ACC Constr. Corp. v Merchants Mut. Ins. Co.
2018 NY Slip Op 32662(U)
October 10, 2018
Supreme Court, New York County
Docket Number: 654508/2016
Judge: Debra A. James
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. DEBRA A. JAMES **PART** IAS MOTION 59EFM

Justice

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ACC CONSTRUCTION CORPORATION, 370 SEVENTH AVENUE ASSOCIATES, LLC, and COMSCORE, INC.

Plaintiffs,

- v -

MERCHANTS MUTUAL INSURANCE COMPANY, and PREMIER ELECTRIC, INC.,

Defendants.

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INDEX NO. 654508/2016

MOTION DATE 11/17/2017

MOTION SEQ. NO. 001

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 001) 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34

were read on this motion to/for SUMMARY JUDGMENT (AFTER JOINDER).

ORDER

Upon the foregoing documents, it is

ORDERED that plaintiffs' motion for summary judgment is granted; and it is further

ADJUDGED and DECLARED that defendants must defend plaintiffs in the underlying action entitled Hammer v ACC Constr. Corp., Index No. 152347/14 (Sup Ct, NY County) (underlying action) and are entitled to primary coverage; and it is further

ORDERED that the determination of plaintiffs' entitlement to indemnification from defendants' is held in abeyance pending the outcome of a trial in the underlying action.

DECISION

In this declaratory judgment action, plaintiffs ACC Construction Corporation (ACC), 370 Seventh Ave Associates, LLC (370), and ComsSore, Inc. (ComScore) move for an order pursuant to CPLR 3212, for summary judgment. Defendants Merchants Mutual Insurance Company (Merchants) and Premier Electric, Inc. (Premier) oppose the motion.

Background

The declaratory judgment sought in this action concerns an underlying action entitled Hammer v ACC Construction Corp., Index No. 152347/14 (Sup Ct, NY County) (underlying action).

Daniel Hammer, the plaintiff in the underlying action, alleged that on September 19, 2012, during his employment with Godsell Construction Corporation (Godsell), he tripped and fell due to a defect in the work area.

Hammer injured himself on property owned by 370 and located at 7 Pennsylvania Plaza, New York, New York (the building). 370 leased a portion of the building to ComScore. ComScore retained ACC to be the general contractor or construction manager of a construction project at the building. ACC subcontracted out a portion of the construction project to Hammer's employer, Godsell, and retained Premier to perform electrical work in connection with the construction project in the building.

On March 17, 2014, Hammer commenced the underlying action against ACC, 370, Premier, and Broadwall Management Corporation (together, the underlying defendants). Hammer alleged in his complaint that he was working on the 10th floor of the building as a carpenter, when he tripped on electrical wiring that was protruding from the floor. Hammer further alleged that the negligence of the underlying defendants, in causing the defect to exist on the premises, caused his injuries.

In the underlying action, plaintiffs in the instant action brought a third-party action against Godsell for indemnification. As a result, Godsell's insurer, Liberty International Underwriters (Liberty), is now defending and indemnifying plaintiffs.

In the underlying action, Hammer seeks damages more than the Liberty policy limits. As a result, plaintiffs are seeking additional coverage from Premier and its insurer, Merchants. The relevant indemnity provision in the contract between ACC and Premier (the Subcontract) provides:

> "To the fullest extent permitted by law, Subcontractor shall defend, indemnify and hold harmless Owner, Contractor, Architect, and consultants, agents and employees of any of them (individually or collectively, 'Indemnity') from and against all claims, damages, liabilities, losses and expenses, including but not limited to attorneys' fees, arising out of or in any way connected with the performance or lack of performance of the work under the agreement and any change orders or additions to the work included in the agreement, provided that any such claim, damage, liability, loss or expense is attributable

> to bodily injury, sickness, disease or death, or physical injury to tangible property including loss of use of that property, or loss of use of tangible property that is not physically injured, and caused in whole or in part by any actual or alleged:
>
> - Act or omission of the Subcontractor or anyone directly or indirectly retained or engaged by it or anyone for whose acts it may be liable; or
>
> - Violation of any statutory duty, regulation, ordinance, rule or obligation by an Indemnitee provided that the violation arises out of or is in any way connected with the Subcontractor's performance or lack of performance of the work under the agreement."

(Subcontract § 4.6.1.)

The Subcontract includes the following insurance procurement provision, which provides:

> "The Subcontractor shall purchase and maintain insurance of the following types of coverage and limits of liability:
> 1) Commercial General Liability (CGL) coverage with limits of Insurance of not less than $2,000,000 each occurrence and $4,000,000 Annual Aggregate."
>
> * * *
>
> "c) Contractor, Owner and all other parties who Contractor is required to name as additional insured by any contract, shall be included as insured on the CGL, using ISO Additional Insured Endorsement CG 20 10 11 85 or an endorsement providing equivalent or broader coverage to the additional insured. The coverage provided to the additional insured under the policy issued to the Subcontractor shall be at least as broad as the coverage provided to the Subcontractor under the policy. Coverage for the additional insured shall apply as Primary and non-contributing Insurance before any other insurance or self-insurance, including any deductible, maintained by, or provided to, the additional insured."

(Subcontract § 13.1.)

The Subcontract also includes an insurance procurement provision:

> "The Subcontractor shall cause the commercial liability coverage required by the Subcontract Documents to include:
>
> (1) the Contractor, the Owner, the Architect and the Architect's consultants as additional insureds for claims caused in whole or in part by the Subcontractor's negligent acts or omissions during the Subcontractor's operations; and
> (2) the Contractor as an additional insured for claims caused in whole or in part by the Subcontractor's negligent acts or omissions during the Subcontractor's completed operations in the form annexed hereto as Rider F (samples attached)."

Defendants note that the contract between ACC and Godsell contains similar indemnification provisions to the Subcontract. Also, Godsell purchased an insurance policy, through Liberty, which contains an additional insured as required by contract endorsement, as well as a contractual liability exclusion.

Pursuant to the terms of the Subcontract, Premier procured a commercial general liability insurance policy from Merchants effective January 9, 2012 to January 9, 2013. Plaintiffs allege that the Merchants policy contains a blanket additional insured endorsement that is triggered by the Subcontract, making ACC an additional insured under the policy. The Merchants policy also defines "insured contract" as

> "part of any other contract or agreement pertaining to your business . . . under which you assume the tort liability of another party to pay for 'bodily injury' . . . to a third person or organization. Tort liability means a liability

that would be imposed by law in the absence of any contract or agreement".

Plaintiffs also allege that the Merchants policy provides an exception to the exclusion for contractual liability, in which Merchants agrees to extend coverage liability for damages assumed in an "insured contract".

On August 28, 2013, after receiving a letter of representation from Hammer's attorney, plaintiffs allege that they tendered to Merchants, demanding defense and indemnification, and Merchants did not respond.

On March 17, 2014, Hammer filed his summons and complaint for the underlying action. On November 11, 2014, plaintiffs allege that they tendered again to Merchants demanding defense and indemnification, but Merchants did not respond. Plaintiffs allege that they sent additional tenders to Merchants demanding defense and indemnification as additional insureds pursuant to the terms of the Subcontract on January 23, 2015; June 10, 2015; May 13, 2016; and August 15, 2016, and Merchants failed to respond to any of these tenders.

On August 26, 2016, plaintiffs commenced the instant declaratory judgment action against defendants. Plaintiffs now move for summary judgment pursuant to CPLR 3212 including the issuance of the following:

1) A declaratory judgment pursuant to CPLR 3001 that, regarding the underlying action, plaintiffs are all entitled to primary additional insured coverage and / or coverage as contractual indemnitees under the Merchants policy issued to Premier pursuant to an insured contract;

2) A declaratory judgment that Premier contractually agreed to indemnify and hold harmless plaintiffs and that Merchants is required to cover Premier's obligations to its contractual indemnities, on a primary basis;

3) A declaratory judgment that Merchants' duty to defend and indemnify is primary to other insurers' duty to indemnify plaintiffs;

4) or, in the alternative, a declaratory judgment that Premier is in breach of its contractual duty to procure adequate insurance naming plaintiffs as additional insureds.

