

**Denihan Ownership Co., LLC v Commerce and  
Industry Insurance Co.**

2005 NY Slip Op 30252(U)

October 3, 2005

Supreme Court, New York County

Docket Number:

Judge: Herman Cahn

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.

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

PRESENT: ~~PERMAN CASE~~ Justice

PART 49

DENIHAN OWNERSHIP Co

INDEX NO.

601399/04

MOTION DATE

5/28/05

MOTION SEQ. NO.

003

- v -

MOTION CAL. NO.

Comeree and Insurer

The following papers, numbered 1 to Insurance Co were 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

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION IN MOTION SEQUENCE.

FILED

OCT - 3 2005

Dated: 10/3/05

Am Cal

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: IAS PART 49

-----X  
DENIHAN OWNERSHIP COMPANY, LLC, :  
: Index No. 601399/04  
Plaintiff, :  
- against - :  
COMMERCE AND INDUSTRY INSURANCE :  
COMPANY, a member of the American :  
International Group, :  
Defendant. :  
-----X

Herman Cahn, J.

Defendant moves (seq. no. 003) for partial summary judgment dismissing plaintiff's claim for coverage in connection with a pollution liability insurance policy, CPLR 3212. Plaintiff cross-moves for partial summary judgment on its said claim.

**Facts:**

Plaintiff is the owner of two parcels of real estate located on East 75<sup>th</sup> and 76<sup>th</sup> Streets in Manhattan. The East 75<sup>th</sup> Street parcel consists of five buildings containing two auto repair shops, a parking garage, a commercial office building, and a paved area (Notice of Cross-Motion Ex. 2). The parcel previously contained a dry cleaner (*id.*, at 18). The East 76<sup>th</sup> Street parcel contains a parking garage (Simons Aff. ¶ 5). Plaintiff initially retained non-party AKRF, Inc., an environmental consultant, in 1996, to conduct environmental assessments of the parcels, in order to identify any potential hazards (*id.*, ¶¶ 4-5). AKRF conducted Phase I and II environmental site assessments at that time (*id.*).<sup>1</sup>

---

<sup>1</sup> Marcus Simons, AKRF's president, explains that Phase I identifies possible hazards; Phase II studies the hazards located during the Phase I review process (Simons Aff. ¶ 4). Simons further explains that the impetus for the environmental assessments was plaintiff's

AKRF furnished plaintiff the 1996 Phase I and II reports that year (Denihan Aff. ¶

4). The Phase II report on the East 76<sup>th</sup> Street parcel uncovered solvent tanks, underground gasoline storage tanks, fuel oil tanks, and hydraulic oil drums, and leakage from one of the drums (Haas Aff. Ex. 1B at 1-2). AKRF further uncovered elevated levels of volatile organic compounds, methylene chloride, acetone, tetrachloroethylene, diadipate, benzene, and ethylbenzene (*id.*, at 2-8). While finding no evidence of widespread chlorinated solvent contamination of the soil, the reports did find that soil samples taken from areas closest to the solvent tanks had high levels of contamination (*id.*, at 9).

In 2000, plaintiff entered into a contract to sell the parcels to non-party Albanese Partners for \$10,000,000.00 (Denihan Aff. ¶ 5). Albanese, thereafter, contracted to sell the parcels to Lycee Francais de New York, for the purpose of constructing a school building. Plaintiff was contractually responsible for remediation efforts in connection with underground storage tanks, contaminated soil, and asbestos (*id.*). Plaintiff retained AKRF to perform the remediation, which commenced January 2001.

In October 2000, plaintiff purchased a “Cleanup Cost Cap Insurance” policy (the “CCC Policy”) from defendant (Notice of Motion Ex. 2). For a premium of \$100,000.00, defendant agreed to cover plaintiff’s cleanup costs in connection with the remediation, “in excess of the **Self-Insured Retention** incurred solely for **Cleanup**” (*id.*, at 2 [emphasis in original]). The “Self-Insured Retention” – i.e., a cap on the insured’s responsibility to absorb remediation costs – was fixed at \$1,127,587.00 (*id.* [Declarations], at 1). Any costs beyond that were covered

---

entering into a voluntary agreement with the New York State Department of Environmental Conservation, to clear the site of environmental hazards (*id.*, ¶ 10).

by the CCC Policy, to the extent of \$2,000,000.00 (*id.*). There is no dispute that defendant has already paid out that maximum sum to plaintiff in connection with the remediation effort lying at the heart of this lawsuit. The issue before the court in this lawsuit is whether defendant bears any further obligation arising out of a supplemental policy among the parties – the “Pollution Legal Liability Select Policy” (the “PLLS Policy”).

In December 2000, plaintiff purchased the PLLS Policy from defendant for a premium of \$42,213.00 (Notice of Motion Ex. 1A [Declarations] at 2). Central to the issues underlying this lawsuit is a coverage exclusion (the “Exclusion”) contained in Endorsement No. 11 to the policy (Notice of Motion Ex. 1A), which provides as follows:

It is hereby agreed that no coverage will be provided for Cleanup Costs, Claims or Losses arising from the Pollution Conditions associated with the following documents:

1. Asbestos Abatement Cost Estimate – Drafted by AKRF, Inc. dated April 26, 2000.
2. Storage Tank and Contaminated Soil Removal Cost Estimate – Drafted by AKRF, Inc. dated April 26, 2000.
3. Phase II Site Assessment Report East 76<sup>th</sup> Street Property NY, NY[.]

(*Id.*, at 1.)<sup>2</sup>

**Pollution Conditions** means the discharge, dispersal, release or escape of any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, medical waste and waste materials into or upon land, or any structure on land, the atmosphere or any watercourse or body of water, including groundwater, provided such conditions are not naturally present in the environment.

(*Id.*, at 11.)

---

<sup>2</sup> The year-2000 cost estimates referenced in the Endorsement (Items 1 and 2) were prepared at plaintiff’s request, preparatory to the sale to Albanese/Lyce Francais (Denihan Aff. ¶ 9).

Defendant maintains that the Exclusion was devised “[t]o avoid any potential overlap between (a) the Cleanup Cost Cap (CCC) policy coverage for the Site’s petroleum contamination and (b) the Pollution Liability Policy (PLS) coverage for new and different ‘Pollution Conditions’ . . . .” (Def. Br. at 10.)

AKRF ceased its remediation efforts in May 2001. In January 2002, a general contractor retained by Lycee Francais for the school construction discovered two underground tanks, as well as extensive chemical contamination across a large portion of the site, including fractured bedrock beneath the contaminated area. The complaint alleges that those precise conditions were “previously unknown and unidentified pollution conditions which extended across the entire site and down into the bedrock” (Complaint ¶ 11). The complaint further alleges that “[t]hese site wide pollution conditions were not identified in the Phase I and Phase II reports, and the costs of remediating this site wide pollution were not included in the cost estimates prepared by [AKRF]” (*id.*). Marcus Simons, AKRF’s senior vice president, supports those allegations by attesting that those conditions were “completely unknown prior to the start of the general excavation and was in no way indicated by any of the results of the testing done during the Phase II” (Simons Aff. ¶ 12 [emphasis in original]). Accordingly, plaintiff maintains that remediation costs for the newly discovered contamination are not within the Exclusion of Endorsement No. 11, and are supposed to be covered by the PLLS Policy. The PLLS Policy insures up to \$5,000,000.00, above a \$25,000.00 self-insured retention sum (Notice of Motion Ex. 1A). Plaintiff alleges that it has incurred a minimum of \$3,800,000.00 in covered costs (Complaint ¶ 29).

Defendant posits, inter alia, that the plain language of the Exclusion mandates denial of coverage for costs related to the conditions found during the Lycee Francais excavation, irrespective of AKRF's actual knowledge of their existence at the time of the 1996 Phase I and II reports, or at the time of the 2000 cost estimates.

The parties each move for partial summary judgment on the premise that the language of the PLLS Policy – specifically, Endorsement No. 11 – must be reasonably read to support their respective positions as to whether the newly discovered contamination is or is not covered.

***Discussion:***

Interpretation of an unambiguous contract is a question of law for the court, which may be decided on motion for summary judgment (*Evans v Famous Music Corp.*, 1 NY3d 452, 458 [2004] [“the law issue before us is a simple and familiar one: how should the parties’ contract be interpreted?”]). In that vein, “courts may not by construction add or excise terms, nor distort the meaning of those used and thereby make a new contract for the parties under the guise of interpreting the writing” (*Reiss v Financial Performance Corp.*, 97 NY2d 195, 199 [2001]).

The coverage exclusion contained in Endorsement No. 11 to the PLLS Policy provides that “no coverage will be provided for Cleanup Costs, Claims or Losses arising from the Pollution Conditions associated with” AKRF’s: Phase II Site Assessment Report for the East 76<sup>th</sup> Street parcel; Storage Tank and Contaminated Soil Removal Cost Estimate; and Asbestos Abatement Cost Estimate (Notice of Motion Ex. 1A [emphasis added]).

The words “arising out of,” “[w]hen used in an exclusion . . . are deemed to be broad, general, comprehensive terms ‘ordinarily understood to mean originating from, incident

to, or having connection with” (*New Hampshire Ins. Co. v Jefferson Ins. Co.*, 213 AD2d 325 [1<sup>st</sup> Dept 1995] [citation omitted]). There is no reason why that common sense construct should not also apply to the nearly identical phrase “arising from,” stated in the exclusion of Endorsement No. 11. Indeed, the definition itself states “originating from,” rendering the phrases “arising out of” and “arising from” virtually, if not literally, synonymous.

The words “associated with” are similarly amenable to the same type of common sense construct. “Associated” is defined as “connected, joined, or related . . . .” (Random House Webster’s College Dictionary 83 [1992].) “With” is defined as “in regard to” (*id.*, at 1530).

The above quoted contractual terms are unambiguous. The policy endorsement could have, but did not, employ language which might have excluded coverage only for types of contamination which AKRF positively discovered during its 1996 and 2000 inspections of the site. Rather, the Exclusion is carefully, yet simply, crafted to exclude a more expansive category of contamination; to wit, any contamination “arising from the Pollution Conditions associated with” AKRF’s: Phase II Site Assessment Report for the East 76<sup>th</sup> Street parcel; Storage Tank and Contaminated Soil Removal Cost Estimate; and Asbestos Abatement Cost Estimate (Notice of Motion Ex. 1A [emphasis added]). Interpreting “associated with” to mean “relating to,” as one reasonably must, the Exclusion is most reasonably construed to exclude from coverage any pollution condition which bears a relation to the AKRF reports – not necessarily uncovered in the reports, as plaintiff urges. In other words, as long as the condition found was “associated with” conditions discussed in the reports, it is excluded from coverage.

Supporting the reasonableness of this construction, defendant points out that the Exclusion was devised “[t]o avoid any potential overlap between (a) the Cleanup Cost Cap

(CCC) policy coverage for the Site’s petroleum contamination and (b) the Pollution Liability Policy (PLS) coverage for new and different ‘Pollution Conditions’ . . . .” (Def. Br. at 10 [emphasis added].) “New and different” conditions – not old ones which might not have been picked up by plaintiff or its contractor, AKRF.

With the foregoing in mind, the court takes particular note of the following aspects of AKRF’s 1996 Phase II Site Assessment Report for the East 76<sup>th</sup> Street parcel (Notice of Motion Ex. 1B):

1. It notes the past use of the site as a “dry-cleaning establishment” (*id.*, at 1);
2. It notes that “[d]ry cleaners represent an environmental concern because of their historic use of solvents” (*id.*);
3. AKRF’s testing program for the site focused, among other compounds, on “chlorinated and petroleum-based solvents used in dry cleaning operations” (*id.*, at 3);
4. Its “Conclusions and Recommendations” address soil contamination due to dry-cleaning solvents. The second paragraph of that section states that “[s]oil samples nearest the former solvent tanks exhibit elevated levels of Base Neutral Contamination, indicating that the former solvents used by the dry cleaning establishment might have also stored petroleum-based products” (*id.*, at 9);
5. It identifies environmental concerns posed by “the former presence of buried gasoline tanks and a buried fuel oil tank” (*id.*, at 1);
6. It identifies the presence of various gasoline storage tanks and hydraulic oil drums throughout the site (*id.*, at 1-2). Significantly, the report states that “[p]ast spills or leaks from this drum and others have the potential of causing petroleum contamination of the soil underlying the concrete” (*id.*, at 2 [emphasis added]);
7. It states that: “Underground gasoline storage tanks are likely still present within three of the four project site buildings. It is also possible that gasoline contamination of soil and perched water is present at the approximate locations of these former USTs<sup>3</sup>.” (*Id.*); and

---

<sup>3</sup> USTs are defined as underground storage tanks (Notice of Motion Ex. 1B at 1).

8. It identifies a 5,000-gallon fuel oil tank buried at the site, and warns of resultant contamination (*id.*, at 2-3).

Perhaps most significantly, the 1996 Phase II Assessment Report recommends that: “All underground tanks present on the site should be properly closed and removed as part of the demolition project. A contingency plan should be developed to deal with any additional tanks which may be uncovered during the excavation work.” (Notice of Motion Ex. 1B at 10.)

Thus, it would be difficult to suggest that the contamination uncovered during the excavation did not “aris[e] from the Pollution Conditions associated with” that Report (Notice of Motion Ex. 1A). AKRF’s actual knowledge of such contamination in 1996 (or 2000, discussed *infra*) is simply not a condition to exclusion, and is nowhere to be found in the Exclusion agreed to by the parties and which this court is obliged to enforce, pursuant to its unambiguous terms. Association, rather than knowledge, is the keystone to exclusion. The court finds such association to exist in abundance, as demonstrated by the foregoing findings and recommendations of AKRF.

The same is true of AKRF’s 2000 Storage Tank and Contaminated Soil Removal Cost Estimate (Notice of Motion Ex. 1C), which reports as follows, in pertinent part:

1. “[U]nderground conditions are unpredictable and actual quantities of contaminated soil may be many times the assumed value” (*id.*, at 1);
2. Various underground gasoline storage tanks and hydraulic tanks were located at the site (*id.*, at 1-2); and
3. Former dry-cleaning solvents at the site were petroleum-based, as well as the contents of tanks at the site (*id.*, at 2).

Thus, as with the 1996 Phase II Assessment Report, the 2000 Cost Estimate found the existence of the described contaminants and, importantly, recognized the possible existence

of others (which might only be detected through full-scale excavation, as occurred here).

The notion that the contamination found by Lycee Francais on excavation is not “associated with” the matters reported in the 2000 Cost Estimate is, as stated above in conjunction with the 1996 Phase II Assessment, simply wrong.

Consequently, plaintiff’s preoccupation with what AKRF knew in 1996 and 2000, or the extent of its survey of the property in those years, is misplaced. PLLS Policy Endorsement No. 11 simply does not make those factors dispositive of what is covered. Rather, it excludes claims and losses arising from Pollution Conditions associated with AKRF’s 1996 and 2000 reports. Those reports, as demonstrated, make clear reference to existing, as well as possible, conditions created by petroleum-based, or other, contaminants buried at the site.

Extrinsic matter is not admissible to define the parties’ duties under PLLS Policy Endorsement No. 11, which the court finds to be an unambiguous contract (*e.g.*, *ABS Partnership v Airtran Airways, Inc.*, 1 AD3d 24 [1<sup>st</sup> Dept 2003]). In addition, the “[m]ere assertion by one that contract language means something to him, where it is otherwise clear, unequivocal and understandable” does not raise an issue of fact (*Bethlehem Steel Co. v Turner Constr. Co.*, 2 NY2d 456, 460 [1957]).

In sum, a reasonable construction of the language of PLLS Policy Endorsement No. 11 requires the conclusion that the contaminants discovered during the Lycee Francais excavation are excluded from coverage thereunder, as they are associated with the assessment and cost reports specifically described in said endorsement. Therefore, defendant’s motion for partial summary judgment, dismissing the first cause of action under the PLLS Policy, is granted; plaintiff’s cross-motion for partial summary judgment on that cause is denied.

Accordingly, it is

ORDERED that defendant's motion for partial summary judgment, dismissing the first cause of action, is granted, and the same is hereby dismissed; and it is further

ORDERED that plaintiff's cross-motion for partial summary judgment, granting it judgment on its first cause of action, is denied; and it is further

ORDERED that the clerk shall enter judgment accordingly.

Dated: October 3, 2005

ENTER:

  
\_\_\_\_\_  
J. S. C.

**FILED**

OCT - 3 2005

NEW YORK  
COUNTY CLERK'S OFFICE