SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10

----------X

BREEZE NATIONAL, INC.

Plaintiff,

-against-

Index № 652611/2016
Motion Seq. 001

CENTURY SURETY COMPANY and ACT ABATEMENT CORPORATION,

Defendants.

----------X

GEORGE J. SILVER, J.S.C.:

The following papers were considered in the review of this motion (*see* CPLR § 2219[a]):

Papers (Plaintiff's motion for summary judgment)	Numbered
Notice of motion	1
Affirmation in support	2
Notice of cross-motion	3
Opposition and support of cross-motion	4, 5
Affirmation in opposition to cross-motion	6
Affirmation in reply	7

BACKGROUND

On February 5, 2010, Jozef Wilk ("decedent") was working in the course of his employment for plaintiff Breeze National, Inc. ("plaintiff") when he fell approximately 15-to-20 feet from an exterior scaffold through a third floor window in the elevator shaft of a building located at 3229 Broadway, New York. At the time of the incident, the property, known as Manhattanville, was owned by Columbia University. Columbia University had retained Bovis Lend Lease, LMB, Inc. ("Bovis") as the project's construction manager and/or general contractor. Bovis then retained plaintiff to perform demolition, and plaintiff subcontracted the asbestos abatement work to defendant Century Surety Company's ("Century") named insured, defendant ACT Abatement Corporation ("ACT"). Century issued a policy of general liability insurance, No: CCP620387, to ACT. The policy's effective dates are August 29, 2009 to August 29, 2010, which encompass the date of the Wilk accident. The policy contains additional insured endorsement No.: ENV 1912 0108 which expressly provides that the additional insured coverage applies to plaintiff for ACT's asbestos abatement work at Columbia University's Manhattanville project at Building #5. The additional insured endorsement provides coverage to plaintiff with respect to liability for bodily injury, caused in whole or part, by the acts or omissions of Century's insured, ACT, in the performance of ACT's

ongoing operations at the Columbia University project site. This endorsement also provides additional insured coverage to
plaintiff on a primary and non-contributory basis.

Following the incident, on or about May 3, 2010, Janina Wilk, as Administrator of the Estate of decedent, and Janina Wilk, individually ("the Estate"), commenced the underlying action (Index. No. 105784/2010) naming Columbia University, the Trustees of Columbia University in the City of New York (collectively "Columbia") and Bovis as defendants. The complaint alleged violations of New York Labor Law §§ 200, 240(1) and 241(6) along with claims of common law negligence and loss of consortium. Thereafter, on or about December 9, 2010, Columbia and Bovis commenced a Third-Party action against ACT. ACT then commenced a Second Third-Party action against Total Safety Consulting, LLC, the entity responsible for safety oversight. A Third Third-Party action was then commenced by Total Safety against plaintiff, and a Fourth Third-Party action by ACT against plaintiff.

Thereafter, motions were filed in the underlying action. By Decision/Order dated December 21, 2015, I granted the Estate summary judgment on the Labor Law § 240(1) claim against Columbia and Bovis. In addition, and in relevant part, the statutory claims (i.e., Labor Law §§ 240(1), 241(6) and 200) against ACT were dismissed as it was determined that ACT did not exercise the requisite supervisory control over decedent's work or the area where it occurred, to be deemed a statutory agent under the labor law.

With regard to the claim seeking contractual indemnification from ACT, I found that ACT, as part of its asbestos abatement subcontract with plaintiff, removed the elevator shaft window that decedent fell through. It was undisputed that, at the time of the incident, the decedent had been instructed by plaintiff to install guards on the non-elevator shaft windows ACT had previously removed. The court then reasoned that ACT's work came within the parameters of the broadly worked contractual indemnification agreement, and summary judgment was granted in favor of Columbia, as owner, on its contractual indemnification claim. Bovis was denied such relief on the grounds that the indemnity provision only extended to "Owner and/or Managing Agent," and it was neither. Moreover, Columbia and Bovis' cross-claim for common indemnification and contribution against ACT was dismissed as "ACT did not have authority to control decedent's injury producing work." Thereafter, Columbia and Bovis moved pursuant to CPLR § 221 for leave to reargue, and upon reargument for an Order granting, among other things, Bovis' motion for summary judgment as to its contractual claim against ACT. ACT opposed the motion, and likewise moved for leave to reargue and upon reargument an order denying Columbia contractual indemnification from ACT, and granting ACT summary judgment dismissing all claims against it by Columbia, Bovis and plaintiff.

By Decision/Order dated September 26, 2016, I granted reargument, and upon reargument, all claims against ACT were dismissed. In doing so, I noted as follows: "In its prior order the court

granted plaintiff summary judgment on her Labor Law § 240[1] claim because plaintiff established prima facie that the safety devices provided to decedent, i.e., the scaffold and lanyard were insufficient to protect decedent from an elevation related hazard. No party argues that the court misapprehended the law and/or the facts in reaching that determination. The scaffold from which decedent fell was not supplied or erected by ACT…ACT did not provide decedent with the harness and lanyard. Rather, the scope ACT's work was expressly limited in the subcontract to the removal and disposal of asbestos containing material."

I further noted that while the words "arising out of" are broadly construed, the scaffold and other safety devices provided to the decedent were not with the ambit of ACT's work. Columbia and Bovis appealed to the Appellate Division, First Department.

On appeal, by Decision and Order dated May 16, 2017, the First Department reversed, in part, finding:

> Columbia and Bovis are entitled to summary judgment on their contractual indemnification claim against ACT, based on paragraph seven of ACT's contract with Breeze, which provides for indemnification for claims arising out of ACT's work even if ACT is not negligent (*Brown v. Two Exch. Plaza Partners*, 76 NY2d 172, 178 [1990]; *see Keena v. Gucci Shops*, 300 AD2d 82, 82 [1st Dept 2002]). The accident arose out of ACT's work, since ACT removed the window through which decedent fell (*see Murphy v. Columbia Univ.*, 4 A.D.3d 200, 203, 773 N.Y.S.2d 10 [1st Dept 2004]; *see also Urbina v. 26 Ct. St. Assoc., LLC*, 46 A.D.3d 268, 274, 847 N.Y.S.2d 67 [1st Dept 2007]). Given the foregoing, we need not reach Columbia and Bovis's claims against ACT for common-law indemnification and contribution (*see McGurk v. Turner Constr. Co.*, 127 A.D.2d 526, 530 [1987]). In any event, the motion court correctly dismissed those claims (*see Martinez v. 342 Prop. LLC*, 89 A.D.3d 468, 469, 932 N.Y.S.2d 454 [1st Dept 2011]).

INSTANT MOTION

Plaintiff argues that in light of the First Department's finding that plaintiff's accident arose out of ACT's work, the additional coverage under the Century policy is triggered in plaintiff's favor. As such, plaintiff seeks an order, pursuant to CPLR §§ 3001 and 3212, declaring that Century is obligated to provide insurance coverage under policy No.: CCP620387 to plaintiff with regard to the claims asserted in the underlying action as a matter of law.

In support of its motion, plaintiff cites *National Union Fire Ins. Co. of Pittsburgh, PA v. Greenwich Insurance Company*, 103 AD3d 473 (1st Dept. 2013), a case in which the First

Department considered an additional insured endorsement identical in wording to the provision in the Century policy. In *National Union*, plaintiff contends, the additional insured endorsement in the Greenwich Insurance policy applied to bodily injury caused, in whole or in part, by Greenwich's insured's acts or omissions or the acts or omissions of those acting on the insured's behalf in the performance of the insured's ongoing operations for the additional insured. Plaintiff highlights that in construing the reach of the Greenwich Insurance policy, the First Department held that the phrase "caused by" does not materially differ from the .. phrase, "arising out of" (*citing W & W Glass Sys., Inc. v. Admiral Ins. Co.*, 91 AD3d 530 [1st Dept. 2012]). The court further held that the phrase "'arising out of' focuses not on the precise cause of the accident but the general nature of the operation in the course of which the injury was sustained." Accordingly, the First Department held that the condition set forth in the additional insured endorsement was satisfied, and summary judgment should have been granted in plaintiffs' favor. As such, here plaintiff contends that the phrase "acts or omissions" should be afforded the same meaning as "arising out of." Moreover, plaintiff argues that the First Department has already determined that decedent's accident in the underlying case arose out of ACT's work since ACT removed the window that decedent fell through . Plaintiff contends that this finding entitles plaintiff to additional insured coverage under the Century policy. Plaintiff further avers that Century is obligated to reimburse plaintiff for those attorney's fees and expenses incurred in defending the underlying action.

In opposition, Century argues that decedent's employer does not qualify as an additional insured under the terms of the Century policy issued to ACT relative to the underlying action, as the underlying incident was not "caused, in whole or in part, by" ACT's "acts or omissions" in the performance of its ongoing operations for plaintiff. Rather, pursuant to the Court of Appeals' decision in *Burlington Ins. Co. v. NYC Transit Authority*, 29 NY3d 313 (2017), Century contends that the coverage at issue applies only to injury proximately caused by the named insured's work. Since ACT was not negligent, Century avers that ACT's actions were not a proximate cause of decedent's death. It therefore follows, in Century's estimation, that since the loss at issue in this case was not "caused, in whole or in part, by" ACT's "acts or omissions," the additional insured endorsement is not triggered. As such, Century proclaims that it is under no obligation to defend or indemnify plaintiff in the underlying action, and is therefore entitled to judgment in its favor.[1]

DISCUSSION

Resolution of the central issues upon which the disputes in this case are premised requires reference to the language of the indemnity agreement contained in the subcontract at ¶ seven (7) between ACT and plaintiff. Indeed, the First Department made reference to the provision when it determined that ACT was obligated to indemnify the property owner, Columbia, and its construction

[1]Century has cross-moved for summary judgment seeking a declaration that it is under no obligation to defend or indemnify plaintiff under its policy of insurance issued to ACT.

manager, Bovis. That provision reads as follows:

> The Vendor/Contractor will furnish all labor, equipment, materials, tools, scaffolding, rigging, hoisting, etc., required to carry on the work in the best and most expeditious manner and to protect its and other work, and will do all necessary cutting and patching and also remove and replace any interfering work for the proper installation of its work Vendor/Contractor agrees to perform work in a safe and proper manner and further agrees to indemnify, defend and hold harmless the Purchaser, the Owner of the job, and each of their shareholders, directors, officers, partners, members, employees, agents, subsidiaries and divisions (and each of their heirs, successors and assigns) from any claims, losses, costs and damages, including but not limited to judgments, attorney's fees, court costs and costs of appellate proceedings, which the Purchaser or Owner incurs because of injury to, or sickness, illness or death of any person (including but not limited to any employee of the Vendor/Contractor or any employees of any of its subcontractors), or on account of damage to property, including loss thereof, and any other claim arising out of or in connection with or as a consequence of the performance or nonperformance of the Vendor/Contractor's work. This indemnification is limited only to the extent that the NY General Obligations Law is applicable, in that this provision does not require indemnification of the Vendor's own negligence.

Reference to this provision illustrates that ACT is obligated to indemnify plaintiff for claims arising out of ACT's work even if ACT was not negligent. That interpretation is supported by the First Department's findings, since the First Department found that ACT was obligated to indemnify Columbia and Bovis based on ACT's mere removal of the window through which decedent fell. Century's entire cross-motion in opposition to plaintiff's motion is based upon its interpretation of *Burlington*. Century essentially argues that the plaintiff is not entitled to additional insured coverage under its insurance policy because ACT was not found negligent in the underlying matter.

Century's argument that the additional insured endorsement does not provide coverage to plaintiff because its named insured ACT was not found negligent in the underlying case is misplaced. To be sure, the additional insured endorsement in the Century policy is not triggered by the named insured's negligence but rather by a finding that the loss was due to ACT's acts or omissions, which the Court of Appeals has interpreted to mean proximate cause of the accident. Here, the First Department has already found that "The accident arose out of ACT's work since ACT removed the window through which decedent fell." As such, it is axiomatic that ACT's removal of the window was the proximate cause of the accident without the need to reach the question of whether or not

ACT was negligent. As such, the additional insured endorsement in the Century policy is triggered, and plaintiff is entitled to a defense and indemnification under that policy as a matter of law.

The *Burlington* case is not analogous to the facts of this case, and does not alter this court's determination. Indeed, unlike the facts in *Burlington*, here there has been no finding that plaintiff was solely responsible, or even partially responsible, for the accident.

Accordingly, it is hereby

ORDERED that plaintiff's motion for an order declaring that Century is obligated to provide insurance coverage under policy No.: CCP620387 to plaintiff with regard to the claims asserted in the underlying action, is GRANTED; and it is further

ORDERED that Century's cross-motion for summary judgment seeking a declaration that it is under no obligation to defend or indemnify plaintiff under its policy of insurance issued to ACT, is denied; and it is further

ORDERED that plaintiff's additional request for attorney's fees is denied; and it further

ORDERED that the clerk is directed to enter judgment in favor of plaintiff.

This constitutes the decision and order of the court.

Dated: March 27, 2018

ENTER:

George J. Silver

GEORGE J. SILVER