

**York Hunter Constr. Servs., Inc. v Great  
Am. Custom Ins. Servs., Inc.**

2008 NY Slip Op 30112(U)

January 9, 2008

Supreme Court, New York County

Docket Number: 0109049/2006

Judge: Judith J. Gische

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

PRESENT: **JUDITH J. GISCHE, J.S.C.**

PART 10

Index Number : 109049/2006

YORK HUNTER INSURANCE SERVICES

vs

GREAT AMERICAN CUSTOM

Sequence Number : 001

SUMMARY JUDGMENT

INDEX NO. \_\_\_\_\_

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

MOTION SEQ. NO. \_\_\_\_\_

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 ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

**FILED**  
JAN 16 2008

COUNTY CLERK'S OFFICE  
NEW YORK

MOTION IS DECIDED IN ACCORDANCE WITH  
THE ACCOMPANYING MEMORANDUM DECISION.

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

Dated: January 9, 2008

**JUDITH J. GISCHE, J.S.C. J.S.C.**

Check if appropriate:  DO NOT POST  
Check one:  FINAL DISPOSITION

REFERENCE  
 NON-FINAL DISPOSITION

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 10**

-----X  
YORK HUNTER CONSTRUCTION  
SERVICES, INC.,

Plaintiff

-against-

GREAT AMERICAN CUSTOM INSURANCE  
SERVICES, INC., GREAT AMERICAN E & S  
INSURANCE COMPANY, GREAT AMERICAN  
ALLIANCE INSURANCE COMPANY, GREAT  
AMERICAN ASSURANCE COMPANY, GREAT  
AMERICAN CONTEMPORARY INSURANCE,  
GREAT AMERICAN INSURANCE COMPANY,  
GREAT AMERICAN INSURANCE COMPANY  
OF NEW YORK, GREAT AMERICAN SECURITY  
INSURANCE COMPANY, GREAT AMERICAN  
SPIRIT INSURANCE COMPANY, NATIONAL  
CASUALTY INSURANCE COMPANY, UNITED  
NATIONAL CASUALTY INSURANCE  
COMPANY, NATIONAL CASUALTY COMPANY,  
SCOTTSDALE INSURANCE GROUP, FARM  
FAMILY CASUALTY INSURANCE COMPANY  
f/m/a FARM FAMILY MUTUAL INSURANCE  
COMPANY, OHIO CASUALTY INSURANCE  
COMPANY, AMERICAN EMPIRE INSURANCE  
COMPANY, UTICA FIRST INSURANCE COPANY  
f/k/a UTICA FIRE INSURANCE COMPANY OF  
ONEIDA COUNTY N.Y., U.S. UNDERWRITERS  
INSURANCE COMPANY,

Defendants.

-----X  
U.S. UNDERWRITERS INSURANCE  
COMPANY,

Third-party Plaintiff,

- against -

DENNIS TOAL, KATHLEEN TOAL, and  
NOVA STAR ELECTRIC CORP.,

Third party Defendants.

-----X

**Decision/Order**

Index No.: 109049/06

Seq. No. : 001

**Present:**

Hon. Judith J. Gische

J.S.C.

Third-party Index No.:  
590723/06

Recitation, as required by CPLR 2219 [a], of the papers considered in the review of this (these) motion(s):

<b>Papers</b>	<b>Numbered</b>
US Underwriters' n/m §§ 3212, 3215 w/SV affirm, JH affid (sep back), exhs . . . . .	1, 2
Utica opp w/ASZ affirm, exhs . . . . .	3
YH opp w/MPDeC affirm, exhs (including JW affid) . . . . .	4
US Underwriters' reply w/SV affirm, exhs . . . . .	5

*Upon the foregoing papers the court's decision is as follows:*

**GISCHE, J.;**

Plaintiff York Hunter Construction Services, Inc. ("York" at times "plaintiff") seeks a declaration from this court that defendant U.S. Underwriters Insurance Company ("U.S. Underwriters" at times "defendant") must defend and indemnify plaintiff in connection with a separate but underlying personal injury action against York. York also asserts a claim for breach of contract.

U.S. Underwriters has now moved for summary judgment dismissing York's complaint. U.S. Underwriters also moves for a default judgment against the 3<sup>rd</sup> party defendants, all of whom have been served, none of whom have answered or appeared. None of them oppose this motion.

Plaintiff York and co-defendant Utica First Insurance Company f/k/a Utica Fire Insurance Company of Oneida County ("Utica"), however, each separately oppose U.S. Underwriters' motion. For the most part, Utica relies upon the same arguments presented by York. Therefore, unless Utica's argument is unique to its legal position in this case, all arguments by York or "defendant" are to be attributed to both opposing parties.

\* 4 ]

Summary judgment is available once issue has been joined, provided it is made within the time set forth in CPLR § 3212. Chun v. North American Mortgage, 285 AD2d 42 (1<sup>st</sup> dept. 2001). U.S. Underwriters motion meets this criteria and will be decided on the merits. Although plaintiff contends the motion is premature because discovery is incomplete, this issue is addressed in the context of whether the moving party, and those opposed, have met their respective burdens entitling them to summary judgment.

That branch of U.S. Underwriters motion for entry of a default judgment against the 3<sup>rd</sup> party defendants on its 3<sup>rd</sup> party complaint against them is also addressed below since U.S. Underwriters' claims against them are interwoven with the overarching claims by York against defendant/3rd party plaintiff U.S. Underwriters.

#### **Arguments presented**

Dennis Toal ("Mr. Toal"), a plumber, commenced a personal injury action against the owner and contractors of a certain construction project located on Greenwich Street in Manhattan ("the project" or "premises") [Toal v. York Hunter Construction Services, Inc., Take One, LLC and Nova Star Electric, Corp., Supreme Court, New York Co., Index 112541/03] ("personal injury action"). Mr. Toal contends he was injured on April 10, 2003 ("date of the accident") when he stepped on, and his foot got tangled in, wire mesh at the construction site. According to plaintiff, this caused him to fall down and tear ligaments in his knee. Mr. Toal alleges his injuries were due to the defendants' violations of sections 200, 240 and 241 (6) of the Labor Law.

At the time of Mr. Toal's accident York had a written construction contract with the owner of the premises ("Take One") to provide construction services as a contractor.

York, in turn, subcontracted the plumbing work to Parkview, Mr. Toal's employer, and the electrical work to Nova. Nova's subcontract with York is dated August 1, 2001 ("York/Nova subcontract").

Nova defaulted in the personal injury action. It has also defaulted in appearing in this declaratory judgment action. York and Take One, however, settled the personal injury action with Mr. Toal for a total payment of \$625,000. Releases were signed in the Toal action and it was discontinued. Nova was not a party to that settlement nor a signatory to the November 27, 2006 release.

In this declaratory judgment action York contends that it is an additional insured under an effective commercial general liability policy that Nova had in effect with U.S. Underwriters at the time of Mr. Toal's accident. For purposes of this motion, there is no disagreement that U.S. Underwriters issued a policy to Nova for the period January 28, 2003 to January 28, 2004, number CL-3059872, or that the accident alleged took place during the effective dates of that policy ("Nova policy"). U.S. Underwriters, however, denies that York was an additional insured under Nova's policy.

York, on the other hand, claims that it is an additional insured under the Nova policy because Nova was obligated to obtain insurance for its benefit. York contends further that as the general contractor of the project, it is entitled to additional insured coverage under each of the insurance policies that were issued to its subcontractors. York provides and relies upon a certificate of liability insurance that was issued by a broker ("Cosmos") to Nova, dated June 19, 2002 ("certificate of insurance"). Though the certificate of insurance is admittedly for a different policy (CL-3051065), and for a time

period before the date of Mr. Toal's accident (i.e. for the period 1/28/02 - 1/28/03), York nonetheless contends that this certificate of insurance is circumstantial evidence that Nova complied with its contractual obligation, to obtain insurance coverage for plaintiff's benefit, as Nova was obligated to do under paragraph 15.01 of its contract with York. York claims this certificate is also circumstantial evidence that U.S. Underwriters intended to provide plaintiff with insurance coverage as an additional insured, and therefore the underpinnings of its separate claim for insurance by estoppel. York also contends that because discovery is not completed and it has not deposed anyone from Cosmos, or U.S. Underwriters, plaintiff cannot yet establish that it is an additional insured under Nova's 2003-2004 policy. This argument is also embraced by Utica, who further contends that U.S. Underwriters has not responded to Utica's December 21, 2006 or January 15, 2007 discovery demands, which include a request for the underwriter's file.

In support of its motion for summary judgment, U.S. Underwriters first contends that no further discovery is needed because York is relying on a certificate of insurance that has no applicability to the claims asserted. Not only is the certificate for an entirely different policy, and different time period, U.S. Underwriters contends that a certificate of insurance is not proof of coverage, and cannot confer such benefits in the absence of a contract to insure. Therefore, U.S. Underwriters contends the certificate is insufficient to raise a triable issue of fact as to whether York has been named as an additional insured under the Nova policy. A closely related argument by defendant is that York lacks standing to bring this action because plaintiff did not first obtain a default judgment against Nova in this case, who has not answered nor appeared, nor has York obtained a

money judgment against Nova that has remained unsatisfied for more than 30 days. Ins Law § 3420

Alternatively, U.S. Underwriters argues that even were York able to prove it is an additional insured under the Nova policy, the policy contains two exclusions that would exclude coverage of the Toal accident and claims thereunder, and therefore deprive York of the right to recovery under the Nova policy. The Nova policy contains an "employee exclusion" (endorsement L310) which the insurance company contends excludes coverage for claims of bodily injuries to "any" employees, contractors and employees of contractors. In relevant part, the endorsement provides that "this insurance does not apply to":

"(i) bodily injury to any employee of any insured, to any contractor hired or retained by or for any insured or to any employee of such contractor, if such claim for bodily injury arises out of and in the course of his employment or retention of such contractor by or for any insured, for which any insured may become liable in any capacity;

(ii) any obligation of any insured to indemnify or contribute with another because of damages arising out of the bodily injury . . ."

Thus, U.S. Underwriter contends that the policy's use of broad language - "any" employee and "any" contractor - conclusively disposes of York's claims, because Nova and Parkview were each contractors of York at the time of Mr. Toal's accident.

U.S. Underwriter also relies upon the "contractual liability exclusion" in Nova's policy. It 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:

(1) That the insured would have in the absence of the contract or agreement; or

(2) Assumed in a contract or agreement that is an "insured contract" provided that the "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 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 damage", 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 fees and litigation expenses are for defense of that party against a civil or alternate dispute resolution proceeding in which damages to which this insurance applies are alleged.

U.S. Underwriters contends that because York had a written contract with Nova for it to do work on the project, and Nova was obligated to indemnify York as per the terms of that contract, Mr. Toal's bodily injury claims come within that contract. U.S. Underwriters further contends that because Nova's policy contains an express exclusion from coverage claims for bodily injury, even were York to prove it is an additional insured, plaintiff has no right to indemnification and/or defense by U.S. Underwriters. U.S. Underwriter further contends that because Nova's policy narrowly defines (endorsement CG2139) what an "insured contract" is, and the contract York has with Nova does not come within the definition, it is not an exception to this exclusion.

In opposition, York relies upon the facts provided in the complaint, the certificate of insurance and the sworn affidavit of Mr. Wrum, its former employee.<sup>1</sup> He states that York relied upon the certificate of insurance to its detriment and therefore equity should intervene to prevent U.S. Underwriters from denying coverage.

**Discussion**

A movant seeking summary judgment in its favor must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. " Winegrad v. New York Univ. Med. Ctr., 64 N.Y.2d 851, 853 (1985). The evidentiary proof tendered, however, must be in admissible form. Friends of Animals v. Assoc. Fur Manufacturers, 46 N.Y.2d 1065 (1979). Once met, this burden shifts to the opposing party who must then demonstrate the existence of a triable issue of fact. Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324 (1986); Zuckerman v. City of New York, 49 N.Y.2d 557 (1980).

On this motion, U.S. Underwriters has met its burden and proved, for the reasons that follow, that it is entitled to summary judgment dismissing the complaint against it. York has failed to raise factual disputes requiring a trial of this action.

At the outset, the court has considered whether this motion is premature because, as York and Utica each contends, there may be certain information necessary for them to fully oppose the motion. CPLR § 3212 (f); Lewis v. Safety Disposal System of Pennsylvania, Inc., 12 AD3d 324 (1<sup>st</sup> dept. 2004); Global Minerals and Metals Corp. v. Holme, 35 AD3d 93 (1<sup>st</sup> dept 2006) (internal citations omitted). This argument is not persuasive. York has only offered a two-paged bare boned affidavit by someone who

---

<sup>1</sup>York has not described in what capacity he worked for them, or his title.

used to be employed by it. Leaving aside the issue that the affidavit does not address why Mr. Wrum would have any familiarity with the facts he asserts, it is completely devoid of any detail. Therefore, it does not present any facts that would tend to show that information may exist that could help York present its case, but cannot be stated at this time. Lewis v. Safety Disposal System of Pennsylvania, Inc., supra. Mr. Wrum simply contends that York relied on the certificate of insurance to its detriment. Since the certificate expired before the date of the accident and it is for a different policy, Mr. Wrum's affidavit does not set forth factual disputes to be tried.

In any event, although as a general rule of law, a certificate of insurance is evidence of a contract for insurance [Horn Maintenance Corp. v. Aetna Cas. & Sur. Co., 225 AD2d 443 (1st dept. 1996)], standing alone it is not conclusive proof that a contract for insurance exists. Buccini v. 1568 Broadway Associates, 250 A.D.2d 466 (1<sup>st</sup> Dept 1998). The certificate that plaintiff relies upon does not establish any factual dispute for trial about whether York was an additional insured under Nova's policy because by its very terms, it is issued for "information only." Tribeca Broadway Associates, LLC v. Mount Vernon Fire Ins. Co., 5 A.D.3d 198 (1<sup>st</sup> Dept 2004).

Even were the court to decide that York has set forth a factual dispute about its status as an additional insured, its indemnification and defense claims against U.S. Underwriters fail. Nova's policy contains two exclusions that are of particular significance to the disputes at bar: an "employee exclusion" and a "contractual exclusion."

The employee exclusion exempts U.S. Underwriter from having to provide coverage for Mr. Toal's accident because he was an employee of Parkview, and Parkview was York's subcontractor. Where, as here, an aggrieved party seeks the benefit of

coverage, "the terms of the contract must clearly evince such intent . . ." Sixty Sutton Corp. v. Illinois Union Insurance Co., 34 A.D.3d 386, 386 (1<sup>st</sup> Dept 2006). The clear and unambiguous language of the Nova policy does not support York's claims, but supports U.S. Underwriter's position that York is, in fact, not entitled to defense and indemnification. Sixty Sutton v. Illinois Union Insurance Co., *supra*. Although York contends this would offend public policy, employee exclusion provisions similar, if not identical, to this one are routinely enforced in the First Department and have been expressly found not to offend public policy. Moleon v. Kreisler Borg Florman General Const. Co., Inc., 304 A.D.2d 337, 340 (1<sup>st</sup> Dept 2003); *Also: Sixty Sutton Corp. v. Illinois Union Ins. Co.*, *supra*.

Similarly, the contractual exclusion clause in Nova's policy is also clear, excluding coverage for any accident that results in bodily injury to "any" contractor or "any" employee for which "any insured may become liable in any capacity. . ." Though York contends application of this exclusion would work a hardship to it because of the settlement payments it had to make to Mr. Toal, plaintiff has failed to identify any ambiguity that might require a trial of this action. Morse Diesel Intern. v. Olympic Plumbing & Heating Corp., 299 A.D.2d 276 (1<sup>st</sup> Dept 2002).

U.S. Underwriters has proved that the certificate of insurance York relies upon is not evidence it was an additional insured under the policy Nova had in effect at the time of the Toal accident. It has also proved that even if York was an additional insured, there are policy exclusions that apply, defeating the claims for defense and indemnification plaintiff has asserted in its complaint. In opposition, York has only provided the bare-boned affidavit by a former employee. It has failed to set forth any meaningful arguments

that would justify the court postponing its decision on this motion for summary judgment to allow for the completion of discovery. See: Auerbach v. Bennett, 47 NY2d 619 636 (1979).


For these reasons, defendant U.S. Underwriters is entitled to summary judgment and a declaration that it is not obligated to defend or indemnify York and/or Nova in the underlying personal injury action by Mr. Toal. To the extent that U.S. Underwriters also seeks entry of a default judgment on liability (CPLR § 3215) against the non-appearing 3<sup>rd</sup> party defendants, they have proved that the defaulting defendants were served with the summons and complaint, their time to answer/ appear has expired, and they have not moved to extend their time to do so. Thus, in that respect, U.S. Underwriters' motion is granted. However, to the extent that U.S. Underwriters seek entry of a default judgment on the issue of liability, it is denied since the 3<sup>rd</sup> party claims against the 3<sup>rd</sup> party defendants emanate from the now dismissed claims against U.S. Underwriters indemnification and defense.

U.S. Underwriters may settle a judgment on notice.

Although York has already settled its case against some of the defendants, some claims still remain. Therefore the already scheduled compliance conference in Part 10 (February 21, 2008 at 9:30 a.m) remains in place and appearances are required. Any relief requested that has not been addressed has nonetheless been considered and is hereby expressly denied. This constitutes the decision and order of the court.

Dated: New York, New York  
January 9, 2008

So Ordered:

  
\_\_\_\_\_  
Hon. Judith J. Gische, JSC

**FILED**  
JAN 16 2008  
COUNTY CLERK'S OFFICE  
NEW YORK