

**Hotel Des Artistes, Inc. v General Accident  
Insurance Company of America**

2002 NY Slip Op 30014(U)

December 23, 2002

Supreme Court, New York County

Docket Number: 0107029/7029

Judge: Barbara R. Kapnick

Republished from New York State Unified Court  
System's E-Courts Service.  
Search E-Courts (<http://www.nycourts.gov/ecourts>) for  
any additional information on this case.

This opinion is uncorrected and not selected for official  
publication.

PRESENT: BARBARA R. KAPNICK  
Justice

PART 12

Hotel Des Artistes

INDEX NO. 107029/01

- v -

General Accident

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

MOTION SEQ. NO. 002

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

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

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

Answering Affidavits - Exhibits \_\_\_\_\_

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

PAPERS NUMBERED

**SCANNED**

JAN 06 2003

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH  
ACCOMPANYING MEMORANDUM DECISION

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

Dated: 12/23/02



J.S.C.

Check one:  FINAL DISPOSITION

NON-FINAL DISPOSITION  
**BARBARA R. KAPNICK**  
J.S.C.

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 12**  
-----X  
HOTEL DES ARTISTES, INC.,

Plaintiff,

-against-

**DECISION/ORDER**  
Index No. 107029/01  
Motion Seq. No. 002

GENERAL ACCIDENT INSURANCE COMPANY  
OF AMERICA n/k/a CGU INSURANCE COMPANY,

Defendant.

..... X

**BARBARA R. KAPNICK, J.:**

Plaintiff Hotel des Artistes ("Hotel") previously moved for summary judgment declaring that defendant General Accident Insurance Company of America n/k/a CGU Insurance Company ("CGU") was required to defend plaintiff in a lawsuit that was brought against it by its tenant, Café Des Artistes ("Café") and to indemnify Hotel for the sums paid by it in settlement of the underlying action. Defendant cross-moved for summary judgment dismissing the complaint on the ground that it had no duty under its commercial general liability policy to defend and/or indemnify plaintiff in the underlying action since the claims therein arose from Hotel's alleged failure to perform or comply with terms contained in a contract, not as a result of property damage caused by any negligence on the part of the plaintiff.

By Decision and Order dated April 9, 2002, this Court found that three out of the four causes of action alleged in the

complaint in the underlying action sounded in breach of contract, rather than tort, and thus did not give rise to a duty on the part of defendant to defend and/or indemnify plaintiff under the terms of the policy.

However, this Court found that the first cause of action of the underlying complaint which alleged that Hotel des Artistes breached its duty under the Lease to promptly repair and restore the leased premises following the fire and which sought reimbursement of the amount spent by Café des Artistes to repair and restore the Café so that it could resume operation of its Restaurant triggered defendant's obligation to defend plaintiff since the property damage was initially caused by the fire independent of Hotel's contractual obligations.

The defendant's cross-motion was consequently denied and plaintiff's motion for summary judgment granted to the extent of declaring that defendant was required to defend plaintiff in the underlying lawsuit. That portion of plaintiff's motion seeking an order declaring that defendant was required to indemnify it for the sums paid in settlement of the underlying action was denied based on this Court's finding that an issue of fact existed as to what portion, if any, of the total settlement amount was attributable to the claims raised in Café's first cause of action against Hotel.

Plaintiff now moves for an order granting it leave to reargue

its prior motion and, upon reargument, granting summary judgment declaring that as a matter of law defendant is liable for the defense costs it incurred in the underlying action and for the sums paid by Hotel in settlement of that action.

defendant cross-moves for an order granting it leave to reargue its prior cross-motion for summary judgment and, upon reargument, declaring that it had no obligation to either defend or indemnify Hotel in the underlying action.

Defendant's cross-motion for leave to reargue is granted based on the papers submitted and upon reargument, this Court finds that it erroneously concluded that Café's first cause of action triggered defendant's duty to defend Hotel.

It is well settled that the duty of the insurer to defend the insured rests on whether the complaint, liberally construed, alleges any facts or grounds which arguably fall within a risk covered by the policy. See, Servidone Constr. Corp. v. Security Insur. Co., 64 N.Y.2d 419 (1985)

Upon reconsideration, this Court finds that the first cause of action alleged solely that Hotel breached its contractual duty under Café's Lease and did not contain any allegation that Hotel negligently caused the fire and the resulting property damage to Cafe's property.

Thus, the underlying complaint, even when liberally construed, failed to allege any facts or grounds which arguably fall within the terms of this policy.

Accordingly, it is hereby

**ORDERED** and **ADJUDGED** that defendant had no obligation to either defend or indemnify plaintiff in the underlying action, and plaintiff's complaint is dismissed.

Plaintiff's cross-motion for leave to reargue is consequently denied.

This constitutes the decision and order of this Court.

Dated: December 23, 2002

  
\_\_\_\_\_  
BARBARA R. KAPNICK

J.S.C.

BARBARA R. KAPNICK  
J.S.C.