Wesco Ins. Co. v James River Ins. Co.
2022 NY Slip Op 30263(U)
January 3, 2022
Supreme Court, New York County
Docket Number: Index No. 655814/2019
Judge: Louis L. Nock
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LOUIS L. NOCK — *Justice* — PART 38M

INDEX NO. 655814/2019

MOTION DATE 01/12/2021

MOTION SEQ. NO. 001

--X

WESCO INSURANCE COMPANY,

Plaintiff,

- v -

JAMES RIVER INSURANCE COMPANY, DELUXE HOME BUILDERS CORP., THREE TWO ONE LLC, SAINTS PETER & PAUL'S CHURCH, BROOKLYN, E.D., and FINEST WINDOW INC.,

Defendants.

--X

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57

were read on this motion for SUMMARY JUDGMENT.

LOUIS L. NOCK, J.

Upon the foregoing documents, plaintiff's motion for summary judgment and default is granted, in accord with the attached memorandum decision.

Background

In this action, plaintiff Wesco Insurance Company ("Wesco") seeks a declaratory judgment declaring that defendant James River Insurance Company ("JRIC") has a duty to defend and indemnify defendants Deluxe Home Builders Corp. ("Deluxe"), Three Two One LLC ("321"), Saints Peter & Paul's Church, Brooklyn, E.D. (the "Church"), and Finest Window Inc. ("Finest"), and that Wesco has no duty to defend and indemnify, in connection with an underlying action captioned *Manuel Velasquez v. Deluxe Home Builders Corp., et al.*, pending in this court under Index No. 524257/2017 (the "Underlying Action").

A. The Insurance Policies

Wesco issued a Commercial Auto Policy numbered WPP1217614 01 to Finest (the "Wesco Policy") (NYSCEF Doc No. 44). The Wesco Policy was effective January 13, 2017 to January 13, 2018 (*id.* At 41). The Wesco Policy covers the insured for damages "because of 'bodily injury' or 'property damage' to which this insurance applies, caused by an 'accident' and resulting from the ownership, maintenance or use of a covered 'auto'" (*id.* at 49, Business Auto Coverage Form, § II, ¶ A). The Wesco Policy provides that the following are "insureds" under the policy:

> a. You for any covered "auto".
> b. Anyone else while using with your permission a covered "auto" you own, hire or borrow except:
>
> * * *
>
> (4) Anyone other than your "employees" . . . or a lessee or borrower or any of their "employees", while moving property to or from a covered "auto".
>
> * * *
>
> c. Anyone liable for the conduct of an "insured" described above but only to the extent of that liability.

(*Id.* at 50-51, Business Auto Coverage Form, § II, ¶ A.1.) The Wesco Policy also contains the following policy exclusion, in relevant part:

> Employee Indemnification And Employer's Liability
>
> This insurance does not apply to:
> "Bodily injury" to an "employee" of the "insured" arising out of and in the course of:
>
> (1) Employment by the "insured"; or
>
> (2) Performing the duties related to the conduct of the "insured's" business.
> But this exclusion does not apply to "bodily injury" to domestic "employees" not entitled to workers' compensation benefits or to liability assumed by the "insured" under an "insured contract".

(*Id.* at 52, § II, ¶ B.4 at 4.) "Insured contract" is defied, in relevant part, as follows:

> That part of any other contract or agreement pertaining to your business under which you assume the tort liability of another to pay damages because of "bodily injury" or "property damage" to a third person or organization, if the contract or agreement is made prior to the "bodily injury" or "property damage". Tort liability means a liability that would be imposed by law in the absence of any contract or agreement.

(*Id*. at 59, § V, ¶ H at 11.)

JRIC issued a commercial general liability insurance policy numbered 00075489-0 to Finest (the "JRIC Policy") (NYSCEF Doc No. 18., Exhibit A to Gershweir affirmation in support). The JRIC Policy covers the following:

> 1. Insuring Agreement
> a. "We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies"
>
> * * *
>
> b. This insurance applies to "bodily injury" and "property damage" only if:
> (1) The "bodily injury" or "property damage" is caused by an "occurrence" that takes place in the "coverage territory";

(*Id.* at 5, Commercial General Liability Coverage Form, § I – Coverages ¶ 1 [a-b].)

"Occurrence" is defined as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions" (*id.* at 18, § V – Definitions ¶ 13). The JRIC Policy contains the following relevant exclusion:

> **SECTION I – COVERAGES**
>
> * * *
>
> **2. Exclusions**
> This insurance does not apply to:
>
> * * *
>
> **e. Employer's Liability**
> "Bodily injury" to:
> (1) An "employee" of the insured arising out of and in the course of:
> (a) Employment by the insured; or
> (b) Performing duties related to the conduct of the insured's business; or
> (2) The spouse, child, parent, brother or sister of that "employee" as a consequence of Paragraph (1) above.

> This exclusion applies whether the insured may be liable as an employer or in any other capacity and to any obligation to share damages with or repay someone else who must pay damages because of the injury. This exclusion does not apply to liability assumed by the insured under an "insured contract".

(*Id.* at 6, § I [2][e].) The JRIC Policy also contains an auto exclusion that applies, in relevant part, to bodily injury "arising out of the ownership, maintenance, use or entrustment to others of any aircraft, 'auto' or watercraft owned or operated by or rented or loaned to any insured. Use includes operation and 'loading or unloading'" (*id.* at 8, § I [2][g]). "Loading or unloading" is defied in the following manner:

> 11. "Loading or unloading" means the handling of property:
> a. After it is moved from the place where it is accepted for movement into or onto an aircraft, watercraft or "auto";
> b. While it is in or on an aircraft, watercraft or "auto"; or
> c. While it is being moved from an aircraft, watercraft or "auto" to the place where it is finally delivered;
>
> * * *
>
> but "loading or unloading" does not include the movement of property by means of a mechanical device, other than a hand truck, that is not attached to the aircraft, watercraft or "auto".

(*id.* at 18, § V – Definitions ¶ 11). The JRIC Policy also includes the following endorsement titled EXCLUSION – DESIGNATED ONGOING OPERATIONS (the "Work-Height Exclusion"):

> **Description of Designated Ongoing Operation(s):**
>
> 1. any and all exterior work on any building or structure which requires work in excess of 30 feet from exterior grade and/or any projects for which your work is required on the exterior of building or structure in excess of 30 feet from exterior grade.
>
> 2. any window or façade work performed by or on behalf of the insured on buildings, even if from the interior, where the exterior glass is in excess of 30 feet from exterior grade
>
> * * *
>
> Exclusions of COVERAGE A – BODILY INJURY AND PROPERTY DAMAGE LIABILITY (Section 1 – Coverages): This insurance does not apply to "bodily

> injury" . . . arising out of the ongoing operations described in the Schedule of this endorsement, regardless of whether such operations are conducted by you or on your behalf or whether the operations are conducted for yourself or for others.

(*Id.* at 44.) The JRIC Policy also includes the following additional insured endorsement:

> **ADDITIONAL INSURED – OWNERS, LESSEES OR CONTRACTORS – SCHEDULED PERSON OR ORGANIZATION**
>
> This endorsement modifies insurance provided under the following:
>
> COMMERCIAL GENERAL LIABILTY COVERAGE PART
>
> **Schedule**

Name of Additional Insured Person (s) Or Organization(s):	Location(s) Of Covered Operations
Where required by written contract or written agreement	All operations of the Named Insured
Information required to complete this Schedule, if not shown above, will be shown in the Declarations.	

> **A. Section II – Who Is An Insured** is amended to include as an additional insured the person(s) or organization(s) shown in the Schedule, but only with respect to liability for "bodily injury", "property damage" or "personal and advertising injury" caused, in whole or in part, by:
>
> 1. Your acts or omissions; or
>
> 2. The acts or omissions of those acting on your behalf; in the performance of your ongoing operations for the additional insured(s) at the location(s) designated above.
>
> in the performance of your ongoing operations for the additional insured(s) at the location(s) designated above.

(*Id.* at 32.) Finally, the JRIC Policy includes a "Primary and Non Contributory Endorsement," which states: "Any coverage provided to an Additional Insured under this policy shall be excess over any other valid and collectible insurance available to such additional insured whether primary, excess, contingent or on any other basis unless a written contract or written agreement specifically requires that this insurance apply on a primary and noncontributory basis" (*id.* at 31).

Non-party State National Insurance Company ("SNIC") issued a commercial general liability insurance policy numbered 1600118 to 321 and Deluxe as named insureds (the "SNIC Policy") (NYSCEF Doc No. 19). The SNIC Policy is effective May 26, 2016, to May 26, 2019 (*id.*). The SNIC Policy is excess to other primary policies that include its named insureds as additional insureds.

B. The Contracts

By Lease Agreement dated June 5, 2015, the Church leased to 321 the premises located at 321 Wythe Avenue, Brooklyn, New York ("the Premises") (NYSCEF Doc No. 20). By contract dated March 15, 2016, 321 hired Deluxe to act as the general contractor for the Project at the Premises ("the Prime Contract") (NSYCEF Doc No. 21). By a work proposal dated and executed by both parties on November 2, 2016, Deluxe hired Finest to provide and install an "EFCO Window/Curtain Wall/Storefront System" at the Premises (NYSCEF Doc No. 22). By Subcontract Agreement ("the Subcontract") executed by Deluxe and Finest on March 10, 2017, Finest agreed to obtain "primary and non-contributory" commercial general liability and commercial auto insurance (NSYCEF Doc No. 23). The Subcontract's "List of Indemnified Parties and Additional Insureds" includes 321, Deluxe and the Church (the "Tendering Parties") (*id.* at 3). The Subcontract also includes the following indemnity:

> **Indemnity**. In consideration of the Contract Agreement, and to the fullest extent permitted by law, the Subcontractor shall defend and shall indemnify, and hold harmless, at Subcontractor's sole expense, the Contractor [Deluxe], all entities the Contractor is required [to] indemnify and hold harmless, the Owner of the property, . . . and against all liability or claimed liability for bodily injury or death to any person(s), and for any and all property damage or economic damage, including all attorney fees, disbursements and related costs, arising out of or resulting from the Work covered by this Contract Agreement to the extent such Work was performed by or contracted through the Subcontractor or by anyone for whose acts the Subcontractor may be held liable, excluding only liability created by the sole and exclusive negligence of the Indemnified Parties. . . .

(*Id.* ¶ 1.)

C. The Underlying Action

Non-party Manuel Velasquez ("Velasquez") commenced the Underlying action by filing a Summons and Verified Complaint on December 18, 2017 (Underlying Action NYSCEF Doc No. 1).[1] The Tendering Parties are all named as defendants in the Underlying Action, which seeks damages for personal injuries allegedly sustained by Velasquez on November 21, 2017, at the Premises in the course of his employment with Finest (*id.*). The complaint filed in the Underlying Action (the "Underlying Complaint") broadly alleges the Tendering Parties are liable for the accident based on their negligence and violations of Labor Law §§ 200 and 241(6), in failing to provide Velasquez with a safe place to work. Finest is not named in the Underlying Complaint, which also does not refer to any vehicle.

A bill of particulars served in the Underlying Action (the "Bill of Particulars") alleges more specifically that the Tendering Parties are liable for failing to provide Velasquez with safe footing on which to perform his work and obstructing a safer path (NYSCEF Doc No. 25). The Bill of Particulars describes the accident as follows:

> [T]he Accident occurred while the plaintiff was in the process of transporting a large box full of aluminum panels from the street (Wythe Avenue) through the front entrance of the construction job site which was located on the Premises at the time of the Accident. It is claimed that the Accident occurred approximately 25-30 feet into the Premises (the lot in question) measured from Wythe Avenue in the area in front of the building under construction thereat on the Wythe Avenue side of the Premises.
>
> It is claimed that the Premises was, at the time of the Accident, encircled by a fence with a gated entryway on Wythe Avenue; and that the accident occurred as the plaintiff was entering the job site and transporting the aforementioned materials thereupon. The Wythe Avenue gate of the premises was obstructed/locked and nobody would open it or clear the way so that the plaintiff could use the ramp that

[1] The court takes judicial notice of the documents filed in the Underlying Action (*Chateau Rive Corp. v Enclave Development Associates*, 22 AD3d 445, 446 [2d Dept 2005] ["In New York, courts may take judicial notice of a record in the same court of either the pending matter or of some other action"]).

