SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. DAVID BENJAMIN COHEN** **PART** **IAS MOTION 58EFM**

Justice

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INDEX NO. 651979/2017

WILCOX DEVELOPMENT CORP. and UNITED SPECIALTY INSURANCE COMPANY,

Plaintiffs,

MOTION SEQ. NO. 001

- v -

HDI GLOBAL INSURANCE COMPANY,

DECISION + ORDER ON MOTION

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59

were read on this motion to/for SUMMARY JUDGMENT.

In this declaratory judgment action, plaintiffs Wilcox Development Corporation (Wilcox) and United Specialty Insurance Company (USIC) move, in Motion Seq. No. 001 (Doc No. 39),[1] for summary judgment (CPLR 3212) against defendant, HDI Global Insurance Company (HDI), declaring that: (a) there are HDI policies which afford additional insured coverage to Wilcox for claims asserted against Wilcox in an action captioned *Richard Caracciolo v SHS Ralph, LLC, Dina Realty, LLC and Wilcox Development Corp.* commenced in Supreme Court, Kings County under Index No. 512132/2016 (the Underlying Action); (b) HDI is required to defend and indemnify Wilcox in the Underlying Action pursuant to said policies; and (c) HDI must accordingly reimburse plaintiffs for expenses and attorneys' fees incurred to date and going forward, the amount of which is to be awarded with interest and determined at a court ordered hearing.

[1] References to "Doc No." followed by a number refers to documents filed in NYSCEF.

FACTUAL AND PROCEEDURAL BACKGOUND

On or about January 19, 2015[2], SHS Ralph LLC (SHS), as owner of 1414 Ralph Avenue, Brooklyn NY (the Premises), executed a contract (Doc No. 5) (the Contract) with ThyssenKrupp Elevator Corporation (TKE) to, *inter alia*, install two elevators (the Project) at the Premises. The Contract provided that: "Hoistway and Machine Room OSHA compliant removable barricades are to be provided by others prior to installation [TKE] will replace if removed by [TKE]." Neil Simon, principal of SHS, which owned the Premises, testified at his deposition (Simon dep tr) (Doc No. 48) that he executed the Contract on behalf of SHS and the reference to "others" here meant that Wilcox, the general contractor of the Project, was responsible for installing barricades at the job site (Simon dep tr at 114:8-14; and 115:18-116:12).

Annexed to the Contract is an August 18, 2015 "Subcontract Agreement Rider" (the Rider) (Doc No. 37). The Rider states, in pertinent part, as follows:

> "1. Indemnity. In consideration of the Contract Agreement, and to the fullest extent permitted by law, the Subcontractor shall defend and shall indemnify, and hold harmless, at the Subcontractor's sole expense, the Contractor, the Owner of the property, and the officers, directors, agents, employees, successors and assigns of each of them from and against all liability or claimed liability for bodily injury or death to any person(s), and for any and all property damage including all reasonable attorney fees, disbursements and related costs, arising out of or resulting from the Work covered by this Contract Agreement to the extent such Work was performed by or contracted through the Subcontractor or by anyone for whose acts that Subcontractor may be held liable, excluding only liability created by the sole and exclusive negligence of the Indemnified Parties. This Indemnity agreement shall survive the completion of any work specified in the Contract Agreement."

[2] The signature page of the contract reflects the date signed as January 19, 2015. However, on that page there is also a stamp which states, "The attached amendment No. 1 shall be made part of this agreement" and that stamp is dated February 9, 2015.

(The Indemnification provision). There is no dispute that TKE was the "Subcontractor," that Wilcox was the general contractor or "Contractor" for the Project identified in the Contract, and that SHS was the "Owner" referenced in the Rider. The aforementioned Indemnification provision provides, therefore, that TKE indemnify Wilcox, in accordance with its terms. Under the "List of Indemnified Parties and Additional Insureds" section of the Rider, Wilcox is named as an indemnified party and as an additional insured (Doc No. 37 at page 2 of the Rider). The Rider further provides:

> "2. Insurance. The Subcontractor shall procure and shall maintain until final acceptance of the Work, such insurance as will protect the Owner/General Contractor, all entities the Owner/General Contractor is required to indemnify and hold harmless, the Owner, and their officers, directors, agents and employees, for claims arising out of or resulting from Subcontractor's Work under this Contract Agreement, whether performed by the Subcontractor, or by anyone directly or indirectly employed by Subcontractor, or any anyone for whose acts Subcontractor may be liable. Such insurance shall be provided by an insurance carrier rated "A-" or better by A.M. Best and lawfully authorized to do business in the jurisdiction where the Work is being performed.
>
> 2.1 The Subcontractor's insurance shall include contractual liability coverage and additional insured coverage for the benefit of the Owner/General Contractor, Owner and anyone else the Owner is required to name (as set forth in the schedule below) and shall specifically include coverage for completed operations. The insurance required to be carried by the Subcontractor and any Sub-Sub-Contractors shall be PRIMARY AND NONCONTRIBUTORY. With respect to each type of insurance specified hereunder, the Owner/General Contractor's and Owner's insurances shall be excess to Subcontractor's insurance.
>
> 2.2 The Subcontractor warrants that the coverage provided under the commercial general liability policy shall be written on an "occurrence" basis with coverage as broad as the Insurance Office Inc 's form and that no policy provisions shall restrict, reduce, limit or otherwise impair contractual liability coverage or the Owner/General Contractor's, Owner's (or others as required and as listed below) status as additional insured."

The signature page of the Rider states that "The attached amendment No. 1 shall be made part of this agreement." Amendment No. 1 (the Amendment) (Doc. No 35) also dated August 18, 2015 states, in pertinent part, as follows:

> "1. Indemnity: Amend (including 2. Insurance) to indemnity, defend and hold harmless is limited to [TKE's] acts and actions and in no way to include the acts, actions, omissions, neglects or bare allegations of a party indemnified hereunder. In no event shall [TKE] be liable for indirect, special, liquidated, incidental, exemplary or consequential damages.
>
> 2. Insurance: Amend so the additional insured is defended and indemnified for claims arising from [TKE's] acts, actions, omissions or neglects, but is not defended or indemnified for its own acts, actions, omissions, neglects or bare allegations. Amend so all aggregate shall apply on a per policy basis. Amend so the waiver of subrogation shall be limited to extent any claim is caused by [TKE]."

As proof of compliance with its contractual obligations, TKE issued to Wilcox a copy of a Certificate of Insurance (COI) (Doc No. 38) listing Wilcox as an additional insured with respect to TKE's general liability and umbrella policies with HDI which issued a policy numbered GLD12574-02 (Doc No. 39) to TKE for the period of October 1, 2015 to October 1, 2016 with a limit of $1 million per occurrence and an aggregate limit of $1 million (the General Liability policy); and a policy numbered GLD11085-07 with a limit of $4 million per occurrence and an aggregate limit of $8 million (Doc No. 40) to TKE for the period of October 1, 2015 to October 1, 2016 (the Umbrella Liability policy) (collective, the HDI policies). The "Additional Insured Endorsement" of the HDI policies states, in pertinent part, as follows:

> "Section II - Who Is An Insured - is amended by adding the following paragraph: ...
>
> 4. Any person firm, corporation or government body for whom you are obligated by virtue of a written contract or agreement entered into with respect to your manufacture, sale, distribution, installation,

> service, repair or inspection of elevators and related devices, parts and components, to afford coverage such as provided by this policy.
>
> The coverage provided for any such additional insured is expressly limited to apply only to liability arising out of operations conducted by or for you under the written contract or agreement and then only to the extent required by such written agreement. No coverage is provided for any additional insured for the liability which arises in any manner, directly or indirectly, other than from operations conducted by or for you. All other terms and conditions remain unchanged."

(The Additional Insured Provision of the HDI policies).

On or about July 15, 2016, Richard Caracciolo (Caracciolo), commenced the Underlying Action alleging that he sustained personal injuries on January 14, 2016 while working as a mechanic for the TKE. Specifically, Caracciolo testified at his deposition that he fell approximately eight to ten feet to the ground (Caracciolo dep tr at 112:18-21) (Doc No. 41) when he exited the mezzanine level after installing electrical call button boxes and fell because there was no floor present outside the elevator (Caracciolo dep tr at 105:15-7; 107:5-11; 112:12-21; and 113:6-11). Caracciolo alleges in his Summons and Complaint (Doc No. 31) in the Underlying Action that the Premises owner SHS, its management company Dina Realty LLC, and the Project Contractor Wilcox (collectively, the defendants in the Underlying Action) are responsible for his injuries because they were negligent, careless and/or reckless in failing to provide a safe place to work, and violated the New York Labor Law and the New York Industrial Code. The defendants in the Underlying Action filed and served responsive pleadings generally denying the allegations in Caracciolo's Complaint and setting forth various affirmative defenses.

The SHS onsite construction supervisor and site safety coordinator for the Project, Greg DePetro (DePetro) testified at his deposition in the Underlying Action (DePetro dep tr) (Doc No. 47) that it was Wilcox's responsibility to install OSHA-compliant barricades (DePetro dep tr at

151:3-7). DePetro further testified that, while there was a guardrail in place on the first floor (*id.* at 59:19-60:5), there was "no guardrail required on the second floor opening" where Caracciolo's accident occurred because "the guardrail is in place to prevent people from falling into the shaft, not out of the shaft" (*id.* at 60:2-5).

By letter dated September 26, 2016 (Doc No. 41), Wilcox tendered its defense and indemnification in the Underlying Action to HDI, asserting that TKE was obligated to defend, indemnify and hold harmless Wilcox for any claims arising from TKE's work at the Premises. HDI did not respond to the letter. By letter dated October 26, 2016 (Doc No. 43), Wilcox renewed the tender of its defense and indemnification to HDI. Approximately three months later, by a response letter dated January 9, 2017 (Doc No. 44), HDI denied Wilcox's request that HDI defend and indemnify Wilcox on grounds that the Additional Insured Provision of the HDI policies

> "only applies to liability arising out of [TKE's] operations. It expressly states that there is no coverage for any additional insured for liability which arises in any manner, directly or indirectly, other than from operations conducted by or for [TKE]. There are no allegations in the Complaint [of the Underlying Action] that, if proven, would establish that the injuries sustained by [ ] Caracciolo arose out of [TKE] operations. The injuries could have arisen from any number of reasons other than operations performed by TKE."

(the Notice of Disclaimer).

On or about April 12, 2017, several months after the Notice of Disclaimer, Wilcox and USIC[3] commenced the captioned declaratory judgment action by service of a Summons and Complaint (Doc No. 1) against TKE's insurer, HDI, asserting that HDI owes Wilcox additional

[3] USIC is the general liability insurer for Wilcox and in accordance with a commercial general liability insurance policy (Doc No. 4), USIC has been defending Wilcox in the Underlying Action.

insured coverage for the alleged damages/personal injuries sustained by Caracciolo as claimed in the Underlying Action.

Numerous decisions rendered in the Underlying Action have determined certain salient facts relevant to the instant summary judgment application before the court.

On or about January 2, 2019 SHS, as the defendant/third-party plaintiff in the Underlying Action, moved for summary judgment (CPLR 3212) (Doc No. 50) dismissing Caracciolo's claims against SHS, and Wilcox and TKE's cross claims against SHS for indemnification. On or about March 15, 2019, SHS further moved for summary judgment (CPLR 3212) on its Third-Party Complaint in the Underlying Action against TKE. On or about January 31, 2019, TKE moved for summary judgment dismissing (CPLR 3212) (Doc No. 51) the Underlying Action and Third-Party Complaint against it in that action. All three of the aforementioned motions in the Underlying Action were consolidated for disposition by decision and order dated June 12, 2019 (Doc No. 59) wherein the court (Rivera, J.) determined that there are:

> "triable issues of fact as to the scope and nature of the work [Caracciolo] was supposed to perform. There [are] also triable issues of fact as to whether the safety devices provided to plaintiff were sufficient under the circumstances and whether [Caracciolo] was the sole proximate cause of his injury ... SHS [ ] did not demonstrate that Wilcox had control over [Caracciolo's] work to establish a prima facie entitlement to summary judgment for common law indemnification."

(The Underlying decision). The court further noted in the Underlying decision that SHS withdrew the branch of its application seeking contractual indemnification against Wilcox, and denied SHS's application for contractual indemnification against TKE for failing to annex "a complete copy of the subject contract in support of its motion." TKE's motion to dismiss the claim against it for contractual indemnification was denied as "premature" because TKE failed to demonstrate "that the triggering event for indemnification does not exist."

Wilcox's January 31, 2019 motion for summary judgment (CPLR 3212) (Doc No. 49) dismissing the claims against it in the Underlying Action was denied by decision and order (Rivera, J.) dated June 12, 2019 (the 2nd Underlying decision) (Doc No. 49) on grounds that there are "triable issues of fact regarding the scope and nature of the work [Caracciolo] was supposed to perform ... and whether [Caracciolo] was the sole proximate cause of his own injury."

On or about July 17, 2019 TKE moved (CPLR 3103) (Doc No. 51) for a protective order in the Underlying Action vacating SHS's Notice to Admit dated June 27, 2019. By decision and order dated December 18, 2019 (Doc No. 51) the court (Rivera, J.) granted TKE's application, noting that "the Notice to Admit was used improperly to seek admissions as to ultimate issues of fact, including which contract controls on a contractual indemnity case where such determination is to be determined by the trier of fact ...". The authenticity of the Contract, together with the Rider attendant therein, was vehemently challenged by motion practice in the Underlying Action.

By order dated October 2, 2019 (Doc. No. 28), the parties in the captioned declaratory judgment action were directed to complete all depositions of fact witnesses on or before January 31, 2020. Wilcox and USIC contend that no depositions are needed because this declaratory judgment action may be disposed of by documentary evidence including, but not limited to, the Contract; the Rider to the contract; deposition transcripts; and court orders in the Underlying Action.

ARGUMENTS

Wilcox and USIC contend that the court must grant its motion for summary judgment based upon the pleadings, documentary evidence and controlling law to declare that HDI must indemnify and defend Wilcox in the Underlying Action because: (1) the Contract, the Rider to the Contract, the Amendment and the HDI policies contain unambiguous language establishing

that Wilcox is an additional insured entitled to indemnification and defense by HDI in the Underlying Action; (2) the Rider and the Amendment were authenticated by SHS's principal at his deposition when he affirmed that he executed these documents at the same time as the Contract (Simon dep tr at 32:825; and 33:8-18); (3) the Contract identifies Wilcox as an additional insured and therefore Wilcox is as an "additional insured" to the HDI policies issued to TKE; (4) Caracciolo, as TKE's employee, was injured while he was performing elevator installation work at the Premises in accordance with the Contract, thereby triggering Wilcox's entitlement to indemnification/defense as an additional insured under the HDI policies issued to TKE which supervised and directed Caracciolo's work; (5) Caracciolo was the sole proximate cause of his accident; and (6) Wilcox was in compliance with the applicable OSHA standards for guarding of openings with regard to the Project and was not obligated to protect an opening in the elevator shaftway where there was no floor in place, a fact which is not disputed.

