

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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ILLINOIS UNION INSURANCE COMPANY,

Docket No. 13 Civ. ____ ()

Plaintiff,

-against-

COMPLAINT

MIDWOOD LUMBER & MILLWORK, INC.,
IGNATIUS REGIS, CLAYTON LABOARD,
DEANNA ROSE SIMMS AS ADMINISTRATRIX
OF THE ESTATE OF WINSTON GILLETTE, 231
CARLTON AVENUE, LLC, BORO ARCHITECTS,
LLC, KINGS MATERIAL CO., INC., ALBANNA
ENGINEERING, P.C., INTEGRITY CONSULTING
SERVICES, INC., S&B MASONRY CORP., and
PROFESSIONAL GRADE CONSTRUCTION GROUP,
INC.,

Defendants.

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Plaintiff, ILLINOIS UNION INSURANCE COMPANY (“ACE”), by and through its attorneys, TRAUB LIEBERMAN STRAUS & SHREWSBERRY, LLP, as and for its Complaint for declaratory relief, alleges the following:

INTRODUCTION

1. This is an action for declaratory judgment pursuant to 28 U.S.C. §§2201-2202. Plaintiff seeks this Court’s determination concerning the respective rights and obligations of the parties under an insurance policy issued to MIDWOOD LUMBER & MILLWORK, INC. (“MIDWOOD”), in connection with an underlying claim.

2. An actual and justiciable controversy exists among the parties as to which a declaratory judgment setting forth their respective rights and obligations under the subject

insurance policy is necessary and appropriate.

JURISDICTION

3. This Court has original jurisdiction over this civil action under 28 U.S.C. §1332(a).

4. Plaintiff ACE is a corporation organized and existing under the laws of the State of Illinois, with its principal place of business Chicago, Illinois.

5. Defendant MIDWOOD is a corporation and/or business entity organized under the laws of the State of New York with its principal place of business within the State of New York.

6. Defendant IGNATIUS REGIS (“REGIS”) is a natural person and a citizen and resident of the State of New York.

7. Defendant CLAYTON LABOARD (“LABOARD”) is a natural person and a citizen and resident of the State of New York.

8. Defendant DEANNA ROSE SIMMS is sued herein individually and in her capacity as the Administratrix of the Estate of WINSTON GILLETTE (“SIMMS”), formed in the County of Kings, City and State of New York.

9. Defendant 231 CARLTON AVENUE, LLC (“231 CARLTON”) is a corporation and/or business entity organized under the laws of the State of New York with its principal place of business within the State of New York.

10. Defendant BORO ARCHITECTS, LLC (“BORO”) is a corporation and/or business entity organized under the laws of the State of New York with its principal place of business within the State of New York.

11. Defendant KINGS MATERIAL CO., INC. (“KINGS”) is a corporation and/or business entity organized under the laws of the State of New York with its principal place of

business within the State of New York.

12. Defendant ALBANNA ENGINEERING, P.C. (“ALBANNA”) is a corporation and/or business entity organized under the laws of the State of New York with its principal place of business within the State of New York.

13. Defendant INTEGRITY CONSULTING SERVICES, INC. (“INTEGRITY”) is a corporation and/or business entity organized under the laws of the State of New York with its principal place of business within the State of New York.

14. Defendant S&B MASONRY CORP. (“S&B MASONRY”) is a corporation and/or business entity organized under the laws of the State of New York with its principal place of business within the State of New York.

15. Defendant PROFESSIONAL GRADE CONSTRUCTION GROUP, INC. (“PROFESSIONAL”) is a corporation and/or business entity organized under the laws of the State of New York with its principal place of business within the State of New York.

16. No named defendant is domiciled in the State of Illinois neither is any named defendant a citizen of the State of Illinois. Plaintiff and defendants are, therefore, citizens of different states and this Court has original jurisdiction over this civil action based upon diversity of citizenship under 28 U.S.C. §1332(a).

17. The amount in controversy in the underlying claim exceeds the sum or value of \$75,000, exclusive of interest and costs.

VENUE

18. In this action, plaintiff seeks a declaration of the parties’ rights and liabilities with respect to insurance coverage for MIDWOOD with regard to the lawsuits captioned *Ignatius Regis*

v. *231 Carlton Avenue, LLC., et al.*, Index No. 23520/2012 (the “*Regis* action”), *Clayton Laboard v. 231 Carlton Avenue, LLC., et al.*, Index No. 21547/2012 (the “*Laboard*” action), and *Deanna Rose Simms as administratrix of the Estate of Winston Gillette v. 231 Carlton Avenue, LLC., et al.*, Index No. 22408/2012 (the “*Simms*” action), all pending in the Supreme Court of the State of New York, Kings County (collectively, the “Underlying Actions”).

19. The Underlying Actions contain allegations that on or about September 10, 2012, the underlying plaintiffs were working at a construction site located at 227 Carlton Avenue, Brooklyn, New York, when they were caused to sustain injuries. A copy of the three underlying complaints are annexed hereto as Exhibits “A,” “B,” and “C,” respectively.