> led to the building . . . despite the plaintiff's request for same, thus forcing the plaintiff to walk on an uneven, rutted, pitted, rocky and unstable portion of ground on the Wythe Avenue side of the job site . . . thus causing the Accident when the plaintiff lost his footing, slipped/tripped and fell due to making contact with said dangerous conditions upon the Premises.

(*Id.* ¶ 3.) The Bill of Particulars further states that Velasquez was on the Premises "to perform construction labor and other work in connection with the construction job that was ongoing on the Premises at the time of the Accident. At the time of the Accident, [Velasquez]] was transporting materials for use on the construction job in question from a truck located on the Street (Wythe Avenue) through the job site and to a particular area therein for installation/use in connection with the construction job" (*id.* ¶ 9).

The Tendering Parties impleaded Finest as a third-party defendant in the Underlying Action by filing a Third-Party Summons and Verified Complaint on May 9, 2018 (NYSCEF Doc No. 26). The third-party complaint (the "Third-Party Complaint") seeks recovery based on common-law indemnity and contribution, contractual indemnity, and breach of contract for failure to procure insurance covering the Tendering Parties (*id.*). The Third-Party Complaint makes reference to the Underlying Complaint and Bill of Particulars (NYSCEF Doc No. 14-19, Third-Party Complaint) and alleges, *inter alia*, that Finest "exercised control over the place of the occurrence referred to in Plaintiff's pleadings" at the time of the injury (*id.* ¶ 22), "owned, operated, controlled and parked a vehicle at the place of the occurrence referred to the Plaintiff's pleadings" (*id.* ¶ 24), supervised and controlled the work referred to in the Underlying Complaint (*id.* ¶ 26), and that the "incident arose out of the performance of the work of Finest and also it's [sic] operation, control and parking of its vehicle at the premises" (*id.* ¶ 28).

At a deposition conducted in the Underlying Action, Velasquez testified that when he arrived at the site, the delivery truck was parked on the street in front of the side entrance to the

construction site (NYSCEF Doc No. 27 at 66, 70-71, 73, 86). The side entrance included a gated portion with a concrete ramp, which was next to another opening adjacent to an unpaved area covered with dirt, rocks, and gravel (*id.* at 60-63, 84-85, 89). When the accident occurred, the gate was closed and locked but the door was open (*id.* at 63, 73-74). Finest co-workers asked someone who did not work for Finest to unlock the gate but the request was refused (*id.* at 74-76). After the request was refused, he and his co-workers began unloading window materials from the truck (*id.* at 79). He paired up with a Finest co-worker to carry these materials from the truck into the construction-site building through the opening next to the locked gate (*id.* at 81-84). He fell and was injured when, while carrying a window panel with his co-worker, his co-worker stopped short and he tripped due to the gravel and rocks next to the entrance (*id.* at 95-97, 105-106).

The principal of Finest, Nerim Capri ("Capri"), testified at a deposition that Finest hired a window manufacturer, EFCO, to deliver the windows that were to be installed at the Premises (NYSCEF Doc No. 28 at 20-21, 25-27, 55, 77). When EFCO, using its own truck and driver, delivered the windows to the Premises, day laborers hired by Finest would move the windows from the EFCO truck into the Premises (*id.*). The general contractor decided which entrance to the Premises would be used to deliver the windows (*id.*) When asked if Finest owned any commercial vehicles that it used in its projects, Capri responded that it owned a pickup truck, that it used to transport tools to job sites, but did not use for deliveries (*id*. at 11).

Discovery in the Underlying Action is complete, and the note of issue was filed on May 26, 2021 (Underlying Action NYSCEF Doc Nos. 187-188).

D. Procedural History of This Action

Wesco commenced this action by filing a summons and complaint on October 4, 2019 (NYSCEF Doc No. 1). The complaint seeks a judgment declaring that JRIC has a duty to defend the Tendering Parties and Finest in the Underlying Action, that Wesco has no duty to defend or indemnify the Tendering Parties or Finest in the Underlying Action, and that the anti-subrogation rule bars the Tendering Parties' claims against Finest in the Underlying Action (*id.*). The complaint also seeks to recover from JRIC half the costs that Wesco has incurred in its defense of Finest in the Underlying Action (*id.*). All defendants were timely served with process. JRIC appeared by filing an answer on December 19, 2019 and the Church appeared by filing an Answer on May 18, 2020 (NYSCEF Doc Nos. 6, 10). Deluxe, 321, and Finest have not answered the complaint or otherwise appeared in the action.

Wesco now moves for entry of a default judgment against Deluxe, 321, and Finest, and for summary judgment against the Church and JRIC, seeking a declaration that (1) Wesco has no duty to defend the Tendering Parties and Finest in the Underlying Action, (2) JRIC has a duty to defend the Tendering Parties and Finest, (3) that the third-party action in the Underlying Action is barred by the anti-subrogation rule, up to the JRIC Policy's $1,000,000 occurrence limit, and (4) that JRIC is required to reimburse half the costs Wesco has incurred defending Finest in the Underlying Action. Wesco argues that the facts asserted in the complaint, the Bill of Particulars, and in the Velasquez and Capri depositions raise the possibility that the Auto and Work-Height Exclusions do not apply, and because JRIC has a duty to defend those parties, the anti-subrogation rule prohibits the third-party action against Finest, up to the JRIC Policy's $1,000,000 limit (Gershweir affirmation in support ¶ 61). Wesco also argues that it is entitled to summary judgment declaring it has no duty to defend or indemnify the Tendering Parties

because the allegations against them in the Underlying Action do not seek damages for injury arising from auto unloading but rather based on their failure to properly maintain the Premises (*id.* ¶ 62). Finally, Wesco alleges that the Work-Height Exclusion of the JRIC Policy does not relieve JRIC of its duty to defend.

JRIC opposes the motion and argues that the Wesco Policy provides coverage for the loss because the truck at issue qualifies as a covered auto under the policy and the circumstances of the loss arose from "use" of an automobile under the Wesco Policy and the completed operations doctrine (NYSCEF Doc No. 56, mem in opposition at 15-21). JRIC also argues that Wesco separately has a duty to defend Finest due to the allegations set forth in the Third-Party Complaint filed in the Underlying Action (*id.* at 21), and due to an outstanding question of fact regarding ownership of the delivery truck (*id.* at 25), and a duty to defend the Tendering Parties because they, as owner and general contractors, could be held vicariously liable for the actions of Finest, a subcontractor (*id.* at 24-25). Finally, JRIC alleges that the Work-Height Exclusion applies to exclude coverage from the underlying loss (*id*. at 25).

Standard of Review

"The proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law" (*Dallas-Stephenson v Waisman*, 39 AD3d 303, 306 [1st Dept 2007]). The movant's burden is "heavy," and "on a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party" (*William J. Jenack Estate Appraisers & Auctioneers, Inc. v Rabizadeh*, 22 NY3d 470, 475 [2013] [internal quotation marks and citation omitted]). Upon proffer of evidence establishing a *prima facie* case by the movant, the party opposing a motion for summary judgment bears the burden of producing evidentiary proof in admissible form sufficient

to require a trial of material questions of fact (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). "A motion for summary judgment should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility" (*Ruiz v Griffin*, 71 AD3d 1112, 1115 [2d Dept 2010] [internal quotation marks and citation omitted]).

Discussion

"[An insurer's] duty to defend is triggered by the allegations contained in the underlying complaint" (*BP A.C. Corp. v One Beacon Ins. Group*, 8 NY3d 708, 714 [2007]). Nonetheless, "an insurer 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" (*Allstate Ins. Co. v Zuk*, 78 NY2d 41, 45 [1991]). Stated otherwise, even if the complaint triggers a duty to defend, that duty is "not an interminable one, and will end if and when it is shown unequivocally that the damages alleged would not be covered by the policy" (*Sturges Mfg. Co. v Utica Mut. Ins. Co.*, 37 NY2d 69, 74 [1975]). An insurer seeking to be relieved of its duty to defend "bears the heavy burden of demonstrating that the allegations of the complaint cast the pleadings wholly within that exclusion, that the exclusion is subject to no other reasonable interpretation, and that there is no possible factual or legal basis upon which the insurer may eventually be held obligated to indemnify the insured under any policy provision" (*Frontier*, 91 NY2d at 175).

A. Wesco's Duty to Defend

The Wesco Policy covers the insured, Finest, for damages "because of 'bodily injury' or 'property damage' . . . caused by an 'accident' and resulting from the ownership, maintenance or use of a covered 'auto'" (NYSCEF Doc No. 44 at 49, Business Auto Coverage Form, § II, ¶ A at

2). The Declarations page of the Wesco Policy indicates that liability coverage applies to "Any 'Auto'", which is distinguished from only autos owned by the insured, specifically described autos, hired/rented autos, and other limited circumstances (NYSCEF Doc No. 44 at 13, Commercial Business Auto Coverage Declarations; at 49, Business Auto Coverage Form). Therefore, the incident is covered under the Wesco Policy if the damages arise from "use" of the delivery truck.

Under the "complete operation" rule articulated in *Cosmopolitan Mut. Ins. Co. v. Baltimore & Ohio R.R. Co.* (18 AD2d 460, 462 [1st Dept]), "[l]iabiltiy insurance coverage for use of a vehicle during loading and unloading embraces 'not only the immediate transference of the goods to or from the vehicle, but the 'complete operation' of transporting the goods between the vehicle and the place from or to which they are being delivered" (*quoting Wagman v American Fidelity & Cas. Co.*, 304 NY 490, 494 [1952]). "Therefore, it is settled that where an accident results from an act inherent in or directly related to the process of the moving of the goods from the vehicle to the place to which they are to be delivered, then there is coverage" (*id.*). Nevertheless, "where the cause of the accident does not arise from an act or omission related to the 'complete operation' in the movement of the goods to or from the truck, there is no coverage" (*id.* at 464). In *Cosmopolitan*, the driver of an insured vehicle was injured while moving goods from the vehicle to the delivery point when he stepped onto a portion of the flooring that was broken (*id*. at 461). The court held that, although the injury occurred during the unloading process, "the cause of the accident was the defective flooring . . . and, thus, as a matter of fact, the accident did not result from any act or omission incidental to the carrying out of the unloading process" (*id.* at 464; *see also ABC, Inc. v Countrywide Ins. Co.*, 308 AD2d 309, 310 [1st Dept] ["Simply sustaining an injury during the unloading process, without any showing of

negligent use of the truck, does not invoke liability coverage under the vehicle insurance policy"]). The court noted that the accident could have happened to "anyone walking upon the platform or pier whether or not he was engaged in unloading goods from a standby vehicle" (*id.*).

Similarly, although Mr. Velasquez's injury occurred during the loading or unloading of goods from a vehicle, the Underlying Complaint does not allege that the injury arose from any negligence incidental to the unloading process.[2] Rather, Velasquez alleges that that injury was caused by the "uneven, rutted, pitted, rocky and unstable work surface on which [he] was walking and transporting materials . . . substantially contributed to/caused him to lose his footing, skid/slip, and to twist/roll and break his ankle upon stepping on a certain portion thereof" (NYSCEF Doc No. 25, Bill of Particulars ¶ 5). On their face, these allegations relate solely to the condition of the construction site. Furthermore, discovery is complete in the Underlying Action. In his uncontradicted deposition testimony, Velasquez testified that he tripped on the gravel and rocks that was "really unsteady" and "very uneven" (NYSCEF Doc No. 27 at 90, 96, 106-107), and that Finest was not permitted to open the gate in order to utilize the potentially safer path to traverse the site (*id.* at 74-76, ln 15-20). As in *Cosmopolitan*, the accident could therefore have happened to anyone walking in the area where the injury occurred, regardless of whether they were loading or unloading goods from an automobile (18 AD2d at 463 ["The accident was one that could have happened to anyone walking upon the platform or pier whether or not he was engaged in unloading goods from a standby vehicle"]). To the extent that Finest had an obligation to maintain the condition of the construction site, this obligation

[2] Because the insured, Finest, is only named as a third-party defendant in the Underlying Action, the operative complaint is the Third-Party Complaint (NYSCEF Doc No. 26). Nevertheless, because the Third-Party Complaint makes reference to the allegations of the Underlying Complaint, it is appropriate to include the Underlying Complaint in this analysis.

would necessarily extent to all of its activity at the construction site and does not specifically relate to the loading or unloading of goods.

With respect to the ownership of the truck, Capri's testimony that Finest did not own the delivery truck and, in fact, did not own any delivery truck used for deliveries (NYSCEF Doc No. 28 at 11, 20-21, 25-27, 55, 77) is uncontested. Because JRIC does not point to any outstanding discovery or deficiency in discovery that would lead to additional facts regarding ownership and control of the delivery truck, there is no question of fact that Finest did not own the delivery truck in question. Under these circumstances, the facts elucidated during discovery in the Underlying Action indicate that the injury did not result from any act or omission incidental to the carrying out of the unloading process or ownership of the vehicle, but rather from the condition of the construction site. As such, the injury did not occur during the "use" of a covered auto and is not covered by the Wesco Policy. Additionally, the Tendering Parties do not qualify as insureds under the Wesco Policy, as defined by the policy (*see* NYSCEF Doc No. 44 at 50-51, Business Auto Coverage Form, § II, ¶ A.1.) Therefore, Wesco is entitled to a declaration that it has no further duty to defend or indemnify Finest or the Tendering Parties in the Underlying Action.

B. JRIC's Duty to Defend

The Tending Parties are covered by the JRIC Policy by virtue of the additional insured endorsement contained therein (NYSCEF Doc No. 18 at 32). Whereas the facts alleged in the Underlying Action suggest a reasonable possibility of coverage for both Finest and the Tendering Parties, the JRIC Policy is implicated (*Frontier Insulation Constr. v Merchants Mut. Ins. Co.,* 91 NY2d 169, 175 [1997]). JRIC does not contest this point, but argues that the Work-Height Exclusion excludes coverage for the injury because "[i]t is uncontested that Finest

Window contracted to install windows on a 19-story building, and that exterior glass on a 19-story building would be in excess of 30 feet from exterior grade" (NYSCEF Doc No. 56 at 25, mem in opp).[3]

"An insurance contract is to be interpreted by the same general rules that govern the construction of any written contract and enforced in accordance with the intent of the parties as expressed in the language employed in the policy" (*Throgs Neck Bagels, Inc. v GA Ins. Co. of N.Y.*, 241 AD2d 66, 69 [1st Dept 1998]). The policy must be examined "as an integrated whole to determine its purpose and effect and the apparent intent of the parties" *Gap, Inc. v Firemen's Fund Ins. Co.*, 11 A.D.3d 108, 111 [1st Dept 2004]). Generally, "[i]nsurance contracts must be interpreted according to common speech and consistent with the reasonable expectations of the average insured" (*Cragg v Allstate Indem. Corp.,* 17 NY3d 118, 122 [2011]). "[A]mbiguities will be resolved against the insurer, as drafter of the policy *(Throgs Neck*, 241 AD2d at 69*).* Additionally, "exclusions or exceptions from policy coverage . . . are not to be extended by interpretation or implication, but are to be accorded a strict and narrow construction. Indeed, before an insurance company is permitted to avoid policy coverage, it must satisfy the burden which it bears of establishing that the exclusions or exemptions apply in the particular case, and that they are subject to no other reasonable interpretation" (*Cragg*, 17 NY3d at 122).

The Work-Height Exclusion excludes coverage for bodily injury "arising out of the ongoing operations described in the Schedule of this endorsement" (NYSCEF Doc No. 18 at 44, JRIC Policy). The referenced schedule is as follows:

[3] JRIC also argues that coverage is excluded due to the Auto exclusion of the JRIC policy, but discussion of this exclusion is unnecessary in light of this court already having determined that the injury did not occur as the result of use of an auto.

Description of Designated Ongoing Operation(s):

> 1. any and all exterior work on any building or structure which requires work in excess of 30 feet from exterior grade and/or any projects for which your work is required on the exterior of building or structure in excess of 30 feet from exterior grade.
>
> 2. any window or façade work performed by or on behalf of the insured on buildings, even if from the interior, where the exterior glass is in excess of 30 feet from exterior grade

(NYSCEF Doc No. 18 at 44, JRIC Policy.) JRIC relies on the second clause, arguing that it excludes "coverage for all work arising out of window work when the exterior glass of the building is above 30 feet from exterior grade" (NYSCEF Doc No. 56 at 8, mem in opposition). This court disagrees. The plain language of the policy indicates that the first clause excludes coverage for *any* exterior work, or from projects where Finest is required to perform exterior work, where the project requires work in excess of 30 feet or where, while the second clause only excludes coverage *only* for "any window or façade work . . . where the exterior glass is in excess of 30 feet from exterior grade" (NYSCEF Doc No. 18 at 44, JRIC Policy). Because Velasquez was unquestionably not performing window or façade work at the time of the accident, which occurred at grade level, the exclusion does not apply. To the extent that the exclusion is ambiguous, the ambiguity must be construed against JRIC, as drafter of the policy *(Throgs Neck*, 241 AD2d at 69*)*. Therefore, Wesco is entitled to a declaration that JRIC is obligated to defend Finest and the Tendering Parties.

Whereas JRIC has an obligation to defend Finest and the Tendering Parties, the claims asserted in the Third-Party Action are barred by the anti-subrogation rule, up to the extent of the $1,000,000 policy limit (*see North Star Reins. Corp. v Continental Ins. Co.*, 82 NY2d 281, 294 [1992] ["An insurer, however, has no right of subrogation against its own insured for a claim arising from the very risk for which the insured was covered"]). Additionally, Wesco is entitled

to recover half of the defense costs expended in the Underlying Action from JRIC (*see National Union Fire Ins. Co. of Pittsburgh, Pa. v State Ins. Fund*, 222 AD2d 369, 372 [1st Dept 1995]). JRIC has not disputed either of these points.

Finally, Wesco has demonstrated its entitlement to entry of a default judgment against Deluxe, 321, and Finest by submitting proof of service of the summons and complaint on each defendant, proof of default, and proof of the facts constituting its claims. Therefore, the motion is granted in its entirety.

Accordingly, it is

ORDERED that the motion is granted, and the Clerk of the Clerk is directed to enter a judgment against defendants Deluxe Home Builders Corp.; Three Two One LLC; Peter & Paul's Church, Brooklyn, E.D., and Finest Window Corp.; and it is, therefore,

ORDERED, ADJUDGED and DECLARED that plaintiff Wesco Insurance Company has no further duty to defend or indemnify defendants Finest Window Inc.; Deluxe Home Builders Corp.; Three Two One LLC; or Peter & Paul's Church, Brooklyn, E.D., in the action captioned *Manuel Velasquez v. Deluxe Home Builders Corp., et al.*, in the Supreme Court of the State of New York, Kings County, under Index No. 524257/2017 ("the Underlying Action"); and it is further

ORDERED, ADJUDGED and DECLARED that defendant James River Insurance Company has a duty to defend defendant Finest Window Inc.; Deluxe Home Builders Corp.; Three Two One LLC; and Peter & Paul's Church, Brooklyn, E.D., in the Underlying Action; and it is further

ORDERED, ADJUDGED and DECLARED that the third-party action commenced against Finest Window Inc. in the Underlying Action is barred by the anti-subrogation rule, up to the James River Insurance Company Policy's $1,000,000 occurrence limit; and it is further

ORDERED, ADJUDGED and DECLARED that defendant James River Insurance Company is required to reimburse half the costs Wesco Insurance Company has incurred defending Finest Window Inc. in the Underlying Action.

This will constitute the decision and order of the court.

ENTER:

[signature]

1/3/2022			
DATE		LOUIS L. NOCK, J.S.C.	
CHECK ONE:	[X] CASE DISPOSED	[ ] NON-FINAL DISPOSITION	
	[X] GRANTED [ ] DENIED	[ ] GRANTED IN PART	[ ] OTHER
APPLICATION:	[ ] SETTLE ORDER	[ ] SUBMIT ORDER	
CHECK IF APPROPRIATE:	[ ] INCLUDES TRANSFER/REASSIGN	[ ] FIDUCIARY APPOINTMENT	[ ] REFERENCE