

**Dormitory Auth. of the State of N.Y. v Everest Natl.  
Ins. Co.**

2013 NY Slip Op 34192(U)

March 13, 2013

Supreme Court, New York County

Docket Number: 108638/11

Judge: Barbara Jaffe

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK : IAS PART 12

-----X  
DORMITORY AUTHORITY OF THE STATE OF  
YORK and CITY UNIVERSITY OF NEW YORK,

Plaintiffs,

- against -

Index No. 108638/11

Subm.: 11/28/12

Motion seq. no.: 001

Motion cal. no.: 047

**DECISION AND ORDER**

EVEREST NATIONAL INSURANCE COMPANY,  
BBR CONTRACTING CORPORATION, and  
ALBERTO FLORES,

Defendants.

-----X  
BARBARA JAFFE, JSC:

For plaintiffs:  
Joel M. Simon, Esq.  
Smith Mazure, et al., P.C.  
111 John Street  
New York, NY 10038  
212-964-7400

For Everest:  
Denise M. Marra, Esq.  
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New York, NY 10022  
646-625-4000

By notice of motion dated October 7, 2011, defendant Everest National Insurance Company (Everest) moves pursuant to CPLR 3211(a)(1) and (7) for an order dismissing plaintiffs' claims against it or, in the alternative, pursuant to CPLR 3211(c) for an order granting it summary judgment. Plaintiffs oppose.

By interim order dated April 4, 2012, the justice previously assigned to this matter converted the instant motion to one for summary judgment and ordered that it be held in abeyance pending the parties' submission of any supplemental papers.

**I. BACKGROUND**

On May 20, 2009, Everest issued defendant BBR Contracting Corporation (BBR) a commercial insurance policy, effective July 10, 2009 to April 30, 2010. (Affirmation of Denise M. Marra, Esq., dated Oct. 7, 2011 [Marra Aff.], Exh. H; Affirmation of Denise M. Marra, Esq.,

in Reply, dated Dec. 12, 2011 [Marra Reply Aff.], Exh. A). The coverage provided by the policy is defined as follows: "We will pay those sums that the insured becomes legally obligated to pay as damages because of 'bodily injury' or 'property damage' to which this insurance applies. We will have the right and duty to defend the insured against any 'suit' seeking those damages."

(Marra Reply Aff., Exh. A). BBR is the sole named insured identified on the policy's declarations page. (*Id.*) Section II of the coverage form, entitled "Who is an Insured," reflects that the following are also named insureds:

[BBR's] 'executive officers' and directors, but only with respect to their duties as [its] officers or directors[; BBR's] stockholders . . . , but only with respect to their liability as stockholders[;] . . . 'volunteer workers only while performing duties related to the conduct of [its] business, or [its] employees', . . . but only for acts within the scope of their employment . . . or while performing duties related to the conduct of [BBR's] business[;] . . . [and a]ny organization [BBR] newly acquire[s] or form[s] . . . . No person or organization is an insured with respect to the conduct of any current or past partnership, joint venture or limited liability company that is not shown as a [n]amed [i]nsured in the [d]eclarations.

(*Id.*).

A certificate of insurance, dated August 10, 2009, reflects that BBR had, in addition to the Everest policy, two additional insurance policies and that plaintiffs are "additional insured[s] as their interests may appear." (Affirmation of Joel M. Simon, Esq., in Opposition, dated Oct. 18, 2011 [Simon Opp. Aff.], Exh. C).

On September 24, 2009, BBR and plaintiffs executed a contract whereby BBR agreed to perform construction work at plaintiff City University of New York (CUNY) School of Law in Queens. (Marra Aff., Exhs. B, D). Sometime thereafter, but before March 9, 2010, BBR subcontracted with Cali Renovation Corporation (Cali) for its performance of work at the site. (Marra Aff., Exh. B).

On March 9, 2010, Alberto Flores, a Cali employee, sustained injuries while working at the site. (*Id.*, Exhs. B, C). On or about January 28, 2011, he commenced two suits, one against plaintiff Dormitory Authority of the State of New York and another against the State of New York and CUNY, asserting against each negligence and Labor Law claims. (*Id.*).

By letter dated April 6, 2011, plaintiffs tendered their demand for indemnification and defense in the underlying actions to Everest, relying on their denomination as additional insureds in BBR's certificate of insurance. (*Id.*, Exh. E). By letter dated April 25, 2011, Everest's claims adjustment servicer denied plaintiffs' demand, noting that they are neither named nor additional insureds under the policy and, even if they were, their delay in tendering the demand would preclude them from obtaining coverage. (*Id.*, Exh. G).

On or about July 21, 2011, plaintiffs commenced the instant action, asserting claims against Everest for a declaratory judgment that it has a duty to indemnify and defend them in the underlying actions and for breach of contract for failure to provide them with coverage. (*Id.*, Exh. A).

On October 7, 2011, Everest served plaintiffs with the instant motion, annexing thereto, *inter alia*, uncertified copies of the relevant sections of the insurance policy. On October 18, 2011, plaintiffs served Everest with its opposition, and on December 12, 2011, Everest served them with its reply, annexing thereto a certified, complete copy of the policy. Neither party submitted any additional papers after the motion was converted to one for summary judgment.

## II. CONTENTIONS

Everest denies any duty to defend or indemnify plaintiffs as they are neither named nor additional insureds under the policy, that it timely disclaimed coverage, and thus, that it is

entitled to a judgment declaring that plaintiffs are not entitled to coverage. (Marra Aff.).

In opposition, plaintiffs argue that they had a reasonable expectation of insurance coverage as they are listed as additional insureds in BBR's certificate of insurance and that Everest, in failing to offer a certified, complete copy of the policy, fails to demonstrate that they are not entitled to defense and indemnification. (Simon Opp. Aff.). Moreover, they claim that their delay in tendering their demand for coverage is immaterial absent any prejudice to Everest. (*Id.*).

In reply, Everest notes that the certified complete copy of the policy demonstrates that plaintiffs are neither named nor additional insureds, and thus, that it is entitled to summary judgment. (Marra Reply Aff.).

### III. ANALYSIS

A party seeking summary judgment must demonstrate, *prima facie*, entitlement to judgment as a matter of law by presenting sufficient evidence to negate any material issues of fact. (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). If the movant meets this burden, the opponent must rebut the *prima facie* showing by submitting admissible evidence, demonstrating the existence of factual issues that require trial. (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Bethlehem Steel Corp. v Solow*, 51 NY2d 870, 872 [1980]). Otherwise, the motion must be denied, regardless of the sufficiency of the opposition. (*Winegrad*, 64 NY2d at 853).

#### A. Consideration of policy submitted in reply

Although a party may not cure a defect in its moving papers by submitting materials in reply (*Accardo v Metro-N. RR.*, \_\_ AD3d \_\_, 2013 NY Slip Op 1324 [1<sup>st</sup> Dept Feb. 28, 2013]),

here, as Everest submitted a certified, complete copy of the policy before the motion was converted to one for summary judgment, and as plaintiffs were provided with an opportunity to submit additional opposition and failed to do so, the certified copy of the policy is properly considered.

**B. Declaratory judgment claim**

“A party not named as an insured or additional insured on the face of [an insurance] policy is not entitled to coverage” (*Tower Ins. of N.Y. v Amsterdam Apts., LLC*, 82 AD3d 465, 467 [1<sup>st</sup> Dept 2012]), and therefore, is not entitled to defense or contractual indemnification (*Sixty Sutton Corp. v Illinois Union Ins. Co.*, 34 AD3d 386 [1<sup>st</sup> Dept 2006]). Consequently, as plaintiffs are not named insureds on the declarations page, do not fall within the definition of “insured” set forth in Section II of the coverage form, and are not identified as additional insureds in the policy, they are not entitled to defense or indemnification by Everest. That plaintiffs are listed as additional insureds on the certificate of insurance is immaterial. (*See Tribeca Broadway Assocs., LLC v Mount Vernon Fire Ins. Co.*, 5 AD3d 198 [1<sup>st</sup> Dept 2004] [where party not named as insured or additional insured in policy but identified as additional insured in certificate of insurance, it is not entitled to indemnification or defense as certificate is not contract and does not confer coverage]).

In light of this determination, the parties’ contentions as to plaintiffs’ delay in tendering their demand for defense and indemnification need not be considered.

**C. Breach of contract claim**

As plaintiffs are entitled to neither defense nor indemnification pursuant to the policy, Everest breached no contract in denying their demand.

IV. CONCLUSION

Accordingly, it is hereby

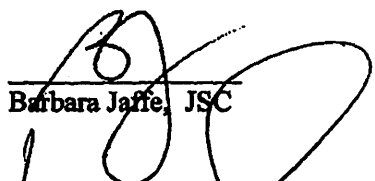
ORDERED, that defendant Everest National Insurance Company's motion for summary judgment is granted with costs and disbursements to defendant Everest National Insurance Company as taxed by the Clerk; it is further

ADJUDGED and DECLARED, that plaintiffs are not entitled to coverage under the insurance policy defendant Everest National Insurance Company issued to defendant BBR Contracting Corporation, and defendant Everest National Insurance Company has no duty to defend or indemnify them in the underlying actions; it is further

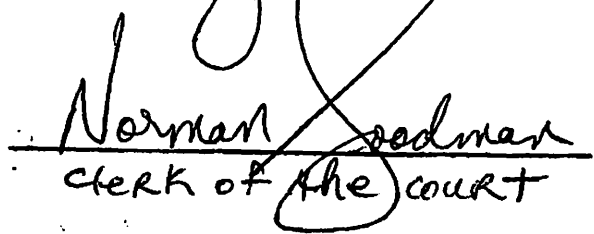
ORDERED, that the complaint is hereby severed and dismissed in its entirety as against defendant Everest National Insurance Company, and the Clerk is directed to enter judgment accordingly in favor of Everest National Insurance Company; it is further

ORDERED, that the remainder of the action shall continue.

ENTER:

  
Barbara Jaffe, JSC

DATED: March 13, 2013  
New York, New York

  
Norman Sedman  
Clerk of the Court

**FILED**

MAY 17 2013

COUNTY CLERK'S OFFICE  
NEW YORK