[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Hon. MICHAEL D. STALLMAN PART 21
Justice

Index Number : 102774/2011
BURLINGTON INSURANCE
vs.
NEW YORK CITY TRANSIT
SEQUENCE NUMBER : 001
AMEND SUPPLEMENT PLEADINGS

INDEX NO. 102774/11
MOTION DATE 10/5/12
MOTION SEQ. NO. 001

The following papers, numbered 1 to 12 were read on this motion for leave to amend and cross motion for summary judgment

Notice of Motion —Affidavit of Service; Affirmation — Exhibits A-D	No(s). 1-2; 3
Notice of Cross Motion—Affirmation — Exhibits A-Z—Affidavit of Service	No(s). 4-6
Affirmation in Opposition — Exhibits A-G, H [Affidavit], I [Affidavit], J-N; Reply Affirmation—Exhibit A	No(s). 7-9; 10
Reply Affirmation — Exhibits A-C —Affidavit of Service	No(s). 11-12

Upon the foregoing papers, plaintiff's motion for leave to amend and defendants' cross motion for summary judgment are decided in accordance with the annexed memorandum decision, order, and judgment.

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

MICHAEL D. STALLMAN
J.S.C.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 12/20/12
New York, New York

_____, J.S.C.

1. Check one: ..... ☐ CASE DISPOSED ■ NON-FINAL DISPOSITION
2. Check if appropriate:..... MOTION IS: ☐ GRANTED ☐ DENIED ■ GRANTED IN PART ☐ OTHER
3. Check if appropriate:..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: IAS PART 21

----------x

THE BURLINGTON INSURANCE COMPANY,

Plaintiff,

Index No. 102774/2011

-against-

NYC TRANSIT AUTHORITY and MTA NEW YORK CITY TRANSIT,

Decision, Order, and Judgment

Defendants.

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HON. MICHAEL D. STALLMAN, J.:

Motion sequence numbers 001 and 002 are hereby consolidated for disposition.

In this action, plaintiff The Burlington Insurance Company (Burlington) seeks, among other things, a judgment declaring that it does not owe insurance coverage to defendants in an underlying personal injury action commenced in federal court, *Kenny v City of New York* et al., Docket No. 09-CV-1422 (EDNY) (the underlying action).

Pursuant to CPLR 3025 (b), plaintiff now moves for an order granting it leave to amend its complaint to assert a claim against defendants New York City Transit Authority and MTA New York City Transit (MTA) (collectively, the Authorities) for contractual indemnification (Motion Seq. No. 001). Pursuant to CPLR 3212, plaintiff also separately moves for partial summary judgment declaring that it has no coverage obligations to the Authorities for the underlying action (Motion Seq. No. 002).

The Authorities cross-move for summary judgment for an order dismissing Burlington's complaint against them, and awarding them defense costs, including attorney's fees, incurred in the underlying action and third-party action in federal court.

BACKGROUND

The underlying action arises out of a construction project (the Project), which entailed the excavation of a subway tunnel located near Eastern Parkway in Brooklyn, New York (the Premises). On or about July 2, 2008, the New York City Transit Authority (NYCTA) entered into a contract with Breaking Solutions, pursuant to which Breaking Solutions would supply NYCTA with excavation equipment and labor for the Project. The contract required Breaking Solutions to obtain a Commercial General Liability insurance policy which included:

> vi. **Additional Insured Endorsement** (latest I.S.O. Form CG 20 10 or equivalent approved by the Authority) naming the New York City Transit Authority ("NYCTA") ... the Metropolitan Transportation Authority ("MTA") ... and the City of New York ("City")

(Burlington's Notice of Motion, Exhibit D, Breaking Solutions/NYCTA Contract, Schedule A, Insurance Requirements, at 2).

Breaking Solutions obtained said coverage from Burlington under policy number HGL0019305, effective July 17, 2008 to July 17, 2009 (the Burlington

Policy). The Burlington Policy includes an endorsement that provides additional insurance coverage for, among others, NYCTA, MTA and the City for liability caused by the "acts or omissions [of Breaking Solutions] or the acts or omissions of those acting on behalf of [Breaking Solutions]" (Burlington's Notice of Motion, Exhibit E, IFG-I-0160 11 00).

Thomas Kenny, an NYCTA employee, allegedly sustained injuries when he fell from an elevated work platform as a result of an explosion in the tunnel. Allegedly, the explosion was caused when excavation equipment came into contact with a live electrical cable, buried below the concrete.

In April 2009, Kenny commenced a personal injury action in the United States District Court for the Eastern District of New York (the underlying action), asserting claims sounding in common-law negligence and Labor Law §§200, 240 (1) and 241 (6) against Breaking Solutions, and claims sounding in common-law negligence and Labor Law §§240 (1) and 241 (6) against the City. Kenny did not sue NYCTA, presumably because such claims would be barred under New York's Workers' Compensation Law.

However, the City impleaded the Authorities in the underlying action, seeking contractual indemnification under a 1953 Lease Agreement between the City and NYCTA, whereby the transit facilities owned, acquired or constructed by the City

were transferred to NYCTA's operation, management and control. Section 6.8 of the Lease Agreement provides, in pertinent part:

> [NYCTA] covenants that, during the term of this Agreement, it shall be responsible for the payment of, discharge of, defense against, and final disposition of, any and all claims, actions, or judgments, including compensation claims and awards and judgments on appeal resulting from any accident or occurrence arising out of or in connection with the operations, management and control by [NYCTA] of the Leased Property

(Burlington's Notice of Motion, Exhibit C, Lease Agreement).

Burlington agreed to defend the City in the underlying action as an additional insured under the Burlington Policy, subject to a reservation of rights, stating, "The City of New York qualifies as an Additional Insured but only with respect to liability for bodily injury caused in whole or in part by Breaking Solution[s]'s acts or omissions (or acts or omissions of those acting on their behalf)" (Burlington's Notice of Motion, Exhibit H). After the City impleaded the Authorities, the Authorities tendered the third-party claims to Burlington as a putative insured under the Burlington Policy, as set forth in a letter dated March 22, 2010 from Priscilla Yen, Senior Claims Specialist (Burlington's Notice of Motion, Exhibit J).

By letter dated April 9, 2010 to Yen, Burlington accepted the defense of the Authorities, subject to a reservation of rights, specifying that NYCTA's liability had to arise out of Breaking Solutions's "acts or omissions" for the Authorities to be an

additional insured under the Burlington Policy, pursuant to endorsement IFG-I-0160 11 00 (Burlington's Notice of Motion, Exhibit K, April 9, 2010 Letter).

It should be noted that, in a letter from NYCTA to Breaking Solutions, NYCTA stated that it withhold the payment of over $153,000 to Breaking Solutions, unless Breaking Solutions agreed to defend and indemnify the City pursuant to the contract. The letter states, in pertinent part:

> "In response to your phone calls to me, I wish to explain New York City Transit Authority's (NYCTA) concerns and position. As you know, in connection with the referenced Contract and lawsuit, the City of New York (NYC), along with Breaking Solutions, has been sued. Breaking Solutions'[s] insurer, Burlington Insurance Co., has agreed to defend NYC. However, Breaking Solutions is also required, under Article 219.B and Schedule A of its Contract with NYCTA, to indemnify NYC (as an additional insured), but your insurer has so far not agreed to do so.
>
> Accordingly, Breaking Solutions is in breach of our Contract, and NYCTA is entitled to withhold payment from seven pending invoices . . . potentially up to the total invoice amount of approximately $153,000, until Breaking Solutions satisfies its contractual obligations to both defend and indemnify NYC.
>
> NYCTA also expressly confirms its right, if necessary, to withhold additional future payments from Breaking Solutions if it continues to refuse to indemnify NYC as required by the Contract."

(Burlington's Affirmation in Opposition, Exhibit E, Letter to Breaking Solutions from NYCTA's Assistant General Counsel, David Boyle, dated December 3, 2009). According to the affidavit of John Keizer, Burlington's Regional Claim Manager,

Burlington then agreed to withdraw its reservation as to the City as an accommodation to its policyholder, Breaking Solutions.

In late 2010, at the close of discovery in the underlying federal action, it apparently became evident that the underlying accident did not arise out of Breaking Solutions's work on the project. Burlington contends that documents obtained during discovery establish that the underlying accident was caused by the negligence of NYCTA, which Burlington asserts failed to identify job-site hazards involving buried energized cables. In a memorandum drafted by a NYCTA superintendent, NYCTA acknowledged that Breaking Solutions's operators were

> "operating the equipment properly and had no way of knowing that the cables were submerged in the invert. It was also determined that whoever installed the cables in the invert failed to provide adequate cover to protect the cables. A regular chipping gun (buster) or even a pinch bar could have penetrated the layer of Quikcrete covering these cables. To prevent this from happening in the future Signal Department, Third Rail and all other Support Departments will need to conduct an extensive survey of the area . . . and remedy any potential hazards by clearly marking them."

(Burlington's Notice of Motion, Exhibit L, February 17, 2009 NYCTA Memorandum). Further, in a NYCTA Memorandum, dated March 16, 2009, Cheryl E. Kennedy, Vice President, Office of System Safety states:

> The existing procedure for identifying/locating buried cables/power lines or other utilities prior to starting the job involves performing a visual inspection with representatives from Track Construction, Third

> Rail Operations, Infrastructure, Signals and Lighting; whereby, the entire jobsite is inspected for hazards which are corrected before the Major Track Construction Project Joint Management/Union Safety Inspection Placard is issued. If any cables are identified, they are marked and/or protected from accidental damage by the Brokk machines.
>
> * * *
>
> Based on factual information compiled during the investigation, OSS concluded that this accident was primarily due to an inadequate/ineffective inspection process for identifying job-site hazards involving buried energized cables. A complicating factor was the failure to use any electrical detection equipment and the absence of power/electrical schematics that illustrated the exact location of ALL power cables on drawings provided to OSS for review. However, Structure Maintainer (B) T. Kenny's injuries appeared to have resulted primarily from tripping and falling from the crowded benchwall, as he attempted to flee from the scene after being startled by the explosion/sparking.

(Burlington's Affirmation in Opposition, Exhibit G).

Accordingly, Burlington disclaimed coverage to the Authorities on December 10, 2010, noting that the recently completed discovery in the matter revealed that the accident was caused solely by NYCTA (Burlington's Notice of Motion, Exhibit N, December 10, 2010 Disclaimer Letter).

Thereafter, by order dated September 26, 2011, U.S. District Judge Mauskopf dismissed the claims against Breaking Solutions, with prejudice, stating that "Plaintiffs concede that the action against Breaking Solutions is meritless, and consent to the dismissal of their claims against Breaking Solutions with prejudice"

(Burlington's Notice of Motion, Exhibit O, Mauskopf Order at 8).

On June 15, 2012, Burlington paid $950,000 (the settlement payment) to settle the underlying action on behalf of the City. Burlington also allegedly paid $62,210.82 in defense costs on behalf of the City. Keizer, Burlington's Regional Claim Manager, stated that Burlington's payment to settle the underlying action was expressly conditioned upon the City's agreement to transfer to Burlington its indemnification rights against NYCTA. In his affidavit, Christopher Dickerson, senior insurance claims specialist for the City of New York Law Department, also maintained that Burlington's payment to settle the underlying action on behalf of the City was expressly conditioned on the City's agreement to cooperate with Burlington in pursuit of the City's contractual indemnification rights against the Authorities.

DISCUSSION

"'The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact'" (*Wolff v New York City Tr. Auth.*, 21 AD3d 956, 956 [2d Dept 2005], quoting *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). The burden then shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact" (*Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006]; *see also*

Zuckerman v City of New York, 49 NY2d 557, 562 [1980]). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]; *Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226 [1st Dept 2002]).

THE AUTHORITIES AS ADDITIONAL INSUREDS UNDER THE BURLINGTON POLICY

Burlington moves for partial summary judgment declaring that the Authorities are not covered under the Burlington Policy as additional insureds for the claims asserted against them in the underlying action, because Kenny's accident was not due to Breaking Solutions's negligence.

The Authorities contend they are entitled to coverage as additional insureds under the Burlington Policy. The Authorities also argue that Burlington's disclaimer was not only late, but also that Burlington's purported Reservations of Rights and Disclaimer letters to the MTA were ineffective as to NYCTA. The Authorities therefore conclude that they should be granted summary judgment dismissing the complaint and granted the defense costs that the Authorities incurred in the underlying action and third-party action.

