# SUPREME COURT OF THE STATE OF NEW YORK
# NEW YORK COUNTY

**PRESENT:** ENGORON **PART** 37
*Justice*

Index Number : 160353/2014
ASPEN SPECIALTY INSURANCE
vs
IRONSHORE INDEMNITY
Sequence Number : 005
RENEWAL

**INDEX NO.** 160353/2014
**MOTION DATE** 8/11/17
**MOTION SEQ. NO.** 005

The following papers, numbered 1 to 3, were read on this motion to/~~for~~ Renew

Notice of Motion/~~Order to Show Cause~~ — Affidavits — Exhibits ____ No(s). 1
Answering Affidavits — Exhibits ____ No(s). 2
Replying Affidavits ____ No(s). 3

Upon the foregoing papers, it is ordered that this motion is

MOTION IS DECIDED [illegible]
WITH ACCOMPANYING MEMORANDUM DECISION

MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM DECISION

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 1/26/2018

HON. ARTHUR F. ENGORON, J.S.C.

1. CHECK ONE: ..... ☒ CASE DISPOSED ☐ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☒ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 37

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ASPEN SPECIALTY INSURANCE COMPANY,

Plaintiff,

- against -

IRONSHORE INDEMNITY INCORPORATED and TRANSEL ELEVATOR, INC.,

Defendants.

----------x

Index Number: 160353/2013

Sequence Number: 003

Decision and Order

Arthur F. Engoron, Justice

In compliance with CPLR 2219(a), this Court states that the following papers, numbered 1 to 3, were used on the motion by defendant Ironshore Indemnity Incorporated ("Ironshore"), pursuant to CPLR 2221(e), to renew its prior CPLR 3211(1) and (7) motion to dismiss the complaint, for reconsideration of this Court's prior dispositive orders, and for other relief:

| | Papers Numbered: |
|---|---|
| Notice of Motion - Affirmation - Exhibits | 1 |
| Affirmation in Opposition - Exhibits | 2 |
| Reply Affirmation | 3 |

Upon the foregoing papers, Ironshore's motion to renew is denied.

Background

The Court presumes that the reader is familiar with the facts of this insurance declaratory judgment action arising out of an underlying personal injury action, which, in any event, are set forth in its prior Decision and Order dated July 7, 2015, and Decision and Order dated December 9, 2015. Briefly, as a result of the prior Decisions and Orders, this Court declared that non-party Alphonse Hotel Corp. ("Alphonse") is an Additional Insured the commercial general liability ("cgl") policy that Ironshore issued to Transel Elevator Inc. ("Transel"), for personal injury claims asserted against Alphonse in a lawsuit brought by Michael Patalano ("Patalano"), an elevator repairman employed by Transel. Plaintiff Aspen Speciality Insurance Company ("Aspen") issued a cgl policy to Alphonse as named insured.

The core facts are undisputed. Transel contracted with Alphonse to maintain and repair three of the elevators at Alphonse's hotel. On October 12, 2012, Patalano, while working for Transel, fell down an interior stairway at the hotel. Transel was contractually obligated to name Alphonse as an Additional Insured ("AI") on its commercial general liability ("cgl") policy. Ironshore issued the cgl policy to Transel, which defined an AI as follows:

> ... any ... organization for whom you are performing operations ... Such person or organization is an additional insured only with respect to liability for "bodily 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.

By Decision and Order dated July 7, 2015, relying upon well-settled First Department insurance coverage authority, this Court determined that Alphonse is an Additional Insured on Ironshore's policy, reasoning that the phrase "caused by" in the AI endorsement did not materially differ from the phrase "arising out of," and, therefore, that Patalano was injured while working for Transel at Alphonse's hotel sufficiently triggered additional insured coverage under Ironshore's policy. By Decision and Order dated December 9, 2015, this Court determined that Ironshore's policy was primary for Alphonse in the Patalano lawsuit.

However, on June 6, 2017, the Court of Appeals decided Burlington Ins. Co. v NYC Transit Auth., 29 NY3d 313 (2017), in which it clarified that an AI endorsement which contains the phrase "caused, in whole or in part, by" the named insured's "acts or omissions," limits AI coverage only to injuries *proximately caused* by the name insured and rejected an interpretation of the phrase to mean "but for" causation, which is the meaning of the phrase "arising out of." In pertinent part, the Court of Appeals held:

> We conclude that where an insurance policy is restricted to liability for any bodily injury "caused, in whole or in part," by the "acts or omissions" of the named insured, the coverage applies to injury proximately caused by the named insured. The Appellate Division erroneously interpreted this policy language as extending coverage broadly to any injury causally linked to the named insured, and wrongly concluded that an additional insured may collect for an injury caused solely by its own negligence, even where the named insured bears no legal fault for the underlying harm. We reject this "but for" causation formulation of the policy and, on this appeal, reverse the Appellate Division's denial of summary judgment in favor of the insurance company on the issue of coverage.

Burlington Ins. Co. v NYC Transit Auth., 29 N.Y.3d at 317.

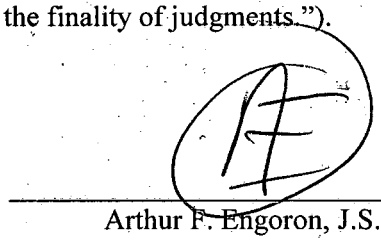
It is short work to conclude that the rule set forth in Burlington (with which, parenthetically, this Court fully concurs) applies herein, and – under different circumstances – would result in a finding that Alphonse is not an AI under Ironshore's policy for the Patalano lawsuit. The Ironshore AI endorsement contains the same phrase, and conditions AI coverage upon the same condition – i.e., that the underlying bodily injury is "caused, in whole or in part, by" the named insured's "acts or omissions" – as the AI endorsement in Burlington.

However, Ironshore has not demonstrated entitlement to renewal. Although Burlington represents a change in the law that would change this Court's prior determination (CPLR 2221[e]), Ironshore's motion is untimely, as there has been a final determination of the insurance coverage issues herein and the case has been "marked disposed" in this Court as of December 2016. Ironshore has already fully exercised its right to appeal the coverage issues, and it failed to prevail. Of its own volition, Ironshore did not seek leave to appeal to the Court of Appeals from the First Department's November 29, 2016 Order affirming this Court's July 7, 2015 Decision and Order, and its time to do so has long since expired. Renewal under these circumstances is barred, and, "[w]hile this result might at times seem harsh, there must be an end to lawsuits and the time to take an appeal cannot forever be extended." In re Huie, 20 NY2d 568, 572 (1967) ("after the time to appeal had expired," motion to reargue can not be

granted "on the sole ground that, in the interim, an appellate court has overruled its own or another statement of existing law."); Swope v Quadra Realty Tr., Inc., 28 Misc3d 1209(A) (Sup. Ct. 2010) ("Once the case has gone to judgment and the time to appeal has expired, to permit a change in decisional law to change the result in the case would upset the finality of judgments.").

Conclusion
Motion to renew denied.

Dated: January 26, 2018



Arthur F. Engoron, J.S.C.