Turner Constr. Co. v Navigators Ins. Co.
2015 NY Slip Op 31353(U)
July 23, 2015
Supreme Court, New York County
Docket Number: 157322/13
Judge: Ellen M. Coin
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 63

---X

TURNER CONSTRUCTION COMPANY,

Plaintiff,

- against -

NAVIGATORS INSURANCE COMPANY and
TRAVELERS PROPERTY CASUALTY
COMPANY OF AMERICA,

Defendants.

---X

Index No. 157322/13
Decision, Order and
Judgment

ELLEN M. COIN, J:

Turner Construction Company (Turner) claims that it is an additional insured on policies issued by defendant insurance companies. Turner moves for partial summary judgment declaring that defendant Travelers Property Casualty Company of America (Travelers) is obligated to defend it in the underlying personal injury case. Travelers cross-moves for summary judgment dismissing the complaint and declaring that it has no duty to defend Turner.

The Dormitory Authority of the State of New York (DASNY), the owner of a construction project at the John Jay College of Criminal Justice in New York City, hired Skidmore, Owings & Merrill LLP (SOM) to perform architectural and engineering services. DASNY hired contractors Enclos Corp. (Enclos) and Five Star Electric Corp. (Five Star). In their separate contracts with DASNY, each contractor agreed to procure primary commercial general liability (CGL) insurance naming DASNY and a person identified as the construction manager as additional insureds. Travelers is Enclos's insurer, and defendant Navigators Insurance Company (Navigators) is Five Star's.

SOM hired Turner to "provide pre-construction services and construction management services for the Project . . . Turner is the construction management subconsultant for the Project and shall provide itself or provide through subcontractors certain pre-construction services and construction management services . . ." (SOM/Turner contract, at 2-3; Ex. E to the Lanzalotto Aff.). Liberty Mutual Insurance Company (Liberty) is Turner's insurer. The Liberty policy is divided into two parts, one for primary insurance and one for excess. (DASNY, SOM, Enclos, Liberty, and Five Star are not parties).

The plaintiff in the underlying case is Edward Walls, an Enclos employee. On April 13, 2011, at work, Walls walked into a heating unit that was suspended from the ceiling. Walls sued Turner, DASNY, Five Star, and others, not including Enclos, for injuries (*see Walls v Turner Constr. Co.*, 2014 WL 1714432, 2014 NY Misc LEXIS 1943, 2014 NY Slip Op 31061[U] [Sup Ct, NY County 2014], index No. 108890/11). In the Walls case, Turner and DASNY brought a joint third-party action against Enclos and Five Star.

As Travelers alleges, Liberty is paying Turner's defense costs in the Walls action. Turner's reply/opposition appends a "Loan Receipt Agreement" between it and Liberty (Ex. A). The document states that Turner is an additional insured under the Navigators and the Travelers policies, that both insurers rejected Turner's tender related to the Walls action, that at Liberty's request Turner filed an action against Navigators and Travelers seeking recovery of defense fees, and that Liberty has loaned and will continue to loan Turner an amount equal to the cost of defending the Walls action. The agreement further provides that the sums advanced to Turner are non-interest bearing loans to be repaid only from the proceeds of any amounts obtained for defense by Turner from Navigators and Travelers. In the event that it is determined that

Navigators and Travelers do not have any obligation to defend Turner, Turner has no obligation to repay Liberty.

Turner claims additional insured status by virtue of the blanket additional insured endorsement (BAE) in the Travelers policy. Travelers argues that: 1) Turner is not an additional insured because it is not named in the policy and is nowhere identified as the construction manager; 2) as the Travelers policy insures risks in many different states and the home of the first named insured is in Missouri, Missouri law, not New York law, applies to the policy; under Missouri law, the BAE does not confer additional insured status on Turner; 3) this action should be dismissed because Turner has failed to add a necessary party, its own insurer, Liberty; and 4) even if Turner were an additional insured, it would not be entitled to a defense because its costs in the underlying action do not equal and most likely will not equal the deductible in the Travelers policy.

