

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

2002 NY Slip Op 30015(U)

April 9, 2002

Supreme Court, New York County

Docket Number: 0107029/7029

Judge: Barbara R. Kapnick

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

PRESENT: Kapnick  
Justice

PART 12

Hotel Des Artistes Inc,  
- v -  
General Accident Ins

INDEX NO. 107029-0  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. 001  
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 Affidavit3 \_\_\_\_\_

PAPERS NUMBERED  
\_\_\_\_\_  
\_\_\_\_\_

**SCANNED**  
APR 17 2002

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: 4/9/02

[Signature]

Check one:  FINAL DISPOSITION

NON-FINAL DISPOSITION

**BARBARA R. KAPNICK**

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK : IA PART 12

----- X

HOTEL DES ARTISTES, INC.,  
  
Plaintiff,

**DECISION/ORDER**  
Index No. 107029/01  
Motion Seq. No. 001

- against -

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

Defendant.  
-----X

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

Plaintiff Hotel Des Artistes, Inc. ("Hotel") moves for summary judgment declaring that defendant General Accident Insurance Company of America n/k/a CGU Insurance Company ("General Accident") was required to defend Hotel in a lawsuit that was brought against it by its tenant, Café Des Artistes (the "Café"), and to indemnify Hotel for the sums paid by it in settlement of the underlying action. General Accident cross-moves for summary judgment dismissing the complaint.

There is no dispute that General Accident issued a Commercial General Liability insurance policy (the "Policy"), with Hotel as one of the named insureds, which provided primary insurance coverage for the policy period of December 17, 1997 to December 10, 1998. The Policy provides, in relevant part, as follows:

Section 1 - 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 damages" to which this insurance applies. ... 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.

The policy also contained the following exclusions:

2. Exclusions

This insurance does not apply to:

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...

\* \* \*

- m. Damage to Impaired Property or Property Not Physically Injured

- . "Property" damage to "impaired property" or property that has not been physically injured, arising out of:

\* \* \*

- (2) A delay or failure by you or anyone acting on your behalf to perform a contract or agreement in accordance with its terms.

The policy defines an insured contract to mean, among other things:

- a. A contract for a lease of premises. However, that portion of the contract for a lease of premises that indemnifies any person or organization for damage by fire to premises while rented to you or temporarily occupied by you with permission of the owner is not an 'insured contract'."

On or about September 1, 1995, Hotel entered into a lease agreement with Café (the "Lease"), pursuant to which Café leased portions of the main floor and basement of the Hotel building, located at 1 West 67th Street in Manhattan, for use as a restaurant (the "Restaurant"). On December 23, 1997, a fire occurred in the Restaurant, causing extensive damage. As a result, Café was required to close the Restaurant for some time.

On or about January 22, 1999, Café commenced a lawsuit against Hotel alleging four causes of action. The first cause of action alleges that Hotel breached its duty under the Lease to promptly repair and restore the leased premises following the fire, and seeks reimbursement of the amount spent by it to repair and restore the Cafe so it could resume the operation of the Restaurant. The second cause of action alleges that Cafe submitted a claim to its

business interruption insurer - USF&G - who denied that portion of the claim for the period after which, the insurer claimed, repairs should have been completed. This cause of action seeks recovery of that portion of the business interruption loss that USF&G did not pay. The third cause of action demands that Hotel reimburse Café for expenditures it made in connection with repairs to the public and structural portions of the building for which Hotel was allegedly responsible. This cause of action, which is unrelated to the damage caused by the fire, seeks recovery of the sums that Café spent on those repairs. The fourth cause of action seeks attorney's fees, pursuant to the Lease.

By letter dated February 2, 1999, General Accident notified Hotel that it was disclaiming coverage in the underlying action. The letter specifically stated that,

"Upon review of your policy and the allegations in the complaint, we must advise you that there is no coverage for this lawsuit. Your policy does not cover a claim for "Breach of Contract." We do not cover the liability for failure to perform or comply with the terms contained in a contract. It is alleged that the Hotel Des Artistes, Inc. failed to restore the structure of the premises back to its pre-accident state in a timely manner based on the lease signed by both entities on or about September 1, 1995. There is no damages alleged that would qualify under the definition of "bodily injury", "property damage", "personal injury" or "advertising injury" which are the only damages your policy covers."

An insurance company's duty to defend its policyholder is broader than its duty to indemnify. Fitzpatrick v. American Honda Motor Co., 78 N.Y.2d 61 (1991); Seaboard Surety Comsanv v. The Gillette Comsanv, 64 N.Y.2d 304, 310 (1984). Whether an insurance company has a duty to defend is determined by comparing the terms of the governing insurance policy with the allegations contained in the underlying complaint. Fitzpatrick, supra. The duty to defend is triggered unless the insurer can establish "as a matter of law, that there is no possible factual or legal basis on which the insurer might eventually be obligated to indemnify [the policyholder] under any provision contained in the policy." Villa Charlotte Bronte, Inc. v. Commercial Union Ins. Co., 64 N.Y.2d 846, 848 (1985); see also, International Paper Co. v. Continental Cas. Co., 35 N.Y.2d 322 (1974).

Hotel's claim that General Accident had a duty to defend is based on Hotel's characterization of the underlying complaint as alleging "**four** causes of action seeking damages from [Hotel] for destruction of property and loss of use of the [Café] as a result of the December 23, 1997 fire." As summarized above, the Café's third cause of action is unrelated to the fire, and its fourth cause of action (for attorney's fees) arises out of the Lease.

To be sure, the second cause of action in the underlying complaint would not have accrued but for the fire. However, the second cause of action sounds in contract, not in tort, and the gravamen is not that Hotel is liable to the Café for the damage done by the fire, but, rather, that Hotel breached a contractual duty owed to its tenant.

Thus, the second cause of action is similar to the facts in Georse A. Fuller Co. v. United States Fid. and Guar. Co., 200 A.D.2d 255 (1<sup>st</sup> Dep't 1994); lv. to app. den. 84 N.Y.2d 806 (1994). There, as defendant argues is the case here, all the allegations in the underlying complaint "relate to [the insured's] failure to meet its contractual obligations." Id. at 259; see also, Willets Point Contr. Corp. v. The Hartford Ins. Group, 75 A.D.2d 254 (2d Dep't 1980), aff'd, 53 N.Y.2d 879 (1981). The fact that Hotel's contractual obligations were triggered by an event that constituted "property damage," and an "occurrence" within the meaning of the Policy, does not make those obligations anything other than contractual.

However, although the first cause of action of the underlying complaint also contains language suggesting a claim for breach of contract, unlike the second cause of action, it did not seek damages incurred as a result of Hotel's breach of its Lease obligation to promptly repair and restore the leased premises following the fire. Rather, Cafe's first cause of action sought to

recover for property damage initially caused by the fire independent of Hotel's contractual obligations. See, generally, Touchette Corp. v. Merchants Mut. Ins. Co., 76 A.D.2d 7 (4<sup>th</sup> Dep't 1980).

Thus, this Court finds that defendant's obligation to defend Hotel was triggered by Café's first cause of action.

Accordingly, Hotel's motion for summary judgment is granted to the extent of declaring that General Accident was required to defend Hotel in the lawsuit brought against it by Café. Consequently; defendant's cross-motion for summary judgment dismissing plaintiff's complaint is denied.

That portion of plaintiff's motion seeking summary judgment declaring that defendant was required to indemnify it for the sums paid in settlement of the underlying action is also denied, since there remains an issue of fact as to what portion, if any, of the total settlement amount was attributable to the claims raised in Cafe's first cause of action against Hotel.

Counsel for both parties are directed to appear for a settlement conference in IA Part 12, 80 Centre Street, Room 308 on May 8, 2002 at 10:00 a.m.

This constitutes the decision and order of this Court.

Dated: April 9, 2002

  
BARBARA R. KAPNICK  
J.S.C.

BARBARA R. KAPNICK  
J.S.C.