

**Hunter Robert Constr. Group, L.L.C. v Travelers  
Indem. Co.**

2015 NY Slip Op 32062(U)

October 6, 2015

Supreme Court, New York County

Docket Number: 103583/12

Judge: Kelly A. O'Neill Levy

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This opinion is uncorrected and not selected for official publication.

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SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY

PRESENT: HON. KELLY O'NEILL LEVY  
Justice

PART 19

Index Number : 103583/2012  
HUNTER ROBERT CONSTRUCTION  
VS.  
TRAVELERS INDEMNITY  
SEQUENCE NUMBER : 002  
SUMMARY JUDGMENT

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
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

**Decided in accordance  
with the accompanying  
memorandum decision/order**

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

RECEIVED  
OCT 15 2015  
GENERAL CLERK'S OFFICE  
NYS SUPREME COURT - CIVIL

**FILED**  
OCT 15 2015  
NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 10-6-15

Kelly O'Neill Levy  
J.S.C.  
HON. KELLY O'NEILL LEVY

- 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

FOR KELL Y ORELL LEAY

as a business in 1963  
with the accompanying  
substantive information

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 19

-----X  
HUNTER ROBERTS CONSTRUCTION GROUP,  
L.L.C., GOUVERNEUR HEALTHCARE SERVICES,  
INC., an operating division of New York City Health  
and Hospitals Corporations, DORMITORY  
AUTHORITY OF THE STATE OF NEW YORK,  
CITY OF NEW YORK and NEW YORK CITY  
HEALTH AND HOSPITALS CORPORATION,

Plaintiffs,

Index No. 103583/12

-against-

THE TRAVELERS INDEMNITY COMPANY,  
EVEREST NATIONAL INSURANCE COMPANY,  
J. PETROCELLI CONTRACTING, INC., STARR  
INDEMNITY & LIABILITY COMPANY,  
NATIONAL CASUALTY COMPANY and  
R. SMITH RESTORATION, INC.,

Motion Sequence No. 002

**FILED**

Defendants.

OCT 15 2015

-----X  
**KELLY O'NEILL LEVY, J.:** **NEW YORK  
COUNTY CLERK'S OFFICE**

In this insurance coverage dispute, plaintiffs seek defense and indemnification in a wrongful death action captioned *Smith v Hunter Roberts Constr. Group, L.L.C.*, Index No. 102928/11 (Sup Ct, NY County) (hereinafter, the underlying action).

Plaintiffs Hunter Roberts Construction Group, L.L.C. (Hunter Roberts), Gouverneur Healthcare Services, Inc. (GHS), Dormitory Authority of the State of New York (DASNY), the City of New York (the City), and New York City Health and Hospitals Corporation (HHC) move, pursuant to CPLR 3212, for an order: (1) declaring that they are named as additional insureds under the insurance policy issued by defendant Travelers Indemnity Company (Travelers) procured by defendant J. Petrocelli Contracting, Inc. (Petrocelli) and under the insurance policy issued by defendant Everest National Insurance Company (Everest) procured by

Petrocelli; (2) declaring that Travelers and Everest are obligated to indemnify plaintiffs in the underlying action; (3) declaring that the insurance policy issued by nonparty Zurich North American Insurance Company (Zurich) to plaintiffs is excess over Travelers' insurance policy and that Zurich's policy will not contribute with Travelers' policy; (4) declaring that plaintiffs are entitled to all prior legal fees and expenses incurred in the underlying action; and (5) setting this matter down for an inquest on the issue of damages incurred by plaintiffs, including, but not limited to, legal fees, disbursements, costs, and expenses.

Defendant Travelers cross-moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint, declaring that it has no duty to indemnify plaintiffs in the underlying action, and declaring that it is not the sole primary insurer of plaintiffs.

Defendant Everest cross-moves, pursuant to CPLR 3212, for an order: (1) dismissing all claims by GHS, with prejudice; (2) declaring that the limits of Travelers' policy must be exhausted before Everest's policy may potentially be implicated; (3) declaring that Everest's policy is excess to the insurance policy issued by defendant Starr Indemnity & Liability Company (Starr) and that the limits of Starr's policy must be exhausted before Everest's policy may potentially be implicated; and (4) declaring that Everest's policy is excess to Zurich's policy and that the limits of Zurich's policy must be exhausted before Everest's policy may potentially be implicated.

Defendant Starr cross-moves, pursuant to CPLR 3212, for summary judgment dismissing plaintiffs' complaint and all cross claims against it, and declaring that it has no duty to defend or indemnify plaintiffs or Petrocelli in the underlying action.

## BACKGROUND

### *The Underlying Action*

In the underlying action, the plaintiffs, the estate of Richard Smith and Richard Smith's wife, Mary Smith, allege that, on January 19, 2011, Richard Smith fell to his death from the roof of the GHS facility located at 227 Madison Street in Manhattan (amended verified complaint, ¶ 63). The GHS facility was undergoing a complete renovation, which included the construction of a new six-story tower and renovation of the existing 13-story building. It is undisputed that the City is the owner of the premises, and that HHC operates the GHS facility. DASNY hired Hunter Roberts as the construction manager for the construction project on the premises. DASNY also hired Petrocelli as a general contractor for the project. Petrocelli was retained to complete "Core, Shell, and Infrastructure with Associated Asbestos Abatement" for the project. R. Smith Restoration, Inc. (RSR) was the roofing subcontractor hired by Petrocelli, and Richard Smith was its owner. Richard Smith was allegedly at the premises on the date in question to attend a meeting regarding an upcoming delivery of roofing materials.

The plaintiffs seek recovery against Hunter Roberts, GHS, DASNY, the City, and HHC under Labor Law §§ 240 (1), 241 (6), 200 and in common-law negligence. Mrs. Smith also asserts a claim for loss of consortium. In their answers, Hunter Roberts, DASNY, the City, and HHC assert, among other claims, claims for contractual indemnification against Petrocelli. Petrocelli commenced a third-party action against RSR, seeking contribution and common-law indemnification. Hunter Roberts and GHS subsequently brought a second third-party action against RSR, also seeking contribution, contractual indemnification, and common-law indemnification.

On March 26, 2014, the court (Tingling, J.) granted Hunter Roberts, DASNY, the City, and HHC summary judgment on their cross claims for contractual indemnification against Petrocelli, and also granted Hunter Roberts, DASNY, the City, and HHC summary judgment on their third-party claims for contractual indemnification against RSR (Shapiro affirmation in opposition to Travelers' cross motion, exhibit C).

On April 28, 2015, the First Department reversed Justice Tingling's March 26, 2014 decisions (*Smith v Hunter Roberts Constr. Corp., LLC*, 127 AD3d 647 [1st Dept 2015]). Noting that "[t]he indemnification provisions at issue require defendant Petrocelli and third-party defendant RSR to indemnify [Hunter Roberts, DASNY, the City, and HHC] for incidents arising from their work on a construction project at the Gouverneur Healthcare Services, Inc. (the GHS) facility" and that "it is uncontested that Richard Smith's death may have been suicide," the Court held that "[e]ven giving the indemnity provisions at issue the broadest possible construction, it cannot be said as a matter of law that the loss arose out of RSR's work on the project, especially given the testimony that RSR had ceased working on the GHS Project before the date of the incident" (*id.* at 648).

On June 24, 2015, Justice Kern denied the plaintiffs' motion for partial summary judgment under Labor Law § 240 (1), finding issues of fact as to whether the incident was an accidental fall or a suicide, whether Richard Smith was an employee when the incident occurred, whether he was engaged in a protected activity, and whether any safety devices provided were adequate. Justice Kern also denied the defendants' motions on the plaintiffs' Labor Law § 241 (6) claim based upon a violation of 12 NYCRR 23-1.7 (d) concerning slipping hazards. With respect to plaintiffs' Labor Law § 200 and common-law negligence claims, Justice Kern

determined that there were issues of fact as to whether Hunter Roberts had constructive notice of snow and ice, but granted dismissal of these claims against the City, HHC, and DASNY.<sup>1</sup>

### *The Trade Contracts*

The DASNY/Hunter Roberts contract required Hunter Roberts to procure a policy naming DASNY, the City, HHC, and GHS as additional insureds and that the policy be “endorsed to be primary as respects the coverage afforded the Additional Insureds” (Shapiro affirmation in support, exhibit V, art. IX).

The DASNY/Petrocelli contract required Petrocelli to obtain commercial general liability insurance naming DASNY, “the Client,” “the Construction Manager”, and “other entities as additional insured as specified on the Dormitory Authority Sample Certificate of Insurance in the Supplement to Information for Bidders” (*id.*, appendix A, exhibit M, § 15.01). The sample certificate of insurance provides that “[t]he following are [a]dditional [i]nsureds under [g]eneral [l]iability as respects this project: The City of New York, the New York City Health and Hospitals Corporation, the Construction Manager and the Dormitory Authority of the State of New York as additional insureds” (*id.*).

The Petrocelli/RSR contract required RSR to procure commercial general liability insurance and states as follows with respect to such insurance:

- “c. [Petrocelli], Owner and all other parties who [Petrocelli] is required to name as additional insureds by any contract, shall be included as insureds on the CGL, using ISO Additional Insured Endorsement CG 20 10 11 85 or an endorsement providing equivalent or broader coverage to the additional insureds. The coverage provided to the additional insureds under the policy issued to [RSR] shall be at least as broad as the coverage provided to [RSR]

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<sup>1</sup>On March 26, 2014, GHS was dismissed from the underlying action (Shapiro affirmation in opposition to Travelers’ cross motion, exhibit C).

under the policy. Coverage for the additional insureds shall apply as Primary and Non-contributing Insurance before any other insurance or self-insurance, including and deductible, maintained by, or providing to, the additional insureds.

\* \* \*

“3) Commercial Umbrella

\* \* \*

- b. Umbrella coverage must include as insureds all entities that are additional insureds on the CGL.
- c. Umbrella coverage for such additional insureds shall apply as primary before any other insurance of self-insurance, including any deductible, maintained by, or provided to, the additional insured other than the CGL, Auto Liability and Employers Liability coverages maintained by the Subcontractor”

(*id.*, exhibit O at rider A1).

*The Insurance Policies*

*Travelers’ Policy*

Travelers issued a commercial general liability policy to Petrocelli, policy number DTNY-CO-0297P163-IND-10, for the period from November 1, 2010 through November 1, 2011 (*id.*, exhibit N at TRAV 000001). Travelers’ policy has an each occurrence limit of \$1,000,000 and \$2,000,000 in the aggregate (*id.* at TRAV 000013).

Travelers’ policy contains a blanket additional insured endorsement that provides, in pertinent part, as follows:

“WHO IS AN INSURED – (Section II) is amended to include any person or organization you are required to include as an additional insured on this policy by a written contract or written agreement in effect during this policy period and signed and executed by you prior to the loss for which coverage is sought. The person or organization does not qualify as an additional insured with respect to the independent

acts or omissions of such person or organization. The person or organization is only an additional insured with respect to liability caused by ‘your work’ for that additional insured”

(*id.* at TRAV 000065). “Your work” is defined as follows:

“22. ‘Your work’:

a. Means:

- (1) Work or operations performed by you or on your behalf;  
and
- (2) Materials, parts or equipment furnished in connection with such work or operations.

b. Includes:

- (1) Warranties or representations made at any time with respect to the fitness, quality, durability, performance or use of ‘your work’, and
- (2) The providing of or failure to provide warnings or instructions”

(*id.* at TRAV 000032-000033).

*Everest’s Policy*

Everest issued a commercial excess liability policy to Petrocelli, policy number 71C4000243-101, for the period from November 1, 2010 through November 1, 2011 (*id.*, exhibit P at P 00356). Everest’s policy has an each occurrence limit of \$10,000,000 (*id.*).

Everest’s policy provides as follows with respect to who is an insured:

“SECTION II – WHO IS AN INSURED

The following persons or organizations are insured under this insurance:

1. Any person or organization qualifying as such under the ‘first underlying insurance’.

2. Any additional insured qualifying as such under the ‘first underlying insurance’, but only:
  - a. To the extent of the insurance provided the additional insured under the ‘first underlying insurance’, but not otherwise excluded by this policy; and
  - b. Where coverage is required to be provided to an additional insured under a contract or agreement. However, the Limits of Insurance afforded the additional insured in this paragraph shall be the lesser of the following:
    - i. The minimum limits of insurance required in the contract or agreement between you and the additional insured; or
    - ii. The Limits of Insurance shown in the Declarations of this policy”

(*id.* at P 00360).

*Zurich’s Policy*

Zurich issued a commercial general liability policy to Hunter Roberts, policy number GLO 3867383-03, for the period from January 1, 2011 through January 1, 2012 (*id.*, exhibit Q, common policy declarations page). Zurich’s policy has an each occurrence limit of \$2,000,000 (*id.*, commercial general liability coverage part declarations page).

Zurich’s policy contains a blanket additional insured endorsement, which provides:

“WHO IS AN INSURED IS AMENDED TO INCLUDE AS AN INSURED ANY PERSON, ORGANIZATION, STATE OR OTHER POLITICAL SUBDIVISION, TRUSTEE OR ESTATE FOR WHOM YOU HAVE AGREED IN WRITING TO PROVIDE LIABILITY INSURANCE, BUT:

THE INSURANCE PROVIDED BY THIS AGREEMENT:

1. APPLIES ONLY TO ‘BODILY INJURY’, ‘PERSONAL INJURY’, OR ‘PROPERTY DAMAGE’ ARISING OUT OF:
  - A. ‘YOUR WORK’; OR

\* \* \*

3. THIS ENDORSEMENT DOES NOT APPLY TO AN ADDITIONAL INSURED WHICH HAS BEEN ADDED TO THIS POLICY BY AN ENDORSEMENT SHOWING THE ADDITIONAL INSURED IN A SCHEDULE OF ADDITIONAL INSUREDS, AND WHICH ENDORSEMENT APPLIES SPECIFICALLY TO THAT IDENTIFIED ADDITIONAL INSURED”

(*id.* at form U-GL-1114-A-CW).

*Starr's Policy*

Starr issued a commercial general liability policy to RSR, policy number WCSICON30008610, for the period from April 1, 2010 through April 2, 2011 (Marra affirmation in support, exhibit I, declarations page). Starr's policy contains an each occurrence limit of \$1,000,000 (*id.*).

Starr's policy contains the following language as to who is an insured:

- “A. **Section II – Who Is An Insured** is amended to include as an insured 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. Such person or organization is an additional insured only with respect to liability arising out of your ongoing operations performed for that insured. A person's or organization's status as an insured under this endorsement ends when your operations for that insured are completed”

(*id.* at form CG 20 33 10 01).

*National Union Fire Insurance Company of Pittsburgh, Pa. 's Policy*

Nation Union Fire Insurance Company of Pittsburgh, Pa. (National Union) issued a commercial umbrella liability policy, policy number 15972684, to Hunter Roberts, for the period from January 1, 2011 through January 1, 2012 (Shapiro affirmation in support, exhibit S,

declarations page). National Union's policy has an each occurrence limit of \$25,000,000 (*id.*).

*Plaintiffs' Tenders to Travelers, Everest, and Starr*

On April 1, 2011, plaintiffs requested defense and indemnification from Travelers and Everest (*id.*, exhibit W). In a letter dated April 4, 2011, Everest responded that it did not have any obligation to provide a defense or indemnification until all other insurance and underlying insurance had been exhausted (*id.*, exhibit Z). On August 26, 2011, Travelers agreed to provide additional insured coverage to plaintiffs pursuant to the terms and conditions of the blanket additional insured endorsement, referencing the language of the policy (*id.*, exhibit X).

By letter dated September 23, 2011, plaintiffs requested clarification of Travelers' letter (*id.*, exhibit Y). Travelers reiterated that there would be no coverage for plaintiffs' independent acts or omissions pursuant to the terms of the policy (*id.*).

On April 1, 2011, April 15, 2011, and August 8, 2011, plaintiffs wrote to Starr, requesting additional insured coverage under RSR's policy (5/28/14 Archuleta aff, exhibit B). Starr did not issue a notice of disclaimer.

### **PROCEDURAL HISTORY**

On August 12, 2012, plaintiffs commenced this declaratory judgment action, seeking declarations that they are additional insureds under Travelers' and Everest's policies, and that they are entitled to indemnification in the underlying action from Travelers and Everest. The amended complaint also seeks a declaration that the policies issued to plaintiffs are excess over the policies issued by Travelers and Everest.

On December 12, 2012, plaintiffs filed a separate declaratory judgment action under Index No. 158793/12 against Starr, National Casualty Company (NCC), and RSR. The

complaint seeks a declaration that plaintiffs are additional insureds under policies issued by Starr and NCC; that Starr owes plaintiffs a defense and indemnification in the underlying action; that NCC owes plaintiffs indemnification in the underlying action; and that Starr and NCC are obligated to reimburse plaintiffs for defense costs, fees, and expenses in the underlying action.

On October 30, 2013, the court (Tingling, J). consolidated the first action and the second action under this index number (Marra affirmation in support, exhibit K).

### DISCUSSION

“[T]he proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law” (*Ostrov v Rozbruch*, 91 AD3d 147, 152 [1st Dept 2012]; *see also Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). “Once such a prima facie showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to raise material issues of fact which require a trial of the action” (*Cabrera v Rodriguez*, 72 AD3d 553, 553-554 [1st Dept 2010]). “On a motion for summary judgment, issue-finding, rather than issue-determination, is key” (*Shapiro v Boulevard Hous. Corp.*, 70 AD3d 474, 475 [1st Dept 2010]). If there is any doubt as to the existence of a triable issue of fact, summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]).

#### **A. Whether Plaintiffs Qualify as Additional Insureds on Travelers and Everest’s Policies and Whether They Are Covered for the Claims in the Underlying Action**

Plaintiffs contend that they are additional insureds on Travelers and Everest’s insurance policies. It is the insured’s burden to establish coverage and a duty to indemnify (*see Consolidated Edison Co. of N.Y. v Allstate Ins. Co.*, 98 NY2d 208, 218 [2002]; *Stout v I E. 66<sup>th</sup>*

*St. Corp.*, 90 AD3d 898, 902 [2d Dept 2011]). The “well-understood meaning” of “additional insured” is “an entity enjoying the same protection as the named insured” (*Pecker Iron Works of N.Y. v Traveler’s Ins. Co.*, 99 NY2d 391, 392 [2003] [internal quotation marks and citation omitted]). By letter dated August 26, 2011, Travelers acknowledged that Hunter Roberts, DASNY, the City, and HHC were additional insureds under its policy issued to Petrocelli and agreed to defend them in the underlying action (Shapiro affirmation in support, exhibit X). Accordingly, Hunter Roberts, DASNY, the City, and HHC are entitled to a declaration that they are additional insureds under Travelers’ policy.<sup>2</sup>

Everest’s policy states that “[a]ny additional insured qualifying as such under the ‘first underlying insurance’” also qualifies as an insured under Everest’s policy (*id.*, exhibit P at P 00360). The “first underlying insurance” is defined as Travelers’ policy (*id.* at P 00367). Thus, plaintiffs qualify as additional insureds under Everest’s policy if they qualify as additional insureds under Travelers’ policy. As noted above, Travelers’ blanket additional insured endorsement provides as follows:

“WHO IS AN INSURED – (Section II) is amended to include any person or organization you are required to include as an additional insured on this policy by a written contract or written agreement in effect during this policy period and signed and executed by you prior to the loss for which coverage is sought. The person or organization does not qualify as an additional insured with respect to the independent acts or omissions of such person or organization. The person or organization is only an additional insured with respect to liability caused by ‘your work’ for that additional insured”

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<sup>2</sup>In their cross motions, Travelers and Everest seek declarations that GHS is not covered under their policies. Plaintiffs have not disputed that Petrocelli was not required to name GHS as an additional insured on Travelers’ policy or Everest’s policy. Accordingly, Travelers and Everest are entitled to declarations that they are not obligated to defend or indemnify GHS in the underlying action.

(*id.*, exhibit N at TRAV 000065). Travelers’ policy also provides that “your work” means “[w]ork or operations performed by you or on your behalf” and “[m]aterial, parts or equipment furnished in connection with such work or operations” (*id.* at TRAV 000032-000033).

It is undisputed that Petrocelli’s contract with DASNY required it to name Hunter Roberts, DASNY, the City, and HHC as additional insureds; thus, these entities qualify as “any person or organization [Petrocelli was] required to include as an additional insured on [Travelers’] policy by written contract or written agreement” (*id.*, exhibit N at TRAV 000065).

Plaintiffs contend that no potential limitation in Travelers’ additional insured endorsement applies here. They argue, with respect to the second sentence of the endorsement, that the phrase “independent acts or omissions” in Travelers’ policy is ambiguous.

“As with any contract, unambiguous provisions of an insurance contract must be given their plain and ordinary meaning . . . and the interpretation of such provisions is a question of law for the court” (*White v Continental Cas. Co.*, 9 NY3d 264, 267 [2007] [citation omitted]). If the policy terms are ambiguous, the parties may submit extrinsic evidence as an aid in construction, and any ambiguity must be construed in favor of the insured and against the insurer (*Matter of Mostow v State Farm Ins. Cos.*, 88 NY2d 321, 326 [1996]; *State of New York v Home Indem. Co.*, 66 NY2d 669, 671 [1985]; *242-44 E. 77<sup>th</sup> St., LLC v Greater N.Y. Mut. Ins. Co.*, 31 AD3d 100, 105 [1st Dept 2006]). Ambiguity is present in a contractual provision where it is “reasonably susceptible of more than one interpretation” (*Chimart Assoc. v Paul*, 66 NY2d 570, 573 [1986]). Contract language is unambiguous if it has “a definite and precise meaning, unattended by danger of misconception in the purport of the [contract] itself, and concerning which there is no reasonable basis for a difference of opinion” (*Breed v Insurance Co. of N. Am.*,

46 NY2d 351, 355 [1978], *rearg denied* 46 NY2d 940 [1979]).

Although “independent acts or omissions” is not defined in the policy, the court finds that this language is “reasonably susceptible of only one meaning” (*White*, 9 NY3d at 267 [internal quotation marks and citation omitted]). “Independent” is defined as “[n]ot determined or influenced by someone or something else; not contingent” (American Heritage Dictionary of the English Language 890 [4<sup>th</sup> ed]). In this case, “independent” modifies “act,” which is defined as “[s]omething done or performed” and “omission,” which is defined as “[t]he act or an instance of omitting” and “[s]omething omitted or neglected” (*id.* at 16, 1227). In other words, Hunter Roberts, DASNY, the City, and HHC do not qualify as additional insureds with respect to their own acts or omissions.

Indeed, courts have construed similar endorsements excluding liability for independent acts and omissions as providing coverage where the alleged liability of the additional insured is vicarious. In *Wilson Cent. School Dist. v Utica Mut. Ins. Co.* (123 AD3d 920, 921 [2d Dept 2014]), an insurance policy’s additional insured endorsement stated that a school district was an additional insured on a policy issued to a bus service, but only:

“[t]o the extent that such additional insured is held liable for your acts or omissions arising out of and in the course of ongoing operations performed by you or your subcontractors for such additional insured; or . . . [w]ith respect to property owned or used by, or rented or leased to you.”

The Court held that “[i]t is thus clear that the language of the endorsement covers only the District’s vicarious liability for the acts of the Bus Service” (*id.*; *see also National Union Fire Ins. Co. of Pittsburgh, PA v Greenwich Ins. Co.*, 103 AD3d 473, 474-475 [1st Dept 2013]).

In *St. Paul Fire & Mar. Ins. Co. v Hanover Ins. Co.* (187 F Supp 2d 584, 590 [ED NC

2000]), a case cited by plaintiffs, the court analyzed similar additional insured language to the language at issue in this case.<sup>3</sup> The court found that in order “to give meaning to the ‘independent acts’ provision of the endorsement, the court must construe the ‘arising out of the subcontractor’s work’ provision as one providing coverage in cases where the alleged liability is vicarious” (*id.* at 590). Therefore, the court analyzed the complaint “to determine whether the alleged liability arises from [the insured] subcontractor’s work, i.e., whether [the plaintiff] seeks to hold the [additional insured] liable for [the insured’s] acts or failure to act” (*id.*). Because the complaint did not mention vicarious liability, the court found that the additional insured’s liability did not arise out of the insured’s work, but instead out of its own independent acts and omissions (*id.* at 594). Therefore, the court found that the contractor that claimed status as an additional insured was not covered under the policy (*id.*).

*Edwards v Brambles Equip. Servs., Inc.* (2002 WL 31001835, 2002 US Dist LEXIS 16718, [ED La 2002], *aff’d* 75 Fed Appx 929 [5th Cir 2003]), another case relied upon by plaintiffs, also considered similar additional insured language.<sup>4</sup> The court agreed with the *St. Paul* court that “the only way to give effect to the language in the endorsement excluding liability arising from the independent acts and omissions is to interpret the provision granting coverage for liability ‘arising out of [the insured’s work]’ to provide coverage where the alleged liability of the additional insured is vicarious” (2002 WL 31001835, \*6, 2002 US Dist LEXIS 16718, \*19).

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<sup>3</sup>The blanket additional insured endorsement stated that “[t]his coverage does not include liability arising out of the independent acts or omissions of such person or organization” (*St. Paul Fire & Mar. Ins. Co.*, 187 F Supp 2d at 587).

<sup>4</sup>The blanket additional insured endorsement stated that “[t]his coverage does not include liability arising out of the independent acts or omissions of such person or organization” (*Edwards*, 2002 WL 31001835, \*1, 2002 US Dist LEXIS 16718, \*5).

The phrase “caused by” in the blanket additional insured endorsement “does not materially differ from the general phrase ‘arising out of’” (*W & W Glass Sys., Inc. v Admiral Ins. Co.*, 91 AD3d 530, 530 [1st Dept 2012]). In turn, the phrase “arising out of” has been defined to mean “originating from, incident to or having connection with” (*Regal Constr. Corp. v National Union Fire Ins. Co. of Pittsburgh, PA*, 15 NY3d 34, 38 [2010] [internal quotation marks and citation omitted]). The term “arising out of” “focuses not upon the precise cause of the accident . . . but upon the general nature of the operation in the course of which the injury was sustained” (*Consolidated Edison Co. of N.Y. v Hartford Ins. Co.*, 203 AD2d 83, 83 [1st Dept 1994]). The language in the additional insured endorsement granting coverage does not require a negligence trigger (*W & W Glass Sys.*, 91 AD3d at 531).

The court must review the complaint in the underlying action to determine whether plaintiffs’ alleged liability is vicarious and was caused by Petrocelli’s work. In view of the fact that the amended complaint seeks recovery under Labor Law §§ 240 (1) and 241 (6) against Hunter Roberts, DASNY, the City, and HHC (amended verified complaint, fourth, fifth, sixth causes of action), their alleged liability is vicarious (*see Brown v Two Exch. Plaza Partners*, 76 NY2d 172, 179 [1990] [liability for violation of Labor Law § 240 (1) “is not predicated on fault: it is imputed to the owner or contractor by statute and attaches irrespective of whether due care was exercised and without reference to principles of negligence”]; *see also Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 352 [1998] [“an owner or general contractor’s vicarious liability under section 241 (6) is not dependent on its personal capacity to prevent or cure a dangerous condition . . .”]). Stated otherwise, the amended complaint does not seek to hold Hunter Roberts, DASNY, the City, and HHC liable only for their independent acts or omissions. Additionally, the

amended complaint and bill of particulars in the underlying action allege that Richard Smith's death was caused by Petrocelli's work, given that he allegedly died while performing roofing work for RSR, Petrocelli's subcontractor, when he slipped and fell on snow and ice on the GHS project (amended verified complaint, ¶ 63; verified bill of particulars, ¶¶ 8, 14). Therefore, Hunter Roberts, DASNY, the City, and HHC are covered for the claims in the underlying action. As a result, Hunter Roberts, DASNY, the City, and HHC are entitled to a declaration that they are additional insureds under Everest's policy for amounts above the limits of Travelers' policy.

**B. Travelers and Everest's Duty to Indemnify Plaintiffs**

Plaintiffs seek a declaration that Travelers and Everest are obligated to indemnify them in the underlying action. In their cross motions, Travelers and Everest argue that there are questions of fact as to whether plaintiffs will be held liable for their independent acts or omissions, and as to whether Smith's death was caused by Petrocelli's work.

While an insurer's duty to defend its insured is determined by the allegations of the complaint, "[t]he duty to indemnify 'is determined by the actual basis for the insured's liability to a third person'" (*Atlantic Mut. Ins. Co. v Terk Tech. Corp.*, 309 AD2d 22, 28 [1st Dept 2003], quoting *Servidone Constr Corp. v Security Ins. Co. of Hartford*, 64 NY2d 419, 424 [1985]). "[A]n insurer may be contractually bound to defend even though it may not ultimately be bound to pay, either because its insured is not factually or legally liable or because the occurrence is later proven to be outside the policy's coverage" (*Fitzpatrick v American Honda Motor Co.*, 78 NY2d 61, 65 [1991]). The duty to indemnify depends "on whether the loss, as established by the facts, is covered by the policy" (*Atlantic Mut. Ins. Co.*, 309 AD2d at 28).

Since there has been no determination in the underlying action that plaintiffs are

vicariously liable for Petrocelli's acts or omissions or that plaintiffs' liability was caused by Petrocelli's work, it is premature to grant any declaration that Travelers and Everest owe a duty to indemnify Hunter Roberts, DASNY, the City, and HHC. Indeed, a determination of liability in the underlying action is required prior to determination that an insurer owes a duty to indemnify (*see e.g. Greenwich Ins. Co. v City of New York*, 122 AD3d 470, 471 [1st Dept 2014] ["the duty to indemnify requires a determination of liability"] [internal quotation marks and citation omitted]; *Chunn v New York City Hous. Auth.*, 55 AD3d 437, 438 [1st Dept 2008] ["(w)hile the duty to defend is clear, issues of fact as to liability in the underlying personal injury action renders premature the conclusion that the insurers have a duty to indemnify [the additional insured]"]; *79<sup>th</sup> Realty Co. v X.L.O Concrete Corp.*, 247 AD2d 256, 257 [1st Dept 1998] ["a declaration that the insurer has a duty to indemnify the general contractor requires a determination that the underlying accident arose out of the subcontractor's performance of work under its contract with the general contractor, which must await a determination of liability in the underlying personal injury action"]]).

In opposition to Travelers' and Everest's cross motions, plaintiffs argue that the court should issue a declaration that Travelers and Everest owe a duty to indemnify them based upon Justice Tingling's March 26, 2014 decisions, based upon collateral estoppel and the doctrine of law of the case. Even if Justice Tingling's March 26, 2014 decisions were entitled to preclusive effect in this action, those decisions were reversed on appeal (*see Smith*, 127 AD3d at 648). As noted by the First Department, "[i]t is uncontested that Richard Smith's death may have been suicide" (*id.*). There is no genuine dispute that Travelers and Everest's policies would not cover suicide.

Plaintiffs also contend that Travelers and Everest waived their arguments concerning the “caused by” language in the additional insured endorsement. Waiver “is a voluntary and intentional relinquishment of a known right” (*Albert J. Schiff Assoc. v Flack*, 51 NY2d 692, 698 [1980]). “[W]here the issue is the existence or nonexistence of coverage (e.g., the insuring clause and exclusions), the doctrine of waiver is simply inapplicable” (*id.*). In this case, Travelers’ and Everest’s arguments concerning whether they will be required to indemnify plaintiffs because there are issues of fact as to whether Smith’s death was caused by Petrocelli’s work go to the heart of the issue of existence or nonexistence of coverage.

Furthermore, plaintiffs point out that, in the underlying action, Justice Kern granted the City, HHC, and DASNY summary judgment dismissing the underlying plaintiffs’ Labor Law § 200 and common-law negligence claims as against them. However, Justice Kern did not determine that plaintiffs herein are vicariously liable for Petrocelli’s acts or omissions pursuant to Labor Law §§ 240 (1) and 241 (6), or that their liability was caused by Petrocelli’s work. Rather, Justice Kern denied summary judgment on the Labor Law §§ 240 (1) and 241 (6) claims, finding issues of fact as to whether the incident was an accidental fall or suicide, whether Smith was an employee when the incident occurred, whether he was engaged in a protected activity and whether any safety devices that were provided were adequate.

Accordingly, plaintiffs’ request for a declaration that Travelers and Everest are obligated to indemnify them in the underlying action is denied. Travelers’ request that the complaint should be dismissed, without prejudice, because its duty to indemnify plaintiffs cannot be determined at this time, is denied.

### C. Starr's Cross Motion for Summary Judgment Dismissing the Complaint

Starr, RSR's insurer, moves for summary judgment dismissing the complaint, arguing that the incident did not arise out of RSR's ongoing operations.

As indicated above, Starr's additional insured endorsement provides as follows:

“**A. Section II – Who Is An Insured** is amended to include as an insured 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. *Such person or organization is an additional insured only with respect to liability arising out of your ongoing operations performed for that insured. A person or organization's status as an insured under this endorsement ends when your operations for that insured are completed*”

(Moroknek affirmation in support, exhibit F at form CG 20 33 10 01 [emphasis supplied]).

Starr argues that RSR had ceased operations one month before the incident, had no employees or equipment on the site, and had gone out of business or was about to go out of business. Starr contends that Smith was on site in his capacity as a consultant. Starr, however, does not dispute that RSR was required to procure insurance naming plaintiffs and Petrocelli as additional insureds.<sup>5</sup>

As noted previously, in the insurance context, the term “arising out of” has been defined to “mean originating from, incident to, or having connection with” (*Worth Constr. Co., Inc. v Admiral Ins. Co.*, 10 NY3d 411, 415 [2008], quoting *Maroney v New York Cent. Mut. Fire Ins. Co.*, 5 NY3d 467, 472 [2005]).

In *Worth, supra*, a case relied upon by Starr, the Court of Appeals held that liability did

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<sup>5</sup>Even though plaintiffs argue that Starr is bound by Justice Tingling's March 26, 2014 decisions based upon the law of the case doctrine and collateral estoppel, those decisions were overturned on appeal (*see Smith*, 127 AD3d at 648).

not arise out of a subcontractor's operations, as required for a general contractor to have coverage under an additional insured endorsement naming the contractor as an additional insured (*Worth*, 10 NY3d at 416). In that case, Pacific Steel, Inc. (Pacific) was a subcontractor hired to make and install a staircase on an apartment complex construction project (*id.* at 413). Pacific obtained a commercial general liability policy naming Worth Construction Co., Inc. (Worth), the general contractor as an additional insured “*but only with respect to liability arising out of your [Pacific's] operations*” (*id.* at 414 [emphasis in original]). After the stairs had been installed but before the walls had been raised, an ironworker slipped on fireproofing that had been applied to the stairs (*id.*). In the underlying action, in response to Pacific's motion for summary judgment dismissing the third-party complaint, Worth conceded that its negligence claims against Pacific were without merit (*id.* at 414-415). The Court of Appeals, therefore, held that there was no connection between the worker's accident and the risk for which coverage was intended; “[o]nce Worth admitted that its claims of negligence against Pacific were without factual merit, it conceded that the staircase was merely the situs of the accident” (*id.* at 416).

