

<b>UMF Contr. Corp. v Arch Specialty Ins. Co.</b>
2019 NY Slip Op 30661(U)
March 11, 2019
Supreme Court, New York County
Docket Number: 651821/2018
Judge: Louis L. Nock
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART IAS MOTION 38EFM

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UMF CONTRACTING CORP.,  
Plaintiff,

- v -

ARCH SPECIALTY INSURANCE COMPANY, UNITED  
SPECIALTY INSURANCE CO., STATE NATIONAL INSURANCE  
COMPANY

Defendants.

INDEX NO. 651821/2018

MOTION DATE 2/21/2019

MOTION SEQ. NO. 001

**DECISION AND ORDER**

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HON. LOUIS L. NOCK:

This is an action seeking a declaratory judgment that defendants – all insurance companies – are required by various policies of insurance to defend and indemnify plaintiff – a contractor – in connection with allegations and claims asserted in an underlying real property damage action in which plaintiff has been sued (*452 E. 118<sup>th</sup> St. LLC, et al. v 329 Pleasant Ave. Mazal Holdings LLC, et al.*, index No. 151437/17 [Sup Ct NY County]) (the “Underlying Action”). Defendant Arch Specialty Insurance Company moves herein to dismiss this declaratory judgment action on the force of a “Subsidence Exclusion” contained in the policy of insurance which it issued to plaintiff. For the reasons set forth herein, the motion is denied.

The court has considered the following e-filed submissions of the parties: document Nos. 3 through 12 (the moving papers); 17 through 19 (the opposition papers); and 20 (the reply papers). The court has also received and considered the oral argument of counsel for the parties, on the Part 38 return date of February 21, 2019.

## BACKGROUND

### The Underlying Action:

The Underlying Action was commenced by an owner of a building located at 452 Pleasant Avenue, New York, New York, abutting real property known as 329 Pleasant Avenue, New York, New York (Second Amended Verified Complaint in the Underlying Action<sup>1</sup> [the “Underlying Complaint”] ¶¶ 11-14). As alleged, the owner of 329 Pleasant Avenue had undertaken to develop its property by constructing an eight-story, twenty-unit, residential building thereat. To accomplish this, it retained several construction-related companies to perform the work (*see, id.*, ¶¶ 15-35). The particular degree of involvement of each of the various companies is not well delineated, leaving the reader with only the following very broad-brushed iterations:

- Defendant HAP Investment LLC was the “developer that caused the excavation and construction” (*id.*, ¶ 20);
- Defendant Wexler Associates provided “excavation, foundation, shoring, underpinning and structural design services for the construction” (*id.*, ¶ 27);
- Defendant UMF Contracting Corp. (the plaintiff in the instant declaratory judgment action) performed “excavation and construction” (*id.*, ¶ 34);
- Defendant Mario Bulfamante & Sons caused “the excavation for and to construct the Project” (*id.*, ¶ 35); and
- Defendant S.I. Services Group of N.Y., Inc., caused “the excavation for and the construction of the Project” (*id.*, ¶ 31).

As is evident from the foregoing iterations, each one of the stated defendants in the Underlying Action, including the plaintiff herein, was involved in what the Underlying Complaint characterizes as both excavation *and* construction.

The Underlying Complaint asserts separate causes of action against each of the foregoing defendants, including the plaintiff herein, sounding, substantially, in negligence, based on

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<sup>1</sup> Moving Affirmation of Adam B. Curtis, Esq., dated August 3, 2018, Exh. 4.  
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allegations of physical damage caused to the 452 Pleasant Avenue building resulting from the work that was performed on the 329 Pleasant Avenue property (*see*, Underlying Complaint ¶¶ 41-49, 53-60, 64-71, 75-82, 86-93, 97-104). Millions of dollars in damages are sought as against those defendants in the Underlying Complaint. As regards the plaintiff herein, *it* has been sued in the Underlying Action for not less than \$3,000,000.00 in compensatory damages and \$5,000,000.00 in punitive damages (Underlying Complaint ¶¶ 66-67).

*The Insurance Policy Underlying this Declaratory Judgment Action:*

It is undisputed that plaintiff is the holder of a general liability policy of insurance issued by movant, that was in effect during the time period concerned in the Underlying Action (*see*, *e.g.*, Supporting Affidavit of Jennifer A. Fuschetto, sworn to August 3, 2018). It is also undisputed that the policy insured plaintiff, both in terms of furnishing a defense to litigation, as well as indemnification for any loss that would be incurred by plaintiff (*see, id.*, Exh. 3). Based on that, plaintiff tendered a claim to movant, seeking such defense and indemnification in connection with the Underlying Action (*see, id.*). That claim was denied by movant based on its citation of the following “Subsidence Exclusion” contained in the policy:

This insurance does not apply to any claim, “suit”, demand or loss that alleges “bodily injury”, “property damage”, or “personal and advertising injury” that in any way, in whole or in part, directly or indirectly, arises out of, relates to, results from, contributes to or is aggravated by subsidence, settling, sinking, slipping, falling away, caving in, shifting, eroding, consolidating, compacting, flowing, rising, tilting, or any other movement of land or earth, regardless of whether such movement is a naturally occurring phenomena or is man-made.

(*Id.*)

In response to the aforesaid denial of claim, plaintiff commenced this action seeking a judgment declaring that, notwithstanding the above-quoted Subsidence Exclusion, movant *is* obligated to defend and indemnify plaintiff in connection with the allegations and claims related

to the Underlying Action. The instant motion seeks dismissal of this action, based on the language of the above-quoted Subsidence Exclusion.

#### DISCUSSION

It is a fundamental principle that:

An insurer's duty to defend is liberally construed and is broader than the duty to indemnify, "in order to ensure [an] adequate . . . defense of [the] insured," without regard to the insured's ultimate likelihood of prevailing on the merits of a claim. . . . Moreover, if "any of the claims against an insured arguably arise from covered events, the insurer is required to defend the entire action." It is "immaterial that the complaint against the insured asserts additional claims which fall outside the policy's general coverage."

(*Fieldston Prop. Owners Assn., Inc. v Hermitage Ins. Co., Inc.*, 16 NY3d 257, 264 [2011])

[citations omitted; brackets in original]. See also, *QBE Ins. Corp. v Junx-Proof Inc.*, 102 AD3d 508, 510 [1<sup>st</sup> Dept 2013] ["As the Court of Appeals has explained, "if *any* of the claims against the insured arguably arise from covered events, the insurer is required to defend the entire action."] [emphasis in original], *affd* 22 NY3d 1105 [2014].)

As applied to the present case: the plaintiff-insured is alleged in the Underlying Action to have caused damage, not solely due to excavation activity that could fall within the Subsidence Exclusion of movant-insurer's policy; but also due to any construction activity it might be proven to have engaged in. It is conceivable that the plaintiff in the Underlying Action might prove that any damage was caused solely by plaintiff-insured's construction activity, if any; in which case plaintiff-insured's said activity would fall outside the Subsidence Exclusion and subject to coverage. Given that possibility, this court is bound by the foregoing Court of Appeals policy to deny the movant-insurer's motion to dismiss, which motion is premised on the Subsidence Exclusion. As the Court of Appeals has additionally and similarly held:

To be relieved of its duty to defend on the basis of a policy exclusion, the insurer bears the heavy burden of demonstrating that the allegations of the complaint [in

the underlying action] cast the pleadings wholly within that exclusion, that the exclusion is subject to no other reasonable interpretation, and that there is no possible factual or legal basis upon which the insurer may eventually be held obligated to indemnify the insured under any policy provision."

(*Frontier Insulation Contractors, Inc. v Merchants Mut. Ins. Co.*, 91 NY2d 169, 175 [1997]

[emphasis added; brackets in original].)

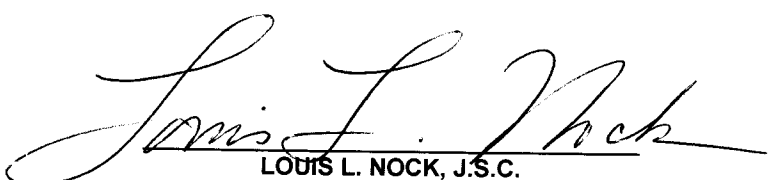
Accordingly, it is

ORDERED that the motion by defendant Arch Specialty Insurance Company to dismiss the complaint in this action is denied.

This shall constitute the decision and order of the court.

Dated: New York, New York  
March 11, 2019

E N T E R :

  
LOUIS L. NOCK, J.S.C.

3/11/2019  
DATE

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	DENIED	<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>		<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	REFERENCE
	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>		<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE