At a Motion Term of the Supreme Court of the State of New York, held in and for the County of Onondaga on December 19, 2006.

PRESENT: HON. DONALD A. GREENWOOD
Supreme Court Justice

STATE OF NEW YORK
SUPREME COURT COUNTY OF ONONDAGA

JOSEPH KASSIS and KASSIS SUPERIOR SIGN CO., INC.,

Plaintiffs,

v.

THE OHIO CASUALTY INSURANCE COMPANY,

Defendant.

DECISION AND ORDER ON MOTION

Index No.: 2006-0025
RJI No.: 33-06-4198

APPEARANCES: **LAWRENCE M. ORDWAY, JR., ESQ., OF GREEN & SEIFTER, PLLC**
For Plaintiffs

VINCENT G. SACCOMANDO, ESQ., OF DAMON & MOREY, LLP
For Defendant

Plaintiffs Joseph Kassis ("Kassis") and Kassis Superior Sign Co., Inc. ("Superior Sign") have moved for summary judgment on their complaint, which was filed on or about January 3, 2006. In the complaint, plaintiffs seek a Declaratory Judgment that the defendant Ohio Casualty Insurance Company is required to indemnify and defend them with respect to a lawsuit brought by Andrew Holden in Oswego County, under Index Number 2004-1911 (hereinafter the Holden action). In addition, plaintiffs seek a Declaratory Judgment with respect to the following issues: that the defendant is liable for all costs, attorney's fees and disbursements incurred in the defense of the Holden action, that Kassis is an intended beneficiary under the policy, that the defendant is

obligated to provide a defense to the Holden action and that plaintiffs are entitled to their costs, attorney's fees and disbursements in this action. The defendant has cross-moved for summary judgment dismissing the complaint, seeking the Court's declaration that the defendant has no duty to defend or indemnify plaintiff Superior Sign in the absence of a claim or action against Superior Sign and that the defendant has no duty to defend or indemnify Kassis, as he is not an additional insured under the policy at issue.

The plaintiffs allege in their complaint that Kassis leased property located at 6699 Old Thompson Road in Syracuse to Superior Sign pursuant to a twenty year lease, commencing on November 20, 1997. Thereafter, in December of 2004 Andrew Holden brought an action against Kassis with respect to injuries which he allegedly sustained on February 25, 2004, when he slipped and fell on the property owned by Kassis as a result of an accumulation of snow and/or ice. Holden alleged that he was attempting to walk to the building where Superior Sign had its operations at the time of the incident. The Holden action alleges that Holden was an employee of Superior Sign and that his injury occurred during the course of his employment. At the time of the alleged accident defendant insured Superior Sign pursuant to a commercial general liability policy. After being served with the summons and complaint in the Holden action, Kassis requested defense and indemnification from the defendant with respect to that action. The defendant disclaimed coverage based upon the employer's liability exclusion.

Although the defendant has argued that Kassis does not have standing to bring this action, there is no dispute that Superior Sign, a plaintiff herein, is an insured under the subject policy. As such, it has standing to bring this action. *See, Reliance Ins. Co. of NY v. Garsart Bldg.*,122 AD2d 128 (2d Dept. 1986). Moreover, a party who is not privy to an insurance contract but would nonetheless stand to benefit from the insurance policy may bring a

declaratory judgment action to determine whether the insurer owes a defense and/or coverage under the policy. *See, Abate v. All-City Insur. Co.*, 214 AD2d 627 (2d Dept. 1995). As such, the defendant's argument with respect to standing fails.

When addressing an insurance coverage dispute, the Court must first look to the language of the policy. *See, Traveler's Indemnity Co. v. Commerce & Industry Insurance Co. of Canada*, 2006 WL 3916516 (3d Dept. 2007). The law is well settled that the clear and unambiguous terms of an insurance policy must be enforced as written. *See, Maurice Goldman & Sons, Inc. v. Hanover Insurance Co.*, 80 NY2d 986 (1982). The terms of the subject policy require the defendant to defend and indemnify the plaintiffs in the Holden action. The plaintiffs rely on Section I(1)(b)(2) with respect to coverage. That section provides that "this insurance applies to ' bodily injury' and 'property damage' only if: 1) the 'bodily injury' or 'property damage' is caused by an 'occurrence' that takes place in the 'coverage territory'; 2) the 'bodily injury' or 'property damage' occurs during the policy period. *Policy Section I(1)(b)(2).* More relevant, however, is Section I(2)(b)(2), which provides as follows:

> (2) - Exclusions
>
> This insurance does not apply to:
> b) contractual liability: "bodily injury" or "property damage" for which the insured is obligated to pay damages by reason of the assumption of liability in a contract or agreement. This exclusion *does not apply to* liability for damages:
> 2) assumed in a contract or agreement that is an "insured contract" provided that "bodily injury" or "property damage" occurs subsequent to the execution of the contract or agreement. Solely for the purposes of liability assumed in an "insured contract" reasonable attorney's fees and necessary litigation expenses incurred by or for a party other than an insured are deemed to be damages because of "bodily injury" or "property damages", provided
> a) liability to such party for, or for the cost of, that party's defense has also been assumed in the same "insured contract" and
> b) such attorney's fees and litigation expenses are for defense of that party against a civil or alternative dispute resolution proceeding in

which damages to which this insurance applies are alleged.

