

**Everest Natl. Ins. Co. v Illinois Union Ins. Co.**

2017 NY Slip Op 33328(U)

February 23, 2017

Supreme Court, Kings County

Docket Number: 500467/15

Judge: Edgar G. Walker

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At an IAS Term, Part 90 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 23<sup>rd</sup> day of February, 2017.

P R E S E N T:

HON. EDGAR G. WALKER,

Justice.

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EVEREST NATIONAL INSURANCE COMPANY,  
JC REALTY DEVELOPMENT CORP., AND  
NEIGHBORHOOD PARTNERSHIP HOUSING  
DEVELOPMENT FUND COMPANY,

Plaintiffs,

- against -

Index No. 500467/15

ILLINOIS UNION INSURANCE COMPANY,  
MECCA CONTRACTING, INC., SCOTTSDALE  
INSURANCE COMPANY AND SALCORA  
CONSTRUCTION CORP.,

Defendants.

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The following e-filed papers read herein:

Papers Numbered

Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed_____	<u>34, 36-51</u>	<u>57-64</u>	<u>99-101</u>
Opposing Affidavits (Affirmations)_____	<u>54, 69-72, 74-83</u>		<u>103-114</u>
Reply Affidavits (Affirmations)_____		<u>90-91</u>	<u>115</u>
_____ Affidavit (Affirmation)_____			
Memoranda of Law_____	<u>35 84 86-89 95</u>		

Upon the foregoing papers, in this declaratory judgment action by plaintiffs Everest National Insurance Company (Everest), JC Realty Development Corp. (JC Realty), and Neighborhood Partnership Housing Development Fund Company (NPHDF) (collectively,

plaintiffs) against defendants Illinois Union Insurance Company (ILU), Mecca Contracting, Inc. (Mecca), Scottsdale Insurance Company (Scottsdale), and Salcora Construction Corp. (Salcora), plaintiffs move, under motion sequence number one, for an order, pursuant to CPLR 3212, granting them partial summary judgment in their favor with respect to their claim as to a duty to defend. Scottsdale cross-moves, under motion sequence number two, for an order: (1) pursuant to CPLR 3124, 3126, and/or CPLR 3120, striking plaintiffs' complaint and/or compelling plaintiffs to respond to its outstanding discovery demands, and (2) pursuant to CPLR 603, severing the insurance coverage claims against it from the contractual claims against the remaining defendants for both discovery and trial. Plaintiffs additionally move, under motion sequence number three, for an order vacating the CPLR 3214 (b) automatic stay of disclosure triggered by their service of their motion for partial summary judgment and compelling Scottsdale to respond to their April 7, 2016 discovery demands.

### **FACTS AND PROCEDURAL BACKGROUND**

JC Realty was the owner of premises located at 49 Wilson Avenue, in Brooklyn, New York, and the manager/developer of a construction project on these premises. NPHDF was the sponsor of the construction project. Mecca was the general contractor for the construction project, pursuant to a contract dated June 29, 2007, entered into between it and JC Realty and NPHDF (the prime contract). Pursuant to a subcontract dated August 16, 2007 (the subcontract), Mecca hired Salcora as a subcontractor for the construction project to

completely renovate the building on the premises. Salcora, in turn, entered into a sub-subcontract dated December 15, 2008, wherein it hired Odys General Construction (Odys), as a sub-subcontractor, to complete the siding work on the building for the construction project.

Section 7.8 of the prime contract provided that Mecca “assume[d] sole responsibility for appropriate safety measures with respect to the execution of the [w]ork and sole responsibility for the safety of all persons with respect to the performance of the work.” Section 7.9 of the prime contract further provided that the presence of JC Realty at the work site did “not relieve [Mecca] of its obligations to supervise and monitor the [w]ork.”

Section 10.1 of the prime contract made Mecca “responsible for initiating, maintaining and supervising all safety precautions and programs in connection with the performance of the [prime c]ontract.” Under section 10.2.1 of the prime contract, Mecca was required to “take reasonable precautions for [the] safety of, and [to] provide reasonable protection to prevent damage, injury or loss to . . . employees on the [w]ork.” In addition, section 10.2.12 of the prime contract specifically required Mecca to “at all times exercise all necessary precautions for the safety . . . of the employees on the work.”

Under section 3.3 of the prime contract, Mecca agreed that it would supervise and direct the work and that it would be solely responsible for and have control over construction means, methods, techniques, sequences and procedures and for coordinating all portions of the work. Section 3.3.2 of the prime contract required Mecca to be responsible to JC Realty

for the acts and omissions of its employees, subcontractors (including Salcora), and its subcontractors' agents (including Odys) and employees. Under section 5.3.1 of the prime contract, Mecca agreed to require Salcora to be bound to it by the terms of the prime contract and to assume toward it all of the obligations and responsibilities which it assumed toward JC Realty.

Section 3.18 of the prime contract contained a broad indemnification clause requiring Mecca to indemnify and hold harmless JC Realty and NPHDF against all claims, causes of action, or costs and expenses, including attorneys' fees, arising out of any act, omission or negligence, whether real or alleged, of Mecca, Salcora, or Odys during the performance of the prime contract, regardless of whether or not such claim, demand, loss or expenses was caused in part by JC Realty and NPHDF, excepting only the gross negligence of JC Realty. This indemnification clause expressly provided that Mecca, "at its own expense, shall defend the Indemnified Parties [i.e., JC Realty and NPHDF] in court," and that "[n]o provision requiring the furnishing of insurance shall be construed to affect, impair, or excuse [Mecca's] obligation to indemnify and save [harmless] the Indemnified Parties [i.e., JC Realty and NPHDF]."

Section 11.1 of the prime contract required Mecca to purchase and maintain insurance to protect it from claims arising out of its operations under the prime contract, including operations by Salcora and Odys. Such insurance was to cover claims for damages due to bodily injury, and indemnification of JC Realty and NPHDF from and against all claims in

connection with Mecca's obligations under section 3.18. Section 11.1.4 of the prime contract required Mecca to obtain a liability insurance policy that named JC Realty and NPHDF as additional named insureds. Section 11.1.4.2 of the prime contract provided that such insurance coverage was to apply on a primary basis for JC Realty and NPHDF and that any insurance maintained by JC Realty and NPHDF was to be in excess of Mecca's insurance and would not contribute with it.

Mecca obtained a commercial general liability insurance policy issued by ILU for the policy period from January 24, 2008 to January 24, 2009 (the ILU policy), under which Mecca was the named insured. The ILU policy contained an additional insured endorsement, which provided as follows:

"A. Section II - Who Is an Insured is amended to include as an additional insured the person(s) or organizations(s) shown in the Schedule (which states '[a]s required by written contract signed by both parties prior to loss'), but only with respect to liability for 'bodily injury', 'property damage' or 'personal and advertising injury' caused, in whole or in part, by:

1. Your acts or omissions; or
  2. The acts or omissions of those acting on your behalf;
- in the performance of your ongoing operations for the additional insured(s) at the location(s) designated above."

Under Section V - Definitions of the ILU policy, "insured contract" is defined, in subdivision (9) (f), as:

"That part of any other contract or agreement in your business . . . under which you assume the tort liability of another party to pay for 'bodily injury' or 'property damage' to a third person or organization. Tort liability means a liability that would be imposed by law in the absence of any contract or agreement."

In addition, JC Realty and NPHDF were designated as additional insureds under the ILU policy on separate certificates of insurance dated January 28, 2008.

As to the subcontract between Mecca and Salcora, in section 1.1 of article 1, entitled “The Subcontract Documents,” it incorporated the prime contract between JC Realty and NPHDF and Mecca by providing as follows:

“The Subcontract Documents consist of: (1) this Agreement; (2) the Prime Contract, consisting of the Agreement between [JC Realty] and [Mecca] and other Contract Documents enumerated therein; (3) Modifications issued subsequent to the execution of the Agreement between [JC Realty] and [Mecca], whether before or after the execution of this Agreement; (4) other documents listed in Article 16 of this Agreement; and (5) Modifications to this Subcontract issued after execution of this Agreement. These form the Subcontract, and are fully a part of the Subcontract as if attached to this Agreement or repeated herein. The Subcontract represents the entire and integrated agreement between the parties hereto and supersedes prior negotiations, representations or agreements, either written or oral. An enumeration of the Subcontract Documents, other than modifications issued subsequent to the execution of this Agreement, appears in Article 16.”

Under article 16 of the subcontract, entitled “Enumeration of Subcontract Documents,” section 16.1.2 specifically enumerated the subcontract documents as including “[t]he Prime Contract, consisting of the Agreement between [JC Realty] and [Mecca] . . . and the other Contract Documents enumerated in the Owner-Contractor Agreement.”

Under article 2 of the subcontract, entitled “Mutual Rights and Responsibilities,” in section 2.1, Salcora, to the extent that the provisions of the prime contract applied to its work,

expressly assumed toward Mecca all obligations and responsibilities which Mecca assumed toward JC Realty.

Section 4.3.1 of the subcontract required that Salcora keep the job safe at all times, and that “all site workers must work safely at all times.” Section 4.3.2 of the subcontract required Salcora to take reasonable safety precautions with respect to the performance of the subcontract. Section 4.3.3 required Salcora to provide safety devices for its portion of its work on the project.

The subcontract, in section 4.6.1, contained a broad indemnification clause which provided, in pertinent part, as follows:

“To the fullest extent permitted by applicable law, [Salcora] shall assume entire responsibility and liability for all damages . . . and/or injury of any nature (including death) to persons and property . . . arising out of, or in any manner relating to, its performance of work at the Project, and [Salcora] agrees to defend (if requested by [Mecca] or [JC Realty]), indemnify and hold harmless [Mecca], [JC Realty] . . . and others identified by [Mecca] or [JC Realty] [i.e., NPHDF], and their respective agents, servants and employees, from all demands, claims, causes of action (even though they may be groundless, false or fraudulently asserted), losses, costs and expenses, including reasonable counsel fees, arising out of, or in any manner relating to, the execution of the work at the Project, or asserted against one or more indemnitees under this paragraph, by reason of the acts or omissions of [Salcora], or of any entity directly or indirectly engaged by [Salcora, including Odys,] in connection with the work at the Project, regardless of whether the acts or omissions complained of were caused, in whole or in part, by an indemnitee under this Article.”

Section 13.1 of the subcontract required Salcora, prior to the commencement of work on the project, to purchase and maintain liability insurance. This section also required such liability insurance policy to name both JC Realty and NPHDF as additional named insureds by providing as follows:

“All such policies shall [name] [Mecca], [JC Realty] . . . and others (as may be named by [Mecca, who named NPHDF]) as additional named insureds and shall contain a waiver of subrogation rights against all additional named insureds.”

Salcora obtained a commercial general liability insurance policy issued by Scottsdale for the policy period from August 3, 2008 to August 3, 2009 (the Scottsdale policy), under which Salcora was the named insured. The Scottsdale policy contained a blanket additional insured endorsement, which provided that it amended Section II - Who is an Insured to include as an additional insured:

“any person or organization whom [Salcora was] required to add as an additional insured on this policy under a written contract, written agreement or written permit, which [had to] be: a. Currently in effect or becoming effective during the term of the policy; and b. Executed prior to the ‘bodily injury.’”

This blanket additional insured endorsement in the Scottsdale policy further provided that the additional insured coverage was limited to liability for “bodily injury,” “property damage,” or “personal and advertising injury” “caused in whole or in part by: a. [Salcora’s] acts or omissions; or b. The acts or omissions of those acting on [Salcora’s] behalf [such as Odys].”

This blanket additional insured endorsement in the Scottsdale policy also stated that coverage was not provided for “bodily injury” “arising out of the sole negligence of the additional insured.” In addition, it set forth that “[a]ny coverage provided hereunder w[ould] be excess over any other valid and collectible insurance available to the additional insured whether primary, excess, contingent or on any other basis unless a written contract specifically require[d] that this insurance be primary.” It further set forth that “[w]hen this insurance is excess, [Scottsdale would] have no duty under Section 1 - Coverages to defend the additional insured against any ‘suit’ if any other insurer ha[d] a duty to defend the additional insured against that ‘suit,’ but that “[i]f no other insurer defends, [Scottsdale would] undertake to do so, but [Scottsdale would] be entitled to the additional insurer’s rights against all those other insurers.”

