Aspen Specialty Ins. Co. v Zurich Am. Ins. Co.
2018 NY Slip Op 32328(U)
September 18, 2018
Supreme Court, New York County
Docket Number: 653950/12
Judge: Shlomo S. Hagler
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 17

---X

ASPEN SPECIALTY INSURANCE COMPANY,

Plaintiff,

-against-

Index № 653950/12

ZURICH AMERICAN INSURANCE COMPANY and AMERICAN GUARANTEE & LIABILITY INSURANCE COMPANY,

Motion Sequence No. 005

Defendants.

---X

D7 CONSTRUCTION 101, LLC, 101 AVENUE D ASSOCIATES, LLC and 101 AFFORDABLE, LLC,

Third-Party Plaintiffs,

-against-

Third-Party №
Index No. 590527/13

ASPEN SPECIALTY INSURANCE COMPANY, ZURICH AMERICAN INSURANCE COMPANY and AMERICAN GUARANTEE & LIABILITY INSURANCE COMPANY,

DECISION/ORDER

Third-Party Defendants.

---X

HON. SHLOMO S. HAGLER, J.S.C.:

In this insurance coverage dispute, third-party plaintiffs D7 Construction 101, LLC ("D7"), 101 Avenue D Associates, LLC and 101 Affordable, LLC (together, "Owners") move to renew their prior motion for summary judgment. Upon renewal, third-party plaintiffs seek a declaration that defendant/third-party defendant Zurich American Insurance Company ("Zurich") is obligated to defend a stop work order issued by the New York City Department of Buildings ("DOB").

BACKGROUND

The relevant facts are set forth in detail in the Court's March 17, 2015 decision and order (hereinafter, the "Prior Decision"), and will be repeated only to the extent necessary to this decision. Owners, along with nonparty Lower East Side Girls Club, were the owner of the premises located at 101 Avenue D in Manhattan. On July 2, 2010, D7, as construction manager, entered into a subcontract with nonparty Coastal Drilling East ("Coastal") to perform excavation work on the premises. Pursuant to the terms of the subcontract, Coastal was required to procure insurance naming D7 and Owners as additional insureds with respect to its excavation work on the project.

On or about August 11, 2010, D7 and Owners noticed cracking in an exterior wall of a building located on the adjacent property located at 283 East 7th Street. The adjacent property was owned by nonparty Seven D, LLC ("Seven D"). D7 and Owners believed that the damage was caused by the construction work performed by Coastal. According to third-party plaintiffs, the cracking was reported to the DOB, as required.

On the same day, the DOB inspected the site and issued a stop work order, a notice of violation, and a partial stop work rescind order. Third-party plaintiffs also allege that the DOB ordered D7 and Owners to remediate the problem and prevent further damage from occurring.

On January 28, 2011, Owners and Seven D entered into an indemnification agreement, pursuant to which Owners agreed to prepare and implement a plan to protect, restore and repair Seven D's property.

By letters dated August 25, 2010 and September 23, 2010, plaintiff Aspen Specialty Insurance Company notified Zurich of an occurrence and tendered the defense on behalf of third-

party plaintiffs. However, Zurich has not acknowledged that it has a duty to defend or indemnify third-party plaintiffs with respect to the occurrence.

It is undisputed that Coastal was a named insured under a commercial general liability policy issued by Zurich to named insured nonparty Shaft Drillers International (Smith affirmation in opposition, Exhibit "B"). The policy period was from November 1, 2009 through November 1, 2010 (*id.*). Zurich's policy provides as follows:

> "**SECTION I - COVERAGES**
>
> **COVERAGE A BODILY INJURY AND PROPERTY DAMAGE LIABILITY**
>
> **1. Insuring Agreement**
>
> **a.** We will pay those sums that the insured becomes legally obligated to pay as damages because of 'bodily injury' or 'property damage' to which this insurance applies. We will have the right and duty to defend the insured against any 'suit' seeking those damages. However, we will have no duty to defend the insured against any 'suit' seeking damages for 'bodily injury' or 'property damage' to which this insurance does not apply. We may, at our discretion, investigate any 'occurrence' and settle any claim or 'suit' that may result"

(*id.*, form CG 001 01 12 07).

Zurich's policy contains an endorsement entitled "Additional Insured – Automatic - Owners, Lessees Or Contractors," which provides as follows:

> "**A.** **Section II - Who is An Insured** is amended to include as an insured any person or organization who you are required to add as an additional insured on this policy under a written contract or written agreement.
>
> **B.** The insurance provided to the additional insured person or organization applies only to 'bodily injury,' 'property damage' . . . covered under **SECTION I - Coverage A - Bodily Injury and Property Damage Liability** . . . caused, in whole or in part, by:

1. Your acts or omissions; or

2. The acts or omissions of those acting on your behalf; and resulting therefrom:

a. Your ongoing operations performed for the additional insured, which is the subject of the written contract or written agreement; or

b. 'Your work' completed as included in the products-completed operations hazard, performed for the additional insured, which is the subject of the written contract or agreement"

(*id.*, form U-GL-1175-B-CW [3/2007]).

"Property damage" is defined as follows:

"a. Physical injury to tangible property, including all resulting loss of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it; or

b. Loss of use of tangible property that is not physically injured. All such loss of use shall be deemed to occur at the time of the 'occurrence' that caused it"

(*id.*, form CG 00 01 12 07).

In addition, a "suit" is defined as the following:

"'Suit' means a civil proceeding in which damages because of 'bodily injury, 'property damage' or 'personal and advertising injury' to which this insurance applies are alleged. Suit includes:

a. An arbitration proceeding in which such damages are claimed and to which the insured must submit or does submit with our consent; or

b. Any other alternative dispute resolution proceeding in which such damages are claimed and to which the insured submits with our consent"

(*id.*).

Third-party plaintiffs allege that they have spent in excess of $265,000.00 in attorneys' fees, and in excess of $4,000,000 in costs in responding to the DOB's order, defending themselves against various claims asserted by Seven D, and in preventing further damage to the

adjacent property.

In their third-party intervenor complaint, third-party plaintiffs assert three causes of action against Zurich, seeking recovery for: (1) breach of Zurich's duty to defend third-party plaintiffs (third-party intervenor complaint, ¶¶ 34-39); (2) breach of Zurich's duty to indemnify third-party plaintiffs (*id.*, ¶¶ 40-45); and (3) breach of the covenant of good faith and fair dealing (*id.*, ¶¶ 46-48).

Previously, third-party plaintiffs moved for summary judgment declaring that Zurich has a duty to defend the stop work order, arguing that the underlying claim is a "suit" seeking "damages" because of "property damage."

In the prior decision, the Court rejected Zurich's defenses to its duty to defend based on the "Wrap-Up Exclusion" in its policy and a limited release executed among D7, Owners, and Coastal (Breene renewal aff, exhibit A at 11). However, the Court denied third-party plaintiffs' motion for summary judgment, explaining that:

> "Unfortunately, this Court can not determine this legal issue at this time as both parties failed to attach the subject stop work order, any notices of violation, orders of remedial work or a certified copy of the DOB file applicable to this action"

(*id.* at 12-13).

Third-party plaintiffs subsequently moved to reargue and/or renew the Court's prior decision. Third-party plaintiffs argued that all stop work orders are "suits" within the meaning of the policy. Specifically, third-party plaintiffs pointed out that, pursuant to New York City Administrative Code § 28-207.2.1, "upon issuance of a stop work order by the commissioner, all work shall immediately stop." In addition, third-party plaintiffs contended that Administrative Code § 28-207.2.2 directs that "no person shall with knowledge or notice of a stop work order

allow, authorize, promote, continue or cause to be continued any work covered by the stop work order." According to third-party plaintiffs, if they violated the stop work order, they would have been subject to an action or proceeding to restrain, correct or abate the violation, or to compel compliance with the stop work order under section 28-205.1. Additionally, as argued by third-party plaintiffs, the partial stop work rescind order contained adequate evidence of adversariness to meet their burden of proof.

At oral argument on October 26, 2015, the Court requested that third-party plaintiffs obtain from the DOB its entire file related to the stop work order, and then "renew the motion without prejudice" (*id.*, exhibit B [October 26, 2015 oral argument tr at 16]).

Thereafter, third-party plaintiffs moved for issuance of a judicial subpoena duces tecum and ad testificandum: (1) to obtain from the DOB a complete copy of its entire file related to the stop work order and related violations; and (2) to produce a witness to testify regarding the "origin, purpose and custody" of the documents. The Court granted third-party plaintiffs' motion on February 8, 2016.

On April 12 and 28, 2016, the DOB produced documents in response to the subpoena duces tecum (*id.*, exhibit D).

On May 23, 2016, the DOB produced a witness, Bernard Ross ("Ross"), to testify on behalf of the DOB regarding the stop work orders and the DOB's policies and procedures with respect to the stop work order. Ross testified that he is currently a director of major projects at the DOB (*id.* at 13). At the time that the stop work order was issued, Ross was the assistant chief of the excavation unit (*id.*). Ross testified that he was involved in the issuance of the stop work order in this case, and signed the notice of violation as a supervisor (*id.* at 12-13, 47-48). Ross

testified that stop work orders are required to be affixed to a fence or a wall at a construction site (*id.* at 20). He stated that the stop work order depicted in photographs was a standard form used by the DOB "every time they issue a stop work order" (*id.* at 18-19). According to Ross, the DOB may issue partial rescissions of a stop work order to allow certain approved remedial work to be done (*id.* at 52-53). Partial rescission orders were issued to allow third-party plaintiffs to perform remedial work (Breene renewal aff, Exhibit "I"). Ross stated that "the stop work order is really the violation itself" (*id.* at 42). Ross also testified that "we [the DOB] would require a – request the contractor to do it. If he could not do it or failed to do it, we would have HPD [the New York City Department of Housing Preservation and Development] step in and do the work" (*id.* at 36). The DOB would "give the owner the option to either get it fixed, or we will fix it" (*id.* at 85).

The DOB also provided an affidavit from a document custodian, Leonid Miller ("Miller"), indicating that all responsive documents were provided to third-party plaintiffs' counsel, and that, to the best of his knowledge, there are no additional documents in the Excavation and BEST units of the DOB (Miller aff, ¶¶ 2-8).

Third-party plaintiffs now argue that the DOB's files and testimony establish beyond any doubt that the stop work order is the equivalent of a "suit," and that Zurich has a duty to defend them. Third-party plaintiffs contend that Ross confirmed that the stop work order relied upon by third-party plaintiffs in its prior motions is the stop work order issued by the DOB. In addition, third-party plaintiffs contend that the notice of violation issued simultaneously with the stop work order confirms that the stop work order is compulsory and adversarial.

In opposition, Zurich contends that the blank stop work order offered by third-party

plaintiffs is insufficient to determine the extent of the stop work order issued to D7. Zurich also maintains that it has no duty to defend the stop work order because it is not a "suit." In this regard, Zurich asserts that the stop work order is not adversarial; a stop work order informs the contractor that it may be liable for civil or criminal penalties for an incident that occurred, but does not require the contractor to remedy any existing problems. Additionally, Zurich contends that, even if the stop work order is deemed adversarial, it does not seek insured damages. As argued by Zurich, its defense obligation would arise only after the HPD threatens to repair and remediate the hazardous condition affecting the adjacent property and to hold the contractor liable for those repairs. Zurich further argues that summary judgment is premature. In particular, Zurich contends that it needs discovery regarding its liability, other insurance, and damages.

In reply, third-party plaintiffs argue that the stop work order is a "suit," and the documents that they obtained from the DOB establish the particular wording of the DOB's orders. Third-party plaintiffs assert that the record is as complete as it will ever be. DOB's orders, third-party plaintiffs argue, are coercive and adversarial. At all times, Owners were faced with the possibility of fines and penalties, the obligation to appear in court at administrative hearings, and the continued delay of the work. Further, third-party plaintiffs maintain the stop work order seeks damages because of covered "property damage," since there is no doubt that the DOB's orders were triggered by damage to third-party property, an adjacent building, and that the DOB ordered third-party plaintiffs to remediate that damage. Finally, third-party plaintiffs argue that discovery is unnecessary to establish Zurich's duty to defend.

DISCUSSION

Zurich's policy requires it to defend "any suit . . . seeking damages" (Smith affirmation in

opposition, exhibit B, form CG 00 01 12 07). Thus, the Court must determine whether the stop work order falls within the meaning of a "suit."[1]

> "[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]; *see also Frontier Insulation Contrs. v Merchants Mut. Ins. Co.*, 91 NY2d 169, 178 [1997]). "[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]). As noted by the Court of Appeals, "[t]he insured's right to representation and the insurer's correlative duty to defend suits . . . are in a sense 'litigation insurance' expressly provided by the insurance contract" (*Servidone Constr. Corp. v Security Ins. Co. of Hartford*, 64 NY2d 419, 423-424 [1985]).

> "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*,

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[1]Contrary to Zurich's contention, summary judgment on its duty to defend the stop work order is not premature. While Zurich relies upon certain documents obtained from third-party plaintiffs to establish that they may not be covered as additional insureds for certain periods of time (Smith affirmation in opposition, Exhibits "E", "F", "G"), Zurich cannot avoid its duty to defend by resorting to extrinsic evidence (*see Petr-All Petroleum Corp. v Fireman's Ins. Co. of Newark*, 188 AD2d 139, 142 [4th Dept 1993]). In addition, third-party plaintiffs have not sought a determination as to priority of coverage or sought reimbursement for attorneys' fees or costs at this juncture.

64 NY2d at 424).

"[T]he insurer's duty to defend may be triggered by an administrative agency's demand letter that 'commences a formal proceeding against [the insured], advising it that a public authority has assumed an adversarial posture toward it, and that disregard of the ... demands may result in the loss of substantial rights by [the insured]'" (*Texaco A/S [Denmark] v Commercial Ins. Co. of Newark, NJ*, 160 F3d 124, 130 [2d Cir 1998], quoting *Avondale Indus., Inc. v Travelers Indem. Co.*, 887 F2d 1200, 1206 [2d Cir 1989]).

Thus, in *Avondale*, *supra*, the insured received a letter from the Louisiana State Department of Environmental Quality ("DEQ"), which notified the insured of the DEQ's intention "to take immediate action to bring about the prompt and thorough cleanup of a hazardous waste site . . . and to recover all costs of remediation expended by the State . . . at the site" (*Avondale*, 887 F2d at 1202 [internal quotation marks omitted]). The letter ordered the insured to attend a meeting or face the institution of a suit, and made a "demand" that the insured submit a plan for remedial action at the site or pay the full costs of remedial action incurred by the State (*id.*). In determining that the administrative proceeding was a "suit," the Second Circuit Court of Appeals noted that "the demand letter commences a formal proceeding against [the insured], advising it that a public authority has assumed an adversarial posture toward it, and that disregard of the DEQ's demands may result in the loss of substantial rights by [the insured]" (*id.* at 1206). The Court emphasized that "[t]hese strike us as the hallmarks of litigation, and are sufficiently adversarial to constitute a suit under New York law and within the meaning of the policy" (*id.*).

In *Carpentier v Hanover Ins. Co.* (248 AD2d 579, 580-581 [2d Dept 1998]), a letter was

sufficiently adversarial, threatening, and specific to be the functional equivalent of "suit," where it demanded payment of a large, specified sum of money, advised that interest would begin to accrue, threatened the filing of a lien notice, and gave the insureds opportunity to be heard at a conference with the agency's counsel and to attend with an attorney.

However, in *Technicon Elecs. Corp. v American Home Assur. Co.* (141 AD2d 124, 145-146 [2d Dept 1988], *affd on other grounds* 74 NY2d 66 [1989]), the Second Department held that an insurer's duty to defend did not extend to a matter under consideration by the United States Environmental Protection Agency ("EPA"). The Court explained that:

> "The EPA letter at issue merely informed Technicon of its potential liability under CERCLA and that the EPA was interested in discussing Technicon's voluntary participation in remedial measures. The letter was an invitation to voluntary action on Technicon's part and is not the equivalent of the commencement of a formal proceeding within the meaning of the subject comprehensive general liability policies"

(*id.* at 146).

In *Ryan v Royal Ins. Co. of Am.* (916 F2d 731, 741-742 [1st Cir 1990]), a case in which an owner of a contaminated site sought insurance coverage, the First Circuit Court of Appeals held that correspondence received by the insured owner was not the functional equivalent of a "suit" sufficient to trigger the duty to defend under a CGL policy. The correspondence was "conciliatory rather than belligerent," and did not direct a cleanup of the site or seek reimbursement for cleanup costs (*id.* at 733). The Court focused on "coerciveness, adversariness, the seriousness of the effort with which the government hounds an insured, and the gravity of imminent consequences" (*id.* at 741). In other words, to qualify as a "suit,"

> "[t]he 'something more,' we suggest, must relate to the seriousness of purpose which characterizes the government's role. If government assumes an adversarial posture,

> making sufficiently clear that the force of the State will be brought promptly to bear in a way that threatens the insured with probable and imminent financial consequences, then the functional equivalent of a suit may be in progress and the insured might reasonably expect the insurer to defend"

(*id.*; *see also Borg-Warner Corp. v Insurance Co. of N. Am.*, 174 AD2d 24, 36 [3d Dept 1992], *lv denied* 80 NY2d 753 [1992] [administrative letters "are not the equivalent of suits because they seek only voluntary participation and negotiation and do not threaten litigation"]).

Here, the Court concludes that the stop work order is insufficiently "coercive" or "adversarial" to constitute the functional equivalent of a "suit." New York City Administrative Code § 28-207.2, entitled "Stop work orders," provides that:

> "Whenever the commissioner finds that any building work is being executed in violation of the provisions of this code, the 1968 building code, the zoning resolution or of any laws or rules enforced by the department, or in a dangerous or unsafe manner, the commissioner or his or her authorized representative may issue a stop work order"

(Administrative Code of City of NY § 28-207.2). In addition, Administrative Code § 28-207.2.1, "Issuance," states that "[u]pon issuance of a stop work order by the commissioner, all work shall immediately stop unless otherwise specified," and that "[s]uch order . . . may also require such work to be done as, in the opinion of the commissioner, may be necessary to remove any danger therefrom" (Administrative Code of City of NY § 28-207.2.1). Section 28-207.2.1 further provides that:

> "The stop work order may be given verbally or in writing to the owner, lessee or occupant of the property involved, or to the agent of any of them, or to the person or persons executing the work. A verbal order shall be followed promptly by a written order and shall include the reason for the issuance of the stop work order"

(*id.*). Administrative Code § 28-205.1, titled "Civil judicial enforcement," also states that:

> "The owner, lessee, person in charge, or occupant of any building, structure,

premises, equipment or part thereof, where a violation of this code, the 1968 building code, the zoning resolution or of other laws or rules enforced by the department or any order issued by the commissioner shall exist or the agent, architect, builder, contractor, engineer, or any other person who commits or assists in any such violation or who maintains any building, structure, premises, equipment or part thereof where any such violation shall exist shall be subject to an action or proceeding to restrain, correct or abate such violation, or to compel compliance with such order. Upon request of the commissioner, the corporation counsel may institute judicial actions or proceedings seeking such relief. In addition to any other remedies, in any such action or proceeding the defendant or respondent shall be subject to the payment of civil penalties as provided in this code"

(Administrative Code of City of NY § 28-205.1).

In this case, Ross testified that a stop work order is "an order by the Buildings Department to stop all work at the site, unless otherwise noted on the stop work order" (Ross tr at 18). He stated that the stop work orders are always pasted on a fence or wall at the site (*id.* at 20). After reviewing a photograph of the stop work order posted on the premises, Ross stated that it was a full stop work order (*id.* at 18). According to Ross, the verbiage on a blank form was the same as that depicted in the photograph (*id.* at 20, 31; Breene renewal aff, Exhibit "G"). The blank form states that "you are hereby ordered to immediately stop all work at the above premises . . . FAILURE TO COMPLY WITH THIS STOP WORK ORDER MAY RESULT IN CRIMINAL CHARGES BEING FILED AGAINST YOU" (Breene renewal aff, Exhibit "G"). Significantly, Ross stated that "the stop work order is really the violation itself," and that "the violation is in itself [] the stop work order" (*id.* at 42).

The notice of violation issued in this case states that the "Violating Conditions Observed" included "failure to adequately support adjoining ground and/or structures during pile driving operations" and noted that there was "[e]xtensive thru-cracking observed running vertically on side and rear walls of 2-story extension of adjoining" building (Breene renewal aff, Exhibit "H").

Under the heading "Remedy," the notice of violation states "stop all work forthwith," "reevaluate means and methods of installation so as to prevent damage to all property and structures," and "submit all plans and monitoring reports to SEPEX for eng'g revision" (*id.*). The notice of violation indicates that it is designated a "hazardous," "class 1" violation, requiring an appearance before the New York City Environmental Control Board to determine the amount of civil fines and penalties (*id.*). The purpose of the hearing was to determine the amount of any fines for violations, not to determine whether the stop work order should be lifted (Ross tr at 62).

Notably, third-party plaintiffs were not directed to perform remediation work. Third-party plaintiffs were not advised that they were facing a lawsuit or imminent financial consequences for failure to comply (*compare Kirchner v Fireman's Fund Ins. Co.*, 1991 WL 177251, *5, 1991 US Dist LEXIS 12244 [SD NY 1991] [insurer was required to defend letter that required insured to conduct an investigation and warned that failure to comply would result in legal action seeking reimbursement for funds expended and penalties]). Third-party plaintiffs point out that the DOB directed that they take affirmative measures to "reevaluate means and methods of installation so as to prevent damage to adj. property and structures," and to "submit all plans and monitoring reports" for review (Breene renewal aff, Exhibit "H"). However, in *Ryan*, the Court found language in letters requesting that the insured submit plans for approval to be insufficiently adversarial (*Ryan*, 916 F3d at 742).

Rather, the evidence indicates that the stop work order at issue was more like "an invitation to voluntary action" (*Technicon*, 141 AD3d at 146). Indeed, Ross testified that "we [the DOB] would require a – *request* the contractor to do it. If he could not do it or failed to do it, we would have HPD step in and do the work" (Ross tr at 36 [emphasis supplied]). The DOB

would "give the owner the *option* to either get it fixed, or we will fix it" (*id.* at 85 [emphasis added]). In the latter case, the DOB would seek to hold the owner financially responsible for the work (*id.* at 40). The HPD would place liens on the property to insure payment, and would go to court to seek an order of payment (*id.* at 87-88).[2] Ross also testified that the purpose of a partial stop work rescind order was to "allow the site to do some work at the site after a stop work order is issued" (*id.* at 59). When a partial stop work rescind order is issued, the original stop work order is still in effect; "[i]t gives you an allowance under the stop work order" (*id.* at 60-61). There is no evidence that the HPD ever threatened third-party plaintiffs with litigation in this case. "But the mere possibility of future litigation, indefinite and unfocused, cannot trigger the duty to defend under a CGL policy" (*Ryan*, 916 F3d at 743).

Although third-party plaintiffs rely on *Castle Vil. Owners Corp. v Greater N.Y. Mut. Ins. Co.* (64 AD3d 44 [1st Dept 2009]), the Court finds this case to be distinguishable. In that case, the First Department held that an exclusion in an umbrella policy was applicable where the City issued an emergency declaration requiring that remediation work be performed so that no further damage would occur (*id.* at 45). There, the City sent a letter to an insured cooperative corporation directing it to repair or demolish an unsafe section of a retaining wall (*id.* at 46). The letter stated that "[t]he responsibility to take such action is yours and, because of the severity of the condition, the work must begin immediately . . . If you fail to do so, the City will perform the necessary work and seek to recover its expenses from you" (*id.* [internal quotation marks

[2]Administrative Code § 27-2143 states that "[the HPD] may bring an action against the owner of a dwelling for the recovery of any costs, expenses and disbursements incurred by it under any provision of the administrative code making such expenses a debt recoverable from the owner" (Administrative Code of City of NY § 27-2143).

omitted]). In discussing a trial court decision cited by the cooperative, the First Department wrote that:

> "we do not agree with the court's rationale that the test as to whether the exclusion should be avoided is whether a legal directive had been issued. The answer to that question is only helpful in ascertaining whether coverage is triggered. *If coverage were the only issue, and there were no 'owned property' exclusion, Castle Village's damages, including its obligation to repair the wall, would have been covered.*
>
> The issue is not coverage, but, rather the applicability of the exclusion. In determining whether the exclusion applies, the question becomes not whether the City ordered Castle Village to repair its own wall, but, rather, whether repair of the wall was necessary to stop ongoing and imminent damage to property belonging to another, such as in those cases where the threat of oil pollution was continuing"

(*id.* at 50 [emphasis added]). The issue in this case is coverage, not whether an exclusion applies. Moreover, in this case, the DOB did not direct D7 or Owners to make any immediate repairs in writing or threaten to hold D7 or Owners financially responsible or take other action if they failed to do so.

Consequently, Zurich is not obligated to defend the stop work order issued to third-party plaintiffs.

Since third-party plaintiffs are not entitled to the declaration sought, the Court must declare the rights and obligations of the parties, instead of dismissing the first cause of action in the third-party intervenor complaint (*see Lanza v Wagner*, 11 NY2d 317, 334 [1962], *cert denied* 371 US 901 [1962]). "Where, as here, a decision is rendered on the merits, the court should issue a declaration" (*Port Parties, Ltd. v Merchandise Mart Props., Inc.*, 102 AD3d 539, 541 [1st Dept 2013]). Therefore, the Court shall issue a declaration that Zurich is not required to defend the stop work order issued by the DOB on August 11, 2010.

CONCLUSION

Accordingly, it is

ORDERED that the motion (sequence number 005) of third-party plaintiffs D7 Construction 101, LLC, 101 Avenue D Associates, LLC, and 101 Affordable, LLC to renew their motion for summary judgment is denied; and it is further

ADJUDGED and DECLARED that defendant/third-party defendant Zurich American Insurance Company is not obligated to defend the stop work order issued by the New York City Department of Buildings on August 11, 2010; and it is further

ORDERED that the balance of the action is severed and continued.

Dated: September 19, 2018

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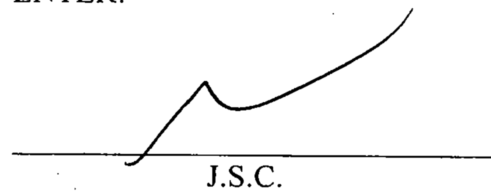

J.S.C.

SHLOMO HAGLER
J.S.C.