

**HDI-Gerling Am. Ins. Co. v Zurich Am. Ins. Co.**

2015 NY Slip Op 30874(U)

April 14, 2015

Sup Ct, New York County

Docket Number: 158475/13

Judge: Anil C. Singh

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 61

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HDI-GERLING AMERICA INSURANCE COMPANY;  
THE CITY OF NEW YORK,

Plaintiffs, Index No. 158475/13

- against -

Motion Sequence No. 003

ZURICH AMERICAN INSURANCE CO.; SLATTERY USA  
CIVIL NORTHEAST, INC.; SLATTERY SKANSKA, INC.;  
TULLY CONSTRUCTION CO., INC.; SKANSKA/TULLY  
JV, INC.; SLATTERY SKANSKA INC./GOTTLIEB  
SKANSKA INC./TULLY CONSTRUCTION INC. JV,

Defendants.  
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**SINGH, J:**

Plaintiffs the City of New York (City) and HDI-Gerling America Insurance Company (HDI) bring this action to obtain coverage for the City as an additional insured under the policy defendant Zurich America Insurance Co. (Zurich) issued to defendants Slattery USA Civil Northeast, Inc., Slattery Skanska, Inc., Tully Construction Co., Inc., Skanska/Tully JV, Inc. and Slattery Skanska Inc./Gottlieb Skanska Inc./Tully Construction Inc. JV (collectively, Skanska).<sup>1</sup> The three-count complaint asserts causes of action for: (1) a declaration of Zurich’s obligation to defend and indemnify the City; (2) breach of contract against Zurich; and (3) breach of contract against Skanska.

Plaintiffs now move for partial summary judgment on the first cause of action. Zurich opposes the motion and cross-moves for summary judgment, seeking a declaration that Zurich’s coverage is excess to HDI’s coverage, and that Zurich has no obligation to defend the City until

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<sup>1</sup> According to defendants, the correct names of the insured defendants are Slattery Skanska, Inc./Gottlieb Skanska, Inc./Tully Construction Co. JV. Welch affirmation, ¶ 1.

HDI's coverage is exhausted. Skanska opposes plaintiffs' motion for partial summary judgment, but does not seek any affirmative relief.

### Background

The parties do not dispute the underlying facts. On September 26, 2006, Skanska entered into a construction contract with the City to perform work at the Croton Water Treatment Plant located at the Mosholu Golf Course in Bronx, New York (Project). Skanska agreed to procure a commercial general liability insurance (CGL) policy that "cover[ed] the Contractor as a Named Insured and the City as an Additional Insured" and "[would] be primary (and non-contributing) to any insurance or self-insurance maintained by the City." Friedman affirmation, exhibit B, ¶ 22.1. Skanska obtained a CGL policy from Zurich, policy number GLO 3867164-00, covering the policy period of May 11, 2007 to May 11, 2012, which was later extended to December 31, 2014 (Zurich Policy).

Nonparty Siemens Electric LLC, formerly known as Siemens-Schlesinger Electrical, LLC (Siemens), entered into a separate construction contract with the City. The parties do not dispute that this contract required Siemens to acquire a CGL policy that named the City as an additional insured and that provided coverage on a primary and noncontributory basis. Siemens procured a CGL policy from HDI, policy number GLD 11101-03, covering the policy period of October 1, 2011 to October 1, 2012 (HDI Policy).

The HDI Policy and the Zurich Policy each contained an "Other Insurance" provision (Other Insurance Provision). The Zurich Policy's Other Insurance Provision stated, in relevant part:

**"SECTION IV – COMMERCIAL GENERAL LIABILITY  
CONDITIONS**

...

#### **“4. Other Insurance**

“If other valid and collectible insurance is available to the insured for a loss we cover . . . our obligations are limited as follows:

##### **“a. Primary Insurance**

“This insurance is primary except when **b.** below applies. If this insurance is primary, our obligations are not affected unless any of the other insurance is also primary. Then, we will share with all that other insurance . . . .

##### **“b. Excess Insurance**

“This insurance is excess over:

“(1) Any of the other Insurance, whether primary, excess, contingent or on any other basis:

“(a) That is Fire, Extended Coverage, Builder’s Risk, Installation Risk or similar coverage for ‘your work’;

“(b) That is Fire insurance for premises rented to you or temporarily occupied by you with permission of the owner;

“(c) That is insurance purchased by you to cover your liability as a tenant for ‘property damage’ to premises rented to you or temporarily occupied by you with permission of the owner; or

“(d) If the loss arises out of the maintenance or use of aircraft, ‘autos’ or watercraft to the extent not subject to Exclusion **g.** of Section **I — Coverage A — Bodily Injury And Property Damage Liability.**

“(2) Any other primary insurance available to you covering liability for damages arising out of the premises or operations, or the products and completed operations, for which you have been

added as an additional insured by attachment of an endorsement.”

Friedman affirmation, exhibit C, form CG 00 01 12 04 at 10-11. The HDI Policy contained a nearly identical Other Insurance Provision.

In addition, the Zurich Policy contained an “Other Insurance Amendment – Primary And Non-Contributory” endorsement (Zurich Endorsement), which provided:

**“Section IV. Commercial General Liability Conditions, 4. Other Insurance, is amended per the following: \_\_\_\_\_.”**

- “1. The following paragraph is added under **a. Primary Insurance:**

“This insurance is primary insurance as respects our coverage to an additional insured person or organization, where the written contract or written agreement requires that this insurance be primary and non-contributory. In that event, we will not seek contribution from any other insurance policy available to the additional insured on which the additional insured person or organization is a Named Insured.

- “2. The following paragraph is added under **b. Excess Insurance:**

“This insurance is excess over:

“Any of the other insurance, whether primary, excess, contingent or on any other basis, available to an additional insured, in which the additional insured on our policy is also covered as an additional insured by attachment of an endorsement to another policy providing coverage for the same ‘occurrence’, claim or ‘suit’. This provision does not apply to any policy in which the additional insured is a Named Insured on such other policy and where our policy is required by written contract or written agreement to provide coverage to the additional insured on a primary and non-contributory basis.”

*Id.*, exhibit C, form U-GL-1327-A CW.

The HDI Policy also contained an “endorsement [that] modifie[d] insurance provided under the [CGL policy].” *Id.*, exhibit F at Manuscript Endorsement # 34. The endorsement, entitled “Blanket Additional Insured,” (HDI Endorsement) provided, in relevant part:

“The insurance provided to the additional insured by this endorsement is excess over any valid and collectible other insurance, whether primary, excess, contingent, or on any other basis, that is available to the additional insured for a loss we cover under this endorsement. However, if the written agreement specifically requires that this insurance apply on a primary basis, this insurance is primary. If the written agreement specifically requires this insurance apply on a primary and non-contributory basis this insurance is primary to other insurance available to the additional insured and we will not share with that other insurance.

“This endorsement shall prevail over additional insured endorsements that may apply under this policy unless required otherwise in a written agreement.”

*Id.*

Both policies defined “you” and “your” as “the Named Insured shown in the Declarations, and any other person or organization qualifying as a Named Insured under this policy.” *Id.*, exhibit C, form CG 00 01 12 04 at 1; exhibit F, form CG 00 01 12 07 at 1.

“Skanska USA Civil Northeast, Inc./Tully Construction Co., Inc. AJV” (*id.*, exhibit C, form U-GU-621 CW) were the named insureds on the Zurich Policy, and Siemens and related entities were the named insureds on the HDI Policy. The City was not a named insured on either policy. Instead, it was covered as an “insured,” which both policies defined to include “any person or organization for whom you are performing operations when you and such person or organization have agreed in writing in a contract or agreement that such person or organization be added as an additional insured on your policy.” *Id.*, exhibit C, form CG 00 01 12 04 at 1 and form CG 20 33 07 04; *see also* exhibit F, form CG 00 01 12 07 at 1 and forms CG 20 10 07 04, CG 20 10 11 85

(“additional insured” endorsement includes “any person or organization required by written contract”).

On December 11, 2012, Rocco Zaino, an employee of Siemens, and his wife commenced an action against the City, the Department of Environmental Protection and Skanska in the Supreme Court of New York, Bronx County, in *Zaino v The City of New York*, (index No. 309557/12). Zaino alleged that he was injured on July 11, 2012, during the course of his employment for Siemens, while working at the Project, due to an unsafe work environment created by Skanska.

On May 1, 2013, the City tendered a claim for its defense and indemnity to Skanska and its insurer, Zurich, and to Siemens and its insurer, HDI. HDI agreed to defend and indemnify the City as an additional insured. Zurich declined to assume the City’s defense. On September 17, 2013, the City and HDI commenced the instant action.

#### Analysis

The parties dispute the priority of additional insured coverage available to the City under the HDI Policy and the Zurich Policy. Plaintiffs contend that the policies are co-primary. In the alternative, they argue that, even if the Zurich Policy is excess for liability purposes, Zurich still has a duty to defend. Defendants counter that, pursuant to the Zurich Endorsement, the Zurich Policy is excess over any other additional insured coverage available to the City. Alternatively, Zurich contends that, even if the policies provide the City with the same level of coverage, HDI has the initial obligation to provide coverage, because the HDI Endorsement does not share with other insurance available to the City. Both sides contend that their position is supported by the plain language of the Zurich Endorsement, and that an alternate reading would render portions of the endorsement meaningless.

Pursuant to CPLR 3212 (b), “[t]o obtain summary judgment, the movant ‘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.’” *Madeline D’Anthony Enters., Inc. v Sokolowsky*, 101 AD3d 606, 607 (1st Dept 2012), quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 (1986). Upon such a showing, the burden shifts to the opposing party “‘to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action.’” *Id.*, quoting *Alvarez*, 68 NY2d at 324. “Where . . . the case turns upon an unambiguous written agreement . . . and the material facts of the case are not in dispute, summary judgment [is] properly granted.” *Solow Mgt. Corp. v Hochman*, 191 AD2d 250, 251 (1st Dept 1993).

“Where the same risk is covered by two or more policies, each of which was sold to provide the same level of coverage (as is the case here), priority of coverage (or, alternatively, allocation of coverage) among the policies is determined by comparison of their respective ‘other insurance’ clauses.” *Sport Rock Intl., Inc. v American Cas. Co. of Reading, Pa.*, 65 AD3d 12, 18 (1st Dept 2009). “[T]he unambiguous provisions of an insurance policy, as with any written contract, must be afforded their plain and ordinary meaning, and . . . the interpretation of such provisions is a question of law for the court.” *Broad St., LLC v Gulf Ins. Co.*, 37 AD3d 126, 130 (1st Dept 2006). Where no ambiguity exists, “courts should refrain from rewriting the agreement.” *Government Empls. Ins. Co. v Kligler*, 42 NY2d 863, 864 (1977). In addition, when “construing an endorsement to an insurance policy, the endorsement and the policy must be read together, and the words of the policy remain in full force and effect except as altered by the words of the endorsement.” *County of Columbia v Continental Ins. Co.*, 83 NY2d 618, 628

(1994). “An insurance contract should not be read so that some provisions are rendered meaningless.” *Id.*

For the following reasons, the court finds that the Zurich Endorsement renders the Zurich Policy excess over the HDI Policy and that the HDI Policy, by its own terms, requires it to provide primary coverage, without sharing with other insurance. The Other Insurance Provision, found in both policies, stated that coverage was primary unless one of the exceptions of paragraph (b) applied. Because all of the exceptions listed in paragraph (b) pertained to other insurance available to “you,” the named insured, they did not apply to the City as an additional insured on either policy. Friedman affirmation, exhibit C, form CG 00 01 12 04 at 11; exhibit F, form CG 00 01 12 07 at 11. Therefore, under the Other Insurance Provision, both policies provided primary coverage to any additional insured, and, as co-primary insurers, Zurich and HDI would share coverage. The Zurich and HDI Endorsements modified that coverage by providing exceptions to primary, co-primary, and excess insurance coverage.

Paragraph 1 of the Zurich Endorsement created an exception to co-primary insurance coverage for instances “where the written contract . . . requires that this insurance be primary and non-contributory,” as the contract between Skanska and the City did here. *Id.*, exhibit C, form U-GL-1327-A CW. Where the contract so provided, Zurich agreed “not to seek contribution from any other insurance policy available to the additional insured,” but only where “the additional insured . . . is a Named Insured” on the other policy. *Id.* As it is undisputed that the City was not a “Named Insured” under the HDI Policy, paragraph 1 of the Zurich Endorsement, read together with the Other Insurance Provision, permitted Zurich and HDI to serve as co-primary insurers. *Id.*

This interpretation of the Zurich Endorsement is also consistent with the language of paragraph 2. The first sentence of paragraph 2 stated that, where the additional insured had primary or excess coverage under another policy as an additional insured (as opposed to as a “Named Insured”), the Zurich Policy would be excess over such insurance. *Id.* The second sentence of paragraph 2 harmonized this excess coverage provision with paragraph 1, by clarifying that the Zurich Policy would not be excess insurance over “any policy in which the additional insured is a Named Insured on such other policy” and where the Zurich Policy was “required by written contract or written agreement to provide coverage to the additional insured on a primary and non-contributory basis.” *Id.* In other words, in the Zurich Endorsement, the second sentence of paragraph 2 is consistent with the second sentence of paragraph 1, as both sentences speak to Zurich providing primary coverage if the written contract between the City and Skanska required the Zurich Policy to be “primary and non-contributory” and the other, competing policy identified the City as “a Named Insured.” *Id.*

Pursuant to paragraph 2 of the Zurich Endorsement, the Zurich Policy is excess insurance, because the City is an “additional insured by attachment of an endorsement to [the HDI P]olicy.” *Id.* The exception to the excess coverage, contained in the paragraph’s second sentence, does not apply because, while the Zurich Policy was “required by written contract . . . to provide coverage to the additional insured [the City] on a primary and non-contributory basis,” the City was not a “Named Insured” on the HDI Policy. *Id.* Therefore, the Zurich Policy is excess over the HDI Policy.<sup>2</sup>

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<sup>2</sup> The court notes Skanska’s argument relating to the endorsement that the Insurance Services Office (ISO) introduced in 2013. According to Skanska, the endorsement is “similar to [the Zurich Endorsement]” and “confirms the intended effect of the endorsement in the Zurich Policy.” Skanska’s brief at 12. However, the ISO-issued endorsement differs, in content and structure, from the one at issue here. *See* Welch affirmation, exhibit I. In any event, whatever

The HDI Endorsement confirms that the HDI Policy is primary and that the Zurich Policy is excess. The HDI Endorsement provided that, where “the written agreement specifically requires [that the HDI Policy] apply on a primary and non-contributory basis this insurance is primary to other insurance available to the additional insured and [HDI] will not share with that other insurance.” *Id.*, exhibit F at Manuscript Endorsement # 34. Unlike the Zurich Endorsement, the HDI Endorsement is not limited to instances where the City, as an “additional insured[,] is a Named Insured on such other policy” (*id.*, exhibit C at U-GL-1327-A CW), but rather, applies broadly to “other insurance available to the additional insured,” including the Zurich Policy. *Id.*, exhibit F at Manuscript Endorsement # 34. Thus, pursuant to the plain language of the policies, the HDI Policy is primary and the Zurich Policy is excess, and, therefore, the City is not entitled to coverage or a defense under the Zurich Policy until the HDI Policy is exhausted. *See Sport Rock Intl., Inc.*, 65 AD3d at 18; *see also HRH Constr. Interiors, Inc. v Royal Surplus Lines Ins. Co.*, 16 AD3d 115, 116 (1st Dept 2005) (finding that subcontractor’s insurer had to defend general contractor and reimburse general contractor and its general liability insurer for legal fees incurred in the underlying action, where the subcontractor’s insurance policy contained an “Additional Insured [Blanket—Primary]” endorsement, which rendered inapplicable the co-primary insurance sharing provision of the “Other Insurance” clause).

Plaintiffs argue that the first sentence of paragraph 1 of the Zurich Endorsement creates a category of primary coverage (where a written contract requires additional insured coverage to

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the language and the intended effect of the ISO-issued endorsement, it was not part of the policies at issue here and, therefore, sheds no light on “the intent of the parties as expressed in the language employed in the polic[ies].” *Throgs Neck Bagels v GA Ins. Co. of N.Y.*, 241 AD2d 66, 69 (1st Dept 1998). Therefore, the ISO endorsement has no impact on the instant motions.

be primary and noncontributory) that is not subject to the excess insurance clause under paragraph (b) of the Other Insurance Provision. This interpretation impermissibly reads the sentence in isolation from the other provisions of the Zurich Endorsement and conflicts with the plain language of the endorsement's paragraph 2. *See County of Columbia*, 83 NY2d at 628. Therefore, plaintiffs' argument is without merit.

*General Motors Acceptance Corp. v Nationwide Ins. Co.* (4 NY3d 451 [2005]) does not support plaintiffs' contention that, even if the Zurich Policy's liability coverage is excess over the HDI Policy, Zurich still has a duty to defend. The Court of Appeals, in *General Motors Acceptance Corp.*, rejected such a rule "and [held] only that, *under the circumstances of [that] case,*" where the excess insurer triggered its duty to defend by voluntarily assuming the insured's defense, the primary and excess insurers were "required to share defense costs." 4 NY3d at 457-458 (emphasis added). Here, Zurich declined coverage and, as such, never triggered its duty to defend. Therefore, *General Motors Acceptance Corp.* is distinguishable on its facts and Zurich has no duty to defend the City in the underlying action until the HDI Policy is exhausted. *See Sport Rock Intl., Inc.*, 65 AD3d at 23 (holding excess insurer had no duty to defend until primary coverage was exhausted, where excess insurer "did nothing to trigger its duty to defend [insured] before that duty otherwise would have arisen").

The court notes plaintiffs' argument that this court is bound by the prior decision, *HDI-Gerling Am. Ins. Co. v Zurich Am. Ins. Co.* (Sup Ct, NY County, Jan. 19, 2012, Tingling, J., index No. 102922/2011). There, the City and HDI commenced a declaratory judgment action against Zurich and Skanska and moved for partial summary judgment. Interpreting the Zurich Policy at issue here, specifically "Section IV, subsection 4, paragraphs a and b," as amended by the Zurich Endorsement, the court found that the Zurich Policy was primary and that Zurich

owed the City a defense in the underlying personal injury action. Friedman affirmation, exhibit I at 2. Zurich moved for reconsideration of the decision and the court denied the motion by order dated March 29, 2012. Friedman affirmation, ¶ 14 and exhibit J. Zurich sought to appeal the trial court's decision, but allegedly never perfected its appeal, despite two extensions of time, which have now expired. *Id.*, ¶ 15 and exhibits K and L. Therefore, this court is not required to follow *HDI-Gerling Am. Ins. Co.* (Sup Ct, NY County, Jan. 19, 2012, Tingling, J., index No. 102922/2011) and declines to do so here. *Cf Mountain View Coach Lines v Storms*, 102 AD2d 663, 664-665 (2d Dept 1984) (court not bound by decision of a sister court); *see also Bush v City of New York*, 195 Misc 2d 882, 888 (Sup Ct, Bronx County 2003) (“[a]bsent any pronouncement by the Court of Appeals or the Appellate Division where the action is pending or any other department, the doctrine of stare decisis does not require the trial court to follow as precedent a point established by the courts of coordinate jurisdiction”).

Accordingly, it is hereby

ORDERED that the motion of plaintiffs City of New York and HDI-Gerling America Insurance Company for partial summary judgment on its first cause of action is denied; and it is further

ORDERED that defendant Zurich America Insurance Company's cross motion, which seeks a declaratory judgment with respect to the subject matter of the complaint's first cause of action, is granted; and it is further

ADJUDGED and DECLARED that any additional insured coverage available to plaintiff the City of New York under the subject policy provided by defendant Zurich American Insurance Company (policy number GLO 3867164-00) is excess to any additional insured coverage available to the City of New York under the subject policy provided by plaintiff HDI-

Gerling America Insurance Company (policy number GLD 11101-03), in connection with the underlying personal injury action, *Zaino v The City of New York et al.* (under index No. 309557/12); and it is further

ORDERED that the action is severed and continued with respect to the second and third causes of action.

Date: April 14, 2015  
New York, New York

  
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Anil C. Singh