

AIX Specialty Ins. Co. v Steel Fab NY, Inc.

2021 NY Slip Op 32415(U)

October 28, 2021

Supreme Court, Kings County

Docket Number: 525584/2018

Judge: Richard J. Montelione

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: PART DJMP

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AIX SPECIALTY INSURANCE COMPANY,

DECISION/ORDER

Plaintiff,
-against-

Index No.: 525584/2018
Motion Date:
Motion Cal. No.:
Mot. Seq. 1, 2, 3

STEEL FAB NY, INC., SULLIVAN HEIGHTS, LLC, ZNKO
CONSTRUCTION, INC., G & C CRANE SERVICE, LLC,
OSWALDO ARTURO QUINDUISACA CHILLOGALLI, JUAN
CARLOS RIVERA VIVANCO,

Defendants.
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After oral argument, the following papers were read on this motion pursuant to CPLR 2219(a):

Papers	Numbered
<p>Plaintiff AIX Specialty Insurance Company's ("ASIC") motion dated January 21, 2020 seeks an Order: (1) granting default judgments in ASIC's favor pursuant to CPLR 3215 against Defendant Steel Fab NY, Inc. ("Steelfab") and Defendant Oswaldo Arturo Quinduisaca Chillogalli ("Chillogalli"); (2) granting Summary Judgment in ASIC's favor pursuant to CPLR 3212 against Sullivan Heights, LLC ("Sullivan Heights"), ZNKO Construction, Inc. ("ZNKO"), G & C Crane Service LLC, and Juan Carlos Rivera Vivanco; (3) adjudging, declaring and decreeing that: there is no coverage under the ASIC Policy available to Steelfab, ZNKO and Sullivan Heights, or any other persons or entities, in the underlying actions; that ASIC has no obligation to defend or indemnify Steelfab, ZNKO, Sullivan Heights, or any other persons or entities in the underlying actions; and (4) awarding any other relief this Court deems just, proper and equitable;</p> <p>Supporting papers:</p> <p>Attorney Affirmation of Michael P. Kandler, Esq., affirmed on January 21, 2020; Affidavit of Steven M. Mills, President of Excess and Surplus Lines for the Hanover Insurance Group, Inc., which includes AIX Specialty Insurance Company ("ASIC") (collectively, "Hanover"), sworn to on January 13, 2020; Certificate of Conformity of Lori Fowler, Notary Public, State of Georgia, January 13, 2020;</p> <p>EXHIBIT(S) - A (Motion #1) Kandler Ex. A - Vivanco Complaint EXHIBIT(S) - B (Motion #1) Kandler Ex. B - Vivanco T.P. Complaint EXHIBIT(S) - C (Motion #1) Kandler Ex. C - Chillogalli Complaint EXHIBIT(S) - D (Motion #1) Kandler Ex. D - Chillogalli T.P. Complaint EXHIBIT(S) - E (Motion #1) Kandler Ex. E - DJ Complaint EXHIBIT(S) - F (Motion #1) Kandler Ex. F - Sullivan/ZNKO Answer to DJ EXHIBIT(S) - G (Motion #1) Kandler Ex. G - G&C Answer to DJ EXHIBIT(S) - H (Motion #1) Kandler Ex. H - Vivanco Answer to DJ EXHIBIT(S) - I (Motion #1) Kandler Ex. I - ASO re DJ on SteelFab EXHIBIT(S) - J (Motion #1) Kandler Ex. J - AOS re DJ on Chillogalli</p>	

<p>EXHIBIT(S) - K (Motion #1) Kandler Ex. K - ASIC's Notice to Steelfab EXHIBIT(S) - L (Motion #1) Kandler Ex. L - Motion and Order</p> <p>Attorney Affirmation of Sarah J. Delaney, Esq., affirmed on January 17, 2020;</p> <p>EXHIBIT(S) - 1 (Motion #1) Delaney Ex. 1 - Printouts of NYC DOB EXHIBIT(S) - 2 (Motion #1) Delaney Ex. 2 - NYC DOB email responses to FOIL request EXHIBIT(S) - 3 (Motion #1) Delaney Ex. 3 - Copies of NYC DOB online records EXHIBIT(S) - 4 (Motion #1) Delaney Ex. 4 - Printout of public online records re SteelFab EXHIBIT(S) - 5 (Motion #1) Delaney Ex. 5 - Printout of public online records re ZNKO EXHIBIT(S) - 6 (Motion #1) Delaney Ex. 6 - FOIL Request</p> <p>Affidavit of Donna M. Normile, sworn to on January 16, 2020, employed by Hanover Insurance Group ("Hanover") as a National Liability Adjuster. Certificate of Conformity of Janis Simonelli, dated January 16, 2020;</p> <p>EXHIBIT(S) - 1 (Motion #1) Normile Ex. 1 - Policy EXHIBIT(S) - 2 (Motion #1) Normile Ex. 2 - 11/17/17 letter EXHIBIT(S) - 3 (Motion #1) Normile Ex. 3 - Tender letter EXHIBIT(S) - 4 (Motion #1) Normile Ex. 4 - 12/12/17 Disclaimer EXHIBIT(S) - 5 (Motion #1) Normile Ex. 5 - 9/5/18 Email EXHIBIT(S) - 6 (Motion #1) Normile Ex. 6 - 9/7/18 Denial letter EXHIBIT(S) - 7 (Motion #1) Normile Ex. 7 - Order EXHIBIT(S) - 8 (Motion #1) Normile Ex. 8 - 10/4/18 letter EXHIBIT(S) - 9 (Motion #1) Normile Ex. 9 - Vivanco VBOP</p> <p>Affidavit of Steven M. Mills, President of Excess and Surplus Lines for the Hanover Insurance Group, Inc., which includes ASIC (collectively, "Hanover"), sworn to on January 13, 2020; Certificate of Conformity of Lori Fowler, dated January 13, 2020;</p> <p>EXHIBIT(S) - A (Motion #1) Mills Ex. A - Policy EXHIBIT(S) - B (Motion #1) Mills Ex. B - Steelfab's Application EXHIBIT(S) - C (Motion #1) Mills Ex. C - CGL Classification Guide Entries</p>	
<p>Proposed intervenor-defendant Mt. Hawley Insurance Company's ("Mt. Hawley") Motion to Intervene, dated January 24, 2020 (Motion #2); Attorney Affirmation of John A. Mattoon, affirmed on January 24, 2020;</p> <p>EXHIBIT(S) - A (Motion #2) AIX Complaint EXHIBIT(S) - B (Motion #2) Steelfab Subcontracts EXHIBIT(S) - C (Motion #2) Mt. Hawley Policy EXHIBIT(S) - D (Motion #2) Mt. Hawley's Proposed Answer</p>	
<p>Defendants Sullivan Heights LLC and ZNKO Construction' Opposition to Plaintiff's Motion, by Joanna M. Roberto, Esq., duly affirmed on May 15, 2020 (Motion #1);</p> <p>EXHIBIT(S) - A (Motion #1) Insurance Journal Article</p>	

<p>EXHIBIT(S) - B (Motion #1) Heather Clemente Affidavit EXHIBIT(S) - C (Motion #1) Email</p>	
<p>Defendants Sullivan Heights LLC and ZNKO Construction's Cross Motion dated May 15, 2020 (Motion #3) (a) pursuant to CPLR §§ 3124, 3125 and 3126, dismissing Plaintiff's Complaint and dismissing all claims against Defendants, Sullivan Heights, LLC and ZNKO Construction, Inc. ("Defendants") for failing to provide discovery; (b) precluding Plaintiff from offering evidence in support of the allegations in Plaintiff's Complaint at trial for failure to provide discovery; or in the alternative (c) compelling Plaintiff to respond to outstanding discovery by a date certain and (d) and further relief as this Court may deem just, proper and equitable under the circumstances;</p> <p>Attorney Affirmation of Joanna M. Roberto, Esq., and Attorney Affirmation of good faith, each affirmed on May 15, 2020;</p> <p>EXHIBIT(S) - A (Motion #3) Denial of Insurance Letter EXHIBIT(S) - B (Motion #3) Initial S&C EXHIBIT(S) - C (Motion #3) Verified Answer EXHIBIT(S) - D (Motion #3) Interrogatories EXHIBIT(S) - E (Motion #3) Notice of EBT EXHIBIT(S) - F (Motion #3) Pltfs response to Demands EXHIBIT(S) - G (Motion #3) Pltf response to Inter EXHIBIT(S) - H (Motion #3) Normile Affidavit EXHIBIT(S) - I (Motion #3) Mills Affidavit EXHIBIT(S) - J (Motion #3) Plaintiffs Privilege Log 10.17.19 EXHIBIT(S) - K (Motion #3) 10.17.19 Ltr to Pltf Ltr to Pltf EXHIBIT(S) - L (Motion #3) 5.5.20 Ltr to Pltf</p>	
<p>Plaintiff's Attorney Affirmation of Michael P. Kandler, affirmed on May 15, 2020, in opposition to defendant-proposed intervenor Mt. Hawley Insurance Company ("Mt. Hawley")'s Motion to Intervene (Motion #3).</p> <p>Affidavit of Donna M. Normile, sworn to on January 16, 2020, a National Liability Adjuster at Hanover; Certificate of Conformity of Janis A. Simonelli, dated January 16, 2020;</p> <p>Affidavit of Steven M. Mills, sworn to on January 13, 2020; President of Excess and Surplus Lines for the Hanover; Certificate of Conformity of Lori Fowler, dated January 13, 2020;</p>	
<p>Plaintiff's Attorney Affirmation of Michael P. Kandler, affirmed on September 4, 2020, in Opposition and in Reply to defendants Sullivan Heights, LLC ("Sullivan"), ZNKO Construction, Inc. ("ZNKO") and Proposed Intervenor Mt. Hawley Ins. Co., and in further support of ASIC's Motion for the entry of Default Judgments and for Summary Judgment (Motion #1, 2, 3);</p> <p>EXHIBIT(S) - A (Motion #1) 1/24/2017 Steel Fab Proposal and 8/1/2017 Subcontract Agreement between ZNKO and Steel Fab EXHIBIT(S) - B (Motion #1) Documents received from OSHA Concerning subject Occurrence</p>	

