

**14th at Irving Fee LLC v Almar Plumbing & Heating Corp.**

2024 NY Slip Op 34391(U)

December 11, 2024

Supreme Court, New York County

Docket Number: Index No. 651295/2022

Judge: Leslie A. Stroth

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LESLIE A. STROTH PART 12M

Justice

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14TH AT IRVING FEE LLC AND SUFFOLK CONSTRUCTION CORP.,

Plaintiff,

- v -

ALMAR PLUMBING & HEATING CORPORATION, TRAVELERS INDEMNITY COMPANY OF CONNECTICUT, TRAVELERS INDEMNITY COMPANY, AND NAVIGATORS INSURANCE COMPANY

Defendant(s).

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INDEX NO. 651295/2022
MOTION DATE 02/28/2023
MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 77, 78, 79, 80, 81, 82, 83

were read on this motion to/for PARTIAL SUMMARY JUDGMENT

In motion sequence number 001, plaintiffs 14th at Irving Fee LLC (hereinafter "14TH AT IRVING") and Suffolk Construction Corp. (hereinafter "Suffolk" and collectively "plaintiffs") move, pursuant to CPLR 3212 and CPLR 3001, for an order granting partial summary judgment, and declaring that plaintiffs are additional insureds under the insurance policy of Travelers Indemnity Company of Connecticut (hereinafter "Travelers" and "TICOC policy," respectively). Plaintiffs further move for an order declaring that defendants Almar Plumbing & Heating Corporation (hereinafter "Almar") and Travelers have a duty to defend plaintiffs on a primary and noncontributory basis in connection to the underlying case of George A. Papandrew v 14th At Irving Fee LLC and Suffolk Construction Corp., et. al. (Sup Ct, New York County, Index No. 152236/2021). Plaintiffs also move for an order declaring that defendants are obligated to

reimburse plaintiffs for the post-tender defense costs incurred in defense of the underlying action.

Defendant Travelers cross-moves, pursuant to CPLR 3212, for an order granting it summary judgment, and declaring that Travelers does not have a duty to defend nor to indemnify plaintiffs under the TICOC policy in connection to the underlying action.

Defendant Almar cross-moves, pursuant to CPLR 3211(a)(4) and CPLR 3212, for an order dismissing plaintiff's first and second causes of action for breach of contract and for a declaration that defendants are required to defend, indemnify, and hold harmless plaintiffs in this action. Defendant Almar also moves, pursuant to CPLR 3212, for an order dismissing the remainder of plaintiff's complaint.

## **BACKGROUND**

### The Underlying Action

George Papandrew (hereinafter "Papandrew"), was an employee of Almar at the time of the underlying accident in this matter. He sued 14<sup>th</sup> At Irving and Suffolk, alleging, among other things, that they were the owners of the premises where he was injured while working, and that they were negligent in failing to provide a safe place to work, by not providing any notice or warning of dangers, as well as appropriate safety devices to plaintiff. (See NYSCEF DOC. NO. 71 at ¶ 11).

Papandrew claims that his injuries were caused by the negligence of plaintiffs "in that the work being performed by [Papandrew] at the time of his accident was being done in a dangerous, unsafe, defective and hazardous manner." (*id.*). Papandrew alleges that plaintiffs violated New York Industrial Code Rule Sections 23-1.7(e) and 23-1.30, as well as Labor Law Sections 200 and 241(6). (*id.*). Papandrew further claims that the alleged incident occurred when he tripped

and fell in the basement of the building located at 124 East 14<sup>th</sup> Street, New York, NY. (*id.* at ¶ 2). Specifically, plaintiffs claim that on October 15, 2020, while Papandrew was working within the scope of his employment with Almar at the subject premises, he was caused to trip and fall over an “overpour of concrete” caused by defendants.

Papandrew alleged in his Verified Bill of Particulars that plaintiffs “had actual and constructive notice of the overpour of concrete that caused the plaintiff to trip and fall in that the defendants, their agents and/or employees, caused and/or created this condition.” (*id.* at ¶¶ 6-7; *see also* NYSCEF DOC. NO. 72 at ¶ 7). Papandrew notes it was “not claiming strict liability against the defendants.” (*See* NYSCEF DOC. NO. 72 at ¶ 10).

#### Incident Report

In opposition to plaintiffs’ motion and in support of its cross-motion, Travelers as indicated on page one, annexed a document entitled “Suffolk Construction Company, Inc. Superintendent’s Incident Report”, dated October 16, 2020, in which George Papandrew is identified as an injured party. (*See* NYSCEF DOC. NO. 47). Papandrew is identified as being employed by Almar Plumbing. (*id.*) The incident report describes that plaintiff was “coming down stair #2 to the cellar, exited the stairwell and tripped over concrete that was raised at the threshold. He landed on his left knee with both palms to the ground.” (*id.*).

#### Instant Action

Plaintiffs commenced this action by filing a summons and verified complaint against defendants Almar, Travelers, and Navigator’s Insurance Company (hereinafter “Navigator”) on March 21, 2022. (*See* NYSCEF DOC. NO. 1, Summons and Verified Complaint).

Plaintiffs alleges in the Complaint that “prior to October 15, 2020, Almar entered into a written contract with plaintiffs to perform certain work and services on its behalf” (*id.* at ¶ 36).

Plaintiffs further allege in their complaint that prior to October 15, 2020, Travelers “issued and delivered a commercial general liability insurance policy, covering the work and/or services [Almar] was contractually required to provide and/or perform.” (*id.* at ¶ 37). Plaintiff further states that “Upon information and belief, prior to October 15, 2020, TICOC, at the request of Almar, issued and delivered an excess insurance policy, covering the work and/or services Almar was contractually required to provide and/or perform.” (*id.*).

Plaintiffs state that prior to October 15, 2020, Travelers also issued a commercial general liability insurance policy and an excess insurance policy to Almar. (*id.* at ¶ 38). Plaintiffs also allege that prior to October 15, 2020, Navigator issued a commercial general liability insurance policy and an excess insurance policy to Almar. (*id.*).

Accordingly, plaintiffs claim that they are “entitled to defense and indemnification under the terms of the policies issued by TICOC, TIC and [Navigator] to [Almar], and the contract between [p]laintiffs and [Almar].” (*id.* at ¶ 43).

Defendants The Travelers Indemnity Company of Connecticut and The Travelers Indemnity Company joined issue by service of their answer on May 25, 2022. (*See* NYSCEF DOC. NO. 8). Defendant Almar joined issue by service of its answer on May 31, 2022. (*See* NYSCEF DOC. NO. 9). Defendant Navigator joined issue by service of its answer on June 1, 2022. (*See* NYSCEF DOC. NO. 10).<sup>1</sup>

#### Subcontract Agreement Between Almar and Suffolk Construction

The subcontract agreement dated May 17, 2019, between Almar and Suffolk, states in relevant part:

“8.9.5 Subcontractor shall name Contractor, Owner and/or any other interested parties as designated by Owner or Contractor as

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<sup>1</sup> Defendant Travelers also served an answer to cross-claims by Navigator on June 8, 2022. (*See* NYSCEF DOC. NO. 11).

Additional Insureds on a primary, non-contributing basis to any other insurance available to the additional insured whether such insurance is primary, excess/umbrella, self-insured, or otherwise, on all liability policies of Subcontractor, throughout the duration of the Project for claims arising out of the Work for ongoing and completed operations. Subcontractor's policies shall continue to so name those additional insureds in this fashion upon policy renewals throughout the statute of repose period under the law of the state in which the Project is located.

.....  
Subcontractor's policies required herein shall contain no exclusions or limitations with respect to Subcontractor's scope of work and/or type of structure being constructed, including, without limitation, exclusions for condominium exclusion, residential, lead, asbestos, EIFS or specified drywall, or the method of insuring the project including the implementation of a controlled insurance program (wrap up).

The Umbrella Liability insurance required by this Article, and any other insurance required by this Subcontract which is furnished via an excess/umbrella policy form, shall provide that (i) it covers any party as an additional insured who qualifies as such on the underlying insurance and follows form for such additional insured coverage, and (ii) the coverage afforded to such additional insured is primary and non-contributing to any of the other insurance available to the additional insureds whether such insurance is primary, excess/umbrella, self-insured, or otherwise. Subcontractor shall provide reasonable evidence of completed operation coverage if required by Contractor as a condition precedent to final payment. The Liability Policies will provide defense and indemnity to the Additional Insureds for any and all claims arising out of the Work. The insurer's defense and indemnity obligations shall not be limited to claims in connections with Contractor's supervision of the Work. Each such policy obtained by Subcontractor shall provide that the insurer shall defend any suit against Contractor, its officers, agents, or employees even if such suit is frivolous or fraudulent so long as such suit results from or arises out of the Work."

(See NYSCEF DOC. NO. 64 at pg. 13).

The subcontract agreement further identifies plaintiff 14<sup>th</sup> At Irving as the owner of the subject location of the construction project. (*id.* at pg. 4).

TICOC Insurance Policy

The TICOC insurance policy entitled “Commercial Insurance” issued to Almar, with an effective date of April 1, 2020, states in relevant part:

- “4. Any person or organization that is a premises owner, manager or lessor and that you have agreed in a written contract or agreement to include as an additional insured on this Coverage Part is an insured, **but only with respect to liability “for bodily injury,” “property damage” or “personal and advertising injury” that:**
- a. Is “bodily injury” or “property damage” that occurs, or is “personal and advertising injury” caused by an offense that is committed subsequent to the signing of that contract or agreement; and
  - b. Arises out of the ownership, maintenance or use of that part of any premises leased to you.”
- (See NYSCEF DOC. NO. 65 at pg. 31).

.....

- “Any person or organization that you agree in a written contract or agreement to include as an additional insured on this Coverage Part is an insured, but only:
- a. With respect to liability for “bodily injury” or “property damage” that occurs, or for “personal injury” caused by an offense that is committed, subsequent to the signing of that contract or agreement and while that part of the contract or agreement is in effect; and
  - b. If, and only to the extent that, such injury or damage is caused by acts or omissions of you or your subcontractor in the performance of “your work” to which the written contract or agreement applies. Such person or organization does not qualify as an additional insured to the independent acts or omissions of such person or organization.”
- (See NYSCEF DOC. NO. 29 at pg. 88)

Certificate of Liability Insurance

The Certificate of Liability Insurance (“COI”), identifying Almar as the insured party, states in relevant part:

“The following are included as additional insured if required by written contract subject to the terms and conditions of stated policies: Suffolk Construction Company Inc. 14th at Irving Fee LLC, The City of New York, New York City Economic

Development Corporation, New York City Land Development Corporation, RAL 14th Street Developer LLC on a primary and non-contributory basis; waiver of subrogation applies in favor of general liability coverage.”  
(See NYSCEF DOC. NO. 68).

### TIC Insurance Policy

The TIC insurance policy entitled “Excess Follow-Form and Umbrella Liability Insurance Policy” and issued to Almar, with an effective date of April 1, 2020, states in relevant part:

1. “We will pay on behalf of the insured those sums, in excess of the "applicable underlying limit", that the insured becomes legally obligated to pay as damages to which Coverage A of this insurance applies, provided that the "underlying insurance" would apply to such damages but for the exhaustion of its applicable limits of insurance. If a sublimit is specified in any "underlying insurance", Coverage A of this insurance applies to damages that are in excess of that sublimit only if such sublimit is shown for that "underlying insurance" in the Schedule Of Underlying Insurance.”
2. “Coverage A of this insurance is subject to the same terms, conditions, agreements, exclusions and definitions as the "underlying insurance", except with respect to any provisions to the contrary contained in this insurance.”  
(See NYSCEF DOC. NO. 66 at pg. 7).

The Navigators insurance policy names Almar as an insured for a policy period from April 1, 2020 to April 1, 2021. (See NYSCEF DOC. NO. 67 at pg. 3). The policy states in relevant part:

“SECTION II – WHO IS AN INSURED The WHO IS AN INSURED section of the “controlling underlying insurance” is made part of this policy. Any person or organization that is an insured in “controlling underlying insurance” is an insured in this policy to the same extent.” (See NYSCEF DOC. NO. 67 at pg. 7).

The underlying insurance coverage is identified as the umbrella liability by Travelers Indemnity Company. (*id.*).

## DISCUSSION

It is well settled that “[t]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact” (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986] citing *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Once the movant has made a prima facie showing, the burden shifts to the opposing party to “present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact” (*Casper v Cushman & Wakefield*, 74 AD3d 669, 669 [1st Dept 2010], *lv dismissed* 16 NY3d 766 [2011] [internal quotation marks and citation omitted]).

The court’s function on summary judgment is “issue-finding rather than issue-determination” (*Mayo v Santis*, 74 AD3d 470, 471 [1st Dept 2010]). In deciding the motion, “the court should draw all reasonable inferences in favor of the nonmoving party” and deny summary judgment if there is any doubt as to the existence of a material issue of fact (*Assaf v Ropog Cab Corp.*, 153 AD2d 520, 521 [1st Dept 1989] [citations omitted]). “[M]ere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient” to defeat a motion for summary judgment (*Siegel v City of New York*, 86 AD3d 452, 455 [1st Dept 2011], quoting *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

Furthermore, since summary judgment is a drastic remedy, it should never be granted when there is any doubt as to the existence of a triable issue of fact (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]). When the existence is even arguable or debatable, summary judgment should be denied (*Stone v Goodson*, 8 NY2d 8, 12 [1960]).

### Travelers Opposition and Cross-Motion

In support of their motion, plaintiffs first rely on the subcontract between Suffolk and Almar, with respect to the project at 14<sup>th</sup> at Irving. (*See* NYSCEF DOC. NO. 64). Plaintiffs argue that pursuant to the subcontract, “Almar agreed to defend, indemnify and provide additional insured status to 14<sup>th</sup> at Irving and Suffolk in connection with the work to be performed.” (*See* NYSCEF DOC. No. 36 at pg. 7).

Plaintiffs next highlight the COI, which states “the following are included as additional insured if required by written contract subject to terms and conditions of stated policies: Suffolk Construction Company Inc., 14<sup>th</sup> at Irving Fee LLC.” (*See* NYSCEF DOC. NO. 36 at pg. 7; *see also* NYSCEF DOC. NO. 68).

Finally, plaintiffs argue that they are entitled to summary judgment as a matter of law and seek a declaratory judgment stating that they are additional insureds under the TICOC, TIC and Navigators policy. Plaintiffs maintain that on the date of his accident, Papandrew was “lawfully on the Premises as an employee of Almar, which was retained by Suffolk to provide services at the Premises.” (*See* NYSCEF DOC. NO. 36, pg. 2).<sup>2</sup>

In opposition, defendant Travelers argues that plaintiff are not entitled to additional insured coverage because the plaintiffs cannot “show that the underlying complaint reasonably alleges that the named insured proximately caused the underlying accident.” (*See* NYSCEF DOC. NO. 43 at pg. 11). Travelers further argues that the blanket additional insured endorsement does not provide coverage to plaintiffs for liability based on any independent acts or omissions. Specifically, Travelers argues that “there is no allegation within the four corners

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<sup>2</sup> Plaintiffs have not made any specific requests for declaratory relief with respect to Navigators’ in the instant motion and therefore no question as to whether Navigators is required to provide any defense to plaintiffs will be considered in the instant motion.

of the underlying complaint that plaintiffs are liable based on vicarious liability for Almar's actions. The only claim for recovery against plaintiffs is premised on its own 'negligence, carelessness, and recklessness.'" (*id.* at pg. 13). Travelers also argues that its policy does not provide coverage to plaintiffs based on any independent acts or omissions on their behalf. (*id.*) As such, Travelers now cross-moves for an order declaring that Travelers does not have a duty to defend nor to indemnify plaintiffs under the TICOC policy in connection to the underlying action.

The Court of Appeals has held that "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]). Moreover, the Court of Appeals has held that "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]). Additionally, the Court of Appeals has held that the terms of a policy at issue "require a written contract between the named insured and an additional insured, if coverage is to be extended to an additional insured" (*Gilbane Bldg. Co./TDX Constr. Corp. v St. Paul Fire & Mar. Ins. Co.* (31 NY3d 131, 134 [2018])).

The TICOC insurance policy issued to Almar, with an effective date of April 1, 2020, states in relevant part:

"4. Any person or organization that is a premises owner, manager or lessor and that you have agreed in a written contract or agreement to include as an additional insured on this Coverage Part is an

insured, but only with respect to liability “for bodily injury,” “property damage” or “personal and advertising injury” that:

- c. Is “bodily injury” or “property damage” that occurs, or is “personal and advertising injury” caused by an offense that is committed subsequent to the signing of that contract or agreement; and
- d. Arises out of the ownership, maintenance or use of that part of any premises leased to you.”

(See NYSCEF DOC. NO. 65 at pg. 31).

In affording a plain and ordinary reading to the TICOC policy, it is clear that “any person or organization that is a premises owner, manager or lessor” and that Almar have “agreed in a written contract or agreement to include as an additional insured...is an insured.” (See NYSCEF DOC. NO. 65 at pg. 31). A subcontract agreement dated May 17, 2019, between Almar and Suffolk, states that the “subcontractor shall name Contractor, Owner and/or any other interested parties as designated by Owner or Contractor as Additional Insureds.” (See NYSCEF DOC. NO. 64 at pg. 13). Additionally, the COI identifying Almar as the insured party reads “[t]he following are included as additional insured if required by written contract subject to the terms and conditions of stated policies: Suffolk Construction Company Inc., [and] 14th at Irving Fee LLC...” (See NYSCEF DOC. NO. 68). Given the language in the TICOC, coupled with the subcontract agreement and the COI, both 14<sup>th</sup> at Irving and Suffolk can be, and are, identified as additional insureds.

“It is well settled that an insurance company’s duty to defend is broader than its duty to indemnify. Indeed, the duty to defend 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’” (Automobile Ins. Co. of Hartford v Cook, 7 NY3d 131, 137 [2006]; see also *Continental Cas. Co. v Rapid-American Corp.*, 80 NY2d 640, 648 [1993]). The Court of Appeals “has repeatedly held that an insurer’s duty to defend its insured arises whenever the

allegations in a complaint state a cause of action that give rise to the reasonable possibility of recovery under the policy” (*Fitzpatrick v American Honda Motor Co., Inc.* 78 NY2d 61, 65 [1991]). “[A]n insurer will be called upon to provide a defense whenever the allegations of the complaint suggest...a reasonable possibility of coverage” (*W & W Glass Sys., Inc. v Admiral Ins. Co.*, 91 AD3d 530, 531 [1st Dept 2012], quoting *BP A.C. Corp. v One Beacon Ins. Group*, 8 NY3d 708, 714 [2007]). The duty to defend the additional insured exists where there is “a reasonable possibility based on the allegations in the underlying complaint, that the underlying injury was caused, in whole or in part, by the acts or omissions of the subcontractors to which the policies were issued in connection with their ongoing operations” and, therefore, coverage “was implicated under the policies” (*Allied World Assur. Co. (U.S.) Inc. v Aspen Specialty Ins. Co.*, 192 AD3d 449, 450 [1st Dept 2021] [internal citations omitted]).

Further, “the merits of the complaint are irrelevant and, [a]n insured’s right to be accorded legal representation is a contractual right and consideration upon which [a person’s] premium is in part predicated, and this right exists even if debatable theories are alleged in the pleading against the insured” (*BP A.C. Corp.*, 8 NY3d at 714 [internal quotation marks and citation omitted]). “[A]dditional insured coverage is not contingent upon a liability finding” and the insurer’s obligation “to provide a defense to an additional named insured under the policy exists to the same extent as it does to a named insured” (*BP A.C. Corp.*, 8 NY3d at 711).

The duty remains “even though facts outside the four corners of [the] pleadings indicate that the claim may be meritless or not covered.” (*Fitzpatrick v Am. Honda Motor Co., Inc.*, 78 NY2d 61, 63 [1991]). Moreover, “for this reason, when a policy represents that it will provide the insured with a defense, we have said that it actually constitutes ‘litigation insurance’ in

addition to liability coverage (*Automobile Ins. Co. of Hartford*, 7 NY3d at 137 quoting *Seaboard Sur. Co. v Gillette Co.*, 64 NY2d 304, 310 [1984]).

Travelers argues that plaintiffs cannot “show that the underlying complaint reasonably alleges that the named insured proximately caused the underlying accident” and thus, are not entitled to coverage as additional insureds. (*See* NYSCEF DOC. NO. 43 at pg. 11). Travelers also alleges that “the endorsement provides coverage to additional insureds for liability for bodily injury only to the extent that the injury was caused by the acts or omissions” of Almar. (*id.* at pg. 7). Therefore, Travelers contends that the indemnity provision’s “acts or omissions” requirement means that this provision is triggered only upon Almar’s negligence.

Here, there can be no doubt that Travelers is obligated to defend plaintiffs in the underlying action. Papandrew’s complaint states

“11. The foregoing occurrence was caused by and through the negligence of the defendants, 14<sup>th</sup> at Irving and Suffolk, their agents and/or employees, in that the work being performed by the plaintiff at the time of his accident was being performed in a dangerous, unsafe, defective and hazardous manner; in that the defendants, 14<sup>th</sup> at Irving and Suffolk, failed to provide the plaintiff with a safe place to work; failed to give the plaintiff any signal, notice or warning of the danger and perils involved; failed to keep and maintain the premises in a safe and secure condition; failed to provide the plaintiff with the appropriate safety devices; and were otherwise reckless, careless and negligent under the circumstances.”  
(*See* NYSCEF DOC. NO. 46 at P11).

By mere allegations of negligence by Papandrew in his underlying complaint, there exists a “reasonable possibility” that the underlying action will result in a judgment against plaintiffs within the scope of its coverage under Almar’s policy with Travelers. This same policy covers both plaintiffs as additional insureds. Thus, if either plaintiff is ultimately held liable to Papandrew, such a liability would arise from “the extent that, such injury or damage is caused by acts or omissions” of the plaintiff in the performance of plaintiff’s work. However at this

juncture, it has no bearing on the existence of a duty to defend that, especially given that Travelers “may not be required to pay once the litigation has run its course” (*BP A.C. Corp.*, 8 NY3d at 714 quoting *Automobile Ins. Co. of Hartford*, 7 NY3d at 137).

Lastly, by establishing that they are entitled to a defense under the TICOC policy, plaintiffs have also established that they are entitled to post-tender defense costs based upon defendants’ failure to defend plaintiffs. The Court notes that neither Travelers nor Almar have directly addressed this branch of plaintiffs’ motion in their opposition or moving papers, arguing instead that plaintiffs are not entitled to a defense. However, plaintiffs have not proven the amount of defense costs and thus, those shall be decided at the time of trial.

Accordingly, the portion of plaintiffs’ motion seeking a declaratory judgment declaring that plaintiffs are additional insureds under the TICOC policy is granted and Travelers has a duty to defend plaintiffs on a primary and noncontributory basis in the underlying action. Plaintiffs are also entitled to post-tender costs based on Travelers’ failure to provide a defense to plaintiffs. Travelers’ cross-motion seeking a declaratory judgment declaring that plaintiffs are not additional insureds must therefore be denied.

#### Almar’s Opposition and Cross-Motion

Almar cross-moves for an order seeking dismissal of all claims by plaintiff against Almar. (*id.*). Specifically, Almar argues the first two claims of plaintiff’s third-party complaint in the underlying action are identical to those in this action.

Under CPLR 3211(a)(4), a court has broad discretion as to the disposition of an action when another is pending (*Whitney v Whitney*, 57 NY2d 731, 732 [1982]). To warrant dismissal or a stay, the two actions must be sufficiently similar and the relief sought must be “the same or substantially the same.” (*White Light Prod., Inc. v On Scene Prods.*, 231 AD2d 90, 94 ([1st

Dept 1997)) quoting *Kent Dev. Co. v Liccione*, 37 NY2d 899, 901 [1975]). “It is not necessary that the precise legal theories presented in the first proceeding also be presented in the second proceeding,” but “[r]ather, it is necessary that ‘both suits arise out of the same subject matter or series of alleged wrongs.’” (*Simonetti v Larson*, 44 AD3d 1028, 1029 [2d Dept 2007][citation omitted]).

Here, plaintiff’s first two claims in this complaint, namely that Almar is liable for a breach of contract for their failure to obtain insurance and thus, plaintiffs are entitled to a declaration that Almar is liable for a breach of contract, are identical to those in the third-party action of the underlying claim. (*See* NYSCEF DOC. NO 1 at ¶¶ 44-55; see also). Plaintiff’s argument, namely that “[i]n contrast to the [u]nderlying [a]ction, which is based in tort, the instant action seeks to determine the collective coverage obligations of the named defendants...all of which name Almar as their named insured” is unavailing. (*See* NYSCEF DOC. NO. 73). In both the instant action and the third-party action of the underlying case, plaintiffs seek to hold Almar liable for a breach of contract and, ultimately, seek a declaration that Almar has a duty to defend and indemnify plaintiffs. Accordingly, given that plaintiffs make the same claims in this action as the third-party action, the first two claims of plaintiffs’ complaint herein are dismissed.

With respect to the remaining causes of action against Almar, Almar has failed to meet its prima facie burden that it is entitled to summary judgment as a matter of law.

In both opposition to plaintiffs’ motion and in support of its cross-motion, Almar argues that Travelers, and not Almar, is the insurer and thus, the remaining causes of action do not apply to them. Almar further argues that plaintiff has “failed to show that this incident qualifies for additional insured coverage under the TICOC Policy.” (*See* NYSCEF DOC. NO. 57 at pg. 10).

Specifically, Almar argues that “[p]laintiffs do not argue that Almar’s acts or omissions somehow caused Mr. Papandrew’s alleged injured.” (*id.* at 12). “Accordingly, there are no allegations that Mr. Papandrew’s injuries were caused by Almar’s acts or omissions and therefore, under the language of the TICOC Policy, [p]laintiffs are not entitled to additional insured coverage and their motion must be denied.” (*id.*).

The subcontract agreement between Almar and Suffolk states:

**“8.8 Indemnification.** To the fullest extent permitted by law, Subcontractor shall defend, indemnify and save harmless Contractor, Contractor’s sureties and Owner, as well as any other parties which Contractor is required under the Contract Documents to defend, indemnify and hold harmless, and their agents, servants and employees, from and against any claims, costs, expenses, damages, suits, fines, penalties and/or liabilities (including attorneys’ fees and costs and attorneys’ fees incurred in enforcing Subcontractor’s obligations set forth in this Section 8.8), caused by, arising out of, resulting from, or occurring in connection with (i) the Work, whether or not caused in part by the negligence or other fault of a party indemnified hereunder; (ii) any breach or default by the Subcontractor in the performance of any of its obligations under the Subcontract; or (iii) any actions or suits concerning any of the foregoing in which any of the Indemnitees are made a party defendant; provided, however, Subcontractor’s duties set forth in this Section 8.8 shall not arise if any such claim, cost, expense, damage, suit, fine, penalty and/or liability is wholly caused by the sole negligence of a party indemnified hereunder.” (*See* NYSCEF DOC. NO. 48 at pg. 8).

In affording a plain and ordinary reading to the subcontract language, it is clear that Almar, in its capacity as subcontractor “shall defend, indemnify and save harmless [c]ontractor, [c]ontractor’s sureties and Owner, as well as any other parties which [c]ontractor is required...to defend.” (*id.* at pg. 8). This language includes defending plaintiffs. This is further evidenced by the fact that Almar’s COI identifies Suffolk and 14<sup>th</sup> at Irving as additional insured. (*See* NYSCEF DOC. NO. 68). Based on the foregoing plain reading of the language, it is evident that

Almar intended to provide a defense to plaintiff. Almar's arguments that it is not an insurance company and thus, is not obligated to provide a defense to plaintiffs is immaterial.

Accordingly, the portion of plaintiffs' motion seeking a declaratory judgment declaring they are additional insureds under the TICOC policy is granted and Almar has a duty to defend plaintiffs on a primary and noncontributory basis in the underlying action. Plaintiffs are also entitled to post-tender costs based on Almar's failure to provide a defense to plaintiffs.

Moreover, plaintiffs' first two claims against Almar, in the instant action, are dismissed. Almar's cross-motion to dismiss the remaining claims is denied.

### **CONCLUSION AND ORDER**

Accordingly, it is

ORDERED that the motion by plaintiffs 14<sup>th</sup> at Irving Fee LLC and Suffolk Construction Corp., for summary judgment seeking a declaration that plaintiffs are additional insureds under the Travelers Indemnity Company of Connecticut Policy with respect to the underlying action is granted; and it is further

ADJUDGED AND DECLARED that plaintiffs 14<sup>th</sup> at Irving Fee LLC and Suffolk Construction Corp. are additional insureds under the Travelers Indemnity Company of Connecticut Policy with respect to the underlying action is granted; and it is further

ORDERED that the motion by plaintiffs 14<sup>th</sup> at Irving Fee LLC and Suffolk Construction Corp., for summary judgment seeking a declaration that defendants Travelers Indemnity Company of Connecticut and Almar Plumbing & Heating Corporation are obligated to provide a defense to plaintiffs on a primary and non-contributory basis in the underlying action is granted; and it is further

ADJUDGED AND DECLARED that defendants Travelers Indemnity Company of Connecticut and Almar Plumbing & Heating Corporation are obligated to provide a defense to plaintiffs 14<sup>th</sup> at Irving Fee LLC and Suffolk Construction Corp. on a primary and non-contributory basis in the underlying action is granted; and it is further

ORDERED that the motion by plaintiffs 14<sup>th</sup> at Irving Fee LLC and Suffolk Construction Corp. for summary judgment seeking a declaration that defendants Travelers Indemnity Company of Connecticut and Almar Plumbing & Heating Corporation are obligated to reimburse plaintiffs for the post-tender defense costs they have incurred in the Underlying Action is granted; and it is further

ADJUDGED AND DECLARED that defendants Travelers Indemnity Company of Connecticut and Almar Plumbing & Heating Corporation are obligated to reimburse plaintiffs 14<sup>th</sup> at Irving Fee LLC and Suffolk Construction Corp. for the post-tender defense costs they have incurred in the Underlying Action, whereupon said amount shall be determined at the time of trial; and it is further

ORDERED that the motion by plaintiffs 14<sup>th</sup> at Irving Fee LLC and Suffolk Construction Corp., for summary judgment seeking a declaration that defendants Travelers Indemnity Company of Connecticut and Almar Plumbing & Heating Corporation are obligated to reimburse plaintiffs for the post-tender defense costs they have incurred in the Underlying Action is granted; and it is further

ORDERED that the motion by defendant Travelers Indemnity Company of Connecticut is denied in its entirety; and it is further

ORDERED that the portion of defendant Almar Plumbing & Heating Corporation's motion seeking dismissal of plaintiffs' 14<sup>th</sup> at Irving Fee LLC and Suffolk Construction Corp.'s first two causes of action in the instant claim is granted; and it is further

ORDERED that the portion of defendant Almar Plumbing & Heating Corporation's seeking dismissal of plaintiffs' 14<sup>th</sup> at Irving Fee LLC and Suffolk Construction Corp.'s remaining causes of action is denied.

The foregoing constitutes the decision and order of the Court.

DATE: 12/11/2024

*Leslie A. Stroth*  
HON. LESLIE A. STROTH  
J.S.C.

CHECK ONE:

<input type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
<input type="checkbox"/>	GRANTED			<input type="checkbox"/>	GRANTED IN PART		
<input type="checkbox"/>	SETTLE ORDER			<input type="checkbox"/>	SUBMIT ORDER		

APPLICATION: