

**UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING TO A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 30th day of September, two thousand twenty-six.

PRESENT:

RICHARD C. WESLEY,
RICHARD J. SULLIVAN,
BETH ROBINSON,
Circuit Judges.

TINDALL CORPORATION,

Plaintiff-Appellant,

v.

No. 25-1448

BERKLEY ASSURANCE COMPANY,

Defendant-Appellee.

For Plaintiff-Appellant:

RICHARD D. MILONE, JR. (Kevin G. Cope,
Bond Schoeneck & King PLLC, Buffalo,

NY, *on the brief*), Milone Law Firm PLLC, Washington DC, *for Plaintiff Appellant*.

For Defendant-Appellee:

DAVID T. MCTAGGART (Max H. Stern, Duane Morris LLP, San Francisco, CA, *on the brief*), Duane Morris LLP, New York, NY, *for Defendant-Appellee*.

Appeal from a judgment of the United States District Court for the Western District of New York (John L. Sinatra, Jr., *Judge*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the May 14, 2025 judgment of the district court is **AFFIRMED**.

Tindall Corporation (“Tindall”) appeals from a grant of summary judgment in favor of Berkley Assurance Company (“Berkley”) on Tindall’s claim for coverage under an insurance policy. We assume the parties’ familiarity with the underlying facts, procedural history, and issues on appeal, to which we refer only as necessary to resolve this appeal.

Tindall, a South Carolina corporation that designs and manufactures concrete structures, contracted with Berkley, an Iowa corporation, for a policy that would cover claims of professional error brought against Tindall between October 1, 2019 and October 1, 2020. As a “condition precedent” to coverage, the policy

required Tindall to obtain Berkley's consent before admitting any liability for which coverage might be sought. See J. App'x at 47–48 (“As a condition precedent to this insurance,” Tindall “shall not voluntarily . . . admit any liability . . . without our prior written consent.”). Tindall sued Berkley after it denied Tindall reimbursement under the policy for the cost of fixing an error Tindall made in designing a set of concrete beams for a contractor renovating a site in Philadelphia. The district court granted summary judgment to Berkley, holding that because Tindall had admitted liability for the defect without Berkley's consent, Berkley was excused from paying on the policy. On appeal, Tindall contends that the district court erred in concluding that its representations regarding the beam error amounted to an admission of liability as a matter of law.

We review *de novo* a district court's grant of summary judgment, *McBride v. BIC Consumer Prods. Mfg.*, 583 F.3d 92, 96 (2d Cir. 2009), which “is appropriate only if ‘there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.’” *Bey v. City of New York*, 999 F.3d 157, 164 (2d Cir. 2021) (quoting Fed. R. Civ. P. 56(a)). “In applying this standard, we resolve all ambiguities, and credit all factual inferences that could rationally be drawn, in

favor of the party opposing summary judgment.” *Brown v. Henderson*, 257 F.3d 246, 251 (2d Cir. 2001) (internal quotation marks omitted).

Because this case arises pursuant to the Court’s diversity jurisdiction, *see* 28 U.S.C. § 1332, we apply the choice-of-law rules of the forum state – here, New York. *See Klaxon Co. v. Stentor Elec. Mfg.*, 313 U.S. 487, 496 (1941). “In the absence of a violation of a fundamental state policy, New York courts generally defer to the choice of law made by the parties to a contract.” *Cargill, Inc. v. Charles Kowsky Res., Inc.*, 949 F.2d 51, 55 (2d Cir. 1991); *see IRB-Brasil Resseguros, S.A. v. Inepar Invs.*, 20 N.Y.3d 310, 314 (2012). Because the parties selected New York law to govern the policy, the insurance contract at issue must be interpreted “to give effect to the intent of the parties as expressed in the clear language of the contract.” *Ment Bros. Iron Works Co. v. Interstate Fire & Cas.*, 702 F.3d 118, 122 (2d Cir. 2012) (internal quotation marks omitted); *see Jin Ming Chen v. Ins. Co. of Pa.*, 36 N.Y.3d 133, 138 (2020). New York courts “construe[] ambiguous policy provisions in favor of coverage and against the insurer who drafted the policy.” *Primavera v. Rose & Kiernan, Inc.*, 670 N.Y.S.2d 223, 225 (3d Dep’t 1998). Therefore, for Berkley “to prevail, it must demonstrate not only that its interpretation is reasonable but [also] that it is the only fair interpretation.” *Id.*

I. The District Court Did Not Err in Finding that Tindall Breached the Policy's Admission-of-Liability Provision.

Tindall first argues that it could not, as a matter of law, have triggered the policy's admission-of-liability clause because it never entered into a "binding and enforceable settlement agreement" that "admitted liability" for the breach of its beam-supply contract. Tindall Br. at 15–16 (internal quotation marks omitted). We disagree that a binding settlement agreement was required.

The policy's plain text – which provides that Berkley "shall not be liable for any payment, assumed or admitted liability, consent judgment, settlement, or Claim Expense to which [it] ha[s] not consented," J. App'x at 48 – clearly covers more than just settlement agreements. Were we to accept Tindall's argument that a settlement agreement is required to admit liability, the separate prohibition on "admit[ting] liability" would do no work whatsoever. Under New York law, an "interpretation [that] would render [a] policy's specific exclusions mere surplusage [is] a result to be avoided." *Westview Assocs. v. Guar. Nat. Ins.*, 95 N.Y.2d 334, 339 (2000); *see also Rothenberg v. Lincoln Farm Camp, Inc.*, 755 F.2d 1017, 1019 (2d Cir. 1985) ("[A]n interpretation that gives a reasonable and effective

meaning to all the terms of a contract is generally preferred to one that leaves a part unreasonable or of no effect.”).¹

Tindall contends in the alternative that, even if the admission-of-liability clause encompasses more than just a formal settlement agreement, the district court nevertheless erred in finding no disputed issue of material fact regarding whether Tindall’s correspondence with the contractor amounted to an admission of liability for the defective beams. Again, we disagree. After it became apparent that the beams lacked the required amount of insulation, Tindall’s head of engineering advised the contractor that “Tindall acknowledges there are certain conditions that don’t meet what was specified in the contract documents.” “Observed conditions include: . . . locations where the minimum coverage of 1 ½ [inches] is not provided.” J. App’x at 622.

This was not an isolated statement about a minor nonconformance. In a later letter, Tindall again acknowledged that there were “nonconforming portions

¹ Tindall argues that under the New York Court of Appeals’ decision in *Bear Stearns*, the relevant inquiry is not whether Tindall admitted liability but whether it was “free to walk away.” Tindall Br. at 16 (quoting *Vigilant Ins. v. Bear Stearns Cos.*, 10 N.Y.3d 170, 178 (2008)). Though it is true that *Bear Stearns* involved a clause like this one, the Court there only interpreted the clause’s prohibition on *settlement*, since Bear Stearns explicitly withheld any admission of liability. See *Bear Stearns*, 10 N.Y.3d at 174. The case is therefore inapposite and does not stand for the proposition asserted by Tindall.

of its work,” *id.* at 749, noted that its contracted engineers had concluded that the nonconformances could be remedied, *id.*, and assured the property owner that it was prepared to “immediately begin implementing” a number of substantial “corrective measures” that involved work on every beam, *id.* at 751. Only after the property owner approved the remediation plan and Tindall identified contractors to perform the required work did Tindall give notice to Berkley of the potential claim. *Id.* at 807. Because no other inference “could rationally be drawn” on this record, the district court did not err in concluding that Tindall breached the admission-of-liability condition and that summary judgment was proper. *Henderson*, 257 F.3d at 251.

In a last-ditch effort to preserve coverage, Tindall argues that even if it *did* admit liability, disputed issues of fact remain as to whether the admission was material – *i.e.*, whether Berkley still could have contested Tindall’s liability notwithstanding the admission. But the clause at issue prohibits “admit[ting] *any* liability,” regardless of whether the insurer – or the insured – would later have been harmed by the admission. J. App’x at 48 (emphasis added). In this case, “compliance with the requirement is a condition precedent to coverage,” and as such “the insurer need not show prejudice” to deny the claim. *Seaport Park Condo.*

v. Greater New York Mut. Ins., 828 N.Y.S.2d 381, 384 (1st Dep’t 2007) (citing *Great Canal Realty Corp. v Seneca Ins.*, 5 N.Y.3d 742, 743 (2005), *abrogated on other grounds* by N.Y. Ins. Law § 3420). And while the New York Legislature has amended the state’s insurance law to expressly require a showing of prejudice for another common condition precedent to insurance coverage, *see* N.Y. Ins. Law § 3420(a)(5) (requiring insurer to establish prejudice before enforcing exclusion for failure to timely notify the carrier of a claim), it has not done so with respect to admission-of-liability clauses like the one here.

Accordingly, the district court did not err in concluding that Tindall breached the policy’s admission-of-liability provision.

II. The District Court Did Not Err in Rejecting Tindall’s Equitable Estoppel Argument.

Tindall next argues that Berkley should have raised the admission-of-liability clause as a defense to coverage *before* Tindall paid for the repairs, and that its failure to do so equitably estops Berkley from subsequently raising the defense. Again, we are not persuaded.

“Under New York law, equitable estoppel requires a showing of (1) [a]n act constituting a concealment of facts or a false misrepresentation; (2) [a]n intention or expectation that such acts will be relied upon; (3) [a]ctual or constructive

knowledge of the true facts by the wrongdoers; [and] (4) [r]eliance upon the misrepresentations [that] causes the innocent party to change its position to its substantial detriment.” *Gen. Elec. Cap. v. Armadora, S.A.*, 37 F.3d 41, 45 (2d Cir. 1994) (internal quotation marks omitted); see *Fundamental Portfolio Advisors v. Tocqueville Asset Mgmt.*, 7 N.Y.3d 96, 106 (2006). Tindall fails to make the required showing here, particularly with respect to the fourth element – detrimental reliance.

Tindall provided Berkley with notice of the claim on April 13, 2020, and had a company begin the repair work on May 26, a few weeks before Berkley ultimately rejected the claim on June 16, 2020. See App’x at 185, 898. According to Tindall, by not objecting to the repairs in May, Berkley “conceal[ed] . . . its intentions” to assert the admission-of-liability defense, causing Tindall to “proceed[] with the grouting and [insulation] coating work, which then allowed Berkley to argue in hindsight that Tindall had admitted or assumed liability.” Tindall Br. at 32. The problem with this argument is that Berkley’s assertion that Tindall admitted liability does not hinge on Tindall having started repairs in May. Tindall had *already* violated the admission-of-liability clause by conceding responsibility for the defects in the fall of 2019. See J. App’x at 622. Thus,

Tindall's suggestion that its breach of the policy was induced by Berkley's silence in May 2020 is incorrect. Accordingly, Tindall flunks the fourth prong of the equitable estoppel test.

To the extent Tindall instead argues that it would have mitigated its damages, contested its liability, or refused to pay for the repairs had it known that Berkley would deny coverage, Tindall points to nothing in the record to support that proposition. It began the repairs before it knew whether the claim would be covered and continued the repairs after the claim was denied. *See* App'x at 185, 898. In no sense then did Tindall "change its position" in "reliance" on Berkley, and the district court therefore did not err in declining to equitably estop Berkley from raising the admission-of-liability clause as a defense to Tindall's breach of contract claim. *Armadora, S.A.*, 37 F.3d at 45.

* * *

We have considered Tindall's remaining arguments and find them to be without merit. Because there is no genuine dispute of material fact that Tindall breached a condition precedent to coverage on its insurance policy, we **AFFIRM**

the district court's grant of summary judgment to Berkley.

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk of Court