

**Fireman's Fund Ins. Co. v Accredited Surety & Cas.
Co. Inc.**

2021 NY Slip Op 30647(U)

March 5, 2021

Supreme Court, Kings County

Docket Number: 517191/2019

Judge: Karen B. Rothenberg

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This opinion is uncorrected and not selected for official publication.

Terrace located at 2150 Ocean Parkway, Brooklyn, they were exposed to a live current which caused them to get electrocuted. Defendant S & N Builders, Inc. [S & N], pursuant to its contract with Ocean Terrace, was the general contractor for the project which included flood-proofing and electrical upgrades. Lintech was the subcontractor retained by S & N to perform certain electrical work for the project.

The contract between Ocean Terrace and S & N dated May 18, 2018 contained indemnification and additional insured provisions for the benefit of Ocean Terrace. In paragraph 9.15(c) of the rider to the contract, the indemnity provision states in relevant part as follows:

“Notwithstanding anything to the contrary contained in the Contract Documents or otherwise, and to the fullest extent permitted by law, the Contractor shall indemnify, defend and hold harmless the Owner...for any and all liability or claims for damages, injuries or sickness to persons or property arising (i) due to the violation of any Legal Requirement, (ii) as the result of any act, omission or conduct of Contractor, or any Subcontractor of any tier, or any of their respective agents and employee or any labor union, (iii) as the result of any event or occurrence which arises in connection with the Work by Contractor, Subcontractor or any individual or entity performing the Work at the request of or on behalf of Contractor, including, but not limited to, any acts by any labor union or any member or agent thereof, or (iv) any claim by any employee of Contractor, or any Subcontractor of any tier, or any of their respective agents and employees or any labor union. The Contractors duty to defend the Indemnitees shall arise regardless of the fault of any party, except for Negligent Actions or omissions by Owner, architect, its agents, subcontractors, licensees, Invitees servants or employers. In addition the Contractor’s insurance as required herein shall name the following parties as additional insureds (the “Additional Insureds”):

1. Ocean Terrace Owners, Inc., c/o FirstService Residential, 9347 Shore Road, Brooklyn, NY 11209...”

Paragraph 9.15 of the contract’s rider also provided that the expenses recoverable as part of S & N’s indemnity obligations would include, without limitation, “all attorney’s fees and any costs incurred in enforcing the provisions of the Contractor’s indemnity obligations.”

Further, pursuant to Paragraph 17.5 of the contract’s rider, S & N was required to procure a Broad Form Comprehensive or Commercial General Liability Insurance [CGL] policy, which would name Ocean Terrace as an additional insured, in the minimum amount of \$1,000,000 per occurrence that would be primary and non-contributory.

In accordance with the parties' contract, S & N procured a CGL policy on February 9, 2018 through ACCS, which policy was in full force and effect on the date of plaintiffs' accidents. The CGL policy contained an endorsement entitled "Additional Insured - Owners, Lessees or Contractors -Scheduled Person or Organization" which provided as follows:

"A. Section II – Who is An Insured is amended to include as an additional insured the persons(s) or organization(s) shown in the Schedule, but only with respect to liability for "bodily injury", "property damage" or "personal and advertising injury" caused, in whole or in party, by:

1. Your acts or omissions; or
 2. The acts or omissions of those on your behalf;
- in the performance of your ongoing operations for the additional insured(s) at the location(s) designated above."

As required by the parties' contract, the CGL policy listed Ocean as an additional insured and contained a "Primary and Noncontributory - Other Insurance Condition" endorsement that provided for the insurance coverage to be primary to any other insurance available to the additional insured.

Plaintiff Fireman's Fund Insurance Company [FFIC] issued a liability policy to Ocean Terrace that was in effect on the date of the plaintiffs' accidents, and has provided a defense to Ocean Terrace in the underlying personal injury actions. Beginning in March 2019, after its investigation into the claims, FFIC through its third-party administrator, F & L Claims Services Inc., made a demand on ACCS's third-party administrator Gallagher Basset Services, Inc. [Gallagher] that ACCS acknowledge Ocean Terrace as an additional insured under the S & N policy and to agree to defend and indemnify Ocean Terrace in the underlying personal injury actions. By letter dated June 14, 2019, Gallagher, on behalf of ASSC, denied coverage asserting that Ocean Terrace is not an additional insured within the meaning of the policy because the pleading and documents did not indicate that liability for the injuries arose out of S & N's ongoing operations performed for Ocean Terrace and because the accident was not caused in whole or in party by the acts or omissions of S & N or those acting on their behalf.

Plaintiffs commenced the instant declaratory judgment action seeking a full defense and indemnification of Ocean Terrace. Plaintiffs assert that the injured plaintiffs' allegations in the underlying complaints trigger ACCS's duty to defend and indemnify Ocean Terrace as an additional insured under S & N's CGL policy. Plaintiffs further assert that ACCS never served its disclaimer of coverage on Ocean Terrace and, therefore, waived any right to disclaim pursuant to Insurance Law §3420(d).

In opposition to the motion, defendants argue that plaintiffs' motion is both defective and premature. With respect to indemnification, defendants argue that there has

been no discovery in the underlying actions and, thus, no basis to claim that either S & N or Lintech's "acts or omissions" were a proximate cause of the accident. Defendants also contends that plaintiffs' tender was defective as it was not served upon ACCS as required by the policy. ACCS argues, therefore, that there has not been a tender that would obligate it to defend and pay defense costs or require it to disclaim coverage.

Initially, contrary to ASSC's argument, the demand letter(s) to its third-party administrator Gallaher was sufficient to put ASSC on notice of the underlying personal injury claims as required under the policy. Based on the submissions, including the disclaimer letter issued by Gallagher on behalf of ASSC, it is demonstrated that Gallagher acted as an agent of ASSC, so that timely notice to Gallagher constituted sufficient notice to ASSC (*see generally Rendeiro v State-Wide Ins. Co.*, 8 AD3d 253 [2d Dept 2004]). Nevertheless, ASSC makes no showing of prejudice based on late notice (*see Insurance Law §3420[d]*).

Plaintiffs' argument that ASSC waived any right to disclaim by failing to serve the disclaimer on Ocean Terrace is unavailing. Here, because ASSC's denial was based on lack of coverage under the additional insured endorsement as opposed to an exclusion under the policy, a timely disclaimer is not necessary (*see Markevics v Liberty Mut. Ins. Co.*, 97 NY2d 646 [2001]). Regardless, ASSC's denial of coverage is without merit.

It is well settled that an insurer's duty to defend is broader than its duty to indemnify (*see Automobile Ins. Co. of Hartford v Cook*, 7 NY3d 131 [2006]). "An insurer's duty to defend will be triggered by allegations in the complaint suggesting a reasonable possibility of coverage irrespective of the apparent merits of the allegations" (*Stout v 1 East 66th Street Corp.*, 90 AD3d 898, 902 [2d Dept 2011]). "If [a] complaint contains any facts or allegations which bring the claim even potentially within the protection purchased, the insurer is obligated to defend" (*Regal Constr. Corp v National Union Fire Ins. Co. of Pittsburgh, PA*, 15 NY3d 34, 37 [2010]). "This standard applies equally to additional insured and named insureds" (*id.* at 37).

"The Court of Appeals has held that when an endorsement providing additional insured coverage, as here, 'is restricted to liability for any bodily injury caused... by the acts or omissions of the named insured [or for those acting on the named insured's behalf], the coverage applies to injury proximately caused by the named insured [or those acting on the named insured's behalf]' " (*Citizens Ins. Co. of America v American Ins. Co.*, 187 AD3d 461, 461 [1st Dept 2020] quoting *Burlington Ins. Co. v NYC Tr. Auth.*, 29 NY3d 313, 317 [2017]). The purpose of the endorsement is to "provide coverage for an additional insured's vicarious liability or contributory negligence, and to prevent coverage for the additional insured's sole negligence" (*id.* at 461 quoting *Burlington Ins Co.* at 326).

Here, as the underlying complaints allege that the plaintiffs were injured due to the negligence of all defendants, including S & N, and that all defendants, including S & N, were a proximate cause of those injuries, ACCS's duty to defend Ocean Terrace as an additional insured is implicated (*see Mt. Hawley Ins. Co. v American States Ins. Co.*, 168 AD3d 558 [1st Dept 2019]) and it is required to pay Ocean Terrace's defense costs in the underlying action from June 14, 2019, the date it refused tender (*id.* at 559; *see also Nation Union Fire Ins. Co. of Pittsburgh, PA v Greenwich Ins. Co.*, 103 AD3d 473, 474 [1st Dept 2013] [internal quotation marks and citations omitted]). In addition, pursuant to the parties' construction contract which provides Ocean Terrace the right to recoup attorney's fees and costs incurred in enforcing the provisions of S & N's indemnity obligations, Ocean Terrace is entitled to the legal fees and costs it has expended in this declaratory judgment action (*cf. Hooper Assocs, Ltd. v AGS Computers, Inc.*, 74 NY2d 487 [1989]).

While the duty to defend has been established, defendants correctly argue that it is premature to declare that ACCS is obligated to indemnify Ocean Terrace in the underlying personal injury actions. Here, as no discovery has taken place in the underlying actions it is too early to determine whether S & N (or its subcontractor Lintech) was a proximate cause of the injuries (*see Lexington Ins. Co. v Kiska Dev.*, 182 AD3d 462 [1st Dept 2020]).

Accordingly, it is

Ordered, that the portion of plaintiffs' motion for summary judgment seeking a declaration that ASSC has a duty to provide a primary, non-contributory defense to Ocean Terrace in the three underlying lawsuits pending in Supreme Court, Kings County, *Joseph Ryan and Elizabeth Ryan v. AANYC et. al.* (Index no. 593126/19); *James Ryan v AANYC, et al.* (Index No. 503248/19); and *Joseph Michael Ryan v AANYC, et al.* (Index No. 503254/19) is granted; and it is further

Ordered, that the portion of plaintiffs' motion for summary judgment seeking a declaration that ASSC has a duty to indemnify Ocean Terrace in the underlying personal injury actions is denied as premature; and it is further

Ordered, that the portion of plaintiffs' motion for summary judgment seeking a declaration that ASSC is required to reimburse Ocean Terrace for its legal fees, costs, and expenses in the underlying personal injury actions is granted, and ASSC shall pay such costs from June 14, 2019, the date it refused tender; and it is further

Ordered, that the portion of plaintiffs' motion for summary judgment seeking an award for the legal fees, costs and expenses that Ocean Terrace has expended in this declaratory judgment action is granted.

This constitutes the decision/order of the Court

Dated: March 5, 2021

Enter,



Karen B. Rothenberg
J.S.C.