

**One Bryant Park LLC v AXA Ins. Co.**

2019 NY Slip Op 31268(U)

April 12, 2019

Supreme Court, New York County

Docket Number: 655640/2017

Judge: Frank P. Nervo

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK -- PART 4

-----X  
ONE BRYANT PARK LLC; DURST DEVELOPMENT,  
L.L.C., and TISHMAN CONSTRUCTION CORPORATION  
OF NEW YORK,

Plaintiffs,

Index No. 655640/2017

vs.

AXA INSURANCE COMPANY; AXA CORPORATE  
SOLUTIONS ASSURANCE; AXA CORPORATE  
SOLUTIONS ASSURANCE (US REINSURANCE TRUST);  
PERMASTEELISA NORTH AMERICA CORP.; TRAVELERS  
PROPERTY AND CASUALTY COMPANY OF AMERICA;  
ALLIED WORLD ASSURANCE COMPANY (US) INC.;  
COMPONENT ASSEMBLY SYSTEMS, INC.; and ROBERT  
McCULLOUGH,

DECISION AND ORDER

Defendants.  
-----X

**NERVO, J.**

Motion sequence numbers 001 and 002 are consolidated for disposition.

This is a declaratory judgment action commenced by a number of additional insureds under a commercial general liability (CGL) policy to recoup defense costs and other expenses incurred in connection with the underlying personal injury action, *McCullough v One Bryant Park*, Index No. 113802/2009 (Sup Ct, NY County) (the *McCullough* action).

In motion sequence number 001, defendant AXA Insurance Company (AXA) moves to dismiss the Amended Complaint for failure to state a claim, upon documentary evidence and the statute of limitations pursuant to CPLR 3211(a)(1), (5) and (7). AXA alternatively seeks summary judgment pursuant to CLPR 3211(c).

In motion sequence number 002, plaintiffs One Bryant Park LLC (Bryant), Durst Development LLC (Durst), and Tishman Construction Corporation of New York (Tishman) (collectively, plaintiffs or the Bryant parties) move, pursuant to CPLR §§ 3211(b) and 3212, for an order:

- (a) Declaring that the duty of defendant Travelers Property and Casualty Company of America (Travelers) to defend plaintiffs was triggered by the pleadings and proceedings in the *McCullough* Action, and that Travelers must therefore fund their ongoing post-verdict defense in that action (and awarding plaintiffs a money judgment for their post-tender defense costs incurred in that action); and
- (b) Declaring that Travelers and defendant Allied World Assurance Company (US) Inc. (Allied) must together indemnify plaintiffs for their liability in the *McCullough* action (and awarding plaintiffs a money judgment equal to the amount of that liability), and
- (c) Dismissing Travelers' affirmative defense of late notice.

Plaintiffs have withdrawn by stipulation (Dkt. 98) that branch of their motion which sought, in the alternative, a default judgment pursuant to CPLR § 3215 against defendant Component Assembly Systems, Inc. (Component) on their claim for failure to procure insurance.

For the reasons set forth below, the motions are denied without prejudice to renewal upon the completion of discovery.

#### **FACTS/BACKGROUND**

The following facts are taken from the Amended Complaint (AC) (Dkt. 5)<sup>1</sup> the relevant insurance policies and the other submissions by the parties. In the *McCullough* action, the plaintiff therein, Robert McCullough, claims that he was injured due to the negligence of Component, while performing work as an employee of a subcontractor of Permasteelisa North

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<sup>1</sup>References to "Dkt." followed by a number refer to documents filed in this action in the New York State Courts Electronic Filing (NYSCEF) system.

America Corp. (PNA), pursuant to PNA's contract with One Bryant Park LLC (Bryant) (AC, ¶¶ 1, 15). The injury arose out of construction work at a site owned by Bryant and also allegedly by Durst, at which Tishman was the construction manager (*id.*). Plaintiffs Bryant, Tishman and Durst allege that they are entitled to a defense and/or indemnification in the *McCullough* action under the primary and excess liability insurance policies procured by PNA from defendant AXA, and as additional insureds under the policies procured by Component from defendants Travelers and Allied (*id.*).

The AXA's Motion to Dismiss

On or about April 1, 2009, PNA and non-party Tower Installation LLC (Tower) procured an insurance policy from AXA bearing policy number CS001273(09) (the AXA Policy) (Maria Thorpe Aff. [Dkt. 12], Ex. B [Dkt. 14]; AC ¶ 17). The AXA Policy was effective from April 1, 2009 to April 1, 2010 (AXA Policy, p. 8). The Commercial General Liability (CGL) Declarations page provides for a per occurrence limit of \$1 million, a General Aggregate Limit of \$2 million, and a "Products/Completed Operations Aggregate Limit" of \$2 million (*id.*). Endorsements #1 and #6 to the AXA Policy (*id.*, pp. 46, 61) extended coverage for bodily injury to any person or organization that PNA was required to add as an additional insured pursuant to contract or other agreement. The parties do not dispute that plaintiffs were additional insureds under the AXA Policy.

Under Coverage A (for bodily injury and property damage liability), the Commercial General Liability Coverage form provides as follows:

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 against any "suit" seeking those damages even if the allegations of the "suit" are groundless, false or

fraudulent. However, we will have no duty to defend the insured against any “suit” 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:

- (1) The amount we will pay for damages is limited as described in Section III – Limits of Insurance; and
- (2) Our right and duty to defend ends when we have used up the applicable limit of insurance in the payment of judgments or settlements . . . .

(*Id.*, p. 12, section 1.a). The AXA Policy also contains an endorsement for a separate “Designated Construction Project(s) General Aggregate Limit” (*id.*, p. 37). That endorsement specifically provides that it modifies the CGL coverage part. As pertinent here, it provides coverage as follows:

- A. For all sums which the insured becomes legally obligated to pay as damages caused by “occurrences” under COVERAGE A . . . which can be attributed only to ongoing operations at a single designated construction project shown in the Schedule above.
  1. A separate Designated Construction Project General Aggregate Limit applies to each designated construction project, and that limit is equal to the amount of the General Aggregate Limit shown in the Declarations.
  2. The Designated Construction Project General Aggregate Limit is the most we will pay for the sum of all damages under COVERAGE A, except damages because of “bodily injury” or “property damage” included in the “products-completed operations hazard . . . .
  3. Any payments made under COVERAGE A . . . shall reduce the Designated Construction Project General Aggregate Limit for that designated construction project. Such payments shall not reduce the General Aggregate Limit shown in the Declarations nor shall they reduce any other Designated Construction Project General Aggregate Limit for any other designated construction project shown in the Schedule above.
  4. The limits shown in the Declarations for Each Occurrence . . . continue to apply. However, instead of being subject to the General Aggregate Limit shown in the Declarations, such limits will be subject to the applicable Designated Construction Project General Aggregate Limit.

- B. For all sums which the insured becomes legally obligated to pay as damages caused by “occurrences” under COVERAGE A . . . which cannot be attributed only to ongoing operations at a single designated construction project shown in the Schedule above:
1. Any payments made under COVERAGE A for damages . . . shall reduce the amount available under the General Aggregate Limit or the Products-Completed Operations Aggregate Limit, whichever is applicable, and
  2. Such payments shall not reduce any Designated Construction Project General Aggregate Limit.
- C. When coverage for liability arising out of the “products-completed operations hazard” is provided, any payments for damages because of “bodily injury” or “property damage” included in the “products-completed operations hazard” will reduce the Products-Completed Operations Aggregate Limit, and not reduce the General Aggregate Limit nor the Designated Construction Project General Aggregate Limit.

The “Schedule” of designated construction projects referred to in this endorsement did not identify a specific project. Instead, it stated that the projects were to be “[a]s required by written contract.”

The *McCullough* action was commenced on September 24, 2009, alleging that Mr. McCullough sustained injuries on April 14, 2009 (AC ¶ 22). AXA acknowledged coverage for the insured plaintiffs in that action and provided them with a defense through March 24, 2016. At that time, plaintiffs allege, “AXA putatively exhausted the aggregate limits of the . . . Policy by the payment of other claims” and thereafter refused to acknowledge coverage for plaintiffs or provided them with a defense (*Id.*, ¶ 23). Plaintiffs commenced this action by filing a summons and complaint on August 31, 2017 (Dkt. 1), and filed the Amended Complaint on October 2, 2017 (Dkt. 5).

As relevant here, the first cause of action seeks a declaratory judgment that plaintiffs are entitled to a defense and indemnification under the AXA Policy. In support of its motion to

dismiss that claim, AXA relies upon the affidavit of a Senior Claims Examiner, Maria Thorpe, who contends that the Policy's \$2,000,000 General Aggregate Limit was exhausted by a series of settlements between May 7, 2010 and March 24, 2016. Specifically, she asserts that six separate payments totaling \$1,273,033 were made in connection with the insureds' 510 Madison Project between April 30, 2010 and August 31, 2011; that a \$966,000 payment was made in settlement of an action entitled *Cantelmo v One Bryant Park, LLC* on March 24, 2016; that \$25,000 was paid to the Connecticut Science Center Project on November 15, 2012; that \$5,000 was paid to the Gucci Project on December 16, 2011; and that \$4,000 was paid to one Gisela Misch-Baum on February 2, 2012 (*see* Thorpe Aff. ¶ 11; Exs. E-I [Dkt. 14]).

The documentation submitted reflects that in each case the settlement checks were made payable to the actual third-party claimants, except in the case of the 510 Madison Project. In that case, AXA has instead submitted documentation for payments made directly to PNA by wire transfer or check. To establish that those payments were in satisfaction of claims made in connection with the 510 Madison Project, defendants have annexed a May 8, 2014 email from PNA's general counsel Greg Holness to AXA sent under the subject line "510 Madison Payments" (Thorpe Aff., Ex. F [Dkt. 14]). In it, Mr. Holness represented that he had "asked our accounting department to provide me copies of checks/wire transfers received from AXA relative to the 510 Madison claim" and listed five payments made between April 30, 2010 and May 24, 2011. He also purported to attach the documentation for the payments.

AXA further supports the motion with a series of letters sent by Thorpe to Holness in April, November and December 2015 in connection with the *McCullough* and *Cantelmo* actions (Thorpe Aff., Ex. C [Dkt. 14]). Each stated that only \$966,000 remained available under the

\$2,000,000 aggregate limit and that AXA's defense and indemnification obligations to PNA and its additional insureds would terminate upon the exhaustion of that limit. Then, by letter dated January 21, 2016, Thorpe advised Holness that plaintiff's counsel in the *Cantelmo* case had accepted \$966,000 in settlement of the claims and that the Policy limits would be exhausted once the anticipated payment was made by the end of that month (Thorpe Aff., Ex. D [Dkt. 14]). The payment was actually made on March 24, 2016, and Thorpe advised Holness of that fact by letter dated April 1, 2016 which purported to retender the defense to PNA (*id.*).

AXA's motion to dismiss is denied. On a motion based upon documentary evidence under CPLR 3211(a)(1), the court must "accept the facts as alleged in the complaint as true, accord plaintiff[ ] the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Kolchins v Evolution Markets, Inc.*, 31 NY3d 100, 105–06, [2018], quoting *Leon v Martinez*, 84 NY2d 83, 87–88 [1994]). Dismissal is appropriate "only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law" (*Leon*, 84 NY2d 83, 88). The defendant bears the burden of establishing that the documentation refutes the plaintiff's factual allegations (*Kolchins*, 31 NY3d 100, 106).

In an insurance declaratory judgment action, exhaustion of the policy limits is affirmative defense which thus must be pled and proven by the defendant (*Matter of State Farm Mut. Auto. Ins. Co. v City of Yonkers*, 21 AD3d 1110, 1111 [2d Dept 2005]; *Ortho Passive Motion Inc. v Allstate Ins. Co.*, 55 Misc. 3d 794, 797 [Nassau Co Dist Ct 2017]). If the policy so provides, the insurer's duty to defend terminates upon exhaustion (*Am. Home Assurance Co. v Port Auth. of NY & NJ*, 166 AD3d 464 [1st Dept 2018]). Whether the policy limits have been exhausted may

create a factual question (*see Mount Sinai Hosp. v Zurich Am. Ins. Co.*, 15 AD3d 550, 550–51 [2d Dept 2005]; *New York & Presbyterian Hosp. v Allstate Ins. Co.*, 12 AD3d 579, 580 [2d Dept 2004]; *compare Matter of East 51st Street Crane Collapse Litig.*, 103 AD3d 401, 403–04 [1st Dept 2013]). Similarly, a question may exist regarding whether a settlement has been properly allocated to a particular policy coverage limit (*J.P. Morgan Chase & Co. v Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 8 AD3d 188, 188–89 [1st Dept 2004]).

While plaintiffs do not dispute that the *Cantelmo* settlement was properly allocated, they contend that discovery is required into the circumstances surrounding the remaining four settlements. The documentation submitted by AXA regarding those payments in support of its motion falls far short of eliminating all issues surrounding exhaustion and allocation.

First, the checks and wire transfers in the record confirm only that certain payments were made to a number of parties. From that limited information, it cannot be determined whether the settlement amounts were properly deducted from the General Aggregate Limit, as opposed to the separate Products/Completed Operations Aggregate Limit or the Designated Construction Project(s) General Aggregate Limit. That allocation would necessarily depend on the nature of the allegations and proof in the underlying actions. However, AXA has made no attempt to address how the injuries to the plaintiffs in those actions fell within the AXA Policy language defining the General Aggregate limit. Indeed, the Court cannot determine whether the lawsuits involved bodily injury or property damage “to which this insurance applies” under Coverage A. The Thorpe affidavit does not address these issues, other than to assert the bald conclusion that all of the payments were “allocated and applied” to the General Aggregate Limit.

Second, the documentation for the alleged settlement with 510 Madison Project raises a number of additional serious questions. None of the checks or wire transfers to PNA make any reference to the project. This deficiency is not remedied by the Holness email purporting to recount his communications with the accounting department regarding payments to 510 Madison, as the message is unauthenticated and thus inadmissible hearsay (*see AQ Asset Mgt. LLC v Levine*, 128 AD3d 620, 621 [1st Dept 2015]). While an email may qualify as documentary evidence if it meets the “essentially undeniable” test (*Amsterdam Hosp. Group, LLC v Marshall-Alan Assocs., Inc.*, 120 AD3d 431, 432–33 [1<sup>st</sup> Dept 2014], *quoting Art and Fashion Group Corp. v Cyclops Prod., Inc.*, 120 AD3d 436 [1<sup>st</sup> Dept 2014]), the Holness email does not. The exhibit in which that email is included contains documents for six payments, rather than the five listed by Holness, the additional payment being for the amount of \$58,533 paid on August 31, 2011. It is not clear whether Holness merely left that payment off the list, or whether it was included by AXA in that same exhibit even though it was not actually an attachment to the email. Additionally, there are discrepancies between the dates of payment provided by the email and the dates reflected by the actual documents. AXA’s claim that the Thorpe affidavit somehow “authenticates” the Holness email is specious, and even if it did the problems discussed above would remain.

Furthermore, AXA offers no explanation for why the payments were made to PNA rather than to the third-party claimants or their representatives. If, in fact, PNA made payments to such claimants before or after receiving the funds from AXA, such evidence is not in the record. AXA also does not explain why, if the payments were made under a policy with a \$1,000,000 per occurrence limit, a sum exceeding \$1,200,000 was paid out. The Court also notes the suspect

nature of the payouts; the settlement was paid in six installments over fourteen months, and the date assigned for the loss was the precise inception date of the AXA Policy.

Third, the Court rejects AXA's arguments that plaintiffs lack standing to challenge its coverage determination. Additional insureds are entitled to the same protections under a policy as the named insureds (*Pecker Iron Works of New York, Inc. v Traveler's Ins. Co.*, 99 NY2d 391, 393 [2003]). To the extent that AXA relies upon the AXA Policy provision bestowing upon the insurer with the "discretion" to settle claims (section 1.a), that language cannot be read as empowering it to misallocate the settlement payments in violation of the other sections which specifically define the various aggregate limits. Nor have plaintiffs lost their standing by virtue of PNA's failure to object in its answer to AXA's accounting of the payments, as it is the policy provisions, not PNA's legal position, which control. The Court also notes that the boilerplate responses of PNA's answer go beyond simply rejecting plaintiffs' position on exhaustion, and deny the very existence of the Policy and plaintiffs' status as additional insureds (*see* AC ¶¶17-18, 20; Gollub Reply Affirm. [Dkt. 27], Ex. B [PNA's answer] [Dkt. 27]).

AXA's remaining contentions merit little discussion. Its argument that the complaint fails to state a claim rests upon plaintiffs' allegation that "AXA putatively exhausted the aggregate limits" (AC ¶ 25), which AXA interprets as an admission that the limits were *actually* exhausted. However, "putative" means "reputed; believed or supposed" (Black's Law Dictionary (10th ed. 2014) and in the context of the pleadings the word was clearly used to express AXA's stated reason for disclaiming further responsibility while signaling disagreement with it. AXA's statute of limitations argument likewise fails, as plaintiffs' cause of action accrued upon the insurer's alleged breach of the Policy on March 24, 2016, well within the six-

year period for contracts under CPLR § 213(2); *Benson v Boston Old Colony Ins. Co.*, 134 AD2d 214, 215 [1st Dept 1987]). AXA's assertion that the limitations period should function to prohibit plaintiffs from challenging the allocation of the settlements made more than six years before the filing of the action is erroneous, as no actual breach occurred at that time.

Finally, the Court declines AXA's invitation to convert this motion to one for summary judgment under CPLR § 3211(c). For the reasons stated above, the factual questions raised by plaintiffs preclude resolution of the exhaustion issue. Furthermore, conversion would be inappropriate because plaintiffs have not consented to it, and have instead requested discovery (*see Cooney v City of New York Dep't of Sanitation*, 127 AD3d 629, 630 [1st Dept 2015]).

#### Plaintiffs' Motion for a Declaration and Judgment

Component entered into a Contract with Bryant dated November 8, 2005 (the Component Contract) (Eagle Affirm. [Dkt.70], Ex. 3 [Dkt. 73], p. 1). The contract was executed by Component on June 20, 2006 and by Tishman, as agent for Bryant, on June 25, 2006 (Component Contract, p. 17). Paragraph 8, "Insurance," provided that "Contractor shall comply with the requirements set forth in Rider F attached hereto" (*Id.*, p. 5).

Plaintiffs have submitted a form captioned "Rider 'F'" – Contract Insurance Requirement . . . Special Requirements – Owner Controlled Insurance Program" (Eagle Affirm, Ex. 4 [Dkt. 74]), which they contend was a part of the Component Contract. Participation in the Owner Controlled Insurance Program (OCIP) was made "mandatory but not automatic" and subject to compliance with "the program enrollment procedures outlined in the Insurance Manual" (Rider F, § 1). Under section 5(2) of Rider F, the Owner Provided Coverage had limits of \$2 million per occurrence and \$4 million aggregate.

However, Section 7, "Termination/Modification of the OCIP" permitted the owner to terminate or modify the OCIP at any time upon 30 days written notice, after which time the contractor was required to obtain "appropriate replacement insurance coverage" at the owner's expense. Furthermore, the prefatory paragraph of Rider F cautioned that "[w]hile the OCIP is intended to provide broad coverages and high limits, the OCIP is not intended to meet all the Insurance needs of the Contractor . . . . [i]n addition to any Insurance provided by [the Owner], an enrolled Contractor . . . will be responsible for providing certain insurance as specified in Section 8." Section 8, "Contractor Provided Coverage," provided that "[e]ligible Contractors/Subcontractors must provide their own insurance for off-site activities and Automobile Liability In accordance with this agreement . . . [e]ligible Contractors/Subcontractors must provide their own Insurance if they are still on the job after the OCIP has been terminated." That section also required the contractor to name the owner, sponsor and construction manager as additional insureds. Under section 8(3), the required GCL coverage was \$1 million per occurrence and \$2 million aggregate. Section 8(4) required \$10 million in excess liability coverage, with the coverage to "follow form" of the primary CGL policy.

Rider A to the Component Contract required Component to perform "Rough Carpentry/Drywall/Ceilings/Resilient Flooring (Base Building)" work (Component Contract,

Rider A, p. 6). Component's "Scope of Work" under the Component Contract included the following:

### III. TEMPORARY PROTECTION

1. Furnish all labor, materials, equipment, etc., required to perform temporary and safety protection. In general, this Contractor shall be responsible for furnishing, erecting, maintaining and removing, of all items of temporary protection required to maintain the safety of all personnel during the course of construction....

\* \* \*

11. This contractor will furnish, install, maintain and remove removable covers with cleats to prevent lateral movement) on all floor openings not protected by rails and toe boards.

\* \* \*

22. In addition to all other requirements of this section, this Contractor provide a two (2) man "roving team" (7 hrs straight time/Monday-Friday) with direct radio contact with the Site Safety Manager, to continuously make repairs to temporary protection. This contractor to provide this team for a twelve (12) month duration. Payment against this allowance to be by signed work tickets. This work does not take the place of any general maintenance work described in this section.

Component Contract, Rider A, pp. 13, 15.

On or about April 1, 2009, Component procured an insurance policy from Travelers bearing policy number VTC2J-CO-2396A693-TIL-09 (the Travelers Policy) (Robertson Affirm. [Dkt. 90], Ex. 1 [Dkt. 91]). The Travelers Policy was effective from April 1, 2009 to April 1, 2010, with a \$1 million per occurrence and \$2 million aggregate limit (Travelers Policy, Declarations page, Bates TRAV\_000012). It contains an "Additional Insured - Owners, Lessees Or Contractors - Scheduled Person or Organization" endorsement that provides that the definition of an insured includes "[a]ny person or organization . . . that [Component] agree[s] in a written contract to include as an additional insured", "but only with respect to liability arising out of [Component's] ongoing operations performed for that insured" (*id.*, Bates TRAV\_000121).

The Travelers Policy contained an exclusion for bodily injury sustained on any project that was subject to a “wrap-up insurance program.” The policy defined such a program as “any owner-controlled or similar program, under which some or all of the contractors working on a specific project . . . are required to participate in a program to obtain insurance . . . that includes the same or similar insurance as that provided by this Coverage Part” (*id.*, Bates TRAV\_000056). Additionally, the policy required that the insured provided Travelers with notice of any occurrence, claim or lawsuit “as soon as practicable” and cooperate in the defense or settlement of any such claims (*id.*, section IV, paragraph 2, Bates TRAV\_000023-000024).

Component also procured an umbrella policy from Allied bearing policy number C011687/001 (the Allied Policy) (Kaplan Affirm. [Dkt. 30], Exs. R & R2) [Dkt. 49 & 50] effective from April 1, 2009 to April 1, 2010, with a \$25 million per occurrence and aggregate limit (Allied Policy, declarations page). The Allied Policy listed the Travelers Policy in its schedule of underlying insurance (Allied Policy, Endorsement 001).

By letter dated August 1, 2017 (Robertson Affirm., Ex. 2 [Dkt. 92]), defense counsel for the Bryant parties in the *McCullough* action, purported to tender the defense of that action to Travelers, relying on the Component Contract and enclosing a copy of Rider F. The Bryant parties’ coverage counsel sent a similar demand letter on August 5, 2017 (Robertson Affirm., Ex. 3 [Dkt. 93]), also relying on Rider F. Travelers disclaimed coverage by letter dated August 16, 2017 (Robertson Affirm., Ex. 4 [Dkt. 94]). Travelers contended, *inter alia*, that there was no written contract executed by Component requiring it to name the Bryant parties as additional insured; that the liability did not arise out of Component’s work for the Bryant parties; and that the Bryant parties breached the Travelers Policy by failing to give prompt notice of the

*McCullough* action.

As noted, plaintiffs originally filed this action on August 31, 2017. The next day, plaintiffs' coverage counsel sent a letter to Travelers disputing the insurer's grounds for disclaiming (Robertson Affirm., Ex. 5 [Dkt. 95]). Plaintiffs enclosed the Component Contract together with Rider F, and protested that Travelers had not demonstrated prejudice by the delay as required Insurance Law § 3420. Specifically, plaintiffs' counsel asserted that Travelers had early notice of the *McCullough* action and the underlying circumstances by virtue of its retention of counsel for Component in the litigation.

A nine-day jury trial was held commencing October 2, 2017. A directed verdict was entered in favor of Durst at the close of evidence. On October 18, 2017, the jury rendered a verdict in favor of the *McCullough* plaintiff in the amount of \$3,927,046 (Kaplan Affirm. [Dkt. 30], Ex. O [Dkt. 45]). The jury apportioned liability 90% to Bryant and Tishman, 5% to Component and 5% to Mr. McCullough. Although the jury found that Component was negligent and that its negligence was a substantial factor in causing McCullough's injuries, it found that Component was not negligent in carrying out its contractual obligations to Bryant and Tishman.

The parties made various post-trial motions challenging the verdict. In a decision issued on August 10, 2018 (the Post-trial Order [McCullough Dkt. 360]), after the instant motions were submitted, the Court in the *McCullough* action (Chan, J.) upheld the verdict, except for a minor adjustment in the calculation of lost earnings. In addressing the apparent inconsistency between the jury's finding Component was negligent, but not negligent in the performance of its contract, the court referred to testimony that Component had a roving two-man team that performed work outside of the contract by radioing the safety manager to make repairs (Post-trial Order at 5).

The court further observed that Component performed carpentry and there was a photograph in evidence of a piece of wood sticking out of the drain hole into which McCullough tripped and fell (*id.*). The court issued an amended order on November 15, 2018 (McCullough Dkt. 366) directing the entry of a judgment in the amount of \$3,878,780.93, in accordance with its recalculations and a stipulation of the parties.

In support of their motion, plaintiffs argue that they qualify as additional insureds under the Travelers' Policy because, as required by the additional insured endorsement, Component agreed to name them as such in its contract with them. They further contend that Travelers' duty to defend was triggered by the Amended Complaint, which alleged that plaintiffs' liability to McCullough arose from Component's ongoing operations under the contract, and by a 2015 Appellate Division ruling that there was at least a question of fact as to whether Component's contractual obligation to provide temporary protection for drain hole could support a common law negligence claim. As to the duty to indemnify, plaintiffs contend that it was established by the jury verdict finding Component negligent, and by the trial testimony that McCullough tripped and fell while stepping over a temporary plywood threshold built by Component which blocked his view of the drain hole. Finally, plaintiffs contend that Travelers late notice defense must be dismissed because it has failed to allege or establish prejudice and has violated the notice requirements of two sections of the Insurance Law.

In response, Travelers asserts that it is entitled to discovery regarding whether the Component Contract contained provisions extending additional insured coverage to plaintiffs. Travelers also argues that indemnity is not available because the accident did not arise out of Component's contracted-for work. With respect to the late notice defense, Travelers contends

that the burden to establish prejudice falls upon plaintiffs and has not been met.

Allied disputes plaintiffs' entitlement to additional insured coverage, but on the ground that the Travelers Policy only extends it to specifically identified parties. Allied also joins in Travelers argument that the accident did not arise out of Component's contract work. Additionally, Allied argues that a judgment is premature in view of the post-trial challenges to the jury verdict, and contends that it is entitled to discovery on the existence of other insurance.

#### Additional Insured Coverage

The Court finds that a question of fact exists as to whether plaintiffs are additional insured under the Travelers Policy. In a declaratory judgment action, the insured bears the burden to establish the existence of coverage (*Platek v Town of Hamburg*, 24 NY3d 688, 694 [2015]; *Lend Lease (U.S.) Const. LMB Inc. v Zurich Am. Ins. Co.*, 136 AD3d 52, 56 [1<sup>st</sup> Dept 2015], *aff'd sub nom. Lend Lease (US) Const. LMB Inc. v Zurich Am. Ins. Co.*, 28 NY3d 675 [2017]). A party is not entitled to additional insured coverage if it is not named on face of the policy, or required to be named pursuant to a written contract with the primary insured (*Nat'l Abatement Corp. v Nat'l Union Fire Ins. Co. of Pittsburgh, PA*, 33 AD3d 570, 571 [1<sup>st</sup> Dept 2006]). Furthermore, because an additional insured endorsement is an addition to, rather than a limitation of coverage, if the party is not covered by the policy, the insurer's failure to disclaim is irrelevant (*id.*; see *Sumner Builders Corp. v Rutgers Cas. Ins. Co.*, 101 AD3d 417, 418 [1<sup>st</sup> Dept 2012]).

Plaintiffs' claim to insured status rests entirely upon the "Rider F" to the Component Contract, which is alleged to be the written agreement which triggers the additional insureds endorsement to the Travelers Policy. However, Travelers denies ever seeing the rider until being

provided with it around the time this litigation was commenced in 2017 (Robertson Affirm. [Dkt. 90], ¶¶ 8-10), and correctly notes that the rider has not been authenticated on this motion by any party with actual knowledge of the Component Contract. Furthermore, as plaintiffs admit, the rider was not introduced into evidence along with the Component Contract at the McCullough trial (Kaplan Affirm. [Dkt. 30], ¶ 7).

Although plaintiffs contend that the entire Component Contract is on file on the electronic docket sheet for the *McCullough* action, this Court has been unable to locate it there. Rather, the Court has found only incomplete copies consisting of the main contract document and Rider A (*see* Dkts. 26, 55, 98, 178, 244, 260 and 309). Like the copies provided to the Court on this motion, those versions are also missing riders B, C, D, E as listed on page 15 of the main contract. Notably, the contract for Permasteelisa Cladding Technologies, Ltd. uploaded to the *McCullough* docket (Dkt. 233) does contain all of the listed riders, A through F. Given the record as it stands, plaintiffs have not submitted proof in admissible form that there is a contract conferring additional insured status upon them.

Furthermore, under section 8 of Rider F it appears that the contractor is only required to obtain coverage (and name additional insureds) for *off-site* activities. Under the OCIP program, plaintiffs were required to obtain the on-site coverage, subject to the contractor completing the enrollment process and subject to plaintiffs' right to later terminate upon notice. The record is silent as to whether and when the OCIP program was in effect, and discovery is required upon this issue. If Component did enroll prior to the time of the accident, a different insurer may be liable (*see, e.g. Zurich Am. Ins. Co. v Illinois Nat. Ins. Co.*, 93 AD3d 545, 545-46 [2012]).

The Court rejects plaintiffs' suggestion that Travelers was required to treat the OCIP program as an exclusion from coverage and issue a disclaimer specifically based upon its existence. The obligations imposed under Rider F relate solely to additions to coverage, whether coverage for off-site or on-site activities. The Court also rejects Allied's contention that the Travelers' additional insured endorsement lacks language extending coverage to parties named in a written contract. This argument was not raised by Travelers, and in any event, the endorsement clearly contains such language (*see* Travelers Policy, Bates TRAV\_000121).

Indemnification for Liability for Ongoing Operations Performed for Plaintiffs

Assuming, *arguendo*, that plaintiffs are additional insured under the Travelers Policy, the Court finds that another question of fact remains as to whether McCullough's accident arose out of Component's work for plaintiffs. Despite the rendering of a jury verdict and an order sustaining that determination, the question still remains unresolved.

The Court of Appeals has held that an injury can be deemed to be "arising out of" an additional insured's ongoing operations" where it is "originating from, incident to, or having connection with" the insured's work (*Regal Const. Corp. v Nat'l Union Fire Ins. Co. of Pittsburgh, PA*, 15 NY3d 34, 38 [2010], quoting *Maroney v New York Cent. Mut. Fire Ins. Co.*, 5 NY3d 467, 472 [2005]). "Generally, the absence of negligence, by itself, is insufficient to establish that an accident did not 'arise out of' an insured's operations" (*Worth Constr. Co., Inc. v Admiral Ins. Co.*, 10 NY3d 411, 416 [2008]). There need only be "some causal relationship between the injury and the risk for which coverage is provided" (*Maroney*, 5 NY3d 467, 472). The question "is not on the precise cause of the accident but the general nature of the operation in the course of which the injury was sustained" (*Worth*, 10 NY3d 411, 416 [internal quotation

marks and citation omitted]). However, liability will not attach where the injury is caused by a different contractor's work and insured's workplace provides "merely the situs of the accident" with no actual connection to the insured's performance (*id.*)

Plaintiffs insist that the trial record and verdict supports their theory that the accident arose out of Component's construction of the plywood threshold. In view of Justice Chan's post-trial decision, plaintiffs also contend that coverage could have been triggered by the negligence of Component's roving safety inspection team. Travelers counters that the jury's finding that Component's committed no negligence in the contracted-for work is dispositive, and that Justice Chan effectively rejected plaintiffs' additional theories.

As noted above, an accident may "arise out of" an insured's operations despite the absence of negligence; consequently, the jury's verdict did not conclusively dispose of the issue. Nor did the post-trial order directly address the question. In deciding whether the jury verdict could be sustained by any evidence in the record, Justice Chan did not commit to a specific theory of liability. Rather, the Court opined that there was a possibility that the jury may have considered the conduct of the roving team, or concluded that Component was somehow responsible for the piece of wood in the drain due to its performance of carpentry work. At best, however, those theories were based upon speculation. As Travelers indicates, there is some testimony in the record that Component's contractual obligation to supply a roving team ended long before the accident. The testimony cited by the Court in post-trial motion practice provided a possible basis for the jury's verdict, but represents only speculation on what the jury may have considered. Plaintiffs' contention that the team may have continued its efforts under the Component Contract as extra work is also speculative.

Likewise, plaintiffs' continued reliance on the threshold as the basis for Component's liability is misplaced. Although the Court observed, in its discussion of McCullough's own negligence, that "there was sufficient evidence that the hole was not so visible as it was by the underside of a raised threshold" (Post-trial Order at 3), it also noted that there "was no evidence that the drain was installed when the threshold was built" (*id.* at 5). Moreover, the Court stated that "the threshold construction is a new theory thrown in toward the end of the trial . . . [t]he focus of the trial was the drain hole, not the threshold" (*id.*).

In short, given the inconclusive nature of the jury's verdict and the ambiguity regarding the grounds upon which it rested, the question of indemnity cannot be decided at this juncture.

#### Late Notice

Plaintiffs do not dispute that they first gave Travelers notice that they were seeking additional insured coverage under the policy eight years after the commencement of the *McCullough* action. Under Insurance Law § 3420(c)(2)(A), the burden to demonstrate the absence of prejudice to the insurer shifts to the insured if more than two years have passed from the time notice should have been given under the policy. Plaintiffs argue, however, that Travelers waived the defense of late notice by failing to specifically allege prejudice in its affirmative defense, violated Insurance Law § 3420(a)(5) by failing to include a provision notifying the insured that late notice would be excused in the absence of prejudice to the insurer, and violated § 3420(d)(2) by failing to specify how it was prejudiced in its disclaimer letter. Plaintiffs also claim that Travelers was not prejudiced in view of its control of Component's defense in the *McCullough* action.

None of these arguments are persuasive. First, there is no specific statutory requirement

that an affirmative defense of late notice must additionally include an allegation of prejudice. A party need only plead an affirmative defense with respect to matters on which it has the burden of proof, and under CPLR § 3018, only for “matters which if not pleaded would be likely to take the adverse party by surprise.” As noted, plaintiffs have the burden of proof on the issue of prejudice. Furthermore, they cannot claim surprise from the omission of that issue in the affirmative defense insofar as they specifically addressed prejudice and Insurance Law § 3420 in their September 1, 2017 complaint.

The Court agrees that Travelers did not waive its late notice defense by failing to comply with Insurance Law § 3420(a)(5). While that section does require every policy to contain a provision explaining the prejudice requirement, it does not provide that the failure to do so waives the late notice defense. Rather, under Insurance Law § 3013 the policy is merely deemed to conform (*see State of NY v Fed. Ins. Co.*, 189 AD2d 4, 7 [3d Dept 1993] [“Defendant's failure to include the mandated provisions merely triggers Insurance Law § 3103(a) and the inclusion of the required provisions is made by implication”). The court also agrees that Travelers’ letter set forth the grounds for the late notice disclaimer with the required “high degree of specificity” by clearly citing and quoting from the relied upon policy provision (*Realm Nat’l Ins. Co. v Hermitage Ins. Co.*, 8 AD3d 110, 111 [1st Dept 2004]), and outlining plaintiffs’ delay in notifying Travelers of the 2011 lawsuit and demanding coverage. As with the affirmative defense, the court rejects the notion that the insurer was required to recount the ways in which it was prejudiced in the face of plaintiffs’ burden on that issue.

Also unavailing is plaintiffs’ argument that Travelers’ involvement in Component’s defense dispelled any prejudice. Component was plaintiffs’ adversary in the *McCullough* action.

Travelers was thus necessarily focused upon Component's defense and had no reason to address plaintiffs' defenses, claims or settlement prospects. For this reason, a named insured and alleged additional insured have independent duties to provide timely notice to the insurer, and notice by one insured does not excuse late notice by the other (*see Castro v Prana Assoc. Twenty One, LP*, 95 AD3d 693, 694 [1st Dept 2012]; *Ciampa Estates, LLC v Tower Ins. Co. of NY*, 84 AD3d 511, 512 [1st Dept 2011]; *Travelers Ins. Co. v Volmar Constr. Co.*, 300 AD2d 40, 42 [1st Dept 2002]).

Although it does not bear the burden, Travelers has claimed it suffered prejudice from the untimely notice in that it was precluded from pursuing indemnity claims in the McCullough action against plaintiffs' other subcontractors; from negotiating an early initial \$1.5 million settlement demand by McCullough's counsel to settle the underlying action prior to the \$3.9 million judgment verdict; from seeking contributions for such a settlement from AXA before its \$1 million policy allegedly exhausted and/or from the other subcontractors' insurers; and from coordinating Component's defense with plaintiffs. Although plaintiffs have sought to address some of these issues on reply, their response merely raises additional questions of fact.

#### Duty to Defend

Travelers does not meaningfully challenge plaintiffs' claim that the pleadings and the evidence adduced at the pre-trial stage would have given rise to a duty to defend, a conclusion compelled by the First Department's ruling in *McCullough v One Bryant Park*, 132 AD3d 491 (1st Dept 2015). However, the court cannot yet make a declaration on that issue in view of the

threshold issues raised by Travelers' outstanding coverage and late notice defenses.

Accordingly, it is hereby

ORDERED that the motion of defendants AXA Insurance Company; AXA Corporate Solutions Assurance; AXA Corporate Solutions Assurance (US Reinsurance Trust) to dismiss is denied, and those defendants are directed to serve an answer to the complaint within 20 days after service of a copy of this order with notice of entry; and it is further

ORDERED that plaintiffs' motion is denied, and it is further

ORDERED that counsel are directed to appear for a conference in Room 327 at 80 Centre Street, on May 24, 2019 at 10:00am.

THIS CONSTITUTES THE DECISION AND ORDER OF THE COURT

Dated:

*April 17, 2019*



FRANK P. NERVO, J.S.C.