

**Starr Indem. & Liab. Co. v Zurich Am. Ins. Co.**

2022 NY Slip Op 31554(U)

May 10, 2022

Supreme Court, New York County

Docket Number: Index No. 656346/2020

Judge: Arthur Engoron

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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. ARTHUR ENGORON PART 37**

*Justice*

-----X	INDEX NO.	<u>656346/2020</u>
STARR INDEMNITY AND LIABILITY COMPANY, NAVIGATORS INSURANCE COMPANY, BERKLEY INSURANCE COMPANY, PHILADELPHIA INDEMNITY INSURANCE COMPANY, MARKEL AMERICAN INSURANCE COMPANY,	MOTION DATE	<u>04/04/2022, 04/04/2022</u>
	MOTION SEQ. NO.	<u>004 005</u>

Plaintiffs,

- v -

**DECISION + ORDER ON  
MOTION**

ZURICH AMERICAN INSURANCE COMPANY, BDG  
GOTHAM RESIDENTIAL, LLC, ZDG, LLC,

Defendants.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 004) 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 85, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 147, 149, 186, 187, 188, 189, 190, 191, 196, 197, 201, 202, 203, 204, 215

were read on this motion for PARTIAL SUMMARY JUDGMENT

The following e-filed documents, listed by NYSCEF document number (Motion 005) 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 148, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 192, 193, 194, 195, 198, 199, 205, 206, 207, 208, 216

were read on this motion for PARTIAL SUMMARY JUDGMENT

Upon the foregoing documents, and for the reasons stated hereinbelow, the motions for partial summary judgment by plaintiffs Starr Indemnity & Liability Company and Navigators Insurance Company are denied and the cross-motion for partial summary judgment of defendant Zurich American Insurance Company is granted.

The instant motions for partial summary judgment on the second counterclaim of defendant Zurich American Insurance Company (“Zurich”) asks the Court to answer a seemingly straightforward question: does New York’s antisubrogation rule bar a third-party claim for contribution and indemnity by defendants Zurich, BDG Gotham Residential, LLC (“Gotham”), and ZDG, LLC (“ZDG”) against non-party Western Waterproofing Company Inc. d/b/a Western Specialty Contractors (“Western”)?

The seemingly straightforward answer is “yes, it is.”

## Background

The facts, as relevant, are as follows.

On September 1, 2016, defendants, Gotham, as owner, and ZDG, as construction manager, entered into a Construction Management Agreement to build an eleven-story mixed use building at 158 East 126th Street, New York, New York (“The Project”). NYSCEF Doc. No. 60. Pursuant to Article 15 of that agreement, ZDG was required to obtain a Contractor Controlled Insurance Program (“CCIP”), and that all contractors and subcontractors on The Project be provided coverage under the CCIP’s common policies of insurance. Id.

### *The Insurance Policies*

As part of The Project’s CCIP, Zurich issued to ZDG Contractor General Liability policy #GLO 0217324-00 with a \$2,000,000-per-occurrence claim limit and a \$4,000,000 aggregate limit (“The Primary Policy”). NYSCEF Doc. No. 64 at ZAIC000026. The Primary Policy listed as its Named Insured “ZDG, LLC” as well as “all contractors of any tier to whom ZDG LLC contracts to furnish insurance under the Contractor Controlled Insurance Program, enroll in the program and who perform operations at a designated project site.” Id. at ZAIC000011. In an endorsement, Gotham was also listed as an additional insured. Id. at ZAIC000148.

The Primary Policy excludes from its coverage the following:

#### “b. Contractual Liability

‘Bodily injury’ or ‘property damage’ for which the insured is obligated to pay damages by reason of the assumption of liability in a contract or agreement. This exclusion does not apply to liability for damages:

- (1) That the insured would have in the absence of the contract or agreement; or
- (2) Assumed in a contract or agreement that is an ‘insured contract’, provided the ‘bodily injury’ or ‘property damage’ occurs subsequent to the execution of the contract or agreement. ...”

...

#### “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 ...

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’.”

NYSCEF Doc. No. 64 at ZAIC000029.

The term “insured contract” is defined in an endorsement to The Primary Policy as: “That part of any other contract or agreement pertaining to your business ... under which you assume the tort liability of another party to pay for ‘bodily injury’ or ‘property damage’ to a third person organization. Tort liability means a liability that would be imposed by law in the absence of any contract or agreement.” NYSCEF Doc. No. 64 at ZAI000048.

On “top” of The Primary Policy, as part of a “tower of excess insurance,” ZDG was issued excess liability policies by plaintiffs. That tower from bottom up consisted of Starr Indemnity and Liability Company (“Starr”) policy #1000023029 (“The Starr Excess Policy”) (NYSCEF Doc. No. 100), Navigators Insurance Company (“Navigators”) policy #NY16EXC868144IV (“The Navigators Excess Policy”) (NYSCEF Doc. No. 122), Berkley Insurance Company policy #CEX09602405-00 (NYSCEF Doc. No. 123), Philadelphia Indemnity Insurance Company policy #PHUB555669 (NYSCEF Doc. No. 125), and Markel American Insurance Company policy #MKLM1EUE1000032 (NYSCEF Doc. No. 124) (collectively, “The Excess Insurers” and “The Excess Policies”).

In addition, also as part of the CCIP, non-party American Zurich Insurance Company (“AZIC”), an affiliate of Zurich, issued to ZDG a Worker’s Compensation and Employer’s Liability policy that, in accordance with New York State law, had an unlimited limit for covered claims (“The AZIC Policy”). NYSCEF Doc. No. 98.

#### *The Underlying Incident*

On April 11, 2017, ZDG subcontracted with Western to install a curtainwall façade for The Project. NYSCEF Doc. No. 61.

On June 25, 2018, an accident occurred wherein two of Western’s employees, non-parties Christopher Jackson and Jorge Delgado, were allegedly injured when a mini-crane, which Western apparently rented from non-party United Rentals, Inc. (“United”) and that was being operated by another Western employee, fell from the fourth floor of The Project (“The Underlying Incident”). NYSCEF Doc. No. 102.

#### *The Underlying Lawsuits*

On July 16, 2018, Mr. Delgado commenced a lawsuit in Supreme Court, Bronx County, against ZDG and Gotham in a case captioned Delgado v BDG Gotham Residential and ZDG, LLC, Index No. 28195/2018E (“The Delgado Lawsuit”).

On April 9, 2019, Juanita Jackson, as guardian of Mr. Jackson, commenced a lawsuit in Supreme Court, New York County, against ZDG and Gotham captioned Juanita Jackson, as Guardian of Christopher Jackson, an incapacitated person v. BDG Gotham Residential, LLC, and ZDG, LLC, Index No. 153339/2019 (“The Jackson Lawsuit”) (NYSCEF Doc. No. 93).

Pursuant to The Primary Policy, Gotham and ZDG tendered their defense in The Jackson Lawsuit to Zurich, and Zurich has since been defending Gotham and ZDG in that lawsuit without a reservation of rights. NYSCEF Doc. No. 5 ¶ 28.

On April 11, 2019, ZDG and Gotham filed a third-party complaint in The Jackson Lawsuit against Western seeking contribution, contractual indemnification and common law indemnification (“The Third-Party Jackson Action”). NYSCEF Doc. No. 129. Pursuant to The AZIC Policy, Western tendered its defense in The Third-Party Jackson Action to AZIC. NYSCEF Doc. No. 5 ¶ 31.

On November 14, 2019, Western filed a motion for summary judgment seeking, inter alia, the dismissal of The Third-Party Jackson Action on the grounds that the antisubrogation rule barred ZDG and Gotham from asserting claims against Western. NYSCEF Doc. No. 130.

On April 17, 2020, The Jackson Lawsuit Court so-ordered a stipulation in which Western, inter alia, withdrew its aforesaid summary judgment motion against ZDG and Gotham. NYSCEF Doc. No. 131.

In another stipulation, dated August 11, 2020, ZDG and Gotham agreed to discontinue The Third-Party Jackson Action. NYSCEF Doc. No. 132. Plaintiffs in the instant matter allege, and Zurich denies, this stipulation was agreed to inappropriately at the directive of Zurich.

#### *The Federal and Instant Lawsuits*

Meanwhile, on June 4, 2019, ZDG and Gotham sued Western and non-party Western Surety Company asserting breach of contract and negligence causes of actions for, inter alia, property damage. NYSCEF Doc. No. 59 ¶ 21. On July 10, 2019, that case was removed to United States District Court for the Southern District of New York and captioned BDG Gotham Residential, LLC and ZDG, LLC v W. Waterproofing Co., Inc., Civil Action No. 1:19-cv-06386 (AJN) (“The Federal Property Damage Lawsuit”). NYSCEF Doc. No. 101.

On April 22, 2020, Western in turn commenced a coverage action in Federal court against Zurich, Gotham, ZDG, Allied World Specialty Insurance Company, and Allied World Assurance Company, captioned W. Waterproofing Co. v Zurich Am. Ins. Co., et. al., Civil Action No.: 1:20-cv-3199 (AJN) (“The Western Coverage Lawsuit”), in which the instant plaintiffs intervened.

On November 16, 2020, plaintiffs commenced the instant lawsuit, asserting that Zurich, by allegedly Gotham and ZDG to discontinue The Third-Party Jackson Action, breached its duty of good faith and therefore plaintiffs are entitled to a declaratory judgment that Zurich, because of its alleged breach, is liable, and must indemnify plaintiffs, for any excess liability incurred in The Jackson Action. NYSCEF Doc. No. 1.

On January 29, 2021, Gotham and ZDG filed a counterclaim in The Western Coverage Lawsuit (“The Western Coverage Counterclaim”) essentially mirroring The Third-Party Jackson Action and asserting, inter alia, contribution, common law indemnity, and contractual indemnity claims against Western. NYSCEF Doc. No. 78.

On February 5, 2021, Zurich answered the instant lawsuit with general denials, nine affirmative defenses, and two counterclaims seeking declaratory judgements that: (1) ZDG, Gotham and Western are insured under The Primary Policy and the Excess Policies; and (2) that the antisubrogation rule bars a third-party claim for contribution and indemnity against Western on behalf of Zurich, Gotham and/or ZDG. NYSCEF Doc. No. 5.

In letters dated February 16, 2021, and March 18, 2021, Zurich acknowledged its duty, pursuant to The Primary Policy, to defend and indemnify Western against the contractual indemnification counterclaim in The Western Coverage Counterclaim, and AZIC acknowledged its duty, pursuant to The AZIC Policy, to defend and indemnify Western against the common law indemnity and common law contribution causes of action in the same counterclaims. NYSCEF Doc. No. 79.

In a letter dated April 21, 2021, counsel for Starr disclaimed coverage to Western in The Western Coverage counterclaim based on the terms of the policy, specifically the Employer's Liability Exclusion, and the Contractual Liability Exclusion because The Excess Policies define certain terms differently than the Primary Policy. NYSCEF Doc. No. 81.

In a Decision and Order dated July 8, 2021, this Court granted motions by Gotham and ZDG to intervene in the instant case. NYSCEF Doc. No. 42.

On November 30, 2021, Starr moved, pursuant to CPLR 3212, for partial summary judgment dismissing Zurich's second counterclaim. NYSCEF Doc. No. 56.

On January 13, 2022, Navigators also moved, pursuant to CPLR 3212, for partial summary judgment dismissing Zurich second counterclaim. NYSCEF Doc. No. 88.

The next day, on January 14, 2022, Zurich cross-moved, pursuant to CPLR 3212, for partial summary judgment granting its second counterclaim. NYSCEF Doc. No. 108.

### Discussion

A court may grant summary judgment where there is no genuine issue of material fact, and the moving party has made a prima facie showing of entitlement to a judgment as a matter of law. See Alvarez v Prospect Hosp., 68 NY2d 320, 324 (1986); see generally American Sav. Bank v Imperato, 159 AD2d 444, 444 (1st Dep't 1990) ("The presentation of a shadowy semblance of an issue is insufficient to defeat summary judgment"). The moving party's burden is to tender sufficient evidence to demonstrate the absence of any material issue of fact. See Ayotte v Gervasio, 81 NY2d 1062 (1993). Once this initial burden has been met, the burden shifts to the party opposing the motion to submit evidentiary proof sufficient to create material issues of fact requiring a trial; mere conclusions and unsubstantiated allegations are insufficient. See Zuckerman v City of New York, 49 NY2d 557, 562 (1980).

"An insurer must defend whenever the four corners of the complaint suggest--or the insurer has actual knowledge of facts establishing--a reasonable possibility of coverage." Cont. Cas. Co. v

Rapid-Am. Corp., 80 NY2d 640, 648 (1993) citing Fitzpatrick v American Honda Motor Co., 78 NY2d 61, 66-67 (1991); Seaboard Sur. Co. v Gillette Co., 64 NY2d 304, 311-312 (1984).

The doctrine of subrogation “entitles an insurer to 'stand in the shoes' of its insured to seek indemnification from third parties whose wrongdoing has caused a loss for which the insurer is bound to reimburse.” North Star Reins. Corp. v Continental Ins. Co., 82 NY2d 281, 294 (1993).

However, there is an exception to the right of subrogation, and in Pennsylvania Gen. Ins. Co. v Austin Powder Co., 68 NY2d 465 (1986), the Court of Appeals formally articulated it: the so-called antisubrogation rule.

Under the antisubrogation rule an “insurer has no right of subrogation against its own insured for a claim arising from the very risk for which the insured was covered ... even where the insured has expressly agreed to indemnify the party from whom the insurer's rights are derived.” Id. at 468; see also, Jefferson Ins. Co. v Travelers Indem. Co., 92 NY2d 363 (1998). Put another way, “an insurer may not step into the shoes of its insured to sue a third-party tortfeasor--if that third party also qualifies as an insured under the same policy--for damages arising from the same risk covered by the policy. This rule applies even if the third-party tortfeasor has expressly agreed to indemnify the insured for the loss.” ELRAC, Inc. v Ward, 96 NY2d 58, 76 (2001).

The “essential element of the antisubrogation rule is that the party to which the insurer seeks to subrogate is covered by the relevant insurance policy.” Millennium Holdings LLC v Glidden Co., 27 NY3d 406, 416 (2016). So, if a policy exclusion bars coverage to a party to which the insurer seeks to subrogate then that party is *not* covered by the same policy, and the antisubrogation rule does not apply. Larson v City of New York, 214 AD2d 413 (1st Dept 1995) (“As the employee exclusion in the National Union insurance policy clearly bars coverage of Simpson Metal's employee's alleged on-the-job injuries (plaintiff Larson), the anti-subrogation rule does not apply here.”).

The antisubrogation rule derives from two main policy considerations: (1) preventing an insurer from using the right of subrogation to avoid paying coverage due under a policy; and (2) limiting the instances where an insurer and its insured have adverse interests which might disincentivize an insurer to provide a vigorous defense. Austin Powder at 471-472.

Here, Zurich is seeking a declaration that “a third-party claim for contribution and indemnity against Western on behalf of Zurich, Gotham and/or ZDG would be barred by the antisubrogation rule.” Pursuant to The Primary Policy, Zurich has been covering Gotham and ZDG in The Jackson Lawsuit. The central issue in these motions for partial summary judgment, then, is whether The Principal Policy covers Western for the same risk as it covers ZDG and Gotham, such that the antisubrogation rule applies.

Plaintiffs argue, and defendants do not dispute, that The Underlying Incident occurred while employees of Western were performing duties related to Western's business. Therefore, the Employer's Liability Exclusion should preclude Western from being covered by The Primary Policy for any potential common law indemnification and contribution claims. And if those

were the only potential claims then the policies covering Western and Gotham/ZDG would be distinct, the discussion would be done, and the antisubrogation rule would not apply.

Zurich, however, asserts that, as both The Third-Party Jackson Action and The Western Coverage Counterclaim included claims on behalf of Western for contribution, common-law indemnification *and* contractual indemnification, the Court's analysis should continue.

Here, The Primary Policy's Contractual Liability Exclusion has exceptions for liability for damages assumed in an "insured contract" or that the insured "would have in the absence of the contract or agreement." Zurich argues The Primary Policy is therefore triggered by any contractual indemnification claim against Western, in turn triggering the antisubrogation rule, as Western is covered pursuant to the "insured contract" exception.

As the underlying subcontract between Western and ZDG is clearly an "insured contract" included within the coverage of The Primary Policy, and the underlying complaint in the Jackson Action alleges negligence that Western would otherwise be liable for "in the absence of the contract," the exception to the Contractual Liability Exclusion applies, and Western should be covered by The Primary Policy as to any contractual indemnity. See Maksymowicz v New York City Bd. Of Educ., 232 AD2d 223, 224 (1st Dep't 1996).

Therefore, if there is a third-party claim for contribution and contractual indemnity on behalf of Zurich, Gotham and/or ZDG the antisubrogation rule should bar Zurich from stepping into the shoes of its insured, as Western and Gotham and ZDG are covered by The Primary Policy for The Underlying Incident.

Plaintiffs argue that if The Primary Policy *does* cover Western and ZDG/Gotham, the antisubrogation rule would still *not* apply, because even if The Primary Policy covers Western the Excess Policies do not, and therefore the policy in question is *not* the same.

Specifically, plaintiffs note that The Excess Policies, unlike The Primary Policy, define "you" as only referring to a "Named Insured" (specifically, and only, ZDG) and not an "insured," and, therefore, the Contractual Liability Exclusion's exception for an "insured contract" would not be triggered. So, plaintiffs argue, "because there is no common coverage between Gotham/ZDG and Western at the excess level, the anti-subrogation rules does not prevent Gotham and ZDG from asserting contribution and indemnification claims against Western."

Plaintiffs' "different excess level" argument, however, is an unconvincing attempt to side-step both the clear intention of the CCIP, which ZDG obtained at the behest of Gotham so as to provide insurance for all parties involved in The Project, and the public policy reasoning behind the anti-subrogation rule. Finding that The Primary Policy covers Western but the Excess Policies do not, as plaintiffs propose, would create an instance where Zurich and its insured have exactly the adverse interests the antisubrogation rule attempts to prevent. Further, what happens at the excess level of an insurance policy is immaterial to the antisubrogation rule that an *insurer* has no right of subrogation against *its own insured* for a claim arising from the very risk for which the insured was covered.

This Court has considered the parties' other arguments and finds them to be unavailing and/or non-dispositive.

In the final analysis, Zurich and the Excess Insurers agreed to insure ZDG, Gotham and the subcontractors against the subject losses, and should be held to the bargain they made.

Conclusion

Therefore, the motions for partial summary judgment by plaintiffs Starr Indemnity & Liability Company and Navigators Insurance Company are denied and the cross-motion for partial summary judgment of defendant Zurich American Insurance Company is granted as to defendant's second counterclaim only. Thus, this Court hereby declares that a third-party claim for contribution, common law and contractual indemnity against non-party Western Waterproofing Company Inc. d/b/a Western Specialty Contractors on behalf of Zurich American Insurance Company, BDG Gotham Residential, LLC, and/or ZDG, LLC is barred by the antisubrogation rule.

5/10/2022

DATE

ARTHUR ENGORON, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART	<input checked="" type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE