

<b>CB Richard Ellis, Inc. v Harleysville Ins. Co. of N.J.</b>
2015 NY Slip Op 32050(U)
January 29, 2015
Supreme Court, New York County
Docket Number: 101259/2012
Judge: Kathryn E. Freed
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*EA  
2/3/15*

**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. KATHRYN FREED  
JUSTICE OF SUPREME COURT**

**PART 2**

Index Number : 101259/2012

CB RICHARD ELLIS, INC.

vs

HARLEYSVILLE INSURANCE COMPANY

Sequence Number : 002

SUMMARY JUDGMENT

INDEX NO. \_\_\_\_\_

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 002

The following papers, numbered 1 to \_\_\_\_\_, were read on this motion to/for \_\_\_\_\_

Notice of Motion/Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_

No(s). \_\_\_\_\_

Answering Affidavits — Exhibits \_\_\_\_\_

No(s). \_\_\_\_\_

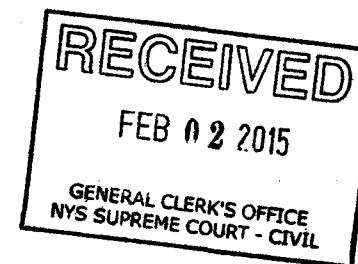
Replying Affidavits \_\_\_\_\_

No(s). \_\_\_\_\_

Upon the foregoing papers, it is ordered that this motion is

**DECIDED IN ACCORDANCE WITH  
ACCOMPANYING DECISION / ORDER**

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



**FILED**

FEB 03 2015

NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 1-29-15  
JAN 29 2015

*[Handwritten Signature]*  
J.S.C.  
**HON. KATHRYN FREED**  
**JUSTICE OF SUPREME COURT**  
 **NON-FINAL DISPOSITION**

1. CHECK ONE: .....  CASE DISPOSED
2. CHECK AS 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  
 COUNTY OF NEW YORK: IAS PART 2

-----x  
 CB RICHARD ELLIS, INC.,

Plaintiff,

-against-

HARLEYSVILLE INSURANCE COMPANY OF NEW  
 JERSEY and WADE RAY & ASSOCIATES  
 CONSTRUCTION, INC. (pertaining to an  
 underlying action entitled  
 Prisco v 24-08-18 Jackson Realty  
 Associates, LLC, et al.),

Defendants.

-----x  
 KATHRYN E. FREED, J.S.C.

**DECISION AND ORDER**

Index No. 101259/12  
 Seq. Nos. 002 & 003

**FILED**

FEB 03 2015

**NEW YORK  
 COUNTY CLERK'S OFFICE**

RECITATION, AS REQUIRED BY CPLR 2219 (a), OF THE PAPERS CONSIDERED  
 IN THE REVIEW OF THIS MOTION:

PAPERS	NUMBERED
CBRE NOTICE OF MOTION AND AFFIDAVITS ANNEXED	1-2 (Exs. A-I)
WADE RAY NOTICE OF CROSS-MOTION AND	
AFFIDAVITS ANNEXED	3-4 (Exs. A-I)
HARLEYSVILLE NOTICE OF CROSS-MOTION AND	
AFFIDAVITS ANNEXED	5-6 (Exs. A-L)
CBRE AFFIRMATION IN OPPOSITION	7
CBRE AFFIRMATION IN OPPOSITION	8
CBRE AFFIRMATION IN REPLY	9
WADE RAY MEMORANDUM OF LAW	10
HARLEYSVILLE REPLY AFFIRMATION	11 (Exs. M-O)

UPON THE FOREGOING CITED PAPERS,  
 THE DECISION/ORDER ON THE MOTIONS IS AS FOLLOWS:

Motions bearing sequence numbers 002 and 003 are consolidated  
 for disposition.

This is an action for breach of contract and for a declaratory judgment by plaintiff CB Richard Ellis, Inc. ("CBRE") in connection with a general liability policy issued by defendant Harleysville Insurance Company of New Jersey ("Harleysville") to defendant Wade Ray & Associates Construction, Inc. ("Wade Ray"), which allegedly included CBRE as an additional insured.

CBRE moves, pursuant to CPLR 3212, for an order granting summary judgment declaring that Harleysville is obligated to insure, defend and indemnify CBRE in connection with an underlying personal injury action. It also seeks a declaration that Wade Ray breached its contractual agreement to procure certain levels of insurance for the benefit of CBRE.

Wade Ray cross-moves, pursuant to CPLR 3212, for an order granting it summary judgment dismissing the complaint. Harleysville also cross-moves, pursuant to CPLR 3017 and 3212, for an order declaring that CBRE is not an additional insured under Wade Ray's policy or, in the alternative, declaring that any coverage provided by Harleysville is excess to CBRE's own insurance.

For the reasons stated below, **the motion is granted in part, and denied in part, and the cross-motions are denied.**

**FACTUAL AND PROCEDURAL BACKGROUND:**

In its complaint, CBRE alleges that, in 2008, it was acting as a property manager for a client which was the lessee of the premises located at 2410 Jackson Avenue in Long Island City, New York ("the premises"). On its client's behalf, CBRE contracted for the build-out of a retail bank at the premises.

Wade Ray was one of the contractors hired by CBRE to perform construction work at the premises. CBRE alleges that, pursuant to a construction contract dated October 6, 2008, Wade Ray agreed to procure insurance coverage, with CBRE as an additional insured, and agreed to indemnify CBRE and hold it harmless. Wade Ray obtained a commercial general liability policy effective February 1, 2008 to February 1, 2009 ("the policy").

Among other things, the policy contained an additional insured endorsement amending the definition of an insured party to include any entity for whom Wade Ray was performing operations pursuant to a written contract which required that such entity be added as an additional insured on the policy. See CG-7254 (A). It further stated that any such additional insured was covered only for damages caused by Wade Ray for which the additional insured would be entitled to indemnification from Wade Ray. See CG-7254 (B). Further, the endorsement stated that any coverage provided would be

excess to other policies available to the additional insured unless the parties' agreement provided that such coverage would be primary. See CG-7254 (D).

On December 22, 2008, Neil Prisco, a pedestrian, allegedly slipped and fell on the sidewalk leading into a driveway which was directly behind, and part of, the premises, as the result of an accumulation of snow and ice on the sidewalk. CBRE alleges in its complaint in the instant action that Wade Ray had used that driveway on, and prior to, that date, as part of its job site and had used the adjacent sidewalk as a means of access to the driveway.

On May 22, 2009, Prisco commenced a personal injury action against, *inter alia*, CBRE and Wade Ray. See *Prisco v 24-08-18 Jackson Realty Associates, LLC, et al*, Sup Ct, Nassau County, Index Number 010011/09 ("the Prisco action"). On November 30, 2009, CBRE tendered a claim for defense and indemnity to Harleysville pursuant to the policy. On December 9, 2009, Harleysville declined coverage on several grounds. First, Harleysville maintained that snow and ice removal was not part of Wade Ray's contractual duties on the project and, thus, Prisco's alleged injuries did not arise from any acts or omissions on the part of Wade Ray. Further, it asserted that CBRE was not an additional insured under the policy because the policy conferred additional insured status to parties only with

respect to acts or omissions on the part of the named insured, i.e., Wade Ray, which was not responsible for snow or ice removal. Finally, Harleysville maintained that, if any coverage were provided, it would be on an excess basis only.

Harleysville now asserts an additional basis for denying coverage: that coverage must be disclaimed because the policy contains an exclusion providing that it does not apply to any injuries arising from Wade Ray's "snow and ice removal activities which are performed for others." See, CG-7241.

CBRE commenced the instant action in January 2012, seeking a declaration that Harleysville is obligated to defend and indemnify CBRE in connection with the Prisco action. It also seeks a declaration that Wade Ray breached its contractual agreement to procure adequate insurance on CBRE's behalf.

In two decisions dated April 30, 2014, the court in the Prisco action denied motions by CBRE and Wade Ray for summary judgment dismissing the complaint. The court found that questions of fact existed as to: 1) whether Wade Ray was obligated to perform snow and ice removal; 2) whether it did so; 3) whether Prisco was injured as the result of such activities; and 4) whether Prisco was injured as the result of other work done by Wade Ray pursuant to its contract with CBRE, or as the result of Wade Ray's negligence. See *Prisco v 24-08-18 Jackson Realty Associates, LLC, et al*, Sup

Ct, Nassau County, April 30, 2014, Sher, J., Index Number 010011/09.

Each of the parties in the instant action now moves for summary judgment. A party moving for summary judgment is required to make a *prima facie* showing that it is entitled to judgment as a matter of law, by providing sufficient evidence to eliminate any material issues of fact from the case. *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 (1985). The party opposing the motion must then demonstrate the existence of a factual issue requiring a trial of the action. *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980).

**LEGAL CONSIDERATIONS:**

**Timeliness**

As a threshold matter, CBRE argues that its motion should be granted as against Harleysville because the disclaimer of coverage was untimely. This argument is without merit. CBRE alleges that it tendered its claim to Harleysville on November 30, 2009 and it is undisputed that Harleysville disclaimed coverage on December 9, 2009. Therefore, CBRE has not set forth any facts demonstrating that the disclaimer was untimely.

**Choice of Law**

CBRE and Harleysville also dispute whether New York or New Jersey law applies in this action. CBRE argues that New York law applies because the site of the insured risk, i.e., Wade Ray's work site in the Prisco action, was located in New York. Harleysville argues that New Jersey law applies because, among other things, Wade Ray is a New Jersey company and the policy was issued in New Jersey.

It is well-settled that New York courts apply a "center of gravity" or "grouping of contacts" approach to choice-of-law questions in contract cases. *Certain Underwriters at Lloyd's, London v Foster Wheeler Corp.*, 36 AD3d 17, 21 (1<sup>st</sup> Dept 2006), *aff'd* 9 NY3d 928 (2007). Thus, the court must "apply the law of the state with the most significant relationship to the transaction and the parties (internal quotation marks and citation omitted)." *Id.* "This approach generally dictates that a contract of liability insurance be governed by the law of the state which the parties understood to be the principal location of the insured risk unless with respect to the particular issue, some other state has a more significant relationship to the transaction and the parties (internal quotation marks and citation omitted)". *Id.*, at 21-22.

"[W]ith respect to a choice-of-law analysis for insurance policies covering multistate risks, the state of the insured's domicile is a fact known to the parties at the time of contracting, and (in the absence of a contractual choice-of-law provision) application of the law of that state is most likely to conform to their expectations (internal quotation marks and citation omitted)." *FC Bruckner Assoc., L.P. v Fireman's Fund Ins. Co.*, 95 AD3d 556 (1st Dept 2012); *see Appalachian Ins. Co. v Di Sicurata*, 60 AD3d 495, 495-496 (1st Dept 2009).

Here, the parties have not pointed to any choice of law provision in the policy. However, numerous factors demonstrate that New Jersey law should apply to the policy.

First, it is undisputed that Wade Ray is a New Jersey company and that it purchased the policy through a New Jersey broker. Further, the policy was issued in New Jersey and contains New Jersey endorsements. These factors establish that New Jersey has the most significant relation to the parties and the transaction.

Moreover, while the location of the insured risk at issue in the Prisco action was in New York, the policy did not exclusively cover New York locations or risks. Instead, the policy defined the "coverage territory" as including "the United States...Puerto Rico and Canada." Therefore, because the policy covered potential risks in multiple states, application of the law of New Jersey,

i.e., Wade Ray's state of domicile, is most likely to conform to the expectations of the parties at the time the policy was entered into. *FC Bruckner Associates, L.P. v Fireman's Fund Ins. Co.*, *supra*.

### **Duty to Defend**

CBRE moves for summary judgment and a declaration that Harleysville is obligated to defend and indemnify it in connection with the Prisco action. Harleysville argues that the motion is premature because factual issues exist in the Prisco action regarding how the accident occurred and, thus, as to whether Harleysville must defend or indemnify CBRE.

Under New Jersey law, "[a]n insurer's duty to defend an action brought against its insured depends upon a comparison between the allegations set forth in the complainant's pleading and the language of the insurance policy." *Flomerfelt v Cardiello*, 202 NJ 432, 444, 997 A2d 991, 998 (2010). "In making that comparison, it is the nature of the claim asserted, rather than the specific details of the incident or the litigation's possible outcome, that governs the insurer's obligation." *Id.*

In order to determine whether a duty to defend exists, "the complaint is placed alongside the policy and the test is whether the allegations of that complaint, upon its face, fall within the

risk insured against (citation omitted).” *W9/PHC Real Estate LP v Farm Family Cas. Ins. Co.*, 407 NJ Super 177, 191, 970 A2d 382, 391 (Super Ct, AD, 2009). “When the two correspond, the duty to defend arises, irrespective of the claim's actual merit because the duty to defend is broader than the duty to indemnify.” *Id.*<sup>1</sup>

Here, the policy contained an additional insured endorsement including any entity for which Wade Ray performed operations pursuant to a written contract which required that such entity be added as an additional insured on the policy. See CG-7254 (A). The endorsement further provided that the additional insured was covered for damages caused by Wade Ray for which the additional insured would be entitled to indemnification from Wade Ray. See CG-7254 (B).

It is undisputed that, at the time of Prisco's alleged injury, Wade Ray was performing operations pursuant to a written contract with CBRE which required Wade Ray to obtain coverage for CBRE. Further, the complaint in the Prisco action alleges that the plaintiff was injured on Wade Ray's job site and the trial court in the Prisco action has found that questions of fact exist as to whether the alleged injuries occurred as the result of Wade Ray's conduct. Since it is possible that the injuries alleged in the

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<sup>1</sup>New York law is similar. See *QBE Ins. Corp. v Adjo Contr. Corp.*, 121 AD3d 1064, 1082 (2d Dept 2014) (“duty to defend is exceedingly broad (internal quotation marks and citation omitted)”).

