

**MJM Assoc. Constr., LLC v Travelers Indem. Co.**

2023 NY Slip Op 31234(U)

April 13, 2023

Supreme Court, New York County

Docket Number: Index No. 652869/2021

Judge: Suzanne J. Adams

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. SUZANNE J. ADAMS PART 39TR

Justice

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INDEX NO. 652869/2021

MJM ASSOCIATES CONSTRUCTION, LLC, 52-58
GANSEVOORT STREET, LLC,

MOTION DATE N/A

Plaintiff,

MOTION SEQ. NO. 001

- v -

TRAVELERS INDEMNITY COMPANY, TRAVELERS
INDEMNITY COMPANY OF AMERICA, OM ELECTRIC,
INC.

DECISION + ORDER ON
MOTION

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 12, 13, 14, 15, 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

were read on this motion to/for JUDGMENT - SUMMARY

Upon the foregoing documents, it is ordered that plaintiffs' motion is granted and the cross-
motion of defendants The Travelers Indemnity Company (s/h/a Travelers Indemnity Company)
and The Travelers Indemnity Company of America (s/h/a Travelers Indemnity Company of
America) (collectively, "Travelers") is denied. This declaratory judgment action arises out of an
underlying personal injury action in which the claimant, a construction worker, alleges he was
injured at a construction site. Plaintiff MJM Associates Construction, LLC ("MJM") and 52-58
Gansevoort Street, LLC ("Gansevoort") are the construction manager and property owner,
respectively, of the construction site. The claimant is an employee of defendant OM Electric Inc.
("OM"), a subcontractor, and has alleged he was injured as a result of the negligence of plaintiffs
and their subcontractors. Plaintiffs impleaded OM into the underlying action via a third-party
complaint, alleging that OM's negligence caused the claimant's alleged accident.

Prior to the underlying incident, MJM entered into a contract with OM, pursuant to which OM, *inter alia*, procured a policy of insurance from Travelers which named MJM and Gansevoort as additional insureds by virtue of an endorsement. The operative additional insured endorsement added plaintiffs as additional insureds on a primary basis. OM also procured, per its contract with MJM, a policy of umbrella insurance from Travelers. In March, 2020, Plaintiffs' counsel tendered the underlying claim to Travelers for defense and indemnification under said insurance policies. Travelers denied coverage in April, 2021. Shortly thereafter, plaintiffs commenced the instant declaratory judgment action and now move pursuant to CPLR § 3001 and 3212 for partial summary judgment declaring that Travelers owes plaintiffs a duty to defend on a primary basis in the underlying action, and that plaintiffs are additional insureds on the umbrella policy, and entering judgment against Travelers for defense costs made by plaintiffs or their insurer in the underlying action. Travelers opposes the motion and cross-moves pursuant to CPLR 3212 for summary judgment declaring that Travelers does not have any duty to defend or indemnify plaintiffs. Plaintiffs oppose the cross-motion.

It is well-settled that "the proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact." *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 324 (1986) (citing *Winegrad v. New York University Medical Center*, 64 N.Y.2d 851 (1985)). The party opposing a motion for summary judgment is entitled to all reasonable inferences most favorable to it, and summary judgment will only be granted if there are no genuine, triable issues of fact. *Assaf v. Ropog Cab Corp.*, 153 A.D.2d 520, 521-22 (1<sup>st</sup> Dep't 1989).

Plaintiffs herein have established entitlement to summary judgment on the relief requested. As is well established law in New York, the duty to defend is greater than the duty to indemnify.

*See, e.g., Fitzpatrick v. American Honda Motor Co, Inc.*, 78 N.Y.2d 61, 65 (1991). The gravamen of Travelers' opposition and cross-motion is that the claimant in the underlying action did not plead that Travelers' insured, OM, was negligent with respect to the occurrence. However, the claimant alleged that OM was plaintiffs' contractor, and that his alleged accident was caused by the negligence of plaintiffs and their contractors and subcontractors, which includes OM. The underlying claimant is of course precluded under Workers' Compensation Law from directly suing his employer, OM, but nothing in the underlying complaint specifically absolves OM from liability. Significantly, discovery in the underlying matter to date has not established proximate cause or liability as a matter of law with respect to any specific party, including the claimant. It cannot be said that "extrinsic facts suggest[...] that the claim may ultimately prove meritless or outside the policy's coverage," but even if such facts were present, "the insurer cannot avoid its commitment to provide a defense." *Fitzpatrick*, 78 N.Y.2d at 66. Furthermore, plaintiffs proffer evidence that OM's contract with MJM was entered into prior to the underlying occurrence. Finally, the court has reviewed plaintiffs' defense bills (Exhibit F to the moving papers) and finds them to be reasonable.

Accordingly, it is hereby

ORDERED that plaintiff's motion is granted and Travelers' cross-motion is denied; and it is further

ORDERED, ADJUDGED and DECREED that defendant The Travelers Indemnity Company of America (s/h/a Travelers Indemnity Company of America) owes a duty to defend plaintiffs on a primary basis with respect to the underlying action styled *Fayzullo Kedratov v. 52-58 Gansevoort Street, LLC and MJM Associates Construction, LLC et ano.*, New York County Index No. 157073/2019 (the "Underlying Action"), and that plaintiffs are also additional insureds

on the umbrella policy issued by The Travelers Indemnity Company (s/h/a Travelers Indemnity Company); and it is further

ORDERED and ADJUDGED that Travelers must reimburse plaintiffs or their insures for defense costs incurred defending themselves in the Underlying Action, in the amounts set forth in Exhibit F to the moving papers.

This constitutes the decision and order of the court.

4/13/2023

DATE

SUZANNE J. ADAMS, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE