Tishman Constr. Co. of N.Y. v Liberty Mut. Fire Ins. Co.
2017 NY Slip Op 30003(U)
January 4, 2017
Supreme Court, New York County
Docket Number: 154366/2015
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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TISHMAN CONSTRUCTION COMPANY OF NEW YORK
and ARE - EAST RIVER SCIENCE PARK, LLC,

Plaintiffs,

-against- Index No. 154366/2015

LIBERTY MUTUAL FIRE INSURANCE COMPANY
and HELMARK STEEL, INC.,

Defendants.

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LIBERTY MUTUAL FIRE INSURANCE COMPANY
and HELMARK STEEL, INC.,

Third-Party Plaintiffs,

-against-

HARRIS CAMDEN TERMINAL,

Third-Party Defendant.

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Madden, J.;

Plaintiffs Tishman Construction Company of New York (Tishman) and ARE - East River Science Park, LLC (ARE) move, pursuant to CPLR 3212, for summary judgment in their favor on the claims for a judgment declaring that they are entitled to primary coverage as additional insureds under an insurance policy issued by defendant Liberty Mutual Fire Insurance Company (Liberty Mutual), to non party Falcon Steel Co. Inc., (Falcon), and endorsed to include defendant Helmark Steel, Inc. (Helmark) as an insured, and a hearing and determination that the attorneys' fees incurred in an underlying personal injury action by plaintiffs were reasonable, and a money judgment against Liberty Mutual in that amount, or, in the alternative, a judgment declaring that

Helmark breached its contractual duty to procure a commercial automobile liability insurance policy naming plaintiffs as additional insureds.

Liberty Mutual and Helmark oppose the motion on various procedural and substantive grounds, primarily arguing that plaintiffs' papers are defective, the motion is premature, and a conflict of law issue as well as issues of fact preclude summary judgment. As to the alternative relief plaintiffs seek for breach of contract for failure to procure adequate insurance, defendants oppose that part of the motion on the grounds that plaintiffs' proof demonstrates that Helmark did procure the insurance required by the contract.

FACTS

In the underlying action, Alexander Solovyov (Solovyov) alleges he sustained personal injuries on November 27, 2012, while unloading materials from a tractor-trailer at the site of a construction project (project) in the course of his employment as a steel worker for Falcon, a steel work subcontractor. (*see Solovyov v ARE-East River Science Park LLC, Tishman Constr. Corp., Helmark Steel, Inc.*, Sup Ct, NY County, index no. 153418/2013 [*Solovyov* action]). Solovyov alleges the accident occurred at the "NYU Medical Center on First Avenue and 33rd Street" in Manhattan (*Solovyov* action second amended complaint, ¶ 9).

The project where Helmark and Falcon worked is known as the Alexandria Center for Life Science - West Tower, and is bordered on the north and south by East 28th Street and East 29th Street and on the east and west by First Avenue and the FDR Drive Service Road in Manhattan.

ARE is the owner of the project, and hired Tishman as the project construction manager. Pursuant to subcontract dated October 23, 2012 and revised November 26, 2012 and November

30, 2012,[1] (Helmark subcontract), Tishman retained Helmark as a structural steel subcontractor on the project. Helmark subcontracted a portion of its work to Falcon, Solovyov's employer.

Pursuant to the Helmark subcontract, Helmark was obligated to procure a commercial automobile liability insurance policy naming itself as the primary insured and Tishman and ARE as additional insureds, and covering the use of all owned, non-owned, and hired motor vehicles, with combined bodily injury coverage for injuries occurring during Helmark's work at the project (*see* Helmark subcontract, ¶ 8, ins. rider § E). The policy that Helmark contends fulfills its contractual obligation is a commercial automobile liability insurance policy issued by Liberty Mutual policy # AS2-631-509429-032 (policy), (see policy, business auto coverage form § II [A] [form CA 00 01 03 10]), which policy, as previously stated, was issued to Falcon, and endorsed to include Helmark as a named insured. Tishman and ARE base this motion seeking a defense and indemnification in the underlying personal injury action, on the grounds that they are additional insureds under this policy.

The Helmark subcontract also includes an indemnification provision that requires Helmark to defend, indemnify, and hold harmless Tishman, as the construction manager, and ARE, as the owner, against all claims and losses, including attorneys' fees and legal and settlement costs and expenses arising out of the acts or omissions by Helmark, or anyone for whom Helmark may be liable, in connection with the work (*see* Helmark subcontract, ¶ 7).

Plaintiffs contend and defendants do not dispute that on October 9, 2012, nonparty Construction Risk Partners, LLC (CRP), a licensed insurance producer based in New Jersey,

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[1]The contract was signed on December 3, 2012 by Helmark and on December 5, 2012 by Tishman.

issued two nearly identical Accord certificates of insurance to Helmark and Falcon, which identify the project as the Alexandria Center for Life Science, West Tower, and list Tishman as the certificate holder and as an additional insured/indemnitee and ARE as an additional insured/indemnitee.

On April 19, 2013, following commencement of the Solovyov action against them on April 15, 2013, Tishman and ARE tendered their defense and indemnification obligations to Liberty Mutual, citing the policy terms. By letter dated May 15, 2013, Liberty Mutual accepted tender by Tishman, "subject to the terms and conditions of our policy." Also in that letter, Liberty Mutual refused to accept tender of ARE's obligations, on the ground that the Helmark subcontract does not appear to require Liberty Mutual to cover ARE.

By letter dated September 4, 2014, Liberty Mutual formally declined Tishman's and ARE's tender, on the grounds that the accident location alleged in the *Solovyov* action complaint is different from the location of the project in the insurance policy, and that there was no evidence that Solovyov's injuries, as alleged, were caused by Helmark's acts or omissions, inasmuch as Solovyov was employed by Falcon, not Helmark. In that letter, Liberty Mutual also contended that, even if Tishman and ARE establish their additional insured status, the available coverage was excess, not primary, pursuant to the terms of the policy's "other insurance" provision. Liberty Mutual based this contention on the policy provision which provided that the policy is excess where the trailer involved in the underlying accident is connected to a tractor that is not owned by the named insureds.

On May 1, 2015, Tishman and ARE commenced this action for a judgment declaring that they are additional insureds under the policy, and that Liberty Mutual must provide them with a

defense and indemnification in the Solovyov action, or, in the alternative, that Helmark breached the Helmark subcontract by failing to procure the required automobile liability insurance.

On June 6, 2015, Liberty Mutual filed an answer in which it denies all allegations of wrongdoing, and asserts affirmative defenses based on plaintiffs' lack of coverage under the policy. Subsequently, Tishman and ARE filed the instant summary judgment motion against both Liberty Mutual and Helmark.

During the pendency of the motion, on September 21, 2015, Helmark filed an answer in which it denies all allegations of wrongdoing, and asserts affirmative defenses based on plaintiffs' lack of coverage under the policy.

On that date as well, Liberty Mutual and Helmark together commenced a third-party action against third-party defendant Harris Camden Terminal (Harris Camden), alleging that it is the owner of the tractor-trailer involved in the accident underlying the *Solovyov* action.

Subsequently, Harris Camden filed a third-party answer in which it denies all allegations of wrongdoing, and asserts affirmative defenses.

DISCUSSION

As previously stated, Tishman and ARE move for summary judgment on the ground that the undisputed record demonstrates that plaintiffs are each additional insureds and contractual indemnitees under the policy issued by Liberty Mutual, or, in the alternative, that Helmark breached the Helmark subcontract insurance procurement and indemnification/hold harmless provisions. Liberty Mutual and Helmark oppose the motion on the grounds that the moving papers are fatally defective and that the motion is procedurally improper as Helmark had neither appeared nor answered at the time of filing of this motion. Defendants also argue that summary

judgment is premature as a conflict of law issue exists, specifically, that Delaware law applies and under its law, issues of fact exist regarding coverage and additional issues of fact preclude the determination of coverage at this stage of the proceeding. Defendants further argue that plaintiffs are not insureds under the policy.

Specifically, Liberty Mutual argues that this motion is premature on the ground that discovery is necessary regarding the location of the underlying accident and the manner in which it occurred, before judgment regarding the parties' rights and obligations under the policy may be declared. Liberty Mutual also contends that plaintiffs fail to submit competent evidence, as they submit only an attorney's affirmation.

"The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Once the movant has made such a showing, the burden shifts to the opposing party to demonstrate, with admissible evidence, facts sufficient to require a trial, or summary judgment will be granted (*Winegrad v New York Univ Med Ctr*, 64 NY2d 851, 853 [1985]). While summary judgment is a drastic remedy, it is warranted where the movant demonstrates that no genuine triable issue of material fact exists (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *see* CPLR 3212).

With respect to declaratory judgments, such as the one plaintiffs seek, it has been held that their general purpose "is to serve some practical end in quieting or stabilizing an uncertain or disputed jural relation either as to present or prospective obligations" (*James v Alderton Dock Yards*, 256 NY 298, 305 [1931]; *see* CPLR 3001). Fact issues may be addressed and resolved in

the context of a declaratory judgment action (*Rockland Light & Power Co. v City of New York*, 289 NY 45, 50-51 [1942]). Moreover, the issue of whether an additional insured is entitled to a judicial declaration regarding its right to indemnification before a determination of negligence in the underlying tort action is not premature (*see Kassis v Ohio Cas Ins. Co.*, 12 NY3d 595, 599-601 [2009]; *State Farm Fire & Cas. Co. v LiMauro*, 103 AD2d 514, 517-518 [2d Dept 1984], *affd* 65 NY2d 369 [1985]).

