New York Marine & Gen. Ins. Co. v Illinois Union Ins. Co.
2013 NY Slip Op 33347(U)
April 22, 2013
Sup Ct, Bronx County
Docket Number: 309507/08
Judge: Robert E. Torres
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NEW YORK SUPREME COURT - COUNTY OF BRONX

#1

PART IA- 29

Case Disposed	❑
Settle Order	❑
Schedule Appearance	❑

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX:

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NEW YORK MARINE AND GENERAL INSURANCE COMPANY, et al.

Index №. **309507/2008**

-against-

Hon..**ROBERT E. TORRES** ,

ILLINOIS UNION INSURANCE COMPANY, et al.

Justice.

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The following papers numbered 1 to (see below)_____ Read on these 4 motions,
Noticed on ___ and duly submitted on the Motion Calendars of **Dec. 1, 2010 and March 17, 2011**

	PAPERS NUMBERED	
#1) Plaintiffs Motion Defendant ILLINOIS Opp Defendant JOY Opp Plaintiffs Reply to ILLINOIS Plaintiffs Reply to JOY	1-4 5-6 7-8 9-10 11-12	
#2) Defendant ILLINOIS Motion & Memo Of Law #3) Defendant ARCH Cross Motion Defendant ILLINOIS Opp to Cross Motion Defendant ARCH Reply	1-3, 4-5 6-8 9-10 11-12	
#4) Defendant ARCH Motion Plaintiffs Opp Defendant ARCH Reply	1-4 5-6 7-8	

Respectfully Referred to: _____

Dated: _____

UPON the foregoing papers,
the above-enumerated motions are decided in the annexed decision and order.

Dated: 4 / 22 / 2013

Hon._____
ROBERT E. TORRES, J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX PART 29

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NEW YORK MARINE AND GENERAL INSURANCE COMPANY, HIGHBRIDGE COMMUNITY HOUSING DEVELOPMENT FUND CORPORATION, KENSINGTON HEIGHTS ASSOCIATES, L.P., and KNICKERBOCKER CONSTRUCTION, LLC,

Decision & Order

Plaintiffs,

-against-

Index No. 309507/08

ILLINOIS UNION INSURANCE COMPANY, JOY CONSTRUCTION CORP., ARCH INSURANCE GROUP, NEW YORK PRECAST, LLC, and ARIEL PAZ,

Defendants.

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TORRES, ROBERT E.. J.:

This is a declaratory judgment action, wherein the parties seek declarations pertaining to their insurance coverage in an underlying personal injury action. Motion Seqs. 4, 5 and 9 are consolidated for disposition.

The Parties:

Plaintiff, HIGHBRIDGE COMMUNITY HOUSING DEVELOPMENT FUND CORPORATION (HIGHBRIDGE), is the owner of premises known as 1345/1347 Shakespeare Avenue, Bronx, NY, where a housing project was being constructed.

Plaintiff, KENSINGTON HEIGHTS ASSOCIATES, L.P. (KENSINGTON), is the lessee of the premises, who, on October 26, 2005, entered into a 55-year lease for KENSINGTON "to construct, own and operate a low-income housing project" at the premises.[1]

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[1] *See* "Lease Agreement", between HIGHBRIDGE and KENSINGTON, dated Oct. 26, 2005, signed by Msgr. Donald Sakano on behalf of HIGHBRIDGE, and signed by Peter Fine, on behalf of KENSINGTON, attached to Plaintiffs' underlying motion as plaintiffs' exhibit "A."

Plaintiff, KNICKERBOCKER CONSTRUCTION, LLC, (KNICKERBOCKER), and KENSINGTON, are affiliated entities, who entered into an Agreement[2], on August 8, 2005, "whereby KNICKERBOCKER was assigned the selection of the general contractor for the low-income housing project" (affidavit of Altheim, dated Sept. 14, 2009).

Plaintiff, NEW YORK MARINE AND GENERAL INSURANCE COMPANY (NYMAGIC), is the insurance carrier for HIGHBRIDGE, KENSINGTON, and KNICKERBOCKER.

Defendant, JOY CONSTRUCTION CORP. (JOY), was the general contractor for the construction project, pursuant to an Agreement with KNICKERBOCKER.[3]

Defendant, ILLINOIS UNION INSURANCE COMPANY (ILLINOIS), is the insurance carrier for JOY.

Defendant, NEW YORK PRECAST, LLC (NY PRECAST), is the subcontractor who was hired to install concrete planks, pursuant to a subcontract with JOY, dated January 20, 2006.[4]

Defendant, ARCH INSURANCE GROUP (ARCH), is the insurance carrier for NY

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[2] *See* contract, between KENSINGTON and KNICKERBOCKER, dated Aug. 8, 2005, which is signed by the same person [Peter Fine] on behalf of both entities, attached to plaintiffs' underlying motion as plaintiffs' exhibit "B", also referred to herein as the KENSINGTON-KNICKERBOCKER Agreement.

[3] *See* contract, between JOY and KNICKERBOCKER, dated Sept.22, 2005, which is signed by Peter Fine on behalf of KNICKERBOCKER, and signed by Amnon Shalhov on behalf of JOY, attached to plaintiffs' underlying motion as plaintiffs' exhibit "C", and attached to ILLINOIS' affirmation in opposition, as exhibit "C," referred to herein as the JOY-KNICKERBOCKER Agreement.

[4] *See* contract, between JOY and NY PRECAST, dated Jan. 20, 2006, which is signed by Steve Blernacki on behalf of NY PRECAST, and Amnon Shalhov on behalf of JOY, attached to ILLINOIS' affirmation in opposition, as Exhibit "D," referred to herein as the JOY-NY PRECAST Subcontract.

PRECAST.

Defendant, ARIEL PAZ (PAZ), was employed by NY PRECAST or New York Planking, two companies owned by the same persons.[5] While PAZ was working, in the course of his employment, connecting concrete planks on the third floor, on April 27, 2006, he was injured in an accident, when he lost his balance and fell on the concrete ground of the first floor. PAZ is the plaintiff in an action he commenced against HIGHBRIDGE, KENSINGTON, JOY, and KNICKERBOCKER (the Underlying Action), which is pending in this court under Index No.: 18075/2006. On February 28, 2013, that court granted PAZ'S motion for partial summary judgment on the issue of liability pursuant to Labor Law 240 (1). It also denied that branch of JOY'S motion which sought summary judgment on its contractual indemnification claim against NY PRECAST. The court, as well, granted that branch of HIGHBRIDGE, KENSINGTON, JOY's motion for summary judgment on their claims for contractual indemnification.

The Motions:

The following four motions are decided in this same order:

(1) Motion by the plaintiffs, NYMAGIC, HIGHBRIDGE, KENSINGTON, and KNICKERBOCKER, to reargue the court's Decision and Order, dated June 11, 2010,[6] wherein the plaintiffs' motion for summary judgment was denied. That portion of the motion by the plaintiffs for leave to reargue, pursuant to CPLR 2221, is granted. Essentially, the plaintiffs seek summary judgment, pursuant to CPLR 3212, against JOY and ILLINOIS, declaring that they

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[5] PAZ EBT, at 36-38.

[6] The court's subject Decision and Order, dated June 11, 2010, was made by the Honorable Diane A. Lebedeff, JSC, who has since retired. The motions were assigned, pursuant to CPLR 2221 and 9002, to the undersigned for determination.

defend, indemnify and provide insurance coverage to HIGHBRIDGE, KENSINGTON, and KNICKERBOCKER, in PAZ's underlying personal injury action, and related relief.

(2) Motion by the defendant, ILLINOIS, for summary judgment against ARCH, pursuant to CPLR 3212, declaring that JOY is an additional insured under that Policy; that JOY is entitled to coverage under ARCH's Policy for any contractual indemnity obligation that JOY may have to Plaintiff KNICKERBOCKER; that NY PRECAST's contractual indemnity obligation to JOY is an insured liability under the ARCH Policy; and related relief.

(3) Cross motion by ARCH, for summary judgment, pursuant to CPLR 3212, declaring that ARCH and ILLINOIS provide insurance coverage to JOY on a co-primary basis.

(4) Motion by ARCH, for summary judgment, pursuant to CPLR 3212, declaring that it has no duty to defend or indemnify the plaintiffs in the underlying personal injury action, or, in the alternative, declaring that coverage under the ARCH Policy is co-primary with insurance issued to the plaintiffs by NYMAGIC.

(1) Plaintiffs' Motion

Plaintiffs seek declaratory judgment against JOY and ILLINOIS, that they defend, indemnify, and provide insurance coverage to the plaintiffs, HIGHBRIDGE, KENSINGTON, and KNICKERBOCKER, in PAZ's underlying personal injury action, and related relief.

Additional Insureds

Plaintiffs, HIGHBRIDGE, KENSINGTON, and KNICKERBOCKER, are additional insureds under the ILLINOIS Policy, for the reasons set forth herein. In support of their motion, these plaintiffs provide the affidavit of Marc Altheim (Altheim), who is a member/partner of

HIGHBRIDGE, and an authorized agent of KENSINGTON and KNICKERBOCKER. [7]

Altheim attests to the fact that JOY was required to, and did, name HIGHBRIDGE, KENSINGTON and KNICKERBOCKER, as additional insureds on JOY's policy of insurance with respect to its work on the project, within the meaning of the contract between the parties (quoted below)[8], stating: "On behalf of KNICKERBOCKER, I required that JOY have HIGHBRIDGE and KENSINGTON named as additional insured on its general liability policy and JOY did so" (affidavit of Altheim, dated Oct. 6, 2009, at 4).

In this regard, in pertinent part, the JOY-KNICKERBOCKER Agreement provides as follows, in Article 11, in the section on *"**Insurance and Bonds**"*:

> *"11.1 ....* ***[The Contractor, JOY's] comprehensive general and auto liability policy and umbrella policy shall name Owner [KNICKERBOCKER] and such others as Owner may require, as an additional insured****; ...* ***and shall include coverage for contractual liability*** *. . .* ***Certificates of insurance shall be filed with Owner****. ...*
> 11.1.2 . . . All insurance policies procured by Contractor and its Subcontractors shall be considered primary coverage and not contribution [sic] with any coverage maintained by Owner (emphasis added)[9]."

Also relevant is the Endorsement in the ILLINOIS Policy, entitled "ADDITIONAL INSURED–OWNERS, LESSEES OR CONTRACTORS-FORM B" which provides that "WHO IS INSURED" includes organizations "*as required by contract* ... executed prior to loss ... but only with respect to liability *arising out of 'your work'*[10] for that insured by or for you [JOY]

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[7] *See* affidavit of Altheim, dated Oct. 6, 2009.

[8] *See* the JOY-KNICKERBOCKER Agreement, dated Sept. 22, 2005.

[9] *See* JOY-KNICKERBOCKER Agreement, § 11.1 and 11.1.2, and "Supplement" to the Agreement annexed to the JOY-KNICKERBOCKER Agreement.

[10] The ILLINOIS Policy defined "you" and "your" as the Named Insured shown in the Declarations, to wit, JOY.

(emphasis added) ."[11]

There is no dispute that the pertinent contract (the JOY-KNICKERBOCKER Agreement) was executed in September 2005, which was prior to the loss which occurred on April 27, 2006.

As far as the meaning of the clause pertaining to "liability arising out of" JOY's work, the New York Court of Appeals has stated:

> "We have interpreted the phrase 'arising out of' in an additional insured clause to mean 'originating from, incident to, or having connection with' (*Maroney v New York Cent. Mut. Fire Ins. Co.*, 5 NY3d 467, 472, 839 NE2d 886, 805 NYS2d 533 [2005] [internal quotation marks and citations omitted]). It requires "only that there be some causal relationship between the injury and the risk for which coverage is provided" (*id.*). . . . [T]he focus of the inquiry "is not on the precise cause of the accident but the general nature of the operation in the course of which the injury was sustained [internal quotation marks and citation omitted])."

Regal Constr. Corp. v Natl. Union Fire Ins. Co. of Pittsburgh, PA, 15 NY3d 34, 38 (2010).

The pertinent facts in *Regal* were that LeClair, an employee of Regal (who was the prime contractor for general construction), slipped on a recently-painted metal joist. Regal contended that it was the employees of URS (the construction manager) who had painted the joist. However, the Court of Appeals held that "the injury "ar[ose] out of" Regal's operations notwithstanding URS's alleged negligence, and fell within the scope of the additional insured clause of the insurance policy."

The Appellate Division, First Department, recently held that "the language in the additional insured endorsement granting coverage does not require a negligence trigger " (*W & W Glass Sys., Inc. v Admiral Ins. Co.*, 91 AD3d 530, 531 [1st Dept 2012], citing *Hunter Roberts*

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[11] *See* Endorsement to ILLINOIS Policy, at plaintiffs' motion exhibit "D."

Const. Group, LLC v Arch Ins. Co., 75 AD3d 404, 407-408 [1st Dept 2010]).[12]

Likewise, in the case at bar, PAZ's injury arose out of JOY's operations, notwithstanding allegations of negligence made against other parties; and so falls within the scope of the "Additional Insured" clause of the insurance policy.

It is axiomatic that the duty to defend is "exceedingly broad" (*BP A.C. Corp. v One Beacon Ins. Group*, 8 NY3d 708, 714 [2007], *quoting Automobile Ins. Co. of Hartford v Cook*, 7 NY3d 131, 137 [2006]). An "insurer will be called upon to provide a defense whenever the allegations of the complaint suggest . . . a reasonable possibility of coverage [internal quotation marks omitted]" (*id.*, *quoting Automobile Ins. Co. of Hartford v* Cook, 7 NY3d at 137). "If [a] complaint contains any facts or allegations which bring the claim even potentially within the protection purchased, the insurer is obligated to defend [internal quotation marks omitted]" *(id., quoting Technicon Elecs. Corp. v American Home Assur. Co.*, 74 NY2d 66, 73 [1989]). Furthermore, "an insurer may be required to defend under the contract even though it may not be required to pay once the litigation has run its course (*Automobile Ins. Co. of Hartford v Cook,* , 7 NY3d at 137)." This criterion applies equally to additional insureds and named insureds (*see BP A.C. Corp. v. One Beacon Ins. Group*, 8 NY3d at 714-715, citing *Pecker Iron Works of N.Y. v Traveler's Ins. Co.*, 99 NY2d 391, 393 [2003]).

To further substantiate their position, the plaintiffs include the three "Certificates of Liability Insurance" which, respectively, name HIGHBRIDGE, KENSINGTON, and

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[12] This was so, even though therein the phrase involved was: "caused by," rather than "arising out of [the] "ongoing operations performed for that insured," since the Court found that the phrases were not materially different (*W & W Glass Sys., Inc. v Admiral Ins. Co.*, 91 AD3d 530, 531 [1st Dept 2012]).

KNICKERBOCKER, as Additional Insureds on the subject Policy.[13]

The court also notes that ILLINOIS' counsel's argument that it needs to conduct depositions, to be able to oppose the assertions made by Mr. Altheim in Plaintiffs' motion, [14] is unavailing. It seems that ILLINOIS is attempting to invoke CPLR 3212 (f), which provides as follows:

> "(f) Facts unavailable to opposing party. Should it appear from affidavits submitted in opposition to the motion that facts essential to justify opposition may exist but cannot then be stated, the court may deny the motion or may order a continuance to permit affidavits to be obtained or disclosure to be had and may make such other order as may be just."

However, ILLINOIS did not make a proper showing that such further discovery could lead to relevant evidence, or that it had previously timely made diligent efforts to obtain the discovery. The pertinent procedural history includes that this action was commenced on Nov. 17, 2008, by the filing of a Summons and Complaint. ILLINOIS interposed its Answer on, or about, July 10, 2009. ILLINOIS participated in the preliminary conference held on June 12, 2009.[15] Other compliance conferences were held on Sept. 30, 2009, and Dec. 10, 2009.[16]

Pursuant to the last compliance conference held on Dec. 10, 2009, there were no

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[13] *See* "Certificates of Insurance", dated Sept. 26, and Nov. 29, 2005, attached to the plaintiffs' underlying motion as the plaintiffs' exhibits "K", "L", and "M."

[14] *See* ILLINOIS affirmation in opposition by Jonathan Mugel, dated Aug. 16, 2010, at 4-5.

[15] This is evident from the front page of the "Preliminary Conference Order," dated June 12, 2009, where counsel set forth their appearance.

[16] The date, on the last page of the Compliance Conference Order, was erroneously set forth as Dec. 10, ***2010***, but the date that the compliance conference was actually held was on Dec. 10, ***2009*** (emphasis added).

outstanding depositions. The only remaining minimal outstanding discovery was the exchange of a few documents, namely, that ILLINOIS should produce a copy of its Policy; and that JOY, NY PRECAST, and PAZ, would provide a response to ARCH's Notice for Discovery & Inspection, and Interrogatories, within 20 days.[17]

Plaintiffs were directed to file the Note of Issue by Sept. 10, 2010; and, the plaintiffs did so. Thereafter, the defendants' respective motions to strike the Note of Issue resulted in court orders, dated Jan. 14, and 21, 2011, wherein the court held that all discovery was completed. Therefore, the motions were marked withdrawn or denied.

In opposition to the plaintiffs' instant motion, ILLINOIS does not include any affidavit, made by a person having knowledge of the facts, who disputes the pertinent matters sworn by Altheim.[18] CPLR 3212 (f) "contemplates an affidavit detailing hearsay and the reason why it cannot be presented in admissible form" (*R.C.S. Farmers Markets Corp. v Great Am. Ins. Co.*, 56 NY2d 918, 921 [1982]). No officer or employee of ILLINOIS, or JOY, however, offers any hearsay that differs from Altheim's statements and the other documentary evidence which show that JOY was required to, and did, name the plaintiffs HIGHBRIDGE, KENSINGTON, and KNICKERBOCKER, as Additional Insureds on JOY's Policy.

Additionally, given the relationship between the parties, that JOY was ILLINOIS' insured, JOY would have cooperated with its own carrier and shared pertinent information.

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[17] *See* NYMAGIC Reply, by Gallagher, dated Sept. 20, 2010, at 8.

[18] *See* John R. Higgitt, *Opposing Summary Judgment Motions Under CPLR 3212 (f)*, NYLJ, Oct. 17, 2005, at 17, col 2.

ILLINOIS does not allege that JOY failed to do so.

Thus, ILLINOIS did not establish a foundation for a need to have depositions. A "claimed need for discovery without some evidentiary basis suggesting that discovery may lead to relevant evidence is insufficient to avoid the grant of summary judgment" (*Cioe v Petrocelli Elec. Co., Inc.*, 33 AD3d 377, 378 [1st Dept 2006], citing *Bailey v New York City Tr. Auth.*, 270 AD2d 156, 157 [1st Dept 2000]).

It is well-established that, where, as here, the defendant "had ample opportunity to gather evidence[,] ... [defendant's] bare affirmation raising speculative defenses is insufficient to defeat a prima facie showing of entitlement to summary judgment . . . Defendants cannot avoid summary judgment based on speculation that further discovery may uncover something" (*W & W Glass Sys., Inc. v Admiral Ins. Co.*, 91 AD3d at 531, citing *Gilbert Frank Corp. v Federal Ins. Co.*, 70 NY2d 966, 967-968 [1988]).

Stated another way, "[a] mere chance that somehow, somewhere, on cross examination or otherwise plaintiffs will uncover something which might add to their case but obviously of which now they have no knowledge, is mere speculation and conjecture and is not sufficient" (*Trails West, Inc. v Wolff,* 32 NY2d 207, 221 [1973], *quoting Hurley v Northwest Publs., Inc.*, 273 F Supp 967, 974 [D Minn 1967], *affd* 398 F 2d 346 [8th Cir 1968]; *see also Barach v Farbenfabriken Bayer AG*, 36 NY2d 696, 697 [1975] ["Hope alone will not raise a triable issue").

Furthermore, although ILLINOIS laments that it "has not had the opportunity to depose

Carmoon, who issued the Certificates of Insurance,"[19] it will not be heard to bemoan its own inaction. ILLINOIS never served a non-party subpoena upon Carmoon, or attempted to obtain that non-party deposition.[20] There is no evidence to even suggest that the Certificates of Insurance presented were not authentic. Moreover, ILLINOIS had the opportunity to bring any remaining discovery issues to the attention of the court during the motion practice pertaining to the striking of the Note of Issue. However, at that time, the parties had demonstrated that discovery was completed.

"Summary judgment may not be defeated on the ground that more discovery is needed, where, as here, the side advancing such an argument has failed to ascertain the facts due to its own inaction" (*Meath v Mishrick*, 68 NY2d 992, 994 [1986]).

In a recent case, the Appellate Division, First Department, held that an "IAS court also properly rejected plaintiff's CPLR 3212 (f) request for leave to take [non-party] depositions. ... Denial of such leave was a proper exercise of discretion since plaintiff had ample opportunity to take the ... depositions" (*Ptacek v City Wide Asphalt Paving Co.*, 305 AD2d 119, 120 [1st Dept 2003]).

From the record before the court, it appears that ILLINOIS neither noticed nor pursued depositions of the parties or non-parties.[21] Thus, even "if discovery is still outstanding, [it has] only [itself] to blame for not having completed it" (*Mahoney v Turner Constr. Co.*, 37 AD3d 377, 380 [1st Dept 2007]). "In light of the ... the lack of a showing of what further evidence

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[19] *See* ILLINOIS affirmation in opposition, by Mugel, dated Aug. 16, 2010, at 4.

[20] *See* NYMAGIC reply, by Gallagher, dated Sept. 20, 2010, at 8.

[21] *See* NYMAGIC reply, by Gallagher, dated Sept. 20, 2010, at 8.

might be unearthed, the asserted need for further discovery reduces itself to a "mere hope," which is insufficient to defeat summary judgment" (*id.*).

Accordingly, because the plaintiffs HIGHBRIDGE, KENSINGTON, and KNICKERBOCKER, are Additional Insureds under the ILLINOIS Policy, they are entitled to coverage thereunder, the same as the named insured. "'Additional insured' is a recognized term in insurance contracts, . . . As cases have recognized, the 'well-understood meaning' of the term is 'an "entity enjoying the same protection as the named insured' " (*Pecker Iron Works of N.Y., Inc. v Traveler's Ins. Co.*, 99 NY2d at 393).

Indemnification

Further, the plaintiffs HIGHBRIDGE, KENSINGTON, and KNICKERBOCKER, have coverage for indemnification, under JOY's ILLINOIS Policy.

In this regard, the "Indemnification" clause in the contract between JOY and KNICKERBOCKER sets forth JOY's obligation. The JOY-KNICKERBOCKER Agreement, paragraph 3.18.1, provides as follows:

> "***To the fullest extent permitted by law, the Contractor [JOY] shall indemnify and hold harmless the Owner*** [KNICKERBOCKER CONSTRUCTION, LLC], Atlantic Development Group, LLC, Knickerbocker Management, LLC,[22] Architect, Architect's consultants, ***and agents and employees of any of them*** from and against any claims, damages, losses and expenses, including, but not limited to, attorneys' fees ***arising out of or resulting from performance of the Work***, provided that such claim, damage, loss or expense is attributable to bodily injury, ... ***but only to the extent caused in whole or in part by the negligent acts or omissions of the Contractor, a Subcontractor, anyone directly or indirectly employed by them or anyone for whose acts they may be liable***, regardless of whether or not such claim, damage, loss or expense is caused in part by a

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[22] The phrase "Atlantic Development Group, LLC, Knickerbocker Management, LLC" is inserted herein, pursuant to the terms of the "Supplement" to the Agreement, annexed to the JOY- KNICKERBOCKER Agreement.

party indemnified hereunder (emphasis added)[23]."

Also pertinent is the clause in the JOY-KNICKERBOCKER Agreement which provides that: "The Contractor ***[JOY] shall be responsible to the Owner for acts and omissions of the Contractor's employees, Subcontractors and their agents and employees, and other persons performing portions of the Work under a contract with the Contractor*** (emphasis added)[24]."

JOY's aforesaid obligation would be covered by ILLINOIS, pursuant to the Endorsement in the ILLINOIS Policy, cited above, which provides that the plaintiffs are Additional Insureds "as required by contract."

Thus, the remainder of the plaintiffs' Motion, seeking summary judgment on their claims for contractual indemnification against JOY, is "conditionally" granted, in that, if the plaintiffs, HIGHBRIDGE, KENSINGTON, and KNICKERBOCKER, are found statutorily liable, then JOY would be obligated to indemnify them, to the extent that the negligence of persons encompassed in the aforesaid clauses is determined to have caused the accident (*Hernandez v Argo Corp.*, 95 AD3d 782, 783-784 [1st Dept 2012]).

For instance, an Appellate Court held that a "conditional" order of contractual indemnification in favor of a landowner was correctly granted where "the extent to which the parties ...[were] entitled to indemnification, ...[depended] on the extent to which each party's negligence is determined to have contributed to the accident " (*Hughey v RHM-88, LLC*, 77 AD3d 520, 522-523 [1st Dept 2010]).

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[23] *See* JOY- KNICKERBOCKER Agreement § 3.18.1.

[24] *See* JOY- KNICKERBOCKER Agreement § 3.3.2.

Likewise, where an indemnity clause[25] involved was similar to the one in the case at bar, the granting of the owner and managing agent's motion for summary judgment on contractual indemnity against a subcontractor was conditioned upon a finding of negligence against the subcontractor at trial (*see Velez v Keystone Bldg. Corp.*, _____ Misc 3d _____ [A], 2012 NY Slip Op 32390 [U], *11 [Sup Ct, NY County 2012]).

It is noted that, since the contract provides that JOY indemnify "[t]o the fullest extent permitted by law," the indemnification provision is not barred by General Obligations Law § 5-322.1[26] (*Hernandez v. Argo Corp.*, 95 AD3d 782, 783-784 [1st Dept 2012]).

Regardless, by Altheim's statements, and the other evidence presented, the plaintiffs met their burden on their summary judgment motion to show that there was no negligence by the plaintiffs involved in the happening of the accident. Altheim states, for example, that: "At no time did anyone from HIGHBRIDGE, KENSINGTON, and KNICKERBOCKER, supervise, direct or control construction of the Project. The JOY Agreement was entered specifically to have JOY supervise, direct and control the construction of the Project."[27]

Consistent with Altheim's statements, the JOY- KNICKERBOCKER Agreement, in the section on "Supervision and Construction Procedures," provides as follows: "The Contractor

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[25] The indemnification clause in *Velez,* similar to the one in the case at bar, provided that: "To the fullest extent permitted by law, ... the Contractor shall indemnify and hold harmless the Owner ... and agents ... from and against claims, damages, losses and expenses ... arising out of or resulting from performance of the Work, ... but only to the extent caused by the negligent acts or omissions of the Contractor [or its employees]" (*Velez v Keystone Bldg. Corp.*, ___ Misc 3d ___, 2012 NY Slip Op 32390 [U], *10 [Sup Ct, NY County 2012]).

[26] In this regard, pursuant to General Obligations Law § 5-322.1, a party may not be indemnified for its own negligence, and a clause purporting to do so would be deemed void.

[27] *See* Altheim's Oct. 6, 2009 sworn affidavit, at 3.

[JOY] shall be solely responsible for and have control over construction means, methods, techniques, sequences, and procedures and for coordinating all portions of the Work under the Contract including the coordination of the duties of all trades."[28]

Moreover, the section on "Safety Precautions and Programs," provides that the "Contractor [JOY] shall be responsible for initiating, maintaining and supervising all safety precautions and programs in connection with the performance of the Contract."[29]

In addition, the section on "Safety of Persons and Property," provides that the "Contractor [JOY] shall take reasonable precautions for safety of, and shall provide reasonable protection to prevent damage, injury or loss to: employees on the Work and other persons who may be affected thereby".[30]

Similarly, PAZ's testimony indicates that he did not receive instructions from the plaintiffs on how to perform his work.[31]

In response, the defendants do not offer any sworn affidavit, made by their officer or employee having knowledge of the facts, that contains facts refuting the proof that the plaintiffs were not involved in the methods or means by which PAZ performed his work; and the defendants do not otherwise present an issue of fact as to the plaintiffs' negligence and so do not meet their consequent burden on the summary judgment motion.

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[28] *See* JOY- KNICKERBOCKER Agreement, § 3.3.1, as well as the "Supplement" to the Agreement annexed to the JOY-KNICKERBOCKER Agreement.

[29] *See* JOY- KNICKERBOCKER Agreement, § 10.1.1.

[30] *See* JOY- KNICKERBOCKER Agreement, § 10.2.1.1.

[31] *See* plaintiff PAZ EBT, at 42-43, and 49-51.

Accordingly, if the plaintiffs, HIGHBRIDGE, KENSINGTON, and KNICKERBOCKER, are found statutorily liability, then JOY would be obligated to indemnify them, as long as there ultimately is the requisite finding of negligence against JOY, NY PRECAST, their employees, PAZ, or the others encompassed in the aforesaid clauses.

In this regard, it is noted that the issue pertaining to the extent, if any, that the defendants, or their employees, and others, were negligent, will be determined in the underlying action, and this court defers to the decisions that will be made therein.

(2) Defendant ILLINOIS' Motion

Defendant ILLINOIS seeks summary judgment on its cross claim against ARCH, requesting a declaration that JOY be deemed an additional insured under that Policy; that JOY is entitled to coverage under ARCH's Policy for any contractual indemnity obligation that JOY may have to plaintiff KNICKERBOCKER; that NY PRECAST's contractual indemnity obligation to JOY is an insured liability under the ARCH Policy; and related relief.

Additional Insureds

Defendant JOY is an additional insured under the Policy issued by ARCH to Defendant NY PRECAST, for the reasons set forth herein.

"It is well settled that whether a third party is an additional insured under a policy is determined from the intention of the parties to the policy, as determined from the four corners of the policy itself" (*140 Broadway Prop. v Schindler El. Co.*, 73 AD3d 717, 718 [2d Dept 2010], *quoting I.S.A. In N.J. v Effective Sec. Sys.*, 138 AD2d 681, 682 [2d Dept 1988]). It is also well established that the party claiming insurance coverage bears the burden of proving entitlement (*see e.g. Moleon v Kreisler Borg Florman Gen. Constr. Co.*, 304 AD2d 337, 339-340 [1st Dept

2003]). Thus, "[a] party not named as an insured or additional insured on the face of the policy is not entitled to coverage" (*Tower Ins. v Amsterdam Apts.*, 82 AD3d 465, 467 [1st Dept 2011], citing *Sixty Sutton v Illinois Union Ins. Co.*, 34 AD3d 386, 388 [1st Dept 2006]; *Moleon v Kreisler Borg Florman Gen. Constr. Co.*, 304 AD2d at 339).

In this regard, the JOY- NY PRECAST Subcontract, in Article 13, "Insurance and Bonds," provides that NY PRECAST should include JOY and KNICKERBOCKER as additional insureds on its Policy.[32]

The "ADDITIONAL INSURED ENDORSEMENT" in the ARCH Policy provides that additional insureds include those organizations who are required under a written contract with NY PRECAST to be named as additional insureds, but only with respect to liability **arising out of** NY PRECAST's operations or work[33] [emphasis added]."

In support of its Motion, ILLINOIS provides a copy of ARCH's letter, dated Dec. 27, 2007, wherein ARCH had agreed to provide a defense to JOY with a full reservation of rights to disclaim coverage if PAZ's injury are deemed not to have arisen out of NY PRECAST's work.[34]

However, PAZ's injuries are deemed to have arisen out of NY PRECAST's operations or work, within the meaning of the applicable law, discussed above (*see Regal Constr. Corp. v National Union Fire Ins. Co. of Pittsburgh, PA*, 15 NY3d at 38).

Accordingly, because JOY is an Additional Insured under the ARCH Policy, it is entitled

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[32] *See* JOY-NY PRECAST Subcontract, § 13.1.

[33] *See* Endorsement to ARCH Policy, at ILLINOIS' motion, exhibit "B."

[34] *See* ARCH Letter, by D'Auguste, dated Dec. 27, 2007, attached to ILLINOIS' affirmation in opposition, as exhibit "L."

to coverage thereunder.

Contractual Indemnification

That part of ILLINOIS' Motion, whereby it seeks a declaration that JOY is covered under ARCH's Policy for any contractual indemnity obligation it may have to the plaintiff KNICKERBOCKER, is granted, as set forth below; to wit, that ARCH and ILLINOIS provide insurance coverage to JOY on a co-primary basis. In addition, ILLINOIS also requests a declaration that NY PRECAST's contractual indemnity obligation to JOY is an insured liability under the ARCH Policy; and that JOY be indemnified by NY PRECAST, by its insurance Policy with ARCH, for PAZ's claim for personal injury.

Again, the four corners of an insurance agreement govern who is covered and the extent of coverage (*Stainless, Inc. v Employers Fire Ins. Co.*, 69 AD2d 27, 33 [1st Dept 1979], *affd* 49 NY2d 924 [1980]).

In this regard, the paragraph on "Indemnification" in the JOY-NY PRECAST contract provides that,

> "[T]o the fullest extent permitted by law, the Subcontractor [NY PRECAST] shall indemnify and hold harmless the Owner [KNICKERBOCKER], Contractor [JOY], ... and agents and employees of any of them from and against claims ... arising out of or resulting from performance of [NY PRECAST's] Work under this Subcontract, provided that any such claim ... is attributable to bodily injury ... arising out of the Work of [NY PRECAST], [its] Sub-subcontractors, anyone directly or indirectly employed by them or anyone for whose acts they may be liable."

Thus, NY PRECAST's contractual indemnity obligation to JOY is covered under the ARCH Policy.

However, it is also well-established that a: "party seeking contractual indemnification

must prove itself free from negligence, because to the extent its negligence contributed to the accident, it cannot be indemnified therefor [internal citations omitted] " (*Rodriguez v Tribeca 105, LLC*, 93 AD3d 655, 657 [2d Dept 2012]; *see also Correia v Professional Data Mgmt., Inc.*, 259 AD2d 60, 65 [1st Dept 1999]).

In this regard, General Obligations Law § 5-322.1 provides that:

> "A covenant, promise, agreement or understanding in, or in connection with or collateral to a contract or agreement relative to the construction, alteration, repair or maintenance of a building, structure, appurtenances and appliances including moving, demolition and excavating connected therewith, purporting to indemnify or hold harmless the promisee against liability for damage arising out of bodily injury to persons or damage to property contributed to, caused by or resulting from the negligence of the promisee, his agents or employees, or indemnitee, whether such negligence be in whole or in part, is against public policy and is void and unenforceable."

Where, as here, a general contractor, "failed to eliminate the existence of all triable issues of fact regarding its negligence," the Supreme Court properly denied the general contractor's motion for summary judgment on its cause of action for contractual indemnification against a subcontractor, without regard to the sufficiency of the opposition papers (*Rodriguez v Tribeca 105, LLC*, 93 AD3d at 657).

Here, the movant does not submit an affidavit by an officer or employee of JOY, or anyone else having knowledge of the facts pertaining to JOY's negligence, and so fails to meet its initial burden on summary judgment. 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, tendering sufficient evidence to demonstrate the absence of any material issues of fact (*Winegrad v New York Univ. Med. Center*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404

[1957]). Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

Thus, to the extent that ILLINOIS requests summary judgment, in its favor, that JOY be indemnified by NY PRECAST, by its insurance Policy with ARCH, for PAZ's claim for personal injury, the motion is denied. It is premature to make this determination since the factual issue as to whether JOY was negligent has not yet been determined in the underlying action.

(3) ARCH's Cross Motion

ARCH cross-moves for summary judgment, declaring that ARCH and ILLINOIS provide insurance coverage to JOY on a co-primary basis.

ARCH alleges that its Policy contains an "other insurance" clause which provides that the ARCH Policy is excess over any other insurance that applies to any claim to which the ARCH Policy applies. The ARCH "other insurance" clause provides as follows: "This insurance is excess over any other valid and collectible insurance that applies to any claim or 'suit' to which this insurance applies, whether such other insurance is written on a primary, excess, contingent or on any other basis."[35] However, the ILLINOIS' Policy also contains an "other insurance" clause which provides that it is excess over: "any other primary insurance available to you covering liability for damages arising out of the premises or operations for which you have been added as an additional insured by attachment of an endorsement."[36]

It is well-established under New York law that, "where each policy contains an excess 'other insurance' clause, so that giving each policy's clause effect would leave the insured without

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[35] *See* ARCH Policy, at ARCH Cross Motion, exhibit "A."

[36] *See* ILLINOIS Policy, at ARCH Cross Motion, exhibit "J."

primary insurance, the clauses are deemed to cancel each other out, and the insurers are required to cover the loss on a pro rata basis [internal citations omitted]" (*Sport Rock Intl. v Am. Cas. Co. of Reading*, 65 AD3d 12, 19 [1st Dept 2009]; *see also Great N. Ins. Co. v Mount Vernon Fire Ins. Co.*, 92 NY2d 682, 687 [1999]).

Finally, "it is the policy provisions that control and not the provisions of the subcontract [internal citations omitted]" (*Travelers Indem. Co. v Am. & Foreign Ins. Co.*, 286 AD2d 626, 626 [1st Dept 2001]). Accordingly, ARCH's cross motion is granted, and ARCH and ILLINOIS shall provide insurance coverage to JOY on a co-primary basis.

(4) ARCH's Motion

ARCH moves for summary judgment, declaring that it has no duty to defend or indemnify the plaintiffs, HIGHBRIDGE, KENSINGTON, and KNICKERBOCKER, in the underlying personal injury action; or, in the alternative, declaring that coverage under the ARCH Policy is co-primary with insurance issued to the plaintiffs by NYMAGIC.

ARCH disclaims coverage on two grounds, namely, that the plaintiffs HIGHBRIDGE and KENSINGTON do not qualify as additional insureds under the ARCH Policy; and that the plaintiffs, HIGHBRIDGE, KENSINGTON, and KNICKERBOCKER, failed to give ARCH timely notice of PAZ's accident, and the claim and lawsuit against them.

Notice

As far as the late notice issue, ARCH provides the affidavit of its assistant vice-president of Casualty Claims[37], and documentary evidence, showing the pertinent facts, to wit, that it was

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[37] *See* affidavit by Ms. Deveau, assistant vice-president, of Casualty Claims, Arch Insurance Group, dated Dec. 29, 2010.

not until September 18, 2008, that the plaintiffs gave ARCH the requisite notice . This was done by correspondence from the plaintiffs' counsel to JOY's counsel.[38]

This date was more than two years after the happening of PAZ's accident (which occurred in April 2006), and the institution of the lawsuit against them (which was filed in July 2006).[39] Also, the date was about two years after the plaintiffs had interposed their answer to PAZ's lawsuit (since their answer was served in October 2006). Moreover, it was over two years from the time that PAZ's attorney sent HIGHBRIDGE a letter (dated June 21, 2006) notifying it that PAZ was injured as a result of an accident which occurred at the premises owned by HIGHBRIDGE, and asking that it to forward the letter to its insurance carrier.[40]

The ARCH Policy contains the following conditions pertaining to notice:

> "Section IV - Commercial General Liability Conditions
> 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. ...
> Notice of an 'occurrence' or an offense is not notice of a claim.
> b. If a claim is made or 'suit' is brought against any insured, you must:
> ...(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 and or legal papers received in connection with the claim or 'suit'*** (emphasis added) [41]."

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[38] *See* Letter, by the law firm of Wilson, Elser (attorneys for the plaintiffs) to the law firm of McMahon, Martine, & Gallagher (attorneys for JOY), at Arch motion, exhibit "E."

[39] The Supplemental Summons and Amended Verified Complaint were filed August 2006 (*see* ARCH Motion, exhibit "C").

[40] *See* Letter, by the law firm of Jacob Oresky (attorney for PAZ) to HIGHBRIDGE, at ARCH motion, exhibit "B."

[41] *See* ARCH Policy, at 12, at ARCH motion, exhibit "A."

It is well established that "a purported additional insured under a commercial liability policy, [is]... required to give defendant [insurance carrier] notice of the underlying claim as soon as practicable. Absent a valid excuse, the failure to satisfy this notice requirement, which is a condition precedent to coverage, vitiates the policy" (*Bovis Lend Lease LMB, Inc. v Travelers Prop. Cas. Co. of Am.*, 78 AD3d 405, 405-406 [1st Dept 2010], citing *Sec. Mut. Ins. Co. of N.Y. v Acker-Fitzsimons Corp.*, 31 NY2d 436, 440 [1972]). Also, "notice provided by one insured in accordance with the policy terms will not be imputed to another insured" (*Travelers Ins. Co. v Volmar Constr. Co.*, 300 AD2d 40, 44 [1st Dept. 2002)]).

In a recent First Department case, the Court held as follows:

> "As an additional insured under the policy issued by defendant, ***plaintiff had,*** *in the absence of an express duty,* ***an implied duty, independent of the named insured's obligation, to provide defendant with timely notice of the occurrence for which it seeks coverage*** (internal citations omitted)."
>
> * * *
>
> ***"Nor may plaintiff rely upon the named insured's timely notice of the underlying action to satisfy its duty to provide timely notice of the occurrence, since the duty under the policy to notify of an occurrence is distinct from the duty to notify of any claim or suit brought thereon*** (internal citations omitted)*"* (*City of New York v Investors Ins. Co. of Am.*, 89 AD 3d 489, 489 [1st Dept 2011][emphasis added]).

Accordingly, regardless of any notice that ARCH may have received from JOY, the Plaintiffs herein, HIGHBRIDGE, KENSINGTON, and KNICKERBOCKER, "should have given the notice required by [the subject] policy; and [their] failure to do so is fatal to [their] claim" (*Delco Steel Fabricators, Inc. v Amer. Home Assurance Co.*, 40 AD2d 647, 648 [1st Dept 1972]).

Additional Insureds

In addition, there is no coverage for Plaintiffs HIGHBRIDGE and KENSINGTON, because they are not additional insureds under the ARCH Policy. In this regard, ARCH's Policy's

Blanket Additional Insured Endorsement provides that "WHO IS AN INSURED" includes as "additional insured those persons or organizations who are required under a written contract with the Named Insured [NY PRECAST] to be named as an additional insured, but only with respect to liability arising out of your [NY PRECAST] operations, [or] your work. ... As used in this endorsement, the words 'you' and 'your' refer to the Named Insured."[42]

In pertinent part, the contract between NY PRECAST and JOY provides that "the Subcontractor [JOY] should include Joy construction and owner [KNICKERBOCKER] as additional insured on his policy."[43] On the first page of their Agreement, it is KNICKERBOCKER who is defined as the Owner.[44]

Accordingly, ARCH's Motion is granted, and it has no duty to defend or indemnify the plaintiffs with respect to PAZ's action. It is noted that, since there is no coverage for the plaintiffs, HIGHBRIDGE, KENSINGTON, and KNICKERBOCKER, under ARCH's Policy, ARCH's request for alternative relief, to wit, a declaration that its Policy be deemed co-primary with NYMAGIC's Policy, is deemed moot.

Dated: April 22, 2013

ENTER:

Robert E. Torres, J.S.C.

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[42] *See* ARCH Policy, at ARCH Motion, Exhibit "A.".

[43] *See* JOY-NY PRECAST Subcontract, Article 13, at 11, at ARCH motion, exhibit "J."

[44] *See* JOY-NY PRECAST Subcontract, at 1, at ARCH motion, exhibit "J."