As required by the contract, Breaking Solutions obtained coverage from Burlington under policy number HGL0019305, effective July 17, 2008 to July 17,

2009. The scope of the coverage afforded to the Authorities under the Burlington Policy is governed by endorsement IFG-I-0160 11 00, which provides additional insurance coverage for NYCTA, MTA (and the City) for liability "caused, in whole or in part, by the "acts or omissions [of Breaking Solutions] or the acts or omissions of those acting on behalf of [Breaking Solutions]" (Burlington's Notice of Motion, Exhibit E, IFG-I-0160 11 00). As Burlington correctly argues, the Appellate Division, First Department has held that this "acts or omissions" language limits additional insured coverage to those instances where there has been a finding of negligence by the named insured (*see Crespo v City of New York*, 303 AD2d 166, 167 [1st Dept 2003]).

The Authorities do not dispute that discovery in this case indicates that Kenny's injuries in the underlying action did not arise out of Breaking Solutions's work on the project. Indeed, by order dated September 26, 2011, U.S. District Judge Mauskopf necessarily determined that Breaking Solutions was not negligent when she dismissed the claims against Breaking Solutions, with prejudice, stating that "Plaintiffs concede that the action against Breaking [Solutions] is meritless, and consent to the dismissal of their claims against Breaking [Solutions] with prejudice" (Burlington's Notice of Motion, Exhibit O, Mauskopf Order at 8).

Because the terms of the additional insured endorsement of the Burlington

Policy provided coverage to the Authorities only for the liability arising out of Breaking Solutions's "acts or omissions", and because Breaking Solutions was determined not to be negligent in the underlying action, the underlying action fell outside the additional insured endorsement IFG-I-0160 11 00 of the Burlington Policy.

The Authorities' arguments that Burlington's purported Reservations of Rights and Disclaimer letters to the MTA were ineffective as to NYCTA are unpersuasive. According to the Authorities, certain endorsements cited in the Reservation of Rights letter were not cited or quoted in Burlington's subsequent Disclaimer Letter, and the letters were not delivered to NYCTA. However, it is undisputed that the additional insured endorsement at issue here (i.e., IFG-I-0160 11 00) was invoked in the Reservation of Rights letter (Burlington's Notice of Motion, Exhibit K, April 9, 2010 Letter).

Burlington was not required to disclaim coverage as to the Authorities, given that they were not additional insureds under the endorsement (*Sumner Builders Corp. v Rutgers Cas. Ins. Co.*, ___ AD3d ___, 2012 WL 6013032, *1 [1st Dept 2012]). "A disclaimer is unnecessary when a claim does not fall within the coverage terms of an insurance policy. Conversely, a timely disclaimer pursuant to Insurance Law § 3420 (d) is required when a claim falls within the coverage terms but is denied based on a

policy exclusion" (*Markevics v Liberty Mut. Ins. Co.*, 97 NY2d 646, 649 [2001]; *see also National Abatement Corp. v National Union Fire Ins. Co. of Pittsburgh, PA.*, 33 AD3d 570, 571 [1st Dept 2006]["If the claim falls outside the policy's coverage, . . . the insurer is not required to disclaim"]; *Tribeca Broadway Assoc. LLC v Mount Vernon Fire Ins. Co.*, 5 AD3d 198, 200-201 [1st Dept 2004]).[1] In any event, this additional insured endorsement (i.e., IFG-I-0160 11 00) was contained in the Disclaimer Letter. Moreover, as additional insured coverage did not exist in the instance for the underlying action, estoppel cannot be used to create coverage where it does not exist (*Federated Dept. Stores, Inc. v Twin City Fire Ins. Co.*, 28 AD3d 32, 38 [1st Dept 2006]). Therefore, the Authorities' argument of late disclaimer is unavailing.

Given all the above, the Court need not reach the issue of whether Burlington had reserved its rights as to other endorsements that were allegedly not contained in the Reservation of Rights letter.

Finally, although the MTA and NYCTA are separate public authorities,

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[1] Thus, the Court need not address Burlington's argument, that assuming the disclaimer was late, NYCTA suffered no prejudice. Were the Court to reach this argument, this argument would be unavailing. Insurance Law § 3420 (a) (5) requires that policies contain a provision that the failure to provide timely notice shall not invalidate a claim unless prejudice is demonstrated. However, Insurance Law § 3420 (a) (5) applies to policies issued or delivered in New York on or after January 17, 2009, the effective date of the law which added Insurance Law § 3420 (a) (5) (L2008 ch 388 § 8).

Priscilla Yen sent a tender letter regarding the underlying action, acting on behalf of both MTA and NYCTA. Burlington's Reservation of Rights and Disclaimer Letters were sent to Ms. Yen at the same address from which her tender letter was sent. Therefore, the Authorities fail to raise a triable issue of fact as to whether the Reservation of Rights letter was delivered to NYCTA.

In sum, Burlington is entitled to a declaration that it does not owe additional insured coverage to the Authorities for the underlying action under the additional insured endorsement to the policy issued to Breaking Solutions. For the same reasons, the Authorities are not entitled to dismissal of the complaint or an award of defense costs and attorneys' fees as additional insureds under the Burlington Policy relative to their defense of the underlying action.

Accordingly, plaintiff's motion for partial summary judgment is granted, and the Authorities' cross motion for summary judgment is denied. The Court does not reach Burlington's argument that the Authorities' cross motion for summary judgment should be denied because they cross-moved for summary judgment instead of exchanging discovery pursuant to a so-ordered stipulation dated June 21, 2012.

LEAVE TO AMEND

Burlington seeks leave to amend the complaint to assert a claim against the Authorities for contractual indemnification. By virtue of the settlement payment that

Burlington made on behalf of the City in the underlying action, Burlington claims to be a subrogee, equitably and conventionally, of the City, and therefore entitled to seek indemnification from NYCTA under the 1953 Lease Agreement between the City and NYCTA, for claims "resulting from any accident or occurrence arising out of or in connection with the operations, management and control by [NYCTA] of the leased property" (*see* Burlington's Notice of Motion, Exhibit C, Lease Agreement).

The Authorities oppose leave to amend, arguing that the proposed amendment is "palpably insufficient and patently devoid of merit" (NYCTA's Opposition, ¶¶ 6, 60). The Authorities argue that Burlington cannot be subrogated to the City's rights under the 1953 Lease Agreement because Burlington's settlement payment on behalf of the City was "voluntary," in that the City, like the Authorities, was not an additional insured under the Burlington policy for the underlying accident. Assuming, for the sake of argument, that the City were an additional insured, the Authorities further argue that Burlington's right to seek indemnification against NYCTA would be barred by the anti-subrogation rule.

"Leave to amend pleadings is freely given absent prejudice or surprise. Nevertheless, a court must examine the merit of the proposed amendment in order to conserve judicial resources" (*360 West 11th LLC v ACG Credit Co. II, LLC*, 90 AD3d 552, 553 [1st Dept 2011] [internal citations omitted]). "[M]ovant need not establish

the merit of the proposed new allegations, but must 'simply show that the proffered amendment is not palpably insufficient or clearly devoid of merit'" (*Miller v Cohen*, 93 AD3d 424, 425 [1st Dept 2012]). "[T]he standard applied on a motion to amend a pleading is much less exacting than the standard applied on a motion for summary judgment" (*James v R & G Hacking Corp.*, 39 AD3d 385, 386 [1st Dept 2007]).

Whether the Proposed Amendment will result in prejudice or surprise

The Authorities argue that the proposed amendment will prejudice the Authorities, "because of how BURLINGTON controlled their defense in the Underlying Action." (Strugatz Opp. Affirm. ¶ 11.) However, "[p]rejudice in this context means the loss of a special right, a change in position, or significant trouble or expense that could have been avoided had the original pleading contained the proposed amendment" (*New York State Health Facilities Assn., Inc. v Axelrod*, 229 AD2d 864, 866 [3d Dept 1996]). The manner which Burlington allegedly controlled the defense of the Authorities in the underlying action, which led up to Burlington's disclaimer, predates the commencement of this declaratory judgment action. Thus, the Authorities have not demonstrated any change in position or loss of a special right that could have been avoided had the original pleading in this action contained the Burlington's proposed amendment.

Burlington sought to add the subrogation claim soon after the settlement

payment on behalf of the City. Moreover, in the underlying action, Judge Mauskopf expressly contemplated resolution of the subrogation issue in this action, when she dismissed the claims against Burlington's insured, Breaking Solutions. To that effect, referring to the underlying plaintiffs' motion to strike the City's third-party complaint against the Authorities for contractual indemnification and contribution, Judge Mauskopf stated:

> For these reasons, the Court finds that nothing is gained by the maintenance of the third-party claim here, nor lost by its dismissal, and its net effect on balance is to cause delay, prejudice the plaintiffs, and burden the parties and the Court with protracted litigation on an issue that can easily await a full determination of liability, and may, indeed, be resolved in the other fora. Plaintiff's motion to strike the third-party Complaint, therefore, is GRANTED (Burlington's Notice of Motion, Exhibit O, Mauskopf Order, dated September 26, 2011, at 7).

Burlington seeks leave to amend its complaint to assert a cause of action that arises from the same circumstances as those already at issue.

While NYCTA argues that Burlington improperly delayed seeking the additional claim for subrogation, mere delay does not warrant a denial of leave to amend, unless the delay is coupled with significant prejudice to the other side (*New York State Health Facilities Assn., Inc. v Axelrod*, 229 AD2d at 866; *see also Lake v Cowper Co.*, 249 AD2d 934, 936 [4th Dept 1988][leave to amend granted where only prejudice was delay]; *Stengel v Clarence Materials Corp.*, 144 AD2d 917, 918 [4th Dept 1988][delay in seeking an amendment for several years is not sufficient

ground for denying amendment absent a showing of prejudice or surprise]).

Whether the proposed amendment plainly lacks merit

The subrogation claim that Burlington seeks to assert is not plainly lacking in merit. First, claims asserted in the underlying action would appear to fall within the indemnification provisions contained in the 1953 Lease Agreement between the City and NYCTA. Section 6.8 of the Lease Agreement provides that NYCTA shall be responsible for all claims resulting "from any accident or occurrence arising out of or in connection with the operations, management and control by [NYCTA] of the Leased Property." (Burlington's Notice of Motion, Exhibit C, Lease Agreement). Burlington relies upon documents to allege that the accident was due to NYCTA's negligence in not properly identifying and marking its live electrical cables prior to the commencement of excavation work on the project. Therefore, the contention that the underlying action arose out of or in connection with the operation, management and control by the NYCTA of the leased property is not palpably insufficient or clearly devoid of merit.

Although Burlington initially agreed to defend the City subject to a reservation of rights, Burlington waived its reservation of rights as against the City prior to the settlement payment, at NYCTA's insistence. As discussed above in the background allegations, Burlington withdrew its reservation as to the City after NYCTA stated

that it would withhold the payment of approximately $153,000 to Breaking Solutions, unless Breaking Solutions agreed to indemnify the City. This secured the City's coverage as an additional insured under the Burlington Policy. As such, Burlington's continued defense of the City in the underlying action and settlement payment was not "voluntary."

The Court rejects the Authorities' argument that Burlington should be estopped from maintaining either that the City was its additional insured, or that it has standing to be an equitable subrogee of the City. The Authorities essentially maintain that Burlington may not assert that the City is an additional insured while asserting (as it did in the federal action) that Kelly's injuries were not due to Breaking Solutions's negligence. This argument overlooks the circumstance that, at NYCTA's insistence that Breaking Solutions indemnify the City, Burlington waived its rights to dispute that the City was an additional insured under the additional insured endorsement. The waiver is binding upon Burlington here. Given that they insisted that Burlington waive its rights and indemnify the City, the Authorities shall not be heard to complain of the consequences of the waiver.

Second, once Burlington paid the settlement on behalf of the City, whom Burlington conceded to be an additional insured, Burlington became subrogated to its insured's rights, i.e., the City's rights. "Subrogation, an equitable doctrine, entitles

an insurer to stand in the shoes of its insured to seek indemnification from third parties whose wrongdoing has caused a loss for which the insurer is bound to reimburse" (*St. John's Univ., N.Y. v Butler Rogers Baskett Architects, P.C.*, 92 AD3d 761, 763-764 [2d Dept 2012]).

The Authorities' argument that the anti-subrogation rule bars Burlington from seeking indemnification from them is without merit. "An insurer . . .has no right of subrogation against its own insured for a claim arising from the very risk for which the insured was covered" (*N. Star Reins. Corp. v Continental Ins. Co.*, 82 NY2d 281, 294-295 [1993]). However, a prerequisite for the application of the anti-subrogation rule is that both parties must actually be covered by the policy (*see id.* at 296 ["we agreed with the Appellate Division in *North Star* that, because exclusions in the GCL rendered that policy inapplicable to the loss, the antisubrogation rule does not apply in that case"]; *see also Wright v E.S. McCann & Son*, 216 AD2d 73, 74 [1st Dept 1995] [premises owner was permitted to assert cross claims against contractor and subcontractor because it was not named as an additional insured in the insurance policy that the subcontractor obtained]). Here, Burlington correctly argues that the anti-subrogation rule does not apply, because, as discussed above, the Authorities are not insured under the additional insured endorsement of the Burlington Policy for the underlying action.

Finally, the Authorities contend that the portion of the proposed amendment which seeks to recover attorneys' fees incurred in this declaratory judgment action "has no basis in law or equity" (Strugatz Affirm. ¶ 70). Burlington's recovery of attorneys' fees is ostensibly pursuant to the indemnification provisions of the 1953 Lease Agreement with NYCTA. Inasmuch as the Authorities do not cite any case law or rule that would bar such recovery of such fees under the provisions, and the Authorities do not argue that the language of the provisions would bar such a recovery, this aspect of the proposed amendment is not plainly lacking in merit. As discussed above, the Court has rejected the Authorities' remaining arguments opposing the recovery of attorneys' fees (i.e., that Burlington is estopped from claiming the City was an additional insured, and that its payment was voluntary).

Thus, because Burlington's proposed amendment is not plainly lacking in merit, and as the amendment will not prejudice the Authorities, Burlington is granted leave to amend the complaint to assert a cause of action against NYCTA for contractual indemnification.[2]

To the extent that the Authorities allege that Burlington had unclean hands, engaged in bad faith claims handling, or had a conflict of interest, such allegations

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[2] The proposed amended complaint refers to NYCTA and the MTA collectively as the "MTA," but the 1953 Lease Agreement is made only with NYCTA.

are in the nature of defenses or counterclaims, which do not defeat Burlington's motion for leave to amend. The Court notes that, in the underlying action, the City and Breaking Solutions were apparently represented by counsel different from the counsel who represented the Authorities (*see* the Authorities' Notice of Cross Motion, Exhibits K and L).

CONCLUSION

For the foregoing reasons, it hereby

ORDERED that plaintiff Burlington Insurance Company's motion for leave to amend the complaint (Motion Seq. No. 001) is granted only to the extent that the proposed second cause of action asserts contractual indemnification against defendant New York City Transit Authority only, and the amended complaint in the proposed form annexed to the moving papers (as limited by this decision) shall be deemed served upon service of a copy of this order with notice of entry thereof; and it is further

ORDERED that the defendants shall serve an answer to the amended complaint or otherwise respond thereto within 30 days from the date of said service; and it is further

ORDERED that plaintiff Burlington Insurance Company's motion for summary judgment (Motion Seq. No. 002) is granted; and it is further

ORDERED that the Authorities's cross motion is denied; and it is further

ADJUDGED AND DECLARED that the New York City Transit Authority and Metropolitan Transportation Authority are not covered for losses arising out of the action *Kenny v City of New York* et al., Docket No. 09-CV-1422 (EDNY) under an endorsement to policy number HGL0019305, effective July 17, 2008 to July 17, 2009, issued by the Burlington Insurance Company to Breaking Solutions, and that the Burlington Insurance Company owed no duty to either the New York City Transit Authority or Metropolitan Transportation Authority to indemnify them in *Kenny v City of New York* et al., Docket No. 09-CV-1422 (EDNY); and it is further

ORDERED that the second cause of action of the amended complaint is severed and shall continue.

Dated: December 6, 2012
New York, New York

ENTER:

J.S.C.

MICHAEL D. STALLMAN
J.S.C.