SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 8

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B Q E INDUSTRIES, INC. and CENTURY SURETY COMPANY,

Plaintiffs,

-against-

Index No. 652959/14

STARR INDEMNITY & LIABILITY COMPANY and ENDURANCE AMERICAN SPECIALTY INSURANCE COMPANY,

Motion Sequence Nos. 002 & 003

Defendants.

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LYNN R. KOTLER, J.S.C.:

Motion sequence numbers 002 and 003 are consolidated for disposition.

This is a declaratory judgment action in which plaintiffs seek defense and indemnification in a personal injury action captioned *Castilla v City of New York*, Index No. 152863/12 (Sup Ct, NY County) (hereinafter, the underlying action).

Plaintiffs BQE Industries, Inc. (BQE) and Century Surety Company (Century) move, pursuant to CPLR 3212, for summary judgment declaring that: (1) the claims against BQE in the underlying action are covered under insurance policies issued by defendants Starr Indemnity & Liability Company (Starr) and Endurance American Specialty Insurance Company (Endurance); (2) BQE is an additional insured under Endurance's policy on a primary basis; (3) BQE is an additional insured under Starr's policy on a primary basis; and (4) Endurance's and Starr's policies are primary over the policy issued by Century to BQE. Plaintiffs also seek reimbursement from Endurance and Starr for the costs and expenses incurred in defending BQE in the underlying action (motion sequence number 002).

Endurance cross-moves, pursuant to CPLR 3212, for partial summary judgment declaring

that it has no duty to defend BQE in the underlying action.

Pursuant to CPLR 3212, Starr moves for summary judgment declaring that it has no duty to defend or indemnify BQE in the underlying action (motion sequence number 003).

BACKGROUND

The Underlying Action

On November 12, 2009, BQE, as the general contractor, entered into a subcontract with Dosanjh Construction Corp. (Dosanjh) with respect to work at the Clemente Soto Velez Cultural Center located at 107 Suffolk Street (*id.*, exhibit J). The agreement provided that Dosanjh would "perform all Roofing work and shall furnish supervision, labor, materials, plant hoisting, scaffolding, tools, equipment, supplies and all other things necessary for the construction and completion of the work described . . ." (*id.*). Dosanjh's subcontract provides, under section 4, entitled "Subcontractor's Insurance," that "[p]rior to commencing the work, Subcontractor shall procure, with Contractor and Owner as additional insured parties, and thereafter maintain at it's [sic] own expenses until final acceptance of work" (*id.*). Dosanjh provided BQE with a certificate of insurance indicating that BQE was an additional insured under a commercial general liability policy issued by Endurance to Dosanjh (*id.*, exhibit K).

On January 21, 2010, BQE hired Xaren Corporation (Xaren) to perform asbestos abatement work at the premises (*id.*, exhibit L). Pursuant to Xaren's subcontract, Xaren was to "perform all work and shall furnish all supervision, labor, materials, plant hoisting, scaffolding, tools, equipment, supplies and all other things necessary for the construction and completion of the work in Exhibit A" (*id.*). Exhibit A defines the scope of work as "Asbestos and Lead abatement at Clemente Soto Velez Cultural & Education Center for the Project . . ." (*id.*). In

section 4, Xaren's subcontract states that "[p]rior to commencing the work, Subcontractor shall procure [insurance], with Contractor and Owner as additional insured parties, and thereafter maintain at it's [sic] own expenses until final acceptance of work" (*id.*). Xaren provided BQE with a certificate of insurance stating that BQE was an additional insured on a policy issued by Starr (*id.*, exhibit M).

In the underlying action, the plaintiff, William Castilla (Castilla), alleges that, on November 10, 2011, he fell during the course of demolition, construction and/or renovation work at the Clemente Soto Velez Cultural Center, as a result of a dangerous condition (Kohane affirmation in support, exhibit H, ¶¶ 75, 79). According to Castilla, defendants, including BQE, allowed him to work on the roof without scaffolds, nets, ropes or other devices, which resulted in Castilla falling to the ground (*id.*, ¶ 80). Castilla asserts claims for common-law negligence and for violations of Labor Law §§ 200, 240 (1), and 241 (6) (*id.*, ¶ 102). BQE subsequently impleaded Dosanjh and Xaren, seeking: (1) contribution, (2) common-law indemnification, (3) contractual indemnification, and (4) damages for failure to procure insurance (*id.*, exhibit I). Castilla subsequently amended the complaint to add Xaren as a defendant, seeking recovery on the same theories (*id.*, exhibit H).

The Insurance Policies

a. Endurance's Policy

Endurance issued commercial general liability coverage to Dosanjh, policy number CBC10000526900, effective from September 2, 2011 through September 2, 2012 (*id.*, exhibit W).

An endorsement to the policy provides, in relevant part, as follows:

ADDITIONAL INSURED – BLANKET (CONTRACTORS)

It is hereby agreed that:

A. The following are included as additional insureds:

Any entity required by written contract or as required in writing from a municipality as a condition of issuing a permit (hereinafter for purposes of this endorsement called 'additional insured') to be named as an insured is an insured but only with respect to liability arising out of your premises, 'your work' for the additional insured, or acts or omissions of the additional insured, in connection with their general supervision of 'your work' to the extent set forth below:

1) The limits of insurance provided on behalf of the additional insured(s) will not be greater than the limits of insurance provided in this policy.

2) Except as provided herein all insuring agreements, exclusions and conditions of this policy apply to such additional insured(s).

3) The insurance provided by us to the additional insured will not be greater than that required by contract and to the extent that such insurance is more restrictive the terms of the insuring agreements, exclusions and conditions of this policy shall be deemed to be amended accordingly.

4) In no event shall coverage or limits of Insurance in this policy be increased by such contract.

This insurance does not apply to:

a) 'Bodily injury' or 'property damage' occurring after:

1) All work on the project (other than service maintenance or repairs) to be performed by or on behalf of the additional insured(s) at the site of the covered operations has been completed . . ."

(*id.*, endorsement no. E0007 [11.10]).

b. Starr's Policy

Starr issued a commercial general liability policy, number SISIEIL70047811, with effective dates from June 25, 2011 through June 25, 2012 (*id.*, exhibit X).

An endorsement entitled "ADDITIONAL INSURED – OWNERS, LESSEES OR CONTRACTORS – AUTOMATIC STATUS WHEN REQUIRED IN CONSTRUCTION AGREEMENT WITH YOU," states that:

> "A. **Section II – Who Is An Insured** is amended to include as an additional insured any person or organization for whom you are performing operations when you and such person or organization have agreed in writing in a contract or agreement that such person or organization be added as an additional insured on your policy. Such person or organization is an additional insured only with respect to liability for 'bodily injury', 'property damage' or 'personal and advertising injury' caused, in whole or in part, by:
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> **1.** Your acts or omissions; or
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> **2.** The acts or omissions of those acting on your behalf;
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> in the performance of your ongoing operations for the additional insured.
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> A person's or organization's status as an additional insured under this endorsement ends when your operations for that additional insured are completed"

(*id.*, form CG 20 33 07 04). Another endorsement to the policy contains similar language (*id.*, form CG 20 10 07 04).

Plaintiffs' Tenders to Endurance and Starr

By letter dated January 25, 2012, Century, as BQE's insurer, tendered the defense of BQE under Endurance's policy (Roberts aff, exhibit D). The letter was sent to NYC Guardian Brokerage, enclosed a certificate of insurance, and copied Endurance (*id.*). In a letter dated March 7, 2012, E.R. Quinn Company, Endurance's third-party administrator, disclaimed coverage, because Dosanjh was off site on October 10, 2011, and because coverage was excluded

under the exterior work limitation endorsement (Kohane affirmation in support, exhibit Y). In a subsequent letter dated October 12, 2012, E.R. Quinn Company cited additional policy exclusions (*id.*, exhibit Z).

By letter dated December 21, 2011, Century tendered the defense of BQE to Xaren (Roberts aff, exhibit B). On January 25, 2012, Century sent a separate letter to Professional Risk Planners, Inc., again tendering BQE's defense (*id.*, exhibit C). In an email dated February 6, 2012, Starr acknowledged receipt of the tender, but did not otherwise respond (*id.*, exhibit AA).

PROCEDURAL HISTORY

In this action, plaintiffs assert that Endurance and Starr have wrongfully failed to defend and indemnify BQE for the claims in the underlying action (verified complaint, first, second causes of action). Plaintiffs request declarations that BQE qualifies as an additional insured under Endurance's and Starr's policies, and that such coverage is primary over Century's coverage (*id.*). Additionally, plaintiffs seek reimbursement for the costs and expenses incurred in defending BQE in the underlying action (*id.*).

DISCUSSION

"On a motion for summary judgment, the moving party must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Friends of Thayer Lake LLC v Brown*, 27 NY3d 1039, 1043 [2016]). "Once such a prima facie showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to raise material issues of fact which require a trial of the action" (*Cabrera v Rodriguez*, 72 AD3d 553, 553-554 [1st Dept 2010]). "On a motion for summary judgment, issue-finding, rather than issue-

determination, is key" (*Shapiro v Boulevard Hous. Corp.*, 70 AD3d 474, 475 [1st Dept 2010]). If there is any doubt as to the existence of a triable issue of fact, summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]).

It is 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]). The "well-understood meaning" of "additional insured" is "an entity enjoying the same protection as the named insured" (*Pecker Iron Works of N.Y. v Traveler's Ins. Co.*, 99 NY2d 391, 393 [2003] [internal quotation marks and citation omitted]).

> "[A]n insurance company's duty to defend is broader than its duty to indemnify. 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]). 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]).

In *Northville Indus. Corp. v National Union Fire Ins. Co. of Pittsburgh, Pa.* (89 NY2d 621, 634-635 [1997]), the Court of Appeals further clarified the standard for an insurer's duty to

defend an insured:

> "a court should not attempt to impose the duty to defend on an insurer through a strained, implausible reading of the complaint that is linguistically conceivable but tortured and unreasonable. Moreover, a court may look to judicial admissions in the insured's responsive pleadings in the underlying tort action or other formal submissions in the current or underlying litigation to confirm or clarify the nature of the underlying claims" (internal quotation marks and citation omitted).
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> "An insurer may obtain a declaration absolving it of its duty to defend only when a comparison of the policy and the underlying complaint on its face shows that, as a matter of law, 'there is no possible factual or legal basis on which the insurer might eventually be held to be obligated to indemnify the insured under any provision of the insurance policy'"

(*Greenwich Ins. Co. v City of New York*, 122 AD3d 470, 471 [1st Dept 2014], quoting *Servidone Constr. Corp. v Security Ins. Co. of Hartford*, 64 NY2d 419, 424 [1985]).

"While the duty to defend is measured against the possibility of a recovery, the duty to pay is determined by the actual basis for the insured's liability to a third person" (*Frontier Insulation Contrs. v Merchants Mut. Ins. Co.*, 91 NY2d 169, 178 [1997] [internal quotation marks omitted]). "[A]n insurer may be contractually bound to defend even though it may not ultimately be bound to pay, either because its insured is not factually or legally liable or because the occurrence is later proven to be outside the policy's coverage" (*Fitzpatrick*, 78 NY2d at 65).

Whether Endurance is Required to Defend and Indemnify BQE in the Underlying Action

The blanket additional insured endorsement to Endurance's policy includes as an additional insured "[a]ny entity required by written contract . . . to be named as an insured but only with respect to liability *arising out of* your premises, *'your work' for the additional insured*, or acts or omissions of the additional insured in connection with their general supervision of 'your work' . . ." (Kohane affirmation in support, exhibit W, endorsement no. E0007 [11.10]

[emphasis added]).

