Touro Coll. v Arch Specialty Ins. Co.
2018 NY Slip Op 30912(U)
May 8, 2018
Supreme Court, New York County
Docket Number: 652642/2016
Judge: Gerald Lebovits

NEW YORK STATE SUPREME COURT
NEW YORK COUNTY: IAS PART 7

----------X

TOURO COLLEGE and UNITED EDUCATORS,

Index No. 652642/2016

Plaintiffs,

Motion Sequence No. 002

- against -

ARCH SPECIALTY INSURANCE COMPANY and
ALL PRO DESIGN & CONSTRUCTION CORP.,

Defendants.

----------X

LEBOVITS, J.:

Plaintiffs Touro College (Touro) and its insurer, United Educators (UE), bring this action for breach of contract and for a judgment declaring that defendant ARCH Specialty Insurance Company (ARCH) must defend and indemnify Touro, as an additional insured under a commercial general liability (CGL) policy that ARCH issued to All Pro Design & Construction Corp. (All Pro),[1] in an underlying personal injury action (Underlying Action). The complaint asserts the following claims: (1) judgment declaring that ARCH is obligate to defend, indemnify, and hold Touro harmless in the Underlying Action (first cause of action); (2) judgement declaring that ARCH has a duty to defend Touro in the Underlying Action, on a primary and noncontributory basis (second cause of action); (3) breach of contract arising from ARCH's allegedly wrongful refusal to defend and indemnify Touro in the Underlying Action (third cause of action); and (4) judgement declaring that ARCH pay UE's attorney fees, costs, and expenses in defending Touro in the Underlying Action and in bringing the instant declaratory action.

ARCH joined issue on June 17, 2016, with the filing and service of its answer. Plaintiffs now move for summary judgment in their favor on all claims against ARCH. In the alternative, plaintiffs move to strike ARCH's answer based on its alleged failure to provide court-ordered discovery.

I. Background and Procedural History

On April 9, 2014, Touro entered into a written agreement with All Pro (Construction Contract) for interior renovation of the second floor of the office building located at 902 Quentin Road, Brooklyn, New York (902 Quintin Road). The Construction Contract provides, in the annexed "Rider to Standard Form of Agreement Between Touro College ('Owner') and [All Pro] ('Contractor') Dated as of April 9, 2014" (Rider), that the scope of "Work" is "set forth in detail

[1] This court granted All Pro's CPLR 3211 (a) (7) motion (motion sequence number 001) to dismiss plaintiffs' breach of contract claim against it (fourth cause of action). *See* NYSCEF document number 48.

in [All Pro's] Bid." Johnson affirmation, exhibit K, Rider, ¶ 12. The "Bid Clarification Form," annexed to the Construction Contract, lists, among other items, installation of drywall and ceilings. *Id.*, exhibit K. Also, the Construction Contract provides, in pertinent part, as follows:

> "13. Contractor [All Pro] shall be solely and entirely responsible for initiating, maintaining and supervising all safety precautions regarding the Work.
>
> * * *
>
> "19. A. Prior to commencing any Work under this Agreement, Contractor shall deliver to Touro College insurance certificates naming 'Touro College' and 'Quentin Road Development LLC' and 'Atrium Builders, LLC' certificate holders and additional insureds under Contractor's insurance policies, such insurance to include: (i) all risk builder's insurance in limits of at least Two Million Dollars ($2,000,000.00) per occurrence, Four Million Dollars ($4,000,000.00) aggregate and Five Million Dollars ($5,000,000.00) of excess liability insurance; and (ii) hazard (including fire) insurance in limits of at least Five Million Dollars ($5,000,000.00) representing the full replacement value of Touro College's leasehold improvements.
>
> * * *
>
> "23. Contractor shall defend and indemnify Owner from and against all claims, actions, causes of action, losses, liabilities and judgments, and all costs and expenses related thereto, including court costs and attorneys' fees, arising out of or relating in any way to (a) Contractor's breach of this Agreement (whether or not cured); and (b) Contractor's performance of the Work. Contractor's obligation to defend and indemnify Owner survives expiration or termination of this Agreement."

Id., exhibit K, Rider.

ARCH issued a CGL policy to All Pro (Policy), from March 24, 2014, to March 24, 2015, with a limit of $2,000,000 per occurrence and $4,000,000 in the aggregate. All Pro provided Touro with a certificate of insurance, identifying Touro as an additional insured and listing All Pro's insurers and policies, including ARCH as the carrier affording general liability coverage and Zurich Insurance as the carrier affording builder's risk coverage.

The Policy contains the following "Blanket Additional Insured Endorsement" (Additional Insured Endorsement):

> "**SECTION II - WHO IS AN INSURED** is amended to include as an additional insured those persons or organizations who are required under a written contract with you [All Pro] to be named as an additional insured, but only with respect to liability for 'bodily injury', 'property damage', or 'personal and advertising injury' caused, in whole or in part, by your acts or omissions or the acts or omissions of your subcontractors:
>
> "a. In the performance of your ongoing operations or 'your work', including 'your work' that has been completed; or
>
> "b. In connection with your premises owned by or rented to you."

Raicus affirmation, exhibit DD.

Pursuant to a purchase order dated April 29, 2014, Touro hired T.R. Joy Associates, Inc. (T.R. Joy) to upgrade the security system on the second floor of 902 Quentin Road. All Pro allegedly did not enter into any subcontract agreement with T.R. Joy. On June 24, 2014, Josue Padilla (Padilla), an employee of T.R. Joy, was allegedly injured while working on the second floor of 902 Quentin Road.

On December 17, 2014, Padilla commenced the Underlying Action in the Supreme Court of the State of New York, Bronx County, entitled *Padilla v Touro College*, under Index No. 25984/2014E, alleging that while "[Padilla] was working in an area which was under construction and/or renovation, building materials, to wit, sheet rock, fell on him causing his serious and permanent injuries" and that "defendant was negligent in failing to provide [Padilla] with a safe place to work [and] in failing to safely store materials in a safe and orderly manner . . . ." Johnson affirmation, exhibit N, complaint, ¶¶ 13, 14; amended complaint, ¶¶ 26, 27. Notably, the complaint misidentifies the premises where Padilla was injured as 901 Quentin Road, Brooklyn, New York.

On August 29, 2014, UE tendered the defense and indemnification of Touro to All Pro, with carbon copy of the tender to ARCH. Neither All Pro nor ARCH responded. On March 2, 2015, Touro tendered its defense and indemnification to All Pro, with a carbon copy to ARCH. Neither All Pro nor ARCH responded. On April 16, 2015, Touro commenced a third-party action against T.R. Joy and All Pro for common law and contractual indemnification and contribution.

By letter dated July 22, 2015, ARCH rejected Touro's tender. ARCH explained that it did not have a present duty to defend or indemnify because: (1) the complaint in the Underlying Action alleged that the injury occured at 901 Quintin Road, Brooklyn, NY, whereas All Pro's Construction Contract was for work at 902 Quentin Road; and (2) it had not yet been determined, in the Underlying Action, whether All Pro's acts or omissions caused the accident.

On September 10, 2015, Padilla filed an amended summons and verified complaint in the Underlying Action, correctly identifying the location of the accident as 902 Quentin Road. Thereafter, Padilla amended his summons and verified complaint to add another defendant.

On May 6, 2016, Touro sent a final letter tendering its defense and indemnification in the Underlying Action to ARCH, with a carbon copy to All Pro, pointing out that the amended complaint in the Underlying Action changed the location of the accident cite and arguing that, as All Pro was contracted to install drywall and was responsible for maintaining a safe work environment, Touro was entitled to coverage based on the allegations that Padilla was injured when improperly stored sheet rock fell on him. Neither ARCH nor All Pro responded.

On May 17, 2016, Touro and UE commenced the instant action. ARCH filed its answer on June 17, 2016, and the parties engaged in discovery. Of relevance to the instant motion, on August 2, 2016, plaintiffs served their first set of interrogatories and a demand for the production of documents. On August 19, 2016, they served a second set of interrogatories and a second demand for production of documents. After ARCH served its response to plaintiffs' first set of interrogatories on January 19, 2017, plaintiffs served a supplemental response to their first set of interrogatories. Pursuant to a compliance conference order dated November 1, 2017, this court determined that a previous case management order had not been complied with and that paper discovery and depositions had not been completed. Accordingly, it ordered ARCH to respond to plaintiffs' first and second demands for production of documents, their second set of interrogatories and the supplemental responses to plaintiffs' first set of interrogatories "within 30 days or ARCH shall be precluded at trial from introducing evidence of the items demanded and not produced." NYSCEF document number 87.

II. Analysis

A. Motion for Summary Judgment

Plaintiffs contend that Touro is entitled to coverage as an additional insured under the Policy because the underlying injury arose out of All Pro's work — it included installing drywall and maintaining a safe work environment. ARCH counters that it has no obligation to defend or indemnify Touro in the absence of a determination that All Pro's acts or omissions caused the underlying injury. It argues that, because the Construction Contract did not obligate All Pro to procure a CGL policy, Touro is not an additional insured under the Policy. Plaintiffs reply that ARCH's failure to timely disclaim coverage on that ground violates Insurance Law § 3420 (d).

Under CPLR 3212 (b), "[t]o obtain summary judgment, the movant 'must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact.'" *Madeline D'Anthony Enters., Inc. v Sokolowsky*, 101 AD3d 606, 607 (1st Dept 2012), quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 (1986). Upon such a showing, the burden shifts to the opposing party "'to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action.'" *Id.*, quoting *Alvarez*, 68 NY2d at 324. "Where . . . the case turns upon an unambiguous written agreement . . . and the material facts of the case are not in

dispute, summary judgment [is] properly granted." *Solow Mgt. Corp. v Hochman*, 191 AD2d 250, 251 (1st Dept 1993).

"An insurance policy is a contract between the insurer and the insured. Thus, the extent of coverage . . . is controlled by the relevant policy terms, not by the terms of the underlying trade contract that required the named insured to purchase coverage." *Bovis Lend Lease LMB, Inc. v Great Am. Ins. Co.*, 53 AD3d 140, 145 (1st Dept 2008). "[T]he unambiguous provisions of an insurance policy, as with any written contract, must be afforded their plain and ordinary meaning, and . . . the interpretation of such provisions is a question of law for the court." *Broad St., LLC v Gulf Ins. Co.*, 37 AD3d 126, 130 (1st Dept 2006). "[W]ords of ordinary import [are to be construed] with their usual and commonly understood meaning, and in that connection . . . dictionary definitions [are] useful guideposts in determining the meaning of a word or phrase." *Yaniveth R. v LTD Realty Co.*, 27 NY3d 186, 192 (2016) (internal quotation marks and citation omitted). "[P]articular words should be considered, not as if isolated from the context, but in the light of the obligation as a whole and the intention of the parties as manifested thereby." *Riverside S. Planning Corp. v CRP/Extell Riverside, L.P.*, 13 NY3d 398, 404 (2009) (internal quotation marks and citation omitted).

As a preliminary matter, ARCH's failure to disclaim Touro's status as an additional insured prior to the instant motion does not violate Insurance Law § 3420 (d) (2). The law requires an insurer to disclaim liability or deny coverage "as soon as is reasonably possible . . . ." Insurance Law § 3420 (d) (2). But "[a] disclaimer is unnecessary when a claim does not fall within the coverage terms of an insurance policy." *Markevics v Liberty Mut. Ins. Co.*, 97 NY2d 646, 648 (2001) (internal citation omitted). Therefore, the lateness of the disclaimer does not preclude ARCH from arguing that Touro is not covered as an additional insured under the Policy. *See Vargas v City of New York*, 158 AD3d 523, 525 (1st Dept 2018) (stating that "[a] late disclaimer would not preclude [insurer] from arguing that the . . . defendants were not covered under the policy because they were not additional insureds"); *accord George Campbell Painting v National Union Fire Ins. Co. of Pittsburgh, PA*, 92 AD3d 104, 112 (1st Dept 2012) (noting that a denial of coverage, based on the claimants' lack of additional insured status, "would not even have been subject to [Insurance Law] section 3420 (d) . . .").

Turning to the plain language of the Policy and the Construction Contract, Touro satisfies the Additional Insured Endorsement's first prerequisite for additional insured status, that it must be an "organization[] who [is] required under a written contract with [All Pro] to be named as an additional insured." Raicus affirmation, exhibit DD. The Construction Contract between Touro and All Pro provides that Touro is to be among the "certificate holders and additional insureds under Contractor's insurance policies, such insurance to include: (i) all risk builder's insurance . . . and (ii) hazard (including fire) insurance . . . ." Johnson affirmation, exhibit K, Rider, ¶ 19 (A). ARCH insists that the plain language of this insurance procurement provision requires All Pro to obtain only the specified policies. As such, ARCH reasons, the Construction Contract does not require ALL Pro to obtain a CGL policy naming Touro as an additional insured. This is a tortured reading of the Construction Contract's procurement clause and the Additional Insured Endorsement.

The plain language of the Construction Contract's policy procurement provision requires All Pro to name Touro as an additional insured on its policies, which is all that the plain language of the Additional Insured Endorsement calls for. That the policy procurement provision goes on to specify the types of policies that All Pro must provide does nothing to restrict the preceding independent clause, calling for additional insured coverage under All Pro's policies generally. As *English Oxford Living Dictionaries* explains, while the word "include" may be used to imply that the items listed comprise the whole, "it is also used in a non-restrictive way, implying that there may be other things not specifically mentioned that are part of the same category." *English Oxford Living Dictionaries* (2018) (Note: online version). Here, the appearance of "to include," after the language requiring All Pro to list Touro as an additional insured on its insurance policies, conveys such non-restrictive usage of the phrase. Therefore, contrary to ARCH's reading, the Construction Contract requires that Touro be named as an additional insured on All Pro's policies, including the Policy.

This, however, does not resolve the issue of ARCH's duty to defend and indemnify in the Underlying Action. The Additional Insured Endorsement contains a second prerequisite to coverage. The underlying injury must be "caused, in whole or in part, by [All Pro's] acts or omissions or the acts or omissions of [its] subcontractors." Raicus affirmation, exhibit DD. Interpreting identical language, the Court of Appeals has recently held that "'caused, in whole or in part,' as used in the endorsement, requires the insured to be the proximate cause of the injury giving rise to liability, not merely the 'but for' cause." *Burlington Ins. Co. v NYC Tr. Auth.*, 29 NY3d 313, 324 (2017). "Accordingly, when a policy limits coverage to an injury 'caused, in whole or part' by the 'acts or omissions' of the named insured, coverage is extended to an additional insured only when the damages are the result of the named insured's negligence or some other act or omission." *Hanover Ins. Co. v Phila. Indem. Ins. Co.*, — NY3d —, 2018 NY Slip Op 02121, *1, 2018 WL 1473390, at *1 (1st Dept 2018), citing *Burlington Ins. Co.*, 29 NY3d at 323 (finding no coverage available under additional insured endorsement where "the sole proximate cause of the injury was the additional insured").

Here, notwithstanding the allegations and evidence put forth in the Underlying Action, there has not been a determination of All Pro's liability. In the absence of such a determination, it is premature to decide whether ARCH has a duty to indemnify Touro as an additional insured. *See Vargas*, 158 AD3d at 525 (finding that "it was premature to declare that [insurer] [was] obliged to *indemnify* the [additional insureds]," where "[i]t ha[d] not yet been determined if [the named insured] was the proximate cause of plaintiff's injury," as required by the policy's endorsements (emphasis in original)).

The Construction Contract's broad indemnification clause, which provides for indemnification for "claims . . . arising out of or relating in any way to . . . Contractor's performance of the Work," does not require a contrary result. Johnson affirmation, exhibit K, Rider, ¶ 23. "[T]he extent of coverage . . . is controlled by the relevant policy terms, not by the terms of the underlying trade contract . . . ." *Bovis Lend Lease LMB, Inc.*, 53 AD3d at 145. Here, the Additional Insured Endorsement provides coverage to the additional insured for injury "caused, in whole or in part, by [All Pro's] acts or omissions." Raicus affirmation, exhibit DD. This language differs significantly from the Construction Contract's indemnification provision. The Court of Appeals removed all doubt about the magnitude of that difference when it rejected

the First Department's line of cases that held "that the phrase 'caused by' does not materially differ from the . . . phrase, 'arising out of" and results in coverage even in the absence of the insured's negligence." *Burlington Ins. Co.*, 29 NY3d at 323-224 (2017) (internal quotation marks and citations omitted). Therefore, at this time — before knowing whether All Pro is liable — ARCH does not have a duty to indemnify Touro in the Underlying Action.

But ARCH has a duty to defend Touro in the Underlying Action. "The duty to defend is broader than the duty to indemnify." *Vargas*, 158 AD3d at 525.

> "[I]t is well settled that an insurer's duty to defend [its insured] is exceedingly broad and an insurer will be called upon to provide a defense whenever the allegations of the complaint suggest . . . a reasonable possibility of coverage. . . . If [a] complaint contains any facts or allegations which bring the claim even potentially within the protection purchased, the insurer is obligated to defend. . . . [A]n insurer may be required to defend under the contract even though it may not be required to pay once the litigation has run its course."

BP A.C. Corp. v One Beacon Ins. Group, 8 NY3d 708, 714 (2007) (internal quotation marks and citations omitted). Here, the complaint in the Underlying Action alleges that the work site was not safe and that the injury was caused by unsecured sheet rock (*see* Johnson affirmation, exhibit N, complaint, ¶¶ 13, 14, amended verified complaint, ¶¶ 26, 27) and All Pro was tasked with installing drywall and maintaining a safe work environment. *See* Johnson affirmation, exhibit K, Rider, ¶¶ 12, 13; Bid Clarification Form.

While it may be that All Pro's acts or omissions were not the proximate cause of Padilla's injury, the allegations in the Underlying Action "suggest . . . a reasonable possibility of coverage" (*BP A.C. Corp.*, 8 NY3d at 714), which triggers the duty to defend. *See Vargas*, 158 AD3d at 524-525, quoting *BP A.C. Corp.*, 8 NY3d at 714 (finding that the additional insured endorsements, limiting coverage to injuries caused by the named insured, "[did] not vitiate [insurer's] duty to defend, because the second amended complaint [brought] the insurance claim at least 'potentially within the protection purchased'" by "alleg[ing] that *all* defendants—which include[d] [the named insured]—operated, maintained, managed, and controlled the job site. . . . [and] were negligent and failed to provide a safe job site"); *accord Chunn v New York City Hous. Auth.*, 55 AD3d 437, 438 (1st Dept 2008) (finding that, while "issues of fact as to liability in the underlying personal injury action render[ed] premature the conclusion that the insurers ha[d] a duty to indemnify," the insurers' "duty to defend [was] clear"). Therefore, ARCH has a duty to defend Touro in the Underlying Action and it is in breach of that obligation.[2]

[2] The court does not determine whether the Policy provides coverage on a primary and noncontributory basis, as the parties do not offer any argument or present any evidence on the issue (*e.g.* Zurich Insurance's builder's risk policy). *See Sport Rock Intl., Inc. v American Cas. Co. of Reading, Pa.*, 65 AD3d 12, 18 (2009) ("Where 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").

In accordance with the foregoing, plaintiffs are entitled to recover costs and expenses incurred in defending the Underlying Action. *See National Union Fire Ins. Co. of Pittsburgh, PA v Greenwich Ins. Co.*, 103 AD3d 473, 474 (1st Dept 2013) ("In the event of a breach of the insurer's duty to defend, the insured's damages are the expenses reasonably incurred by it in defending the action after the carrier's refusal to do so") (internal quotation marks and citation omitted). Plaintiffs, however, "may not recover the expenses incurred in bringing an affirmative action against an insurer to settle its rights under the policy." *New York Univ. v Continental Ins. Co.*, 87 NY2d 308, 324 (1995); *accord Strauss Painting, Inc. v Mt. Hawley Ins. Co.*, 105 AD3d 512, 514 (1st Dept 2013), *mod on other grounds* 24 NY3d 578 (2014).

Plaintiffs' reliance on *U.S. Underwriters Ins. Co. v City Club Hotel, LLC* (3 NY3d 592 [2004]) and similar cases, to support an award of costs in connection with the instant action, is misplaced. These cases hold that an "insured who is cast in a defensive posture by the legal steps an insurer takes in an effort to free itself from its policy obligations, and who prevails on the merits, may recover attorneys' fees incurred in defending against the insurer's action." *U.S. Underwriters Ins. Co.*, 3 NY3d at 597 (internal quotation marks and citation omitted); *accord Illusion Hair Designers v Commercial Union Ins. Cos.*, 181 AD2d 527, 527 (1st Dept 1992) ("When an insurer brings a declaratory judgment action to determine its duty to defend and indemnify which is unsuccessful, it must pay the insured for the defense of both the underlying action and the declaratory judgment action"). Here, ARCH did not bring the instant action and plaintiffs are not in a defensive posture. Accordingly, plaintiffs are entitled to costs and expenses incurred in defending the Underlying Action, but may not recover the costs and expenses incurred in bringing the instant action.