However, in *Regal*, *supra*, another case cited by Starr, the Court found a sufficient causal connection to trigger coverage. In that case, URS Corporation (URS) was hired as a construction manager for a renovation project at Rikers Island (*Regal Constr. Corp.*, 15 NY3d at 36). URS hired the plaintiff Regal Construction Corporation (Regal) as a prime contractor to perform general construction work, including demolition and renovation (*id.*). During the course of the project, Regal's project manager slipped on a freshly painted metal floor joist and fell (*id.*). The project manager claimed that an unnamed person from URS told him that URS employees had painted the joist (*id.* at 37). Regal procured an insurance policy from the plaintiff Insurance

Corporation of New York (INSCORP) naming URS as an additional insured “only with respect to liability *arising out of* Regal’s ongoing operations performed for URS” (*id.* at 36). The Court held that:

“[a]lthough Regal and INSCORP contend that LeClair’s injury did not arise out from Regal’s demolition and renovation operations performed for URS, but that it was URS employees who painted the joist on which LeClair slipped, the focus of the inquiry ‘is not on the precise cause of the accident but the general nature of the operation in the course of which the injury was sustained’ (*Worth*, 10 NY3d at 416 [internal quotation marks and citation omitted]). Accordingly, the injury ‘ar[ose] out of’ Regal’s operations notwithstanding URS’s alleged negligence, and fell within the scope of the additional insured clause of the insurance policy”

(*id.* at 38).

“It is well settled that an insurance company’s duty to defend is broader than its duty to indemnify. Indeed, the duty to defend is exceedingly broad and an insurer will be called upon to provide a defense whenever the allegations of the complaint suggest . . . a reasonable possibility of coverage. If, liberally construed, the claim is within the embrace of the policy, the insurer must come forward to defend its insured no matter how groundless, false or baseless the suit may be”

(*Automobile Ins. Co. of Hartford v Cook*, 7 NY3d 131, 137 [2006] [internal quotation marks and citations omitted]). “An insurer may obtain a declaration absolving it of its duty to defend only when a comparison of the policy and the underlying complaint on its face 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’ (*Greenwich Ins. Co.*, 122 AD3d at 471, quoting *Servidone Constr. Corp.*, 64 NY2d at 424). Moreover, “[w]here . . . 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” (*Hunter Roberts Constr. Group, LLC v Arch Ins. Co.*, 75 AD3d 404, 408 [1st

Dept 2010])). In view of these principles, Starr has not shown, as a matter of law, that it may be relieved of its duty to defend plaintiffs or Petrocelli. As acknowledged by Starr, “[t]he complaint erroneously alleges that Richard Smith’s injuries and death while he was working for R. Smith Restoration, Starr’s named insured” (Starr’s memorandum of law in support at 4). Indeed, the amended verified complaint in the underlying action alleges that Smith was performing RSR’s work at the time of the incident (amended verified complaint, ¶ 63; verified bill of particulars, ¶¶ 8, 14).

In addition, there are issues of fact as to whether RSR’s work was ongoing at the time of Richard Smith’s death and as to whether RSR was working for Petrocelli on January 19, 2011, such that Starr may be obligated to indemnify plaintiffs or Petrocelli under the ongoing operations additional insured endorsement (*see Atlantic Mut. Ins. Co.*, 309 AD2d at 28 [“[t]he duty to indemnify ‘is determined by the actual basis for the insured’s liability to a third person’”] [internal quotation marks and citation omitted]). RSR was retained as a subcontractor to perform roofing work on the project (Shapiro affirmation in support, appendix A, exhibit O). James Petrocelli, Petrocelli’s vice president, testified that the only roofing contractor Petrocelli hired was RSR (Petrocelli EBT at 74). According to RSR’s foreman, on January 19, 2011, Richard Smith was scheduled to attend a logistics meeting regarding the delivery of roofing materials (Cieniewicz EBT at 95-97). Mr. Petrocelli further indicated that, on December 23, 2010, Richard Smith informed him that he was going to close down his business, but also stated that “[h]e didn’t say when. Just that he was closing down his business” (Petrocelli EBT at 423). RSR’s former estimator, John O’Donoghue, testified that in early 2011, RSR still had an open project at the GHS site (O’Donoghue EBT at 34). In addition, an OSHA report determined that

Smith's incident occurred because Smith "needed to take some measurements out on the roof for the job they were starting on Monday 1/24/11" (Marra affirmation in support, exhibit E).

O'Donoghue testified that he was advised that Smith went up on a roof to investigate a sketch that was sent by Hunter Roberts (O'Donoghue EBT at 22-24).

In light of the above, Starr's cross motion for summary judgment is denied.

#### **D. Priority of Coverage**

Plaintiffs also seek a declaration that Travelers' policy is primary over Zurich's policy. Travelers requests a declaration that it would not provide the sole primary insurance based upon the language of Zurich's policy.<sup>6</sup> Additionally, Travelers argues that the complaint should be dismissed, since plaintiffs have not joined Zurich or Chartis to this action. For its part, Everest seeks a declaration that its policy is excess to the policies issued by Travelers, Starr, and Zurich. Everest also contends that plaintiffs' motion should be denied because plaintiffs have failed to join Zurich to this action.

The court must first consider whether Zurich is a necessary party. Necessary parties are defined as "[p]ersons who ought to be parties if complete relief is to be accorded between the persons are parties to the action or who might be inequitably affected by a judgment in the action" (CPLR 1001 [a]). An action is subject to dismissal if there has been a failure to join a necessary party (CPLR 1003). "The rule serves judicial economy by preventing a multiplicity of

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<sup>6</sup>In opposition to Starr's cross motion, Travelers argues that Starr must provide primary and non-contributory coverage to plaintiffs. However, the court does not consider this request made in Travelers' opposition papers. "It is not as a rule sufficient to demand such relief in opposing affidavits or memoranda; an outright notice is required, to avoid any surprise at all to the original movant" (*Guggenheim v Guggenheim*, 109 AD2d 1012, 1012 [3d Dept 1985] [internal quotation marks and citation omitted]).

suits. It also insures fairness to third parties who ought not to be prejudiced or ‘embarrassed by judgments purporting to bind their rights or interest where they have had no opportunity to be heard’” (*City of New York v Long Is. Airports Limousine Serv. Corp.*, 48 NY2d 469, 475 [1979], quoting *First Natl. Bank of Amsterdam v Shuler*, 153 NY 163, 170 [1897]). However, “the joinder provision is to be employed to avoid dismissal” (*Matter of Red Hook/Gowanus Chamber of Commerce v New York City Bd. of Stds. & Appeals*, 5 NY3d 452, 459 [2005]). Pursuant to CPLR 1001, “[w]hen a person who should be joined . . . has not been made a party and is subject to the jurisdiction of the court, the court shall order him summoned” (CPLR 1001 [b]).

In *David Christa Constr., Inc. v American Home Assur. Co.* (41 AD3d 1211 [4th Dept 2007]), the defendant sought a declaration concerning priority of coverage. The Court held that:

“defendant is not entitled to declaratory relief, based on its failure to join a necessary party. According to defendant, its obligation to provide insurance coverage to plaintiff is excess to the primary obligation of United Pacific Insurance Company (United Pacific) and, because United Pacific is not a party to this action, it would not be bound by any declaration. Thus, until United Pacific is joined as a party and afforded an opportunity to be heard, the declaratory judgment sought herein cannot serve any legitimate purpose”

(*id.* at 1211-1212 [internal quotation marks and citations omitted]).

Here, the court finds that, at this juncture, plaintiffs are not entitled to declaratory relief in their favor because they have failed to join Zurich as a party to this action. “Thus, until [Zurich] is made a party and afforded an opportunity to be heard, the declaratory judgment sought herein cannot serve any legitimate purpose” (*id.* at 1212; *see also Structure Tone, Inc. v Eurotech Constr. Corp.*, 2011 NY Slip Op 32725[U] [Sup Ct, NY County 2011] [“the issue of priority (of coverage) between the Illinois and New Hampshire Insurance Company policies cannot be determined in the absence of the latter entity, which is a necessary party”]). That said, however,

Travelers' request for dismissal of the complaint is denied, because "dismissal for failure to join a necessary party should eventuate only as a last resort" (*Leeward Isles Resorts, Ltd. v Hickox*, 61 AD3d 622, 622 [1st Dept 2009], *appeal dismissed* 13 NY3d 814 [2009] [internal quotation marks and citation omitted]). Plaintiffs, therefore, are directed to join Zurich as a party plaintiff to this action within 30 days of service of a copy of this order with notice of entry.

*Hausman v Royal Ins. Co.* (153 AD2d 527 [1st Dept 1989]), a case relied upon by plaintiffs, is distinguishable. In that case, the First Department held that "there is no merit to the argument, accepted by the motion court, that Public Service Mutual, plaintiffs' other insurer, is a necessary party to this action. That insurer has already fulfilled its obligation to defend plaintiffs. Its rights cannot be adversely affected here" (*id.* at 529). Here, in contrast, plaintiffs have not demonstrated that Zurich is defending plaintiffs in the underlying action.

The court next turns to Travelers' request for a declaration that its policy would not provide the sole primary insurance. "In order to determine the priority of coverage among different policies, a court must review and consider all of the relevant policies at issue" (*BP A.C. Corp. v One Beacon Ins. Group*, 8 NY3d 708, 716 [2007]). Travelers contends that it would not provide the only primary insurance coverage, and that Zurich and Starr would be co-insurers (*see generally Tops Mkts. v Maryland Cas.*, 267 AD2d 999, 1000 [4th Dept 1999] ["(W)here insurance policies provide coverage for the same interest and against the same risk, concurrent coverage exists and two or more primary insurers will be held to be coinsurers who must contribute a ratable portion of the amount paid"]) [internal quotation marks and citation omitted]). Given that Zurich is not currently a party to this action, issues regarding contribution and how defense costs should be shared cannot be determined at this juncture (*see Turner Constr. Co. v*

*Kemper Ins. Co.*, 341 Fed Appx 684, 687 [2d Cir 2009] [“no other insurer is currently a party, and issues regarding contribution and allocation of the costs of defense among insurers should be reserved to proceedings in which those other insurers are parties”]). Therefore, the court denies the branch of Travelers’ cross motion seeking a declaration that it does not provide the sole primary insurance.

Everest also requests a declaration that its policy is excess over Travelers’ policy. None of the parties has opposed this request. Everest’s policy provides that Everest “will pay on behalf of the insured the amount of the ‘ultimate net loss’ in excess of the ‘underlying limits of insurance’” (Shapiro affirmation in support, exhibit P at P 00358). The “underlying limits of insurance” refers to Travelers’ policy with an each occurrence limit of \$1,000,000 (*id.* at P 00367). Accordingly, Everest is entitled to a declaration that its policy is excess over Travelers’ policy.

Everest also seeks a declaration that its policy is excess over Starr’s policy. Everest’s policy states that it “is excess over, and will not contribute with any ‘other insurance’, whether primary, excess, contingent or on any other basis” (*id.* at P 00362). As noted by Everest, Starr’s policy contains an endorsement which states that it “is primary insurance as respects our coverage to the additional insured, where the written contract or written agreement requires that this insurance be primary and non-contributory” (Marra affirmation in support, exhibit I, primary and non-contributory condition page). The Petrocelli/RSR contract provides that “[c]overage for the additional insured shall apply as Primary and Non-contributing Insurance before any other insurance or self-insurance, including an[y] deductible, maintained by, or provided to, the

additional insureds” (Shapiro affirmation in support, appendix A, exhibit O at rider A1).<sup>7</sup>

Therefore, Everest’s policy is excess over Starr’s policy, and Everest is entitled to a declaration to that effect (*see Pecker Iron Works of N.Y.*, 99 NY2d at 394 [“Pursuant to the policy provision at issue, Travelers agreed to provide primary insurance to any party with whom Upfront had contracted in writing for insurance to apply on a primary basis. When Upfront agreed to it, the policy provision was satisfied”]).

Finally, Everest requests a declaration that its policy is excess over Zurich’s policy. Since Zurich is not a party to this action, the court cannot properly declare Everest’s policy to be excess over Zurich’s policy (*see David Christa Constr., Inc.*, 41 AD3d at 1211-1212). Accordingly, this branch of Everest’s motion must be denied.

#### **E. Reimbursement for Legal Fees and Expenses in the Underlying Action**

Plaintiffs request a declaration that they are entitled to all prior legal fees and expenses incurred in the underlying action, and also ask for a hearing on the damages incurred, including, but not limited to, legal fees, disbursements, costs and expenses.

As Travelers has acknowledged that it has a duty to defend plaintiffs in the underlying action, it is obligated to reimburse plaintiffs for reasonable legal fees incurred in their defense of the underlying action (*see Serio v Public Serv. Mut. Ins. Co.*, 7 AD3d 277, 279 [1st Dept 2004];

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<sup>7</sup>In opposition to Everest’s request for a declaration that Everest’s policy is excess over Starr’s policy, Starr only argues that Everest failed to show that plaintiffs and Petrocelli qualify as additional insureds under Starr’s policy. However, as noted above, plaintiffs bear the burden of showing that they are covered under Starr’s policy (*see Consolidated Edison Co. of N.Y.*, 98 NY2d at 218). In addition, since the court has determined that the allegations of the complaint in the underlying action trigger Starr’s duty to defend plaintiffs, Everest is entitled to a declaration of priority of coverage in its favor (*see e.g. 1515 Broadway Fee Owner, LLC v Seneca Ins. Co., Inc.*, 90 AD3d 436, 437 [1st Dept 2011] [declaring priority of coverage where insurer had a duty to defend additional insureds]).

*ACP Servs. Corp. v St. Paul Fire & Mar. Ins. Co.*, 224 AD2d 961, 963 [4th Dept 1996]). “It is well established that an insured may not recover the expenses incurred in bringing an affirmative action against an insurer to settle its rights under the policy” (*New York Univ. v Continental Ins. Co.*, 87 NY2d 308, 324 [1995]; *see also West 56<sup>th</sup> St. Assoc. v Greater N.Y. Mut. Ins. Co.*, 250 AD2d 109, 114 [1st Dept 1998]). However, an insured may recover attorneys’ fees when the insured “has been cast in a defensive posture by the legal steps an insurer takes in an effort to free itself from its policy obligations” (*Mighty Midgets v Centennial Ins. Co.*, 47 NY2d 12, 21 [1979]). Here, plaintiffs commenced this declaratory judgment action seeking a determination of their rights under Travelers’ policy. As a result, plaintiffs would not be entitled to recover attorneys’ fees incurred in this declaratory judgment action. Accordingly, the court refers the issue of the amount of attorneys’ fees incurred in the underlying action to date to a Special Referee to hear and report with recommendations (*see W & W Glass Sys., Inc. v Admiral Ins. Co.*, 2010 NY Slip Op 32120[U], *affd* 91 AD3d 530 [1st Dept 2012] [referring the amount of defense costs incurred in underlying action to date to Special Referee to hear and report]).

### CONCLUSION

Accordingly, it is

**ORDERED** that the motion (sequence number 002) of plaintiffs Hunter Roberts Construction Group, L.L.C., Gouverneur Healthcare Services, Inc., an operating division of New York City Health and Hospitals Corporation, Dormitory Authority of the State of New York, the City of New York, and New York City Health and Hospitals Corporation is granted to the extent of: (1) declaring that Hunter Roberts Construction Group, L.L.C., Dormitory Authority of the State of New York, the City of New York, and New York City Health and Hospitals Corporation

are additional insureds under the insurance policy issued by defendant Travelers Indemnity Company (policy number DTNY-CO-0297P163-IND-10) procured by defendant J. Petrocelli Contracting, Inc. and under the insurance policy issued by defendant Everest National Insurance Company (policy number 71C4000243-101) procured by defendant J. Petrocelli Contracting, Inc.; and (2) referring the issue of the amount of attorneys' fees, costs, and expenses incurred by plaintiffs to a Special Referee to hear and report with recommendations, and is otherwise denied; and it is further

**ADJUDGED** and **DECLARED** that plaintiffs Hunter Roberts Construction Group, L.L.C., Dormitory Authority of the State of New York, the City of New York, and New York City Health and Hospitals Corporation are additional insureds under the insurance policy issued by defendant Travelers Indemnity Company (policy number DTNY-CO-0297P163-IND-10) procured by defendant J. Petrocelli Contracting, Inc. and under the insurance policy issued by defendant Everest National Insurance Company (policy number 71C4000243-101) procured by defendant J. Petrocelli Contracting, Inc.; and it is further

**ORDERED** that so much of the amended complaint that seeks indemnification from defendants Travelers Indemnity Company and Everest National Insurance Company is severed and continued; and it is further

**ORDERED** that the cross motion of defendant Travelers Indemnity Company for summary judgment is granted to the extent of dismissing all claims of plaintiff Gouverneur Healthcare Services, Inc. against it, and is otherwise denied; and it is further

**ADJUDGED** and **DECLARED** that defendant Travelers Indemnity Company is not obligated to defend or indemnify plaintiff Gouverneur Healthcare Services, Inc. in the action

captioned *Smith v Hunter Roberts Constr. Group, L.L.C.*, Index No. 102928/11 (Sup Ct, NY County); and it is further

**ORDERED** that the cross motion of defendant Everest National Insurance Company is granted to the extent of dismissing all claims of plaintiff Gouverneur Healthcare Services, Inc. against it, and declaring that the limits of defendant Travelers Indemnity Company's policy must be exhausted before defendant Everest National Insurance Company's policy may potentially be implicated, and that defendant Everest National Insurance Company's policy is excess to defendant Starr Indemnity & Liability Company's policy and that the limits of Starr Indemnity & Liability Company's policy must be exhausted before Everest National Insurance Company's policy may potentially be implicated, and is otherwise denied; and it is further

**ADJUDGED** and **DECLARED** that defendant Everest National Insurance Company is not obligated to defend or indemnify plaintiff Gouverneur Healthcare Services, Inc. in the action captioned *Smith v Hunter Roberts Constr. Group, L.L.C.*, Index No. 102928/11 (Sup Ct, NY County), and the limits of defendant Travelers Indemnity Company's policy must be exhausted before defendant Everest National Insurance Company's policy may potentially be implicated, and that defendant Everest National Insurance Company's policy is excess to defendant Starr Indemnity & Liability Company's policy and that the limits of Starr Indemnity & Liability Company's policy must be exhausted before Everest National Insurance Company's policy may potentially be implicated; and it is further

**ORDERED** that the cross motion of defendant Starr Indemnity & Liability Company for summary judgment is denied; and it is further

**ORDERED** that, within 30 days of service of a copy of this decision and order with notice of entry, plaintiffs shall serve Zurich North American Insurance Company with a supplemental complaint naming Zurich North American Insurance Company as a party plaintiff; and it is further

**ORDERED** that the issue of the amount of attorneys' fees incurred by plaintiffs Hunter Roberts Construction Group, L.L.C., Dormitory Authority of the State of New York, the City of New York, and New York City Health and Hospitals Corporation to date and for which defendant Travelers Indemnity Company is responsible is referred to a Special Referee to hear and report with recommendations, except that, in the event of and upon the filing of a stipulation of the parties, as permitted by CPLR 4317, the Special Referee, or another person designated by the parties to serve as referee, shall determine the aforesaid issue; and it is further

**ORDERED** that this branch of plaintiffs' motion is held in abeyance pending receipt of the report and recommendations of the Special Referee and a motion pursuant to CPLR 4403 or receipt of the determination of the Special Referee or the designated referee; and it is further

**ORDERED** that counsel are directed to the Rules of the Special Referees' Part<sup>8</sup> and plaintiffs shall, within 30 days from the date of this order, serve a copy of this order with notice of entry, together with a completed Information Sheet,<sup>9</sup> upon the Special Referee Clerk who is

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<sup>8</sup> Available at [www.nycourts.gov/courts/1jd/supctmanh/SR-JHO/Rules-SRP.pdf](http://www.nycourts.gov/courts/1jd/supctmanh/SR-JHO/Rules-SRP.pdf)

<sup>9</sup> Available at [www.nycourts.gov/supctmanh](http://www.nycourts.gov/supctmanh)

directed to place this matter on the calendar of the Special Referees' Part for the earliest convenient date.

This constitutes the decision and order of the court.

Dated: October 6, 2015

ENTER:

*Kelly O'Neill Levy*  
KELLY O'NEILL LEVY, A.J.S.C.

**HON. KELLY O'NEILL LEVY**

**FILED**

OCT 15 2015

NEW YORK  
COUNTY CLERK'S OFFICE