SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LOUIS L. NOCK **PART** IAS MOTION 38EFM

Justice

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ZURICH AMERICAN INSURANCE COMPANY,

Plaintiff,

- v -

PORT AUTHORITY OF NEW YORK AND NEW JERSEY, TISHMAN CONSTRUCTION CORPORATION, TOWER 5 LLC, f/k/a 1 WORLD TRADE CENTER LLC, and NEW HAMPSHIRE INSURANCE COMPANY,

Defendants.

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INDEX NO. 657165/2017

MOTION DATE 03/07/2019, 03/07/2019, 03/07/2019

MOTION SEQ. NO. 001 002 003

DECISION + ORDER ON MOTION

LOUIS L. NOCK, J.

The following e-filed documents, listed by NYSCEF document number (Motion 001) 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 44, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 106, 107, 108, 109, 110, 111, 112, 120

were read on this motion for PARTIAL SUMMARY JUDGMENT.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 105, 113, 114, 115, 123, 125, 126, 127, 128, 129, 130, 131, 150, 151, 152, 158, 159

were read on this motion for PARTIAL SUMMARY JUDGMENT.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 121, 122, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 153, 154, 155, 156, 157

were read on this motion for SUMMARY JUDGMENT.

Upon the foregoing documents, and with due deliberation, it is ordered that motion sequence numbers 001 through 003 are determined in accordance with the following memorandum.

In this action for a declaratory judgment, plaintiff Zurich American Insurance Company ("Zurich") moves for partial summary judgment against defendant New Hampshire Insurance Company ("NHIC") (motion seq. no. 001) on the ground that NHIC has the primary duty to

defend defendants Port Authority of New York and New Jersey (the "Port Authority"), Tishman Construction Authority ("Tishman"), and Tower 5 LLC, f/k/a 1 World Trade Center LLC ("WTC") (collectively, the "Port Defendants") in underlying actions titled *Bivens v Port Authority of N.Y. & N.J., et al.* (index No. 020637/2014 [Sup Ct, Bronx County]) (the "Bivens Action") and *King v Port Authority of N.Y. & N.J., et al.* (index No. 020549/2014 [Sup Ct, Bronx County] (the "King Action").

NHIC moves for partial summary judgment against Zurich (motion seq. no. 002), arguing that Zurich has the primary duty of defense for the Port Defendants. Finally, the Port Defendants move for summary judgment (motion seq. no. 003) seeking a declaration for indemnification by Zurich and NHIC.

All three motions are consolidated herein for disposition.

The Underlying Actions

The underlying actions arise out of a construction site accident. Tishman was hired as a construction manager and general contractor by WTC for a project located at 1 World Trade Center, New York, New York (the "WTC Project"), involving the Port Authority. On or about April 10, 2007, Tishman, as agent for WTC, accepted a bid from Benson Industries LLC ("Benson") for the "Building Enclosure System" at the WTC Project, and signed a contract on June 28, 2007, with Benson (the "Benson-WTC Contract"). This contract contained an insurance Rider "D", which required Benson to purchase commercial automobile liability insurance in the amount of at least $5,000,000, endorsing the Port Defendants as additional insureds on a "primary and non-contributory" basis (NYSCEF Doc. No. 48). Benson was also obligated to schedule the commercial automobile liability insurance as primary on any umbrella policy of at least $5,000,000. The rider also expressly required that such primary and non-

contributory commercial automobile liability insurance cover the Port Defendants for the use of all "Owned, Non-Owned, and Hired Vehicles" (*id.*). The rider identifies the Port Defendants as additional insureds.

The underlying actions were commenced by their respective plaintiffs, Craig Bivens and Raymond King, who were both allegedly injured on October 7, 2013, while working at the WTC Project. At the time, Bivens was employed by Benson, and King was employed by Hailey Insulation Corporation ("Hailey"), a subcontractor for Benson at the WTC Project. Bivens and King were allegedly injured when they fell from a delivery truck while unloading insulation spray materials from the truck. Both King and Bivens testified at their depositions that the delivery truck unexpectedly moved forward as they stepped out onto the dock plate between the truck and the loading dock, causing the dock plate and them to fall. NHIC acknowledges that its insured was the owner of the truck.

On February 7, 2014, Raymond King filed the King Action, which is a personal injury action against the Port Defendants, and an entity named Distribution International, Inc. ("DI"), alleging violations of Labor Law §§ 200, 240 and 241(6), as well as a cause of action for common law negligence, alleging that the defendants in the King Action failed to "properly maintain, inspect and keep in good repair the delivery truck to prevent the truck and its parts from sudden movements" (NYSCEF Doc. No. 3).

On February 10, 2014, Craig Bivens filed the Bivens Action, which is a personal injury action against the Port Defendants, and DI, alleging that DI was "a distributor of thermal and acoustic insulation, and related supplies, that were being shipped to" the WTC Project and that DI was the owner of the truck (NYSCEF Doc. No. 2). While alleging violations of the Labor

Law, Craig Bivens also alleges that the DI driver "acted in a negligent, careless, and reckless manner, causing the aforesaid ramps/runways to collapse during unloading procedures" (*id.*).

The Insurance Policies

Zurich had issued a commercial automobile policy, number GLA2862495-10, to Benson for the period December 31, 2012, to December 31, 2013, with limits of $1,000,000 per accident (the "Zurich Auto Policy") (NYSCEF Doc. No. 24).

The Zurich Auto Policy states, as to the coverage:

> We will pay all sums an "insured" legally must pay as damages because of "bodily injury" or "property damage" to which this insurance applies, caused by an "accident" and resulting from the ownership, maintenance or use of a covered "auto[.]"

(*Id.*)

The Zurich Auto Policy included the following language concerning the insured and the additional insured:

> The following are "insureds":
> a. You for any covered "auto" . . . .
>
> c. Anyone liable for the conduct of an "insured" described above but only to the extent of that liability."

(*Id.*)

The policy includes the following "other insurance provision," providing in relevant part:

> **5. Other Insurance**
> a. For any covered "auto" you own, this Coverage Form provides primary insurance. For any covered "auto" you don't own, the insurance provided by this Coverage Form is excess over any other collectible insurance. However, while a covered "auto" which is a "trailer" is connected to another vehicle, the Liability Coverage this Coverage Form provides for the "trailer" is:
> (1) Excess while it is connected to a motor vehicle you do not own.
> (2) Primary while it is connected to a covered "auto" you own.

(*Id.*)

The Zurich Auto Policy also includes a Designated Insured Endorsement, with manuscript language drafted by Zurich noted in the "Schedule":

With respect to coverage provided by this endorsement, the provisions of the Coverage Form apply unless modified by this endorsement.
This endorsement identifies person(s) or organization(s) who are "insureds" under the Who Is An Insured Provision of the Coverage Form. This endorsement does not alter coverage provided in the Coverage Form.

SCHEDULE

Name of Person(s) or Organization(s):
ANY PERSON OR ORGANIZATION TO WHOM OR WHICH YOU ARE REQUIRED TO PROVIDE ADDITIONAL INSURED STATUS OR ADDITIONAL INSURED STATUS ON A PRIMARY, NON-CONTRIBUTORY BASIS, IN A WRITTEN CONTRACT OR WRITTEN AGREEMENT EXECUTED PRIOR TO LOSS, EXCEPT WHERE SUCH CONTRACT OR AGREEMENT IS PROHIBITED BY LAW

Each person or organization shown in the Schedule is an "insured" for Liability Coverage, but only to the extent that person or organization qualifies as an "insured" under the Who Is An Insured Provision contained in Section II of the Coverage Form

(*Id.*)

NHIC had issued a commercial automobile policy to DI, the owner of the truck involved in the accident, for the period March 31, 2013, to March 31, 2014, with liability limits of $2,000,000 per accident (the "NHIC Auto Policy"). The NHIC Auto Policy also includes an "other insurance" provision identical to that found in the Zurich Auto Policy.

The preamble to the NHIC Auto Policy states: "[t]hroughout this policy the words 'you' and 'your' refer to the Named Insured shown in the Declarations[]" - i.e., Distribution International, Inc." (NYSCEF Doc Nos. 53, 68 at 9 [internal citation and emphasis omitted]).

On May 15, 2015, then-counsel for the Port Defendants tendered the defense and indemnity of the Port Defendants to Zurich. The Port Defendants made the tender pursuant to insurance Rider "D" in the Benson-WTC Contract in which Benson contractually agreed to provide the Port Defendants with "primary and non-contributory" commercial automobile insurance. The tender letter advised that the depositions of both Craig Bivens and Raymond King indicated that the accident arose from the loading and unloading of a delivery truck at the

WTC Project and, thus, Benson's commercial automobile insurance provided the proper coverage.

On March 17, 2016, Zurich accepted the defense and indemnification of the Port Defendants in the underlying actions. Zurich cited both the Designated Insured Endorsement and the "Who is An Insured" provision in the Zurich Auto Policy and concluded that the Port Defendants qualified as additional insureds under the Zurich Auto Policy. The letter states in part:

> Pursuant to the terms and conditions of the applicable endorsement [i.e., the Designated Insured Endorsement CA 20 48 (02/99)] . . . it is Zurich's determination that Port Authority qualifies as an additional insured. Therefore, Zurich accepts the tender of the defense and indemnity of Port Authority under the additional insured requirement in RIDER "D" INSURANCE RIDER.

(NYSCEF Doc. No. 58.)

Zurich assigned its staff counsel to represent the Port Defendants. Eight months later, on November 16, 2016, Zurich advised the Port Defendants that it was reserving its right to deny any duty to defend and indemnify the Port Defendants in the underlying actions. Zurich advised that its staff counsel could no longer represent the Port Defendants since there was a potential conflict of interest "[a]s a result of Zurich's reservation of rights" (NYSCEF Doc. No. 99). In the letter, Zurich outlined its reservation of rights to the extent: (1) the Port Defendants do not qualify as insureds with respect to the underlying actions under Section II.A.1. of the Zurich Auto Policy, "Who Is An Insured"; (2) the accident at issue did not arise out of the "use of an auto"; and (3) the Mechanical Device Exclusion applies to bar coverage for the underlying actions. In January 2017, independent counsel for the Port Defendants was substituted to replace Zurich's staff counsel.

On November 16, 2016, Zurich also sent a letter to counsel for DI in the underlying actions requesting that DI's commercial automobile carrier defend and indemnify the Port Defendants in the underlying actions (NYSCEF Doc. No. 100). Zurich stated that the underlying complaints allege that DI's negligent operation of the delivery truck caused and/or contributed to the accident and that the underlying plaintiffs sought to hold the Port Defendants liable for DI's negligent conduct by virtue of Labor Law §§ 240 and 241(6).

On December 8, 2016, NHIC denied Zurich's tender since there was no contract between the Port Defendants and DI that would require DI to contractually indemnify the Port Defendants or provide them with additional insured coverage (NYSCEF Doc. No. 101). NHIC also denied coverage on the basis that the tendering parties were not "insured[s]" as defined by the NHIC auto policy. On January 3, 2017, Zurich requested that NHIC reconsider its coverage position and defend and indemnify the Port Defendants in the underlying actions on a "primary, non-contributory basis" (NYSCEF Doc. No. 102). Zurich claims that the Port Defendants were entitled to coverage under the vicarious liability clause in the NHIC Auto Policy's omnibus insured provision. Based upon the information Zurich provided in its January 3, 2017 letter, as well as both policies' standard "other insurance" clauses, NHIC agreed to share defense costs in the underlying actions with Zurich on a co-primary basis, subject to a full reservation of rights.

On April 28, 2017, Zurich rejected NHIC's offer to share in the defense costs on a co-primary basis and, according to NHIC's opposition papers, Zurich "provided, for the first time, an incomplete copy of the Benson-WTC Contract with the Rider 'D' insurance rider" (NYSCEF Doc. 46 at 13). Zurich took the position that NHIC's named insured, DI, owned the vehicle involved in the accident, and, therefore, under the "other insurance" clauses in both the Zurich and NHIC Auto Policies, NHIC was the primary insurer.

Consequently, NHIC withdrew its offer to share defense costs with Zurich in the underlying actions (NYSCEF Doc. No. 104). After reviewing the insurance Rider "D" in the Benson-WTC Contract, NHIC believed that the manuscript language that "Zurich drafted into the Designated Insured Endorsement reflected its commitment to provide additional insured status to the Port Defendants on a 'primary and non-contributory basis'" (NYSCEF Doc. No. 46 at 13).

This Action

On December 1, 2017, Zurich filed this declaratory judgment action against the Port Defendants and NHIC, seeking a declaration that: (1) Zurich has no duty to defend or indemnify the Port Defendants in the underlying actions; (2) NHIC has a duty to defend and indemnify the Port Defendants in the underlying actions on a primary, non-contributory, basis; (3) NHIC must reimburse Zurich for all post-tender defense costs, plus interest; and (4) NHIC owes equitable contribution toward any defense costs which Zurich has incurred and may incur in the underlying actions.

On January 24, 2018, the Port Defendants filed an answer and cross-claimed against NHIC, seeking an order declaring that both Zurich and NHIC are obligated to defend and indemnify the Port Defendants as additional insureds. On January 26, 2018, NHIC filed an answer to Zurich's complaint with affirmative defenses, denying any duty to defend or indemnify the Port Defendants in the underlying actions. Zurich filed its instant motion before producing documents in discovery.

In NHIC's cross-motion for partial summary judgment, motion sequence no. 002, seeking to dismiss the third, fifth, and sixth causes of action, NHIC reiterates that this is a dispute between two insurers to determine the priority of coverage, and argues that the coverage under

the NHIC policy is excess to the Zurich Auto Policy. NHIC points to Zurich's defense of the Port Defendants that lasted for eight months, the duty for which arose out of the contract between Zurich's insured, Benson, and WTC. NHIC issued a policy to DI, which included the Port Defendants as additional insureds, but DI had not entered into any contract promising primary and non-contributory commercial automobile coverage to the Port Defendants.

In its cross-motion, NHIC argues that Zurich has a primary and non-contributory duty to defend the Port Defendants based upon the Designated Insured Endorsement in the Zurich policy, insurance Rider "D" in the contract between Benson and WTC, and upon the "Other Insurance" provision in the two policies, since DI was not the owner of the truck.[1]

In their motion for summary judgment, motion sequence no. 003, the Port Defendants seek a declaration of coverage for the two underlying actions but take no position on the issue of priority of coverage as between Zurich and NHIC. The Port Defendants argue that they are entitled to coverage under the NHIC policy on the ground that that policy contains the definition of an insured as "anyone liable for the conduct of an 'insured' described above but only to the extent of that liability" and that, as owners, their liability in the underlying actions could only be vicarious. They additionally argue that they are entitled to coverage under the Zurich Auto Policy, on the following grounds: (1) Zurich's letters reflect a determination that the Port Defendants are insureds under the policy, and entitled to both defense and indemnification; (2) Zurich is estopped from denying that coverage promised under its original letter; (3) under the language of the Zurich policy, including the omnibus clause and the Designated Insured Endorsement, and the coverage language (i.e., that an accident "resulted from the ownership,

[1] This argument is moot in light of NHIC's admission that DI was the owner of the truck involved in the accident. In an October 23, 2018 letter to the court, NHIC withdrew this argument that the delivery truck was not owned by its named insured (*see*, NYSCEF Doc. No. 124).

maintenance or use of a covered 'auto'"), the Port Defendants are entitled to coverage; and (4) the Mechanical Device Exclusion set forth in the Zurich Auto Policy is not applicable.

In opposition, Zurich argues that, with respect to the duty to defend, it is presently providing a defense to the Port Defendants in the underlying actions subject to a reservation of rights, and, thus, the Port Defendants' argument is moot. With respect to a duty to indemnify, Zurich argues that the Port Defendants' motion is premature since there has been no factual or liability determination in the underlying actions, and so there are no facts uncovered to establish indemnity coverage under the Zurich Auto Policy. NHIC posits the same argument in its opposition to the Port Defendants' motion.

Zurich's Motion for Summary Judgment

On its motion, Zurich seeks a determination concerning priority of coverage between the Zurich policy issued to Benson and the NHIC policy issued to DI and argues that NHIC is required to defend the Port Defendants as the primary insurer. Zurich relies upon the language in the two policies, as well as the Benson-WTC Contract. Specifically, Zurich relies on the language in the "Other Insurance" provisions, which are identical in both auto policies. The language states, in part:

> For any covered "auto" you own, this Coverage Form provides primary insurance. . . . For any covered "auto" you don't own, the insurance provided by this Coverage Form is excess over any other collectible insurance . . . .

(NYSCEF Doc. No. 24.)

Zurich argues that under the NHIC policy, the Port Defendants qualify as insureds, as the underlying complaints seek to hold them vicariously liable for DI's conduct. In the underlying actions, Craig Bivens and Raymond King seek to hold the Port Defendants vicariously liable under Labor Law §§ 240 and 241(6). Those allegations are predicated upon DI's alleged

negligent operation of the truck, and DI's and the Port Defendants' failure to have proper loading and unloading procedures; failure to ensure that ramps, runways, and other building structures were properly constructed; and failure to have proper safety nets and guardrails at the site (NYSCEF Doc. Nos. 2, 3). Zurich maintains that those allegations are sufficient to establish that the Port Defendants qualify as insureds under the NHIC policy and raise a reasonable possibility that Craig Bivens' and Raymond King's alleged bodily injuries resulted from DI's use or maintenance of its truck.

In opposition, NHIC does not deny that the Port Defendants are additional insureds under its policy. Nor does NHIC deny that both the Zurich and NHIC policies contain a standard "Other Insurance Provision." But NHIC argues that the Zurich policy is primary and non-contributory pursuant to the "non-standard manuscript" language that "Zurich drafted into" the Designated Insured Endorsement. Specifically, NHIC argues that this language, which references the sub-contract between Benson and WTC, takes precedence over the standard language in the policies, including the "Other Insurance" provision. The endorsement language states, in part:

> Name of Person(s) or Organization(s): Any person or organization to whom or which you are required to provide additional insured status or additional insured status on a primary, non-contributory basis, in a written contract, or written agreement executed prior to loss, except where such contract or agreement is prohibited by law.

(NYSCEF Doc. No. 24 at 147.)

The Endorsement also contains the language: "With respect to coverage provided by this endorsement, the provisions of the Coverage Form apply unless modified by this endorsement. This endorsement identifies person(s) or organization(s) who are 'Insureds' under the Who Is An Insured Provision of the Coverage Form. This endorsement does not alter coverage provided in the Coverage Form" (*id.*).

According to NHIC, this "manuscript" language, and not the pre-printed standard policy language, controls the relationship between the parties. NHIC relies on the following precedent: "It is a well-established rule of construction that the written or typewritten portions of an agreement represent an express manifestation of the parties' actual intentions and take precedence over any inconsistent provisions in the printed form" (*Cale Development Co., Inc. v Conciliation and Appeals Bd.,* 94 AD2d 229, 234 [1st Dept 1983]), *affd* 61 NY2d 976 [1984]). NHIC argues that the "primary and non-contributory" language was written into the endorsement by Zurich and should control the relationship between the parties (*see, Arch Ins. Co. v Old Republic Ins. Co.*, 151 AD3d 534, 534 [1st Dept 2017] [citing *Kratzenstein v Western Assur. Co.*, 116 NY 54, 57-58 (1889) (holding that a policy endorsement was controlling to provide to an additional insured "primary insurance on a non-contributory basis" because the endorsement made express reference to the underlying contract between the named insured and the additional insured)]).

This contention of NHIC, that the preamble language stating that "the provisions of the Coverage Form apply unless modified by this endorsement," together with the typewritten manuscript language referencing the Benson-WTC Contract's requirement for Benson to provide primary and non-contributory coverage, makes it clear that the endorsement reflects Zurich's intention to provide primary, non-contributory, coverage to entities such as the Port Defendants.

On this point, NHIC argues that because the language in the Endorsement references the Benson-WTC Contract, which required coverage on a primary basis, the intention of the policy was to provide primary and non-contributory coverage to Benson and the additional insureds. NHIC argues that based on this reference to the contract in non-standard, manuscript language, Zurich, under the policy, is committed to providing primary coverage. NHIC is arguing the

proposition that this policy "expressly provide[d] that the terms of the subcontract would determine whether the additional insured coverage afforded was primary or excess" (NYSCEF Doc. No. 68 at 16).

On this point, NHIC relies upon the Court of Appeals decision in *Pecker Iron Works of N.Y. v Traveler's Ins. Co.* (99 NY2d 391 [2003]). In that decision, the Court of Appeals found that "Travelers agreed to provide primary insurance to any party with whom Upfront had contracted in writing for insurance to apply on a primary basis. When Upfront agreed to it, the policy provision was satisfied" (*id.*, at 394).

In *Bovis Lend Lease LMB, Inc. v Great American Ins. Co.* (53 AD3d 140 [1st Dept 2008]), the Appellate Division, First Department, in determining priority of coverage, referenced the Court of Appeals decision in *Pecker Iron Works of N.Y. v Travelers Ins. Co.* (99 NY2d 391 [2003]), and stated that:

> The critical point, however, is that the Court of Appeals looked to the subcontract because the insurance policy itself expressly provided that the terms of the subcontract would determine whether the additional insured coverage afforded was primary or excess . . . .

(*Bovis, supra*, at 145.)

In *Bovis*, the court concluded that the language in the subcontract is determinative of priority only where the policy "contains a provision defining the priority of the coverage provided to additional insureds by reference to the requirements of the subcontract" (*id.*, at 146).

Likewise, in *Arch Ins. Co. v Old Republic Ins. Co.* (151 AD3d 534, 535 [1st Dept 2017]), the court held that where the policy language expressly "modifies the relevant coverage to provide to an additional insured 'primary insurance on a non-contributory basis' if such coverage is required by the contract between the named insured and the additional insured," then the coverage is so modified.

On this point, Zurich argues that the typewritten manuscript language does not modify the insurance clause in the coverage form because (1) the endorsement expressly provides that it does not "alter coverage provided in the coverage form," and (2) the endorsement expressly provides that "the provisions of the coverage form apply unless modified by this endorsement" (NYSCEF Doc. No. 37 at 14). Zurich also argues that the language "additional insured status on a primary, non-contributory basis" was meant only to "identify" those persons or organizations entitled to "additional insured status," and not to confer any additional coverage status.

