

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 35

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CHURCH MUTUAL INSURANCE COMPANY AND
THE UNIVERSAL CHURCH,

Plaintiffs,

Index No. 651087/2016

Motion Sequence No. 002

-against-

ENDURANCE AMERICAN SPECIALTY INSURANCE
COMPANY, SCOTTSDALE INSURANCE COMPANY,
ARCH SPECIALTY INSURANCE COMPANY,
NEWTON CONSTRUCTION CORP. and NCP
RESTORATIONS LTD.,

Defendants.

-----X
CAROL R. EDMOND, J.S.C.:

MEMORANDUM DECISION

Plaintiffs Church Mutual Insurance Company (“Church Mutual”) and The Universal Church (collectively, “plaintiffs”) move for partial summary judgment (1) declaring that defendants Endurance American Specialty Insurance Company (“Endurance Insurance”) and Arch Specialty Insurance Company (“Arch Insurance”) (collectively, defendants”) have a duty to defend The Universal Church in an underlying personal injury action brought against The Universal Church,¹ (2) declaring that defendants’ policies provide primary coverage while Church Mutual provides excess coverage, and (3) directing defendants to reimburse The Universal Church its attorneys’ fees and costs in defending suit.

Arch Insurance cross moves for summary judgment declaring that to the extent it owes any coverage obligation to The Universal Church, it and Endurance Insurance must share equally in The Universal Church’s defense.

¹ The underlying action is entitled, Stephen Heald and Barbara Heald v Newton Construction Corp. and The Universal Church Inc., NCP Restorations Ltd., under Index No. 150779/2014 (the “underlying action”).

Endurance Insurance and its insured, nominal defendant Newton Construction Corp. (a defendant in the underlying suit) (“Newton”) cross move for summary judgement declaring that Newton is an additional insured on the policy issued by Arch Insurance (the “Arch Policy”), and that Arch Insurance must defend and indemnify Newton on a sole, primary basis, and reimburse Endurance Insurance and Newton for Newton’s past defense costs, and that Endurance Insurance’s policy is excess to the Arch Policy.

Factual Background

In 2012, The Universal Church (as “Owner”), engaged Newton (as “Contractor”) in connection with a renovation and construction project at the The Universal Church building site in Jamaica, New York pursuant to a November 26, 2012 Agreement (the “Prime Contract”) (e-doc. 60). Newton (as “Contractor”) engaged nominal defendant NCP Restorations Ltd. (“Restorations”) (as “Subcontractor”) pursuant to a November 2012 Agreement (the “Subcontract”) (e-doc. 61).

On July 23, 2013, Stephen Heald (“Heald”), an employee of Restorations, was allegedly injured when he slipped and fell while performing carpentry work at the building site. Consequently, Heald and his wife (the “Healds”) sued The Universal Church and Newton for Labor Law violations and negligence. In turn, Newton impleaded subcontractor Restorations for indemnification, contribution, and failure to procure insurance as required under the Subcontract.

Thereafter, The Universal Church and its insurer Church Mutual commenced this declaratory judgment action for, *inter alia*, defense and indemnification insurance coverage under the policies Endurance and Arch issued to their respective insureds, Newton and Restoration.

These motions for summary relief ensued.

Discussion

Since each side seeks summary judgment, each side bears the burden of making a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case (*Bellinson Law, LLC v Iannucci*, 35 Misc 3d 1217(A), 951 NYS2d 84 [Sup Ct New York Cty 2012], *aff'd* 102 AD3d 563, 958 NYS2d 383 [1st Dept 2013], *citing Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, [1985]). Once met, this burden shifts to the opposing party who must then demonstrate the existence of a triable issue of fact (*Bellinson Law, LLC v Iannucci*, 35 Misc 3d 1217, *supra*, *citing Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986], *Zuckerman v City of New York*, 49 N.Y.2d 557 [1980] and *Santiago v. Filstein*, 35 AD3d 184.[1st Dept 2006]).

It is also well established that the party claiming coverage bears the burden of proving entitlement (*National Abatement Corp. v National Union Fire Ins. Co. of Pittsburgh, Pa.*, 33 AD3d 570, 570 [1st Dept 2006]; *Tribeca Broadway Assoc. v Mount Vernon Fire Ins. Co.*, 5 AD3d 198, 200 [1st Dept 2004]).

An insurer owes a duty to defend as long as “the pleadings allege a covered occurrence, even though facts outside the four corners of those pleadings indicate that the claim may be meritless or not covered” (*Fitzpatrick v American Honda Motor Co.*, 78 NY2d 61, 63 [1991]). “[I]f any of the claims against [an] insured arguably arise from covered events, the insurer is required to defend the entire action” (*Sport Rock Intl., Inc. v American Cas. Co. of Reading, Pa.*, 65 AD3d 12, 17 [1st Dept 2009] [internal quotation marks and citations omitted]). “ Indeed, the duty to defend is exceedingly broad and an insurer will be called upon to provide a defense whenever the allegations of the complaint suggest . . . a reasonable possibility of coverage. If,

liberally construed, the claim is within the embrace of the policy, the insurer must come forward to defend its insured no matter how groundless, false or baseless the suit may be” (*Automobile Ins. Co. of Hartford v Cook*, 7 NY3d 131, 137 [2006] [internal quotation marks and citations omitted]).

While an insurer’s duty to defend its insured is determined by the allegations of the complaint, “[t]he duty to indemnify ‘is determined by the actual basis for the insured’s liability to a third person’” (*Atlantic Mut. Ins. Co. v Terk Tech. Corp.*, 309 AD2d 22, 28 [1st Dept 2003], quoting *Servidone Constr. Corp.*, 64 NY2d at 424). The duty to indemnify depends “on whether the loss, as established by the facts, is covered by the policy” (*Atlantic Mut. Ins. Co.*, 309 AD2d at 28). To find a duty to indemnify, the contract must manifest “a clear and unmistakable intent to indemnify” for particular liabilities (*Millennium Holdings LLC v. Glidden Co.*, 146 A.D.3d 539, 46 N.Y.S.3d 528 [1st Dept 2017]). “The indemnity obligation will be strictly construed, and additional obligations may not be imposed beyond the explicit and unambiguous terms of the agreement” (*Millennium Holdings LLC*, *supra*).

Further, and as raised by Endurance Insurance and Newton, the “well-understood meaning” of “additional insured” is “an entity enjoying the same protection as the named insured” (*Pecker Iron Works of N.Y. v Traveler’s Ins. Co.*, 99 NY2d 391, 393 [2003] [internal quotation marks and citation omitted]).

Church Mutual and The Universal Church’s Motion

Plaintiffs argue that Endurance and Arch are required to defend The Universal Church in the *Heald* Action as a matter of law.

The Prime Contract required Newton to add The Universal Church to its policy as an

additional insured, and given that Heald was injured during the course of his work for a subcontractor (Restoration) that contracted with and performed work for Endurance's named insured (Newton), any liability "arises out of" Newton's "work." Thus, the Universal Church is an additional insured under the Endurance Policy.

The Subcontract required Restoration to name The Universal Church as an additional insured in its policy. That Heald was injured during the course of his work as an employee of subcontractor Restoration is sufficient to establish that liability was caused in whole or in part by Restoration. Thus, The Universal Church is entitled to additional insured coverage under the Arch Policy.

The Other Insurance provisions of the Endurance and Arch Policies provide coverage on a primary and non-contributory basis, and do not render their coverage for additional insureds to be excess. And, the Church Mutual policy provides that it is excess over any other insurance that is available to The Universal Church when Universal is added as an additional insured under any policy.

Further, because Endurance and Arch have not accepted The Universal Church's defense without reservation, their interests are in conflict with The Universal Church. Further, a "*Goldfarb* Conflict" exists because Endurance and Arch are actively contesting coverage for The Universal Church. Unless and until Endurance and Arch agree to defend and indemnify The Universal Church without reservation, such conflict will exist until the *Heald* Action is resolved. Thus, The Universal Church is entitled to select its own counsel.

