350 E. Houston St., LLC v Travelers Indem. Co. of Am.
2018 NY Slip Op 32588(U)
October 9, 2018
Supreme Court, New York County
Docket Number: 650450/2018
Judge: Doris Ling-Cohan
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: I.A.S. PART 36

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350 EAST HOUSTON STREET, LLC, and BERKLEY INSURANCE COMPANY,

Plaintiff,

- against -

TRAVELERS INDEMNITY COMPANY OF AMERICA, AXIS INSURANCE COMPANY, TEMPLE INSURANCE COMPANY, COPPS FOUNDATIONS INC., and PETERSON GEOTECHNICAL CONSTRUCTION LLC,

Defendants.

DECISION AND ORDER

Index No. 650450/2018

Motion Seq. No.: 001, 002 & 003

DORIS LING-COHAN, J.:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 66, 67, 75

were read on this motion to/for DISMISSAL

The following e-filed documents, listed by NYSCEF document number (Motion 002) 27, 28, 29, 30, 31, 32, 33, 61, 62, 63, 64, 65, 68, 69, 74

were read on this motion to/for DISMISS

The following e-filed documents, listed by NYSCEF document number (Motion 003) 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 71, 72, 73

were read on this motion to/for AMEND CAPTION/PLEADINGS

This action arises out of a construction project located at 11 Avenue C, New York, New York, owned by plaintiff 350 East Houston Street, LLC (Houston). Houston and plaintiff Berkley Insurance Company (collectively, plaintiffs) seek damages for breach of contract and for a judgment declaring that they are entitled to coverage under the insurance policies issued by

defendants Travelers Indemnity Company of America (Travelers), Axis Insurance Company (Axis), and Temple Insurance Company (Temple) to defendants Copps Foundations Inc. (Copps) and Peterson Geotechnical Construction LLC (Peterson).

In Motion Sequence No. 1, defendant Axis moves, pursuant to CPLR 3211 (a) (1) and (a) (7), for dismissal of the complaint on the grounds that it had no contractual obligation to provide plaintiffs with additional insured coverage, and that even if Axis was required to do so, plaintiffs vitiated that right by voluntarily undertaking repairs to an adjoining property. In Motion Sequence No. 2, defendant Peterson moves, pursuant to CPLR 3211(a) (1) and (a) (7), for dismissal of the complaint on the ground that Peterson was not contractually obligated to obtain an insurance policy that named plaintiffs as additional insureds. In Motion Sequence No. 3, plaintiffs move, pursuant to CPLR 3025 (b), for leave to file an amended complaint asserting additional claims sounding in negligence against defendants Copps and Peterson.

In accordance with this Court's interim decision and order dated May 9, 2018, the motions are consolidated for decision and are disposed of herein.

BACKGROUND

Plaintiff Houston is the owner of a construction site located at 11 Avenue C, New York, New York (the 350 Property) on which it was developing a 10-story residential building (the Project). In connection with the Project, Houston retained non-party Noble Construction Group LLC (Noble), as its construction manager. On November 15, 2016, Noble entered into a written trade contract with defendant Copps (Copps Contract), wherein Copps agreed to perform Support of Excavation and Foundation Piles work (Excavation Work) on the Project.

The Copps Contract contained numerous provisions for insurance and indemnification, which are found in Article 12. Section 12.1 (Insurance Requirements), reads, in part:

> "(a) Contractor agrees to carry insurance, which shall be primary to all other insurance, for its own account and all additional insureds as listed in Exhibit A herein as well as the Construction Manager, Noble Construction Group, LLC, the Owner. . . of sufficient amount to cover any loss or damage that may arise on account of injuries . . . to any property caused by or in connection with the operations of the Contractor under this Trade Contract, but in any event with the minimum limits of liability set forth in Section 12.1(e) hereinafter.
>
> * * *
>
> (h) Compliance with the foregoing requirements with respect to insurance shall not relieve the Contractor from any liability under the indemnity provisions of this Trade Contract.
>
> * * *
>
> (j) If the Construction Manager and Owner consent to any sub-subcontracting, each Sub-Contractor shall be required to: (i) comply with the requirements of this Article 12; (ii) maintain the same forms of liability insurance referred to above; and (iii) shall include in its Sub-Contract the indemnification provisions as set forth in Section 12.2 of this Article indemnifying the Indemnitees under this Contract and those who in order of relationship are prior to the one to whom the Sub-Contract is issued."

Section 12.2 (Indemnity Requirements) states, in part:

> "(a) As used in this Trade Contract, 'Indemnitees' shall mean and include the Construction Manager, the Owner, the Architect and the Owner's Lender and all other persons and entities mentioned or referred to as Additional Insureds in Exhibit A hereof, and the directors, officers, partners, subsidiaries, consultants, agents, assigns and employees of each of them (all of which are the 'Indemnitees', each an 'Indemnitee').
>
> (b) To the fullest extent permitted by law, the Contractor hereby agrees to and shall at its own cost and expense, indemnify, defend and save harmless the Indemnitees from and against any and all claims . . . including any and all damage, destruction and/or loss of use of real property or other tangible property, including the work itself (all collectively, 'Claims') that in any way or measure are caused by, arise out of or in connection with the Work or any act or

> omission of Contractor, Sub-Contractor (any tier), or any employee (whether directly or indirectly employed), agent, assign, consultant, materialman or supplier of any of them, or anyone for whom any of them may be liable or responsible. The Contractor's duty and obligation to defend and to save harmless all Indemnitees from and against any and all Claims in accordance with Section 12.2 hereof is in addition to and independent of the duty to indemnify under Section 12.2."

Exhibit A attached to Rider 1 of the Copps Contract set forth additional insurance requirements, including minimum coverage amounts, and required Houston and Noble to be named as additional insureds on any policy.

Travelers issued Copps Commercial General Liability Insurance policy no. 660-2H601557-TIA-16 for the period June 1, 2016 through June 1, 2017, with a $2 million limit of liability for each occurrence. Temple issued Copps Umbrella Liability Insurance policy no. UMB109042, effective June 1, 2016 to June 1, 2017, with a $15 million limit on liability.

Article 14 of the Copps Contract permitted Copps to subcontract its work, subject to prior written approval from Houston and Noble. Section 14.1(a) states that "[e]very such subcontract (any tier) shall require the Sub-Contractor to be bound by and to comply with all the Contract Documents and Contractor shall cause its Sub-Contractors to comply with all the Contract Documents." Section 14.1(a) also reads, in pertinent part, that "such approval shall in no way be construed as creating any Contractual relationship between the Construction Manager or the Owner, and any such Sub-Contractor nor shall it relieve the Contractor of its obligations for the performance of the work covered by such subcontract."

Copps subcontracted a portion of the Excavation Work to Peterson, specifically the installation of micropiles and the dewatering system. The Subcontract Agreement dated December 8, 2016 between Copps and Peterson (Peterson Subcontract), states that "[t]his subcontract shall be further understood that the primary trade contract between Noble Construction and Copps

Foundations shall be enforceable to both Copps Foundations and Peterson Geotechnical Construction, for the listed respective scopes of work and remuneration." The Peterson Subcontract also states that "[s]pecifically, Peterson has reviewed the primary trade contract and hereby agree [sic] to the terms of the trade contract as signed between the Construction Manager (Noble Construction) and the Contractor (Copps Foundations), as if it were for their own work."

Axis issued Commercial General Liability insurance policy no. EAP793999-16 to Peterson, in effect from May 8, 2016 to May 8, 2017, with a $1 million per occurrence limit of liability (Axis Primary Policy). An endorsement to the Axis Primary Policy, entitled Additional Insured – Owners, Lessees Or Contractors – Completed Operations, states that an additional insured shall be "[a]ny person or organization that you are required by written contract to name as an additional insured" (Axis exhibit B at 40). Section IV of the Axis Primary Policy set forth additional commercial general liability conditions, including paragraph 2(d) which reads that "[n]o insured will, except at that insured's own cost, voluntarily make a payment, assume any obligations, or incur any expense, other than for first aid, without our consent" (Axis exhibit B at 13-14). Axis also issued Excess Liability policy no. ENU793995/01/2016 to Peterson, in effect from May 8, 2016 to May 8, 2017, with a $5 million limit of liability (Axis Excess Policy).

Houston procured Comprehensive Liability Insurance policy no. VGGP002410 from Berkley, in effect from November 18, 2016 to November 18, 2018, with a $2 million per occurrence limit of liability.

The complaint alleges that on or about March 21, 2017, the Excavation Work caused damage to an adjacent property located at 249 East Second Street (249 Property), which is owned by non-party 249 East Second Street Realty, LLC (249 LLC). The complaint alleges that the Excavation Work damaged the foundation of the building on the 249 Property and caused that

building to move or tilt towards the 350 Property. The New York City Department of Buildings (DOB) issued a stop-work order and an ECB violation on the Project.

249 LLC served Houston with a notice of claim demanding repairs to the 249 Property, and Houston undertook repairs to remediate the 249 Property at a cost of $1.2 million. Houston contemplates that an additional $500,000 is needed for further repair work. In addition, Houston alleges that it has incurred expenses of an estimated $1 million in extra costs and delay damages in connection with the Project.

Houston provided Copps and Peterson with notice of 249 LLC's claim and demanded indemnification. Neither Copps nor Peterson agreed to indemnify Houston. Houston also provided notice of 249 LLC's claim to Travelers and Axis. Neither responded to the notice and tender of 249 LLC's claim.

Houston and Berkley commenced this action asserting claims for breach of contract and for a declaratory judgment against Travelers, Temple, Axis, Copps and Peterson. Plaintiffs maintain that Houston is an additional insured on each of the aforementioned insurance policies. The complaint asserts two causes of action against Axis – a declaratory judgment (third cause of action) and breach of contract (fourth cause of action). The complaint also asserts two causes of action against Axis' insured, Peterson – a declaratory judgment (seventh cause of action) and breach of contract (eighth cause of action).

In Motion Sequence No. 1, Axis moves for pre-answer dismissal of the complaint against it on the ground that plaintiffs are not additional insureds under the Axis Policies because the Peterson Subcontract did not incorporate the insurance and indemnification provisions contained in Article 12 of the Copps Contract. Axis also moves for dismissal on the additional ground that plaintiffs vitiated the right to coverage by voluntarily performing repairs to the 249 Property.

Plaintiffs in opposition argue that dismissal is unwarranted because the Peterson Subcontract properly incorporated Article 12 of the Copps Contract and, thus, plaintiffs are entitled to insurance coverage and indemnification. Plaintiff further asserts that discovery on the intent of defendants Copps and Peterson when they entered the Peterson Subcontract is necessary. In addition, plaintiffs argue that consideration of a pre-answer motion to dismiss a declaratory judgment action is limited to the issue of whether a plaintiff has set forth a cause of action for a declaratory judgment.

Peterson in Motion Sequence No. 2 moves for pre-answer dismissal of the complaint against it on the same grounds as those raised by Axis. As for the eighth cause of action for breach of contract, Peterson submits that plaintiffs may not maintain the claim in the absence of contractual privity. Plaintiffs in response submit the same arguments as those propounded in opposition to Axis' motion. Plaintiffs also argue that they were intended third-party beneficiaries of the Peterson Subcontract.

Plaintiffs in Motion Sequence No. 3 move for leave to file an amended complaint with additional claims against Copps and Peterson. Peterson opposes the motion related to Berkley because Peterson owed no duty to that plaintiff. In reply, plaintiffs contend that the amendment is permissible because "Berkley's right to recover from Peterson is contingent on facts yet to be proved" (Affirmation of Plaintiffs' Counsel, ¶ 10).

DISCUSSION

On a motion to dismiss brought under CPLR 3211 (a) (7), the court must "accept the facts as alleged in the complaint as true, accord the plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994] [citations omitted]). Ambiguous allegations must be

resolved in plaintiff's favor (*see JF Capital Advisors, LLC v Lightstone Group, LLC*, 25 NY3d 759, 764 [2015]). A motion to dismiss will be denied "if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law" (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]). However, "the court is not required to accept factual allegations that are plainly contradicted by the documentary evidence or legal conclusions that are unsupportable based upon the undisputed facts" (*Robinson v Robinson*, 303 AD2d 234, 235 [1st Dept 2003]). "When documentary evidence is submitted by a defendant 'the standard morphs from whether the plaintiff stated a cause of action to whether it has one'" (*Basis Yield Alpha Fund (Master) v Goldman Sachs Group, Inc.*, 115 AD3d 128, 135 [1st Dept 2014] [internal citation omitted]).

Dismissal under CPLR 3211 (a) (1) is warranted "only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (*Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]). "To be considered 'documentary' under CPLR 3211 (a) (1), evidence must be unambiguous and of undisputed authenticity" (*Fontanetta v John Doe 1*, 73 AD3d 78, 86 [2d Dept 2010] [citation omitted]). Judicial records, mortgages, deeds and contracts constitute documentary evidence (*id.* at 84), but affidavits and deposition testimony are not considered documentary evidence (*see Lowenstern v Sherman Sq. Realty Corp.*, 143 AD3d 562, 562 [1st Dep't 2016]; *Correa v Orient-Express Hotels, Inc.*, 84 AD3d 651, 651 [1st Dept 2011]). "[T]he paper's content must be 'essentially undeniable and . . ., assuming the verity of [the paper] and the validity of its execution, will itself support the ground on which the motion is based" (*Amsterdam Hospitality Group, LLC v Marshall-Alan Assoc., Inc.*, 120 AD3d 431, 432 [1st Dept 2014] [internal citation omitted]).

A. The Motions by Axis and Peterson for Dismissal (Motion Sequence Nos. 1 and 2)

1. The Third and Seventh Causes of Action for a Declaratory Judgment

"When a party is under no legal duty to indemnify, a contract assuming that obligation must be strictly construed to avoid reading into it a duty which the parties did not intend to be assumed" (*Hooper Assoc. v AGS Computers*, 74 NY2d 487, 491 [1989]). The "intention to indemnify [must] be clearly implied from the language and purposes of the entire agreement and the surrounding facts and circumstances'" (*Drzewinski v Atlantic Scaffold & Ladder Co.*, 70 NY2d 774, 777 [1987], quoting *Margolin v New York Life Ins. Co.*, 32 NY2d 149, 153 [1973]). A contractual obligation to procure insurance does not equate to an obligation to indemnify (*Kinney v Lisk Co.*, 76 NY2d 215, 218 [1990]).

The Peterson Subcontract does not contain an insurance or indemnification provision. However, it states that the Copps Contract "shall be enforceable to both Copps . . . and Peterson . . . for the listed respective scopes of work and remuneration" and that "Peterson. . . hereby agree [sic] to the terms of the trade contract . . . as if it were for their own work" (Axis Exhibit E, at 1). Axis and Peterson submit that such language is insufficient to incorporate Article 12 of the Copps Contract into the Peterson Subcontract.

"[I]ncorporation clauses in a construction subcontract, incorporating prime contract clauses by reference into a subcontract, bind a subcontractor only as to prime contract provisions relating to the scope, quality, character and manner of the work to be performed by the subcontractor" (*Bussanich v 310 E. 55th St. Tenants*, 282 AD2d 243, 244 [1st Dept 2001]). Here, the purported incorporation clause does not contain any express language specifically incorporating, let alone referring to, the indemnification and insurance provisions of the Copps Contract into the Peterson Subcontract. Thus, Peterson and Axis are not contractually obligated to indemnify plaintiffs for

any actions that arise out of Peterson's work (*id.*; *accord Pipia v Turner Constr. Co.*, 114 AD3d 424, 428 [1st Dept 2014], *lv dismissed* 24 NY3d 1216 [2015]; *Waitkus v Metropolitan Hous. Partners*, 50 AD3d 260, 261 [(1st Dept 2008]).

Plaintiffs' arguments in response are unpersuasive. The relevant inquiry is whether clear and specific language in the Peterson Subcontract incorporates the insurance and indemnification provisions from the Copps Contract. There is no such language contained in the Peterson Subcontract.

Plaintiff also argues that discovery is necessary to discern the parties' intent when they entered the Peterson Subcontract. However, "[w]hen parties set down their agreement in a clear, complete document, their writing should as a rule be enforced according to its terms" (*W.W.W. Assocs. v Giancontieri*, 77 NY2d 157, 162 [1990]). The Peterson Subcontract is unambiguous with respect to insurance and indemnification. The document incorporates only those portions of the Copps Contract pertaining to "the listed respective scopes of work and remuneration" (Axis exhibit E at 1). In addition, the Peterson Subcontract includes a statement that "Copps has included a 10% markup of Peterson's work for the purpose of insurance and overheads associated with holding the primary trade contract" (*id.*). That statement does not impose an obligation upon Peterson procure insurance or indemnify any other entity.

Moreover, the Axis policies state that an additional insured shall be "[a]ny person or organization that you are required by written contract to name as an additional insured" (Axis exhibit B at 40). Plaintiffs did not execute the Peterson Subcontract and, therefore, they are not considered additional insureds under the Axis policies (*see Mayo v Metropolitan Opera Assn., Inc.*, 108 AD3d 422, 425 [1st Dept 2013], *lv dismissed* 22 NY3d 1125 [2014], citing *AB Green Gansevoort, LLC v Peter Scalamandre & Sons, Inc.*, 102 AD3d 425, 426 [1st Dept 2013]).

Plaintiffs' contention that is improper to grant pre-answer dismissal of a declaratory judgment action lacks merit. They cite *Staver Co. v Skrobisch* (144 AD2d 449 [2d Dept 1988], *lv dismissed* 74 NY2d 791 [1989]) for the proposition that consideration of a pre-answer motion to dismiss a declaratory judgment action is limited to "the issue of whether a cause of action for declaratory relief is set forth, not the question of whether the plaintiff is entitled to a favorable declaration" (*id.* at 450). Plaintiffs, though, ignore the additional proposition that "the court, deeming the material allegations of the complaint to be true, is nonetheless able to determine, as a matter of law, that the defendant is entitled to a declaration in his or her favor [and] may enter a judgment making the appropriate declaration" (*Pilgrim v Pantorilla*, 144 AD3d 882, 883-884 [2d Dept 2017] [internal quotation marks and citations omitted]).

Based on the foregoing, Axis is entitled to dismissal of the third cause of action against it and Peterson is entitled to dismiss the seventh cause of action against it. The court need not address Axis' alternative ground for dismissal.

2. The Fourth and Eighth Causes of Action for Breach of Contract

To sustain a cause of action for breach of contract, plaintiff must prove the existence of a contract, plaintiff's performance, defendant's breach, and damages (*see Harris v Seward Park Hous. Corp.*, 79 AD3d 425, 426 [1st Dept 2010]). Here, neither Peterson nor Axis was in contractual privity with either plaintiff (*see CDJ Bldrs. Corp. v Hudson Group Constr. Corp.*, 67 AD3d 720, 722 [2d Dep't 2009]), and Section 14.1(a) in the Copps Contract expressly disclaimed the formation of any contractual relationship between Houston and Peterson.

Although not pleaded in the complaint, plaintiffs contend that they are intended third-party beneficiaries of the Peterson Subcontract. "A party asserting rights as a third-party beneficiary must establish '(1) the existence of a valid and binding contract between other parties, (2) that the

contract was intended for his [or her] benefit and (3) that the benefit to him [or her] is sufficiently immediate, rather than incidental, to indicate the assumption by the contracting parties of a duty to compensate him [or her] if the benefit is lost'" (*State of Cal. Pub. Employees' Retirement Sys. v Shearman & Sterling*, 95 NY2d 427, 434-435 [2000] [internal citations omitted]). For a third-party beneficiary to recover under a construction contract, the contract must contain "express contractual language stating that the contracting parties intended to benefit a third party by permitting that third party 'to enforce [a promisee's] contract with another'" (*Dormitory Auth. of the State of N.Y. v Samson Constr. Co.*, 30 NY3d 704, 710 [2018] [internal citation omitted]). The intent must be "apparent from the face of the contract" (*LaSalle Natl. Bank v Ernst & Young*, 285 AD2d 101, 108 [1st Dept 2001], *rearg denied* 2001 NY App Div LEXIS 11868 [1st Dept 2001] [citations omitted]).

Peterson does not dispute that the Excavation Work would ultimately inure to Houston's benefit. Nevertheless, a reading of the Peterson Subcontract reveals that plaintiffs are not named beneficiaries nor did the Peterson Subcontract expressly grant plaintiffs authorization to enforce it. Furthermore, the complaint lacks any specific allegations of privity between plaintiffs and Peterson or Axis. Accordingly, plaintiffs may not maintain the breach of contract claims against those defendants (*see Dormitory Auth. of the State of N.Y.*, 30 NY3d at 711), and the fourth and eighth causes of action are dismissed against Axis and Peterson, respectively.

B. Plaintiffs' Motion to Amend the Complaint (Motion Sequence No. 3)

Plaintiffs move for leave to file an amended complaint to assert claims for negligence against Copps and Peterson related to the Excavation Work. Submitted with the motion is a proposed amended complaint.[1]

It is well settled that a motion for leave to amend the pleadings should be freely granted unless there is prejudice or surprise from the delay or if the amendment is "palpably insufficient or patently devoid of merit" (*see JPMorgan Chase Bank, N.A. v Low Cost Bearings NY Inc.*, 107 AD3d 643, 644 [1st Dept 2013], quoting *MBIA Ins. Corp. v Greystone & Co., Inc.*, 74 AD3d 499, 500 [1st Dept 2010]). The court must examine the sufficiency of the merits of the proposed amendment and is not required to accept plaintiff's allegations as true (*see Bag Bag v Alcobi*, 129 AD3d 649, 649 [1st Dept 2015]). The party moving to amend the pleadings need not prove the facts (*see Daniels v Empire-Orr, Inc.*, 151 AD2d 370, 371 [1st Dept 1989]), but must tender an affidavit of merit or an offer of evidence similar to that used to support a motion for summary judgment (*see Matthews v City of New York*, 138 AD3d 507, 508 [1st Dept 2016]). The party opposing the motion bears a heavy burden of showing prejudice (*see McGhee v Odell*, 96 AD3d 449, 450 [1st Dept 2012]) or demonstrating that the facts as alleged are unreliable or insufficient to support the motion (*see Peach Parking Corp. v 346 W. 40th St., LLC*, 42 AD3d 82, 86 [1st Dept 2007], citing *Daniels*, 151 AD3d at 371]).

Neither the original nor the proposed amended complaints were verified by plaintiffs, and plaintiffs offered no documentary evidence or an affidavit of merit in support of the motion. Nevertheless, the court will excuse this apparent deficiency in this instance (*see Berkeley Research*

[1] In the proposed amended complaint, plaintiffs renumbered the causes of action against the parties such that the eighth cause of action now asserts a declaratory judgment and ninth cause of action asserts a claim for breach of contract, both against Peterson.

Group, LLC v FTI Consulting, Inc., 157 AD3d 486, 490 [1st Dept 2018]). The allegations in the complaint, which include excerpted language from DOB's stop-work order, are sufficient to give defendants notice of potential claims for negligence related to the Excavation Work. The negligence claims are timely, and Peterson can point to no prejudice from the delay. In addition, the affidavit of Kevin Tartaglione, Senior Vice President of Development for BLDG Management Co., Inc., which plaintiffs submitted in opposition to Axis' motion to dismiss, further describes Houston's actions upon learning of the damage to the 249 Property.

Insofar as the motion concerns Berkley, though, Peterson has demonstrated that Berkley's claim lacks merit. The elements for a cause of action for negligence are "(1) a duty owed by the defendant to the plaintiff, (2) a breach thereof, and (3) injury proximately resulting therefrom" (*Pasternack v Laboratory Corp. of Am. Holdings*, 27 NY3d 817, 825 [2016], *rearg denied* 28 NY3d 956 [2016] [internal quotation marks and citation omitted]). The proposed amended complaint fails to identify a specific duty Peterson owed to Berkley, Houston's insurance carrier.

Furthermore, Peterson has demonstrated that Berkley has not asserted the equitable right of subrogation. "Subrogation . . . allows an insurer to stand in the shoes of its insured and seek indemnification from third parties whose wrongdoing has caused a loss for which the insurer is bound to reimburse" (*Kaf-Kaf, Inc. v Rodless Decorations*, 90 NY2d 654, 660 [1997]). "An insurer's subrogation rights accrue upon payment of the loss" (*Winkelmann v Excelsior Ins. Co.*, 85 NY2d 577, 582 [1977] [collecting cases]). The proposed amended complaint fails to allege that Berkley actually paid any sum of money on behalf of its insured, Houston.

Consequently, plaintiffs' motion seeking leave to file an amended complaint to assert negligence claims against Copps and Peterson is granted only as to Houston. Because it would be premature to grant Berkley relief at this juncture, that facet of the motion on behalf of Berkley is

denied without prejudice to renewal.[2] Peterson, though, is entitled to dismissal of the eighth cause of action for a declaratory judgment and the ninth cause of action for breach of contract in the amended complaint for the reasons set forth above.

Accordingly, it is

ORDERED that the motion of defendant Axis Insurance Company to dismiss the complaint against it (Motion Sequence No. 1) is granted and the complaint is dismissed in its entirety as against said defendant, with costs and disbursements to said defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendant; and it is further

ORDERED that the action is severed and continued against the remaining defendants; and it is further

ORDERED that the caption of this case is amended to reflect the dismissal of this action against defendant Axis Insurance Company and shall read as follows:

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350 EAST HOUSTON STREET, LLC, and BERKLEY INSURANCE COMPANY,

Plaintiff,

- against -

TRAVELERS INDEMNITY COMPANY OF AMERICA, TEMPLE INSURANCE COMPANY, COPPS FOUNDATIONS INC., and PETERSON GEOTECHNICAL CONSTRUCTION LLC,

Defendants.

----------x

[2] Copps submitted no opposition to plaintiffs' motion, but the arguments raised by Peterson apply equally to Copps.

It is further

ORDERED that, within 30 days of entry, counsel for defendant Axis Insurance Company shall serve a copy of this order with notice of entry upon all parties and the County Clerk (Room 141B) and the Clerk of the Trial Support Office (Room 158), who are directed to amend their records accordingly; and it is further

ORDERED that such service upon the Clerk of the Court and the Clerk of the General Clerk's office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh); and it is further

ORDERED that the motion of defendant Peterson Geotechnical Construction LLC to dismiss the complaint against it (Motion Sequence No. 2) is granted to the extent of dismissing the seventh cause of action for a declaratory judgment and the eighth cause of action for breach of contract asserted against it, and the seventh cause of action for a declaratory judgment and the eighth cause of action for breach of contract are dismissed against said defendant; and it is further

ORDERED that the plaintiffs' motion for leave to amend the complaint herein (Motion Sequence No. 3) is granted to the extent of granting plaintiff 350 East Houston Street LLC leave to assert a seventh cause of action for negligence against defendant Copps Foundations Inc. and a tenth cause of action for negligence against defendant Peterson Geotechnical Construction LLC, and the motion as to plaintiff Berkley Insurance Company is otherwise denied without prejudice to renewal; and it is further

ORDERED that the amended complaint in the proposed form annexed to the moving papers as Exhibit A shall be deemed served upon service of a copy of this order with notice of entry thereof; and it is further

ORDERED that plaintiffs' eighth cause of action for a declaratory judgment and the ninth cause of action for breach of contract asserted against defendant Peterson Geotechnical Construction LLC in the amended complaint are dismissed as against said defendant; and it is further

ORDERED that the defendants Travelers Indemnity Insurance of America, Temple Insurance Company, Copps Foundations Inc. and Peterson Geotechnical Construction LLC shall each serve an answer to the amended complaint or otherwise respond thereto within 20 days from the date of said service; and it is further

ORDERED that within 30 days of entry of this order, plaintiff shall serve a copy upon all parties, with notice of entry.[3]

Dated: 10/9/18

Doris Ling-Cohan, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE

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[3] By separate order dated 10/9/18, a Preliminary Conference Order was issued, for the expeditious completion of discovery.