According to Zurich, in order for the language to be able to amend the policy's provisions on the priority of coverage – meaning, to alter the language of the "Other Insurance" clause – the policy must not only reference the underlying contract, but must also state that it is defining the priority of coverage by reference to the underlying contract. Zurich argues that the Designated Insured Endorsement refers to the contract; but does not define coverage in the policy by the contract language. In other words, Zurich argues that the endorsement is simply adding the additional insureds, and references the subcontract, but does not define the coverage as primary in the policy.

Analysis:

It is fundamental that:

> In [an] action for a judgment declaring the parties' rights under an insurance policy, this Court must be guided by the rules of contract interpretation because "[a]n insurance policy is a contract between the insurer and the insured." As a result, 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."

(*Gilbane Bldg. Co/TDX Constr. Corp. v St. Paul Fire & Mar. Ins. Co.*, 143 AD3d 146, 150-151 [1st Dept 2016] [internal citations omitted], *affd* 31 NY3d 131 [2018].)

Additionally, the interpretation of the language of a policy of insurance is similar to that of a commercial contract:

> "Well-established principles governing the interpretation of insurance contracts . . . provide that the unambiguous provisions of an insurance policy, as with any written contract, must be afforded their plain and ordinary meaning, and that the interpretation of such provisions is a question of law for the court."

(*id.*, at 151 [internal citations omitted].)

A contract of insurance is ambiguous when the language "is susceptible of two or more reasonable interpretations, whereas, in contrast, a contract is unambiguous if the language has a definite and precise meaning, unattended by danger of misconception in the purport of the [agreement] itself, and concerning which there is no reasonable basis for a difference of opinion" (*id.* [brackets in original]). When there is ambiguity in the terms of the policy, the court must construe coverage in favor of the insured (*id.*).

In order to determine priority, because the Port Defendants seek coverage as additional insureds under the policies at issue in this action, the court turns first to the policy language. "In order to determine the priority of coverage among different policies, a court must review and consider all of the relevant policies at issue" (*BP A.C. Corp. v One Beacon Inc. Group.*, 8 NY3d 708, 716 [2007]). "Where the same risk is covered by two or more policies, each of which was sold to provide the same level of coverage . . . , priority of coverage (or, alternatively, allocation of coverage) among the policies is determined by comparison of their respective 'other insurance' clauses" (*Sport Rock Intl, Inc. v Am. Cas. Co. of Reading, Pa.*, 65 AD3d 12, 18 [1st Dept 2009], *appeal withdrawn* 14 NY3d 796 [2010]).

Here, the language in the "Other Insured" provision, set forth in both the Zurich and NHIC policies, states in no uncertain terms that "for any auto you own," the coverage is primary. Since NHIC's insured is the owner of the subject truck, NHIC's coverage is primary. On this

issue, the court does not find NHIC's argument concerning the Designated Insured Endorsement in the Zurich policy compelling, as that document does not contain language that expressly modifies the terms of the policy to conform to the terms of the subcontract. This is unlike the policy language in the *Bovis, Arch, and Pecker* cases cited by NHIC. For example, in *Arch,* the court stated that the language of the contract controls where the policy language expressly "'modifies' the relevant coverage to provide to an additional insured 'primary insurance on a non-contributory basis' if such coverage is required by the contract" (*Arch*, *supra*, at 535). Here, the language of the Designated Insured Endorsement does not define the terms of the policy by the terms of the subcontract. Instead, the language, "any person or organization to whom or which you are required to provide additional insured status on a primary, non-contributory basis, in a written contract" (NYSCEF Doc. No. 24 at 147), simply references the contract as a means of identifying the parties to be added to the policy. There is no language in this endorsement stating that the type of coverage will be defined by the contract.

Further, the Designated Insured Endorsement contains conflicting clauses regarding both its purpose and its effect on the remainder of the policy. For example, the endorsement contains directly conflicting language as to whether it modifies any other coverage provision in the policy. The preamble to the Endorsement contains the sentence: "With respect to coverage provided by this endorsement, the provisions of the Coverage Form apply unless modified by this Endorsement," however, it also contains the sentence: "This endorsement does not alter coverage provided in the Coverage Form."

Unlike the "Other Insured" provision, which speaks with clarity to the issue of priority, the above language in the endorsement is contradictory, and lacks a comparable directive concerning priority.

Ultimately, the court finds, taking into account the policy language as a whole, that if the parties intended to undermine the crystal-clear meaning of the "Other Insured" provision, that intention is not reflected in the language of the Endorsement.

For these reasons, the court grants Zurich's motion for summary judgment seeking a declaration that NHIC's coverage is primary and denies the cross-motion of NHIC.

The Duty to Defend

With respect to the duty to defend, the Court of Appeals has held:

> [A]n insurer's duty to defend is "exceedingly broad, which is in the interest of the insured. The duty arises whenever the allegations of the complaint, for which the insured may stand liable, fall within the risk covered by the policy. The ultimate responsibility of the insured is not a consideration. "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."

(*Colon v Aetna Life & Cas. Ins. Co.*, 66 NY2d 6, 8-9 [1985]. *See also, Regal Constr. Corp. v Natl. Union Fire Ins. Co.,* 15 NY3d 34, 37 [2010].)