PROCEDURAL ISSUES

Liberty Mutual and Helmark's argument that plaintiffs' papers are defective since the affirmation is submitted by the movants' attorney and is not based on personal knowledge is unavailing. An affirmation of this nature is permitted where it is based on documentary proof submitted before the court, and the affirmation and the proof may be considered by the court in rendering a decision on the motion (*see Krohn v Felix Indus.*, 302 AD2d 499, 500 [2d Dept 2003]).

Also unavailing is defendants' argument that the motion for summary judgment cannot be granted on the claims asserted against Helmark since Helmark had neither appeared nor answered at the time of filing of this motion. While CPLR 3212 (a) provides that "[a]ny party may move for summary judgment in any action, after issue has been joined," the statute does not operate to preclude summary judgment against a defendant who had not yet answered the complaint at the time that the motion was filed (*see Duell v Hancock*, 83 AD2d 762, 762-763 [4th Dept 1981]; *see also, Premiere Eglise Baptiste Haitienne de Manhattan (First Haitian Baptist Church of Manhattan) v Joseph*, 57 AD3d 330, 331 [1st Dept 2008]; CPLR 3211 (c).

Here, Helmark filed its answer during the pendency of the motion, submitted papers in

opposition to the motion, and appeared at oral argument. In addition, as discussed below, all facts necessary for resolution of the motion were produced by plaintiffs, including copies of the policy, the Helmark subcontract, and Tishman's documentation relating to the accident. In such circumstances, summary judgment may be granted (*see Duell v Hancock*, 83 AD2d at 762-763 [holding that plaintiff's summary judgment motion made "before issue had been joined does not require reversal [of the lower court's order]; defendants submitted their answer prior to the granting of the motion which, along with their opposing affidavits and oral argument on the motion, allowed all triable issues of fact to be raised"]).

CONFLICT OF LAW

As to Liberty Mutual and Helmark's contention that the motion is premature, they argue, *inter alia*, that the determination of the existence of a duty to defend and indemnify depends on whether there is coverage under the insurance policy, and a conflict of law exists as to this issue. Defendants contend that Delaware law applies, and that Delaware and New York law differ with respect to this issue. Specifically, defendants argue that under Delaware law, coverage depends on a factual determination of whether the accident occurred during the "use" of the vehicle, and the facts for such determination were unknown at the time of filing of this motion. Plaintiffs argue there is no conflict between New York and Delaware law on this issue, and that even if a conflict exists, New York law applies, and under New York law, the vehicle at issue is covered. Thus, plaintiffs contend, Liberty Mutual has a duty to defend and indemnify them.

"The first step in any case presenting a potential choice of law issue is to determine whether there is an actual conflict between the laws of the jurisdictions involved" (*Matter of*

Allstate Ins. Co. (Stolarz-New Jersey Mfr. Ins. Co.) 81 NY2d 219, 223 [1993]; *Elmaliach v Bank of China Ltd.,* 110 AD3d 192 [1st Dept 2013]). "To find that there is an "actual conflict," the laws in question must provide different substantive rules in each jurisdiction that are "relevant" to the issue at hand and have a "significant possible effect on the outcome of the trial"(*Elmaliach v Bank of China Ltd.*, 110 AD3d at 200 [quoting *Finance One Pub. Co. v. Lehman Bros. Special Fin., Inc.*, 414 F3d 325, 331 [2d Cir 2005] [citations omitted], *cert denied* 548 US 904 [2006]).

Liberty Mutual and Helmark argue a conflict of law exists, as the policy at issue provides that in order for a vehicle to be covered, the accident must result from the "use" of the vehicle,[2] and that under Delaware law, the determination of this issue depends on whether the "use" of the vehicle meets the requirements of what has been called the "Klug test,"[3] which test is not applied under New York law. The Klug test requires that in order for a vehicle to be covered under the "use" of a vehicle provision in an automobile insurance policy, it must be shown that 1) the vehicle was an "active accessory" in causing the injury; 2) no act of independent significance broke the causal link between the use of the vehicle and the injury; and 3) the vehicle was being used for transportation purposes when the accident occurred (*National General Ins. Co. v Royal,* 700 A2d 130, 132 [Del 1997]). At the stage of the Kolvoyov proceedings at the time of

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[2]Section II of the policy, entitled "Liability Coverage" provides that Liberty Mutual "will pay all sums an 'insured' legally must pay as damages because of 'bodily injury' or 'property damage' to which this insurance applies, caused by an 'accident' and resulting from the ownership, maintenance or use of a covered 'auto.'"

[3]This test was adopted by Delaware courts from Minnesota law. (*National General Ins. Co. v Royal*, 700 A2d 130, (citing *Continental Western Insurance Company v. Klug*, 415 NW2d 876 [Minn Supr 1987])

submission of this motion, defendants argue, it could not be determined whether the allegations in this case meet these requirements and whether coverage exists. Thus, defendants argue, the motion is premature, as in the absence of a determination of coverage, it cannot be determined whether a duty to defend and indemnify exists.

In reply, Tishman and ARE argue that Liberty Mutual and Hallmark's argument mischaracterizes the issue, which they contend is not whether a conflict of law exists with respect to the application of the Klug test to the allegations in Kolvoyov, but rather whether they are entitled to additional insurance coverage under the commercial automobile liability policy issued by Liberty Mutual. Plaintiffs further argue that even if an analysis of New York and Delaware law is required, the laws do not conflict, as the Klug test applies to personal liability insurance and not to a commercial liability policy, the type of policy at issue here. In addition, plaintiffs argue there is no conflict, with respect to the duty to defend, as both Delaware and New York law hold that an insurer's duty to defend is broader than its duty to indemnify, and that an insurer is only excused from defending, if it can be said, as a matter of law, that there is no legal or factual basis upon which the insurer might be obligated to indemnify the insured.

In connection with this issue, it must be noted that Liberty Mutual and Helmark, as the proponents of the existence of a conflict of law, bear the burden of demonstrating that the law of Delaware, applies (*see Matter of Allstate Ins. Co. v. Conigliaro*, 248 AD2d 293, 294 [1st Dept 1998]; *Reale by Reale v Herco Inc.*, 183 AD2d 163 [2d Dept 1992]). Any analysis of whether a duty to defend and indemnify exists, begins with the threshold issue of applicable principles of law as to whether a duty to defend exists. With respect to this analysis, defendants do not assert,

nor does any difference exist between the laws of New York and Delaware. Specifically, under the laws of both states, an insurer's duty to defend is broader than its duty to indemnify. Under New York law

> 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 omitted).

Similarly, under Delaware law, an insurer's duty to defend is "broader than the substantive coverage afforded under its policies," (*1367 Charles E. Brohawn & Bros., Inc. v. Employers Commercial Union Insurance Co.*, 409 A2d 1055, 1058 [Del 1979]), and may be "broader than the duty to ultimately indemnify" *(American Insurance Group v Risk Enterprise Management, Limited*, 761 A2d 826, 830 [Del 2000]).

Under the law of New York, the analysis involves reviewing the complaint to determine if the allegations in the complaint, suggest "a reasonable possibility of coverage" (*Automobile Ins. Co. of Hartford v. Cook, supra* at 137) , and under Delaware law the complaint is reviewed to see if it "potentially states a claim which is covered under the policy" *(American Insurance Group v Risk Enterprise Management, Limited, supra* at 830).[4] Under the law of both New York

[4]"In construing an insurer's duty to indemnify and/or defend a claim asserted against its insured, a court typically looks to the allegations of the complaint to decide whether the third

and Delaware, if any of the allegations in the underlying tort action even arguably arises from a covered event, then the insurer must defend the additional insureds against all claims asserted against them in the entire action (*see Frontier Insulation Contrs. v Merchants Mut. Ins. Co.*, 91 NY2d 169, 175 [1997]; *Continental Cas. Co. v Alexis I. duPont Sch. Dist.*, 317 A2d 101, 105 [Del 1974]). Moreover, in both states, an insurer may avoid the duty to defend "only if it could be concluded as a matter of law that 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" (*Spoor-Lasher Co. v Aetna Cas. & Sur. Co.*, 39 NY2d 875, 876 [1976]; *Harleysville Mut. Ins. v Sussex County, Del.*, 831 F Supp at 1130). As the analysis under the law of both states, involves comparable standards, and as the same result is reached applying either standard, it is clear that the laws of New York and Delaware do not conflict with respect to whether a duty to defend exists.

In the *Solovyov* action, Solovyov alleges he was injured in the course of his employment by Falcon at a construction project owned by ARE, and that Tishman was the project construction manager (*see Solovyov* action second amended complaint, ¶¶ 3, 5, 7, 8, 10). The allegations specifically state that Solovyov was injured while "off loading steel form a truck,"

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party's action against the insured states a claim covered by the policy, thereby triggering the duty to defend. The rationale underlying this principle is that the determination of whether a party has a duty to defend should be made at the outset of the case, both to provide the insured with a defense at the beginning of the litigation and to permit the insurer, as the defraying entity, to control the defense strategy.The insurers are required to defend any action which potentially states a claim which is covered under the policy (*American Insurance Group v Risk Enterprise Management, Limited*, *supra* at 830 [citation omitted]).

that defendants, Tishman, ARE, and their contractors were negligent in failing to properly load the truck and failed to provide equipment and devices to safely remove the materials from the truck. (Second Amended Complaint, par.11).[5] The parties here do not dispute that Solovyov was acting in the course of his employment by Falcon, as part of Helmark's work required by the Helmark subcontract, when he sustained injury while unloading a tractor-trailer rented and used for such work. Plaintiffs argue Solovyov's claims involve Helmark's potential liability for Solovyov's bodily injury which were caused by the contractors' [Helmark and/or Falcon] acts or omissions in the performance of their work for Tishman as the construction manager, and ARE as the owner.

The policy, in relevant part, provides coverage to any organization which Helmark and Falcon have agreed in writing to add as an additional insured, and anyone liable for the conduct of an insured (*see* policy, designated insured endorsement [form CA 20 48 02 99]; policy, business auto coverage form § II [A] [1] [c], citing policy, business auto coverage form § II [A] [1] [a, b] [form CA 00 01 03 10]). The policy also provides, in relevant part, that Liberty Mutual will pay "all sums an 'insured' legally must pay as damages because of 'bodily injury' . . . to which this insurance applies, caused by an 'accident' and resulting from the ownership, maintenance or use of a covered 'auto'" (policy, business auto coverage form § II [A] [form CA 00 01 03 10]).

Liberally construing the allegations in the complaint, and recognizing that the duty to defend is broader than the duty to indemnify, I conclude, based on the allegations in the

[5] Accident reports submitted with this motion indicate that plaintiff was injured when his right arm was caught between a steel frame and wood. (Exhibit J to Plaintiff's papers.)

complaint, and for the reasons discussed more fully below with respect to plaintiffs' claims for coverage as contractual indemnities, there is a reasonable possibility of coverage under New York law so that Liberty Mutual is required to provide a defense in the Soloyvov action to Tishman and ARE (*see Colon v Aetna Life and Casualty Ins Co.*, 66 NY2d 6, 9 [1985][noting that the duty to defend "arises whenever the allegations in the complaint, for which the insured may stand liable, fall within the risk covered by the policy]).

As to a duty to indemnify, as discussed above, defendants' argument is that it is premature to determine if such a duty exists, as this determination requires a determination of coverage. With respect to indemnification, Liberty Mutual and Helmark's argument is based solely on the grounds that Delaware law applies and that it must first be determined whether the "use" of the vehicle meets the "Klug test," and that at the time of this motion's submission, the known information was insufficient to make this determination. In support of their argument defendants cite *National General Ins. Co. v Royal*, *supra*, where the Delaware Court held that the Klug test applied in determining whether coverage existed under the underinsured motorist provision of the automobile policy at issue. In so holding, the court stated "[t]he Krug approach provides a flexible framework that takes into account the circumstances of the injury and promotes the legislative purpose of Delaware's underinsured motorist statute the "protection of innocent persons from negligence of unknown or impecunious tortfeasors," (700 A2d at 132). In *Sanchezv American Independent Insurance Co.*, 886 A2d 1278 [Del 2005], *Campbell v State Farms Mut Auto Ins. Co.*, 12 A3d 1137, 1139 [Del 2011] and *Kelty v State Farm Mut. Auto. Ins Co.*, 73 A3d 926, 932 (Del 2012), the Delaware courts applied the Klug test to personal injury

protection, commonly known as PIP coverage, under the Delaware statute mandating such coverage. Significantly, these decisions, and recent Delaware decisions which address the Klug test, apply the test to issues with respect to no fault coverage under underinsured or uninsured provisions of policies, or pursuant to statutory PIP requirements (*see State Farm Mutual Ins Co v. Buckingham*, 919 A2d 1111 [Del 2007] [applying the Klug test to determine coverage under uninsured motorist benefits]; *Buckley v. State Farm Mutual Automobile Ins Co.,* 139 A3d 845 [Del Super. 2015]] [applying the test was to determine PIP coverage]; *Anderson v. Nitin Enterprises, Inc.*, 995 A2d 154 [Del Super. 2011][same]). Significantly, Soloyvov does not seek damages based on under or uninsured benefits, or PIP coverage, but rather based on policy provisions in a commercial automobile liability insurance policy.

