

SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. ROBERT R. REED
J.S.C. Justice

PART 43

Endurance American Specialty

INDEX NO. 654568/2017

-v-

MOTION DATE _____

Harleysville Worcester

MOTION SEQ. NO. 001

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

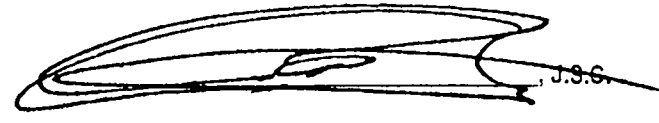
Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

decided in accordance with the attached decision and order.

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

Dated: 1/28/19


J.S.C.

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK: IAS PART 43

-----x
 ENDURANCE AMERICAN SPECIALTY INSURANCE
 COMPANY, NYCHA PUBLIC HOUSING
 PRESERVATION I, LLC, and NEW YORK CITY
 HOUSING AUTHORITY,

Index No. 654568/2017

Plaintiffs,

- against-

HARLEYSVILLE WORCESTER INSURANCE
 COMPANY, and WOMEN WORK CONSTRUCTION
 CORP. d/b/a WWC CORPORATION,

Defendants.

----- X
ROBERT R. REED, J:

These summary judgment motions and motion for leave to amend to assert a counterclaim arise in an insurance coverage declaratory judgment action involving a workplace accident that occurred on March 17, 2011. Nonparty Apolinar R. Garcia-Salazar (Garcia-Salazar), a construction laborer, is the plaintiff in the underlying action. He allegedly was struck by a piece of scaffolding that fell from an elevated sidewalk bridge at a construction site at the Bayview Houses in Brooklyn (the Premises). The underlying action, captioned *Apolinar v NYCHA Public Housing Preservation I, LLC, and New York City Housing Authority*, Index No. 12037/2012, is currently pending in Supreme Court, Kings County (the Underlying Action).

On March 16, 2010, defendant Women Work Construction Corp. d/b/a WWC Corporation (WWC) entered into a contract (the Contract) (Wishert affirmation, exhibit A) with nonparty STV Construction Company (STV), pursuant to which STV would act as the construction manager and WWC would act as the contractor on a project at the Bayview housing project in Brooklyn, which is owned and/or operated by plaintiffs New York City Housing Authority (NYCHA) and NYCHA Public Housing Preservation I, LLC (jointly, NYCHA). STV is a third-party defendant in the Underlying Action. WWC employed Garcia-Salazar at the time of the accident.

Article 22 of the Contract requires WWC to obtain CGL coverage naming STV and NYCHA "as additional insureds on a primary and noncontributory basis thereunder and endorsed to cover liability assumed by [WWC] under the indemnity provisions of this Agreement" (*id.*).

WWC obtained two CGL policies, policy number GLO10002344400, issued by plaintiff Endurance American Specialty Insurance Company (Endurance, Complaint, exhibit F); and policy number mpa99943g, issued by defendant Harleysville Worcester Insurance Company (Harleysville). WWC is the named insured on both, and each names NYCHA as an additional insured. WWC obtained the Endurance Policy seven months after entering into the Contract, and

obtained the Harleysville Policy eight months after obtaining the Endurance Policy.

The Endurance Policy contains an endorsement captioned "Limitation of Coverage to Designated Premises or Project," listing as the project, "[NYCHA], Bayview Houses Contract No. CM7015064 and Baychester Houses, Contract No. CM7015062" (Endurance Policy at 25). The equivalent endorsement in the Harleysville Policy provides as follows: "[d]esignated construction projects: [a]ll projects when required in a written contract" (Wishert affirmation, exhibit C).

Plaintiffs move for summary judgment declaring (1) that Harleysville and Endurance both owe a pro rata share of the defense and indemnity of plaintiffs in the Underlying Action and (2) that Harleysville must contribute to the defense of the Underlying Action and reimburse all fees and costs of defense incurred by Endurance to date.

Harleysville and WWC cross-move for an order granting summary judgment against Endurance, denying Endurance's motion, and granting leave to file a counterclaim against Endurance for contribution.

By certified letter dated January 26, 2017 to NYCHA (*id.*, exhibit J), Harleysville acknowledged that the NYCHA, as its additional insured, is entitled to coverage in the Underlying

Action, but took the position that Harleysville's coverage is excess to that of Endurance.

Both policies contain 'other insurance' clauses. The Harleysville clause provides, as pertinent:

"[a]ny coverage provided ... to an additional insured shall be excess over any other valid and collectible insurance available to [WWC] unless a written contract specifically requires that this insurance be primary and that the additional insured's primary coverage be non-contributory. Even if the requirements of the above paragraph are met, this coverage shall share with other insurance available to [WWC] which is conferred onto [WWC] by a separate additional insured endorsement"

(Complaint, exhibit E).

The "primary non-contributory endorsement" in the Endurance Policy provides, as pertinent:

"[w]hen required by written contract or agreement, the insurance provided by endorsements [covering additional insureds] is primary insurance and we will not seek contribution from any other insurance available to [WWC] unless the other insurance is provided by a contractor, other than you for the same operations and job location. Then we will share that other insurance by the method described in paragraph 4.c. of the Commercial General Liability Conditions (Section IV) [emphasis supplied]"

(Wishert affirmation, exhibit B).

Harleysville cited the "primary and non-contributory endorsement" in the Endurance Policy (Wishert affirmation,

exhibit C) for its statement in the January 26, 2017 letter:

"[b]ecause the Endurance policy expressly manifests that it is intended to be primary and expressly negates the possibility of contribution with other carriers, the coverage afforded to NYCHA under the Harleysville policy is excess over the coverage afforded to NYCHA under the Endurance policy"

(*id.*).

The Endurance Policy expressly states that it is intended to be primary, but so does the Harleysville Policy. The Endurance Policy provides in the CGL conditions, section IV, (4), captioned "other insurance," subdivision (b), captioned "excess insurance," subdivision (1)(b) of which provides:

"[t]his insurance is excess over ... (b) any other primary insurance available to [WWC] covering liability for damages arising out of the premises or the operations ... for which you [WWC] have been added as an additional insured by attachment of an endorsement"

By letter dated February 8, 2017 (*id.*, exhibit Q) to Harleysville's claims administrator, counsel for Endurance contended that, when the "other insurance" endorsement in the Endurance Policy is considered together with the "other insurance" endorsement in the Harleysville Policy, the coverage provided by the two policies is co-primary in relation to their joint additional insureds, NYCHA. Endurance also argues that it should not be penalized for providing a defense when both it and

Harleysville are obligated to provide that defense as co-primary insurers.

"Where [as here] the same risk is covered by two or more policies, each of which was sold to provide the same level of coverage (as is the case here), priority of coverage (or, alternatively, allocation of coverage) among the policies is determined by comparison of their respective 'other insurance' clauses"

(see *Sport Rock Intl., Inc. v American Casualty Co. of Reading, PA*, 65 AD3d 12, 18 [1st Dept 2009]).

The court agrees with Endurance that the two policies, by their terms, are co-primary in relation to their respective duties to defend and indemnify NYCHA, and, thus,

"[p]ursuant to the 'other insurance' and 'method of sharing' provisions of those policies, both [Endurance and Harleysville] have an obligation to provide primary coverage and to share equally in the costs of plaintiff's defense and indemnification in the underlying action [citations omitted]"

(see *B.F. Yenny Constr. Co. v One Beacon Ins. Group.*, 50 AD3d 1477, 1479 [4th Dept 2008]).

Because each states that it is excess as to the other, the "other insurance" clauses cancel each other out, and both insurers cancel each other out and "the companies must apportion the costs of defending and indemnifying [WWC] on a pro rata basis" (*Great Northern Ins. Co. v Mount Vernon Fire Ins. Co.*, 92 NY2d 682, 687 [1992]).

This result is not altered by the language in the Endurance Policy in the "primary non-contributory endorsement" that Endurance

"will not seek contribution from any other insurance available to [WWC] unless the other insurance is provided by a contractor, other than you for the same operations and job location"

(Wishert affirmation, exhibit B).

While there is no corresponding provision in the Harleysville Policy stating that Harleysville will not seek contribution, Endurance is not the only plaintiff. NYCHA is also suing to enforce its rights as an additional insured based on indemnity under the Harleysville Policy, not contribution. The court holds that the apparent waiver of the right to seek contribution in the Endurance Policy does not vitiate NYCHA's rights under the Harleysville Policy as an additional insured.

Accordingly, it is

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

ADJUDGED AND DECLARED that defendant Harleysville Worcester Insurance Company and plaintiff Endurance American Specialty Insurance Company each owe a pro rata share of the defense and indemnity of plaintiffs in the Underlying Action; and that Harleysville must contribute to the defense of the Underlying Action and reimburse all fees and costs of defense incurred by

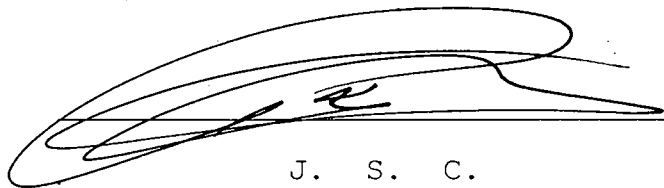
Endurance to date; and it is further

ORDERED that defendant's cross motion for leave to serve and file a counterclaim is denied as moot; and it is further

ORDERED that the Clerk shall enter judgment accordingly.

Dated: January 22, 2019

E N T E R:

A handwritten signature in black ink, consisting of several overlapping loops and a horizontal line at the bottom, positioned above the initials "J. S. C."

J. S. C.