National Union Fire Ins. Co. of Pittsburgh, PA v Burlington Ins. Co.
2018 NY Slip Op 30741(U)
April 27, 2018
Supreme Court, New York County
Docket Number: 155114/2013
Judge: Marcy Friedman
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK – PART 60

PRESENT: Hon. Marcy Friedman, J.S.C.

NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA,

Index No.: 155114/2013

Plaintiff,

- against –

DECISION/ORDER

THE BURLINGTON INSURANCE COMPANY and UNITED STATES FIDELITY & GUARANTY COMPANY,

Defendants.

This is an action brought by plaintiff excess insurer, National Union Fire Insurance Company of Pittsburgh, PA (National Union), against defendant primary insurers, The Burlington Insurance Company (Burlington) and United States Fidelity & Guaranty Company (USF&G). Burlington declined to defend the insured, Mayore Estates, LLC (Mayore), in actions brought against Mayore alleging personal injury resulting from clean-up work performed at 22 Cortlandt Street following the World Trade Center disaster on September 11, 2001 (the Underlying Actions). National Union defended the insured and seeks a declaration that Burlington improperly failed to defend Mayore in the Underlying Actions and that National Union is entitled to reimbursement and/or contribution from Burlington for all expenses incurred in its defense of Mayore. (Am. Compl., ¶¶ 1-2, 23.) Burlington denies liability and asserts a counterclaim against National Union and a cross claim against USF&G for a declaration that it is not liable or, in the alternative, is entitled to contribution and/or indemnification. (See Am. Answer, Wherefore Clause at 12.)

National Union moves for summary judgment, pursuant to CPLR 3212, on its claim for a declaratory judgment determining that Burlington had a duty to defend and indemnify Mayore in the Underlying Actions and directing Burlington to reimburse National Union for all amounts paid or incurred in connection with the defense and indemnification of Mayore in the Underlying Actions. (National Union Memo. In Supp., at 1, 21-22.)[1] Burlington also moves for summary judgment on its counterclaim against National Union, seeking a declaration that Burlington does not have a duty to defend or indemnify Mayore in the Underlying Actions. (Burlington Memo. In Supp., at 1.)[2]

Facts

The following facts are undisputed. On September 11, 2001, Mayore was the owner of 22 Cortlandt Street, a 34-story building located in lower Manhattan. (Joint Statement of Undisputed Material Facts [Jt. St.], ¶ 1.)

Burlington issued a general liability insurance policy (Burlington Policy) to Mayore, which covered the period from December 10, 2001 to December 10, 2002. (Jt. St., ¶ 2.) The Burlington Policy has limits of $1 million per occurrence and $2 million in the aggregate. (Id., ¶ 3.)

The Burlington Policy provides, in pertinent part:

"1. Insuring Agreement

a. We will pay those sums that the insured becomes legally obligated to pay as damages because of 'bodily injury' or 'property damage' to which this insurance applies. We will have the right and duty to defend the insured

[1] The memoranda of law on National Union's motion are referred to as National Union Memo. In Supp., Burlington Memo. In Opp., and National Union Reply Memo. The memoranda of law on Burlington's motion are referred to as Burlington Memo. In Supp., National Union Memo. In Opp., and Burlington Reply Memo.

[2] According to National Union, defendant USF&G "issued a primary policy to Mayore that terminated before the Burlington policy incepted. USF&G is defending Mayore in the Underlying Actions, and is a defendant herein solely because a determination of Burlington's obligations could impact USF&G." (National Union Memo. In Supp., at 2, n. 1.) Neither plaintiff nor Burlington seeks affirmative relief against USF&G on these motions.

against any 'suit' seeking those damages. However, we will have no duty to defend the insured against any 'suit' seeking damages for 'bodily injury' or 'property damage' to which this insurance does not apply. We may, at our discretion, investigate any 'occurrence' and settle any claim or 'suit' that may result. But:

. . .

b. This insurance applies to 'bodily injury' and 'property damage' only if:

(1) The 'bodily injury' or 'property damage' is caused by an 'occurrence' that takes place in the 'coverage territory'; and

(2) The 'bodily injury' or 'property damage' occurs during the policy period."

(Jt. St., Exh. 1, TBIC 0005.)

The policy also contains the following "Total Pollution Exclusion Endorsement":

"This insurance does not apply to:

f. Pollution

(1) 'Bodily injury' or 'property damage' which would not have occurred in whole or part but for the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of pollutants at any time.

(2) Any loss, cost or expense arising out of any:

(a) Request, demand or order that any insured or others test for, monitor, clean up, remove, contain, treat, detoxify or neutralize, or in any way respond to, or assess the effects of pollutants; or

(b) Claim or suit by or on behalf of a governmental authority for damages because of testing for, monitoring, cleaning up, removing, containing, treating, detoxifying or neutralizing, or in any way responding to, or assessing the effects of pollutants.

Pollutants means any solid, liquid, gaseous, or thermal irritant or contaminant including smoke, vapor, soot, fumes, acid, alkalis, chemicals and waste. Waste includes material to be recycled, reconditioned or reclaimed."

(Jt. St., Exh. 1, TBIC 0028.)

National Union issued a commercial umbrella liability policy to Mayore for the period from February 14, 2002 to December 10, 2002 (National Union Policy). (Jt. St., ¶ 9.) The National Union Policy has limits of $10 million per occurrence and in the aggregate excess of underlying insurance. (Id., ¶ 10.)

On February 8, 2005, Mayore was named as a defendant in a New York State Supreme Court action brought by a plaintiff (Manuel Checo) who was allegedly injured in the World Trade Center clean-up. (Jt. St., ¶ 18.) Subsequent actions followed in this Court. (See Jt. St., ¶¶ 25, 27, 41, 42, 45, 47.) The World Trade Center litigation was consolidated before the United States District Court for the Southern District of New York. On or about September 9, 2005, Burlington received a copy of the Master Complaint filed in the federal action, In re World Trade Center Site Litigation, 21 MC 100 (AKH) (Master Complaint), "alleging injuries to a plaintiff class relating to post 9/11 clean-up activities." (Jt. St., ¶ 29; Aug. 19, 2005 Master Compl. [Jt. St., Exh. 14].) This Master Complaint alleged that plaintiffs sustained injuries both at the World Trade Center Site and at surrounding buildings identified in "Check-Off Complaints." (Aug. 19, 2005 Master Compl., ¶¶ 1-2; id., at 41.) The docket in the federal action was subsequently divided among various groups. Mayore was named as a defendant in 51 Check-Off Complaints filed pursuant to the Master Complaint (21 MC 102), dated June 14, 2007, in the related action, In re World Trade Center Lower Manhattan Disaster Site Litigation. (Jt. St., ¶¶ 32, 37.)

The plaintiffs in each of the 51 Check-Off Complaints seek redress for "purported respiratory illness and other injuries suffered as a result of post 9/11 clean-up activities at properties located in the vicinity of the former World Trade Center." (Jt. St., ¶ 38.) The June 14, 2007 Master Complaint alleges that plaintiffs sustained damages "as a result of the carelessness, recklessness and negligence of the Defendants . . . in failing to provide the Plaintiff[s] with a safe

place to work . . . and in failing to provide the Plaintiff[s] with proper and appropriate respiratory protection and protection from exposure to toxins during the time that the Plaintiff[s] participated in the clean-up. . . ." (June 14, 2007 Master Compl., ¶ 3 [Jt. St., Exh. 16]; see also id. e.g., ¶¶ 5, 66-72, 101-102.) The Check-Off Complaints further allege that each injured plaintiff was "exposed to and inhaled or ingested toxic substances and particulates." (E.g. Aristizabal Check-Off Compl., ¶ 32 [Jt. St., Exh. 18, Tab 1]; Barbosa Check-Off Compl., ¶ 32 [Jt. St., Exh. 18, Tab 2]; Bastidas Check-Off Compl., ¶ 33 [Jt. St., Exh. 18, Tab 3].) The Check-Off Complaints seek damages upon several "theories of liability," including breaches of the New York State Labor Laws and common law negligence. (E.g. Aristizabal Check-Off Compl., ¶ 40 [A], [B], [E]; Barbosa Check-Off Compl., ¶ 40 [A], [B], [E]; Bastidas Check-Off Compl., ¶ 45 [A], [B], [C].)

It is undisputed that on September 14, 2005, Burlington disclaimed any duty to defend Mayore in the federal action on the same grounds on which it had previously disclaimed coverage in the Checo and other state court actions. (Jt. St., ¶¶ 36, 22-24, 26, 28; Sept. 14, 2005 Letter [Jt. St., Exh. 17].) Specifically, in its letter to Mayore, Burlington's Area Claim Manager acknowledged receipt of the August 19, 2005 Master Complaint, which it categorized as follows: "The Class Action alleges that during the course of their employment between 9/11/01 through an unspecified date, employees involved in the 9/11 cleanup were caused to be exposed to, inhaled and or ingested unsafe, hazardous and or toxic elements, chemicals, materials or substances in and about the air and on the premises and parts within, within the defendants premises and or place of business in which he/she was working, due to the negligence of the defendant, its servants, agents, employees, permittees and or contractors." (Sept. 14, 2005 Letter.) This letter disclaimed liability on the ground, among others, that coverage is barred by the pollution exclusion, stating: "To the extent that the loss arises from exposure to, and

resultant inhalation and ingestion of pollutants, there is no potential for any duty under the policy, based on the endorsement [i.e., the pollution exclusion]." (Id.)

It is undisputed that on October 5 and 12, 2005, Burlington "reiterated" its September 14, 2005 disclaimer with regard to the August 19, 2005 Master Complaint. (Jt. St., ¶ 39; Oct. 5, 2005 Letter [Jt. St., Exh. 7]; Oct. 12, 2005 Letter [Jt. St., Exh. 19].)[3] Burlington also reiterated its disclaimers in multiple actions that had initially been filed in state court. (See Jt. St., ¶¶ 40-48.) In addition, in response to requests by USF&G that Burlington participate in the defense of the Underlying Actions, Burlington repeatedly "reiterated" its disclaimers between March 2009 and May 2010. (Id., ¶¶ 49-51.) By letters dated November 13 and 21, 2012 and January 4, 2013, National Union requested that Burlington assume the defense of the Underlying Actions. (Jt. St., ¶ 52.) In response, by letter dated January 31, 2013, Burlington confirmed that "Burlington will not alter its previously documented coverage positions . . . and as such respectfully declines to assume the defense of Mayore Estates or reimburse National Union or USF&G." (Id., ¶ 53; Jan. 31, 2013 Letter [Jt. St., Exh. 39].)

National Union received notice of the Underlying Actions on or around February 28, 2008, and has been defending the actions since 2009 pursuant to a reservation of rights. (Jt. St., ¶¶ 54-55.) On June 15, 2015, National Union provided Burlington with a claim note stating that eight of the claims against Mayore were settled for $136,250, and that National Union's share of the settlement was $102,187.50. (Id., ¶ 58; June 15, 2015 Email [Aff. of Emilie Bakal-Caplan (National Union's Atty) In Supp., Exh. 41].) On July 24, 2015, National Union notified Burlington that 41 claims were settled for $250,000, and that National Union's share of the settlement was $187,500. (Jt. St., ¶ 59; July 24, 2015 Email [Bakal-Caplan Aff., Exh. 42].)

[3] The Joint Statement states that Burlington reiterated the September 14, 2015 disclaimer. The 2015 date was clearly a typographical error. (See Jt. St., ¶¶ 36-39.)

According to William Carpenter, the adjuster responsible for overseeing the defense of Mayore in the Underlying Actions on behalf of National Union, all of the Underlying Actions against Mayore have been settled. (Carpenter Aff., ¶¶ 2, 7.) Mr. Carpenter represents that National Union has "paid or incurred over $1.5 million to defend and indemnify Mayore in the Underlying Actions, including over $1.2 million in defense fees and costs and almost $300,000 in indemnity" (id., ¶ 5), of which it "has paid or will pay $289,687.50 in indemnity on behalf of Mayore in connection with the settlements. . . ." (Id., ¶ 8.)

Discussion

As pleaded in the amended complaint, the plaintiffs in the Underlying Actions assert that they "were conducting clean-up operations at [Mayore's] premises after the September 11, 2011 [sic] attacks and were thereby injured as a result of exposure to various toxicants. The underlying plaintiffs generally allege that their injuries were caused by a dangerous, defective, unsupervised, hazardous and unsafe condition at Mayore's premises, caused by the carelessness, negligence, wanton and willful acts and disregard of Mayore." (Am. Compl., ¶ 14.) In moving for summary judgment, Burlington argues that it has no duty to defend or indemnify Mayore for four reasons: 50 of the 51 Underlying Actions do not allege injuries that occurred within the Burlington policy period; the Underlying Actions are barred by the Total Pollution Exclusion in the policy; the Underlying Actions are barred by the asbestos exclusion; and National Union failed to provide timely notice of the Underlying Actions and, in particular, to provide Burlington with notice of the Check-Off Complaints. (Burlington Memo. In Supp., at 1-3.) National Union disputes all of these contentions and seeks a declaration in its favor as to Burlington's duty to defend and indemnify Mayore. (National Union Memo. In Supp., at 1-2.)

The standards for summary judgment are well settled. The movant must tender evidence, by proof in admissible form, to establish the cause of action "sufficiently to warrant the court as a matter of law in directing judgment." (CPLR 3212 [b]; Zuckerman v City of New York, 49 NY2d 557, 562 [1980].) "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers." (Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 [1985].) Once such proof has been offered, to defeat summary judgment "the opposing party must 'show facts sufficient to require a trial of any issue of fact' (CPLR 3212, subd. [b])." (Zuckerman, 49 NY2d at 562.)

It is also "well settled that an insurance company's duty to defend is broader than its duty to indemnify." (Automobile Ins. Co. of Hartford v Cook, 7 NY3d 131, 137 [2006].) "[A]n insurer's duty to defend its insured 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. The duty to defend an insured . . . is derived from the allegations of the complaint and the terms of the policy. If a complaint contains any facts or allegations which bring the claim even potentially within the protection purchased, the insurer is obligated to defend." (BP Air Conditioning Corp. v One Beacon Ins. Group, 8 NY3d 708, 714 [2007] [internal quotation marks, brackets, and citations omitted]; General Acc. Ins. Co. of Am. v IDBAR Realty Corp., 229 AD2d 515, 516 [2d Dept 1996].) "Thus, an insurer may be required to defend under the contract even though it may not be required to pay once the litigation has run its course." (Automobile Ins. Co. of Hartford, 7 NY3d at 137.)

It is further settled that "policy exclusions are given a strict and narrow construction, with any ambiguity resolved against the insurer." (Belt Painting Corp. v TIG Insurance Co., 100 NY2d 377, 383 [2003]; County-Wide Ins. Co. v Excelsior Ins. Co., 147 AD3d 407, 408 [1st

Dept 2017] [same], lv denied 30 NY3d 905.) For an insurer "[t]o negate coverage by virtue of an exclusion, an insurer must establish that the exclusion is stated in clear and unmistakable language, is subject to no other reasonable interpretation, and applies in the particular case." (Continental Cas. Co. v Rapid-Am. Corp., 80 NY2d 640, 652 [1993]; accord Incorporated Vil. of Cedarhurst v Hanover Ins. Co., 89 NY2d 293, 298 [1996].) The insurer must "demonstrate that the allegations of the complaint cast [the] pleading solely and entirely within the policy exclusions. . . ." (International Paper Co. v Continental Cas. Co., 35 NY2d 322, 325 [1974]; accord Seaboard Sur. Co. v Gillette Co., 64 NY2d 304, 311-312 [1984].) "If any of the claims against the insured arguably arise from covered events, the insurer is required to defend the entire action." (Frontier Insulation Contrs., Inc. v Merchants Mut. Ins. Co., 91 NY2d 169, 175 [1997]; accord Fieldston Property Owners Assn., Inc. v Hermitage Ins. Co., Inc., 16 NY3d 257, 264 [2011].) The "insurer seeking to avoid its duty to defend bears a heavy burden, which, in practice, is rarely met." (Hotel Des Artistes, Inc. v Transamerica Ins. Co., 1994 WL 263429, * 3 [SD NY, No. 93 Civ 4563, June 13, 1994] [Sotomayer, J.] [applying New York law].)

The Total Pollution Exclusion

National Union and Burlington dispute whether the dispersal of toxins and other matter as a result of the World Trade Center disaster constitutes pollution within the meaning of the Total Pollution Exclusion. The parties agree that under the Court of Appeals decision in Belt Painting Corp. v TIG Insurance Co. (100 NY2d 377, supra), the Total Pollution Exclusion is applicable to "traditional" or "classic" environmental pollution. (National Union Memo. In Supp., at 16-17; Burlington Memo. In Opp., at 4-5.) They disagree, however, as to whether the World Trade Center dispersal constituted classic or traditional environmental pollution.

As noted by the Court of Appeals in Belt Painting, the trial court rejected the insured's contention that the exclusion was inapplicable because the underlying injury was not caused by environmental or industrial pollution, and stated that "it has been held that indoor air contamination can constitute environmental pollution." (100 NY2d at 383 [ellipses omitted].) The Appellate Division reversed and "rejected the insurer's literal reading of the pollution exclusion in favor of a common sense construction that the clause applies only where the damages alleged 'are truly environmental in nature' or result from 'pollution of the environment.'" (Id. [citation omitted].) The Court of Appeals agreed that the exclusion was "ambiguous when applied to the personal injury claim underlying [the] case," and did not apply to injuries caused by the inhalation of paint fumes in an office the insured was painting and stripping. (Id., at 382-383.)[4]

In concluding that the pollution exclusion was ambiguous as to the personal injury claim at issue, the Court considered the genesis of pollution exclusion clauses. (Bell Painting, 100 NY2d at 384-387.) The Court noted, among other things, that these clauses were required in all commercial and industrial liability policies, starting in 1971, to "'assure that corporate polluters bear the full burden of their own actions spoiling the environment.'" (Id., at 385, citing Governor's Mem approving L 1971, ch 765-766].) When the law was amended in 1982 to allow insurers to provide coverage for pollution, "it was part of a 'comprehensive effort to encourage industry responsibly to handle its hazardous wastes' and 'safeguard the public from the adverse consequences of hazardous waste handlers which become financially disabled.'" (Id., citing Governor's Mem approving L 1982, ch 855-856].) As the Court further observed, pollution exclusion clauses "have engendered litigation[] and divergent results." (Id., at 384.) "Many

[4] The pollution exclusion in Belt Painting is virtually identical to that at issue here. (Belt Painting, 100 NY2d at 382.)

courts have pronounced the exclusion unambiguous and applied it broadly, even to incidents that are not classic environmental pollution. Other courts have found the clause to be ambiguous as applied to personal injury claims arising out of a more direct contact with a substance that may fall into the exclusion's broad definition of 'pollutant.'" (Id., at 386 [internal citations omitted].) In Belt Painting, the Court of Appeals joined those courts that have more narrowly applied the pollution exclusion.

The Belt Painting Court was not called upon to, and did not, articulate comprehensive criteria for determining whether pollution qualifies as classic or traditional environmental pollution for purposes of insurance policy exclusions. Nor have the parties cited, or the court's own research located, any New York authority which has definitively determined this issue in the context of World Trade Center claims.

In BMS Enterprises, Inc. v General Star Indemnity Co. (2015 WL 13650038 [SD NY, No. 14 Civ 3375, Mar. 11, 2015] [Pauley, J.]), a case that is part of the World Trade Center litigation, the Court held, applying Texas law, that an insured's claim for coverage of the personal injury claims of workers injured in the clean-up was barred by a pollution exclusion clause that was substantially similar to that at issue here. Under a choice of law analysis, the Court reasoned that "Texas law considers pollution exclusion clauses to be 'clear, unambiguous, and properly applied [to bar personal injury claims] in non-traditional environmental pollution cases.' However, New York courts have 'long held the total pollution exclusion clause to be ambiguous when applied outside the context of lawsuits arising from traditional environmental pollution.'" (Id., at * 2, quoting Lapolla Indus., Inc. v Aspen Specialty Ins. Co., 962 F Supp 2d 479, 486-487 [ED NY 2013], affd 566 Fed Appx 95 [2d Cir 2014].) In finding a conflict between New York and Texas law, the BMS Enterprises Court arguably concluded, although it

did not expressly determine, that under New York law, the World Trade Center dispersal constituted non-traditional environmental pollution, which would not bar coverage.

In contrast, in WTC Captive Insurance Co., Inc. v Liberty Mutual Fire Insurance Co. (549 F Supp 2d 555 [SD NY 2008] [Hellerstein, J.] [WTC]) and 120 Greenwich Development Associates, L.L.C. v Admiral Indemnity Co. (US Dist Ct, SD NY, 08 Civ 6491, Preska, J., Sept. 25, 2013 [120 Greenwich]), the two cases in the World Trade Center litigation in which the Courts have in fact construed the pollution exclusions under New York law, the Courts did not address the issue of whether the World Trade Center dispersal constituted non-traditional environmental pollution. Rather, as discussed further below, the threshold issue they considered, in construing the exclusions, was whether the claims of the personal injury plaintiffs fell wholly within those exclusions. Concluding that the claims did not, the Courts held that the insurers' duty to defend was triggered as to all claims.

While the attack on the World Trade Center may be commonly regarded as having resulted in an environmental disaster, and while the World Trade Center emissions contained materials that would undoubtedly qualify as environmental pollutants, the event that resulted in their dispersal was unprecedented. On this record, the parties have not addressed whether, given the nature of this event, the pollution is properly considered "classic" or "traditional" environmental pollution within the meaning of the pollution exclusion. This court need not, determine the issue, however, as it holds below, consistent with the decisions in WTC and 120 Greenwich, that even if the dispersal did constitute classic or traditional environmental pollution, the claimants in the Underlying Actions asserted independent claims that do not fall within the exclusion, thus triggering Burlington's duty to defend.

WTC involved personal injury claims by clean-up workers at the World Trade Center itself, while 120 Greenwich involved personal injury claims, like those at issue here, by clean-up workers at surrounding sites. The exclusions in both cases were materially similar and barred coverage for bodily injury "arising out of" the discharge, dispersal, seepage or release of pollutants. (WTC, 549 F Supp 2d at 558; 120 Greenwich, Decision, at 8.) The policies in WTC, like the policy here, were issued shortly after 9/11. The WTC policies covered the period from September 11, 2001 to December 31, 2002. (549 F Supp 2d at 557-558.) The policy in 120 Greenwich was issued prior to 9/11 and covered the period from June 1, 2001 to June 1, 2002. (120 Greenwich, Decision, at 6.) In both cases, the Courts rejected the insurers' contention, like Burlington's here, that because the underlying personal injury claims involved exposure to toxic chemicals, they must fall within the exclusion. (WTC, 549 F Supp 2d at 563; 120 Greenwich, Decision, at 20-21; Burlington Memo. In Supp., at 2.) In holding that the insurers had not shown that all of the claims fell within the pollution exclusion, both Courts cited the allegations of the complaints in the underlying actions which, like those here, asserted that the plaintiffs were injured due to the failure of the insured to provide adequate safety protections. More particularly, the WTC Court reasoned: "The City and its contractors are sued, not for causing pollution, but under the Labor Law, because the City allegedly failed to provide proper equipment, or training in the use of such equipment, and did not assure the safety of the workplace." (549 F Supp 2d at 563.) And again: "They sue the City, not because it failed to abate the pollution resulting from the collapse of the Twin Towers, but because, they allege, the City negligently failed to protect them from the harms present at the World Trade Center site." (Id., at 563-564.) The 120 Greenwich Court followed WTC, reasoning that both litigations "center around allegations that plaintiffs suffered various injuries related to exposure to toxic

substances as a result of the respective defendants' failure to warn of the hazardous conditions and defendants' failure to provide plaintiffs with proper protective and decontamination equipment. Plaintiffs in both actions bring their claims under, inter alia, New York state labor laws, Federal labor laws, and common law negligence." (120 Greenwich, Decision, at 26-27 [internal citations to underlying complaints omitted].) The Court concluded: "Because the claims against Greenwich in the Underlying Actions sound in, among other things, labor law violations and negligence, they arguably trigger [the insurer's] duty to defend pursuant to the Policy. [The insurer], accordingly, fails to carry its burden of showing all the claims in the Underlying Actions are within the Policy's pollution exclusion." (Id., at 27-28 [internal citations omitted].)

This court concurs with these decisions. Contrary to Burlington's contention, the pollution exclusions at issue in WTC and 120 Greenwich do not differ materially from the exclusion at issue here. The exclusions there barred coverage for bodily injury "arising out of" dispersal of pollutants, while the exclusion here (quoted in full, supra at 3) bars coverage for bodily injury "which would not have occurred in whole or part but for" the dispersal of pollutants. The obvious difference in terminology is not legally significant, as New York Courts have adopted a "but for" test in determining the applicability of policy exclusions that bar coverage for injuries "arising out of" or "based on" specified events.

In Mount Vernon Fire Insurance Co. v Creative Housing Ltd. (88 NY2d 347, 351-353 [1996]), the Court of Appeals explained that "the phrases 'based on' and 'arising out of', when used in insurance policy exclusion clauses, are unambiguous and legally indistinguishable" (id., at 352), and that a "but for" test applies in determining coverage under both phrases. (Id., at 350, 353.) The Mount Vernon Court construed a clause excluding coverage for any claim "based on"

assault and battery, and held that this clause barred the claim that the insured's negligent supervision led to the assault. The Court reasoned that "the operative act giving rise to any recovery is the assault," and that no negligence cause of action would exist "but for" the assault. (Id., at 352, 353.)

The "but for" test articulated in Mount Vernon has been applied to bar coverage in limited other circumstances in which the Courts have concluded that "none of the causes of action that [the plaintiff in an underlying action] asserts could exist but for the existence of the excluded activity or state of affairs. . . ." (Scottsdale Indem. Co. v Beckerman, 120 AD3d 1215, 1219 [2d Dept 2014], lv denied 24 NY3d 912 [construing a policy that excluded coverage of insured public officials for claims arising out of a taking by eminent domain]; see also Country-Wide Ins. Co., 147 AD3d at 409 [holding that a policy, which excluded coverage for a claim of bodily injury arising out of the unloading of vehicles by the insured, barred a claim by the insured's employee for injury sustained during such unloading, the Court reasoning that "[t]o determine the applicability of an 'arising out of' exclusion, the Court of Appeals had adopted a 'but for' test" in Mount Vernon].)

Here, Burlington claims that "[a]lthough the injuries may be alleged to have been caused by a lack of proper safety equipment . . . , none of the workplace safety issues or injuries would exist but for the polluted environment." (Burlington Memo. In Supp., at 21.) Significantly, Burlington fails to cite any New York authority that has extended Mount Vernon to hold that a pollution exclusion—whether or not it contains an explicit "but for" test—applies to defeat an insurer's obligation to defend workplace safety claims stemming from exposure to pollution. As noted in WTC and 120 Greenwich, there is at least some authority applying New York law to the contrary. (See Calvert Ins. Co. v S & L Realty Corp., 926 F Supp 44, 47 [SD NY 1996];

Schumann v State of New York, 160 Misc 2d 802, 805-806 [Ct Cl 1994].)[5] As also noted in WTC, the defendants in the Underlying Actions are not sued for an affirmative act in causing the pollution but, rather, for their alleged independent wrong in failing to provide a safe workplace. (WTC, 549 F Supp 2d at 563-564.)

It bears emphasis that the court must apply the established precept that the insurer must demonstrate that the allegations of the complaint cast the pleading solely within the policy exclusion. (See generally International Paper Co., 35 NY2d at 325.) Given the extensive allegations of lack of workplace safety, and consistent with the decisions in WTC and 120

[5] Authorities under the laws of states other than New York are in conflict. For example, in BMS Enterprises v General Star Indemnity Co. (2015 WL 13650038, supra), as discussed above, the federal court first determined that a conflict existed between New York and Texas law as to whether a pollution exclusion clause will be applied to non-traditional environmental pollution, and that Texas law applied under a conflicts analysis. (Id., at * 2.) The Court then held that the exclusion barred claims asserted by plaintiffs in the World Trade Center litigation, because "the claims in the Master Complaint would not have arisen in whole or in part but for the dust, debris, and other toxins and harmful airborne products released at the clean-up site." (Id., at * 4 [emphasis in original].) The Court explained that, under Texas law, if a claim alleges that injury arose at least in part from a pollutant, coverage must be denied, and that coverage was accordingly barred for the claims of the workers because they arose in part from the dust, debris, and toxins at the clean-up site. (Id.)

In Barrett v National Union Fire Insurance Co. of Pittsburgh (304 Ga App 314 [2010]), the policy contained an exclusion for any liability "arising out of" the discharge, dispersal, seepage or release of pollutants, including "any solid, liquid, gaseous, or thermal irritant or contaminant. . . ." (Id., at 317.) A worker, who sustained injuries while installing taps on a gas line, alleged that he was injured due to the insured's negligence in failing to ensure workplace safety by, among other things, failing to monitor the oxygen level in the work area and to provide respirators or "supplied air." (Id., at 316.) The Court applied a "but for" test in construing the exclusion, and held that the insurer had failed to demonstrate that the injuries would not have arisen "but for" the release of the natural gas. The Court reasoned that the "allegations [of the complaint] do not show such a definitive 'but-for' causal link" (id., at 321), and that "[b]ecause the allegations of the complaint indicate that the release of the natural gas, standing alone, did not cause [the plaintiff's] injuries, we cannot say that the injuries 'arose out of' the release of that gas." (Id., at 322.)

