

**Romeo v Malta**

2007 NY Slip Op 31984(U)

June 29, 2007

Supreme Court, New York County

Docket Number: 0100055/2005

Judge: Debra A. James

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

PRESENT: DEBRA A. JAMES  
*Justice*

PART 59

LOUIS ROMEO,	Plaintiff,	Index No.:	<u>100055/05</u>
- v -			
ROBERT MALTA, CHELSEA TOMATO, INC., d/b/a INTERMEZZO RESTAURANT, 202 EIGHTH AVENUE, LLC and E&F CONSTRUCTION CORP.,	Defendants,	Motion Date:	<u>03/20/07</u>
ROBERT MALTA, CHELSEA TOMATO, INC., d/b/a INTERMEZZO RESTAURANT,	Third-Party Plaintiffs,	Motion Seq. No.:	<u>06</u>
- v -			
THE TRAVELERS INDEMNITY COMPANY OF CONNECTICUT,	Third-Party Defendant,	Motion Cal. No.:	<u>80</u>
CHELSEA TOMATO, INC.,	Third-Party Plaintiff,	Third- Party Index No.:	<u>590248/05</u>
- v -			
202 EIGHTH AVENUE, LLC,	Third-Party Defendant.	Third- Party Index No.:	<u>591176/05</u>
CHELSEA TOMATO, INC., and ROBERT MALTA,	Third-Party Plaintiffs,	Third- Party Index No.:	<u>590337/05</u>
- v -			
E&F CONSTRUCTION CORP.,	Third-Party Defendant.	Third- Party Index No.:	<u>590748/06</u>
CHELSEA TOMATO, INC.,	Third-Party Plaintiff,	Third- Party Index No.:	<u>591079/06</u>
- v -			
ATLANTIC CASUALTY INSURANCE COMPANY	Third-Party Defendant.	Second Third- Party Index No.:	<u>591079/06</u>
ATLANTIC CASUALTY INSURANCE COMPANY,	Second Third-Party Plaintiff,		
- v -			
202 EIGHTH AVENUE, LLC, and LOUIS ROMEO,	Second Third-Party Defendant.		

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

**FILED**  
JUL 09 2007  
NEW YORK COUNTY CLERK'S OFFICE

The following papers, numbered 1 to \_\_\_ were read on this motion for summary judgment.

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

Answering Affidavits - Exhibits \_\_\_\_\_

Replying Affidavits - Exhibits \_\_\_\_\_

PAPERS NUMBERED	
1 - 3	
4 - 11	
12 - 15	

Cross-Motion:  Yes  No

Check One:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check If appropriate:  DO NOT POST  REFERENCE

Upon the foregoing papers,

On this motion, third-party defendant Atlantic Casualty Insurance Company seeks severance of its third-party declaratory judgment action (Index No.: 590748/06). Chelsea Tomato, the restaurant-tenant, cross-moves for summary judgment on its claims seeking a declaratory judgment that it is an additional insured entitled to coverage under the policy issued by Atlantic and that E&F Construction Corp. failed to procure insurance pursuant to the construction contract dated June 30, 2003 between E&F, Chelsea, and 202 Eighth Avenue LLC, the owner of the premises. Cross claimant 202 Eighth Avenue (the "Owner") cross-moves for summary judgment on its declaratory judgment cross claim against Atlantic and for a declaration that Atlantic is required to defend and indemnify E&F and Chelsea. E&F apparently joins in Chelsea's cross-motion for summary judgment only to the extent that any declaratory judgment this court issues should require Atlantic to defend and indemnify it. Confusingly, Atlantic attempts to cross-move for summary judgment to its own motion to sever although such an application fails to comply with CPLR 2215 which allows only non-moving parties to cross-move. With respect to the latter two cross-motions, the court shall consider the arguments raised in the papers in this decision as the court has the authority to grant summary judgment to any party entitled to such relief by searching the record pursuant to CPLR 3212 (b).

With respect to the insurance policy issued by Atlantic to E&F, the court shall grant summary judgment dismissing the coverage and indemnification claims of Chelsea and 202 Eighth Avenue on the grounds of late notice. It is undisputed that the plaintiff provided the first notice of the claim to Atlantic by letter dated April 11, 2006, and that subsequently, Chelsea provided notice by letter dated June 20, 2006, and the Owner by letter dated August 28, 2006. The accident occurred on February 19, 2004.

Contrary to the arguments of Chelsea and 202 Eighth Avenue, both parties had knowledge of plaintiff's claims by the commencement of his suit in January 2005 if not earlier. Their argument that it was not until February 2006 that they learned that the work of E&F was possibly implicated in the occurrence is unsupportable. Both Chelsea and 202 Eighth were signatories to the construction contract which obligated E&F to obtain insurance coverage for them that was supplied by Atlantic. As a matter of law, notification of the occurrence by Chelsea and 202 Eighth is untimely as a reasonable investigation of their own records should have revealed that the contracted work took place in an area that was possibly linked to the accident. Furthermore, Atlantic correctly argues that Chelsea and 202 Eighth cannot avail themselves of any benefit conferred by the plaintiff's notification. As stated by the First Department, "the notice

requirement in this insurance policy applies equally to both primary and additional insureds, and notice provided by one insured in accordance with the policy terms will not be imputed to another insured." Travelers Ins. Co. v Volmar Const. Co., Inc., 300 AD2d 40, 44 (1<sup>st</sup> Dept 2002) (citations omitted); see also Empire City Subway Co. (Ltd.) v Greater New York Mut Ins Co., 35 NY2d 8, 13-14 (1974) ("Where, as here, an accident occurs which may fall within the coverage of an insurance policy the insured may not, without investigation, gratuitously conclude that coverage does not exist.").

Therefore, even assuming that Chelsea and 202 Eighth were additional insureds under the Atlantic policy issued to E&F, their failure to provide timely notice of plaintiff's claim excuses any coverage obligation undertaken by Atlantic to them.

However, with respect to the plaintiff and E&F, the court shall deny summary judgment to Atlantic as to its obligations to those parties. Plaintiff's right to proceed against Atlantic directly upon timely notice arises under Insurance Law

3420 (a) (3) & (4). Courts have stated that

Where the insured fails to give proper notice, the injured party can give notice herself, thereby preserving her right to proceed directly against the insurer. Having been statutorily granted an independent right to give notice and recover directly from the insurer, the injured party or other claimant is not to be charged vicariously with the insured's delay. In determining the reasonableness of an injured party's notice, the notice required is measured less rigidly than that required of the insureds. The sufficiency of notice by an injured

party is governed not by mere passage of time but by the means available for such notice.

Appel v Allstate Ins. Co., 20 AD3d 367, 368-369 (1<sup>st</sup> Dept 2005) (citations and internal quotations omitted). In this case, there is an issue of fact as to reasonableness of plaintiff's notice to Atlantic based upon plaintiff's allegation that E&F's possible liability could not have been known to plaintiff until revealed by discovery in this action in early 2006.

Atlantic raises no argument on this application that E&F is not entitled to defense and indemnification on the ground of late notice. With respect to whether the plaintiff's claims are in fact covered by the Atlantic policy, the court declines to summarily determine the scope of the subject coverage as there are issues of fact as to how the plaintiff was injured and whether the work performed by E&F is implicated. Without the determination of such facts, the court cannot summarily rule whether the policy language encompasses plaintiff's claim.

The court shall also deny summary judgment to Chelsea and 202 Eighth on their claims that E&F breached the June 30, 2003 contract by failing to name them as additional insureds under the Atlantic policy. The contract at issue in Paragraph 20.2 specified that Chelsea and 202 Eighth were to be added as additional insureds but did not specify the scope of coverage to be provided. Therefore, the court cannot determine from this record whether the policy issued by Atlantic complies with the

contractual procurement provision. Furthermore, the mere fact that the Chelsea and 202 Eighth were found not to be entitled to defense and indemnification under the policy because of their own actions does not, as a matter of law, resolve the issue as to whether the Atlantic policy satisfies E&F's contractual obligations. The issue of the policy's sufficiency, in any event, has been rendered moot as the result of Chelsea and 202 Eighth's untimely notice to Atlantic.

Finally, the court shall grant Atlantic's motion to sever the insurance coverage issues from the trial of liability issues in this action. As stated by the First Department

[T]o permit the dispute as to insurance coverage to be tried before the same jury charged with determining the negligence issue would be prejudicial, since it would bring before the jury the fact of the existence of liability insurance coverage. The specific knowledge of the dispute over insurance coverage would of necessity temper the thinking of the jury and unduly influence their verdict. The prejudice inherent in a situation of this sort should be avoided.

Transamerica Ins. Co. v. Tolis Inn, Inc., 129 AD2d 512 (1<sup>st</sup> Dept 1987) (citations and internal quotations omitted). No party has indicated that there is any outstanding discovery to be completed as to any of the remaining claims in this action. Therefore, the court shall direct that a note of issue be filed for the severed insurance coverage action so that it may be tried before the court.

Accordingly, it is

ORDERED that the cross-motions of CHELSEA TOMATO, INC., and 202 EIGHTH AVENUE, LLC, for summary judgment against ATLANTIC CASUALTY INSURANCE COMPANY upon the cross-movants' claims for defense and indemnification is DENIED; and it is further

ORDERED that the cross-motions of CHELSEA TOMATO, INC., and 202 EIGHTH AVENUE, LLC, for summary judgment against E&F CONSTRUCTION CORP. as to the cross-movants' claims for breach of contract is DENIED; and it is further

ORDERED that upon searching the record, the court GRANTS summary judgment to ATLANTIC CASUALTY INSURANCE COMPANY DISMISSING all claims for defense and indemnification by CHELSEA TOMATO, INC., and 202 EIGHTH AVENUE, LLC, and the Clerk is directed to enter judgment dismissing all claims by CHELSEA TOMATO, INC., and 202 EIGHTH AVENUE, LLC, seeking defense and indemnification from ATLANTIC CASUALTY INSURANCE COMPANY; and it is further

ORDERED that summary judgment is DENIED to ATLANTIC CASUALTY INSURANCE COMPANY as against the plaintiff and co-defendant E&F CONSTRUCTION CORP. with respect to ATLANTIC CASUALTY INSURANCE COMPANY's obligation to provide coverage for the accident; and it is further

ORDERED that the motion of ATLANTIC CASUALTY INSURANCE COMPANY for severance of any remaining claims as to insurance coverage by any of the parties is hereby GRANTED and the claims

of any of the parties as to insurance coverage from ATLANTIC CASUALTY INSURANCE COMPANY are hereby SEVERED and upon the filing of a separate note of issue, the Clerk is directed to effectuate, upon the payment of appropriate fees, such severance and issue an appropriate calendar and index number thereunder; and it is further

ORDERED that the parties are directed to attend a pre-trial conference on July 10, 2007, at 2:30 P.M., because this case has been granted a special preference by Order of this Court dated November 1, 2006, jury selection shall commence in the first-party action on July 16, 2007, with the trial of the severed insurance issues to be tried at the conclusion of the first-party trial.

This is the decision and order of the court.

Dated: June 29, 2007

ENTER:

Debra A. James  
DEBRA A. JAMES J.S.C.  
J.S.C.

**FILED**  
JUL 09 2007  
NEW YORK  
COUNTY CLERKS OFFICE