Section V - Definitions of the Scottsdale policy, in subdivision (9), as amended by an Amendment to Insured Contract Definition endorsement, defined “insured contract” to mean:

“That part of any other contract or agreement pertaining to your business . . . under which you assume the tort liability of another party to pay for ‘bodily injury’ or ‘property damage’ to a third person or organization, provided the ‘bodily injury’ or ‘property damage’ is caused, in whole or in part, by [Salcora] or by those acting on [Salcora’s] behalf. Tort liability means a liability that would be imposed by law in the absence of any contract or agreement.”

JC Realty and NPHDF were also designated as additional insureds under the Scottsdale policy on separate certificates of insurance dated August 8, 2008.

On January 13, 2009, Jorge Amaya (Amaya), who was employed by Odys, while working at the construction project, was injured when a fire escape ladder fell and trapped his arm between its rungs. This accident occurred after Amaya had been directed by a supervisor from Odys to access a lower roof level by means of an extension ladder which led to the fire escape platform. At the end of the work day, when Amaya climbed the extension ladder as he had been doing throughout the course of the day, his extension ladder started to sway and he grabbed onto the fire escape platform. When he had steadied the extension ladder on which he was standing and while his hand was still on the fire escape platform, the fire escape ladder (a different ladder than the extension ladder) suddenly fell down onto his arm. The fire escape had been installed by one of Mecca's subcontractors other than Salcora.

Consequently, on September 15, 2010, Amaya commenced an action against NPHDF and Mecca, seeking to recover damages for his personal injuries (the Amaya action), in the Supreme Court, New York County, and on June 17, 2011, Amaya amended his complaint to add JC Realty as a defendant. Amaya's amended complaint in the Amaya action alleges claims of negligence and violations of the Labor Law. On February 25, 2011, Mecca filed a third-party action against Salcora, seeking contractual indemnification, common-law indemnification, and contribution.

With respect to insurance coverage for liability in connection with the construction project, JC Realty and NPHDF were named insureds under an insurance policy issued by Everest for the policy period from June 29, 2008 to June 29, 2009 (the Everest policy).

Section IV - Commercial General Liability Conditions of the Everest policy provided, in subdivision (4) (b) (1) (b), that this insurance was excess over “[a]ny other primary insurance available to you covering damages arising out of the premises or operations, and the products and completed operations, for which you have been added as an additional insured by attachment of an endorsement.”

JC Realty and NPHDF, asserting that they are additional insureds under the ILU policy and the Scottsdale policy, repeatedly sought defense and indemnification in connection with the Amaya action from ILU and Scottsdale, but they refused to provide any defense or indemnification to them. As a result, Everest was compelled to undertake JC Realty and NPHDF’s defense, incurring legal costs and expenses. JC Realty and NPHDF also assert that Mecca, in the prime contract, and Salcora in its subcontract, had agreed to defend, indemnify, and hold them harmless, but have refused to do so.

Consequently, on January 14, 2015, plaintiffs filed this action against defendants, seeking a declaratory judgment that ILU has a duty to defend and indemnify JC Realty and NPHDF in the Amaya action pursuant to the terms of the prime contract and the ILU policy, that such obligation is on a primary basis, and that ILU has breached its obligations to defend and indemnify them. Plaintiffs also seek a declaratory judgment that Scottsdale has a duty to defend and indemnify JC Realty and NPHDF in the Amaya action pursuant to the terms of the prime contract, the subcontract, and the Scottsdale policy, that such obligation is on a primary basis, and that Scottsdale has breached its obligations to defend and indemnify

them. Plaintiffs further seek a declaration that if ILU and Scottsdale do not have a duty to defend and indemnify JC Realty and NPHDF in the Amaya action, Mecca and Salcora have breached their contractual obligations by failing to procure insurance coverage in which JC Realty and NPHDF were covered as additional named insureds, and Mecca and Salcora must, therefore, provide a defense and indemnification to JC Realty and NPHDF with respect to the Amaya action. In addition, Everest seeks reimbursement of the fees and costs that it has incurred in defending JC Realty and NPHDF to date. Defendants have interposed their respective answers.

On August 14, 2015, plaintiffs filed their instant motion for partial summary judgment declaring that JC Realty and NPHDF are entitled to a defense<sup>1</sup> in the Amaya action under the ILU policy and the Scottsdale policy, and that ILU and Scottsdale have wrongfully refused to defend JC Realty and NPHDF in the Amaya action. Plaintiffs request partial summary judgment declaring that Mecca and/or Salcora are in breach of their contractual obligations to defend JC Realty and NPHDF and to provide JC Realty and NPHDF with insurance coverage. They also request reimbursement to Everest for the fees and costs that it has incurred in defending JC Realty and NPHDF to date in the Amaya action. On October 9, 2015, Scottsdale filed its cross motion seeking to compel responses to its discovery demands

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<sup>1</sup>Plaintiffs do not request summary judgment on the issue of indemnification at this juncture, asserting that this issue cannot be determined until further progression of the Amaya action.

and an order of severance. On May 18, 2016, plaintiffs filed their additional motion which concerns their discovery demands.

## DISCUSSION

### Plaintiffs' Motion As Against Scottsdale

In support of their motion, plaintiffs assert that they are additional insureds under the blanket additional insured endorsement of the Scottsdale policy. They further assert that Scottsdale has wrongfully refused to defend them in the Amaya action.

Scottsdale, in opposition, argues that JC Realty and NPHDF are not additional insureds under the Scottsdale policy. It asserts that this is because there is no written contract between Salcora and JC Realty and NPHDF. It contends that it only entered into a written contract with Mecca, and that the blanket additional insured endorsement in the Scottsdale policy required that plaintiffs must have entered into a written contract with it, in which it agreed to procure additional insured coverage for them in order for them to qualify as additional insureds.

Scottsdale relies upon the case of *Linarelllo v City Univ. of N.Y.* (6 AD3d 192, 195 [1st Dept 2004]), in which the Appellate Division, First Department, held that by the plain terms of the policies issued by the insurance companies therein to the subcontractors of a construction project, the construction manager was not an additional insured because it had no written contracts with the subcontractors. With respect to coverage of additional insureds, both insurance policies at issue in that case had provided: "Who Is An Insured (Section II)

is amended to include as an insured any person or organization for whom you [the subcontractor] 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” (*Linarello v City Univ. of N.Y.*, 2003 WL 25669421 [Sup Ct, NY County 2003], *affd as mod* 6 AD3d 192 [1st Dept 2007] [emphasis added]). Here, in contrast, the Scottsdale policy provided additional insurance coverage for “[a]ny person or organization whom [Salcora was] *required to add* as an additional insured on this policy *under a written contract*,” which was “in effect . . . during the term of the policy” and “[e]xecuted prior to the ‘bodily injury’” (emphasis added). Thus, unlike the terms of the policies in *Linarello*, the Scottsdale policy did not specify that the written contract must be with the additional insured.

The case of *AB Green Gansevoort, LLC v Peter Scalamandre & Sons, Inc.* (102 AD3d 425, 426 [1st Dept 2013]), in which the Appellate Division, First Department, held that there must be a written agreement between the insured and the organization seeking coverage in order to add that organization as an additional insured, is similarly distinguishable from the case at bar. The language of the insurance policy at issue in *AB Green Gansevoort, LLC* (102 AD3d at 426) was exactly the same as the language of the insurance policy in *Linarello*, i.e., it specifically provided that an organization was added as an additional insured “when you and such . . . organization have agreed in writing in a contract or agreement that such . . . organization be added as an additional insured on your policy.”

Similarly, the instant case is distinguishable from the case of *Gilbane Bldg. Co./TDX Const. Corp. v St. Paul Fire and Mar. Ins. Co.* (143 AD3d 146, 148 [1st Dept 2016]), wherein the Appellate Division, First Department, held that the additional insured clause therein covered only those who had written contracts directly with the named insured. In *Gilbane Bldg. Co./TDX Const. Corp.* (143 AD3d at 149), the insurance policy at issue contained an additional insured endorsement, which provided that “WHO IS AN INSURED (Section II) is amended to include as an insured any person or organization *with whom you have agreed* to add as an additional insured by written contract but only with respect to liability arising out of your operations or premises owned by or rented to you” (emphasis added). In denying coverage, the Appellate Division, First Department, emphasized that “the inclusion of the words ‘with whom’ was “the object of the verb phrase ‘you agree’” (*id.* at 153). Unlike the endorsement in *Gilbane Bldg. Co./TDX Const. Corp.* (143 AD3d at 149), the blanket additional insured endorsement in the Scottsdale policy does not contain such language. Rather, its language extends additional insured coverage to those third parties or organizations that were not parties to the agreement with the named insured, provided that the named insured was required to include those third parties as additional insureds in the agreement.

Indeed, the case at bar closely parallels *Pinon v 99 Lynn Ave., LLC* (124 AD3d 746, 748 [2d Dept 2015]), in which the Appellate Division, Second Department, recently found that owners were additional insureds under a subcontractor’s insurance policy where there

was no direct contract between the owner and the subcontractor, but the contract between the general contractor and the subcontractor required that the subcontractor obtain insurance which named the owner as an additional insured. In *Pinon* (124 AD3d at 748), the policy issued by the insurance company to the subcontractor stated that it provided additional insurance coverage for “[a]ny person or organization [the subcontractor was] required by a written contract, agreement or permit to name as an insured” with respect to liability for injuries arising out of the subcontractor’s work for the additional insured “at the location designated in the contract.” This language is similar to the language contained in the blanket additional insured endorsement in the Scottsdale policy.

Thus, the court finds that contrary to Scottsdale’s contention, the Scottsdale policy did not require that JC Realty and NPHDF be parties to the contract between Mecca and Salcora or otherwise require a contract directly between Salcora and JC Realty and NPHDF. JC Realty and NPHDF have satisfied the requirements of the blanket additional insured endorsement by demonstrating the existence of a written agreement, i.e., the subcontract, which, in section 13.1, expressly required Salcora to add them as additional insureds under the commercial liability policy that Salcora obtained from it (*see Pinon*, 124 AD3d at 748; *cf. 140 Broadway Prop. v Schindler El. Co.*, 73 AD3d 717, 718 [2d Dept 2010]). Furthermore, the subcontract incorporated the terms of the prime contract between JC Realty and NPHDF and Mecca. Thus, JC Realty and NPHDF qualify as additional insureds under the plain meaning of the blanket additional insured endorsement of the Scottsdale policy.

In addition, as noted above, there were certificates of insurance issued with respect to the Scottsdale policy, naming JC Realty and NPHDF as additional insureds. While a certificate of insurance is not “conclusive proof, standing alone,” of a contract to insure a party, it is “evidence of a carrier's intent to provide [additional insured] coverage” (*Tribeca Broadway Assoc. v Mount Vernon Fire Ins. Co.*, 5 AD3d 198, 200 [1st Dept 2004]).

“Additional insured” is a recognized term in insurance contracts and the “well-understood meaning of the term 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, 393 [2003]). The Scottsdale policy provided the named insured, Salcora, with primary coverage. Under the blanket additional insured endorsement of the Scottsdale policy, Scottsdale agreed to provide primary coverage to any party with whom Salcora entered into a contract if such contract specifically required the Scottsdale policy to be primary. Since the Scottsdale policy provided Salcora with primary coverage, and Salcora agreed to make JC Realty and NPHDF additional insureds, the subcontract constituted a contract requiring Scottsdale to provide JC Realty and NPHDF with primary coverage, and satisfied the requirement of the blanket additional insured endorsement (*see id.* at 393-394; *Mack-Cali Realty Corp. v NGM Ins. Co.*, 119 AD3d 905, 907-908 [2d Dept 2014]; *William Floyd School Dist. v Maxner*, 68 AD3d 982, 986-987 [2d Dept 2009]).

Scottsdale further contends, however, that plaintiffs are not additional insureds under the Scottsdale Policy because coverage is only provided for liability where the injury was

caused in whole or in part by Salcora's acts or omissions or the acts or omissions of those acting on Salcora's behalf. It argues that plaintiffs have failed to establish that JC Realty and NPHDF's liability arises out of Salcora's acts or omissions or the acts or omissions of those acting on Salcora's behalf. It asserts that there are disputed issues of fact as to whether Amaya may have had some connection with the work that Salcora was performing at the construction site to the extent that Amaya's employer, Odys, had entered into a sub-subcontract with Salcora. It maintains that summary judgment is, therefore, precluded on this basis.

Significantly, however, JC Realty and NPHDF have moved for summary judgment solely with respect to Scottsdale's duty to defend them and not with respect to the issue of indemnification. Thus, while the issue of whether Amaya will ultimately prevail in his claims against JC Realty and NPHDF may have a bearing upon whether Scottsdale will be required to indemnify JC Realty and NPHDF, the question of indemnity is separate and apart from the question of whether Scottsdale has a duty to defend them in the Amaya action. It is well established that an insurer's duty to defend its insured is exceedingly broad (*Regal Constr. Corp. v National Union Fire Ins. Co. of Pittsburgh, PA*, 15 NY3d 34, 37 [2010]; *BP A.C. Corp. v One Beacon Ins. Group*, 8 NY3d 708, 714 [2007]; *Automobile Ins. Co. of Hartford v Cook*, 7 NY3d 131, 137 [2006]). An insurer will be called upon to provide a defense whenever the allegations of the complaint suggest a reasonable possibility of coverage (*Regal Constr. Corp.*, 15 NY3d at 37; *BP A.C. Corp.*, 8 NY3d at 714). If a

complaint contains any facts or allegations which bring the claim even potentially within the protection purchased, the insurer is obligated to defend (*Regal Constr. Corp.*, 15 NY3d at 34; *BP A.C. Corp.*, 8 NY3d at 714; *Technicon Elecs. Corp. v American Home Assur. Co.*, 74 NY2d 66, 73 [1989], *rearg dismissed* 74 NY2d 843 [1989], *rearg denied* 74 NY2d 893 [1989]). This standard applies equally to additional insureds and named insureds (*Regal Constr. Corp.*, 15 NY3d at 34; *Worth Constr. Co., Inc. v Admiral Ins. Co.*, 10 NY3d 411, 415 [2008]; *BP A.C. Corp.*, 8 NY3d at 715; *Stout v 1 E. 66th St. Corp.*, 90 AD3d 898, 903 [2d Dept 2011]).

Thus, the court, in making its determination as to whether Scottsdale has a duty to defend JC Realty and NPHDF in the Amaya action, need only compare the allegations in the complaint in the Amaya action with the coverage provided under the Scottsdale policy. While Scottsdale asserts that Amaya's complaint does not mention Salcora, Mecca alleges, in its third-party complaint in the Amaya action, that Salcora was retained by it to perform certain services and/or work at the construction project, and that the injuries sustained by Amaya were caused by Salcora's negligence. Thus, the pleadings in the Amaya action suggest, at the very least, a reasonable possibility of coverage of JC Realty and NPHDF under the Scottsdale policy (*see Regal Constr. Corp.*, 15 NY3d at 37; *BP A.C. Corp.*, 8 NY3d at 714; *Sucrest Corp. v Fisher Governor Co., Inc.*, 83 Misc 2d 394, 402 [Sup Ct, NY County 1975]).

Scottsdale also argues that the alleged liability in the Amaya action could not have arisen out of Salcora's operations performed on behalf of JC Realty and NPHDF since Salcora had no contract directly with plaintiffs. This argument is rejected. Pursuant to the terms of the subcontract, which in article 1 and article 16 incorporated the prime contract, Salcora, in article 2, expressly assumed Mecca's obligations and responsibilities towards JC Realty. Thus, the alleged liability could have arisen out of Salcora's operations, which it performed to satisfy Mecca's obligations to JC Realty and NPHDF. Moreover, as previously discussed, the Scottsdale policy did not require that JC Realty and NPHDF have a direct contract with Salcora to be deemed additional insureds under the Scottsdale policy.

Scottsdale further points to the fact that the blanket additional insured endorsement excludes additional insured coverage where the additional insured's sole negligence caused the injury. It contends that since there is an issue of fact as to whether JC Realty and NPHDF's sole negligence caused Amaya's injuries, it is premature to decide if the Scottsdale policy provides additional insured coverage to them prior to discovery with respect to the evidence considered by the trial court in the Amaya action.

This contention is devoid of merit since "[t]he duty [to defend] is not contingent on the insurer's ultimate duty to indemnify should the insured be found liable, nor is it material that the complaint against the insured asserts additional claims which fall outside the policy's general coverage or within its exclusory provisions" (*Seaboard Sur. Co. v Gillette Co.*, 64 NY2d 304, 310 [1984]). "Rather, the duty of the insurer to defend the insured rests solely on

whether the complaint alleges any facts or grounds which bring the action within the protection purchased” (*id.*). An insurer cannot avoid summary judgment based solely on mere “speculation that further discovery may uncover something,” and may not claim that discovery is incomplete as a way to delay resolution of a motion for summary judgment (*W & W Glass Sys., Inc. v Admiral Ins. Co.*, 91 AD3d 530, 531 [1st Dept 2012]). Thus, it is not premature to determine JC Realty and NPHDF’s entitlement to partial summary judgment against Scottsdale with respect to the duty to defend them.

Plaintiffs have established their *prima facie* entitlement to a declaration that Scottsdale owes JC Realty and NPHDF a duty to defend them, as additional insureds under the Scottsdale policy. In opposition, Scottsdale has failed to raise a triable issue of fact. Consequently, plaintiffs are entitled to partial summary judgment declaring that Scottsdale is obligated to defend JC Realty and NPHDF in the Amaya action, and that the Scottsdale policy is primary to the Everest policy (*see Pecker Iron Works of N.Y.*, 99 NY2d at 393; *Mecca Contr., Inc.*, 140 AD3d at 716; *Pinon*, 124 AD3d at 748; *William Floyd School Dist.*, 68 AD3d at 986-987). In addition, Scottsdale must reimburse Everest for the past costs that it has incurred in undertaking JC Realty and NPHDF’s defense in the Amaya action (*see Pinon*, 124 AD3d at 748; *W & W Glass Sys., Inc.*, 91 AD3d at 530).

#### **Plaintiffs’ Motion As Against Salcora**

Plaintiffs further seek summary judgment declaring that Salcora is in breach of its contractual obligations to defend them and provide them with insurance coverage. Salcora

was obligated to defend, indemnify and hold harmless JC Realty and NPHDF in the Amaya action pursuant to the terms of the prime contract, which, pursuant to section 1.1 and section 16.1.2, was incorporated and integrated into and formed a part of the subcontract. Salcora was also obligated to defend, indemnify, and hold harmless JC Realty and NPHDF in the Amaya action pursuant to the specific terms of the subcontract, i.e., section 4.6.1.

Salcora, however, did not breach its contractual obligation to procure insurance for JC Realty and NPHDF, pursuant to section 13.1 of the subcontract, since it purchased an insurance policy from Scottsdale with a blanket additional insured endorsement (*see Perez v Morse Diesel Intl., Inc.*, 10 AD3d 497, 498 [1st Dept 2004]; *Britez v Madison Park Owner, LLC*, 36 Misc 3d 1233[A], 2012 NY Slip Op 51586[U] \*14 [Sup Ct, NY County 2012], *aff'd* 106 AD3d 531 [1st Dept 2013]). Plaintiffs' complaint, insofar as it is asserted against Salcora, seeks a declaration that *if* the court determines that Scottsdale does not have a duty to defend and indemnify JC Realty and NPHDF in the Amaya action, Salcora has breached its contractual obligations by failing to procure insurance coverage in which JC Realty and NPHDF were covered as additional insureds and Salcora must, therefore, provide defense and indemnity to JC Realty and NPHDF in the Amaya action. Thus, since the court finds that JC Realty and NPHDF are covered as additional insureds under the Scottsdale policy and that Scottsdale has a duty to defend them under the Scottsdale policy, plaintiffs' motion for partial summary judgment as against Salcora is rendered moot.

### Plaintiffs' Motion As Against ILU

Plaintiffs argue that ILU wrongfully refused to honor its obligations to defend JC Realty and NPHDF in connection with the Amaya action. As discussed above, section 11.1.1 of the prime contract required Mecca to purchase insurance that named JC Realty and NPHDF as additional insureds, and section 11.1.4.2 of the prime contract required such coverage to apply on a primary basis for JC Realty and NPHDF with any insurance maintained by JC Realty and NPHDF to be excess of Mecca's insurance and not contributory. They further point out that the additional insured endorsement of the ILU policy purchased by Mecca included JC Realty and NPHDF as additional insureds since it included, as additional insureds, all persons or organizations "[a]s required by written contract signed by both parties prior to loss" with respect to bodily injury "caused, in whole or in part" by Mecca's acts or omissions or the acts or omissions of those acting on Mecca's behalf (i.e., Salcora and Odys) "in the performance of [Mecca's] ongoing operations for the additional insured(s) [i.e., JC Realty and NPHDF]."

Plaintiffs further note that the complaint in the Amaya action contains allegations against Mecca, JC Realty, and NPHDF. They contend that the allegations in the Amaya action suggest a reasonable possibility of coverage, thereby triggering a duty to defend pursuant to the additional insured endorsement in the ILU policy (*see Regal Constr. Corp.*, 15 NY3d at 37; *BP A.C. Corp.*, 8 NY3d at 714; *Automobile Ins. Co. of Hartford*, 7 NY3d at 137).

In opposition, ILU does not dispute that JC Realty and NPHDF are additional insureds under the ILU policy, or that the allegations in the Amaya action suggest a reasonable possibility of coverage. Rather, ILU argues that the ILU policy is excess to the Scottsdale policy and only provides its named insured, Mecca, with excess coverage in the Amaya action. It contends that the rights of JC Realty and NPHDF under the ILU policy can be no greater than those of Mecca and that, therefore, the ILU policy can only provide excess coverage to JC Realty and NPHDF. It maintains that, as such, any coverage under the Scottsdale policy would need to be fully exhausted before implicating the ILU policy. It asserts that it has no obligation to defend JC Realty and NPHDF until the Scottsdale policy has been exhausted.

In support of its contention, ILU relies upon the ruling in *Mecca Contr., Inc. v Scottsdale Ins. Co.* (140 AD3d 714 [2d Dept 2016]), where an action was commenced by Mecca against Scottsdale and Salcora arising out of the same construction project and the identical subcontract between Mecca and Salcora, and involving the question of Scottsdale's obligation to defend and indemnify Mecca under the identical Scottsdale policy in the same Amaya action at issue in the case at bar. In *Mecca*, the Appellate Division, Second Department, affirmed the ruling by the Supreme Court, Kings County, which granted a motion by Mecca for summary judgment declaring that Scottsdale was obligated to defend and indemnify it in the Amaya action and that the Scottsdale policy is primary to the ILU policy. In so ruling, the Appellate Division, Second Department, in *Mecca*, found that

“[s]ince the [Scottsdale] policy provided Salcora with primary coverage, and Salcora agreed to make Mecca an additional insured [in the subcontract], the [sub]contract between Mecca and Salcora constituted a contract requiring Scottsdale to provide Mecca with primary coverage, and satisfied the requirement of the [b]lanket [a]dditional [i]nsured [e]ndorsement.”

However, this ruling in *Mecca* only pertained to Mecca’s right to coverage and which policy is primary with respect to Mecca. It did not address JC Realty and NPHDF’s right to coverage under the ILU policy nor did it rule that the Scottsdale policy was primary to the ILU policy with respect to JC Realty and NPHDF. The ILU policy provided Mecca with primary coverage, and JC Realty and NPHDF, as additional insureds under the ILU policy, were entitled to the same primary coverage as Mecca (*see United States Fire Ins. Co. v Knoller Cos., Inc.*, 80 AD3d 692, 694 [2d Dept 2011]; *Pecker Iron Works of N.Y.*, 99 NY2d at 393-394; *Jefferson Ins. Co. of N.Y. v Travelers Indem. Co.*, 92 NY2d 363, 372 [1998]; *William Floyd School Dist.*, 68 AD3d at 986-987).

