| **New York Mar. & Gen. Ins. Co. v American Empire Ins. Co.** |
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| 2018 NY Slip Op 30439(U) |
| March 13, 2018 |
| Supreme Court, New York County |
| Docket Number: 151192/2017 |
| Judge: Carol R. Edmead |
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**SUPREME COURT OF THE STATE OF NEW YORK**
**COUNTY OF NEW YORK: PART 35**

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NEW YORK MARINE AND GENERAL INSURANCE COMPANY, CAVA CONSTRUCTION & DEVELOPMENT INC., CAVA CONSTRUCTION CO., INC. and SNRP WEST 37 LLC,

Index No.: 151192/2017

Plaintiffs,

-against-

AMERICAN EMPIRE INSURANCE COMPANY and CONTINENTAL CASUALTY COMPANY,

Defendants.

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**Edmead, J.:**

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

This is an action to obtain declaratory relief with respect to the rights and obligations of the parties under an insurance policy in connection with an underlying personal injury action entitled *Armando Juarez Methuala, as Administrator of Estate of Rudolfo Vazquez-Galan, deceased and Marcela Ines Huarez Mathuala, individually v Cava Construction Company, Inc. and SNRP West 37 LLC,* index No. 151990/2016 (Sup Ct, NY County) (the Underlying Action), in which Rudolfo Vazquez-Galan (Vasquez-Galan), an employee of third-party defendant Parkside Construction Builders Corp. (Parkside), was fatally injured on September 23, 2014, when a large section of foundation wall collapsed onto him while he was performing foundation and/or excavation work at a construction site (the Premises).

In motion sequence number 001, defendant Continental Casualty Company (Continental) moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint and all cross claims against it.

In motion sequence number 002, plaintiffs New York Marine and General Insurance Company (Marine), Cava Construction & Development Inc, Cava Construction Co., Inc. (together, Cava) and SNRP West 37 LLC (SNRP) (collectively plaintiffs) move, pursuant to CPLR 3212, for partial summary judgment declaring that Cava and SNRP are additional insureds under an insurance policy issued by Continental to a third-party defendant in the underlying action, Bronzino Engineering, P.C. (Bronzino) and that, as such, Continental is obligated to defend Cava and SNRP as additional insureds in the Underlying Action.[1]

## BACKGROUND

***Background Facts to the Underlying Action***

On the day of the accident, SNRP was the owner of the Premises where the accident occurred. SNRP hired Cava to construct a hotel at the Premises.

The underlying complaint asserts claims for wrongful death, common-law negligence and violations of Labor Law §§ 200, 240 (1) and 241 (6) against Cava and SNRP for, inter alia, their failure to properly inspect the site or use sufficient underpinnings to secure the subject wall.

Specifically, the underlying complaint alleges that, at the time of the accident, Vazquez-Galan was working in an area that required its "foundations, walls, supports or utility facilities" to be properly secured so as to prevent their collapse; that such protections were missing and/or insufficient; and that, as a result, a part of a foundation wall fell and killed Vazquez-Galan (Continental's notice of motion, exhibit A, the Underlying Complaint ¶¶ 152, 154).

[1] After the commencement of this action, defendant American Empire Insurance Company, Parkside's insurer, agreed to defend Cava and SNRP in the Underlying Action under a reservation of rights.

Cava and SNRP brought a third-party action against Bronzino and Parkside, seeking common-law indemnification, contribution and breach of contract for the failure to procure insurance.

*The Cava/Bronzino Agreement*

Cava and Bronzino entered into a "consulting services agreement" (the Agreement), dated February 14, 2014, wherein Bronzino would provide "services of Consultation in connection with Support of Excavation" (plaintiffs' affirmation in opposition, exhibit E, the Agreement at 1).

Bronzino's scope of work under the Agreement entailed the following, in pertinent part:

> "Perform all necessary site inspections as required to develop a comprehensive plan package for proposed Foundation underpinning & Support of Excavation work to facilitate new building construction at the site.
>
> "Prepare design based on drawings supplied by . . . your office for subsequent filing . . .
>
> "Submit detail plan for filing at NYCDOB for Foundation Underpinning & Support of Excavation Work . . .
>
> "Sign on as NYCDOB Engineer of Record for Plans and Design listed above"

(*id.* at 7).

In addition, the Agreement states, in pertinent part, as follows:

> "[Bronzino] shall name Owner [SNRP] . . . and Contractor [Cava] as additional insureds . . . for any liability incurred as a result of [Bronzino's] work and services under this agreement"

(*id.* at 8).

*The Continental Policy*

Continental issued Bronzino, as the named insured, an insurance policy effective September 9, 2014 through September 25, 2015 (the Policy). The Policy contains a "Blanket Additional Insured – Liability Extension" (the AI Endorsement), which sets forth who is an additional insured under the Policy. The AI Endorsement states, in pertinent part, as follows:

> "2. MISCELLANEOUS ADDITIONAL INSUREDS
>
> "WHO IS AN INSURED is amended to include as an insured any person or organization . . . whom you are required to add as an additional insured on this policy under a written contract or agreement, but the written contract or agreement must be:
>
> 1. Currently in effect or becoming effective during the term of this policy; and
>
> 2. Executed prior to the 'bodily injury' . . ."
>
> "Only the following persons or organizations are additional insureds under this endorsement and coverage provided to such additional insured is limited as provided herein:
>
> a. Additional Insured – Your Work
> That person or organization for whom you do work is an additional insured solely for liability due to your negligence specifically resulting from your work for the additional insured which is the subject of the written contract or written agreement. No coverage applies to liability resulting from the sole negligence of the additional insured.
>
> The insurance provided to the additional insured is limited as follows:
>
> * * *
>
> (3) The insurance provided to the additional insured does not apply to "bodily injury" . . . arising out of the rendering or failure to render any professional services"

(plaintiffs' affirmation in opposition, exhibit J, the Policy, the AI Endorsement).

**DISCUSSION**

"[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. Failure to make such prima facie showing requires denial of the motion, regardless of the sufficiency of the opposing papers" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986] [internal citations omitted]). Once prima facie entitlement has been established, in order to defeat the motion, the opposing party must "'assemble, lay bare, and reveal his [or her] proofs in order to show his [or her] defenses are real and capable of being established on trial . . . and it is insufficient to merely set forth averments of factual or legal conclusions'" (*Genger v Genger*, 123 AD3d 445, 447 [1st Dept 2014], quoting *Schiraldi v U.S. Min. Prods.*, 194 AD2d 482, 483 [1st Dept 1993]). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]).

The party claiming insurance coverage bears the burden of proving entitlement to such coverage (*National Abatement Corp. v National Union Fire Ins. Co. of Pittsburgh, Pa.*, 33 AD3d 570, 570 [1st Dept 2006]). In addition, "the party asserting that someone other than a named insured is an insured under the policy bears the initial burden of submitting proof in evidentiary form that the alleged insured is, in fact, an insured within the meaning of the policy" (*Preferred Mutual Insurance Company v Ryan,* 175 AD2d 375, 378 [3d Dep't 1991]). There is no duty to defend when the party asserting coverage is not an insured under the policy (*Seavey v James Kendrick Trucking*, 4 AD3d 119, 119 [1st Dept 2004]). "A provision in a construction contract cannot be interpreted as requiring the procurement of additional insured coverage unless such a requirement is expressly and specifically stated (*Trapani v 10 Arial Way Assoc.*, 301 AD2d 644,

647 [2d Dept 2003]; *see also Clavin v CAP Equip. Leasing Corp.*, 156 AD3d 404, 405 [1st Dept 2017]).

Once entitlement to coverage has been established,

> "[a]n insurer's duty to defend its insured is exceedingly broad. An insurer will be called upon to provide a defense whenever the allegations of the complaint suggest . . . a reasonable possibility of coverage. If [a] complaint contains any facts or allegations which bring the claim even potentially within the protection purchased, the insurer is obligated to defend"

(*Regal Const. Corp. v National Union Fire Ins. Co. of Pittsburgh, PA*, 15 NY3d 34, 37 [2010] [internal citations and internal quotation marks omitted]).

"[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]).

> "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]).

Initially, plaintiffs seek a declaration that Cava and SNRP are additional insureds under the Policy and that, as such, Continental is obligated to defend them in the Underlying Action.

Continental moves for summary judgment dismissing the complaint and all cross claims against it on the ground that it had no duty to defend or indemnify Cava or SNRP in the Underlying Action because, pursuant to the AI Endorsement, the Policy only provides additional insured coverage "for liability due to [Bronzino's] negligence specifically resulting from [Bronzino's] work [under the Agreement]," and the underlying complaint contains no allegations

that any negligence on the part of Bronzino caused the accident (plaintiff's affirmation in opposition, exhibit J, the Policy, the AI Endorsement). In addition, the AI Endorsement states that "[t]he insurance provided to the additional insured is limited in that it . . . 'does not apply to "bodily injury" . . . arising out of the rendering or failure to render any professional services,'" and Bronzino's services at the Project were professional in nature (*id.*).

*Whether Cava and SNRP are Additional Insureds Under the Policy*

Under the AI Endorsement, "[w]ho is an insured" under the Policy includes "any person or organization . . . whom [Bronzino is] required to add as an additional insured on this policy under a written contract or agreement," provided that the written contract or agreement was (1) currently in effect and (2) executed prior to the injury (*id*).

Here, the Agreement is a writing that required Bronzino to name Cava and SNRP as additional insureds. In addition, the Agreement was executed prior to the date of the accident and was in still in effect at the time of Vazquez-Galan's accident. Therefore, Cava and SNRP are entitled to additional insured status under the Policy.

*Whether Cava and SNRP are Entitled to Additional Insured Coverage Under the Policy*

However, as noted previously, additional insured coverage is limited under the AI Endorsement to "negligence resulting from [Bronzino's] work for the additional insured which is the subject of the written contract or written agreement" (*id.*).

While Continental argues that Cava and SNRP are not entitled to additional insured coverage because the underlying complaint does not allege any negligence as against Bronzino, "where the pleadings do not allege a covered occurrence but the insurer has actual knowledge of facts demonstrating that the lawsuit does involve such an occurrence[,] . . . the insurer cannot use

a third party's pleadings as a shield to avoid its contractual duty to defend its insured" (*Fitzpatrick v American Honda Motor Co.*, 78 NY2d 61, 63 [1991]).

Here, plaintiffs argue, and it is not disputed, that Bronzino's design work and plans included the use of underpinnings and other devices to support the foundation work at the Premises. Therefore, as the accident was allegedly caused when the subject wall collapsed due to insufficient underpinning and support, at least a question of fact exists as to whether the accident was due to Bronzino's negligence.

In any event, importantly, in their affirmation in opposition, plaintiffs explicitly concede that "Bronzino's consulting work at the [Project] constituted 'professional services'" (plaintiffs' affirmation in opposition, ¶30). As set forth previously, "[t]he insurance provided to the additional insured does not apply to "bodily injury" . . . arising out of the rendering or failure to render any professional services" (plaintiffs' affirmation in opposition, exhibit J, the AI Endorsement). Accordingly, due to this limitation, Continental does not owe additional insured coverage to Cava and SNRP, and therefore, Continental does not have a duty to defend them in the Underlying Action.

*The Timeliness of the Disclaimer*

Nevertheless, plaintiffs argue that Continental cannot rely on the aforementioned limitation to coverage as set forth in the AI Endorsement, because Continental waited over one year before disclaiming coverage, in violation of Insurance Law § 3420 (d).

Insurance Law § 3420 (d) (2) provides, as follows:

> "If under a liability policy issued or delivered in this state, an insurer shall disclaim liability or deny coverage for death or bodily injury arising out of a motor vehicle accident or any other type of accident occurring within this state, it shall give written notice as soon as is reasonably possible of such disclaimer of liability or

> denial of coverage to the insured and the injured person or any other claimant."

"The timeliness of an insurer's disclaimer is measured from the point in time when the insurer first learns of the grounds for disclaimer of liability or denial of coverage. When the basis for denying coverage was or should have been readily apparent before the onset of the delay [of disclaimer], the insurer's explanation is insufficient as a matter of law" (*Matter of New York Cent. Mut. Fire Ins. Co. v. Aguirre,* 7 NY3d 772, 774 [2006] [internal quotation marks and citations omitted]; *Ace Packing Co. Inc. v Campbell Solberg Assoc., Inc.* 41 AD3d 12, 14 [1st Dept 2007]).

*Additional Facts Relevant To This Issue*

*Marine's November 4, 2014 Tender Letter*

In a tender letter, dated November 4, 2014 (the Tender Letter), Marine requested that Continental defend and indemnify Cava and SNRP as additional insureds under the Policy. Marine also provided Continental with notice of Vazquez-Galan's accident, as follows:

> "On or about September 23, 2014, while Mr. Galan was in the course of his employment for [Parkside] and performing work at the [Premises], an incident occurred that resulted in the passing of Mr. Galan"

(plaintiffs' affirmation in opposition, exhibit F, the Tender Letter). Marine also annexed a copy of the Agreement to the Tender Letter.

*Continental's December 2, 2014 Letter*

By letter dated December 2, 2014 (the Response), Continental acknowledged receipt of the November 4, 2014 tender letter, and responded as follows:

> "Please be advised that at this time, I am unable to determine whether acceptance of the tender is appropriate because no claim has been presented. If a claim is made or lawsuit commenced

> against your insured please forward all relevant documents and your tender demand will be evaluated at that time"

(plaintiffs' affirmation in opposition, exhibit G, the Response). The Response also advised Marine that "the insurance provided to the additional insured does not apply to 'bodily injury' . . . arising out of the rendering of or failure to render professional services" (*id.*).

*Marine's March 14, 2016 Email*

By email, dated March 14, 2016 (the Email), Marine forwarded to Continental a copy of the Tender Letter along with a copy of the complaint in the Underlying Action (plaintiffs' affirmation in opposition, exhibit H, the Email). The Email again tendered the subject claim to Continental.

*Continental's Disclaimer*

By letter dated March 15, 2016, one day after receiving the Email, Continental disclaimed coverage for Cava and SNRP "[b]ased upon the facts as alleged in the complaint . . . on the basis that this loss did not arise out of [Bronzino's] work under the contract" (the Disclaimer) (plaintiffs' affirmation in opposition, exhibit I, the Disclaimer at 2). Continental also disclaimed coverage pursuant to the AI Endorsement, stating that "there is no additional insured coverage available under the [Policy] because the agreement between [Cava] and [Bronzino] is for professional services which are specifically excluded under the policy" (*id.*).

Here, plaintiffs are not entitled to additional insured coverage based upon the untimeliness of Continental's disclaimer. Subsequent to Continental's request for additional information, Marine did not respond and provide such information until over one year later. Once Continental received Marine's response, it disclaimed coverage one day later. Accordingly, plaintiffs are not entitled to additional insured coverage on this ground.

Thus, as plaintiffs are not owed additional insured coverage under the Policy, Continental is entitled to summary judgment dismissing the complaint against it, and plaintiffs are not entitled to a declaration that, as additional insureds, Cava and SNRP are entitled to defense from Continental in the Underlying Action.

*The Cross Claims Against Continental*

While Continental moves for summary judgment dismissing any and all cross claims asserted against it, Continental does not identify such cross claims, or make any argument in support of their dismissal.

Thus, Continental is not entitled to summary judgment dismissing the cross claims asserted against it.

The court has reviewed the remaining contentions of the parties and finds them to be unavailing.

**CONCLUSION AND ORDER**

For the foregoing reasons, it is hereby

**ORDERED** that the part of defendant Continental Casualty Company's (Continental) motion (motion sequence number 001), pursuant to CPLR 3212, for summary judgment dismissing the complaint against it is granted, and the complaint is dismissed as against Continental with costs and disbursements as taxed by the Clerk of the Court upon the submission of an appropriate bill of costs, and the motion is otherwise denied; and it is further

**ORDERED** that plaintiffs New York Marine and General Insurance Company (Marine), Cava Construction & Development Inc., Cava Construction Co., Inc. (together, Cava), and SNRP West 37 LLC's (SNRP) motion (motion sequence number 002), pursuant to CPLR 3212, for summary judgment seeking a declaration that Cava and SNRP are entitled to a defense from

Continental as additional insureds in the underlying action of *Armando Juarez Methuala, as Administrator of Estate of Rudolfo Vazquez-Galan, deceased and Marcela Ines Huarez Mathuala, individually v Cava Construction Company, Inc., et. al.,* index No. 151990/2016 (Sup Ct, NY County) (the Underlying Action), is denied; and it is further

**ADJUDGED and DECLARED** that Continental is not obligated to provide a defense to, and to provide coverage for Cava and SNRP in the Underlying Action; and it is further

**ORDERED** that counsel for defendant Continental Casualty Company shall serve, on all parties, a copy of this order with notice of entry within 20 days of entry.

Dated: 3/13/18

ENTER:

Carol Robinson Edmead, J.S.C.

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