

**Bridge St. Contr., Inc. v Everest Natl. Ins. Co.**

2014 NY Slip Op 30151(U)

January 14, 2014

Supreme Court, New York County

Docket Number: 602447/09

Judge: Louis B. York

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY

~~LOUIS B. YORK~~ ~~J.S.C.~~ ~~LOUIS B. YORK~~ ~~J.S.C.~~

PRESENT: \_\_\_\_\_ PART 2

Justice

Bridge Street Contracting

-v-

Everest National Ins. Company

INDEX NO. 602447/09

MOTION DATE 01

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

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 ~~denied~~ decided in  
accordance with the accompanying decisions

**FILED**

JAN 22 2014

COUNTY CLERK'S OFFICE  
NEW YORK

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

Dated: 1/14/14

[Signature], 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

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 2

\_\_\_\_\_  
BRIDGE STREET CONTRACTING, INC.,  
EMFT, LLC, ROBERT MOEZINIA and  
SANTIAGO AURAPINA,

Plaintiffs,

Index No. 602447/2009

-against-

EVEREST NATIONAL INSURANCE  
COMPANY and SCOTTSDALE  
INSURANCE COMPANY,

**FILED**

**JAN 22 2014**

Defendants.

COUNTY CLERK'S OFFICE  
NEW YORK

\_\_\_\_\_  
LOUIS B. YORK, J.:

This is an indemnity case; the underlying dispute, *Javier Tacuri v. EMFT, LLC, et al*, Index No. 3862/09<sup>1</sup>, was commenced in Supreme Court, Kings County. Mr. Tacuri, the plaintiff in that case, alleges that on November 24, 2008 he fell while he was working at a construction site and sustained serious injuries, including head injuries. The defendants in that case are Cherechian Trading Co., Inc. ("Trading"), which is connected to the Moezinia defendants and which allegedly owns the building where the accident occurred, located at 365 Broadway in Manhattan; EMFT LLC ("EMFT"), and Eshagh Moezinia Family Trust, the lessees of at 365 Broadway; Bridge Street Contracting, Inc. ("Bridge Street"), the plaintiff's employer, and R. Moezinia's Contracting Corp., which along with Bridge Street apparently performed the work; Eshagh Moezinia, Robert Moezinia and Michael Moezinia, who allegedly worked for and/or had an interest in the defendants listed above; and Santiago Aurapina, an employee of several of the

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<sup>1</sup>Upon Mr. Tacuri's death, Robert Kruger, Esquire became administrator of his estate, and plaintiff amended the complaint and caption to reflect this fact.

above companies. Of these, Bridge Street, EMFT, Robert Moezinia (“Moezinia”) and Santiago Aurapina (“Aurapina”) are plaintiffs here.

Everest National Insurance Company issued primary and excess liability insurance policies to Bridge Street in connection with the above construction project. Everest is not named as a defendant in the action, yet plaintiff sought a declaration that based on Everest’s failure to disclaim in a timely fashion, it must defend and indemnify the Moezinias’ defendants. Bridge Street also was the defendant in the third-party action which is part of the underlying case.

In the case before this Court, Bridge Street, EMFT, Robert Moezinia and Santiago Aurapina seek indemnification in the underlying action from Everest Insurance Company. Plaintiffs allege: 1) given the dispute between the parties over the obligation to indemnify, Everest should have agreed to defend the underlying lawsuit; and 2) Everest has breached its contractual obligation to plaintiffs. Plaintiffs also state that, in addition to Bridge Street, to which it issued the policy, Everest must cover Robert Moezinia, as president of Bridge Street, and Santiago Aurapina, an employee of Bridge Street. Initially, plaintiffs asserted similar claims against Scottsdale Insurance Company but they have discontinued against Scottsdale.<sup>2</sup>

There is a cross-motion by a nonparty, CastlePoint Insurance Company (“Castle”) in which it seeks leave to intervene and to oppose Everest’s motion. Castle has represented EMFT until this point and has asserted third-party claims against Bridge Street – claims which, among other things, seek contractual indemnification and reimbursement of legal costs. Therefore, it states, Castle is the real party in interest to the extent of EMFT’s third-party claims, and will be impacted by the resolution of this motion. However, in its reply affirmation, Everest states that it has agreed to participate with Castle in the defense and indemnification of EMFT, though it

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<sup>2</sup> The parties should have amended the caption to reflect the discontinuance. As the Court here dismisses the entire action, however, this problem is moot.

has reserved its rights. Plaintiffs also have agreed to discontinue their action as against EMFT, according to Everest. Therefore, it appears this cross-motion has been resolved and is now moot.

Before the Court are two additional motions: Everest's motion for summary judgment, and plaintiffs' cross-motion for a declaratory judgment which holds that Everest is obliged to defend and indemnify them. Initially, the parties argue the issue of timeliness of notice. For the sake of this motion the Court treats plaintiffs' claims as timely. After careful consideration, the Court grants defendant's motion and dismisses the action, and also denies plaintiffs' cross-motion for affirmative relief.

Plaintiffs argue that because there is a dispute over coverage, Everest has a duty to defend pending the resolution of the dispute. Plaintiffs are correct that an insurer's duty to defend is broader than its duty to indemnify, but even this duty arises only when "the allegations within the four corners of the underlying complaint potentially give rise to a covered claim, or where the insurer has actual knowledge of facts establishing a reasonable possibility of coverage." *Frontier Insulation Contractors, Inc. v. Merchants Mut. Ins. Co.*, 91 N.Y.2d 169, 175, 667 N.Y.S.2d 982, 984 (1997). Here, the complaint does not establish a reasonable possibility of coverage. Therefore, there is no duty to defend.

Everest contends that the policy does not apply to workers insurance or compensation claims, that the claims against Moezinia and Aurapina for battery and intentional breach of their duty of care are excluded under the assault and battery exclusions, and that cross-claims and third-party claims regarding Bridge Street's failure to procure insurance are not "occurrences" triggering coverage and at any rate are excluded under the worker's compensation and employer's liability exclusions.

As for Everest's arguments, the Court initially agrees that the assault and battery, intentional tort and employment-related injury claims are excluded under the insurance agreement. See *QBE Ins. Corp. v. Jinx-Proof, Inc.*, 102 A.D.3d 508, 513, 959 N.Y.S.2d 19, 24 (1<sup>st</sup> Dept. 2013). In addition, the failure to procure insurance is not an "occurrence" within the meaning of the policy.<sup>3</sup> The definition in the policy is: "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." Everest Ins. Policy # 690000686-001, § V (Definitions), #13; see *Michael S. Oakley, M.D., PC v. Main St. America Group*, Index No. 14375/2010, 40 Misc. 3d 1204(a), 975 N.Y.S.2d 367 (June 6, 2013, Sup. Ct. Suffolk County)(avail at 2013 WL 3315383). Thus, to the extent that intentional torts are asserted, these are excluded; for, with limited exceptions, the quoted provision excludes intended harm. See *Consolidated Edison Co. of New York v. Allstate Ins. Co.*, 98 N.Y.2d 208, 219, 746 N.Y.S.2d 622, 626 (2002). Also, as Everest argues, worker's compensation exclusion bars the negligence claims. Plaintiffs' argument to the contrary – which appears to be that as long as one claim requires indemnification, the insurer must indemnify against all claims, regardless of their merit – is not persuasive as plaintiffs do not point successfully to any covered claims.

The Court has considered the various other arguments of the parties and they do not change this decision. In particular, regarding the timeliness and specificity of Everest's disclaimers, the Court finds Everest's arguments on this issue persuasive. It notified plaintiffs of its intention to disclaim shortly after receiving formal notification of the lawsuit, articulating clear objections and expressly reserving the right to supplement its response if any new facts emerged. Following the addition of the intentional torts claims and the formal request for

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<sup>3</sup> Indeed, it does not appear that plaintiffs argue this point.


indemnification on behalf of Moezinia and Aurapina, Everest responded with reasons for declining those requests.

For the reasons above, it is

ORDERED that defendant's motion for summary judgment is granted and plaintiff's cross-motion for summary judgment is denied, and this action is dismissed.

Dated: 1/17, 2014

Enter:

  
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LOUIS B. YORK, J.S.C.

**LOUIS B. YORK**  
**J.S.C.**

**FILED**  
JAN 22 2014  
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NEW YORK