Liberty Mutual and Helmark fail to cite any decisions applying the Klug test to issues other than the interpretation of "use" with respect to under and uninsured benefits, and PIP coverage. As this is defendants' sole argument with respect to the conflict of law issue, in the absence of any precedent or controlling authority applying the Klug test in determining coverage under the use of an automobile in a commercial automobile liability insurance policy, the provision at issue here, Liberty Mutual and Helmark have not met their burden that a conflict exists with respect to Delaware and New York law (*Matter of Allstate Ins. Co. v. Conigliaro*, supra at 294; *Reale by Reale v Herco Inc., supra.*)[6] Under these circumstances, any further

[6]Liberty Mutual and Helmark also point to Delaware decisions, many of which were decided prior to *Nationwide General Ins Co. v Royal, supra*, which do not apply the Klug test but, instead, discuss interpretations of arising out of, or caused by, the operation, maintenance or use of a vehicle (*see e.g. Dick v. Koutoufaris*, 1990 *WL* 106182 [Del Super. 1990]; *American v. International South Ins. Co. v. Morrow,* 2008 *WL* 3321331 (Del Super. 2008]; *Hudson v. State*

choice of laws analysis is unnecessary (*Tronlone v Lac d'Amiante Du Quebec*, 297 AD2d 528, 528 [1st Dept 2002], *affd* 99 NY2d 647 [2003][a choice of law analysis is not required where there was no relevant conflict between New York and New Jersey law with respect to the sufficiency of a plaintiff's showing of product identification and exposure in an asbestos case]).

COVERAGE DISPUTE

With respect to coverage, Liberty Mutual and Helmark dispute plaintiffs' contention that pursuant to the express terms of the Helmark subcontract and the policy, Tishman and ARE qualify as additional insureds and/or as contractual indemnities so as warrant summary judgment as to their claims for indemnification.

In construing a contract for insurance, where the insurance policy provisions "are clear and unambiguous, they must be given their plain and ordinary meaning" *(United States Fid. & Guar. Co. v Annunziata* 67 NY2d 229, 232 [1986] [internal quotation marks and citations omitted]; *Breed v Insurance Co. of N. Am.*, 46 NY2d 351, 355 [1978]. In the absence of relevant evidence extrinsic to the insurance policy bearing on the parties' intent, construction of the policy terms is an issue of law for the court to decide (*Hartford Acc. & Indem. Co. v Wesolowski*, 33 NY2d 169, 172 [1973]). Furthermore, "the party claiming insurance coverage bears the burden of proving entitlement, and . . . a party that is not named an insured or an additional insured on the face of the policy is not entitled to coverage"(*Tribeca Broadway Assoc. v Mount Vernon Fire*

Farm Mut. Ins. Co., 569 A2d 1168 [Del 1990]; *Bryant v. Progressive Northern Ins Co*, 2008 WL 4140686 [Del Super. 2008]). Notably, however, Liberty Mutual and Helmark do not argue that the law of Delaware and New York differs regarding the definition and/or interpretation of these terms.

Ins. Co., 5 AD3d 198, 200 [1st Dept 2004], citing *Moleon v Kreisler Borg Florman Gen. Constr. Co.*, 304 AD2d 337, 339 [1st Dept 2003]).

It is undisputed that Falcon and Helmark are named insureds under the policy. With respect to Tishman and ARE's claims of coverage as additional insureds, the policy's Designated Insured Endorsement provides, in relevant part:

> This endorsement identifies person(s) or organizations(s) who are 'insureds' under the Who Is An Insured Provision of the Coverage Form. This endorsement does not alter coverage provided in the Coverage Form.
>
> SCHEDULE
>
> Name of Person(s) or Organization(s):
> Any person or organization whom you [Helmark and Falcon] have agreed in writing to add as a additional insured, but only to coverage and minimum limits of insurance required by the written agreement, and in no event to exceed either the scope of coverage or the limits of insurance provided in this policy.
> . . .
> "Each person or organization shown in the Schedule is an 'insured' for Liability Coverage, but only to the extent that person or organization qualifies as an 'insured' under the Who Is An Insured Provision contained in Section II of the Coverage Form"

(policy, designated insured endorsement [form CA 20 48 02 99].

Under the Who Is An Insured provision, the policy provides:

> The following are "insureds":
>
> **a.** You for any covered "auto".
> **b.** Anyone else while using with your permission a covered "auto" you own, hire or borrow . . .[7]

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[7]There are certain exceptions which are not relevant to this issue.

> **c**. Anyone liable for the conduct of an "insured" described above but only to the extent of that liability.

(policy, business auto coverage form, § II [A] [1] [c], citing policy, business auto coverage form § II [A] [1] [a, b, c] [form CA 00 01 03 10]).

With respect to the policy provision requiring a written contract, the Helmark subcontract meets this requirement as it obligates Helmark to procure a commercial automobile liability insurance policy insuring Tishman and ARE as additional insureds, and covering the use of all owned, non-owned, and hired motor vehicles, with combined bodily injury coverage for injuries occurring during Helmark's work at the project (*see* Helmark subcontract, ¶ 8, ins. rider § E).[8]

However, as to the requirements of subsection c of "Who Is An Insured," plaintiffs fail to address whether Tishman and ARE are liable for the conduct of Helmark and Falcon so as to qualify as insureds. Absent such qualification, an issue of fact exists and plaintiffs have failed to establish entitlement to summary judgment as additional insureds. In this connection, I note that in the *Solovyov* action, plaintiff alleges defendants, ARE, Tishman, Helmark and their contractors, agents and employees were negligent and violated §§ 200, 240 and 241(6) of the

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[8]Section 8 of the contract provides that "[t]he Contractor and each of the Contractor's subcontractors shall, at its own expense, maintain the insurance coverage and limits of liability stated in the attached insurance rider....Contractor shall deliver certificates of insurance ....which shall expressly identify the Owner, the Owner's lenderConstruction Manager and all other indemnitees named in this Agreement (hereinafter referred to as "Additional Insureds") ...as additional insureds."

Section E of the Insurance Rider provides for "Commercial General Liability Insurance covering the use of all Owned, Non-Owned and Hired Vehicles...Automobile Insurance must include all additional insureds... a. Coverage is to be endorsed to reflect that the insurance provided is to be primary and non-contributary for the Contractor, Owner, Tishman Construction Corporation and all other indemnitees named in the contract.

Labor Law (*see Solovyov* action second amended complaint, ¶ 11). In *Paul M Maintenance, Inc., v Transcontinental Insurance Co.,* 300 AD2d 209 [1st Dept 2002], the First Department interpreted a policy provision, like the one at issue here, which provided under "Who Is An Insured," that an insured is "[a]nyone ... liable for the conduct of an "insured." The Court held that the general contractor was an insured based on a judicial determination that under the Labor Law, the general contractor was vicariously liable for the subcontractor's conduct which caused the subcontractor's employee's injuries. Under this holding, Tishman, the construction manager, and ARE, the owner, may qualify as additional insureds, if there is a determination that they are vicariously liable under the Labor Law for any negligence of Helmark and Falcon.

As to plaintiffs' argument that they qualify as contractual indemnities, Tishman and ARE point to the indemnification provision in the Helmark subcontract which obligates Helmark, to the fullest extent permitted by law, to indemnify, defend, and hold harmless Tishman and ARE, and to assume their tort liability for personal injuries "arising out of or resulting Contractor's acts or omissions, or anyone for whose acts Contractor may be liable in connection with the Contract Documents, the performance of, or failure to perform, the Work, or the Contractor's operations," (Helmark subcontract, ¶ 7). Tishman and ARE argue that under the policy's "Contractual Liability" exclusion, coverage is extended to liability incurred pursuant to a contract that meets the policy's definition of an "insured contract."

The parts of the policy upon which plaintiff rely, provide:

> B. Exclusions.
>
> This insurance does not apply to any of the following:

> 1....
> 2.Contractual
>
> Liability assumed under any contract or agreement
> But this exclusion does not apply to liability for damages:
>
> a. Assumed in contract or agreement that is an "insured contract" provided the "bodily injury" or "property damage" occurs subsequent to the execution of the contract or agreement;
>
> (*see* policy, business auto coverage form § II [B] [2] [form CA 00 01 03 10]).

The policy defines the term "insured contract" to mean

> "[t]hat part of any other contract or agreement pertaining to your [Helmark's] business . . . under which you assume the tort liability of another to pay for 'bodily injury' . . . to a third person or organization."
>
> (*id.* § V [H] [5] [form CA 00 01 03 10]).

Since the indemnification provision in the Helmark subcontract obligated Helmark to assume the tort liability of Tishman and ARE, it is an "insured contract." However, the "bodily injury" at issue, occurred before, and not subsequent to the execution of the contract. The Helmark subcontract was signed by Helmark on December 3, 2012, and by Tishman on December 5, 2012, and Solovyov alleges he was injured on November 27, 2012. Plaintiffs' argue it is "irrelevant" that the contract was not signed until after the accident, as an "an unsigned contract is valid and enforceable." In support of this argument, plaintiffs cite *Flores v Lower E. Side Serv. Ctr.*, 4 NY3d 363, 369 (2005). *Flores* is not on point, as the issues in that case involved Workers' Compensation Law §11, which permits an owner to sue an injured worker's employer where the employer had agreed to indemnify the owner. The Court held, citing the specific language of Workers' Compensation Law §11, that under that statute, a written

agreement to indemnify need not be signed. To the extent that plaintiffs cite *Flores* for the proposition that an unsigned contract may be enforceable under certain circumstances, enforceability is not the issue here. Rather, the issue is the effect of the policy requirement that the "bodily injury"occur subsequent to the execution of the contract.