While the court, as discussed above, has found that Scottsdale is required to defend JC Realty and NPHDF in the Amaya action, this does not absolve ILU of its independent duty to defend JC Realty and NPHDF in the Amaya action (*see Continental Cas. Co. v Rapid-American Corp.*, 80 NY2d 640, 655 [1993]; *United States Fire Ins. Co.*, 80 AD3d at 695). Each insurer has a duty “to defend if there is an asserted occurrence covered by its policy” (*Continental Cas. Co.*, 80 NY2d at 655; *Cordial Greens Country Club v Aetna Cas.*

& *Sur. Co.*, 41 NY2d 996, 997 [1977]). An additional insured “should not be denied initial recourse to a carrier merely because another carrier may also be responsible” (*Continental Cas. Co.*, 80 NY2d at 655). Therefore, ILU may not look to Scottsdale’s policy in order to disclaim its own duty to defend JC Realty and NPHDF. In fact, “[w]hen more than one policy is triggered by a claim, pro rata sharing of defense costs may be ordered” (*id.*). Thus, ILU’s argument that JC Realty and NPHDF must first exhaust the Scottsdale policy before obtaining a defense under the ILU policy is devoid of merit.

Consequently, the coverage provided under the ILU policy to JC Realty and NPHDF, as additional insureds, is concurrent with the coverage provided under the Scottsdale policy to JC Realty and NPHDF, as additional insureds (*see United States Fire Ins. Co. v Knoller Cos., Inc.*, 80 AD3d 692, 695 [2d Dept 2011]). Therefore, ILU is obligated, as a co-insurer with Scottsdale, to defend JC Realty and NPHDF in the Amaya action, and since both the ILU policy and the Scottsdale policy provide the same level of insurance to JC Realty and NPHDF, ILU and Scottsdale must share ratably in the expenses of defending JC Realty and NPHDF in connection with the Amaya action (*see id.*). The Everest Policy is an excess policy, and Everest’s duty to defend is not triggered until exhaustion of the ILU policy and the Scottsdale policy (*see Pecker Iron Works of N.Y.*, 99 NY2d at 393; *Sport Rock Intl., Inc. v American Cas. Co. of Reading, Pa.*, 65 AD3d 12, 19-20 [1st Dept 2009], *appeal withdrawn* 14 NY3d 796 [2010]).

Consequently, inasmuch as plaintiffs have established their prima facie entitlement to a declaration that ILU owes them a duty to defend them as additional insureds under the ILU policy, and ILU has failed to raise a triable issue of fact, plaintiffs are entitled to partial summary judgment declaring that ILU is obligated to defend JC Realty and NPHDF in the Amaya action, as a co-insurer with Scottsdale, and that the ILU policy is primary to the Everest policy (*see Pecker Iron Works of N.Y.*, 99 NY2d at 393; *William Floyd School Dist.*, 68 AD3d at 986-987). In addition, ILU must reimburse Everest (on a pro-rata basis with Scottsdale) for the past costs that it has incurred in undertaking JC Realty and NPHDF's defense in the Amaya action (*see Pinon*, 124 AD3d at 748; *W & W Glass Sys., Inc.*, 91 AD3d at 530).

#### **Plaintiffs' Motion As Against Mecca**

Plaintiffs also seek summary judgment declaring that Mecca is in breach of its contractual obligations to defend them and provide them with insurance coverage. As set forth above, Mecca, in section 11.1.4 of the prime contract, agreed to procure liability insurance which named JC Realty and NPHDF as additional insureds. Since Mecca procured insurance coverage which covered JC Realty and NPHDF, as additional insureds, in accordance with section 11.1.4 of the prime contract, it satisfied its obligation to procure insurance covering JC Realty and NPHDF as additional insureds (*see Perez*, 10 AD3d at 498; *Garcia v Great Atl. & Pac. Tea Co.*, 231 AD2d 401, 401 [1st Dept 1996]; *Murphy v*

*University Club*, 200 AD2d 532, 533 [1st Dept 1994]; *Britez*, 2012 NY Slip Op 51586[U\*14).

Mecca argues that it had no obligation to JC Realty and NPHDF other than to procure insurance naming JC Realty and NPHDF as additional insureds and that JC Realty and NPHDF have no basis for a contractual demand for a defense. Plaintiffs point out, however, that, in addition to Mecca's contractual obligation to procure insurance, it had a separate and distinct independent contractual obligation to defend, hold harmless, and, if required, indemnify, JC Realty and NPHDF in the Amaya action. pursuant to section 3.18 of the prime contract, in which it agreed to indemnify and hold JC Realty and NPHDF harmless against all claims, including attorneys' fees, arising out of any act, whether real or alleged, by it, Salcora, or Odys during the performance of the prime contract. Indeed, Section 3.18 of the prime contract expressly provided that Mecca, "*at its own expense, shall defend the Indemnified Parties [i.e., JC Realty and NPHDF] in court,*" and that "[n]o provision requiring the furnishing of insurance shall be construed to affect, impair, or excuse [Mecca's] obligation to indemnify and save [harmless] the Indemnified Parties [i.e., JC Realty and NPHDF]" (emphasis added; *compare Garcia*, 238 AD2d at 401 [where the contract did not impose such an obligation]).

However, plaintiffs' complaint only alleges that Mecca breached its contractual obligation to procure insurance and the relief it demands against Mecca is a declaration that *if* the court determines that ILU does not have a duty to defend and indemnify JC Realty and

NPHDF in the Amaya action, Mecca has breached its contractual obligations by failing to procure insurance coverage in which JC Realty and NPHDF were covered as additional insureds and Mecca must, therefore, provide a defense and indemnify JC Realty and NPHDF in the Amaya action. Thus, since the court finds that ILU has a duty to defend JC Realty and NPHDF under the ILU policy, this renders plaintiffs' motion for partial summary judgment as against Mecca moot.