Endurance argues that Heald was not in the employ of its insured Newton. Thus, it

cannot be determined, at this juncture, whether the *Heald* Action arises out of Newton's work.² However, if the Court finds that Endurance owes additional insured coverage to The Universal Church, Endurance would only owe co-insurance along with Arch.

Arch does not contest that the Universal Church is an additional insured under the Endurance and Arch Policies or that the Church Mutual policy is excess to the Endurance and Arch Policies. Arch only contests the Universal Church's ability to select its own defense counsel, in that (1) plaintiffs failed to identify any conflict between them and Endurance and Arch and (2) a reservation of rights in and of itself does not create such a conflict.

Restoration contests that Heald's injuries were caused by Restoration's acts. Further, as there has been no finding yet as to the cause of Heald's injuries, it is premature for this Court to make such a finding to resolve the motions herein. And, plaintiffs' failed to tender sufficient evidence on this issue to support their motion.

In reply, plaintiffs point out that they only need to show, and have shown, that the allegations in the underlying complaint in *Heald* suggest a reasonable possibility of coverage under the Endurance Policy. Heald was injured while working for a subcontractor that contracted with Endurance's insured. In addition, the Heald complaint alleges that the underlying plaintiffs are seeking liability against The Universal Church in connection with its general supervision of Newton's work. Plaintiffs further point out that contrary to Restoration's contention, an actual liability finding against Restoration is unnecessary to grant relief under their

² Endurance and Newton add, in reply in further support of their cross-motion, that it has not been established on this record that Newton in any way caused Heald's injury, and that negligence is required to trigger Endurance's obligations to Universal. Endurance and Newton's reliance on *Crespo v. City of New York* (303 A.D.2d 166, 756 N.Y.S.2d 183 [1st Dept 2003]) for the proposition that an insured's negligence must be determined first in order to issue a declaration of coverage is misplaced; the *Crespo* decision involved an issue of an insurer's duty to provide indemnification as opposed to the issue of the broader duty to defend.

motion.

In reply, plaintiffs maintain that a conflict exists because Arch and Endurance continue to dispute their coverage obligations to The Universal Church. Further, Arch and Endurance represent their insureds in the *Heald* Action, wherein the possibility that Heald's claims against The Universal Church will exceed the coverage to it under the Arch and Endurance Policies. Neither Endurance or Arch can control the defense of these multiple parties to the *Heald* Action, whose interests are opposed to each other.

Here, it is uncontested that the Prime Contract between The Universal Church and Newton required Newton to procure insurance in favor of The Universal Church.³ It is also uncontested that Newton procured insurance from Endurance providing coverage as follows:

SECTION I- COVERAGES
COVERAGE A BODILY INJURY AND
PROPERTY DAMAGE LIABILITY

1. Insuring Agreement
 - a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies. We will have the right and duty to defend the insured against any "suit" seeking those damages. However, we will have no duty to defend the insured against any "suit" seeking damages for "bodily injury" or "property damage" to which this insurance does not apply. . . .

The Endurance Policy also contains the following additional insured blanket

³ §17.1 The Contractor [Newton] shall purchase from, and maintain . . . insurance for protection from . . . claims for damages because of bodily injury, . . . which may arise out of or result from the Contractor's operations and completed operations under the Contract, whether such operations be by the Contractor or by a Subcontractor or anyone directly or indirectly employed by any of them. . . . The Contractor shall cause the commercial liability coverage required by the Contract Documents to include: (1) the Owner, . . . as additional insureds for claims caused in whole or in part by the Contractor's negligent acts or omissions during the Contractor's operations; and (2) the Owner as an additional insured for claims caused in whole or in part by the Contractor's negligent acts or omissions during the Contractor's completed operations.

(See Article 17)

endorsement:

It is hereby agreed that:

A. The following are included as additional insureds:

Any entity required by written contract . . . to be named as an insured is an insured but only with respect to liability arising out of your premises, "your work" for the additional insured, or acts or omissions of the additional insured, in connection with their general supervision of "your work""

An additional insured "enjoy[s] the same protection as the named insured" (*BP Air Conditioning Corp. v. One Beacon Ins. Group*, 33 A.D.3d 116, 821 N.Y.S.2d 1 [1st Dept 2006] citing *Pecker Iron Works of N.Y. v. Traveler's Ins. Co.*, 99 N.Y.2d 391, 393, 756 N.Y.S.2d 822, 786 N.E.2d 863). Thus, "for named insureds and additional insureds alike, the activation of the duty to defend depends on the allegations of the pleadings" (*id.*).

The allegations in Heald's complaint assert that Newton was negligent in: failing to provide Plaintiff with a safe place to work; in permitting Plaintiff to walk in an area that was dangerous and hazardous; . . . in permitting the work area to be exposed to weather including rain and wind; . . . in failing to handle and dispose of debris by methods that would not endanger persons lawfully frequenting the premises . . . in failing to provide Plaintiff proper equipment and safety devices . . . in failing to fulfill its non-delegable duty to keep its premises in a reasonably safe condition. (Heald Complaint, ¶Seventeenth).

Heald also alleges that Newton violated Labor Law §§200(1) and 241(6).

Such allegations are sufficient to trigger Endurance's duty to defend The Universal Church under its Policy.

Contrary to Endurance's contention, that Heald was not employed by Newton at the time of his alleged accident, or that there is no *evidence* at this stage that Heald's injuries arose out of Newton's work is immaterial to Endurance's duty to defend under its policy. The "focus of an 'arising out of' clause is not on the precise cause of the accident but on the general nature of the

operation in the course of which the injury was sustained (*Hunter Roberts Const. Group, LLC v. Arch Ins. Co.*, 75 A.D.3d 404, 904 N.Y.S.2d 52 [1st Dept 2010] citing *Regal Constr. Corp. v. National Union Fire Ins. Co. of Pittsburgh, Pa.*, 64 A.D.3d 461, 883 N.Y.S.2d 207 [2009], affd. 15 N.Y.3d 34, 904 N.Y.S.2d 338, 930 N.E.2d 259 [2010]). As the Court of Appeals explained in *Regal*, "We have interpreted the phrase 'arising out of' in an additional insured clause to mean originating from, incident to or having connection with. It requires only that there be some causal relationship between the injury and the risk for which coverage is provided" (*Hunter Roberts Const. Group, LLC, supra*, citing 15 N.Y.3d at 38, 904 N.Y.S.2d at 341, 930 N.E.2d at 262 [internal quotation marks and citation omitted]).

The same holds true as to Arch's duty to defend The Universal Church under the policy Arch issued to Restoration, which Arch does not contest. It is uncontested that the Subcontract between Newton and Restoration contained an insurance procurement provision obligating Restoration to provide insurance in favor of The Universal Church.⁴

Further, Restoration procured insurance from Arch Insurance providing coverage as follows:

SECTION I- COVERAGES
COVERAGE A BODILY INJURY AND PROPERTY

⁴ §13.1 The Subcontractor [Restoration] shall purchase and maintain insurance . . . as will protect the Subcontractor from claims that may arise out of, or result from, the Subcontractor's operations and completed operations under the Subcontract. . . .

* * * * *

§13.4 The Subcontractor shall cause the commercial liability coverage required by the Subcontract Documents to include: (1) the Contractor, the Owner, . . . as additional insureds for claims caused in whole or in part by the Subcontractor's negligent acts or omissions during the Subcontractor's operations; and (2) the Contractor as an additional insured for claims caused in whole or in part by the Subcontractor's negligent acts or omissions during the Subcontractor's completed operations.
(See)

DAMAGE LIABILITY

1. Insuring Agreement

a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies. We will have the right and duty to defend the insured against any "suit" seeking those damages. However, we will have no duty to defend the insured against any "suit" seeking damages for "bodily injury" or "property damage" to which this insurance does not apply. We may, at our discretion, investigate any "occurrence" and settle any claim or "suit" that may result. . . .

The Arch Policy also contained a **Blanket Additional Insured Endorsement** which provided, as follows:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

SECTION II-WHO IS AN INSURED is amended to include as an additional insured those persons or organizations who are required under a written contract with you to be named 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 your subcontractors:*

- a. In performance of your ongoing operations or "your work", including "your work" has been completed; or
- b. In connection with your premises owned by or to you.
(Emphasis added)

The phrase "caused by" "does not materially differ from the ... phrase, 'arising out of' " (*National Union Fire Ins. Co. of Pittsburgh, PA v. Greenwich Ins. Co.*, 103 A.D.3d 473, 962 N.Y.S.2d 9 [1st Dept 2013] citing *W & W Glass Sys., Inc. v. Admiral Ins. Co.*, 91 A.D.3d 530, 937 N.Y.S.2d 28 [1st Dept 2012]). And, as noted above, the "phrase 'arising out of' focuses "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 Constr. Corp. v. National Union Fire Ins. Co. of Pittsburgh, PA*, 15 N.Y.3d 34, 38, 904 N.Y.S.2d 338, 930 N.E.2d 259 [2010] [internal quotation marks omitted]).

In light of the above, Restoration's contention that there has been no finding that as to the cause of Heald's injuries, or that his injuries were caused by Restoration's acts, is immaterial as to Arch's duty to defend The Universal Church. Therefore, plaintiffs are entitled to a declaration that Endurance and Arch have a duty to defend The Universal Church in the *Heald* Action.

And, inasmuch as both Endurance and Arch agree that they are co-insurers, and it is uncontested that the Endurance and Arch Policies are excess to Church Mutual, plaintiffs are entitled to a declaration that Endurance and Arch Policies provide primary coverage and the Church Mutual Policy provides excess coverage in connection with the *Heald* Action.

Consequently, The Church Universal is entitled to reimbursement from Endurance Insurance and Arch Insurance of The Church Universal's attorneys' fees and defense costs incurred in defending the underlying *Heald* Action

As to plaintiffs' claim that they are entitled to select their own defense counsel, it is uncontested that both Endurance and Arch Insurance have not accepted the defense of The Universal Church without a reservation of rights, have not accepted the defense of The Universal Church in the *Heald* Action, and that Church Mutual has paid and continues to pay The Universal Church defense costs. As plaintiffs point out, Endurance or Arch cannot defend their insureds, Newton and Restoration, and simultaneously control the defense of Endurance and Arch's "additional insured," The Universal Church, which maintains cross claims against Newton and Restoration. Contrary to Arch Insurance's contention, under such circumstances, The Universal Church is entitled to select its counsel and reimbursement of reasonable costs for such retention (*First Jeffersonian Assoc. v Insurance Co. of N. Am.*, 262 A.D.2d 133, 691 N.Y.S.2d 506 [1st Dept 1999]) ("inasmuch as defendant's subsequent offer to defend was

conditioned on a reservation of rights with respect to its obligation to indemnify, plaintiff was at all times entitled to counsel of its own choosing, and to reimbursement of the reasonable cost thereof”).

Arch Insurance's Cross-Motion

As indicated above, both Endurance and Arch agree that they are co-insurers,⁵ and it is

⁵ Both the Endurance and Arch Policies provide as follows:

4. Other Insurance

If other valid and collectible Insurance is available to the insured for a loss we cover under Coverages A or B of this Coverage Part, our obligations are limited as follows:

a. Primary Insurance

This insurance is primary except when Paragraph b. below applies. If this insurance is primary, our obligations are not affected unless any of the other insurance is also primary. Then, we will share with all that other insurance by the method described in Paragraph c. below.

b. Excess Insurance

(1) This insurance is excess over:

(a) Any of the other insurance, whether primary, excess, contingent or on any other basis:

(i) That is Fire, Extended Coverage, Builder's Risk, Installation Risk or Similar coverage for "your work";

* * * * *

(2) When this insurance is excess, we will have no duty under Coverages A or B to defend the insured against any "suit" if any other insured has a duty to defend the insured against that "suit". . . .

(3) When this insurance is excess over other insurance, we will pay only our share of the amount of the loss, if any, that exceeds the sum of:

(a) The total amount that all such other insurance would pay for the loss in the absence of this insurance; and

(b) The total of all deductible and self-insured amounts under all that other insurance.

(4) We will share the remaining loss, if any, with any other insurance that is not described in this Excess Insurance provision and was not bought specifically to apply in excess of the Limits of Insurance shown in the Declarations of this Coverage Part.

c. Method Of Sharing

If all of the other insurance permits contribution by equal shares, we will follow this method also. Under this approach each insurer contributes equal amounts until it has paid its applicable limit of insurance or none of the loss remains, whichever comes first.

uncontested that the Endurance and Arch Policies are excess to Church Mutual. Arch Insurance is thus entitled to a declaration that it and Endurance Insurance must share equally in The Universal Church's defense.

Endurance Insurance and Newton's Cross-Motion

Newton established that it is an additional insured under the Blanket Additional Insured Endorsement of the the The Arch Policy, which is cited above (*supra*, p. 10). Again, this Endorsement defines as an additional insured the "person or organizations who are required under a written contract with you to be named 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 your subcontractors*"; the Subcontract, Article 13 entitled Insurance and Bonds, required Restoration to name Newton as an additional insured (*supra*, page 9, fn.4). Under the broad duty to defend as noted above, Newton is entitled to defense coverage under the Arch policy.

Arch has not opposed Newton and Endurance's cross-motion in this regard.

Therefore, Newton and Endurance are entitled to a declaration that Arch Insurance is obligated to defend and indemnify Newton on a sole primary basis in the underlying *Heald* Action. Further, Arch Insurance is obligated to reimburse Endurance Insurance for the defense costs incurred in defending Newton to date.

Conclusion

Based on the foregoing, it is hereby

If any of the other insurance does not permit contribution by equal shares, we will contribute by limits. Under this method, each insurer's share is based on the ratio of its applicable limit of insurance to the total applicable limits of insurance of all insurers.

ORDERED that plaintiffs' motion for partial summary judgment is granted; and it is further

ORDERED AND DECLARED THAT (1) defendants Endurance American Specialty Insurance Company and Arch Specialty Insurance Company have a duty to defend The Universal Church in an underlying personal injury action entitled, *Stephen Heald and Barbara Heald v Newton Construction Corp. and The Universal Church Inc., NCP Restorations Ltd.*, under Index No. 150779/2014; (2) the subject Endurance American Specialty Insurance Company policy and Arch Specialty Insurance Company policy provide primary coverage and Church Mutual Insurance Company provides excess coverage; and (3) defendants shall reimburse The Universal Church its reasonable attorneys' fees and costs in defending suit forthwith; and it is further

ORDERED that the cross-motion by Arch Specialty Insurance Company for summary judgment is granted; and it is further

ORDERED AND DECLARED THAT to Arch Specialty Insurance Company and Endurance American Specialty Insurance Company shall share equally in The Universal Church's defense in the underlying action entitled, *Stephen Heald and Barbara Heald v Newton Construction Corp. and The Universal Church Inc., NCP Restorations Ltd.*, under Index No. 150779/2014; and it is further

ORDERED that the the cross-motion by Endurance American Specialty Insurance Company and Newton Construction Corp. for summary judgement is granted; and it is further

ORDERED AND DECLARED THAT (1) Newton Construction Corp. is an additional insured on the policy issued by Arch Specialty Insurance Company, (2) Arch Specialty Insurance Company shall defend and indemnify Newton Construction Corp. on a sole, primary basis in the

underlying action entitled, *Stephen Heald and Barbara Heald v Newton Construction Corp. and The Universal Church Inc., NCP Restorations Ltd.*, under Index No. 150779/2014; and (3) Arch Specialty Insurance Company shall reimburse Endurance American Specialty Insurance Company and Newton Construction Corp. for Newton Construction Corp.'s past defense costs; and (4) Endurance American Specialty Insurance Company's policy is excess to the Arch Specialty Insurance Company Policy; and it is further

ORDERED that plaintiffs shall serve a copy of this order with notice of entry upon all parties within 20 days of entry; and it is further

ORDERED that the parties shall appear for a preliminary conference on June 27, 2017, 2:15 p.m.

This constitutes the decision and order of the Court.

Dated: April 26, 2017



Hon. Carol Robinson Edmead, J.S.C.

HON. CAROL R. EDMEAD
J.S.C.