[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Hon. MICHAEL D. STALLMAN PART 21
Justice

THE BURLINGTON INSURANCE COMPANY,

Plaintiff,

- v -

NYC TRANSIT AUTHORITY and MTA NEW YORK CITY TRANSIT,

Defendants.

INDEX NO. 102774/11

MOTION DATE 6/20/13

MOTION SEQ. NO. 003

The following papers, numbered 1 to 12 were read on this motion and cross motion—

Notice of Motion —Affidavit of Service; Affirmation — Exhibits A-R; Affidavit–Exhibit A	No(s). 1-2; 3; 4
Notice of Cross Motion—Good Faith Affirmation—Exhibits 1-5 — Affirmation in Opposition — Exhibits A-S—Affidavit of Service	No(s). 5-8
Reply Affirmation in Further Support and in Opposition to Cross Motion — Exhibit A—Affidavit of Service	No(s). 9-10
Reply Affirmation in Support of Cross Motion — Affirmation of Service	No(s). 11-12

Upon the foregoing papers, it is ordered that plaintiff's motion and the cross motion by defendant New York City Transit Authority are decided in accordance with the annexed memorandum decision and order.

MICHAEL D. STALLMAN

Dated: 12/17/13
New York, New York

_____, J.S.C.

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

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

[* 2]

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

----------X

THE BURLINGTON INSURANCE COMPANY,

Plaintiff,

Index No. 102774/2011

- against -

NYC TRANSIT AUTHORITY and MTA NEW YORK CITY TRANSIT,

Decision and Order

Defendants.

----------X

HON. MICHAEL D. STALLMAN, J.:

This insurance dispute arises out of 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), where plaintiff The Burlington Insurance Company (Burlington) paid $950,000 on behalf of the City of New York to settle the underlying action.

By decision, order, and judgment dated December 20, 2012, this Court granted Burlington partial summary judgment declaring that it does not owe insurance coverage to defendants in the underlying action. The Court granted a motion by Burlington, as subrogee of the City of New York, for leave to amend the complaint to seek contractual indemnification against defendant New York City Transit Authority only. The proposed amended complaint (as limited by the decision) was deemed served upon service of a copy of the Court's order with notice of entry.

The New York City Transit Authority (NYCTA) answered the amended complaint, asserting 14 affirmative defenses, including unclean hands, bad faith claims handling procedures, a conflict of interest, laches, and "all rights that might arises from said appeals" of the decision, order, and judgment dated December 20, 2012. (D'Ambrosio Affirm., Ex R.)

Burlington now moves for partial summary judgment in its favor on "Count II" of the amended complaint, for contractual indemnification, against NYCTA, for a judgment declaring that the NYCTA is obligated to indemnify Burlington for the defense and indemnity payments it made on behalf of the City of New York in the underlying action, and that NYCTA is obligated to pay Burlington $950,000, with interest. The NYCTA opposes Burlington's motion and cross-moves for an order of preclusion against Burlington, on the ground that Burlington failed to furnish a bill of particulars and failed to comply with document discovery and depositions.

BACKGROUND

The background allegations of this action were set forth in the Court's prior decision, order, and judgment dated December 20, 2012.

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 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 was obtained from Burlington under policy number HGL0019305, effective July 17, 2008 to July 17, 2009 (the Burlington Policy).

Thomas Kenny, a NYCTA employee, allegedly sustained injuries when he fell from an elevated work platform as a result of an explosion in the tunnel. The explosion was allegedly caused when excavation equipment came into contact with a live electrical cable, buried below the concrete. According to the amended verified complaint, "Upon information and belief, Kenny was standing on an elevated benchwall near the point of explosion, and was injured when he tripped on benchwall debris and fell off benchwall [*sic*] while trying to evacuate the tunnel." (D'Ambrosio Affirm., Ex O [Amended Verified Complaint] ¶ 24.)

In April 2009, Kenny commenced a personal injury action in the United States District Court for the Eastern District of New York, 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 NYCTA and "MTA New York City Transit" in the underlying action, seeking contractual indemnification under a 1953 Lease Agreement between the City and the NYCTA, whereby the transit facilities owned, acquired or constructed by the City were transferred to the NYCTA's operation, management and control.

Burlington agreed to defend the NYCTA and the City in the underlying action as additional insureds under the Burlington Policy, subject to a reservation of rights. (D'Ambrosio Affirm., Ex J; Strugatz Affirm., Ex D.) Camacho, Mauro & Mulholland represented the City, while Wade Clark Mulcahy represented the NYCTA. (*see id.*) Burlington later withdrew its reservation of rights as to the City, and stated that it would indemnify the City in accordance with the terms and conditions of an endorsement to the Burlington Policy. (*see* Strugatz Affirm., Ex E.)

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 the NYCTA, which Burlington asserts failed to identify job-site hazards involving buried energized cables.

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.

I.

Burlington's Motion for Partial Summary Judgment

The standards for summary judgment are well-settled.

> "On a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party. Summary judgment is a drastic remedy, to be granted only where the moving party has tender[ed] sufficient evidence to demonstrate the absence of any material issues of fact, and then only if, upon the moving party's meeting of this burden, the non-moving party fails to establish the existence of material issues of fact which require a trial of the action. The moving party's [f]ailure to make [a] prima facie showing [of entitlement to summary judgment] requires a denial of the motion, regardless of the sufficiency of the opposing papers."

(*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012] [internal citations and quotation marks omitted].)

A.

Burlington maintains that, as the subrogee of the City, it is entitled to indemnification from the NYCTA under a 1953 Lease Agreement between the City and the NYCTA. Section 6.8 of the 1953 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

(D'Ambrosio Affirm., Ex C [1953 Lease Agreement].) It is undisputed that Kenny was injured while he was within the subway.

Burlington argues that underlying action "arose out of or in connection with the operations, management and control by [NYCTA] of the Leased Property" because the NYCTA purportedly failed to de-energize the area where the concrete breaking was taking place, causing an electrical short.

Burlington submits a memorandum dated March 16, 2009 by Cheryl E. Kennedy, Vice President, Office of System Safety of the NYCTA. (D'Ambrosio Affirm., Ex L.) The memorandum states, in relevant part:

> "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 [Office of System Safety] 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."

(D'Ambrosio Affirm., Ex L.) Burlington also submits a memorandum dated February 17, 2009 from a NYCTA Superintendent, which states, in relevant part: "It is my findings that the Brokk Operators were operating the equipment properly and had no way of knowing that the cable was submerged in the invert." (D'Ambrosio Affirm., Ex F.)

Burlington has demonstrated that the underlying action falls within the scope of Section 6.8 of the 1953 Lease Agreement, as an "action[ ]. . . resulting from any accident or occurrence arising out of or in connection with the operations, management and control by [NYCTA] of the Leased Property." Kenny's accident/occurrence arose out of "the operations, management and control by [NYCTA] of the Leased Property" because: (1) Kenny, a NYCTA employee, was undisputedly injured while performing construction work, and therefore the accident/occurrence "arose out of" and was "in connection with" the construction work (*see Hurley v Best Buy Stores, L.P.*, 57 AD3d 239, 239-240 [1st Dept 2008]);

and (2) the construction work was undisputedly part of a NYCTA construction project occurring within a subway, and therefore can be considered "operations" by the NYCTA of the Leased Property[1].

Yet, the analysis does not end there.

> "'The rule in the State of New York, is that a person entitled to indemnity, where he is liable to be mulcted in damages, may settle the claims and recover over against the indemnitor, subject to the proof (1) of liability and (2) as to the reasonableness of the amount of settlement."

(*McGurran v DiCanio Planned Dev. Corp.*, 251 AD2d 467, 468 [2d Dept 1998].) Here, the underlying action against the City of New York and Breaking Solutions asserted violations of Labor Law §§ 240 and 241. (D'Ambrosio Affirm., Ex L.) As discussed above, it is undisputed that Kenney was injured on Leased Property, i.e., on property owned by the City of New York and leased to the NYCTA pursuant to the 1953 Lease Agreement. In *Coleman v City of New York* (91 NY2d 821 [1997]), which Burlington cited in its reply papers, the Court of Appeals held that, by virtue of the 1953 Lease Agreement, the City was an "owner" under Labor Law § 240, with respect to a construction accident that allegedly occurred at an elevated train station in Brooklyn. Thus, under *Coleman*, the City was faced with liability in the

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[1] The Court notes that the NYCTA's powers under the Public Authorities Law includes the power "[t]o construct, reconstruct, improve, maintain and operate buildings, structures, and facilities as may be necessary or convenient . . ." (Public Authorities Law § 1204 [9].)

underlying action for alleged violations of Labor Law §§ 240 and 241. The reasonableness of the amount of the settlement is not in dispute. (*See* D'Ambrosio Affirm., Ex R [Verified Answer].) Therefore, the City would be entitled to indemnification from the NYCTA for the amount of the settlement paid in the underlying action pursuant to Section 6.8 of the 1953 Lease Agreement.

Burlington paid the settlement in the underlying action on the City's behalf. Burlington submits an affidavit from a regional claim manager, who avers that Burlington paid $950,000 to settle the underlying action on behalf of the City, and a copy of a check issued to plaintiffs and their attorney in the underlying action. (Keizer Aff., Ex A.) Once Burlington paid the settlement on behalf of the City, Burlington became subrogated to its insured's rights, i.e., the City's rights. (*See St. John's Univ., N.Y. v Butler Rogers Baskett Architects, P.C.*, 92 AD3d 761, 763-764 [2d Dept 2012]).

Therefore, Burlington has demonstrated prima facie entitlement to summary judgment in its favor against the NYCTA for the amount of the settlement that Burlington paid on the City's behalf in the underlying action.

B.

In opposition, the NYCTA contends that Burlington is not entitled to contractual indemnification from the NYCTA because Burlington allegedly engaged

in bad faith claims handling, that there was a conflict of interest between Burlington and the NYCTA, and that Burlington has unclean hands.

The defenses that the NYCTA raises are not valid defenses to the contractual obligation of the NYCTA to indemnify the City pursuant to Section 6.8 of the 1953 Lease Agreement. That is, even if the allegations on which these defenses are based were proven, the NYCTA would not be excused or relieved of its contractual obligation to indemnify the City. For example, "the doctrine of unclean hands is an equitable defense that is unavailable in an action exclusively for damages." (*Manshion Joho Ctr. Co., Ltd. v Manshion Joho Ctr., Inc.*, 24 AD3d 189, 190 [1st Dept 2005].) The allegations of bad faith claims handling and the alleged conflict of interest are apparently raised against Burlington in its capacity as an insurer, and not as the subrogee of the City of the New York.

Assuming, for the sake of argument, that the allegations could be considered for the purpose of defeating Burlington's status as subrogee, the allegations would fail to state a valid defense. "As in all contracts, implicit in contracts of insurance is a covenant of good faith and fair dealing, such that 'a reasonable insured would understand that the insurer promises to investigate in good faith and pay covered claims.'" (*Bi-Economy Mkt., Inc. v Harleysville Ins. Co. of N.Y.*, 10 NY3d 187, 194 [2008][citation omitted].) To recover for breach of duty of good faith and fair dealing

in handling of insurance claims, the insured must prove not only that the insurer "materially mishandled claims, but that [the insured] incurred damages as result thereof." (*Continental Ins. Co. v Tollman-Hundley Hotels Corp.*, 223 AD2d 374 [1st Dept 1996].)

However, in this case, by a prior decision, order, and judgment dated December 20, 2012, this Court declared that the NYCTA was not an additional insured under the Burlington Policy, and that the Burlington owed no duty to either the NYCTA or Metropolitan Transportation Authority to indemnify them in the underlying action. (*See* D'Ambrosio Affirm., Ex A, at 22.) Burlington points out that, in *Zurich Ins. Co. v Texasgulf, Inc.* (233 AD2d 180, 180-181 [1st Dept 1996]), the Appellate Division, First Department dismissed allegations that the insurer acted in bad faith in refusing to settle an action, stating, "a claim of bad faith must be predicated on the existence of coverage of the loss in question." (*Zurich Ins. Co.*, 233 AD2d at 180-181.) Thus, under *Zurich Ins. Co.*, the NYCTA may not assert bad faith claims handling, even as a defense, because it was not covered under the Burlington Policy for the underlying action.

Unlike *Zurich Ins. Co.*, NYCTA's allegations of bad faith claim handling do not involve an insurer's refusal to settle, which can be seen as falling under an

insurer's duty to indemnify the insured.[2] Rather, the contentions are instead based on several decisions that Burlington purportedly made in the period after Burlington agreed to defend the NYCTA in the underlying action, subject to a reservation of rights, but before Burlington disclaimed coverage to the NYCTA: (1) Burlington offered a defense to the NYCTA by "one of [the] firms that was a member of Burlington's defense panel"; (2) Burlington withdrew a reservation of rights issued to the City; (3) Burlington permitted the same counsel to represent both Breaking Solutions and the City in the underlying action; and (4) Burlington decided that the City's liability in the underlying action should be passed down to the NYCTA.

Assuming, as the NYCTA urges, that *Zurich Ins. Co.* is distinguishable from the instant action, the NYCTA's allegations fail to raise a triable issue of fact as to whether the NYCTA has valid defenses that would warrant denial of summary judgment in Burlington's favor. As discussed in the prior decision, order and judgment, Burlington withdrew its reservation of rights as to the City after the NYCTA stated that it would withhold the payment of approximately $153,000 to Breaking Solutions, unless Breaking Solutions agreed to indemnify the City. This

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[2] Allegations of bad faith claims handling more typically involve allegations that the insurer unreasonably delayed or denied payments to the insured. (*See e.g. Bi-Economy Market, Inc.*, 10 NY3d at 191; *Global Reinsurance Corporation-U.S. Branch v Equitas Ltd.*, 20 Misc 3d 1115 [A] [Sup Ct, NY County 2008].)

Court stated, "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." (D'Ambrosio Affirm., Ex A, at 18.)

As mentioned in the prior decision, order, and judgment, the NYCTA and the City were represented by separate counsel in the underlying action. Camacho, Mauro & Mulholland's joint representation of Breaking Solutions and the City in the underlying action does not amount to bad faith claims handling as to the NYCTA, because the representation of others would not be part of the handling of the NYCTA's own claim for losses.

The NYCTA repeatedly asserts that Burlington had a conflict of interest, but does not explain the nature of the conflict, i.e., which interests were conflicting. The NYCTA alleges, in pertinent part:

> "BURLINGTON claims it provided coverage to the City as an accommodation for Breaking Solutions, when in fact, BURLINGTON advanced its own economic interests by withdrawing its reservation of rights against the City, which enabled it to reassign the defense of the City to the same attorneys assigned by BURLINGTON to representing Breaking Solutions, thereby reducing the defense expenses BURLINGTON would incur in providing defenses to the City and Breaking Solutions."

(Strugatz Reply Affirm. ¶ 7.) The NYCTA does not explain how withdrawal of the reservation of rights against the City created a conflict with the NYCTA's defense in

the underlying action, thereby giving rise to even a colorable claim of bad faith claims handling. Moreover, the NYCTA and the City were represented by different counsel in the underlying action.

The NYCTA makes a passing reference to *North Star Reinsurance Corp. v Continental Insurance Co.* (82 NY2d 281 [1993]), which discussed a situation where an insurer has a potential conflict of interest. In *North Star Reinsurance Corp.*, the Court of Appeals applied the antisubrogation rule to a situation where the owner and contractor are insured under two policies covering the same risk, issued simultaneously by the same insurer. The Court of Appeals, which previously addressed the antisubrogation rule in *Pennsylvania General Ins. Co. v Austin Powder Co.* (68 NY2d 465 [1986]), reasoned that, "The policy considerations underlying *Pennsylvania Gen.*, preventing the insurer from recouping the insurance proceeds from its insured, and avoiding the potential for conflict of interest when the parties' insurer is subrogated against an insured, are equally applicable here." (*N. Star Reins. Corp.*, 82 NY2d at 295.)[3]

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[3] *Pennsylvania General Ins. Co.* (68 NY2d 465) recognized that an insurer has an inherent conflict of interest in situations where the insurer was called upon to defend both an insured and an additional insured, and where the additional insured was obligated to indemnify the insured. In this situation, the insurer would face competing incentives concerning the defense of its insured.

The Court of Appeals recognized that the interests of the additional insured-indemnitor could only be fully protected through the vigorous defense of the insured-indemnitee. However, if the additional insured had agreed to indemnify the insured for any losses sustained, then the

Here, this Court ruled in the prior decision, order, and judgment, that the NYCTA was not an additional insured under the Burlington Policy for the underlying action. (*See* Decision, at 19.) Therefore, the antisubrogation rule, *Pennsylvania General Ins. Co.*, and *North Star Reinsurance Corp.* do not apply here. Burlington's subrogation claim is not against an insured or an additional insured.

The NYCTA points out that counsel for all parties in the underlying action stipulated that they would be "precluded, at all stages of the proceedings hereinafter had in this action, from offering evidence for any purpose, by or through, and calling as a witness, Robert Czeres", a former employee of Breaking Solutions. (Strugatz Affirm., Ex N.) According to the NYCTA, its counsel in the underlying action did not pursue the depositions of Czeres or Breaking Solutions's operating engineer. (Strugatz Affirm. ¶ 32.) The NYCTA appears to imply that those depositions would have led to evidence "of even 1% of fault attributable to Breaking Solutions [which] would have obligated BURLINGTON to indemnify the NYCTA" (Strugatz Affirm. ¶ 32). The NYCTA also asserts that its counsel in the underlying action "never provided its clients" with written reports addressed to Burlington, "raising a

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insurer (who was defending the insured-indemnitee) would have less incentive to defend the insured-indemnitee from claims made against it. The Court of Appeals stated, "allowing indemnification might sanction an indirect breach of the insured's obligation to defend its insured . . ." (*Pennsylvania General Ins. Co.*, 68 NY2d at 472.)

reasonable inference that said firm mistakenly believed its communications with BURLINGTON should be kept secret from its clients, the NYCTA and the MTA." (Strugatz Affirm. ¶ 27.)

However, the NYCTA is careful not to accuse Burlington of having engaged in an inadequate claims investigation concerning Breaking Solutions's role in Kenny's accident.[4] Neither does the NYCTA contend that the counsel who represented it in the underlying action engaged in malpractice. In any event, an insurer "is not answerable in malpractice for professional errors on the part of independent attorneys retained by it." (*Transcare New York, Inc. v Finkelstein, Levine & Gittlesohn & Partners*, 23 AD3d 250, 251 [1st Dept 2005].) Thus, to the extent that the NYCTA now argues that its counsel in the underlying action ought to have pursued a different litigation strategy, which therefore should be considered as bad faith claims handling, these are "feigned factual issues and are insufficient to defeat the summary judgment motion." (*Van Damme v Gelber*, ___ AD3d ___, 974 NYS2d

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[4] In the prior decision, order, and judgment, this Court noted,

> "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' [citation omitted]."

(Ambrosio Affirm., Ex A, at 10 [emphasis added].)

375, 377 [1st Dept 2013]; *Cillo v Resjefal Corp.*, 16 AD3d 339 [1st Dept 2005].)

Finally, the NYCTA argues that discovery is needed to oppose Burlington's motion for summary judgment. To the extent that the NYCTA's discovery demands bore on the defenses of bad faith claims handling, unclean hands, or a conflict of interest, these defenses are not valid defenses to Burlington's claim of contractual indemnification, for the reasons already discussed above. To the extent that the NYCTA's discovery demands are relevant to calculating the total amount of the defense costs incurred, they are not relevant to Burlington's entitlement to indemnification from the NYCTA for the amount of the settlement paid on the City's behalf in the underlying action. It is undisputed that the settlement amount was $950,000.

Therefore, Burlington is granted summary judgment in its favor against the NYCTA as to the settlement that Burlington paid on behalf of the City of New York to settle the underlying action, i.e., $950,000.

Burlington is also entitled to recover prejudgment interest, computed from the date of the settlement paid on behalf of the City. (*See Nesterczuk v Goldin Mgt., Inc.*, 77 AD3d 800, 805 [2d Dept 2010] [condominium sponsor was entitled to prejudgment interest on the award for contractual indemnification, computed from the date of its settlement with the plaintiff]; 23 NY Jur 2d, Contribution, Indemnity and

Subrogation § 140 ["in an action for contractual indemnification, such [prejudment] interest normally accrues from the date of payment of the damage or loss by the indemnitee and not from the date the action is commenced"].)

Contrary to the NYCTA's argument, Public Authorities Law § 2880 (7), which governs interest eligibility and the computation of interest, does not apply. Public Authorities Law § 2880 (7) applies to payments due to a contractor under a contract with a public authority. In this case, neither the City nor its insurer falls within the definition of a "contractor" under Public Authorities Law § 2880 (1) (c). Contrary to Burlington's argument, the rate of prejudgment interest is not set at the rate of 9% per annum, as provided in CPLR 5004. Rather, under Public Authorities Law § 1212 (6), "the rate of interest against NYCTA may be no more than 3%." (*Williams v City of New York*, ___ AD3d ___, 974 NYS2d 383, 384 [1 Dept 2013]; *Klos v New York City Tr. Auth.*, 240 AD2d 635, 638 [2d Dept 1997]; *Coping v New York City Tr. Auth.*, 73 AD2d 948 [2d Dept 1980].)

C.

Burlington is also entitled to partial summary judgment in its favor on the second cause of action against the NYCTA as to the defense costs, including attorneys' fees, incurred on behalf of the City of New York in the underlying action. The broad language of Section 6.8 of the 1953 Lease Agreement, whereby the

NYCTA "shall be responsible for the . . . defense against . . . any and all claims, actions . . " must be read to include defense costs, including attorney's fees. (*Milani v Broadway Mall Props.*, 261 AD2d 370, 371 [2d Dept 1999].)

Burlington admits that, aside from the amount of the settlement, it is premature to determine the amount of defense costs at this juncture because of the need for discovery (D'Ambrosio Reply Affirm. ¶ 37.) Therefore, Burlington is granted partial summary judgment against the NYCTA as to liability with respect to Burlington's claim for defense costs, including attorneys' fees.

II.

The NYCTA's Cross Motion for an order to preclude and to compel

According to the NYCTA, Burlington did not provide a bill of particulars, did not adequately respond to items 4-19 of its notice for discovery and inspection dated April 8, 2013, and did not produce a witness for a deposition.

Burlington is directed to serve a bill of particulars within 45 days. It does not appear from the record that Burlington served a bill of particulars in response to the NYCTA's demand.

The branch of the NYCTA's cross motion to compel Burlington to comply with items 4-19 of its notice for discovery and inspection dated April 8, 2013 is denied. It appears from a letter dated May 13, 2013 that Burlington served a response to this

demand. (Strugatz Affirm., Ex 1.) Inasmuch as the NYCTA contends that the responses were inadequate, it should have included Burlington's response with its cross motion for the Court to examine.

The branch of the NYCTA's cross motion to compel Burlington to appear for a deposition is denied. The NYCTA's notice for deposition, dated April 8, 2013, demanded a deposition on May 29, 2013. (Strugatz Affirm., Ex S.) However, an affidavit of service indicates that Burlington served the instant motion for summary judgment on April 29, 2013, which triggered an automatic stay of discovery of the entire action. (CPLR 3214.) Therefore, the automatic stay of discovery excused Burlington from having to produce a witness for a deposition on May 29, 2013.

The scheduling of Burlington's deposition can be discussed at the next compliance conference.

CONCLUSION

Accordingly, it is hereby ORDERED that the motion for summary judgment by plaintiff Burlington Insurance Company is granted as follows:

(1) the Clerk is directed to enter judgment in favor of plaintiff The Burlington Insurance Company and against defendant New York City Transit Authority on Count II of the amended verified complaint (that part which seeks to recover the amount of a settlement) in the amount of $950,000, with interest at the rate of 3% per

annum from the date of June 15, 2012, until the date of the decision on this motion, and thereafter at the rate of 3% per annum, as calculated by the Clerk, together with costs and disbursements as taxed by the Clerk;

(2) the remainder of Count II of the amended verified complaint (that part which seeks to recover defense costs, including attorneys' fees) is severed, and on the remainder of Count II of the amended verified complaint, plaintiff The Burlington Insurance Company is granted partial summary judgment in its favor against defendant the New York City Transit Authority as to liability only; and it is further

ORDERED that the cross motion by defendant New York City Transit Authority is granted only to the extent that, within 45 days, plaintiff shall serve a bill of particulars as demand by defendant New York City Transit Authority, and the cross motion is otherwise denied; and it is further

ORDERED that the remainder of the action shall continue; and it is further

ORDERED that the parties are directed to appear for a compliance conference on February 27, 2014 at 11 A.M. in IAS Part 21, 80 Centre Street, Room 278.

Dated: December 17, 2013 **ENTER:**
New York, New York

FILED
DEC 19 2013
NEW YORK
COUNTY CLERK'S OFFICE

J.S.C.

MICHAEL D. STALLMAN
J.S.C.

[* 24]