

IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY  
 FIRST JUDICIAL DISTRICT OF PENNSYLVANIA  
 CIVIL TRIAL DIVISION

ZURICH AMERICAN INSURANCE  
 COMPANY, AMERICAN  
 GUARANTEE & LIABILITY  
 INSURANCE COMPANY and  
 MASCARO CONSTRUCTION CO,  
 L.P.

v.

GEMINI INSURANCE COMPANY,  
 COLONY INSURANCE COMPANY,  
 UNITED STATES FIRE  
 INSURANCE COMPANY, THE  
 NORTH RIVER INSURANCE  
 COMPANY, SELECTIVE WAY  
 INSURANCE COMPANY,  
 CONTINENTAL CASUALTY  
 COMPANY, HEERY  
 INTERNATIONAL, and JOSHUA  
 ROMIG

JANUARY TERM, 2012

NO. 02551

COMMERCE PROGRAM

CONTROL NOS. 13082049,  
 13081701, 13082766, 13082018,  
 13082046, 13082045, 13082042

**DOCKETED**

NOV 6 2013

**C. HART  
 CIVIL ADMINISTRATION**

ORDER

AND NOW, on this

*5<sup>th</sup>*

day of

*November*

, 2013, upon

consideration of the motions for summary judgment of plaintiffs, Zurich American Insurance Company, American Guarantee & Liability Insurance Company, and Mascaro Construction Co., L.P and the cross-motions for summary judgment of defendants Gemini Insurance Company, Colony Insurance Company, United States Fire Insurance Company, The North River Insurance Company, Selective Way Insurance Company, Continental Casualty Company, and Heery International, and any responses thereto, it is hereby

Zurich American Insuran-ORDOP



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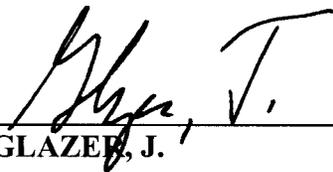
## ORDERED

as follows:

1. Plaintiffs' motion for summary judgment is **GRANTED IN PART AND DENIED IN PART** as follows:
  - a. Plaintiffs' motion for summary judgment against Gemini Insurance Company is **DENIED**.
  - b. Plaintiffs' motion for summary judgment against Colony Insurance Company is **DENIED**.
  - c. Plaintiffs' motion for summary judgment against United States Fire Insurance Company and The North River Insurance Company is **GRANTED**.
  - d. Plaintiffs' motion for summary judgment against Heery International is **DENIED**.
  - e. Zurich American Insurance Company and American Guarantee & Liability Insurance Company are excess insurers.
2. The motion for summary judgment of defendant, Gemini Insurance Company, is **GRANTED** and Gemini Insurance Company is dismissed from the action.
3. The motion for summary judgment of defendant, Colony Insurance Company, is **GRANTED** and Colony Insurance Company is dismissed from the action.
4. The motion for summary judgment, as to the duty to defend, of defendants, United States Fire Insurance Company and The North River Insurance Company, is **DENIED**. Further, United States Fire Insurance is the primary insurer for Mascaro Construction Co., L.P. and Heery International.
5. The motion for summary judgment of defendant, Selective Way Insurance Company, is **GRANTED** and Selective Way Insurance Company is dismissed from the current action.

6. The motion for summary judgment of defendant, Heery International is **GRANTED**.
7. The motion for summary judgment of defendant, Continental Casualty Company, is **GRANTED** and Continental Casualty Company is dismissed from the action.
8. Should the primary policy be exhausted due to payments, the parties are permitted to file briefs for determination of coverage for the excess providers.
9. Moreover, this case is **STAYED** as to the duty to indemnify pending the outcome of the underlying action.

**BY THE COURT:**

  
\_\_\_\_\_  
GLAZER, J.

**IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY  
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA  
CIVIL TRIAL DIVISION**

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<b>ZURICH AMERICAN INSURANCE</b>	:	<b>JANUARY TERM, 2012</b>
<b>COMPANY, AMERICAN</b>	:	
<b>GUARANTEE &amp; LIABILITY</b>	:	<b>NO. 02551</b>
<b>INSURANCE COMPANY and</b>	:	
<b>MASCARO CONSTRUCTION CO,</b>	:	<b>COMMERCE PROGRAM</b>
<b>L.P.</b>	:	
	:	<b>CONTROL NOS. 13082049,</b>
<b>v.</b>	:	<b>13081701, 13082766, 13082018,</b>
	:	<b>13082046, 13082045, 13082042</b>
<b>GEMINI INSURANCE COMPANY,</b>	:	
<b>COLONY INSURANCE COMPANY,</b>	:	
<b>UNITED STATES FIRE</b>	:	
<b>INSURANCE COMPANY, THE</b>	:	
<b>NORTH RIVER INSURANCE</b>	:	
<b>COMPANY, SELECTIVE WAY</b>	:	
<b>INSURANCE COMPANY,</b>	:	
<b>CONTINENTAL CASUALTY</b>	:	
<b>COMPANY, HEERY</b>	:	
<b>INTERNATIONAL, and JOSHUA</b>	:	
<b>ROMIG</b>	:	

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**OPINION**

GLAZER, J.

November 5, 2013

Before the court are the cross-motions for summary judgment plaintiffs, Zurich American Insurance Company, American Guarantee & Liability Insurance Company, Mascaro Construction Co., L.P, and defendants, Gemini Insurance Company, Colony Insurance Company, United States Fire Insurance Company, The North River Insurance Company, Selective Way Insurance Company, Continental Casualty Company, and Heery International Inc. For the reasons set forth below, plaintiffs' motion is granted in part and denied in part. Further, the summary judgment motions of defendants, Gemini Insurance Company, Colony Insurance

Company, Selective Way Insurance Company<sup>1</sup>, Continental Casualty Company, and Heery International Inc., are granted. All other motions are denied.

### **FACTS AND PROCEDURAL BACKGROUND**

Plaintiffs, Zurich American Insurance Company (hereinafter “Zurich”), American Guarantee & Liability Insurance Company (hereinafter “American Guarantee”), and Mascaro Construction Co., LP (hereinafter “Mascaro”) (collectively “plaintiffs”) brought the instant declaratory judgment action to address the question of whether and/or which insurance coverage is owed to plaintiff Mascaro and defendant, Heery International, Inc. (hereinafter “Heery”), to defend them in connection with an underlying action, Romig v. Mascaro Construction Company, et al., (hereinafter “underlying action”) which is pending in the Court of Common Pleas of Allegheny County No. GD09-008585. In the underlying action, Joshua Romig (hereinafter “Romig”), brought suit against Mascaro, Heery, Powell Steel Corporation (hereinafter “Powell”), Stewart-Amos Steel, Inc (hereinafter “SAS”), and Eichelbergers, Inc.<sup>2</sup> Romig was an iron worker employed by Tuscarora Rigging, Inc. (hereinafter “Tuscarora”) and was injured on July 27, 2007 in the course and scope of his employment. Romig filed a complaint alleging negligence against Mascaro, Heery, Powell, and SAS in which he alleges that the parties were jointly and severally negligent. Subsequently, Mascaro joined Tuscarora as a defendant in the underlying action. However, Tuscarora has since been dismissed.

The underlying action arises from the construction of the Pennsylvania Judicial Center in Harrisburg, PA (hereinafter “the project”). The Pennsylvania Department of General Services (hereinafter “DGS”) hired Heery as a construction manager and Mascaro as the general

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<sup>1</sup> Defendant Selective Way Insurance Company is the insurance provider for Stewart-Amos Steel, Inc. which has been dismissed from the underlying case. Moreover, plaintiffs did not answer defendant Selective Way Insurance Company’s motion for summary judgment. Thus, the motion for summary judgment of defendant, Selective Way Insurance Company, is granted and Selective Way Insurance Company is dismissed from the instant action.

<sup>2</sup> All claims against Eichelbergers, Inc. in the underlying action were dismissed.

contractor for the project. Heery's role as construction manager is defined in the contract between the DGS and Mascaro (hereinafter "prime contract"). Specifically the prime contract states: "[t]he consultant retained by the Department is to act as the Department's Agent and authorized representative to coordinate and manage the Project." See plaintiffs' motion for summary judgment, Exhibit C.

Mascaro and DGS also detailed the responsibilities and obligations of the general contractor and the construction manager. The prime contract stated that "[t]he [c]onstruction [m]anager will not be responsible for the acts or omissions of any [c]ontractor, or any of its subcontractors, or any of their agents or employees, or any other persons performing any of the [w]ork for the [c]ontractor." Id. Moreover, Mascaro agreed to be, "solely responsible for initiating, maintaining and supervising all safety precautions." Id. Mascaro was also required to maintain insurance and name "the Commonwealth of Pennsylvania, the Construction Manager, and Professional as an additional insured." Id.

Heery obtained professional liability insurance through Continental Casualty Company (hereinafter "Continental") while Mascaro acquired its commercial general liability insurance through Zurich (hereinafter the "Zurich policy") and its excess umbrella liability coverage through American Guarantee (hereinafter "American Guarantee Policy"). The Zurich policy states, "[who is an insured] (Section II) is amended to include as an insured the person or organization shown in the [schedule] above whom you are required to add as an additional insured on this policy under a written contract or written agreement." Id. at Exhibit H. Further, the Zurich policy states:

B. The insurance provided to additional insureds applies only to "bodily injury", "property damage" or "personal and advertising injury" covered under Section I, Coverage A, BODILY INJURY AND PROPERTY DAMAGE LIABILITY

and Coverage B, PERSONAL AND ADVERTISING INJURY LIABILITY, but only if:

1. The “bodily injury” or “property damage” results from your negligence; and
2. The “bodily injury”, “property damage” or “personal and advertising injury” results directly from:
  - a. Your ongoing operations; or
  - b. “Your work” completed as included in the “products-completed operations hazard”, performed for the additional insured, which is the subject of the written contract or agreement.

Id.

However, the Zurich policy also carves out exclusions which explain what is not covered under the policy. Specifically not included under the policy is:

“[b]odily injury,” “property damage” or “personal and advertising injury” arising out of the rendering or failure to render any professional architectural, engineering or surveying services including:

- a. The preparing, approving, or failing to prepare or approve maps, shop drawings, opinions, reports, surveys, field order, change orders or drawings and specification; and
- b. Supervisory, inspection, architectural or engineering activities.

Id.

Additionally, the Zurich policy states:

The insurance provided by this endorsement is primary insurance and we will not seek contribution from any other insurance available to the person or organization shown in the Schedule unless the other insurance is provided by the contractor other than you for the same operations and job location. Then we will share with that other insurance by the method described in paragraph 4c. of SECTION IV – COMMERCIAL GENERAL LIABILITY CONDITIONS.

Id.

However, if the entity is not an additional insured under the Zurich policy then Paragraph

4 of Section IV explains:

If other valid and collectible insurance is available to the insured for a loss we cover under Coverage A or B of this Coverage Part, our obligations are limited as follows:

a. Primary Insurance

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

b. Excess Insurance

This insurance is excess over

...

2. Any other primary insurance available to you covering liability for damages arising out of the premises or operations, or the products and completed operations, for which you have been added as an additional insured by attachment of an endorsement.

When this insurance is excess, we will have no duty under Coverage A or B to defend the insured against any "suit" if any other insurer has a duty to defend the insured against that "suit".

Id.

If Zurich's policy and other insurance are both primary, the method of sharing paragraph provides:

If all of the other insurance permits contribution by equal shares, we will follow this method also. Under this approach each insurer contributes equal amounts until it has paid its applicable limit of insurance or none of the loss remains, whichever comes first.

If any other insurance does not permit contribution by equal shares, we will contribute by limits. Under this method, each insurer's share is based on the ratio of its applicable limit of Insurance to the total applicable limits of insurance to all insurers.

Id.

Subsequently, Mascaro subcontracted with Powell (hereinafter “Mascaro Powell contract”) to “perform and furnish all labor, supervision, services, equipment, tools, scaffolds, materials and all other things (the “Work”) necessary for the incorporation in the Project of the Work.” Id. at Exhibit E. Moreover, the Mascaro Powell contract provided that Powell would hold Mascaro harmless and procure insurance on behalf of Mascaro and the owner. Specifically:

29. Insurance. Before commencing with the Work, Subcontractor shall procure and shall thereafter maintain, at its own expense, until completion and final acceptance of the Work, the types of minimum limits of insurance set forth in Schedule H. All insurance coverage, certificates of insurance and Subcontractor’s obligations to provide the same hereunder shall also be required of Subcontractor’s subcontractor, suppliers or consultants. Contractor and Owner shall be named as additional insureds on Subcontractor’s comprehensive general liability policy. Subcontractor shall be responsible for payment, without adjustment of the Subcontract Price, of all deductibles and insurance premiums due to change is the Subcontract Price. Subcontractor shall provide insurance that covers the Indemnitees for Subcontractor’s indemnification obligations for damage to property, injury, death and/or the provision of any professional architectural and engineering design services included within the performance of Subcontractor’s work.

Id.

Powell was required to maintain commercial general liability insurance coverage with \$1,000,000/\$2,000,000 limits, and excess umbrella liability coverage with limits of \$5,000,000/\$5,000,000. Id. Subsequently, Powell obtained commercial general liability insurance through United States Fire Insurance Company (hereinafter “U.S. Fire”) and excess umbrella liability coverage with North River Insurance Company (hereinafter “North River”). The U.S. Fire policy contains a General Liability Enhancement Endorsement which provides additional insured status. The policy states, “[who is an insured] is amended to include as an additional insured any person or organization whom you are required to add as an additional

insured to this policy by a written contract or written agreement.” Id. at Exhibit I. Moreover, “[t]hat person or organization is only an additional insured with respect to liability caused by your negligent acts or omissions...” Id.

Additionally, the insurance contract explains when the U.S. Fire policy is primary or excess coverage. Specially, the policy states:

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

Regardless of whether other insurance is available to an additional insured on a primary basis, this insurance will be primary and noncontributory if a written contract between you and the additional insured specially requires that this insurance be primary.

Id.

Powell also obtained excess umbrella liability coverage with North River (hereinafter “North River policy”). The North River policy provides:

I. Coverage

We will pay those sums that the Insured become legally obligated to pay as damages, in accordance with the applicable provisions of the underlying coverage shown above Item 2. Schedule A – Schedule of underlying insurance, which are in excess of the Applicable Limits of the Underlying Insurance shown above in Item 2.

See defendants U.S. Fire and North River’s motion for summary judgment, Exhibit D. The underlying insurance is U.S. Fire. Additionally, “[w]ith respect to “Bodily Injury”, “Property Damage”, “Personal and Advertising Injury” arising out of liability you assume under contract, coverage is excluded under this policy if coverage is not provided by the “Underlying insurance”. Id.

Further, an insured is

5. any person, organization, trust, or estate that has obligated you by an “Insured Contract to provide the insurance that is afforded by this policy, but this policy applies:
- a. only up to the policy limits required by the “Insured Contract”, subject to the limits of this policy; and,
  - b. only with respect to “Bodily injury”, “Property Damage” or “Personal Advertising Injury” that occurs subsequent to the time you enter into the “Insured Contract”; and
  - c. only with respect to liability arising out of “Your Work”, “Your Product” or property owned or used by you, or with respect to other liability arising out of your negligence.

Id.

Powell then subcontracted with Tuscarora (hereinafter “Powell Tuscarora contract”) to “furnish all labor material and equipment to compete all work in accordance to the plans and specifications ... of Architect and to the full satisfaction of said Architect.” See plaintiffs’ motion for summary judgment, Exhibit G. Pursuant to the Powell Tuscarora contract, Tuscarora agreed:

The Subcontractor shall be bound to the Contractor by all the contractual obligations binding the Contractor to the owner, the owner’s agent or the owner’s general contractor. All of the provisions of the contract between the Contractor and the owner, its agents or the owner’s general contractor are incorporated herein by reference and are binding upon the Subcontractor as if fully set forth herein. By signing this contract, the subcontractor acknowledges that it has been given the opportunity to review said documents and has expressly agreed to be bound thereby.

Id.

Further, Tuscarora agreed to hold harmless Powell and assume the entire liability, “for any and all damages and injury of any kind of nature whatever to all persons, whether employees or otherwise and to all property caused by or resulting form the execution of the work provided for in this contract...” Id. Moreover, the Powell and Tuscarora contract provided that Tuscarora was to maintain insurance protecting Powell and Tuscarora “[a]gainst liability to pay claims or

demands for personal injuries or death resulting from the work or manner of performing the work to be done by the Subcontractor under this agreement.” Id. Tuscarora obtained Commercial General liability insurance through Gemini Insurance Company (hereinafter “Gemini”) and obtained excess umbrella coverage with Colony Insurance Company (hereinafter “Colony”). Gemini is currently defending Powell in the underlying action.

The Gemini policy contains a Blanket Additional Insured Endorsement which provides:

WHO IS AN INSURED is amended to include as an insured any person or organization for whom you are performing operations when you and such person or organization have agreed in writing in a contract or agreement that such person or organization be added as an additional insured on your policy.

Id. at Exhibit J. Additionally, Tuscarora also obtained insurance through Colony. Colony had originally provided commercial general liability insurance to Tuscarora which ended on July 21, 2007. However, the excess umbrella liability insurance that Colony provided to Tuscarora was still in effect when the accident occurred. The Colony policy states that, “[a]ny additional insured under any policy of ‘underlying insurance’ will be an additional insured only if endorsed to this policy...” See defendant Colony Insurance Company’s motion for summary judgment, Exhibit F.

Colony issued a certificate of liability insurance which states,

THE COMMONWEALTH OF PENNSYLVANIA, THE DEPARTMENT OF GENERAL SERVICE, VITETTA GROUP INC, HEERY INTERNATIONAL, MASCARO CONSTRUCTION CO LP, STEWART-AMOS STEEL INC, POWELL STEEL CORP & ANY OTHER PERSONS OR ENTITIES REQUIRED BY CONTRACT DOCUMENTS ARE ADDITIONAL INSURED AND PRIMARY COVERAGE & WAIVER OF SUBROGATION IN FAVOR FOR WORK PERFORMED FOR THEM BY INSURED – SEE PAGE TWO.”

Id. Neither party provided page two of the certificate of liability.

## **DISCUSSION**

### **I. STANDARD OF REVIEW**

Once the relevant pleadings have closed, any party may move for summary judgment, “whenever there is no genuine issue of any material fact as to a necessary element of the cause of action or defense which could be established by additional discovery or expert report.” Pa.R.C.P. 1035.2(1). “Pennsylvania law provides that summary judgment may be granted only in those cases in which the record clearly shows that no genuine issues of material fact exist and that the moving party is entitled to judgment as a matter of law.” Rausch v. Mike-Meyer, 783 A.2d 815, 821 (Pa. Super. 2001).

Declaratory judgment may be invoked to interpret the obligations under an insurance contract. General Accident Ins. Company of America v. Allen, 692 A.2d 1089, 1095 (Pa. 1997). Under Pennsylvania law, if “the language of the contract is clear and unambiguous, a court is required to give effect to that language.” Prudential Prop. & Cas. Ins. Co. v. Sartno, 588 Pa. 205, 903 A.2d 1170, 1174 (2006) (citation omitted). The interpretation of an insurance contract regarding the existence or non-existence of coverage is generally performed by the court. Minnesota Fire & Cas. Co. v. Greenfield, 549 Pa. 333, 855 A.2d 854, 861 (2004) (quotation omitted). Moreover, the burden of proving the exclusion is upon the insurer. Rothstein v. Aetna Insurance Company, 216 Pa. Super. 418, 423, 268 A.2d 233, 235 (1970).

“The duty to defend is a distinct obligation, separate and apart from the insurer’s duty to provide coverage.” Am. & Foreign Ins. Co. v. Jerry’s Sport Ctr., Inc., 948 A.2d 834, 845 (Pa. Super. 2008). “[T]he obligation to defend arises whenever the complaint filed by the insured party may potentially come within the coverage of the policy.” Id. In Pennsylvania, an insurer’s

duty to defend is determined by comparing the four corners of the complaint with the relevant policy of insurance. Kvaerner U.S., Inc. v. Commer. Union Ins. Co., 589 Pa. 317, 908 A.2d 888, 896 (2006). Moreover, “[t]o decide whether a duty to defend exists, the court must compare the allegations in the complaint with the provisions of the insurance contract and determine whether, if the complaint allegations are proven, the insurer would have a duty to indemnify the insured.” Keystone Spray Equip., Inc. v. Regis Ins. Co., 2001 PA Super 13, 767 PA Super 13, 767 A.2d 572, 574 (Pa. Super. 2001).

## **II. THE ZURICH POLICY PROVIDES EXCESS COVERAGE TO HEERY**

Plaintiffs argue that it does not have duty to defend Heery because there is no privity of contract between Mascaro and Heery. However, the court finds this argument to be meritless. The endorsement provides coverage to “any person or organization whom [Mascaro is] required to add as an additional insured on this policy under a written contract or written agreement.” See plaintiffs’ motion for summary judgment, Exhibit H. Moreover, the Zurich policy further affords such coverage to the additional insured if: (1) the “bodily injury” results from Mascaro’s negligence; and (2) the “bodily injury” results directly from Mascaro’s ongoing or completed operations for Heery “which is subject of the written contract or written agreement.” Id.

The prime contract specifically states that Heery is an agent of DGS and that “[t]he [c]onstruction [m]anager will not be responsible for the acts or omissions of any [c]ontractor, or any of its subcontractors, or any of their agents or employees, or any other persons performing any of the [w]ork for the [c]ontractor.” Id. at Exhibit C. Moreover, the contractor agreed to be “solely responsible for initiating, maintaining and supervising all safety precautions.” Id. Mascaro was also required to maintain insurance which named “the Commonwealth of Pennsylvania, the Construction Manager [Heery], and Professional as an additional insured.” Id.

The Zurich policy does not require privity of contract and thus the fact that Mascaro and Heery did not have a direct contract with each other is of no matter. While liability has yet to be determined in the underlying action, Mascaro could potentially be found solely liable and thus Zurich has an obligation to defend Heery in the underlying action.

Plaintiffs further allege that it does not have an obligation to defend Heery under the professional architectural, engineering or surveying services exclusion. Plaintiffs support this allegation by referencing the underlying complaint which includes failure to “coordinate” and “supervise” work against defendants Mascaro, Heery, Powell, and SAS. Plaintiffs allege that “Heery was charged with furnishing ‘efficient business administration and superintendence’ of the Project.” Id. at Memorandum of Law, pp. 25-26. However this argument is clearly erroneous as the prime contract makes it clear that Mascaro is solely responsible to DGS and Heery for all safety of the subcontractors at the project. Moreover, plaintiffs do not address how the underlying complaint allegations refer to Heery’s alleged professional architectural, engineering or surveying services. Plaintiffs have not met their burden to establish the exclusion applies.

While plaintiffs do not meet their burden, this court finds the Zurich policy to be excess insurance as discussed further below. The policy provides, “when this insurance is excess, [Zurich] will have no duty under Coverage A or B to defend the insured against any “suit” if any other insurer has a duty to defend the insured against that “suit”. See plaintiffs’ motion for summary judgment, Exhibit H.

### III. U.S. FIRE AND NORTH RIVER HAVE A DUTY TO DEFEND MASCARO AND HEERY

Defendant U.S. Fire alleges that its policy does not provide coverage for Mascaro or Heery because “the policy provides coverage to additional insured only for liability caused by Powell’s negligent acts or omissions from Powell Steel’s ongoing operations performed for the additional insured.” See defendant U.S. Fire’s memorandum of law in opposition to plaintiffs’ motion for summary judgment, pp. 11. Powell agreed to name Mascaro and Heery as additional insured. See plaintiffs’ motion for summary judgment, Exhibit E at ¶29 (“Contractor and Owner shall be named as additional insureds on Subcontractor’s comprehensive general liability policy”); Id. at Schedule H, ¶6 (“the above insurance coverages will include...Heery International and Mascaro Construction Company, L.P. and any other person or entities required by the Contract Document as a[n] Additional Insured.”).

“[T]he obligation to defend arises whenever the complaint filed by the insured party may potentially come within the coverage of the policy.” Am. & Foreign Ins. Co. v. Jerry’s Sport Ctr., Inc., 948 A.2d 834, 845 (Pa. Super. 2008). In the underlying complaint, Romig alleges that, “[a]t all relevant times, defendant Heery acted by and through its agents, servants and employees who were acting within the scope of their agency, service, and employment with defendant Heery. See plaintiffs’ motion for summary judgment, Exhibit A. Additionally, Romig alleges, “defendant Powell was a subcontractor of Mascaro Construction and Mascaro Services at the Project.” Further, the complaint asserts, “[a]t all relevant times, defendant Powell was acting by and through its agents, servants and/or employees who were acting within the course and scope of their agency, service, and employment with Powell.” Id. Moreover, defendants Mascaro, Heery, Powell, and SAS are alleged to be joint and severally liable. As the complaint states that

Powell was at all relevant times a subcontractor of Mascaro and negligence has not been decided, Powell may potentially be solely negligent in the underlying action and U.S. Fire has an obligation to defend Mascaro and Heery.

U.S. Fire further argues that to the extent that it has a duty to defend Mascaro and Heery, it is excess insurance. The U.S. Fire policy states, “[t]his insurance is primary except when b. below applies. If this insurance is primary, our obligations are not affected unless any of the other insurance is also primary.” *Id.* at Exhibit I. Moreover, the second paragraph of the U.S. Fire policy provides, “[r]egardless of whether other insurance is available to an additional insured on a primary basis, this insurance will be primary and noncontributory if a written contract between you and the additional insured specially requires that this insurance be primary.” *Id.* U.S. Fire relies solely on the second paragraph alleging that, because the contract between Powell and Mascaro does not require U.S. Fire to be the primary insurer, it is therefore the excess insurer. However, this argument is clearly erroneous when reading the provision in full. The second paragraph does not void the first paragraph; it merely adds additional ways in which the policy will be primary. Therefore, given the plain language of the contract, this court finds that the U.S. Fire insurance is primary because no exclusion in paragraph b. applies.

The Zurich policy also expands on whether the policy is primary or excess. The Zurich policy provides that it is excess if, “[a]ny other primary insurance available to you covering liability for damages arising out of the premises or operations, or the products and completed operations, for which you have been added as an additional insured by attachment of an endorsement.” *Id.* at Exhibit H. Thus, since Mascaro and Heery are additional insureds and U.S.

Fire's insurance is primary, this court finds that the Zurich policy is excess and U.S. Fire policy is primary.<sup>3</sup>

#### **IV. GEMINI DOES NOT HAVE A DUTY TO DEFEND MASCARO OR HEERY**

Plaintiffs allege that Gemini has a duty to defend Mascaro pursuant to the Mascaro Powell contract which was incorporated by reference in the contract between Powell and Tuscarora (hereinafter "Powell Tuscarora contract"). In the contract between Powell Tuscarora contract, Tuscarora agreed to, "be bound to the Contractor by all the contractual obligations binding the Contractor and the owner, the owner's agent and the owner's general contractor." Id. at Exhibit G.

However, while Tuscarora may have been required to name Mascaro and Heery as additional insureds, the Gemini policy specifically addresses who is an insured. The policy states, "[who is an insured] is amended to include any person or organization... when you and such person or organizations have agreed in writing in a contract or agreement that such person or organization be added as an additional insured." Id. at Exhibit J. Tuscarora and Mascaro never entered into such a contract or agreement. Moreover, Tuscarora never entered into a contract with Heery. Given the plain language of the Gemini policy, Gemini is not required to defend Mascaro or Heery. Therefore, Gemini's motion for summary judgment is granted and plaintiffs' motion for summary judgment as to Gemini is denied.<sup>4</sup>

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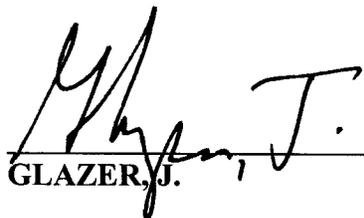
<sup>3</sup> Pursuant to the finding that U.S. Fire has a duty to defend Mascaro, section V(G) is triggered in the North River policy which states, "[I]f the applicable limits of Underlying Insurance" or "other Insurance" are reduced or exhausted by payments from one or more "Occurrences", the Limits of insurance of this policy will apply in excess of such reduced or exhausted limits.

<sup>4</sup> The Colony policy provides coverage if, "[a]ny additional insured under any policy of 'underlying insurance' will be an additional insured only if endorsed by this policy." Plaintiffs state throughout their motion for summary judgment and their response that the underlying insurance is Gemini. This court found that Mascaro is not an additional insured under the Gemini policy and thus Colony does not have a duty to defend Mascaro or Heery. Colony's motion for summary judgment is granted.

## CONCLUSION

For the reasons set forth above, plaintiffs' motion for summary judgment is granted in part and denied in part. Further, the summary judgment motions of defendants, Gemini Insurance Company, Colony Insurance Company, Selective Way Insurance Company, Continental Casualty Company, and Heery International Inc., are granted and the named defendants are dismissed from the current action. All other motions are denied. Additionally, this case is stayed as to the claims for indemnity pending the outcome of the underlying action.

**BY THE COURT:**

  
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GLAZER, J.