

**Charter Oak Fire Ins. Co. v Zurich Am. Ins. Co.**

2023 NY Slip Op 31643(U)

May 15, 2023

Supreme Court, New York County

Docket Number: Index No. 160228/2017

Judge: Frank P. Nervo

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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. FRANK P. NERVO PART 04**

*Justice*

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THE CHARTER OAK FIRE INSURANCE COMPANY, THE  
TRAVELERS INDEMNITY COMPANY,

Plaintiff,

INDEX NO. 160228/2017

MOTION DATE 06/29/2022

MOTION SEQ. NO. 001

- v -

ZURICH AMERICAN INSURANCE COMPANY, ALLIED  
WORLD ASSURANCE COMPANY (U.S.) INC., NATIONAL  
UNION FIRE INSURANCE COMPANY OF PITTSBURGH,  
PA, IRONSHORE SPECIALTY INSURANCE COMPANY,  
AMERICAN EMPIRE SURPLUS LINES INSURANCE  
COMPANY, SCOTTSDALE INSURANCE COMPANY,  
INDIAN HARBOR INSURANCE COMPANY,  
HARLEYSVILLE WORCESTER INSURANCE COMPANY,

Defendant.

**DECISION + ORDER ON  
MOTION**

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ZURICH AMERICAN INSURANCE COMPANY

Plaintiff,

Third-Party  
Index No. 595070/2018

-against-

IRONSHORE SPECIALTY INSURANCE COMPANY,  
AMERICAN EMPIRE SURPLUS LINES INSURANCE  
COMPANY, SCOTTSDALE INSURANCE COMPANY, INDIAN  
HARBOR INSURANCE COMPANY, HARLEYSVILLE  
INSURANCE COMPANY

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 154, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 189

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

After the complete submission of papers on this motion, the matter was administratively transferred to Part IV. The Court's transfer order and Part

Rules, advise that this Part takes motions on submission, absent order otherwise. The Court has considered the parties' request for oral argument, and deems same unnecessary.

This insurance dispute matter arises out of the widely publicized crane collapse that occurred in lower Manhattan on February 5, 2016. While the collapse and subsequent actions arising from the collapse undoubtedly raise complex issues, the instant insurance action is straightforward. Plaintiffs' claim, on this partial motion for summary judgment, inter alia, the insurance policies issued by defendant insurers Zurich and Allied provide primary coverage to the policies issued by plaintiffs.

It axiomatic that unambiguous contract terms raise questions of law for the Court to determine, and in so doing, the Court should consider the contract as whole so as to give effect to the parties' intentions and general purpose of the agreement (*see e.g. Kaplan v. Kaplan*, 174 AD3d 691 [1st Dept. 2019]). “[W]hen parties set down their agreement in a clear, complete document, their writing should ... be enforced according to its terms” (*Vermont Teddy Bear Co., Inc.*, 538 *Madison Realty Co.*, 1 NY3d 470 [2004] [internal citations omitted]). Insurance

policies, as contracts, are entitled to enforcement of their plain meaning (*State Farm Fire & Cas. Co. v. LiMauro*, 65 NY2d 369 [1985]).

Where multiple and overlapping insurance policies raise issues of the priority of each policy, the Court reviews each policy and applies the plain meaning of the policies' language to determine priority (*see e.g. BP Air Conditioning Corp. v. One Beacon Ins., Group*, 8 NY3d 708 [2007]; *Tishman Contr. Corp. of NY v. American Mfrs. Mut. Ins. Co.*, 303 AD2d 323 [1st Dept 2003]). Simply put and unsurprisingly, where a policy's language states that it provides primary coverage, its coverage will be primary over another policy which states it provides only excess coverage (*id.*).

Here, beginning with the policies issued by plaintiffs to Nova, the plain language of the Charter Oak policy provides that its coverage is excess when a party has additional insurance coverage. The Charter Oak policy states, in relevant part,

This insurance is excess over any of the other insurance, whether primary, excess, contingent or on any other basis, that is available to the insured when the insured is added as an additional insured under any other policy, including any umbrella or excess policy.

[...]

When this insurance is excess, we will have no duty under Coverages A or B to defend the insured against any “suit” if any other insurer has a duty to defend the insured against that “suit....”

(NYSCEF Doc. No. 101).

Although the language of the plaintiffs’ Travelers policy differs, it likewise provides that its coverage will be in excess of any other insurance. It provides, in relevant part,

This insurance is excess over any valid and collectible other insurance whether such other insurance is stated to be primary, contributing, excess, contingent or otherwise. This provision does not apply to a policy bought specifically to apply excess of this insurance.

(NYSCEF Doc. No. 102).

Conversely, the plain language of the defendants’ Zurich policy states that it is “primary to and will not seek contribution from any other insurance available to an additional insured” (NYSCEF Doc. No. 103). There can be no argument that Nova, the general contractor and named insured in plaintiffs’ policies and a party to the underlying actions, is an additional insured under the

Zurich policy, as defined by the Zurich policy<sup>1</sup> issued to the subcontractor Hatzel & Buehler (“H&B”) (*supra.*).

Similarly, the Allied policy provides that “coverage afforded to ... additional Insured parties will be primary to, and non-contributory with, any other insurance available to that person or organization” (NYSCEF Doc. No. 104). Likewise, as with the Zurich policy, there can be no argument that the Allied policy applies to Nova as an additional insured.<sup>2</sup>

[continued on following page]

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<sup>1</sup> “Who Is An Insured is amended to include as an additional insured any person or organization whom you [H&B] are required to add as an additional insured on this policy under a written contract or written agreement. 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 [H&B’s] acts or omissions; or
2. The acts or omissions of those acting on your behalf, in the performance of your ongoing operations ... which is the subject of the written contract or written agreement.

However, the insurance afforded to such additional insured:

1. Only applies to the extent permitted by law; and
2. Will not be broader than that which you are required by the written contract or written agreement to provide for such additional insured.”

(*see e.g.* NYSCEF Doc. No. 103).

<sup>2</sup> “Any person or organization for whom you [H&B] are performing operations when you and such person or organization have agreed in writing in a contract or agreement that such person or organization is an additional Insured on your policy, but only if such person or organization is included under the coverage provided by Scheduled Underlying Insurance [Zurich CGL Policy]. Such person or organization is an additional Insured only with respect to liability arising out of Your Work at the location designated.” (NYSCEF Doc. No. 104).

Accordingly, it is

ORDERED that the motion is granted; and it is further

ORDERED, ADJUDGED, and DECLARED that the insurance coverage duty to defend Nova in underlying actions as provided by Zurich and Allied are primary to the coverage provided by Charter Oak and Travelers; and it is further

ORDERED that Zurich shall bear the cost of Nova's defense in the underlying actions; and it is further

ORDERED that Zurich shall reimburse those defense costs already borne by Nova and/or plaintiffs subject to a hearing of those damages, as set below; and it is further

ORDERED that the court having on its own motion determined the appointment of a referee to determine as follows; and it is further

ORDERED that a Judicial Hearing Officer (“JHO”) or Special Referee shall be designated to determine the following individual issues of fact, which are hereby submitted to the JHO/Special Referee for such purpose:

(1) the issue of defense costs, previously borne by plaintiffs and/or their insured, Nova, including attorney’s fees, costs, and disbursements; and it is further

ORDERED that the powers of the JHO/Special Referee shall not be limited beyond the limitations set forth in the CPLR; and it is further

ORDERED that this matter is hereby referred to the Special Referee Clerk for placement at the earliest possible date upon the calendar of the Special Referees Part (Part SRP), which, in accordance with the Rules of that Part (which are posted on the website of this court at [www.nycourts.gov/supctmanh](http://www.nycourts.gov/supctmanh) at the “References” link ), shall assign this matter at the initial appearance to an available JHO/Special Referee to determine as specified above; and it is further

ORDERED that counsel shall immediately consult one another and counsel for plaintiff/petitioner shall, within 15 days from the date of this Order, submit to the Special Referee Clerk by e-mail an Information Sheet (accessible



at the “References” link on the court’s website) containing all the information called for therein and that, as soon as practical thereafter, the Special Referee Clerk shall advise counsel for the parties of the date fixed for the appearance of the matter upon the calendar of the Special Referees Part; and it is further

ORDERED that the parties shall appear for the reference hearing, including with all witnesses and evidence they seek to present, and shall be ready to proceed with the hearing, on the date fixed by the Special Referee Clerk for the initial appearance in the Special Referees Part, subject only to any adjournment that may be authorized by the Special Referees Part in accordance with the Rules of that Part; and it is further

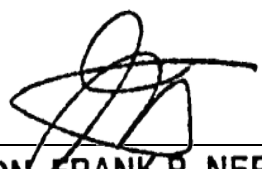
ORDERED that, except as otherwise directed by the assigned JHO/Special Referee for good cause shown, the trial of the issue(s) specified above shall proceed from day to day until completion and counsel must arrange their schedules and those of their witnesses accordingly; and it is further

ORDERED that counsel shall file memoranda or other documents directed to the assigned JHO/Special Referee in accordance with the Uniform Rules of the Judicial Hearing Officers and the Special Referees (available at the

“References” link on the court’s website) by filing same with the New York State Courts Electronic Filing System (see Rule 2 of the Uniform Rules).

THIS CONSTITUTES THE DECISION AND ORDER OF REFERENCE OF THE COURT

5/15/2023  
DATE

  
\_\_\_\_\_  
**HON. FRANK P. NERVO**  
J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE