

**Chelsea Associates, LLC v Laquila- Pinnacle**

2004 NY Slip Op 30024(U)

January 22, 2004

Supreme Court, New York County

Docket Number:

Judge: Paul G. Feinman

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY  
PRESENT: HON. PAUL G. FEINMAN PART 7

Justice

Chelsea Associates, LLC, Turner Construction Company,  
Albanese Development Corporation and Liberty Mutual

INDEX NO. 112357/02  
MOTION DATE 1/5/04  
MOTION SEQ. NO. 002  
MOTION CAL. NO. \_\_\_\_\_

- v -

Laquila-Pinnacle and Gerling America Insurance Company.

The following papers, numbered 1 to 3 were read on this motion to/for summary judgement.

Notice of Motion/Petition-- Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_  
Answering Affidavits — Exhibits \_\_\_\_\_  
Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED	
1	_____
2	_____
3	_____

**SCANNED**

~~JAN 29 2004~~

**SCANNED**

JAN 30 2004

Cross-Motion:     Yes     No

Upon the foregoing papers, it is ordered that this motion for summary judgment is DENIED in accordance with the annexed memorandum decision and order.

**FILED**

FEB - 2 2004

COUNTY CLERK'S OFFICE  
NEW YORK

Dated: January 22, 2004

Paul G. Feinman  
HON. PAUL G. FEINMAN  
J.S.C.

Check one:     FINAL DISPOSITION     NON-FINAL DISPOSITION

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IA PART 7

-----X  
CHELSEA ASSOCIATES, LLC, TURNER  
CONSTRUCTON COMPANY, ALBANESE  
DEVELOPMENT CORPORATION, and LIBERTY  
MUTUAL INSURANCE COMPANY

Plaintiffs,

Index No. 112357/02

against

Motion Seq. No. 002

LAQUILA-PINNACLE and GERLING  
AMERICA INSURANCE COMPANY,  
Defendants.

**DECISION AND ORDEK**

-----X

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Papers considered in review of this mton for summary judgment:

<b>Papers</b>	<b>Numbered</b>
Notice of Motion arid Affidavits Annexcd.....	<u>1</u>
Answering Affidavits.....	<u>2</u>
Replying Affidavits.....	<u>3</u>

**PAUL G. FEINMAN, J.:**

In this declaratory judgment action, plaintiffs move for summary judgment pursuant to CPLR 3212. Plaintiffs seek a declaration in their fnvor that they are entitled to recover the reasonable costs of defending them in an action captioned *Vincent Langella and Roxanne Langella v Chelsea Associates, LLC, Turner Construction Company and Albanese Development Corporation* (Supreme Court, New York County, Index. No. 109557/00) [“the underlying action”]. They also seek a declaration that they arc entitled to full indcmnification against any recovery in the underlying action. Upon consideration of the above-enumerated

[\* 3 ]

papers, the plaintiffs' motion is denied.

The plaintiff in the underlying action, Vincent Langella, worked as a laborer for Laquila Construction, Inc.-Pinnacle Concrete Corp., a Joint Venture, which company was hired as a subcontractor by Turner Construction pursuant to an agreement dated October 14, 1998. Langella was injured when exiting the job site on July 26, 1999. He subsequently commenced an action alleging negligence and violations of Labor Law § 200. Turner and the other defendants commenced a third party action against Langella's employer, Laquila-Pinnacle, seeking contractual and common-law indemnification and contribution, and partial contractual indemnification. Laquila-Pinnacle counterclaimed for contribution.

Turner subsequently moved for summary judgment and dismissal of the complaint and all counterclaims and cross claims. Laquila-Pinnacle cross moved for summary judgment. Turner's motion was denied in a decision and order dated October 28, 2002 by the Hon. Louise Gruner Gans (Not. of Mot. Ex. L, Decision, *Vincent Langella v Chelsea Assocs., Turner Construction, et al.*, [Sup. Ct., New York County, Ind. No. 109557/00, Mot. Scq. No. 002]). That court held there were questions of fact as to whether Turner supervised or controlled the entity which built the ramp on which Langella tripped and fell, whether the condition was open and obvious, and whether Turner had notice of the ramp's condition. The court also held there was a question as to whether Turner was responsible for Langella's fall, which would bar its seeking full contractual indemnification for its own negligence. In addition, there was a question as to whether Langella was actually engaged in work arising under the contract between Turner and Laquila-Pinnacle at the time of his accident, or whether he was simply walking to the job site following his lunch break. Based on these material questions of fact, the court in the underlying

action denied Laquila-Pinnacle's cross motion for summary judgment and dismissal of the first and third causes of action of the third party complaint related to indemnification. The remaining causes of action of the third party complaint were dismissed.

On January 29, 2003, the eve of trial in the underlying action, Turner and the other defendants settled the matter with Laigella for \$305,000. They rejected Laquila-Pinnacle's offer to contribute \$50,000 and chose instead to pursue this declaratory judgment action.

In the instant action, plaintiffs and their insurer seek a declaration that Laquila-Pinnacle and its insurer, GAIC, are obligated to indemnify them for the settlement cost in the underlying action. They note that the parties' contractual agreement required Laquila-Pinnacle to procure and maintain commercial liability insurance naming Turner *as* an additional insured, which coverage was to include protection for Turner from claims arising out of the liability assumed under the indemnification provisions.<sup>1</sup> They contend that GAIC failed to timely decline coverage,<sup>2</sup> citing, among others, *Hartford Ins. Co. v County of Nassau*, 46 NY2d 1028 (1979) (delay of two months is unreasonable when there is no explanation for the delay).

Plaintiffs' arguments are unpersuasive however, given that it was previously held by Justice Gans that there is a question of fact as to whether Turner is liable for plaintiff's accident which, if true, would preclude its indemnification under General Obligations Law § 5-322.1. Furthermore, there simply has been no determination as to whether the plaintiffs *or* the

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<sup>1</sup>The October 28, 2002 decision by Justice Gans states explicitly that Laquila-Pinnacle acquired the necessary insurance policy, and dismisses the third party claim of breach of agreement to procure insurance (see Not. of Mot. *Ex. L*, Decision at 5-6).

<sup>2</sup>Liberty Mutual wrote to GAIC on August 8, 2000, requesting it assume the defense and indemnification of Turner. GAIC investigated and responded by letter dated September 15, 2000, declining to cover (see Not. of Mot. *Ex. J*, Notice to Admit, *exh. D,E*).

defendants are liable in whole or in part for Langella's injuries, in part because there has been no finding that Langella was actually injured during the course of his work arising under the contract between the parties.

Notably absent from movants' papers is any discussion of the preclusive effect of Justice Gans' prior order resolving the same issues presented in this motion. That decision was rendered after depositions, and thus the only changed circumstance is that the underlying action is now settled and the potential damages under the claim for indemnification fixed. However, all the material issues of fact previously identified by Justice Gans remain not further resolved. Thus, there is no basis for this court to ignore that decision and to not give collateral estoppel effect to it. For the reasons previously identified by Justice Gans, summary judgment remains inappropriate. It is therefore

ORDERED that the plaintiffs' motion for summary judgment is denied.

This constitutes the decision and order of the court.

Dated: January 22, 2004  
New York, New York



J.S.C.

**FILED**  
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