On point is the holding in *Cusumano v Extell Rock, LLC,* 86 AD3d 448 (1st Dept 2011) where the court held that the parties seeking coverage were not additional insureds as the contract was not signed at the time of the accident. As the motion court in *Cusumano* explained, at issue was a policy which provided that an insured is a person who the contractor agreed in writing to add as an additional insured, provided "the injury or damage occurs subsequent to the execution of the contract or agreement" *Cusumano v Extell Rock, LLC,* 2010 NY Slip OP 30898(U), *14 [Sup Ct NY County 2010], *mod on other grounds Cusumano v Extell Rock, LLC,* 86 AD3d 448. Thus, under *Cusumano, supra,* Tishman and ARE are not entitled to coverage as contractual indemnities, since Solovyov's accident was not subsequent to the execution of the Helmark subcontract.

Defendants also argue that there is no coverage, since in the Second Amended Complaint the allegations state the accident occurred on First Avenue, near 33rd Street, not at the Alexander Center for Life Science New York City as listed in the certificate of insurance, which site is located at 430 East 29th Street, near First Avenue.

The documentary record, consisting primarily of accident reports and daily logs and reports produced by plaintiffs, list the November 27, 2012 accident site as 430 East 29th Street, near First Avenue, in Manhattan, within the ARE Alexandria Center for Life Science, West

Tower project (*see* Tishman Supervisors Accident Investigation Report; Tishman Incident Witness Statement; Tishman Safety Manager Daily Log; Tishman Daily Construction Report, West Tower; C-2 Employer's Report of Work-Related Injury/Illness submitted to the New York State Workers' Compensation Board; IWIF Accident Witness Statements by three witnesses). That project is the same project on which Helmark was hired, pursuant to the Helmark subcontract, and the project covered by the policy. Liberty Mutual does not deny that it is aware of the accident location. With respect to coverage, this determination need not be made at this stage of the proceedings as this court has found issues of fact exist in this regard. However, based on the foregoing record, the issue of accident location does not affect defendants' duty to defend since "[t]he duty to defend arises whenever the allegations of the complaint, for which the insured may stand liable, fall within the risk covered by the policy, or, in other words, where there is a reasonable possibility of recovery under the policy." *City of New York Certain Underwriters at Lloyd's of London,* 15 AD 3d 228, 230 [1st Dept 2005][internal citations and quotations omitted]).

To the extent, defendants argue that additional discovery is needed regarding the manner in which the accident occurred, such argument need not be addressed, since discovery shall continue based on that part of this decision denying plaintiffs' motion for summary judgment as to their claims of indemnification.

Similarly, since plaintiffs' entitlement to indemnity has not been established, plaintiffs' contention that coverage is primary, and defendants' contention that coverage, if any, is excess need not be addressed.

Finally, plaintiffs' alternate request for a judgment declaring that Helmark breached its contractual duty to procure insurance is denied as premature, without prejudice to renewal.

CONCLUSION

Accordingly, it is

ORDERED that motion for summary judgment by plaintiffs Tishman Construction Company of New York and ARE - East River Science Park, LLC is granted only to the extent of its claim seeking a declaration that Liberty Mutual has an obligation to defend plaintiffs against all claims asserted against them in the underlying action, *Solovyov v ARE-East River Science Park LLC, Tishman Constr. Corp., Helmark Steel, Inc.*, Sup Ct, NY County, index no. 153418/2013, and it is further

ADJUDGED AND DECLARED that defendant Liberty Mutual Fire Insurance Company is obligated by the terms of the Liberty Mutual policy to defend Tishman Construction Company of New York and ARE - East River Science Park, LLC against all claims asserted against them in the underlying action, *Solovyov v ARE-East River Science Park LLC, Tishman Constr. Corp., Helmark Steel, Inc.*, Sup Ct, NY County, index no. 153418/2013, and that Liberty Mutual is obligated to reimburse plaintiffs for all costs and expenses that they have incurred in their defense of that action; and it is further

ORDERED that the procedures for the determination of the amount of attorney's fees, costs, and disbursements incurred in defending the underlying action shall be discussed at the preliminary conference; and it is further

ORDERED that the part of the motion for summary judgment in which plaintiffs seek

indemnification from defendant Liberty Mutual Fire Insurance Company of New York is denied; and it is further

ORDERED that the part of the motion for summary judgment on the breach of contract asserted against defendant Helmark Steel, Inc. is denied; and it is further.

ORDERED that the parties shall appear on January 26, 2017, at 9:30 am for a preliminary conference in Part 11, room 351, 60 Centre Street, New York, NY.

Dated: January 4 2017

ENTER:

J.S.C.

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