20. Venue in this District is proper, pursuant to 28 U.S.C. § 1391(a)(2), as a substantial part of the events, acts, or omissions giving rise to the asserted claim took place in this District.

NATURE OF CONTROVERSY

21. ACE issued Commercial General Liability Policy No. G240893A to MIDWOOD LUMBER & MILLWORK, INC. for the policy period May 25, 2012 to May 25, 2013 (the “Policy”). A copy of the Policy is annexed hereto as Exhibit “D.”

22. The Policy contains a Commercial General Liability Coverage Form (CG 00 01 1207), of which the Insuring Agreement provides, in pertinent part:

- a. We will pay those sums that the insured becomes legally obligated to pay as damages because of “bodily injury” or “property damage” to which this insurance applies. We will have the right and duty to defend the insured against any “suit” seeking those damages even if the allegations of the “suit” are groundless, false or fraudulent. However, we will have no duty to defend the insured against any “suit” seeking damages for “bodily injury” or “property damage” to which this insurance does not apply. We may, at our discretion, investigate any “occurrence” and settle any claim or “suit” that may result.

23. The Policy contains an endorsement entitled “Limitation of Coverage to Designated Premises or Project” (the “Designated Premises Endorsement”), which limits coverage as follows:

This insurance applies only to “bodily injury”, “property damage”, “personal and advertising injury” and medical expenses arising out of:

1. The ownership, maintenance or use of the premises shown in the schedule and operations necessary or incidental to those premises.

24. The Designated Premises Endorsement contains the following schedule of designated premises:

- 1) 1100 Coney Island Avenue, Brooklyn, NY 11230
- 2) 1090 Coney Island Avenue, Brooklyn, NY 11230
- 3) 1122 Coney Island Avenue, Brooklyn, NY 11230
- 4) 35 4th Ave., Brooklyn, NY 11217
- 5) 1196 Coney Island Ave., Brooklyn, NY 11230
- 6) 4907 1st Ave., Brooklyn, NY 11232
- 7) 5301 – 5323 1st Ave., Brooklyn, NY 11230
- 8) 1169 Coney Island Ave., Brooklyn, NY 11230
- 9) 1195 Coney Island Ave., Brooklyn, NY 11230
- 10) 102 49th St., Brooklyn, NY 11232

25. In the Underlying Actions, defendants REGIS, LABOARD, and SIMMS all allege that the subject accident occurred at 227 Carlton Avenue, Brooklyn, New York.

26. 227 Carlton Avenue, Brooklyn, New York, is not a scheduled location in the Designated Premises Endorsement and, as such, there is no coverage for bodily injury at 227 Carlton Avenue, Brooklyn, New York.

27. The Policy also contains the following auto exclusion, which bars coverage for:

“Bodily injury” or “property damage” arising out of the ownership, maintenance, use or entrustment to others of any aircraft, “auto” or watercraft owned or operated by or

rented or loaned to any insured. Use includes operation and “loading or unloading.”

28. It is alleged that the underlying incident occurred as a result of MIDWOOD’S use of its truck to load and unload materials on the roof of the subject building. As such, on information and belief, coverage is barred by the auto exclusion.

UNDERLYING CLAIM

29. It is alleged in the *Laboard* action, among other things, that on September 10, 2012, CLAYTON LABOARD, employee of S&B Masonry Corp., a subcontractor of MIDWOOD, was working at the premises located at located at 227 Carlton Avenue, County of Kings, City and State of New York. It is further alleged that CLAYTON LABOARD was working within a platform on the third level of the aforesaid premises, when the platform collapsed, causing CLAYTON LABOARD to fall approximately forty feet to the ground.

30. In the *Simms* action, it is alleged, among other things, that on September 10, 2012, decedent WINSTON L. GILLETT was working at the construction site located at 227 Carlton Avenue, County of Kings, City and State of New York, when the building collapsed, causing decedent to fall approximately forty feet to the basement level, resulting in his death at the aforementioned location.

31. In the *Regis* action, it is alleged, among other things, that on September 10, 2012, REGIS was working at the premises located at 227 Carlton Avenue, County of Kings, City and State of New York, when the roof collapsed, causing him to sustain injuries at the aforementioned location.

32. ACE is presently providing a defense for MIDWOOD in the *Laboard*, *Simms*, and *Regis* actions despite having no contractual obligation to do so because coverage is barred as set

forth herein.

AS AND FOR A FIRST CLAIM FOR RELIEF
(Declaratory Judgment – Designated Premises)

33. ACE repeats and realleges the allegations contained in Paragraphs 1 through 32 as if fully set forth herein at length.

34. Coverage, if any, under the Policy is only with respect to bodily injury or property damage arising out of the ownership, maintenance, or use of a designated premises.

35. The subject accident occurred at 227 Carlton Avenue, County of Kings, City and State of New York.

36. 227 Carlton Avenue, County of Kings, City and State of New York is not a scheduled designated premises in the Policy.

37. There is no coverage under the Policy for the Underlying Actions because they arise from an incident that occurred away from any scheduled location on the Designated Premises Endorsement.

38. Based on the foregoing, ACE has no duty to defend MIDWOOD in the Underlying Actions.

39. Based on the foregoing, ACE has no duty to indemnify MIDWOOD in the Underlying Actions.

AS AND FOR A SECOND CLAIM FOR RELIEF
(Declaratory Judgment – Auto Exclusion)

40. ACE repeats and realleges the allegations contained in Paragraphs 1 through 39 as if fully set forth herein at length.

41. It is alleged that the underlying incident occurred as Midwood was using its truck,

operated by a Midwood employee, to load and unload material on the roof of the building.

42. On information and belief, the Underlying Actions arise out of the use of an auto.

43. The Policy's auto exclusion bars coverage for "bodily injury" arising out use of an auto.

44. Based on the foregoing, ACE has no duty to defend MIDWOOD in the Underlying Actions.

45. Based on the foregoing, ACE has no duty to indemnify MIDWOOD in the Underlying Actions.

AS AND FOR A THIRD CLAIM FOR RELIEF
(Declaratory Judgment – Recoupment)

46. ACE repeats and realleges each and every allegation set forth in paragraphs 1 through 45 of this Complaint as if fully set forth at length herein.

47. ACE is providing MIDWOOD with a defense in the Underlying Actions although ACE has determined that the Underlying Actions do not arise out of a scheduled designated premises in the Policy and coverage may be barred by the auto exclusion.

48. By reason of the foregoing, upon a finding of no coverage for MIDWOOD, Plaintiff is entitled to recoup defense costs incurred on behalf of these defendants in the Underlying Actions, in an amount to be proven at the time of trial.

AS AND FOR A FOURTH CLAIM FOR RELIEF
(Declaratory Judgment - Necessary Party)

49. ACE repeats and realleges each and every allegation set forth in paragraphs 1 through 48 of this Complaint as if fully set forth at length herein.

50. Plaintiff seeks this Court's determination, pursuant to the Declaratory Judgment

Act, 28 U.S.C. §§2201-2202, concerning the respective rights and obligations of the parties under the Policy in connection with the Underlying Actions.

51. An actual and justiciable controversy exists among the parties as to which a declaratory judgment setting forth their respective rights and obligations under the Policy is necessary and appropriate.

52. Under Rule 19(a) of the Federal Rules of Civil Procedure, a necessary and otherwise proper party is one who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest.

53. Defendants LABOARD, SIMMS, and REGIS are plaintiffs in the Underlying Actions, and they were allegedly injured as a result of the matters alleged therein against MIDWOOD.

54. Defendants 231 CARLTON, BORO, KINGS, ALBANNA, INTEGRITY, S&B MASONRY, and PROFESSIONAL are defendants in one or more of the Underlying Actions that have or may assert claims against MIDWOOD in Underlying Actions.

55. As parties in the Underlying Actions, LABOARD, SIMMS, REGIS, 231 CARLTON, BORO, KINGS, ALBANNA, INTEGRITY, S&B MASONRY, and

PROFESSIONAL have an interest relating to the subject matter of the action and will be bound by a determination in ACE's favor.

56. Therefore, upon a declaration of non-coverage for MIDWOOD, ACE is entitled to a declaration that it has no obligation to LABOARD, SIMMS, REGIS, 231 CARLTON, BORO, KINGS, ALBANNA, INTEGRITY, S&B MASONRY, and PROFESSIONAL for the matters alleged in the Underlying Actions.

Plaintiff demands trial by jury on all issues herein.

WHEREFORE, ACE demands judgment on the Complaint as follows:

- 1) A declaration that there is no coverage for the Underlying Actions because 227 Carlton Avenue, County of Kings, City and State of New York, is not a scheduled designated premises under the Policy;
- 2) A declaration that there is no coverage for the Underlying Actions because they arose out of the use of an auto;
- 3) A declaration that ACE has no obligation to defend or indemnify MIDWOOD in the Underlying Actions;
- 4) A declaration that ACE may withdraw the defense of MIDWOOD in the Underlying Actions;
- 5) As necessary and otherwise proper parties, LABOARD, SIMMS, REGIS, 231 CARLTON, BORO, KINGS, ALBANNA, INTEGRITY, S&B MASONRY, and PROFESSIONAL are bound by the Court's determinations herein, and have no right to make any claim under the Policy with respect to the claims against MIDWOOD in the Underlying Actions;
- 6) A declaration that ACE is entitled to recoup defense costs incurred on behalf of

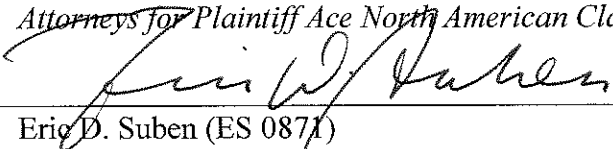
MIDWOOD in the Underlying Actions; and

7) For such other and further relief as the Court may deem just, proper and equitable, together with the costs, attorneys' fees and disbursements of this action.

Dated: Hawthorne, New York
April 23, 2013

TRAUB LIEBERMAN STRAUS & SHREWSBERRY LLP
Attorneys for Plaintiff Ace North American Claims

By: _____


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