### **Scottsdale's Cross Motion**

Scottsdale, in its cross motion, seeks an order striking plaintiffs' complaint pursuant to CPLR 3126, or compelling plaintiffs to respond to its discovery demands pursuant to CPLR 3124. Scottsdale acknowledges that plaintiffs served responses to its interrogatories, but argues that these responses were incomplete and render the issue of additional insured coverage uncertain. Specifically, it argues that plaintiffs have not provided the identity of other trade contractors at the construction site at the time of Amaya's accident, the names of witnesses, the person in charge of general site safety on the premises on the date of Amaya's accident, the identity of documents by title pertaining to the claims between it and plaintiffs, an explanation of how and why JC Realty and NPHDF believe they are entitled to insurance coverage from it as additional insureds, documents as to when plaintiffs provided notice to it, and any communications between plaintiffs and it. It further asserts that plaintiffs have not appeared for depositions in accordance with a notice for examination before trial served by it on March 20, 2015. It also asserts that plaintiffs have failed to provide any responses

to its notice of prior pleadings served on March 20, 2015, which requests that plaintiffs furnish it with the prior pleadings, motion papers, documents produced in disclosure, and other documents from the Amaya action.

Plaintiffs, in opposition, state that they have complied with their discovery obligations since they have served responses to Scottsdale's interrogatories and responses to Scottsdale's requests for production of documents, whereby they have produced 2,559 pages of responsive materials. They also assert that they obtained documents from the Amaya action and produced them. Scottsdale acknowledges that plaintiffs have served these additional documents prior to the return date of its instant cross motion. It asserts, however, that these supplemental responses still do not provide full disclosures, and that plaintiffs have not appeared for depositions.

There is no pattern of a willful or contumacious failure to respond to discovery demands which would justify the extreme and drastic relief of dismissing plaintiffs' complaint against Scottsdale (*see Crystal Clear Dev., LLC v Devon Architects of N.Y., P.C.*, 127 AD3d 911, 914 [2d Dept 2015]). Significantly, Scottsdale has not previously sought an order compelling plaintiffs to comply with any discovery demands, and there is no showing that plaintiffs have acted in bad faith with respect to their compliance with Scottsdale's discovery demands. Thus, Scottsdale's cross motion must be denied insofar as it seeks an order striking plaintiffs' complaint for failing to adequately respond to its discovery demands.

Scottsdale also seeks to compel plaintiffs to respond to its discovery demands. However, Scottsdale asserts that it needs such discovery in connection with opposing plaintiffs' motion for partial summary judgment, which has now been decided. Therefore, the granting of partial summary judgment against Scottsdale has rendered the issue of these discovery requests moot.

To the extent that Scottsdale's discovery requests are related to the issue of indemnity, such issue can only be determined in the Amaya action. In this regard, it has been held that "[i]n the absence of a jury finding in the underlying action, any claim of an entitlement to indemnification would be premature" (*Bovis Lend Lease LMB Inc. v Garito Contr., Inc.*, 65 AD3d 872, 875 [1st Dept 2009], *appeal dismissed* 13 NY3d 878 [2009], *appeal withdrawn* 14 NY3d 884 [2010]; *see also Crespo v City of New York*, 303 AD2d 166, 167 [1st Dept 2003]; *Construction Corp. v Old Republic Ins. Co.*, 2010 NY Slip Op 30599[U], 2010 WL 1179404 [Sup Ct, NY County 2010]). The court notes, however, that in *Mecca*, the Appellate Division, Second Department, has already ruled that Scottsdale is obligated to both defend and indemnify Mecca in the Amaya action. Thus, Scottsdale's request for an order compelling discovery must be denied at this juncture.

Scottsdale, in its cross motion, further argues that a trial of plaintiffs' contractual indemnification claims against Mecca and Salcora should be severed from plaintiffs' claims seeking insurance coverage from ILU and Scottsdale. It contends that combining these

claims in this action is prejudicial to it because the jury will be aware that insurance coverage is involved.

CPLR 603 provides that “[i]n furtherance of convenience or to avoid prejudice the court may order a severance of claims, or may order a separate trial of any claim, or of any separate issue.” Scottsdale’s argument that a severance is necessary to avoid prejudice to it, however, is devoid of merit since the severance that it seeks does not involve severance of plaintiffs’ insurance coverage claims from Amaya’s claims to recover damages for his personal injuries. The Amaya action is being separately litigated. Scottsdale cannot show that it will be prejudiced by a lack of severance of plaintiffs’ breach of contract claims against Mecca and Salcora from their insurance claims against Scottsdale and ILU in this declaratory judgment action. These claims involve common factual and legal issues, are inextricably intertwined, and are routinely litigated in the same action. Thus, Scottsdale’s cross motion, insofar as it seeks a severance of the insurance coverage claims against it from the contractual claims against Salcora and Mecca, must be denied (*see New York Cent. Mut. Ins. Co. v McGee*, 87 AD3d 622, 624 [2d Dept 2011]).

#### **Plaintiffs’ Motion With Respect to the Stay of Disclosure**

Pursuant to CPLR 3214 (b), service of a notice of motion under CPLR 3212 “stays disclosure until determination of the motion unless the court orders otherwise.” Thus, plaintiffs’ motion, which seeks an order lifting this automatic stay, which was in effect pursuant to CPLR 3214 (b), following their service of their notice of motion for partial

summary judgment and continuing while their motion for partial summary judgment was pending, has now been rendered moot by the granting of their motion for partial summary judgment. In any event, such discovery was unnecessary with respect to the disposition of their motion for partial summary judgment declaring that they are entitled to a defense in the Amaya action from Scottsdale and ILU. While plaintiffs argue that they need such discovery with respect to the issue of indemnity, there is no basis for such discovery since the issue of indemnity must await the resolution of the Amaya action.

### CONCLUSION

Accordingly, plaintiffs' motion for partial summary judgment in their favor is granted to the extent that it is declared that Scottsdale and ILU have a duty to defend JC Realty and NPHDF in the Amaya action, and that Everest is entitled to reimbursement from Scottsdale and ILU of the defense costs incurred by it in defending JC Realty and NPHDF in the Amaya action. In light of this determination, plaintiffs' motion for partial summary judgment in their favor as against Salcora and Mecca is rendered moot. Scottsdale's cross motion for an order striking plaintiffs' complaint, compelling responses to its discovery demands, and severing the insurance claims against it from the contractual claims against Salcora and Mecca is

denied. Plaintiffs' motion is denied as moot insofar as it seeks to vacate the stay under CPLR 3214 (b), and is denied insofar as it seeks to compel responses to their discovery demands.

This constitutes the decision and order of the court.

E N T E R,



J. S. C.

HON. EDGAR G. WALKER

KINGS COUNTY CLERK  
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