The Georgia rules governing the interpretation of insurance policies, as set forth in Barrett, appear to be substantially similar to those in New York, requiring that policies be liberally construed in favor of coverage and that exclusions be narrowly construed in favor of the insured. (See id., at 320-321.) In light of these separate objectives, the Court articulated an instructive test for distinguishing between causality for purposes of coverage and causality for purposes of exclusion:

> ". . . [W]here the phrase 'arising out of' is found in a coverage provision of an insurance policy, Georgia courts have construed the phrase broadly, holding that 'where [an insurance] contract provides that a loss must 'arise out of' a specified act, it does not mean proximate cause in the strict legal sense but instead encompasses almost any causal connection or relationship.'
>
> By contrast, however, when found in an exclusionary clause of an insurance policy, we have interpreted the phrase 'arising out of' more narrowly, applying the 'but for' test traditionally used to determine cause-in-fact for tort claims."

(Barrett, 304 Ga App at 321-22 [internal citations and quotations omitted].)

Greenwich, the court does not find that Burlington meets its heavy burden of showing that the dispersal of pollutants, standing alone, caused the plaintiffs' injuries in the Underlying Actions.

Finally, it cannot be ignored that the policy was issued after 9/11, for the period from December 10, 2001 to December 10, 2002, during which the clean-up in areas surrounding the World Trade Center would have been expected to occur. An insurance policy must be read "in light of 'common speech' and the reasonable expectations of a businessperson." (Belt Painting, 100 NY2d at 383; accord J.P. Morgan Sec. Inc. v Vigilant Ins. Co., 126 AD3d 76 [1st Dept 2015].) If this sophisticated insurer sought to exclude liability for injuries sustained by workers performing contemplated clean-up activities, it could readily have adopted specific language to that effect. (See WTC, 549 F Supp 2d at 561, 564.)

The court accordingly holds that Burlington's duty to defend was triggered as to all claims in the Underlying Actions. On these motions, National Union does not submit proof of its defense costs, including attorneys' affirmations as to the reasonableness of the fees charged and services performed, and contemporaneous time records. A reference will accordingly be made to a Special Referee to determine such costs.

As discussed further below, triable issues of fact exist as to the extent to which National Union is entitled to indemnification. (See infra at 20-21.)

The Asbestos Exclusion

Burlington contends, and National Union disputes, that coverage for the personal injury claims in the Underlying Action is barred by the asbestos exclusion. (Burlington Memo. In Supp., at 23-26; National Union Memo. In Opp., at 17-18.) The asbestos exclusion provides in pertinent part: "This insurance does not apply to 'bodily injury' . . . caused by asbestosis, mesothelioma, emphysema, pneumoconiosis, pulmonary fibrosis, pleuritis, endothelioma or any

lung disease or any ailment caused by, or aggravated by exposure, inhalation, consumption or absorption of asbestos fibers or dust." (Jt. St., Exh. 1, TBIC 0020.) It is undisputed that the Master Complaint alleges exposure not only to asbestos but to a wide variety of toxins and contaminants, including "fiberglass, glass, silica, asbestos, lead, benzene, organic matter, and other hazardous chemicals. . . ." (June 14, 2007 Master Compl., ¶ 6 [Jt. St., Exh. 16].)

Based on the pleadings, Burlington fails to show that all of the plaintiffs' personal injury claims in the Underlying Actions fall within the asbestos exclusion. On the above authority (supra, at 8-9), Burlington's duty to defend was thus triggered. An issue of fact remains for trial, however, as to the extent to which the plaintiffs' injuries were caused or aggravated by asbestos and therefore as to the extent to which Burlington is obligated to indemnify National Union for the settlements paid or incurred on account of the injuries.

Occurrence of Injuries Within the Policy Period

It is undisputed that New York applies an "injury-in-fact" trigger of coverage. (National Union Memo. In Supp., at 12; Burlington Memo. In Supp., at 8.) The injury-in-fact trigger "requires the insured to demonstrate actual damage or injury during the policy period." (Continental Cas. Co. v Employers Ins. Co. of Wausau, 60 AD3d 128, 148 [1st Dept 2008], lv denied 13 NY3d 710 [2009].)

In claiming that 50 of the 51 Underlying Actions do not allege injuries that occurred within the Burlington policy period, Burlington relies on the Check-Off Complaints which enumerate specific injuries alleged to have been sustained by each plaintiff. According to Burlington, except in the case of one plaintiff, the Check-Off Complaints set forth a "date of onset" outside the policy period for each specified injury. (See Burlington Memo. In Supp., at 8-9; Aff. of John Mattoon (Burlington's Atty) In Supp., Exh. 60 [chart showing dates of onset].)

Burlington's reliance on the Check-Off Complaints ignores that they incorporate the allegations of the June 14, 2007 Master Complaint. They state on their face that they are "to be utilized and read in conjunction with the Master Complaint on file with the Court," and that "[a]ll headings, paragraphs, allegations and Causes of Action in the entire Master Complaint are applicable to and are adopted by the instant Plaintiff(s) as if fully set forth herein, in addition to those paragraphs specific to the individual Plaintiff(s), which are included below or annexed in a rider." (Aristizabal Check-Off Compl., Introduction, ¶ 1.)[6] The June 14, 2007 Master Complaint, in turn, alleges: "Plaintiff breathed in, ingested, came into contact with and/or absorbed said toxins, contaminants and other harmful airborne products during the entire time he/she performed clean-up, construction, demolition, excavation, and/or repair operations and worked at the aforementioned 'locations,' thus sustaining injury during the entire period of his/her employment activities at said locations." (June 14, 2007 Master Compl., ¶ 107.) It is undisputed that each of the plaintiffs in the Check-Off Complaints was employed at the location surrounding the World Trade Center during the Burlington policy period. Moreover, the Check-Off Complaints state that the injuries include but are not limited to the specified injuries or contain language to that effect. The Check-Off Complaints also fail to define the term "Date of onset." (See e.g. Aristizabal Check-Off Compl., ¶ 43.)

As the Court of Appeals has observed, and the Appellate Division of this Department has reiterated, "[t]he question of what event constitutes 'bodily injury' sufficient to trigger coverage . . . where latent injury is caused by prolonged exposure to a toxic substances such as asbestos, has been hotly contested" since the 1980s. (Continental Cas. Co. v Rapid-Am. Corp., 80 NY2d at 650; Continental Cas. Co. v Employers Ins. Co. of Wausau, 60 AD3d at 145.)

[6] Although the language of the Check-Off Complaints may differ in some respects, it is not disputed that they all contain materially similar provisions. (See Exh. 18, Tabs 2-51.)

To the extent that there are any inconsistencies between the Check-Off Complaints and the Master Complaint, such inconsistencies raise factual issues to be resolved at trial. Given the allegations of the Master Complaint that the plaintiffs' injuries occurred during the policy period, the court holds that Burlington was obligated to defend the Underlying Actions under the settled precept that the obligation to defend arises if the complaint alleges any facts that bring the claim even potentially within the protection purchased. (See BP Air Conditioning Corp., 8 NY3d at 714; see also Automobile Ins. Co. of Hartford, 7 NY3d at 137 ["[W]hen a policy represents that it will provide the insured with a defense, we have said that it actually constitutes 'litigation insurance' in addition to liability coverage"].)

The court reaches a different result as to the duty to indemnify. In claiming that Burlington has a duty to indemnify it for the settlement payments it paid or incurred in the Underlying Actions, National Union argues that "where an insurer breaches its duty to defend its insured in a personal injury action, and the insured thereafter concludes a reasonable settlement, 'the burden of proof will rest with the insurer to demonstrate that the loss compromised by the insured was not within policy coverage.'" (National Union Memo. In Opp., at 23-24, quoting Servidone Constr. Corp. v Security Ins. Co. of Hartford, 64 NY2d 419, 425 [1985].)

While the Servidone Court held that the burden was on the insurer to establish that the loss was not covered by the policy, the issue there was whether coverage was barred by a policy exclusion. (Id. at 425.) Notably, the Court also held that "an insurer's breach of [the] duty to defend does not create coverage and that, even in cases of negotiated settlements, there can be no duty to indemnify unless there is first a covered loss." (Id., at 423.) The Court concluded: "Since the loss compromised by Servidone was not determined [by the lower court] to be within the covered risks, we reverse the order awarding Servidone the full settlement amount and remit

the case for further proceedings." (Id.; see K2 Inv. Group, LLC v American Guar. & Liab. Ins. Co., 22 NY3d 578, 584-587 [2014] [reversing prior precedent that conflicted with Servidone].)

Here, similarly, the court is unable "to conclude from the summary judgment submissions that coverage [has] been established as a matter of law." (Servidone, 64 NY2d at 425.) That issue must be determined "not from the pleadings but from the actual facts" at a trial. (Id.)

Timeliness of Notice

Burlington acknowledges that it "did receive notice of the Master Complaint and the earlier state court actions," but contends that it has no duty to defend the Underlying Actions because it "never received specific notice of the Check-Off Complaints." (Burlington Memo. In Supp., at 3, 26.) Burlington also argues that it did not receive notices of claim for 21 of the 51 actions. (Burlington Memo. In Opp., at 16.) National Union argues that "[e]ven if Burlington could show that it truly had no notice of the Check-Off Complaints," Mayore was "excused from any further notice obligations" because Burlington had repeatedly disclaimed coverage of the state court actions and the Master Complaint. (Id., at 24; National Union Memo. In Supp., at 19.) According to National Union, further notice would have been "futile." (National Union Memo. In Opp., at 25; National Union Memo. In Supp., at 19.)

At the time the Burlington Policy was in effect, an insurer was authorized to disclaim coverage, even absent a showing of prejudice, based on the insured's failure to give notice of a lawsuit in accordance with policy requirements. (Argo Corp. v Greater New York Mutual Ins. Co., 4 NY3d 332, 339 [2005].)

New York courts have, however, held that an insured's failure to provide notice will be excused in certain circumstances. For example, where an insurer has previously disclaimed coverage of an underlying claim, an insurer may not further disclaim coverage based on the

insured's failure to forward the legal papers because such forwarding would be "a useless act." (Merchants Ins. of New Hampshire, Inc. v Weaver, 31 AD3d 945, 946 [3d Dept 2006]; Mid City Dodge, Inc. v Universal Underwriters Ins. Co., 306 AD2d 868, 869 [4th Dept 2003]; Moye v Thomas, 153 AD2d 673, 674 [2d Dept 1989].) Conversely, an insurer's disclaimer of coverage will not relieve the insured of its notice obligations when a new claim is asserted against the insured. (Axelrod v Magna Carta Cos., 63 AD3d 444, 445 [1st Dept 2009] [comparing Moye and holding that the insured "was not relieved of the obligation to notify defendants [insurers]" of a new claim in an amended complaint simply because one insurer had disclaimed coverage "based on the allegations in the original underlying complaint"]; see Bridge St. Contr. Inc. v Everest Natl. Ins. Co., 132 AD3d 500, 501 [1st Dept 2015], lv denied 27 NY3d 905 [2016], lv dismissed 27 NY3d 1032 [holding that where the insurer's prior disclaimers "were only partial disclaimers" based on specified exclusions in the policy, the insurer did not waive its late notice defense as to subsequently asserted cross-claims and third-party claims].)

In 120 Greenwich (08 Civ 6491, supra), the Court rejected the insurer's claim that it was entitled to disclaim coverage based on the insured's failure to notify it of a particular plaintiff's personal injury action. As noted by the Court, that plaintiff's complaint in the underlying action referenced the Master Complaint and alleged causes of action nearly identical to those alleged in another plaintiff's personal injury action filed pursuant to the same Master Complaint. As further noted by the Court, the insurer had already disclaimed coverage of the other action based, among other things, on the policy's pollution exclusion. (Id., at 17.) The Court explained that "notification would have been futile" because the insured "already knew that [the insurer's] position was to deny coverage for claims arising out of the WTC Lower Manhattan Litigation by asserting that such claims fall within the Policy's pollution exclusion." (Id.) In support of this

holding, the Court cited the Second Circuit's reasoning that "where an insured becomes aware of a general practice of its insurer to deny coverage for a particular type of claim on a particular basis, the insured is relieved of the obligation to continue to give futile notification as to such claims." (Id., at 16, quoting Olin Corp. v Insurance Co. of N. Am., 221 F3d 307, 329 [2d Cir 2000], citing H.S. Equities, Inc. v Hartford Accident & Indem. Co., 609 F2d 669, 673 [2d Cir 1979] and 661 F2d 264, 271 [2d Cir 1981].)

In 120 Greenwich and the Second Circuit cases, the Courts all applied New York law. This court finds that these authorities are persuasive and consistent with the New York authorities discussed above. Applying the futility standard, the court further holds that the insured's failure, if any, to give specific notice of the underlying Check-Off plaintiffs' claims does not vitiate coverage under the Burlington Policy. Here, like the insurer in 120 Greenwich, Burlington repeatedly disclaimed coverage on the grounds, among others, that the injuries did not take place within the coverage period and that the Underlying Actions were barred by the pollution and asbestos exclusions. Burlington disclaimed in the Checo action on these bases, as of February 28, 2005 (Jt. St., Exh. 5), and repeated these disclaimers in 2005 in Checo and other state court actions. (Id., Exhs. 10, 11, 13, 22-24, 26, 28.) By letter dated September 14, 2005 (discussed supra at 5), Burlington disclaimed on the same grounds as to the August 19, 2005 Master Complaint. (Aug. 19, 2005 Letter [Jt. St., Exh. 17].) By letters dated October 5 and 12, 2005, Burlington reiterated this disclaimer as to the Master Complaint and as to various state court actions. (Oct. 5, 2005 Letter [Jt. St., Exh. 7]; Oct. 12, 2005 Letter [Jt. St., Exh. 19].) By letter dated November 5, 2009, Burlington noted that it had disclaimed coverage as to certain plaintiffs and acknowledged receipt of the Master Complaint. Although Burlington stated that it was "unable to respond" to a September 18, 2009 request for coverage in the "hundreds" of cases

filed by other claimants, Burlington in fact stated that it had previously "disclaimed coverage for the WTC Actions on several grounds, including the pollution exclusion, asbestos exclusion . . . , and late notice." (Nov. 5, 2009 Letter [Jt. St., Exh. 34].) It further stated that the September 18, 2009 request "provides no substantive reason why [Burlington] should . . . change its position," and that it "will not rescind its denial of coverage nor begin participating in the defense of any WTC Action or the actions by 'hundreds of claimants' who have sued Mayore Estates." (Id.) By letter dated May 10, 2010, Burlington again asserted that it was "unable to respond" to a request for coverage for any case for which it had not received specific notice, but stated: "With that said, as previously noted, it is [Burlington's] understanding that all of the actions wherein the plaintiffs seek to recover for personal injuries allegedly sustained while performing post-September 11th rescue and recovery work in Lower Manhattan are based upon similar facts and claims, and thus, the bases for [Burlington's] disclaimers of coverage for the WTC Actions would be applicable to the 'consolidated matters' against Mayore." (May 10, 2010 Letter [Jt. St., Exh. 35].) Burlington also acknowledged that it had reviewed the Southern District Master Docket (21 MC 102), and "determined that the 'Check-Off Complaints' filed by the plaintiffs adopt the allegations of a master complaint." (Id.) It concluded that it "continues to stand behind its prior disclaimers, and [Burlington] will not rescind its denial of coverage nor begin participating in the defense of any WTC action or the consolidated matters." (Id.) Although the November 5, 2009 and May 10, 2010 letters were both written to counsel for USF&G, Burlington similarly notified counsel for National Union, by letter dated January 31, 2013, that "Burlington will not alter its previously documented coverage positions all of which are incorporated herein by reference, and as such respectfully declines to assume the defense of

Mayore Estates or reimburse National Union or USF&G." (Jan. 31, 2013 Letter [Jt. St., Exh. 39].)

Burlington's own letters thus acknowledged that the Check-Off Complaints made substantially the same allegations as those in the state court actions and in the WTC Litigation Master Complaint, as to which Burlington had disclaimed coverage, dating back to 2005. The court holds that any further notice to Burlington was excused as futile.

It is accordingly hereby ORDERED that the motion of National Union Fire Insurance Company of Pittsburgh, PA (National Union) for summary judgment is granted to the extent that it is ORDERED, ADJUDGED, and DECLARED that defendant The Burlington Insurance Company (Burlington) had a duty defend Mayore Estates LLC (Mayore) in the underlying personal injury actions against Mayore pending the United States District Court of the Southern District of New York in In re World Trade Center Lower Manhattan Disaster Site Litigation, 21 MC 102 (AKH); and it is further

ORDERED that Burlington's motion for summary judgment is denied; and it is further

ORDERED that a Special Referee shall be designated to hear and report with recommendations with respect to the following issues:

1. The amount of the costs and expenses, including reasonable attorney's fees, that National Union incurred in defending Mayore in In Re World Trade Center Lower Manhattan Disaster Site Litigation, and
2. The date(s) from which statutory interest should be awarded, and
3. Whether National Union is entitled to reasonable attorney's fees in the instant action and, if so, the amount of such fees; and it is further

ORDERED that, in the event of and upon the filing of a stipulation of the parties, as permitted by CPLR 4317, the Special Referee, or another person designated by the parties to serve as referee, shall determine the aforesaid issues; and it is further

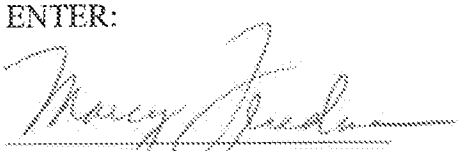
ORDERED that, within 15 days from the date of entry of this order, National Union shall serve a copy of this order with notice of entry upon Burlington by NYSCEF and by overnight mail; and it is further

ORDERED that, within 30 days of the date of entry of this order, National Union shall serve a copy of this order with notice of entry on the Clerk of the Special Referee's Office (Room 119) to arrange a date for the reference to a Special Referee; and it is further

ORDERED that a motion to confirm or reject the report of the Special Referee shall be made within 15 days of the filing of the report.

Dated: New York, New York
April 27, 2018

ENTER:



MARCY FRIEDMAN, J.S.C.