STATE OF NEW YORK
SUPREME COURT COUNTY OF ONONDAGA

TIME CAP DEVELOPMENT CORP.,

Plaintiff,

v.

COLONY INSURANCE COMPANY AND
PARISH IRON WORKS, INC.,

Defendants.

DECISION

Index No. 2014EF639
RJI No. 33-15-0215

COLONY INSURANCE COMPANY,

Defendant/Third-Party Plaintiff,

v.

CINCINNATI INSURANCE COMPANY,

Third-Party Defendant.

APPEARANCES:

SUGARMAN LAW FIRM, LLP
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Attorneys for Plaintiff
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Syracuse, NY 13202

MELITO & ADOLFSEN, P.C.
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33 Broadway
New York, NY 10279

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926 RXR Plaza
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MURPHY, J.

In this action commenced by Plaintiff Time Cap Development Corp. ("Time Cap") which seeks a declaratory judgment against Defendant/Third-Party Plaintiff Colony Insurance Company ("Colony") and Defendant Parish Iron Works, Inc. ("Parish"), Time Cap, by Notice of Motion dated and e-filed on January 21, 2015, seeks an Order granting summary judgment declaring that they are an additional insured of Colony, and as such, Colony is obligated to defend and indemnify Time Cap for past and future defense costs incurred in the underlying action captioned *Larry West v. Time Cap Development Corp., et al*, Index No. 2012-4082 ("underlying *West* lawsuit").

Also before the Court is the Notice of Cross-Motion of Colony dated and e-filed on March 9, 2015, which seeks summary judgment declaring that the Colony insurance policy at issue does not afford defense or indemnity coverage to Time Cap with regard to the underlying *West* lawsuit. Colony's cross-motion further seeks a declaration that Colony and Third-Party Defendant Cincinnati Insurance Company ("Cincinnati") each afford co-insurance for Time Cap on a 50/50 basis.[1] Lastly, Colony seeks an Order deferring any ruling on Colony's alleged indemnity obligation to Time Cap until such time as there is a ruling in the underlying *West* action as to whether the "bodily injury" was caused by "an act or omission" by Parish.

Cincinnati, by Notice of Cross-Motion dated and e-filed on April 13, 2015, seeks an Order granting summary judgment declaring that Colony has the sole duty to defend Time Cap, without any contribution from Cincinnati in the underlying lawsuit.

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[1]Third-Party Defendant Cincinnati Insurance Company issued a General Liability Policy to time Cap naming Time Cap as a named Insured for the period 9/15/2009-9/15/2010. Affirmation of S. Dwight Stephens, Esq., dated March 9, 2015, Exhibit 5.

By way of background, on August 7, 2012, in the underlying *West* lawsuit, Plaintiff Larry West served an Amended Summons and Complaint against defendant Time Cap, et al., for monetary damages arising out of an accident that occurred on September 21, 2009, wherein West suffered personal injuries while working in the basement of a building located at 1386 West Genesee Street, Chittenango, New York. Plaintiff Larry West alleges he was acting in his capacity as an employee of Parish Iron Works, a subcontractor on the construction project. In the Amended Complaint, West alleges that he was provided with an inadequate ladder which was too short and not provided proper safety devices related to his job which was to connect beams for the first floor, approximately 12 feet above the surface of the basement floor. He claims that upon reaching up to perform his job, the ladder kicked out from underneath him causing him to fall and sustain injuries. West alleges a violation of Labor Law §§ 200, 240 (1) and 241 (6). In the underlying lawsuit, West alleges that defendant Time Cap was the general contractor of the construction project and is thus liable.

On February 27, 2014, Time Cap commenced the instant declaratory judgment action against Colony Insurance Company and Parish Iron Works, Inc. (Index No. 2014EF0639) claiming that there is a breach of contract by Parish relating to the contract which was entered into between the parties on September 3, 2009. Pursuant to the contract, Parish agreed to perform certain construction work as a subcontractor at the Chittenango dental office building. Time Cap alleges that Parish agreed that Time Cap would be added as an "additional insured" under Parish's commercial general liability policy issued by defendant Colony to Parish (Policy No. GL 129670) effective May 27, 2009 to May 27, 2010. (Attorney Affirmation of Kevin R. Van Duser, Esq., dated January 21, 2015, Exhibit H, Commercial General Liability Policy; Commercial General Liability Coverage Part Declarations, attached herein as Court Appendix 1).

The subcontract entered into between Time Cap Development and Parish Iron Works dated August 18, 2009, states in ¶ 8 in pertinent part:

> Before commencing the Work, *Subcontractor shall furnish to Contractor, certificates, naming Contractor additional insured and satisfactory to Contractor from each insurance company showing the policy numbers, dates of expiration and limits of liability and providing that the insurance* will not canceled or changes (sic) until the expiration of at least thirty (30) days after written notice of such cancellation or change has been mailed to and received by Contractor. Subcontractor's first requisition for payment will not approved (sic) until these insurance requirements have ben complied with. Compliance by Subcontractor with these insurance requirements shall not relieve it from liability under any indemnity obligations incurred by Subcontractor under this Agreement. Should Subcontractor fail to procure and maintain the required insurance, Contractor shall have the right to procure and maintain such insurance at the Subcontractor's cost. (emphasis added).

(Van Duser Aff., Exhibit G, Subcontract).

On February 10, 2010, Cincinnati, Time Cap's insurer, sent a letter to Colony (Van Duser Aff., Exhibit I) advising Colony that Cincinnati had been placed on notice of Larry West's accident of September 21, 2009. The letter described the accident setting forth that an employee of Parish Iron Works fell from a ladder at the work site and further requested Colony to provide a complete defense and indemnification. Some 20 months later, on October 19, 2011, Colony wrote a letter to Parish copying Time Cap and Cincinnati denying coverage with respect to Larry West's accident (Van Duser Aff., Exhibit J).

Colony denies coverage based on at least three grounds. First, Colony's letter which was authored by Kelly A. Bernstein, Supervisor, in part denies coverage based upon an exclusion relating to employer's coverage wherein Bernstein states:

> Your policy contains a contractors coverage limitations endorsement which excludes coverage for employer's liability.

(Policy CG 00 01 12 04, page 2 of 15 (e), attached herein as Court Appendix 2).

Second, Colony states that Time Cap is not an additional insured. The letter cites to the Colony policy section titled "Contractors Coverage Limitations," which states in pertinent part that the insurance does not apply to "Subcontractors and Independent Contractors" for bodily injury arising out of "the acts of your independent contractors or subcontractors unless you: (a) obtain certificate of insurance that evidence coverage and Limits of Insurance equal to or greater than the coverages and Limits of Insurance provided by this policy in force for the term of the work performed for you . . . ." (Policy U008R-0707, attached herein as Court Appendix 3).

Third, Colony argues that the language and coverage afforded for additional insureds would only provide coverage for bodily injury caused in whole or in part by (1) Parish's acts or omissions or (2) the acts or omissions of those acting on Parish's behalf. (Policy CG 20 10 07 04 A. Section II, attached herein as Court Appendix 4). In this regard, Colony contends that there has been no finding of liability against Parish, or anyone acting on their behalf.

Time Cap's Motion Seeking Coverage as an Additional Insured

It is well settled that when an issue arises relating to the interpretation of an insurance policy, it is the insured's burden to establish coverage, and the insurer's burden to prove that a claimed exclusion in the policy applies to defeat coverage. *See, Consolidated Edison Company of NY v. Allstate Insurance Company*, 98 N.Y.2d 208 (2002); *see also, Northville Industries Corp. v. National Union Fire Insurance Company*, 89 N.Y.2d 621 (1997).

In support of Time Cap's motion for coverage, Time Cap argues that they are an "additional insured" and that Parish was required pursuant to ¶ 8 of the Subcontract to name Time Cap as an additional insured and thus, Colony has an obligation to defend and indemnify them. The law is clear that a contractor will be considered an additional insured under a subcontractors commercial liability policy (1) when the subcontractor agrees in writing to obtain

liability insurance and name the contractor as an additional insured; and (2) where the subcontractor's insurance policy provides that an additional insured includes any organization that the subcontractor agrees to name as an additional insured pursuant to a written contract. *See, America Ref-Fuel Company of Hempstead v. Employers Insurance Company of Wausau*, 265 A.D.2d 49 (2d Dept. 2000); *see also, Trapani v. 10 Arial Way Associates,* 301 A.D.2d 644 (2d Dept. 2003).

The clear wording of ¶ 8 of the subcontract entered into between Time Cap and Parish unambiguously obligates Parish to furnish to Time Cap "certificates, naming contractor additional insured and satisfactory to contractor from each insurance company showing the policy numbers, dates of expiration and limits of liability . . . . (Van Duser Aff., Exhibit H). Time Cap cites to that portion of Colony's Commercial General Liability Policy provided to Parish, CG 20 10 07 04, titled "Additional Insured – Owners, Lessees or Contractors – Scheduled Person or Organization." The endorsement provides in the schedule the name of additional insured, persons or organizations as "all persons or organizations as required by written contract with the named insured." (*See,* Court Appendix 4). Colony's declarations page which names Parish Iron Works, Inc., as the named insured further shows that Colony is providing coverage for both "blanket additional insureds" and "blanket primary additional insureds." (*See,* Court Appendix 1).

When considered altogether, the plain language of the subcontract requiring Parish to add Time Cap as an additional insured, together with the "additional insured" endorsement referring to the written contract between the parties, along with the fact that the declaration sets forth that a "blanket additional insured" has been added, conclusively proves that Parish was obligated to and did, in fact, include Time Cap as an additional insured under the terms of its commercial

general liability coverage issued by Colony. Accordingly, the Court finds that Time Cap has met its burden showing that they are an additional insured under the Colony policy issued to Parish, and that they are entitled to coverage in the underlying *West* lawsuit.

Colony's Cross-Motion Seeking a Declaration of No Duty to Defend and/or Indemnify Timecap

With regard to Colony's cross-motion, before Colony can advance its argument that several exclusions set forth in the insurance policy issued to Parish are applicable, Colony must first meet its burden that its disclaimer of coverage to Time Cap pursuant to Insurance Law § 3420 (d) was timely. The facts are undisputed here that Colony was advised in writing on or about February 10, 2010, that Larry West, an employee of Colony's insured, Parish Iron Works, fell from a ladder on or about September 21, 2009, and was injured at a work site where Time Cap was the general contractor and Parish was a subcontractor on the job site. It was not until some 20 months later, on October 19, 2011, that Colony disclaimed coverage to Time Cap with respect to West's accident.

