

SCAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. KENNETH A. DAVIS,

Justice

TRIAL/IAS, PART 10
NASSAU COUNTY

W & S ASSOCIATES, L.P., SIMON PROPERTY
GROUP, L.P., NORDSTROM, INC. and
NATIONAL UNION FIRE INSURANCE COMPANY
OF PITTSBURGH, PENNSYLVANIA,

Plaintiffs,

SUBMISSION DATE: 10/07/03
INDEX No.: 16502/00

-against-

CNA TRANSCONTINENTAL INSURANCE COMPANY
and ZURICH AMERICAN INSURANCE COMPANY,

MOTION SEQUENCE #2, 3, 4

Defendants.

ZURICH-AMERICAN INSURANCE COMPANY,

Third-Party Plaintiff,

-against-

J & A CONCRETE CORP. and TRANSCONTINENTAL
INSURANCE COMPANY,

Third-Party Defendants.

The following papers read on this motion:

Notice of Motion/ Order to Show Cause.....	X
Answering Papers.....	X
Reply.....	X
Briefs: Plaintiff's/Petitioner's.....	
Defendant's/Respondent's.....	

Upon the foregoing papers, plaintiffs' motion for summary judgment declaring that defendant Zurich American Insurance Company (Zurich) is obligated to defend and indemnify them in the underlying action and to reimburse them for all legal fees expended in the defense of said lawsuit from July 19, 1999 to the present is granted.

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Cross motion by defendant Zurich for summary judgment dismissing plaintiffs' complaint is denied in view of the disposition of the motion in chief.

Cross motion by third party defendants J&A Concrete Corp. and for Transcontinental Insurance Company (Transcontinental) for summary judgment dismissing the third party action as to defendant J&A Concrete Corp. and judgment declaring that Transcontinental is not obligated to defend and indemnify third party plaintiff Zurich with regard to the underlying Bohm action is granted.

The underlying action arises out of an accident on June 12, 1997 at a construction site located at the retail store known as Nordstrom's Rack located in the Source Mall, Mineola, New York. Plaintiff W&S Associates, L.P. is the owner of the property; plaintiff Simon Property Group, L.P. is the manager of the property and plaintiff Nordstrom, Inc. is the lessee of the premises. A policy of general liability insuring the Nordstrom plaintiffs issued by National Union Fire Insurance Company was in effect on the date of the underlying accident.

Gary Bohm, the injured plaintiff in the underlying lawsuit, was employed by non-party PMC Rebar, Inc., one of the subcontractors on the project along with Macedos Construction, Co., Inc., J&A Concrete Corp., and DeFazio Electric, Inc., which had been hired to perform all of the electrical work at the premises. HRH Construction Interiors, Inc. was the general contractor hired by Nordstrom.

According to his deposition testimony, Mr. Bohm's accident occurred in an open construction area where he and his co-workers were laying rebar on a dirt base in preparation for the installation of the concrete slab by J&A Concrete Corp. Mr. Bohm further testified that electricians employed by DeFazio Electric, Inc. were also working in the same general area installing conduit. His testimony establishes that at the time of the accident, he was carrying approximately ten to fifteen pieces of steel rebar from a storage area to a location where members of his crew were laying the rebar. As he walked along the tamped dirt surface of the construction area, Mr. Bohm was injured when he lost his footing on a piece of electrical conduit pipe that rolled out from under his foot causing him to fall.

Pursuant to a document entitled Rider to Letter of Credit

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between Macedos Const. Co., Inc. and the general contractor, HRH Construction Interiors, Inc., dated October 14, 1998, Macedos agreed to procure insurance coverage for the benefit of HRH and the Nordstrom plaintiffs and to:

"indemnify and hold harmless the Owner, Contractor, A/E, A/E's Consultants, Agents and employees of any of them from and against any and all claims, damages, losses and expenses, including, but not limited to, attorney's fees, arising out of or resulting from performance of the Subcontractor's work under this Subcontract, or including such claim, damage, loss or expense which is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (other than the work itself), including loss of use resulting therefrom, but only to the extent caused in whole by negligent acts or omissions of the Subcontractor."

* * *

"The subcontractor shall be responsible for all costs, disbursements and expenses, including attorney's fees, incurred by the contractor as a result of the contractor's having to defend or take part in any action or proceeding which results from acts or omissions of the subcontractor."

Although Macedos did, in fact, obtain the required insurance under a commercial general liability policy (CPO 8522363-01), issued by Zurich American Insurance Company, for the policy period December 31, 1996 to December 31, 1997, Zurich denied any obligation to provide a defense and indemnification despite plaintiffs' timely request for coverage. According to its disclaimer letter of March 7, 2000, Zurich's denial of coverage was based on the contention that "the loss did not arise out of our work".

In opposition to plaintiffs' motion, and in support of its cross motion, Zurich proffers an additional ground to deny coverage, not raised in its disclaimer letter, i.e., plaintiffs' failure to satisfy the terms and conditions of the additional

insured indorsement of the Zurich policy in that 1) the certificate of insurance, naming them as addition insureds, is dated one year after the accident occurred. Zurich also argues maintains that the endorsement does not provide coverage for the claims asserted by Gary Bohm in the underlying action as his injuries did not arise out of work performed by either Macedos Construction Co. Inc., or its subcontractor, J&A Concrete Corp. In this regard, Zurich points to language contained in the additional insured endorsement which states that "any owner with certificate of insurance on file with the Co." is an additional insured "but only with respect to liability arising out of your ongoing operations performed for the additional insureds.

The first contention is unavailing inasmuch as the certificate of insurance unambiguously references the same December 31, 1996 to December 31, 1997 policy period as the policy itself. The written terms and conditions of a contract define the rights and obligations of the parties where the language employed is clear and unambiguous. Abiele Contr. v. New York City School Constr. Auth., 91 NY2d 1, 9. The fact that it is dated September 18, 1998 does not alter the clear effective dates and policy period set forth in the policy and certificate of insurance naming, *inter alia*, HRH Construction Interiors, Inc., W&S Associates, LP, Simon Property Group, LP, M.S. Management Associates, Inc., Nordstrom Stores Planning, their officers, agents, directors, employees, partners and any and all related companies as additional insureds with respect to claims "arising out of operations of the insured [Macedos Construction Co. Inc.] regarding project: Nordstrom Rack @ The Source Mall."

There is no evidence that Zurich ever communicated an intent to limit plaintiffs' coverage to claims made after the certificate of insurance is dated. Dryden Central School District v. Dryden Aquatic Racing Team, 195 AD2d 790, 792-93 [3rd Dept 1993]; Lenox Realty, Inc. v. Excelsior Insurance Co., 255 AD2d 644 [3rd Dept 1998]. Moreover, there is no requirement set forth in the Zurich policy that the certificate of insurance be dated or filed prior to the date of the loss in order for coverage to be afforded. Further, Zurich's interpretation of the language of the additional insured endorsement regarding liability arising out of "ongoing" operations performed for the additional insured" is far too narrow. The language focuses not upon the precise cause of the accident, as Zurich urges, but rather upon the general nature of the operation in the course of which injury was sustained. Consolidated Edison

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Co. Of New York, Inc. v. Hartford Inc. Co., 203 AD2d 83 [1st Dept 1994]. Under the circumstances extant, the grounds on which Zurich's disclaimer is predicated are unavailing.

In support of their motion for summary judgment, third party defendants J&A Concrete Corp. and its insurer, Transcontinental Insurance Company, assert that J&A Concrete Corp., never entered any agreement, prior to the Bohm accident, to procure insurance coverage naming either Macedos Construction Co., Inc., or any of the plaintiffs, as additional insured with regard to the Nordstrom Rack project. If there was such a contractual obligation, they maintain it was satisfied by the policy issued by Transcontinental for the policy period April 11, 1997 to April 11, 1998 [#1029873011]. The policy contains a blanket additional insured endorsement, however, which reads as follows:

"WHO IS AN INSURED (Section II) is amended to include as an insured any person or organization (called additional insured) whom you are required to add as an additional insured on this policy under:

1. A written contract or agreement; or
2. An oral agreement or contract where a certificate of Insurance showing that person or organization as an additional insured has been issued; but the written or oral contract must be:
 - a. currently in effect or becoming effective during the term of this policy; and
 - b. executed prior to the 'bodily injury,' 'property damage,' 'personal injury', or 'advertising injury.' "

The insurance provided to the additional insured is limited as follows:

"That person or organization is only an additional insured with respect to liability arising out of:

- a. Premises you own, rent, lease, or occupy: or

- b. Your work for that additional insured by or for you."

Moreover, the endorsement further states that:

"Any coverage provided herein under shall be excess over any other valid and collectible insurance available to the additional insured whether primary, excess, contingent or on any other basis unless a contract specifically requires that this insurance be primary or you request that it apply on a primary basis."

Defendant third party movants maintain that although an oral contract existed between Macedos Construction Co., Inc. and J&A Concrete Corp. for the Nordstrom Rack Project @ Source Mall, J&A Concrete Corp., never entered into an agreement with any party to procure insurance coverage for any entity with regard to the Nordstrom Rack project prior to the Bohm accident. Moreover, the letter of May 15, 1996 on which third party plaintiff Zurich relies as a memorialization of the verbal agreement between J&A Concrete Corp. and Macedos, describes work to be done on the Nordstrom project at Roosevelt Field in Westbury not the Nordstrom Rack project @ Source Mall. Moreover the sworn affidavit of the president of J&A Concrete Corp. states that "at no time prior to June 12, 1997, did J&A Concrete Corp. agree to indemnify or hold harmless Macedos "or name it as an additional insured with regard to the Nordstrom Rack project at the Source Mall in Westbury, New York." Neither the letter on which defendant/third party plaintiff Zurich American Insurance Company relies or the oral agreement referenced therein required the procurement of insurance. The record is devoid of any evidence to show the existence of the purported verbal agreement.

Inasmuch as the record is devoid of any evidence to demonstrate either that Zurich's insured [Macedos] or any of the plaintiffs, qualify as additional insureds, with respect to the Bohm accident, under the blanket additional insured endorsement of the policy issued by Transcontinental, or that J&A Construction Corp. was obligated to procure insurance covering the plaintiffs, Zurich or Zurich's insured, third party defendants are not obligated to defend and indemnify plaintiffs in the underlying Bohm action.

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Accordingly, plaintiffs' motion for summary judgment is granted and it is hereby declared that defendant/third party plaintiff Zurich is obligated to defend and indemnify plaintiffs in the underlying action and to reimburse them for all legal fees expended in the defense of said lawsuit from July 19, 1999 to the present.

Cross motion by defendant/third party plaintiff Zurich to dismiss the complaint is denied.

Cross motion by third party defendants for summary dismissing the third party complaint as to said defendants is granted and the third party declaratory judgment action is dismissed. It is hereby declared that defendant Transcontinental has no obligation to defend and indemnify defendant/third party plaintiff Zurich with regard to the underlying Bohm action and defendant J&A Concrete Corp. was not obligated to procure insurance coverage on behalf of any entity with regard to the Nordstrom Rack Project herein prior to commencement of the Bohm action.

This decision constitutes the order of the court.

Dated: DEC 18 2003



HON. KENNETH A. DAVIS J.S.C.