Prisco action will fall within the coverage provided under the policy, Harleysville has a duty to provide CBRE with a defense under the terms of the policy.

**Additional Insured/Indemnification**

CBRE moves for a declaration that Harleysville is required to indemnify it for any losses in connection with the Prisco action. Harleysville seeks a declaration that CBRE is not an additional insured under the policy, because the Prisco action does not arise from any acts or omission's on Wade Ray's part arising from its contract with CBRE. Each of these motions depends on whether the alleged injuries in the Prisco action arose from acts or omissions on Wade Ray's part pursuant to its contract with CBRE and covered by the policy.

As set forth above, the court in the Prisco action has found that questions of fact exist as to whether Wade Ray was obligated to perform snow and ice removal, whether it did so, and whether Prisco was injured as the result of such activity. The court also found that questions of fact exist as to whether Prisco was injured as the result of any other work done by Wade Ray pursuant to its contract with CBRE, or as the result of Wade Ray's negligence.

In light of the questions of fact that exist as to how the alleged injuries occurred in the Prisco action, it is unclear at

this point whether CBRE was an additional insured entitled to coverage under the policy with respect to the underlying action.

Such questions of fact also preclude a finding as to whether Harleysville is obligated to indemnify CBRE in connection with the Prisco action. This Court notes that, as set forth above, the policy contained an exclusion for injuries arising from Wade Ray's "snow and ice removal activities which are performed for others." See, CG-7241. However, at this point, it is unclear whether the injuries alleged in the underlying action fall within that exclusion.

### **Excess Insurance**

Harleysville argues that any insurance coverage is excess to any other insurance obtained by CBRE. Harleysville bases this on an endorsement to the policy, CG 7254(D), which provides that additional insured coverage would be excess to other policies available to the additional insured, unless the contract between the additional insured and Wade Ray required the coverage acquired by Wade Ray to be primary and non-contributory.

CBRE points out that section 19.1 of its contract with Wade Ray required Wade Ray to obtain insurance for CBRE's benefit and specifically provides that such coverage would be primary and non-contributory. In light of that section, Harleysville has not

demonstrated that it is entitled to summary judgment declaring that the policy is excess to any other policies available to CBRE.

### **Breach of Contract**

CBRE moves for summary judgment on its second cause of action, which alleges that Wade Ray breached the construction contract by failing to procure adequate liability insurance for the benefit of CBRE as an additional insured in connection with the underlying action. Wade Ray cross-moves for summary judgment dismissing this cause of action on the ground that it fulfilled its obligation by obtaining the policy.

It is undisputed that the policy contained an endorsement for additional insureds such as CBRE. However, as set forth above, Harleysville disclaimed coverage on the ground that CBRE did not qualify as an additional insured. Further, the court in the Prisco action found that factual issues exist regarding how Prisco's accident occurred and whether Wade Ray's conduct contributed to that accident. Such factual questions will determine the extent to which coverage exists, if any, and whether CBRE qualifies as an additional insured under Wade Ray's policy. In light of these factual questions, neither side has demonstrated that it is entitled to summary judgment with respect to this cause of action.

In accordance with the foregoing, it is hereby:

ORDERED that the motion for summary judgment by plaintiff CB Richard Ellis, Inc. for a declaratory judgment is granted to the extent that defendant Harleysville Insurance Company of New Jersey must provide a defense to plaintiff CB Richard Ellis, Inc. in the action entitled *Prisco v 24-08-18 Jackson Realty Associates, LLC, et al*, Sup Ct, Nassau County, Index Number 010011/09 and the motion is otherwise denied; and it is further,

ORDERED that the cross motion by defendant Wade Ray & Associates Construction, Inc. for summary judgment dismissing the complaint is denied; and it is further,

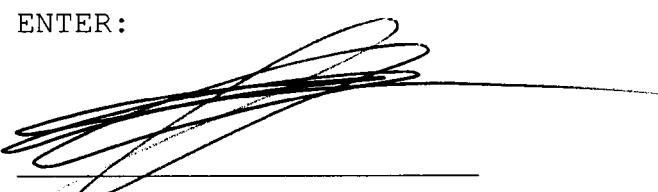
ORDERED that the cross motion by defendant Harleysville Insurance Company of New Jersey for summary judgment dismissing the complaint is denied; and it is further,

ORDERED that this constitutes the decision and order of the court.

DATED: JANUARY 29, 2015

**FILED**  
FEB 03 2015  
NEW YORK  
COUNTY CLERK'S OFFICE

ENTER:

  
KATHRYN E. FREED, J.S.C.  
**HON. KATHRYN FREED**  
**JUSTICE OF SUPREME COURT**