

<b>Verizon Communications, Inc v Starr Indem. &amp; Liab. Co.</b>
2018 NY Slip Op 33137(U)
December 5, 2018
Supreme Court, New York County
Docket Number: 656855/2017
Judge: Joel M. Cohen
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. JOEL M. COHEN PART IAS MOTION 45**

*Justice*

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VERIZON COMMUNICATIONS, INC, VERIZON NEW YORK,  
INC., TISHMAN CONSTRUCTION CORPORATION

Plaintiffs,

- v -

STARR INDEMNITY & LIABILITY COMPANY, ALLAN BRITWAY  
ELECTRICAL CONTRACTORS, INC.,

Defendants.

INDEX NO. 656855/2017

MOTION DATE 10/19/2018

MOTION SEQ. NO. 001

**DECISION AND ORDER**

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31

were read on this motion for SUMMARY JUDGMENT

Upon the foregoing documents:

Defendant Starr Indemnity & Liability Company (“Starr”) seeks an Order granting it summary judgment and dismissing all claims asserted against it by Plaintiffs Verizon Communications, Inc., Verizon New York, Inc. (collectively “Verizon”) and Tishman Construction Corporation (“Tishman”). For the following reasons, Starr Indemnity’s motion is granted.

This is an insurance defense and coverage case in which Verizon and Tishman seek a declaration that they are “additional insureds” on an insurance policy issued by Starr in connection with an underlying bodily injury action filed against Plaintiffs. Specifically, Starr issued a general liability policy to its insured, Allan Brite-Way Electrical Contractors, Inc., (“Brite-Way”), with effective dates of March 1, 2012 to March 1, 2013 (“the Policy”). Plaintiffs are named as additional insureds on the Policy, subject to the following qualifications:

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**“ADDITIONAL INSURED – OWNERS, LESSEES OR CONTRACTORS – AUTOMATIC STATUS WHEN REQUIRED IN CONSTRUCTION AGREEMENT WITH YOU**

A. Section II – Who Is An Insured is amended to include as an additional insured any person or organization for whom you are performing operations when you and such person or organization have agreed in writing in a contract or agreement that such person or organization be added as an additional insured on your policy. Such person or organization is an additional insured only with respect to liability for “bodily injury”, “property damage” or “personal and advertising injury” **caused, in whole or in part, by:**

1. Your acts or omissions; or
2. The acts or omissions of those acting on your behalf; in the performance of your ongoing operations for the additional insured.” (NYSCEF 11) (emphasis added)

On February 6, 2013 one of Brite-Way’s employees, Joseph Filardo, was allegedly injured while working on a construction project. Mr. Filardo commenced an action in Suffolk County alleging that his injuries were caused by the negligence of Verizon and Tishman. His complaint does not name Brite-Way as a defendant but does broadly name as defendants “ABC Company One through Ten,” which Verizon and Tishman claim includes Brite-Way.<sup>1</sup> (NYSCEF 14).

In the Filardo case, Verizon and Tishman asserted a third-party claim against Brite-Way seeking contractual indemnification. (NYSCEF 15). Judge Peter H. Mayer issued a July 27, 2018 Order granting summary judgment on that claim in favor of Brite-Way. Significantly, Judge Mayer held: “Brite-Way has established its prima facie entitlement to judgment as a matter of law ... by demonstrating that plaintiff’s injuries were not caused by any negligence on its part,” and that Verizon and Tishman had not raised an issue of fact to avoid summary judgment on that question. (NYSCEF 16 at 6).

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<sup>1</sup> As Brite-Way is Mr. Filardo’s employer, absent a grave injury (which is not being claimed), Workers Compensation §11 prohibits an employee from commencing a lawsuit directly against his employer for work related injuries.

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Relying on Judge Mayer's decision, Brite-Way now seeks dismissal of Plaintiffs' claim for declaratory relief which, given the definition of "additional insured," necessarily is predicated on the assertion that Verizon and Tishman are being sued by Mr. Filardo for damages caused in whole or part by the acts or omissions of Brite-Way. As noted, however, Judge Mayer has already concluded in the underlying action as a matter of law that Mr. Filardo's injuries were *not* caused by the acts or omissions of Brite-Way. Accordingly, Verizon and Tishman are not being threatened with liability based on the acts or omissions of Brite-Way and thus are not "additional insureds" under the Starr policy.<sup>2</sup>

In *Worth Construction Co. v. Admiral Ins. Co.*, 10 N.Y.3d 411 (2008), the Court of Appeals was faced with a similar set of facts. In that case, as here, the defendant in the underlying action brought a third-party claim against the insured as well as a declaratory judgment action against the insurer. While the declaratory judgment action against the insurer was pending, summary judgment was granted in favor of the insured in the underlying action based on a concession by the defendant that the insured was not at fault. The Court of Appeals held that the determination in the underlying action that the insured was not at fault mandated dismissal of the declaratory judgment action because it established that the defendant was not an "additional insured." *Id.* at 415-16. The fact that the finding in favor of Brite-Way (the insured) in this case was by judicial determination (rather than a concession) does not dictate a different result. *See also Hanover Ins. Co. v. Philadelphia Indemnity Ins. Co.*, 159 A.D.3d 587, 588 (1<sup>st</sup>

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<sup>2</sup> Generally, there are two differing, yet commonly used endorsements in insurance policies when addressing additional insured coverage for bodily injury: i) "arising out of" and ii) "caused, in whole or in part, by". Starr Indemnity's policy uses the latter phrasing. (NYSCEF 11). The notable difference between the two has been explained in *Burlington Ins. Co., v. NYC Transit Authority*, 29 N.Y.3d 313 (2017). There, the Court of Appeals held that when liability policies include the phrase "caused, in whole or in part, by," additional insured coverage is triggered when the named insured's operations were a *proximate cause* of the underlying plaintiff's injuries. *Id.* at 315 (emphasis added).

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Dep't 2018) ("additional insured" coverage not available because the acts or omissions of the insured were not the proximate cause of the underlying plaintiff's injury).

Therefore, it is:

**ORDERED** Defendant Starr Indemnity & Liability Insurance Company's motion for summary judgment is granted; and it is further

**ORDERED** Defendant is to file this Order with Notice of Entry within 5 days from the date of this Order; and it is further

**ORDERED** all remaining parties are to appear for a Preliminary Conference on January 22, 2019 at 9:30 a.m. in Room 412.

**HON. JOEL M. COHEN**  
**J.S.C.**

  
JOEL M. COHEN, J.S.C.

12/5/2018  
DATE

CHECK ONE:

CASE DISPOSED  
GRANTED  DENIED  
SETTLE ORDER  
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION  
GRANTED IN PART  
SUBMIT ORDER  
FIDUCIARY APPOINTMENT

OTHER  
REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: