

1 UNITED STATES COURT OF APPEALS

2 FOR THE SECOND CIRCUIT

3 August Term, 2010

4 (Argued: October 8, 2010

Decided: December 23, 2010

5 Amended: December 28, 2010)

6 Docket No. 10-0799-CV

7 -----
8 10 ELLICOTT SQUARE COURT CORPORATION and 5182 GROUP, LLC,

9 Plaintiffs-Appellees,

10 - v -

11 MOUNTAIN VALLEY INDEMNITY COMPANY,

12 Defendant-Appellant.

13 -----
14 Before: SACK and RAGGI, Circuit Judges, and KOELTL, District
15 Judge.*

16 Appeal by the defendant from a summary judgment entered
17 in the United States District Court for the Western District of
18 New York (William M. Skretny, Chief Judge) in favor of the
19 plaintiffs. The district court's judgment rested on three
20 grounds relevant to this appeal: first, that a contract that had
21 not been signed on behalf of the parties to it nonetheless had
22 been "executed" within the meaning of the primary insurance
23 policy in issue and New York law; second, that the defendant was
24 bound to provide insurance coverage to the plaintiffs under an

* The Honorable John G. Koeltl of the United States District Court for the Southern District of New York, sitting by designation.

1 umbrella policy; and third, that in any event the defendant was
2 estopped from denying insurance coverage to the plaintiffs by
3 having issued a certificate of insurance identifying the
4 plaintiffs as additional insureds. We reverse the district
5 court's determination on the first issue, affirm on the second,
6 and certify to the New York Court of Appeals a question of New
7 York law necessary to our resolution of the third.

8 Affirmed in part, reversed in part, question certified
9 to the New York Court of Appeals in part, decision reserved in
10 part.

11 MAX GERSHWEIR, Hurwitz & Fine,
12 P.C. (Katherine A. Fijal, Esq., of
13 counsel), Buffalo, New York, for
14 Defendant-Appellant.

15 JUDITH TREGGER SHELTON, Kenney
16 Shelton Liptak Nowak LLP, Buffalo,
17 New York, for Plaintiffs-
18 Appellees.

19 SACK, Circuit Judge:

20 The plaintiffs in this action, 5182 Group, LLC, and 10
21 Ellicott Square Court Corporation, were, respectively, the owner
22 of and construction manager for a commercial building in Buffalo,
23 New York. They contracted with a third firm, Ellicott
24 Maintenance, Inc., for the building's partial interior
25 demolition.

26 The construction agreement between the plaintiffs and
27 Ellicott Maintenance required the latter to secure insurance to
28 cover the former for any legal liability arising out of the

1 demolition project. Ellicott Maintenance therefore purchased two
2 policies--one primary, the other "umbrella"--from the defendant
3 Mountain Valley Indemnity Company. The defendant, by its agent
4 LRMP, Inc., issued a certificate of insurance evidencing the
5 policies and the status of the plaintiffs as additional insureds,
6 after receipt of which Ellicott Maintenance began the demolition
7 work.

8 The primary insurance policy required that the
9 underlying written construction agreement between the named
10 insured, Ellicott Maintenance, and the additional insureds, the
11 plaintiffs in this action, be "executed" in order for any injury
12 for which the plaintiffs sought defense and indemnification to be
13 covered by the policy. Before anyone on behalf of either
14 Ellicott Maintenance or the plaintiffs signed the construction
15 agreement, a worker on the demolition project was injured. When
16 the worker brought suit in New York State court in an attempt to
17 recover for his injuries, the plaintiffs sought defense and
18 indemnification from the defendant insurance company. The
19 defendant declined coverage, arguing that because the
20 construction agreement was neither signed on behalf of the
21 parties nor fully performed prior to the worker's injury, it had
22 not been "executed" under the primary insurance policy issued by
23 the defendant to Ellicott Maintenance, and therefore the
24 plaintiffs did not qualify as additional insureds under either of
25 the policies. The plaintiffs then brought this action in the

1 United States District Court for the Western District of New York
2 seeking a declaratory judgment to the contrary.

3 The district court (William M. Skretny, Chief Judge)
4 agreed with the plaintiffs, concluding that the construction
5 agreement was "executed" even though it had not been signed or
6 fully performed, and that the plaintiffs therefore were entitled
7 to coverage under both the primary and the umbrella policies.
8 The court also decided that even if the plaintiffs were not
9 entitled to coverage under the terms of the policies, the
10 defendant was estopped from denying coverage because its agent
11 had issued a certificate of insurance to Ellicott Maintenance
12 that listed the plaintiffs as additional insureds. The defendant
13 appeals.

14 We disagree with the district court's view that under
15 New York law, a contract has been "executed" despite the absence
16 of either a signature by or on behalf of both parties or full
17 performance. Therefore, under its terms, the primary insurance
18 policy's additional insured coverage did not become effective
19 prior to the accident in question. We conclude, however, that
20 the plaintiffs nonetheless were covered under the terms of the
21 umbrella policy because that policy did not require "execution"
22 of an underlying written agreement to take effect.

23 New York's intermediate appellate courts are divided as
24 to whether, despite the fact that an insurance policy's
25 additional-insured coverage is not in effect under its express
26 terms, a certificate of insurance issued by an agent of the

1 insurer nonetheless may estop the insurer from denying coverage
2 to a party identified as an additional insured on the
3 certificate, even where the certificate contains various
4 disclaimers, such as that it is "for informational purposes
5 only." We therefore certify the following question to the New
6 York Court of Appeals:

7 In a case brought against an insurer in which
8 a plaintiff seeks a declaration that it is
9 covered under an insurance policy issued by
10 that insurer, does a certificate of insurance
11 issued by an agent of the insurer that states
12 that the policy is in force but also bears
13 language that the certificate is not evidence
14 of coverage, is for informational purposes
15 only, or other similar disclaimers, estop the
16 insurer from denying coverage under the
17 policy?

