

**Kirchhoff-Consigli Constr. Mgt., LLC v Acadia Ins.
Co.**

2017 NY Slip Op 31632(U)

August 2, 2017

Supreme Court, Kings County

Docket Number: 505610/16

Judge: Genine D. Edwards

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At an IAS Term, Part 80 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 2nd day of August, 2017.

P R E S E N T:

HON. GENINE D. EDWARDS,
Justice.

-----X

KIRCHHOFF-CONSIGLI CONSTRUCTION
MANAGEMENT, LLC, KIRCHHOFF CONSTRUCTION
MANAGEMENT, INC., CONSIGLI CONSTRUCTION
CO., INC. and THE CULINARY INSTITUTE OF
AMERICA, INC.,

Plaintiffs,

- against-

Index No. 505610/16

ACADIA INSURANCE COMPANY, FIREMEN'S
INSURANCE COMPANY OF WASHINGTON, D.C.,
SHAWNLEE CONSTRUCTION LLC and
SHEPARDVILLE CONSTRUCTION, LLC,

Defendants.

-----X

ACADIA INSURANCE COMPANY, FIREMEN'S
INSURANCE COMPANY OF WASHINGTON, D.C.,
SHAWNLEE CONSTRUCTION LLC AND
SHEPARDVILLE CONSTRUCTION, LLC,

Third-Party
Plaintiffs,

- against-

ROCK HARD HOMES, INC., NATIONAL GRANGE
MUTUAL INS. c/o THE MAIN STREET AMERICA
GROUP,

Third-Party
Defendants.

-----X

| <u>The following papers numbered 1 to 10 read herein:</u> | <u>Papers Numbered</u> |
|---|------------------------------|
| Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed _____ | <u>1-2 3-4 5-6</u> |
| Opposing Affidavits (Affirmations) _____ | <u>4 6, 7-8 7-8, 9</u> |
| Reply Affidavits (Affirmations) _____ | <u>7-8 9 10</u> |

Upon the foregoing papers in this insurance coverage dispute, plaintiffs Kirchoff-Consigli Construction Management, LLC (KCCM), Kirchoff Construction Management, Inc. (KCM), Consigli Construction Co., Inc. (Consigli) (collectively, the Kirchoff Entities) and The Culinary Institute Of America, Inc. (CIA), move (in motion seq. 1) for an order: (1) amending the complaint and caption to add Kirchoff Properties, LLC (Kirchoff Properties) as a plaintiff, and (2) granting summary judgment, pursuant to CPLR 3212, in their favor, declaring that: (a) plaintiffs are entitled to primary, non-contributory additional insured coverage under an insurance policy issued by defendants Acadia Insurance Company and Firemen’s Insurance Company Of Washington, D.C. (collectively, Acadia/Firemen’s) to Shawnlee Construction LLC (Shawnlee) (the Acadia/Firemen’s Policy) with respect to the underlying action captioned *Lojano v The Culinary Institute of America, et al.*, Kings County index No. 17168/12 (the Underlying Action), including the payment of all future defense costs and the reimbursement of all past defense costs; (b) defendants Shawnlee and Shepardville Construction, LLC (Shepardville) contractually agreed to defend and indemnify plaintiffs; and (c) Acadia/Firemen’s is required to cover Shawnlee’s obligations to its contractual indemnitees on a primary, non-contributory basis; or, alternatively, (d) Shawnlee

breached its subcontract with KCCM by failing to procure insurance naming plaintiffs as additional insureds.

Defendants/third-party plaintiffs Acadia/Firemen's, Shawnlee and Shepardville cross-move (in motion seq. 2) for an order granting summary judgment, pursuant to CPLR 3212, in their favor, declaring that: (1) Shepardville is an additional insured entitled to primary and non-contributory coverage under an insurance policy issued by third-party defendant Main Street America Assurance Group i/s/h/a National Grange Mutual Ins. c/o The Main Street America Group (MSA) to Rock Hard Homes, Inc. (Rock Hard) (the MSA Policy) with respect to the Underlying Action; and (2) MSA is obligated to assume plaintiffs' defense and indemnification in the Underlying Action, pursuant to the MSA Policy; or, alternatively, (3) third-party defendant Rock Hard breached its contractual duty to procure insurance for Shawnlee and Shepardville.

Third-party defendants Rock Hard and MSA cross-move (in motion seq. 3) for an order granting summary judgment, pursuant to CPLR 3212, in their favor, declaring that: (1) plaintiffs are not additional insureds under the MSA Policy; (2) Rock Hard is not contractually obligated to defend and indemnify plaintiffs; and (3) MSA is not required to cover Shawnlee and Shepardville's obligations to its contractual indemnitees.

The Underlying Action

The instant insurance coverage dispute arises out of personal injuries sustained by Jose Lojano (Lojano), the plaintiff in the Underlying Action, in a June 1, 2012 accident in which Lojano fell when he was descending a ladder. Lojano was injured during his employment by Salvador Ordonez Construction LLC (Salvador), one of the subcontractors hired to work on a project involving the construction of new student housing for CIA's teaching facility at 1946 Campus Drive, Route 9, in Hyde Park (CIA Construction Project).

Prior to Lojano's accident, CIA entered into a ground lease with the Collegiate Housing Foundation, which entered into a Development Agreement for the CIA Construction Project with Kirchhoff Properties. Kirchhoff Properties contracted with KCCM for it to act as the Design Builder and General Contractor for the CIA Construction Project. KCCM then retained Shawnlee, a subcontractor, to perform framing, install siding and other work, pursuant to a December 13, 2011 subcontract (Shawnlee Subcontract). Shepardville, Shawnlee's sister company,¹ sub-subcontracted a portion of the work to Rock Hard, pursuant to a May 4, 2012 subcontract (Rock Hard Subcontract). Rock Hard, in turn, further subcontracted a portion of the work to Salvador.

Lojano commenced the Underlying Action in Kings County Supreme Court against CIA, KCCM, KCM, Consigli and Shawnlee, in which he alleged that he sustained personal injuries during the performance of his work on the CIA Construction Project due to

¹ Both companies are subsidiaries of United Forest Products.

defendants' negligence and violations of the New York State Labor Law. Consigli and KCCM commenced a third-party action against Shawnlee for contractual indemnification as well as common-law indemnification, contribution and breach of the Shawnlee Subcontract for failure to procure insurance. Shawnlee commenced a second third-party action against Rock Hard for common-law indemnification as well as contractual indemnification, contribution and breach of the Rock Hard Subcontract for failure to procure insurance.

By a November 28, 2012 letter, CIA and the Kirschhoff Entities tendered their defense and indemnification in the Underlying Action to Acadia/Firemen's under the Acadia/Firemen's Policy, both as additional insureds and as contractual indemnitees of Shawnlee. Acadia/Firemen's responded by a March 31, 2014 disclaimer letter in which it denied coverage and refused to provide CIA and the Kirschhoff Entities with a defense in the Underlying Personal Injury Action.

Acadia/Firemen's tendered the defense and indemnification of Shawnlee and Shepardville in the Underlying Personal Injury Action to MSA. While MSA agreed to provide a defense and indemnification to Shawnlee, it only agreed to defend Shepardville.

This Declaratory Judgment Action

On April 11, 2016, plaintiffs KCCM, KCM, Consigli and CIA commenced the instant declaratory judgment action against Acadia/Firemen's, Shawnlee and Shepardville. Among other things, the complaint alleges that plaintiffs are additional insureds under Shawnlee's general liability insurance policy with Acadia/Firemen's and, as such, Acadia/Firemen's is

obligated to defend and indemnify plaintiffs in the Underlying Action on a primary and non-contributory basis. Plaintiffs allege that Acadia/Firemen's is obligated to assume their defense and indemnification in the Underlying Action, including the reimbursement of attorneys' fees and defense costs incurred; or alternatively, that they are entitled to monetary damages from Shawnlee and Shepardville for breach of their contractual obligation to procure insurance coverage for plaintiffs.