"An 'insurer will be called upon to provide a defense whenever the allegations of the complaint suggest . . . a reasonable possibility of coverage'" (*Regal, supra*). This standard applies equally to additional insureds and named insureds (*id.*). Based upon the allegations in the complaint in the underlying actions, there is a reasonable possibility of coverage under New York law such that NHIC is required to provide a defense in the underlying actions. Here, there is no question that the allegations of the underlying complaints, as to the additional insureds, fall within the risk covered by the policy.

Outstanding Discovery, and the Status of the Motions for Summary Judgment

In its opposition, NHIC argues that Zurich's motion for summary judgment should be denied to allow the parties to complete discovery concerning the Benson-WTC Contract and the underwriting of the typewritten manuscript language in the Designated Insured Endorsement in

Zurich's policy. Specifically, NHIC argues that discovery is in its early stages and that Zurich has not produced a complete copy of the Benson-WTC Contract, which, NHIC argues, bears directly on the priority of coverage for the Port Defendants in the Zurich Auto Policy. NHIC argues that discovery regarding the typewritten manuscript language in the Endorsement should be completed.

The court finds that there is no need for additional discovery on the question of priority of coverage between Zurich and NHIC, since the language in the "Other Insured" provisions in both auto policies resolves the question of priority.

NHIC's Cross-Motion for Summary Judgment

NHIC cross-moves for summary judgment to dismiss the third, fifth, and sixth causes of action. In the third cause of action, Zurich seeks a declaratory judgment that NHIC has a duty to defend the Port Defendants in the underlying action. In the fifth cause of action, Zurich seeks an order for NHIC to pay all amounts that Zurich has or will incur in the defense of the Port Defendants. In the sixth cause of action, Zurich seeks a declaration regarding NHIC's obligation to contribute to the defense costs that Zurich has incurred. The court denies NHIC's cross-motion consistent with findings and reasoning set forth hereinabove in disposition of Zurich's motion for summary judgment.

The Port Defendants' Motion for Indemnification

The Port Defendants move for a declaration that they qualify as insureds under the auto policies of both Zurich and NHIC, and further move for a declaration of entitlement to coverage for the two underlying matters.

First, the Port Defendants argue that Zurich is equitably estopped from denying coverage.

According to the Port Defendants, in a May 15, 2015 letter (NYSCEF Doc. No. 54), counsel for the Port Defendants tendered their defense in the underlying actions to Benson. By a March 17, 2016 letter (NYSCEF Doc. No. 58), Zurich agreed to accept the defense and indemnity of the Port Defendants without reservation. The letter stated, in pertinent part:

> Pursuant to the terms and conditions of the applicable endorsement . . . it is Zurich's determination that Port Authority qualifies as an additional insured. Therefore, Zurich accepts the tender of the defense and indemnity of the Port Authority under the additional insured requirement in RIDER "D" INSURANCE RIDER.

Eight months later, by letter dated November 16, 2016 (NYSCEF Doc. No. 99), Zurich advised the Port Defendants that it was now reserving its rights to deny any duty to defend or indemnify the Port Defendants because (1) the Port Defendants may not qualify as insureds under "1. Who Is An Insured"; (2) the accident may not have arisen out of the "use of an auto"; and (3) the mechanical device exclusion may bar coverage." On that same day, Zurich tendered the defense of the Port Defendants to NHIC as the insurer (*see*, NYSCEF Doc. No. 100).

In opposition, Zurich argues that the facts in this action do not justify a finding of estoppel. According to Zurich, although it initially accepted the Port Defendants' tender in March 2016, the Port Defendants did not execute the required Consents to Change Attorney in the underlying actions until August 31, 2016 (NYSCEF Doc. No. 137). As a result, argues Zurich, Zurich was providing defense counsel for only three months, until November 2016, when it reserved its rights to deny any duty to defend or indemnify. Zurich asserts that in that three-month period there were no "developments, discovery or events whatsoever that transpired" (NYSCEF Doc. No. 148).

Further, Zurich argues, during that time period the Port Defendants brought in new defense counsel three times. For these reasons, Zurich argues there can be no finding of estoppel.

Under New York law, "the doctrine of estoppel precludes an insurance company from denying or disclaiming coverage where the proper defending party relied to its detriment on that coverage and was prejudiced by the delay of the insurance company in denying or disclaiming coverage based on the loss of the right to control its own defense" (*Liberty Ins. Underwriters, Inc. v Arch Ins. Co.*, 61 AD3d 482, 482 [1st Dept 2009] [internal citations omitted]). Further, there is no estoppel where "plaintiff gave defendant the opportunity to assume the defense, which defendants refused to do" (*General Acc. Ins. Co. v U.S. Fid. & Guar. Ins. Co.*, 193 AD2d 135, 138 [3d Dept 1993]). Additionally, under the circumstances here, Zurich reserved its rights to deny coverage, thus its actions did not estop it as against the Port Defendants from asserting noncoverage.

Prejudice "'is established only where the insurer's control of the defense is such that the character and strategy of the lawsuit can no longer be altered'" (*Yoda, LLC v Natl. Union Fire Ins. Co.*, 88 AD3d 506, 508 [1st Dept 2011] [citation omitted]). In *Yoda*, plaintiff claimed prejudice with respect to National Union's actions in the defense of the underlying action. Specifically, plaintiff argued that if National Union had disputed coverage in a reasonably timely manner, plaintiff could have impleaded a third party, Queens Stainless, thereby triggering insured contract coverage or, at least, timely resolution of any disclaimer. These arguments supported the court's finding that National Union was estopped from denying that it provided excess coverage, as there were issues of fact as to whether the plaintiff relied to its detriment on National Union's conduct.

Here, the Port Defendants argue that Zurich's November 16, 2016, letter reveals that Zurich's decision to reconsider its position was not based on new information, and that as a result of this change in position, the Port Defendants suffered prejudice through loss of control of

their defense in the middle of the litigation. The Port Defendants offer no factual support for their conclusory statement that they suffered prejudice. In support of their motion seeking estoppel, the Port Defendants offer no facts indicating that the strategy in the underlying action was altered to their detriment as a result of Zurich's decision. This court, therefore, denies this part of the motion, and will not apply the doctrine of estoppel.

The Port Defendants further argue that the question of Zurich's and NHIC's duty to indemnify should be resolved in their favor at this juncture. This is so, according to the Port Defendants, because their liability is purely vicarious, and there are no facts that need to be determined in the underlying action to resolve the issue of indemnification.

With respect to indemnification, the Port Defendants argue that any finding resolving Zurich's or NHIC's duty to indemnify would concern coverage questions and must be addressed in this action. They argue first that there is no dispute that they are insureds under section 1.(c) of the auto policies, relying on the language: "[a]nyone liable for the conduct of an 'insured' described above but only to the extent of that liability." They argue that they are insureds under this definition, since, in the underlying actions, it will be determined whether they are vicariously liable, in whole or in part, for Benson's conduct.

The Port Defendants argue that the requirement raised by Zurich, that the accident "must be the result of some act or omission related to the use of the vehicle," is met here. The Port Defendants describe the facts of the accident, and offer their conclusion, as follows:

> The underlying plaintiffs testified that they were unloading a box truck when it unexpectedly moved forward causing the ramp connecting the back of the truck to the loading dock to slip out of place, and causing them to fall. Kohane Aff., Exh. I, pp. 53-54. Based upon these facts, where the box truck is claimed to have moved, the loss unquestionably was connected to the auto.

(NYSCEF Doc. No. 157.)

The Port Defendants conclude by stating that because there will not be a finding below that the "loss arose out of the use or operation of a vehicle," this issue must be resolved in this action (*id.* at 10).

Although Zurich concedes that the allegations in the underlying complaint potentially implicate coverage under its policy, Zurich argues in opposition that its duty to indemnify the Port Defendants is not ripe for adjudication in this action because, it posits, no factual determinations have been made in the underlying actions, nor has any determination been rendered regarding the Port Defendants' liability to Craig Biven and Raymond King, or the liability of any other defendants therein.

Zurich further argues in opposition that a determination as to liability in the underlying action is critical to Zurich's duty to indemnify under the "omnibus provision" – Section II.A.1.c – under which the Port Defendants contend coverage is triggered. Again, this provision identifies who is an insured, and states: "Anyone liable for the conduct of an 'insured' described above but only to the extent of that liability" (NYSCEF Doc. No. 24 at ZAIC 110). Zurich further argues that before the court can make a finding that Zurich must indemnify the Port Defendants as additional insureds under the policy, there must be a finding that the Port Defendants are vicariously liable under the Labor Law for any negligence of Benson.

Similarly, in its opposition, NHIC argues that because there has been no finding of the Port Defendants' statutory liability, the duty to indemnify is a premature issue. NHIC argues that such a finding of liability of any of the other defendants, including the Port Defendants, is a condition precedent to the Port Defendants qualifying as an "insured" with respect to the duty to indemnify under the same provision in both Zurich's and NHIC's policies.

Zurich next argues against the Port Defendants' assertion that the accident at issue in the underlying actions was the result of an auto loss under the Zurich Auto Policy. On this point, Zurich cites the policy language that there is coverage where the accident arose out of the "ownership, maintenance or use of the covered 'auto,'" and that there has been no determination as of yet as to whether the accident of Craig Bivens and Raymond King which occurred as they were loading or unloading the truck arose out of the "use" of the vehicle. Thus, Zurich argues that any finding that it owes a duty to indemnify the Port Defendants is premature.

In support of its argument that the accident did not arise out of the "use" of the vehicle, as required for coverage, Zurich argues that under New York law, the determination of whether an accident has resulted from the use of a covered vehicle requires consideration of whether the accident arose out of the inherent nature of the vehicle and whether the vehicle itself produced the injury (relying on *Eagle Ins. Co. v Butts*, 269 AD2d 558 [2d Dept], *lv denied* 95 NY2d 768 [2000]; *see also, id.*, at 559 ["it is insufficient to show merely that the accident occurred during the period of loading or unloading. Rather, the accident must be the result of some act or omission related to the use of the vehicle."]).

Analysis:

The duty to indemnify "is determined by the actual basis for the insured's liability to a third person" (*Servidone Constr. Corp. v Security Ins. Co.*, 64 NY2d 419, 424 [1985]). This duty to pay "does not turn on the pleadings, but rather on whether the loss, as established by the facts, is covered by the policy" (*Atlantic Mut. Ins. Co. v Terk Tech. Corp.*, 309 AD2d 22, 28 [1st Dept 2003]). Unlike the duty to defend, which is concerned with the possibility of coverage, the duty to indemnify "is determined by the actual basis for the insured's liability to a third person" (*id.*).

Here, it is undisputed that the Port Defendants are additional insureds under both the Zurich and NHIC Auto Policies. Under the policies, the insured is "anyone liable for the conduct of an insured" (NYSCEF Doc. Nos. 88, 89).

In *Paul M. Maintenance, Inc. v Transcontinental Ins. Co.* (300 AD2d 209 [1st Dept 2002]), the court held, under the same provision, that the general contractor was an insured, based on a judicial determination that under the Labor Law the general contractor was vicariously liable for the subcontractor's conduct which caused the plaintiff employee's injuries. Under this holding, the Port Defendants may qualify as additional insureds if there is a determination that they are vicariously liable under the Labor Law for negligence of the subcontractors.

Here, there has been no finding in the underlying actions with respect to the insured's liability or the Port Defendants' vicarious liability. This court, therefore, cannot make any determination at this time under the policy concerning the Port Defendants' liability "for the conduct of the insured." For this reason, any finding of indemnification would be premature. Consequently, the court will not make any finding at this point concerning whether the accident took place in connection with the "use" of the automobile under the terms of the policy. Accordingly, the Port Defendants' motion seeking indemnification is denied, without prejudice to renew upon the requisite findings in the underlying actions.

Finally, in their motion, the Port Defendants argue that the Mechanical Device Exclusion, as relied upon by Zurich to deny coverage, is not applicable. In support of this argument, the Port Defendants argue first that under New York law, only those exclusions authorized by state law are enforceable. According to the Port Defendants, a review of Insurance Regulation § 60-1.2 (11 NYCRR) reveals no mechanical device exclusion, and, therefore, it is not enforceable in

New York. Section 60-1.2, "Exclusions," begins with the language: "Such an 'owner's policy of liability insurance' may contain in substance the following exclusions . . . ." (11 NYCRR § 60-1.2.) No mechanical device exclusion is listed therein.

However, that regulation applies to an "owner's" policy of liability insurance which was procured to satisfy the owner's obligations under New York's minimum financial responsibility law to provide No-Fault coverage (Vehicle & Traffic Law § 310, *et seq.*) (*see*, 11 NYCRR § 60-1.1). There is no dispute that Benson did not own the truck, and that the subject policy does not provide No-Fault coverage for the truck. Because the policy is not within the ambit of Section 60-1.2, the Mechanical Device Exclusion is enforceable, if applicable to the underlying circumstances.

With regard to the exclusion's applicability here, the Port Defendants argue that, even if the exclusion would be enforceable – as this court has just held – it would not be applicable to the underlying circumstances. They argue that the exclusion states that "no coverage will be afforded for 'bodily injury' or 'property damage' resulting from the movement of property by a mechanical device (other than a hand truck) unless the device is attached to the covered 'auto.'" The Port Defendants assert that the device used in the underlying actions "constitutes a hand truck as an average business person would interpret the term, since it is a small hand-propelled device used for moving property, or alternatively, the Zurich Policy is sufficiently ambiguous that it is not clear that such a device is excluded" (NYSCEF Doc. No. 83 at 22).

The Port Defendants rely on the Third Department's decision in *General Accident Ins. Co. v U.S. Fid. & Guar. Ins. Co.* (193 AD2d 135 [3d Dept 1993]), where the court examined the same exclusion and opined that exclusions "must be specific and clear in order to be enforced" (*id.*, at 137-38). Further, "whenever an insurer wishes to exclude certain coverage from its

policy obligations, it must do so 'in clear and unmistakable language'" (*Seaboard Surety Co. v Gillette Co.*, 64 NY2d 304, 311 [1984] [citation omitted]). In *General Accident, supra,* the defendant argued that the "push cart used by the insured's employee to deliver the water softener tanks from the insured's vehicle is not a hand truck," and, therefore, the mechanical device exclusion applied. However, that court found that since the policy did not define the term "hand truck," and because the term is sufficiently ambiguous, the push cart could not be considered anything other than a hand truck, and the exclusion did not apply" (193 AD2d at 138).

In opposition, Zurich argues that the exclusion *is* applicable. According to Zurich, Craig Bivens and Raymond King testified that they were injured while moving material from the truck with the use of a "hand jack" or "power jack" in conjunction with a "plate" or "bridge" placed between the dock and truck (*see*, NYSCEF Doc. Nos. 77, 78). It is Zurich's position that in light of this testimony there is an issue of fact regarding the exclusion, which precludes summary judgment. In other words, are Craig Bivens and Raymond King talking about an injury caused by a "hand truck," in the sense intended by the use of that term in the exclusion; or something else? This issue of fact precludes summary judgment at this time regarding applicability of the Mechanical Device Exclusion.

Accordingly, it is

ORDERED that the motion of plaintiff Zurich American Insurance Company for partial summary judgment (motion sequence no. 001) is granted to the extent that the New Hampshire Insurance Company has a primary duty to defend the Port Defendants in the Underlying Actions; and it is further

ORDERED that the motion of plaintiff Zurich American Insurance Company for summary judgment on its first cause of action seeking a declaration that it is not obliged to

provide a defense to the Port Defendants in the Underlying Actions until the cost of such defense exceeds the cost covered under the primary New Hampshire Insurance Company policy is granted; and it is further

ORDERED that the cross motion of New Hampshire Insurance Company for partial summary judgment (motion sequence no. 002) is denied; and it is further

ORDERED that the motion of the Port Authority of New York and New Jersey; Tishman Construction Corporation; and Tower 5 LLC, f/k/a 1 World Trade Center LLC, for indemnification from Zurich American Insurance Company (motion seq. no. 003), is denied, without prejudice to renew, insofar as further proceedings are necessary regarding issues of fact identified hereinabove; and it is further

ORDERED that counsel for the parties in this action are directed to appear at a conference before the undersigned at 111 Centre Street, Room 1166, New York, New York, November 14, 2019, at 2:15 p.m.

ENTER:

Louis L. Nock

10/4/2019
DATE

LOUIS L. NOCK, J.S.C.

CHECK ONE:	[ ]	CASE DISPOSED	[X]	NON-FINAL DISPOSITION		
	[ ]	GRANTED	[ ] DENIED	[ ]	GRANTED IN PART	[X] OTHER
APPLICATION:	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER	
CHECK IF APPROPRIATE:	[ ]	INCLUDES TRANSFER/REASSIGN		[ ]	FIDUCIARY APPOINTMENT	[ ] REFERENCE