agreed in writing in a contract or agreement that such ... organization be added as an additional insured on [Devincentis'] policy. Such... organization is an additional insured only with respect to liability arising out of [Devincentis'] ongoing operations performed for that insured... [An] organization's status as an insured under this endorsement ends when [Devincentis'] operations for that insured are completed." Each policy also specifically requires the respective insurer to defend its insured in property damage actions.

With such endorsement and obligation, Plaintiffs demonstrated Morrisville's reasonable possibility of coverage under ACE's September 30, 2002 through September 30, 2003 policy. The Georgius v. Morrisville complaint alleged that Devincentis, after entering the 2002 Contract, constructed a portion of the contracted for sewer system across the property. Although no installation or reconstruction dates were specified in such complaint, Georgius' bill of particulars clarified Devincentis' "ongoing operations performed" dates, by attaching his July 11, 2003 Resident Property Complaint Form. Such form stated that Devincentis was the contractor when, in "Spring 2003", the sewer system work "create[d] an erosion problem." Because these allegations in the Georgius v. Morrisville action unambiguously claim that Devincentis' operations were ongoing (Spring 2003) during the ACE insurance contact period (September 30, 2002 through September 30, 2003), Morrisville demonstrated a reasonable possibility of coverage.

Plaintiffs similarly demonstrated Morrisville's reasonable possibility of coverage under

the ALEA policies. The Georgius v. Morrisville complaint alleged that Georgius discovered the damages Devincentis caused to the home located on the property by September 2005. Moreover, Georgius particularized the "date and time of day of occurrence" in its bill of particulars as "[o]n or before October 3, 2005, and believed to have been on or about August 25, 2005; time of day unknown." Because the Georgius v. Morrisville complaint and bill of particulars allege that Georgius's property was damaged by Devincentis within ALEA's policy periods (September 30, 2003 through September 30, 2005), Plaintiffs demonstrated a reasonable possibility of coverage under the ALEA policies.

Because "the duty to defend is at issue, [the] liability alleged [in Georgius v. Morrisville] to arise out of [Devincentis'] ongoing operations is one 'arising out of' such operations within the meaning of the [ACE and ALEA] polic[ies]." (BP A.C. Corp. v One Beacon Ins. Group, supra 715 [examining an "Additional Insured" endorsement identical to the one at issue here] [emphasis added]; Town of Fort Ann v Liberty Mut. Ins. Co., 69 AD3d 1261, 1263 [3d Dept 2010]). As such, Plaintiffs demonstrated their prima facie entitlement to a defense from both ACE and ALEA in the Georgius v. Morrisville action.

With the burden shifted, ACE failed "to establish the absence of coverage." (492 Kings Realty, LLC v 506 Kings, LLC, 88 AD3d 941, 942 [2d Dept 2011]). Focusing solely on the Georgius v. Morrisville complaint, ACE characterizes that action's damages as occurring in 2005, well after its policy had expired. Such overly restrictive reading, however, wrongly disregards the "Spring 2003" damages allegation set forth with Georgius' bill of particulars. Because the Spring 2003 damages "allegations fall within the risk of loss undertaken by the insured... it is immaterial that [Georgius'] complaint against [Morrisville] asserts additional

claims which fall outside the policy's general coverage or within its exclusory provisions." (BP A.C. Corp. v One Beacon Ins. Group, supra 714). Because ACE proffered no affirmative proof establishing that the property sustained no damages during its policy period, ACE failed to raise a triable issue of material fact. Nor did ACE offer any admissible proof to establish that it was not timely notified of Georgius' claims. (2 North Street Corp. v Getty Saugerties Corp., 68 AD3d 1392 [3d Dept 2009][such claim was made only by ACE's attorney, whose speculative and hearsay account is of no probative value]). As such, ACE raised no triable issue of fact relative to its obligation to defend Morrisville.

ALEA too failed "to establish the absence of coverage." (492 Kings Realty, LLC v 506 Kings, LLC, supra 942). It claims that it owes no duty to defend because Morrisville had knowledge of Georgius' claims prior to their first policy's inception, the "occurrence" happened prior to coverage and no injury in fact occurred during their policies' coverage periods. Not one such conclusion, however, is based upon the four corners of the Georgius v. Morrisville complaint. Instead, each wrongly relies on extrinsic evidence. (Fitzpatrick v Am. Honda Motor Co., Inc., supra; Durant v N. Country Adirondack Co-op. Ins. Co., supra; City of Kingston v Harco Nat. Ins. Co., supra). It remains uncontested that the Georgius v. Morrisville complaint specifically sought damages that allegedly occurred during ALEA's coverage period. Moreover, even if extrinsic evidence could be considered, ALEA failed to establish the absence of coverage with admissible proof. The unsigned and uncertified deposition testimony it submitted was inadmissible (Marks v Robb, 90 AD3d 863 [2d Dept 2011]; Marmer v IF USA Exp., Inc., 73 AD3d 868 [2 Dept 2010]; Ashif v Won Ok Lee, 57 AD3d 700 [2d Dept 2008]; Moffett v Gerardi, 75 AD3d 496 [2d Dept 2010]; Martinez v 123-16 Liberty Ave. Realty Corp., 47 AD3d

901 [2 Dept 2008]), and its reliance on The Certificate of Substantial Completion of the Morrisville sewer project, was misplaced. Such certificate was dated October 1, 2003 and signed by Devincentis on November 25, 2003, after ALEA's first policy took effect on September 30, 2003. On this record, ALEA failed to demonstrate its non-coverage of Morrisville.

Additionally, to the extent ACE and ALEA failed to specify the above exclusions in their respective notices of disclaimer, they are precluded from relying on them here. "Since an insurer's disclaimer is strictly limited to those grounds stated in the notice of disclaimer, which disclaimer must clearly apprise the insured of the grounds on which the disclaimer is based... [ACE and ALEA] cannot now rely on uninvoked exclusions as a basis for denying coverage." (Vil. of Brewster v Virginia Sur. Co., Inc., supra 1242, quoting City of Kingston v Harco Natl. Ins. Co., 46 AD3d 1320 [3d Dept 2007], lv dismissed 10 NY3d 822 [2008][internal citations omitted]).

Accordingly, Plaintiffs' motion for summary judgment declaring that both ACE and ALEA owe Morrisville a duty to defend in the Georgius v. Morrisville action is granted, while ACE and ALEA's motions are denied.

Lastly, Plaintiffs demonstrated their entitlement to a judgment declaring that Morrisville's NYMIR[12] insurance policy is excess to both the ACE and ALEA policies. Considering each policy at issue (BP A.C. Corp. v One Beacon Ins. Group, supra), the pertinent clauses of ACE and ALEA's policies are identical to each other and substantially similar to NYMIR's policy. Each policy first provides that it is primary when other insurance is available, unless an "Excess Insurance" exception applies. The only relevant exception here, set forth with identical language

[12] New York Municipal Insurance Reciprocal will be referred to herein as "NYMIR."

in each of the policies, states: "This insurance is excess over... [a]ny other primary insurance available to you covering liability for damages arising out of the... operations for which you have been added as an additional insured by attachment of an endorsement." "Here, [as set forth above, Morrisville] is added as an additional insured on [both defendant ACE and ALEA's] polic[ies]... thereby triggering the excess clause in the NYMIR policy, but not in [either] defendant[s'] policy. Thus, pursuant to the terms of the policies, NYMIR's coverage is excess to [both ACE and ALEA's] coverage." (Vil. of Brewster v Virginia Sur. Co., Inc., supra 1242-43). As such, ACE and ALEA had the primary duty to defend Morrisville in the Georgius v. Morrisville action, with "no entitlement to contribution from [NYMIR,] an excess insurer." (Fieldston Prop. Owners Ass'n, Inc. v Hermitage Ins. Co., Inc., 16 NY3d 257, 265 [2011], quoting Gen. Motors Acceptance Corp. v Nationwide Ins. Co., 4 NY3d 451 [2005]).[13]

Accordingly, Plaintiffs' motion is granted, while ACE and ALEA's motions are denied, and it is hereby:

ORDERED, ADJUDGED, DECLARED AND DECREED that ACE and ALEA were both required to defend Morrisville in the Georgius v. Morrisville action, and it is further

ORDERED, ADJUDGED, DECLARED AND DECREED that both ACE and ALEA are required to reimburse Plaintiffs for the costs of the defense provided to Morrisville in the Georgius v. Morrisville action, and it is further

ORDERED, ADJUDGED, DECLARED AND DECREED that NYMIR's policy is excess to ACE and ALEA's policies in the Georgius v. Morrisville action, and neither ACE nor

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[13] Because the priority of coverage between the ACE and ALEA policies was not briefed, it will not be addressed herein.

ALEA are entitled to contribution from NYMIR for defense costs.

This Decision and Order is being returned to the attorneys for Plaintiffs. A copy of this Decision and Order and all other original papers submitted on this motion are being delivered to the Albany County Clerk for filing. The signing of this Decision and Order shall not constitute entry or filing under CPLR §2220. Counsel is not relieved from the applicable provision of that section respecting filing, entry and notice of entry.

So Ordered.

Dated: April 18, 2013
Albany, New York

Joseph C. Teresi
JOSEPH C. TERESI, J.S.C.

PAPERS CONSIDERED:

1. Notice of Motion, dated December 28, 2012; Affidavit of Ed Andrescavage, dated November 30, 2012, with attached Exhibit "A"; Affirmation of Michael Glascott, dated December 28, 2012, with attached Exhibits "A" - "H(A)".
2. Notice of Motion, dated February 22, 2013; Affirmation of Avis Spencer Decaire, dated February 22, 2013, with attached Exhibits "A" - "P"; Affidavit of Gregg Papush, dated February 19, 2013, with attached Exhibits "A" - "C".
3. Notice of Motion, dated March 21, 2013; Affidavit of Tod Lascurettes, dated March 21, 2013, with attached Exhibits "A" - "D"; Affidavit of Lauren Miller, dated March 20, 2013, with attached Exhibits "A" - "B".
4. Affirmation of Michael Glascott, dated March 25, 2013.