Discussion

CPLR 3001 permits the court to "render a declaratory judgment having the effect of a final judgment as to the rights and other legal relations of the parties to a justiciable controversy whether or not further relief is or could be claimed" (CPLR 3001). An insurer may be relieved of its duty to defend and indemnify an insured in a declaratory judgment action, if it establishes as a matter of law that there is "no possible factual or legal basis on which it might eventually be

obligated to indemnify its insured under any policy provision" (Total Concept Carpentry, Inc. v Tower Ins. Co. of N.Y., 95 AD3d 411, 411 [1st Dept 2012] [internal quotation marks and citations omitted]).

The principle is well settled that the 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 eliminate any material issues of fact from the case (Zuckerman v City of New York, 49 NY2d 557, 562 [1980]; Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 [1985]). The motion shall be granted if neither party has shown "facts sufficient to require a trial of any issue of fact" (CPLR 3212 [b]).

In summary judgment coverage cases, New York courts will enforce the "plain and ordinary meaning" of unambiguous policy terms (2619 Realty v Fidelity & Guar. Ins. Co., 303 AD2d 299, 300 [1st Dept 2003]). The issue of whether a provision in an insurance policy is ambiguous is a question of law for the court to decide (Atlantic Mut. Ins. Co. v Terk Tech. Corp., 309 AD2d 22, 28 [1st Dept 2003]). The policy is the controlling document (Evanston Ins. Co. v Po Wing Hong Food Mkt., Inc., 21 AD3d 333, 334 [1st Dept 2005]).

Plaintiffs initially argue that ACC is an additional insured under the Merchants policy, therefore, Merchants must defend and indemnify ACC. In opposition, defendants contend

that the Subcontract and the Merchants policy require proof of negligence on the part of Premier for ACC to be declared an additional insured. Defendants also contend that further factual discovery is warranted, and that ACC did not annex a certified copy of the insurance policy on which the motion is based.

"[An insurer's] 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" (Automobile Ins. Co. of Hartford v Cook, 7 NY3d 131, 137 [2006] [internal quotation marks and citations omitted]). "[T]he insured's ultimate liability [is not] a consideration. 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" (Ruder & Finn Inc. v Seaboard Sur. Co., 52 NY2d 663, 670 [1981]). "The duty remains even though facts outside the four corners of [the] pleadings indicate that the claim may be meritless or not covered" (Automobile Ins. Co., 7 NY3d at 137 [2006] [internal quotation marks and citations omitted]). "This standard applies equally to additional insureds and named insureds" (Regal Constr. Corp. v National Union Fire Ins. Co. of Pittsburgh, PA, 15 NY3d 34, 37 [2010]). An insurer may be relieved of its duty to defend if the insurer

can establish as a matter of law that there is no possible legal or factual basis upon which it might be obligated to indemnify the insured, or, by proving that the allegations fall within a policy exclusion. If any of the allegations in an underlying action arise from a covered event, the insurer must defend the additional insureds for the entire action. (See Frontier Insulation Contrs., Inc. v Merchants Mut. Ins. Co., 91 NY2d 169, 175 [1997].)

Declaratory judgment actions seeking additional insured coverage are not premature just because there has not been a determination of liability in the underlying action. A finding of negligence is not required to trigger additional insured coverage (see Aspen Specialty Ins. Co. v Ironshore Indem. Inc., 144 AD3d 606, 607 [1st Dept 2016]; William Floyd Sch. Dist. v Maxner, 68 AD3d 982, 985 [2d Dept 2009]).

In the instant case, the additional insured endorsement in the Merchants policy provides coverage to any person or organization (here ACC) for whom the named insured (here Premier) is performing operations, where the named insured (Premier) and such person or organization (ACC) have agreed in a contract or agreement (here the Subcontract) that such person or organization (ACC) be added as an additional insured to the policy. ACC and Premier entered into a contract under which Premier agreed to name ACC as an additional insured under the

Merchants policy. Furthermore, the Additional Insured Endorsement in the Merchants policy provides coverage for additional insureds with respect to losses caused by Premier's work. Plaintiffs' complaint alleges that Hammer's injuries in the underlying action were caused by Premier's work. Hammer alleged in his complaint in the underlying action that he tripped and fell over an electrical wire, and that Premier was the electrical contractor working on the construction project. Hammer further alleged that the underlying defendants, which include Premier, were responsible for the purported defective condition that caused his accident. To the extent that the damage was caused even only in part by Premier's work, it would be a covered loss under the Merchants policy. Thus, the allegations in the complaint are sufficient to trigger Merchants' duty to defend ACC as an additional insured. Furthermore, discovery is not relevant or warranted, as this matter involves an issue of law regarding the interpretation of contract documents (see The City of New York v Arch Ins. Co., 2012 NY Slip Op 30619 [U] [Sup Ct, NY County 2012]). In addition, contrary to defendant's argument, a certified copy of the insurance policy is not required for the court to grant declaratory relief in favor of the insurer (see Serrano v Republic Ins., 2006 WL 6602210 [Sup Ct, Westchester County 2006] as modified by 48 AD3d 665, 666 [App Term, 2d Dept 2008] [trial

court stating that a certified copy of insurance policy was not submitted and appellate term granting the requested declaratory relief]).

Defendant's contention that there is a conflict between sections 13.1 and 13.4 of the Subcontract is without merit. As plaintiffs argue, section 13.1 is a general provision broadly setting forth that ACC will be named as an additional insured, while section 13.4 expands on section 13.1 by providing who must be added as an additional insured, and when additional insured coverage may be triggered (see Subcontract). Both sections refer to Rider F, which contains the relevant provisions for the types and limits of insurance.

Plaintiffs argue that 370 and ComScore are entitled to defense and indemnification as Premier's contractual indemnitees pursuant to the "insured contracts" provision in the Merchants policy. Defendants maintain that the contractual indemnity claims are premature. Defendants contend that Premier's contractual indemnity requirements are not triggered simply by claims in the underlying action but may be implicated by a sufficient factual showing by plaintiffs.

Putative insurers cover contractual indemnities of their named insured (see Tower Ins. Co. of N.Y. v A. Apicella Fish Co. of N.Y., Inc., 2015 WL 3961751 (Sup Ct, NY County 2015) [holding that plaintiff must defend indemnitee under the "insured

contract" provision in the policy]). Granting indemnification, not defense, to an indemnitee prior to the determination in an underlying action is premature (see Bovis Lend Lease LMB Inc. v Garito Contr., Inc., 65 AD3d 872, 875-876 [1st Dept 2009] [finding that "what triggers the duty to defend also triggers the duty to indemnify," but "[i]n the absence of a jury finding in the underlying action, any claim of an entitlement to indemnification [not defense] would be premature"]; Axis Surplus Ins. Co. v GTJ Co., 139 AD3d 604, 605 [1st Dept 2016] [holding that the plaintiff is obligated to defend in the underlying action, but that the plaintiff's indemnification obligations can only be fully determined after the resolution of the underlying action]).

In the instant case, the Merchants policy provides coverage to Premier for its indemnity obligations to 370 and ComScore, pursuant to the insured contracts exception to the contractual liability exclusion. Under this exception, coverage is extended to a party pursuant to a contract which meets the policy's definition of "insured contract". Merchants defines "insured contract" to include the part of any contract pertaining to the named insured's business, in which the named insured agrees to assume the tort liability of another to pay for property damage. In the Subcontract, Premier contracted to assume tort liability of 370 and ComScore for bodily injuries arising out of Premier's

acts and omissions. Therefore, Merchants is obligated to defend 370 and ComScore, as well as ACC because, they are contractual indemnitees under the "insured contract" exception. However, determining Merchants' indemnification obligations at this juncture is premature.

Defendants contend that plaintiffs have not submitted any evidence showing lack of negligence in the underlying action and that General Obligations Law (GOL) 5-322.1 invalidates contracts purporting to indemnify a party for its sole negligence in the construction context and prevents a party from recovering contractual indemnity for that portion of its own active negligence. Plaintiffs argue that Merchants policy and the Subcontract do not violate GOL § 5-322.1.

GOL § 5-322.1 provides in pertinent part:

> "1. A covenant, promise, agreement or understanding in, or in connection with or collateral to a contract or agreement relative to the construction, alteration, repair or maintenance of a building, structure, appurtenances and appliances including moving, demolition and excavating connected therewith, purporting to indemnify or hold harmless the promisee against liability for damage arising out of bodily injury to persons or damage to property contributed to, caused by or resulting from the negligence of the promisee, his agents or employees, or indemnitee, whether such negligence be in whole or in part, is against public policy and is void and unenforceable; provided that this section shall not affect the validity of any insurance contract, workers' compensation agreement or other agreement issued by an admitted insurer. This subdivision shall not preclude a promisee requiring indemnification for damages arising out of bodily injury to persons or damage to property caused by or resulting from the negligence of a

> party other than the promisee, whether or not the promisor is partially negligent.
>
> 2. A covenant, promise, agreement or understanding in, or in connection with or collateral to a contract or agreement relative to the construction, alteration, repair or maintenance of a building, structure, appurtenances and appliances including moving, demolition and excavating connected therewith, purporting to condition a subcontractor's or materialman's right to file a claim and/or commence an action on a payment bond on exhaustion of another legal remedy is against public policy and is void and unenforceable; provided that this subdivision shall not affect the validity of any insurance contract, workers' compensation agreement or other agreement issued by an admitted insurer."

(GOL § 5-322.1.)

A contractual indemnification clause that provides the promisor will indemnify the promisee "to the fullest extent permitted by law" does not violate the General Obligations Law, since the language contemplates partial indemnification and is intended to limit the promisor's/subcontractor's obligation to its own liability (see Brooks v Judlau Contr., Inc., 11 NY3d 204, 210 [2008] [holding that such a contractual indemnification clause is valid and enforceable]). Therefore, the Subcontract and Merchants policy do not violate GOL § 5-322.1.

Plaintiffs contend that Merchants must also defend Premier pursuant to its supplementary payments provision. Plaintiffs rely on Hunt v Ciminelli-Cowper Co., Inc., 93 AD3d 1152, 1155 (4th Dept 2012). In Hunt, an owner of a construction site was seeking defense and indemnification from the subcontractor's/

indemnitor's insurance company pursuant to the terms of the carrier's policy after the subcontractor's employee sustained bodily injuries at the construction site. The owner had entered into contractual indemnification agreements that required the contractors to indemnify the owners and the general contractor in the event of bodily injuries. The subcontractor's policy contained a supplementary payments provision similar to the instant case. The Appellate Division, Fourth Department declined to grant the insurer's motion for summary judgment dismissing the third-party complaint and declaring that it was not obligated to defend or indemnify the owner, on the grounds that there was a question of fact as to whether the supplementary payments section's conditions were complied with by the proposed insured such that the coverage may apply.

Plaintiffs in the instant case, argue that, unlike in Hunt, plaintiffs have complied with all the conditions or at least stand ready to comply with all the conditions of the supplementary payments section in the Merchants policy. However, as defendants argue, and the court agrees, plaintiffs have failed to show that all the conditions of the supplementary payments section in the Merchants policy have been met. Thus, there is a question of fact as to whether plaintiffs have complied with all the conditions of the supplementary payments section of the Merchants policy.

Plaintiffs maintain that they are entitled to primary coverage because the Merchants policy provides that Merchants must provide primary coverage to its additional insureds and indemnities. The Merchants policy provides that coverage to additional insureds and indemnities will be primary whenever required by a contract or a written agreement. The policy also provides that if there is other insurance "available to the insured" (i.e. Premier or ACC/any additional insured), then Merchants' coverage is primary. Defendants counter that in determining the order of insurance coverage, the Liberty and Merchants policies would provide co-insurance in the instance that the Merchants policy additional insured coverage is triggered. Additional insured parties are entitled to the same coverage afforded primary insureds under insurance policies (see Regal, 15 NY3d at 37). Therefore, if Premier is entitled to primary, non-contributory coverage, so is ACC.

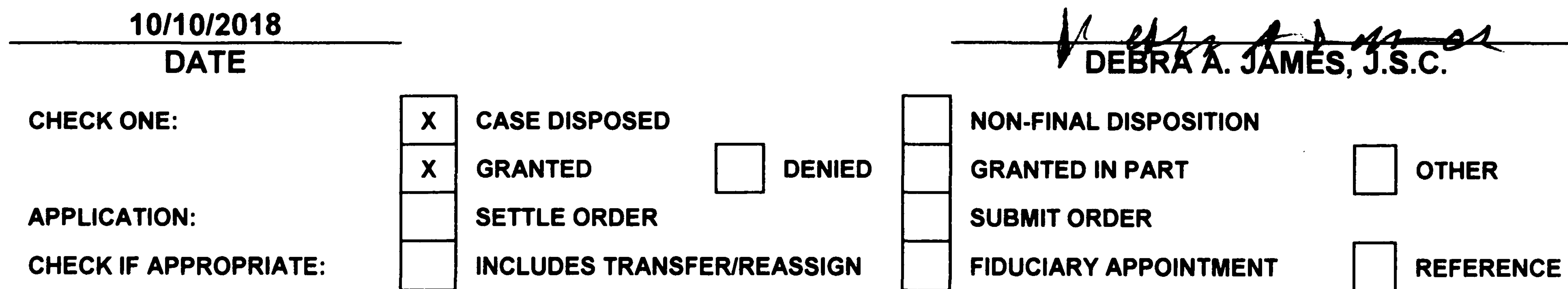
Plaintiffs argue in the alternative that, Premier has breached its contractual duties to procure insurance on behalf of plaintiffs. Plaintiffs contend that the Subcontract required Premier to obtain commercial general liability insurance to include ACC, as the construction manager, and 370 and ComScore, as the owners of the property, as additional insureds for liability caused by Premier's work. Plaintiffs also contend that the Subcontract required Premier to defend, indemnify, and

hold plaintiffs harmless for all claims arising out of Premier's work. Defendants maintain that ACC brought a similar breach of contract claim in the underlying action, thus, this branch of the motion should be denied. The pleadings from the underlying action show that ACC also asserted a cross claim for contractual indemnity against Premier. Therefore, this branch of the motion is denied (see GSL Enters., Inc. v Citibank, 155 AD2d 247, 247 [1st Dept 1989] [internal quotation marks and citations omitted] [dismissing complaint because "a pending action existed between the same parties for essentially the same relief and involving the same actionable wrong"]).

Defendants contend that the motion should be denied because plaintiffs have failed to join all necessary parties. Defendants allege that plaintiffs have failed to join all parties from the underlying action including Liberty, Godsell's insurer, which took over the defense of plaintiffs in the underlying action. Plaintiffs maintain that the fact that Liberty is not named as a plaintiff in this action, or the fact that every party in the underlying action is not a party to this action, should not prevent the court from deciding priority of coverage. It is not necessary for a putative additional insured's primary insurance carrier to be named as a plaintiff in a declaratory judgment action seeking coverage under another insurer's policy (see Hausman v Royal Ins. Co., 153 AD2d 527,

529 [1st Dept 1989] [finding that "there is no merit to the argument, accepted by the motion court, that Public Service Mutual, plaintiffs' other insurer, is a necessary party to this action. That insurer has already fulfilled its obligation to defend plaintiffs. Its rights cannot be adversely affected here."]).

The Court need not reach plaintiffs' and defendants' remaining contentions.



10/10/2018
DATE

DEBRA A. JAMES, J.S.C.

CHECK ONE: [X] CASE DISPOSED [ ] NON-FINAL DISPOSITION

APPLICATION: [X] GRANTED [ ] DENIED [ ] GRANTED IN PART [ ] OTHER

[ ] SETTLE ORDER [ ] SUBMIT ORDER

CHECK IF APPROPRIATE: [ ] INCLUDES TRANSFER/REASSIGN [ ] FIDUCIARY APPOINTMENT [ ] REFERENCE