Fordham Valentine Assoc. LLC v American Cas. Co. of Reading, Pa.

2026 NY Slip Op 31307(U)

March 31, 2026

Supreme Court, New York County

Docket Number: Index No. 652340/2024

Judge: Phaedra F. Perry-Bond

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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. PHAEDRA F. PERRY-BOND** **PART** **35**

Justice

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FORDHAM VALENTINE ASSOCIATES LLC F/K/A FORDHAM VALENTINE ASSOCIATES, JENEL MANAGEMENT CORP., and PAV-LAK CONTRACTING INC.

Plaintiffs,

- v -

AMERICAN CASUALTY COMPANY OF READING, PENNSYLVANIA, and TRISURA SPECIALTY INSURANCE COMPANY,

Defendants.

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INDEX NO. 652340/2024

MOTION DATE 02/12/2025

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

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, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68

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

Upon the foregoing documents, Plaintiffs' motion for partial summary judgment is granted.

I. Background

Plaintiff Fordham Valentine Associates LLC f/k/a Fordham Valentine Associations ("Fordham") owns the shopping complex at 215-223 East Fordham Road, Bronx, New York (the "Premises"). Plaintiff Jenel Management Corp. ("Jenel") manages the Premises on behalf of Fordham. Pav-Lak Contracting Inc. ("Pav-Lak") was retained as general contractor for a renovation project at the Premises. Pav-Lak retained Top Notch Finishes, Inc. ("Top Notch") and East End Concrete Industries, Inc. ("East End") as subcontractors on the renovation project.

On September 10, 2021, Top Notch employed Hector Robles ("Robles") at the Premises. Robles was moving sheetrock in the Premises' basement when he allegedly tripped on cables and wood left on the floor. Robles allegedly had complained to Top Notch employees about dangerous

conditions in the basement prior to his accident but was instructed to keep working. The electrical cable which Robles allegedly tripped on was connected to one of East End's machines. As a result, Robles sued Fordham, Jenel, and Pav-Lak for personal injuries sustained due to alleged violations of the New York Labor Law (*see Robles v Fordham Valentine Associates LLC, et al.*, Index No. 816226/2021E [Sup. Ct., Bronx County]) (the "Underlying Action").

In the Underlying Action, via Decision and Order dated March 19, 2025, and uploaded to NYSCEF on April 10, 2025, Hon. Shawn T. Kelly dismissed the Labor Law § 240(1) claim as against Top Notch without opposition and dismissed the contribution and common law indemnification claims asserted against Top Notch pursuant to Workers' Compensation Law § 11. Justice Kelly found issues of fact precluded granting or dismissing Fordham, Jenel, and Pav-Lak's contractual indemnification claims against Top Notch. Justice Kelly specifically found there were issues of fact as to whether Top Notch was negligent. Justice Kelly granted Plaintiff's motion for summary judgment on the issue of liability on his Labor Law § 241(6) claim predicated on a violation of Industrial Code § 23-1.7(e)(2), which requires floors where people work or pass be kept free from accumulations of dirt, debris, and from scattered tools and materials. Fordham, Jenel, and Pav-Lak's motion for summary judgment on their contractual indemnification claim against East End was denied, not on the merits, but based on untimely filing.[1]

Mt. Hawley Insurance Company ("Mt. Hawley") issued a commercial general liability policy to Pav-Lak (the "Mt. Hawley Policy"), and Fordham and Jenel are additional insureds under that policy. Mt. Hawley is providing a defense to Pav-Lak, Fordham and Jenel in the Underlying Action. Defendant American Casualty Company of Reading, Pennsylvania ("American Casualty")

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[1] There remains pending an appeal of Justice Kelly's decision. The appeal was perfected and is noticed for the May 2026 term.

issued a commercial general liability policy to East End (the "American Casualty Policy") and is providing a defense to East End in the Underlying Action. Defendant Trisura Specialty Insurance Company ("Trisura") issued a commercial general liability policy to Top Notch (the "Trisura Policy") and is providing a defense to Top Notch in the Underlying Action.

In this action, Plaintiffs seek a declaration that American Casualty and Trisura must provide Plaintiffs with a defense and indemnification in the Underlying Action. Now, Plaintiffs move for partial summary judgment, seeking a declaration that Trisura and American Casualty must provide Plaintiffs with a defense in the Underlying Action and seeking reimbursement of defense costs expended in the Underlying Action. American Casualty opposes, arguing Plaintiffs have not met their *prima facie* burden. American Casualty argues that because neither Fordham nor Jenel entered a contract with East End, they are not additional insureds. American Casualty also argues the motion is premature because discovery is needed. Trisura also opposes and argues that since Trisura's insured, Top Notch, did not cause Robles's accident there is no coverage for Plaintiffs.

II. Discussion

A. Standard

It is well established that "[i]f any of the claims against an insured arguably arise from covered events, the insurer is required to defend the entire action" (*Town of Massena v Healthcare Underwriters Mut. Ins. Co.*, 98 NY2d 435, 443-44 [2002] quoting *Frontier Insulation Contrs. v Merchants Mut. Ins. Co.*, 91 NY2d 169, 175 [1997]). The insurer's duty to defend is broader than the duty to indemnify (*General Motors Acceptance Corp. v Nationwide Ins. Co.*, 4 NY3d 451, 456 [2005]). The standard used to determine whether the duty to defend is triggered is whether "the allegations in a complaint state a cause of action that gives rise to the reasonable possibility of recovery under the policy" (*Port Auth. of N.Y. & N.J. v Brickman Group Ltd.,* LLC, 181 AD3d 1,

20 [1st Dept 2019] quoting *Fieldston Prop. Owners Assn., Inc. v Hermitage Ins. Co.*, 16 NY3d 257, 264 [2011]). To avoid its duty to defend an insured, an insurer must show, as a matter of law, that there is no possible factual or legal basis on which the insurer might eventually be held to be obligated to indemnify the insured (*see 3650 White Plains Corp. v Mama G. African Kitchen Inc.*, 205 AD3d 468 [1st Dept 2022]).

It is immaterial "that the complaint against the insured asserts additional claims which fall outside the policy's general coverage or within its exclusory provisions" (*Town of Massena, supra* quoting *Seaboard Sur. Co. v Gillette Co.*, 64 NY2d 304, 310 [1984]). Any ambiguity regarding an insurer's duty to defend is resolved in favor of the insured (*International Business Machines Corp. v Liberty Mut. Ins. Co.*, 363 F3d 137, 144 [2d Cir. 2004] citing *Charles F. Evans, Inc. v Zurich Ins. Co.*, 95 NY2d 779, 780 [2000]). "[T]he fact that an additional insured may ultimately be found liable solely for its own independent negligent acts or omissions, which are not covered under an additional insured provision, does not negate an insurer's duty to defend it" (*see Arch Specialty Insurance Co. v HDI Gerling American Ins. Co.*, 230 AD3d 445, 445-446 [1st Dept 2024] citing *Fitzpatrick v American Honda Motor Co.*, 78 NY2d 61, 65 [1991]; *see also Wilxoc Dev. Corp. v HDI Global Ins. Co.*, 198 AD3d 590 [1st Dept 2021]). "Even where there exist extrinsic facts suggesting that the claim may ultimately prove meritless or outside the policy's coverage, the insurer cannot avoid its commitment to provide a defense, since '[a] complaint subject to defeat because of debatable theories * * * must [nevertheless] be defended by the insured" (*Fitzpatrick, supra* at 66 quoting *International Paper Co. v Continental Cas. Co.*, 35 NY2d 322, 326 [1974])

Where a duty to defend is triggered, so too is the obligation to pay defense costs (*Federal Ins. Co. v Kozlowski*, 18 AD3d 33, 40-41 [1st Dept 2005]). Until there is a final determination that an insured's actions fall squarely under an exclusion of a liability policy, or outside the policy

altogether, the policy remains in effect and an insurer must pay defense costs related to the underlying action, subject to recoupment if it is ultimately found no coverage exists (*Dupree v Scottsdale Ins. Co.*, 96 AD3d 546 [1st Dept 2012]).

B. Trisura Policy

Plaintiff's motion as to the Trisura Policy is granted. The additional insured schedule in the Trisura Policy explicitly lists Pav-Lak, Fordham, and Jenet as additional insureds, and lists the Premises as a "covered operation" (*see* NYSCEF Doc. 22). The Trisura Policy further contains an endorsement tiled "Additional Insured – Owners, Lessees or Contractors – Scheduled Person or Organization." That endorsement provides an "Insured" includes persons or organizations "shown in the Schedule. But only with respect to liability for 'bodily injury'…caused, in whole or in part, by: 1. Your acts or omissions; or 2. The acts or omissions of those acting on your behalf; in the performance of your ongoing operations for the additional insureds at the locations designated above." Robles sustained personal injuries performing construction work for Top Notch at the Premises. Moreover, in Justice Kelly's decision and order on the summary judgment motions filed in the Underlying Action, he found there are issues of fact as to whether Top Notch's negligence contributed to Robles's accident. Therefore, there is a reasonable possibility that Robles's injuries may have been caused, at least in part, by Top Notch's acts or omissions, meaning the duty to defend under the additional insured endorsement is triggered (*Port Auth. of N.Y. & N.J. v Brickman Group Ltd.,* LLC, 181 AD3d 1, 20 [1st Dept 2019]).

In opposition, Trisura fails to raise an issue of fact. While Trisura makes arguments as to Top Notch's ultimate liability, this is insufficient as those arguments do not establish conclusively that Top Notch is free from liability. This is particularly underscored by Justice Kelly finding issues of fact as to Top Notch's negligence (*see Regal Const. Corp. v National Union Fire Ins. Co.*

of Pittsburgh, PA, 15 NY3d 34 [2010]; *see also Pofi Construction Corp. v Rutgers Casualty Ins. Co.*, 189 AD3d 465, 466 [1st Dept 2020]). Trisura's reliance on the "employee of the insured" exclusion is unavailing pursuant to the separations of insureds doctrine. The insureds seeking defense are Plaintiffs, none of whom employed Robles (*Pofi, supra* citing *Greaves v Public Serv. Mut. Ins. Co.*, 5 NY2d 120, 123-124 [1959]). Therefore, the motion is granted as to Trisura (*see also Titan Indus. Servs. Corp. v Navigators Ins. Co.*, 223 AD3d 426, 428 [1st Dept 2024]).

C. American Casualty Policy

Plaintiff's motion as to the American Casualty Policy is granted. The American Casualty Policy contains an endorsement titled "Blanket Additional Insured – Owners, Lessees or Contractors" provides an "Insured" includes "any person or organization whom you are required by written contract to add as an additional insured…but only with respect to liability for bodily injury…caused in whole or in part by your acts or omissions, or the acts or omissions of those acting on your behalf: A. in the performance of your ongoing operations subject to such written contract…." (NYSCEF Doc. 21). American Casualty's insured, East End, entered a contract with Pav-Lak (the "East End Contract") which required Pav-Lak, "Owner[2], and any others required by the Owner" to be named as additional insured parties (NYSCEF Doc. 15). Therefore, Pav-Lak, qualifies as an additional insured under the American Casualty Policy pursuant to the blanket additional insured endorsement.

The East End Contract also required East End to procure insurance to protect "all entities [Pav-Lak] is required to indemnify and hold harmless" (*id.* at p. 7). Pursuant to Pav-Lak's contract with Fordham, Pav-Lak and all its subcontractors were required to include as additional insureds Fordham and Jenel (NYSCEF Doc. 14). Since Pav-Lak is required to indemnify Fordham and

[2] Pav-Lak and East End's contract defines "Owner" as "Fordham Valentine c/o Janel."

