| **Mazo v DCBE Contr. Inc** |
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| 2019 NY Slip Op 33065(U) |
| October 16, 2019 |
| Supreme Court, New York County |
| Docket Number: 161671/2013 |
| 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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JAIRO MAZO,

Plaintiff,

- v -

DCBE CONTRACTING INC. and ICONIC MECHANICAL LLC,

Defendants.

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**INDEX NO.** 161671/2013

**MOTION DATE** 05/15/2018

**MOTION SEQ. NO.** 004 005 006

**DECISION + ORDER ON MOTION**

DCBE CONTRACTING INC.,

Third-Party Plaintiff,

-against-

ICONIC MECHANCIAL LLC, HARLEYSVILLEINSURANCE COMPANY OF NEW YORK, and HARLEYSVILLE WORCESTER INSURANCE COMPANY,

Third-Party Defendants.

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Third-Party
Index No. 595366/2014

The following e-filed documents, listed by NYSCEF document number (Motion 004) 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 143, 144, 171, 172, 173, 176, 179, 182, 185, 186

were read on this motion to/for JUDGMENT - SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 005) 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 145, 174, 175, 177, 180, 187

were read on this motion to/for JUDGMENT - SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 006) 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 178, 181, 183, 184, 188, 189

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

ORDER

Upon the foregoing documents, it is

ORDERED (motion sequence number 004) that the summary judgment motion by defendant/third-party defendant Iconic Mechanical, LLC: 1) to dismiss the complaint is granted as to the Labor Law claims which are dismissed, and is otherwise denied; and 2) to dismiss the cross claims and third-party claims is denied; and it is further

ORDERED (motion sequence number 005) that the summary judgment motion by defendant/third-party plaintiff DCBE Contracting, Inc.: 1) to dismiss the complaint is granted as to the Labor Law claims which are dismissed, and the motion is otherwise denied; and 2) on its claims for contractual and common law indemnification against Iconic Mechanical, LLC is denied; and it is further

ORDERED (motion sequence number 006) that the summary judgment motion by defendant/third-party plaintiff DCBE Contracting, Inc. for a declaratory judgment that third party defendants Harleysville Insurance Company of New York and Harleysville Worcester Insurance Company owe it defense and indemnity is denied; and it is further

ORDERED that the cross motion by third-party defendants Harleysville Insurance Company of New York and Harleysville Worcester Insurance Company (collectively, the insurers) for

summary judgment for declaratory judgments concerning the primary and umbrella policies issued by them is granted only as follows and is otherwise denied; and it is hereby

ADJUDGED and DECLARED

1) that the insurers' duty to indemnify DCBE Contracting, Inc. has not been triggered and must await a liability determination; and

2) that the insurance coverage owed to DCBE Contracting, Inc. does not cover that portion of liability determined to be attributable to its own negligence or fault; and

3) that the insurance coverage owed to DCBE Contracting, Inc. under the umbrella policy is excess to coverage owed under the primary policy; and

4) that the policy limits of the coverage available to DCBE Contracting, Inc. under the umbrella policy is limited to $1 million.

DECISION

Plaintiff Jairo Mazo alleges that he was injured when he fell into a hole at work. The parties make these motions:

1) defendant/third-party defendant Iconic Mechanical, LLC (Iconic) moves for summary judgment dismissing the complaint, cross claims, and third-party claims against it (motion sequence number 004);

2) defendant/third-party plaintiff DCBE Contracting, Inc. (DCBE) moves for summary judgment dismissing the complaint and on its claims for contractual and common law indemnification against Iconic (motion sequence number 005);

3) DCBE moves for summary judgment declaring that third-party defendants Harleysville Insurance Company of New York and Harleysville Worcester Insurance Company (collectively, Harleysville) owe DCBE defense and indemnity (motion sequence number 006); and

4) Harleysville, issuer of a primary policy and an umbrella policy to Iconic, cross-moves for summary judgment declaring: I) that its duty to indemnify DCBE has not been triggered and must await a liability determination; ii) that any additional insured coverage owed to DCBE does not cover that portion of the liability determined to be attributable to DCBE's own negligence or fault; iii) that any additional insured coverage owed to DCBE under Harleysville's primary policy is excess to coverage under DCBE's primary policy, so that DCBE's primary policy must be exhausted before Harleysville is obligated to provide any coverage to DCBE; iv) that any additional insured coverage owed to DCBE under Harleysville's umbrella policy is excess to the coverage afforded to DCBE under its primary policy, so that DCBE's primary policy must be exhausted before Harleysville is obligated to provide any coverage to DCBE under the umbrella

policy; and v) that the policy limits of the additional insured coverage available to DCBE under the Harleysville umbrella policy is limited to $1 million.

Plaintiff worked as a porter for the property manager of a residential building. Plaintiff's duties included taking out the garbage, cleaning vacant apartments, and acting as doorman. On December 6, 2013, the day of plaintiff's accident, contractors had been on the premises for some weeks, renovating the lobby and adding a mezzanine level to the second floor. DCBE, the general contractor on the project, hired Iconic, the HVAC (heating, ventilation, and air conditioning) subcontractor. The parties agree that plaintiff had no duties of any kind related to the contractors and did not take part in their work.

Uriah George (George), the DCBE superintendent, testified during his deposition that he was onsite every day, and that he coordinated the subcontractors' labor. He made sure that the subcontractors were accomplishing tasks according to the construction plan. He testified that he oversaw everything, but that he did not supervise the subcontractors.

On the third floor of the building, there was what the parties call a mechanical room, housing condensing units and ducts, and also being used, it seems, as a storage room. There was a three by six foot hole in the floor of the room. Before the project began, there were large ducts in the hole which took

up the entire area of the hole. The hole went through the floor to the second floor ceiling and the ducts in the hole could be seen from the second floor. Since the construction plan called for the ductwork to be replaced, a subcontractor removed the ductwork from the hole. George testified that then DCBE's workers placed a four by eight foot piece of plywood over the hole and nailed the four corners of the plywood to the concrete floor using special nails designed to penetrate concrete. The DCBE workers spray painted in red "X" and "DANGER" on the plywood. They locked the door and left. From then until the day that plaintiff fell through the hole, George went into the mechanical room one time.

George testified that he had no key to the mechanical room. In order to gain entrance, he had to call someone from building management to unlock the door. He testified that the door could be unlocked only by building management and was always kept locked.

Iconic stored refrigeration piping and other equipment in the mechanical room. George testified that, on the day of the accident, Jorge Ramirez (Ramirez), an Iconic worker, told George that Iconic had ductwork for the opening. George arranged for the building superintendent to unlock the door. George's workers took the nails out of the plywood and left it in the same position as before, covering the opening in the floor.

George called Ramirez and told him to meet George on the third floor. George testified that he told Ramirez that after finishing the work, Ramirez should call George so that George could have the room locked.

Ramirez testified that a duct had been delivered to the building. It was too big to fit in the elevator, so he and another Iconic employee dismantled it and brought it up to the third floor mechanical room in pieces. Ramirez testified that the duct was planned to go into the hole the next day, and that he did not remember telling George that he needed access to the hole on that day and asking him to remove the nails in the plywood cover. Ramirez testified that Iconic did not move the plywood that day and did not alter its position when moving the ductwork into the room.

After Ramirez and his coworker finished putting the duct in the third floor room, they went to lunch, closing the door after them. They planned to work on the second floor the rest of the day and had no intention of returning to the third floor. Ramirez did not remember whether they locked the door. He testified that he believed that the door was the sort that they could have locked from the inside as they went out. Ramirez testified that he never saw any writing or signs on the plywood or nail holes showing that it had been nailed down.

Meanwhile, plaintiff was assigned to remove file cabinets from the 11th floor to the mechanical room on the third floor. Plaintiff and another porter named Albert lifted the file cabinets onto a dolly and took them to the third floor. The door to the mechanical room was unlocked. As the porters rolled the dolly into the room, Albert saw a sheet of rectangular plywood on the floor. Albert determined that they could not roll the dolly over the plywood and that they had to lift it and place it against the wall in order to move the dolly fully into the room.

Plaintiff took one end of the plywood and Albert another end so that they were standing along the same side of the sheet of plywood. They lifted the plywood, plaintiff stepped forward, and fell through the hole in the floor that the plywood had been covering, and landed on the second floor. An ambulance took plaintiff to the hospital. Plaintiff testified that he was looking forward as he stepped forward and did not observe the hole before he stepped into it. He had never been in the mechanical room before and did not know that there was a hole in the floor.

Against Iconic and DCBE, plaintiff asserts causes of action based on Labor Law § § 200, 240 (1), and 241 (6), common-law negligence, and Industrial Code sections 12 NYCRR 23-1.7, 23-1.15, 23-1.33, and 23-2.4.

Against Iconic, DCBE's third-party complaint asserts claims for contractual indemnification, breach of contract for failing to procure insurance, contribution, and common-law indemnification. DCBE's cross claims against Iconic are the same. Against Harleysville, DCBE seeks a declaratory judgment that it is entitled to primary coverage and excess coverage. Iconic cross-claims against DCBE for indemnification and contribution.

I. Standard for summary judgment motions

"'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'" (Santiago v Filstein, 35 AD3d 184, 185-186 [1st Dept 2006], quoting Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 [1985]). If the proponent fails to make such showing, the motion will be denied, regardless of the adequacy of the opposing papers (Smalls v AJI Indus., Inc., 10 NY3d 733, 735 [2008]). If the proponent succeeds in making the requisite showing, the opponent of the motion must then present evidence in admissible form sufficient to raise a genuine, triable issue of fact (Mazurek v Metropolitan Museum of Art, 27 AD3d 227, 228 [1st Dept 2006]; DeRosa v City of New York, 30 AD3d 323, 325 [1st Dept 2006]). If there is any doubt as to the existence of a triable fact, the motion for summary judgment

must be denied (Grossman v Amalgamated Hous. Corp., 298 AD2d 224, 226 [1st Dept 2002]).

II. Plaintiff's Labor Law claims

The contractors' argument that plaintiff may not assert Labor Law claims is correct, as the purpose of the Labor Law is to protect those who "perform work [that is] integral or necessary to the completion of the construction project," or those who are "'a member of a team that undertook an enumerated activity under a construction contract'" (Coombs v Isso Gen. Contr., Inc., 49 AD3d 468, 468-469 [1st Dept 2008] quoting Prats v Port Auth. of N.Y. & N.J., 100 NY2d 878, 882 [2003]). Plaintiff was an employee of the building manager, not of a contractor. His duties did not take in any of the renovation or construction work; nor did he supervise or inspect the progress of that work (see Spadola v 260/261 Madison Equities Corp., 19 AD3d 321, 323 [1st Dept 2005]; Lynch v Abax, Inc., 268 AD2d 366, 367 [1st Dept 2000]).

Plaintiff contends that he may assert a claim based on violation of an Industrial Code regulation, despite the inability to maintain a claim under Labor Law § 241 (6). A claim that an Industrial Code regulation was violated must be made pursuant to a section 241 (6) claim (see Misicki v Caradonna, 12 NY3d 511, 515 [2009]). The regulations invoked by plaintiff are found in Part 23 of the Industrial Code, which is

entitled "Protection in Construction, Demolition and Excavation Operations." Part 23 is applicable only to persons employed in those operations (Probst v 11 W. 42 Realty Investors, L.L.C., 2012 NY Slip Op 30476[U], *12 [Sup Ct, Queens County 2012], affd 106 AD3d 711 [2d Dept 2013]; see also Acosta v Gouverneur Court Ltd. Partnership, 2014 NY Slip Op 31366[U], *16 [Sup Ct, NY County 2014], affd 133 AD3d 480 [1st Dept 2015] [as plaintiff's section 241 (6) claim must be dismissed, the Industrial Code is inapplicable]). The rule is that an action may be predicated upon the violation of an Industrial Code regulation only where the Labor Law is implicated.

Plaintiff's Labor Law claims against both contractors are dismissed.

III. Plaintiff's common-law negligence claim

Remaining for plaintiff is a common-law negligence cause of action. The elements of negligence are a duty of care owed to the plaintiff by the defendant, the defendant's breach of that duty, and injury to the plaintiff proximately resulting from the breach (Pasternack v Laboratory Corp. of Am. Holdings, 27 NY3d 817, 825 [2016]). Without duty, even though the defendant negligently injures the plaintiff, the defendant is not liable for damages (id.). Whether a defendant has a duty toward a plaintiff is for the court to decide (Fairclough v All Serv. Equip. Corp., 50 AD3d 576, 577 [1st Dept 2008]).

DCBE and Iconic contend that neither owed a duty of care to plaintiff, an unrelated third party. DCBE and Iconic had a subcontract between them and DCBE had a contract with the building's ownership. Neither had a relationship with plaintiff and neither was a landowner charged with the common-law duty to keep premises reasonably safe (see Galindo v Town of Clarkstown, 2 NY3d 633, 636 [2004]). Ordinarily, a duty of care to a third party does not arise from a contractual obligation between two other parties (Espinal v Melville Snow Contrs., 98 NY2d 136, 138-139 [2002]). A contractual obligation, standing alone, will not give rise to tort liability in favor of a non-contracting third party (id. at 138]).

Plaintiff argues in favor of the three exceptions to the rule propounded in Espinal, whereby a party who enters into a contract is said to have assumed a duty of care to a non-contracting third party, and thus be potentially liable for negligence related to the third party (Church v Callanan Indus., Inc., 99 NY2d 104, 111 [2002]). The first exception to the Espinal rule arises when the contracting party, in the course of discharging a contractual obligation, "launches a force or instrument of harm," which creates or increases an unreasonable risk of harm to others (id.; Vega v S.S.A. Props., 13 AD3d 298, 302 [1st Dept 2004]; see Doona v OneSource Holdings, Inc., 680 F Supp 2d 394, 402 [ED NY 2010]).

Second, a contractor may bear liability for a third party's injury where the "performance of contractual obligations has induced [the plaintiff's] detrimental reliance on continued performance and inaction would result not 'merely in withholding a benefit, but positively or actively in working an injury'" (Eaves Brooks Costume Co. v Y.B.H. Realty Corp., 76 NY2d 220, 226 [1990], quoting Moch Co. v Rensselaer Water Co., 247 NY 160, 167 [1928]). In such instances, the defendant undertakes, not just by promises, but by deeds, a duty to act with due care (Eaves, 76 NY2d at 226).

The third exception originates when a contract is so comprehensive and exclusive that one contracting party entirely displaces and assumes the other party's duty to safely maintain the premises. In such an instance, the party displacing the other party's duty may come to bear a duty regarding the safety of a third party (Church, 99 NY2d at 112; Palka v Servicemaster Mgt. Servs. Corp., 83 NY2d 579, 589 [1994]).

It has been noted that the Espinal standard regarding the means by which a contractor takes on a duty of care "paradoxically" conditions the contractor's duty on the contractor breaching such duty (DeAngelis v American Airlines, Inc., 2010 WL 1292349, *5, 2010 US Dist LEXIS 33404, *14 [ED NY 2010]). In this case, the contractors fail to show that they did not have a duty toward plaintiff and that they did not

breach a duty toward plaintiff. DCBE's workers unfastened the plywood covering the hole and did not ascertain that the door was locked after Iconic's workers left the room. Iconic did not lock the door after its workers left the room and did not inform DCBE that it was leaving. The contractors do not show that they had no duty to warn or to make the area safer, or that the hole in the floor, and the hole in the floor together with the unlocked door, were not dangerous conditions (see Farrugia v 1440 Broadway Assoc., 163 AD3d 452, 455 [1st Dept 2018]). Viewing the evidence in a light most favorable to the plaintiff, as required on a summary judgment motion (Byrnes v Scott, 175 AD2d 786, 786 [1st Dept 1991]), the court finds that there is a triable issue of fact as to whether the contractors created an unreasonable risk of harm to plaintiff or increased that risk.

The contractors argue that plaintiff caused his own accident by not looking where he was stepping, and that the allegedly unsafe condition was open and obvious. Under the comparative negligence system, a plaintiff's contributory fault may proportionally diminish his or her recovery, but will not preclude recovery unless the plaintiff was solely at fault for his or her own injury (CPLR 1411; 79 NY Jur 2d, Negligence § 116). If there is a decision that the contractors negligently caused the accident, they will have to pay plaintiff damages,

even if there is also a decision that plaintiff's own negligence contributed to his accident.

The other exceptions in Espinal are not applicable. Plaintiff does not allege facts that could potentially warrant the application of the detrimental reliance exception, i.e., that plaintiff detrimentally relied on DCBE's and Iconic's continued performance of their contractual duties. Indeed, plaintiff's argument in that regard is cursory, and he testified that he was not familiar with either contractor.

As to whether a party to a contract assumed the other party's duty to keep premises safe, courts examine the language in the language to determine whether the first party's obligations became sufficiently comprehensive and exclusive (see Church, 99 NY2d at 113). The contract between DCBE and the owner provides that DCBE is responsible for and has control over all construction methods (DCBE contract, ¶ 3.1). DCBE shall provide reasonable protection to prevent damage or injury to employees on the project and other persons who may be affected (id., ¶ 17.1). Owner's action in requiring the implementation of a safety program shall not be construed as owner having control over contractor's safety program (id.).

In the subcontract between DCBE and Iconic, Iconic agrees to assume all the obligations that DCBE assumes toward the owner, to follow DCBE's cleanup and safety directions, to keep

the building free from debris and unsafe conditions, and that it is Iconic's responsibility to prevent accidents in the vicinity of its work (subcontract, ¶ ¶ 2.3, 8.9.1, 8.10). A rider to the subcontract provides that if Iconic needs to remove "fall protection" in order to perform some work, it will coordinate with DCBE in advance; any additional fall protection will be Iconic's responsibility; and Iconic will provide temporary barricades and safety measures when conditions caused by the work call for such measures (id., rider, ¶ ¶ 4-10).

None of these provisions demonstrate that either contractor had a comprehensive and exclusive property maintenance obligation so as to displace the owner's obligations to safely maintain the premises. George testified that to open the mechanical room, he had to call building personnel because DCBE was not provided with keys to the mechanical room. Access to the mechanical room was controlled by the building, and it was building management which ordered plaintiff to go to the room. While the contractors had safety obligations, they did not take entirely take the owner's place. In addition, neither contractor displaced the other's duty to keep the premises safe.

IV. Relevant parts of the subcontract and insurance policies

Harleysville issued a primary and an umbrella policy to Iconic, and nonparty Prosight Specialty Insurance (Prosight) issued a primary policy to DCBE. DCBE, an additional insured

under Harleysville's policies, and Harleysville seek declaratory judgments related to Harleysville's obligations to protect DCBE, and DCBE and Iconic seek indemnification and contribution from each other. The pertinent provisions of the subcontract between DCBE and Iconic and the Harleysville policies sold to Iconic are here represented.

Article 12 of the subcontract provides that, "to the fullest extent permitted by law," Iconic undertakes to indemnify and defend DCBE against all liabilities, "except to the extent caused by the negligence of the indemnitee, which arise out of or are connected with, or are claimed to arise out of or be connected with . . ." the performance of the work or any act or omission of the subcontractor (subcontract, ¶ 12). Iconic agrees to procure all insurance required under the contract documents and Rider D "annexed hereto" (id., ¶ 13.1). The contractor and other designated parties shall be named as additional insured on the policies (id., ¶ 13.1.2). The insurance shall include commercial liability insurance covering the subcontractor's obligations under article 12, the indemnity provision of the subcontract (id., ¶ 13.1.3).

Rider D of the subcontract, entitled "Insurance Requirements," lists the policies that Iconic must procure, including commercial general liability (CGL) insurance of not less than $1 million per occurrence and $2 million aggregate,

and umbrella liability insurance of not less than $1 million (id., Rider D, ¶ 1). The CGL "policy shall be primary to any policy or policies carried by or available to Owner" (id.).

The "Other Insurance" section of the Harleysville primary policy states that "this insurance" is primary, except when paragraph (b) applies (Harleysville primary policy, ¶ 4). Paragraph (b) provides that "this insurance" is excess over any "other primary insurance available to you covering liability for damages arising out of the premises or operations . . . for which you have been added as an additional insured by attachment of any endorsement" (id., ¶ 4 [b] [2]). The Harleysville primary policy defines "you" as the named insured, which is Iconic.

The "Other Insurance" section in Prosight's policy is similar to that in Harleysville's.

The additional insured endorsement in Harleysville's primary policy provides that an insured includes "any person or organization for whom you [Iconic] are performing operations only as specified under a written contract . . . that requires that such person or organization be added as an additional insured on your policy" (Harleysville primary policy, additional insured endorsement, ¶ A [II]). Such person or organization is an additional insured only respecting liability caused by the acts or omissions of the named insured while performing the

named insured's operations for the additional insured as specified under the written contract (id.). The additional insured is covered only for such damages which are caused, in whole or in part, by the act or omissions of the named insured to which the additional insured is entitled to be indemnified by the named insured (id., ¶ B).

The additional insured endorsement continues:

"D. Other Insurance

1. If specifically required by the written contract . . . , any coverage provided by this endorsement to an additional insured shall be primary and any other valid and collectible insurance available to the additional insured shall be non-contributory with this insurance. If the written contract does not require this coverage to be primary and the additional insured's coverage to be non-contributory, then this insurance will be excess over any other valid and collectible insurance available to the additional insured"(id.).

Under Harleysville's umbrella policy, any additional insured under any policy of "underlying insurance" is automatically an insured, if a contract requires Harleysville to provide additional insured coverage, the most Harleysville will pay on behalf of the additional insured is the amount of insurance required by the contract, less any amounts payable by any "underlying insurance," and the additional insured coverage will not be broader than the coverage under the underlying coverage (Harleysville umbrella policy, ¶ II [3], at 10 of 17).

The declarations page states that the underlying insurance is the primary policy issued to Iconic.

The "other insurance" provision in Harleysville's umbrella policy states that "[T]his insurance is excess over, and shall not contribute with any of the other insurance, whether primary, excess, contingent or on any other basis. This condition will not apply to insurance specifically written as excess over this Coverage Part" (id., ¶ 5, at 12 of 17).

V. DCBE's coverage under the Harleysville primary policy

Primary or excess - Rider D of the subcontract between Iconic and DCBE expressly provides that the owner will have primary insurance, and makes no mention of any contractor. Under the Harleysville primary policy, insurance is primary for the additional insured only if specifically required by the written contract which, in this case, is the subcontract between Iconic and DCBE. Hence, Harleysville contends that the additional insured coverage for DCBE under the Harleysville primary policy is excess, since there is no specific requirement in the subcontract for DCBE to have primary coverage.

The rule is that the term, "additional insured," denotes an insured receiving the same coverage as the named insured (Pecker Iron Works of N.Y., Inc. v Traveler's Ins. Co., 99 NY2d 391, 393 [2003]). In Pecker, the subcontractor's employee was injured and sued the contractor. A dispute arose about whether the

subcontractor's insurer was obligated to provide the contractor with additional insured coverage on a primary or excess basis. The subcontractor's insurance policy provided that the additional insured coverage would be excess, unless the subcontractor agreed in a contract for this insurance to be primary. The subcontract did not expressly state whether the additional insured coverage was to be primary or excess. The Court of Appeals ruled that the additional insured coverage was primary, based upon the general concept that an additional insured enjoys the same protection as the named insured, and that an agreement to name a party as additional insured was in itself an agreement to afford it primary coverage.

According to Pecker, where the insurance policy provides that the additional insured coverage is primary if the written contract so provides, and the written contract provides that additional insured coverage will be provided but does not specify whether excess or primary, the additional insured coverage is primary (see Town Plaza of Poughquag, LLC v Hartford Ins. Co., 175 F Supp 3d 93, 102-103 [SD NY 2016]; Liberty Mut. Ins. Co. v Harco Natl. Ins. Co., 990 F Supp 2d 194, 203-204 [D Conn 2013] [New York law]; United Parcel Serv. v Lexington Ins. Group, 983 F Supp 2d 258, 265 [SD NY 2013]; BP A.C. Corp. v One Beacon Ins. Group, 8 NY3d 708, 714-715 [2007]; Mecca Contr.,

Inc. v Scottsdale Ins. Co., 140 AD3d 714, 716 [2d Dept 2016]; Riccobono v State of N.Y., 57 Misc 3d 737, 742 [Ct Cl 2017]).

In this case, the additional insured endorsement in the policy states that coverage for DCBE is primary if "specifically required" in the subcontract. The subcontract does not so provide. The insurance policies in Pecker and the cases cited above did not state that for the additional insured to receive primary coverage, the underlying contract must "specifically require" primary insurance. Harleysville cites to the following cases, in which the additional insured endorsement in the insurance policies provided that coverage was excess over any other insurance available to the additional insured, unless the underlying contract "specifically requires" primary insurance (Poalacin v Mall Props., Inc., 155 AD3d 900, 911 [2d Dept 2017]; Kel-Mar Designs v Harleysville Ins. Co. of N.Y., 127 AD3d 662 [1st Dept 2015], revg 2013 WL 10871519, *3 [Sup Ct, NY County 2013]). In those cases, because the underlying contracts did not "specifically require" primary coverage for the additional insured, the First and Second Departments determined that the policies afforded the respective additional insured parties' excess coverage rather than primary coverage.

This precedent has not been universally followed. Even where the insurance policy provides that the underlying contract must "specifically require" primary insurance for the additional

insured, but the underlying contract does not specifically require such coverage, the trend in New York, according to some commentators, has been to follow the rationale of Pecker and determine that the additional insured coverage is primary (see Ashlyn M. Capote, A Contract that Specifically Requires ... Recent Cases Analyzing Primary and Noncontributory Endorsements, 61 No. 3 DRI For the Defense 22 [Mar 2019] [Westlaw citation: 61 No. 3 DRI For Def. 22]; Marci Goldstein Kokalas, Rippi Gill, Priority of Coverage in the Additional Insured Context Pecker and Its Progeny, ABA Brief, at 50, 54 [Fall 2016] [Westlaw citation: 46-FALL Brief 50]; Forty Second Assocs., Inc. v Natl. Fire Ins. Co. of Hartford, 48 Misc 3d 1211[A], 2015 NY Slip Op 51042[U], *3-4 [Sup Ct, NY County 2015]; Briarwoods Farm, Inc. v Central Mut. Ins. Co., 22 Misc 3d 427, 432-433 [Sup Ct, Orange County 2008]).

In line with the Court of Appeals, this court determines that DCBE has primary coverage under Harleysville's primary policy. DCBE and Iconic have the same coverage in that both receive primary coverage. That does not mean that their coverage is identical.

Vicarious or direct liability - The Harleysville primary policy provides that DCBE, additional insured, is covered for damages for which it is entitled to be indemnified by Iconic. The subcontract provides that DCBE is not indemnified for

liability caused by its own negligence, but rather for liability connected to Iconic's acts or omissions while performing Iconic's work for DCBE under the subcontract. When a policy limits additional insured coverage to an injury caused by the "acts or omissions" of the named insured, coverage is extended to the additional insured only when the injury is the result of the named insured's negligence or some other act or omission by the named insured (Hanover Ins. Co. v Philadelphia Indem. Ins. Co., 159 AD3d 587, 588 [1st Dept 2018]). In such instances, the additional insured's coverage is vicarious, and the additional insured is not covered for its own negligence (Burlington Ins. Co. v NYC Tr. Auth., 29 NY3d 313, 326 [2017]; E.E. Cruz & Co., Inc. v Axis Surplus Ins. Co., 165 AD3d 603, 604-05 [1st Dept 2018]). Thus the Harleysville primary policy gives DCBE primary coverage for vicariously incurred damages for which DCBE must be indemnified by Iconic.

VI. Interplay of Harleysville's and Prosight's primary policies

The question is whether, as Harleysville contends, its primary coverage is excess to Prosight's primary coverage. Harleysville only protects DCBE in the event that DCBE, without engaging in any negligence, is found liable for harm connected to Iconic's work. Prosight protects DCBE in the same manner (though not only in the same manner).

Where the same risk is covered by more than one policy, priority of coverage is determined by comparing the respective "other insurance" clauses (Sport Rock Intl., Inc. v American Cas. Co. of Reading, Pa, 65 AD3d 12, 18 [1st Dept 2009]; Bovis Lend Lease LMB, Inc. v Great Am. Ins. Co., 53 AD3d 140, 145 [1st Dept 2008]). Prosight and Harleysville have the same "other insurance" clauses. Under Prosight's policy, DCBE, as the named insured, is the "you" for whom "this insurance" is excess over any "other primary insurance available to you covering liability for which you have been added as an additional insured by attachment of any endorsement." DCBE is an additional insured on Harleysville's policy. That means that Prosight's policy is excess to Harleysville's policy in regard to the coverage provided by Harleysville.

VII. Interplay of Harleysville's umbrella policy and Prosight's primary policy

DCBE receives excess coverage as an additional insured under Harleysville's umbrella policy. Harleysville seeks a declaration that its excess coverage for DCBE does not kick in until the excess coverage for DCBE under Prosight's primary policy is exhausted.

While the Prosight policy provides some excess coverage, it is not a "true excess" policy, but a primary policy, that under certain conditions, "happens to cover excess CGL risks" (Bovis,

53 AD 3d at 150). "True excess insurance must be distinguished from insurance which is written to be primary, but includes an 'other insurance' clause making it excess in those circumstances in which another policy, also written to be primary, applies to the loss" (15 Stephen Plitt et al., Couch on Insurance 3d § 219:18 [2018] [Westlaw cite: 15 Couch on Ins. § 219:18]). "The presence of an excess "other insurance" clause in a primary policy does not transform that policy into an excess policy vis-a-vis a second carrier providing true excess or umbrella coverage" (3 Douglas R. Richmond, New Appleman Insurance Law Practice Guide § 29A.01 [2018] [Lexis cite: 3 New Appleman Insurance Law Practice Guide 29A.01]). Excess and umbrella policies provide "true excess" coverage, above primary policies, including primary policies, like Prosight's, that include excess "other insurance" clauses (id.; see also Bovis, 53 AD3d at 148). An "other insurance" clause in a policy sold as primary insurance (the Prosight policy), will not make said policy excess to a true excess or umbrella policy sold to provide a higher level of coverage (the Harleysville umbrella policy) (see Sport Rock, 65 AD3d at 19 n 5).

The "other insurance" provision in Harleysville's umbrella policy states that it will not contribute with any other insurance, except for insurance "specifically written" as excess over the umbrella policy (umbrella policy, ¶ 5, at 12 of 17).

Such language is understood to negate any intention to contribute to any other insurance and is evidence of the intention to provide excess coverage (see Hartford Underwriters Ins. Co. v Hanover Ins. Co., 653 F Appx 66, 68 [2d Cir 2016]; Utica Mut. Ins. Co. v Government Empls. Ins. Co., 98 AD3d 502, 503-04 [2d Dept 2012]).

Where Harleysville's umbrella policy refers to "specifically written" it means a higher-level policy that specifically designates the subject policy as underlying insurance (Bovis, 53 AD3d at 152 [and cases cited therein]; and see Tishman Constr. Corp. v Great Am. Ins. Co., 53 AD3d 416, 421 [1st Dept 2008]). No party submits a policy that specifically designates Harleysville's umbrella policy as underlying. Harleysville states that DCBE did not respond to the request to produce any excess policy. If DCBE purchased excess coverage, the result determined here might have to change. Based on the three policies that have been produced, Harleysville, as DCBE's primary insurer, provides the first layer of coverage. Prosight is next, followed by Harleysville as excess insurer.

VIII. The policy limits of Harleysville's umbrella policy

Harleysville declares that the umbrella policy limits the additional insured coverage to $1 million. This is correct. The umbrella policy provides that the insurance amount is limited to the amount required by the subcontract. Rider D of

the subcontract provides that Iconic will procure CGL insurance of not less than $1 million per occurrence and $2 million aggregate, and umbrella liability insurance of not less than $1 million (id., rider D, ¶ 1). The limits of insurance are determined by the terms of the subcontract (E.E. Cruz & Co., Inc. v Axis Surplus Ins. Co., 165 AD3d 603, 605 [1st Dept 2018], citing Bovis, 53 AD3d at 156 n 14).

IX. Harleysville's duty to defend and indemnify DCBE

An insurer's duty to defend is exceedingly broad and is triggered whenever the allegations of the complaint suggest a reasonable possibility that the insured is covered (Automobile Ins. Co. of Hartford v Cook, 7 NY3d 131, 137 [2006]; City of New York v Evanston Ins. Co., 39 AD3d 153, 157 [2d Dept 2007] [duty to defend evaluated in light of allegations in third-party complaint]). If a complaint contains any allegations which bring the claim even potentially within the protection afforded under the policy, the insurer is obligated to defend, even if the claims lack any merit (Automobile, 7 NY3d at 137; Technicon Elecs. Corp. v American Home Assur. Co., 74 NY2d 66, 73 [1989]). The obligation to defend is greater than the obligation to indemnify, and an insurer may be required to defend, although it may not be required to pay once the litigation is finished (BP, 8 NY3d at 714; Automobile, 7 NY3d at 137).

Nonetheless, the obligation to defend is not triggered when there is no possible factual or legal basis upon which the insurer might eventually be held obligated to indemnify the insured under any provision of the policy (Bruckner Realty, LLC v County Oil Co., Inc., 40 AD3d 898, 900 [2d Dept 2007]). Whether this is the case is a matter of law for the court to determine (Spoor-Lasher Co. v Aetna Cas. & Sur. Co., 39 NY2d 875, 876 [1976]).

The amended complaint alleges that DCBE was negligent and contains no allegations suggesting that its liability was vicarious. In the third-party complaint, DCBE alleges that Iconic's negligence caused or contributed to plaintiff's accident, but does not include any factual allegations in support of its demands. The claims against Iconic are standard and nearly always made by contractors against each other when there is a workplace accident. No factual or legal basis is suggested for Harleysville to provide a defense to DCBE. Nonetheless, despite Harleysville having no duty to defend DCBE, the court cannot state as a matter of law that vicarious liability will not be placed on DCBE. For that reason, as discussed in the next section, the contractors' motions against each other are denied.

X. DCBE's and Iconic's claims against each other

DCBE is not entitled to summary judgment on its claims for contractual and common-law indemnification against Iconic. Iconic is not entitled to summary judgment dismissing DCBE's claims for contractual and common law indemnification and contribution against Iconic.

Contribution is available where two or more parties cause an injury and share the cost of damages according to their relative culpability (Trustees of Columbia Univ. v Mitchell/Giurgola Assocs., 109 AD3d 449, 454 [1st Dept 1985]; see also Godoy v Abamaster of Miami, Inc., 302 AD2d 57, 61 [2d Dept 2003]). Each contractor's claim of contribution against the other is not dismissed, since their relative liability, if any, is not yet known. Common-law indemnification permits one who has been compelled to pay for the wrong of another to recover from the wrongdoer all the damages that it paid to the injured party (17 Vista Fee Assoc. v Teachers Ins. & Annuity Assn. of Am., 259 AD2d 75, 80 [1st Dept 1999]). All of the liability is shifted to wrongdoer and the party seeking indemnification must show that it was not responsible in any degree (Trustees of Columbia,109 AD3d at 453). Common-law indemnity would be available only in the event that one contractor was found vicariously liable for the fault of the other. As the court cannot definitively say that this will not

happen, the claim for common-law indemnity will not be dismissed.

DCBE's claim that Iconic failed to procure insurance is not dismissed, although Iconic did apparently purchase insurance according to its undertaking in the subcontract, because neither contractor discusses the claim.

10/16/2019
DATE

DEBRA A. JAMES, J.S.C.

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| CHECK ONE: | | CASE DISPOSED | | | X | NON-FINAL DISPOSITION | |
| | | GRANTED | | DENIED | X | GRANTED IN PART | OTHER |
| APPLICATION: | | SETTLE ORDER | | | | SUBMIT ORDER | |
| CHECK IF APPROPRIATE: | | INCLUDES TRANSFER/REASSIGN | | | | FIDUCIARY APPOINTMENT | REFERENCE |