

**L&L 2085 Amsterdam Realty, LLC v Starr Indem. & Liab. Co.**

2020 NY Slip Op 33857(U)

November 19, 2020

Supreme Court, New York County

Docket Number: 656654/2019

Judge: Arlene P. Bluth

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT:** HON. ARLENE P. BLUTH **PART** **IAS MOTION 14**

*Justice*

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L&L 2085 AMSTERDAM REALTY, LLC,

Plaintiff,

- v -

STARR INDEMNITY & LIABILITY COMPANY, LA RUBIA  
DELI CORP.

Defendant.

-----X

**INDEX NO.** 656654/2019

**MOTION DATE** 11/17/2020

**MOTION SEQ. NO.** 001

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18

were read on this motion to/for JUDGMENT - DECLARATORY.

The motion by plaintiff for partial<sup>1</sup> summary judgment declaring that defendant Starr Indemnity & Liability Company (“Starr”) owes a duty to defend and indemnify plaintiff in a pending underlying action and for defense and indemnity payments is granted.

**Background**

This declaratory judgment action relates to an underlying personal injury case pending in New York County. In the personal injury case, Ms. Aleyda Then (the plaintiff) claims that she slipped and fell while walking on the sidewalk in front of the premises located at 2083-2085 Amsterdam Avenue in Manhattan on August 29, 2018.

Plaintiff claims that it is the landlord for the premises at 2085 Amsterdam and that it is seeking relief against the insurer of its tenant (defendant La Rubia Deli Corp.). Plaintiff argues that pursuant to the lease, La Rubia was supposed to obtain insurance that named plaintiff as an

<sup>1</sup> Plaintiff appears to seek relief only against defendant Starr and claims remain pending against defendant La Rubia.

additional insured. It points to the La Rubia's policy (issued by defendant Starr) which identifies plaintiff as an additional insured and argues that Starr has improperly refused to defend and indemnify plaintiff in the personal injury case.

In opposition, Starr claims that the additional insured provision in the policy only applies to liability that arises out of the part of the premises leased to La Rubia and it would be premature to make that conclusion in the personal injury case. Starr observes that Ms. Then alleges that she fell on the sidewalk abutting "2083-2085 Amsterdam Avenue" which are two separate properties. La Rubia leased the property from plaintiff at 2085 Amsterdam Avenue. Starr concludes that liability might only be found against the owner and tenant of 2083 Amsterdam, thereby rendering the instant dispute moot. Starr also argues that landlords have a non-delegable duty to maintain the sidewalk.

In reply, plaintiff contends that the question of whether Ms. Then might ultimately recover against plaintiff is besides the point. The issue is whether this is a covered claim and no discovery is needed to order to make a coverage determination.

## **Background**

To be entitled to the remedy of summary judgment, the moving party "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact from the case" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). The failure to make such prima facie showing requires denial of the motion, regardless of the sufficiency of any opposing papers (*id.*). When deciding a summary judgment motion, the court views the alleged facts in the light most favorable to the non-moving party (*Sosa v 46th St. Dev. LLC*, 101 AD3d 490, 492, 955 NYS2d 589 [1st Dept 2012]).

Once a movant meets its initial burden, the burden shifts to the opponent, who must then produce sufficient evidence to establish the existence of a triable issue of fact (*Zuckerman v City of New York*, 49 NY2d 557, 560, 427 NYS2d 595 [1980]). The court's task in deciding a summary judgment motion is to determine whether there are bonafide issues of fact and not to delve into or resolve issues of credibility (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 505, 942 NYS2d 13 [2012]). If the court is unsure whether a triable issue of fact exists, or can reasonably conclude that fact is arguable, the motion must be denied (*Tronlone v Lac d'Amiante Du Quebec, Ltee*, 297 AD2d 528, 528-29, 747 NYS2d 79 [1st Dept 2002], *affd* 99 NY2d 647, 760 NYS2d 96 [2003]).

The Court grants the motion. Starr's insurance policy provides that plaintiff is entitled to additional insured coverage "only with respect to liability arising out of the ownership, maintenance or use of that part of the premises leased to you and shown in the Schedule" (NYSCEF Doc. No. 11 at 12). The lease specifically states that the tenant is responsible for maintaining the sidewalks adjacent to the premises (NYSCEF Doc. No. 10 at 1). Clearly, the underlying lawsuit relates to the "use" of the portions of the premises that were leased to La Rubia (Starr's insured).

When considering nearly identical language in both an insurance policy and in a lease, the First Department found that a landlord was covered as an additional insured under its tenant's insurance policy (*Wesco Ins. Co. v Travelers Prop. Cas. Co. of Am.*, 2020 NY Slip Op 06411, 1 [1st Dept 2020] [declaring that landlord was entitled to additional insured coverage and stressing that coverage is determined by the terms of the policy not by whether the landlord may have failed to satisfy certain legal obligations with respect to the sidewalk]). Based on *Wesco*, this Court is compelled to reach the same conclusion: that plaintiff is entitled to additional insured

coverage because the accident arose out of a trip and fall on the sidewalk, a portion of the premises that the tenant was supposed to maintain. It makes no difference whether the injured plaintiff in the underlying case is ultimately successful or whether it turns out that the fall happened solely on the adjacent property. The claim that it occurred on the portion of the property specifically identified in the lease is enough to trigger coverage (*Tower Ins. Co. of New York v Leading Ins. Group Ins. Co., Ltd.*, 134 AD3d 510, 510, 21 NYS3d 240 [1st Dept 2015]).

With respect to the priority of coverage issue, the Court finds that Starr's policy applies on a primary and non-contributory basis. Starr attempts to claim that plaintiff's additional insured status applies only as excess to plaintiff's own insurance policy. But that makes no sense pursuant to the lease. The lease clearly states that the tenant shall "provide and keep in force during the term of this Lease for the benefit of the Landlord, generally liability policies of insurance in standard form, protecting the Landlord against any liability whatsoever, occasioned by accident or disaster on or about the demised premises, or any appurtenances thereto" (NYSCEF Doc. No. 10, ¶ 64).

The Court agrees with plaintiff's argument that the only reasonable interpretation of the language requiring La Rubia to procure additional insurance coverage for the benefit of plaintiff is to provide the same level of coverage to the named insured and the additional insured; that means it applies as primary coverage. Otherwise, what would be the purpose of this requirement in the lease? To be named as an additional insured but only get coverage as excess while the tenant gets primary coverage?

"Additional insured is a recognized term in insurance contracts, with an understanding crucial to our conclusion in this case. As cases have recognized, the well-understood meaning of the term is an entity enjoying the same protection as the named insured" (*Pecker Iron Works of*

*New York, Inc. v Traveler's Ins. Co.*, 99 NY2d 391, 393, 756 NYS2d 822 [2003] [internal quotations and citations omitted]).

There is no question here that Starr’s policy contains an endorsement that insists that the coverage is only excess for the additional insured “unless this coverage is required to be primary and/or not contributory in the contract, agreement or permit referred to above” (NYSCEF Doc. No. 16 at 28). As plaintiff points out, there is no evidence in this case that the parties intended the additional insured coverage to be excess over any insurance that plaintiff might have. Starr’s theory defies the standard definition of an additional insured and common sense about the purpose of obtaining additional insured coverage. Moreover, when La Rubia obtained insurance naming plaintiff as an additional insured, it signified that it was agreeing to provide primary coverage to plaintiff (*see Pecker*, 99 NY2d at 393-94).

Accordingly, it is hereby

ORDERED that the motion for summary judgment by plaintiff is granted.

Remote Conference: March 4, 2021.

11/19/2020

DATE



ARLENE P. BLUTH, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE