

**244 Howard Ave., LLC v Certain Underwriters at  
Lloyd's London**

2022 NY Slip Op 30111(U)

January 7, 2022

Supreme Court, Kings County

Docket Number: Index No. 509101/2020

Judge: Peter P. Sweeney

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS, PART 73

Index No.: 509101/2020  
Motion Date: 10-18-21  
Mot. Seq. No.: 1

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244 HOWARD AVENUE, LLC, and JIH BUILDERS  
GROUP LLC,

Plaintiffs,

-against-

**DECISION/ORDER**

CERTAIN UNDERWRITERS AT LLOYD’S,  
LONDON,

Defendant.

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Upon the following e-filed documents, listed by NYSCEF as item numbers 13-49, the motion is decided as follows:

In this declaratory judgment action, the plaintiffs, 244 HOWARD AVENUE, LLC (“244 Howard”), and JIH BUILDERS GROUP LLC (“JIH”), move (1) pursuant to CPLR § 3212 for an order granting them summary judgment against defendants, CERTAIN UNDERWRITERS AT LLOYD’S, LONDON (“Lloyd’s”), declaring that Lloyd’s is obligated to defend and indemnify them in two personal injury actions; *Marquez v. 244 Howard Avenue LLC & Y&Z Developers, Inc.*, Kings County Index No. 502337/2019 (the “Marquez Action”), and *Holness v. 244 Howard Ave LLC & Y&Z Developers Inc.*, Kings County Index No. 500826/2019 (the “Holness Action”) and that Lloyd’s must compensate them for the costs they incurred in defending those actions.

Plaintiff 244 Howard is the owner of real property located at 244 North Howard Avenue, Brooklyn, New York (“the property”). 244 Howard retained defendant JIH to act as general contractor in connection with a construction project that was taking place at the property. The record contains two written contracts between the plaintiffs concerning the construction work. The first contract was executed on March 1, 2018 and in relevant part provides:

15) It is further agreed that the owner is responsible to purchase the proper Liability Insurance and any necessary Umbrella Policies for the project, naming both the Owner and GC as insured. Owner also has the option to pay the GC for the cost to be covered under the GC's policy.

16) It is hereby agreed that for the sum of \$50,000.00 owner will be covered under GC's underlying Liability and Umbrella policies. This fee is based on the project total cost of \$1,300,000.00-\$1,500,000.00 (approximately 3.8%). However, in the event of an insurance audit and it is determined that the project cost is higher and the annual insurance premium is increased, the above fee will be increased accordingly. (Increase should also be based on the same 3.8%) ...

26) The GC shall name the owner as additional insured on their insurance policy and provide a certificate of insurance.

The second contract was executed on March 10, 2018. Paragraph 2.1 of this contract provided:

The Subcontractor shall purchase and maintain insurance of the following types of coverage and limits of liability:

Commercial General Liability - including Contractual Liability and employer's liability: \$1,000,000 Each Occurrence \$2,000,000 Aggregate on a PER PROJECT basis Workers' Compensation and Employers Liability: NYS statutory limits Business Automobile: \$1,000,000 CSL per Accident (if applicable) Umbrella \$4,000,000 Each occurrence \$4,000,000 Aggregate

The Owner and/or manager/Contractor are to be named as an additional insured on a primary basis to the Subcontractor's Comprehensive General Liability policy using appropriate ISO forms that include Premises Operations Liability, Contractual Liability, Advertising and Personal Injury Liability, waiver of subrogation endorsement and additional insured for ongoing and Products/Completed Operations Liability, or by using a company specific endorsement that provide equivalent protection.

Paragraph 1.1 of this contract also required JIH to indemnify 244 Howard to the fullest extent permitted by law and provided:

To the fullest extent permitted by law, the Subcontractor shall indemnify and hold harmless the Owners and/or managers/Contractor and employees of either of them from and against claims, damages, losses and expenses, including but not limited to attorney's fees, arising out of or resulting from performance of the Subcontractor's Work, provided that such claim, damage, loss or expense is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible

property (other than the Work itself), including loss of use resulting therefrom, cause in whole or in part by negligent acts or omissions of the Subcontractor, the Subcontractor's Subcontractors, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, regardless of whether or not such claim, damage, loss or expense is caused in part by a party indemnified hereunder. Such obligation shall not be construed to negate, abridge, or otherwise reduce other rights or obligations of indemnity which would otherwise exist as to a party or person described above.

Issac Hirsch executed the second contract on behalf of both plaintiffs.

On or about May 21, 2018, Lloyd's issued to JIH a commercial general liability insurance policy (No. XB52310180180116) for the period May 17, 2018 to May 17, 2019 ("the policy"). The policy contained an endorsement entitled ADDITIONAL INSURED – OWNERS, LESSEES OR CONTRACTOR - AUTOMATIC STATUS WHEN REQUIRED IN CONSTRUCTION AGREEMENT WITH YOU (*emphasis in original*) which states in pertinent part:

Who Is An Insured is amended to include as an additional insured any person or organization for whom you are performing operations when you and such person or organization have agreed in writing in a contract or agreement that such person or organization be added as an additional insured on your policy. Such person or organization is an additional insured only with respect to liability for "bodily injury", "property damage" or "personal and advertising injury" caused, in whole or in part, by:

1. Your acts or omissions; or
2. The acts or omissions of those acting on your behalf.

However, the insurance afforded to such additional insured:

1. Only applies to the extent permitted by law; and
2. Will not be broader than that which you are required by the contract or agreement to provide for such additional insured ("the Additional Insured Endorsement").

After the execution of the two contracts, JIH retained Mr. Demolition, Inc. to perform work on the project. It is alleged that Alexander Marquez ("Marquez") and Maurice Holness

("Holness"), the plaintiffs in the two personal injury actions, were employees of Mr. Demolition, Inc. and worked on the project. It is further alleged that on or about January 9, 2019, Marquez and Holness were injured while working on the project as a result of a partial collapse in an area on the site where Mr. Demolition was working.

On or about January 19, 2019, Holness commenced an action to recover for his injuries. On or about February 1, 2019, Marquez commenced an action to recover for his injuries. Both complaints asserted causes of action against 244 Howard for negligence and violations of the Labor Law. Initially, JIH was not named as a defendant in the actions.

Lloyd's was put on notice of the underlying accident almost immediately and Lloyd's (through its claims administrator) acknowledged by letter dated January 22, 2019 that it had received such notice. On May 22, 2019, counsel for 244 Howard and JIH sent a letter to the claims administrator for Lloyd's stating that they were entitled to both a defense and indemnification in the two actions under the Lloyd's policy. Lloyd's was provided with copies of the complaints in both actions, as well as copies of the two contracts.

On at least six separate occasions between May 30, 2019 and December 19, 2019 (usually in connection with upcoming deadlines in the Holness Litigation and the Marquez Litigation), 244 Howard followed up with the claims administrator for Lloyd's seeking an answer to their demand for coverage. In a December 19, 2019 letter, Lloyd's (through its counsel) responded by disclaiming coverage to 244 Howard in connection with both actions. Referring to the first contract entered into between JIH and 244 Howard, Lloyd's' counsel stated::

The JIH Contract contains a provision which provides that Howard, as owner, is responsible to purchase liability insurance, naming both Howard and JIH as insureds. To the extent that provision is applicable, the JIH Contract does not contain a written contract sufficient to satisfy the first prong of the additional insured endorsement contained in the Underwriters Policy.

As set forth above, one of the requirements for coverage under the endorsement was the existence of a written agreement between JIH and 244 Howard pursuant to which JIH agreed to

name 244 Howard as an additional insured. The disclaimer letter is unclear as to Lloyd's reasons for not deeming the second contract a qualifying contract. The disclaimer stated:

Additionally, the further agreement between JIH and Howard requires the "Subcontractor" to obtain commercial general liability insurance on behalf of both JIH and Howard. Accordingly, there is no obligation for JIH to obtain additional insured coverage for Howard, and therefore, the further agreement between the parties likewise does not satisfy the written contract requirement of the additional insured endorsement.

Lloyd's also disclaimed coverage as to 244 Howard on the basis that there were no allegations in the complaints in the two actions that plaintiffs' injuries resulted from JIH's acts of omissions. The letter stated:

Further, even if the JIH Contract requires additional insured coverage from JIH and satisfies the first condition precedent to additional insured coverage, the second prong to coverage has not been satisfied, as it must be shown that Howard's liability for "bodily injury" must be caused, in whole or in part, by JIH's acts or omissions or the acts or omissions of those acting on its behalf in the performance of JIH's ongoing operations for Howard. Here, there are no allegations that the underlying injury was caused, in whole or in part, by JIH's acts or omissions, or those acting on its behalf. Accordingly, Howard does not qualify as an additional insured under the Underwriters Policy.

With respect to this ground for the disclaimer, when the disclaimer was issued, JIH was not a named defendant in either the Holness or Marquez action. Subsequently, the plaintiffs in both actions amended their complaints and named JIH as a co-defendant. Plaintiffs' counsel notified Lloyd's of this by letter dated January 16, 2020 and asked Lloyd's to reconsider its disclaimer. Lloyd's counsel responded by letter dated April 7, 2020 and again declined to provide coverage. The letter stated:

As set forth below, Howard does not qualify as an additional insured under the Underwriters Policy, as there is no written contract between JIH and Howard requiring Howard to be named as an additional insured on the Underwriters Policy, and, the underlying injury was not caused in whole or in part by JIH's acts or omissions or the acts or omissions of those acting on its behalf in the performance of JIH's ongoing operations for Howard. Accordingly, Underwriters was not required to disclaim coverage

to Howard in the first instance, and thus its disclaimer is not untimely.

Plaintiffs' counsel states that Lloyd's has recently retained counsel for JIH in the two actions but neither 244 Howard nor JIH has received any written notification of this from Lloyd's. Counsel for 244 Howard was simply told of this via phone or via email. To date, Lloyd's continues to refuse to defend or indemnify 244 Howard in the Holness or Marquez actions.

Clearly, pursuant to the policy, Lloyd's is obligated to provide JIH with a defense in both the Holness and Marquez actions, and to indemnify JIH up to the policy limits should JIH be found liable in those actions. Apparently, Lloyd's has recognized these obligations and has already retained counsel to represent JIH in those actions. Since the record does not clearly indicate that Lloyd's has owned up to its obligations under the policy, that branch of plaintiff's motion for a judgment declaring that Lloyd's has these obligations is **GRANTED**.

That branch of plaintiff's motion for a money judgment representing the defense costs that JIH has incurred in defending the Holness and Marquez actions prior to the appointment of counsel by Lloyd's is also **GRANTED** to the extent that an evidentiary hearing shall be held at after the conclusion of those actions to determine the amount of such defense costs.

With respect to that branch of plaintiffs' motion for a judgment declaring that Lloyd's is obligated to defend 244 Howard in the Holness and Marquez actions and to indemnify 244 Howard up to the policy limits should 244 Howard be found liable in those actions, the motion is **DENIED**, without prejudice, with leave granted to renew the motion following the completion of discovery. Lloyd's correctly contends that 244 Howard is only entitled to coverage under the Additional Insured Endorsement if a contract existed between JIH and 244 Howard pursuant to which JIH agreed in writing to add 244 Howard as an additional insured on its policy. It is unclear if first contract executed on March 1, 2018 required JIH agreed in writing to add 244 Howard as an additional insured. In this regard, paragraph 16 of this contract obligated JIH to name 244 Howard as an insured only if 244 Howard paid JIH the sum of \$50,000.00. Paragraph 26 appears to have obligated JIH to name 244 Howard as an additional insured without condition. Since there has been no showing that 244 Howard paid the \$50,000.00 to JIH to be named as an insured under the policy, whether the contract required JIH to name 244 Howard as

an additional insured is ambiguous and such ambiguity must be resolved before a determination of 244 Howard's rights under the policy pursuant to his contract can be declared. Where, as here, the contract, read as a whole, is ambiguous and fails to disclose its purpose and the parties' intent, or is susceptible of two reasonable interpretations, extrinsic evidence is necessary to determine the parties' intent in entering into the contract (*see, Schron v. Troutman Saunders LLP*, 20 N.Y.3d 430, 436, 963 N.Y.S.2d 613, 986 N.E.2d 430; *Greenfield v. Philles Records*, 98 N.Y.2d at 569, 750 N.Y.S.2d 565, 780 N.E.2d 166; *Fattorusso v. RJR Mech., Inc.*, 131 A.D.3d 1098, 1100, 16 N.Y.S.3d 844, 846; *Ellington v. EMI Music, Inc.*, 24 N.Y.3d 239, 244, 997 N.Y.S.2d 339 [citation and internal quotation marks omitted] ). Since the plaintiffs did not demonstrate as a matter of law that the first contract unconditionally required JIH to name 244 Howard as an additional insured or that 244 Howard paid JIH \$50,000.00 to be named as an additional insured, 244 Howard did not demonstrate its entitlement to summary judgment declaring that Lloyd's is required to coverage under policy.

Although JIH unconditionally agreed to name 244 Howard as an additional insured in the contract executed March 10, 2018, before the Court determines whether this contract is legally valid, Lloyd's is entitled to conduct discovery on the issue. The execution of this contract raises issues which are not addressed in plaintiffs' moving papers such as whether JIH received consideration when it executed this contract and whether this contract was intended to supplement or replace the insurance procurement provisions in the first contract. It is also unclear why Mr. Hirsch executed this contract on behalf of both parties only 10 after the first contract.

Accordingly, it is hereby

**ORDERED** that the branch of plaintiffs' motion for a declaration that Lloyd's is obligated to provide JIH with a defense in both the Holness and Marquez actions and to indemnify JIH up to the policy limits of the Lloyd's' policy should JIH be found liable in those actions is **GRANTED**; it is further

**ORDERED** that the branch of plaintiffs' motion for a money judgment for the defense costs that JIH incurred in defending the Holness and Marquez actions from the time those actions were commenced to the time that counsel is or was appointed by Lloyd's to represent it the

actions is **GRANTED** to the extent that an evidentiary hearing shall be held at the conclusion of those actions to determine the amount of such defense costs, if any; and it is further

**ORDERED** that the branch of plaintiffs' motion for a declaration that Lloyd's is obligated to defend and indemnify 277 Howard in the Holness and Marquez actions is **DENIED**, without prejudice, to renewal upon the completion of discovery in this action.

This constitutes the decision and order of the Court.

Dated: January 7, 2020



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**PETER P. SWEENEY, J.S.C.**

Note: This signature was generated electronically pursuant to Administrative Order 86/20 dated April 20, 2020