

**Supreme Court of the State of New York**  
**Appellate Division: Second Judicial Department**

D24714  
O/hu

\_\_\_\_\_AD3d\_\_\_\_\_

Argued - September 18, 2009

WILLIAM F. MASTRO, J.P.  
RUTH C. BALKIN  
THOMAS A. DICKERSON  
PLUMMER E. LOTT, JJ.

---

2008-09849

DECISION & ORDER

Outlook Realty, LLC, appellant, v U.S. Underwriters  
Insurance Company, et al., respondents.

(Index No. 27568/07)

---

Mitchell & Incantalupo, Forest Hills, N.Y. (Thomas V. Incantalupo of counsel), for  
appellant.

Milber Makris Plousadis & Seiden, LLP, Woodbury, N.Y. (Lorin A. Donnelly of  
counsel), for respondents.

In an action for a judgment declaring that the defendants are obligated to defend and indemnify the plaintiff in an underlying action entitled *City of New York v Outlook Realty, LLC*, pending in the Supreme Court, New York County, under Index No. 400100/05, the plaintiff appeals from an order of the Supreme Court, Queens County (Cullen, J.), dated September 3, 2008, which granted those branches of the defendants' motion which were pursuant to CPLR 3211(a)(1) and to declare that they were not obligated to defend or indemnify the plaintiff in the underlying action.

ORDERED that the order is affirmed, with costs.

“Generally, it is [the burden] for the insured to establish coverage and for the insurer to prove that an exclusion in the policy applies to defeat coverage” (*Consolidated Edison Co. of N.Y. v Allstate Ins. Co.*, 98 NY2d 208, 218; *see Seaboard Sur. Co. v Gillette Co.*, 64 NY2d 304, 311; *Essex Ins. Co. v Pingley*, 41 AD3d 774, 776). In the instant case, the defendants conclusively established with documentary evidence that the policy exclusion for “independent contractors” “performing operations” for the plaintiff applied to defeat coverage for the instant loss (*see*

October 20, 2009

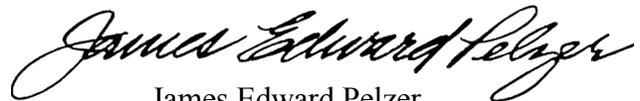
Page 1.

OUTLOOK REALTY, LLC v U.S. UNDERWRITERS INSURANCE COMPANY

*Metropolitan Heat & Power Co., Inc. v AIG Claims Servs., Inc.*, 47 AD3d 621, 622; *Brooklyn Hosp.-Caledonia Hosp. v Medical Malpractice Ins. Assn.*, 286 AD2d 410, 411). The plaintiff failed to refute that documentary showing. Accordingly, the Supreme Court properly granted those branches of the defendants' motion which were pursuant to CPLR 3211(a)(1) and to declare that they were not obligated to defend or indemnify the plaintiff in the underlying action.

MASTRO, J.P., BALKIN, DICKERSON and LOTT, JJ., concur.

ENTER:



James Edward Pelzer  
Clerk of the Court