To the extent plaintiffs' motion for summary judgment seeks a declaration that Arch is in breach of its duty to defend Touro in the Underlying Action, the motion is granted. And motion is otherwise denied.

B. Motion to Strike ARCH's Answer

At the time plaintiffs made the instant motion to strike ARCH's answer, they contended that, notwithstanding their good-faith attempts to obtain outstanding discovery and this court's orders, ARCH had yet to provide responses to plaintiffs' first and second demands for production of documents, plaintiffs' second set of interrogatories and plaintiffs' supplemental response to their first set of interrogatories. But in its submissions in opposition to the instant motion, ARCH substantially complied with its discovery obligations. By letter to the court, dated December 12, 2017, plaintiffs acknowledge that "upon review of the exhibits submitted with ARCH's opposition papers, we would like to clarify that the only outstanding discovery owed by ARCH is its Response to Plaintiffs' August 2, 2016 Demand for Production of Documents." NYSCEF document number 100. By letter to the court, dated December 12, 2017, ARCH states that it responded to all of plaintiffs' discovery demands, including the first demand for production of documents.

The drastic sanction of striking a pleading under CPLR 3126 "is only justified when the moving party shows conclusively that the failure to disclose was willful, contumacious or in bad

faith, a burden borne by the movant. Generally, the sanction should be commensurate with the nature and extent of the disobedience." *Christian v City of New York*, 269 AD2d 135, 137 (1st Dept 2000) (internal citation omitted). "[T]he determination of an appropriate sanction pursuant to CPLR 3126 lies in the trial court's discretion." *De Socio v 136 E. 56th St. Owners, Inc.*, 74 AD3d 606, 607 (1st Dept 2010).

Here, plaintiffs readily admit that ARCH complied with most of its discovery obligations by submitting responses as part of its opposition to the instant motion. The opposition and supporting exhibits were electronically filed on November 27, 2017, before the December 1, 2017, deadline set forth in the November 1, 2017, compliance conference order. To the extent that plaintiffs contend that ARCH has yet to respond to their first demand for production of documents, they do not specify what, if any, documents are still outstanding. Also, in its December 12, 2017 letter to the court, ARCH provides an itemized list of the documents that plaintiffs sought in that demand and either identifies the location (*i.e.* provides exhibit and/or NYSCEF document numbers) of the responsive documents it has served or explains why it has not served such documents. *See* NYSCEF document number 101.

Although somewhat belated, ARCH's response does not demonstrate that its conduct was willful, in bad faith, or contumacious. "[M]ere lack of diligence in furnishing some of the requested materials may not be grounds for striking a pleading." *De Socio*, 74 AD3d at 608. To the extent that ARCH has not complied with its discovery obligations, the November 1, 2017, compliance conference order provides the appropriate penalty under the circumstances, by "preclud[ing] [ARCH] at trial from introducing evidence of the items demanded and not produced." NYSCEF document number 87. Therefore, plaintiffs' motion to strike ARCH's answer is denied. *See De Socio*, 74 AD3d at 608 (finding that a CPLR 3126 sanction was warranted where defendants engaged in a "pattern of noncompliance and [failed] to account for their actions over a period of a year and a half," but that the conduct did not "r[i]se to the level that would justify striking the answer," because "defendants, albeit belatedly, [came] forward with an explanation for the nonproduction").

Accordingly, it is hereby

ORDERED that the motion of plaintiffs Touro College and United Educators is granted to the extent of granting summary judgement on their first, second, third, and fifth causes of action, to the extent they seek a declaration that defendant ARCH Specialty Insurance Company is obliged to provide a defense to the plaintiff Touro College in the action of *Padilla v Touro College*, Index No. 25984/2014E, Bronx County, with costs and disbursements to plaintiffs, upon submission of an appropriate bill of costs, as taxed by the Clerk, and the motion is otherwise denied; and it is further

ADJUDGED and DECLARED that that defendant ARCH Specialty Insurance Company is obliged to provide a defense to plaintiff Touro College in the said action pending in Bronx County; and it is further

ORDERED that counsel are directed to appear for a status conference in Room 345, at 60 Centre Street, on May 9, 2018, at 10:00 a.m.

Dated: May 8, 2018

J.S.C.

HON. GERALD LEBOVITS J.S.C.