Insurance Policy Section I(2)(b)(2) (emphasis added).

The policy defines an "insured contract" is a contract for the lease of premises. *Insurance Policy, Section V(9)(a).* It further defines "insured contract" as "that part of any other contract or agreement pertaining to your business...under which you assume the tort liability of another party to pay for a 'bodily injury' or 'property damage' to a third person or organization. Tort liability means a liability that would be imposed by law in the absence of any contract or agreement." *Insurance Policy, Section V(9)(f).* The subject lease agreement, executed between Kassis as landlord and Kassis as President of Superior Sign as tenant, expressly states that Superior Sign assumed the obligation for removing any and all snow and ice during its occupancy of the premises. *See, Lease, paragraph 6(a).* It is clear that the lease is a contract for the lease of premises as defined by the policy and as a result, the lease is an "insured contract" according to both of the policies' definitions. Defendant has, in fact, admitted that the lease is an insured contract under the terms of the policy,[1] but nevertheless argues that it is not obligated to indemnify the plaintiffs until there is a determination that Superior Sign caused Holden's injuries. Defendant's duty to defend Kassis, however, does not depend upon proof of Superior Sign's negligence. Such a duty is broad and requires insurers to provide a defense whenever the allegations in a complaint merely suggest a reasonable possibility of coverage. *See, BP Air Conditioning Corp. v. One Beacon Insurance Group*, 33 AD3d 116 (1st Dept. 2006). Insurers must defend an action even if it may not ultimately be required to indemnify an insured. *See, Automobile Insurance Co. of Hartford v. Cook*, 7 NY3d 131 (2006). The law is well settled that an insurance policy must be construed in a way that affords a fair meaning to all of the language

employed by the parties in a contract and leaves no provision without force in effect; unambiguous provisions are given their plain and ordinary meaning. *See, Travelers Indemnity, supra.* The fair meaning here is that the plaintiffs are entitled to coverage based upon the clear language of the policy and of the lease agreement.

The subject lease states the following with respect to Superior Sign's obligation to indemnify and defend Kassis:

> Tenant shall indemnify, defend and hold harmless Landlord from any and all damages, costs, expenses and liabilities for anything arising out of the occupancy of the Premises caused by Tenant or its agents and from any loss or damage arising out of the acts of Tenant or its agents or the failure of Tenant to comply with the terms and conditions of this Lease. Tenants shall, at its own cost and expense, defend any and all suits that may be brought against Landlord or which Landlord may be impleaded with others on any such above mentioned claim, and, in the event of the failure of the Tenant to do so, Landlord may, at the cost and expense of Tenant, and upon prior written notice to Tenant, defend any and all suits and actions and Tenant will satisfy and pay any and all judgments that may be recovered against Landlord.. In the event of the failure of Tenant to pay the amount for which Landlord shall become liable, Landlord may pay with interest, costs, or other charges which may have been accrued and the amount so paid by Landlord shall become due and payable by Tenant as additional rent with the next installment of rent which shall become due after payment by Landlord.
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> *Paragraph 14 of Lease.*

Although the defendant declined coverage based upon the employer's liability exclusion, the defendant did not allege that Superior Sign and Kassis are one in the same or that Kassis is an "alter ego" of Superior Sign. Nor does the defendant contend that the two parties are two separate entities who have reached a binding and enforceable lease contract between them. While a landlord may not delegate its duty to keep its premises in a safe condition with regard to third parties, it is free to contract with its tenant to maintain and repair the premises and to

allocate the risk of liability to third parties by the procurement of liability insurance for their mutual benefit. *See, Morel v. City of New York*, 192 AD2d 428 (1st Dept. 1993); *see also, Schumacher v. Lutheran Community Services*, 177 AD2d 568 (2d Dept. 1991). Holden is a third party in relation to Kassis and Superior Sign. While Superior Sign would not be liable to Holden because of the Workers Compensation Law, Kassis as landlord may still be liable, although that would be an issue of fact.

Based upon the foregoing, the plaintiff is entitled to summary judgment seeking a Declaratory Judgment that the defendant is liable for all costs, attorney's fees and disbursements incurred in the defense of the Holden action, that Kassis is an intended beneficiary under the policy, that the defendant is obligated to provide a defense to the Holden action and that the plaintiffs are entitled to their costs, attorney's fees and disbursements in this action.

NOW, therefore, for the foregoing reasons, it is

ADJUDGED AND DECLARED, defendant is obligated to provide a defense to the Holden action under the subject insurance policy, and it is further

ADJUDGED AND DECLARED, that the defendant is liable for all costs, attorney's fees and disbursements incurred in the defense of the Holden action, and it is further

ADJUDGED AND DECLARED, that the and that plaintiffs are entitled to their costs, attorney's fees and disbursements in this action, and it is further

ORDERED, that the defendant's cross-motion for summary judgment dismissing the complaint is denied.

ENTER

Dated: February 16, 2007

Syracuse, New York

DONALD A. GREENWOOD
Supreme Court Justice

[1] Defense counsel's affidavit at paragraph 16.