18 **BACKGROUND**

19 The defendant Mountain Valley Indemnity Company
20 ("Mountain Valley") issued a commercial general liability
21 insurance policy, effective March 15, 2003 to March 15, 2004,
22 (the "Primary Policy") to non-party Ellicott Maintenance, Inc., a
23 general contractor in Buffalo, New York.¹ As amended by an
24 additional-insured endorsement, the Primary Policy covered not

¹ In identifying the terms of the Primary Policy, the parties refer the Court to a Renewal Declaration contained in the joint appendix reflecting an insurance policy effective from March 15, 2004, to March 15, 2005. The policy at issue in this litigation, however, was effective from March 15, 2003 to March 15, 2004, the same dates listed on the Certificate of Insurance. Because the parties do not dispute that the Primary Policy was issued, that it was effective from 2003 to 2004, and that it was subject to the same terms and endorsements as are contained in the Renewal Declaration, we rely upon the terms of the Renewal Declaration as evidence of the contents of the Primary Policy.

1 only Ellicott Maintenance but also any "person or organization
2 with whom [Ellicott Maintenance] agreed, because of a written
3 contract[,] . . . to provide insurance such as is afforded under
4 [the Primary Policy], but only with respect to liability arising
5 out of [Ellicott Maintenance's] operations," and only when "the
6 written contract or agreement [between Ellicott Maintenance and
7 the additional insured] ha[d] been executed . . . prior to the
8 'bodily injury.'" Mountain Valley Indemnity Co. Commercial
9 Policy No. 331-0013567, Issued to Ellicott Maintenance, Inc.,
10 Gen. Liability Extension Endorsement ¶ 11, Decl. of Katherine A.
11 Fijal in Supp. of Mountain Valley's Mot. for Summ. J. ("Fijal
12 Decl.") Ex. J., 10 Ellicott Square Court Corp. v. Mountain Valley
13 Indem. Co., No. 07-CV-0053 (W.D.N.Y. June 13, 2008). The Primary
14 Policy limited Mountain Valley's liability to one million dollars
15 "per occurrence" of bodily injury, and defined "occurrence" to
16 "mean[] an accident"

17 In addition to the Primary Policy, Mountain Valley
18 issued to Ellicott Maintenance an umbrella policy (the "Umbrella
19 Policy") bearing the same effective dates as the Primary Policy.
20 The Umbrella Policy limited Mountain Valley's liability per
21 occurrence to two million dollars "in excess of" the coverage
22 provided by the Primary Policy and stipulated that the Umbrella
23 Policy's general aggregate limit for each annual period was two
24 million dollars. Like the Primary Policy, the Umbrella Policy
25 guaranteed coverage for bodily injury resulting from an
26 occurrence, which it defined as "an accident . . . , " and

1 extended coverage to additional insureds with whom Ellicott
2 Maintenance had "agreed in writing prior to any [injury] . . . to
3 provide insurance such as is afforded" by the Umbrella Policy.
4 Mountain Valley Indem. Co. Commercial Umbrella Policy No. X31-
5 0013568, Issued to Ellicott Maintenance, Inc. at 8, Fijal Decl.
6 Ex. K (the "Umbrella Policy"). Unlike the Primary Policy, the
7 Umbrella Policy did not provide that its coverage of additional
8 insureds was effective only if the written agreement between
9 Ellicott Maintenance and any additional insureds had been
10 "executed."

11 On or about August 14, 2003, Ellicott Maintenance
12 contracted with plaintiffs 5182 Group, LLC, and 10 Ellicott
13 Square Court Corporation d/b/a Ellicott Development Company
14 ("EDC"), to perform interior demolition work at the Graystone
15 Building in Buffalo, New York, owned by plaintiff 5182 Group, and
16 managed by EDC. The agreement between Ellicott Maintenance and
17 the plaintiffs (the "Construction Agreement") obligated Ellicott
18 Maintenance to procure insurance coverage protecting both itself
19 and the plaintiffs against claims by employees or subcontractors
20 for, inter alia, damages resulting from bodily injury. The
21 Construction Agreement required that the insurance be "primary,
22 rather than concurrent with or secondary to [the] Owner's own
23 liability insurance," that it provide coverage of no less than
24 five million dollars,² and that Ellicott Maintenance obtain,

² While the Primary and Umbrella Policies, each of which limited liability to two million dollars for each annual period,

1 prior to the commencement of work, "Certificates of Insurance
2 naming [the plaintiffs] as additional insureds." Agreement for
3 Construction, dated Sept. 12, 2003, at 10-11, Fijal Decl. Ex. G.
4 No one signed the Construction Agreement on behalf of either the
5 plaintiffs or Ellicott Maintenance until September 12, 2003.

6 Some three weeks earlier, on August 19, 2003, Mountain
7 Valley's agent, LRMP, Inc., had issued a certificate of insurance
8 (the "COI") identifying Mountain Valley as the issuer of the
9 Primary Policy and the Umbrella Policy, Ellicott Maintenance as
10 the named insured, and the plaintiffs as "additional insured with
11 respect to project: Graystone." Certificate of Liability
12 Insurance, dated August 19, 2003, Fijal Decl. Ex. L. The COI
13 listed the limits of liability described above--one million
14 dollars per occurrence under the Primary Policy and two million
15 dollars under the Umbrella Policy. The following language
16 appeared in the upper right-hand quadrant of the front of the
17 COI: "THIS CERTIFICATE IS ISSUED AS A MATTER OF INFORMATION ONLY
18 AND CONFERS NO RIGHTS UPON THE CERTIFICATE HOLDER. THIS
19 CERTIFICATE DOES NOT AMEND, EXTEND OR ALTER THE COVERAGE AFFORDED
20 BY THE POLICIES BELOW." Id. (capitalization in original). The
21 COI also provided that "THE INSURANCE AFFORDED BY THE POLICIES
22 DESCRIBED HEREIN IS SUBJECT TO ALL THE TERMS, EXCLUSIONS AND
23 CONDITIONS OF SUCH POLICIES." Id. (capitalization in original).

did not together provide the five million dollars in coverage
required by the construction agreement, that fact does not affect
our resolution of the issues on appeal.

1 The reverse side of the COI bore similar language under the
2 heading "DISCLAIMER": "The Certificate of Insurance . . . does
3 not constitute a contract between the issuing insurer . . . and
4 the certificate holder, nor does it affirmatively or negatively
5 amend, extend or alter the coverage afforded by the policies
6 listed thereon." Id. Ellicott Maintenance began work the day
7 after it received the COI.

