

**City of New York v Zurich American Insurance Co.**

2005 NY Slip Op 30111(U)

July 12, 2005

Supreme Court, New York County

Docket Number: 0402240/2003

Judge: Doris Ling-Cohan

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

PRESENT: Hon. DORIS LING-COHAN, Justice

PART 62

THE CITY OF NEW YORK,

Plaintiff,

- v -

ZURICH AMERICAN INSURANCE COMPANY,

Defendant.

INDEX NO. 402240/03  
MOTION DATE  
MOTION SEQ. NO. 003  
MOTION CAL.NO.

The following papers, numbered 1 to 5 were read on this motion to/for : renewal by defendant Zurich and plaintiff City's cross motion to stay proceedings pending determination of the parties appeals and to discontinue, without prejudice the cause of action seeking Indemnification from defendant Zurich.

Papers

Numbered

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

1,2

Notice of Cross Motion - Affidavits - Exhibits (Memo)

3,4

Replying Affidavits (Reply Memo)

5

Cross Motion:  Yes  No

**FILED**  
JUL 22 2005

Upon the foregoing papers, it is ordered that this motion is denied and the cross motion is granted, in part to the extent of allowing the City to discontinue, without prejudice, its cause of action for indemnification, for the reasons set forth below.

Background

This is a declaratory judgment action brought by plaintiff the City of New York (City) seeking, among other things, an order declaring that defendant Zurich American Insurance Company (Zurich) is obligated to defend and indemnify it in an underlying action entitled, *Melia Rothfeder and Abraham Rothfeder v City of New York and American Bridge Company*, Sup Ct Bronx County, Index No. 21891/02 (the *Rothfeder* action). The relevant facts are discussed in detail in the prior decisions and orders of this Court, entered on March 2, 2004 and December 16, 2004.

## Discussion

### 1. Motion by Zurich for Renewal

Zurich moves for renewal of the decision and order of this Court, entered on December 16, 2004, which denied its motion for summary judgment, after concluding that it failed to make a prima facie showing as to whether the City had an affirmative duty to inspect and supervise the work of the American Bridge Company (ABC), Zurich's insured, on a communications room at the elevated subway station, located at the intersection of Broadway and West 231<sup>st</sup> Street in Bronx, New York. The accident which caused Melia Rothfeder to trip and fall occurred in the roadway at that intersection. This Court further stated that the summary judgment motion by Zurich, as well as the City's cross motion for summary judgment were denied, subject to renewal based upon additional briefing and proof concerning the alleged duty of the city to inspect and supervise ABC's work.

Zurich seeks renewal of this Court's prior decision and order, based upon an alleged stipulation in the *Rothfeder* action discontinuing said action as against ABC, with prejudice. In an affirmation, Zurich's attorney asserts that this stipulation of discontinuance was executed after a deposition of ABC's witnesses in the underlying action revealed that the accident did not arise out of ABC's work. Therefore, Zurich maintains that the City is not entitled to defense and indemnification as an additional insured under the Zurich policy, as the injury did not arise out of work performed by ABC.

As the City points out, however, the stipulation cannot serve as the basis of renewal and summary judgment in favor of Zurich, as it was not signed by the City or "so ordered" by the court (see CPLR 3217 [a] [2] and [b]). Moreover, this alleged stipulation of discontinuance in the *Rothfeder* action cannot serve as the basis for collateral estoppel or issue preclusion in the instant declaratory judgment action, as the issues as to whether the accident occurred as the result of ABC's work and whether the City had a duty to inspect and supervise that work were not finally determined in the underlying action, nor did the parties have a full and fair opportunity to litigate these issues (see *Color by Pergament, Inc. v O'Henry's Film Works, Inc.*, 278 AD2d 92, 93-94 [1<sup>st</sup> Dept 2000]);

*Singleton Mgt, Inc. v Compere*, 243 AD2d 213, 217-218 [1<sup>st</sup> Dept 1998]).

Additionally, Zurich failed to provide any evidence, aside from a copy of the alleged stipulation and its attorney's unsubstantiated assertions as to what transpired during the depositions of ABC's witnesses in the *Rothfeder* action, to support its position that the accident did not occur as the result of ABC's work. It has repeatedly been held that the affirmation of an attorney who lacks personal knowledge of the facts, cannot provide the evidentiary basis for summary judgment (*see Zuckerman v City of New York*, 49 NY2d 557, 563 [1980]; *Bendik v Dybowski*, 227 AD2d 228, 229 [1<sup>st</sup> Dept]). Accordingly, Zurich has not demonstrated that it is entitled to renewal of this Court's December 16, 2004 decision and order.

Moreover, upon further consideration of this matter, this Court determines that partial summary judgment should be granted in favor of the City, to the extent of declaring that Zurich has a duty to defend the City in the *Rothfeder* action as an additional insured under the Zurich policy<sup>1</sup>. This Court bases its conclusion on the general principle that an insurer's duty to defend its insured is broader than its duty to indemnify and the duty to defend is based upon the four corners of the complaint in the underlying action, liberally construed. As the Court of Appeals has stated, "It is well established that the duty of an insurer to defend is broader than its duty to indemnify" (*Agoado Realty Corp. v United Intl. Ins. Co.*, 95 NY2d 141, 145 [2000]). "The duty to defend arises whenever the allegations in the complaint against the insured fall within the risks covered by the policy. If, liberally construed, the complaint is within the embrace of the policy, the insurer must come forward to defend its insured" (*id.*; *see also Frontier Insulation Contrs., Inc. v Merchants Mut. Ins. Co.*, 91 NY2d 169, 175 [1997]) ("The duty of an insurer to defend its insured arises whenever the allegations within the four corners of the underlying complaint potentially give rise to a covered claim, or where the insurer 'has actual knowledge of facts establishing a reasonable possibility of

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<sup>1</sup> CPLR 3212 provides, in pertinent part, "If it shall appear that any party other than the moving party is entitled to a summary judgment, the court may grant such judgment without the necessity of a cross-motion." To the extent that this decision and order is inconsistent with portions of this Court's prior decisions and orders, entered on March 2, 2004 and December 16, 2004, this Court recalls and vacates the portions of those decisions which conflict with this decision and order.

coverage”...[citation omitted]). An insurer can only be relieved of the duty to defend by establishing that the allegations of the underlying complaint are wholly within a policy exclusion, which is subject to no other reasonable interpretation and “that there is no possible factual or legal basis under which the insurer may eventually be held obligated to indemnify the insured under any policy provision” (*Frontier Insulation Contrs., Inc. v Merchants Mut. Ins. Co.*, 91 NY2d at 175; see also *City of New York v Certain Underwriters at Lloyd’s of London, England*, 15 AD3d 228 [1<sup>st</sup> Dept 2005]).

As has been noted in the December 16, 2004 decision and order of this Court, the complaint in the Rothfeder action contains allegations that the City had a duty to inspect and supervise ABC’s work and was negligent in its inspection and supervision (see Rothfeder complaint, at ¶¶ 19-20, 27 and 30). The allegations in the *Rothfeder* complaint concerning the City’s alleged breach of its duty to inspect and supervise ABC’s work are, thus, within the ambit of the Automatic Additional Insureds Endorsement of the Zurich Policy, to the extent that such allegations involve “liability arising out of ... “acts or omissions of the additional insured in connection with the general supervision of ‘your work’”. Accordingly, Zurich must come forward to defend the City in the *Rothfeder* action.

As the Court of Appeals has stated, “[t]he insured’s right to representation and the insurer’s correlative duty to defend suits, however groundless, false or fraudulent, are in a sense ‘litigation insurance’ expressly provided by the insurance contract” [*Servidone Constr. Corp. v. Security Ins. Co.*, 64 N.Y.2d 419, 423-424, quoting *Intl. Paper Co. v. Continental Cas. Co.*, 35 N.Y.2d 322, 325-326). “If the claims asserted, though frivolous, are within policy coverage, the insurer must defend irrespective of ultimate liability” (*Servidone Constr. Corp. v. Security Ins. Co.*, 64 N.Y.2d at 424).

Furthermore, this Court concludes that the City is entitled to reimbursement from Zurich for litigation expenses, including reasonable attorney’s fees, incurred in defending the *Rothfeder* action, after the date that Zurich received notice of said action from the City (see *ACP Servs. Corp. v St. Paul Fire & Marine Inc. Co.*, 224 AD2d 961, 963 [4<sup>th</sup> Dept 1996]; *New York Univ. v Royal Ins. Co.*,

200 AD2d 527, 528-529 [1<sup>st</sup> Dept 1994]).

## 2. The City's Cross Motion

The City cross-moves for and order (1) staying proceedings in this action before this Court pending the determination of the appeals of this Court's December 16, 2004 decision and order by both parties and (2) granting a voluntary discontinuance, without prejudice, of the City's claim for indemnification from Zurich.

This Court declines to stay the proceedings pending the determination of the parties' respective appeals. The parties are, however, free to pursue this issue before the Appellate Division. Moreover, the City is not entitled to an automatic stay of the proceedings, pursuant to CPLR 5519(a), as there has been no judgment entered against it in this action. Nevertheless, in view of the fact that this decision and order will affect the parties' appeals, the City is directed to serve a copy of it upon the Clerk of the Appellate Division, First Department and to notify that court of this decision and order.<sup>2</sup>

This Court does, however, grant that branch of the City's cross motion which seeks to voluntarily discontinue, without prejudice, the claim it has asserted against Zurich for indemnification in the *Rothfeder* action. The City recognizes the legal principle that, although an insurer's duty to defend an insured is determined based upon the pleadings in the underlying action, the duty to indemnify must await the final resolution of the underlying action (*see Spoor-Lasher Co., Inc. v Aetna Cas. and Sur. Co.*, 39 NY2d 875, 876-877 [1976]; *Lehrer McGovern Bovis, Inc. v Halsey Constr. Corp.*, 254 AD2d 333, 335-336 [2d Dept 1998]; *County of Orange v Hartford Acc. and Indem. Corp.*, 226 AD2d 578, 579 [2d Dept 1996]).

Accordingly, it is

ORDERED that the motion by defendant Zurich for renewal is denied; and it is further ORDERED, ADJUDGED and DECLARED that defendant Zurich American Insurance

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<sup>2</sup> Furthermore, this decision may affect the parties' decision as to continuing with the appeal of the previous decision and order.

Company is obligated to defend the City of New York in the personal injury action, entitled *Rothfeder v City of New York*, Sup Ct, Bronx County, Index No. 21891/02, as an additional insured under its Policy and to reimburse the City for litigation expenses, including reasonable attorney's fees, incurred in defending that action from the date that the City first provided Zurich with written notice of that action, until the date of the entry of this decision, order and judgment; and it is further

ORDERED, that within 60 days of entry of this decision, order and judgment, the City is directed to submit an accounting of the costs incurred in defending the *Rothfeder* action, and Zurich is directed to review and, should they agree with such costs, satisfy such defense costs incurred by the City within 45 days from receipt of the City's accounting or provide specific reasons for its disagreement within such time<sup>3</sup>. If the parties are unable to agree on the amount of the defense costs owed to the City, either side shall file a motion to set such costs with a copy of this decision, order and judgment attached, within 150 days of the date of entry<sup>4</sup>; and it is further

ORDERED that the cross motion of the plaintiff City of New York is granted, to the extent of authorizing the voluntary discontinuance, without prejudice, of the City's claims for indemnification by Zurich in the *Rothfeder* action, and the City's cross motion is otherwise denied; and it is further

ORDERED that, within thirty days of entry, the City shall serve upon all parties to this action and upon the Clerk of the Appellate Division, First Department, a copy of this decision and order, with notice of entry.

This constitutes the Decision and Order of the Court.

Dated: \_\_\_\_\_



ENTER: \_\_\_\_\_

Doris Ling-Cohan, JSC

**FILED**

JUN 22 2005

NEW YORK  
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Check One:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if Appropriate:  DO NOT POST

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<sup>3</sup> Settlement of such costs shall be filed with the clerk of this court and a copy provided to the Part Clerk (with a copy of this decision, order and judgment).

<sup>4</sup> Failure to comply may be deemed a waiver or default on this claim, as appropriate. The Court notes that the City's complaint requests \$250 per hour, plus out of pocket expenses and interest from August 15, 2002 though the date in which Zurich provides a defense. (Complaint, page 6).