| **National Fire Ins. Co. of Hartford v Lexington Ins. Co.** |
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| 2015 NY Slip Op 32566(U) |
| October 26, 2015 |
| Supreme Court, New York County |
| Docket Number: 150973/12 |
| Judge: Joan A. Madden |
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 11

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NATIONAL FIRE INSURANCE COMPANY OF HARTFORD,

Plaintiff,

-against- Index No. 150973/12

LEXINGTON INSURANCE COMPANY, ADCO ELECTRICAL CORPORATION, SIRINA FIRE PROTECTION COMPANY and OLD REPUBLIC GENERAL INSURANCE COMPANY, Motion Sequence No. 004

Defendants.

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**JOAN A. MADDEN, J.:**

In this insurance coverage dispute, plaintiff National Fire Insurance Company of Hartford (National Fire) moves, pursuant to CPLR 3212, summary judgment seeking: (1) a declaration that defendant Old Republic General Insurance Company (Old Republic) has a duty to defend nonparty Americon Construction, Inc. (Americon) in the action captioned *Gallinaro v Americon Construction, Inc.*, Index No. 115323/09 (Sup Ct, NY County) (hereinafter, the underlying action) and to reimburse National Fire for all past costs incurred in defending Americon; and (2) a declaration that Old Republic owes a duty to indemnify Americon in the underlying action. Old Republic and its insured, defendant Sirina Fire Protection Company (Sirina), oppose the motion.

**BACKGROUND**

In the underlying action, Joseph Gallinaro (Gallinaro) alleges that, on July 31, 2008, he tripped and fell while stepping down from a ladder on a construction project located at 299 Park Avenue, New York, New York. Americon was the general contractor on the job site, which

hired ADCO as an electrical subcontractor. Americon retained Sirina as the sprinkler subcontractor. Gallinaro was an employee of ADCO on the date of his accident. Gallinaro seeks recovery against, inter alia, Americon under Labor Law §§ 240 (1), 241 (6) and 200 and under principles of common-law negligence. Americon filed a third-party complaint against ADCO, seeking indemnification and contribution. Americon also filed a second second third-party complaint against Sirina, asserting claims for: (1) common-law indemnification, (2) contractual indemnification, (3) contribution, and (4) breach of contract for failure to procure insurance.

Gallinaro testified at his deposition held on June 13, 2012, that, on the date of his accident, he "[o]pen[ed] up [his] ladder, climb[ed] up [his] ladder, [went] into the ceiling and saw where [he] had to bring his power source to power any fixtures" (Gallinaro EBT at 32). Gallinaro stated that he "[c]ame down off [his] ladder, fell on debris" (*id.*). When asked what he tripped on, Gallinaro testified that it was a "[s]prinkler pipe nipple" (*id.*). Gallinaro testified that it was about three-quarters to one-inch in width, and approximately seven inches in length (*id.* at 36). Gallinaro indicated that there was more than one sprinkler nipple in the area where he fell; they were of different lengths, but of the same width (*id.*).

Sirina's representative, David Kuehn (Kuehn), testified that Sirina was performing work on the job on July 29, 2008 and July 30, 2008 (Kuehn EBT at 18-21). Kuehn testified that a purchase order dated August 4, 2008 related to the work that Sirina was performing on July 29, 2008 and July 30, 2008 (*id.* at 23). He further stated that Americon would not issue payment to the subcontractor until the subcontractor signed the purchased order (*id.* at 42).

National Fire issued a commercial general liability policy, policy no. G2 95944262, to Americon, for the period from September 1, 2007 through September 1, 2008 (Vigliano

affirmation in support, exhibit D). Pursuant to this policy, National Fire has been defending Americon in the underlying action (Harwood aff, ¶ 3).

Old Republic issued a commercial general liability policy, policy no. A-2CG-364008-02, to Sirina, for the period from January 24, 2008 through January 24, 2009 (*id.*, exhibit E, renewal declaration page). The policy contains an each occurrence limit of $1,000,000 and $2,000,000 in the aggregate (*id.*).

Old Republic's policy contains the following additional insured endorsement:

> **"ADDITIONAL INSURED – OWNERS, LESSEES OR CONTRACTORS – (FORM B)**
>
> This endorsement modified insurance provided under the following:
>
> COMMERCIAL GENERAL LIABILITY COVERAGE PART
>
> **SCHEDULE**
>
> **Name of Person or Organization:**
>
> WHERE REQUIRED BY WRITTEN CONTRACT
>
> * * *
>
> WHO IS AN INSURED (Section II) is amended to include as an insured the person or organization shown in the Schedule, but only with respect to liability arising out of 'your work' for that insured by or for you"

(*id.* at form CG 20 10 11 85).

Old Republic's policy defines "your work" as the following:

> "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 form CG 00 01 12 07).

Following Gallinaro's deposition, on July 13, 2012, National Fire provided notice to Old Republic of Gallinaro's claim, and requested defense and indemnification from Old Republic on behalf of Americon (*id.*, exhibit L). On November 12, 2012, Old Republic disclaimed coverage because there was no evidence that the accident arose out of Sirina's work and because National Fire's notice to Old Republic was late (*id.*, exhibit M).

On March 20, 2012, National Fire commenced the instant action, seeking declarations that ADCO's insurer, Lexington Insurance Company, and Old Republic are obligated to defend and indemnify Americon in the underlying action. The amended complaint requests: (1) a declaration that the underlying action is covered under Old Republic's insurance policy; (2) a declaration that Old Republic breached its obligation under its contract of insurance; (3) a declaration that Old Republic is obligated to defend Americon in the underlying action to the full extent of Old Republic's policy limits and to indemnify Americon for any judgment or settlement in the underlying action that would fall within the policy limits; (4) costs and disbursements incurred in this action; and (5) a declaration that Old Republic is required to reimburse National Fire for all of its attorneys' fees and other expenses incurred to date for the defense of the

underlying action, as well as all attorneys' fees, costs, and other expenses hereinafter incurred by National Fire (amended complaint, ¶¶ 45-59, wherefore clause).

National Fire now moves for summary judgment, arguing that Americon qualifies as an additional insured under Old Republic's policy. As support, National Fire relies on a purchase order dated September 4, 2008 between Americon and Sirina, which was executed by Sirina's representative on September 10, 2008 (Vigliano affirmation in support, exhibit I). National Fire points out that section 4 (e) of the purchase order's terms and conditions states that:

> "*Americon shall be named as an Additional Insured on Subcontractor's primary and excess liability policies to completely protect Americon from claims arising out of or resulting from Subcontractor's operations, attempted operations, or failure to perform operations under this Agreement*, whether such operations are or are to be performed by Subcontractor or by any of its Subcontractors or agents or by anyone directly or indirectly employed by any of them or by anyone else for whose acts any of them may be liable. Americon's agreement with the Owner is hereby incorporated by reference and any entities that Americon is required to name as an additional insured's [sic] are also to be named and included as additional insured's [sic] on the Subcontractor's insurance policies. *The insurance coverage provided for the benefit of Americon shall be provided on a primary and non-contributory basis by the Subcontractor and the Subcontractor shall have the changes made to its insurance policies to effect said coverage*. Any insurance maintained by Americon shall be maintained on an excess basis only and will not contribute with Subcontractor's insurance coverage until such time as the Subcontractor's primary and excess limits have been exhausted"

(*id.* [emphasis supplied]).

National Fire also contends that liability "arises out of [Sirina's] work," since Gallinaro, an employee of ADCO, was performing the job that he was hired to do when he fell from the ladder and injured himself on the sprinkler nipple placed there by Sirina. In addition, National Fire asserts that Old Republic's policy provides excess coverage for Americon's defense and liability costs. National Fire also maintains that Old Republic's four-month-delay in disclaiming

coverage renders its disclaimer ineffective as a matter of law.

In opposition to National Fire's motion, Old Republic contends that there are issues of fact as to whether a written contract existed between Americon and Sirina on July 31, 2008, which required Americon to be added as an additional insured under the policy issued by Old Republic to Sirina. In this regard, Old Republic argues that National Fire has failed to make a prima facie showing that Americon qualifies as an additional insured, since National Fire only submitted a September 4, 2008 purchase order, which does not pertain to the work being performed by Sirina on July 29, 2008 and July 30, 2008, and the September 4, 2008 purchase order was signed over a month after Gallinaro's accident. According to Old Republic, even if National Fire had submitted the August 4, 2008 purchase order, this purchase order was not executed until after Gallinaro's accident.

Additionally, Old Republic maintains that there are issues of fact as to: (1) whether Sirina ever received the 14 pages of terms and conditions containing the insurance procurement requirement; (2) whether Americon's August 4, 2008 purchase order or September 4, 2008 purchase order applies to Sirina's work obligations on-site prior to Gallinaro's July 31, 2008 accident; (3) whether AIA Document A-2011997 applies to Sirina as a subcontractor under the August 4, 2008 purchase order or the September 4, 2008 purchase order; (4) whether a prior course of dealing existed between Sirina and Americon; (5) whether Gallinaro's accident was connected in any manner to Sirina's work; (6) whether Sirina was responsible for its own on-site clean-up prior to Gallinaro's accident; (7) whether Old Republic was timely notified of the claim by its insured; and (8) whether Old Republic has a reasonable excuse for its delay in disclaiming coverage, since its disclaimer was not limited to late notice, but also was based upon the fact that

Americon was not an additional insured.

In reply, National Fire submits the August 4, 2008 purchase order, which was signed by Sirina's representative on August 11, 2008 (Vigliano reply affirmation, exhibit C). National Fire argues that the work that Sirina was performing was done pursuant to this purchase order. As for Old Republic's argument that the purchase order was signed after the accident, National Fire contends that there is no requirement in Old Republic's policy that the written contract be executed prior to the accident. National Fire further maintains that had Old Republic wished to cover additional insureds only where the contract had been executed prior to the occurrence, it could have easily done so in its policy. Additionally, National Fire argues that the contract between Americon and Sirina would be enforceable even if the contract was not signed because the parties intended to be bound by the contract. Finally, National Fire asserts that Old Republic has not established valid grounds for its four-month delay in disclaiming coverage, and, at a minimum, Old Republic has a duty to defend Americon given Americon's allegations against Sirina.

**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]).

"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. 77th 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]).

National Fire contends that Americon qualifies as an additional insured under Old Republic's policy. It is well established that the party claiming coverage bears the burden of proving entitlement (*National Abatement Corp. v National Union Fire Ins. Co. of Pittsburgh, Pa.*, 33 AD3d 570, 570 [1st Dept 2006]; *Tribeca Broadway Assoc. v Mount Vernon Fire Ins. Co.*, 5 AD3d 198, 200 [1st Dept 2004]). "A party is not entitled to coverage if it is not named as an insured or additional insured on the face of the policy as of the date of the accident for which

coverage is sought" (*York Restoration Corp. v Solty's Constr., Inc.*, 79 AD3d 861, 862 [2d Dept 2010]). As indicated above, Old Republic's additional insured endorsement states that a person or organization qualifies as an additional insured "where required by written contract" (Vigliano affirmation in support, exhibit E, form CG 20 10 11 85).

In *National Abatement Corp.*, the First Department considered similar additional insured language[1] where the written contract did not exist at the time of the accident (*National Abatement Corp.*, 33 AD3d at 571). The Court held that:

> "Here, there is additional insured coverage only if such coverage is required by 'written contract,' but none existed at the time of the accident underlying this personal injury action. Contrary to plaintiffs' understanding, the fact that an unsigned contract may be enforceable if there is objective evidence the parties intended to be bound or the eventual writing was intended to be valid retroactively has no bearing on whether there is a 'written contract' pursuant to the policy endorsement. Interpreting the insurance contract under the same principles as any ordinary business contract, we find the subject provision unambiguous, and reasonably susceptible to only one meaning, leaving no occasion to consider parol evidence of the parties' course of conduct"

(*id.* [citations omitted]). Therefore, the First Department held that the insurer's motion for summary judgment declaring that it was not obligated to defend or indemnify the plaintiffs in the underlying personal injury action was properly granted (*id.* at 570).[2]

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[1]The policy provided additional insured coverage to "Project Owners, Property Managers, and Project Managers where required by written contract" (*National Abatement Corp. v National Union Fire General Ins. Co. of Pittsburgh, Pa.*, 2006 WL 5110989 [Sup Ct, NY County 2006], *affd* 33 AD3d 570 [1st Dept 2006]).

[2]Although Old Republic relies on *Travelers Ins. Co. v Utica Mut. Ins. Co.* (27 AD3d 456 [2d Dept 2006]) and *Penske Truck Leasing Co. v Home Ins. Co.* (251 AD2d 478 [2d Dept 1998]), these cases are distinguishable because the language granting additional insured coverage in those cases permitted oral agreements. In *Penske*, the policy provided coverage to entities that leased vehicles to lessee "where required by contract" (*Penske*, 251 AD2d at 479). The Second Department held that was a question as to whether an assignee of a truck lease was obligated to obtain insurance for the lessor as of the date of an accident, where an assignment and assumption

In this case, even if the court were to consider the August 4, 2008 purchase order, which was signed by Sirina's representative on August 11, 2008, National Fire has failed to establish that a written contract existed as of the date of the accident which required Americon to be named as an additional insured. Although National Fire contends that there is no requirement that the written contract had to be "executed" prior to the accident, as noted by the First Department, the "written contract" must be in existence at the time of the accident (*see id.*). National Fire has not shown that a purchase order existed on July 31, 2008. Moreover, "the fact that an unsigned contract may be enforceable . . . has no bearing on whether there is a 'written contract' pursuant to the policy endorsement" (*id.*).

The cases cited by National Fire in reply do not support its contention that courts have enforced more restrictive additional insured endorsements, i.e., additional insured endorsements requiring an "executed contract,"[3] under similar circumstances. In *Burlington Ins. Co. v Utica First Ins. Co.* (71 AD3d 712, 713 [2d Dept 2010]), a blanket additional insured endorsement provided that an insured included any person or organization the insured was required to name as

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agreement was not signed until a month after the accident (*id.*). The Court also held that there was a question of fact as to whether there was an oral contract between the lessor and lessee prior to the accident which obligated the lessee to obtain insurance (*id.*). In *Travelers*, the Court held, in light of evidence that an owner and contractor may have had an oral contract requiring that the owner be named as an additional insured, that there was a question of fact as to whether the parties intended the plaintiff to be an additional insured throughout the period of the policy (*Travelers*, 27 AD3d at 458).

[3]In the insurance context, a contract is considered "executed" when it has been signed or fully performed by both parties (*see Rodless Props., L.P. v Westchester Fire Ins. Co.*, 40 AD3d 253, 254 [1st Dept 2007], *lv denied* 9 NY3d 815 [2007] [owners of construction site were not additional insureds where contract was never reduced to a writing and the accident, which occurred five days before the conclusion of the job, prevented full performance by the site owners and the general contractor]).

an additional insured on the policy "under a written contract or written agreement." The endorsement further provided that the written contract or agreement must be, inter alia, "[c]urrently in effect or becoming effective during the terms of this policy; and . . . [e]xecuted prior to the 'bodily injury' [or] 'personal injury'" (*id.*). The Court held that "the defendant demonstrated that the contract was not 'executed' at the time of the alleged accident on June 27, 2003, since it was both unsigned and had not been fully performed at that time" (*id.* at 714). The Court also reasoned that "there is no support for the plaintiffs' contention that the condition in the additional insured endorsement that the contract be 'executed' prior to the bodily injury or personal injury could be satisfied by partial performance" (*id.*).

In *10 Ellicott Sq. Ct. Corp. v Mountain Val. Indem. Co.* (634 F3d 112, 121 [2d Cir 2010]), the Second Circuit, following *Burlington*, held that "[b]ecause New York law unambiguously requires either the signing of a contract or its full performance for it to be 'executed' within the meaning of an insurance policy requiring such prior execution, and because neither occurred here, the Construction Agreement was not executed as of the date of DelPrince's injury." Here, the additional insured language at issue did not require "execution," and neither the August 4, 2008 purchase order nor the September 4, 2008 purchase order was in existence on July 31, 2008 when Gallinaro was injured. In any event, neither purchase order was signed by Sirina on the date of Gallinaro's injury. It also appears that Sirina's August 4, 2008 purchase order was not fully performed by both parties as of July 31, 2008. Kuehn testified that Americon did not issue payment to a subcontractor until the subcontractor signed the purchase order (Kuehn EBT at 42).

National Fire contends that Old Republic's delay in disclaiming renders its disclaimer ineffective. However, an additional insured endorsement is an addition, rather than a limitation

of coverage (*Consolidated Edison Co. of N.Y. v Hartford Ins. Co.*, 203 AD2d 83, 84 [1st Dept 1994]). If the claim falls outside the policy's coverage, the insurer is not required to disclaim coverage (*Matter of Worcester Ins. Co. v Bettenhauser*, 95 NY2d 185, 188-189 [2000] ["Disclaimer pursuant to Insurance Law § 3420 (d) is unnecessary when a claim falls outside the scope of the policy's coverage portion . . . By contrast, disclaimer pursuant to [Insurance Law] § 3420 (d) is necessary when denial of coverage is based on a policy exclusion without which the claim would be covered"]; *see also Zappone v Home Ins. Co.*, 55 NY2d 131, 136-138 [1982]). In light of the above, National Fire has not demonstrated that Americon qualifies as an additional insured under Old Republic's policy.

Accordingly, National Fire's motion for summary judgment seeking a declaration that Old Republic is obligated to defend and indemnify Americon in the underlying action is denied, and upon a search of the record pursuant CPLR 3212(b), the court finds that Old Republic is entitled to a declaration that it is not obligated to provide insurance coverage, including a defense or indemnification, to nonparty Americon Construction, Inc. in *Gallinaro v Americon Construction, Inc.*, Index No. 115323/09 (Sup Ct, NY County).

**CONCLUSION**

In view of the above, it is

**ORDERED** that the motion (sequence number 004) of plaintiff National Fire Insurance Company of New York for summary judgment seeking: (1) a declaration that defendant Old Republic General Insurance Company is obligated to provide a defense to nonparty Americon Construction, Inc. in *Gallinaro v Americon Construction, Inc.*, Index No. 115323/09 (Sup Ct, NY County) and to reimburse plaintiff for all past costs incurred in defending Americon Construction, Inc.; and (2) a declaration that defendant Old Republic General Insurance

Company is obligated to indemnify Americon Construction, Inc. in *Gallinaro v Americon Construction, Inc.*, Index No. 115323/09 (Sup Ct, NY County), is denied; and it is further

ORDERED, ADJUDGED AND DECLARED that defendant Old Republic General Insurance Company is not obligated to provide insurance coverage, including a defense or indemnification to nonparty Americon Construction, Inc. in *Gallinaro v Americon Construction, Inc.*, Index No. 115323/09 (Sup Ct, NY County). .

Dated: October 16, 2015

HON. JOAN A. MADDEN
J.S.C.

Milton A Tingling
Clerk

FILED
APR 13 2016
COUNTY CLERK'S OFFICE
NEW YORK