EXHIBIT(S) - C (Motion #1) OSHA Documents Obtained and Submitted by Counsel for Vivanco in underlying action	
EXHIBIT(S) - D (Motion #1) Motion papers and Orders in Underlying actions Regarding Motions to Be Relieved as Counsel	
Defendants, Sullivan Heights LLC ("Sullivan Heights") and ZNKO Construction ("ZNKO")'s Sur-Reply to Plaintiff AIX Specialty Insurance Company's ("Plaintiff" or "AIX") Affirmation in Reply filed in accordance with this Court's permission as provided during the hearing held on September 16, 2020, by affirmation of Joanna M. Roberto, Esq., affirmed on September 30, 2020	

MONTELIONE, RICHARD J., J.

Plaintiff AIX Specialty Insurance Company ("ASIC") seeks a declaratory judgment that its insurance policy does not cover two work site accidents which it claims are excluded and that it is not obligated to defend involving defendants Steel Fab NY, Inc. ("SteelFab"), an employer of the workers injured; Sullivan Heights, LLC ("Sullivan Heights"), the owner of the premises; or ZNKO Construction, Inc. ("ZNKO"), the general contractor. Plaintiff argues that the policy it issued only covers, "those operations described in the Schedule of Insurance, Coverage Parts, Declarations and/or Endorsements made a part of (its) policy." Because the alleged accidents were not covered, plaintiff argues that it was not required to disclaim coverage under Insurance Law § 3420(d)(2). Further, the underlying claim is otherwise excluded by plaintiff's policy's exclusion for all damages arising out of "installation operations." Plaintiff also seeks a default judgment against defendants SteelFab and Oswaldo Arturo Quinduisaca Chillogalli ("Chillogalli"), one of the workers allegedly injured at a work site.

Proposed intervenor-defendant Mt. Hawley Insurance Company's ("Mt. Hawley") moves the court to Intervene claiming it has a financial interest in the outcome of this action.

Defendants Sullivan Heights and ZNKO move pursuant to CPLR §§ 3124, 3125 and 3126, to dismiss Plaintiff's Complaint for failing to provide discovery; (b) precluding Plaintiff

from offering evidence in support of the allegations in Plaintiff's Complaint at trial for failure to provide discovery; or in the alternative (c) compelling Plaintiff to respond to outstanding discovery by a date certain.

Related Cases

Two workers were injured on or about August 9, 2018 when they were allegedly struck by a steel beam that was being hoisted by a crane. These two workers, Juan Carlos Rivera Vivanco ("Vivanco") and Oswaldo Arturo Quinduisaca Chillogalli ("Chillogalli"), both worked for defendant SteelFab. On or about September 5, 2017, Vivanco commenced a lawsuit against Sullivan and ZNKO in an action venued in Kings County Supreme Court captioned *Vivanco v. ZNKO Construction, Inc., et al.*, Index No. 517138/2018. On or about October 27, 2017, Chillogalli commenced a lawsuit against Sullivan and ZNKO in an action venued in Kings County Supreme Court captioned *Chillogalli v. Zullivan Heights, LLC, et al.*, Index No. 520927/2017. By order dated August 9, 2018, the underlying Actions were joined for the purpose of trial.

The Insurance Policy

ASIC issued commercial general liability policy number L1Q A932992 02 to SteelFab, effective May 22, 2017 to May 22, 2018 ("the ASIC policy"). This ASIC policy had a liability limit of \$1,000,000 per occurrence subject to certain exclusions, for "...sums that the insured becomes legally obligated to pay as damages because of 'bodily injury' or 'property damage' to which this insurance applies...." Plaintiff argues that the ASIC policy contains a Classification Limitation Endorsement (801-0018 06 13) that limits coverage:

Coverage under this policy applies only to those operations described in the Schedule of Insurance, Coverage Parts, Declarations and/or endorsements made a part of this policy.

Further, Plaintiff claims that the policy includes an All Hazards in Connection with Designated Operations Exclusion (801-0027 06 13):

This endorsement modifies insurance provided under the following: COMMERCIAL GENERAL LIABILITY COVERAGE PART SCHEDULE Description Of Operations: - All Installation operations. - Any and All operations performed on your behalf by independent contractors and/or subcontractors.

(If no entry appears above, information required to complete this endorsement will be shown in the Declarations as applicable to this endorsement.)

The following exclusion is added to SECTION I - COVERAGES, COVERAGE A BODILY INJURY AND PROPERTY DAMAGE LIABILITY, Paragraph 2. Exclusions and SECTION I - COVERAGES, COVERAGE B PERSONAL AND ADVERTISING INJURY LIABILITY, Paragraph 2. Exclusions: This insurance does not apply to "bodily injury", "property damage" or "personal and advertising injury arising out of the operations shown in the Schedule above conducted by you or on your behalf.

Plaintiff claims that SteelFab's operations involved the delivery and erection of structural steel, metal deck and other operations involving the installation and erection which brought it out of the coverage language of the insurance policy. The plaintiff also directs the court's attention to a NYC Department of Buildings incident report and an OSHA investigation resulting in SteelFab being cited for violation of 29 C.F.R. 1926.756(a)(1), which applies to steel erections of "beams and columns."

Plaintiff directs the court's attention to an email which specifically restricts coverage based on a premium of \$18,000.00:

On May 19, 2016, at 1:19 PM, O'NEILL, JOSHUA S <JOONEILL@HANOVER.COM> wrote:

Katie —

I can get to \$18,000 with \$1K ded, based on \$800K sales —
assumes NO Install ops. Exclude: Installation Ops, Subcontractors
I will not provide Blanket AI—but would offer an AI request on
CG 2026, as there are no construction ops here.
Let me know if you need formal terms.

Josh
Joshua S. O'Neill AVP, Excess & Surplus
Merit Specialty I A Division of The Hanover Insurance Group.

Plaintiff disclaimed coverage to SteelFab by letter dated September 7, 2018 but agreed to offer defense costs on the third party complaint in the underlying action. By letter dated October 4, 2018 plaintiff denied coverage to all claimants.

Defendants Sullivan Heights and ZNKO Arguments

Defendants Sullivan Heights and ZNKO argue they are additional insured under the policy and that plaintiff cannot obtain a default judgment against Chillogalli because there is no viable cause of action involving this defendant as there is no contractual relationship between the plaintiff and this party. Further, denial based on the Classification Limitation found only on the Declaration page and the Designated Operations Exclusion is ambiguous and defeats the purpose of the remainder of the Policy. Lastly, the Exclusion does not preclude coverage because the disclaimers issued by AIX to Defendants were statutorily defective as plaintiff failed to comply with Ins. Law §3240 by never providing a copy of its disclaimers to either Sullivan, ZNKO, Chillogalli, Vivanco or Defendants' attorneys.

Moreover, Defendants argue that if the primary operation provided by SteelFab involves installation, then code 97650¹ should have been assigned to the Policy and without any testimony

¹ There is no indication whether this code would have been covered by the premium paid by SteelFab. On the other hand, the email dated May 19, 2016 specifically references that the premium being charged assumed "NO install" operations.

or discovery, AIX cannot establish that the services provided by SteelFab fall under anything but codes 56915 or 59914.

Code 59914:

This classification applies to risks that are in business to manufacture, fabricate, and/or assemble decorative or artistic metal work. Decorative or artistic metal work are those pieces that only serve a decorative function or is the end product of an artist working with metals. On the other hand, ornament iron work produces decorative metal products that serve a useful purpose such as railings and balconies; however, such operations are assigned to code 56916. The primary operation of these risks is to fabricate the decorative or artistic pieces for other risks to erect. However, risks assigned to code 59914 may offer an installation service to their clients.

Risks that are primarily in business to install or erect decorative or artistic metal works and also operate a shop will have both operations assigned to code 97650. The notes to codes 59914 and 97650 differ from the notes to the other metal works and metal erection classifications regarding the relationship between the two operations. The assignment of the decorative or artistic classifications relies on the principal operation of the risk while the other metal classifications notes state to separately classify the shop operations from the erection operations.

Code 59914 contemplates the use of ferrous and nonferrous metal but does not include sheet metal.

These defendants argue that plaintiff fails to present any testimony supporting the assumption that AIX's underwriter would have assessed the risk under another or a different classification code. There is also no conclusive statement from AIX that it would not have written the Policy for installation operations at a higher premium.

Defendants Sullivan Heights and ZNKO argue that code 56915 is ambiguous and directs the court's attention to the Guide that describes how Code 56915 and 59914 should be applied:

Note

For the purpose of this classification, "load bearing" means structural metal work designed to support weight.

Installation and erection shall be separately classified and rated.

Contemplated Operations

This classification is applied to insureds that primarily fabricate or assemble load bearing structural iron or steel. The materials under this code include load bearing structural iron or steel pieces such as bars, "I" beams, studs, channels, angles, tees, columns, plates and roof trusses; they will be subsequently used in the construction of buildings, bridges, heavy machinery platforms and structural ship plates. Further, insureds in this classification may undertake steel bar joist and truss assembling, steel open web joist fabrication, steel frame fabrication for bridges, etc... as long as the steel work is designed to be a load bearing member of the structure.

The fabricating operations normally involve layout of the pieces, machining, cutting, sawing, bending, drilling, punching, riveting, bolting, welding and assemblage into the finished structural steel piece. The shop equipment generally used includes heavy metal power saws, power shears, plate shears, heavyduty punch presses, drill presses, plate rolls and welding equipment. Not all structural metal fabrication will be assigned to code 56915, On[ly] those pieces that are designed to carry the weight or force of the structure are assigned to code 56915. The fabrication of structural metal pieces that do not qualify as load bearing will be assigned to code 56916. Such items assigned to code 56915 include, but are not limited to balconies, fire escapes, permanent grandstands, and loading platforms. **Code 56915 does not contemplate erection of load bearing structural metal (Emphasis Added);** such operations will be separated classified to code 97655. ... Code 56915 is assigned to the manufacturing and processing classifications. These classifications are assigned by final product; therefore, a risk fabricating load bearing and non load bearing steel is assigned to multiple classifications as long as the risk maintains appropriate records.

The Policy Refers to code 59914 as follows:

This classification applies to risks that are in business to manufacture, fabricate, and/or assemble decorative or artistic metal work. Decorative or artistic metal work are those pieces that only serve a decorative function or is the end product of an artist working with metals. On the other hand, ornament iron work produces decorative metal products that serve a useful purpose such as railings and balconies; however, such operations are

assigned to code 56916. The primary operation of these risks is to fabricate the decorative or artistic pieces for other risks to erect. However, risks assigned to code 59914 may offer an installation service to their clients. Risks that are primarily in business to install or erect decorative or artistic metal works and also operate a shop will have both operations assigned to code 97650. The notes to codes 59914 and 97650 differ from the notes to the other metal works and metal erection classifications regarding the relationship between the two operations. The assignment of the decorative or artistic classifications relies on the principal operation of the risk **while the other metal classifications notes state to separately classify the shop operations from the erection operations. (Emphasis Added).**

Defendants Sullivan Heights and ZNKO argue that it was not until October 4, 2018 that they, Vivanco, Chillogalli, and MM&G first received notice disclaiming coverage. It was only then, raised for the first time, that plaintiff stated its reliance upon the Classification Limitation Endorsement as a separate and independent basis for the disclaimer of coverage.

Proposed Intervenor Mt. Hawley Insurance Company

The proposed intervenor, Mount Hawley Insurance Company (MHIC) moves pursuant to CPLR §§ 1012 & 1013 to intervene as a defendant and argues that it has a real and substantial legal and financial interest in the outcome of this action. MHIC issued a policy with a liability limit of \$5 million per occurrence in excess of a \$1 million commercial general liability policy issued by Lloyd's of London. MHIC seeks to protect its rights with respect to additional coverage owed by plaintiff to Mt. Hawley's insureds in the underlying actions.

Issue: Does the Insurance Policy's Schedule of Insurance, Coverage Parts, Declarations and/or Endorsements or Classification Limitation Endorsement exclude "installation operations" of structural Steel such that the underlying personal injury actions are not covered?

Summary Judgment Standard

In *Stukas v. Streiter*, 83 A.D.3d 18, at 22-23, 918 N.Y.S.2d 176, at 2011 N.Y. App. Div. LEXIS 1740, 2011 NY Slip Op 1832 (N.Y. App. Div. 2d Dep't 2011), the court laid out the requirements to prevail in a motion for summary judgment:

In 1962 the Legislature enacted the first version of the CPLR, and the now-familiar burden-shifting procedure for determining motions for summary judgment was codified in CPLR 3212. That statute provides, in pertinent part, that a motion for summary judgment 'shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party,' and the motion 'shall be denied if any party shall show facts sufficient to require a trial of any issue of fact' (CPLR 3212 [b]); *see Zuckerman v City of New York*, 49 NY2d 557, 562-563, 404 NE2d 718, 427 NYS2d 595 [1980]; *Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 390 NE2d 298, 416 NYS2d 790 [1979]). In determining a motion for summary judgment, the court must view the evidence in the light most favorable to the nonmoving party (*see Pearson v Dix McBride, LLC*, 63 AD3d 895, 883 NYS2d 53 [2009]). 'The function of the court on a motion for summary judgment is not to resolve issues of fact or determine matters of credibility, but merely to determine whether such issues exist' (*Kolivas v Kirchoff*, 14 AD3d 493, 493, 787 NYS2d 392 [2005]). Summary judgment is a drastic remedy which should only be employed when there is no doubt as to the absence of triable issues (*see Millerton Agway Coop. v Briarcliff Farms*, 17 NY2d 57, 215 NE2d 341, 268 NYS2d 18 [1966]). *Stukas v. Streiter*, 83 A.D.3d 18, 22-23, 918 N.Y.S.2d 176, 180, 2011 N.Y. App. Div. LEXIS 1740, 7-9, 2011 NY Slip Op 1832, 3 (N.Y. App. Div. 2d Dep't 2011).

The court will always look to the language in the insurance policy to determine coverage issues. *Parauda v. Encompass Ins. Co. of Am.*, 188 A.D.3d 1083, 136 N.Y.S.3d 453 (2020), leave to appeal denied, 36 N.Y.3d 912, 168 N.E.3d 858 (2021). "Generally, where an insurer wishes to exclude certain coverage from its policy obligations, it must do so in clear and unmistakable language" (*Fruchthandler v. Tri-State Consumer Ins. Co.*, 171 A.D.3d at 707, 96 N.Y.S.3d 649 [internal quotation marks omitted])." *See Parauda v. Encompass Ins. Co. of Am.*,

188 A.D.3d 1083, 1084–85, 136 N.Y.S.3d 453, 455 (2020), *leave to appeal denied*, 36 N.Y.3d 912, 168 N.E.3d 858 (2021). “...(I)nsurance policy exclusions are to be strictly and narrowly construed.” (See *W. 56th St. Assocs. v. Greater New York Mut. Ins. Co.*, 250 A.D.2d 109, 111, 681 N.Y.S.2d 523, 525 [1998], as amended [Jan. 19, 1999] citing *Seaboard Sur. Co. v. Gillette Co.*, 64 N.Y.2d 304, 486 N.Y.S.2d 873, 476 N.E.2d 272).

The Appellate Court in *L & D Serv. Station, Inc. v. Utica First Ins. Co.*, 103 A.D.3d 782, 783, 962 N.Y.S.2d 187, 188 (AD 2nd Dept. 2013), sets the burden of proof in determining insurance policy coverage:

The insured bears the initial burden of establishing that the loss claimed falls within the scope of the policy (see *Bread & Butter, LLC v. Certain Underwriters at Lloyd's, London*, 78 A.D.3d 1099, 1101, 913 N.Y.S.2d 246). ‘Once coverage is established, the insurer bears the burden of proving that an exclusion applies’ (id. at 1101, 913 N.Y.S.2d 246 [internal quotation marks omitted]).

...

“ ‘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’ ” (*Richner Communications, Inc. v. Tower Ins. Co. of N.Y.*, 72 A.D.3d 670, 671, 898 N.Y.S.2d 615, quoting *Vigilant Ins. Co. v. Bear Stearns Cos., Inc.*, 10 N.Y.3d 170, 177, 855 N.Y.S.2d 45, 884 N.E.2d 1044, see *White v. Continental Cas. Co.*, 9 N.Y.3d 264, 267, 848 N.Y.S.2d 603, 878 N.E.2d 1019). “[I]n construing an endorsement to an insurance policy, the endorsement and the policy must be read together, and the words of the policy remain in full force and effect except as altered by the words of the endorsement ... An insurance contract should not be read so that some provisions are rendered meaningless” (*Shah v. Cambridge Mut. Fire Ins. Co.*, 304 A.D.2d 815, 816, 757 N.Y.S.2d 870 [internal quotation marks omitted]; see *Richner Communications, Inc. v. Tower Ins. Co. of N.Y.*, 72 A.D.3d at 671; 898 N.Y.S.2d 615).

The Court in *Allstate Ins. Co. v. Massre*, 14 A.D.3d 610, 611, 789 N.Y.S.2d 206, 207 (AD 2nd Dept. 2005) in interpreting Insurance Law § 3420(d) holds that no disclaimer is required

when a denial is based on lack of coverage.

Default Judgment

The legal standards for obtaining and/or vacating a default or default judgment are found in *Fried v Jacob Holding, Inc.*, 110 AD3d 56, 59-60 [2d Dept 2013]:

On a motion for leave to enter a default judgment pursuant to CPLR 3215, a plaintiff is required to file proof of: (1) service of a copy or copies of the summons and the complaint, (2) the facts constituting the claim, and (3) the defendant's default (*see* CPLR 3215 [f])... To demonstrate "the facts constituting the claim" the movant need only submit sufficient proof to enable a court to determine that "a viable cause of action exists" (*Woodson v Mendon Leasing Corp.*, 100 NY2d 62, 71 [2003]; *see Alterbaum v Shubert Org., Inc.*, 80 AD3d 635, 636 [2011]; *Neuman v Zurich N. Am.*, 36 AD3d 601, 602 [2007]). CPLR 3215 (f) expressly provides that a plaintiff may satisfy this requirement by submitting the verified complaint.

Legal Analysis

A policy's classification limitation endorsement defines the scope of coverage. *See Black Bull Contracting LLC v Indian Harbor Ins. Co.*, 353 AD3d 401, 23 NYS2d 59 (1st Dept. 2016). Here, the Classification Limitation Endorsement (801-0018 06 13) limits "coverage under this policy...to those operations described in the Schedule of Insurance, Coverage Parts, Declarations and/or endorsements made a part of this policy" and excludes those activities under "Description Of Operations:-All Installation operations.-Any and All Installation operations performed on your behalf."

Tellingly, the email from the plaintiff's agent on May 19, 2016 to the insured reflects, "I can get to \$18,000 with \$1K deductible based on \$800K sales-assumes **NO Install ops**. Exclude: Installation Ops, Subcontractors I will not provide Blanket A1-but would offer an A1 request on CG2026, **as there are no construction ops here.**" The plain language with the insurance policy and endorsements made a part of this policy make clear that "installation" of a

steel beam at a construction site was not part of the coverage under the insurance contract and the premium paid was based on coverage limited to the fabrication of the metal and other related processes but not to the installation of the beam at a construction site. Defendants argue that no discovery has been exchanged that would bear on the issues that need to be determined by the court and urge that the court not to consider the complaints in the underlying personal injury actions. But the complaints in the two personal injury matters involving Chillogalli and Vivanco, consolidated under Index No. 520927/2017, is exactly the kind of document reviewed by the Appellate Division in determining whether the insurance policy covered the type of accident alleged in the complaint. *See Black Bull Contracting LLC v Indian Harbor Ins. Co.*, 353 AD3d 401, 23 NYS2d 59 (1st Dept. 2016). The court may consider the pleadings in the underlying personal injury matters as judicial admissions as to the circumstances of the accident. (“...(I)n determining whether or not to grant summary judgment, we may and do consider the judicial admission contained in (defendant’s) answer in the underlying personal injury action...[see, *Fisch, NY Evidence*, §§ 803, 804 [2d ed]]; *Richardson, Evidence*, §§ 216, 217 [Prince 10th ed],” see *Technicon Elecs. Corp. v. Am. Home Assur. Co.*, 141 A.D.2d 124, 144, 533 N.Y.S.2d 91, 104 [1988], *aff’d*, 74 N.Y.2d 66, 542 N.E.2d 1048 [1989]). Moreover, there is a policy exclusion for all damages arising out of “installation operations.”

Defendants Sullivan Heights and ZNKO have the burden of proof to show there is coverage under this policy. *See Consol. Edison Co. of New York v. Allstate Ins. Co.*, 98 N.Y.2d 208, 774 N.E.2d 687 (NY Ct. of Ap. 2002). No timely disclaimer of coverage is required when there was never any coverage to begin with for the type of loss suffered. *Zappone v. Home Ins. Co.*, 55 N.Y.2d 131, 137-193, 432 N.E.2d 783 (NY Ct. of Ap. 1982). Defendants Sullivan Heights and ZNKO move to dismiss based on the failure of the plaintiff to provide discovery but

a motion for summary judgment stays all discovery (CPLR 3214[b])) and the court is basing its decision on the plain language within the policy and the type of activity claimed in the underlying complaints, bill of particulars and answer. None of the defendants have provided the court with a sufficient basis to show there is any information that is relevant that they could not obtain in the underlying actions, or that information is exclusively within the possession of the plaintiff regarding the circumstances of the accident (*Porco v. Lifetime Ent. Servs., LLC*, 195 A.D.3d 1335 [N.Y. App. Div. 2021]) which directly effects whether the policy covered the activity.

There being no issue of factual or legal basis raised by the defendants regarding employees of SteelFab engaged in placement of a steel beams during a construction operation, an “operation” not covered by the policy and which a premium was not paid, the issue before the court is one of law. (See *Rinaldi v. Wakmal*, 183 A.D.3d 652, 123 N.Y.S.3d 156, *leave to appeal denied*, 35 N.Y.3d 914, 153 N.E.3d 450 (Ct. of Ap. 2020), “[A]n insurance carrier can be relieved of its duty to defend if it establishes, as a matter of law, that there is no possible factual or legal basis on which it might eventually be obligated to indemnify its insured under any policy provision” (*Matter of Transtate Ins. Co.*, 303 A.D.2d 516, 516, 756 N.Y.S.2d 441).” “ ‘When an insurer seeks to disclaim coverage on the further basis of an exclusion, ... the insurer will be required to provide a defense unless it can demonstrate that the allegations of the complaint cast that pleading solely and entirely within the policy exclusions, and, further, that the allegations, in toto, are subject to no other interpretation’ (*Automobile. Ins. Co. of Hartford v. Cook*, 7 N.Y.3d 131, 137, 818 N.Y.S.2d 176, 850 N.E.2d 1152 [internal quotation marks omitted]).”

Based on the foregoing, it is

ORDERED that plaintiff’s motion for summary judgment is granted to the extent that the

court shall declare the rights of the parties in a separate Order and Declaratory Judgment providing that the plaintiff is not liable to indemnify or defend any of the defendants regarding the injuries suffered in the underlying personal injury matters as the event giving rise to the accident was not a covered event under the subject policy of insurance; and it is further

ORDERED that plaintiff's motion for default judgment against SteelFab and Oswaldo Arturo Quinduisaca Chillogalli is granted; and it is further

ORDERED, that proposed Intervenor-defendant Mt. Hawley Insurance Company's motion to intervene is granted, its answer is deemed served and filed, but all other requests for relief are denied; and it is further

ORDERED, that proposed Intervenor-defendant Mt. Hawley Insurance Company shall submit an Order amending the caption; and it is further

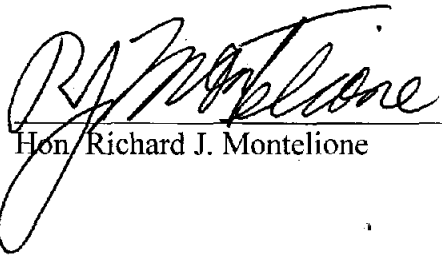
ORDERED, that Defendants Sullivan Heights and ZNKO's motion pursuant to CPLR §§ 3124, 3125 and 3126 is denied; and it is further

ORDERED, that all other requests for relief are denied.

Plaintiff is directed to Settle Order and Declaratory Judgment on Notice.

This constitutes the decision and order of the Court.

Dated: 10/28/2021


Hon. Richard J. Montelione

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KINGS COUNTY CLERK
FILED