Plaintiffs argue that Castilla was working in the course of his employment for Dosanjh, Endurance's named insured, at the time of the accident. Plaintiffs point to Castilla's deposition testimony in the underlying action, a sign-in sheet, BQE's daily report dated November 10, 2011, accident reports, and a determination by the Workers' Compensation Board that Castilla was an employee of Dosanjh on November 10, 2011.

Endurance contends, in cross-moving for partial summary judgment declaring that it does not have a duty to defend BQE, that the allegations of the complaint in the underlying action do not trigger the blanket additional insured endorsement. Specifically, Endurance maintains that the complaint does not allege by whom Castilla was employed, and that there is no indication that Castilla's accident arose out of Dosanjh's work. In addition, according to Endurance, the extrinsic evidence relied upon by plaintiffs establishes that: (1) Castilla was an employee of BQE, not Dosanjh; (2) Castilla was performing work outside the scope of Dosanjh's contract; and (3) Dosanjh was not working at the time of the accident. Endurance asserts that it is not collaterally estopped from challenging the Workers' Compensation Board's determination, since it was not a party to that proceeding. Furthermore, Endurance contends that Dosanjh was not given a full and fair opportunity to litigate whether Dosanjh was Castilla's employer, given that Dosanjh's principal, Harmel Singh, was not given an interpreter until halfway through the proceeding.

In opposition to Endurance's cross motion, Starr argues that Castilla's accident arises out of Dosanjh's work, and that Endurance's cross motion for summary judgment is untimely.

Even though Endurance's cross motion is untimely,[1] the court may consider Endurance's cross motion, because it addresses the same issues as plaintiffs' timely motion against Endurance (*see Filannino v Triborough Bridge & Tunnel Auth.*, 34 AD3d 280, 281 [1st Dept 2006] [an untimely cross motion for summary judgment "may be considered by the court, even in the absence of good cause, where a timely motion for summary judgment was made seeking relief 'nearly identical' to that sought by the cross motion"]). Plaintiffs moved, inter alia, for a declaration that Endurance is required to defend BQE in the underlying action. Endurance cross-moved for a declaration that it is not required to defend BQE in the underlying action.

Here, it is uncontested that BQE was "required by written contract . . . to be named as an insured" (Kohane affirmation in support, exhibit W, endorsement no. E0007 [11.10]). Dosanjh's subcontract states that "[p]rior to commencing the work, Subcontractor shall procure [insurance], with Contractor [BQE] and Owner as additional insured parties" (*id.*, exhibit J).

The phrase "arising out of" has been defined to mean "originating from, incident to, or having connection with" (*Regal Constr. Corp. v National Union Fire Ins. Co. of Pittsburgh, PA*, 15 NY3d 34, 38 [2010] [internal quotation marks and citation omitted]). The phrase "arising out of" requires "only that there be some causal relationship between the injury and the risk for which coverage is provided" (*id.* [internal quotation marks and citation omitted]).

"Where . . . the loss involves an employee of the named insured, who is injured while performing the named insured's work under the subcontract, there is a sufficient connection to

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[1] A so-ordered stipulation dated November 21, 2016 directed that all motions for summary judgment were to be filed by January 27, 2017 (Grabowski affirmation in opposition, exhibit 6). However, Endurance filed its cross motion for partial summary judgment on February 27, 2017 (Endurance's notice of cross motion for partial summary judgment at 2).

trigger the additional insured 'arising out of' operations' endorsement and fault is immaterial to this determination" (*Hunter Roberts Constr. Group, LLC v Arch Ins. Co.*, 75 AD3d 404, 408 [1st Dept 2010]).

