| **Skanska USA Bldgs. Inc. v Harleysville Ins. Co. of N.Y.** |
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| 2022 NY Slip Op 31241(U) |
| April 13, 2022 |
| Supreme Court, New York County |
| Docket Number: Index No. 654696/2020 |
| Judge: Arlene Bluth |
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# SUPREME COURT OF THE STATE OF NEW YORK
# NEW YORK COUNTY

**PRESENT:** **HON. ARLENE BLUTH** **PART** **14**

***Justice***

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SKANSKA USA BUILDINGS INC.,

Plaintiff,

- v -

HARLEYSVILLE INSURANCE COMPANY OF NEW YORK,
HARLEYSVILLE WORCESTER INSURANCE COMPANY

Defendants.

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**INDEX NO.** 654696/2020

**MOTION DATE** 04/11/2022

**MOTION SEQ. NO.** 001

**DECISION + ORDER ON MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 52, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69

were read on this motion to/for JUDGMENT - SUMMARY.

The motion by plaintiff for summary judgment seeking a declaration that defendants are obligated to defend it in connection with an underlying Labor Law action in Kings County, that defendants must reimburse all legal fees in that Kings County case and allowing plaintiff to continue using independent counsel in that case is denied.

**Background**

This insurance dispute relates to a Labor Law action currently pending in Kings County. In the Kings County case, the injured plaintiff seeks damages arising out of a construction accident against plaintiff and other defendants, including various city-affiliated defendants. The accident allegedly occurred when the Kings County plaintiff tripped over debris on an uneven surface on the job site. The plaintiff here contends that a subcontractor, Geller, or one of Geller's subcontractors, was working in the area where plaintiff fell. Plaintiff argues that its

subcontract with Geller required that it be indemnified for bodily injury claims arising from its operations or any entity working on Geller's behalf.

Plaintiff argues that it is an additional insured on Geller's insurance policy with defendants and that it must be covered on a primary and non-contributory basis. It points out that when it tendered to defendants, defendants denied coverage on the ground that there was a wrap-up exclusion. Plaintiff argues that the exclusion did not apply because Geller was not enrolled in a controlled insurance program (the basis for the exclusion) and that Geller was actually carrying its own insurance coverage.

In this motion, plaintiff argues that defendants have a duty to defend plaintiff in the Kings County case. It argues that at the 50-H hearing for the Kings County plaintiff, he claimed that electricians were cutting the group up for conduits and that Geller's subcontractor was an electrical subcontractor (JM). Plaintiff maintains that Geller was supposed to install electrical power and lights at the job site and so the duty to defend is triggered. Plaintiff also relies on Geller's safety plan showing the scope of work, daily pre-task logs and maintains the evidence shows that JM was laying conduit in the days leading up to the Kings County plaintiff's trip and fall. Plaintiff argues this is why it brought a third-party action against Geller in the Kings County case. With respect to the wrap-up exclusion, plaintiff argues that defendants untimely asserted this exclusion and that the exclusion does not apply.

In opposition, defendants emphasize that the wrap-up exclusion applies and means they need not provide any coverage to plaintiff. They also argue that there has been no determination on liability in the Kings County case and so it has no duty to defend. Defendants maintain that the denial of plaintiff's tender was timely and that the evidence shows it was plaintiff who was responsible for the accident.

Defendants point to a contractor-controlled insurance program (CCIP) policy sponsored by plaintiff and issued by Ace American Insurance Company that, along with the wrap exclusion in defendants' CGL policy, negates any coverage that defendants might afford to plaintiff. Defendants argue that it does not matter that Geller did not have the CCIP; instead, the fact that plaintiff had CCIP coverage means the wrap-up exclusion applies. They also argue that the tender denial, issued after 49 days, was timely and that defendants conducted a prompt investigation. Defendants insist that the City defendants in the Kings County case are not entitled to additional insured coverage because they are not in contractual privity with Geller.

**Discussion**

As with all insurance coverage disputes, the Court must begin with the terms of the policy at issue. "When construing insurance policies, the language of the contracts must be interpreted according to common speech and consistent with the reasonable expectation of the average insured" (*Matter of In re Viking Pump, Inc.*, 27 NY3d 244, 257, 33 NYS3d 118 [2016] [internal quotations and citations omitted]). The policy here undisputedly provided additional insured coverage to plaintiff and also contained a wrap-up exclusion. The question for this Court is whether the wrap-up exclusion applies to plaintiff, an additional insured under defendants' policy. Plaintiff says the exclusion only applied to Geller, defendants' insured and a subcontractor, while defendants insist it applied to plaintiff.

The CGL policy states that "Throughout this policy the words 'you' and 'your' refer to the Named Insured shown in the Declarations, and any other person or organization qualifying as a Named Insured under this policy. The words 'we,' 'us' and 'our' refer to the company

providing this insurance. The word 'insured' means any person or organization qualifying as such under Section II – Who Is An Insured" (NYSCEF Doc. No. 41 at 36 of 531).

The endorsement providing additional insured coverage to plaintiff provides that "Section II - Who Is An Insured is amended to include as an insured the person or organization shown in the Schedule, but only with respect to liability arising out of your ongoing operations performed for that insured" (*id*. at 126 of 531). This means that the definition of who qualifies as an insured is amended to include plaintiff, the organization identified in the "Schedule".

And the wrap-up exclusion clearly provides that "insurance does not apply to 'bodily injury' or 'property damage' arising out of either your ongoing operations or operations included within the 'products-completed operations hazard' when a consolidated (wrap-up) insurance program has been provided by the prime contractor/project manager or owner of the construction project in which you are involved" (*id*. at 97 of 531). Of course, the issue here is bodily injury alleged in the Kings County case arising out of the construction project in which both plaintiff and Geller were involved, and where plaintiff participated in a contractor controlled insurance program.

Because it is undisputed that plaintiff is an additional insured under the policy and that it was provided coverage under a contractor controlled insurance program, the Court finds that the wrap-up exclusion applies and the tender denial was justified (*Structure Tone, Inc. v Nat. Cas. Co.*, 130 AD3d 405, 406, 13 NYS3d 52 [1st Dept 2015] ["Plaintiffs conceded that they were being provided coverage in the underlying action "pursuant to a contractor controlled insurance program," a policy issued by another carrier, and therefore, based on the plain language of the policy . . ., the Wrap-Up exclusionary language was triggered, precluding coverage for both

plaintiffs]). Plaintiff is subject to the same terms and conditions as defendants' insured. Those terms contained a wrap-up exclusion.

However, the Court's inquiry does not end there. The Court must consider whether the denial of coverage was timely as a matter of law. Here, the Court finds that there is an issue of fact with respect to the alleged delay in the denial of coverage. This is another ground upon which the Court denies plaintiff's motion but also a basis upon which the Court refrains from simply awarding defendants declaratory relief that it need not defend or indemnify plaintiff. Defendants attach the affidavit of a claims examiner who explains that he conducted an investigation of whether coverage was available and that the tender letter did not mention that there was a CCIP involved (NYSCEF Doc. No. 64, ¶ 5). This examiner details how he talked to Geller employees and reviewed all of the relevant contracts before he discovered the existence of the CCIP (*id.* ¶¶ 6-7). Of course, the presence of the CCIP program is the reason for the denial of coverage—that it was not disclosed immediately means the Court must consider the time it took to discover the existence of the CCIP.

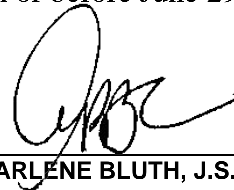
Given the large size of the construction project at issue here and particularly the number of parties at issue (especially the city-affiliated defendants), the Court is unable to conclude that defendants' denial was untimely. For instance, the CGL policy at issue is over 500 pages. This is not a situation where the Court is able find it unreasonable as a matter of law to deny coverage after 49 days as defendants did here—it took some time to review the policies and the facts. Therefore, there remains an issue of fact regarding whether defendants took too long to issue the denial of coverage based on the wrap-up exclusion, given that the existence of the CCIP was not immediately disclosed.

Certainly, plaintiff identified a number of cases in which the length of time that passed before the denial at issue here prevented an insurance company from denying coverage. But the Court of Appeals has stressed that "the difficulty with imposing a fixed time period--which the Legislature scrupulously avoided--is that most often the question whether a notice of disclaimer has been sent 'as soon as is reasonably possible' will be a question of fact, dependent on all of the circumstances of a case that make it reasonable, or unreasonable, for an insurer to investigate coverage" (*First Fin. Ins. Co. v Jetco Contr. Corp.*, 1 NY3d 64, 70, 769 NYS2d 459 [2003]). This Court finds, simply, that it cannot reach a conclusion as a matter of law on these facts on this particular issue.

Accordingly, it is hereby

ORDERED that the motion for summary judgment by plaintiff is denied; and it is further

ORDERED that plaintiff is directed to file a note of issue on or before June 29, 2022.



| 4/13/2022 | | | | |
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| **DATE** | | | | **ARLENE BLUTH, J.S.C.** |
| **CHECK ONE:** | [ ] **CASE DISPOSED** | | [X] **NON-FINAL DISPOSITION** | |
| | [ ] **GRANTED** | [X] **DENIED** | [ ] **GRANTED IN PART** | [ ] **OTHER** |
| **APPLICATION:** | [ ] **SETTLE ORDER** | | [ ] **SUBMIT ORDER** | |
| **CHECK IF APPROPRIATE:** | [ ] **INCLUDES TRANSFER/REASSIGN** | | [ ] **FIDUCIARY APPOINTMENT** | [ ] **REFERENCE** |