

**WCC Bldrs. v State Farm Fire & Cas. Co.**

2020 NY Slip Op 33291(U)

October 6, 2020

Supreme Court, New York County

Docket Number: 652776/2020

Judge: Arlene P. Bluth

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. ARLENE P. BLUTH PART IAS MOTION 14**

*Justice*

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**INDEX NO. 652776/2020**

WCC BUILDERS, LLC,

**MOTION DATE 10/02/2020**

Plaintiff,

**MOTION SEQ. NO. 001**

- v -

STATE FARM FIRE AND CASUALTY COMPANY,  
ENDURANCE AMERICAN SPECIALTY INSURANCE  
COMPANY

**DECISION + ORDER ON  
MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 23, 24, 25, 26, 27, 28, 30, 31, 32, 33, 34

were read on this motion to/for DISMISS.

The motion to dismiss by defendant Endurance American Specialty Insurance Company (“Endurance”) is denied and the cross-motion by plaintiff for summary judgment is denied.

**Background**

This dispute arises out of an underlying action pending in Kings County where Con Ed alleges that it is owed damages stemming from a water main rupture near the intersection of Avenue U and Ocean Parkway. In that case, Con Ed claims that plaintiff performed work near the intersection and allegedly damaged Con Ed’s electric facilities and appurtenances.

Plaintiff brought this case seeking coverage from defendants—it claims it was named as an additional insured on a subcontractor’s (Pisa) insurance policy obtained from defendant State Farm. It also claims that it is an additional insured on a policy issued by Endurance to another subcontractor (Optimum).

Endurance moves to dismiss solely on the ground that collateral estoppel bars plaintiff's claims against it. It points out that after a hearing before the Office of Administrative Trials and Hearings ("OATH") held in December 2016, the ALJ found that there was no violation for failing to safeguard existing utilities and that the water main rupture was not caused by ongoing construction. Endurance concludes that it need not provide any additional insured coverage to plaintiff where there has been a finding that the work of its insured (Optimum) did not cause the water main break.

Plaintiff brings a cross-motion for partial summary judgment seeking a declaration that Endurance must defend plaintiff in the underlying Kings County case filed by Con Ed. It admits that the OATH decision was favorable to plaintiff but it did not end the Con Ed case in Brooklyn. Plaintiff claims that is still in need of a defense and Endurance is obligated to provide it. It argues that Endurance can raise the OATH issues as a defense in the Con Ed case but it is still Endurance's obligation to defend plaintiff. Plaintiff maintains that the issue of collateral estoppel is irrelevant because the duty to defend is a matter of insurance law.

In reply and in opposition to the cross-motion, Endurance argues that although most instances of collateral estoppel involve an adverse ruling, that does not prevent its application here. It points to cases in which parties are prevented from taking a contrary position in a later action simply because interests have changed.

Endurance also claims that plaintiff cannot allege that the water main ruptured due to Optimum's construction work and, therefore, there can be no coverage under the subject policy. It claims that the duty to defend is not implicated because the named insured (Optimum) has not been named in Con Ed's case and no allegations have been asserted against it. Endurance notes that there have been allegations against plaintiff's other subcontractor (Pisa).

## Discussion

The Court denies both the motion and the cross-motion. “The doctrine of collateral estoppel, a narrow species of *res judicata*, precludes a party from relitigating a subsequent action or proceeding an issue clearly raised in a prior action or proceeding and decided against that party or those in privity, whether or not the tribunals or causes of action are the same” (*Ryan v New York Telephone Co.*, 62 NY2d 494, 500, 478 NYS2d 823 [1984]).

As an initial matter, the Court finds that the doctrine of collateral estoppel, the only ground upon which Endurance moves, does not apply here. Contrary to Endurance’s arguments, plaintiff is not seeking to relitigate an issue that was previously decided. In fact, plaintiff successfully defeated a case brought by the City before OATH and it will undoubtedly take the same position in the Con Ed case in Brooklyn. But, as plaintiff points out, the OATH decision in plaintiff’s favor did not automatically compel dismissal of Con Ed’s claims against plaintiff in Kings County. Plaintiff is not taking a contrary position because its interests have changed, it is merely seeking coverage as an additional insured pursuant to a policy issued to one of its subcontractors. The Court is unable to conceive of how collateral estoppel could bar plaintiff from seeking coverage under these circumstances. Under Endurance’s theory, plaintiff should have tried to lose the OATH case so that it could get coverage in the Con Ed case. That makes no sense.

The Court also denies the cross-motion for summary judgment. “The duty to defend arises whenever the allegations in a complaint against the insured fall within the scope of the risks undertaken by the insurer, regardless of how false or groundless those allegations might be. . . . Rather, the duty of the insurer to defend the insured rests solely on whether the complaint alleges any facts or grounds which bring the action within the protection purchased” (*Seaboard*

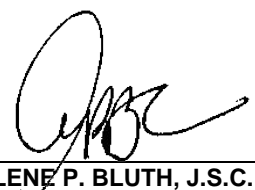
Sur. Co. v Gillette Co., 64 NY2d 304, 310, 486 NYS2d 873 [1984]). Here, as Endurance points out, the underlying complaint by Con Ed does not mention Optimum (Endurance’s insured and plaintiff’s subcontractor) but does mention another subcontractor hired by plaintiff (Pisa). Under these circumstances, the Court is unable to find that the duty to defend is implicated.

Accordingly, it is hereby

ORDERED that the motion by defendant Endurance to dismiss pursuant to CPLR 3211(a)(5) is denied and the cross-motion by plaintiff for partial summary judgment is also denied.

Remote Conference: February 1, 2021.

10/6/2020  
DATE

  
ARLENE P. BLUTH, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION		
	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	DENIED	<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER			<input type="checkbox"/>	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN			<input type="checkbox"/>	REFERENCE