

**Daversa v New York City Hous. Auth.**

2021 NY Slip Op 34214(U)

January 22, 2021

Supreme Court, Kings County

Docket Number: Index No. 511636/2018

Judge: Carolyn E. Wade

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This opinion is uncorrected and not selected for official publication.

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At an IAS Term, Part 84 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 22nd day of January, 2021.

PRESENT:

HON. CAROLYN E. WADE,  
Justice.

----- X

JOSEPH DAVERSA AND NICOLE DAVERSA,

Plaintiffs,

- against -

Index No. 511636/2018

NEW YORK CITY HOUSING AUTHORITY, HP PPN HOUSING DEVELOPMENT FUND COMPANY, INC., OCEANHILL, LLC, PPD PARTNERS, LLC, BLUE SEA DEVELOPMENT COMPANY, LLC AND BLUE SEA CONSTRUCTION COMPANY, LLC, JEMCO ERECTORS, INC., LINDEN CONSTRUCTION CORP., PREMIER PAINTING DECORATING AND FINISHING LLC AND CDP CONSTRUCTION CORP.,

*Seq 1, 4*

Defendants.

----- X

NEW YORK CITY HOUSING AUTHORITY, HP PPN HOUSING DEVELOPMENT FUND COMPANY, INC., OCEANHILL, LLC, PPD PARTNERS, LLC, BLUE SEA DEVELOPMENT COMPANY, LLC AND BLUE SEA CONSTRUCTION COMPANY, LLC,

Third-Party Plaintiffs,

- against -

A&R ELECTRICAL MAINTENANCE, INC.,

Third-Party Defendant.

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-----X  
NEW YORK CITY HOUSING AUTHORITY, HP PPN  
HOUSING DEVELOPMENT FUND COMPANY, INC.,  
OCEANHILL, LLC, PPD PARTNERS, LLC, BLUE SEA  
DEVELOPMENT COMPANY, LLC AND BLUE SEA  
CONSTRUCTION COMPANY, LLC,

Second Third-Party Plaintiffs,  
- against -

JEMCO ERECTORS, INC. AND LINDEN CONSTRUCTION,  
CORP.,

Second Third-Party Defendants.

-----X  
LINDEN CONSTRUCTION CORP.,

THIRD Third-Party Plaintiffs,  
- against -

PREMIER PAINTING DECORATING AND FINISHING LLC  
AND CDP CONSTRUCTION CORP.,

Third Third-Party Defendants.

-----X  
NEW YORK CITY HOUSING AUTHORITY, HP PPN  
HOUSING DEVELOPMENT FUND COMPANY, INC.,  
OCEANHILL, LLC, PPD PARTNERS, LLC, BLUE SEA  
DEVELOPMENT COMPANY, LLC AND BLUE SEA  
CONSTRUCTION COMPANY, LLC,

Fourth Third-Party Plaintiffs,  
- against -

LIBERTY MUTUAL FIRE INSURANCE COMPANY,

Fourth Third-Party Defendant.

-----X  
LIBERTY MUTUAL FIRE INSURANCE COMPANY,

Fifth Third-Party Plaintiff,  
- against -

HARLEYSVILLE INSURANCE COMPANY OF NEW YORK,

Fifth Third-Party Defendant.  
-----X

<u>The following e-filed papers read herein:</u>	<u>NYSCEF Doc Nos.</u>
Notice of Motion, Affidavit/Affirmation/Annexed Exhibits	<u>(mot. seq. 1) 48-51, 53</u> <u>(mot. seq. 4) 137-155</u>
Opposing Affidavits (Affirmations)/Annexed Exhibits	<u>(mot. seq. 1) 57-59</u> <u>(mot. seq. 4) 157, 158</u>
Reply Affidavits (Affirmations)	<u>(mot. seq. 4) 159 -161</u>
Other (Memorandum of Law)	<u>(mot. seq. 1) 60<sup>1</sup></u>

Upon the foregoing papers, fourth third-party defendant Liberty Mutual Fire Insurance Company (Liberty) moves, in motion sequence (mot. seq.) one, for an order: (1) pursuant to CPLR 3211 (a) (1) and (7), dismissing the sixth cause of action in the fourth third-party complaint filed by defendants/fourth third-party plaintiffs New York City Housing Authority, HP PPN Housing Development Fund Company, Inc., Oceanhill, LLC, PPD Partners, LLC, Blue Sea Development Company, LLC, and Blue Sea Construction Company, LLC (collectively, the NYCHA Parties); (2) dismissing the NYCHA Parties' claim for recovery of attorneys' fees as against Liberty; and (3) pursuant to CPLR 603, severing the NYCHA Parties' fifth cause of action for insurance coverage against Liberty from the remaining claims in this action.

In mot. seq. four, fifth third-party defendant Harleysville Insurance Company (Harleysville) moves for an order, pursuant to CPLR 602, joining this action (Action No. 1) with *New York City Housing Authority, HP PPN Housing Development Fund Company Inc., Oceanhill LLC, PPD Partners, LLC, Blue Sea Development Company, LLC and Blue Sea Construction Company, LLC v Harleysville Worcester Insurance Company, A&R Electrical Maintenance, Joseph Daversa and Nicole Daversa*, Sup Ct, Kings County, index No. 512087/17 (Action No. 2) for discovery and trial, or

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<sup>1</sup> Enumerated herein, as no reply affirmation was submitted.

alternatively, consolidating Action No. 1 and Action No. 2 for all purposes, including trial.

### **Background**

#### ***The Underlying Personal Injury Complaint and Third-Party Complaints Under Index No. 511636/18 (Action No. 1)***

On or about July 11, 2016, plaintiffs Joseph Daversa (Daversa) and Nicole Daversa (collectively, the Daversas) filed an action in this court, under index No. 511716/16, entitled *Joseph Daversa and Nicole Daversa v New York City Housing Authority, HP PPN Housing Development Fund Company, Inc., Oceanhill, LLC, PPD Partners, LLC and Blue Sea Construction Company, LLC* (the 2016 Action). The 2016 Action alleged that Daversa sustained bodily injury on October 9, 2015 when he fell from the landing on the seventh floor of a building located at 1765 Prospect Place in Brooklyn (the premises) while performing construction due to defendants' failure both to erect a safety device to prevent his fall, and to provide safety equipment, covers, barriers, railings or exterior ladders. Subsequently, on June 6, 2018, the Daversas commenced an action under docket Number 511636/18 (Action No. 1) alleging the same tort and Labor Law claims as alleged in the 2016 Action. By order filed on May 21, 2019, the court consolidated the 2016 Action with Action No. 1 for all purposes. The consolidation order further provided that the pleadings in each action shall stand as the pleadings in the consolidated action.

On or about May 18, 2017, the NYCHA Parties commenced a third-party action against A&R Electrical Maintenance, Inc. (A&R) seeking contractual indemnification and apportionment of liability, claiming that A&R failed to procure the requisite insurance. On or about March 14, 2018, the NYCHA Parties commenced a second third-

party action against Jemco Erectors, Inc. (Jemco) and Linden Construction, Corp. (Linden), claiming that Jemco and Linden entered into contracts with them for construction of the site where Daversa was injured. The NYCHA Parties claimed that Jemco and Linden are contractually obligated to indemnify them against the Daversas' claims. On or about May 29, 2019, Linden commenced a third third-party action against Premier Painting Decorating and Finishing LLC (Premier) and CDP Construction Corp. (CDP) for breach of contract and contribution, alleging that the Daversas' injuries were caused by Premier's and CDP's negligence.

On November 22, 2019, the NYCHA Parties commenced a fourth third-party action against Liberty. The fourth third-party complaint alleges that Jemco contracted with the NYCHA Parties to provide construction work at the premises. The contract, attached to the fourth third-party complaint, between Jemco and Blue Sea Construction Company, LLC (Blue Sea Construction) mandated that Jemco provide insurance. In that regard, Liberty insured Jemco as a first-party insured under a commercial general liability policy in effect from January 1, 2015 to January 1, 2016 (the Liberty Policy). As alleged in the fourth third-party complaint and stated in the contract, Jemco was required to indemnify and hold harmless "the Contractor, Owner, and others additionally insured as required by the Contract" against all bodily injury claims.

The fourth third-party complaint's first four causes of action, for contractual indemnity, breach of contract, common-law indemnity and contribution, respectively, are asserted against Jemco. While Jemco is not a named fourth-party defendant, Jemco is a named defendant in the NYCHA Parties' second third-party complaint.

In the fourth third-party complaint's fifth cause of action entitled "As and For A Fifth Cause of Action For Insurance Coverage," the NYCHA Parties allege that Liberty has disclaimed coverage and refused to indemnify them, and that should the NYCHA Parties be found liable to the Daversas for damages, that Jemco is liable for the full amount of such damages, including attorneys' fees and costs (fourth third-party complaint [compl.] ¶¶ 44-45). This cause of action further alleges that if the NYCHA Parties are found liable to the Daversas for damages, then Liberty is liable for the full amount of such damages, including fees and costs for defense (*id.* at ¶ 46).

In the fourth third-party complaint's sixth cause of action, simply entitled "As and For a Sixth Cause of Action," the NYCHA Parties allege that under the Liberty Policy, which specifically provided for coverage to Jemco for liability it assumed under the construction contract, Jemco was required to defend and indemnify for any claims or damages regarding resulting from performance of the construction work (*id.* at ¶¶ 47-51). The NYCHA Parties further allege that Liberty collected an additional premium from Jemco for adding the NYCHA Parties as additional insureds and for underwriting coverage for liabilities assumed by Jemco pursuant to the construction contract (*id.* at ¶¶ 53-54). The NYCHA Parties allege that, since all the conditions required by the Liberty Policy to be performed by the insureds have been performed, Liberty is obligated to defend and indemnify them in regard to its contractually assumed liability to Jemco (*id.* at ¶¶ 55-58).

The fourth third-party complaint does not specifically state that the fifth or sixth causes of action are for declaratory relief. However, the "Wherefore" clause at the end of the complaint demands judgment "for contractual indemnification, breach of contract,

common[-]law indemnity, contribution, defense, indemnity and additional insured status” in addition to attorneys’ fees and defense costs.

Prior to commencement of the fourth third-party complaint, Liberty denied the NYCHA Parties’ request for coverage under the Liberty Policy in an August 27, 2018 letter. In the letter, Liberty stated that it would not defend or indemnify the NYCHA Parties. Liberty’s basis for denial of coverage was that coverage exists only if the named insured, Jemco, agreed to include the NYCHA Parties as additional insureds and if coverage otherwise exists under the policy endorsements for additional insureds. Liberty stated that Jemco agreed to include Oceanhill, PPD and Blue Sea Construction as additional insureds in its subcontract with Blue Sea Construction, but did not agree to add the NYCHA Parties as such. Liberty also denied coverage on the ground that coverage exists for an additional insured only for bodily injury or property damage caused by the acts or omissions of the named insured or those acting on behalf of the named insured in the named insured’s ongoing or completed operations. In that regard, the complaint did not allege that Daversa’s bodily injury was caused by Jemco or anyone acting on Jemco’s behalf.

On September 14, 2020, Liberty commenced a fifth third-party action against Harleysville Insurance Company of New York (Harleysville) alleging that Harleysville insured A&R, and that Blue Sea Construction Company, LLC (Blue Sea Construction), PPD Partners, LLC (PPD) and Oceanhill, LLC (Oceanhill) qualify as additional insured under the Harleysville policy. Liberty demands judgment for all or its proportional share of responsibility for providing coverage to Blue Sea Construction, PPD and Oceanhill, as well as a declaration of the insurers’ respective rights and responsibilities for providing a

defense and indemnification to Blue Sea Construction, PPD and Oceanhill. On October 21, 2020, Harleysville filed an answer.

***The Declaratory Judgment Action Under Index No. 512087/17 (Action No. 2)***

On June 20, 2017, the NYCHA Parties filed a complaint seeking a declaratory judgment against Harleysville, A&R and the Daversas. The complaint alleged that Blue Sea Development subcontracted with A&R, Harleysville's insured, and that pursuant to the subcontract, A&R was required to maintain insurance and name the NYCHA Parties as additional insureds. The NYCHA Parties seek a declaration that Harleysville is obligated to (1) indemnify and defend them in Action No. 1, and (2) provide primary level coverage to the NYCHA Parties and that insurance coverage provided by any other entity to the NYCHA Parties is excess to that owed to the NYCHA Parties by Harleysville. On July 19, 2017, Harleysville filed an answer.

After completion of discovery, on February 12, 2019, the NYCHA Parties filed a note of issue and certificate of readiness, and Harleysville subsequently moved for summary judgment. On October 30, 2019, the Honorable Richard Velsquez denied Harleysville's motion. Harleysville has appealed the denial of the motion, and the appeal is sub judice.

On September 25, 2020, Harleysville moved for a stay of the trial in Action No. 2 pending the resolution of the appeal and consolidation of the insurance coverage claims. In his October 29, 2020 order, the Honorable Lawrence Knipel denied the branch of the motion seeking a stay pending resolution of the appeal, but granted the branch of the

motion regarding consolidation, directing Harleysville to “move expeditiously to consolidate this action with other relevant actions seeking insurance coverage.”

**Liberty’s Motion to Dismiss the Sixth Cause of Action  
in the Fourth-Third Party Complaint in Action No. 1**

***Parties’ Contentions***

With respect to the sixth cause of action alleged in the fourth third-party complaint in Action No. 1, Liberty contends that it is an improper direct action that is not available under New York law pursuant to *Lang v Hanover Ins. Co.*, 3 NY3d 350, 352 (2004). In that regard, Liberty claims that the allegation that because Liberty insured Jemco it owes Jemco’s contractual indemnity obligations directly to the NYCHA Parties, is a direct action. Liberty contends that the NYCHA Parties must first obtain a judgment against Jemco before the NYCHA Parties can bring an action against Liberty holding it liable for Jemco’s contractual obligations. Alternatively, Liberty argues that the sixth cause of action should be dismissed because it is duplicative of the fifth cause of action for declaratory judgment.

In opposition, the NYCHA Parties contend they are entitled to a defense and indemnification under the Liberty policy, as sought in the sixth cause of action of the fourth third-party complaint. The NYCHA Parties argue that Liberty improperly denied coverage. In that regard, the NYCHA Parties argue that in the complaint filed around the time that the tender denial letter was submitted, the Daversas alleged that Daversa’s bodily injury was caused, either in whole or in part, by Jemco. The NYCHA Parties submit, therefore, that Liberty has no basis for its continued failure to defend, indemnify, or provide additional insured status and pay the NYCHA Parties’ attorneys’ fees.

The NYCHA Parties argue that *Lang* is distinguishable because it involved an injured party's standing to sue a tortfeasor's insurer. The NYCHA Parties contend that, unlike in *Lang*, the fourth third-party complaint was not brought by the Daversas but rather by the NYCHA Parties seeking a declaratory judgment that Liberty and its insured, Jemco, are obligated to defend, indemnify, provide additional insured status, and attorneys' fees to the NYCHA Parties. The NYCHA Parties assert that the First Department's ruling in *BP Air Conditioning Corp. v One Beacon Ins. Group*, 33 AD3d 116 (1st Dept 2006) controls. They further contend, citing *Rojas v New York Elevator and Elec. Corp.*, 118 AD3d 642 (1st Dept 2014), that they are entitled to indemnity and other relief under the supplementary payments sections of the Liberty Policy.

In reply to the NYCHA Parties' argument in its opposition concerning supplementary payments, Liberty argues that the NYCHA Parties are not entitled to supplementary payments under the Liberty policy because they do not fulfill the necessary criteria. Liberty asserts that under the policy, only a named insured has standing to enforce the supplementary payments provision, and the NYCHA Parties are neither named nor additional insureds. Liberty contends that whether or not the NYCHA Parties may be deemed additional insureds under the Liberty Policy is an issue that would be addressed by the fifth cause of action, but in any event, the NYCHA Parties may not use the supplementary payments provision to avoid the no direct action rule.

Even if the NYCHA Parties had standing, which Liberty denies, Liberty argues that they do not, and cannot, allege that they satisfy the conditions necessary to receive supplemental payments. To that end, Liberty contends that the NYCHA Parties cannot establish that a conflict of interest does not exist between them and Jemco.

### *Discussion*

Dismissal is warranted under CPLR 3211 (a) (1) only if “documentary evidence” conclusively refutes a plaintiff’s allegations (*see AG Capital Funding Partners, L.P. v State St. Bank & Trust Co.*, 5 NY3d 582, 590-591 [2005]) or establishes a defense to the asserted claims as a matter of law (*see Spoleta Const., LLC v Aspen Ins. UK Ltd.*, 27 NY3d 933, 936 [2016]; *Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]). The scope of the evidence that is statutorily “documentary” is exceedingly narrow and “[m]ost evidence does not qualify (*see* John R. Higgit, *CPLR 3211 [a] [1] and [a] [7] Dismissal Motions – Pitfalls and Pointers*, 83 NY St BJ 32, 33-35 [Nov/Dec. 2011]). The evidence submitted in support of such motions must be “documentary” or the motion will be denied (*see Fontanetta v John Doe 1*, 73 AD3d 78, 84 [2d Dept 2010], quoting David D. Siegel, *Practice Commentaries, McKinney’s Cons Laws of NY, Book 7B, CPLR C3211:10*, at 22).

To be considered “documentary,” “evidence must be unambiguous and of undisputed authenticity” (*Minchala v 829 Jefferson, LLP*, 177 AD3d 866, [2d Dept 2019] quoting *Fontanetta*, 73 AD3d at 86). “[J]udicial records, as well as documents reflecting out-of-court transactions such as mortgages, deeds, contracts, and any other papers, the contents of which are essentially undeniable, would qualify as documentary evidence in the proper case” (*Fontanetta*, 73 AD3d at 84-85 [internal quotation marks omitted]). At the same time, “[n]either affidavits, deposition testimony, nor letters are considered documentary evidence” for the purposes of CPLR 3211 (a) (1) (*Granada Conominium III Ass’n v Palomino*, 78 AD3d 996, 997 [2d Dept 2010] [internal quotation marks omitted]; *see also Suchmacher v Manana Grocery*, 73 AD3d 1017, 1017 [2d Dept 2010]).

However, statements made by a party or his/her attorney in pleadings, motion papers, affidavits, or depositions in another judicial proceeding are deemed to be informal judicial admissions and are admissible against the party (*Matter of Liquidation of Union Indem. Ins. Co. of New York v American Centennial Ins. Co.*, 89 NY2d 94, 103 [1996]).

In determining a motion to dismiss pursuant to CPLR 3211 (a) (7), a court must “accept the facts as alleged in the complaint as true, accord plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory” (*Kolchins v Evolution Mkts., Inc.*, 31 NY3d 100, 105-106 [2018] quoting *Leon v Martinez*, 84 NY2d 83, 87-88 [1994]; see also *Strujan v Kaufman & Kahn, LLP*, 168 AD3d 1114, 1115 [2d Dept 2019]; *Gorbatov v Tsirelman*, 155 AD3d 836, 837 [2d Dept 2017]). A court may consider affidavits submitted by plaintiff to remedy any defects in the complaint, but not for the purpose of determining whether there is evidentiary support for the pleading (see *Leon*, 84 NY2d at 88; *Sokol v Leader*, 74 AD3d 1180, 1181 [2d Dept 2010]). “If the court considers evidentiary material, the criterion then becomes whether the proponent of the pleading has a cause of action, not whether he has stated one” (*Sokol*, 74 AD3d at 1181-1182). Allegations consisting of bare legal conclusions must not be considered (see *Connaught on v Chipotle Mexican Grill, Inc.*, 29 NY3d 137, 141-142 [2017]). “Whether the complaint will later survive a motion for summary judgment, or whether the plaintiff will ultimately be able to prove its claims, of course, plays no part in the determination of a prediscovery CPLR 3211 motion to dismiss” (*Gorbatov*, 155 AD3d at 837, quoting *Shaya B. Pacific, LLC v Wilson, Elser, Moskowitz, Edelman & Dicker, LLP*, 38 AD3d 34, [2d Dept 2006]).

In the instant matter, accepting the facts as alleged in the fourth third-party complaint as true, according plaintiff the benefit of every possible favorable inference, and determining only whether the facts as alleged fit within any cognizable legal theory (see *Kolchins*, 31 NY3d at 105-106), the court interprets the fifth and sixth causes of action as ones seeking declaratory relief as to the parties' respective rights under the Liberty Policy. The NYCHA Parties' opposition clarifies that the fourth third-party complaint "was brought by the NYCHA Parties seeking a declaratory judgment that [Liberty] and its insured Jemco . . . are obligated to defend, indemnify, provide additional insured status and attorney's fees to the NYCHA defendants" (affirmation in opposition ¶ 8, NY St Cts Elec Filing [NYSCEF] Doc No. 57). Such causes of action may be brought prior to the plaintiff's obtaining a monetary judgment in the underlying action. A court "may render a declaratory judgment having the effect of a final judgment as to the rights and other legal relations of the parties to a justiciable controversy" (CPLR 3001; see also *Lang*, 3 NY3d at 355). A declaratory judgment seeks a judicial declaration rather than money damages or other coercive relief (see *Lang*, 3 NY3d at 355) and requires an actual case or controversy between genuine disputants with a stake in the outcome (see *Watson*, 246 AD2d at 59).

Second Department cases have allowed a party who is not privy to an insurance contract but who would nevertheless benefit from the policy to bring a declaratory judgment to determine whether an insurer owes a defense and/or coverage under a policy prior to the resolution of the underlying injury action (see *Mortillaro v Public Service Mut. Ins. Co.*, 285 AD2d 586, 587 [2d Dept 2001]; *Tepedino v Zurich-American Ins. Group*, 220 AD2d 579, 580 [2d Dept 1995]). In *Tepedino*, the Second Department held

that “a declaratory judgment action against insurers with respect to jural relations, either as to present or prospective obligations, is permitted prior to entry of judgment in the underlying action” (*id.*). The Second Department has noted that Insurance Law § 3420 prohibits, by its plain terms, only a direct cause of action to recover money damages, and does not prohibit a declaratory judgment action by the plaintiff in the underlying tort action seeking a declaration that a disclaiming insurance company owes a duty to defend or indemnify the tortfeasor (*see Watson v Aetna Cas. And Sur. Co.*, 246 AD2d 57, 59 [2d Dept 1998]).

Liberty’s reliance on *Lang* is misplaced, as *Lang* dealt with a case where an injured party sued for a declaratory judgment against the tortfeasor’s insurer before the resolution of the underlying action. Indeed, the Court of Appeals in *Lang* recognized that

“[t]here is no dispute that parties to an insurance contract--the issuer, a named insured or a person claiming to be an insured under the policy--may bring a declaratory judgment action against each other when an actual controversy develops concerning the extent of coverage, the duty to defend, or other issues arising from the insurance contract” (*Lang*, 3 NY3d at 353).

The question in *Lang* was “whether, and under what circumstances, a stranger to the policy--an injured party who has sued a tortfeasor--can bring a direct action against the tortfeasor’s insurance company for a determination of coverage issues” (*id.* [emphasis added]). Unlike in *Lang*, the claims against Liberty were not brought by the Daversas, the injured parties who had sued the purported tortfeasors, the NYCHA Parties; rather, the claims were brought by the NYCHA Parties seeking a declaratory judgment that Liberty and its insured Jemco are obligated to defend, indemnify and provide additional insured status and attorneys’ fees to the NYCHA Parties.

Nevertheless, the sixth cause of action must be dismissed as it is duplicative of the fifth cause of action. In essence, as conceded by the NYCHA Parties in their opposition, both causes of action were “brought by the NYCHA Parties seeking a declaratory judgment that [Liberty] and its insured Jemco . . . are obligated to defend, indemnify, provide additional insured status and attorneys’ fees to the NYCHA Parties” (affirmation in opposition ¶ 8, NYSCEF Doc No. 57). Hence, while the two causes of action may be worded slightly differently, both seek a declaration of the NYCHA Parties’ rights with respect to indemnification and defense under the Liberty Policy, and are therefore, duplicative of each other (*see New York Univ. v Continental Ins. Co.*, 87 NY2d 308, 320 [1995] [dismissing breach of implied covenant of good faith and fair dealing claim as duplicative of cause of action for breach of contract]; *Anderson v Pinn*, 185 AD3d 534, 536 [2d Dept 2020] [dismissing malpractice cause of action as duplicative of breach of contract cause of action, as the causes of action were essentially identical and did not allege a distinct injury or distinct damages]). Accordingly, dismissal of the sixth cause of action alleged in the fourth third-party complaint is appropriate.

**Liberty’s Motion to Dismiss the NYCHA Parties’ Request For Attorneys’ Fees in the Fourth Third-Party Complaint in Action No. 1**

***Parties’ Contentions***

Liberty contends that attorneys’ fees incurred in an affirmative action brought against an insurance company are not available under New York law. In opposition, the NYCHA Parties argue that the contract between Blue Sea Construction and Jemco provides for attorneys’ fees and costs in their favor. The NYCHA Parties submit that the court should exercise its discretion to award attorneys’ fees. They further assert that the additional request for attorneys’ fees is contained in the “Wherefore” clause of the fourth

third-party complaint, and thus is not a cause of action that can be dismissed by the court. In its reply, Liberty argues the underlying contract between Blue Sea Construction and Jemco, which provides for attorneys' fees and defense costs, does not alter the applicability of the controlling case law, as the Liberty policy, rather than the underlying trade contract, governs Liberty's obligations. According to the Liberty, it is undisputed that there is no provision in Liberty's policy that provides the right of attorneys' fees to any party in an action for coverage under the policy.

### ***Discussion***

"It is well established that an insured may not recover the expenses incurred in bringing an affirmative action against an insurer to settle its rights under the policy" (*New York Univ. v Continental Ins. Co.*, 87 NY2d 308, 324 [1995]; see also *Mighty Midgets v Centennial Ins. Co.*, 47 NY2d 12, 21 [1979]; *Stein, LLC v Lawyers Tit. Ins. Corp.*, 100 AD3d 622, 623 [2d Dept 2012]; *Kantrowitz v Allstate Indem. Co.*, 48 AD3d 753, 754 [2d Dept 2008]; *Hershberger v Schwartz*, 198 AD2d 859, 860 [4th Dept 1993]). Attorneys' fees are only available "when the insured has been cast in a defensive posture by the legal steps an insurer takes in an effort to free itself from its policy obligations" (*Blueprint Plumbing Corp. v Kreisler Borg Florman Constr. Co.*, 147 AD2d 518, 518-519 [2d Dept 1989], quoting *Mighty Midgets*, 47 NY2d at 21).

Here, as the NYCHA Parties bring an affirmative action against Liberty for rights under the Liberty Policy, attorneys' fees are not available. This is so even though the demand for attorneys' fees is asserted in the "Wherefore" section of the fourth third-party complaint (see *Kantrowitz*, 48 AD3d at 754 [dismissing demand for attorneys' fees, costs and disbursements asserted in the ad damnum clause of the complaint]). In addition,

contrary to the NYCHA Parties' argument, the extent of available coverage is controlled by the relevant policy terms, not by the underlying trade contract (*see Bovis Lend Lease LMB, Inc. v Great Am. Ins. Co.*, 53 AD3d 140, 145 [1st Dept 2008]), as New York law "recognize[s] the right of each insurer to rely upon the terms of its own contract with its insured" (*State Farm Fire & Cas. Co. v LiMauro*, 65 NY2d 369, 373 [1985]). There is no dispute that the Liberty policy does not provide for attorneys' fees. Accordingly, to the extent that the fourth third-party complaint purports to state a cause for attorneys' fees, such claim is dismissed.

**Liberty's Motion to Sever the Fifth Cause of Action in the  
Fourth Third-Party Complaint in Action No. 1**

***Parties' Contentions***

Liberty seeks severance of the insurance coverage claim asserted in the fifth cause of action in the fourth third-party complaint in Action No. 1 from the tort and bodily injury claims. Liberty contends that there is inherent prejudice to the insurer when an insurance coverage claim is litigated alongside the underlying bodily injury tort claim. Liberty claims that the NYCHA Parties seemingly do not oppose severance, as the case law that they cite in their opposition favors severance. Liberty clarifies that, contrary to the NYCHA Parties' allegations in its opposition, it does not actually seek to dismiss the fifth cause of action, entitled "Action for Insurance Coverage," in the fourth third-party complaint. Liberty further states that it has no interest in participating in any discovery in the underlying action regarding the cause of the accident or the damages suffered by the Daversas. Liberty argues that the only discovery regarding the insurance coverage issues relates to the insurance terms of the underlying trade contracts and the terms of the insurance policies.

The NYCHA Parties oppose Liberty's request for severance, contending that Liberty will inevitably need to participate in all discovery in the main action, and thus, severance of the matter from the main action will require duplicative depositions, pleadings, and will burden judicial resources.

***Discussion***

"In furtherance of convenience or to avoid prejudice the court may order a severance of claims, or may order a separate trial of any claim, or of any separate issue" (CPLR 603). "The court may order the trial of any claim or issue prior to the trial of the others" (*id.*). "The determination to grant or deny a request for a severance pursuant to CPLR 603 is a matter of judicial discretion" (*Bennett v State Farm Fire and Casualty Company*, 181 AD3d 774, 777 [2d Dept 2020]; *Naylor v Knoll Farms of Suffolk County, Inc.*, 31 AD3d 726 [2d Dept 2006]). "Because CPLR 603, unlike CPLR 602, does not use the words 'upon motion,' it is widely assumed that the court can order a severance or separate trial sua sponte" (Vincent C. Alexander, Practice Commentaries, McKinney's Cons Laws of NY, CPLR C603 [Note: online version]).

A court may providently exercise its discretion in severing a third-party claim "to ensure that no mention of insurance coverage is made during the trial of the main action" (*Meehan v County of Suffolk*, 144 AD3d 642, 644 [2d Dept 2016]; *Winstead v Uniondale Union Free School Dist.*, 170 AD2d 500, 504 [2d Dept 2001]). "[I]t is generally recognized that, even where common facts exist, it is prejudicial to insurers to have the issue of insurance coverage tried before the jury that considers the underlying liability claims" (*Burlington Ins. Co. v Guma Constr. Corp.*, 66 AD3d 622 [2d Dept 2009]; *Christensen v Weeks*, 15 AD3d 330, 331 [2d Dept 2005]).

In the instant matter, the court finds that Liberty would be unduly prejudiced by having a jury evaluate the NYCHA Parties' third-party insurance coverage claim alongside Daversa's bodily injury claim. The court further finds that the prejudice to Liberty is not outweighed by any potential duplication of discovery. Further, Liberty submits that it does not wish to participate in any discovery with respect to liability and damages in the Daversas' personal injury claim, and therefore, discovery in the insurance coverage claim should proceed expeditiously when severed. Accordingly, severance of the fifth cause of action in the fourth third-party complaint in Acton No. 1 is appropriate.

In addition, on its own motion, the court hereby severs Liberty's fifth third-party complaint against Harleysville in Action No. 1 for the same reasons. The fifth third-party action is also a declaratory judgment action seeking a determination of Liberty's obligation to provide insurance coverage for the underlying injury action in light of the existence of Harleysville's policy. Thus, this action should therefore be tried separately from the main action.

**Harleysville's Motion for Joinder for Discovery and Trial, or, Alternatively, for  
Consolidation of Action No. 1 with Action No. 2**

***Parties' Contentions***

Harleysville initially requests that Action No. 1 be joined with Action No. 2 for discovery and trial because, at the time it filed the motion, Liberty's motion to sever the fifth cause of action for a declaratory judgment for insurance coverage in Action No. 1 was sub judice. In that regard, Harleysville asserts if Liberty's motion to sever is denied, then joinder, rather than consolidation, is appropriate, since consolidation of the two actions without severance would result in the NYCHA Parties impermissibly being both a plaintiff and a defendant in a consolidated action. Alternatively, should the motion to

sever be granted, Harleystville argues that consolidation of the severed fifth cause of action with Action No. 2 is appropriate pursuant to CPLR 602, since the NYCHA Parties would be plaintiffs in both actions. Harleystville contends that consolidation is appropriate because the actions share common facts. In addition, Harleystville submits that in an insurance coverage action, the court must examine all relevant insurance policies to determine, which, if any, carrier is obligated to provide the NYCHA Parties with primary coverage for Daversa's injuries.

With regard to the timing of the motion, Harleystville claims that it was forced to make this motion on the eve of trial because it had no knowledge that the NYCHA Parties were seeking additional insured coverage from Liberty, as well as from Northfield Insurance Company and potentially other carriers, until after the note of issue was filed and its motion for summary judgment was decided. Harleystville contends that the NYCHA Parties did not disclose that they were seeking such additional insured coverage. To that end, Harleystville states that the NYCHA Parties decided to implead Liberty in Action No. 1 only after Harleystville's motion for summary judgment in Action No. 2 was denied. Thereafter, Harleystville's counsel requested that the NYCHA Parties provide copies of all insurance policies under which the parties sought coverage for the Daversa's injuries, but that the NYCHA Parties have not responded.

Harleystville further contends that joinder and/or consolidation does not prejudice any party in either Action No. 1 or Action No. 2, as the Daversas and A&R are already parties in both actions and consolidation would eliminate duplicative court appearances. In addition, Harleystville argues that since it is now a party in Action No. 1, consolidation would avoid inconsistent judgments with respect to the priority of coverage and/or court

determinations in the separate cases. Harleystville asserts that since discovery is complete in Action No. 2, consolidation would not further delay Action No. 1. Harleystville also states that the discovery that Liberty will seek from Harleystville in Action No. 1 will likely be similar to the discovery sought by the NYCHA Parties in Action No. 2.

In opposition, the NYCHA Parties contend Harleystville's motion amounts to a request for a stay of a trial in Action No. 2, a request that was twice denied by the Second Department. The NYCHA Parties argue that resolution of Liberty's motions in Action No. 1 has no bearing on Action No. 2, which involve the issue of Harleystville's obligation to defend, indemnify and provide additional insured status to the NYCHA Parties. Further, the NYCHA Parties contend that because Action No. 1 and Action No. 2 are in different procedural stages, consolidation would delay the trial in Action No. 2 and would be improper. Additionally, the NYCHA Parties contend that discovery of Liberty policy was only sought by Harleystville after the close of discovery and after the summary judgment motion was denied, and does not concern the central issue of the insurance coverage action in Action No. 2, and therefore, no discovery is outstanding.

In partial opposition to Harleystville's motion, Liberty states that it is not generally opposed to consolidation, but that the court must first resolve Liberty's severance motion. Liberty contends that all coverage issues should be separated from the Daversas' underlying injury action. Liberty also notes that since the NYCHA Parties filed a note of issue in Action No. 2 over a year ago while Liberty has still not had the opportunity to conduct discovery in Action No. 1, it would be prejudiced because consolidation would preclude it from conducting discovery. Liberty argues that if the court grants consolidation it should strike the note of issue filed in Action No. 2 and direct the parties

in Action No. 2 to exchange all discovery that has been exchanged in that action with Liberty.

In reply, Harleystown contends that the NYCHA Parties do not contest that they seek the same declaratory relief from it and Liberty in two separate consolidations. Harleystown also notes that Liberty does not generally oppose consolidation. Harleystown further notes that in his October 29, 2020 order, the Honorable Lawrence Knipel directed Harleystown to “move expeditiously to consolidate this action with other relevant actions seeking insurance coverage.” Finally, Harleystown argues that joinder or consolidation is warranted in the interest of judicial economy, otherwise parties risk obtaining inconsistent judgments with respect to priority of coverage, which could potentially lead to multiple appeals.

#### ***Discussion***

Upon motion, a court may either join or consolidate actions “involving common questions of law or fact,” and “may make such other orders concerning proceedings therein as may tend to avoid unnecessary costs or delay” (CPLR 602 [a]). “Where common questions of law or fact exist, a motion to consolidate or join for trial pursuant to CPLR 602 should be granted absent a showing of prejudice to a substantial right by the party opposing the motion” (*Oboku v New York City Tr. Auth.*, 141 AD3d 708, 709 [2d Dept 2016]; *Cieza v 20th Ave. Realty, Inc.*, 109 AD3d 506, 506 [2d Dept 2013]). Courts favor consolidation when it serves the interests of justice and judicial economy (*see Lecorps v Bromberg*, 127 AD3d 931, 933 [2d Dept 2015]). Additionally, in actions having common questions of law or fact, consolidation or joinder avoids inconsistent

verdicts (*see Cieza v 20th Ave. Realty, Inc.*, 109 AD3d 506, 506-507 [2d Dept 2013]). It is the burden of the party opposing consolidation or joinder to show prejudice of a substantial right (*see Lingfei Sun v City of New York*, 99 AD3d 673 [2d Dep't 2012]).

Here, both Action No. 2 and the severed fifth cause of action asserted in the fourth third-party complaint in Action No. 1 are actions to determine the applicability and order of insurance coverage for the parties involved in the construction project where Daversa was working when he sustained injury. To determine issues of whether the NYCHA Parties qualify as insureds or additional insureds, and to determine primary versus additional insurance for the parties, the court must examine all the relevant insurance policies. Trying these actions together promotes the interest of justice and avoids the possibility of inconsistent verdicts.

Moreover, the NYCHA Parties have not demonstrated that they would be substantially prejudiced by joinder or consolidation. The court expects discovery in the fifth cause of action in the fourth third-party complaint in Action No. 1 to proceed expeditiously, and directs that discovery of relevant documents already produced in Action No. 2 be exchanged forthwith.

As the NYCHA Parties would be the plaintiffs in both causes of action, the court finds that consolidation under index No. 512087/17 (Action No. 2) is appropriate (*cf. M & K Computer Corp. v MBS Indus.*, 271 AD2d 660 [2d Dept 2000] [finding consolidation inappropriate when certain parties would appear as both plaintiff and defendant in the consolidated action]; *Bass v France*, 70 AD2d 849, [1st Dept 1979]). As to Liberty's point regarding their ability to receive discovery and subsequently move for summary

judgment when there has already been a note of issue filed in Action No. 2, the court hereby vacates the note of issue pursuant to 22 NYCRR § 202.21.

Finally, the court notes that it has also severed Liberty's fifth third-party complaint in Action No. 1 against Harleysville for a declaratory judgment for insurance coverage. However, pursuant to CPLR 602 (a), the court may only join or consolidate Liberty's severed fifth third-party complaint against Harleysville in Action No. 1 with Action No. 2 "upon motion," and no such motion is presently before the court.

The court has reviewed the parties' remaining contentions and find them to be without merit. Accordingly, it is

**ORDERED** that the branch of Liberty's motion, in mot. seq. one, for an order dismissing the sixth cause of action in the fourth third-party complaint in Action No. 1 is granted; and it is further

**ORDERED** that the branch of Liberty's motion, in mot. seq. one for an order dismissing the NYCHA Parties' claims for attorneys' fees in Action No. 1 is granted; and it is further

**ORDERED** that the branch of Liberty's motion, in mot. seq. one for severance of the fifth cause of action in the fourth third-party complaint in Action No. 1 from Action No. 1 is granted; and it is further

**ORDERED** that on the court's own motion, Liberty's fifth third-party action against Harleysville in Action No. 1 is severed from Action No. 1, and the caption in Action No. 1 concludes with the fourth third-party action; and it is further

**ORDERED** that Harleysville's motion, mot. seq. four, for an order pursuant to CPLR 602 consolidating or joining Action No. 1 and Action No. 2 is granted to the extent

that Action No. 2 is hereby consolidated, under Action No. 2, with the severed fifth cause of action in the fourth third-party complaint in Action No. 1. The caption in Action No. 2 is hereby amended to read:

----- X  
NEW YORK CITY HOUSING AUTHORITY, HP PPN  
HOUSING DEVELOPMENT FUND COMPANY, INC.,  
OCEANHILL, LLC, PPD PARTNERS, LLC, BLUE SEA  
DEVELOPMENT COMPANY, LLC AND BLUE SEA  
CONSTRUCTION COMPANY, LLC,

Plaintiffs,

- against -

Index No. 512087/17

HARLEYSVILLE WORCESTER INSURANCE COMPANY,  
A&R ELECTRICAL MAINTENANCE, JOSEPH DAVERSA,  
NICOLE DAVERSA AND LIBERTY MUTUAL FIRE INSURANCE  
COMPANY,

Defendants.

-----X; and it is further

**ORDERED** that the parties in Action No. 2 are to provide Liberty with all discovery previously exchanged in that action within 10 days after receipt of this order.

All relief not expressly granted herein is denied.

This constitutes the decision and order of the court.

ENTER FORTHWITH,



J. S. C.

HON. CAROLYN E. WADE  
SUPREME COURT JUSTICE

2021 MAR -9 AM 11:36

