

**Hotel Des Artistes, Inc. v General Acc.  
Ins. Co. of Am.**

2007 NY Slip Op 31121(U)

January 16, 2007

Supreme Court, New York County

Docket Number: 0107029/7029

Judge: Barbara R. Kapnick

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

PRESENT: **BARBARA R. KAPNICK**

PART 12

Index Number : 107029/2001

HOTEL DES ARTISTES

vs

GENERAL ACCIDENT INSURANCE

Sequence Number : 005

SUMMARY JUDGMENT

INDEX NO. 107029/01

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

MOTION SEQ. NO. 005

MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ 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**

**FILED**  
JAN 17 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 1/16/07

[Signature]  
**BARBARA R. KAPNICK** J.S.C.

Disposition:  FINAL DISPOSITION

NON-FINAL DISPOSITION

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  
HOTEL DES ARTISTES, INC.,

Plaintiff,

-against-

GENERAL ACCIDENT INSURANCE COMPANY OF  
AMERICA n/k/a CGU INSURANCE COMPANY,

Defendant.

-----X  
GENERAL ACCIDENT INSURANCE COMPANY  
OF AMERICA n/k/a CGU INSURANCE COMPANY

Third-Party Plaintiff,

-against-

CAFÉ DES ARTISTES, INC. and  
USA HIGH PRESSURE STEAM CLEANING,

Third-Party Defendants.

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

This lawsuit arises out of an underlying action in which Café des Artistes, Inc. ("Café"), a restaurant located at 105 West 67th Street in Manhattan, sued its landlord, plaintiff Hotel des Artistes, Inc. ("Hotel"), alleging that Hotel had breached its lease with Café by failing to expeditiously repair Café's premises after they had been damaged by a fire.

Defendant/third-party plaintiff General Accident Insurance Company of America, n/k/a CGU Insurance Company ("CGU"), which had issued a commercial general liability insurance policy to non-party

**DECISION/ORDER**  
Index No. 107029/01  
Motion Seq. No. 005

Third-Party  
Index No. 590938/05

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COUNTY CLERK'S OFFICE

Douglas Elliman Purchasing Group under which Hotel was an additional insured, disclaimed coverage with regard to that action, and refused to defend Hotel. Thus, Hotel hired its own counsel.

By letter dated October 17, 2000, Hotel notified CGU that it had negotiated a potential settlement of that lawsuit, and requested that CGU review the terms of the proposed settlement and advise whether it would reconsider its disclaimer. CGU did not respond, and Hotel settled the matter with Café for \$150,000, pursuant to a Settlement Agreement dated October 19, 2000.

Hotel subsequently brought this action, seeking a declaration that under the Policy, it was entitled to both a defense and indemnification, and seeking 1) damages in excess of \$200,000 for the legal fees it incurred in its defense of the action brought by Café; 2) the \$150,000 that it paid to Café pursuant to the Settlement Agreement, and 3) its litigation costs in this action.<sup>1</sup>

The third-party complaint alleges that the fire that damaged Café's premises was caused by the negligence of Café and co-third party defendant USA High Pressure Steam Cleaning, ("USA") - Café's

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<sup>1</sup> The Appellate Division, First Department has already found that CGU breached its duty to defend Hotel in the underlying action and remanded the case to this Court for further proceedings, "including a determination on the issues of coverage and indemnification." 9 A.D.3d 181, 194 (April 15, 2004); lv. to app. dism'd 4 N.Y.3d 739 (2004)

alleged maintenance contractor<sup>2</sup> - in failing to reasonably and adequately inspect and maintain the hoods and duct work in the kitchen area of the restaurant for an accumulation of grease laden materials, thereby causing and creating a hazardous and dangerous condition which directly led to a fire originating in the kitchen area of Café on December 23, 1997. CGU thus demands judgment over and against the third-party defendants "for all, or to the extent that the responsibility of the third-party defendants contributed thereto, for that portion of the verdict or judgment which may be obtained" by Café against CGU, plus all attorneys' fees and costs.

Third-party defendant Café now moves, pursuant to CPLR 3212 (a), for summary judgment dismissing the third-party complaint and awarding it its costs and attorneys' fees herein.

Third-party plaintiff opposes the motion, arguing that it is premature, that CGU is not bound by the Settlement Agreement between Café and Hotel, and that it is permitted to sue Café for indemnification, based on claims sounding in negligence.

CPLR 1007, which governs third-party practice, provides, in relevant part, that "a defendant may proceed against a person not a party who is or may be liable to that defendant for all or part

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<sup>2</sup> Third-party defendant USA failed to serve an answer or appear in this action, and a default judgment was granted against it on default by Order of this Court dated February 10, 2006 (mot. seq. no. 004).

of the plaintiff's claim against that defendant." (underlining supplied.) Thus, any claim raised in a third-party complaint "must be related to the main action by a question of law or fact common to both controversies." (Unger v Horowitz, 17 A.D.2d 807, 808 [1st Dep't 1962]), and, "[o]f course, the third-party plaintiff must have a cause of action against the third-party defendant." Krause v American Guarantee and Liability Ins. Co., 27 A.D.2d 353, 355 (1st Dep't 1967), aff'd 22 N.Y.2d 147 (1968). Here, CGU can have no claim against Café for subrogation since the Settlement leaves CGU's insured (i.e., Hotel) with no claim against Café.

Thus, CGU's claim rests entirely on a theory of implied or common-law indemnity, as acknowledged by counsel for the third-party plaintiff who states that the third-party action "seeks indemnification as against the Café for its negligence in causing the fire that led to the claimed damages."

The "key element of a common-law cause of action for indemnification is not a duty running from the indemnitor to the injured party, but rather is 'a separate duty owed the indemnitee by the indemnitor.'" Raquet v Braun, 90 N.Y.2d 177, 183 (1997), quoting Mas v Two Bridges Assocs., 75 N.Y.2d 680, 690 (1990). To be sure, it is only because there was a fire in Café's premises that the underlying action was brought, absent which this action would not have been commenced. That chain of causation, however, does not create a duty running from Café to CGU. CGU's liability

to Hotel is due, exclusively, to its own failure to perform its contractual obligations.

Contrary to CGU's argument, this third-party action is unlike those in Cassell Vacation Homes, Inc. v Commercial Union Ins. Cos. (121 A.D.2d 674 [2d Dep't 1986]) and Consolidated Edison Co. of New York v Royal Indem. Co. (41 A.D.2d 37 [1st Dep't 1973]), where the courts did allow a third-party action based on negligence. In those cases, however, the plaintiffs sued their insurers for losses allegedly covered under their various insurance policies, and the insurers impleaded third parties whose alleged negligence directly caused the losses. Here, by contrast, Hotel is suing CGU not for losses allegedly covered under their policy but for the expenses that it incurred in litigating and ultimately settling Café's claim of breach of contract. Consequently, Café cannot be held responsible for any part of Hotel's claim against CGU, and impleader does not lie.

Accordingly, it is hereby

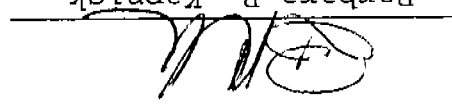
ORDERED that the motion for summary judgment is granted, and the third-party complaint is dismissed as against third-party defendant Café des Artistes, with costs and disbursements to be taxed by the Clerk of the Court upon the presentation of an appropriate bill of costs; and it is further

**FILED**  
JAN 17 2007  
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COUNTY CLERK'S OFFICE

Date: January 16, 2007

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

Barbara R. Kapnick  
J.S.C.



This constitutes the decision and order of this Court.

ORDERED that the Clerk is directed to enter judgment accordingly.  
Counsel for plaintiff and defendant shall appear for a further conference in IA Part 12, 60 Centre Street, Room 341 on February 21, 2007 at 9:30 a.m.