Flintlock Constr. Servs. LLC v Technology Ins. Co.
2019 NY Slip Op 30392(U)
February 15, 2019
Supreme Court, New York County
Docket Number: 652939/2017
Judge: Gerald Lebovits

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. GERALD LEBOVITS** **PART** **IAS MOTION 7EFM**

Justice

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INDEX NO. 652939/2017

FLINTLOCK CONSTRUCTION SERVICES LLC,451 LEXINGTON REALTY LLC, & LIBERTY INSURANCE UNDERWRITERS, INC.,

MOTION SEQ. NO. 002, 003, 004, 005

Plaintiffs,

- v -

TECHNOLOGY INSURANCE COMPANY,

DECISION AND ORDER

Defendant.

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TECHNOLOGY INSURANCE COMPANY, INC. i/s/h/a TECHNOLOGY INSURANCE COMPANY,

Third-Party Plaintiff,

-against-

UTICA NATIONAL ASSURANCE COMPANY, SIGMA ELECTRIC INC. and VORTEX ELECTRIC CO., INC.,

Third-Party Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 110, 112, 127, 128

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

The following e-filed documents, listed by NYSCEF document number (Motion 003) 106, 107, 108, 111, 113, 122, 123, 124, 133, 135

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

The following e-filed documents, listed by NYSCEF document number (Motion 004) 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 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, 103, 104, 105, 109, 125, 126

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

The following e-filed documents, listed by NYSCEF document number (Motion 005) 114, 115, 116, 117, 118, 119, 120, 121, 129, 130, 131, 132, 134, 136

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

Coughlin Duffy LLP, New York (Robert W. Muilenburg), for plaintiffs.
Kennedys CMK, New York (Max W. Gershweir), for defendant/third-party plaintiff Technology Insurance Company
L'Abbate, Balkan, Colavita & Contini, L.L.P., New York (Maureen E. O'Connor, of counsel), for defendant/third-party defendant Utica National Assurance Company

Gerald Lebovits, J.:

Motion sequence nos. 002, 003, 004, and 005 are consolidated for disposition.

Plaintiffs, Flintlock Construction Services LLC (Flintlock), 451 Lexington Realty LLC (Lexington), and Liberty Insurance Underwriters, Inc. (Liberty), move for an order under CPLR 3212 awarding them summary judgment against defendant Technology Insurance Company (Technology) and declaring that Technology has a duty to defend and indemnify Flintlock on a primary non-contributory basis in the lawsuit entitled *Pedro Gutierrez v 451 Lexington Realty LLC and Flintlock Construction Services, LLC*, Index No. 305823/2013 (Sup Ct, Bronx County) (Underlying Action) (motion seq. no. 002).

Plaintiffs also move for an order under CPLR 3212 awarding them summary judgment against defendant Utica National Assurance Company (Utica) and declaring that Utica has a duty to defend and indemnify Flintlock and Lexington in the Underlying Action, and that duty is primary to plaintiff Liberty's duty to defend and indemnify those entities (motion seq. no. 003).[1]

Defendant Technology moves for an order, under CPLR 3212, awarding it summary judgment against defendant Utica, declaring that Utica has a primary duty to defend and indemnify Flintlock, Lexington, and third-party defendants Sigma Electric Inc. (Sigma) and Vortex Electric Co., Inc. (Vortex) in the Underlying Action (motion seq. no. 004).

Defendant Technology also moves for summary judgment against plaintiffs, dismissing Liberty's claims against it, declaring that it has no duty to defend or indemnify Lexington in the Underlying Action, and declaring that Liberty's duty to defend and indemnify Flintlock in the Underling Action is excess to any duty Technology may owe to Flintlock (motion seq. no. 005).[2]

BACKGROUND

In the Underlying Action, non-party Pedro Gutierrez seeks damages for personal injuries he sustained on February 18, 2013, at a hotel construction project, while attempting to load a vehicle owned by third-party defendant Sigma, in the course of his employment with Sigma, an

[1] Plaintiffs must comply with the court's January 11, 2018, order (NYSCEF document no. 31) and serve the County Clerk and Clerk's Office to amend the caption to reflect that Utica is a direct defendant. In any event, the court will consider plaintiffs' summary-judgment motion against Utica.

[2] The relief sought in defendant's Notice of Motion, paragraph 3, is different from the relief sought in the accompanying documents in support of summary judgment.

electrical subcontractor and an entity allegedly closely related to, or purportedly interchangeable with, third-party defendant Vortex. Plaintiff Lexington owned the property where the construction project took place. Defendant Flintlock was the general contractor for the project.

In an "Injury Report" on Flintlock letterhead, dated that same day, Flintlock project supervisor Frank Nucatola states that the accident occurred "while loading in cable wheel on to van," and refers to a photo showing the van, cable reels and planks leading into the van (exhibit A to notice of motion 005, injury report; exhibit B, deposition of Frank Nucatola [Nucatola tr] at 23, 36).

An "Accident Report" was prepared that same day by the site safety manager Ralph Camarado which also provides the accident happened while electricians were loading wire wheels up planks into the van, injuring Gutierrez (exhibit C to notice of motion 005; Nucatola tr at 37).

The "Employer's Report of Work-Related Injury/Illness" submitted in connection with Gutierrez's workers' compensation claim, similarly provides the accident happened while loading wire wheels into the van (NYSCEF Doc. No. 56).

On August 26, 2013, Gutierrez sued Lexington and Flintlock to recover damages for his injuries under Labor Law §§ 200, 240 (1) and 241 (6). The complaint is general and does not specify the circumstances of the accident, including that it involved a vehicle. In The complaint provides that plaintiff was injured on a construction site due to the defendants' failure to provide a safe place to work. In his bill of particulars, he alleges that he was "struck by an improperly hoisted wire rol[l]/spool that fell from an elevated height" (NYSCEF Doc. No. 72, ¶ 4).

On August 14, 2013, Lexington and Flintlock impleaded Sigma and Vortex by serving a third-party complaint which alleged that Gutierrez was injured "pushing a wire wheel onto a van" (NYSCEF Doc. No. 73, ¶ 14). It sought common-law contribution and indemnification, contractual indemnification under the subcontract, and breach of the obligation to procure insurance.

The Construction Contracts

By contract dated September 15, 2011, Lexington, the property owner, hired Flintlock as the general contractor for the project (exhibit C to notice of motion 004, Prime Contract).

By a subcontract dated December 19, 2011, Flintlock hired Vortex as the electrical subcontractor on the project (the Subcontract) (exhibit D to notice of motion 004, Subcontract). Pursuant to this Subcontract, Vortex was obligated to obtain commercial general liability and commercial auto insurance that included Lexington and Flintlock as additional insureds (*id.* § 13.1 and exhibit A annexed thereto). It also required Vortex to indemnify Lexington and Flintlock against "claims arising out of or resulting from the performance of the Subcontractor's Work under this Subcontract . . . but only to the extent caused by the negligent acts or omissions of the Subcontractor . . . or anyone for whose acts they may be liable" (*id.*, § 4.6). Section 13.5 of the Subcontract included an additional hold harmless provision, in which the subcontractor

> "assumes the entire responsibility and liability for any and all injury to or death of any and all persons, including the . . . Subcontractor's employees . . . caused by or resulting from or arising out of any negligent act or omission" by the Subcontractor in connection with the "prosecution of the work hereunder" (*id.*, §13.5 at 21-22).

While Vortex was named on the Subcontract, the work permits list Sigma as the subcontractor. Both Sigma and Vortex are principally owned by Peter Kalemkeridis, who attested at his examination before trial (EBT), that he formed Vortex to work on hotel projects, such as the one at issue, and that Sigma is listed on the work permits because Vortex did not have the proper licensing to apply for those permits (exhibit E to notice of motion 004, deposition of Peter Kalemkeridis, dated March 23, 2016 at 18-19, 25-26). He further stated that things just never took off for Vortex and close that company (*id.*).

Defendant Technology insured both Vortex and Sigma under a commercial general liability policy (the Technology Policy). Defendant/third-party defendant Utica insured Sigma under a business auto policy (the Utica Policy). Plaintiff Liberty insured Lexington and Flintlock under a commercial general liability policy (the Liberty policy).

The Insurance Policies

Technology Policy

The Technology Policy issued to Sigma and Vortex, policy number TPP1056447, effective November 1, 2012, to November 1, 2013, covers "those sums that the insured becomes legally obligated to pay as damages because of 'bodily injury' . . . caused by an 'occurrence,'" which is defined in part to include an "accident" (exhibit 2 to notice of motion 002, Technology Commercial General Liability Coverage Form, § I at 1, and § V, ¶ 13 at 14). The Technology Policy includes an Aircraft, Auto or Watercraft exclusion (Auto Exclusion) that applies, in relevant part, to bodily injury "arising out of the ownership, maintenance, use or entrustment to others of any . . . 'auto' . . . owned or operated by . . . any insured, including 'loading or unloading'" (*id.* at § I, ¶ 2.g at 3).

The Technology Policy includes an additional insured endorsement for owners, lessees or contractors, which provides, in relevant part, that

> "Who Is An Insured is amended to include as an insured any person or organization for whom you are performing operations when you and such person or organization have agreed in writing in a contract or agreement that such person or organization be added as an additional insured on your policy. Such person or organization is an additional insured only with respect to liability arising out of your ongoing operations performed for that insured"

(*id.*, Additional Insured Endorsement annexed to Technology Policy). The policy further provided that "[t]his insurance applies on a primary basis if that is required by the written contract, written agreement or permit" (*id.*).

The Technology Policy contains provisions regarding other insurance:

> "4. Other Insurance
>
> If other valid and collectible insurance is available to the insured for a loss we cover under Coverages **A** or **B** o this Coverage Part, our obligations are limited as follows:
>
> a. Primary Insurance
>
> This insurance is primary except when b. below applies. If this insurance is primary, our obligations are not affected unless any of the other insurance is also primary. Then, we will share with all that other insurance by the method described in c. below."

(*id.*, § IV, ¶ 4 at 10-11). Although it generally provides primary insurance, this provision further provides that the coverage is excess to any other insurance "if the loss arises out of the maintenance or use of . . . 'autos' . . . to the extent not subject to" the Auto Exclusion (*id.*, § IV, ¶ 4.b.[a] [iv] at 11).

Liberty Policy

The Liberty Policy, also a commercial general liability policy, number DGLNY168431-1, effective June 9, 2011, to February 9, 2014, included Flintlock and Lexington as named insureds (exhibit B to notice of motion 004, Liberty Policy). It provides the same standard general liability coverage as the Technology Policy (*id.*, ¶ 10.1). The policy included, in Endorsement 7, an "other insurance" provision as follows:

> "4. Other Insurance
>
> If other valid and collectible insurance is available to any insured for a loss we cover under Coverages A or B of this Coverage Part, then this insurance is excess of such insurance and we will have no duty to defend any claim or "suit" that any other insurer has a duty to defend"

(*id.*, at Endorsement No. 7).

Utica Policy

Utica issued to Sigma Commercial Auto policy number BAC 4474466, effective September 20, 2012, to September 20, 2013 (exhibit A to notice of motion 004, Utica Policy). The policy applied to all sums the insured legally must pay as damages "because of 'bodily injury' . . . to which this insurance applies, caused by an 'accident' and resulting from the ownership, maintenance or use of a 'covered auto'" which is defined as "any auto" (*id.*, Business Auto Coverage Form, § II, ¶ A, at 2). The policy identified, on its schedule of covered autos, the Sigma van that was involved in the accident in the Underlying Action (*id.*, Commercial Auto Coverage Part – Declarations Form, at 2).

The Utica Policy defines "insured," in relevant part, as follows:

> "a. You [Sigma] for any covered 'auto'
> b. Anyone else while using with your permission a covered 'auto' you own . . . except:
> (4) Anyone other than your 'employees' . . . or a lessee or borrower or any of their 'employees,' while moving property to or from a covered 'auto'
> c. Anyone liable for the conduct of an 'insured' described above but only to the extent of that liability"

(*id.*, Business Auto Coverage Form, § II, ¶ A.1, at 2-3).

The Utica Policy contains an Employee Indemnification and Employer's Liability Exclusion. That exclusion applies, in relevant part, to bodily injury to:

> "a. An 'employee' of the 'insured' arising out of and in the course of:
> (1) Employment by the 'insured;' or
> (2) Performing the duties related to the conduct of the 'insured's' business"

(*id.*, § II, ¶ B.4 at 3-4, and New York Changes In Business Auto Endorsement at 1). It provides that the exclusion does not apply to liability assumed by the 'insured' under an 'insured contract'" (*id.*, § II, ¶ B.4 a 3-4, and New York Changes in Business Auto Endorsement, ¶ A.4 [a] at 1). The policy defines an "insured contract" to include "[t]hat part of any other contract or agreement pertaining to your business . . . under which you assume the tort liability of another to pay for 'bodily injury' . . . to a third party" (*id.*, § V, ¶ H, at 10-11).

Finally, the Utica Policy provides that "[f]or any covered 'auto' you own, this Coverage Form provides primary insurance" (*id.*, § IV, 5.a at 9).

Insurance Coverage Letters

By letter dated April 4, 2013, to Sigma, Utica stated that any direct claim by Gutierrez was excluded under the Employee Exclusion because Gutierrez was Sigma's employee (exhibit P to notice of motion 004). By letter dated May 20, 2013, Utica denied coverage to Vortex and Flintlock and asserted that they were not insureds under the Utica Policy (exhibit Q to notice of motion 004).

On October 16, 2013, Technology advised Sigma that because the injuries occurred while Gutierrez was loading or unloading wire spools onto a company auto, and the Technology Policy contains an Auto Exclusion, it had no duty to indemnify (exhibit E to notice of motion 005).

In October 2014, Technology, as Sigma's and Vortex's insurer, received Liberty's tender of the defense and indemnification of Lexington and Flintlock (exhibits 9 and 10 to notice of motion 002).

By letter dated February 25, 2015, Technology informed Vortex and Sigma with copies to Liberty, Flintlock and Lexington, that it would defend Vortex and Sigma in the Underlying Action subject to a reservation of rights based on the Technology Policy Auto Exclusion (exhibit 12 to notice of motion 002, NYSCEF Doc. No. 98).

By letter dated July 27, 2016, Technology denied any duty to defend and indemnify Lexington and Flintlock in the Underlying Action on the ground that the accident did not arise out of the work because Sigma/Vortex was moving the cable spool from the project to another site (exhibit 14 to notice of motion 002).

Prior Proceedings

In the Underlying Action, partial summary judgment was granted to Gutierrez against Lexington and Flintlock, based on the Labor Law § 240 (1) claim (exhibit L to notice of motion 004, NYSCEF Doc. No. 75). Lexington and Flintlock moved for summary judgment on their contractual indemnification claim against Vortex and Sigma under the Subcontract, which was granted (exhibit M to notice of motion 004, NYSCEF Doc. No. 76). Sigma's cross-motion to dismiss on the ground that it was not a party to the Subcontract was denied. The court found issues of fact about whether Sigma and Vortex are interchangeable, and about which company employed Gutierrez and performed the electrical work (NYSCEF Doc. No. 76).

On May 31, 2017, plaintiffs commenced this declaratory-judgment coverage action, seeking a declaration that Technology and Utica have a duty to defend and indemnify Lexington and Flintlock in the Underlying Action as alleged additional insureds under their respective policies, and a duty to reimburse Liberty for its costs in defending the Plaintiffs in that action (NYSCEF Doc. No. 86).

On July 24, 2017, Technology brought a third-party complaint against Utica, Sigma, and Vortex, seeking a declaration of the relative responsibilities of Technology and Utica to defend and indemnify the non-insurer parties under the Technology and Utica Policies (NYSCEF Doc. No. 87).

Plaintiffs replied to the counterclaims and included an affirmative defense that Technology is precluded from relying on its Auto Exclusion based on its failure to comply with Insurance Law § 3420 (d) (2), which requires insurers to promptly disclaim coverage.

Plaintiffs amended their complaint to add Utica as a direct defendant, seeking a judgment declaring that Utica must defend and indemnify Flintlock and Lexington in the Underlying Action as additional insureds under the Utica Policy, and reimbursing Liberty for the costs it has expended defending them in that action (NYSCEF Doc. No. 91).

DECISION/ORDER

For the reasons set forth below, plaintiffs' motion for summary judgment against Technology (motion 002) is granted only to the extent that Flintlock is declared an additional insured under the Technology Policy, Defendant Technology's motion for summary judgment against plaintiffs (motion 005) is granted only to the extent that it is declared that Technology has no duty to defend or indemnify Lexington. Liberty's Policy is excess to the Technology Policy. Plaintiffs' motion for summary judgment as against Utica (motion 003) is denied. Defendant Technology's motion for summary judgment as against Utica (motion 004) also is denied.

Flintlock is an Additional Insured

The branch of Liberty's motion for summary judgment against Technology (motion 002) is granted to the extent that it is declared that Flintlock qualifies as an additional insured under the Technology Policy, and that it has a duty to defend and indemnify Flintlock.

The Technology Policy provides in the additional insured endorsement, entitled "Additional Insured – Owners, Lessees or Contractors – Automatic Status When Required In Construction Agreement With You – Primary Insurance," that any organization for which the insured was performing operations was included as an additional insured "when you [insured] and such person or organization have agreed in writing in a contract or agreement that such person or organization be added as an additional insured on your policy" (exhibit 2 to notice of motion 002, Technology Policy at Technology 000324). The Subcontract between Flintlock and Vortex/Sigma obligated Vortex/Sigma to name Flintlock as an additional insured (exhibit D to notice of motion 004, Subcontract § 13.1 at 21). In addition, Flintlock's liability "arises out of" Vortex/Sigma's ongoing operations. It is undisputed that the injury to the named insured subcontractor's employee occurred during the course of his employment working at the project site under the Subcontract for Vortex/Sigma. This is sufficient for Flintlock to qualify as an additional insured under the Technology Policy (*see Regal Constr. Corp. v National Union Fire Ins. Co. of Pittsburgh, PA*, 15 NY3d 34, 38-39 [2010]; *Hunter Roberts Constr. Group, LLC v Arch Ins. Co.*, 75 AD3d 404, 408 [1st Dept 2010]).

Technology has a duty to defend and indemnify Flintlock as an additional insured. Technology's duty to defend is very broad (*Regal Constr. Corp. v National Union Fire Ins. Co. of Pittsburgh, PA*, 15 NY3d at 37), and the complaint, along with the actual facts of which Technology has knowledge, establish a reasonable probability of coverage (*see Continental Cas.*

Co. v Rapid-American Corp., 80 NY2d 640, 648 [1993]). The complaint alleges that Flintlock retained Vortex/Sigma, that Gutierrez was injured while employed by Vortex/Sigma at the project site, and that defendants, including Flintlock, were negligent (exhibit 4 to notice of motion 002, complaint ¶ 28). In addition, evidence extrinsic to the complaint, such as an employer accident report, demonstrates that Gutierrez was injured during the course of his employment for the electrical subcontractor working at Flintlock's project (*see* exhibit 15 to notice of motion 002).

Technology also has a duty to indemnify Flintlock because the facts establish that Gutierrez was injured during the course of his employment by Vortex, or its sister company Sigma, which was performing the Subcontract work for Flintlock (*see id.*; exhibit 5 to notice of motion 002, deposition of Pedro Gutierrez at 20-21; exhibit 6 to notice of motion 002, deposition of Peter Kalemkeridis [Kalemkeridis tr] at 25). The duty to indemnify or pay is determined based on the "actual basis for the insured's liability to a third person" (*Servidone Constr. Corp. v Security Ins. Co. of* Hartford, 64 NY2d 419, 424 [1985]; *Atlantic Mut. Ins. Co. v Terk Technologies Corp.*, 309 AD2d 22, 28 [1st Dept 2003]). It is based on whether the facts establish a loss covered by the policy (*Atlantic Mut. Ins. Co. v Terk Technologies Corp.*, 309 AD2d at 28). Here, Flintlock may be entitled to indemnity as an additional insured under the Technology Policy unless an exclusion precludes coverage, and Technology timely disclaimed on that basis.

Auto Exception Disclaimer

The branch of Liberty's motion seeking dismissal of Technology's affirmative defense based on the Auto Exclusion in its policy and a declaration that it must reimburse Liberty for its past defense costs, is denied.

Technology initially sought to disclaim coverage under its Auto Exception. Insurance Law § 3420 (d) (2) requires that an insurance carrier provide its insured and any other claimant with timely notice of its disclaimer or denial of coverage on the basis of a policy exclusion. Specifically, the insurer "shall give written notice as soon as is reasonably possible of such disclaimer of liability or denial of coverage to the insured and the injured person or any other claimant." The purpose of this provision is to protect the insured, the injured party and any other interested party with a real stake in the outcome, from prejudice resulting from late denial of coverage which creates a risk that the insured or injured party will expend energy and resources in an "ultimately futile attempt to recover damages" from an insurer or will forego alternate ways to recover for damages until it is too late to pursue them (*Bovis Lend Lease LMB, Inc. v Royal Surplus Lines Ins. Co.*, 27 AD3d 84, 92 [1st Dept 2005]; *accord AIU Ins. Co. v Investors Ins. Co.*, 17 AD3d 259, 260 [1st Dept 2005]; *Tops Mkts. v Maryland Cas.*, 267 AD2d 999, 1000 [4th Dept 1999]; *Excelsior Ins. Co. v Antretter Contr. Corp.*, 262 AD2d 124, 127 [1st Dept 1999]). Therefore, Technology, which conceded that its notice of disclaimer was untimely as to its insured, including additional insured Flintlock (*see* exhibit 17 to notice of motion 002, NYSCEF Doc. No. 58), may not disclaim under this exclusion and is required to defend and indemnify Flintlock in the Underlying Action (*see Greater N.Y. Mut. Ins. Co. v Chubb Indem. Ins. Co.*, 105 AD3d 523, 524-525 [1st Dept 2013]).

Technology, however, was not required to give timely notice of disclaimer to another insurer, like Liberty, pursuant to Insurance Law § 3420 (d) (2) (*see e.g. id.* at 524; *J.T. Magen v Hartford Fire Ins. Co.*, 64 AD3d 266, 269-271 [1st Dept 2009]). Rather, recognizing that this is not a risk to which a coinsurer is subject, New York courts have held that section 3420 (d) does not apply to an insurer seeking contribution from a coinsurer or for full defense and indemnity of an alleged joint insured (*see Greater N.Y. Mut. Ins. Co, v Chubb Indem. Ins. Co.*, 105 AD3d at 525; *J.T. Magen v Hartford Fire Ins. Co.*, 64 AD3d at 271 [collecting cases]; *American Guar. & Liab. Ins. Co. v State Natl. Ins. Co., Inc.*, 67 AD3d 488, 488 [1st Dept 2009]; *Bovis Lend Lease LMB, Inc. v Royal Surplus Lines Ins. Co.*, 27 AD3d at 92; *AIU Ins. Co. v Investors Ins. Co.*, 17 AD3d at 260; *Tops Mkts.*, 267 AD2d at 1000). While the insured, Flintlock here, remains personally protected under Insurance Law § 3420 (d) (2), the co-insurer Liberty was barred from receiving its benefit (*Greater N.Y. Mut. Ins. Co, v Chubb Indem. Ins. Co.*, 105 AD3d at 525). Thus, because Technology had no obligation of prompt disclaimer to Liberty, whether it gave Liberty notice as soon as was reasonably possible of its disclaimer of coverage is immaterial.

While Technology had no duty to provide a prompt disclaimer to Liberty, it must demonstrate that an exclusion applies to require a coinsurer, such as Liberty, to continue to contribute to the defense and indemnification of their joint insured Flintlock, and to relieve it of the obligation to reimburse Liberty for the amounts it has expended so far in defending Flintlock in the Underlying Action. Technology has provided proof that the Auto Exclusion in Technology's policy applies. The Auto Exclusion provides that it applies to bodily injury "arising out of the ownership, maintenance, use or entrustment to others of any . . . 'auto' . . . owned or operated by . . . or loaned to any insured," and that use included "loading or unloading" (exhibit 2 to notice of motion 002, Technology Policy Commercial General Liability Coverage Form Endorsement § I, ¶ 2.g at 3). This plainly and unambiguously applies to Gutierrez's injuries while loading the wheels of wire into the Sigma van.

Liberty's argument that no allegation exists in the complaint for the Underlying Action that Technology can identify to determine that the Auto Exclusion applies, and, thus, it cannot defeat its duty to defend regardless of the timeliness of its disclaimer, is unavailing. In *Zurich Am. Ins. Co. v ACE Am. Ins. Co.*, 165 AD3d 558 [1st Dept 2018]), the First Department determined, in analyzing the identical auto exclusion provision, that the insurer may meet its burden of establishing that the claim fell within the policy's exclusionary provision with extrinsic evidence such as accident reports or a claimant's signed statements.

Applying this to the instant action, Technology has met its burden by submitting EBT testimony and the accident reports which make clear that the claims against it in the complaint in the Underlying Action fall within the Auto Exclusion because the injuries arose out of the use, including the loading and unloading, of the van in connection with Vortex/Sigma's work for Flintlock (exhibit A to notice of motion 005, injury report; exhibit B to notice of motion 005, deposition of Frank Nucatola [Nucatola tr] at 23, 36-37; exhibit C to notice of motion 005; NYSCEF Doc. 56). Liberty does not actually dispute these facts, but only argues that because the facts pled in the complaint do not clearly demonstrate that the Auto Exclusion applies, Technology must reimburse Liberty for the costs it expended defending Flintlock to this point. The caselaw, however, permits this court to consider extrinsic evidence to clarify ambiguous

pleadings, such as the complaint here, for Technology to meet its burden that the underlying claims fall within the scope of its Auto Exclusion (*see id.*).

Because Technology has demonstrated that the exclusion applies, and Liberty fails to raise any triable issues of fact, Liberty is not entitled to reimbursement of the amounts it expended so far in defending Flintlock in the Underlying Action (*see Greater N.Y. Mut. Ins. Co, v Chubb Indem. Ins. Co.*, 105 AD3d at 525; *cf. Admiral Ins. Co. v State Farm Fire and Cas. Co.*, 86 AD3d 486 [1st Dept 2011] [denying summary judgment and finding fact issue existed about whether the subcontractor's insurer sent a disclaimer notice as soon as reasonably possible]).

Co-Primary or Primary and Excess Insurers

With respect to the issue of whether, going forward, Technology and Liberty are coprimary insurers, or whether one was obligated as a primary and the other as an excess, again, the court "must review and consider all of the relevant policies at issue to determine the priority of coverage among them, which determination turns on consideration of the policy provisions (*see Sport Rock Intl., Inc. v American Cas. Co. of Reading, Pa.*, 65 AD3d 12, 13 [1st Dept 2009]; *accord Bovis Lend Lease LMB, Inc. v Great Am. Ins. Co.*, 53 AD3d 140, 147-148 [1st Dept 2008]).

Technology's "Other Insurance" clause provides that:

> "This insurance is primary except when b. below applies. If this insurance is primary, our obligations are not affected unless any of the other insurance is also primary. Then, we will share with all that other insurance by the method described in c. below."

(exhibit 2 to notice of motion 002, Technology Policy, § IV, ¶ 4 at 10-11). Subsection b.1 (a) (iv) of that clause provides that the insurance is excess over any of the other insurance, whether primary, excess, contingent or on any other basis . . . if the loss arises out of the maintenance or use of . . . 'autos' . . . to the extent not subject to" the Auto Exclusion (*id.*, § IV, ¶ 4.b.[a] [iv] at 11).

The Liberty Policy's "Other Insurance" provision states that:

> "If other valid and collectible insurance is available to any insured for a loss we cover under Coverages A or B of this Coverage Part, then this insurance is excess of such insurance and we will have no duty to defend any claim or "suit" that any other insurer has a duty to defend"

(exhibit B to notice of motion 004, Liberty Policy, Endorsement No.7).

The issue raised is whether each insurer, Technology and Liberty, is obligated to defend Flintlock concurrently with the other as co-primary insurers, as Technology argues, or,

alternatively, whether one insurer has the primary defense obligation, and the other insurer's defense obligation only arises upon exhaustion of coverage under the first policy, as Flintlock and Liberty argue.

Liberty and Flintlock's position is correct. Technology has the primary defense obligation, and Liberty's obligation does not arise until exhaustion of coverage under the Technology Policy (*See Sport Rock Intl., Inc. v American Cas. Co. of Reading, Pa.*, 65 AD3d at 18).

Where several policies cover the same risk, each of which was sold to provide the same level of coverage, as here, the priority of coverage between the policies is determined by comparison of their "other insurance" clauses (*id.*). Such clauses "limit[] an insurer's liability where other insurance may cover the same loss" (*id.* [internal quotation marks and citation omitted]). "This may be accomplished by providing that the insurance provided by the policy is excess to the insurance provided by other policies, in which case the 'other insurance' clause is known as an excess clause" (*id.*). On the other hand, "an 'other insurance' clause may limit the insurer's liability by providing that, if other insurance is available, all insurers will be responsible for a stated portion of the loss; an 'other insurance' clause of this kind is known as a pro rata clause" (*id.*).

In this case, the applicable "other insurance" clause of the Liberty Policy is an excess clause, because it provides that the insurance was "excess of such [other valid and collectible] insurance" and that Liberty had no duty to defend (exhibit B to notice of motion 004, Liberty Policy, Endorsement No.7). The "other insurance" clause in the Technology Policy is a pro rata clause, because it provides that where other primary insurance is available, "we will share with all that other insurance," either by equal shares or in proportion to policy limits (exhibit 2 to notice of motion 002, Technology Policy, § IV, ¶ 4 at 10-11). The First Department has held that

> "where one of two concurrently applicable insurance policies contains an excess 'other insurance' clause and the other contains a pro rata 'other insurance' clause, the excess clause is given effect, meaning that the coverage under the policy containing the excess clause does not come into play, and the carrier's duty to defend is not triggered, until the coverage under the policy containing the pro rata clause has been exhausted"

(*Sport Rock Intl., Inc. v American Cas. Co. of Reading, Pa.*, 65 AD3d at 18-19 [citations omitted]). On the other hand, where both policies contain excess "other insurance" clauses, so that if both excess clauses are given effect the result would leave the insured without any coverage, then the clauses are deemed to cancel each other out, and the insurers must cover the loss on a pro rata basis, as co-primary insurers (*see Great N. Ins. Co. v Mount Vernon Fire Ins. Co.*, 92 NY2d 682, 686-687 [1999]; *Sport Rock Intl., Inc. v American Cas. Co. of Reading, Pa.*, 65 AD3d at 19).

Therefore, giving effect to the Liberty Policy's excess "other insurance" clause, Flintlock's coverage as a named insured under the Liberty Policy is excess to Flintlock's additional insured coverage under the Technology Policy. Thus, it is declared that Liberty's

obligation to defend Flintlock in the Underlying Action from this point forward will not be triggered until Flintlock's coverage under the Technology Policy has been exhausted.

Technology Has No Duty to Lexington

Technology is granted summary judgment (motion 005) on its claim that it has no duty to defend or indemnify plaintiff Lexington in the Underlying Action. Technology's Policy's additional insured endorsement clearly extends coverage only to "any person or organization for whom you [a named insured, i.e., Vortex or Sigma] are performing operations when you and such person or organization have agreed in writing in a contract or agreement that such person or organization be added as an additional insured on your policy" (exhibit 2 to notice of motion 002, Technology Policy Additional Insured Endorsement). To qualify as an insured under this endorsement, the party seeking coverage must have contracted directly with a named insured (*see All State Interior Demolition Inc. v Scottsdale Ins. Co.*, 2019 NY Slip Op 00574, at *1, 2019 WL 346558 , at *1 [1st Dept 2019]; *AB Green Gansevoort, LLC v Peter Scalamandre & Sons, Inc.*, 102 AD3d 425, 426-427 [1st Dept 2013]; *Linarello v City Univ. of N.Y.*, 6 AD3d 192, 195 [1st Dept 2004]).

Lexington, as the property owner, did not contract with Vortex or Sigma, only Flintlock entered into the Subcontract with Vortex. Absent such an agreement, the clear terms of the Technology Policy have not been met and Lexington cannot seek coverage from Technology as an additional insured. Because this defense rests on the absence of coverage, any delay by Technology in disclaiming coverage to Lexington does not estop it from denying coverage on this ground (*see* Insurance Law § 3420 [d] [2]; *Matter of Worcester Ins. Co. v Bettenhauser*, 95 NY2d 185, 188 [2000]; *Liberty Mut. Fire Ins. Co. v National Cas. Co.*, 47 AD3d 770, 770-771 [2d Dept 2008]; *National Union Fire Ins. Co. of Pittsburgh, Pa. v Utica First Ins. Co.*, 6 AD3d 681, 682 [2d Dept 2004]). A disclaimer under Insurance Law § 3420 (d) (2) is unnecessary where the claim falls outside the scope of the policy's coverage portion (*National Union Fire Ins. Co. of Pittsburgh, Pa. v Utica First Ins. Co.*, 6 AD3d at 682). Thus, Technology is entitled to a declaration in its favor as against Lexington.

Utica Policy Coverage

Both Technology and Plaintiffs urge that Flintlock and Lexington are covered under the Utica Policy, and that no exclusions exist that apply to them. The Utica Policy, a commercial automobile policy, defines an "insured" as follows:

> "a. You [Sigma or Vortex] for any covered "auto;" b. Anyone else while using with your permission covered "auto" you own . . . except:
>
> (5) Anyone other than your "employees" . . . or a lessee or borrower or any of their "employees, while moving property to or from a covered "auto."
>
> c. Anyone liable for the conduct of an "insured" described above but only to the extent of that liability"

(exhibit A to notice of motion 004, § II, ¶ A.1 at 2-3). The New York Changes in Business Auto Coverage Form Endorsement changes that definition as follows:

> "1. Who is An Insured does not include anyone loading or unloading a covered "auto" except you, your 'employees', a lessee or borrower or any of their 'employees'"

(*id.*, New York Changes in Business Auto Endorsement at 1).

The four corners of an insurance policy govern who is covered and the extent of that coverage (*see Sixty Sutton Corp. v Illinois Union Ins. Co.*, 34 AD3d 386, 388 [1st Dept 2006]).

Sigma is the only named insured under the Utica Policy. Contrary to plaintiffs' contentions, neither Flintlock nor Lexington were named as additional insureds under the Utica Policy. The policy does not contain any additional insured endorsement (*see* exhibit A to notice of motion 004).

Flintlock and Lexington, however, fall within subsection c of the "Who is An Insured" provision, as parties liable for the conduct of the insured. That provision clearly and unambiguously includes contractors and property owners who are held vicariously liable for a subcontractor's employee's injuries, but only to the extent of their liability for the conduct of an "insured" (*Paul M. Maintenance, Inc. v Transcontinental Ins. Co.*, 300 AD2d 209, 210 [1st Dept 2002] [identical provision]; *see generally Dairylea Coop., Inc. v Rossal*, 64 NY2d 1, 8 [1984] [same]). In the Underlying Action, Flintlock and Lexington were held liable for the subcontractor Vortex/Sigma's employee's injuries under Labor Law § 240 (2), which imposes vicarious, absolute liability on an owner and general contractor for injuries resulting from the conduct of their subcontractors (*see id.; accord Brown v Two Exch. Plaza Partners*, 76 NY2d 172, 179 [1990]). Thus, they qualified under subsection c as insureds.

Utica urges that the Employee Exclusion in its policy precludes coverage to plaintiffs. The policy contains an Employee Exclusion which precludes coverage for bodily injuries sustained by an employee of the insured. Employee exclusionary clauses containing the same or similar language are unambiguous, and they apply to exclude an insured where, as here, the underlying action is brought against such insured by an employee of an insured (*See Sixty Sutton Corp. v Illinois Union Ins. Co.*, 34 AD3d at 387-389; *Moleon v Kreisler Borg Florman Gen. Constr. Co.*, 304 AD2d 337, 340 [1st Dept 2003]; *accord Essex Ins. Co. v Michael Cunningham Carpentry*, 74 AD3d 733, 733 [2d Dept 2010]).

The term "the insured" in the Utica Policy is clear, and when used in this employee exclusion clause, encompasses both the named insured, Sigma, and Flintlock and Lexington, as insureds under section 1.c discussed above (*see Moleon v Kreisler Borg Florman Gen. Constr. Co.*, 304 AD2d at 340; *Hayner Hoyt Corp. v Utica First Ins. Co.*, 306 AD2d 806, 807-808 [4th Dept 2003]). This exclusion relieves Utica of liability when an insured or additional insured is sued and contribution is sought for damages arising out of bodily injuries to an employee sustained in the course of employment (*Bassuk Bros. v Utica First Ins. Co.*, 1 AD3d 470, 471 [2d Dept 2003]). Plaintiffs' argument that this exclusion does not apply to Flintlock and Lexington,

because Gutierrez was not their employee, is unavailing. While plaintiffs correctly argue that an insurer undertakes a separate obligation to the various insured parties, whether as a named insured or as an additional insured (*see Greaves v Public Serv. Mut. Ins. Co.*, 5 NY2d 120, 123-125 [1959]), nevertheless, nearly identical employee exclusionary clauses have applied to bar coverage to an additional insured for a claim by the named insured's employee (*see Soho Plaza Corp. v Birnbaum*, 108 AD3d 518, 521 [2d Dept 2013] [holding that the plain meaning of a similar employee exclusion was that "the Utica policy did not provide coverage for damages arising out of bodily injury sustained by an employee of any insured in the course of his or her employment"]; *Sixty Sutton Corp. v Illinois Union Ins. Co.*, 34 AD3d at 388-389 [same]; *Essex Ins. Co. v Michael Cunningham Carpentry*, 74 AD3d at 733 [same]; *Moleon v Kreisler Borg Florman Gen. Constr. Co.*, 304 AD2d at 340 [same]; *Bassuk Bros. v Utica First Ins. Co.*, 1 AD3d at 471 [same]; *Rivera v St. Regis Hotel Joint Venture*, 240 AD2d 332, 334 [1st Dept 1997]).

But the Employee Exclusion in the Utica Policy contains an exception to this exclusion that might be applicable. Specifically, the exclusion provides in relevant part: "[b]ut this exclusion does not apply . . . to liability assumed by the "insured" under an "insured contract" (exhibit A to notice of motion 004, Utica Policy New York Changes in Business Auto Endorsement at 1). The Utica Policy defines, in pertinent part, that an "insured contract" includes: "[t]hat part of any contract or agreement entered into, as part of your business . . . under which you assume the tort liability of another to pay for 'bodily injury' or 'property damage' to a third person or organization" (*id.*, Utica Policy at 11).

The Subcontract, under which the electrical work allegedly was performed, includes a contractual indemnification provision, in section 4.6, in which the Subcontractor agrees to indemnify and hold harmless both the owner and general contractors from all claims "arising out of or resulting from performance of the Subcontractor's Work under this Subcontract" provided that the claim is attributable to bodily injury "but only to the extent caused by the negligent acts or omissions of the Subcontractor" (exhibit D to notice of motion 004, Subcontract, § 4.6 at 6). The Subcontract further contains a contractual hold harmless provision, in section 13.5, in which the "Subcontractor" agreed to assume the "entire responsibility and liability for any and all injury to . . . all persons, including the Owner's General Contractor's and Subcontractor's employees" (*id.*, Subcontract, § 13.5 at 21-22).

Lexington and Flintlock, in fact, have been granted summary judgment on their third-party contractual indemnification claim, based on the provisions in the Subcontract, against Sigma and Vortex in the Underlying Action (exhibit M to notice of motion 004, NYSCEF Doc 76). The court in the Underlying Action has already found that an issue of fact was raised about whether Sigma and Vortex are interchangeable (*id.* at 2). This court also finds a triable issue about whether the two companies are one and the same such that Sigma can be held liable under the indemnification clause in the Subcontract Vortex signed with Flintlock. While Vortex was named on the Subcontract, the work permits list Sigma as the subcontractor. Both companies are principally owned by Peter Kalemkeridis, who stated at his EBT that Sigma's name is on the work permits because Vortex did not have the proper licensing, and that he later closed Vortex (exhibit E to notice of motion 004, Peter Kalemkeridis EBT, dated March 23, 2016 at 18-19, 25-26). This proof further demonstrates that a triable issue is raised about whether the two

companies were interchangeable, and whether Sigma is subject to the contractual indemnification provisions in the Subcontract, which may trigger the exception to the Employee Exclusion in the Utica Policy. This factual issue warrants denial of summary judgment to either Technology or plaintiffs with respect to coverage under the Utica Policy, and the application of the exclusion and the exception thereunder.

Accordingly, it is

ORDERED, ADJUDGED and DECLARED that plaintiffs' motion for summary judgment against defendant Technology Insurance Co., Inc. (motion 002) is granted only to the extent that it is declared that plaintiff Flintlock Construction Services LLC is an additional insured under the Technology Policy and Technology has a duty to defend and indemnify Flintlock., and the motion is otherwise denied; and it is further

ORDERED, ADJUDGED and DECLARED that defendant Technology Insurance Company, Inc.'s motion for summary judgment against plaintiffs (motion 005) is granted only to the extent that it is declared that it has no duty to defend and indemnify plaintiff 451 Lexington Realty LLC, plaintiff Liberty Insurance Underwriters Inc.'s Policy is excess to the Technology Policy from this point forward, and the motion is otherwise denied; and it is further

ORDERED that plaintiffs' motion against defendant Utica National Assurance Company (motion 003) is denied; and it is further

ORDERED that defendant/third-party plaintiff Technology Insurance Company's motion for summary judgment against defendant/third-party defendant Utica National Assurance Company (motion 004) is denied.

2/15/2019
DATE

GERALD LEBOVITS, J.S.C.

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