HDI-Gerling Am. Ins. Co. v Zurich Am. Ins. Co.
2015 NY Slip Op 30871(U)
April 16, 2015
Sup Ct, New York County
Docket Number: 155610/2014
Judge: Anil C. Singh
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 61

- X

HDI-GERLING AMERICA INSURANCE COMPANY;
THE CITY OF NEW YORK,

Plaintiffs,

Index No. 155610/2014

– against –

Motion Sequence No. 001

ZURICH AMERICAN INSURANCE CO.; SKANSKA USA CIVIL NORTHEAST, INC.; TULLY CONSTRUCTION CO., INC.; SKANSKA/TULLY JV, INC.,

Defendants.

- X

SINGH, J:

Plaintiffs the City of New York (City) and HDI-Gerling America Insurance Company (HDI) bring this action to obtain coverage for the City as an additional insured under the policy defendant Zurich American Insurance Co. (Zurich) issued to defendants Skanska USA Civil Northeast, Inc., Tully Construction Co., Inc. and Skanska/Tully JV, Inc. (collectively, Skanska). The three-count complaint asserts causes of action for: (1) a declaration of Zurich's obligation to defend and indemnify the City; (2) breach of contract against Zurich; and (3) breach of contract against Skanska.

Plaintiffs now move for partial summary judgment on the first cause of action. Zurich opposes the motion and cross-moves for summary judgment, seeking a declaration that Zurich has no obligation to defend or indemnify the City due to late notice or, in the alternative, that Zurich has no obligations to defend the City until HDI's coverage is exhausted, because Zurich's coverage is excess to HDI's coverage. Skanska opposes plaintiffs' motion for partial summary judgment, but does not seek any affirmative relief.

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Background

The parties do not dispute the underlying facts. On September 26, 2006, Skanska entered into a construction contract with the City to perform work at the Croton Water Treatment Plant located at the Mosholu Golf Course in Bronx, New York (Project). Skanska agreed to procure a commercial general liability insurance (CGL) policy that "cover[ed] the Contractor as a Named Insured and the City as an Additional Insured" and "[would] be primary (and non-contributing) to any insurance or self-insurance maintained by the City." Friedman affirmation, exhibit B, ¶ 22.1. Skanska obtained a CGL policy from Zurich, policy number GLO 3867164-00, covering the policy period of May 11, 2007 to May 11, 2012 (Zurich Policy). Pursuant to "Endorsement No. 007" (Endorsement 7), the policy was extended to May 11, 2013. Smith affirmation, exhibit E. Pursuant to "Endorsement No. 008" (Endorsement 8), the policy was again extended to December 31, 2014. *Id.*, exhibit F. Both endorsements were effective May 11, 2007 and provided that "ALL OTHER TERMS AND CONDITIONS REMAIN[ED] THE SAME." *Id.*, exhibit E and F.

Nonparty Siemens Electric LLC, formerly known as Siemens-Schlesinger Electrical, LLC (Siemens), entered into a separate construction contact with the City. The parties do not dispute that this contract required Siemens to acquire a CGL policy that named the City as an additional insured and that provided coverage on a primary and noncontributory basis. Siemens procured a CGL policy from HDI, policy number GLD 11101-04, covering the policy period of October 1, 2012 to October 1, 2013 (HDI Policy).

The HDI Policy and the Zurich Policy each contained an "Other Insurance" provision (Other Insurance Provision). The Zurich Policy's Other Insurance Provision stated, in relevant part:

"**SECTION IV – COMMERCIAL GENERAL LIABILITY CONDITIONS**

. . .

"**4. Other Insurance**

"If other valid and collectible insurance is available to the insured for a loss we cover . . . our obligations are limited as follows:

"**a. Primary Insurance**

"This insurance is primary except when **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 . . . .

"**b. Excess Insurance**

"This insurance is excess over:

"**(1)** Any of the other Insurance, whether primary, excess, contingent or on any other basis:

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

"**(b)** That is Fire insurance for premises rented to you or temporarily occupied by you with permission of the owner;

"**(c)** That is insurance purchased by you to cover your liability as a tenant for 'property damage' to premises rented to you or temporarily occupied by you with permission of the owner; or

"**(d)** If the loss arises out of the maintenance or use of aircraft, 'autos' or watercraft to the extent not subject to Exclusion **g.** of Section **I** — Coverage **A** — Bodily Injury And Property Damage Liability.

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"**(2)** Any other primary insurance available to you covering liability for damages arising out of the premises or operations, or the products and completed operations, for which you have been added as an additional insured by attachment of an endorsement."

Friedman affirmation, exhibit C, form CG 00 01 12 04 at 10-11.

In addition, the Zurich Policy contained an "Other Insurance Amendment – Primary And Non-Contributory" endorsement (Zurich Endorsement), which provided:

> "**Section IV. Commercial General Liability Conditions, 4. Other Insurance**, is amended per the following:
>
> "1. The following paragraph is added under **a. Primary Insurance:**
>
> "This insurance is primary insurance as respects our coverage to an additional insured person or organization, where the written contract or written agreement requires that this insurance be primary and non-contributory. In that event, we will not seek contribution from any other insurance policy available to the additional insured on which the additional insured person or organization is a Named Insured.
>
> "2. The following paragraph is added under **b. Excess Insurance:**
>
> "This insurance is excess over:
>
> "Any of the other insurance, whether primary, excess, contingent or on any other basis, available to an additional insured, in which the additional insured on our policy is also covered as an additional insured by attachment of an endorsement to another policy providing coverage for the same 'occurrence', claim or 'suit'. This provision does not apply to any policy in which the additional insured is a Named Insured on such other policy and where our policy is required by written contract or written agreement to provide coverage to the additional insured on a primary and non-contributory basis."

Id., exhibit C, form U-GL-1327-A CW.

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The Zurich Policy also included a notice provision, which required that Zurich be informed "as soon as practicable of an 'occurrence' or an offense which may result in a claim." *Id.*, form CG 00 01 12 04 at 10. Pursuant to an endorsement entitled "New York City Department of Environmental Protection," any notice by Skanska to Zurich was also "deemed to be notice . . . on behalf of the City as additional insured." Smith affirmation, exhibit D, form U-GL-1114-A CW.

Effective January 17, 2009, the Zurich Policy provided, pursuant to "Endorsement No. 005" (Endorsement 5), that:

> "Failure to give notice to [Zurich] as required under this Coverage Part shall not invalidate any claim made by the insured, injured person or any other claimant, unless the failure to provide such timely notice has prejudiced [Zurich]. However, no claim made by the insured, injured person or other claimant will be invalidated if it shall be shown not to have been reasonably possible to give such timely notice and that notice was given as soon as was reasonably possible thereafter."

Id., exhibit C, form CG 01 63 04 09 at 3. This paragraph "supersede[d] any provision to the contrary." *Id.*

The HDI Policy contained an Other Insurance Provision that was nearly identical to that of the Zurich Policy. In addition, the HDI Policy contained an "endorsement [that] modifie[d] insurance provided under the [CGL policy]." Friedman affirmation, exhibit G at Manuscript Endorsement # 34. The endorsement, entitled "Blanket Additional Insured," (HDI Endorsement) provided, in relevant part:

> "The insurance provided to the additional insured by this endorsement is excess over any valid and collectible other insurance, whether primary, excess, contingent, or on any other basis, that is available to the additional insured for a loss we cover under this endorsement. However, if the written agreement specifically requires that this insurance apply on a primary basis, this insurance is primary. If the written agreement specifically

> requires this insurance apply on a primary and non-contributory basis this insurance is primary to other insurance available to the additional insured and we will not share with that other insurance.
>
> "This endorsement shall prevail over additional insured endorsements that may apply under this policy unless required otherwise in a written agreement."

Id.

Both policies defined "you" and "your" as "the Named Insured shown in the Declarations, and any other person or organization qualifying as a Named Insured under this policy." *Id.*, exhibit C, form CG 00 01 12 04 at 1; exhibit G, form CG 00 01 12 07 at 1. Skanska and related entities were the named insureds on the Zurich Policy, and Siemens and related entities were the named insureds on the HDI Policy. The City was not a named insured on either policy. Instead, it was covered as an "insured," which both policies defined to include "any person or organization for whom you are performing operations when you and such person or organization have agreed in writing in a contract or agreement that such person or organization be added as an additional insured on your policy." *Id.*, exhibit C, form CG 00 01 12 04 at 1 and form CG 20 33 07 04; *see also* exhibit G, form CG 00 01 12 07 at 1 and forms CG 20 10 07 04, CG 20 10 11 85 ("additional insured" endorsement includes "any person or organization required by written contract").

On March 19, 2013, Dennis Izzo (Izzo), an employee of Siemens' subcontractor, EJ Electrical, LLC, was allegedly injured while working at the Project. On June 19, 2013, Izzo filed his notice of claim with the City. On October 21, 2013, Izzo and his wife commenced an action against the City, the Department of Environmental Protection and Skanska in the Supreme Court of New York, Bronx County, in *Izzo v The City of New York* (index No. 306326/13). Izzo alleged that he was injured due to an unsafe work environment created by Skanska.

On November 11, 2013, Skanska provided Zurich notice of Izzo's lawsuit. By letter dated November 26, 2013, the City tendered its defense and indemnity of Izzo's lawsuit to Zurich. By letter dated December 20, 2013, Zurich disclaimed coverage to the City, citing the City's failure to provide timely notice of Izzo's claim and reserving the right to disclaim on the grounds that the City did not qualify for additional insured coverage and that the Zurich Policy was excess over other insurance available to the City. On June 9, 2014, plaintiffs commenced the instant action.

Analysis

The parties dispute whether Zurich is required to demonstrate that it has been prejudiced in order to disclaim coverage based on the City's late notice of Izzo's claim. In addition, the parties dispute the priority of additional insured coverage available to the City under the HDI Policy and the Zurich Policy. Plaintiffs contend that the policies are co-primary. In the alternative, they argue that, even if the Zurich Policy is excess for liability purposes, Zurich still has a duty to defend. Defendants counter that, pursuant to the Zurich Endorsement, the Zurich Policy is excess over any other additional insured coverage available to the City. Alternatively, Zurich contends that, even if the policies provide the City with the same level of coverage, HDI has the initial obligation to provide coverage, because the HDI Policy does not share with other insurance available to the City. Both sides contend that their position is supported by the plain language of the Zurich Endorsement, and that an alternate reading would render portions of the endorsement meaningless.

Pursuant to CPLR 3212 (b), "[t]o obtain summary judgment, the movant 'must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact.'" *Madeline D'Anthony Enters., Inc. v*

Sokolowsky, 101 AD3d 606, 607 (1st Dept 2012), quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 (1986). Upon such a showing, the burden shifts to the opposing party "'to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action.'" *Id.*, quoting *Alvarez*, 68 NY2d at 324. "Where . . . the case turns upon an unambiguous written agreement . . . and the material facts of the case are not in dispute, summary judgment [is] properly granted." *Solow Mgt. Corp. v Hochman*, 191 AD2d 250, 251 (1st Dept 1993).

Pursuant to a 2008 amendment (Amendment), Insurance Law § 3420 provides that a disclaimer of coverage based on late notice will be upheld only if the insurer establishes that its "ability . . . to investigate or defend the claim" has been "materially impair[ed]." Insurance Law § 3420 (c) (2) (C). The Amendment applies to "policies issued or delivered in this state on or after" January 17, 2009, the Amendment's effective date. 2008 McKinney's Session Law News of NY, ch 388 (s. 8610), § 8. If a policy predates the Amendment, the insurer need not demonstrate prejudice (*25 Ave. C New Realty, LLC v Alea N. Am. Ins. Co.*, 96 AD3d 489, 491 [1st Dept 2012]) and "the notice provision for a primary [or excess] insurer operates as a condition precedent . . . ." *Unigard Sec. Ins. Co. v North Riv. Ins. Co.*, 79 NY2d 576, 581 (1992); *see American Home Assur. Co. v International Ins. Co.*, 90 NY2d 433, 443 (1997) ("excess carriers have the same vital interest in prompt notice as do primary insurers"); *see also Tower Ins. Co. of N.Y. v Classon Hgts., LLC*, 82 AD3d 632, 634 (1st Dept 2011) (affirming grant of summary judgment to insurer where policy required "notice of an occurrence be given 'as soon as practicable,'" and insured's notice was five months late).

"Where the same risk is covered by two or more policies, each of which was sold to provide the same level of coverage (as is the case here), priority of coverage (or, alternatively,

allocation of coverage) among the policies is determined by comparison of their respective 'other insurance' clauses." *Sport Rock Intl., Inc. v American Cas. Co. of Reading, Pa.*, 65 AD3d 12, 18 (1st Dept 2009). "[T]he unambiguous provisions of an insurance policy, as with any written contract, must be afforded their plain and ordinary meaning, and . . . the interpretation of such provisions is a question of law for the court." *Broad St., LLC v Gulf Ins. Co.*, 37 AD3d 126, 130 (1st Dept 2006). Where no ambiguity exists, "courts should refrain from rewriting the agreement." *Government Empls. Ins. Co. v Kligler*, 42 NY2d 863, 864 (1977). In addition, when "construing an endorsement to an insurance policy, the endorsement and the policy must be read together, and the words of the policy remain in full force and effect except as altered by the words of the endorsement." *County of Columbia v Continental Ins. Co.*, 83 NY2d 618, 628 (1994). "An insurance contract should not be read so that some provisions are rendered meaningless." *Id.*

For the following reasons, the court finds that, while the Amendment does not apply to the Zurich Policy, Zurich must demonstrate prejudice to disclaim coverage for untimely notice. Here, it is undisputed that the Zurich Policy was issued on May 11, 2007, before the Amendment's effective date, and that the policy was originally due to expire on May 11, 2012, after the Amendment's effective date. *See* Friedman affirmation, exhibit C. Plaintiffs contend that the extension of the Zurich Policy brought it within the Amendment's ambit, because "[t]he renewal policy was not merely an extension or delay of the policy's termination date," but rather, was a new policy with a "policy period [that] began after the [A]mendment's effective date." Plaintiffs' reply brief at 4. However, Endorsements 7 and 8 expressly provided that they "*AMENDED*" the policy period only and that "ALL OTHER TERMS AND CONDITIONS REMAIN[ED] THE SAME." Smith affirmation, exhibits E and F (emphasis added). Moreover,

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in amending the policy period, both endorsements left the inception date unaltered. Because the Zurich Policy predated the Amendment and "remain[ed] in full force and effect[,] except as altered by the words of the endorsement[s]" (*County of Columbia*, 83 NY2d at 628), the Amendment, which speaks only to "policies *issued or delivered*," rather than amended, on or before January 17, 2009, does not apply to the Zurich Policy. 2008 McKinney's Session Law News of NY, ch 388 (s. 8610), § 8 (emphasis added).

Nonetheless, Zurich must demonstrate that it has been prejudiced in order to disclaim coverage for untimely notice. Pursuant to Endorsement 5, effective January 17, 2009, "[f]ailure to give notice to [Zurich] . . . shall not invalidate any claim made by the insured . . . unless the failure to provide such timely notice has prejudiced [Zurich]." Smith affirmation, Exhibit C, form CG 01 63 04 09 at 3. This endorsement "supersede[d] any provision to the contrary" and was in effect at the time of Izzo's accident. *Id.* On the instant motions, Zurich has not adduced any evidence of prejudice. Therefore, to the extent Zurich's cross motion for summary judgment seeks a declaration that, due to late notice, Zurich has no obligation to defend or indemnify the City in Izzo's lawsuit, the motion is denied for failure to make a prima facie showing. *See JMD Holding Corp. v Congress Fin. Corp.*, 4 NY3d 373, 384 (2005) ("'[f]ailure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers'" quoting *Alvarez*, 68 NY2d at 32).

For the following reasons, the court finds that the Zurich Endorsement renders the Zurich Policy excess over the HDI Policy and that the HDI Policy, by its own terms, requires it to provide primary coverage, without sharing with other insurance. The Other Insurance Provision, found in both policies, stated that coverage was primary unless one of the exceptions of paragraph (b) applied. Because all of the exceptions listed in paragraph (b) pertained to other

insurance available to "you," the named insured, they did not apply to the City as an additional insured on either policy. Friedman affirmation, exhibit C, form CG 00 01 12 04 at 11; exhibit G, form CG 00 01 12 07 at 11. Therefore, under the Other Insurance Provision, both policies provided primary coverage to any additional insured, and, as co-primary insurers, Zurich and HDI would share coverage. The Zurich and HDI Endorsements modified that coverage by providing exceptions to primary, co-primary, and excess insurance coverage.

Paragraph 1 of the Zurich Endorsement created an exception to co-primary insurance coverage for instances "where the written contract . . . requires that this insurance be primary and non-contributory," as the contract between Skanska and the City did here. *Id.*, exhibit C, form U-GL-1327-A CW. Where the contract so provided, Zurich agreed "not to seek contribution from any other insurance policy available to the additional insured," but only where "the additional insured . . . is a Named Insured" on the other policy. *Id.* As it is undisputed that the City was not a "Named Insured" under the HDI Policy, paragraph 1 of the Zurich Endorsement, read together with the Other Insurance Provision, permitted Zurich and HDI to serve as co-primary insurers. *Id.*

This interpretation of the Zurich Endorsement is also consistent with the language of paragraph 2. The first sentence of paragraph 2 stated that, where the additional insured had primary or excess coverage under another policy as an additional insured (as opposed to as a "Named Insured"), the Zurich Policy would be excess over such insurance. *Id.* The second sentence of paragraph 2 harmonized this excess coverage provision with paragraph 1, by clarifying that the Zurich Policy would not be excess insurance over "any policy in which the additional insured is a Named Insured on such other policy" and where the Zurich Policy was "required by written contract or written agreement to provide coverage to the additional insured

on a primary and non-contributory basis." *Id.* In other words, in the Zurich Endorsement, the second sentence of paragraph 2 is consistent with the second sentence of paragraph 1, as both sentences speak to Zurich providing primary coverage if the written contract between the City and Skanska required the Zurich Policy to be "primary and non-contributory" and the other, competing policy identified the City as "a Named Insured." *Id.*

Pursuant to paragraph 2 of the Zurich Endorsement, the Zurich Policy is excess insurance, because the City is an "additional insured by attachment of an endorsement to [the HDI P]olicy." *Id.* The exception to the excess coverage, contained in the paragraph's second sentence, does not apply because, while the Zurich Policy was "required by written contract . . . to provide coverage to the additional insured [the City] on a primary and non-contributory basis," the City was not a "Named Insured" on the HDI Policy. *Id.* Therefore, the Zurich Policy is excess over the HDI Policy.[1]

The HDI Endorsement confirms that the HDI Policy is primary and that the Zurich Policy is excess. The HDI Endorsement provided that, where "the written agreement specifically requires [that the HDI Policy] apply on a primary and non-contributory basis this insurance is primary to other insurance available to the additional insured and [HDI] will not share with that other insurance." *Id.*, exhibit G at Manuscript Endorsement # 34. Unlike the Zurich Endorsement, the HDI Endorsement is not limited to instances where the City, as an "additional

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[1] The court notes Skanska's argument relating to the endorsement that the Insurance Services Office (ISO) introduced in 2013. According to Skanska, the endorsement is "similar to [the Zurich Endorsement]" and "confirms the intended effect of the endorsement in the Zurich Policy." Skanska's brief at 12. However, the ISO-issued endorsement differs, in content and structure, from the one at issue here. *See* Welch affirmation, exhibit I. In any event, whatever the language and the intended effect of the ISO-issued endorsement, it was not part of the policies at issue here and, therefore, sheds no light on "the intent of the parties as expressed in the language employed in the polic[ies]." *Throgs Neck Bagels v GA Ins. Co. of N.Y.*, 241 AD2d 66, 69 (1st Dept 1998). Therefore, the ISO endorsement has no impact on the instant motions.

insured[,] is a Named Insured on such other policy" (*id.*, exhibit C at U-GL-1327-A CW), but rather, applies broadly to "other insurance available to the additional insured," including the Zurich Policy. *Id.*, exhibit G at Manuscript Endorsement # 34. Thus, pursuant to the plain language of the policies, the HDI Policy is primary and the Zurich Policy is excess, and, therefore, the City is not entitled to coverage or a defense under the Zurich Policy until the HDI Policy is exhausted. *See Sport Rock Intl., Inc.*, 65 AD3d at 18; *see also HRH Constr. Interiors, Inc. v Royal Surplus Lines Ins. Co.*, 16 AD3d 115, 116 (1st Dept 2005) (finding that subcontractor's insurer had to defend general contractor and reimburse general contractor and its general liability insurer for legal fees incurred in the underlying action, where the subcontractor's insurance policy contained an "Additional Insured [Blanket—Primary]" endorsement, which rendered inapplicable the co-primary insurance sharing provision of the "Other Insurance" clause).

Plaintiffs argue that the first sentence of paragraph 1 of the Zurich Endorsement creates a category of primary coverage (where a written contract requires additional insured coverage to be primary and noncontributory) that is not subject to the excess insurance clause under paragraph (b) of the Other Insurance Provision. This interpretation impermissibly reads the sentence in isolation from the other provisions of the Zurich Endorsement and conflicts with the plain language of the endorsement's paragraph 2. *See County of Columbia*, 83 NY2d at 628. Therefore, plaintiffs' argument is without merit.

General Motors Acceptance Corp. v Nationwide Ins. Co. (4 NY3d 451 [2005]) does not support plaintiffs' contention that, even if the Zurich Policy's liability coverage is excess over the HDI Policy, Zurich still has a duty to defend. The Court of Appeals, in *General Motors Acceptance Corp*, rejected such a rule "and [held] only that, *under the circumstances of [that]*

case," where the excess insurer triggered its duty to defend by voluntarily assuming the insured's defense, the primary and excess insurers were "required to share defense costs." 4 NY3d at 457-458 (emphasis added). Here, Zurich declined coverage and, as such, never triggered its duty to defend. Therefore, *General Motors Acceptance Corp.* is distinguishable on its facts and Zurich has no duty to defend the City in the underlying action until the HDI Policy is exhausted. *See Sport Rock Intl., Inc.*, 65 AD3d at 23 (holding excess insurer had no duty to defend until primary coverage was exhausted, where excess insurer "did nothing to trigger its duty to defend [insured] before that duty otherwise would have arisen").

The court notes plaintiffs' argument that this court should follow the reasoning in the prior decision, *HDI-Gerling Am. Ins. Co. v Zurich Am. Ins. Co.* (Sup Ct, NY County, Jan. 19, 2012, Tingling, J., index No. 102922/2011). There, the City and HDI commenced a declaratory judgment action against Zurich and Skanska and moved for partial summary judgment. Interpreting the Zurich Policy at issue here, specifically "Section IV, subsection 4, paragraphs a and b," as amended by the Zurich Endorsement, the court found that the Zurich Policy was primary and that Zurich owed the City a defense in the underlying personal injury action. Friedman affirmation, exhibit I at 2. Zurich moved for reconsideration of the decision and the court denied the motion by order dated March 29, 2012. Friedman affirmation, ¶ 14 and exhibit J. Zurich sought to appeal the trial court's decision, but allegedly never perfected its appeal, despite two extensions of time, which have now expired. *Id.*, ¶ 15 and exhibits K and L. Therefore, this court is not required to follow *HDI-Gerling Am. Ins. Co.* (Sup Ct, NY County, Jan. 19, 2012, Tingling, J., index No. 102922/2011) and declines to do so here. *Cf Mountain View Coach Lines v Storms*, 102 AD2d 663, 664-665 (2d Dept 1984) (court not bound by decision of a sister court); *see also Bush v City of New York*, 195 Misc 2d 882, 888 (Sup Ct,

Bronx County 2003) ("[a]bsent any pronouncement by the Court of Appeals or the Appellate Division where the action is pending or any other department, the doctrine of stare decisis does not require the trial court to follow as precedent a point established by the courts of coordinate jurisdiction").

Accordingly, it is hereby

ORDERED that the motion of plaintiffs the City of New York and HDI-Gerling America Insurance Company for partial summary judgment on its first cause of action is denied; and it is further

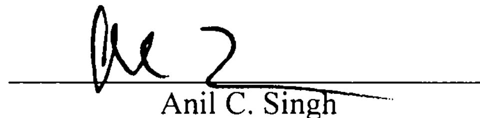
ORDERED that defendant Zurich American Insurance Company's cross motion, which seeks a declaratory judgment with respect to the subject matter of the complaint's first cause of action, is granted to the extent of declaring that any additional insured coverage for the City of New York under the subject policy provided by defendant Zurich American Insurance Company (policy number GLO 3867164-00) is excess to the primary additional insured coverage that plaintiff HDI-Gerling America Insurance Company owes to the City of New York with respect to the subject underlying personal injury action, *Izzo v. The City of New York et al.* (under index No. 306326/13), and that Zurich American Insurance Company has no obligation to defend or participate in the defense of the City of New York in the subject underlying action until coverage under the policy issued by HDI-Gerling America Insurance Company (policy number GLD 11101-04) has been exhausted, and the cross motion is otherwise denied; and it is further

ADJUDGED and DECLARED that: (i) any additional insured coverage available to plaintiff the City of New York under the subject policy provided by defendant Zurich American Insurance Company (policy number GLO 3867164-00) is excess to the primary additional insured coverage available to the City of New York under the subject policy provided by

plaintiff HDI-Gerling America Insurance Company (policy number GLD 11101-04), in connection with the underlying personal injury action, *Izzo v The City of New York et al.* (under index No. 306326/13); and (ii) Zurich American Insurance Company has no obligation to defend or participate in the defense of the City of New York in the subject underlying action until coverage under the policy issued by HDI-Gerling America Insurance Company (policy number GLD 11101-04) has been exhausted; and it is further

ORDERED that the action is severed and continued with respect to the second and third causes of action.

Date: April 16, 2015
New York, New York



Anil C. Singh