Gilbane Bldg. Co./TDX Constr. Corp. v St. Paul Fire & Mar. Ins. Co.

2018 NY Slip Op 02117 [31 NY3d 131]

March 27, 2018

Wilson, J.

Court of Appeals

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[*1]

Gilbane Building Co./TDX Construction Corp. et al., Appellants,
v
St. Paul Fire and Marine Insurance Company et al., Defendants, and Liberty Insurance Underwriters, Respondent.

Argued February 7, 2018; decided March 27, 2018

Gilbane Bldg. Co./TDX Constr. Corp. v St. Paul Fire & Mar. Ins. Co., 143 AD3d 146, affirmed.

{**31 NY3d at 134} OPINION OF THE COURT

Wilson, J.

In January 2002, Dormitory Authority of the State of New York (DASNY) contracted with Samson Construction Company (Samson), a general contractor, for construction of a new forensic laboratory for New York City, to be built next to Bellevue Hospital. Although the lab was constructed for use by New York City's Office of the Chief Medical Examiner, the construction documents identified DASNY as the owner. DASNY also contracted with a joint venture between Gilbane Building Company and TDX Construction Corporation (hereinafter, Gilbane JV) for Gilbane JV to be the construction manager for the project. DASNY's contract with Samson provided that Samson would obtain general liability insurance for the job, with an endorsement naming as additional insureds: "[DASNY], the State of New York, the Construction Manager [Gilbane JV] and other entities specified on the sample Certificate of Insurance provided by [DASNY]." Samson obtained general liability insurance coverage from Liberty Insurance Underwriters (Liberty). The sample certificate of insurance listed as

"Additional Insureds under General Liability as respects this Project: . . . Gilbane/TDX Construction Joint Venture."

In 2006, DASNY sued Samson and Perkins Eastman Architects, P.C., the project architect, alleging that Samson damaged the excavation support system in August of 2003 by negligently removing a section of steel plating which caused the foundation of the neighboring building to settle several inches. Perkins then commenced a third-[*2]party action against Gilbane JV in 2010. Gilbane JV provided notice to Liberty by letter in April of 2011, seeking defense and indemnity under the Liberty policy for Perkins' suit against it, which Liberty denied in July of that year. Gilbane JV commenced this lawsuit in September of 2012, arguing that it qualified for coverage under the Liberty policy as an additional insured. Supreme Court denied Liberty's motion for summary judgment, holding that Gilbane JV is an additional insured under the policy (2014 NY Slip Op 33766[U] [2014]). The Appellate Division subsequently reversed, granting Liberty's motion (143 AD3d 146 [2016]). We now affirm, because the terms of the policy at issue here require a written contract between the named insured and an additional insured, if coverage is to be extended to an additional insured.{**31 NY3d at 135}

The relevant portion of the Liberty policy is the "Additional Insured—By Written Contract" provision, which reads:

> "WHO IS AN INSURED (Section II) is amended to include as an insured any person or organization *with whom* you have agreed to add as an additional insured by written contract but only with respect to liability arising out of your operations or premises owned by or rented to you." (Emphasis added.)

Gilbane JV has no written contract with Samson denominating it an additional insured, but argues no such contract is necessary, because that requirement would conflict with the plain meaning of the Liberty endorsement; with "well-settled rules of policy interpretation"; and with the parties' reasonable expectations. Alternatively, Gilbane JV argues that the Liberty endorsement is, at most, ambiguous on that point, and therefore must be construed against Liberty and in favor of coverage. Gilbane JV is incorrect; the endorsement is facially clear and does not provide for coverage unless Gilbane JV is an organization "with whom" Samson has a written contract.

"Generally, the courts bear the responsibility of determining the rights or obligations of parties under insurance contracts based on the specific language of the policies" (*State of New York v Home Indem. Co.*, 66 NY2d 669, 671 [1985]). "In determining a dispute over insurance coverage, we first look to the language of the policy" (*Consolidated Edison Co. of N.Y. v Allstate Ins. Co.*, 98 NY2d 208, 221 [2002]). "As with the construction of contracts generally, 'unambiguous provisions of an insurance contract must be given their plain and ordinary meaning' " (*Vigilant Ins. Co. v Bear Stearns Cos., Inc.*, 10 NY3d 170, 177 [2008], quoting *White v Continental Cas. Co.*, 9 NY3d 264, 267 [2007]).

Here, the endorsement would have the meaning Gilbane JV desires if the word "with" had been omitted. Omitting "with," the phrase would read: "any person or organization whom you have agreed by written contract to add," and Gilbane JV's position would have merit. But Samson and Liberty included that preposition in the contract between them, and we must give it its ordinary meaning. Here, the "with" can only mean that the written contract must be "with" the additional insured. Gilbane JV proposes other wordings that, in its view, would more clearly require the existence of a written contract between Samson and an additional insured, but those formulations are {**31 NY3d at 136} no clearer and, in any event, the endorsement's meaning is plain and unambiguous.[FN*]

The dissent aptly notes that "[a] reviewing court must decide whether, affording a *fair meaning to all of the language* employed by the parties in the contract and leaving no provision without force and effect, there is a reasonable basis for a difference of opinion as to the meaning of the policy" (*Federal Ins. Co. v International Bus. Machs. Corp.*, 18 NY3d 642, 646 [2012] [internal quotation marks, brackets and citations omitted and emphasis added]), and yet offers no explanation for the meaning of "with" in "with whom" in the provision at issue when proposing that the language is ambiguous (dissenting op at 138). The dissent also centers its argument on the proposition that "the test to determine whether an insurance contract is ambiguous focuses on the reasonable expectations of the average insured upon reading the policy and *employing common speech*" (dissenting op at 138, 142 [internal quotation marks omitted and emphasis added], citing *Universal Am. Corp. v National Union Fire Ins. Co. of Pittsburgh, Pa.*, 25 NY3d 675, 680 [2015]). We cannot ascribe to the position that, whereas "with" has a definite meaning in English, the average insured understands it to have no meaning. Likewise, our decision does not "undermine[ ] an industry market solution aimed at efficiently allocating risk among entities involved in construction projects"

(dissenting op at 137)—it merely requires contracting parties who desire the result proposed by the dissent to remove the word "with" from their future contracts.

Gilbane JV cites extrinsic materials, including the sample certificate of insurance in support of its argument that it reasonably {**31 NY3d at 137} expected to be covered by the policy, and relies heavily on the contract between DASNY and Samson, which required Samson, as the prime contractor, to name Gilbane JV as an additional insured on all liability policies obtained by Samson. However, "[e]xtrinsic evidence of the parties' intent may be considered only if the agreement is ambiguous, which is an issue of law for the courts to decide" (*Greenfield v Philles Records*, 98 NY2d 562, 569 [2002]). Gilbane JV might have a claim against Samson for failing to obtain additional insured status for Gilbane JV, but that breach would not permit us to rewrite Samson's contract with Liberty.

Accordingly, the order of the Appellate Division should be affirmed, with costs, and the certified question answered in the affirmative.

Stein, J. (dissenting).

In concluding that the Appellate Division order should be affirmed, the majority focuses on a single word in the blanket additional insured endorsement at issue while ignoring others, thereby finding clarity where none exists. In doing so, the majority disregards the appropriate standard of review concerning barriers to coverage and, as a result, undermines an industry market solution aimed at efficiently allocating risk among entities involved in construction projects. Because the language of the policy endorsement is ambiguous and subject to more than one reasonable interpretation, it should be construed against defendant Liberty Insurance Underwriters, as the insurer, and in favor of coverage. The majority interprets the ambiguous language in favor of defendant and I, therefore, respectfully dissent.

[*3]

The starting point in a dispute over insurance coverage is the language of the policy itself (*see Selective Ins. Co. of Am. v County of Rensselaer*, 26 NY3d 649, 655 [2016]). Of

course, "[a]n insurance agreement is subject to principles of contract interpretation" (*Universal Am. Corp. v National Union Fire Ins. Co. of Pittsburgh, Pa.*, 25 NY3d 675, 680 [2015]) and, "[a]s with any contract, unambiguous provisions of an insurance contract must be given their plain and ordinary meaning" (*White v Continental Cas. Co.*, 9 NY3d 264, 267 [2007]). An insurance "contract is unambiguous if the language it uses has a definite and precise meaning, unattended by danger of misconception in the purport of the agreement itself, and concerning which there is no reasonable basis for a difference of opinion" (*Greenfield v Philles Records*, 98 NY2d 562, 569 {**31 NY3d at 138} [2002] [internal quotation marks, brackets and citation omitted]). Particularly relevant here, " 'the test to determine whether an insurance contract is ambiguous focuses on the reasonable expectations of the average insured upon reading the policy and employing common speech' " (*Universal Am. Corp.*, 25 NY3d at 680, quoting *Matter of Mostow v State Farm Ins. Cos.*, 88 NY2d 321, 326-327 [1996]; *accord Federal Ins. Co. v International Bus. Machs. Corp.*, 18 NY3d 642, 646 [2012]; *Cragg v Allstate Indem. Corp.*, 17 NY3d 118, 122 [2011]). Guided by these principles,