Defendant HDI argues that the instant application must be denied because: (1) movants failed to present an affidavit from someone with personal knowledge of the facts to authenticate the documentary evidence presented by in support of the instant application; (2) there is no evidence confirming that Wilcox is an "additional insured" under the Contract; (3) the instant application is premature because discovery is incomplete insofar as party depositions have yet to be held: (4) factual disputes surrounding the relevant and applicable contract at the time of the accident, as identified in the court orders of the Underlying Action, preclude the summary disposition of this matter; (5) there is a factual dispute as to whether Caracciolo's and/or Wilcox's own negligence caused Caracciolo's injuries since Caracciolo fell, at least in part, because there was no guardrail/barrier on the floor he exited and it was Wilcox's responsibility to install guardrails at the Project site; (6) the Contract itself does not contain any

indemnification or additional insured obligation undertaken by TKE in connection with the Project work and, to the extent the court deems that the Rider and the Amendment were part of the Contract – although this was deemed a factual dispute in the Underlying Action - said documents, in addition the HDI policies, limit the availability of additional insured coverage to scenarios where Wilcox was not negligent and did not contribute to the cause of the accident – something Wilcox has been unable to establish as a matter of law and, as noted in the court decisions in the Underlying Action, is factually disputed; and (7) the Rider does not reference a particular project/job to which the list of parties and "additional insureds" are subject.

DISCUSSION

"'The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case'" (*Santiago v Filstein*, 35 AD3d 184, 185-186 [1st Dept 2006], *quoting Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). The burden then shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact" (*Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006], *citing Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *see also DeRosa v City of New York*, 30 AD3d 323, 325 [1st Dept 2006]). The evidence presented in a summary judgment motion must be examined in the "light most favorable to the party opposing the motion" (*Udoh v Inwood Gardens, Inc.*, 70 AD3d 563 1st Dept 2010]) and bare allegations or conclusory assertions are insufficient to create genuine issues of fact (*Rotuba Extruders v Ceppos,* 46 NY2d 223, 231 [1978]).

It is well established that, on a motion for summary judgment, the affirmation of an attorney with no personal knowledge of the facts may be considered by the court provided that

the relief is based on documentary evidence relevant to the issue (see, *Spink v Cohen*, 156 AD2d 201 [1st Dept 1989]). Here, the relief sought is based upon the Contract, the Rider and the Amendment to the Contract, in addition to deposition transcripts in the pending Underlying Action, and the court may thus consider the within application submitted only with an attorney affirmation. Additionally, the bare assertion that the instant summary judgment motion is premature insofar as the parties have not completed discovery in the captioned action, is insufficient to preclude consideration of the instant motion. HDI failed to establish what would be revealed in discovery that would warrant denial of the summary judgment (see *State ex rel. Perkins v Cooke Ctr. for Learning & Dev., Inc.,* 164 AD3d 445, 446 [1st Dept 2018], *lv denied* 32 NY3d 919 [2019] [party requesting additional discovery must state more than "a mere hope that evidence sufficient to avoid summary judgment may be uncovered"]).

None of the signatories to the documents submitted in support of the instant motion dispute the authenticity of the same. Moreover, the court in the Underlying Action denied consideration of the Contract in the motions it decided because the complete contract was not submitted. Here, the Contract is submitted in its entirety since the Rider and the Amendment have also been produced for consideration.

A declaratory judgment is a discretionary remedy which may be granted "as to the rights and other legal relations of the parties to a justiciable controversy whether or not further relief is or could be claimed" (CPLR 3001; *see also Long Is. Light. Co v Allianz Underwriters Ins. Co.*, 35 AD3d 253 [1st Dept 2006]). In a declaratory judgment action, the insured bears the burden to establish the existence of coverage (*Platek v Town of Hamburg*, 24 NY3d 688, 694 [2015]; *Lend Lease (U.S.) Const. LMB Inc. v Zurich Am. Ins. Co.,* 136 AD3d 52, 56 [1st Dept 2015], *affd sub nom Lend Lease (US) Const. LMB Inc. v Zurich Am. Ins. Co.,* 28 NY3d 675 [2017]).