Jenel, and East End agreed to include as an additional insured all entities Pav-Lak is required to indemnify, Fordham and Jenel also qualify as additional insureds under the American Causality Policy's blanket additional insured endorsement (*see Catlin Ins. Co. v Colony Ins. Co.*, 237 AD3d 638, 639 [1st Dept 2025] citing *Netherlands Insurance Co. v Endurance American Specialty Ins. Co.*, 157 AD3d 468, 468-469 [1st Dept 2018]). Moreover, the duty to defend under the blanket additional insured endorsement was triggered as Robles fell over a wire and other debris connected to East End's work at the Premises.

In opposition, American Casualty fails to raise a material issue of fact. Contrary to American Casualty's argument, the blanket additional insured endorsement in the American Casualty Policy does not the requisite "with whom you have agreed" language to require privity of contract to qualify as an additional insured (*see, e.g. River Park Bronx Apts., Inc. v Harleysville Ins. Co.*, 222 AD3d 502, 503 [1st Dept 2023] citing *Vargas v City of New York,* 158 AD3d 523, 524 [1st Dept 2018]).

American Casualty's argument that it requires discovery to ascertain if a wrap-up insurance program was in place, which would trigger an exclusion in the American Casualty Policy, is without merit. American Casualty erroneously argues it is Plaintiffs' burden to establish no exclusion applies when the Court of Appeals has repeatedly stated the converse – namely that it is the insurer's burden to show an exclusion applies (*see Lend Lease (US) Const. LMB Inc. v Zurich American Ins. Co.*, 28 NY3d 675, 684 [2017]; *see also Continental Cas. Co. v Rapid-American Corp.*, 80 NY2d 640, 652 [1993]; *Neuwirth v Blue Cross & Blue Shield of Greater New York*, 62 NY2d 718 [1984]). Moreover, to successfully oppose a motion pursuant to CPLR 3212(f), an affidavit from someone with personal knowledge of the facts underlying the claim is required "to demonstrate that essential facts exist but cannot yet be stated" (*354 Chauncey Realty, LLC v*

Brownstone Agency, Inc. 213 AD3d 544 [1st Dept 2023]). The attorney's non-probative and speculative opposition is insufficient to establish the existence of facts not yet uncovered but in the exclusive possession of the Plaintiffs which would be required to oppose the motion (*see also Crimlis v City of New York*, 179 AD3d 575, 575-576 [1st Dept 2020]).

American Casualty fails to explain why it could not ascertain if a wrap-up insurance program was in place by asking its own insured, East End, who was involved in the renovation project, as to whether a wrap-up insurance program was in place. American Casualty has proffered nothing but rank speculation that a wrap-up insurance program was in place, and American Casualty cannot continue to shirt its duty to defend based on a hope to further delay these proceedings through discovery. Therefore, Plaintiffs' motion as to American Casualty is granted.

While American Casualty argues in opposition that if it has to defend Plaintiffs then it's duty to defend should be secondary or co-primary with Trisura, American Casualty failed to seek such relief via notice of motion or cross motion, nor is there a request for this declaratory relief in American Casualty's Answer (*see, e.g. Onofre v 243 Riverside Drive Corp.*, 232 AD3d 443, 443-444 [1st Dept 2024] [court correctly declined to grant relief not specifically requested in the notice of motion] citing *Caesar v Metropolitan Transp. Auth.*, 229 AD3d 601 [2d Dept 2024]). The Court finds it would be unfair to grant this requested relief where Trisura had no opportunity to file opposition papers, therefore the request for a declaration that American Casualty's duty to defend is excess or co-primary to the Trisura Policy is denied, without prejudice, with leave to renew via notice of motion. The Court has considered Defendants' remaining contentions and finds them to be unavailing.

Accordingly, it is hereby,

ORDERED that Plaintiffs' motion for summary judgment is granted in its entirety; and it is further

ORDERED and ADJUDGED that American Casualty Company of Reading, Pennsylvania and Trisura Specialty Insurance Company must defend Plaintiffs in the underlying action captioned *Robles v. Fordham Valentine Associates LLC, et al.*, Index No. 816226/2021E (Sup. Ct., Bronx County), and Plaintiffs are entitled to a judgment against Defendants for the defense costs incurred by and for Plaintiffs (including deductibles) from January 12, 2022 through the date upon which Defendants duly pay Plaintiffs' ongoing defense costs on a direct basis, and Plaintiffs are entitled to separate defense counsel of their selection barring an acknowledgement by Defendants of a duty to indemnify Plaintiffs in connection with the Underlying Action without reservation; and it is further

ORDERED that a Judicial Hearing Officer ("JHO") or Special Referee shall be designated to determine the following individual issues of fact, which are hereby submitted to the JHO/Special Referee for such purpose:

(1) the issue of the amount of defense costs (including deductibles) incurred by and for Plaintiffs in the Underlying Action from January 12, 2022 through the date upon which either or both Defendants duly pays Plaintiffs' ongoing defense costs on a direct basis,

(2) the issue of whether the American Casualty Policy must provide Plaintiffs with a defense on a primary, co-primary, or excess basis with respect to the Trisura Policy; and it is further

ORDERED that the powers of the JHO/Special Referee shall not be limited beyond the limitations set forth in the CPLR; and it is further

ORDERED that this matter is hereby referred to the Special Referee Clerk for placement at the earliest possible date upon the calendar of the Special Referees Part (Part SRP), which, in accordance with the Rules of that Part (which are posted on the website of this court at www.nycourts.gov/supctmanh at the "References" link), shall assign this matter at the initial appearance to an available JHO/Special Referee to determine as specified above; and it is further

ORDERED that counsel shall immediately consult one another and counsel for Plaintiffs shall, within 15 days from the date of this Order, submit to the Special Referee Clerk by e-mail an Information Sheet (accessible at the "References" link on the court's website) containing all the information called for therein and that, as soon as practical thereafter, the Special Referee Clerk shall advise counsel for the parties of the date fixed for the appearance of the matter upon the calendar of the Special Referees Part; and it is further

ORDERED that on the initial appearance in the Special Referees Part the parties shall appear for a pre-hearing conference before the assigned JHO/Special Referee and the date for the hearing shall be fixed at that conference; the parties need not appear at the conference with all witnesses and evidence; and it is further

ORDERED that, except as otherwise directed by the assigned JHO/Special Referee for good cause shown, the trial of the issue(s) specified above shall proceed from day to day until completion and counsel must arrange their schedules and those of their witnesses accordingly; and it is further

ORDERED that counsel shall file memoranda or other documents directed to the assigned JHO/Special Referee in accordance with the Uniform Rules of the Judicial Hearing Officers and the Special Referees (available at the "References" link on the court's website) by filing same with

the New York State Courts Electronic Filing System (see Rule 2 of the Uniform Rules); and it is further

ORDERED that if the parties seek to resolve through the Court's sponsored ADR program the amount of defense costs owed, the parties shall notify the Court so the appropriate referral order may be issued; and it is further

ORDERED that if the parties need to engage in discovery regarding the amount of total defense costs for which Plaintiffs are to be reimbursed, then the parties shall submit a proposed preliminary conference order to the Court via e-mail, but in no event shall the proposed order be submitted any later than May 5, 2026; and it is further

ORDERED that within ten days of entry, counsel for Plaintiffs shall serve a copy of this Decision and Order, with notice of entry, on all parties via NYSCEF.

This constitutes the Decision and Order of the Court.

3/31/26
DATE

HON. PHAEDRA F. PERRY-BOND, J.S.C.

CHECK ONE:	[ ] CASE DISPOSED		[x] NON-FINAL DISPOSITION			
	[x] GRANTED	[ ] DENIED	[ ] GRANTED IN PART		[ ] OTHER	
APPLICATION:	[ ] SETTLE ORDER		[ ] SUBMIT ORDER			
CHECK IF APPROPRIATE:	[ ] INCLUDES TRANSFER/REASSIGN		[ ] FIDUCIARY APPOINTMENT		[ ] REFERENCE	