Relevant provisions of the Travelers policy

"Throughout this policy the words 'you' and 'your' refer to the Named Insured shown in the Declarations, and any other person or organization qualifying as a Named Insured under this policy" (CGL, page 1 of 16; Ex. C to the Vita Aff.). The word 'insured' means any person or organization qualifying as such under Section II - Who Is An Insured" (*id.*). Section II provides that any organization designated in the Declarations is an insured (*id.*, page 8 of 16, ¶ II [1] [a]; Ex. C to the Vita Aff.).

The BAE amends Section II "to include [as an insured] any person or organization that you agree in a 'written contract requiring insurance' to include as an additional insured on this Coverage Part . . . only to the extent that, the injury or damage is caused by acts or omissions of

you or your subcontractor in the performance of 'your work' to which the 'written contract requiring insurance' applies. The person or organization does not qualify as an additional insured with respect to the independent acts or omissions of such person or organization" (BAE, ¶ 1 [b]).

The BAE provides that the "insurance provided to the additional insured by this endorsement is excess . . . However, if the 'written contract requiring insurance' specifically requires that this insurance apply on a primary basis or a primary and non-contributory basis, this insurance is primary to 'other insurance' available to the additional insured which covers that person or organization as a named insured for such loss, and we will not share with that 'other insurance' (BAE, ¶ 3).

The deductible endorsement provides that Travelers's "obligation to pay damages and 'Allocated Loss Adjustment Expenses' [ALAE] . . . under this policy on behalf of the insured, applies only to the amount of damages and [ALAE] . . . which are in excess of the Deductible Amount," which is $150,000 (Deductible, ¶ 1). ALAE means attorney's fees, and other fees and costs related to court matters (*id.*, ¶ 5).

The deductible further provides that the "terms of the policy, including those with respect to: a. our right and duty with respect to the defense of 'suits', and b. your duties in the event of an 'occurrence', offense, act, error or omission, 'injury", claim, or 'suit' (as applicable) apply irrespective of the application of the Deductible Amount" (*id.*, ¶ 3). Travelers "may pay any part or all of the Deductible Amount to effect payment of any claim or 'suit' and you shall reimburse us from your own funds . . . " (*id.*, ¶ 4 [a]). "Only payments made by you will satisfy your obligation to reimburse us for payments we make within your deductible layer" (*id.*, ¶ 4 [b]). "If

you fail to reimburse us for any amounts . . . we may cancel this policy . . ." (*id.*, ¶ 11).

The section entitled "Other Insurance" provides that if other insurance is available to the insured for a loss that the Travelers policy covers, Travelers insurance "is primary except when b. below applies" (CGL, page 11 of 16, ¶ 4 [a]). Section b provides that the Travelers policy is excess over coverage that is not relevant in this case.

When Section b does not apply, "our obligations are not affected unless any of the other insurance is also primary. Then, we will share with all that other insurance by the method described in c. below" (*id.*, ¶ 4 [b]). Section c, entitled "Method of Sharing," provides that if the other insurance permits contribution by equal shares, Travelers will follow the same method. (*id.*, ¶ 4 [c]).

Threshold question - conflict of laws

The BAE in the Travelers policy issued to Enclos provides additional insured coverage "only to the extent that, the injury or damage is caused by acts or omissions of you or your subcontractor in the performance of 'your work' to which the 'written contract requiring insurance' applies" (BAE, ¶ 1 [b]).

The parties dispute the meaning of "caused by" in the BAE. Travelers argues that Missouri law applies to the policy because that state has the most connections to the parties. Under Missouri law, that phrase has a narrow meaning that excludes Turner as an additional insured. Turner argues for application of New York's more expansive definition of the phrase.

In light of the disagreement as to which state's law should be used to interpret the Travelers policy and "caused by," the court will first determine whether there is a conflict between the laws of New York and Missouri (*see Elmaliach v Bank of China Ltd.*, 110 AD3d

192, 200 [1st Dept 2013]). An actual conflict exists when the jurisdictions have different substantive laws that could lead to the case having significantly different outcomes because of where it is litigated (*Finance One Pub. Co. Ltd. v Lehman Bros. Special Fin., Inc.*, 414 F3d 325, 331 [2d Cir 2005], *cert denied* 548 US 904 [2006]). Where the laws of both jurisdictions would lead to the same result, there is no conflict of law and the law of the forum will be applied (*SNS Bank v Citibank*, 7 AD3d 352, 354 [1st Dept 2004]). Where there is a conflict of law, a choice-of-law analysis will be conducted to determine which jurisdiction has the most significant contacts to the case (*Locke v Aston*, 31 AD3d 33, 37 [1st Dept 2006]). Generally, the court applies the law of the state having the most significant contacts to the parties and the litigation.

Since New York is the forum state, New York choice-of-law rules are used to decide if there is a conflict of laws between Missouri and New York and, if there is, which state's law should apply (*see Matter of Travelers Indem. Co.*, 195 AD2d 35, 38 [1st Dept 1993]; *see also GlobalNet Financial.Com, Inc. v Frank Crystal & Co., Inc.*, 449 F3d 377, 383 [2d Cir 2006]).

The Travelers policy covers an additional insured only if the injury was "caused by" Enclos's acts or omissions. Under New York law, "caused by" is not materially different from "arising out of" (*National Union Fire Ins. Co. of Pittsburgh, PA v Greenwich Ins. Co.*, 103 AD3d 473, 474 [1st Dept 2013]; *W & W Glass Sys., Inc. v Admiral Ins. Co.*, 91 AD3d 530, 530-531 [1st Dept 2012]; *100 Church Fee Owner LLC v Harleysville Worcester Ins. Co.*, 2015 WL 1806064, *5, 2015 NY Misc LEXIS 1350, *9, 2015 NY Slip Op 30633[U], *7 [Sup Ct, NY County 2015]). "[T]he focus of an 'arising out of' clause is not on the precise cause of the accident but on the general nature of the operation in the course of which the injury was sustained" (*Hunter Roberts Constr. Group, LLC v Arch Ins. Co.*, 75 AD3d 404, 408 [1st Dept

[* 7]

2010]; *see Regal Constr. Corp. v National Union Fire Ins. Co. of Pittsburgh, PA,* 15 NY3d 34, 38 [2010]). In an additional insured context, "arising out of" applies where there is "some causal relationship between the injury and the risk for which coverage is provided" (*Admiral Ins. Co. v American Empire Surplus Lines Ins. Co.*, 96 AD3d 585, 588 [1st Dept 2012]). "Where . . . the loss involves an employee of the named insured, who is injured while performing the named insured's work under the subcontract, there is a sufficient connection to trigger the additional insured 'arising out of' operations' endorsement and fault is immaterial to this determination" (*id.* at 589, quoting *Hunter,* 75 AD3d at 408; *see National Union,* 103 AD3d at 474).

Walls was injured while he was performing Enclos's work. In New York, that means that the injury arose out of or was "caused by" Enclos's work. Thus, the Travelers policy would provide additional insured coverage for Turner, without Turner needing to prove that Enclos bears any liability for the accident.

In regard to Missouri law,

> "[t]he insurance language 'arising out of' has been interpreted by Missouri courts to be a very broad, general and comprehensive phrase to mean 'originating from' or 'having its origins in' or 'growing out of' or 'flowing from.' . . . The phrase 'arising out of' is more expansive than the words 'caused by' used in some policies. When the former phrase is used in a liability policy, an unbroken chain of events need not be established but rather a simple casual relationship must exist between the accident or injury and the activity of the insured. The causation standard is not elevated to the strict 'direct and proximate cause' standard of general tort law"

(*Colony Ins. Co. v Pinewoods Enters., Inc.*, 29 F Supp 2d 1079, 1083 [ED MO 1998] [citations omitted]; *see Cincinnati Ins. Co. v Missouri Hwys. & Transp. Commn.,* 2014 WL 4594207, *12, 2014 US Dist LEXIS 128394, *33-34 [WD MO 2014]; *Walden v Smith,* 427 SW3d 269, 275 [Mo Ct App 2014]).

In Missouri, "arising out of" has a broader meaning than "caused by" (*Schmidt v Utilities Ins. Co.*, 353 Mo 213, 219, 182 SW2d 181, 183 [1944]. "The words 'arising out of', we believe, are ordinarily understood to mean 'originating from' or 'having its origin in,' 'growing out of or 'flowing from'" (*id.*, 353 Mo at 219, 182 SW2d at 184). The phrase "caused by" "is close in meaning to the 'but for' test for causation in fact (*Safeco Ins. Co. of Am. v Stephenson*, 2008 WL 351006, *3, 2008 US Dist LEXIS 8803, *7-8 [WD MO 2008]). A defendant is liable where the injury or wrong would not have occurred but for its conduct (*Richey v Philipp,* 259 SW3d 1, 8 [Mo Ct App 2008]).

Under Missouri law, in order to qualify for additional insured coverage, Turner would have to show causation in fact, namely, that Walls would not have been injured but for Enclos's acts or omissions. New York law and Missouri law differ in the interpretation of "caused by." The difference could lead to significantly different outcomes. Turner has a much better chance of receiving additional insured coverage under New York law than under Missouri law. Since a conflict of laws exists, the court must conduct a choice-of-law inquiry to decide whether New York or Missouri law applies.

New York law or Missouri law - choice of law

New York applies the "center of gravity" or "grouping of contacts" analysis to determine the choice of law in contract cases (*Matter of Midland Ins. Co.,* 16 NY3d 536, 543 [2011]; *Zurich Ins. Co. v Shearson Lehman Hutton, Inc.*, 84 NY2d 309, 317 [1994]). The purpose of the analysis is to determine which state has the most significant relationship to the parties and the transaction (*Matter of Midland*, 16 NY3d at 543–44). The court takes into account where the contract was negotiated, where it was made and performed, and where the contracting parties are

domiciled and conduct their businesses (*Zurich,* 84 NY2d at 317, citing Restatement [Second] of Conflict of Laws § 188 [1], [2]). In the context of liability insurance contracts, the jurisdiction with the most "significant relationship to the transaction and the parties" will generally be the jurisdiction "which the parties understood was to be the principal location of the insured risk ... unless with respect to the particular issue, some other [jurisdiction] has a more significant relationship" (*Zurich,* 84 NY2d at 318 [citation and internal quotation marks omitted]). When a policy covers risks in multiple states, the domicile of the insured is regarded as a proxy for the principal location of the insured risk (*Matter of Midland,* 16 NY3d at 544; *Certain Underwriters at Lloyd's, London v Foster Wheeler Corp.*, 36 AD3d 17, 24 [1st Dept 2006], *affd* 9 NY3d 928 [2007] [from now on, *Foster Wheeler*). The insured is considered to be domiciled in the state where its principal place of business is located (*id.*).

The Declarations page of the Travelers policy identifies CH Holdings USA, Inc. (CH Holdings), with a St. Louis, Missouri address, as the first named insured, and states the name and address of an agent or broker in Missouri. Travelers alleges that the policy was delivered to CH Holdings at its Missouri location. The policy provides that the first named insured on the Declarations page is responsible for paying all premiums.

The Named Insured Endorsement on the Travelers policy lists thirteen companies, including CH Holdings and four companies with the name of Enclos. One Enclos company is stated to be in Canada and another in New Brunswich (sic). The Designated Locations General Aggregate Limit Endorsement lists 21 addresses in Missouri, Colorado, Tennessee, Nevada, Maryland, Iowa, California, New York, Minnesota, Indiana, Florida, Connecticut, Pennsylvania, the Philippines, and Canada. Separate additional insured endorsements name companies in

Nevada, Massachusetts, Pennsylvania, California, and other states. The policy includes endorsements of changes for New York, Michigan, Texas, and other states.

The parties do not clarify the location of Enclos and its relationship with the first named insured, CH Holdings. The third-party summons in the Walls action lists a New York address for Enclos. The third-party complaint states that Enclos is a foreign corporation authorized to conduct business in New York, that it is a domestic New York corporation, and that it maintains a principal place of business in Minnesota. The contract between Enclos and DASNY lists Enclos at a New York City address.

A principal case involving choice of law in the First Department is *Foster Wheeler Corp.* (36 AD3d 17), a 2006 case which has been frequently cited. Thousands of underlying claims based on asbestos exposure were asserted against Foster Wheeler, the insured. Foster Wheeler conducted its operations throughout the United States. For 62 years, Foster Wheeler had a principal place of business in New York. It then moved to New Jersey, its location at the time of the First Department action. In New Jersey, Foster Wheeler purchased insurance polices from multiple insurers. Most of the insurers were licensed to do business in New York and New Jersey.

The First Department used the grouping of contacts analysis to determine which state's law should decide the method of apportioning defense and indemnity costs. The insurers favored New York law, while Foster Wheeler favored New Jersey law. As the insured risks were nationwide, the law could not be based on the location of the risks, and "at the time the . . . policies were issued, the parties would [not] have understood any one state to have constituted, in a literal sense, 'the principal location of the insured risk'" (*id.* at 22). The court proceeded to

weigh the grouping of contacts according to "broader choice-of-law principles," which included the "governmental interests implicated by an insured's claim against an insurer of risks located in multiple states . . ." (*id.*). The place with "the most interest in the problem [should have] paramount control over the legal issues arising out of a particular factual context . . ." (*id.* [citation and internal quotation marks omitted]). States have a governmental interest in regulating conduct within their borders, including that of insurance companies, and assuring that domiciliaries receive fair treatment from insurers. The court determined that New Jersey had the greater governmental interest, as the insured was domiciled there and the parties knew that at the time of contracting. Applying the law of New Jersey was more likely to conform to the parties' expectations than applying the law of New York, and promote the parties' need for "certainty, predictability, and uniformity of result" in their dealings with each other (*id.* at 23 [citation and internal quotation marks omitted]). Thus, the court chose the law of the named insured's place of domicile, but not because that was the principal location of the insured risk.

Where the covered risks were spread over multiple states, other cases (citing *Foster Wheeler*, 36 AD3d 17) applied the law of the state of the insured's domicile (*Matter of Midland*, 16 NY3d at 543; *FC Bruckner Assoc., L.P. v Fireman's Fund Ins. Co.*, 95 AD3d 556, 556-557 [1st Dept 2012]; *Liberty Surplus Ins. Corp. v National Union Fire Ins. Co. of Pittsburgh, PA*, 67 AD3d 420, 420-421 [1st Dept 2009]).

Later the First Department reached a conclusion that seemed to diverge from *Foster Wheeler* (*Illinois Natl. Ins. Co. v Zurich Am. Ins. Co.*, 107 AD3d 608 [1st Dept 2013]). In that choice-of-law case, the injured person was the employee of a subcontractor of the contractor. The contractor sought additional insured coverage from the subcontractor's policy. *Foster*

Wheeler was deemed inapplicable, as it involved claims throughout the country. The court noted that in the case before it, "[w]hile, in theory, the . . . policy provides to [the subcontractor's parent company], insurance covering risks in multiple states, it is clear that the parties understood, in adding [the contractor] as an additional insured, that the "'principal location of the insured risk'" was in New York, where the work took place" (*Illinois Natl.*, 107 AD3d at 609, quoting *Zurich,* 84 NY2d at 317-318). Although the policy insured risks in multiple states, in the case before the First Department the subcontract was for services in New York, the contractor formed a joint venture in New York to perform said services, the accident and litigation were in New York, one insurer was a New York company, the other was licensed to do business in New York, and the demand letters and responses were sent from the parties' New York offices. Hence, New York law was the proper choice.

The First Department cited *Illinois Natl.* in determining that New York law applied to a case in which the policy insured risks in more than one state but the claim was in New York (*Davis & Partners, LLC v QBE Ins. Corp.*, 113 AD3d 544 [1st Dept 2014], *affg as mod* 38 Misc 3d 1215[A], 2013 NY Slip Op 50105[U] [Sup Ct, NY County 2013]). The contract in *Davis*, which required one contractor to carry insurance naming the other as additional insured, concerned a project in New York, "appear[ed] to have been executed" in New York, contained a choice-of-law provision naming New York as the forum and New York law as the governing choice of law, and the "'occurrence' under the policy" and the ensuing litigation were in New York (*id.*, 113 AD3d at 545). "As the 'principal location of the insured risk,' New York has "the most 'significant relationship to the transaction and the parties'" (*id.* quoting *Matter of Midland Ins. Co.,* 16 NY3d at 544).

In *Foster Wheeler* (36 AD3d 17), the policies insured risks in many states and the claims were in many states. The court chose the law of the state where the insured party had its principal location. In *Illinois Natl.* (107 AD3d 608), the policy also insured risks in multiple states, but the court chose the law based on the particular claim asserted in that case. There were not multiple claims from other states. New York law was chosen because the claim was most related to this state.

Although the Travelers policy insures risks in many states, those risks do not figure in this case. The particular insured risk was in New York. The construction contracts were formed in New York, the project was in New York, Turner is a New York company, and the underlying injury, claim, and litigation are in New York. Travelers is a Connecticut company doing business in New York. Liberty and Turner sent their demand letters from their New York addresses to Travelers in Connecticut and to CH Holdings in Missouri (Exs. F, G to the Vita Aff.). Travelers denied coverage in letters from a New York address (Ex. H to the Vita Aff.). Since the contacts with New York are more significant and numerous than the contacts with Missouri, New York law applies in this case.

That means that "caused by" is construed according to New York law.

Law of policy construction

The meaning of an insurance policy is found in its language, without reference to outside evidence (*Consolidated Edison Co. of N.Y. v Allstate Ins. Co.*, 98 NY2d 208, 221 [2002]; *Jacobson Family Invs., Inc. v National Union Fire Ins. Co. of Pittsburgh, PA,* 102 AD3d 223, 231 [1st Dept 2012]). An insurance policy is construed "in a way that affords a fair meaning to all of the language employed by the parties in the contract and leaves no provision without force

[* 14]

and effect" (*Consolidated,* 98 NY2d at 221-222 [citation and internal quotation marks omitted]). Endorsements must be read together with the policy; the policy retains its full force and effect, except as altered by the endorsement (*Kassis v Ohio Cas. Ins. Co.*, 12 NY3d 595, 599–600 [2009]; *Soho Plaza Corp. v Birnbaum*, 108 AD3d 518, 521 [2d Dept 2013]).

While an additional insured is understood to be an entity enjoying the same protection as the named insured, an endorsement can alter this rule by providing for different coverage (*id.*). An insurance policy may provide more or otherwise different coverage from that enjoyed by the named insured (*see Bovis Lend Lease LMB, Inc. v Great Am. Ins. Co.*, 53 AD3d 140, 154 [1st Dept 2008]).

Turner's status as additional insured

The decision in the underlying action states that Turner was the general contractor on the project (*Walls*, 2014 NY Slip Op 31061[U], *3). However, since the contract between Turner and SOM provides that Turner is the construction manager, the court will accept that as evidence that Turner was the construction manager on the project, and that Enclos's promise in its contract with DASNY to provide additional insured coverage for the construction manager applies to Turner.

Additional insured status is conferred by a blanket additional insured endorsement for any entity that the insured was required by a written contract to name as an additional insured (*see Aetna Cas. & Sur. Co. v National Union Fire Ins. Co.*, 228 AD2d 385, 385-386 [1st Dept 1996]). The contract between Enclos and DASNY is such a contract. That Turner is not named in the contract or the policy is of no moment. A party does not need to be identified by name to be an additional insured under a blanket endorsement (*Time Warner NY Cable LLC v Nova Cas. Co.*,

2013 WL 5188468, *2, 2013 NY Misc LEXIS 4138, *5, 2013 NY Slip Op 32184[U], *5 [Sup Ct, NY County 2013]). The party claiming insurance coverage bears the burden of proof of entitlement (*Tribeca Broadway Assoc., LLC v Mount Vernon Fire Ins. Co.*, 5 AD3d 198, 200 [1st Dept 2004]). Turner shows that it is an additional insured according to the Travelers policy.

Travelers' duty to defend Turner

An insurer's duty to defend is liberally construed (*Fieldston Prop. Owners Assn., Inc. v Hermitage Ins. Co., Inc.,* 16 NY3d 257, 264 [2011]). The duty to defend is broader than the duty to indemnify and does not take account of the insured's ultimate likelihood of prevailing on the merits of a claim (*id.*). The duty to defend arises whenever a complaint alleges facts that gives rise to the reasonable possibility of recovery under the policy (*Town of Massena v Healthcare Underwriters Mut. Ins. Co.*, 98 NY2d 435, 443, [2002]), "even though the facts outside the four corners of those pleadings indicate that the claim may be meritless or not covered" (*Savik, Murray & Aurora Constr. Mgt. Co., LLC v. ITT Hartford Ins. Group,* 86 AD3d 490, 494 [1st Dept 2011). The duty to pay is determined by the actual basis for the insured's liability to a third person and, unlike the duty to defend, is not measured by the allegations of the pleadings (*Servidone Constr. Corp. v Security Ins. Co. of Hartford,* 64 NY2d 419, 424 [1985]).

Walls's complaint alleges that Turner was the construction manager and the general contractor on the project and that it is liable for his injury. The BAE covers Turner for injuries caused by Enclos's work. Walls was Enclos's employee, which means that under New York law the injury arose out of or was caused by Enclos's work.

Travelers argues that nevertheless there is no additional insured coverage for Turner, because the BAE excludes anyone whose "independent acts or omissions" contributed to the

injury. Travelers alleges that the decision in *Walls* (2014 NY Slip Op 31061 [U]) shows that Turner was responsible for the accident. However, while the Walls court denied Turner's motion for summary judgment and retained the claims based on Labor Law §§ 200 and 241 against Turner, the court determined that Turner's liability was an issue of fact. Thus, this court cannot rule that Turner's independent acts or omissions caused the accident. Travelers has a duty to defend Turner in the Walls action.

Travelers states that it is the excess insurer. Under the BAE, Travelers is the primary insurer for additional insured parties. The BAE also states that Travelers will not share primary coverage with another primary insurer. The CGL part of the Travelers policy indicates that when there is other insurance providing primary coverage, Travelers will share with that insurance. However, the BAE modifies the other part of the policy, insofar as additional insureds are concerned.

Deductible Endorsement

Travelers contends that the deductible endorsement curtails the duty to defend. The deductible amount is $150,000. Turner does not deny Travelers' allegation that Turner's costs in the Walls action reached about $58,000 at the time that the parties made these motions. Turner claims that the deductible does not apply to it.

According to the definition in the Travelers policy, Turner is an insured, and the deductible applies to Turner. The deductible endorsement gives Travelers the option of participating in the insured's defense before the deductible amount is reached. If Travelers opts to participate, it has the option of paying all or part of costs incurred before the deductible amount is reached. If it pays any part of that amount, "you" must reimburse it.

"You" and "your" are defined in the policy as the named insured. Enclos is the named insured. This means that if Travelers defends Turner, the additional insured, Enclos, as the named insured, must reimburse Travelers for Turner's defense costs that are within the deductible amount of $150,000. When the costs exceed that amount, Travelers is responsible for the costs, unless another insurer must cover those costs. That leads to the next issue.

Liberty as a necessary party

A necessary party is one who must be added as a party in order for complete relief to be provided to the current parties or one that may be inequitably affected by the relief granted between the current parties (CPLR 1001). Travelers seeks dismissal based on the absence of Liberty as a party to this action.

CPLR 1001 does not apply to Liberty. Turner does not request any relief from Liberty. Travelers contends that Liberty is Turner's primary insurer, thus implying that Travelers is the excess insurer. As stated above, Travelers is the primary insurer for Turner, an additional insured, under the BAE.

Travelers does not need to pay Turner's costs until the costs exceed the deductible amount. Until then, assuming that there will be a question in that regard, there is no need to determine the priorities of coverage between the Travelers and the Liberty policies. At this time, Liberty does not fit the definition of a necessary party.

In addition, an insured "who has executed to his insurer either a loan or subrogation receipt . . . may sue or be sued without joining with him the person for or against whose interest the action is brought" (CPLR § 1004). Turner has entered into a loan receipt agreement with Liberty. Therefore, Turner remains the real party in interest (*Rockawway Blvd. Wrecking &*

Lumber Co. v Raylite Elec. Corp., 25 AD2d 842, 843 [1st Dept 1966]; *Skinner v Klein*, 24 AD3d 433 [1st Dept 1965]).

Declaratory Judgment

A declaratory judgment action requires a genuine dispute, that is, an actual ongoing controversy between interested parties with a stake in the outcome (CPLR 3001; *Megibow v Condominium Bd. of Kips Bay Towers Condominium, Inc.*, 38 AD3d 265, 266 [1st Dept 2007]; *Long Is. Light. Co. v Allianz Underwriters Ins. Co.*, 35 AD3d 253, 253 [1st Dept 2006]). Turner and Travelers have a genuine dispute regarding whether the insurer has a duty to defend and, perhaps ultimately, indemnify, Turner. Since such a duty exists (subject to the deductible), Turner's motion is granted and Travelers' motion is denied. An insurer may obtain a declaration absolving it of its duty to defend only when a comparison of the policy and the underlying complaint shows that, as a matter of law, "there is no possible factual or legal basis on which [the insurer] might eventually be held to be obligated to indemnify [the insured] under any provision of the insurance policy" (*Servidone,* 64 NY2d 419 at 424 [citation and internal quotation marks omitted]).

In conclusion, it is

ORDERED that the motion of plaintiff Turner Construction Company for partial summary judgment seeking a declaration that defendant Travelers Property Casualty Company of America is obligated to defend it in the underlying action entitled *Walls v Turner Constr. Co.*, index No. 108890/11, Supreme Court, New York County (the underlying action) is granted and it is further

ORDERED that the cross-motion for summary judgment by defendant Travelers Property

[* 19]

Casualty Company of America for summary judgment seeking a declaration that it has no duty to defend plaintiff and to dismiss the action is denied; and it is further

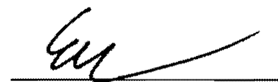
ADJUDGED and DECLARED that defendant Travelers Property Casualty Company of America has an obligation to defend plaintiff Turner Construction Company in the underlying action; and it is further

ORDERED that the balance of the action is severed and continued as against defendant Navigators Insurance Company.

This constitutes the decision, order and judgment of the court.

Dated: July 23, 2015

ENTER:



A.J.S.C.