

**American Empire Suprlus Lines Ins. Co. v Arch  
Specialty Ins.**

2019 NY Slip Op 30909(U)

March 21, 2019

Supreme Court, New York County

Docket Number: 655234/2018

Judge: Carol R. Edmead

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 35

-----X  
AMERICAN EMPIRE SUPRLUS LINES  
INSURANCE COMPANY,

Plaintiff,

-against-

ARCH SPECIALTY INSURANCE,

Defendant.  
-----X

**CAROL R. EDMEAD, J.S.C.:**

**DECISION AND ORDER**

Index No.: 655234/2018

Motion Sequence 001

**MEMORANDUM DECISION**

In a declaratory judgment action arising out of an underlying Labor Law action, Defendant Arch Specialty Insurance moves for dismissal pursuant to CPLR 3211(a)(1) and CPLR 3211(a)(7). In reply, Plaintiff American Empire Surplus Lines Insurance Company opposes the motion. For the reasons set forth below, the Court grants Defendant’s motion to dismiss in part and denies in part.

**BACKGROUND FACTS**

Plaintiff and Defendant are insurance companies that provided general commercial liability policies to parties in an underlying Labor Law action that is also currently before this Court, captioned *Hugo Alejandro Toledo Vargas et. al. v 207 West 147<sup>th</sup> Street Housing Development et. al.* (Index No. 154605/2016). In that action, Vargas alleges he was injured when he fell down the stairs while working on a construction project at a building owned by 207 West 147<sup>th</sup> Street Housing Development (“207 West”). The other defendants, Edwards Sisters Realty Associates LLC (“Edwards”) and Shamas Constructing Company, Inc. (“Shamas”) are the managing agent of the property and the general contractor in charge of the construction,

respectively. Vargas was working on the construction under the employment of 365 Mechanical Inc. (“365 Mechanical”), which was subcontracted by Shamas to perform the work (NYSCEF doc No. 1, ¶ 11). 365 Mechanical is not named as a defendant in the underlying action as Vargas is not asserting any claims against it (NYSCEF doc No. 17 at 2). Shamas, however, filed a third-party complaint against 365 Mechanical, asserting causes of action for contribution, common-law indemnification, contractual indemnification and breach of contract for failure to provide insurance coverage (*id.*).

On October 22, 2018, Plaintiff, the insurer of Shamas, filed this action for declaratory relief pursuant to CPLR 3001, for the purpose of determining an insurance coverage question in actual controversy between the parties (NYSCEF doc No. 1, ¶ 2). Plaintiff claims that pursuant to the subcontractor agreement between 365 Mechanical and Shamas (the “Subcontract”), 365 Mechanical is obligated to indemnify 207 West, Edwards, and Shamas, (collectively, the “Tendering Entities”) and also was required to name them as additional insureds on its own primary insurance policy. According to Plaintiff, Defendant, as the insurer of 365 Mechanical, is obligated to provide coverage for the Tendering Entities, but has failed to do so. Defendant sent notice of formal rejection of Plaintiff’s tender on March 23, 2017 (NYSCEF doc No. 24) and has ignored Plaintiff’s follow-up letters demanding coverage. Plaintiff now seeks a declaratory judgment that Defendant is obligated to provide coverage to the Tendering Entities as additional insureds under 365 Mechanical’s policy and is also obligated to defend and indemnify them under the terms of the Subcontract’s indemnification clause, with respect to all claims in the underlying action.

On January 11, 2019, Defendant moved to dismiss the declaratory judgment action pursuant to CPLR 3211 (a)(1). Defendant contends that the unequivocal documentary evidence

of Defendant's insurance policy with 365 Mechanical demonstrates no duty to indemnify the Tendering Entities (NYSCEF Doc No. 17 at 1). Defendant argues the motion should also be dismissed under CPLR 3211(a)(7) as it fails to state a cause of action. Defendant contends that none of the Tendering Entities qualify as additional insureds under Defendant's policy with 365 Mechanical, and that any indemnification obligations on behalf of Defendant are owed to 365 Mechanical, not the other parties. In reply, Plaintiff opposes the motion and argues that the Tendering Entities are owed coverage pursuant to the "insured contract" exception under Defendant's liability policy with 365 Mechanical. Plaintiff also contends the Tendering Entities are owed indemnification by 365 Mechanical as the underlying action arose out of the scope of Vargas's work for 365 Mechanical.

### DISCUSSION

Under a motion to dismiss pursuant to CPLR 3211(a)(1), a party may dismiss a claim on the basis that "a defense is founded upon documentary evidence." A motion to dismiss on the basis of such a defense may be granted "only where the documentary evidence utterly refutes [the complaint's] factual allegations" (*Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]; *Mill Financial, LLC v. Gillett*, 122 AD3d 98 [1st Dept 2014]). In granting the dismissal, the Court must determine that "the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law" (*Mill Financial, supra*, citing *Art and Fashion Group Corp. v. Cyclops Production, Inc.*, 120 AD3d 436 [1st Dept 2014]). To prevail on a motion pursuant to CPLR 3211(a)(1), the evidence offered by the moving party must be "unambiguous and of undisputed authenticity." (*Fontanetta v Doe*, 73 AD3d 78, 86 [2d Dept 2010]).

It is well settled that when considering a motion to dismiss under CPLR 3211(a)(7), the Court must evaluate “whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law a motion for dismissal will fail” (*African Diaspora Maritime Corp. v Golden Gate Yacht Club*, 109 AD3d 204 [1st Dept 2013]). Generally, the Court must accept the facts in plaintiff’s complaint as being true, and “accord plaintiffs the benefit of every possible favorable inference” (*Goldman v Metropolitan Life Ins. Co.*, 5 NY3d 561, 570-571 [2005] [internal quotations and citations omitted]). Once the Court accepts the facts of the complaint as true, the Court must determine whether “plaintiff can succeed upon any reasonable view of the facts stated” (*Campaign for Fiscal Equity, Inc. v State*, 86 NY2d 307, 318 [1995]). However, “allegations consisting of bare legal conclusions as well as factual claims flatly contradicted by documentary evidence are not” accepted as true or accorded every favorable inference (*David v Hack*, 97 AD3d 437 [1st Dept 2012]). In such situations, the question for the Court becomes “whether the proponent of the pleading has a cause of action, not whether he has stated one” (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]).

In a dispute over insurance coverage, the party claiming insurance coverage bears the burden of proving entitlement to such coverage (*Natl. Abatement Corp. v Natl. Union Fire Ins. Co. of Pittsburgh, Pa.*, 33 AD3d 570, 570 [1st Dept 2006]). In addition, “the party asserting that someone other than a named insured is an insured under the policy bears the initial burden of submitting proof in evidentiary form that the alleged insured is, in fact, an insured within the meaning of the policy” (*Preferred Mutual Ins. Co. v Ryan*, 175 AD2d 375, 378 [3d Dept 1991]). There is no duty to defend when the party asserting coverage is not an insured under the policy (*Seavey v James Kendrick Trucking*, 4 AD3d 119, 119 [1st Dept 2004]). Further, the duty to

indemnify on the part of an insurer requires a determination that the insured is liable for a loss that is covered by the policy (*see Servidone Constr. Corp. v. Security Ins. Co. of Hartford*, 64 NY2d 419 [1985]; *see e.g., Lehrer McGovern Bovis, Inc. v. Halsey Const. Corp.*, 254 AD2d 335 [2d Dept 1998]).

### **Whether the Tendered Entities are Additional Insureds Under the Policy**

Here, Plaintiff has demonstrated that the Tendering Entities, 207 West and Shamas are potentially covered as additional insureds under 365 Mechanical's policy with Defendant.

Defendant's Commercial General Liability policy states that:

"WHO IS AN INSURED is amended to include as an additional insured those persons or organizations who are required under a written contract with you to be named as an additional insured, but only with respect to liability for "bodily injury", "property damage", or "personal and advertising injury" caused, in whole or in part, by your acts or omissions or the acts or omissions of your subcontractors: subcontractors:

- a. In the performance of your ongoing operations or "your work", including "your work" that has been completed; or
- b. In connection with your premises owned by or rented to you."

(Blanket Additional Insured Endorsement, Section II, NYSCEF doc No. 10).

The "Insurance Procurement" section of the Subcontract explicitly states that:

"Subcontractor shall, by specific endorsement to its primary and umbrella/excess liability policy, cause Contractor and Owner to be named as Additional Insureds. Subcontractor shall, specific endorsements to its primary liability policy, cause the coverage afforded to the additional insureds thereunder to be primary to and not concurrent with other valid and collectible insurance available to Contractor and Owner."

(NYSCEF doc No. 3 at 32).

A plain reading of the Subcontract and the insurance policy therefore indicates that 207 West and Shamas are covered as additional insureds due to 365 Mechanical's contractual obligation, subject to the terms of the Blanket Additional Endorsement. The parties dispute

whether Edwards is also an additional insured. The subcontract only refers to Contractor (Shamas) and Owner (207 West) but Plaintiff argues that as manager of the premises, Edwards should be covered as an agent of the owner (NYSCEF doc No. 27 at 13). Plaintiff, however, cites no caselaw or other support for this proposition, and a plain reading of the Subcontract does not indicate that Edwards would be covered as an “Owner,” especially given that it is a separate entity from 207 West and is not a party to the Subcontract.

Regardless, as at least two of the Tendering Entities are additional insureds under Defendant’s policy, the Court must next determine whether they are entitled to coverage under the policy.

#### **Whether Shamas and 207 West are Entitled to Coverage Under the Policy**

“An insurance policy is a contract between the insurer and the insured. Thus, the extent of coverage ... is controlled by the relevant policy terms, not by the terms of the underlying trade contract that required the named insured to purchase coverage” (*Bovis Lend Lease LMB, Inc. v Great Am. Ins. Co.*, 53 AD3d 140, 145 [1st Dept 2008]). “[T]he unambiguous provisions of an insurance policy, as with any written contract, must be afforded their plain and ordinary meaning, and ... the interpretation of such provisions is a question of law for the court” (*Broad St., LLC v Gulf Ins. Co.*, 37 AD3d 126, 130 [1st Dept 2006]).

The Court of Appeals held in *Burlington Ins. Co. v NYC Tr. Auth.* 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” (29 NY3d 313, 323-324 [2017]).

Here, the Court finds that there is a question of fact regarding whether Shamas and 207 West are entitled to coverage as additional insureds in the underlying action as proximate causation has not been established. Additional insured coverage under Defendant's policy is limited to injuries proximately caused by 365 Mechanical's actions. As stated above, Vargas alleges in the underlying action that he was injured while performing work at the premises owned by 207 West, wherein Shamas hired Vargas's employer, 365 Mechanical, to perform work. Vargas does not allege that 365 Mechanical's acts or omissions caused his accident, but rather attributes the cause of the accident exclusively to the negligence of the Tendering Entities who managed the premises and directly oversaw the work being performed. However, Shamas has filed a third-party complaint in the underlying action where it alleges that any injuries suffered by Vargas were caused solely by the negligence of 365 Mechanical (NYSCEF doc No. 22, ¶ 8). Notwithstanding the fact that Vargas does not claim his employer was negligent, as the underlying action is still in the discovery phase, the Court is unable at this juncture to declare as a matter of law that the accident was not proximately caused by 365 Mechanical's negligence. Therefore, it remains to be seen whether Shamas and 207 West are entitled to coverage as additional insureds and Defendant's motion to dismiss the demand for coverage is denied as premature.

#### **Whether the Tendering Entities are Entitled to Contractual Indemnification**

Plaintiff additionally contends that the Tendering Entities are entitled to defense and indemnity from Defendant as contractual indemnitees of 365 Mechanical. The Court finds that this branch of Plaintiff's motion must be dismissed.

The indemnification clause in the Addendum to the Subcontractor agreement provides:

“To the fullest extent permitted by law, Subcontractor shall indemnify, hold harmless and defend Shamas Contracting Co., Inc. against any and all losses, claims, actions, demands, damages, liabilities, or expenses, including but not limited to attorney's fees and all other costs of defense, by reason if the liability imposed by law or otherwise upon Shamas Contracting Co., Inc. for damages because of bodily injuries including death, at any time resulting therefrom, sustained by any person or persons, including Subcontractor's employees, or on account of damages to property, including loss of use thereof, arising directly or indirectly from the performance of Subcontractor's work or from any of the acts or omissions on the part of Subcontractor, its employees, agents, representatives, materialmen, suppliers, and /or subcontractors.”

(NYSCEF doc No. 3 at 18).

“A contract that provides for indemnification will be enforced as long as the intent to assume such a role is sufficiently clear and unambiguous” (*Bradley v Earl B. Feiden, Inc.*, 8 NY3d 265, 274 [2007] [internal quotation marks and citations omitted]). Since this is a broad “arising out of” clause and thus covers incidents not necessarily caused by 365 Mechanical’s negligence, 365 Mechanical potentially owes indemnification to Shamas regardless of the causation of Vargas’s accident, depending on whether the Court in the underlying action concludes that the accident arose out of 365 Mechanical’s work on the premises. (*See Hurley v Best Buy Stores, L.P.*, 57 AD3d 239 [1st Dept 2008]).

In addition to the above clause, an Indemnification provision in the body of the Subcontractor agreement extends indemnity to 207 West, but under narrower circumstances:

“To the fullest extent permitted by law, the Subcontractor shall indemnify and hold harmless the Owner, Contractor, Architect, Architect's Consultants, and agents and employees of any of them from against claims, damages, losses and expenses, including but not limited to attorney's fees, arising out of or resulting from performance of the Subcontractor's Work under this Subcontract, provided such claim, damage, loss or expense is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (other than the Work itself) including loss of use resulting therefrom, but only to the extent caused in whole or in part by negligent acts or omissions of the Subcontractor, the Subcontractor's Sub-subcontractors, anyone directly or indirectly employed by them or anyone for whose acts they may be liable regardless of whether or not such claim, damage, loss or expense is caused in part by a party indemnified hereunder.”

(NYSCEF Doc No. 3, ¶ 4.6.1).

Unlike the indemnification provision that is limited to Shamas, this provision requires a showing of negligence on the part of 365 Mechanical to trigger indemnification. Narrower indemnification provisions that require a showing of negligence are regularly encountered by courts and these provisions are not found to be triggered unless a showing of negligence has been made against the putative indemnitor (*see e.g. Matter of 91st St. Crane Collapse Litig.*, 133 AD3d 478, 480-481 [1st Dept 2015]). 365 Mechanical therefore only has a duty to indemnify and defend 207 West if there is a determination in the underlying action that its negligence at least in part caused Vargas's accident.

Regardless of which parties, if any, are contractual indemnitees of 365 Mechanical under the Subcontract, no indemnitee here is entitled to defense from Defendant. An insurer's "duty to defend arises whenever the underlying complaint alleges facts that fall within the scope of coverage and that the 'same allegations that trigger a duty to defend trigger an obligation to pay defense costs'" (*Federal Ins. Co. v. Kozlowski*, 18 AD3d 33 [1st Dept 2005]; *see also Hotel des Artistes, Inc. v. General Acc. Ins. Co. of America*, 9 AD3d 181 [1st Dept 2004], citing *Incorporated Village of Cedarhurst v. Hanover Ins. Co.*, 89 NY2d 293 [1996]). "If the complaint contains any facts or allegations which bring the claim even potentially within the protection purchased, the insurer is obligated to defend" (*Hotel des Artistes, Inc.* at 298, citing *Technicon Electronics Corp. v. American Home Assurance Co.*, 74 NY2d 66, 73 [1991]).

As Defendant concedes, it may be obligated to provide 365 Mechanical with a defense to indemnification claims from the Tendering Entities, but that does not mean it has an obligation to defend or indemnify the Tendering Entities themselves. Defendant's policy does state that it will defend a party that the insured is under a contractual obligation to indemnify in a lawsuit where

both the insured and indemnitee are named (NYSCEF Doc No. 9 at 44). However, the policy makes it clear that Defendant will only provide defense to the indemnitee when “[t]he allegations in the ‘suit’ and the information we know about the ‘occurrence’ are such that no conflict appears to exist between the interests of the insured and the interests of the indemnitee” (*Id.*). This condition makes it evident that the insurer’s duty to defend is only triggered in situations where the insured and the indemnitee are on the same side of an action, and does not apply where, as here, the insured and the indemnitees have claims against each other regarding the cause and liability of an underlying accident. Given that the insurance policy is what governs Defendant’s obligations, not the Subcontract, the documentary evidence of the policy agreement plainly demonstrates that Defendant is not required to provide defense or indemnity to the Tendering Entities. While, as conceded, Defendant may owe coverage on behalf of 365 Mechanical in its defense against the contractual indemnification claims of the Tendering Entities, Plaintiff does not have standing to assert a claim on behalf of 365 Mechanical.

Accordingly, while the branch of Defendant’s motion seeking dismissal of Plaintiff’s claim for additional insured coverage is premature and must be denied pending a finding of negligence in the underlying action, Defendant’s motion is granted to the extent that Plaintiff is precluded from seeking contractual indemnification on behalf of the Tendering Entities.

### CONCLUSION

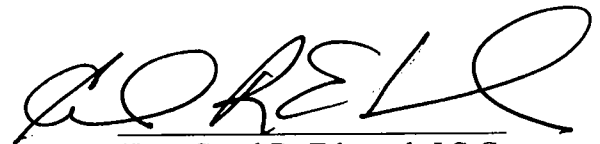
Based on the foregoing, it is hereby

ORDERED that Defendant Arch Specialty Insurance’s motion to dismiss Plaintiff American Empire Surplus Lines Insurance Company’s action for a declaratory judgment is granted to the extent that the branch of Plaintiff’s motion seeking coverage for contractual indemnification claims is dismissed; and it is further

ORDERED that Defendant's motion is denied to the extent that the remainder of Plaintiff's complaint remains before this Court; and it is further

ORDERED that counsel for Defendant shall serve a copy of this decision, along with notice of entry, on all parties within 10 days of entry.

Dated: March 21, 2019



Hon. Carol R. Edmead, J.S.C.

**HON. CAROL R. EDMEAD  
J.S.C.**