

**New York Univ. v American Empire Surplus Lines  
Inc. Co.**

2019 NY Slip Op 31647(U)

June 10, 2019

Supreme Court, New York County

Docket Number: 154595/2015

Judge: Tanya R. Kennedy

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SUPREME COURT OF THE STATE OF NEW YORK  
 COUNTY OF NEW YORK: IAS PART 63

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 NEW YORK UNIVERSITY and AWR GROUP,

Plaintiffs,

Index No.: 154595/2015

-against-

Mot. Seq. No. 001

AMERICAN EMPIRE SURPLUS LINES INC. CO.,  
 AMERICAN EMPIRE INSURANCE COMPANY,  
 and ROCK GROUP NY CORP,

Defendants.

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**HON. TANYA R. KENNEDY, J.S.C.:**

Defendant American Empire Surplus Lines Insurance Company, s/h/a American Empire Surplus Lines Ins.. Co. and s/h/a American Empire Insurance Company (American Empire), moves, pursuant to CPLR 3212, for summary judgment seeking a declaration that it does not owe additional insured coverage to plaintiffs New York University (NYU) or AWR Group (AWR) in an underlying action captioned *Francisco Javier Pena, et al. v New York University, et al.*, which is pending in the Supreme Court of the State of New York, New York County, index No. 56045/2014, (the Pena Action).

AWR cross-moves for summary judgment, pursuant to CPLR 3212, seeking a declaration that: (1) the policies issued by American Empire were in effect on June 10, 2014 when the plaintiff in the underlying Pena Action was allegedly injured; (2) AWR qualified as an additional insured under the insurance policies issued by American Empire; and (3) American Empire breached its duty to provide AWR with a defense in the underlying Pena Action.

**FACTUAL AND PROCEDURAL BACKGROUND**

On April 24, 2014, NYU contracted with AWR to act as general contractor for certain facade repair work at a construction project located at 50 West 4th Street, New York, New York

(the Premises) (stipulated statement of material facts [stipulated facts], ¶1). AWR then hired Rock Group as a subcontractor on May 16, 2014 to install a sidewalk and dismantle a sidewalk bridge/shed at the Premises (AWR-Rock Group contract) (*id.*; Alderman Supporting Affirmation, Exhibit B).

Rock Group agreed “to name [AWR], upon signing [the contract], and such parties named in writing by [AWR] . . . as additionally [i]nsured . . .” (Alderman Supporting Affirmation, Exhibit B, ¶11). Further, Rock Group agreed that “[a]ny coverage to additional [i]nsured’s [would] apply only to occurrences that [arose] out of [Rock Group’s] sole and exclusive negligence and which occur[ed] during the time period when [Rock Group] or its subcontractor [were] physically at the job site performing the ‘work’ of assembling the equipment and/or disassembling the equipment at the end of the rental period” (*id.*).

American Empire issued a Commercial General Liability policy to Rock Group, effective from April 4, 2014 to April 5, 2015 (primary policy) (Alderman Supporting Affirmation, Exhibit D, primary policy). The additional insured endorsement for the primary policy provided that any additional insureds required to be named as such by a written contract—in this case, the AWR-Rock Group contract—would be covered for injuries caused by “[Rock Group’s] acts or omissions; or the acts or omissions of those acting on [Rock Group’s] behalf” (*id.*, primary policy at 43, §A).

However, the primary policy also indicated that where “coverage provided to the additional insured is required by a contract or agreement,” coverage would be limited to “that which [Rock Group was] required by the contract . . . to provide for such additional insured” (*id.*). American Empire also issued an Excess Liability policy to Rock Group during the same time period, with the same coverage limitations (excess policy) (Alderman Supporting Affirmation, Exhibit E; stipulated facts, ¶¶23-26).

Subsequently, Rock Group hired PJP Installers (PJP) to install the sidewalk bridge/shed (Rock Group-PJP contract) (stipulated facts, ¶4). Francisco Javier Pena (Pena), plaintiff in the Pena Action, was a PJP employee (*id.*, ¶6). PJP President, Pablo Perone, testified at his deposition that PJP provided the labor for the sidewalk bridge/shed installation, and that Rock Group provided the driver, the materials, and all necessary permits (*id.*, ¶5). He also testified that no one from Rock Group, except for the driver who delivered the sidewalk shed components, was present at the Premises prior to the accident and during the sidewalk bridge/shed installation (*id.*, ¶9).

Pena testified at his deposition that on June 10, 2014, he fell from a scaffold when attempting to connect two pieces of scaffold while standing on scaffold girts eight feet from the ground (*id.*, ¶¶ 6, 10). He further testified at his deposition that he was not using a lifeline or other safety device, and that the scaffold did not loosen or slip prior to or after his fall (*id.*, ¶¶11-12).

On June 20, 2014, Pena commenced the Pena Action against NYU, AWR, and nonparty Skyline Restoration, Inc., asserting causes of action for negligence and for violations of the New York Labor Law (stipulated facts, ¶7; Alderman Supporting Affirmation, Exhibit A, Pena Amended Complaint). Pena alleged that he fell off scaffolding which was “improperly constructed, improperly placed, improperly operated, and improperly maintained” (Pena Amended Complaint, ¶9). Further, Pena alleged, *inter alia*, that the “scaffolding was unstable, had loose component parts, was caused to give way, shake, move and/or collapse, causing dangerous and hazardous conditions” (*id.*, ¶9).

Plaintiffs tendered the defense and indemnification of the Pena Action to American Empire on February 10, 2015 (Baxter Supporting Affirmation, Exhibit M). On March 31, 2015, American Empire disclaimed coverage, maintaining that the Pena Action did not result from Rock Group’s sole and exclusive negligence since Rock Group subcontracted its work at the Premises to PJP (*id.*,

pp. 2-3). American Empire also maintained that the AWR-Rock Group contract did not obligate Rock Group to procure additional insured coverage in favor of NYU, such that plaintiffs herein did not qualify as additional insureds (*id.*, p. 3). Further, American Empire maintained that the AWR-Rock Group contract required AWR to indemnify Rock Group, and, thus, there was “no basis to accept the defense and indemnification of AWR or NYU as indemnitees” (*id.*, p. 4).

On May 8, 2015, plaintiffs herein commenced a third-party action against Rock Group in the Pena Action (Alderman Reply Affirmation, Exhibit 1, third-party complaint). Plaintiffs also commenced the instant action that same day, which, *inter alia*, seeks a declaratory judgment that American Empire is required to provide them a defense and indemnification in the Pena Action (Alderman Supporting Affirmation, Exhibit F, Complaint).

#### ARGUMENTS

American Empire now moves for summary judgment, seeking a declaration that it does not owe additional insured coverage to plaintiffs in the Pena Action. American Empire argues that neither NYU nor AWR qualify as additional insureds under the primary policy because Rock Group did not agree in writing under the AWR-Rock Group contract that Rock Group would name NYU or AWR as additional insureds. With respect to NYU, American Empire maintains that the AWR-Rock Group contract did not obligate Rock Group to procure additional insured coverage in favor of NYU.

As for AWR, American Empire maintains that Rock Group was not required to name AWR as an additional insured because coverage was limited to events arising out of Rock Group’s sole negligence, and that no coverage exists since Rock Group subcontracted its work to PJP. American Empire also argues that even assuming, *arguendo*, that the accident resulted from Rock Group’s sole negligence, Rock Group did not agree to name AWR as an additional insured since such

obligation was contingent upon Rock Group's signature on the AWR-Rock Group contract, which did not occur. Further, American Empire maintains that since NYU and AWR do not qualify as additional insureds under the primary policy, they are also not entitled to coverage under the excess policy.

In opposition and in support of its cross-motion, AWR argues that American Empire misinterprets the primary policy by maintaining that Rock Group would be required to name AWR as an additional insured only upon a showing that the accident resulted from Rock Group's sole and exclusive negligence. According to AWR, the liability of the parties is not to be determined in this declaratory judgment action and the only matter ripe for determination is whether the allegations of the amended complaint in the Pena Action suggest a reasonable possibility of coverage, which triggers a duty to defend.

Specifically, AWR argues that Pena alleged in the Pena Action that a defective scaffold caused his accident and that Rock Group provided the scaffolding components and parts, such that a trier of fact could determine that Rock Group was negligent in providing defective materials to PJP Installers. AWR further maintains that the allegations in the Pena Action, together with the AWR-Rock Group and Rock Group-PJP contracts, contemplate coverage since Rock Group or PJP Installers were physically at the Premises performing work. Further, AWR argues, *inter alia*, that American Empire's denial/disclaimer letter did not assert that Rock Group was required to sign the AWR-Rock Group contract prior to any obligation by American Empire to provide coverage to AWR as an additional insured, and that American Empire is now estopped from raising such argument.

## DISCUSSION

The proponent of a summary judgment motion must establish its prima facie entitlement

to judgment as a matter of law by tendering sufficient evidence to demonstrate the absence of any material issue of fact (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Once this showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

In deciding a motion for summary judgment, the court must view the evidence in the light most favorable to the non-movant (*see Prine v Santee*, 21 NY3d 923, 925 [2013]; *Hotopp Assoc. v Victoria's Secret Stores*, 256 AD2d 285, 286-287 [1st Dept 1998]), and give the opposing party the benefit of all reasonable inferences (*see Negri v Stop & Shop*, 65 NY2d 625, 626 [1985]; *Rose v Da Ecib USA*, 259 AD2d 258, 259 [1st Dept 1999]).

“[T]he unambiguous provisions of an insurance policy, as with any written contract, must be afforded their plain and ordinary meaning” (*Broad St., LLC v Gulf Ins. Co.*, 37 AD3d 126, 130-131 [1st Dept 2006]). The policy should be read as a whole, and no particular words or phrases should receive undue emphasis (*see Bailey v Fish & Neave*, 8 NY3d 523, 528 [2007]). Courts should give effect to every clause and word of an insurance contract (*see Northville Indus. Corp. v National Union Fire Ins. Co. of Pittsburgh, Pa.*, 89 NY2d 621, 633 [1997]).

“It is the insured’s burden to show that the provisions of a policy provide coverage” (*BP A.C. Corp. v One Beacon Ins. Group*, 33 AD3d 116, 134 [1st Dept 2006]). Moreover, where the policy language offers no reasonable basis for a difference of opinion, a court should not conclude that it is ambiguous (*see Breed v Insurance Co. of N. Am.*, 46 NY2d 351, 355 [1978]). A contract provision is not ambiguous merely because the parties provide differing interpretations (*see Mount Vernon Fire Ins. Co. v Creative Hous.*, 88 NY2d 347, 352 [1996]).

Here, the parties' conflicting interpretations present two questions for the court. First, whether Rock Group was required to procure, and did in fact procure insurance naming plaintiffs as an additional insured. Second, whether the allegations in the Pena Action trigger coverage under the additional insured endorsement, as limited by the AWR-Rock Group contract, requiring American Empire to defend and to indemnify plaintiffs in the Pena Action. The answer to the first question is straightforward.

The unambiguous language of the AWR-Rock Group contract requires Rock Group to name AWR as an additional insured (Alderman Supporting Affirmation, Exhibit B, ¶ 11), and the additional insured endorsement states that all parties required to be an additional insured by contract shall be so named (Alderman Supporting Affirmation, Exhibit D, primary policy at 43, § A).<sup>1</sup> The argument proffered by American Empire that Rock Group was required to name AWR as an additional insured upon the showing that Rock Group was solely responsible for Pena's accident is belied by the express terms of the AWR-Rock Group contract (*see Broad St., LLC v Gulf Ins. Co., supra at 130-131*). However, NYU is not named as an additional insured in the AWR-Rock Group contract, and the record is devoid of any evidence that AWR subsequently requested that Rock Group name NYU as an additional insured in writing, as required by the contract.

Since AWR is an additional insured under the policy, the court must determine whether the facts alleged in the Pena Action are sufficient to trigger American Empire's duty to defend and indemnify AWR in such action. Here, the primary policy provides that additional insureds are

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<sup>1</sup> American Empire failed to raise as a defense in its denial/disclaimer letter that Rock Group was not obligated to name AWR as an additional insured because Rock Group did not sign the contract and may not do so now (*e.g. Benjamin Shapiro Realty Co. v Agricultural Ins. Co.*, 287 AD2d 389 [1st Dept 2001]).

covered in the event of an accident “aris[ing] out of [Rock Group’s] sole and exclusive negligence” (Alderman Supporting Affirmation, Exhibit B, ¶ 11). Thus, American Empire will be required to defend AWR under the policy if the allegations in the Pena Action suggest a reasonable possibility of coverage. “If, liberally construed, the claim is within the embrace of the policy, the insurer must come forward to defend its insured no matter how groundless, false or baseless the suit may be” (*Automobile Ins. Co. of Hartford v Cook*, 7 NY3d 131, 137 [2006] [internal quotation marks and citations omitted]).

In the Pena Action, Pena alleges that:

“The occurrence as aforesaid was caused solely and wholly by reason of the negligence, carelessness and recklessness of the defendants, their contractors, agents and employees who were negligent in the ownership, operation, management and control of the aforesaid premises. While [Pena] was lawfully performing his duties, he was caused to fall from scaffolding that was improperly constructed, improperly placed, improperly operated and improperly maintained. Said scaffolding did not have safety rails, guard rails and other safety devices to prevent a fall from an elevated worksite. Moreover, said scaffolding was unstable, had loose component parts, was caused to give way, shake, move and/or collapse, causing dangerous and hazardous conditions thereat, causing plaintiff to fall and sustain serious and severe injuries. Defendants, their contractors, agents and employees failed to provide access ladders that were properly constructed, placed, operated and maintained to and from the scaffolding; further, failed to have lifelines, safety lines, yo-yo’s, stanchions, safety belts and other safety devices to prevent a fall from an elevated worksite” (Pena Amended Complaint, ¶9).

Pena does not set forth any specific allegations against Rock Group, which is named as a third party in the Pena action. While the court does not render any findings of fact, the record before it leads to the conclusion that no one from Rock Group was at the Premises during the installation and that its sole involvement was to acquire permits and to deliver the components of the sidewalk shed, which AWR does not contest (stipulated facts, ¶¶ 5, 9).

Since Rock Group was not involved with the assembly, use, or maintenance of the sidewalk bridge, Rock Group would only be solely and exclusively negligent if the sidewalk bridge parts were inherently defective prior to assembly. Upon review of the complaint, and reading it as

broadly as possible, Pena does not set forth any such allegations. Therefore, the court cannot impose a duty upon American Empire to defend since the allegations of the complaint do not support a reasonable possibility of coverage (*see Automobile Ins. Co. of Hartford v Cook, supra at 137*).

The cases which AWR cites are unavailing since the court has not rendered any liability determination. Rather, the court has solely determined that Pena did not allege enough facts in his amended complaint to suggest a possibility of coverage based upon Rock Group's sole negligence, and, not whether and to what degree Rock Group was negligent.

Based on the foregoing, American Empire's motion for summary judgment is granted, and AWR's cross-motion for the same relief is denied. The court has considered the parties' remaining arguments and finds them to be without merit.

Accordingly, it is hereby,

ORDERED that the motion of defendant American Empire Surplus Lines Insurance Company, s/h/a American Empire Surplus Lines Inc. Co. and s/h/a American Empire Insurance Company for summary judgment seeking a declaration that defendant does not owe additional coverage to plaintiffs in the underlying action of *Francisco Javier Pena, et al. v New York University, et al.*, which is pending in the Supreme Court of the State of New York, New York County, index No. 156045/2014, New York County, is granted; and it is further

ADJUDGED and DECLARED that defendant herein is not obliged to provide a defense to, and provide coverage for, the plaintiffs New York University and AWR Group in the said action pending in New York County; and it is further

ORDERED that plaintiff AWR Group's cross-motion for summary judgment is denied; and it is further

ORDERED that the balance of this action is severed and continued; and it is further

ORDERED that the remaining parties shall appear before the court for a status conference  
on July 10, 2019 at 2:15 p.m.

This constitutes the Decision and Order of the Court.

New York, New York

Dated: June 10, 2019

ENTER:

  
HON. TANYA R. KENNEDY, J.S.C.

**HON. TANYA R. KENNEDY**