8 On September 9, 2003, three days before Ellicott
9 Maintenance owner Theodore S. DiRienzo and EDC owner Carl P.
10 Paladino signed the construction agreement on behalf of the
11 parties to it, David DelPrince, an employee of S&A Rubbish and
12 Debris Removal--a subcontractor hired by Ellicott Maintenance--
13 was injured when a roof collapsed at the Graystone site.

14 The plaintiffs notified Mountain Valley's agent, LRMP,
15 of DelPrince's injury and potential claim by letter dated October
16 22, 2003, requesting that Mountain Valley defend and indemnify
17 them in any suit brought by DelPrince. Some six months later, by
18 letter dated April 13, 2004, Mountain Valley informed the
19 plaintiffs that it would not defend or indemnify them because,
20 inasmuch as the Construction Agreement had not been signed on
21 behalf of the parties before DelPrince was injured, "there was
22 not in existence on the date of loss a written contract executed
23 prior to the bodily injury," as required by the terms of the
24 Primary Policy. Letter from Susan Gabriele to 10 Ellicott Square
25 [Court] Corp., dated April 13, 2004, App. to Pls.' Local R. 56.1
26 Statement of Material Facts in Supp. of Pls.' Mot. for Summ. J.

1 Ex. 10, 10 Ellicott Square Court Corp. v. Mountain Valley Indem.
2 Co., No. 07-CV-0053 (W.D.N.Y. June 13, 2008). The letter further
3 stated that even if the plaintiffs qualified as additional
4 insureds under the Primary Policy as of the date of the accident,
5 Mountain Valley would deny coverage because the plaintiffs had
6 failed to timely notify Mountain Valley of DelPrince's injury and
7 possible claim, as required by the Primary Policy.

8 DelPrince filed suit against EDC, 5182 Group, and
9 Ellicott Maintenance in New York State Supreme Court, Erie
10 County, on October 28, 2004, alleging negligence and violations
11 of the New York Labor Law, and seeking to recover damages for the
12 injuries he sustained.³

13 The plaintiffs filed this declaratory judgment action
14 in the United States District Court for the Western District of
15 New York on January 30, 2007. They alleged that they were
16 additional insureds under the Primary Policy and therefore were
17 entitled to coverage by Mountain Valley in DelPrince's suit. The
18 plaintiffs further alleged that the COI bound Mountain Valley to
19 provide coverage despite the absence of a signed agreement
20 between EDC and Ellicott Maintenance. Finally, the plaintiffs
21 alleged that Mountain Valley should be precluded from relying on
22 the defense of untimely notice because Mountain Valley's response
23 disclaiming coverage was itself untimely. The plaintiffs later
24 amended their complaint to add a claim alleging entitlement to

³ The parties represented at oral argument before this Court that DelPrince's suit has been settled.

1 indemnification and defense as additional insureds under the
2 terms of the Umbrella Policy.

3 The district court (Richard J. Arcara, Judge⁴) referred
4 the case to Magistrate Judge Leslie G. Foschio. In June 2008,
5 the parties brought cross-motions for summary judgment before the
6 magistrate judge. Mountain Valley's motion principally relied on
7 the same arguments made in its April 2004 letter to the
8 plaintiffs disclaiming coverage. Mountain Valley also argued
9 that it was not bound by the Umbrella Policy because (1) the
10 Construction Agreement required that the insurance provided to
11 the plaintiffs be "primary," and the Umbrella Policy was
12 secondary; and (2) the Umbrella Policy was "subject to all the
13 limitations of [the Primary Policy]," including the execution
14 requirement, and that because the Construction Agreement was not
15 executed before DelPrince's injury, the plaintiffs "[we]re not
16 insureds on the underlying insurance [and we]re not insureds"
17 under the Umbrella Policy. Mem. of Law in Supp. of Mountain
18 Valley Indem. Co.'s Mot. for Summ. J. at 20-21, 10 Ellicott
19 Square Court Corp. v. Mountain Valley Indem. Co., No. 07-CV-0053
20 (W.D.N.Y. June 13, 2008); see Umbrella Policy at 7-8. In support
21 of their cross-motion, the plaintiffs contended that even though
22 the Construction Agreement had not been signed on behalf of the
23 parties at the time of the accident, it nonetheless had been

⁴ This case was originally assigned to Judge Arcara. When, following the reference of the case to the magistrate judge, Judge Arcara recused himself, the case was reassigned to Chief Judge William M. Skretny.

1 "executed" for purposes of the Primary Policy because of the
2 parties' partial performance and because the parties to the
3 contract understood its signing to be ministerial. The
4 plaintiffs further argued that even if the Agreement had not been
5 executed, the COI bound Mountain Valley to provide coverage under
6 the Primary Policy because "Mountain Valley's authorized
7 representative represented that such coverage was in place."
8 Mem. of Law in Supp. of Pls.' Mot. for Summ. J. at 17, 10
9 Ellicott Square Court Corp. v. Mountain Valley Indem. Co., No.
10 07-CV-0053 (W.D.N.Y. June 13, 2008). Finally, the plaintiffs
11 argued that the Umbrella Policy's own "blanket additional insured
12 provision" entitled them to that policy's coverage.

13 In a Report and Recommendation (the "R&R"), 10 Ellicott
14 Square Court Corp. v. Mountain Valley Indem. Co., No. 07-CV-0053
15 (W.D.N.Y. Sept. 22, 2009), the magistrate judge recommended
16 denying Mountain Valley's motion for summary judgment and
17 granting the plaintiffs'.⁵ With regard to whether the
18 Construction Agreement was "executed," the magistrate judge
19 concluded that "in light of 'common speech' and the reasonable
20 expectations of a businessperson"--and because Mountain Valley,
21 as the drafter of the policy, could have used the term "signed"
22 if it had intended to require a signature--the term "executed" as
23 used in the Primary Policy should not be interpreted to require

⁵ Subject matter jurisdiction over this action is founded on diversity of citizenship. The parties do not dispute that the plaintiffs' claims are properly resolved by applying New York law.

1 the parties' signatures to trigger coverage under that policy.
2 R&R at 12-13. On the question of whether the plaintiffs were
3 entitled to coverage based on the COI, the magistrate judge
4 recommended finding that the COI incorporated the terms of the
5 Primary and Umbrella Policies. Relying on Niagara Mohawk Power
6 Corp. v. Skibeck Pipeline Co., 271 A.D.2d 867, 705 N.Y.S.2d 459
7 (4th Dep't 2000), the magistrate judge found that Mountain
8 Valley's agent, acting within the scope of its authority, "issued
9 the certificate of insurance naming [the plaintiffs] as
10 additional insureds, upon which [the plaintiffs] were entitled to
11 rely, regardless of the absence of a signing of the construction
12 contract at that time." R&R at 15. The magistrate judge
13 therefore recommended estopping Mountain Valley from denying
14 coverage to the plaintiffs. Finally, the magistrate judge
15 rejected Mountain Valley's argument that the plaintiffs had not
16 provided timely notice of DelPrince's injury.⁶

17 Mountain Valley filed written objections to the entire
18 R&R making essentially the same arguments it had presented to the
19 magistrate judge. Upon de novo review, the district court
20 adopted the R&R in its entirety and without further written
21 analysis. 10 Ellicott Square Court Corp. v. Mountain Valley
22 Indem. Co., No. 07-CV-0053, 2010 WL 681284, 2010 U.S. Dist. LEXIS
23 14556 (W.D.N.Y. Feb. 19, 2010).

24 Mountain Valley appeals.

⁶ Mountain Valley does not challenge this conclusion on appeal.

1 **DISCUSSION**

2 I. Standard of Review

3 We review the district court's grant of summary
4 judgment de novo, "construing the evidence in the light most
5 favorable to the non-moving party and drawing all reasonable
6 inferences in its favor." Fincher v. Depository Trust & Clearing
7 Corp., 604 F.3d 712, 720 (2d Cir. 2010). "Summary judgment is
8 appropriate where there exists no genuine issue of material fact
9 and, based on the undisputed facts, the moving party is entitled
10 to judgment as a matter of law." O & G Indus., Inc. v. Nat'l
11 R.R. Passenger Corp., 537 F.3d 153, 159 (2d Cir. 2008), cert.
12 denied, 129 S. Ct. 2043 (2009) (brackets and internal quotation
13 marks omitted); see also Fed. R. Civ. P. 56(a) ("The court shall
14 grant summary judgment if the movant shows that there is no
15 genuine dispute as to any material fact and the movant is
16 entitled to judgment as a matter of law. The court should state
17 on the record the reasons for granting or denying the motion.").

18 II. Execution of the Construction Agreement

19 The plaintiffs argue, and the district court concluded,
20 that although no one on behalf of them or Ellicott Maintenance
21 had signed the Construction Agreement before DelPrince was
22 injured, the contract nevertheless was "executed" for purposes of
23 the Primary Policy. We disagree.

24 We must give "unambiguous provisions of an insurance
25 contract . . . their plain and ordinary meaning." Essex Ins. Co.
26 v. Laruccia Constr., Inc., 71 A.D.3d 818, 819, 898 N.Y.S.2d 558,

1 559 (2d Dep't 2010) (internal quotation marks omitted). We
2 cannot disregard "the plain meaning of the policy's
3 language . . . in order to find an ambiguity where none exists."⁷
4 Empire Fire & Marine Ins. Co. v. Eveready Ins. Co., 48 A.D.3d
5 406, 407, 851 N.Y.S.2d 647, 648 (2d Dep't 2008).

6 "[I]t is common practice for the courts of this State
7 to refer to the dictionary to determine the plain and ordinary
8 meaning of words to a contract." Mazzola v. Cnty. of Suffolk,
9 143 A.D.2d 734, 735, 533 N.Y.S.2d 297, 297 (2d Dep't 1988)
10 (citation omitted). The New York Court of Appeals recently did
11 just that in determining the meaning of New York State statutory
12 language. Giordano v. Market Am., Inc., --- N.Y.3d ----, ----, -
13 -- N.E.2d ----, ----, --- N.Y.S.2d ----, ----, 2010 WL 4642451,
14 2010 N.Y. LEXIS 3284, at *10 (Nov. 18, 2010) (adopting a
15 dictionary definition of the word "latent" for purposes of N.Y.
16 C.P.L.R. 214-c(4)).

17 Black's Law Dictionary defines "executed" as: "1. (Of a
18 document) that has been signed <an executed will>. 2. That has
19 been done, given, or performed <executed consideration>."

⁷ The plaintiffs appear to argue that the term "executed" is ambiguous. Whether a contract term is ambiguous is a threshold question of law. Morgan Stanley Grp. Inc. v. New Eng. Ins. Co., 225 F.3d 270, 275 (2d Cir. 2000). "An ambiguity exists where the terms of an insurance contract could suggest more than one meaning when viewed objectively by a reasonably intelligent person" who is aware of trade terminology and of the context of the entire contract. Id. (internal quotation marks omitted). As we will discuss below, we conclude that the term "executed" is not ambiguous.

1 Black's Law Dictionary 650 (9th ed. 2009).⁸ A note to the
2 definition warns that "[t]he term 'executed' is a slippery
3 word. . . . A contract is frequently said to be executed when
4 the document has been signed, or has been signed, sealed, and
5 delivered. Further, by executed contract is frequently meant one
6 that has been fully performed by both parties." Id. (quoting
7 William R. Anson, Principles of the Law of Contract 26 n.*
8 (Arthur L. Corbin ed., 3d Am. ed. 1919)) (brackets and internal
9 quotation marks omitted, emphasis in original).

10 New York courts employ the standard indicated by the
11 definition in Black's, requiring that a contract be either signed
12 or fully performed before it can be considered executed.⁹ For
13 example, in Burlington Insurance Co. v. Utica First Insurance
14 Co., 71 A.D.3d 712, 896 N.Y.S.2d 433 (2d Dep't 2010),¹⁰ a case

⁸ Black's Law Dictionary defines "execute" as, inter alia: "To perform or complete (a contract or duty)"; and "To make (a legal document) valid by signing; to bring (a legal document) into its final, legally enforceable form." Black's Law Dictionary, supra, at 649.

⁹ The parties have not pointed to, nor have we ourselves discovered, an opinion of the New York Court of Appeals addressing the definition of "executed" as it relates to contracts. Because there is no disagreement among the Departments of the Appellate Division in this regard, however, we will apply the decisions of those courts. "[W]e are bound to apply the law as interpreted by New York's intermediate appellate courts unless we find persuasive evidence that the New York Court of Appeals, which has not ruled on this issue, would reach a different conclusion." Blue Cross & Blue Shield of N.J., Inc. v. Philip Morris USA Inc., 344 F.3d 211, 221 (2d Cir. 2003) (ellipses and internal quotation marks omitted).

¹⁰ The district court relied on the Supreme Court's opinion in Burlington, which the Second Department overturned, in determining applicable New York law. We of course treat the Second Department's decision, of which the district court could

1 with facts remarkably similar to those of the case before us, a
2 construction manager contracted with a subcontractor to perform
3 work at a site in Manhattan. The agreement was memorialized in a
4 purchase order that required the subcontractor "to obtain
5 insurance in specified minimum amounts, and to name [the
6 construction manager] as an additional insured on the Certificate
7 of Insurance." Id. at 712, 896 N.Y.S.2d at 434. The policy's
8 additional insured endorsement provided, inter alia, that the
9 written contract or agreement between the manager and
10 subcontractor had to be "[c]urrently in effect or becoming
11 effective during the terms of this policy; and . . . [e]xecuted
12 prior to the 'bodily injury' [or] 'personal injury'." Id. at
13 713, 896 N.Y.S.2d at 434.

14 Before the purchase order was signed on behalf of
15 either party, and before work at the site was completed, a man
16 was injured when he fell through a sidewalk cellar door at the
17 construction site. Id. The injured man filed a personal injury
18 action against the construction manager and the subcontractor,
19 both of whom in turn sought coverage from the defendant insurance
20 company. Id. The defendant declined coverage "on the ground
21 that [the construction manager] was not an additional insured
22 pursuant to the terms of the policy's additional insured
23 endorsement" because "the purchase order was not signed at the
24 time of the underlying plaintiff's alleged injury and, therefore,

not have known when it decided the case at bar, as superseding
the Supreme Court's view on the matter.

1 had not been 'executed' as of that time," as required by the
2 endorsement. Id. The plaintiffs argued that the contract had
3 been executed by virtue of their partial performance of their
4 duties thereunder.

5 The Appellate Division, Second Department, agreed with
6 the insurer, concluding that "the defendant demonstrated that the
7 contract was not 'executed' at the time of the alleged
8 accident . . . since it was both unsigned and had not been fully
9 performed at that time." Id. at 714, 896 N.Y.S.2d at 435. The
10 court found "no support for the plaintiffs' contention that the
11 condition in the additional insured endorsement that the contract
12 be 'executed' prior to the bodily injury or personal injury could
13 be satisfied by partial performance." Id.

14 In this case, the plaintiffs assert that although the
15 Construction Agreement was not signed, the "underlying contract"
16 requiring Ellicott Maintenance to procure insurance had been
17 fully performed in that Ellicott Maintenance had "obtained
18 insurance in favor of EDC/5182 Group by purchasing policies with
19 a blanket additional insured endorsement," and "delivered proof
20 of coverage in the form of" the COI. Appellees' Br. 20. But the
21 Construction Agreement was not comprised of many individual
22 contracts, as the plaintiffs' argument implies. Rather,
23 fulfilling the insurance procurement provision constituted
24 partial performance of the Construction Agreement--satisfaction
25 of one of the duties required of Ellicott Maintenance thereunder.

1 And as the district court correctly noted, partial performance
2 does not constitute execution.

3 The plaintiffs also argue that Burlington "appears to
4 be premised on a legal fallacy," Appellees' Br. 14, i.e., that
5 the Second Department's acknowledgment that the word "executed"
6 can have more than one meaning cannot be reconciled with its
7 conclusion that this "does not render the contract uncertain or
8 ambiguous," Burlington, 71 A.D.3d at 713, 896 N.Y.S.2d at 435
9 (internal quotation marks omitted). But the Burlington court
10 concluded that the contract before it had not been executed
11 because it had neither been signed nor fully performed.
12 Therefore, neither method of execution had been met. Id. at 714,
13 896 N.Y.S.2d at 435. One cannot conclude from the fact that a
14 contract requirement can be satisfied in more than one way that
15 the contract for that reason alone "lack[s] a definite and
16 precise meaning." SUS, Inc. v. St. Paul Travelers Grp., 75
17 A.D.3d 740, 742, 905 N.Y.S.2d 321, 324 (3d Dep't 2010). Neither
18 does it render the term ambiguous, nor create a triable issue of
19 material fact.

20 Because New York law unambiguously requires either the
21 signing of a contract or its full performance for it to be
22 "executed" within the meaning of an insurance policy requiring
23 such prior execution, and because neither occurred here, the
24 Construction Agreement was not executed as of the date of
25 DelPrince's injury. The district court's finding that it was and

1 its conclusion that for that reason the Primary Policy was in
2 effect at the time of the accident, are therefore in error.

3 III. Estoppel under the Certificate of Insurance

4 The plaintiffs contend that Mountain Valley is
5 nonetheless estopped from denying coverage to the plaintiffs
6 under the Primary Policy¹¹ because Mountain Valley's agent issued,
7 and the plaintiffs relied upon, the COI. The district court
8 agreed. New York's intermediate appellate courts are divided on
9 the question.

10 New York contract law instructs that, as a general
11 matter, "[a] certificate of insurance is merely evidence of a
12 contract for insurance, not conclusive proof that the contract
13 exists, and not, in and of itself, a contract to insure." Horn
14 Maint. Corp. v. Aetna Cas. & Sur. Co., 225 A.D.2d 443, 444, 639
15 N.Y.S.2d 355, 356 (1st Dep't 1996); see also Severson Envtl.
16 Servs., Inc. v. Sirius Am. Ins. Co., 74 A.D.3d 1751, 1753, 902
17 N.Y.S.2d 279, 280 (4th Dep't 2010); Tribeca Broadway Assocs., LLC
18 v. Mount Vernon Fire Ins. Co., 5 A.D.3d 198, 200, 774 N.Y.S.2d
19 11, 13 (1st Dep't 2004). While a certificate "may be sufficient
20 to raise an issue of fact" on summary judgment, "it is not
21 sufficient, standing alone . . . , to prove coverage as a matter
22 of law." Id.

¹¹ The plaintiffs make the same argument regarding the Umbrella Policy, but because we conclude in Part IV below that the Umbrella Policy was in any event in effect as to the plaintiffs for other reasons, we need not reach the question of estoppel with respect to that policy.

1 However, the Third and Fourth Departments have held
2 that a certificate of insurance can estop an insurance provider
3 from denying coverage where the parties intended to provide
4 coverage to the party seeking it if the certificate was issued by
5 an agent within the scope of its authority, and if the party
6 seeking coverage reasonably relied on the certificate of
7 insurance by, for example, beginning construction work. See
8 Niagara Mohawk Power Corp. v. Skibeck Pipeline Co., 270 A.D.2d
9 867, 868-69, 705 N.Y.S.2d 459, 460-61 (4th Dep't 2000)
10 (concluding that insurer was bound by certificate of insurance
11 listing the plaintiff as an additional insured, even though
12 another certificate, under which the plaintiff sought coverage,
13 did not list the plaintiff); Bucon, Inc. v. Pa. Mfg. Ass'n Ins.
14 Co., 151 A.D.2d 207, 210-11, 547 N.Y.S.2d 925, 927-28 (3d Dep't
15 1989) (estopping the defendant insurer from denying coverage to
16 the plaintiff where the plaintiff reasonably relied on a
17 certificate of insurance in commencing construction work). But
18 the Second Department has declined to conclude that an insurer
19 was estopped from denying coverage to a party that was
20 erroneously named on a certificate of insurance. See Am. Ref-
21 Fuel Co. of Hempstead v. Res. Recycling, Inc., 248 A.D.2d 420,
22 423-24, 671 N.Y.S.2d 93, 96 (2d Dep't 1998) (rejecting estoppel
23 arising from a certificate of insurance where the certificate
24 stated that it was "a matter of information only and confer[red]
25 no rights upon" the plaintiff, and holding that "the doctrine of
26 estoppel may not be invoked to create coverage where none exists

1 under the policy").¹² The First Department, too, has been
2 reluctant to find estoppel based on a certificate of insurance.
3 See Nicotra Grp., LLC v. Am. Safety Indem. Co., 48 A.D.3d 253,
4 254, 850 N.Y.S.2d 455, 457 (1st Dep't 2008) ("Nor did the
5 certificate of insurance confer additional insured status.");
6 Rodless Props., L.P. v. Westchester Fire Ins. Co., 40 A.D.3d 253,
7 254-55, 835 N.Y.S.2d 154, 155 (1st Dep't 2007) ("We agree . . .
8 that since the certificate of insurance was issued as a matter of
9 information only . . . it is neither proof of insurance nor proof
10 of an oral contract."); Moleon v. Kreisler Borg Florman Gen.
11 Constr. Co., 304 A.D.2d 337, 339, 758 N.Y.S.2d 621, 623 (1st
12 Dep't 2003) (deciding, without reference to estoppel, that
13 certificate of insurance is "insufficient to establish that [the
14 plaintiff] is an additional insured under a policy especially
15 where, as here, the policy itself makes no provision for
16 coverage").

¹² The plaintiffs attempt to distinguish American Ref-Fuel. In that case, the alleged additional insured was named in the certificate of insurance but was never named--and was not intended to be named--as an additional insured under the terms of the insurance contract. Id., 248 A.D.2d at 423-24, 671 N.Y.S.2d at 96. However, the court's rejection of estoppel appears to have been grounded in the plain language of the certificate itself, which, like the certificate at issue in the instant case, warned that it was for informational purposes only. Id. Mountain Valley's effort to distinguish Bucon is similarly unpersuasive, as is its reliance on Taylor v. Kinsella, 742 F.2d 709 (2d Cir. 1984), a case in which we declined to require coverage by virtue of a certificate because, inter alia, in order to provide the coverage sought, the certificate would have had to expand the scope of the policy it referenced. See id. at 711-12.

1 There is reason to conclude that the primary insured--
2 here, Ellicott Maintenance--should bear the burden of ensuring
3 that all the conditions of providing "additional insured" status
4 to those with whom it contracts to provide that status have been
5 met. At oral argument, counsel for both sides acknowledged that
6 it is not customary for an insurer or for the insurer's agent to
7 see the contract ostensibly requiring a contractor to procure
8 insurance; rather, a certificate of insurance naming the
9 additional insured is issued as a matter of course upon the
10 request of the primary insured. Nor is there evidence in the
11 record of which we are aware that the plaintiffs ever saw the
12 policy issued to Ellicott Maintenance, or that a party in the
13 plaintiffs' position would typically see such a policy. The
14 additional insureds did not have a relationship with the insurer
15 that would have given them the right to obtain or question the
16 accuracy of a certificate of insurance. It is, after all, the
17 primary insured which has explicitly agreed to the execution of
18 the underlying contract as a condition of coverage for additional
19 insureds, which has the ability to seek to obtain that execution
20 prior to the beginning of work pursuant to the contract, and
21 which is otherwise best positioned to assure compliance with the
22 conditions of its insurance.

23 On the other hand, there is a reasonable argument to be
24 made that, disclaimers notwithstanding, an insurer has an
25 obligation not to issue false or potentially misleading
26 certificates of insurance--or to permit an agent to issue them--

1 if it or the agent is aware the parties may rely upon the
2 certificate despite disclaimers to the contrary. "[A]n
3 estoppel rests upon the word or deed of one [party] upon which
4 another party rightfully relies and so relying changes his
5 position to his injury." Nassau Trust Co. v. Montrose Concrete
6 Prods. Corp., 56 N.Y.2d 175, 184, 436 N.E.2d 1265, 1269, 451
7 N.Y.S.2d 663, 667 (1982) (citation and internal quotation marks
8 omitted). That formulation may well correctly describe the facts
9 here. Moreover, insurers typically have greater control over the
10 terms of insurance contracts and certificates of insurance than
11 their insureds, along with greater knowledge of the applicable
12 law; estoppel therefore may be appropriate for much the same
13 reason that ambiguities in insurance contracts are construed
14 against insurers. Cf. Thomas J. Lipton, Inc. v. Liberty Mut.
15 Ins. Co., 34 N.Y.2d 356, 361, 314 N.E.2d 37, 39, 357 N.Y.S.2d
16 705, 708 (1974). And such a distribution of responsibility may
17 be particularly appropriate in cases, such as this one, where
18 enforcement of the certificate of insurance would not expand the
19 substantive scope of the insurance contemplated by the insurer,
20 but would instead require the insurer to provide the coverage to
21 which the certificate of insurance states it has agreed. See
22 Bucon, 151 A.D.2d at 210-11, 547 N.Y.S.2d at 927-28.

23 In any event, in light of this diversity of authority
24 among the Appellate Divisions, and of the underlying policy
25 choices involved, on what we think to be a significant issue of
26 state law, and acknowledging the absence of guidance from the

1 Court of Appeals, we respectfully certify to the Court the
2 following question:

3 In a case brought against an insurer in which
4 a plaintiff seeks a declaration that it is
5 covered under an insurance policy issued by
6 that insurer, does a certificate of insurance
7 by an agent of the insurer that states that
8 the policy is in force but also bears
9 language that the certificate is not evidence
10 of coverage, is for informational purposes
11 only, or other similar disclaimers, estop the
12 insurer from denying coverage under the
13 policy?

14 IV. Coverage Under the Umbrella Policy¹³

15 The plaintiffs argue that even if they are not covered
16 as additional insureds under the Primary Policy, they are covered
17 under the Umbrella Policy.¹⁴ Mountain Valley responds that the
18 Umbrella Policy is limited by the same unfulfilled "execution"
19 requirement as the Primary Policy. A finding that the plaintiffs
20 were covered by the Umbrella Policy, Mountain Valley asserts,

¹³ In a joint post-argument submission dated October 14, 2010, the parties confirmed that even though DelPrince's lawsuit has been settled, their dispute concerning the applicability of the Umbrella Policy is not moot because, "given the particulars of the settlement in the underlying action, a finding in this case that [the] plaintiffs are entitled to coverage under the defendant's umbrella policy would result in [the] defendant having to pay under that policy." Letter from Judith Treger Shelton, Counsel for the Pls., to the U.S. Court of Appeals for the Second Circuit, dated Oct. 14, 2010, 10 Ellicott Square Court Corp. v. Mountain Valley Indem. Co., No. 10-0799-CV (2d Cir. Oct. 14, 2010), ECF No. 71.

¹⁴ The district court's finding that the Construction Agreement had been "executed" compelled its conclusion that the plaintiffs were covered under both the Primary and the Umbrella Policies. See 10 Ellicott Square Court Corp., 2010 WL 681284, at *2, 2010 U.S. Dist. LEXIS 14556, at *5. Because we conclude that the Construction Agreement was not "executed," we must consider whether the plaintiffs qualify for defense and indemnification under the Umbrella Policy.

1 would constitute an expansion in coverage in contravention of New
2 York law. We agree with the plaintiffs.

3 Section 3(c) of the Umbrella Policy provides: "Any
4 person or organization with whom or with which you have agreed in
5 writing prior to any loss, 'occurrence[,] or 'offense' to
6 provide insurance such as is afforded by this policy is an
7 insured" Fijal Decl. Ex. K at 8 (§ 3(c)). Pursuant to
8 Section 3(d), "Each person or organization who is an 'insured' in
9 the 'underlying insurance' is an 'insured' under this insurance
10 subject to all the limitations of such 'underlying insurance'
11 other than the limits of the underlying insurer's liability."
12 Id. (§ 3(d)).

13 We conclude that Section 3(c) renders the plaintiffs
14 insureds under the Umbrella Policy. The policy requires no more
15 than an agreement in writing. The New York Court of Appeals
16 "ha[s] long held that a contract may be valid even if it is not
17 signed by the party to be charged, provided its subject matter
18 does not implicate a statute . . . that imposes such a
19 requirement." Flores v. Lower E. Side Serv. Ctr., Inc., 4 N.Y.3d
20 363, 368, 828 N.E.2d 593, 596 (2005). "[A]n unsigned contract
21 may be enforceable, provided there is objective evidence
22 establishing that the parties intended to be bound." Id. at 369,
23 828 N.E.2d at 597.

24 It is undisputed that the parties intended to be bound
25 by the Construction Agreement irrespective of whether and when it
26 was signed. Under New York law, it was therefore a binding

1 agreement prior to its execution. And it is indisputable that
2 under that agreement, the general contractor was to procure
3 insurance for the plaintiffs. Nor is there any issue as to the
4 Construction Agreement's requirement that Ellicott Maintenance
5 obtain aggregate insurance coverage for at least five million
6 dollars, and that the Primary Policy had a general aggregate
7 limit of two million dollars.

8 Mountain Valley argues that the Construction Agreement
9 did not require "insurance such as is afforded" by the Umbrella
10 Policy because the Agreement required that Ellicott Maintenance's
11 insurance be in the form of a "primary policy." But the
12 Agreement required only that Ellicott Maintenance's policy be
13 primary in relation to the plaintiffs' own policies "rather than
14 concurrent" with them. Fijal Decl. Ex. G at 10 (§ 7(A)(3)).

15 Mountain Valley also contends that because the
16 Construction Agreement did not refer explicitly to umbrella
17 coverage, it did not require Ellicott Maintenance to provide
18 "such insurance as is afforded" by the Umbrella Policy.

19 Appellant's Reply. Br. at 11. We find no language in the
20 Umbrella Policy to require such specificity.

21 Notwithstanding Section 3(c), Mountain Valley argues
22 that the plaintiffs do not qualify as additional insureds
23 because, under Section 3(d), the Umbrella Policy is "subject to
24 all the limitations" of the Primary Policy. We need not resolve
25 whether the Primary Policy's execution requirement would preclude
26 the plaintiffs from receiving coverage under Section 3(d) of the

1 Umbrella Policy, because the plaintiffs are eligible for coverage
2 pursuant to Section 3(c) irrespective of the effectiveness of the
3 Primary Policy. Sections 3(c) and 3(d) of the Umbrella Policy,
4 which define who is an insured, provide alternative grounds
5 rather than compound requirements for qualification as an
6 additional insured. We will not read "and" into the policy to
7 conclude that the plaintiffs must qualify as insureds under both
8 Section 3(c) and Section 3(d). If they come within the terms of
9 either, they are insureds. "[C]ourts may not by construction add
10 or excise terms . . . under the guise of interpreting the
11 writing." Vt. Teddy Bear Co. v. 538 Madison Realty Co., 1 N.Y.3d
12 470, 475, 807 N.E.2d 876, 879, 775 N.Y.S.2d 765, 768 (2004)
13 (citation and internal quotation marks omitted). We therefore
14 conclude that Mountain Valley is bound to provide coverage to the
15 plaintiffs under Section 3(c) of the Umbrella Policy.

16 Although our conclusion rests on a ground not
17 considered by the district court, we may "affirm a decision on
18 any grounds supported in the record, even if it is not one on
19 which the trial court relied." Thyroff v. Nationwide Mut. Ins.
20 Co., 460 F.3d 400, 405 (2d Cir. 2006). We do so here.

21 V. Certification to the New York Court of Appeals

22 The rules of this Court provide that "[i]f state law
23 permits, the court may certify a question of state law to that
24 state's highest court." 2d Cir. Local R. 27.2; see also Penguin
25 Grp. (USA) Inc. v. Am. Buddha, 609 F.3d 30, 41-42 (2d Cir. 2010).
26 "Although the parties did not request certification, we are

1 empowered to seek certification nostra sponte." Kuhne v. Cohen &
2 Slamowitz, LLP, 579 F.3d 189, 198 (2d Cir. 2009). Whether to
3 certify is discretionary, Am. Buddha, 609 F.3d at 41, and is
4 principally guided by three factors.

5 First, "certification may be appropriate if the New
6 York Court of Appeals has not squarely addressed an issue and
7 other decisions by New York courts are insufficient to predict
8 how the Court of Appeals would resolve it." Id. at 42; see also
9 O'Mara v. Town of Wappinger, 485 F.3d 693, 698 (2d Cir. 2007);
10 Blue Cross & Blue Shield of N.J., Inc. v. Philip Morris USA Inc.,
11 344 F.3d 211, 220-21 (2d Cir. 2003); N.Y. Comp. Codes R. & Regs.
12 tit. 22, § 500.27(a) (2008). As discussed above, there is a
13 "split of authority," Blue Cross, 344 F.3d at 221, regarding
14 whether a certificate of insurance can be enforced through
15 estoppel: "[T]wo competing lines of cases deal[] with the issue
16 here," and the New York Court of Appeals has not decided which is
17 correct. Am. Buddha, 609 F.3d at 42. In the absence of
18 direction from the state's highest court, we "cannot harmonize"
19 the divergent intermediate court decisions. Carney v.
20 Philippone, 332 F.3d 163, 172 (2d Cir. 2003). Nor can we predict
21 any better than the Departments of the Appellate Division how the
22 Court of Appeals would resolve the question.

23 Second, the question on which we certify must be of
24 "importance . . . to the state," O'Mara, 485 F.3d at 698, and
25 its resolution must "require[] value judgments and important
26 public policy choices that the New York Court of Appeals is

1 better situated than we to make," Am. Buddha, 609 F.3d at 42;
2 accord Bessemer Trust Co. v. Branin, 618 F.3d 76, 93 (2d Cir.
3 2010). We think that the New York Court of Appeals is better
4 positioned than we to weigh who should properly bear the burden
5 under New York law of confirming that coverage exists before
6 issuing a certificate of insurance that purports to evidence such
7 coverage.

8 Third, we may certify if the question is
9 "'determinative' of a claim before us." O'Mara, 485 F.3d at 698
10 (quoting N.Y. Comp. Codes R. & Regs. tit. 22, § 500.27(a)); see
11 also Prats v. Port Auth. of N.Y. & N.J., 315 F.3d 146, 150-51 (2d
12 Cir. 2002) (certifying "unsettled" question of state law). Here,
13 whether the plaintiffs receive coverage under the Primary Policy,
14 and therefore the extent to which the plaintiffs will be
15 indemnified for their defense in DelPrince's action, rests on
16 resolution of the certified question.

17 We therefore certify a question to the New York Court
18 of Appeals and reserve decision on this point pending that
19 Court's action.

20 CONCLUSION

21 For the foregoing reasons, we certify the following
22 question to the New York Court of Appeals:

23 In a case brought against an insurer in which
24 a plaintiff seeks a declaration that it is
25 covered under an insurance policy issued by
26 that insurer, does a certificate of insurance
27 issued by an agent of the insurer that states
28 that the policy is in force but also bears
29 language that the certificate is not evidence
30 of coverage, is for informational purposes

1 only, or other similar disclaimers, estop the
2 insurer from denying coverage under the
3 policy?

4 As is our practice, we do not intend to limit the scope of the
5 Court of Appeals' analysis through the formulation of our
6 question, and we invite the Court of Appeals to expand upon or
7 alter this question as it should deem appropriate. See Am.
8 Buddha, 609 F.3d at 42-43; Kirschner v. KPMG LLP, 590 F.3d 186,
9 195 (2d Cir. 2009).

10 Pursuant to New York Court of Appeals Rule 500.17 and
11 United States Court of Appeals for the Second Circuit Rule 27.2,
12 it is hereby ORDERED that the Clerk of this Court transmit to the
13 Clerk of the Court of Appeals of New York this opinion as our
14 certificate, together with a complete set of the briefs,
15 appendix, and record filed in this Court by the parties. We
16 direct the parties to bear equally any fees and costs that may be
17 imposed by the New York Court of Appeals in connection with this
18 certification. This panel will retain jurisdiction over the
19 appeal after disposition of this certification by the New York
20 Court of Appeals.

21 We affirm the district court's grant of summary
22 judgment to the plaintiffs with respect to coverage under the
23 Umbrella Policy. We reserve decision as to the district court's
24 grant of summary judgment to the plaintiffs with respect to
25 coverage under the Primary Policy pending the New York Court of
26 Appeals' decision as to whether to answer the question we

1 certify, and if it decides to do so, until its judgment in the
2 matter is final.