

**East Harlem Council for Human Servs., Inc. v
Merchants Mut. Ins. Co.**

2021 NY Slip Op 32755(U)

December 23, 2021

Supreme Court, New York County

Docket Number: Index No. 155150/2020

Judge: Gerald Lebovits

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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. GERALD LEBOVITS **PART** **07**

Justice

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INDEX NO. 155150/2020

EAST HARLEM COUNCIL FOR HUMAN SERVICES, INC.
and BORIKEN LOCAL DEVELOPMENT CORPORATION,

MOTION SEQ. NO. 001

Plaintiffs,

- v -

**DECISION + ORDER ON
MOTION**

MERCHANTS MUTUAL INSURANCE COMPANY and
ORLANDO DECORATING INC,

Defendants.

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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, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 62, 63

were read on this motion for SUMMARY JUDGMENT.

Milber Makris Plousadis & Seiden, LLP, Woodbury, NY (Sarah M. Ziolkowski of counsel), for plaintiffs.

Farber Brocks & Zane L.L.P., Garden City, NY (Joseph K. Poe of counsel), for defendant Merchants Mutual Insurance Company.

Gerald Lebovits, J.:

In this insurance-coverage action, plaintiffs, East Harlem Council for Human Services, Inc., and Boriken Local Development Corporation, move for summary judgment on their claims for declaratory relief against defendant Merchants Mutual Insurance Company. The motion is granted in part and denied in part.

BACKGROUND

East Harlem contracted with nonparty Westerman Construction Company, Inc., to build a neighborhood health clinic in Manhattan.¹ Westerman subcontracted painting services on the project to defendant Orlando Decorating Inc. Merchants issued primary and umbrella insurance policies to Orlando. An Orlando employee was injured while working on the project and sued Westerman, East Harlem, and Boriken Local in Supreme Court, Kings County. Plaintiffs now

¹ East Harlem was the original contracting party as owner of the project site. It later deeded the site to Boriken Local (*see* NYSCEF No. 52; NYSCEF No. 30 at ¶ 5) and assigned to Boriken Local its rights under the project's construction contracts (*see* NYSCEF No. 43).

seek reimbursement from Merchants of their defense costs incurred in that underlying action,² contending that they qualify as additional insureds on the policies that Merchants issued to Orlando.³

I. Whether Plaintiffs are Entitled as Additional Insureds to Coverage on a Primary and Non-Contributory Basis under the Merchants Primary Policy

A. Whether Plaintiffs Qualify as Additional Insureds on the Merchants Primary Policy

Plaintiffs contend first that they are additional insureds on the Merchants/Orlando primary policy, and are therefore entitled to reimbursement of defense costs incurred in the underlying action. This court agrees.

Plaintiffs rely in part on a schedule-based additional-insured endorsement in the Merchants primary policy.⁴ That endorsement provides that any person or organization shown in the endorsement schedule qualifies as an additional insured with respect to liability for bodily injury “caused, in whole or in part, by . . . acts or omissions” of Orlando or “those acting on [Orlando’s] behalf” in the “performance of [Orlando’s] ongoing operations for the additional insured[s]” at the insured location.” (NYSCEF No. 17 at MMIC 0062.) The endorsement schedule refers, in turn, to the policy declarations. (*See id.*) And the policy declarations list as

² Plaintiffs also initially moved for summary judgment on their request for a declaration that Merchants had a duty to indemnify them, as well as a duty to defend. They have since withdrawn that branch of their motion in light of the settlement of the underlying action. (*See* NYSCEF No. 49 at 2 n 1.) This court sought, and obtained, letter briefing from the parties on the implications of the settlement for this action. (*See* NYSCEF Nos. 61-63.) The parties did not suggest that the settlement should affect this court’s disposition of plaintiffs’ duty-to-defense claims.

³ In a related coverage action brought by *Westerman*’s insurer (Harleysville Worcester Insurance Company), this court held that *Westerman* was entitled to a defense (and reimbursement of defense costs) from Merchants on a primary basis. (*See* Index No. 656539/2016, NYSCEF No. 86 at Tr. 16-21 [transcript of April 28, 2021, decision delivered on the record]; NYSCEF Nos. 79, 94 [short-form orders incorporating and reflecting that decision].)

⁴ Plaintiffs also rely on a separate policy endorsement conferring additional-insured status on parties who are required by written contracts between them and the policyholder to be included as additional insureds under the policy. Given the lack of privity between plaintiffs and Orlando, this court is skeptical that plaintiffs qualify as additional insureds under this second endorsement. (*See AB Green Gansevoort, LLC v Peter Scalamandre & Sons, Inc.*, 102 AD3d 425, 426-427 [1st Dept 2013].) Plaintiffs suggest that *AB Green* involved materially different policy language. (*See* NYSCEF No. 58 at 11 n 7.) But although other recent decisions reflect the difference in language that plaintiffs seek to rely on for this point (*see Travelers Prop. Cas. Co. of Am. v Burlington Ins. Co.*, 180 AD3d 604, 605 [1st Dept 2020]), the relevant language of the policy in *AB Green* is identical to that of the Merchants policy at issue here. (*See* 102 AD3d at 426.)

additional insureds “East Harlem Council for Human Services Inc.” and “Boriken Neighborhood Health Center.”⁵ (*Id.* at MMIC 0006.)

In opposition, Merchants argues first that “Boriken Neighborhood Health Center” is a different entity from “Boriken Local Development Corporation,” such that the listing of the former entity in the policy declarations does not establish the additional-insured status of the latter. On reply, though, plaintiffs provide an affidavit and supporting documentation from East Harlem’s chief operating officer (also a director of Boriken Local) attesting that “Boriken Neighborhood Health Center” is not itself a separate entity but merely the name of the underlying construction project; that it was always the intent of East Harlem and Boriken Local to require all contractors and subcontractors on the project to name them as additional insureds on their insurance policies; and that the listing of “Boriken Neighborhood Health Center” on the Merchants primary policy was merely a scrivener’s error. (*See* NYSCEF No. 50 at ¶¶ 1, 3, 5-9; *see also* NYSCEF No. 54 [certificate of insurance issued to Orlando, listing Boriken Local as an additional insured]; *cf.* NYSCEF No. 16 at 4 [Orlando purchase order listing “Job Name” as “Boriken-NHC — East Harlem Council for Humanity Services].) The court concludes, taking this evidence into account, that plaintiffs have established as a matter of law that Boriken Local, as well as East Harlem, qualifies as an additional insured by virtue of the “schedule” additional-insured endorsement.⁶

The question thus becomes whether plaintiffs qualify as additional insureds with respect to their potential liability in the underlying action. This court concludes that they do. Merchants argues that Orlando was not conducting operations “for” East Harlem and Boriken Local, and that there is no possibility that the bodily injury here was caused by acts or omissions of Orlando or its employees. But these arguments have already been squarely presented to—and squarely rejected by—this court in the Westerman/Harleysville coverage action against Merchants. (*See* NYSCEF No. 23 at Tr. 19-20 [transcript of April 28, 2021, decision delivered on the record in related action]; *see also* Index No. 656539/2016, NYSCEF Nos. 79, 94 [short-form orders in related action that incorporate and reflect decision delivered on the record].) Issue preclusion bars Merchants from making the same arguments again here.

Plaintiffs are, as a matter of law, additional insureds under the Merchants primary policy, and are entitled to reimbursement of incurred defense costs.⁷

B. Whether Plaintiffs are Entitled to Primary and Non-Contributory Coverage under the Merchants Primary Policy

⁵ The policy declarations also list “The Westerman Construction Co” as an additional insured. (*See* NYSCEF No. 17 at MMIC 0006.)

⁶ Although plaintiffs first submitted this evidence on reply (in response to Merchants’s arguments in opposition), Merchants did not seek leave from this court to file a responsive surreply, or otherwise dispute the accuracy or significance of the evidence.

⁷ As discussed below in Point III, this court leaves for another day the question whether Merchants may properly refuse to pay some of those incurred defense costs as excessive or unnecessary, as contended for in Merchants’s first counterclaim.

Plaintiffs move for summary judgment on their declaratory-judgment claim that their coverage under the Merchants policy is primary and non-contributory. This branch of plaintiffs' motion is denied.

As Merchants argues, plaintiffs have not provided their own insurance policies covering the underlying action. This court is therefore unable to determine on this record how those policies, if any, interact with plaintiffs' additional-insured coverage under the Merchants policy—or, for that matter, any additional-insured coverage to which they might be entitled under the *Harleysville* policy issued to Westerman in connection with the underlying construction project. (*See* note 3, *supra*.)

On reply, plaintiffs contend that this court may simply presume that they enjoy additional-insured coverage under the Harleysville policy based on Harleysville's asserted acknowledgment that it owes them an additional-insured obligation. (*See* NYSCEF No. 58 at 11 n 8.) But even if plaintiffs are correct on this point, the Harleysville additional-insured endorsement to which plaintiffs cite expressly provides that (i) additional-insured coverage provided under the policy is excess to other policies; and (ii) this additional-insured coverage "shall share with other insurance available to the additional insured . . . conferred . . . by a separate additional insured endorsement," pursuant to methods of sharing specified elsewhere in the policy. (NYSCEF No. 29 at 53.) Plaintiffs do not address whether the additional-insured coverage provided by the Merchants policy is *also* excess over other available coverage; and, if so, the method under which the two policies share coverage.

In short, the record at this stage of the action is insufficient to permit this court to determine as a matter of law how plaintiffs' different insurance coverages interact with one another for purposes of determining who has to pay first and how much.

II. Whether Plaintiffs are Entitled as Additional Insureds to Coverage under the Merchants Umbrella Policy

Plaintiffs also seek summary judgment declaring they are entitled to additional-insured coverage under the *umbrella* policy issued by Merchants to Orlando, as well as the Merchants primary policy. This branch of plaintiffs' motion is denied.

Plaintiffs' contention as to the umbrella policy is simple: They are additional-insureds under the Merchants primary policy, and the umbrella policy provides that additional-insureds under the primary policy "will automatically be an insured" under the umbrella policy. (NYSCEF No. 18 at MMIC 0145.) True enough. But the umbrella policy also provides that it is only liable to pay once the underlying insurer (here, Merchants under the primary policy) has become obligated to pay the limit of the underlying insurance policy listed in the policy declarations (*i.e.*, the Merchants primary policy), or a self-insured retention. (*See id.* at MMIC 150, 155.)

As discussed above, it remains unclear on this record what proportions of plaintiffs' defense costs must be covered by Harleysville, Merchants, and any other applicable insurance, respectively—much less whether the Merchants primary policy's share of those costs would

exceed that policy’s limit. This court therefore cannot yet determine whether the Merchants umbrella policy has any coverage liability to plaintiffs.

III. Whether Merchants’s Counterclaims Should Be Dismissed


Plaintiffs seek summary judgment dismissing Merchants’s counterclaims in this action. This branch of plaintiffs’ motion is granted in part and denied in part.

Several of Merchants’s counterclaims raise, in essence, Merchants’s defense that plaintiffs do not qualify as additional insureds and that Merchants therefore do not owe plaintiffs a duty to defend/reimburse defense costs. (See NYSCEF No. 6 at ¶¶ 47-51, 59-63, 65-70, 72-77.) For the reasons discussed above in Section I.A, this court concludes as a matter of law that Merchants *does* owe plaintiffs a duty to defend as additional insured. Plaintiffs’ request for summary judgment dismissing Merchants’s second, fourth, fifth, and sixth counterclaims therefore is granted.)

Merchants’s first counterclaim, on the other hand, contends merely that plaintiffs’ incurred defense costs are excessive and unreasonable, and therefore that Merchants is not required to pay part or all of those costs. (See NYSCEF No. 6 at ¶¶ 39-45.) The record currently before this court does not permit the court to resolve this counterclaim—much less to do so as a matter of law.

Merchants’s third counterclaim contends that its coverage obligations to plaintiffs are excess over any other applicable coverage obligations, including under the Harleysville policy. (See *id.* at ¶¶ 53-57.) As discussed above in Section I.B., this court lacks a basis on this record to determine as a matter of law how plaintiffs’ various applicable coverages interact with one another, either in terms of primary/excess or methods of sharing. It would therefore be premature to grant summary judgment dismissing this counterclaim.

Settle Order.

<u>12/23/2021</u> DATE			 HON. GERALD LEBOVITZ J.S.C.
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> DENIED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
	<input type="checkbox"/> GRANTED		<input checked="" type="checkbox"/> GRANTED IN PART
APPLICATION:	<input checked="" type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT
			<input type="checkbox"/> REFERENCE