

**Liberty Ins. Underwriters Inc. v Arch  
Ins. Co.**

2008 NY Slip Op 33237(U)

December 2, 2008

Supreme Court, New York County

Docket Number: 104396/08

Judge: Walter B. Tolub

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: **WALTER B. TOLUB**

PART \_\_\_\_\_

Justice

Index Number : 104396/2008

LIBERTY INSURANCE UNDERWRITERS, INC.

VS.

ARCH INSURANCE COMPANY

SEQUENCE NUMBER : # 001

PARTIAL SUMMARY JUDGMENT

INDEX NO. 104396-08

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. #001

MOTION CAL. NO. \_\_\_\_\_

are read on this motion to/for \_\_\_\_\_

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

is denied.

**IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION**

UNFILED JUDGMENT

This judgment has been filed with the County Clerk and notice of filing has been given to the County Clerk and not to the parties. To obtain copies of this judgment, the parties must appear in person at the Judgment Clerk's Desk (Room 1603).

Dated: 11/2/08

**WALTER B. TOLUB** J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 15

-----X

LIBERTY INSURANCE UNDERWRITERS INC.,  
Plaintiff,

Index No. 104396/08

-against-

ARCH INSURANCE COMPANY and ARCH  
INSURANCE GROUP,

Defendants.

-----X

**Walter B. Tolub, J.:**

This action is brought to determine, by declaration, the obligations of the two parties to defend and indemnify their insureds in an underlying personal injury action. Here, defendant Liberty Insurance Underwriters Inc. (Liberty) moves for partial summary judgment, and a declaration that defendant Arch Insurance Company (Arch) is required to indemnify the City of New York (the City) and the New York City Department of Environmental Protection (DEP) in an underlying personal injury action. Arch cross-moves to dismiss the complaint, and for a declaration that Liberty is required to defend and indemnify the City and DEP, and for an order compelling Liberty to reimburse Arch for legal fees it incurred prior to Liberty's acceptance of the defense and indemnification.

**I. Background**

Apparently, the City and DEP were involved in a construction

project, along with a party identified as Crescent Contracting Corp (Crescent). The DEP entered into a General Contract with Yonkers Contracting Co., Inc. (Yonkers) to perform work on the project.

Under the General Contract, Yonkers was required to, and did, purchase a Commercial General Liability policy of insurance. It acquired the policy from Arch, No. 11PKG2024901, for the period from July 1, 2005 to July 1, 2006 (Arch Policy). The Arch Policy contained an additional endorsement provision which required Arch to make additional insureds of any party for whom Yonkers was required, by contract, to have named as an additional insured in a policy purchased by Yonkers. Apparently, the General Contract did require Yonkers to obtain such coverage. The additional insured endorsement also provided that "[c]overage afforded to these additional parties will be primary to, and non-contributory with, any other insurance available to that person or organization." Notice of Motion, Ex. C.

Meanwhile, Crescent had its own Commercial General Liability policy for the period in question, issued to it by Liberty. Notice of Motion, Ex. D. The Liberty policy contains an "other insurance" clause, in an amendment to the policy, which reads:

[i]f other valid and collectible insurance is available to any insured for a loss we cover under Coverage A or B of this coverage part, then this insurance is excess of such insurance and we will have no duty to defend any claim or "suit" that any other insurer has a duty to defend.

Carmine Depalma, an employee of Yonkers, was involved in an accident on November 15, 2005, resulting in his being injured. He commenced an action against Crescent, the City and DEP in March 2006, entitled *Depalma v Crescent Contracting Corp.* (Index No. 13364/06 [Sup Ct, Bronx County]) (the *Depalma* action).

In a letter to the City and DEP dated April 12, 2006 (Notice of Cross Motion, Ex. E), Arch, through its attorneys, agreed to provide a defense and to indemnify the City and DEP in the *Depalma* action. Regardless of this letter, Arch served a tender letter on Liberty's counsel, dated April 19, 2006, requesting that Liberty, on behalf of Crescent, assume the defense and indemnification of the City and DEP. *Id.*, Ex. F. In a letter dated May 30, 2006 (*id.*, Ex. G), Liberty agreed to take over the indemnification and defense of the City and DEP. The May 2006 acceptance letter stated that Liberty was "willing to undertake" this obligation, and contained no reservation of rights whatsoever.