> "[a] reviewing court must decide whether, affording a fair meaning to all of the language employed by the parties in the contract and leaving no provision without force and effect, there is a reasonable basis for a difference of opinion as to the meaning of the policy. If this is the case, the language at issue would be deemed to be ambiguous and thus interpreted in favor of the insured" (*Federal Ins. Co.*, 18 NY3d at 646 [internal quotation marks, brackets and citations omitted]; *see White*, 9 NY3d at 267).

The endorsement in the policy at issue here provides, in relevant part, as follows: "WHO IS AN INSURED (Section II) is amended to include as an insured any person or organization with whom you have agreed to add as an additional insured by written contract." The pertinent language, as written, is awkward and unclear, at the very least. Plaintiff Gilbane JV asserts that the phrase "by written contract" modifies "to add," and argues that it refers to the act of the named insured, Samson, agreeing to add an additional insured. Put differently, Gilbane JV argues that "by written contract" means only that any agreement by Samson to add an additional insured must be memorialized in a writing—not necessarily a writing between Samson and the purported additional insured. Thus, according to Gilbane JV, the contract between DASNY and Samson—under which Samson agreed in writing to procure a general liability insurance policy for the construction project and to name Gilbane JV as an additional insured—was sufficient to confer additional insured status upon Gilbane JV.

Defendant, on the other hand, focuses on the phrase "with whom," arguing that the named insured must agree with the purported additional insured, in a writing between those parties, to add coverage for that entity under the policy.

Fixating on the word "with," the majority summarily concludes that the policy does not "provide for coverage unless {**31 NY3d at 139}Gilbane JV is an organization 'with whom' Samson has a written contract" (majority op at 135). In so doing, the majority places the phrase "by written contract" directly after "agreed," effectively rewriting the policy while altogether failing to address Gilbane JV's proposed construction. Under this reformulation, the pertinent policy language would confer additional insured status upon "any person or organization with whom you have agreed by written contract to add as an additional insured." Of course, that is not what the policy says. Moreover, even though the majority's construction is reasonable, the policy language is ambiguous because the construction proffered by Gilbane JV is also reasonable; indeed, Gilbane JV's interpretation is consistent with the "reasonable expectations of the average insured" that would seek to procure this type of coverage, whereas defendant's interpretation is not (*Universal Am. Corp.*, 25 NY3d at 680).

In particular, given the unusual syntax of the endorsement—placing the phrase "by written contract" at the end of the sentence, a placement the majority chooses to ignore—it is reasonable for the average insured to expect that the phrase "by written contract" modifies only the immediately preceding infinitive "to add," such that the phrase prescribes only that the agreement by which the named insured commits to extend coverage to the purported additional insured must be evidenced in a contract reduced to writing. In any event, because each party's reading of this language is reasonable, the endorsement is "ambiguous and thus [should be] interpreted in favor of" coverage (*Federal Ins. Co.*, 18 NY3d at 646). It follows, then, that the endorsement should *not* be interpreted as imposing a [*4]requirement of privity between Samson and Gilbane JV to effectuate additional insured coverage of Gilbane JV, and the DASNY-Samson contract was sufficient to satisfy the policy provision and entitle Gilbane JV to such coverage.[FN1]

{**31 NY3d at 140}A review of *Liberty Mut. Fire Ins. Co. v Zurich Am. Ins. Co.* (2016 WL 452157, 2016 US Dist LEXIS 13604 [SD NY, Feb. 4, 2016, 14 Civ 7568 (PAC)])—a case in which defendant sought a declaration of additional insured coverage under a policy issued by Zurich and took a position antithetical to the one it takes here, yet also prevailed—

is instructive. In that case, construing similar policy language, the District Court rejected the argument that defendant now asserts, "as an incorrectly cramped reading of the policy language" (2016 WL 452157, *2, 2016 US Dist LEXIS 13604, *5).[FN2] The District Court reasoned that the additional insured clause extended coverage to "any person or organization with whom the insured . . . agreed in a written contract to provide insurance for," explaining that the endorsement was "not so restrictive as to limit coverage to only the person or organization with whom . . . the named insured . . . contracted" (*id.* [internal quotation marks and citation omitted]). That court declined to "add a requirement of direct contractual privity between the named insured and the purported additional insured that [did] not exist in the policy language" (2016 WL 452157, *2 n 3, 2016 US Dist LEXIS 13604, *5 n 3). This Court should, likewise, refuse to impose this additional requirement in the face of the ambiguous policy language here.[FN3] If [*5]defendant sought that requirement, it could have so provided by using clear and unambiguous language (*compare AB Green Gansevoort, LLC v Peter Scalamandre & Sons, Inc.*, 102 AD3d 425, 426 [1st Dept 2013] [holding a privity{**31 NY3d at 141} requirement exists where the policy unambiguously stated that an organization is added as an additional insured "when you and such . . . organization have agreed in writing in a contract or agreement that such . . . organization be added as an additional insured on your policy"]; *Linarello v City Univ. of N.Y.*, 6 AD3d 192 [1st Dept 2004] [same]). Its failure to do so is fatal to the argument it advances here.

Moreover, interpreting the policy language as imposing an additional privity requirement where none clearly exists runs counter to the intended purpose of the type of additional insured endorsement at issue here. It is hornbook law that

> "[f]or an additional premium to the named insured, a third party such as a general contractor or project owner can be named by endorsement as an additional insured on the [general commercial liability] policy of a named insured such as a subcontractor. In fact, in the construction industry, this is the rule" (Scott C. Turner, Insurance Coverage of Construction Disputes § 42:1 [2d ed] [emphasis omitted]).

Construction project owners, such as DASNY, customarily require contractors of every tier, such as Samson, to provide coverage for "upstream" parties—such as Gilbane JV—as additional insureds on their general liability policies (*see id.*). This allocation of risk makes sense insofar as the party that is best positioned to control and mitigate any potential risks is responsible for obtaining coverage that extends to those upstream entities that are removed

from the work being performed by a particular subcontractor yet—as a property owner or project manager—may be exposed to third-party liability.[FN4]

Consistent with this risk transfer regime, "[a] blanket additional insured endorsement generally provides coverage for{**31 NY3d at 142} any person or organization to whom or to which the named insured is obligated to name as an additional insured by virtue of a written contract or agreement" (3 Steven Plitt et al., Couch on Insurance § 40:30 [3d ed]).[FN5] The point of such a blanket endorsement is to furnish a means of providing such coverage that is more efficient than requiring either a separate contract between each subcontractor and each additional insured (which the majority finds to be necessary here) or that the policy list the identity of each additional insured (a list that would have to be amended whenever the named insured undertakes an obligation to add a new upstream entity, consistent with standard commercial practice). In that regard, counsel for defendant conceded that underwriting considerations for a policy like the one before us are based, not on the number or identity of additional insureds that may be covered but, instead, on the nature of the insured's work. Thus, when Samson—a subcontractor on a major construction project, with a practical understanding of risk allocation in the construction industry—procured the policy here, it would reasonably expect that it had the right to add Gilbane JV, an upstream entity, as an additional insured without the approval of, or even so much as a notification to, defendant, so long as such coverage was required by *a* written contract. Seen through this lens, the interpretation proffered by Gilbane JV is consistent with the "reasonable expectations of the average insured upon reading the policy and employing common speech" (*Universal Am. Corp.*, 25 NY3d at 680 [internal quotation marks and citation omitted]). Faced with two competing, reasonable interpretations, the language of the endorsement at issue is ambiguous and, therefore, should be interpreted in favor of coverage (*see Federal Ins. Co.*, 18 NY3d at 646).

Accordingly, I would reverse the order of the Appellate Division, answer the certified question in the negative, and remit for consideration of issues raised, but not addressed, by that Court.{**31 NY3d at 143}

Judges Rivera, Fahey, Garcia and Feinman concur; Judge Stein dissents in an opinion in which Chief Judge DiFiore concurs.

Order affirmed, with costs, and certified question answered in the affirmative.

Footnotes

Footnote *: Liberty and Gilbane JV each cite a smattering of cases interpreting similar contractual language that rule in their favor (*compare Liberty Mut. Fire Ins. Co. v Zurich Am. Ins. Co.*, 2016 WL 452157, 2016 US Dist LEXIS 13604 [SD NY, Feb. 4, 2016, 14 Civ 7568 (PAC)], *Plaza Constr. Corp. v Zurich Am. Ins. Co.*, 2011 NY Slip Op 30709[U] [Sup Ct, NY County 2011], *and American Home Assur. Co. v Zurich Ins. Co.*, 26 Misc 3d 1223[A], 2010 NY Slip Op 50237[U] [Sup Ct, Kings County 2010], *with Zoological Socy. of Buffalo, Inc. v Carvedrock, LLC*, 2014 WL 3748545, 2014 US Dist LEXIS 103800 [WD NY, July 29, 2014, No. 10-CV-35-A (Sr)], *AB Green Gansevoort, LLC v Peter Scalamandre & Sons, Inc.*, 102 AD3d 425 [1st Dept 2013], *Linarello v City Univ. of N.Y.*, 6 AD3d 192 [1st Dept 2004], *Murnane Bldg. Contrs., Inc. v Zurich Am. Ins. Co.*, 33 Misc 3d 1215[A], 2011 NY Slip Op 51943[U] [Sup Ct, Suffolk County 2011], *and Best Buy Co., Inc. v Sage Elec. Contr., Inc.*, 2009 NY Slip Op 30208[U] [Sup Ct, NY County 2009]). That some courts may have erred in interpreting the policy language does not render the language ambiguous (*Breed v Insurance Co. of N. Am.*, 46 NY2d 351, 355 [1978]).

Footnote 1: Contrary to the majority's characterization, the DASNY-Samson contract cannot simply be discarded in the "extrinsic materials" bin (majority op at 136). The parties do not dispute that, pursuant to the DASNY-Samson contract, Samson agreed to procure general liability insurance with an endorsement naming Gilbane JV as an additional insured. That contract establishes that the condition to coverage—i.e., that the agreement by Samson to add Gilbane JV as an additional insured must be memorialized in a written contract—has been satisfied. In other words, the DASNY-Samson contract is not extrinsic evidence necessary to interpret the policy language but, instead, demonstrates compliance with the condition to coverage.

Footnote 2: The language of the policy at issue in *Zurich* was more favorable to the insurer resisting coverage, providing that "additional insured[s] include [a]ny person or organization with whom you have agreed, through written contract, agreement or permit, executed prior to the loss, to provide additional insured coverage" (2016 WL 452157, *1, 2016 US Dist LEXIS 13604, *3 [internal quotation marks and citation omitted]).

Footnote 3: The majority rejects *Zurich* and other authorities construing similar contractual language in a like manner, asserting that the policy language is not rendered ambiguous because those "courts may have erred" in determining that more than one reasonable interpretation of the policy language exists (majority op at 136 n). In support of that proposition, the majority cites *Breed v Insurance Co. of N. Am.* (46 NY2d 351, 355 [1978]). However, *Breed* merely stands for the proposition that "[i]t is . . . for this court to say, as

matter of law, whether reasonable [people] may reasonably differ as to [the] meaning [of an exclusionary clause in an insurance policy], or whether the indulgence of the lower courts has . . . written a new contract for the parties and extended the defendant's liability beyond the plain and unambiguous language of the policy" (*id*.). It is the majority that, by ignoring one reasonable interpretation, rewrites the policy at issue here in violation of *Breed* and curtails defendant's liability, contrary to what the insurer and insured originally contemplated, as discussed more fully herein.

Footnote 4: As amicus Turner Construction Company explains, because every construction project involves inherent risks for each individual participant in the project, the construction industry has established a common risk transfer method under which the party closest to the work being performed—and, thus, in the best position to control the work—bears the risk of any bodily injury or property damage arising from that work. In other words, the risk falls on the party best positioned to mitigate potential hazards. A critical component of risk transfer in the industry is additional insured coverage afforded to parties that are upstream—typically general contractors, construction managers, and property owners—and do not have immediate control over the work being performed. Downstream subcontractors, at each tier, are typically required to provide this coverage for all upstream parties. Blanket additional insured endorsements are, thus, a market solution aimed at efficiently allocating risk consistent with these widely-understood conventions.

Footnote 5: Presumably, the requirement of a written contract safeguards against potential abuse by ensuring that the extension of additional insured coverage legitimately falls within the scope of the named insured's operations. Here, as discussed above, the DASNY-Samson contract is a written contract in which Samson agreed to extend coverage to Gilbane JV, an upstream entity on the construction project on which Samson was engaged to work. Therefore, the DASNY-Samson contract, alone, satisfies any potential legitimacy concerns.