Fireman's Fund Insur. Co. v Travelers Cas. Insur. Co. of Am.
2017 NY Slip Op 31068(U)
May 15, 2017
Supreme Court, New York County
Docket Number: 151110/16
Judge: Carol R. Edmead

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

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FIREMAN'S FUND INSURANCE COMPANY, ROBROSE PLACE, L.L.C. and SKY MANAGEMENT CORP.,

Index No.: 151110/16

Plaintiffs,

Motion Seq. 001 and 002

-against-

TRAVELERS CASUALTY INSURANCE COMPANY OF AMERICA, DAFFODIL GENERAL CONTRACTING INC., and TSERING WANGYAL,

Defendants.

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CAROL R. EDMEAD, J.S.C.:

MEMORANDUM DECISION

In this insurance declaratory judgment action, defendant Travelers Casualty Insurance Company of America ("Travelers") moves for summary judgment dismissing the complaint and declaring that it has no duty to defend, indemnify, or otherwise cover plaintiffs, Robrose Place, L.L.C. ("Robrose") and Sky Management Corp. ("Sky") in the underlying personal injury action entitled *Tsering Wangyal v. Robrose Place L.L.C., Sky Management Corp., Daffodil General Contracting Inc.* (Index No. 507954/2013) (the "Underlying Action").

Robrose, Sky and its insurer Fireman's Fund Insurance Company ("Fireman's Fund") (collectively, "plaintiffs") also move for summary judgment declaring, pursuant to CPLR 3001, that Travelers is obligated to defend and indemnify Robrose and Sky in the Underlying Action, on a primary, non-contributory basis pursuant to an insurance policy issued to defendant Daffodil General Contracting Inc. ("Daffodil") and declaring, pursuant to CPLR 3001, that Travelers is obligated to reimburse Fireman's Fund for all fees incurred in defending Robrose and Sky in the Underlying Action (motion sequence 002).

Both motions are consolidated for joint disposition herein.

Factual Background

According to the Complaint, Sky hired Daffodil to perform certain construction work at a premises owned by Robrose located at 220 Sullivan Street, New York, New York (the "premises") (see May 29, 2012 letter agreement, the "Daffodil Contract").

Daffodil also executed an agreement with Robrose, in which Daffodil agreed to procure comprehensive general liability insurance naming Robrose and Daffodil as additional insureds, and to defend and indemnify Robrose and Sky for the work at the premises (see Indemnification Agreement dated May 17, 2013, the "Indemnification Agreement"). Daffodil procured general liability coverage from Travelers.

Thereafter, on June 15, 2013, defendant Tsering Wangyal ("Wangyal") was allegedly injured at the premises and sued Robrose, Sky, and Daffodil for negligence and violations of Multiple Dwelling Law ("MDL") 78 (the "Underlying Complaint").[1]

At the time of Wangyal's alleged accident, Robrose and Sky was covered by a certain commercial general liability insurance policy issued by Fireman's Fund (the "Fireman's Fund Policy"), and Daffodil was covered under a commercial general liability insurance policy issued by Travelers, which contained an additional insured endorsement for the benefit of Robrose and Sky (the "Travelers' Policy").[2]

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[1] Although Wangyal also alleged violations of Labor Law 241 and 200, in its second and "first third cause of action," respectively, in his Complaint, it is undisputed that he withdrew such causes of action with prejudice (See So-Ordered Stipulation, September 29, 2016).

[2] Fireman's Fund is defending Robrose and Sky in the Underlying Action (Complaint, ¶16). According to Fireman's Fund's claims administrator, Stephen Lobaccaro, (Affidavit, ¶4).

When plaintiffs demanded that Travelers assume the defense and indemnification of plaintiffs for the Underlying Action, Travelers declined, and plaintiffs commenced this insurance declaratory judgment action.

In support of summary judgment, Travelers contends that when Fireman's Fund's third-party administrator, F& L Claims Service, tendered this matter to Travelers on June 1, 2015, Travelers undertook an investigation. Thereafter, on July 8, 2015 and July 14, 2015, Travelers disclaimed coverage on the ground that Robrose and Sky's underlying liability arose out of their own "independent acts or omissions" and that the accident was not caused by Traveler's insured Daffodil. Travelers argues that the additional insured endorsement is triggered only where the purported additional insured's underlying liability does not arise out of their own "independent acts or omissions." Robrose and Sky are being sued only with respect to their own negligence under common law and MDL 78 (and not vicariously), and thus, any possible liability under such a common law negligence claim requires a finding that Robrose and Sky, by some act or omission, breached a duty of care owed to the underlying plaintiff. Therefore, since any possible liability of Robrose and Sky in the Underlying Action will necessarily arise out of their own "independent acts or omissions," any possibility of coverage will be precluded.

Further, although the additional insured endorsement limits coverage to liability that is "caused by" Daffodil's work for the claimed additional insureds, any possible liability of Robrose or Sky could not have been "caused by" Daffodil's work because Daffodil's work under its contract had nothing to do with the premises' doors or windows, nor the metal gate that allegedly struck Wangyal. Plaintiffs acknowledged that gate work was done by another contractor. Thus, Traveler's is not obligated to defend or indemnify Robrose or Sky.

In response, plaintiffs argue that Travelers failed to show that there is no possible factual or legal basis under which it would not eventually be obligated to indemnify Robrose and Sky in the Underlying Action so as to be relieved of its duty to defend them, and that the caselaw Travelers cites is factually distinguishable and not controlling.

Plaintiffs further argue that they, instead, are entitled to summary judgment and a declaration that Travelers is obligated to (i) defend and indemnify Robrose and Sky in the Underlying Action on a primary, non-contributory basis; and (ii) reimburse Fireman's Fund for all fees incurred in defending Robrose and Sky in the Underlying Action.

Daffodil agreed by contract to obtain additional insured coverage for Robrose and Sky prior to Wangyal's accident. As such, the condition to additional insured coverage contained in the Travelers' Policy (of a written contract in effect during this policy period and signed and executed by you prior to the loss for which coverage is sought) has been satisfied.

Further, an insurer's broad duty to defend arises whenever the allegations of a complaint against the insured potentially fall within the scope of the risks undertaken by the insurer. The Underlying Complaint, coupled with Wangyal's Bill of Particulars and the facts known by Travelers at the time of its disclaimer indicate a legal theory under which Robrose and Sky may be held vicariously liable for the acts or omissions of Daffodil in the performance of its work at the Premises, thereby triggering a duty by Travelers to defend Robrose and Sky. Although the Underlying Complaint alleges that the negligent acts of Robrose and Sky were the cause of Wangyal's accident, said complaint also alleges that Robrose and/or Sky retained Daffodil to perform certain construction work at the building on the owner's property (42). Wangyal also alleged that he was injured "by the negligence, careless and reckless of the defendants" (136).

Wangyal's Bill of Particulars also establishes that the condition which allegedly caused his accident was created by Daffodil. Indeed, the evidence indicates that Wangyal's injuries were caused by Daffodil at the premises in that the gate which allegedly fell upon Wangyal had been removed by Daffodil in the course of carrying out the work called for in the agreements, thereby making Daffodil liable for the alleged dangerous condition on the premises.

Plaintiffs also contend that Travelers is estopped from relying on the language in the additional insured endorsement. Fireman's Fund's third-party administrator placed Travelers on notice of Wangyal's accident on October 3, 2013. However, Travelers did not deny coverage to Robrose until 21 months later on July 14, 2015. Thus, the denial is untimely pursuant to Insurance Law 3420(d). Moreover, in denying coverage to Robrose, Travelers neglected to respond to Fireman's Fund's third-party administrator demand to provide Sky with additional insured coverage. Thus, Travelers' untimely denial of coverage to Robrose based upon exclusionary language contained in the additional insured endorsement, and its failure to respond to the demand that coverage be afforded to Sky, effectively estops Travelers from denying coverage, pursuant to Insurance Law 3420(d), and entitling Robrose and Sky to both a defense and indemnification in the Underlying Action.

Further, the Indemnification Agreement entered into between the parties expressly required that Daffodil's coverage be primary and non-contributory to any coverage afforded to Robrose and Sky and the additional insured endorsement of the Travelers Policy, under which Robrose and Sky are entitled to coverage, expressly indicates that the additional insured coverage afforded to Robrose and Sky is primary and non-contributory. And, the Fireman's Fund Policy contained an endorsement that provides that the insurance provided thereunder "shall apply as

excess over any other valid insurance, whether such other insurance is written as primary, excess, or contingent insurance or on any other basis." Thus, by the express terms of both policies, coverage owed to Robrose and Sky by Travelers is primary to that owed by Fireman's Fund. Thus, Travelers is obligated to defend and indemnify Robrose and Sky in the Underlying Action, on a primary, noncontributory basis and Fireman's Fund is entitled to reimbursement from Travelers for all expenses, attorneys' fees and disbursements incurred in the defense of Robrose and Sky in the Underlying Action.

In opposition, Travelers argues that the additional insured endorsement provides limited coverage and its duty to defend is not triggered merely because its named insured (Daffodil) is alleged to have caused the accident. Additional insured coverage extends only to liability that does not arise out of the putative additional insured's own "independent acts or omissions," and here, the only claims pending against Robrose and Sky are those that necessarily arise out of their own "independent acts or omissions." There is no vicarious liability claim alleged in the Underlying Complaint, and could not apply to Sky, as Sky is not an owner, but only the alleged managing agent. Further, Insurance Law § 3420, which only applies where the insurer is denying coverage based upon a policy condition or exclusion, does not apply because Travelers' defense is based on the scope of coverage provided under the endorsement. In any case, Travelers timely disclaimed coverage in any event, and even assuming Travelers has a duty to defend, a hearing is required with respect to any claimed defense costs. Also, Travelers has no duty to indemnify plaintiffs under any circumstances, and any determination concerning Travelers' alleged duty to indemnify would be premature until a determination of the Underlying Action. At a minimum, an issue of fact exists as to whether Daffodil was required to procure coverage for Sky, given that

the Indemnification Agreement makes reference only to an undefined "Managing Agent." Such lack of specificity precludes summary judgment in plaintiffs' favor.

Plaintiffs, in reply, argue that Travelers failed to raise an issue of fact sufficient to defeat plaintiffs' motion for coverage. Plaintiffs add that Insurance Law § 3420(d) applies to Travelers' disclaimer.

Travelers, in reply, adds that even if Daffodil's work caused the accident, the additional insured endorsement only extends coverage for a putative additional insured's underlying liability that does not arise out of its own "independent acts or omissions," and then only with respect to such liability that is "caused by" Daffodil's work for that additional insured. There is no evidence that Robrose or Sky's liability (if any) was "caused by" Daffodil's work in that Daffodil's work had nothing to do with the gate which allegedly caused the accident.

Further, the October 3, 2013 letter (which does not mention Sky) is not a tender from plaintiffs to Travelers, but a tender from Fireman's Fund's third-party administrator to Daffodil and thus not a request for additional insured coverage addressed to Travelers. As such, Travelers' disclaimer to Robrose and Sky was triggered no earlier than June 1, 2015, and Travelers' disclaimer 37 days thereafter was timely. Although Travelers' named insured Daffodil subsequently provided notice of the accident to Travelers, such notice does not trigger Travelers' obligation to disclaim to a claimed additional insured who itself failed to provide notice to Travelers.

Discussion

Since each side seeks summary judgment, each side bears the burden of making a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to

eliminate any material issues of fact from the case (*Bellinson Law, LLC v Iannucci*, 35 Misc 3d 1217(A), 951 NYS2d 84 [Supreme Court, New York County 2012], aff'd 102 AD3d 563, 958 NYS2d 383 [1st Dept 2013], *citing Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, [1985]). Once met, this burden shifts to the opposing party who must then demonstrate the existence of a triable issue of fact (*Bellinson Law, LLC v Iannucci*, 35 Misc 3d 1217, *supra, citing Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986], *Zuckerman v City of New York*, 49 N.Y.2d 557 [1980] and *Santiago v. Filstein*, 35 AD3d 184 [1st Dept 2006]).

It is also well established that the party claiming coverage bears the burden of proving entitlement (*National Abatement Corp. v National Union Fire Ins. Co. of Pittsburgh, Pa.*, 33 AD3d 570, 570 [1st Dept 2006]; *Tribeca Broadway Assoc. v Mount Vernon Fire Ins. Co.*, 5 AD3d 198, 200 [1st Dept 2004]).

An insurer owes a duty to defend as long as "the pleadings allege a covered occurrence, even though facts outside the four corners of those pleadings indicate that the claim may be meritless or not covered" (*Fitzpatrick v American Honda Motor Co.*, 78 NY2d 61, 63 [1991]). "[I]f any of the claims against [an] insured arguably arise from covered events, the insurer is required to defend the entire action" (*Sport Rock Intl., Inc. v American Cas. Co. of Reading, Pa.*, 65 AD3d 12, 17 [1st Dept 2009] [internal quotation marks and citations omitted]). " Indeed, the duty to defend is exceedingly broad and an insurer will be called upon to provide a defense whenever the allegations of the complaint suggest . . . a reasonable possibility of coverage. If, liberally construed, the claim is within the embrace of the policy, the insurer must come forward to defend its insured no matter how groundless, false or baseless the suit may be" (*Automobile Ins. Co. of Hartford v Cook*, 7 NY3d 131, 137 [2006] [internal quotation marks and citations

omitted]). "[T]he same allegations that trigger a duty to defend trigger an obligation to pay defense costs" (*Federal Ins. Co. citing Travelers Prop. Cas. Corp. v Winterthur Intl.*, 2002 U.S. Dist. LEXIS 11342, *17, 2002 WL 1391920, *6 [SDNY]).

However, the insurer has no duty if, as a matter of law, the allegations in the complaint could not give rise to any obligation to indemnify, or the allegations fall within a policy exclusion (*Federal Ins. Co. v Tyco Intern. Ltd.*, 2 Misc 3d 1006, 784 NYS2d 920 [Supreme Court, New York County 2004] citing *Allstate Ins. Co. v Zuk*, 78 NY2d 41, 45, 571 NYS2d 429 [1991] ("an insurer can be relieved of its duty to defend if it establishes as a matter of law that there is no possible factual or legal basis on which it might eventually be obligated to indemnify its insured under any policy provision")). But the duty to defend or pay defense costs is construed liberally and any doubts about coverage are resolved in the insured's favor (*Federal Ins. Co. citing Volney Residence, Inc. A. Mut. Ins. Co.*, 195 A.D.2d 434, 434, 600 NYS2d 707 [1st Dept 1993]).

While an insurer's duty to defend its insured is determined by the allegations of the complaint, "[t]he duty to indemnify 'is determined by the actual basis for the insured's liability to a third person'" (*Atlantic Mut. Ins. Co. v Terk Tech. Corp.*, 309 AD2d 22, 28 [1st Dept 2003], quoting *Servidone Constr. Corp.*, 64 NY2d at 424). The duty to indemnify depends "on whether the loss, as established by the facts, is covered by the policy" (*Atlantic Mut. Ins. Co.*, 309 AD2d at 28). To find a duty to indemnify, the contract must manifest "a clear and unmistakable intent to indemnify" for particular liabilities (*Millennium Holdings LLC v. Glidden Co.*, 146 A.D.3d 539, 46 N.Y.S.3d 528 [1st Dept 2017]). "The indemnity obligation will be strictly construed, and additional obligations may not be imposed beyond the explicit and unambiguous terms of the

agreement" (*Millennium Holdings LLC, supra*).

The record establishes that on June 15, 2013, Wangyal was working as a delivery person for Brown Bag Laundry and picking up laundry from an apartment at the premises (Wangyal EBT, pp. 14, 19, 24-25). While Wangyal was exiting the premises, a "gate fell on" him causing him injuries (Underlying Complaint, Bill of Particulars, Wangyal EBT, pp. 32-34, 113-114, 124).

It is undisputed that under Daffodil's Contract, Daffodil was retained to perform certain work at the premises as follows:

> **Cut back all damaged and deteriorated brownstone to a solid base; remove all loose stone at band at ground floor apply a thin slurry coat shall be applied followed by the scratch coat pressed into the slurry coat while moist; the final coat shall be applied to match all details of existing. . . .

It is also undisputed that Daffodil executed the Indemnification Agreement, which provides as follows:

> Whereas Daffodil General Contracting, Inc. ("Contractor") is and will be performing certain work for Robrose Place, LLC ("Owner") pursuant to an agreement for 220-224 Sullivan Street New York, NY 10012; the Contractor and Owner hereby agree:
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> INDEMNIFICATION AGREEMENT
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> To the fullest extent permitted by law, Contractor agrees to indemnify, defend and hold harmless Owner and/or Managing Agent from any and all claims, suits, damages, liabilities, . . . related to . . . personal injuries . . . arising out of or in connection with the performance of work of the Contractor, its agents, servants, subcontractors, or employees, or the use by Contractor, its agents, servants, subcontractors or employees, of facilities owned by Owner. . . .
>
> INSURANCE PROCUREMENT
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> Contractor shall obtain and maintain at all times during the term of this agreement, as its sole cost and expense, the following insurance . . . commercial general liability insurance with a minimum limit of $1,000,000 per occurrence and $2,000,000 in the aggregate, which insurance shall cover the following: premises and operations liability, products/completed operations, broad form property damage, broad form contractual

liability, personal injury and independent contractor's liability; . . . and (d) umbrella liability insurance with a limit of $5,000,000 per occurrence and a general aggregate of $5,000,000. Contractor shall, by specific endorsements to its primary and umbrella/excess liability policy, cause Owner and Managing Agent to be named as Additionally Insured. Contractor shall, by specific endorsement to its primary liability policy, cause the coverage afforded in the additionally insured there-under to be primary to and not concurrent with other valid and collectible insurance available to Owner and Managing Agent. Contractor shall, by specific endorsements to its umbrella/excess liability policy, cause the coverage afforded to the Owner and Managing Agent there-under to be first their umbrella/excess coverage above the primary coverage afforded to Owner and Managing Agent and not concurrent with or excess to other valid and collectible insurance to Owner and Managing Agent.

It is further uncontested that Daffodil's Travelers' policy contains a "Blanket Additional Insured (Contractors Operations-New York") Endorsement" which provides as follows:

COMMERCIAL GENERAL LIABILITY COVERAGE PART
COMMERCIAL GENERAL LIABILITY - CONTRACTORS COVERAGE PART

1. WHO IS AN INSURED - (Section II) is amended to include any person or organization you are required to include as an additional insured on this policy by a written contract or written agreement in effect during this policy period and signed and executed by you prior to the loss for which coverage is sought. The person or organization does not qualify as an additional insured with respect to the independent acts or omissions of such person or organization. The person or organization is only an additional insured with respect to liability caused by "your work" for that additional insured. . . .

* * * * *

4. Any coverage provided by this endorsement to an additional insured shall be excess over any other valid and collectible insurance available to the additional insured whether primary, excess, contingent or on any other basis unless a written contract or written agreement in effect during this policy period and signed and executed by you prior to the loss for which coverage is sought specifically requires that this insurance apply on a primary or noncontributory basis. When this insurance is primary and there is other assurance available to the additional insured from any source, we will share with that other insurance by the method prescribed in the policy.

In interpreting an insurance policy, "words and phrases are to be understood in their plain, ordinary, and popularly understood sense, rather than in a forced or technical sense" (*Hartford*

Ins. Co. of the Midwest v Halt, 223 AD2d 204, 212, 646 NYS2d 589, 594 [4th Dept 1996]). The policy must be construed "in a way that affords a fair meaning to all of the language employed by the parties in the contract and leaves no provision without force and effect" (*Raymond Corp. v National Union Fire Ins. Co.*, 5 NY2d 157, 162, 800 NYS2d 89, quoting *Consolidated Edison Co. of N.Y. v Allstate Ins. Co.*, 98 NY2d 208, 221-222, 746 NYS2d 622 [2002]; see also *United Stated Fid. & Guar. Co. v Annumiata*, 67 NY2d 229, 232, 501 NYS2d 790 [1986] ["Where the provisions of the policy "are clear and unambiguous, they must be given their plain and ordinary meaning, and courts should refrain from rewriting the agreement]). "Unambiguous provisions of a policy are given their plain and ordinary meaning" (*Lavanant v General Ace. Ins. Co.*, 79 NY2d 623, 629, 584 NYS2d 744 [1992]; *Seaport Park Condominium v Greater New York Mutual Ins.* Co., 39 AD3d 51, 828 NYS2d 381 [1st Dept 2007]).

Here, Travelers established, as a matter of law, there is no possible factual or legal basis on which it might eventually be obligated to indemnify Robrose and Sky under its Policy.

The operative additional insured provision sets forth the parameters within which plaintiffs may qualify as an additional insured under Travelers' Policy.

The first parameter, persons or organizations "you [Daffodil is] required to include as an additional insured on this policy by a written contract or written agreement in effect during this policy period and signed and executed by you prior to the loss for which coverage is sought," is clearly met by virtue of the fact that the Indemnification Agreement constitutes such a written agreement. The Indemnification Agreement expressly required Daffodil to name the "Owner and Managing Agent" as an additional insured. The following parameter clearly delineates that a prospective additional insured does not qualify as to its independent acts or omissions *(see*

Hunter Robert Const. v Travelers Indemnity, 2015 WL 7008093, 2015 NY Slip Op. 32062[U] [Supreme Court, New York County 2015] (in interpreting the same additional insured endorsement, and finding that the owner, operator, and construction manager "do not qualify as additional insureds with respect to their own acts or omissions.")). Therefore, notwithstanding the existence of a qualifying written agreement, a prospective additional insured does not qualify as an additional insured as to its own independent acts or omissions. The last parameter further restricts how one qualifies as an additional insured by circumscribing that a prospective additional insured is only deemed an additional insured as to liability which is caused by Daffodil's work.

In analyzing the same additional insured endorsement provision, the Court in *Virginia Surety Co., Inc. v Travelers Property Cas. Co.* (34 Misc. 3d 1216(A), 950 N.Y.S.2d 494 [Supreme Court, New York County 2012]) articulated that "in order for Bovis [the prospective additional insured construction manager] to recover under the endorsement in Traveler's policy with Fujitec [insured elevator installer and maintainer] it must be shown that Fujitec's work "caused" the elevator accident, ***and*** *that the accident was not the result of the independent acts and omissions of Bovis.")* (emphasis added)).[3]

The additional insured endorsement has been construed as providing additional insured coverage where the alleged liability of the prospective additional insured is vicarious (*Hunter Robert Const. v Travelers Indemnity*, 2015 WL 7008093, *supra*) (*citing Wilson Cent. School*

[3] Upon reargument and renewal, the Court held that issues of fact remaining as to whether "the elevator dropped due to Fujitect's negligence in performing its *work and whether Bovis' negligence caused or contributed to the drop*," precluded summary finding that Traveler owed defense and indemnification obligations to the prospective additional insured (*Virginia Sur. Co., Inc v. Travelers Property Cas. Co. of America*, 2012 WL 6707323, 2012 N.Y. Slip Op. 33028(U) [Supreme Court, New York County 2012] (emphasis added)).

Dist. v Utica Mut. Ins. Co., 123 AD3d 920, 921 [2d Dept 2014] and *National Union Fire Ins. Co. of Pittsburgh, PA v Greenwich Ins. Co.*, 103 AD3d 473, 474-475 [1st Dept 2013]). As pointed out in *Hunter Robert Const. (supra)*, a Federal Court (albeit in North Carolina) addressed a nearly identical additional insured endorsement in a Travelers policy,[4] and explained that such an endorsement "must be read to require a duty to defend where the 'alleged liability' arises from the subcontractor's work, but not where the "alleged liability" arises from the independent acts of the additional insured" and "to give meaning to the 'independent acts' provision of the endorsement, the court must construe the "arising out of [the subcontractor's work]" provision as one providing coverage in cases where the alleged liability is vicarious." (187 F.Supp.2d 584 [E.D. North Carolina 2000]). The court then proceeded to analyze the underlying complaint to "determine whether the alleged liability arises from the subcontractor's work, i.e., whether [underlying plaintiff] seeks to hold the [prospective additional insured] Hardin plaintiffs liable for [the insured's] J & A Mechanical's acts or failure to act." (*id.* at 590).

It is noted that the North Carolina District Court reviewed the subject underlying

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[4] The subject additional insured endorsement to the commercial general liability insurance policy issued by Travelers provided:

> 1. WHO IS AN INSURED (Section II) is amended to include any person or organization you are required by written contract to include as an insured, *but only with respect to liability arising out of "your work." This coverage does not include liability arising out of the independent acts or omissions of such person or organization.* The written contract must be executed prior to the occurrence of any loss (emphasis added).

Although such endorsement provides coverage for liability "*arising out of*" the insured's work as opposed to liability "caused by" the insured's work herein, the phrase "caused by" "does not materially differ from the ... phrase, 'arising out of' " (*National Union Fire Ins. Co. of Pittsburgh, PA v. Greenwich Ins. Co.*, 103 A.D.3d 473, 962 N.Y.S.2d 9 [1st Dept 2013] *citing W & W Glass Sys., Inc. v. Admiral Ins. Co.*, 91 A.D.3d 530, 937 N.Y.S.2d 28 [1st Dept 2012] (in addressing policy where plaintiff was covered "only with respect to liability caused by [the subcontractor's] ongoing operations performed for that insured [i.e., plaintiff]"and stated that it "does not apply to liability caused by the sole negligence of the person or organization [named as an addition insured]" and stating that "the phrase "caused by your ongoing operations performed for that insured," does not materially differ from the general phrase, "arising out of")).

complaint and found that it did not seek to impose vicarious liability upon the prospective additional insureds as the result of the subcontractor's negligent acts. In so doing, the Court reviewed "the types of liability recognized by North Carolina in this context" and noted that "While a subcontractor's allegedly negligent act may precede allegations of liability against a general contractor, it [did] not follow that the subcontractor's negligence *is imputed* to the general contractor in the situations described above. Rather, each of the exceptions to the no-liability rule suggest forms of direct liability—liability on the part of the general contractor for something the general contractor has done or failed to do. If [the prospective additional insured] retained control over the manner and method of [the insured's] work, any act or failure to act would be [the prospective additional insured's] own act or failure to act, not that of the [insured] subcontractor, and therefore liability would be direct liability based on [the prospective additional insured's] independent acts. . . ."

Here, likewise, the Underlying Complaint does mention vicarious liability. In fact, the claims that gave rise to vicarious liability, if at all, were expressly withdrawn, with prejudice. And, even liberally construed, the Wangyal's complaint does not seek to hold Robrose or Sky liable for Daffodil's negligent acts. Instead, Wangyal seeks to hold Robrose and Sky liable for their own independent acts and omissions. As against Robrose and Sky, Wangyal alleged in the first cause of action that they were "jointly and severally negligent, careless and reckless to manage the aforesaid premises," negligently owned, controlled, occupied, and possessed" the premises (¶31), and that his injuries were "caused solely by the negligence . . . of the defendants. . . ." (¶36).

The Court notes that as against Daffodil, Wangyal's Bill of Particulars (in response to the

demand for same by Daffodil) alleges that Daffodil "created, caused, permitted and/or allowed inside the premises to be, or become and remain in a dangerous condition or created such hazardous condition without providing warning sign [] trap like condition causing to fall metal gate upon the plaintiff. . . ." (¶3). However, the Bill of Particulars does not mention or even alludes to a theory of vicarious liability on the part of Robrose or Sky as a theory of liability in the Underlying Action.

Thus, as Robrose and Sky's liability, as alleged in the complaint, does not arise out of Daffodil's work but rather, out of its own independent acts and omissions, arising from their independent duty to maintain the premises in the reasonably safe condition.

Plaintiffs' contention, that there is a legal theory under which Robrose and Sky "may be held vicariously liable for" Daffodil's "acts or omissions," ignores the record. Unlike in *Hunter's Robert* where the underlying complaint sought recovery under Labor Law 240 and 241 against the prospective additional insureds (2015 WL 7008093, at *8), the Labor Law 200 and 241[5] claims against Robrose and Sky were withdrawn. And, the caselaw cited by plaintiffs is factually distinguishable (*cf. Burlington Ins. Co. v NYC Tr. Auth.*, 132 A.D.3d 127, 14 N.Y.S.3d 377 [1st Dept 2012] (endorsement did not include the restriction that disqualified a prospective additional insured with respect to its independent acts or omissions); *Strauss Painting, Inc. v. Mt. Hawley Ins. Co.*, 105 A.D.3d 512, 963 N.Y.S.2d 197 [1st Dept 2013] (same).

Under these circumstances, whether Wangyal's accident was caused by Daffodil's work is inconsequential, since the Underlying Complaint does not allege or seek to hold Robrose and

[5] Unlike Labor Law 241 and 240, Labor Law 200 does not impose vicarious liability on owners and general contractors *(Cappabianca v. Skanska USA Bldg. Inc.*, 99 A.D.3d 139, 950 N.Y.S.2d 35 [1st Dept 2012]; *see generally, Keenan v. Simon Property Group, Inc.*, 106 A.D.3d 586, 966 N.Y.S.2d 378 [1st Dept 2013]).

Sky liable for Daffodil's work.

Furthermore, contrary to plaintiffs' contention, Travelers is not precluded from disclaiming coverage under the additional insured endorsement based on Insurance Law § 3420(d)(2)'s timely disclaimer requirement, as this section does not apply in such an instance (*see B.R. Fries & Associates, LLC v. Illinois Union Ins. Co.*, 89 A.D.3d 619, 934 N.Y.S.2d 10 [1st Dept 2011] ("Since the denial of coverage was based on lack of coverage pursuant to the additional insured endorsement, Illinois was not required to issue a timely disclaimer"); *Hunter Roberts Const. Group, LLC v. Arch Ins. Co.*, 75 A.D.3d 404, 904 N.Y.S.2d 52 [1st Dept 2010] ("Insofar as Arch's denial of coverage was based upon lack of coverage as an additional insured pursuant to the additional insured endorsement, a timely disclaimer was unnecessary")).

In light of the above, Fireman's Fund's remaining arguments as to whether the Traveler's Policy is primary and request for reimbursement of defense costs and disbursements incurred on behalf of Robrose and Sky are moot.

Conclusion

Based on the foregoing, it is hereby

ORDERED that the motion (sequence 001) by defendant Travelers Casualty Insurance Company of America for summary judgment dismissing the complaint and declaring that it has no duty to defend, indemnify, or otherwise cover plaintiffs, Robrose Place, L.L.C. and Sky Management Corp. in the underlying personal injury action entitled *Tsering Wangyal v. Robrose Place L.L.C., Sky Management Corp., Daffodil General Contracting Inc.* (Index No. 507954/2013) is granted; and it is further

ORDERED that the action is severed and dismissed as against defendant Travelers

Casualty Insurance Company of America; and it is further

ORDERED and DECLARED that Travelers Casualty Insurance Company of America has no duty to defend, indemnify, or otherwise cover plaintiffs, Robrose Place, L.L.C. and Sky Management Corp. in the underlying personal injury action entitled *Tsering Wangyal v. Robrose Place L.L.C., Sky Management Corp., Daffodil General Contracting Inc.* (Index No. 507954/2013); and it is further

ORDERED that the motion (sequence 002) by Robrose Place, L.L.C., Sky Management Corp. and Fireman's Fund Insurance Company for summary judgment declaring, pursuant to CPLR 3001, that Travelers Casualty Insurance Company of America is obligated to defend and indemnify Robrose and Sky in the Underlying Action, on a primary, non-contributory basis pursuant to an insurance policy issued to defendant Daffodil General Contracting Inc. and declaring, pursuant to CPLR 3001, that Travelers is obligated to reimburse Fireman's Fund for all fees incurred in defending Robrose and Sky in the Underlying Action is denied; and it is further

ORDERED that Travelers Casualty Insurance Company of America shall serve a copy of this order with notice of entry upon all parties within 20 days of entry; and it is further

ORDERED that the remaining parties shall appear for a Preliminary Conference on August 15, 2017, 2:15 p.m.; and it is further

ORDERED that the Clerk may enter judgment accordingly.

This constitutes the decision and order of the Court.

Dated: May 15, 2017

Hon. Carol Robinson Edmead, J.S.C.

HON. CAROL R. EDMEAD
J.S.C.

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