

Arch Ins. Co. v American Alternative Ins. Corp.

2021 NY Slip Op 30320(U)

February 2, 2021

Supreme Court, New York County

Docket Number: 650670/2018

Judge: Louis L. Nock

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

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

Justice

-----X

ARCH INSURANCE COMPANY,

Plaintiff,

- v -

AMERICAN ALTERNATIVE INSURANCE CORPORATION,

Defendant.

-----X

LOUIS L. NOCK, J.

The following e-filed documents, listed by NYSCEF document number (Motion 001) 66-78, 99, (Motion 002) 24-4880-84, 93-96, (Motion 003) 49-65, 79, 85, 86, 89-92

were read on this motion to/for VACATE NOI, SUMMARY JUDGMENT.

**DECISION + ORDER ON
MOTION**

The following motions are consolidated for determination and decided in this memorandum decision.

Defendant American Alternative Insurance Corporation (“AAIC”) moves, pursuant to 22 NYCRR § 202.21 (e), for an order to vacate the plaintiff’s Note of Issue and Certificate of Readiness; and, pursuant to CPLR 3214 (b), staying discovery pending the within motions by the parties for summary judgment (motion seq. no. 001). Plaintiff Arch Insurance Company (“Arch”) moves, pursuant to CPLR 3212, for summary judgment and a declaration: (1) that AAIC owes Arch 50% of the defense costs incurred by Arch in defending underlying actions; and (2) that AAIC owes Arch 50% of the monies paid by Arch to settle underlying actions (motion seq. no. 002). AAIC moves, pursuant to CPLR 3212, for summary judgment to dismiss the action (motion seq. no. 003).

NATURE OF THE CASE

This declaratory judgment action, which contains a single cause of action for equitable contribution, arises out of two underlying actions: *Palacio v East Northport Volunteer Fire Department, Inc. et al.* (Docket No. CV14-6205 [JS] [AKT]) commenced in the United States District Court, Eastern District of New York, and *Palacio v East Northport Volunteer Fire Department, et al.* (index No. 14-01201) commenced in the Supreme Court of the State of New York, County of Suffolk (the “Underlying Actions”). The Underlying Actions were filed by one, Sandra Palacio (“Palacio”), for alleged employment discrimination, harassment, and retaliation, based on her gender, race, and national origin, against the East Northport Fire District (the “District”), the East Northport Fire Department (the “Department”), the Board of Fire Commissioners of the East Northport Fire District of the Town of Huntington, Suffolk County, New York (the “Board”), and certain individual members of the Department. Palacio was an emergency medical technician (“EMT”) and member of the Department. She was terminated by an October 27, 2013, letter from the Department, citing District Rules and Regulations. In this lawsuit, Arch seeks to obtain from AAIC equitable contribution for a monetary settlement payment made to Palacio by Arch on behalf of the District and the individual defendants in the Underlying Actions. Arch also seeks the sum of \$54,350.00, which allegedly constitutes one-half of the defense costs that Arch incurred in defending the Underlying Actions.

Arch had issued a policy to the District as its named insured, which also covered the Department. AAIC had issued a policy to the Department only as *its* named insured. Arch had paid the defense costs for the District and for the individual defendants in the Underlying Actions. Arch alleges herein that AAIC breached its duty to defend the District and the individual defendants in those actions. Therefore, according to Arch, AAIC is liable to Arch for

a pro rata, 50%, share of the defense costs. Further, Arch paid the full settlement amount in the Underlying Actions as as recommended by its insurance defense counsel. Arch claims that AAIC is responsible for its pro rata, 50%, share of the settlement amount.

BACKGROUND

The District is a political subdivision created by the town of East Northport, New York. The District is responsible for preventing and extinguishing fires within its jurisdiction. It functions *through* the Department, a not-for-profit corporation, which provides personnel to the District. The District promulgated “Rules and Regulations” governing the operations of the Department. The Department has its own Constitution and By-Laws.

Members of the Department include firefighters and medical personnel. The District’s Rules and Regulations contain a non-discrimination policy applicable to both the District and the Department:

No member of the Department shall be discriminated against by the East Northport Fire District, the East Northport Fire Department or any officer, member or employee thereof with respect to such member’s race, color, religion, sex, national origin, pregnancy, handicap, marital status, sexual orientation, affectional preference or age in any area of such member’s participation in the affairs or activities of the District and Department, including but not limited to work assignments or conditions, promotion, or benefits.

