

**343 LLC v Scottsdale Ins. Co.**

2014 NY Slip Op 32662(U)

September 2, 2014

Supreme Court, Bronx County

Docket Number: 309131/09

Judge: Mark Friedlander

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**NEW YORK SUPREME COURT - COUNTY OF BRONX  
PART IA-25**

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343 LLC and ALISA CONSTRUCTION CO., and  
ILLINOIS UNION INSURANCE COMPANY,

Plaintiffs,

**MEMORANDUM  
DECISION/ORDER**  
Index No.: 309131/09

-against-

SCOTTSDALE INSURANCE COMPANY,  
EBENEZER CONSTRUCTION INC.,  
WILFREDO LORENZO, ELIOU STEEL  
FRABRICATION, INC., SIEGEL BROS.  
SUPPLY CO., INC., SHAW BELTING CO.,  
INC., SOUTHERN WEAVING CO., and  
KEMPER CORPORTION,

Defendants.

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HON. MARK FRIEDLANDER

Plaintiffs move for an order, pursuant to CPLR§3212, granting summary judgment in favor of plaintiffs, 343 LLC ("343"), Alisa Construction Co., Inc. ("Alisa") and Illinois Union Insurance Company ("Union")(collectively "movants") on their declaratory relief claims against Scottsdale Insurance Company (Scottsdale") and Ebenezer Construction, Inc. ("Ebenezer"). The motion is decided as hereinafter indicated.

This is an action by movants on their declaratory relief claims seeking to hold Scottsdale and Ebenezer responsible for all defense and indemnification costs associated with the defense of 343 and Alisa for an action commenced by Wilfredo Lorenzo ("Lorenzo"), as plaintiff, against 343, Alisa and Eliou Steel Frabrication, Inc. ("Eliou"), as defendants, in the Supreme Court, Bronx County, under Index No. 24436/2005 ("the underlying action").

In the underlying action, Lorenzo seeks to recover monetary damages for personal injuries allegedly sustained by him on September 29, 2005. Lorenzo's complaint alleges, in addition to common law negligence, that the defendants therein violated Labor Law Sections 200, 240, 241, and unspecified sections of The Industrial Code of the State of New York.

The factual allegations in the underlying action are as follows: 343 was the owner of 353 Fourth Avenue, Brooklyn, New York. Alisa acted as the general contractor in the construction of Park Slope Towers at that location. Ebenezer was a subcontractor hired by Alisa to perform steel erection and pre-cast plank installation work at the construction site. The scope of Ebenezer's work entailed "lintel elevation adjustments, safety neck and safety cables installed, and providing 18 additional pieces of steel to support the balcony." On the day of Lorenzo's accident, Ebenezer ordered steel beams from Eliou. The steel beams arrived at the site on the flat bed of a boom truck.

Ebenezer's and Eliou's employees were responsible for removing the steel from the truck and placing it in the lot on the site. An Eliou employee operated the boom to assist in unloading the steel beams. Ebenezer's foreman directed Lorenzo to help unload the materials. Eliou's crane operator and Lorenzo unloaded the steel. The truck, owned by Eliou, was parked in back of the premises when the accident occurred. Lorenzo testified that, immediately prior to the accident, he tied five I-beams together using a strap/sling. At this time, the driver of the truck was seated in the "tow truck" located between the boom truck's cab and the truck's platform where Lorenzo was standing. After Lorenzo secured the steel I-beams, he used a hand signal to inform the crane operator to move the load. The crane operator proceeded to lift the I-beams approximately 25 to 30 feet in the air above where Lorenzo was standing, when the strap broke

and two or three of the beams fell and struck Lorenzo.

Alisa and Ebenezer entered into a construction contract agreement, dated April 22, 2005, revised on August 10, 2005, covering all construction work to be performed at the construction site. Pursuant to Article 11 of said contract, Ebenezer was required to purchase insurance coverage naming 343 and Alisa as additional insureds. Article 11, entitled INSURANCE, provides as follows:

SUBCONTRACTOR shall procure and maintain, during the entire progress of Work, full and unrestricted insurance as described on the pages entitled "Insurance Requirements" on Schedule A of attached Exhibit A. All insurance shall be maintained in the form and be insured by an insurer that is satisfactory to OWNER and GENERAL CONTRACTOR. SUBCONTRACTOR shall furnish GENERAL CONTRACTOR with certificates of said insurance before commencing the Work or demanding any payments, which shall provide that the policy shall not be cancelled or reduced in coverage until thirty (30) days after written notice shall have been given to GENERAL CONTRACTOR of such cancellation or reduction in coverage naming GENERAL CONTRACTOR and OWNER as additional insureds.

Exhibit A of the contract provides that:

SUBCONTRACTOR shall obtain, pay for and keep in full force & effect during the entire term of this agreement, and during the performances, final completion and acceptance of any work, insurance as designated herein. Before starting the Work, SUBCONTRACTOR shall furnish a Certificate of Insurance with attachments as described below or copies of all insurance policies to GENERAL CONTRACTOR. All policies must be written through a company duly authorized to transact that class of business in the State of (state where work is being done) and in a company or companies satisfactory to GENERAL CONTRACTOR.

B. COMMERCIAL GENERAL LIABILITY (ON FORM NO. CG20 10 11 85)

Commercial General Liability Insurance shall be written in ISO form CG 00 10 11 93 or a substitute form providing equivalent coverage. Coverage shall be provided for liability arising from:

- Premises & Operations
- Independent contractors
- Products-completed operations for a minimum of three years after project

- completion
- Personal injury and advertising injury
- blanket contractual liability (including the tort liability of another assumed in a business contract)
- Explosion, collapse, & underground operations

Furthermore, pursuant to Exhibit A of the contract, any insurance policy obtained by Ebenezer was required to name: "Alisa Construction Co., Inc., 700 Pacific Street, Suite 121, Brooklyn, New York 11217" as Certificate Holder, and "Alisa Construction Co., Inc., 700 Pacific Street, Suite 121, Brooklyn, New York 11217" and "343 LLC, 700 Pacific Street, Suite 121, Brooklyn, New York 11217," as additional insureds.

Ebenezer obtained from Scottsdale, and Scottsdale issued, a commercial general insurance policy to Ebenezer (policy number CLS 1063812), effective October 8, 2004 through October 8, 2005, with limits of \$1,000,000.00 per occurrence and \$2,000,000.00 in the general aggregate, naming 343 and Alisa as additional insureds (the "Scottsdale Policy"). Ebenezer furnished a certificate of insurance that indicated that the Scottsdale Policy expressly named 343 and Alisa as additional insureds. The Scottsdale Policy contains a GLS-150 Blanket Additional Insured Endorsement, as follows:

**WHO IS AN INSURED (SECTION II)** is amended to include as an insured any person or organization (called additional insured) whom you are required to add as an additional insured on this policy under a written contract, agreement or permit which must be:

- a. currently in effect or becoming effective during the term of the policy; and
- b. executed prior to the "bodily injury," "property damage," "personal injury," or "advertising injury."

\* \* \*

This insurance provided to this additional insured is limited as follows:

3. Coverage is not provided for "bodily injury" arising out of the sole negligence of

the additional insured.

\* \* \*

Any coverage provided hereunder will be excess over any other valid and collectible insurance available to the additional insured whether primary, excess, contingent or on any other basis unless a contract specifically requires that this insurance be primary.

By letters dated November 29, 2005 and December 1, 2005, Cathy Fox, on behalf of Ace Westchester Specialty Group, as authorized representative of Union, put Ebenezer and Scottsdale on notice of a potential claim by Lorenzo against 343 and Alisa, requesting that Ebenezer and Scottsdale accept the defense and indemnification of any suit brought by Lorenzo. By letter dated April 20, 2007, sent to Ian Kaufman, Esq., of Bivona & Cohen,, P.C., by Lisa Lawing, a claims analyst for Scottsdale, Scottsdale accepted Union's tender of the defense for the underlying action under a reservation of rights, asserting that neither 343 nor Alisa was entitled to additional insured status or indemnification for bodily injury. More specifically, in its letter, Scottsdale stated, in relevant part, as follows:

We have reviewed the construction contract Agreement dated April 22, 2005 between Alisa Construction Company, Inc. and Ebenezer Construction, Inc. as well as the blanket Additional Insured Endorsement GLS-150s (09/96) that forms part of the policy (copy attached). It appears that Alisa Construction Company, Inc. and the premises owner 343 LLC, qualify as additional insured under our policy. Further, the contract appears to be an "insured contract" by definition, as stated in the provisions of the policy.

We agree to accept the tender for defense of Alisa Construction Company, Inc. and 343 LLC as both additional insured and as contractual indemnitees; however, we note the following qualifications as to any indemnity obligations:

While Alisa Construction company, Inc. and 343 LLC are additional insured pursuant to the Blanket Additional Insured Endorsement, there is no obligation pursuant to the express terms of such endorsement to indemnify Alisa Construction Company, Inc. and 343, LLC for any bodily injury that was not caused in whole or in part by either the acts or omissions of Ebenezer Construction Inc., or those acting on behalf of Ebenezer Construction, Inc., nor is there any obligation to indemnify Alisa Construction Company,

Inc. and 343, LLC for bodily injury caused by the sole liability of either Alisa Construction Company, Inc. or 343, LLC.

Scottsdale disclaimer letter does not assert that Scottsdale's insurance coverage is excess to the insurance coverage provided by Union to 343 and Alisa. It is well established law that an insurer must state, with specificity, in its disclaimer of liability, the grounds therefor, and the failure to do so precludes the insurer from raising previously unspecified grounds as affirmative defenses.

The Court of Appeals, in *Fieldston Prop. Owners Assn., Inc. v. Hermitage Ins. Co., Inc.*, 16 N.Y.3d 257 (2011), stated:

“An insurer's duty to defend is liberally construed and is broader than the duty to indemnify, ‘in order to ensure [an] adequate ... defense of [the] insured,’ without regard to the insured's ultimate likelihood of prevailing on the merits of a claim [internal citations omitted]. As we have explained on multiple occasions, the insurer's duty to defend its insured ‘arises whenever the allegations in a complaint state a cause of action that gives rise to the reasonable possibility of recovery under the policy.’”

This “exceedingly broad” duty to defendant “applies equally to additional insureds and named insureds.” See, *Regal Constr. Corp. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 15 N.Y.3d 34, 37 (2010).

As previously stated, in the underlying action, Lorenzo's complaint contains allegations of Labor Law violations against 343 and Alisa, as well as allegations of negligence, and it cannot be concluded at this juncture which allegations will be proven and which will fail. In any event, under its broad duty, as quoted above, Scottsdale has an obligation to defendant 343 and Alisa in the underlying action. This obligation to defend 343 and Alisa continues as long as 343 and/or Alisa remain as defendants in the underlying action.

However, with respect to the indemnification issue, unresolved at the present time are the

issues of whether Lorenzo's claim for bodily injury was: (1) caused, in whole or in part by either the acts or omissions of Ebenezer or those acting on behalf of Ebenezer (Eliou); or (2) caused by the sole liability of 343 or Alisa.

The branch of plaintiff's motion seeking attorneys' fees associated with this declaratory judgment action is denied. *See, Mighty Midgets v. Centennial Ins. Co.*, 47 N.Y.2d 12 (1979); *Chase Manhattan Bank v. Each Individual Underwriter Bound to Lloyd's Policy No. 790/004A890005*, 258 A.D.2d 1 (1<sup>st</sup> Dept. 1999).

Settle Order.

Dated: 9/2/14

  
MARK FRIEDLANDER, J.S.C.