O'Connor v S&S Constr. of W. N.Y., Inc.
2023 NY Slip Op 35315(U)
March 31, 2023
Supreme Court, Erie County
Docket Number: Index No. 806238/2018
Judge: Dennis E. Ward
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

STATE OF NEW YORK
SUPREME COURT : COUNTY OF ERIE

SHANNON O'CONNOR and MARLENE O'CONNOR
Plaintiffs,

vs.

S&S CONSTRUCTION OF WESTERN NEW YORK, INC., and WALLCRAFT DRYWALL, INC.
Defendants.

Index No. 806238/2018

DECISION

HON. DENNIS E. WARD, J.S.C.

S&S CONSTRUCTION OF WESTERN NEW YORK, INC.,
Third-Party Plaintiff,

vs.

H.K FREY & SONS, INC.,
Third-Party Defendant.

Peter M. Kooshoian, Esq.
Rosenthal, Kooshoian & Lennon, LLP
Attorneys for Plaintiffs Shannon O'Connor and Marlene O'Connor

Phyliss A. Hafner, Esq.
Burden, Hafner & Hansen, LLC
Attorneys for Defendant S&S Construction of Western New York, Inc.

Marc A. Schulz, Esq.
Hurwitz & Fine, PC
Attorneys for Defendant Wallcraft Drywall, Inc.

Melissa A. Foti, Esq.
Kenney Shelton Liptak Nowak, LLP
Attorneys for Third-Party Defendant H.K. Frey & Sons, Inc.

HON. DENNIS E. WARD, J.S.C.

The subject litigation arises out of a workplace fall that took place during construction in a subdivision. Pending before the court are five motions seeking summary judgment. Each party filed one motion, and the owner/general contractor, S&S CONSTRUCTION, filed two separate motions for contractual indemnification and related relief as against the other defendant (WALLCRAFT DRYWALL, INC.) and the third-party defendant (H.K. FREY & SONS, INC.), which was also the plaintiff's employer.

The various summary judgment motions raise two groups of issues:

- Plaintiff's right to recover under Labor Law 240; Labor Law 241(6); Labor Law 200; and negligence; and
- The owner and general contractor's claims for contractual indemnification, breach of contract, and alleged failure to procure insurance.

Analysis begins with the liability claims.

I. Labor Law

A. Labor Law §240

The Plaintiff, SHANNON O'CONNOR, sustained serious injuries when he fell from the upper portion of a two-part staircase that had no fall protection, as the railing had been removed during construction. The configuration of the stairway, without its railing, left a gaping hole that exposed the worker directly to the floor below, which is where Mr. O'Connor landed.

Each half of the stairway had approximately 10 steps. Mr. O'CONNOR had walked up the first half of the stairs and reached the landing. The stairs then take a 180 degree turn and continue upward for another 10 stairs. Mr. O'Connor was on about the third or fourth step of the second set of stairs at the time he fell. He "took a header" diving head first, going sideways and down, hitting his shoulder and head against a wall on the way down and ultimately ending up at the bottom of the stairs, one level below.

Mr. O'Connor has moved for summary judgment on Labor Law 240(1), asserting that, by exposing the worker to an open, unfinished stairwell, the owner, S&S Construction, failed to provide proper protection to a worker required to ascend to an elevated work location.

S&S (and the other parties) have cross-moved to dismiss the Labor Law 240(1) claim, asserting that, no matter how dangerous, permanently affixed stairs are not within the ambit of Labor Law 240(1).

It is not disputed that the railing that should have been there had been removed while construction on the premises was ongoing. Plaintiff was employed by third-party defendant, H.K. FREY & SONS, the plumbing subcontractor, which was engaged in work on the second floor. There was at least one other subcontractor on site, defendant, WALLCRAFT DRYWALL, INC.

During depositions, no party admitted removing the railing, although there was an e-mail from the owner/general contractor (Mr. Stover) in which he told WALLCRAFT that he had admitted to his lawyer that he removed the railing, although he also states in the e-mail he does not for sure whether he did so or not. In his deposition testimony, Mr. Stover backed off from the e-mail and implied the removal was done by WALLCRAFT. The WALLCRAFT witnesses denied removing the railing.

Had it been in place, the railing would have provided protection to a falling worker who otherwise had nothing to keep him from catapulting into the chasm below. Without any safety device, the worker was exposed to the devastating effects of gravity,

Decisional law with regard to workplace accidents involving stairways has not always been consistent (*see, generally*, 1B New York Pattern Jury Instructions, 2:217 [3rd ed.] 2023 at pages 574-576). While a permanently affixed staircase itself is generally not deemed a "safety device" within the wording of Labor Law 240(1), it nonetheless remains the duty of the owner and general contractor to provide reasonable protections to permit a worker required to reach an upper elevation with the means to do so safely (*Felker v Corning*, Inc., 90 N.Y.2d 219, 224 [1997] (observing there are two distinct "elevation related risks" one being the need to safely elevate the worker to the height he needs to be to do his work).

Here, Mr. O'Connor was required to ascend to a higher level in order to perform his tasks in an upstairs bathroom. Given the configuration of the work under construction, and in particular the gaping hole between one half of the stairway and the ground level, there was nothing but air between the upper stairs and the lower floor some ten feet below. In these circumstances, New York decisional law has thus held that summary judgment on Labor Law §240(1) is proper where "plaintiff established that he was injured while working at a building under construction, that he fell through an open, unfinished stairwell, and that he was not provided with any safety devices to prevent or break his fall" (*King v Malone Home Builders, Inc.*, 137 A.D.3d 1646, 1649

[4th Dept. 2016], *citing Perkins v. Loewentheil & Daughters*, 282 A.D.2d 510, 511 [2d Dept 2001]; *see also Poulin v Ultimate Homes, Inc.*, 166 A.D.3d 667 [2nd Dept. 2018]; *McKay v Weeden*, 148 A.D.3d 1718 [4th Dept. 2017]; *Schneider v Hanover E. Estates*, 237 A.D.2d 274 [2d Dept 1997]). Here, the stairwell, due to its configuration and without the railing, was likewise open and unfinished, and, as the Fourth Department noted in *King*, "the worker was not provided with any safety devices to prevent or break his fall" (*King* at 1649, *citing Zimmer v Chemung County Performing Arts*, 65 N.Y.2d 513, 524 [1985] ["when the evidence establishes the absence of any safety devices at the worksite, the statute's clear dictates have not been met"]). Here, the worker was exposed to the dangerous effects of gravity without being supplied any device to prevent the catastrophic injury associated with a fall from a height.

For purposes of Labor Law §240, the duty rests with the owner and general contractor, whose duty is nondelegable, irrespective of fault. Thus, regardless of how the railing came to be absent, it is the duty of the owner and general contractor to provide the safe place to work. The purpose of Labor Law §240 "is to protect workers by placing ultimate responsibility for safety practices on owners and contractors instead of on workers themselves" (*Saint v. Syracuse Supply Co.*, 25 N.Y.3d 117, 124, *quoting Panek v County of Albany*, 99 N.Y.2d 452, 457 [2003], and *citing Martinez v City of New York*, 93 N.Y.2d 322, 325-326 [1999]).

The owner and general contractor, S&S CONSTRUCTION, is statutorily liable under Labor Law 240(1), irrespective of fault, and the plaintiff's motion for summary judgment against S&S CONSTRUCTION is therefore granted.

B. Labor Law 241(6)

The plaintiff has also moved for summary judgment on his Labor Law 241(6) claims; the defendants and third-party defendant have cross-moved to dismiss all such claims as a matter of law.

The Industrial Code sections relied upon are: 23-1.7 (b), which governs hazardous openings; 23-1.7 (e), which governs "tripping" hazzards; and 23-2.7 (e), which requires railings on stairways during construction.

The defendants argue, and the court agrees, that 23-1.7(e) (1), which covers "tripping hazards" does not apply to the facts of this case. The plastic that was covering the stairs was intentionally placed there, and while it may have degraded to some degree or been loose, the plastic that remained was nonetheless intentionally placed there to serve a function and thus cannot fairly be characterized as "debris," thus rendering this section inapplicable.

Industrial Code §23-1.7, labeled "Protection from general hazards" at subdivision (b) (1), "Falling hazards–hazardous openings" provides as follows:

> (I) Every hazardous opening into which a person may step or fall shall be guarded by a substantial cover fastened in place or by a safety railing constructed and installed in compliance with this Part (rule).

Another provision, found at §23-2.7(e), is labeled "Stairway requirements during the construction of buildings" and one of its subdivisions expressly requires railings:

> e) Protective railings. The stairwells of temporary wooden stairways and of permanent stairways where enclosures or guard rails have not been erected shall be provided with a safety railing constructed and installed in compliance with this Part (rule) on every open side. Every stairway and landing shall be

provided with handrails not less than 30 inches nor more than 40 inches in height, measured vertically from the nose of the tread to the top of the rail.

The Industrial Code thus requires that every hazardous opening into which a person may fall "shall" be guarded by a cover or safety railing; every permanent and temporary stairway shall be provided with handrails of not less than 30 inches in height. Here, the permanent stairway had no handrail of any height, and thus the workplace failed to conform to the minimum requirements of the Industrial Code.

The defendants argue that the plaintiff should not be permitted to rely upon §23-2.7 because it was first introduced in his summary judgment motion (filed in November, 2020). Defendants' argument on lateness, however, must be evaluated in context, including the ongoing discovery that continued after the motion was originally filed. Additionally, the parties already had every incentive to thoroughly investigate every aspect of the staircase, including the absence of railings, as part of the overall Labor Law §240 case, thus negating claims of prejudice.

In the context of this litigation, the plaintiff's summary judgment motion was filed well before the note of issue had been filed. Following receipt of the plaintiff's summary judgment motion, there was a flurry of activity. In addition to the expected cross-motions, and the continuing request for further discovery, there was also a separate action filed by plaintiff directly against defendant, WALLCRAFT. That action set off a chain of further discovery, which had already been underway due to the other parties claiming they needed additional depositions before the already-filed motions could be concluded. *See, e.g.*, NYSCEF docket numbers 223 & 225. The upshot was that the summary judgment motions were put on hold while discovery continued through 2021.

Additional papers continued to be filed, and oral argument did not go forward until December, 2021. The note of issue still had not been filed.

The failure to include a particular regulation in the bill of particulars "is not necessarily fatal to a §241(6) claim and, in the absence of unfair surprise or prejudice, may be rectified by amendment, even where a note of issue has been filed" (*Walker v Metro-North Commuter RR.*, 11 A.D.3d 339 [1st Dept. 2004, *citing Padilla v Frances Schervier Hous. Dev. Fund Corp.*, 303 A.D.2d 194 [1st Dept. 2003]). In the subject case, the note of issue had not been filed when the subject regulation was raised. Discovery was continuing, and the regulation at issue covers facts that were central to the case, irrespective of Code violations. There is thus no basis to reject the subject Industrial Code regulation.

Turning to the merits of §23-2.7, the Plaintiff asserts that Defendants have failed to raise any substantive argument against its application and that he should therefore be awarded summary judgment. Plaintiff is correct that there has been negligible discussion as to the regulation having been complied with. Nonetheless, the violation of a regulation, as opposed to a statute, does not create *per se* liability. It is still for the jury to determine whether the violation of the regulation established a failure to use reasonable care that warrants recovery (*see,* 1B NY Pattern Jury Instructions, 2:216A, [3rd ed.] 2023). While it is difficult to imagine a jury finding that the protection was adequate without the required railing, the court declines to make that determination. This ruling is without prejudice to a motion for a directed verdict at the close of proof at trial.

C. Labor Law 200 & Common Law Negligence

Plaintiff's motion for summary judgment on Labor Law §200 has been made only against defendant S&S CONSTRUCTION, the owner and general contractor, which has also cross-moved to dismiss these claims.

Liability against an owner or general contractor for general negligence or Labor Law §200 liability requires either a finding that the entity directed the manner and means of the work or provided an unsafe premises (*Urban v No. 5 Times Sq. Dev., LLC.*, 62 A.D.3d 553 [1st Dept. 2009]).

S&S argues that it did not control the method and manner of plaintiff's work and that it did not have actual or constructive notice of the railing being missing on the day of the accident. The latter argument is completely lacking in factual merit, certainly for summary judgment purposes. Mr. Stover of S&S testified he was at the premises every day, and his testimony was that, not only did he remove the railing multiple times, but that he may have actually been the one who removed it on the day of the accident.

On a summary judgment motion the facts must be construed against the moving party and in favor of the non-moving party. It will be for the jury to determine the facts as between the contested positions, and this issue is thus not amenable to summary disposition. All motions and cross-motions regarding Labor Law §200 and common law negligence are, therefore, denied.

D. Motion by WALLCRAFT–Motion 12

Shortly after filing for summary judgment, the plaintiff commenced a separate suit against WALLCRAFT, which was already in the subject suit as a third-party defendant. The parties ultimately stipulated to amend the caption in order to combine the litigation into a single index number. WALLCRAFT then moved for summary judgment seeking dismissal of all claims filed by the plaintiff as against WALLCRAFT. This motion was unopposed by plaintiff and is therefore granted. WALLCRAFT'S motion #12 to dismiss the claims of the other parties as against WALLCRAFT is discussed in the next section.

II. Claims Pertaining to Contractual Indemnification/Additional Insured

In Motion #8, third-party defendant, H.K. FREY & SONS, has moved to dismiss the entire third-party claim against it, on the grounds that FREY had nothing to do with the railing or the plastic on the stairs. In Motion #12, WALLCRAFT likewise moves for the same relief.

In Motions #10 & 11, conversely, the third-party plaintiff, S&S CONSTRUCTION, has moved to have both of its subcontractors, FREY & WALLCRAFT, provide S&S with defense and indemnification, pursuant to the language of the subcontract agreement. S&S seeks summary judgment on contractual indemnification, additional insured coverage, or in the alternative, breach of contract for not obtaining additional insured coverage that applies to these facts.

A. Contractual Indemnification

The short answer to the claim for contractual indemnification is that S&S has not demonstrated its own freedom from fault. To the contrary, the testimony of S&S's owner, Mr. Stover, demonstrates that S&S Construction was very involved in the construction process, being on site on a daily basis. Indeed, Mr. Stover is the person who most likely removed the temporary railing, although the ultimate finding of fact on this point will have to be made by the jury.

New York decisional law is replete with holdings that a party who is not free from fault may not be contractually indemnified (*see, e.g., Hurley v Best Buy Stores, L.P.*, 57 A.D.3d 239 [1st Dept. 2008] [moving party had not ruled out its own negligence and thus award of summary judgment on the indemnification claims was "premature"]; *Urbina v 26 Ct. St. Assoc., LLC,* 46 A.D.3d 268, n. 2 [1st Dept. 2007]).

Under the 1981 amendment of General Obligations Law 5-322.1, owners and contractors are prohibited from passing along liability risks to the extent of their own negligent actions, whether that negligence be in whole or in part (*Brown v Two Exch. Plaza Partners*, 76 N.Y.2d 172, 180 [1990]). However, liability under Labor Law §240 "is not predicated on fault; it is imputed to the owner or contractor by statute and attaches irrespective of whether due care was exercised and without reference to principles of negligence and does not give rise to an inference of negligence" (*Brown,* 76 N.Y.2d at 179). Therefore, "a violation of the statute is not the equivalent of negligence and does not give rise to an inference of negligence" (*Id.*). This court's finding of statutory liability against S&S thus does not automatically translate into a finding that S&S was at fault.

In the absence of actual fault by the owner/general contractor, indemnification is permitted, notwithstanding liability under Labor Law §240. Where the indemnification clause is broad, such that it covers both acts and omissions that cause injury, and also claims "arising out of" the performance of the work, the obligation for indemnity will apply when the injury occurs while the indemnitor's employee is in the course of doing his job (*Brown,* 76 N.Y.2d 172, 178, at Point II). In the subject case, plaintiff was in the course of doing his job, as he was ascending to the upper level of the structure where his work was located.

The indemnification provision in the subject case is also very broad, as the language mirrors the language in *Brown*. In the subject case, FREY and WALLCRAFT agreed to provide contractual indemnification for claims "arising out of or in any way relating to the work performed".

With respect to FREY, this provision clearly applies. Plaintiff was engaged in doing his job at the time of injury, as he was ascending to his workplace location. The claim thus "arises out of" and is "in any way related" to FREY'S work being performed (*see, e.g., Fuger v Amsterdam House for Continuing Care Retirement Community, Inc.*, 117 A.D.3d 649 [1st Dept. 2014] [subcontractor's employee was injured doing the work of the subcontract, thus establishing that the injury is a claim "arising out of" the subcontract).

With respect to WALLCRAFT, whether the injury relates to WALLCRAFT'S work will depend on whether it is ultimately found that the removal of the railing was in any way connected to performance of the drywall work.

Contrary to FREY'S arguments, there is no requirement that the party providing indemnification must, itself, be at fault or negligent (*Mancusi v Avalonbay Communities, Inc*, 199 A.D.3d 463 [1st Dept. 2021]; *McAllister v Construction Consultants L.I., Inc.*, 83

A.D.3d 1013 [2nd Dept. 2011]). Further, contrary to WALLCRAFT'S argument, "it is not necessary that plaintiff himself be actively engaged in the type of work covered by the indemnity contract in order for such injury to fall within this broadly worded indemnification provision" *(Balbuena v New York Stock Exch. Inc.*, 49 A.D.3d 374 [1st Dept. 2008] [worker was doing electrical work but was injured due to the actions of the drywall contractor, which had provided an agreement to indemnify]; *Tanksley v. LCO Bldg. LLC*, 196 A.D.3d 1037, 1038 [4th Dept. 2021]).

Depending on what the facts of this case are ultimately determined to be, it is possible that S&S was not merely statutorily liable under Labor Law §240, but was actively negligent and is thus not permitted to be indemnified under General Obligations Law 5-322.1 and the decisional law.

Conversely, if S&S is found not negligent, it would be entitled to indemnification under the language of the agreement, as the claim arose in the course of Plaintiff performing his work for FREY, and may have arisen out of work being done by WALLCRAFT. Accordingly, both FREY'S and WALLCRAFT'S motions to dismiss the third-party claims, and S&S's motion for summary judgment on its third-party suit are all denied. It will be for the jury to determine who removed the railing and thus created the dangerous condition. If WALLCRAFT is found to have played no role in why the railing was removed, then the claim did not arise from its work, and there will be no basis for indemnification. If S&S did not remove the railing, it would be entitled to indemnification from FREY and, if the railing was removed for WALLCRAFT'S work, then S&S would also be entitled to indemnification from WALLCRAFT. In short, factual questions prevent an award of summary judgment on the issues of contractual indemnification, requiring denial of motions 8, 10, 11, & 12.

B. ADDITIONAL INSURED STATUS/BREACH OF CONTRACT

The argument of S&S, essentially, is that S&S contracted to be named an "additional insured" by FREY and WALLCRAFT, and that there should never be a scenario in which S&S would have to be covered by its own insurance. Thus, argues S&S, either the policies obtained by FREY and WALLCRAFT should be construed to cover this loss, including the cost of defense, or, if that is not the case, then FREY and WALLCRAFT breached their contract.

FREY & WALLCRAFT have argued strenuously against this logic. They note, first, that (in their view) the actual, at-fault party for the injury is S&S, for taking down the railing and making the staircase unsafe. FREY argues its insurance policy does not cover S&S in this instance, even though S&S is an additional insured for some purposes, because the language of the subcontract was vague as to what kind of "additional insured" coverage must be obtained. FREY argues that the additional insured coverage obtained was sufficient to satisfy the contract, and hence there is no breach of contract.[1]

---

[1] WALLCRAFT, for whatever reason, failed to have S&S named as an additional insured on its CGL policy, and thus may have breached the contract. However, S&S has commenced a separate action against both WALLCRAFT and its carrier, Erie Insurance (S&S CONSTRUCTION OF WESTERN NEW YORK v. H.K. FREY & SONS, INC., et al, Erie County Index No. 801287-2021). In its amended complaint, S&S is seeking to have the Erie policy modified on the grounds of "mutual mistake". There was no doubt a mistake, but it is unclear whether it was "mutual". However, depending on how the facts in the underlying case are resolved by a jury, it may not be significant that S&S was not an additional insured on the Erie policy.

In resolving the conflicting positions of the parties, it is important to understand both the background of additional insured coverage and recent Court of Appeals rulings on this topic.

In *Burlington Ins. Co. v NYC Tr. Auth.*, (29 N.Y.3d 313 [2017]). New York's highest court was called upon to construe "additional insured" language that had been developed for use in construction contracts. Notably, the language in *Burlington* is the same "additional insured" language employed in the case at bar.

In *Burlington,* a majority ruled that the "additional insured" language in that case did not provide coverage where the named insured was without fault and the accident was caused entirely by the sole negligence of the additional insured. Importantly, the Court of Appeals majority observed that the endorsement at issue did not provide coverage for claims "arising out of" the subcontract; rather the language limited coverage to cases in which the accident was "caused in whole or in part" by the acts of the named insured. The majority also emphasized that the ISO form in the policy had been intentionally written to replace the "arising out of" language with the "caused by" language in the newer form.

"The change was intended to provide coverage for an additional insured's vicarious or contributory negligence and to prevent coverage for the additional insured's sole negligence" (*Burlington,* 29 N.Y.2d at 326). "At the heart of the amendment, therefore, was 'the preclusion of coverage for an additional insured's sole negligence'" (*Id.*). Where a policy contains the "caused by" language, there must be a showing that the named insured's conduct was a proximate cause of the injury in order for the additional insured to have coverage (*Pioneer Cent. Sch. Dist. v. Preferred Mut. Ins. Co.*, 165 A.D.3d 1646 [4th Dept. 2018]). Where the additional insured is "the sole proximate cause" of the injury, it is not covered by the named insured's policy (*Hanover Ins. Co. v. Philadelphia Indemn. Ins. Co.*, 159 A.D.3d 587, 588 [1st Dept. 2018], *citing Burlington* at 323).

By way of contrast, the Court of Appeals has construed the "arising out of" language in a policy to be very broad. In *Regal Constr. Corp. v. National Union Fire Ins. Co. Of Pittsburgh, PA* (15 N.Y.3d 34 [2010]), the named insured's worker slipped on a recently painted metal joist. The Court of Appeals held the additional insured was covered by the named insured's policy, even though the accident did not arise from work that had been done by the named insured. The Court of Appeals reasoned that the named insured's worker got hurt while he was doing his job–giving instructions to a subcontractor. The "focus of the inquiry is not on the precise cause of the accident but the general nature of the operation in the course of which the injury was sustained" (*Regal* at 38).

The arguments of S&S in the subject case ignore the sharp distinction the Court of Appeals has drawn between insurance policies with "arising out of" language as compared to "caused by" language. Rather, as noted, S&S takes the position that its own carrier should never have to pay, even if S&S is solely at fault for a particular injury. This is exactly the opposite of what the Court of Appeals held in *Burlington*.

The position taken by S&S, and the broad coverage afforded in policies with the "arising out of" language effectively obliterate the intent of General Obligations Law §5-

322.1. As previously noted, the legislature amended this statute in 1981 to make it explicit that a general contractor may not shift its own fault onto the subcontractors. Rather, the owner and general contractor may be indemnified only to the extent that they, themselves are not at fault for the happening of an accident. To the extent S&S seeks to require the subcontractors to, in essence, buy a liability policy for the acts of the general contractor, S&S is undoing what the legislature sought to prevent, namely the shifting of all risks onto the subcontractors, whom the legislature noted are less able to absorb the cost.

Turning to the contract documents in this case, it is readily apparent that S&S did not succeed in this case in shifting coverage for its own fault to another party or carrier.

1. What the contract states

The subcontract with each subcontractor requires additional insured coverage in the following language:

> General Contractor will not pay any money to any subcontractor unless the subcontractor has previously file[d] with The General Contractor a current Certificate of Liability Insurance in an amount not less than $1,000,000 and Workers Compensation Certificate. Certificate must name the general Contractor as additional insured.

A provision in a contract cannot be interpreted as requiring procurement of additional insured coverage "unless such a requirement is expressly and specifically stated" (*Olivieri v. Barnes & Noble, Inc.*, 208 A.D.3d 1001, 1007 [4th Dept. 2022]). Fairly construed, the contract creates an obligation on the subcontractor to procure commercial general liability (CGL) coverage of $1,000,000 and to produce a Certificate of Insurance that names the General Contractor (S&S) as an additional insured.

However, there is no provision stating what type of "additional insured" coverage must be provided or what language must be in the policy.

2. What the policy provides

FREY obtained $1 million of CGL insurance from Merchants Mutual. The policy names S&S as an additional insured. The words of the policy contain the same ISO language that was utilized in *Burlington*, and thus set limits on the coverage provided to the additional insured. The policy states that "Who is An Insured" is defined as follows:

> Any person or organization, when you and such person or organization have agreed in writing in a contract, agreement or permit that was signed and executed prior to the "bodily injury", "property damage" or "personal and advertising injury", that such person or organization be added as an additional insured on your policy. Such person is an additional insured only with respect to liability for "bodily injury", "property damage" or "personal and advertising injury" caused, in whole or in part, by: Your acts or omissions

The language of the policy thus limits "additional insured" coverage to situations in which liability is caused, "in whole or in part by" the acts or omissions of the named insured. As in *Burlington,* the additional insured coverage does not cover liability that is caused by the additional insured's sole negligence.

In viewing the decisional law and the words of the parties' contract, there is no breach of contract by FREY. S&S asked to be named as an additional insured on FREY'S policy, and S&S was so named. The contract did not specify the scope of additional insured coverage or any particular language that had to be utilized. FREY obtained what was standard in the industry, and there is no basis shown to demonstrate a breach of contract in doing so.

3. Application of the Law to the Subject Facts

The additional insured coverage obtained by FREY applies to "liability for 'bodily injury'" that is "caused, in whole or in part, by [FREY'S] acts or omissions" (Merchant's policy). Thus S&S is an additional insured only if there is a possibility of the accident being caused by FREY'S acts or omissions. If the jury finds that S&S removed the railing, then it could find that the acts or omissions that caused the injury are the sole negligence of S&S in removing the railing. If the jury so finds, then there is no basis for additional insured coverage under FREY'S policy.

When a policy "limits coverage to an injury 'caused in whole or part' by the 'acts or omissions' of the named insured, coverage is extended to an additional insured only when the damages are the result of the named insured's negligence or some other act or omission" (*Hanover Ins. Co. v. Philadelphia at* 588). There is no additional insured coverage where "the sole proximate cause of the injury was the additional insured" (*Id.*). In the subject case, the jury may well find S&S to be the sole cause of the plaintiff's injury. That finding would eliminate any obligation for the Merchant's Mutual policy to provide indemnity.

The duty to defend stands on a different footing. If the allegations in the underlying actions potentially give rise to a covered claim, then there is a duty to defend (*Fitzpatrick v. American Honda Motor Co.*, 78 N.Y.2d 61, 67 [1991]; *Indian Harbor Ins. Co. V. Alma Tower, LLC*, 165 A.D.3d 549 [1st Dept. 2018]). An insurer's duty to defend its insured is "exceedingly broad" (*Regal Const. Corp.* at 37, *quoting BP A.C. Corp. v. One Beacon Ins. Group*, 8 N.Y.3d 708 [2007]).

An insurer will be called upon to provide a defense "whenever the allegations of the complaint suggest ... a reasonable possibility of coverage" (*Regal Const. Corp., quoting Automobile Ins. Co. of Hartford v. Cook*, 7 N.Y.23d 131, 137). If a complaint contains "any facts or allegations which bring the claim even potentially within the protection purchased, the insurer is obligated to defend" (*Regal* at 37, *quoting Technicon Elecs. Corp. v. American Home Assur. Co*, 74 N.Y.2d 66). "This standard applies equally to additional insureds and named insureds" (*Regal* at 37, *quoting Technicon* at 714-715).

There is a duty to defend where the proximate cause of the plaintiff's injuries is not "undisputed and it remains a possibility that [the named insured] will be deemed to have been a proximate cause" (*U.S. Specialty Ins. Co. v. Harleysville Worcester Ins. Co.*, No. 20 Civ 7691 (SLC) 2021 WL 4043457 [S.D.N.Y. Sept. 3, 2021]).

In the subject case, FREY sent a worker out to a job site to do work on an upper level and did not, itself, provide a safe means for the worker to get to the elevated work site. While the "factfinder may ultimately determine that [the named insured's] acts or omissions did not establish liability . . . that uncertain outcome is immaterial to the question of [the duty to defend]" where the plaintiff's allegations "suggest a reasonable possibility of coverage" (*Kookmin Best Ins. Co. Ltd. v. Foremost Ins. Co.*, No. 18 Civ 782, 2019 WL 1059973 [S.D.N.Y. March 5, 2019).

When an insurer believes that undisputed facts prove the alleged injuries do not fall within the duty to indemnify, "it must defend the action and seek to prove, in that action, the existence of the facts–at which point it may withdraw its defense" (*Kingsway Realty, LLC v. Gemini Ins. Co*, 2019 WL 1099751 [S.D.N.Y. 2019]).

There is a view of the evidence by which the employer, FREY, could be found at fault for exposing its own worker to a risk of falling and thus exposing him to an unsafe workplace. While FREY did not, itself, remove the railing, neither did it do anything to provide a safe means of accessing the upper floor. Because FREY'S actions cannot be ruled out, as a matter of law, as having contributed to the injuries sustained, FREY'S carrier has a duty to defend.

CONCLUSION

Each moving party shall prepare an order, on notice, with respect to its motion(s), in accordance with this Decision. A status conference has been scheduled for **April 20, 2023 at 3:30 p.m**.

March 31, 2023

Hon. Dennis E. Ward, J.S.C.
HON. DENNIS E. WARD, J.S.C