(NYSCEF Doc. No. 29 at 11.)

The Underlying Actions

The State Action

In 2014, Palacio filed employment discrimination claims in the Underlying Actions. She alleged in the first amended verified complaint in the underlying state court action that she “performed services on behalf of and in furtherance of” the District’s, the Board’s and the Department’s “business” and that the District, the Board and the Department are “employer[s]

within the meaning of N.Y. Exec. Law §§ 292 (5) & 296 (1)”¹ (NYSCEF Doc. No. 32 ¶ 6). She further alleged that she was employed by “Defendants as an Emergency Medical Technician, Advanced Life Support Provider” “from 2005 until the termination of her employment in October 2013” (*id.*, ¶ 3).

According to the complaint in that action, Palacio alleged that she was subjected to a hostile work environment throughout her employment because of “her gender (female) and race (Hispanic)” (NYSCEF Doc. No. 32 ¶ 29). She alleges she “was and remains the only person of Hispanic descent in the Fire Department” (*id.*).

Palacio further alleged:

In October 2011, Plaintiff was nominated for, and appointed to the position of Lieutenant. Following the nomination meeting, a male employee who also wanted the position told Plaintiff that she should resign because, among other things, he could do a better job than her because he is a man. The next day, Plaintiff complained to Defendant Tarantino, Chief of the Department, who, upon information and belief, failed to investigate or remedy her complaint.

....

In September 2012, Plaintiff was given a choice by Defendant Tarantino, Chief of the Department, to either resign from her position as Lieutenant or be removed from that position. According to Defendant Tarantino, Plaintiff had not met the quotas required to remain in the Lieutenant title. A male, non-Hispanic Captain, Defendant Koch, had failed to meet his quotas, yet he was allowed to remain in the Captain title. . . .

(*id.*, ¶¶ 25, 28.)

Palacio further alleged that fellow members disparaged her accent (*id.*, ¶ 30) and that members of the department yelled at her in front of patients (*id.*, ¶ 33). Palacio alleged that she complained of “this discriminatory treatment to the Ex-Chief in Charge of the By-Laws of the Department” (*id.*, ¶ 28). She alleges that he never got back to her and she then submitted “a written complaint to the Department” (*id.*). Palacio alleged that, “upon information and belief,

¹ Pursuant to Executive Law § 292 (5), “the term ‘employer’ shall include all employers within the state.”

there were approximately five women members of the Department when she started and as of her last date of active employment in October 2012, there were approximately 15 women out of 130 members in the Fire Department” (*id.*, ¶ 29).

Palacio additionally alleged that:

On or about October 1, 2012, Plaintiff attended a monthly meeting of Department members at the Department’s Fire House. When she went downstairs to get her gear, she found a piece of paper attached to her jacket with the words “Loser XOXO” written on it and a picture of a penis drawn on it.

(*Id.*, ¶ 34.)

Palacio allegedly complained about the alleged harassing behavior that targeted her, but that “Defendants took inadequate measures to provide Plaintiff with a nondiscriminatory, hostile free work environment” (*id.*, ¶ 30).

Palacio further alleged that on or about October 19, 2012, her home and car were vandalized, and the word “spic” was written on the front door of her house. Her car was damaged, and the words “killer whore” and “ENFD bitch” were painted on her car. Palacio believed members of the Fire Department were responsible and reported these incidents to the Suffolk County Police Department Bias Crimes Bureau (*id.*, ¶ 36).

As alleged, “[f]ollowing the events of October 19, [Palacio] did not return to her position with the Department and went on a medical leave of absence (*id.*, ¶ 37). Palacio further alleged that she learned in January 2013 that members of the Department were instructed by Department Chief Michael Tarantino “to cease all communications, professional, personal or otherwise, with her” (*id.*, ¶ 38) and that this was “retaliatory, and in response to [Palacio’s] numerous internal complaints” (*id.*). Palacio’s employment with the Department was terminated October 27, 2013 (*id.*, ¶ 40).

The Federal Action

Palacio's allegations against the individual defendants in the amended complaint in the underlying federal action are that those defendants – Michael Tarantino (“Tarantino”), Joseph Irvin (“Irvin”), and Wayne Kaifler, Jr. (“Kaifler”) – were employed by the “Municipal Defendants” (defined in that complaint as the District, Department, and Board) as “Chief[s] of the Fire Department” and that they “had the authority to execute policies and customs on behalf of Municipal Defendants, such as creating and implementing work rules and generally administering the Municipal Defendants’ workers” (NYSCEF Doc. No. 34 ¶¶ 10-12).² Palacio alleges that they were each involved in the discriminatory and retaliatory actions against her (*id.*).

Other defendants – Jamie Conroy (“Conroy”), Ryan Koch (“Koch”), Matt Simpson (“Simpson”), and Joseph Senese (“Senese”) – were all “employed by Municipal Defendants” and “personally involved in the discriminatory conduct to which Plaintiff was subjected and, at all relevant times, acted under color of law” (*id.*, ¶¶ 13-16).³

The amended complaint in the federal action included a claim for violation of the Equal Protection Clause of the Fourteenth Amendment. In the state action, Palacio asserted causes of action for discrimination in violation of the New York Human Rights Law; retaliation in violation of the New York Human Rights Law; intentional infliction of emotional distress; negligent infliction of emotional distress; negligent hiring, supervision and retention of individual members of the Department; and trespass to property. In the federal action, Palacio

² The amended complaint in the state action makes similar references: to Tarantino, Irvin, and Keiffler as “employed . . . as the Chief[s] of the Fire Department” (NYSCEF Doc. No. 32 ¶¶ 7-9).

³ The amended complaint in the state action makes similar references: to Conroy, Koch, Simpson, and Senese as “employed by Defendants” and active participants “in the discriminatory conduct” (NYSCEF Doc. No. 32 ¶¶ 10-13).

asserted claims for discrimination in violation of Title VII of the Civil Rights Act of 1964; retaliation in violation of Title VII; discrimination in violation of 42 USC § 1981; and violation of the Equal Protection Clause of the Fourteenth Amendment.

In September 2015, AAIC sent a letter to Arch’s counsel withdrawing from a previous agreement among them to split the defense costs in the Underlying Actions (*see*, NYSCEF Doc. No. 57). The premise of that withdrawal was the allegations of the complaints in the two actions – in amended form – “creates the potential for exposure to liability that is unique to the District [Arch’s insured] and not to the [Department] [AAIC’s insured]” (*id.*). That letter also declined any “indemnity to the District” for that same reason (*id.*). This action, commenced by Arch, takes issue with AAIC’s said refusal to split defense and indemnification costs.

The Insurance Policies

The AAIC Policy

AAIC issued Policy No. VFIS-TR-2063842-03/000 to the Department as a named insured for the policy period of April 8, 2012 to April 8, 2013 (the “AAIC Policy”) (NYSCEF Doc. No. 36). The AAIC policy reads, in pertinent part:

SECTION III, WHO IS AN INSURED

* * *

2. In addition to you, each of the following is an insured:

a. **Volunteers and Employees.** Volunteers and employees, including any elected or appointed officers, directors, commissioners or trustees, but only for acts within the course and scope of their employment by you, membership with you or authorized duties on your behalf.

* * *

d. **Blanket Additional Insureds.** Any person or organization liable for your “employment practices” offenses, offenses arising out of the “administration” of your “employee benefit plans,” or other “wrongful acts” committed or alleged to have been

committed by you is an insured under this coverage part, but only to the extent of that liability.

(*Id.*, at Bates AAIC02006-07.)

The AAIC Policy includes Management Liability coverage, which applies to, among other things, “employment practices” offenses. “Employment practices,” as defined in the AAIC Policy means “an actual or alleged improper employment related practice, policy, act or omission involving an actual, prospective, or former volunteer or employee,” and includes:

- Wrongful dismissal, discharge, or termination of employment or membership, whether actual or constructive;
- Wrongful deprivation of a career opportunity, or failure to promote;
- Wrongful discipline of volunteers or employees;
- Negligent evaluation of volunteers or employees;
- Retaliation against volunteers or employees for the exercise of any legally protected right or for engaging in any legally protected activity;
- Failure to adopt adequate workplace or employment-related policies and procedures;
- Harassment, including “sexual harassment”; or
- Violation of any federal, state or local laws (whether common law or statutory) concerning employment or discrimination in employment.

(*id.*, at Bates AAIC02012.)

The Arch Policy

Arch issued Policy No. MEPK06934307 to the District as named insured for the policy period October 22, 2012 to October 22, 2013 (the “Arch Policy”) (NYSCEF Doc. No. 37). The Arch Policy includes “ESIP Emergency Service Liability – New York (Claims Made Coverage)” coverage, which applies to, among other things, “employment related practices” (*id.*, at Bates ARCH 0138). As defined by the Arch Policy, “employment related practices” includes discrimination and workplace harassment (*see, id.*). Under this policy, “officers, directors, commissioners, board members, appointees, ‘employees’ and ‘volunteer workers’” are insureds, but only with respect to their duties as such, or for acts within the scope of their employment or while performing duties related to the conduct of their business (*see, id.*, at Bates ARCH 0123).

The Defense and Settlement of the Underlying Actions

In light of the Underlying Actions' allegations of discrimination, harassment, and hostile workplace against the District and the Department, Arch and AAIC initially agreed to defend their mutual insureds, the District and the Department, in the Underlying Actions and to share the costs of the defense on an equal basis. By an April 3, 2014 letter, AAIC's representative informed Arch that they would share in the defense of the Department and the District (NYSCEF Doc. 38). By February 16, 2015 letter, AAIC's representative issued a reservation of rights letter, indicating that the defense of the defendants in the Underlying Actions is limited to allegations of "disparate impact discrimination" and "does not include discriminatory acts (other than disparate impact discrimination) if the Named Insured 1) had an active role in the act, 2) aided or encouraged the act, or 3) failed to do all that it could to prevent the act" (NYSCEF Doc. No. 39). On this issue, the letter states that "because the coverage provided to the Defendants for 'employment practices' liability applies only to the Defendants' vicarious liability, AAIC has no obligation to pay any settlement by or judgment against the Defendants if that settlement or judgment is based upon the actions of the Defendants themselves rather than upon the actions of any of its members or employees" (*id.*). AAIC reserved its right "to disclaim any payment obligation and to withdraw . . . from the defense of the Defendants" (*id.*).

Following Palacio's filing of amended complaints in the Underlying Actions, by a September 3, 2015 letter, AAIC withdrew from the defense of the District citing "the potential for divergence of interests" between the Department and the District under the allegations of the amended complaints (NYSCEF Doc. No. 57). In the letter, AAIC's representative explains that the inclusion of the individual defendants "creates a potential exposure for liability that is unique to the District and not to the [Department]" (*id.*).

In addition to withdrawing from the District's defense, AAIC disclaimed any duty to defend the seven individual defendants (NYSCEF Doc. No. 42). While AAIC withdrew from any duty to share in the defense of the District and the individual defendants following the filing of the amended complaints, Arch continued to defend the District and accepted the defense of the individual defendants, paying their defense costs. Defense counsel in the Underlying Actions reported to Arch on Palacio's hostile work environment claim and assessed Palacio's chance of success to be "in the 90% range" (NYSCEF Doc. No. 43 at 10 [at bottom]). Defense counsel also reported on Palacio's damages, including the fact that she was hospitalized on three separate occasions (totaling more than 15 days) for stress, anxiety, and depression (*id.*, at 13-14). Although Palacio had pre-existing Post-Traumatic Stress Disorder, defense counsel stressed "*we do not believe it is feasible to suggest that the actions complained of have nothing to do with plaintiff's mental state, which required hospitalization*" (*id.*, at 15 [emphasis in original]).

Defense counsel further opined that "plaintiff and her family will be sympathetically received" and noted that both the Department and the District believed it would be "nearly impossible to refute the allegations" (*id.*). Defense counsel urged that "this matter should be settled immediately" and recommended "immediate attempts to settle the case" (*id.*, at 15, 17). Based on the serious nature of the claim and defense counsel's recommendation, Arch made efforts to settle the Underlying Actions.

In March 2016, Arch, on behalf of its and AAIC's insureds, settled the Underlying Actions, with all the defendants obtaining a full and final release of Palacio's claims. Arch paid the full amount of the settlement without any contribution from AAIC. Arch also incurred additional expense in defending the District and the individual defendants in the Underlying

Actions, without any contribution from AAIC. Arch has sued AAIC in this lawsuit for equitable contribution for the costs of defense and settlement of the Underlying Actions.

DISCUSSION

The Parties' Competing Motions for Summary Judgment

Arch contends that AAIC is improperly trying to avoid its duty to defend the District and the individual defendants by ignoring the allegations in the Underlying Actions. Arch points out that the amended complaints in both actions identify Palacio as an employee of the Department, the District, and the Board, and that these entities, all together, employed the individual defendants. In their answer to the amended complaint in the federal action, the District, the Board, and the individual defendants allege that Palacio was a member of the Department (who was terminated under the District's rules and regulations), and that the individual defendants were all members of the District.

It is well established that an insurer's duty to defend is broader than its duty to indemnify (*Automobile Ins. Co. v Cook*, 7 NY3d 131 [2006]). As the duty to defend is "exceedingly broad," an insurer must defend whenever the allegations within the four corners of the underlying complaint may give rise to coverage (*id.*), or where the insurer "has actual knowledge of facts establishing a reasonable possibility of coverage" (*Frontier Insulation Contractors, Inc. v Merchants Mut. Ins. Co.*, 91 NY2d 169, 175 [1997] [internal quotations and citations omitted]). On the other hand, there is no duty to defend if, "as a matter of law[,] . . . there is no possible factual or legal basis on which [the insurer] might eventually be obligated to indemnify its insured under any policy provision" (*Allstate Ins. Co. v Zuk*, 78 NY2d 41, 45 [1991]). In evaluating an insurer's duty to defend, a court must focus on the facts alleged, not the legal

characterizations that the parties offer (*see, e.g., Allstate Ins. Co. v Mugavero*, 79 NY2d 153 [1992]).

The duty to indemnify is another matter. That duty “is determined by the actual basis for the insured’s liability to a third person,” rather than the allegations in the pleadings (*Servidone Construction Corp. v Security Ins. Co.*, 64 NY2d 419, 424 [1985]). Generally, “[i]nsurance contracts must be interpreted according to common speech and consistent with the reasonable expectations of the average insured” (*Cragg v Allstate Indem. Corp.*, 17 NY3d 118, 122 [2011]). “A declaration that an insurer is without obligation to defend a pending action could be made ‘only if it could be concluded as a matter of law that there is no possible factual or legal basis on which [the insurer] might eventually be held to be obligated to indemnify [the insured] under any provision of the insurance policy’” (*Servidone*, 64 NY2d at 424 [internal citations omitted]).

Thus, it is not simply a matter of Palacio’s allegations that would obligate AAIC to provide a defense in the underlying action. Instead, the basis for the duty to defend is defined by the allegations in the complaint plus, whether under the language of the policy, AAIC had any obligation whatsoever to indemnify. The allegations in the Underlying Actions derive from workplace harassment, violation of laws concerning employment, and failure to adopt adequate workplace policies and procedures. It is Arch’s position that these qualify as “employment practices” as defined in the AAIC Policy, and that because Palacio alleges that she and the individual defendants were members and employees of the Department, the District, and the Board, they are covered by the AAIC Policy. Yet, Palacio’s allegations concerning who her employer was do not settle the legal question of who the employer was under the policy and under any defining statute. Since this determination, which might reveal no factual or legal duty

to indemnify on the part of AAIC, is reliant upon the policy and any applicable statute, and not just upon Palacio's allegations, her allegations do not necessarily create a duty to defend.

Second, Arch contends that once AAIC agreed (prior to amendment of the underlying complaints) to share in the defense of the District in the underlying actions, it was not entitled to withdraw from that agreement. According to Arch, by agreeing to participate in the District's defense and then waiting over one year to assert its coverage theory and withdraw from the defense, AAIC is foreclosed from denying coverage to the District under Section 3420 (d) of the Insurance Law. This section requires that an insurer seeking to "disclaim liability or deny coverage for death or bodily injury arising out of an . . . accident . . . give written notice as soon as is reasonably possible of such disclaimer of liability or denial of coverage to the insured and the injured person or any other claimant" (Ins. Law § 3420 [d] [2]).

However, "an insurance company is not subject to the timely disclaimer provisions contained in Insurance Law § 3420(d) where no coverage existed under the policy" (*Matter of State Farm Mut. Auto. Ins. Co. [Merrill]*, 192 AD2d 824, 825 [1992]). A distinction is to be drawn between the denial of a claim based upon an exclusion of coverage and the denial of a claim based upon non-coverage (*see, Greater N.Y. Mut. Ins. Co. v Clark*, 205 AD2d 857 [1994], *lv denied* 84 NY2d 807 [1994]). "In the former situation, the policy covers the claim but for the applicability of the exclusion and, therefore, a notice of disclaimer is required. In the latter, the claim is not within the ambit of the policy and, therefore, mandating coverage on the basis of an insurer's failure to serve a timely notice of disclaimer would be to create coverage where none previously existed" (*A. Servidone, Inc. v Commercial Underwriter's Ins. Co.*, 7 AD3d 942, 944 [3d Dept] [internal quotation marks and citation omitted], *appeal dismissed* 3 NY3d 701 [2004]). Here, where AAIC denied the claim based upon non-coverage, there was no requirement to serve

a timely notice of disclaimer. Additionally, courts have applied the time restraints of Insurance Law 3420 (d) to protect insureds and claimants, but “recogniz[ed] that these are not risks to which another insurer seeking contribution is subject” and that “courts have held that section 3420 (d) is not applicable to a request for contribution between coinsurers” (*Bovis Lend Lease LMB, Inc. v Royal Surplus Lines Ins. Co.*, 27 AD3d 84, 92 [1st Dept 2005]).

Finally, Arch contends that Palacio and all of the individual defendants are employees of the Department and, therefore, are entitled to coverage under the AAIC policy. This is the most important question on the two motions for summary judgment as the answer to this question is at the crux of the question concerning AAIC’s coverage.

In the amended complaints in the Underlying Actions, the allegations include seven individual defendants, three of whom, Tarantino, Irvin, and Kaifler, were alleged to be Chiefs of the Fire Department. This position – Department Chief – according to Arch, has the authority to bind the Department *and* the District, and the authority to execute policies and customs on behalf of the Department and the District, including creating and implementing work rules, and general administration of workers. The other four individual defendants, Conroy, Koch, Simpson, and Sense, were alleged to be employed by the Department and the District. All of the individual defendants were alleged to be acting under color of law.

According to Arch, pursuant to the blanket additional insured provision in the AAIC Policy, the District is an insured under the AAIC Policy to the extent it is liable for the Department’s “employment practices” (NYSCEF Doc No. 48 at 11-12). Arch argues that Palacio and all of her coworkers were members of the Department, and that her termination letter came from the Department, thereby making this an internal Department matter. It is Arch’s position that while the District is responsible for firefighting and emergency response services,

the Department is responsible for membership issues. Thus, Arch's main argument is: "[t]o the extent the District may be liable for the Department's 'employment practices,' as alleged in the Amended Complaint, it qualified as an insured under the AAIC Policy. Whether the District ultimately was liable for the Department's practices could only be determined after trial" (*id.*, at 12). Arch further argues that while some of the members' discriminatory treatment of Palacio took place while "on duty," some did not, for example, members who allegedly vandalized Palacio's home and car.

Arch also argues that "under the New York Human Rights Law and federal anti-discrimination statutes, the question of whether the claimant is an 'employee' turns on whether he or she has received direct or indirect remuneration from the alleged employer" (*id.*, at 14 [citing *Pietras v Board of Fire Commissioners*, 180 F3d 468, 473 [2d Cir 1999]]). In *Pietras*, the court found that "it is clear that an employment relationship within the scope of Title VII can exist even when the putative employee receives no salary so long as he or she gets numerous job-related benefits" (*Pietras, supra*). The court further held that a "non-salaried volunteer firefighter's employment status under Title VII is a fact question when that firefighter is entitled to significant benefits" (*id.*). Arch states that "Palacio received certain benefits from the Department, for example, the Fire Department's by-laws provide for length of service awards and death and disability benefits to members" (NYSCEF Doc. No. 48 at 14). Finally, Arch notes that in Palacio's federal complaint, she alleges that the East Northport Fire Department is a covered employer within the meaning of Title VII and Section 1981 (*see*, NYSCEF Doc. No. 59 ¶ 9). "Employer" is defined in Title VII of the Civil Rights Act of 1964 as follows:

The term "employer" means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term does not include (1) the United States, a corporation wholly owned by the

Government of the United States, an Indian tribe, or any department or agency of the District of Columbia subject by statute to procedures of the competitive service (as defined in section 2102 of Title 5), or (2) a bona fide private membership club (other than a labor organization) which is exempt from taxation under section 501(c) of Title 26, except that during the first year after March 24, 1972, persons having fewer than twenty-five employees (and their agents) shall not be considered employers.

(42 USC 2000e [b].)

In opposition, AAIC argues that the District does not qualify for insured status under its policy. To qualify for coverage under the Blanket Additional Insureds provision (NYSCEF Doc. No. 36 at Bates AAIC 02007), the District and Board must be liable for employment practices offenses or other wrongful acts of the Department, which means they must be vicariously liable for the Department's actions. AAIC argues there is no evidence of such a relationship and that, in fact, the District, and not the Department, is the employer of the individual defendants, as reflected in its answer to the complaint in Palacio's federal court action. This, AAIC argues, is consistent with New York statutory law:

A fire district is a political subdivision of the state and a district corporation within the meaning of section three of the general corporation law. The officers and employees of a fire district, including the paid and volunteer members of the fire department thereof, are officers and employees of such fire district and are not officers or employees of any other political subdivision.

(Town Law § 174 [7].) And, as aptly described in case law: “where a town establishes a fire district, it creates a wholly independent subdivision whose ‘members’, including its volunteer firemen, are employees of the district and not of the town (Town Law § 174 [1] . . .)” (*Nelson v Garcia*, 152 AD2d 22, 25 [4th Dept 1989]).

Consistent with the foregoing, a fire department is not liable for the negligence of its volunteer members who are employees, and under the control, of another legal entity (*see, Haskell v Chautauqua County Fireman's Fraternity, Inc.*, 184 AD2d 12, 17 [4th Dept 1992])

[“where as here, the Town created a fire district, its volunteer firemen are employees of the district, which is the proper legal party to be sued”], *appeal dismissed* 81 NY2d 954 [1993]).

The October 27, 2013, letter of termination that was issued to Palacio from Chief of Department Irvin states that the authority for the termination was the District Rules and Regulations (*see*, NYSCEF Doc. No. 35).

All of the causes of action in the Underlying Actions are employment-related claims which turn on the “employer/employee” relationship. Here, per the Town Law and pertinent case law, as well as the answer in the underlying litigation (which admits that defendants were employees of the District), only the District is the employer. There is no coverage under the AAIC policy for the District or the individual defendants based on any theory of vicarious liability.

“Generally, the burden is on the insured to establish coverage in the first instance” (*Belsito v State Farm Mut. Ins. Co.*, 27 AD3d 502, 503 [2d Dept], *lv denied* 7 NY3d 702 [2006]). In their answer in the underlying litigation, each of the seven individual defendants, Tarantino, Ervin, Kaifler, Conroy, Koch, Simpson and Senese, admitted to being members of the District only, and not the Department (*see* NYSCEF Doc. No. 91 ¶¶ 10-16). Under Town Law § 174 (7), the officers and employees of a fire district, which include the paid and volunteer members of the fire department operating in that district, are officers and employees of the fire district. The statute goes on to expressly state that these officers and employers “are not officers or employees of any other political subdivision.” Thus, the court agrees with AAIC’s position here, that not only was Palacio employed by the District, and not the Department; but all of the individual defendants were likewise employed by the District and not the Department. As a result, the individual defendants acted, and made decisions, on behalf of, and according to, the promulgated

Rules and Regulations of, their employer, the District (*see again, e.g.*, NYSCEF Doc. No. 35 [referring specifically to Palacio’s termination “as per the East Northport Fire District Rules and Regulations”]).

Under the AAIC Policy, the Department is a named insured for the policy period of April 8, 2012 to April 8, 2013. Specifically, under section III (2) (a), the Department and its employees are covered. Further, under Section III (2) (d), the Department is only covered when it is liable for the offense, or it has vicarious liability for the offense. The AAIC Policy reads, in pertinent part:

SECTION III, WHO IS AN INSURED

* * *

2. In addition to [the Department], each of the following is an insured:

a. **Volunteers and Employees.** Your volunteers, “employees,” elected or appointed officers, directors, commissioner or trustees, but only for acts within the course and scope of their employment by you, membership with you or authorized duties on your behalf.

* * *

d. **Blanket Additional Insureds.** Any person or organization liable for your “employment practices” offenses, offenses arising out of the “administration” of your “employee benefit plans,” or other “wrongful acts” committed or alleged to have been committed by you is an insured under this coverage part, but only to the extent of that liability.

(NYSCEF Doc. No. 36 at Bates AAIC02007.)

Under Section VII, the AAIC Policy defines “employment practices” as follows:

7. “Employment practices” means an actual or alleged improper employment related practice, policy, act or omission involving an actual, prospective, or former volunteer or employee, including: a. Failing to hire or refusing to hire; b. Wrongful dismissal, discharge, or termination of employment or membership, whether actual or constructive; c. Wrongful deprivation of a career opportunity, or failure to promote; d. Wrongful discipline of volunteers or employees; e. Negligent evaluation of volunteers or employees; f. Retaliation against volunteers or employees for the exercise of any legally protected right or for engaging in any legally protected activity; g. Failure to adopt adequate workplace or employment-related policies and procedures; h. Harassment,

including “sexual harassment”; or i. Violation of any federal, state or local laws (whether common law or statutory) concerning employment or discrimination in employment.

(*Id.*, at Bates AAIC02012.)

As set forth above, under the relevant provision of the Town Law, Palacio and the individual defendants, including the Chiefs of the Department, were employees of the District, and not the Department, at all times relevant to the claims in the Underlying Actions. Thus, as a matter of law, no employer/employee relationship existed between any of them and the Department. The claims in Palacio’s amended complaints in the Underlying Actions require an employer/employee relationship for a finding of liability. Thus, the Department cannot be held liable; nor can its insurer, AAIC, be responsible.

Although discussed by Arch, the court need not reach an analysis of whether Palacio received benefits from the Department to qualify her as an employee of the Department under Title VII, 42 USC 2000e. Town Law § 174 (7) makes it clear that the volunteers and officers of the Department are employees of the District, and not the Department, making unnecessary any additional tests or analyses to determine who the employer was in this instance. While Arch argues that the question of whether the claimant is an “employee” turns on whether he or she has received direct or indirect remuneration from the alleged employer, there is no need for the court to determine whether the District was, in fact, Palacio’s, or the individual defendants’, employer. The question is clearly answered under the statute.

Likewise, Arch argues that because of the allegations in the underlying complaints that the individual defendants acted under color of law pursuant to 42 U.S.C. § 1983, AAIC must provide coverage. However, coverage is based upon the relevant provisions set forth in Section III of the AAIC Policy. Whether the individual defendants acted under color of law does not

mandate coverage under the Department's AAIC Policy, where those individuals were statutorily viewed as employees of the District, and not the Department.

The court need not address the remaining arguments concerning the settlement in the underlying action. For the foregoing reasons, the court grants AAIC's motion for summary judgment, and denies Arch's motion for summary judgment. As a result of these determinations, AAIC's motion to vacate the note of issue is moot.

In accordance with the foregoing, it is

ORDERED that defendant American Alternative Insurance Corporation's motion for summary judgment (motion seq. no. 003) is granted, and the action is dismissed; and it is further

ADJUDGED and DECLARED that defendant American Alternative Insurance Corporation is not required to defend or indemnify the District or the individual defendants in this action for the claims against them in the actions entitled *Palacio v East Northport Volunteer Fire Department, et al.* (Docket No. CV14-6205 [JS] [AKT]) in the United States District Court, Eastern District of New York, and *Palacio v East Northport Volunteer Fire Department, et al.* (index No. 14-01201) in the Supreme Court of the State of New York, County of Suffolk; and it is further

ORDERED that defendant Arch Insurance Company's motion for summary judgment (motion seq. no. 002) is denied; and it is further

ORDERED that defendant American Alternative Insurance Company's motion to vacate the Note of Issue (motion seq. no. 001) is denied as moot.

This will constitute the decision and order of the court.

ENTER:

Louis L. Nock

<u>2/2/2021</u>			<u>LOUIS L. NOCK, J.S.C.</u>
DATE			
CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/> NON-FINAL DISPOSITION
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/> GRANTED IN PART
		<input type="checkbox"/> DENIED	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT
			<input type="checkbox"/> REFERENCE