

ANDERSON KILL CO-OP, CONDO & REAL ESTATE ADVISOR

The New York State Court of Appeals Confirms That the Word ‘With’ Means an Actual Contract Between Two Parties

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This article is an update to our October 2017 article providing guidance to co-op or condo boards who may be seeking to be protected by “additional insured” coverage for liability stemming from an alteration project, for example.

The New York State Court of Appeals recently affirmed the decision that led us to warn in October that it is of the utmost importance for co-op or condo boards to obtain an actual agreement with the contractor, in which the contractor agrees to add the co-op or condo board, and other people or entities, as additional insureds in order to actually secure such insurance coverage. See *Gilbane Bldg. Co./TDX Constr. Corp. v. St. Paul Fire & Mar. Ins. Co.*, 2018 N.Y. Lexis 490 (March 27, 2018).

In this case, the Court of Appeals was faced with a situation where the Dormitory Authority of the State of New York (DASNY) had

contracted with Samson Construction Co. to build a lab for New York City. DASNY also contacted with Gilbane JV as the construction manager for the project. However, the only agreement in which additional insured status for Gilbane JV was addressed was the contract between DASNY and Samson. There was no separate contract with Gilbane JV and DASNY specifically. When damage to the excavation support system occurred and the neighboring building settled several inches as a result, litigation ensued. While not initially brought in as a defendant in the case, Gilbane JV was subsequently sued. It then sought insurance coverage under Samson’s policy, believing it was an additional insured under that policy.

After winning at the trial court level, and losing at the appellate court, Gilbane JV again attempted to secure coverage by appealing to the Court of Appeals. However, the court disagreed with Gilbane JV’s position and ruled that the endorsement to Samson’s insurance policy was clear, and required that Samson

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could only include persons or organizations as additional insureds “with whom” Samson had agreed to add by written contract. The court concluded that the word “with” “can only mean that the written contract must be “with” the additional insured.

To its certain disappointment, Gilbane JV has learned that it was not enough for Samson to have promised to DASNY that it would add Gilbane JV as an additional insured to Samson’s insurance policy.

The Court of Appeals was at pains to point out that the parties must have either the insurance company remove the word “with” from additional insured endorsements or make sure to have separate agreements with insureds.

This decision has implications for the co-op and condo community.

It is not enough for co-op and condo boards to rely on the alteration agreements,

which normally provide, like the contract between DASNY and Samson, that the *apartment owner* will add the board as an additional insured. Co-op and condo boards must also require that the actual contractors agree to add the board et al. as additional insureds. In this way, co-op and condo boards will not need an alternate route essentially suggested by the Court of Appeals, which would be to sue for breach of contract for failing to obtain additional insured status as required by that contract. This route would likely be a much more difficult path, and one for which there may not even be insurance coverage at the end of the day.

Any co-op or condo board that does not require separate contracts with the contractor performing work in the building is taking on an unnecessary risk that could easily be avoided with a simple agreement. ▲

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