

**National Abatement Corp. v National Union Fire  
Insurance Co. of Pittsburgh, Pa.**

2006 NY Slip Op 30315(U)

April 5, 2006

Supreme Court, New York County

Docket Number:

Judge: Jane S. Solomon

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  
**JANE S. SOLOMON**

PART 55

PRESENT  
0603886/2002  
NATIONAL ABATEMENT  
VS  
NATIONAL UNION FIRE INS.  
SEQ 4  
REARGUMENT/RECONSIDERATION

IO. \_\_\_\_\_  
DATE 11/16/05  
SEQ. NO. \_\_\_\_\_  
CAL. NO. \_\_\_\_\_

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

Notice of Motion/ Order to Show Cause -- Affidavits -- Exhibits ...  
*Notice of Motion*  
Answering Affidavits -- Exhibits \_\_\_\_\_  
Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED	
1-3	
4-6	
7-8	

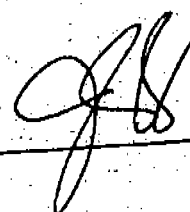
Cross-Motion:  Yes  No

Upon the foregoing papers, It is ordered that this motion

*is decided by attached memorandum decision order & judgment*

**UNFILED JUDGMENT**  
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or substituted representative must appear in person at the Judgment Clerk's Desk (Room 141B).

**JANE S. SOLOMON**



J.S.C.

Dated: 4/18/06

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 55

-----X  
NATIONAL ABATEMENT CORP. and NAC  
ENVIRONMENTAL SERVICES, CORP.,

Plaintiffs,

-against-

NATIONAL UNION FIRE INSURANCE  
COMPANY OF PITTSBURGH, PA,

Defendant.

-----X  
SOLOMON, JANE S., J.

In this declaratory judgment action, plaintiffs National Abatement Corp. and NAC Environmental Services, Corp. (together, NAC), assert a right to coverage as additional insureds under a policy (Policy) issued by defendant National Union Fire Insurance Company of Pittsburgh, Pa (National Union), to a now defunct subcontractor, American Standard Environmental Corp. (ASE). Plaintiffs seek reimbursement for all defense and indemnity costs incurred in the underlying action, *Andruszkiewicz v LaSalle Partners Inc.*, Kings County Index Number 35918/97 (Underlying Action). They obtained a default judgment for indemnification against ASE in the Underlying Action.

Plaintiffs move for leave to reargue a prior decision issued by another justice of this court (Prior Decision), dated April 13, 2005, to the extent that the court denied their motion for summary judgment declaring their rights under the Policy. Defendant cross-moves to reargue to the extent that the court

Index No. 603886/02  
**UNFILED JUDGMENT**  
This judgment has not been filed by the County Clerk and notice of entry cannot be based hereon. To obtain entry, counsel must appear in person at the County Clerk's Office (Room 141B).

denied its motion to dismiss the declaratory judgment action and also permitted plaintiff to amend the complaint to assert a direct cause of action against it under a Pennsylvania statute.

### **Factual Background**

#### **A. Kings County Action**

A worker was injured on March 25, 1997 during an asbestos removal project (Project) while employed by ASE. NAC was a sub-contractor on the Project, and it hired ASE as its sub-contractor. Under their contract, ASE was obligated to indemnify NAC. NAC impleaded ASE into the Underlying Action, and sought a judgment against it based upon contractual indemnification. When ASE failed to interpose an answer, NAC wrote a letter requesting that National Union appoint counsel to appear for ASE, and advised that its default motion would be withdrawn if an appearance were entered on behalf of ASE. The letter did not seek additional insured coverage at that time. National Union did not appear, and in May 2000, a motion by NAC for judgment in default against ASE was granted. Apparently, ASE was defunct by that time. In February 2001, the injured employee settled his claim against the owner and general contractor for \$400,000 to be funded 50% each by the general contractor and NAC. The general contractor's common law indemnification claim against NAC was severed and survived the settlement (see *Andrusziewski v Atlas*, 13 AD3d 325, 326 [2d Dept 2004]). Later that month, NAC advised

National Union of the settlement. NAC apparently entered a judgment in the Underlying Action against ASE in the amount of \$244,551, presumably in 2004 (the papers do not state when the Default Judgment was entered, and no copy of an entered judgment is submitted).

After a bench trial, the trial court in the Underlying Action found that the general contractor was entitled to common law indemnification from NAC. NAC appealed, and the Appellate Division, Second Department reversed the judgment and granted NAC a new trial. *Andrusziewski, supra*. NAC represents that it will seek to have the Default Judgment against ASE supplemented to include the amount it is required to reimburse the general contractor in the event it is not successful after the re-trial.

#### **B. New York County Actions**

In March 2001, NAC commenced an action in this court against American International Insurance Company. The defendant was affiliated with American International Group, Inc. (AIG), the insurance giant, but was not the entity that insured ASE. That action was dismissed, and this action against another AIG affiliate was commenced in October 2002. An incorrect affiliate again was named as defendant, and the parties stipulated to substitute National Union in September 2004. NAC seeks declaratory judgment that it is entitled to coverage as an "additional insured" pursuant to the terms of the Policy, which

contains an additional insured endorsement extending coverage to "Project Owners, Property Managers, and Project/General Managers where required by written contract". The Policy excludes coverage for "[b]odily injury' or 'property damage' for which the insured is obligated to pay damage by reason of the assumption of liability in a contract or agreement," unless liability is "[a]ssumed in a contract or agreement that is an 'insured contract'" (Sec N, § I- Coverage, (2) Exclusions). The Policy defined an "insured contract" as an agreement to assume "the tort liability of another" provided that "the contract or agreement is made prior to the 'bodily injury or property damage'" (*id.*, section V).

National Union moved to dismiss and NAC cross-moved for summary judgment, seeking a declaration of their rights as additional insureds under the Policy. NAC also moved to amend the complaint to assert a direct claim against National Union, and sought summary judgment on the claim. National Union opposed the motion to amend.

In the Prior Order, the court denied the motion to dismiss and cross motion for summary judgment on the additional insured coverage issue finding an issue of fact existed as to whether there was a sufficient written agreement as required by the Policy. It based its finding on the fact that there was an alleged oral agreement as to terms, according to NAC's vice

president. In addition, the court granted NAC's motion to amend the complaint to include a direct cause of action against National Union, but denied summary judgment on the basis that issues of fact exist as to whether an "insured contract" was in existence before the date of the accident.

NAC seek to reargue that portion of the Prior Decision that denied summary judgment on the direct cause of action, asserting that the court overlooked the law in that its right to collect is not an open issue, because NAC's Default Judgment against ASE on the contractual indemnification issue constitutes a finding that NAC and ASE had a written indemnity contract before the accident. In addition, NAC argues that since National Union chose not to participate in the Underlying Action, National Union cannot now collaterally attack those findings by asserting its defenses.

Defendant seeks to reargue those portions of the Prior Decision that denied its motion to dismiss the declaratory judgment and that permitted plaintiff to assert a direct claim against National Union. Defendant contends that the court overlooked the facts and the law in that the Subcontract requiring ASE to obtain indemnification on NAC's behalf had not been in existence on March 25, 1997, the date of the accident, and, thus, does not comply with the plain terms of the Policy. Defendant also argues that public policy does not permit a

contractor and subcontractor to be able to trigger coverage by signing an agreement to indemnify after an accident has occurred. It further asserts that the court improperly granted the motion to amend the complaint to assert a direct cause of action against them because (1) plaintiffs have not demonstrated that they are an "injured person" pursuant to the Statute, and (2) even if plaintiffs were able to bring a direct suit pursuant to the Statute, summary judgment would be premature since plaintiffs have not amended their complaint yet, and finally (3) even if summary judgment were not premature, plaintiffs would "stand in the shoes" of ASE and be subject to defendant's policy exclusions. Defendant maintains that the Policy excludes coverage to plaintiffs because they do not have proof of an "insured contract."

In opposition to defendant's cross motion, plaintiff argues that there is an issue of fact as to whether the Policy requires a written contract to be in existence at the time of the underlying accident and as to whether the Subcontract can be applied retroactively.

#### **Legal Analysis**

On a motion for reargument, the movant must show that the court either overlooked or misapprehended relevant facts, or misapplied controlling principles of law in determining the prior application (CPLR 2221[d][2]; *Amato v Lord & Taylor, Inc.*, 10 AD

3d 374 [2d Dept 2004]; *300 West Realty Co. v City of New York*, 99 AD2d 708 [1<sup>st</sup> Dept 1984]).

The motions to reargue are granted because the Court overlooked certain facts and law in its Prior Decision. Upon reargument, the Prior Decision is recalled and vacated, and replaced with this decision and order denying NAC's motion and granting National Union's requested relief in its entirety.

**A. Leave to Amend the Complaint Should Not Have Been Granted**

As noted in the Prior Decision, the motion and cross motion raise complex legal and factual issues which are complicated by the choice of law question. The parties agree that, for the purposes of this motion, Pennsylvania law applies. Pennsylvania's Direct Action Statute, Pa Stat Ann tit 40, § 117, permits an "injured person" who has an unsatisfied judgment in an action against an insolvent or bankrupt insured, to stand in the shoes of the defunct company and maintain an action against the insurer "under the terms of the policy, for the amount of the judgment in the said action, not exceeding the amount of the policy."

NAC has not met its burden to show that it qualifies as an "injured person" pursuant to the Statute or the Policy (see, *Folmar v Shaffer*, 332 A2d 821 [Pa Super 1974], one may not maintain a suit directly against an insurer to recover a judgment against the insured unless specifically permitted by statute or a policy provision). Accordingly, leave to amend the complaint to

add a claim under Pennsylvania's direct action statute should not have been granted because the proposed amendment is palpably insufficient as a matter of law (see *Ancrum v St Barnabas Hosp.*, 301 AD2d 474 [1<sup>st</sup> Dept 2003]).

Moreover, even if NAC was empowered by the Statute to bring a direct action, NAC stands in the shoes of ASE, the bankrupt insured, for purposes of seeking recovery from an insurer. NAC's right to a recovery from National Union is therefore coextensive with ASE's right, had ASE survived to assert it. To the extent that National Union could successfully assert its lack of writing exclusion against ASE, it may also assert such defense against NAC (*Brooks v American Centennial Ins. Co.*, 327 F3d 260 [3d Cir 2003]). In addition, while no Pennsylvania case has been cited in which the exact issue of insurance coverage is presented, the plain and unambiguous terms of the Policy supports defendant's position that in order to assert rights as an "additional insured" under the Policy, NAC must submit evidence of a writing requiring ASE to obtain coverage that existed prior to the accident.

**B. National Union Is Entitled to Summary Judgment Dismissing the Complaint.**

The Policy provides additional insured coverage only to "Project Owners, Property Managers, and Project/Managers where required by written contract" (emphasis added). The Policy

clearly excludes coverage for "[b]odily injury' or 'property damage' for which the insured is obligated to pay damage by reason of the assumption of liability in a contract or agreement," unless liability is "[a]ssumed in a contract or agreement that is an 'insured contract'" (Ex N, sec I- Coverage, (2) Exclusions). The Policy defined an "insured contract" as an agreement to assume "the tort liability of another" provided that "the contract or agreement is made prior to the 'bodily injury or property damage'" (id., §V).

"Under Pennsylvania law, '[w]hen a written contract is clear and unequivocal, its meaning must be determined by its contents alone. It speaks for itself and a meaning cannot be given to it other than that expressed' (citation omitted)." *Kiewit Eastern Co., Inc. v. L & R Construction Co., Inc.*, 44 F3d 1194, 1199 (3d Cir 1995). The Court will not assume an application that is inconsistent with the language of the contract (see *Brady v Borough of Dunmore*, 84 Pa.Cmnwlth. 331, 335, 479 A2d 59, 61 [1984]).

The fact that there was a written job proposal and oral agreement as to terms prior to the accident is insufficient to raise a triable factual issue as to compliance with the clear and unequivocal terms of the Policy which specifically required a writing that provided for indemnity (see also *Bester v Essex Crane Rental Corp.*, 422 PaSuper 178, 185, 619 A2d 304, 307 (1993))

(finding in the similar worker's compensation setting, that the agreement must "specifically use language which demonstrates that a named employer agrees to indemnify a named third party from liability for acts of that third party's own negligence which result in harm to the employees of the named employer" ) nor was the job proposal signed (see, *Pendrak v Keystone Shipping Co.*, 300 Pa Super 393, 396-397, 446 A2d 912 [1982], which required a signed writing at least one day prior to the date of the accident in the similar worker's compensation context). At best, the facts presented by NAC established that ASE and NAC had an oral agreement as to terms before the accident (see, *Hartman v Baker*, 766 A2d 347 [Pa Super 2000], parties' conduct evidenced formation of contract in accordance with terms of unsigned written memorandum).

NAC's efforts to raise an issue of fact as to whether the parties intended the Subcontract to apply retroactively are unavailing as plaintiff has failed to show that the Subcontract contains any terms regarding retroactivity (see, *Fulgham v Daniel J. Keating Co.*, 285 F Supp 2d 525, 535 [DNJ 2003], applying Pennsylvania law in the similar context of Worker's Compensation law, held that a contract signed nearly a month after the injury could not be applied retroactively). The Court will not insert additional terms into the contract in order to make it applicable to the present case. Rather, the parties have written their own

agreement and it is the duty of the Court to interpret and enforce that contract according to its terms (see *Brady*, 84 Pa Cmwlth at 335, 479 A2d at 61). Moreover, permitting retroactivity in this instance would appear to conflict with the public policy of Pennsylvania (*Rohm and Haas Co., v Continental Cas. Co.*, 732 A2d 1236, 1256 [Pa Super 1999]).

New York cases involving indemnification agreements in the context of the Worker's Compensation Law also require the movant to prove, based upon the express terms of the Subcontract, that there was an explicit intention that the contract was to be applied retroactively (*Elescano v Eighth-19<sup>th</sup> Co., LLC*, 13 AD3d 80 [1<sup>st</sup> Dept 2004]).

National Union is not collaterally estopped from raising its defenses for the first time herein. Collateral estoppel precludes a party from relitigating, in a subsequent action or proceeding, an issue raised in a prior action or proceeding and decided against that party or those in privity (*Ryan v New York Tel. Co.*, 62 NY2d 494, 500 [1984]). Its essential ingredients are: "[f]irst, the identical issue necessarily must have been decided in the prior action and be decisive of the present action, and second, the party to be precluded from relitigating the issue must have had a full and fair opportunity to contest the prior determination" (*Kaufman v Eli Lilly & Co.*, 65 NY2d 449,455 [1985], citing *Gilberg v*

*Barbieri*, 53 NY2d 285, 291 [1981]).

NAC has failed to demonstrate that National Union's defenses were necessarily decided when NAC was granted the Default Judgment on its contractual indemnification claims against ASE. National Union has demonstrated that it was not a party to the prior litigation and was not given a fair and full opportunity to be heard on this issue, and therefore it would be inequitable to prevent National Union from being heard now. In other words, ASE itself is liable on the default judgment, but its carrier is not.

Finally, that portion of the defendant's motion which seeks dismissal of the declaratory judgment action on the basis that plaintiff is not an "additional insured" pursuant to the Policy is granted for the reasons set forth above. Accordingly, it is

ORDERED that the motion and cross motion to reargue are granted, and the decision and order filed under motion sequence 03, and dated April 13, 2005, hereby is recalled, vacated, and replaced with this decision and order; and it is further

ORDERED that upon reargument, defendant's motion to dismiss filed under motion sequence 03 is granted in its entirety, and the complaint is dismissed, and the Clerk is directed to enter judgment accordingly with costs and disbursements as taxed; and it is further

DECLARED and ADJUDGED that NAC is not entitled to a defense and indemnification under the Policy for claims against it in the Underlying Action; and it further is

ORDERED that plaintiffs' cross-motion filed under motion sequence 03 for summary judgment or for leave to amend the complaint is denied.

DATED: April 6, 2006

ENTER:




---

J.S.C.  
**JANE S. SOLOMON**

**UNFILED JUDGMENT**  
 This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or a representative must appear in person at the Judgment Clerk's Desk (Room 141B).