

**Zurich Am. Ins. Co. v Associated Mut. Ins. Coop.**

2023 NY Slip Op 33798(U)

October 17, 2023

Supreme Court, New York County

Docket Number: Index No. 657143/2021

Judge: Lynn R. Kotler

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LYNN R. KOTLER, J.S.C.

PART 8

Zurich American Insurance Company

INDEX NO. 657143/2021

- v -

MOT. DATE

Associated Mutual Insurance Cooperative

MOT. SEQ. NO. 001

The following papers were read on this motion to/for sj
Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits
Notice of Cross-Motion/Answering Affidavits — Exhibits
Replying Affidavits

ECFS Doc. No(s).
ECFS Doc. No(s).
ECFS Doc. No(s).

In this declaratory judgment action, plaintiff Zurich American Insurance Company ("Zurich") moves for an Order pursuant to CPLR § 3212 awarding it partial summary judgment against defendant Associated Mutual Insurance Cooperative ("Associated") and declaring that: (1) Associated has a duty to defend Tishman Speyer Properties, L.P. ("Tishman") and 11 West 42 Realty Investors, LLC ("11 West") in the underlying lawsuit pending in this court captioned Elijah Dalager v. 11 West 42 Realty investors, LLC and Tishman Speyer Properties, L.P., Index Number 154748/16 (the "Dalager Action"); (2) Associated's duty to defend is primary to Zurich's duty to defend; and (3) Associated must reimburse Zurich for its defense costs incurred after August 3, 2016, plus 9% interest accruing from the date of payment. Associated cross-moves for summary judgment declaring that it has no duty to defend in the Dalager Action or compelling Zurich to produce discovery pursuant to CPLR 3124. Zurich opposes Associated's cross-motion. Issue has been joined and note of issue has not yet been filed. Therefore, summary judgment relief is available.

On a motion for summary judgment, the proponent bears the initial burden of setting forth evidentiary facts to prove a prima facie case that would entitle it to judgment in its favor, without the need for a trial (CPLR 3212; Winegrad v. NYU Medical Center, 64 NY2d 851 [1985]; Zuckerman v. City of New York, 49 NY2d 557, 562 [1980]). If the proponent fails to make out its prima facie case for summary judgment, however, then its motion must be denied, regardless of the sufficiency of the opposing papers (Alvarez v. Prospect Hospital, 68 NY2d 320 [1986]; Ayotte v. Gervasio, 81 NY2d 1062 [1993]).

Granting a motion for summary judgment is the functional equivalent of a trial, therefore it is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue (Rotuba Extruders v. Ceppos, 46 NY2d 223 [1977]). The court's function on these motions is limited to "issue finding," not "issue determination" (Sillman v. Twentieth Century Fox Film, 3 NY2d 395 [1957]).

Dated: 10/19/23

HON. LYNN R. KOTLER, J.S.C.

- 1. Check one: [ ] CASE DISPOSED [X] NON-FINAL DISPOSITION
2. Check as appropriate: Motion is [ ] GRANTED [X] DENIED [ ] GRANTED IN PART [ ] OTHER
3. Check if appropriate: [ ] SETTLE ORDER [ ] SUBMIT ORDER [ ] DO NOT POST
[ ] FIDUCIARY APPOINTMENT [ ] REFERENCE

In the Dalager Action, plaintiff Elijah Dalager, an employee of Associated's insured, Le Mirage Café Corp. ("Le Mirage"), was allegedly injured when he slipped and fell down an interior stairwell (the "Accident") while working in Le Mirage's location at 11 West 42nd Street in New York, New York (the "Premises"). In his deposition, Dalager testified that as he was descending the subject staircase, his left foot slipped off the front of the step and then he fell down the stairs. Dalager sued Tishman and 11 West alleging that, while in the course of his employment for Le Mirage, he fell on the stairwell due to Tishman and 11 West's negligent failure to maintain the stairway, steps and handrail system in a good and safe condition, provide a proper and safe means of egress; and erect warnings or barriers. Tishman and 11 West subsequently filed a Third-Party Complaint against Le Mirage in the Underlying Action for contribution and indemnification.

Zurich has been provided a defense to Tishman and 11 West in the Dalager Action under a commercial general liability policy issued to Tishman. Zurich has demanded that Associated take over the defense for Tishman and 11 West because Dalager's injuries arose out of Le Mirage's use of the premises leased to it by Tishman and 11 West and if Tishman and 11 West were held liable in the Dalager Action, they would only be vicariously liable for Le Mirage's acts or omissions.

Meanwhile, Associated contends that 11 West is not entitled to coverage because it is not named, described or otherwise referred to as an insured under the general liability policy issued by it to Le Mirage and neither Tishman nor 11 West are entitled to coverage because they are not being sued vicariously, but rather "for their own independent acts and omissions, which are not covered and are expressly excluded under the additional insured endorsements" in Associated's policy with Le Mirage. Associated further argues that at a minimum, there are issues of fact as to whether Tishman and 11 West qualified as additional insureds under its policy and alternatively, if the court does not grant Associated's cross-motion, it should compel discovery and direct Zurich to produce all non-privileged documents responsive to its Second Notice of Discovery and Inspection.

The court finds that Zurich's motion must be granted as to Tishman for the reasons that follow. There is no dispute that Le Mirage entered into a lease with Tishman agreeing to "take good care of the demised premises" and that Dalager's claims against Tishman and 11 West stem in part from vicarious liability as against Zurich's insureds. Further, Associated's Policy contains an additional insured endorsement which provides coverage to Tishman for liability "arising out of" the use of that part of the premises leased or rented to Le Mirage. Finally, there is no dispute that the coverage afforded under the Associated Policy is primary, non-contributory. Therefore, Tishman is entitled to the declarations it seeks and Associated's cross-motion on this point is denied. Further, the issue of what reasonable attorney's fees Tishman has incurred in defending against the claims asserted in the Dalager Action after August 3, 2016, plus interest, is hereby referred to a Special Referee or JHO to hear and **report**.

As for 11 West, Associated claims that it is not an additional insured under the subject policy because 11 West 42 Limited Partnership, a former owner of the premises, is named in the declarations. Meanwhile, Zurich contends that Associated's Policy is intended to provide coverage to the current building owner, and as Zurich asserts that it is of no moment that the former owner is listed in the declarations. Neither party is entitled to summary judgment as to whether Associated is required to provide coverage to 11 West as there is a triable issue of fact as to whether Associated's Policy provides coverage to the current owner of the Premises rather than just the named former owner.

Finally, the balance of the cross-motion to compel is denied as premature. As Zurich points out, a preliminary conference has not yet been held in this case. Therefore, the parties shall meet and confer and complete a proposed preliminary conference order form and submit same to the court which sets deadlines for all discovery in this action.

## CONCLUSION

In accordance herewith, it is hereby:

**ORDERED** that Zurich's motion is granted to the following extent:

It is **DECLARED** that Associated has a duty to defend Tishman Speyer Properties, L.P. ("Tishman") in the underlying lawsuit pending in this court captioned Elijah Dalager v. 11 West 42 Realty investors, LLC and Tishman Speyer Properties, L.P., Index Number 154748/16 (the "Dalager Action"); and

It is **DECLARED** that Associated's duty to defend is primary to Zurich's duty to defend Tishman; and

It is **DECLARED** that Associated must reimburse Zurich's defense costs incurred after August 3, 2016, plus interest; and it is further

**ORDERED** that the issue of what reasonable attorney's fees Tishman has incurred in defending against the claims asserted in the Dalager Action after August 3, 2016, plus interest, is hereby referred to a Special Referee or JHO to hear and **report**; and it is further

**ORDERED** that plaintiff shall, within 60 days from entry of this decision/order, serve a copy of this order with notice of entry, together with a complete Information Sheet<sup>1</sup>, upon the Special Referee Clerk in the Motion Support Office (Room 119M), who is directed to place this matter on the calendar of the Special Referee's Part and/or assign this matter to a JHO for the earliest convenient date; and it is further

**ORDERED** that any motion to confirm or disaffirm the Report of the JHO/Special Referee shall be made within the time and in the manner specified in CPLR 4403 and section 202.44 of the Uniform Rules for the Trial Courts; and it is further

**ORDERED** that the balance of Zurich's motion is denied; and it is further

**ORDERED** that Associated's cross-motion is denied in its entirety; and it is further

**ORDERED** that the parties in the above captioned matter are hereby directed to submit a proposed Preliminary Conference order on consent on or before **November 21, 2023**.

Pursuant to the Uniform Civil Rules for the Supreme Court and the County Court § 202.11: Counsel for all parties shall consult prior to a preliminary or compliance conference about (i) resolution of the case, in whole or in part; (ii) discovery, including discovery of electronically stored information, and any other issues to be discussed at the conference, (iii) the use of alternate dispute resolution to resolve all or some issues in the litigation; and (iv) any voluntary and informal exchange of information that the parties agree would help aid early settlement of the case. Counsel shall make a good faith effort to reach agreement on these matters in advance of the conference.

All sides are directed to meet and confer before the above date and present a proposed preliminary conference order on consent, completing page 1 (and if necessary, the additional directives) of the preliminary conference order form available on the [nycourts.gov](https://www.nycourts.gov) website at:

<https://www.nycourts.gov/LegacyPDFS/courts/1jd/supctmanh/PC-Genl.pdf>


Proposed preliminary conference orders may be filed on NYSCEF or emailed to the Part 8 Clerk, Steven Carney, at [scarney@nycourts.gov](mailto:scarney@nycourts.gov).

<sup>1</sup> Copies are available in Room 119M at 60 Centre Street and on the Court's website at [www.nycourts.gov/supctmanh](https://www.nycourts.gov/supctmanh) (under the "References" section of the "Courthouse Procedures link).

If all sides do not consent to completing the preliminary conference order outside of court, the parties SHALL submit a joint letter on or before the above date advising as to the status of the meet and confer and what issues, if any, have arisen which prevent the parties from completing a proposed preliminary conference order on consent.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly rejected and this constitutes the decision and order of the court.

Dated: 10/17/23  
New York, New York

So Ordered:   
Hon. Lynn R. Kotler, J.S.C.