SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Hon. Nancy Bannon **PART 42**
Justice

FIREMAN'S FUND INSURANCE COMPANY, WINDSOR APARTMENTS, INC., and ARGO REAL ESTATE, LLC

INDEX NO. 160195/15

- v -

MOTION DATE 1/24/18

STATE NATIONAL INSURANCE COMPANY

MOTION SEQ. NO. 001

The following papers were read on this motion and cross-motion for summary judgment (CPLR 3212):

Notice of Motion/Order to Show Cause — Affirmation — Affidavit(s) — Exhibits — Memorandum of Law	**No(s). 1**
Answering Affirmation(s) — Affidavit(s) — Exhibits	**No(s). 2**
Replying Affirmation — Affidavit(s) — Exhibits	**No(s). 3**
Notice of Cross Motion--Answering Affirmation(s) — Affidavit(s) — Exhibits	**No(s). 2**
Replying Affirmation — Affidavit(s) — Exhibits	**No(s). 3**

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

In this action for a judgment declaring that the plaintiffs Windsor Apartments, Inc. (Windsor), and Argo Real Estate, LLC (together the Windsor plaintiffs), are additional insureds under a liability policy issued by the defendant, State National Insurance Company (SNIC), to Upgrade Contracting Company, Inc. (UCCI), and that a policy issued by Fireman's Fund Insurance Company (FFIC) to the Windsor plaintiffs is excess to the policy issued by SNIC, the plaintiffs move for summary judgment making that declaration. SNIC cross-moves for summary judgment declaring that the Windsor plaintiffs are not additional insureds under the policy that it issued to UCCI and that the policy issued by FFIC to the Windsor plaintiffs is primary. The motion is granted and the cross motion is denied.

Windsor owns, and Argo Real Estate, LLC, manages an apartment building in the Bronx. On November 19, 2010, UCCI contracted with the Windsor plaintiffs to undertake an exterior renovation project at the building. Article 17 of the contract obligated UCCI to maintain insurance covering claims for bodily injury sustained by persons other than UCCI's workers "which may arise out of or result from the Contractor's operations under the Contract, whether such operations be by the Contractor or by a Subcontractor or anyone directly or indirectly employed by any of them." A rider to the contract, included as Article 21.6(a)(i), further clarified UCCI"s obligation to procure insurance. In relevant part, it provided that "Additional Insured status shall be conveyed by endorsement . . . Owner [and] Owner's Managing Agent . . . must be included as 'Additional Insured' parties in both the CGL and Umbrella policies of insurance. The coverage afforded to the Additional Insureds shall be written on a primary basis, and shall not require or contemplate contribution by any other polilcy or policies obtained by, or

available to, any Additional Insured. . . There shall be no shared limits and no erosion of available liability limits by claims arising out of operations unrelated to those contemplated under this Contract." Article 21.6(d) provided that UCCI agreed to defend and indemnify the Windsor plaintiffs against any claims or losses "arising out of or in connection with the operations and performance of the Work specified under this Contract or in connection with the operations and performance of the Work specified under any subcontract agreement including but not limited to" the negligence of UCCI or its agents or UCCI's breach of the renovation contract. (emphasis added)

On October 8, 2014, Mary Jane Schudde allegedly fell in the building's vestibule, and sustained injuries. At the time, the Windsor plaintiffs were insured by an owner's liability policy issued by FFIC, while UCCI was insured by a policy issued by SNIC, effective October 4, 2014. Section IV(4) of the SNIC policy provided it was primary, with exceptions not relevant here. The SNIC policy also included a "Blanket Additional Insured" rider, which provided that the policy "shall include as Additional Insureds any person or organization to whom the Named Insured has agreed by written contract to provide coverage, but only with respect to operations performed by or on behalf of the Named Insured and only with respect to occurrences subsequent to the making of such written contract." (emphasis added).

On April 30, 2015, Schudde commenced a personal injury action against the Windsor plaintiffs in the Supreme Court, Orange County (the underlying action). That complaint alleged that the Windsor plaintiffs were negligent in permitting the entire floor of the vestibule, including catwalks and steps leading up and into the vestibule, to be painted one color - "battleship grey" - so as to create the illusion that the surface was regular and flat, when it in fact was of varying elevations, and that this illusion caused Schudde to trip on an elevated area of the vestibule floor. The Windsor plaintiffs sought a defense and indemnification from SNIC in connection with the underlying action, alleging that they were additional insureds under the SNIC policy. SNIC disclaimed coverage, asserting that Schudde's injuries did not arise from operations performed by or on UCCI"s behalf, since neither UCCI nor any of its subcontractors were responsible for choosing the paint color. Rather, they asserted that Windsor's board was solely responsible for that choice, and that UCCI had no discretion even to add different colored highlights that might have made the elevated portions more visible. This declaratory judgment action ensued. In connection with the motion and cross motion, the parties submit the pleadings, the renovation contract, the FFIC and SNIC insurance policies, the deposition transcripts of the parties, and the plaintiffs' responses to interrogatories.

A person injured in a slip or trip and fall accident may recover from an owner or managing agent of a building where the manner in which a floor is painted or carpeted creates an illusion of flatness or regularity, thus causing the person to take a misstep. See Buonchristiano v Fordham Univ., 146 AD3d 711 (1st Dept. 2017); Saretsky v 85 Kenmare Realty Corp., 85 AD3d 89 (1st Dept. 2011). As the Court of Appeals recently held, a provision that indemnifies a party from a loss "arising out of" its work is fundamentally different from, and necessarily broader than, a provision that indemnifies a party from a loss "caused by" or "resulting from" that party's conduct. Burlington Ins. Co. v NYC Tr. Auth., 29 NY3d 313, 323-324 (2017); see Hanover Ins. Co. v Philadelphia Indem. Ins. Co., 159 AD3d 587 (1st Dept. 2018). The construction of an unambiguous contract is an issue of law, to be decided by the

court, as is the issue of whether the terms of the contract are ambiguous in the first instance. NFL Enters. LLC v Comcast Cable Communications, LLC, 51 AD3d 52, 58 (1st Dept. 2008).

The indemnification provision protecting the Windsor plaintiffs here requires only proof that Schudde's injuries "arise" from the subject work undertaken by or on behalf of UCCI, not that the injuries were caused by the work undertaken by UCCI or its subcontractors. The Windsor plaintiffs show, with the parties' deposition transcripts, that UCCI or its subcontractors actually performed the "operations" that included coating and painting the steps and floor of the vestibule of the building, and that Schudde's accident allegedly arose from those operations. SNIC concedes that UCCI or its subcontractors performed that work, and fails to raise a triable issue that the injuries did not arise from those operations. The plaintiffs thus established their prima facie entitlement to judgment as a matter of law, and SNIC fails to raise a triable issue of fact in opposition. See Alvarez v Prospect Hosp., 68 NY2d 320 (1986); Winegrad v New York Univ. Med. Ctr., 64 NY2d 851 (1985). For the same reasons, SNIC fails to meet the burden on its own motion by failing to establish entitlement to judgment as a matter of law. SNIC's reliance on Worth Constr. Co., Inc. v Admiral Ins. Co. (10 NY3d 411 [2008]) is misplaced since, unlike in that case, the vestibule at issue here was not merely an accident situs at the project location on which it performed no work. SNIC's interpretation of the contract terms is unavailing, as it essentially argues that, notwithstanding the broad language of the additional insured rider, coverage is only triggered if UCCI's conduct was the proximate cause of the accident, i.e., only if UCCI or a subcontractor chose the color and highlight scheme for the vestibule.

Accordingly, it is

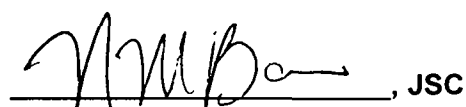
ORDERED that the plaintiffs' motion for summary judgment is granted; and it is further,

ORDERED that the defendant's cross motion for summary judgment is denied; and it is

ADJUDGED and DECLARED that the plaintiffs Windsor Apartments, Inc., and Argo Real Estate, LLC, are additional insureds under the policy issued by the defendant State National Insurance Company to Upgrade Contracting Company, Inc., that policy is primary in connection with the action entitled Schudde v Windsor Apts., Inc., pending in the Supreme Court, Orange County, under Index No. 3404/15, and the policy issued by the plaintiff Fireman's Fund Insurance Company to the plaintiffs Windsor Apartments, Inc., and Argo Real Estate, LLC, is excess in connection with that action.

This constitutes the Decision, Order, and Judgment of the court

Dated: July 9, 2018



HON. NANCY M. BANNON, JSC

1. Check one: ..... ■ CASE DISPOSED ☐ NON-FINAL DISPOSITION
2. Check as appropriate: MOTION IS: ■ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. Check as appropriate: CROSS MOTION IS: ☐ GRANTED ■ DENIED ☐ GRANTED IN PART