Thereafter, Acadia/Firemen's, Shawnlee and Shepardville commenced a third-party action against Rock Hard and MSA seeking additional insured coverage and contractual indemnification. Rock Hard and MSA collectively answered the third-party complaint and asserted a counterclaim for a judgment declaring that MSA owes no duty to provide coverage to Shepardville.

Legal Arguments

(1)

In support of their motion for summary judgment, plaintiffs assert that Section F of the General Liability Expansion Endorsement to the Acadia/Firemen's Policy, entitled "Additional Insured By Contract Or Agreement," triggers primary and non-contributory coverage for plaintiffs, including all of the Kirchhoff Entities, as additional insureds.

Section F of the General Liability Expansion Endorsement to the Acadia/Firemen's Policy provides, in relevant part:

"F. ADDITIONAL INSURED BY CONTRACT OR AGREEMENT

The following is added to SECTION II WHO IS AN INSURED, Paragraph 2:

- e. any person or organization for who[m] you are performing operations *if 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.
- 1) Such person or organization 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:
 - a. Your acts or your omissions; or
 - b. The acts or omissions of those acting on your behalf

In the performance of your ongoing operations for the additional insured.

* * *

- 4) Primary and Non-contributory This insurance applies on a primary and non-contributory basis if that is required by the written contract or agreement. . . .” (emphasis added).

Plaintiffs also contend that they are covered under the Acadia/Firemen’s Policy as Shawnlee’s contractual indemnitees because the Shawnlee Subcontract is an “insured contract” within the meaning of the Acadia/Firemen’s Policy. Section V (9) (f) of the Acadia/Firemen’s Policy defines “insured contract” as:

“That part of any other contract or agreement pertaining to your business . . . under which you assume the tort liability of another party to pay for ‘bodily injury’ or ‘property damage’ to a third person or organization. . . .”

Plaintiffs contend that the Shawnlee Subcontract is an “insured Contract” under the Acadia/Firemen’s Policy because “Shawnlee contracted to assume the tort liability of (*i.e.* indemnify) Plaintiffs for damage arising out of Shawnlee’s work.”² Alternatively, plaintiffs contend that Shawnlee breached the Shawnlee Subcontract by failing to procure insurance on plaintiffs’ behalf.

Plaintiffs rely on Article 4 of the Shawnlee Subcontract, entitled “Indemnification,” which provides, in relevant part:

“A. To the extent permitted by law, the Subcontractor shall (1) fully indemnify and save *the Contractor and Owner* wholly harmless from any and all claims, liabilities, liens, demands, and causes of action for or on account of any injury to persons, damage to property, fines, penalties[,] assessments, or any loss of whatever kind or nature arising out of or in consequence of the performance of the Subcontractor’s work hereunder, but *excluding, however, claims, etc. to the extent arising out of the negligence or other culpable conduct of the contractor* and (2) assume, on behalf of the Contractor, its officers, agents, servants, and employees, the defense of any claim or action which may be brought against the Contractor, its officers, agents, servants, or employees and shall reimburse the Contractor for any attorneys’ fees and expenses incurred by the Contractor with respect to any such claim. . . .” (emphasis added).

² See ¶ 42 of the August 4, 2016 affirmation of Sam Baharvar, Esq., submitted in support of plaintiffs’ summary judgment motion (Baharvar Affirmation).

The Shawnlee Subcontract further provides that “General Contractor, Owner *and all other parties required of the General Contractor*, shall be included as insureds on the [Commercial General Liability Policy] . . . It shall apply as primary and non-contributing insurance . . .” (emphasis added).

Acadia/Firemen’s, Shawnlee and Shepardville, in opposition, contend that each of the Kirschhoff Entities “is a distinct entity” and that plaintiffs’ reliance on language in the Shawnlee Subcontract for coverage of all of the Kirschhoff Entities is misplaced because “this agreement was only between [KCCM] and SHAWNLEE.”³ They argue that the Shawnlee Subcontract only requires that the “Contractor and Owner” be named as additional insureds, which is limited to KCCM and CIA. They also contend that it is premature to determine that KCCM is an additional insured under the Acadia/Firemen’s Policy because discovery has not been completed in the Underlying Action and it is “possible” that KCCM was negligent.

Plaintiffs, in reply, note that defendants concede in their opposition that KCCM and CIA are entitled to additional insured coverage under the Acadia/Firemen’s Policy and that “[t]he only remaining issue to be decided is whether the Court should declare coverage for the other entities that the plaintiff in the *Lojano Action* has named – KCM, Consigli and

³ See ¶¶ 76-78 of the September 16, 2016 affirmation of Matthew B. Spergel, Esq., submitted in opposition to plaintiffs’ summary judgment motion and in support of defendants/ third-party plaintiffs’ cross motion for summary judgment (Spergel Affirmation).

Kirschhoff Properties.”⁴ Plaintiffs contend that all of the Kirschhoff Entities are entitled to additional insured coverage because they are part of the same “organization” as KCCM.

(2)

In support of their cross motion for summary judgment, Acadia/Firemen’s, Shawnlee and Shepardville contend that both Shawnlee and Shepardville are additional insureds under the Contractors Extension Endorsement to the MSA Policy and that Rock Hard had a duty to defend and indemnify both Shepardville and Shawnlee under the Rock Hard Subcontract.

The Contractors Extension Endorsement to the MSA Policy provides, in relevant part:

“A. Additional Insureds

Each of the following is added to Paragraph C. **Who Is An Insured of BPM P – Section II – Liability** but only as specifically described by the following:

1. Any person(s) or organization(s) for whom you are performing operations is also an additional insured, *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. Such person or organization is an additional insured only with respect to liability for ‘bodily injury’, ‘property damage,’ ‘personal and advertising injury’ caused in whole or part, by:
 - a. Your acts or omissions; or
 - b. The acts or omissions of those acting on your behalf . . .”
(emphasis added).

⁴ See ¶¶ 3-4 of the December 20, 2016 reply affirmation of Sam Baharvar, Esq., submitted in further support of plaintiffs’ motion (Baharvar Reply Affirmation).

Acadia/Firemen's, Shawnlee and Shepardville rely on Exhibit J to the Rock Hard Subcontract, entitled "Insurance Checklist," which provides that Rock Hard "shall procure and maintain" \$1 million in insurance coverage with an "Additional Insured endorsement naming Shepardville [and] *its Affiliates and Subsidiaries* as additional insured[s] for General Liability" (emphasis added). They contend that Shawnlee, an undisputed "affiliate" of Shepardville, is an additional insured under this provision.

In addition, Acadia/Firemen's, Shawnlee and Shepardville contend that MSA must defend and indemnify the Kirschhoff Entities and CIA in the Underlying Action based on the Contractors Extension Endorsement to the MSA Policy and the definition of "insured Contract" in the MSA policy. Specifically, they argue that "coverage must be afforded to plaintiffs as a consequence of the insured status of SHAWNLEE and SHEPARDVILLE, and their contractual obligations covered by the [MSA] Policy."⁵ Essentially, they contend that the Shawnlee Subcontract is an "insured contract" within the meaning of the MSA Policy.

While the MSA Policy excludes coverage for "'bodily injury' or 'property damage' for which the insured is obligated to pay damages by reason of the assumption of liability in a contract or agreement[,]" the MSA Policy further provides that:

"[t]his exclusion does not apply to liability for damages: . . .

- (2) Assumed in a contract or agreement that is an 'insured contract', provided the 'bodily injury' or 'property damage' occurs subsequent to the execution of the contract or agreement. Solely

⁵ Spergel Affirmation at ¶ 55.

for the purposes of liability assumed in an ‘insured contract’, reasonable attorney fees and necessary litigation expenses incurred by or for a party other than an insured are deemed to be damages because of ‘bodily injury’ or ‘property damage’, provided:

- (a) Liability to such party for, or for the cost of, that party’s defense has also been assumed in the same ‘insured contract’, and
- (b) Such attorney fees and litigation expenses are for defense of that party against a civil or alternative dispute resolution proceeding in which damages to which this insurance applies are alleged.”

The MSA Policy defines “insured contract” as:

“That part of any other contract or agreement pertaining to your business . . . under which you assume the tort liability of another party to pay for ‘bodily injury’ or ‘property damage’ to a third person or organization, provided the ‘bodily injury’ or ‘property damage’ is caused, in whole or in part, by you or by those acting on your behalf. Tort liability means a liability that would be imposed by law in the absence of any contract or agreement. . . .”

MSA and Rock Hard oppose that branch of defendant/third-party plaintiffs’ cross motion to the extent that it seeks a declaration that MSA is obligated to assume the defense and indemnification of the Kirschhoff Entities and CIA as additional insureds under the MSA Policy. They contend that “[n]othing in Rock Hard[‘s] Subcontract with Shepardville required Rock Hard . . . to defend and/or indemnify any of the plaintiffs, or name them as additional insureds on any policy of insurance procured and maintained by Rock Hard . . .”⁶

⁶ See ¶ 14 of the December 14, 2016 affidavit of John D. Goldman, Esq., submitted in support of third-party defendants’ cross motion for summary judgment and in partial opposition to defendants/third-party plaintiffs’ cross motion for summary judgment (Goldman Affidavit).

They further argue that “there is no written contract between Rock Hard . . . and any of the plaintiffs requiring Rock Hard . . . to name any of the plaintiffs as additional insureds, [which is] a prerequisite in the MSA policy’s Contractors Extension Endorsement.”⁷

Importantly, MSA and Rock Hard do not oppose that portion of defendants/third-party plaintiffs’ cross motion seeking an order declaring that MSA is required to defend and indemnify both Shepardville and Shawnlee as additional insureds under the MSA policy.⁸

(3)

For the same reasons asserted in opposition to defendants/third-party plaintiffs’ cross motion, MSA and Rock Hard cross-move for summary judgment in their favor declaring that: (1) plaintiffs are not additional insureds under the MSA Policy; (2) Rock Hard is not obligated to defend and indemnify plaintiffs in the Underlying Action under the terms of the Rock Hard Subcontract; and (3) MSA is not required to cover Shawnlee and Shepardville’s obligations to its contractual indemnitees.

⁷ Goldman Affidavit at ¶ 24.

⁸ *Id.* at ¶ 20.

Discussion

(1)

The Acadia/Firemen's Policy

The General Liability Expansion Endorsement to the Acadia/Firemen's Policy extends additional insured coverage to those parties with whom Shawnlee, the primary insured, "agreed in writing in a contract or agreement that such person or organization be added as an additional insured on your policy." The Shawnlee Subcontract between KCCM and Shawnlee specifically requires that the "Contractor and Owner" be named as additional insureds. Consequently, additional insured coverage under the Acadia/Firemen's Policy is limited to KCCM and CIA, the General Contractor and Owner.

Defendants Acadia/Firemen's, Shawnlee and Shepardville's contention that it is premature to determine additional insured coverage for KCCM because it may be found negligent in the Underlying Action is misplaced because an insurer's duty to defend is triggered whenever the allegations in a complaint, liberally construed, suggest a reasonable possibility of coverage. *Rhodes v. Liberty Mut. Ins. Co.*, 67 A.D.3d 881 (2nd Dept. 2009). The pleadings in the Underlying Action allege that KCCM is liable under the New York State Labor Law, which claim is covered under the Acadia/Firemen's Policy.

For these reasons, only KCCM and CIA are entitled to a judgment declaring that they are entitled to a defense and indemnification in the Underlying Personal Injury Action on

a primary, non-contributory basis under the terms of the Acadia/Firemen's Policy and the Shawnlee Subcontract. Accordingly, it is

ORDERED that the branch of plaintiffs' motion for summary judgment seeking a declaration that KCM, Consigli and Kirschhoff Properties are entitled to primary, non-contributory additional insured coverage under the Acadia/Firemen's Policy is denied; and it is further

ORDERED that the branch of plaintiffs' motion for summary judgment seeking a declaration that KCCM and CIA are entitled to primary, non-contributory additional insured coverage under the Acadia/Firemen's Policy is granted; and it is further

ORDERED, ADJUDGED AND DECLARED that: (1) KCCM and CIA are additional insureds and Shawnlee's contractual indemnitees entitled to primary and non-contributory coverage under the Acadia/Firemen's Policy in the Underlying Action, including the payment of all future defense costs and the reimbursement of all past defense costs, and (2) Shawnlee agreed to defend and indemnify KCCM and CIA in the Shawnlee Subcontract; and it is further

ORDERED that the branch of defendants/third-party plaintiffs' cross motion for summary judgment seeking a declaration regarding MSA's duty to defend and indemnify both Shepardville and Shawnlee is granted; and it is further

ORDERED, ADJUDGED AND DECLARED that both Shepardville and Shawnlee are additional insureds entitled to primary and non-contributory coverage under the MSA Policy in the Underlying Action; and it is further

ORDERED that the branch of defendants/third-party plaintiffs' cross motion for summary judgment seeking a declaration regarding MSA's duty to defend and indemnify plaintiffs is denied; and it is further

ORDERED that the branch of third-party defendants' cross motion for summary judgment is granted; and it is further

ORDERED, ADJUDGED AND DECLARED that: (1) plaintiffs are not additional insureds under the MSA Policy; (2) Rock Hard is not contractually obligated to defend and indemnify plaintiffs in the Underlying Action; and (3) MSA is not required to cover Shawnlee and Shepardville's obligations to its contractual indemnitees, KCCM and CIA.

(2)

The MSA Policy

The Contractors Extension Endorsement to the MSA Policy similarly extends additional insured coverage to those parties with whom Rock Hard, the primary insured, "agreed in writing in a contract or agreement that such person or organization be added as an additional insured on your policy." The Rock Hard Subcontract with Shepardville only requires that Shepardville and its "affiliates" (i.e., Shawnlee) be named as additional insureds. The Rock Hard Subcontract does not mention the Kirschhoff Entities or CIA. Thus, only Shepardville and Shawnlee are entitled to a defense and indemnification as additional insureds under the MSA Policy. Accordingly, it is further

ORDERED that the branch of plaintiffs' motion seeking to amend the complaint and the caption to add Kirchhoff Properties as a plaintiff is granted; and it is further

ORDERED that the caption shall read as follows:

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KIRCHHOFF-CONSIGLI CONSTRUCTION
MANAGEMENT, LLC, KIRCHHOFF CONSTRUCTION
MANAGEMENT, INC., CONSIGLI CONSTRUCTION
CO., INC., THE CULINARY INSTITUTE OF
AMERICA, INC. and KIRCHHOFF PROPERTIES, LLC,

Plaintiffs,

- against-

ACADIA INSURANCE COMPANY, FIREMEN'S
INSURANCE COMPANY OF WASHINGTON, D.C.,
SHAWNLEE CONSTRUCTION LLC and
SHEPARDVILLE CONSTRUCTION, LLC,

Defendants.

-----X
ACADIA INSURANCE COMPANY, FIREMEN'S
INSURANCE COMPANY OF WASHINGTON, D.C.,
SHAWNLEE CONSTRUCTION LLC AND
SHEPARDVILLE CONSTRUCTION, LLC,

Third-Party
Plaintiffs,

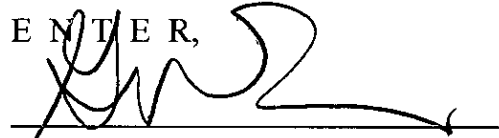
- against-

ROCK HARD HOMES, INC., NATIONAL GRANGE
MUTUAL INS. c/o THE MAIN STREET AMERICA
GROUP,

Third-Party
Defendants.

-----X.

This constitutes the decision, order and judgment of the court.

ENTER,

J. S. C.

HON. GENINE D. EDWARDS

Nancy T. Sunshine

NANCY T. SUNSHINE
Clerk

KINGS COUNTY CLERK
FILED
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