Liberty defended the City and DEP in the *Depalma* action for two years. Three days after a pre-trial conference was held in the *Depalma* action, Liberty sent a letter to the City Law Department, dated March 1, 2008, purporting to reserve Liberty's rights, stating that Liberty would not indemnify the City or DEP in the *Depalma* action "if there is no liability on the part of Crescent," which did not appear to be the case. *Id.*, Ex. H.

Liberty noted in the letter that its policy was excess to Yonkers' policy.

Arch followed up Liberty's reservation of rights letter, in a letter dated June 3, 2008, in which Arch refused to re-assume the defense of the City and DEP. *Id.*, Ex. I. At this time, Liberty continues to provide the City and DEP with a defense in the *Depalma* action.

In the present action, Liberty alleges two causes of action against Arch: one, for a declaration that Arch is obligated to assume the defense and indemnification of the City and DEP in the *Depalma* action; and two, that Arch's coverage is primary to Liberty's policy, which provides only excess coverage. Arch does not dispute that the City and DEP are additional insureds under its policy.

## II. Discussion

Liberty's case is based on the plain language of the two insurance policies, wherein Arch's "other insurance" provision provides that Arch's coverage of its additional insureds is primary and non-contributory (Arch Policy, Notice of Motion, Ex. C), while Liberty's coverage, under its policy, is excess of other valid and collectible insurance, preventing Liberty from having to provide a defense in any suit in which the "other insurer" has a duty to defend.

Arch's defense is based on the doctrine of equitable

estoppel. Arch maintains that Liberty agreed to provide a defense to, and to indemnify, the City of New York and DEP without any reservations, and has done so for years. In doing so, Arch contends that Liberty cannot now claim that it is not the City and DEP's primary insurer.

In support of its theory of equitable estoppel, Arch cites to the cases *Donato v City of New York* (156 AD2d 505 [2d Dept 1989]), and *Fireman's Fund Insurance Company v Zurich American Insurance Company* (37 AD3d 521 [2d Dept 2007]). In *Donato*, the Appellate Division, Second Department, held that, even though an insurance company was not the insurer of the party it had "unqualifiedly" agreed to defend and indemnify in an underlying action, once it had assumed those obligations, it was bound to continue under the doctrine of equitable estoppel. The *Donato* Court further held that "since [the insurer's] primary coverage is based upon estoppel, rather than upon coinsurance policies or contribution principles, application of the principle of pro rata coverage is inappropriate under the circumstances." *Id.* at 508.

Likewise, in *Firemen's Fund*, the Appellate Division, Second Department, found that, an insurer, "[h]aving accepted tender of the defense, without reserving its rights to disclaim coverage," is estopped from requesting contribution. *Id.* at 522.

Arch, based on these cases, maintains that Liberty, having voluntarily assumed the full defense and indemnification of the

City and DEP, is estopped from changing its mind and disclaiming.

Liberty retorts that Arch is relying on irrelevant Second Department precedent, which allegedly diverges from that followed in the Appellate Division, First Department. According to Liberty, the cases Arch should be addressing are those involving timely disclaimer under Insurance Law § 3402 (d).

In one such case, cited by Liberty, *AIU Insurance Company v Investors Insurance Company* (17 AD3d 259, 260 [1st Dept 2005]), the Court, interpreting Insurance Law § 3402 (d), stated that "the duty to disclaim as soon as is reasonably possible ... is not triggered where, as here, the request is for contribution by a coinsurer." See also *Sixty Sutton Corp. v Illinois Union Insurance Co.*, 34 AD3d 386, 338 (1st Dept 2006) ("[b]ecause [an insurer] was requesting defense and indemnification from a co-insurer, the requirements of section 3420 [d] are inapplicable").

Liberty errs when it compares Second Department estoppel cases to First Department Insurance Law notice cases, and finds them competing; the cases simply do not address the same issue. Liberty relies on cases involving timely disclaimer, but late notice is not the issue here. The issue is whether equitable estoppel applies to the circumstances of this action regardless of when notice was given to Arch that Liberty did not wish to further entertain the defense in the *Depalma* action. This court finds that equitable estoppel does apply.

