

**Schechter v UVI Holdings, Inc.**

2007 NY Slip Op 31037(U)

April 26, 2007

Supreme Court, New York County

Docket Number: 0123520/2002

Judge: Barbara R. Kapnick

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

**BARBARA R. KAPNICK**

PRESENT: \_\_\_\_\_

PART 12

Index Number : 123520/2002  
SCHECTER, ROCHELLE

INDEX NO. 123520/02

vs  
UVI HOLDINGS, INC.

MOTION DATE \_\_\_\_\_

Sequence Number : 001

MOTION SEQ. NO. 001

SEVER ACTION

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 ...

PAPERS NUMBERED

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**

**FILED**

MAY 03 2007

NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 4/26/07

  
\_\_\_\_\_  
**BARBARA R. KAPNICK** S.C.  
J.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: PART 12

-----X  
ROCHELLE SCHECTER,

Plaintiff,

-against-

UVI HOLDINGS, INC., UVI HOLDINGS, LLC,  
AL SAED DELI GROCERY and AHMED HUSSEIN  
SENHOOB, JOHN DOE and JOHN DOE CORP.,

Defendants.

-----X  
UVI HOLDINGS,

Third-party plaintiff,

-against-

NABIL ABDULLAH and AHMED H. SENHOOB,  
individually and doing business as  
ALSADIY DELI & GROCERY,

Third-party defendants.

-----X  
NABIL ABDULLAH and AHMED H. SENHOOB,  
individually and doing business as  
ALSADIY DELI & GROCERY,

Fourth-party plaintiffs,

-against-

CENTURION INSURANCE COMPANY,

Fourth-party defendant.

-----X  
BARBARA R. KAPNICK, J.:

DECISION/ORDER

Index No. 123520/02

Index No. 590413/05

**FILED**  
MAY 03 2007

NEW YORK  
COUNTY CLERK'S OFFICE

Index No. 590769/05

In this action, plaintiff Rochelle Schecter seeks to recover damages for personal injuries she sustained on October 29, 1999 when she fell on the sidewalk located at 408 West 56th Street in Manhattan, at the front entrance of the Alsadiy Deli & Grocery.

A third-party action was brought by defendant/third-party plaintiff UVI Holdings, the owner and landlord of the building, against third-party defendants/fourth-party plaintiffs Nabil Abdullah and Ahmed H. Senhoob, individually and doing business as Alsadiy Deli & Grocery, seeking, inter alia, contribution and contractual and/or common law indemnification.<sup>1</sup>

There is no dispute that third-party defendants/fourth-party plaintiffs Abdullah (a/k/a Nabil Abdulla) and Alsadiy Deli & Grocery (a/k/a Al Saed Deli & Grocery) were insured under a Commercial General Liability policy issued by the fourth-party defendant Centurion Insurance Company s/h/a Centurian Insurance Company ("Centurion").

Section IV of the policy provides, in relevant part, as follows:

**2. Duties In The Event of Occurrence, Offense, Claim or Suit**

- a. You must see to it that we are notified as soon as practicable of an "occurrence" or an offense which may result in a claim...

\* \* \*

- c. You and any other involved insured must:

\* \* \*

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<sup>1</sup> Senhoob and the deli were also named as defendants in the main action, but it is not clear if they were ever served with the original summons and complaint.

- (3) Cooperate with us in the investigation or settlement of the claim or defense against the "suit";

\* \* \*

- d. No insured will, except at that insured's own cost, voluntarily make a payment, assume any obligation, or incur any expense, other than for first aid, without our consent.

By letter dated June 14, 2005, Centurion notified Messrs. Abdullah and Senhoob of its determination that it had no duty to defend and no obligation to indemnify them or the business on the grounds, inter alia, that it did not receive timely notice of the accident.

According to Centurion, its investigation revealed that (i) Mr. Abdulla was the sole owner of the deli at the time of the accident, (ii) that Mr. Abdulla admitted in a hand-written statement that he knew about plaintiff's alleged accident for about three years prior to informing Centurion (having received a phone call from the owner of UVI Holdings [his landlord] when he received the summons and complaint in the main action), and (iii) Mr. Senhoob was employed solely as the manager of the deli at the time of the accident.<sup>2</sup>

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<sup>2</sup> Abdullah's "employees" are considered, subject to certain exceptions, "insureds" under the policy pursuant to Section II ("Who Is An Insured"), subsection (2)(a) of the insurance policy.

Mr. Senhoob, however, signed a hand-written statement dated June 15, 2005, claiming that "[t]he first notice that any of us received in regards to this accident was about a month or two ago."

Mr. Senhoob contends that he is now a 50% owner of the deli, although it is not clear from the papers submitted when he acquired this interest in the business.

Leon Brickman, Esq., who was apparently retained directly by the third-party defendants, filed an Answer to the third-party complaint on behalf of both Abdulla and Senhoob dated July 21, 2005.

On the same day, Mr. Brickman, on behalf of Abdullah and Senhoob, individually and doing business as Alsadiy Deli & Grocery, commenced the fourth-party action seeking a judgment: (i) declaring, inter alia, that the main action and the third-party action are covered under the terms of the policy; (ii) directing Centurion to defend, indemnify and hold them safe and harmless from and against any obligations arising out of the damages alleged by plaintiff and the defendant/third-party plaintiff against them; and (iii) directing Centurion to pay them all of the costs, expenses and disbursements, including attorney's fees, incurred in defending the claims asserted against them in the main action and the third-party action and in prosecuting the fourth-party action.

Mr. Senhoob was subsequently notified by letter dated December 6, 2005 from a Senior Claims Examiner at Empire Insurance Group that Centurion had made a

decision to rescind portions of its [sic.] June 14, 2005 coverage declination letter (only as to you as we have not rescinded our denial to Nabil Abdulla, Alsadiy Deli & Grocery or any other party) and reserve its' [sic.] rights regarding its duty to defend and/or obligation to indemnify you in this matter pursuant to liability policy number 397-0056702 or any other policies issued to Nabil Abdulla, d/b/a Alsadiy Deli & Grocery.

\* \* \*

Relying on the truthfulness of the provided information, Centurion has retained the firm of Hawkins, Feretic & Daly on your behalf but in doing so, Centurion expressly reserves the right to contest coverage at a later date, withdraw from the defense of this matter and/or otherwise further amend our present position should it be revealed that the provided information was not entirely accurate and that you had prior notice of the occurrence, claim and/or suit or should the court not allow our retained counsel to Answer or otherwise move to defend your interests due to the late submission to Centurion.

Mr. Brickman then sent a letter to Hawkins Feretic & Daily. dated December 22, 2005 stating, in relevant part, that

For the reasons stated below, my client Ahmed H. Senhoob rejects your proposed stipulation substituting your firm as Attorney for Senhoob in the 3<sup>rd</sup> party action by UVI Holdings vs. Nabil Abdullah and Ahmed H. Senhoob, individually and doing business as Alsadiy Deli and Grocery.

1. Nabil and Abdulla and Ahmed H. Senoob are together doing business as Alsadiy Deli and Grocery.
2. The 2 individuals together with their business entity are parties defendant in the third party action by UVI Holdings.

3. The 2 individuals together with their business are parties plaintiff in their 4<sup>th</sup> party action against Centurion Insurance Company.
4. Centurion Insurance Company, by letter dated December 6, 2005, have advised my client Ahmed Senhoob that they are appointing your firm as attorneys to represent Senhoob in the third party action, with the right to contest coverage and withdraw from its representation.
5. Centurion has further advised that it refuses to provide coverage as to the third party defendants Nabil Abdullah and Nabil Abdullah and Ahmed Senhoob's business entity Alsadiy Deli and Grocery.
6. Nabil Abdullah, Ahmed Senhoob and Alsdiy [sic.] Deli and Grocery have commenced, and there is pending, a fourth party action against Centurion Insurance Company for the declaratory [sic.] judgement in connection with their insurance coverage in the primary and third party actions.
7. Centurion is seeking to substitute their own attorneys to conditionally represent only Senhoob, in the third party action.
8. To permit Centurion, which is in an adversarial position vis-à-vis Abdullah, Senhoob and Alsadiy to represent Senhoob [sic.] only in the third party action constitutes prejudicial and improper conduct in relation to all of the third party defendants, including Senhoob.
9. Senhoob is tied to, and united with, both Abdullah and Alsadiy.

To permit Centurion to inject their own attorneys to conditionally represent Senhoob, constitutes an impermissible conflict of interest.

Mr. Senhoob was thereafter advised by letter dated January 17, 2006 of Centurion's offer to defend and indemnify him alone "without a reservation of rights."

Mr. Brickman, on behalf of Senhoob, rejected this offer by letter dated January 18, 2006.

Fourth-party defendant Centurion now moves for an order:

(1) granting partial summary judgment dismissing the fourth-party claims asserted against it by fourth-party plaintiff Senhoob; and

(2) severing the fourth-party action from the underlying personal injury action on the ground that the continued joinder of the actions will be prejudicial to Centurion's defense, and there exist no common questions of law or fact between the fourth-party action and the underlying personal injury action.

Centurion argues that Mr. Senhoob's rejection of its offer to defend him through counsel of its choice, without a reservation of rights, constitutes non-cooperation in the defense of the lawsuit, in violation of Section IV(2)(c)(3) of the policy. Thus, Centurion contends it no longer owes any duty to Mr. Senhoob.

It is well settled that

[b]efore an insurer may disclaim for an insured's lack of cooperation, it must show that it acted diligently in seeking to bring about that cooperation, that its efforts were reasonably calculated to obtain the insured's cooperation and that the insured's attitude, after cooperation was sought, was one of "'willful and avowed obstruction'". (citations omitted).

Atlantic Mutual Insurance Co. v. Struve, 210 A.D.2d 112, 114 (1st Dep't 1994), lv. to app. denied, 85 N.Y.2d 803 (1995).

The Appellate Division, First Department, has held that an insured's refusal to accept legal representation at the insurer's expense constitutes "willful obstructionism" under certain circumstances, thus permitting the insurer to disclaim coverage. Atlantic Mutual Insurance Co. v. Struve, supra at 114.

Senhoob argues that his refusal to accept representation by counsel designated and controlled by Centurion does not, however, constitute "willful obstructionism" under the circumstances of this case, because said counsel may take actions which are adverse to the interests of co-defendant Alsadiy Deli & Grocery, and thus are also adverse to his financial interests, since he is presently a 50% partner of the business and may potentially be held liable for some or all of its obligations.

However, "[g]enerally, absent a showing that there is a conflict of interest between a liability insurer and the insured, an insurer has the right to control the defense of an action brought against the insured (citation omitted)." Desriusseaux v. Val-Rock Truck Corp., 230 A.D.2d 704 (2nd Dep't 1996).

Based on the papers submitted and the oral argument held on the record on June 21, 2006, this Court finds that Senhoob has failed to establish that there is a direct conflict of interest between Centurion's interests and those of Senhoob, individually.

To the extent that Senhoob believes that Centurion wrongfully disclaimed against Abdullah and/or Alsadiy Deli & Grocery, that argument raises a separate issue which may be litigated by Abdullah in the fourth-party action but which is not the subject of this motion.

Accordingly, Centurion's motion is granted to the extent of dismissing the fourth-party claims brought by third-party defendant/fourth-party plaintiff Senhoob only and permitting Centurion to disclaim coverage against him unless he notifies Centurion within 30 days of service of a copy of this order with notice of entry that he accepts Centurion's offer to defend him through counsel chosen by Centurion.


The fourth-party claims brought by third-party defendant/fourth-party plaintiff Nabil Abdullah, individually and doing business as Alsadiy Deli & Grocery are severed and continued.

That portion of the motion seeking to sever the fourth-party action from the underlying personal injury action is granted only to the extent of directing that the fourth-party action shall not be tried jointly with the underlying action.

The actions, however, shall remain consolidated for joint discovery. A preliminary conference shall be held in IA Part 12, 60 Centre Street, Room 341 on June 20, 2007 at 9:30 a.m.

This constitutes the decision and order of this Court.

Date: April 26, 2007

  
\_\_\_\_\_  
Barbara R. Kapnick  
J.S.C.

**BARBARA R. KAPNICK  
J.S.C.**

**FILED**  
MAY 03 2007  
NEW YORK  
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