A party is not entitled to additional insured coverage if it is not named on face of the policy or required to be named pursuant to a written contract with the primary insured (*Nat'l Abatement Corp. v Nat'l Union Fire Ins. Co. of Pittsburgh, PA*, 33 AD3d 570, 571 [1st Dept 2006]). To determine whether an entity is an additional insured under a policy, the court must look to both the policy and the underlying contract entered into between the parties (see generally, *Greater New York Mut. Ins. Co. v. Mutual Marine Office, Inc.,* 3 AD3d 44, 769 NYS2d 234 [1st Dept 2003]).

Here, there is no dispute that TKE agreed to name Wilcox as an additional insured as evidenced by the Rider. Although HDI raises the question of whether the Rider is applicable to the Project pursuant to the Contract, TKE does not claim that the Rider pertained to some other project, and Simon admitted at his deposition on behalf of SHS that SHS was aware of the Rider and that the Contract was essentially negotiated and signed because the insurance carriers for the parties insisted that the language in the Rider be part of the same (see Simon dep tr at 33:8-16). Furthermore, the Amendment was specifically referenced in the signature page of the Contract and was signed by SHS on August 18, 2015. Moreover, HDI never affirmatively denied coverage in the Notice of Disclaimer on the ground that Wilcox is not an "additional insured" under the HDI policies.

"An insurance agreement is subject to principles of contract interpretation" and "as with the construction of contracts generally, unambiguous provisions of an insurance contract must be given their plain and ordinary meaning, and the interpretation of such provisions is a question of law for the court" (*Burlington Ins. Co. v NYC Transit Auth.*, 29 NY3d 313, 321 [2017] [internal quotation marks and citations omitted]). Moreover, "[w]hen it comes to exclusions from coverage, the exclusion must be specific and clear in order to be enforced (*Seaboard Sur. Co. v*

Gillette Co., 64 NY2d 304, 311 [1984]) and "ambiguities in exclusions are to be construed most strongly against the insurer" (*Heartland Brewery, Inc. v Nova Cas. Co.*, 149 AD3d 522, 523 [1st Dept 2017]).

"A party is entitled to full contractual indemnification provided that the 'intention to indemnify can be clearly implied from the language and purposes of the entire agreement and the surrounding facts and circumstances'" (*Drzewinski v Atlantic Scaffold & Ladder Company, Inc.,* 70 NY2d 774, 777 [1987], quoting *Margolin v New York Life Ins. Co.*, 32 NY2d 149, 153 [1973]; see also *Karwowski v 1407 Broadway Real Estate, LLC,* 160 AD3d 82 [1st Dept 2018]; *Torres v Morse Diesel Intl., Inc.,* 14 AD3d 401, 403 [1st Dept 2005]). "'The right to contractual indemnification depends upon the specific language of the contract'" (*Trawally v City of New York,* 137 AD3d 492, 492-493 [1st Dept 2011], quoting *Alfaro v 65 W. 13th Acquisition, LLC,* 74 AD3d 1255, 1255 [2d Dept 2010]). Indemnity contracts "must be strictly construed so as to avoid reading unintended duties into them" which the parties did not intend to assume (*905 5th Assoc., Inc. v Weintraub*, 85 AD3d 667, 668 [1st Dept 2011]).

Under New York law, the duty to indemnify is unquestionably narrower than the duty to defend (see *Ruder & Finn Inc. v. Seaboard Surety Co.*, 52 NY2d 663, 669 [1981]). Thus, courts have held that issues of fact as to liability in an underlying personal injury action render premature the conclusion that an insurer has a duty to indemnify other parties (see *Mt. Hawley Ins. Co. v. Am. States Ins. Co.*, 168 AD3d 558, 559 [1st Dept 2019]; *N. River Ins. Co. v. ECA Warehouse Corp.*, 172 AD2d 225, 226 [1st Dept 1991]["[W]hether it is required to indemnify defendant depends upon resolution of the underlying action, and that portion of the complaint which seeks such relief must be dismissed as premature"]). Thus, until an underlying action is resolved, denial of a summary judgment motion based on an alleged "duty to indemnify" is,

indeed, appropriate (*see Public Service Mut. Ins. Co. v. Goldfarb*, 53 NY2d 392, 398-99, 442 NYS2d 422 [1981] [any determination as to indemnity must await a trial of the underlying claims]; *Chunn v New York City Hous. Auth.*, 55 AD3d 437, 438 [1st Dept 2008][issues of fact as to liability in the underlying personal injury action render premature the conclusion that the insurers have a duty to indemnify]).

Here, since there has been no determination as to liability of the respective parties in the Underlying Action, there is not yet a compensable "loss" to be covered under the HDI Policies, any declaration that HDI is required to indemnify Wilcox is premature, and Wilcox's summary judgment must thus be denied in this regard (*see also Vargas v City of New York*, 158 AD3d 523, 525 [1st Dept 2018]). Wilcox has failed to meet its burden of proving that there is no possibility that there could be a finding of negligence against it entitle it to indemnification at this juncture of the litigation (*see Martin v Little 40 Worth Assoc., Inc.*, 72 AD3d 483 [1st Dept 2010]; *Correia v Professional Data Mgt.,* 259 AD2d 60, 64 [1st Dept 1999]).

Whether a party is an additional insured entitled to a defense is a matter of law for the court to decide (see *Vigilant Ins. Co. v. Bear Stearns Co., Inc.,* 10 NY3d 170, 177 [2008]). "A duty to defend exists whenever the allegations in the complaint in the underlying action, construed liberally, suggest a reasonable possibility of coverage, *or* where the insurer has actual knowledge of facts establishing such a reasonable possibility" (*City of New York v Wausau Underwriters Ins. Co.*, 145 AD3d 614, 617 [1st Dept 2016] [emphasis supplied], *quoting DMP Contr. Corp. v Essex Ins. Co.*, 76 AD3d 844, 845 [1st Dept 2010]). The inquiry is not limited to the four corners of the underlying complaint; the court may also consider facts extrinsic to the pleading in determining the insurer's defense obligations (*Fitzpatrick v Am. Honda Motor Co.*, 78 NY2d 61, 66–68 [1991]). Such a duty may thus be found even "where the complaint on its

face [does] not state a covered claim but the underlying facts made known to the insurer by its insured unquestionably involve[] a covered event" (*id.* at 69).

It is well established that, where an insurance policy includes the insurer's promise to defend the insured against specified claims and indemnify for an actual liability, the duty of an insurer to defend is broader than its obligation to indemnify (*Continental Cas. Co. v Rapid-American Corp.,* 80 NY2d 640, 648 [1993], *affg* 177 AD2d 61 [1st Dept 1992]). The duty to defend is broad and an insurer will be called upon to provide a defense whenever the allegations of the complaint suggest a reasonable possibility of coverage (*Continental Cas. Co. v Rapid-American Corp.*, *supra* at 648). Indeed, an insurer's duty to defend is "derived from the allegations in the complaint and the terms of the policy" (*Holman v TransAmerica Ins. Co.,* 81 NY2d 1026, 1028 [1993], *affg* 183 AD2d 589 [1st Dept 1992]). If the allegations in the complaint, liberally construed, fall within the scope of the policy, the insurer must defend its insured (*Ruder Finn v Seaboard Sur. Co.,* 52 NY2d 663, 670 [1981], *affg* 71 AD2d 216 [1st Dept 1979]).

In this case, the Additional Insured Provision of the HDI policies provides that coverage is afforded to the additional insured only as to "liability arising out of operations conducted by" TKE. Movants admit that this language limits the coverage provided to them as "additional insured" (see Reply papers at ¶ 28, Doc No. 57) and indeed it does. In fact, the agreement between the parties pursuant to the Amendment states that Wilcox "is defended and indemnified for claims arising from [TKE's] acts, actions, omissions or neglects, but is not defended or indemnified for its own acts, actions, omissions, neglects or bare allegations."

The term "arising out of" in an additional insured clause has been determined by the Court of Appeals to mean "originating from, incident to, or having connection with. It requires only that there be some causal relationship between the injury and the risk for which coverage is provided" (*Hunter Roberts Constr. Group, LLC v. Arch Ins. Co.,* 75 AD3d 404, 408, [2010], *quoting Regal Constr. Corp. v National Union Fire Ins. Co. of Pittsburgh, Pa.*, 64 AD3d 461 [2009], *affd* 15 NY3d 34 [2010]). Here, there is a sufficient connection alleged in the pleadings of the Underlying Action to trigger a defense under the additional insured's "arising out of" endorsement because Caracciolo, who was employed by HDI's insured, TKE, was injured while performing work under the Contract for TKE. For the purposes of providing a defense pursuant to HDI's policies, the applicability of a defense therein is to be liberally construed, and Wilcox's alleged negligence is "immaterial to this determination" (*id.* at 408).

The court has considered all the remaining arguments raised by the parties and finds them to be without merit and/or factually disputed.

Accordingly, it is hereby:

ORDERED that the branch of the application (Motion Seq. No. 001) by plaintiffs Wilcox Development Corporation and United Specialty Insurance Company for a declaration that defendant HDI Global Insurance Company's policies afford additional insured coverage to Wilcox Development Corporation for claims asserted against it in an action captioned *Richard Caracciolo v SHS Ralph, LLC, Dina Realty, LLC and Wilcox Development Corp.,* commenced in Supreme Court, Kings County under Index No. 512132/2016 (the Underlying Action), is granted; and it is

ADJUDGED and DECLARED that Wilcox Development Corporation is an additional insured under the HDI policy numbered GLD12574-02 and policy numbered GLD11085-07 issued to ThyssenKrupp Elevator Corporation; and it is further

ORDERED that the branch of the application by plaintiffs Wilcox Development Corporation and United Specialty Insurance Company for a declaration that HDI Global Insurance Company must indemnify movants in the Underlying Action is denied as premature; and it is further

ORDERED that the branch of the application by plaintiffs Wilcox Development Corporation and United Specialty Insurance Company for a declaration that HDI Global Insurance Company must defend movants in the Underlying Action is granted; and it is further

ADJUDGED and DECLARED that HDI Global Insurance Company is obligated to provide defense to Wilcox Development Corporation in the Underlying Action; and it is further

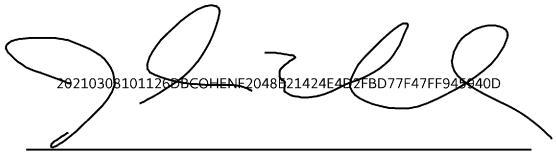
ORDERED that the branch of the application by plaintiffs Wilcox Development Corporation and United Specialty Insurance Company seeking reimbursement from HDI Global Insurance Company for plaintiffs' expenses and attorneys' fees incurred to date and going forward in defending against the claims in the Underlying Action is granted; and it is further

ORDERED that that the recovery of attorneys' fees to be awarded to movants is severed and the issue of the amount of reasonable attorneys' fees plaintiffs may recover against the defendant is referred to a Special Referee to hear and determine; and it is further

ORDERED that counsel for the plaintiffs shall, within 30 days from the date of this order, serve a copy of this order with notice of entry, together with a completed Information

Sheet[4], upon the Special Referee Clerk in the Motion Support Office (Room 119M), who is directed to place this matter on the calendar of the Special Referee's Part for the earliest convenient date; and it is further

ORDERED that the parties are to appear for a compliance conference on April 19, 2021 at 3:30 p.m. unless they e-mail a discovery stipulation to be so-ordered by the court to SFC-Part58-Clerk@nycourts.gov at least two business days prior to the scheduled conference date.



3/8/2021
DATE

DAVID BENJAMIN COHEN, 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

[4] Copies are available in Rm. 119M at 60 Centre Street and on the Court's website at www.nycourts.gov/supctmanh under the "References" section of the "Courthouse Procedures" link).