Insurance Law § 3420 (d) requires an insured to disclaim liability or deny coverage for death or bodily injury, requiring the insurer to give "written notice as soon as reasonably possible of such disclaimer of liability or denial of coverage to the insured and the insured person or any other claimant." *See*, Insurance Law § 3420 (d). In *Tower Insurance Company of New York v. NHT Owners, LLC*, 90 A.D.3d 532 (1st Dept. 2011), the Court held that an insurer's denial issued 33 days after it was provided notice of the accident was untimely as a matter of law. *See also, George Campbell Painting v. National Union Fire Insurance Company of Pittsburgh, PA*, 92 A.D.3d 104 (1st Dept. 2012), where the Court held that the insurer's disclaimer nearly four months after it was provided notice was likewise untimely.

Here, the facts show that Colony's disclaimer given to Time Cap on or about October 19, 2011, some 20 months after being notified of West's accident, was clearly not given "as soon as is reasonably possible" within the meaning of Insurance Law § 3420 (d). *See, Tower, supra; see also, George Campbell Painting, supra.* In *Hartford v. County of Nassau*, 46 N.Y.2d 1028 (1979), the Court of Appeals held that a two-month delay in providing a notice of disclaimer was untimely as a matter of law.

Accordingly, the Court finds that Colony failed to timely disclaim coverage to Time Cap with regard to Larry West's accident and his alleged injuries sustained in the underlying *West* lawsuit. Consequently, it is not necessary for the Court to reach the question of whether the policy exclusions apply here. *See, American Ref-Fuel, supra,* at 54.

Time Cap's Motion Declaring that Colony has a Duty to Defendant Time Cap in the Underlying West Lawsuit

It is well settled that an insurer's duty to defend arises as long as the four corners of the complaint allege causes of action covered by the policy or whenever the allegations in the complaint state a cause of action that gives rise to the reasonable possibility of recovery under the policy. *See, Town of Massena v. Healthcare Underwriters Mutual Insurance Company*, 98 N.Y.2d 435 (2002). It is further well established that the duty to defend is broader than the duty to indemnify. *See, Fitzpatrick v. American Honda Motor Company*, 78 N.Y.2d 61 (1991).

In *Fitzpatrick*, the Court of Appeals held that an insurer had a duty to defend its insured in a pending lawsuit even though the pleadings did not allege a covered occurrence where the insurer had "actual knowledge of facts establishing the reasonable possibility of coverage." *See, Fitzpatrick* at 67. The Court of Appeals rejected the insurer's argument that the insurer's duty to

defend its insured was limited solely on whether the pleadings alleged a covered occurrence within the four corners of those pleadings. The Court of Appeals stated:

> However, to say that the duty to defend is *at least* broad enough to apply to actions in which the complaint alleges a covered occurrence is a far cry from saying that the complaint allegations are the *sole* criteria for measuring the scope of that duty. Indeed, in these circumstances, where the insurer is attempting to shield itself from the responsibility to defend despite its actual knowledge that the lawsuit involves a covered event, wooden application of the "four corners of the complaint" rule would render the duty to defend narrower than the duty to indemnify--clearly an unacceptable result. For that reason, courts and commentators have indicated that the insurer must provide a defense if it has knowledge of facts which **potentially** bring the claim within the policy's indemnity coverage. (emphasis added).

See, Fitzpatrick at 66.

Here, the Amended Complaint in the underlying *West* lawsuit specifically alleges that on September 21, 2009, defendant Time Cap was a general contractor of a construction project being conducted at 1386 West Genesee Street, Chittenango, New York, and that on the same day, Larry West, in his capacity as an employee of Parish Iron Works, Inc., a subcontractor on said construction project, was injured when an inadequate ladder that he was provided was too short and which suddenly kicked out from underneath him causing him to fall and to sustain injuries. Van Duser Aff., Exhibit A, Amended Complaint. These allegations clearly allege sufficient facts of a covered occurrence that would place Parish and Colony on notice sufficient to obligate Colony to provide a defense. This is especially true where Larry West's deposition testimony on November 20, 2013, clearly establishes sufficient facts that give Colony actual notice which brings the claim within Colony's policy's indemnity coverage. While Colony argues that Larry West's deposition testimony should not be considered by the Court as it was submitted to the

Court as part of a Reply, as stated by the Court of Appeals in *Fitzpatrick*, to "shield itself from the responsibility to defend despite its actual knowledge that the lawsuit involves a covered event would dictate an unacceptable result."

Accordingly, the Court finds that Colony had actual knowledge of a covered event which renders a duty and obligation on their part to defend Time Cap in the underlying *West* lawsuit. Consequently, the Court grants Time Cap's motion declaring that Colony is obligated to defend Time Cap in the underlying *West* lawsuit. The Court further finds that Time Cap's motion seeking reimbursement of the costs of defense incurred is hereby denied without prejudice, as there has been no proof submitted to the Court of the relevant amount of the expenses incurred. The Court also denies Colony's cross-motion declaring that the Colony policy at issue does not afford defense coverage to Time Cap for the claims made by West in the underlying *West* lawsuit.

Time Cap's Motion and Colony's Cross-Motion as to Whether the Colony Insurance Policy Affords Indemnity Coverage to Time Cap for the Claims Made by West in the Underlying Lawsuit

The pertinent language of the Colony policy at issue is set forth in the "Additional Insured" endorsement which limits the coverage afforded for additional insureds to liability for "bodily injury" caused in whole or in part by (1) [Parish's] acts or omissions; or (2) the acts or omissions of those acting on [Parish's] behalf. (*See*, Court Appendix 2, CG 20 10 07 04, A. Section II). It is well settled that the right to contractual indemnification depends upon the specific language of the contract. *See, Kader v. City of New York Housing Preservation and Development*, 16 A.D.3d 461 (2d Dept. 2005).

Here, a plain reading of the policy language obligates Colony to indemnify Time Cap only where there is a showing that Larry West suffered a "bodily injury" caused by an "act or omission" of Parish, or the "acts or omissions of those acting on parish's behalf. At this juncture, there has been no finding by a trier of fact whether Larry West's "bodily injury" was in fact caused by an "act or omission" of Parish or the "acts or omissions of those acting" on Parish's behalf. *See, Crespo v. City of New York*, 303 A.D.2d 166 (1st Dept. 2003); *see also, Pavarini Construction Company v. Liberty Mutual Insurance Company*, 270 A.D.2d 98 (1st Dept. 2000). Consequently, the Court denies Time Cap's motion for summary judgment which seeks a declaration of indemnification as being premature. The Court further denies Colony's cross-motion for summary judgment seeking a declaration that they have no obligation to indemnify Time Cap in the underlying *West* lawsuit as being premature.

Colony's Cross-Motion Declaring that the Strict Notice Requirements of Insurance Law § 3420 (d) Do Not Apply to Colony's Disclaimer Insofar as Cincinnati is Concerned

In support of Colony's cross-motion, Colony argues in the alternative that if the Court finds that they owe additional insurance coverage to Time Cap, then the strict notice requirements of Insurance Law § 3420 (d) do not apply to Colony's disclaimer insofar as Cincinnati is concerned. In other words, Colony contends that its 20-month delay in disclaiming coverage is not applicable to Cincinnati. In opposition, and in support of Cincinnati's cross-motion, Cincinnati argues that Colony's 20-month untimely disclaimer applies equally to Cincinnati and, therefore, Cincinnati's policy is not applicable herein. Cincinnati further contends that even if the strict notice requirements of Insurance Law § 3420 (d) do not apply to them, then their insurance coverage provided to Time Cap is excess to the coverage provided by Colony's insurance policy issued to Parish naming Time Cap as an additional insured.

With regard to the first issue whether the strict notice requirements of Insurance Law § 3420 (d) apply to Cincinnati, the First Department Appellate Division in *Bovis Lend Lease LMB v. Royal Surplus Lines Insurance Company*, 27 A.D.3d 84 (1st Dept. 2005), held that the provision of giving written notice of a disclaimer of liability is not available to an insurer to be asserted against another insurer. *See, Bovis* at 90. The First Department in reviewing the language requiring the insurer to give written notice of disclaimer of liability or denial of coverage "as soon as reasonably possible," stated that "the Legislature intended to expedite the disclaimer process, thus enabling a policyholder to pursue other avenues expeditiously," citing to *First Financial Insurance Company v. Jetco Contracting Corp.*, 1 N.Y.3d 64 (2003). The First Department noted that the notice requirement of Insurance Law § 3420 (d) was "designed to protect the insured and the injured person or other claimant against the risk posed by a delay in learning the insurer's position of expending energy and resources in an ultimately futile attempt to recover damages from an insurer or foregoing alternative methods for recovering damages until it is too late to pursue them successfully." *See, Bovis* at 92. The First Department thus concluded that these risks are not shared by another insurer seeking contribution and, therefore, held that § 3420 (d) is not applicable to a claim between insurers. *Id.; see also, Public Service Mutual Insurance Company v. Tower Insurance Company of New York*, 111 A.D.3d 476 (1st Dept. 2013); *see also, J.T. Magen v. Hartford Fire Insurance Company*, 64 A.D.3d 266 (1st Dept. 2009). Accordingly, based upon the rationale set forth in *Bovis Lend Lease LMB*, the Court finds and declares that Insurance Law § 3420 (d) does not apply to Colony's disclaimer insofar as Cincinnati is concerned.

Colony's and Cincinnati's Cross-Motions Seeking a Declaration that Their Own Insurance Policy Issued to Parish and Time Cap, Respectively, is Wholly Excess Over any Other Primary Insurance Available to Time Cap

In this case, Cincinnati argues that once the duty to defend Time Cap is triggered in their capacity as an additional insured, then by operation of the "other insurance" clause in the Cincinnati insurance contract issued to Time Cap, the Cincinnati policy is (1) wholly excess to the Colony insurance contract issued to Parish and (2) Colony alone is obligated to defend Time Cap. Likewise, Colony argues that Cincinnati's insurance coverage provided to Time Cap remains primary, and in the alternative, Colony and Cincinnati are co-insurers for Time Cap on a 50/50 basis.

In *J.T. Magen, supra,* the First Department was faced with the virtually identical issue that is now before this Court. In that case, plaintiff Richard Seifert ("Seifert") was injured on a construction site owned by the New York City Industrial Development Agency ("IDA"). The IDA hired J.T. Magen as their construction manager, and they in turn hired defendant William Erath and Son ("Erath") as one of the subcontractors. Seifert was employed by the subcontractor Erath. The contract between J.T. Magen and Erath was similar to the contract in the case at bar where Erath agreed to indemnify J.T. Magen for personal injuries arising out of Erath's work. Subsequently, Seifert, the injured worker, commenced a personal injury action against various defendants, including J.T. Magen. J.T. Magen notified its insurance carrier, Travelers, of the occurrence and by letter dated June 24, 2005, Travelers advised the Hartford, the insurance company for defendant Erath, of the underlying action and requested that Hartford defend and indemnify J.T. Magen and the IDA as they were additional insureds under the policy Hartford had issued to Erath. Hartford subsequently informed Travelers that it was disclaiming coverage.

J.T. Magen commenced a declaratory judgment action against the Hartford, seeking a declaration that Hartford owed J.T. Magen a defense and indemnification with respect to Seifert's underlying personal injury action brought against them.

The First Department in *J.T. Magen* issued several important rulings. First, the tender letter that insurer Travelers wrote on behalf of J.T. Magen requesting Hartford to provide a defense and indemnity as an additional insured under Hartford's policy issued to Erath, fulfilled the policy's notice of claim requirement so as to trigger the Hartford's insurer's obligation to issue a timely disclaimer pursuant to Insurance Law § 3420 (d). *See, J.T. Magen* at 269. Second, the First Department held that only J.T. Magen, and not Travelers Insurance Company, received the benefit of Insurance Law § 3420 (d), as the tendering letter that Travelers sent on behalf of J.T. Magen did not apply to claims between insurers, i.e. Travelers and Hartford. *Id.* Third, not withstanding the fact that Insurance Law § 3420 (d) did not apply to claims between insurers, the First Department held that because Hartford did not timely disclaim as against **J.T. Magen's** request for indemnity as an additional insured, the First Department declared that Hartford's policy was primary to any other policy covering J.T. Magen and, thus, Hartford was obligated to defend and indemnify J.T. Magen in the underlying personal injury action which was commenced by Seifert against J.T. Magen. *See, J.T. Magen* at 273; *see also, Bovis Lend Lease LMB v. Garito Contracting, Inc.*, 38 A.D.3d 260 (2007), where based upon nearly identical facts as that in *J.T. Magen v. Hartford Fire Insurance Company*, the First Department in *Bovis v. Garito* made the same declaration that plaintiff Bovis, a general contractor, is an additional insured, and that Garito's insurer must provide primary coverage to Bovis as an additional insured under the policy. *See, Bovis* at 260.

Here, this Court has made a finding herein that Time Cap is an additional insured under the policy provided by Colony to Parish. Importantly, pursuant to the Colony policy, the declaration page issued to the named insured, Parish Iron Works, Inc., specifies that the additional insured is provided "blanket primary" coverage under the policy. *See*, Court Appendix 1.

The "other insurance" clause in the Cincinnati insurance contract states:

> This insurance is excess over . . . any other primary insurance available to Time Cap covering liability for damages arising out of the premises or operations . . . for which Time Cap has been added as an additional insured by attachment of an endorsement.

Stephens Aff., Exhibit 5, Common Policy Declarations, Policy No. CPP 105 44 02, Commercial General Liability Coverage Form, GA 101 12 04, pp. 14 and 15 of 23, attached herein as Court Appendix 5). Construed together, the declaration page of the Colony insurance policy setting forth "blanket primary" coverage, and the language of the "other insurance" clause in the Cincinnati insurance contract dictates that the Colony insurance policy naming Time Cap as an additional insured is primary, and that Cincinnati's insurance is wholly excess to the Colony insurance policy. *See, J.T. Magen, supra; see also, Bovis, supra.*

Accordingly, the Court grants that portion of Cincinnati's cross-motion declaring that the Colony insurance policy issued to Parish naming Time Cap as an additional insured is primary. The Court further grants Cincinnati's cross--motion declaring that their insurance coverage provided to Time Cap is wholly excess to the Colony insurance contract issued to Parish, which names Time Cap as an additional insured. The Court further denies Colony's cross-motion which seeks a declaration that Cincinnati Insurance Company is a co-insurer for Time Cap on a 50/50 basis.

In summary, the Court finds and declares that:

1. Time Cap is an additional insured under the policy issued by Colony to Parish.

2. Colony failed to timely disclaim coverage to Time Cap with regard to the underlying *West* lawsuit.

3. Colony alone is obligated to defend Time Cap in the underlying *West* lawsuit.

4. Time Cap's motion seeking reimbursement of defense costs incurred to date in the underlying *West* lawsuit is denied without prejudice.

5. Colony's motion seeking a declaration that they have no obligation to defend Time Cap in the underlying *West* lawsuit is denied.

6. Time Cap's motion seeking indemnification against Colony in the underlying *West* lawsuit is premature and is, thus, denied without prejudice.

7. Colony's motion seeking a declaration that they have no obligation to indemnify Time Cap in the underlying *West* lawsuit is premature and is, thus, denied without prejudice.

8. The strict notice requirements found in Insurance Law § 3420 (d) is not applicable to Cincinnati Insurance Company.

9. Colony's insurance policy provided to Parish which names Time Cap as an additional insured is primary in the underlying *West* lawsuit.

10. Cincinnati's insurance policy providing coverage to Time Cap is wholly excess to Colony's insurance policy in the underlying *West* lawsuit.

11. Colony's cross-motion against Cincinnati declaring that Cincinnati is a co-insurer for Time Cap on a 50/50 basis in the underlying *West* lawsuit is denied.

The above constitutes the Decision of the Court. Time Cap's attorney shall submit a Judgment to the Court, on notice to all counsel, within fifteen (15) days of the electronic filing of this Decision.

Dated: July 7, 2015

J

ENTER

James P. Murphy
Justice of the Supreme Court

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APPENDIX 1

COMMERCIAL GENERAL LIABILITY COVERAGE PART DECLARATIONS

This coverage part consists of this Declarations form, the Common Policy Conditions, the Commercial General Liability Coverage Form and the endorsements indicated as applicable.

POLICY NO. GL129670
NAMED INSURED: PARISH IRONWORKS, INC.

LIMITS OF INSURANCE

General Aggregate Limit (Other Than Products – Completed Operations)	$2,000,000.00	
Products Completed Operations Aggregate Limit	$2,000,000.00	
Personal & Advertising Injury Limit	$1,000,000.00	
Each Occurrence Limit	$1,000,000.00	
Damage To Premises Rented To You Limit	$100,000.00	Any One Premises
Medical Expense Limit	$5,000.00	Any One Person

RETROACTIVE DATE (CG 00 02 only) – Coverage A of this insurance does not apply to "bodily injury" or "property damage" which occurs before Retroactive Date, if any, shown below.

Retroactive Date: (Enter Date or "None" if no Retroactive Date Applies)

Location of All Premises You Own, Rent or Occupy (Same as Item 1 unless shown below):

6744 PICKARD DRIVE MATTYDALE NY 13220

CLASSIFICATION	CODE NO.	PREMIUM BASIS	RATE	ADVANCE PREMIUM PR / CO	ADVANCE PREMIUM ALL OTHER
BLANKET ADDITIONAL INSURED	334-22201	FLAT	FLAT		$750.00 **
BLANKET PRIMARY ADDITIONAL INSURED	334-22201	FLAT	FLAT		$750.00 **
BLANKET WAIVER OF SUBROGATION	334-22205	FLAT	FLAT		$750.00 **
METAL ERECTION - STRUCTURAL	334-97655 336-97655	(S) 2,500,000 (S) 2,500,000	6.00 1.50	$3,750.00	$15,000.00

**FLAT FULLY EARNED

FORMS / ENDORSEMENTS APPLICABLE:
SEE FORM U001 - SCHEDULE OF FORMS AND ENDORSEMENTS

TOTAL PREMIUM FOR THIS COVERAGE PART $21,000.00

FORM OF BUSINESS: CORPORATION

Audit Period: Annual unless otherwise stated:

APPENDIX 2

COMMERCIAL GENERAL LIABILITY COVERAGE FORM

Various provisions in this policy restrict coverage. Read the entire policy carefully to determine rights, duties and what is and is not covered.

Throughout this policy the words "you" and "your" refer to the Named Insured shown in the Declarations, and any other person or organization qualifying as a Named Insured under this policy. The words "we", "us" and "our" refer to the company providing this insurance.

The word "insured" means any person or organization qualifying as such under Section **II** – Who Is An Insured.

Other words and phrases that appear in quotation marks have special meaning. Refer to Section **V** – Definitions.

SECTION I – COVERAGES

COVERAGE A BODILY INJURY AND PROPERTY DAMAGE LIABILITY

1. Insuring Agreement

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. 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. But:

(1) The amount we will pay for damages is limited as described in Section **III** – Limits Of Insurance; and

(2) Our right and duty to defend ends when we have used up the applicable limit of insurance in the payment of judgments or settlements under Coverages **A** or **B** or medical expenses under Coverage **C**.

No other obligation or liability to pay sums or perform acts or services is covered unless explicitly provided for under Supplementary Payments – Coverages **A** and **B**.

b. This insurance applies to "bodily injury" and "property damage" only if:

(1) The "bodily injury" or "property damage" is caused by an "occurrence" that takes place in the "coverage territory";

(2) The "bodily injury" or "property damage" occurs during the policy period; and

(3) Prior to the policy period, no insured listed under Paragraph **1.** of Section **II** – Who Is An Insured and no "employee" authorized by you to give or receive notice of an "occurrence" or claim, knew that the "bodily injury" or "property damage" had occurred, in whole or in part. If such a listed insured or authorized "employee" knew, prior to the policy period, that the "bodily injury" or "property damage" occurred, then any continuation, change or resumption of such "bodily injury" or "property damage" during or after the policy period will be deemed to have been known prior to the policy period.

c. "Bodily injury" or "property damage" which occurs during the policy period and was not, prior to the policy period, known to have occurred by any insured listed under Paragraph **1.** of Section **II** – Who Is An Insured or any "employee" authorized by you to give or receive notice of an "occurrence" or claim, includes any continuation, change or resumption of that "bodily injury" or "property damage" after the end of the policy period.

d. "Bodily injury" or "property damage" will be deemed to have been known to have occurred at the earliest time when any insured listed under Paragraph **1.** of Section **II** – Who Is An Insured or any "employee" authorized by you to give or receive notice of an "occurrence" or claim:

(1) Reports all, or any part, of the "bodily injury" or "property damage" to us or any other insurer;

(2) Receives a written or verbal demand or claim for damages because of the "bodily injury" or "property damage"; or

(3) Becomes aware by any other means that "bodily injury" or "property damage" has occurred or has begun to occur.

e. Damages because of "bodily injury" include damages claimed by any person or organization for care, loss of services or death resulting at any time from the "bodily injury".

2. Exclusions

This insurance does not apply to:

a. Expected Or Intended Injury

"Bodily injury" or "property damage" expected or intended from the standpoint of the insured. This exclusion does not apply to "bodily injury" resulting from the use of reasonable force to protect persons or property.

b. Contractual Liability

"Bodily injury" or "property damage" for which the insured is obligated to pay damages by reason of the assumption of liability in a contract or agreement. This exclusion does not apply to liability for damages:

(1) That the insured would have in the absence of the contract or agreement; or

(2) Assumed in a contract or agreement that is an "insured contract", provided the "bodily injury" or "property damage" occurs subsequent to the execution of the contract or agreement. Solely for the purposes of liability assumed in an "insured contract", reasonable attorney fees and necessary litigation expenses incurred by or for a party other than an insured are deemed to be damages because of "bodily injury" or "property damage", provided:

(a) Liability to such party for, or for the cost of, that party's defense has also been assumed in the same "insured contract"; and

(b) Such attorney fees and litigation expenses are for defense of that party against a civil or alternative dispute resolution proceeding in which damages to which this insurance applies are alleged.

c. Liquor Liability

"Bodily injury" or "property damage" for which any insured may be held liable by reason of:

(1) Causing or contributing to the intoxication of any person;

(2) The furnishing of alcoholic beverages to a person under the legal drinking age or under the influence of alcohol; or

(3) Any statute, ordinance or regulation relating to the sale, gift, distribution or use of alcoholic beverages.

This exclusion applies only if you are in the business of manufacturing, distributing, selling, serving or furnishing alcoholic beverages.

d. Workers' Compensation And Similar Laws

Any obligation of the insured under a workers' compensation, disability benefits or unemployment compensation law or any similar law.

e. Employer's Liability

"Bodily injury" to:

(1) An "employee" of the insured arising out of and in the course of:

(a) Employment by the insured; or

(b) Performing duties related to the conduct of the insured's business; or

(2) The spouse, child, parent, brother or sister of that "employee" as a consequence of Paragraph **(1)** above.

This exclusion applies:

(1) Whether the insured may be liable as an employer or in any other capacity; and

(2) To any obligation to share damages with or repay someone else who must pay damages because of the injury.

This exclusion does not apply to liability assumed by the insured under an "insured contract".

APPENDIX 3

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

CONTRACTORS COVERAGE LIMITATIONS

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART
PRODUCTS/ COMPLETED OPERATIONS LIABILITY COVERAGE PART

A. **SECTION I – COVERAGES, COVERAGE A BODILY INJURY AND PROPERTY DAMAGE LIABILITY, 2. Exclusions, e. Employer's Liability, and SECTION I – COVERAGES, PRODUCTS/COMPLETED OPERATIONS, BODILY INJURY AND PROPERTY DAMAGE LIABILITY, 2. Exclusions, e. Employer's Liability,** are deleted and replaced with the following:

This insurance does not apply to:

e. Employer's Liability

"Bodily injury" to:

(1) An "employee" or "temporary worker" of any insured arising out of and in the course of:

(a) Employment by any insured; or

(b) Performing duties related to the conduct of any insured's business; or

(2) A fellow "employee" or "temporary worker" of any insured arising out of and in the course of such employment when the insured is an "executive officer" of such employer; or

(3) The spouse, child, parent, brother or sister of that "employee" or "temporary worker" as a consequence of Paragraph (1) above.

This exclusion applies:

(1) Whether an insured may be liable as an employer or in any other capacity;

(2) To any obligation to share damages with or repay someone else who must pay damages because of the injury; or

(3) To any liability assumed under any contract or agreement.

B. **SECTION I – COVERAGES, COVERAGE A BODILY INJURY AND PROPERTY DAMAGE LIABILITY, 2. Exclusions** is amended and the following added:

This insurance does not apply to:

Subcontractors and Independent Contractors

"Bodily injury", "property damage", or "personal and advertising injury":

(1) arising out of or resulting from the acts of your independent contractors or subcontractors unless you:

(a) obtain certificates of insurance that evidence coverage and Limits of Insurance equal to or greater than the coverages and Limits of Insurance provided by this policy in force for the term of the work performed for you; and

(b) provide us upon our request copies of Certificates of Insurance that you shall require and have obtained from your subcontractors before any work performed on your behalf. You shall maintain copies of these Certificates during and for up to 5 years after the term of such work.

(2) sustained by any contractor, subcontractor or independent contractor or any of their "employees", "temporary workers", or "volunteer workers".

C. **SECTION V – DEFINITIONS, 19.** of the **COMMERCIAL GENERAL LIABILITY COVERAGE FORM,** and **SECTION V – DEFINITIONS, 15.** of the **PRODUCTS/COMPLETED OPERATIONS LIABILITY COVERAGE FORM** are deleted and replaced with the following:

"Temporary worker" means any person who is:

a. furnished to you to substitute for a permanent "employee";

b. a short-term worker; or

c. not a "employee" or "volunteer worker".

ALL OTHER TERMS AND CONDITIONS OF THE POLICY REMAIN UNCHANGED.

APPENDIX 4

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

ADDITIONAL INSURED – OWNERS, LESSEES OR CONTRACTORS – SCHEDULED PERSON OR ORGANIZATION

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

SCHEDULE

Name Of Additional Insured Person(s) Or Organization(s):
ALL PERSONS OR ORGANIZATIONS AS REQUIRED BY WRITTEN CONTRACT WITH THE NAMED INSURED.
Location(s) Of Covered Operations:
Information required to complete this Schedule, if not shown above, will be shown in the Declarations.

A. **Section II – Who Is An Insured** is amended to include as an additional insured the person(s) or organization(s) shown in the Schedule, but only with respect to liability for "bodily injury", "property damage" or "personal and advertising injury" caused, in whole or in part, by:

1. Your acts or omissions; or
2. The acts or omissions of those acting on your behalf;

in the performance of your ongoing operations for the additional insured(s) at the location(s) designated above.

B. With respect to the insurance afforded to these additional insureds, the following additional exclusions apply:

This insurance does not apply to "bodily injury" or "property damage" occurring after:

1. All work, including materials, parts or equipment furnished in connection with such work, on the project (other than service, maintenance or repairs) to be performed by or on behalf of the additional insured(s) at the location of the covered operations has been completed; or
2. That portion of "your work" out of which the injury or damage arises has been put to its intended use by any person or organization other than another contractor or subcontractor engaged in performing operations for a principal as a part of the same project.

APPENDIX 5

SECTION IV - COMMERCIAL GENERAL LIABILITY CONDITIONS

1. Bankruptcy

Bankruptcy or insolvency of the insured or of the insured's estate will not relieve us of our obligations under this Coverage Part.

2. Duties in the Event of Occurrence, Offense, Claim or Suit

a. You must see to it that we are notified as soon as practicable of an "occurrence" or a "personal and advertising injury" offense which may result in a claim. To the extent possible, notice should include:

(1) How, when and where the "occurrence" or offense took place;

(2) The names and addresses of any injured persons and witnesses; and

(3) The nature and location of any injury or damage arising out of the "occurrence" or offense.

b. If a claim is made or "suit" is brought against any insured, you must:

(1) Immediately record the specifics of the claim or "suit" and the date received; and

(2) Notify us as soon as practicable.

You must see to it that we receive written notice of the claim or "suit" as soon as practicable.

c. You and any other involved insured must:

(1) Immediately send us copies of any demands, notices, summonses or legal papers received in connection with the claim or "suit";

(2) Authorize us to obtain records and other information;

(3) Cooperate with us in the investigation or settlement of the claim or defense against the "suit"; and

(4) Assist us, upon our request, in the enforcement of any right against any person or organization which may be liable to the insured because of injury or damage to which this insurance may also apply.

d. No insured will, except at that insured's own cost, voluntarily make a payment, assume any obligation, or incur any expense, other than for first aid, without our consent.

3. Legal Action Against Us

No person or organization has a right under this Coverage Part:

a. To join us as a party or otherwise bring us into a "suit" asking for damages from an insured; or

b. To sue us on this Coverage Part unless all of its terms have been fully complied with.

A person or organization may sue us to recover on an agreed settlement or on a final judgment against an insured; but we will not be liable for damages that are not payable under the terms of this Coverage Part or that are in excess of the applicable limit of insurance. An agreed settlement means a settlement and release of liability signed by us, the insured and the claimant or the claimant's legal representative.

4. Liberalization

If, within 60 days prior to the beginning of this Coverage Part or during the policy period, we make any changes to any forms or endorsements of this Coverage Part for which there is currently no separate premium charge, and that change provides more coverage than this Coverage Part, the change will automatically apply to this Coverage Part as of the latter of:

a. The date we implemented the change in your state; or

b. The date this Coverage Part became effective; and

will be considered as included until the end of the current policy period. We will make no additional premium charge for this additional coverage during the interim.

5. Other Insurance

If other valid and collectible insurance is available to the insured for a loss we cover under **COVERAGE A. BODILY INJURY AND PROPERTY DAMAGE LIABILITY** or **COVERAGE B. PERSONAL AND ADVERTISING INJURY LIABILITY** 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:

(1) Any of the other insurance, whether primary, excess, contingent or on any other basis:

(a) That is Fire, Extended Coverage, Builder's Risk, Installation Risk or similar insurance for "your work";

(b) That is Fire or Explosion insurance for premises rented to you or temporarily occupied by you with permission of the owner;

(c) That is insurance purchased by you to cover your liability as a tenant for "property damage" to premises rented to you or temporarily occupied by you with permission of the owner; or

(d) If the loss arises out of the maintenance or use of aircraft, "autos" or watercraft to the extent not subject to **SECTION I - COVERAGES, COVERAGE A. BODILY INJURY AND PROPERTY DAMAGE LIABILITY, 2. Exclusions, g. Aircraft, Auto or Watercraft.**

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

(3) Any other insurance:

(a) Whether primary, excess, contingent or on any other basis, except when such insurance is written specifically to be excess over this insurance; and

(b) That is a consolidated (wrap-up) insurance program which has been provided by the prime contractor/project manager or owner of the consolidated project in which you are involved.

When this insurance is excess, we will have no duty under **COVERAGE A. BODILY INJURY AND PROPERTY DAMAGE LIABILITY** or **COVERAGE B. PERSONAL AND ADVERTISING INJURY LIABILITY** to defend the insured against any "suit" if any other insurer has a duty to defend the insured against that "suit". If no other insurer defends, we will undertake to do so, but we will be entitled to the insured's rights against all those other insurers.

When this insurance is excess over other insurance, we will pay only our share of the amount of the loss, if any, that exceeds the sum of:

(1) The total amount that all such other insurance would pay for the loss in the absence of this insurance; and

(2) The total of all deductible and self-insured amounts under all that other insurance.

We will share the remaining loss, if any, with any other insurance that is not described in this Excess Insurance provision and was not bought specifically to apply in excess of the Limits of Insurance shown in the Declarations of this Coverage Part.

c. Method of Sharing

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 of the 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 of all insurers.

6. Premium Audit

a. We will compute all premiums for this Coverage Part in accordance with our rules and rates.

b. Premium shown in this Coverage Part as advance premium is a deposit premium only. At the close of each audit period we will compute the earned premium for that period and send notice to the first Named Insured. The due date for audit and retrospective premiums is the date shown as the due date on the bill. If:

(1) The earned premium is less than the deposit premium, we will return the excess to the first Named Insured; or

(2) The earned premium is greater than the deposit premium, the difference will be due and payable to us by the first Named Insured upon notice from us.

c. The first Named Insured must keep records of the information we need for premium computation, and send us copies at such times as we may request.