

**Indemnity Ins. Co. of North Am. v  
St. Paul Mercury Ins. Co.**

2008 NY Slip Op 30462(U)

February 14, 2008

Supreme Court, New York County

Docket Number: 0102500/2006

Judge: Marylin G. Diamond

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**SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY**  
**PRESENT: HON. MARYLIN G. DIAMOND** **PART 48**  
*Justice*

INDEMNITY INSURANCE COMPANY OF  
NORTH AMERICA,

Plaintiff,

- v -

ST. PAUL MERCURY INSURANCE COMPANY et al.,

Defendants.

And Third Party Actions.

INDEX NO. 102500/06

MOTION DATE

MOTION SEQ. NO. 004

MOTION CAL. NO.

**FILED**  
FEB 21 2008  
NEW YORK  
COUNTY CLERK'S OFFICE

Cross-Motion:  Yes  No

**Upon the foregoing papers, it is ordered that:** In this action, the plaintiff, Indemnity Insurance Company of North America ("IIC"), seeks reimbursement of the \$2 million it paid to settle an underlying personal injury action. The injured plaintiff in the underlying action, Eugene Flood, an employee of the Yonkers Contracting Company, Inc. ("YCC"), was working in September, 2000 on a construction project involving the restoration of the Manhattan Bridge. YCC was retained by the City of New York to serve as the general contractor on the project. In turn, YCC hired a subcontractor named Romano Enterprises of New York, Inc. to paint certain portions of the bridge.

In painting the bridge, Romano had draped a series of steel cables along the sides of the bridge, parallel to the roadway, on which to hang its scaffolding. The cables were essentially camouflaged by, *inter alia*, the bridge lattices. On the day of his accident, Flood and others were attempting to move a five-ton iron beam horizontally through the bridge's lattices and suspension cables. Two days earlier, while looking for objects which might stand in the way of the beam as it was being moved, Flood's supervisor spotted one of the cables which Romano had placed on the bridge and concluded that it needed to be removed by Romano, which was no longer on the job site. He, as well as Flood, allegedly asked a Romano superintendent to do so. The cable, however, had still not been removed at the time that Flood and the others began to move the beam onto the bridge. Halfway through the process, the beam became stuck and Flood climbed onto the beam and walked along its length looking for the obstruction. As he reached the front end of the beam, the beam tilted and struck the cable which had been obstructing its movement. As a result of this contact, the cable snapped and then whipped across the beam, striking and seriously injuring Flood's ankle. In his complaint against the City and Romano, Flood asserted claims under Labor Law §§ 200, 240(1) and 241(6), as well as under the principles of common law negligence.

YCC and the City were insured under a commercial general liability policy of \$ 1 million and an umbrella policy of \$5 million, both of which were issued by the St. Paul Mercury Insurance Company. Romano had a similar policy with the Royal Insurance Company of America for up to \$1,000,000.00, as well as an umbrella policy with IIC for an additional \$10,000,000.00. Under its subcontract with YCC, Romano was required to (1) indemnify and hold harmless the City and YCC from any claims "arising from or in connection with any acts or omissions" in the performance of its work and (2) procure "all necessary and adequate insurances" naming the City and YCC as additional insureds. In this respect, Romano's policies with Royal and IIC covered, as an insured, those parties whom Romano was contractually obligated to indemnify.

Upon being sued by Flood in January, 2001, the City tendered its defense to St. Paul, which then assigned counsel to represent the City. Romano was represented by counsel assigned to it by its carrier, Royal. In June, 2001, St. Paul asked Romano to assume the City's defense and indemnification, pursuant to the indemnification clause in their contract. Romano's counsel agreed to the extent of recommending to St. Paul that it take over the City's defense. By letter to St. Paul dated January 2, 2002, Royal agreed to indemnify and defend the City in the underlying action. Romano's counsel was then assigned to also represent the City.

In December, 2002, IIC demanded that the City and Romano be represented at trial by separate counsel. After initially objecting to this demand, St. Paul agreed and the City's defense was thereafter taken over by new counsel. Soon after the trial began in February, 2003, Royal tendered the defense of the City and Romano to IIC since it appeared that Flood's claim would exceed Royal's policy limits.

As the trial began, the court (Faviola A. Soto, J.) granted Flood's motion for a directed verdict against the City as to the issue of liability on his Labor Law § 240(1) claim. The court found that the accident was caused because of the failure to properly place a pulley under the end of the beam on which Flood was walking, thus causing the beam to tilt and snap the cable which then struck Flood's ankle. The trial then proceeded on Flood's other claims and damages. On February 10, 2003, after Flood's case rested, IIC settled the case for \$3 million. Royal thereafter paid \$1 million and ICC paid the \$2 million balance. Flood's counsel stated on the record that the settlement was made with respect to Flood's claim against the City and that his client's claims against Romano were discontinued with prejudice.

In this action, IIC seeks to recover the \$2 million it paid in settling the underlying action. The complaint asserts two causes of action. The first is against St. Paul and alleges that the St. Paul policy covering the City of New York is primary to the IIC policy and that St. Paul is therefore responsible for indemnifying IIC for the \$2 million payment it made on behalf of St. Paul's insured. The second cause of action is against YCC. It alleges that since YCC is contractually obligated to indemnify the City, it is responsible for reimbursing IIC for the \$2 million payment made on the City's behalf. Both YCC and St. Paul have commenced third-party actions against Romano for indemnification.

In motion sequence number 004, St. Paul has moved for summary judgment dismissing the complaint or, in the alternative, granting its third-party subrogation claim against Romano for contractual indemnification. The plaintiff has cross-moved for summary judgment on its first cause of action against St. Paul. In motion sequence number 005, YCC has moved for summary judgment dismissing the complaint or, in the alternative, granting its third-party claim against Romano for contractual indemnification. The plaintiff has cross-moved for summary judgment on its second cause of action against YCC.

## Discussion

**A. The IIC-St. Paul Dispute** - - In arguing that it is not obligated to reimburse IIC for the payment it made on the City's behalf, St. Paul does not deny that it issued a primary liability policy to YCC which was in effect on the date of Flood's accident and that the City was an additional insured. Nevertheless, relying on *AIU Ins. Co. v. Valley Forge Ins. Co.*, 303 AD2d 325 (1<sup>st</sup> Dept 2003), it contends that the City is entitled, as a matter of law, to full indemnification from Romano and that its liability to Flood, and any obligation on St. Paul's part to cover such liability, must therefore pass-through to Romano and its insurers, Royal and ICC. In *AIU*, the First Department held where a party's liability is entirely vicarious and it is an additional named insured on the primary and excess policies issued to a party which is obligated to provide it with full indemnification, its primary carrier is not required to contribute to the settlement of the case since there should be "a complete pass-through of liability." *Id.* at 325-326. This approach makes eminent sense since otherwise its insurer would be required to pay monies to another insurer which would then have to essentially return these monies in

order to satisfy its own insured's indemnification obligations to the vicariously-liable party.

In opposing St. Paul's motion, IIC does not dispute that, under the proper circumstances, a pass-through would be an appropriate and expeditious resolution of claims and obligations. It argues, however, that a pass-through is not appropriate here because Flood's accident did not trigger the indemnification clause in the contract between YCC and Romano. As already noted, under this contract, Romano was required to indemnify and hold the City harmless from any claims "arising from or in connection with any acts or omissions" in the performance of Romano's work. IIC asserts that Flood's injuries arose from not from Romano's failure to remove the cable but, rather, from YCC's failure to provide a safety device which would have prevented the beam from tipping, as required under Labor Law § 240(1). IIC argues that this violation of Labor Law § 240(1) superseded Romano's failure to remove the obstructing cable.

IIC is essentially arguing that Roman's omissions were not the proximate cause of Flood's accident. It is, however, well settled that in a claim for contractual indemnification, the issues of whether the proposed indemnitor was negligent and, if so, whether such negligence was the proximate cause of the accident are irrelevant unless otherwise required under the indemnification agreement. See *Brown v. Two Exch. Plaza Partners*, 76 NY2d 172, 178-79 (1990); *Barnes v. New York Mercantile Exchange, Inc.*, 7 AD3d 304, 305 (1<sup>st</sup> Dept 2004); *Pope v. Supreme-K.R.W. Constr. Corp.*, 261 AD2d 523, 525 (2<sup>nd</sup> Dept 1999); *Correia v. Professional Data Management, Inc.*, 259 AD2d 60, 64-65 (1<sup>st</sup> Dept 1999). Here, they are not so required. Rather, what is required is only that the claim arise from or be connected to an act or omission by Romano.

In this respect, Flood's accident occurred in the course of an inspection which he undertook to determine what was obstructing the beam's movement. What was obstructing the beam was a cable which Romano was supposed to have earlier removed. But for this failure to remove the cable, Flood would not have conducted the inspection which led to his accident. When an accident occurs in the course of an inspection conducted only because of a party's omissions, the accident can surely be said to have arisen from or been connected to those omissions, irrespective of the fact that the accident would not have otherwise occurred in the absence of a subsequent act of negligence by another party, such as YCC. Although not dispositive, the evidence in the record before the court shows that Romano's attorneys, as well as Royal, accepted St. Paul's tender of a defense and indemnification after having concluded that Flood's accident did, in fact, arise from or in connection with Roman's omissions. The court agrees with this conclusion and find that St. Paul is not obligated to reimburse IIC for the monies it paid in the settlement of the underlying action. St. Paul's motion for summary judgment dismissing the first cause of action must therefore be granted and the plaintiff's cross-motion denied.

**B. IIC's Claim against Yonkers** - - In its second cause of action, IIC alleges that YCC is responsible for reimbursing it for the \$2 million paid on the City's behalf since YCC is contractually obligated to indemnify the City. YCC has moved for summary judgment dismissing this claim based, *inter alia*, on the anti-subrogation rule. This rule prohibits an insurer from maintaining a subrogation action against its own insured for a claim arising from the very risk for which the insured was covered. See *North Star Reinsurance Corp. v. Continental Ins. Co.*, 82 NY2d 281, 294-295 (1993). YCC argues that the anti-subrogation rule is applicable because it was an additional insured under an excess liability policy which IIC issued covering the very project on which Flood was insured.

In opposing the motion and in supporting its cross-motion for summary judgment, IIC points out that the policy which it issued to Romano only covers as additional insureds those parties whom Romano was obligated by contract to name as an insured. It argues that since the indemnification clause in the YCC/Romano contract only requires the procurement of "necessary and adequate insurances" and only refers to "primary coverage," Romano was not obligated to obtain an excess

policy on YCC's behalf. This argument is without merit. The IIC policy also expressly states that it includes as an insured any organization included as an additional insured in the underlying policy issued by Royal. Since YCC is included as an additional insured under the Royal policy, it is therefore also an additional insured under the IIC policy.

IIC also argues, as it did in support of its claim against St. Paul, that Flood's accident was not covered by the policy because it was caused by YCC's negligence, which superseded any previous acts or omissions of Romano. As already discussed, this argument is without merit. Since the policy which IIC issued to Romano thus covered YCC as an additional insured against the claim made by Flood, ICC is barred by the anti-subrogation rule from asserting its claim herein against YCC for reimbursement. YCC's motion dismissing the second cause of action must therefore be granted and IIC's cross-motion denied.

Accordingly, in motion sequence number 004, St. Paul's motion for summary judgment is granted and the first cause of action is hereby dismissed. The plaintiff's cross-motion for summary judgment on this claim is denied. In motion sequence number 005, YCC's motion for summary judgment is granted and the second cause of action is hereby dismissed. The plaintiff's cross-motion for summary judgment on this claim is also denied.

The Clerk Shall Enter Judgment Herein

Dated: 2-14-08

*MGD*

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MARYLIN G. DIAMOND, J.S.C.  
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**FILED**  
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