Here, the third-party complaint in the underlying action alleges that Dosanjh provided demolition, construction, renovation, remediation, and/or repair work at the premises under a contract with BQE, and that Castilla's injury was caused, in whole or in part, by the wrongful conduct of Dosanjh (Kohane affirmation in support, exhibit I, ¶¶ 7, 8, 9, 10). Considering the evidence adduced in the underlying action (*see Durant v North Country Adirondack Coop. Ins. Co.*, 24 AD3d 1165, 1166 [3d Dep 2005] ["extrinsic evidence may be used to expand the insurer's duty to defend"]), the court finds these submissions to be supportive of a duty to defend. Indeed, Castilla testified at his deposition that, on November 10, 2011, he was approached by a man who indicated that he needed helpers to cover a roof in Manhattan (Kohane affirmation in support, exhibit E [Castilla tr at 22-25, 37]). In addition, an employee sign-in sheet reflects that Castilla was on site on November 10, 2011 as an employee of Dosanjh (*id.*, exhibit F). BQE's daily report dated November 10, 2011 indicates that three Dosanjh workers were on site that day, and that Castilla, an employee of Dosanjh, was injured on the site (*id.*, exhibit Q). An accident report also states that Castilla, a roofer, was injured on November 10, 2011 (*id.*, exhibit P). Thus, there is a reasonable possibility that Dosanjh will be found wholly or partially responsible for Castilla's accident (*see City of New York v Evanston Ins. Co.*, 39 AD3d 153, 158 [2d Dept 2007]).

Even assuming that Endurance is not collaterally estopped from relitigating the issue of Castilla's employment, Endurance's reliance on a document entitled "SUBCONTRACTOR

INFORMATION ON REQUEST FOR PAYMENT" (Malpigli affirmation in support, exhibit N), and Castilla's testimony that he taped and covered windows, i.e., tasks allegedly performed by BQE employees (*id.*, exhibit I [Castilla tr at 50-52]), are insufficient to negate its duty to defend (*see Fitzpatrick*, 78 NY2d at 63). Endurance has not shown that "there is no possible factual or legal basis on which the insurer might eventually be held to be obligated to indemnify the insured under any provision of the insurance policy" (*Greenwich Ins. Co.*, 122 AD3d at 471 [internal quotation marks and citation omitted]). Accordingly, the court finds that Endurance has a duty to defend BQE in the underlying action.

Although Endurance relies on *Worth Constr. Co., Inc. v Admiral Ins. Co.* (10 NY3d 411, 414-415 [2008]), the Court of Appeals in that case held that liability did not arise out of a subcontractor's operations, where a general contractor conceded that its negligence claims against the subcontractor were without merit. The Court of Appeals, therefore, held that there was no connection between the worker's accident and the risk for which coverage was intended; "[o]nce [the general contractor] admitted that its claims of negligence against [the subcontractor] were without factual merit, it conceded that the staircase was merely the situs of the accident. Therefore, it could no longer be argued that there was any connection between [the] accident and the risk for which coverage was intended" (*id.* at 416). In this case, however, Castilla and BQE have made no such concession.

Since the claims in the underlying action are still being litigated, Endurance's duty to indemnify must await the resolution of the underlying action. As recently noted by the First Department, "[i]t is after the resolution of that action where the extent of [the insurer's] indemnification obligations can be fully determined" (*Axis Surplus Ins. Co. v GTJ Co., Inc.*, 139

AD3d 604, 605 [1st Dept 2016]). Therefore, plaintiffs' request for a declaration that Endurance is required to indemnify BQE is denied as premature.

Whether Starr is Required to Defend and Indemnify BQE in the Underlying Action

The additional insured endorsements to Starr's policy relied upon by plaintiffs afford coverage to an additional insured for "bodily injury" "caused, in whole or in part, by . . . Your acts or omissions . . . in the performance of your ongoing operations for the additional insured" (Kohane affirmation in support, exhibit X, forms CG 20 33 07 04, CG 20 10 07 04).

Plaintiffs contend that Xaren, as the asbestos contractor, stripped the roofing insulation from the main roof, which exposed the terra cotta tiles underneath, and that the following day, Castilla fell through the exposed terra cotta tiles on that roof.

Starr argues that there is no causal nexus between Xaren's abatement work and the roof's collapse, and that Xaren was not responsible for the poor condition of the roof.

In the recent case of *Burlington Ins. Co. v NYC Tr. Auth.* (29 NY3d 313, 317 [2017]), the Court of Appeals held that "where an insurance policy is restricted to liability for any bodily injury caused, in whole or in part, by the acts or omissions of the named insured, the coverage applies to injury proximately caused by the named insured" (internal quotation marks and citation omitted). In that case, the New York City Transit Authority (NYCTA) had contracted with Breaking Solutions, Inc. to provide equipment and personnel and to perform excavation work on a subway construction project (*id.*). A NYCTA employee fell off an elevated platform as he tried to avoid an explosion after a machine touched a live cable (*id.* at 318). The plaintiff Burlington Insurance Company issued a policy to Breaking Solutions, Inc. listing the NYCTA and the MTA New York City Transit as additional insureds for bodily injury "caused, in whole or

in part, by" the named insured's acts or omissions (*id.* at 317). The Court held that the language required more than "but for" causation (*id.* at 322). "That interpretation, coupled with the endorsement's application to acts or omissions that result in liability, supports our conclusion that proximate cause is required here" (*id.* at 324). The Court further held that there was no coverage, because the employee's injury was due to NYCTA's sole negligence in failing to identify, mark, or deenergize the cable (*id.* at 325).

In *BP A.C. Corp. v One Beacon Ins. Group* (8 NY3d 708, 711-712 [2007]), a subcontractor brought a declaratory judgment action seeking a declaration that its sub-subcontractor's CGL insurer had a duty to defend it in an underlying personal injury action. In concluding that the insurer had a duty to defend the subcontractor, the Court of Appeals wrote that:

> "One Beacon argues that the portion of the additional insured endorsement that states that [the subcontractor] is an additional insured only with respect to liability arising out of [the sub-subcontractor's] ongoing operations performed for that insured, requires a determination of liability for Cosentino's injury before [the subcontractor] is entitled to a defense. However, when considering this policy language in light of an insurer's broad obligation to defend an insured, it does not affect the standard under which a duty to defend is determined. *When the duty to defend is at issue, a liability alleged to arise out of [the sub-subcontractor's] ongoing operations is one 'arising out of' such operations within the meaning of the policy.*
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> "*Here, Cosentino, in his amended complaint, alleged, among other things, that [sub-subcontractor], . . . was engaged in construction work at the work site where he was injured, that [sub-subcontractor] breached its duty to keep the work site safe and that [sub-subcontractor]'s breach caused his injuries.* These allegations form a factual [and] legal basis on which [One Beacon] might eventually be held to be obligated to indemnify [the subcontractor] under any provision of the insurance policy and certainly bring this claim within the ambit of the protection purchased"

(*id.* at 715 [internal quotation marks, citations omitted, and emphasis supplied]).

In this case, the amended complaint in the underlying action alleges that Xaren performed

construction and renovation work, labor, and services at the premises (Kohane affirmation in support, exhibit H, ¶¶ 77-96). The amended complaint further alleges that "the aforesaid occurrence was due solely by reason of the carelessness, recklessness and negligence of the . . . defendants and defendants' respective agents, servants, employees" (*id.*, ¶ 102). Based upon these allegations, Starr may eventually be obligated to indemnify BQE under a provision of its policy. Starr has not established that "there is no possible factual or legal basis on which the insurer might eventually be held to be obligated to indemnify the insured under any provision of the insurance policy" (*Greenwich Ins. Co.*, 122 AD3d at 471 [internal quotation marks and citation omitted]).

While Starr relies on *Worth, supra*, the court finds this case to be distinguishable, as Xaren has not been absolved of liability in the underlying action. In addition, in *Bovis Lend Lease LMB, Inc. v Garito Contr., Inc.* (65 AD3d 872, 874 [1st Dept 2009]), the First Department held that a "jury's finding that [a subcontractor's] negligence was not a substantial factor in causing Armentano to fall is as conclusive as the admission by Worth that Pacific's activities were not a proximate cause of the underlying accident." Here, however, there has been no finding by a jury that Xaren's negligence was not a proximate cause of Castilla's injury.

With respect to Starr's duty to indemnify BQE, neither side is entitled to summary judgment at this stage. Plaintiffs argue that, as the underlying action is currently postured, there already is a finding of liability against Xaren. Plaintiffs point out that, in the underlying action, upon BQE's motion, by order dated September 30, 2015, the court (Wooten, J). struck Xaren's answer and entered a default judgment, in favor of BQE and against Xaren on the third-party claims (Kohane affirmation in opposition, exhibit D). For its part, Starr contends that there has

been no adjudication that Xaren has liability for the accident on the merits; rather, a default judgment was entered against Xaren because it refused to cooperate with its counsel.

"In New York, courts may take judicial notice of a record in the same court of either the pending matter or of some other action" (*Matter of Lane v Lane*, 68 AD3d 995, 997 [2d Dept 2009] [internal quotation marks and citation omitted]; *see also Perez v New York City Hous. Auth.*, 47 AD3d 505, 505 [1st Dept 2008]). After BQE's motion, Dosanjh moved to strike Xaren's answer and to enter a default judgment as against Xaren. On November 18, 2015, the court (Wooten, J.) struck Xaren's answer and cross claims against Dosanjh, and entered a default judgment in favor of Dosanjh on its cross claims against Xaren. Under these circumstances, the court finds that the record in the underlying action makes clear that Xaren's answer to the third-party complaint was stricken. "[A] defendant whose answer is stricken as a result of a default admits all traversable allegations in the complaint, including the basic allegation of liability, but does not admit the plaintiff's conclusion as to damages" (*Rokina Opt. Co. v Camera King*, 63 NY2d 728, 730 [1984]). By virtue of its default, Xaren admitted that if Castilla sustained any or all of the injuries and damages complained of, such injuries and damages were caused in whole or in part by the wrongful conduct of Xaren (Kohane affirmation in support, exhibit I, ¶¶ 24, 27). However, it has yet to be determined whether Castilla sustained any injuries or damages as a result of the accident. Stated otherwise, if Castilla recovers against BQE, then Starr will be obligated to indemnify BQE. Accordingly, Starr's "duty to indemnify depends on factual issues that will be resolved in the underlying action[]" (*Greenwich Ins. Co. v City of New York*, 139 AD3d 615, 616 [1st Dept 2016]).

Priority of Coverage

Plaintiffs seek a declaration that Endurance's and Starr's policies are primary over Century's policy. Endurance and Starr did not specifically oppose this request.

"Where the same risk is covered by two or more policies, each of which was sold to provide the same level of coverage (as is the case here), priority of coverage (or, alternatively, allocation of coverage) among the policies is determined by comparison of their respective 'other insurance' clauses" (*Sport Rock Intl., Inc.*, 65 AD3d at 18). It is well settled that "a primary insurer has the obligation to defend without any entitlement to contribution from an excess insurer" (*Firemen's Ins. Co. of Washington, D.C. v Federal Ins. Co.*, 233 AD2d 193, 193 [1st Dept 1996], *lv denied* 90 NY2d 803 [1997]).

The "other insurance" provision in Endurance's policy states that "[t]his policy is primary except when Paragraph **b.** below applies" (Kohane affirmation in support, exhibit W, form CG 00 01 12 07). None of the exceptions is applicable here. Century's policy states that it is excess over "[a]ny other primary insurance available to you covering liability for damages arising out of the premises or operations for which you have been added as an additional insured by attachment of an endorsement" (Roberts aff, exhibit A at 001128). Thus, Endurance's policy is primary over Century's policy.

The "other insurance" provision in Starr's policy provides that "[t]his policy is primary except when Paragraph **b.** below applies" (Kohane affirmation in support, exhibit X, form CG 00 01 12 07). None of the circumstances in paragraph b applies here. Century's policy states that it is excess over "[a]ny other primary insurance available to you covering liability for damages arising out of the premises or operations for which you have been added as an additional insured

by attachment of an endorsement" (Roberts aff, exhibit A at 001128). Therefore, Starr's policy is also primary over Century's policy.

Defense Costs Incurred in Defending BQE in the Underlying Action

Plaintiffs seek reimbursement from Starr and Endurance for amounts that Century has expended to date in the defense of BQE in the underlying action. Endurance did not specifically oppose this branch of plaintiffs' motion. For its part, Starr argues that there is no evidence that BQE ever tendered its defense directly to Starr.

Where an insurer breaches its duty to defend its insured, the insurer is liable for reasonable attorneys' fees incurred in defending the underlying action (*Urban Resource Inst. v Nationwide Mut. Ins. Co.*, 191 AD2d 261, 262 [1st Dept 1993], *lv dismissed and denied in part* 82 NY2d 704 [1993]). "[I]n the event of a breach of the insurer's duty to defend, the insured's damages are the expenses reasonably incurred by it in defending the action after the carrier's refusal to do so" (*National Union Fire Ins. Co. of Pittsburgh, PA v Greenwich Ins. Co.*, 103 AD3d 473, 474 [1st Dept 2013] [internal quotation marks and citation omitted]). Although Starr argues that plaintiffs have not shown that they ever tendered the defense directly to Starr, Starr acknowledged that it received plaintiffs' tender in an email dated February 6, 2012 (Kohane affirmation in support, exhibit AA). Accordingly, the court refers the issue of the amount of attorneys' fees incurred in the underlying action to date to a Special Referee to hear and report with recommendations (*see W & W Glass Sys., Inc. v Admiral Ins. Co.*, 2010 NY Slip Op 32120 [U], *affd* 91 AD3d 530 [1st Dept 2012] [referring the amount of defense costs incurred in underlying action to date to Special Referee to hear and report]).

CONCLUSION

Accordingly, it is

ORDERED that the motion (sequence number 002) of plaintiffs BQE Industries, Inc. and Century Surety Company for summary judgment is granted in part; and it is further

ADJUDGED and DECLARED that defendants Starr Indemnity & Liability Company and Endurance American Specialty Insurance Company are obligated to defend BQE Industries, Inc. in the underlying action *Castilla v City of New York*, Index no. 152863/12 (Sup Ct, NY County); and it is further

ADJUDGED and DECLARED that the coverage afforded by defendants Starr Indemnity & Liability Company under policy number SISIEIL70047811 and Endurance American Specialty Insurance Company under policy number CBC10000526900 to plaintiff BQE Industries, Inc. is primary to the coverage afforded by plaintiff Century Surety Company under policy number CCP 704071; and it is further

ORDERED that so much of the complaint that seeks indemnification is severed and shall continue; and it is further

ORDERED that the cross motion of defendant Endurance American Specialty Insurance Company for partial summary judgment declaring that it is not obligated to defend plaintiff BQE Industries, Inc. in the underlying action is denied; and it is further

ORDERED that the motion (sequence number 003) of defendant Starr Indemnity & Liability Company for summary judgment is denied; and it is further

ORDERED that the issue of the amount of attorneys' fees incurred by plaintiff BQE Industries, Inc. to date and for which defendants Starr Indemnity & Liability Company and

Endurance American Specialty Insurance Company are responsible is referred to a Special Referee to hear and report with recommendations, except that, in the event of and upon the filing of a stipulation of the parties, as permitted by CPLR 4317, the Special Referee, or another person designated by the parties to serve as referee, shall determine the aforesaid issue; and it is further

ORDERED that this branch of plaintiffs' motion is held in abeyance pending receipt of the report and recommendations of the Special Referee and a motion pursuant to CPLR 4403 or receipt of the determination of the Special Referee or the designated referee; and it is further

ORDERED that counsel for plaintiffs shall, within 30 days from the date of this order, serve a copy of this order with notice of entry, together with a completed Information Sheet,[2] upon the Special Referee Clerk in the Motion Support Office in Rm. 119M at 60 Centre Street, who is directed to place this matter on the calendar of the Special Referee's Part (Part 50 R) for the earliest convenient date.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby denied and this constitutes the decision and order of the court.

Dated: New York, New York
October 10, 2017

SO ORDERED:

HON. LYNN R. KOTLER, J.S.C.

10/10/17

[2]Copies are available in Rm. 119 at 60 Centre Street, and on the Court's website.