

**Sisalima v 845 Unlimited Partnership**

2008 NY Slip Op 32836(U)

October 14, 2008

Supreme Court, New York County

Docket Number: 104334/06

Judge: Doris Ling-Cohan

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

PRESENT: Hon. Doris Ling-Cohan

PART 36

Index Number : 104334/2006  
**SISALIMA, RENEE**  
VS.  
**845 UN LIMITED PARTNERSHIP**  
SEQUENCE NUMBER : 008  
SUMMARY JUDGMENT

INDEX NO. 104334/06  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. 008  
MOTION CAL. NO. \_\_\_\_\_

this motion to/for \_\_\_\_\_

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...  
Answering Affidavits — Exhibits \_\_\_\_\_  
Replying Affidavits \_\_\_\_\_


PAPERS NUMBERED  
1, 2  
3, 4, 6  
5

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion is disposed of in  
accordance with the attached memorandum decision.

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

**UNFILED JUDGMENT**  
This judgment has not been entered by the County Clerk  
and notice of entry cannot be served hereon. To  
obtain entry, counsel or authorized representative must  
appear in person at the Judgment Clerk's Desk (Room  
1412L)

Dated: 10/14/08  \_\_\_\_\_  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION  
Check if appropriate:  DO NOT POST  REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK : IAS PART 36

----- X  
RENEE SISALIMA,

Motion Seq. 008-  
012

Plaintiff,

INDEX NO.  
104334/06

-against-

845 UN LIMITED PARTNERSHIP and FOOD SCOPE  
MIDTOWN, LLC d/b/a MEGU MIDTOWN,

Defendants.

----- X  
FOOD SCOPE MIDTOWN, LLC and FOOD SCOPE, INC.,

Third-Party Plaintiffs,

INDEX NO.  
591071/06

-against-

KUDOS CONSTRUCTION CORPORATION,

Third-Party Defendant,

**UNFILED JUDGMENT**  
This judgment has not been entered by the County Clerk  
and notice of entry cannot be served based hereon. To  
obtain entry, counsel or authorized representative must  
appear in person at the Judgment Clerk's Desk (Room  
1415).

----- X  
KUDOS CONSTRUCTION CORPORATION,

Second Third-Party Plaintiff,

INDEX NO.  
590577/07

-against-

EVEREST NATIONAL INSURANCE CO., RAM CREATIVE  
WOODWORKING, INC., UTICA FIRST INSURANCE CO.,

Second Third-Party Defendants.

----- X  
845 UN LIMITED PARTNERSHIP, FOOD SCOPE  
MIDTOWN, LLC and FOOD SCOPE, INC.,

Third Third-Party Plaintiffs,

INDEX NO.  
590667/07

-against-

RAM CREATIVE WOODWORKING, INC.,

Third Third-Party Defendant.

----- X

----- X

FOOD SCOPE MIDTOWN, LLC and FOOD SCOPE, INC.,  
and 845 UN LIMITED PARTNERSHIP, LLC.,

Fourth Third-Party Plaintiffs,

INDEX NO.  
591102/07

-against-

EVEREST NATIONAL INSURANCE COMPANY,

Fourth Third-Party Defendant.

----- X

**DORIS LING-COHAN, J.:**

In this outgrowth of a Labor Law action premised on a scaffolding accident, motion sequence numbers 008 through 012, all dealing with the various parties' obligations to defend and/or indemnify each other, are consolidated herein for disposition.

In motion seq. no. 008 Everest National Insurance Co. ("Everest") moves for an order pursuant to CPLR 3212 "awarding Everest summary judgment against Kudos Construction Corporation ('Kudos'), Food Scope Midtown, LLC and Food Scope, Inc. (collectively 'Food Scope') and 845 UN Limited Partnership, LLC ['UN'] declaring that Everest has no duty to defend or indemnify Kudos, Food Scope or [UN] in the underlying first-party action."

In motion seq. no. 009 Utica First Insurance Co. ("Utica") moves for an order granting summary judgment pursuant to CPLR 3212 dismissing the second third-party complaint against it together with any and all cross-claims and counterclaims and awarding judgment in its favor declaring pursuant to CPLR 3001 that Utica has no obligation to defend and indemnify Kudos in connection with the third-party action commenced by Food Scope against Kudos. Utica

alternatively requests an order pursuant to CPLR 603 and 1010 severing the second third-party action from the remainder of the action.

In motion seq. no. 010 Food Scope and UN move for an order pursuant to CPLR 3212 granting a conditional order of summary judgment to Food Scope on its cause of action against third-party defendant Kudos for contractual indemnification and granting Food Scope and UN summary judgment on their cause of action against fourth-party defendant Everest declaring that Everest is obligated to defend and indemnify defendants Food Scope and UN in the main action “as well as third-party defendant Kudos” in the first third-party action by Food Scope against Kudos, such indemnity to include the amount of any judgment obtained by plaintiff against defendants Food Scope and UN and the costs and expenses, including attorneys’ fees, incurred by them in defending the main action, as well as the costs and expenses, including attorneys’ fees, incurred by Food Scope in prosecuting the third-party action against Kudos.

In motion seq. no. 011 third-party defendant and second third-party plaintiff Kudos moves for an order pursuant to CPLR 3212 granting it summary judgment on its second third-party complaint against Everest declaring that Everest is obligated to defend and indemnify Kudos and Food Scope in the main action (Food Scope is suing Kudos in the “main action”) for any judgment obtained by plaintiff against defendants and for attorneys’ fees, costs and disbursements incurred by Kudos and Food Scope in defending this lawsuit.

In motion seq. no. 012 Ram Creative Woodworking, Inc. (“Ram”) moves for an order pursuant to CPLR 3212 granting summary judgment dismissing the second third-party complaint and the third third-party complaint against Ram together with any and all cross-claims or counterclaims asserted against it.

The underlying facts are taken from this court's decision and order dated June 19, 2008.

Plaintiff is seeking damages for personal injuries allegedly sustained on February 28, 2006 when he fell off a ladder atop a scaffold during the course of his employment by Kudos on a construction project located at 845 First Avenue in Manhattan. Defendant UN was the owner of the premises at the time of plaintiff's accident. Defendant Food Scope was UN's lessee. Plaintiff's complaint is based on allegations of negligence and violations of the Labor Law. In November 2006 Food Scope commenced a third-party action against its contractor and plaintiff's employer, Kudos, alleging claims for breach of contract, contractual indemnification and common-law indemnification.

In June 2007, Kudos commenced the second third-party action against its insurance carrier Everest, Kudos' subcontractor Ram, and Ram's insurance carrier Utica for declaratory relief alleging that Everest issued a commercial general liability insurance policy to Kudos under which Everest is obligated to defend and indemnify Kudos in the first third-party action brought by Food Scope and that Everest is obligated to defend and indemnify Food Scope, as an additional insured, in the personal injury action brought by plaintiff (see Everest's moving papers, exhibit C, pp 9 and 15 – the court notes that this would create a conflict of interest for Everest). Kudos also seeks contribution and indemnification from Ram as well as a declaration that Kudos is an additional insured under the policy Utica issued to Ram and that Utica is obligated to defend and indemnify Kudos in the first third-party action brought by Food Scope.

In July 2007, UN and Food Scope commenced a third third-party action against Ram for contribution and indemnification with respect to plaintiff's claims, based on allegations that Ram was negligent and violated the Labor Law because it provided plaintiff with a defective scaffold.

In December 2007 UN and Food Scope commenced a fourth third-party action against Everest seeking a declaration that Everest is obligated to defend and indemnify them in the main action.

By decision and order dated June 19, 2008 (after the instant motions were submitted but before they were considered) this court granted motions by Utica and Everest (mot. seq. nos. 003 and 004) and severed the third-party coverage actions from the main action. The court also granted a motion by Tokio Marine and Nichido Fire Insurance Company, Ltd. (mot. seq. no. 007) for leave to intervene as a third-party plaintiff in a proposed coverage action against Everest.

The issue (and potential conflict of interest) presented by three of the instant motions for summary judgment (mot. seq. nos. 008, the second branch of 010, and 011) is whether Everest has a duty to defend and indemnify Food Scope and UN in the action brought by plaintiff as well as a duty to defend and indemnify Kudos in the first third-party action brought by Food Scope.

Everest contends that it is entitled to an order granting summary judgment declaring that it has no duty to defend or indemnify Kudos, Food Scope or UN because Kudos failed to obtain a hold harmless agreement from its subcontractor, Ram, which is expressly required to avoid triggering the contractor's exclusion endorsement in the Everest policy. Everest also contends that the fourth-party coverage claims by Food Scope and UN against Everest should be dismissed because neither Food Scope nor UN is named as an insured or additional insured under the Everest policy.

The court finds that Everest has a duty to defend and indemnify Kudos in the first third-party action brought by Food Scope. Everest insured Kudos under a commercial general liability policy for the policy period of January 19, 2006 to January 19, 2007 (the "Everest policy"). The

contractor's exclusion endorsement on which Everest relies precludes coverage for any "bodily injury" ... arising out of work performed on behalf of [Kudos]" by one of its contractors or subcontractors unless Kudos obtained the contractor's or subcontractor's prior written agreement to indemnify and hold harmless Kudos in the event of a loss (see February 1, 2008 affidavit of Scott Pakes in support of Everest's motion, exhibit 2). It is clear from the papers before the court that the contractor's exclusion is inapplicable because plaintiff's injury arose out of work performed by him on behalf of his employer Kudos, not work performed on behalf of Kudos by its subcontractor Ram. Indeed, plaintiff's complaint against Food Scope and UN, which is based on their vicarious liability under the Labor Law, refers, as it should, to plaintiff's employer Kudos (which plaintiff cannot sue directly because of the Workers' Compensation Law) but makes no mention of Ram (see Everest's moving papers, exhibit A). When an insurer seeks to disclaim coverage on the basis of an exclusion, it must demonstrate that the allegations of the complaint cast the pleading solely and entirely within the policy exclusion and that the allegations, taken as a whole, are subject to no other interpretation (see Automobile Insurance Company of Hartford v. Cook, 7 NY3d 131, 137 [2006]). Everest can make no such showing. Everest's reliance on the fact that the scaffold from which plaintiff fell was owned by Ram is misplaced because plaintiff was not performing work on behalf of Ram when his accident occurred and deposition testimony reflects that plaintiff did not have Ram's permission to use its scaffold.

The court finds further that Everest does not have a duty to defend and indemnify Food Scope and UN in the personal injury action brought by plaintiff. "The party claiming insurance coverage bears the burden of proving entitlement ... and is not entitled to coverage if not named

as an insured or an additional insured on the face of the policy [citation omitted]” (National Abatement Corp. v. National Union Fire Insurance Co., 33 AD3d 570, 570-571 [1<sup>st</sup> Dept 2006]). Although the Everest policy contains an additional insured endorsement covering owners, lessees and contractors (see Pakes affidavit, exhibit 3), it is undisputed that Food Scope and UN are not named as additional insureds on the face of the policy or schedule thereto. Their contention that the certificates of insurance on which they are named as additional insureds (see February 11, 2008 affirmation of Gene Weisberg in opposition to Everest’s motion, exhibits O and P) creates coverage is incorrect. “[A] certificate of insurance, by itself, is insufficient to raise a factual issue as to the existence of coverage [citations omitted]” (Glynn v. United House of Prayer, 292 AD2d 319, 322 [1<sup>st</sup> Dept 2002]). The court notes that the second branch of the motion by Food Scope and UN seeking a declaration that Everest is obligated to defend and indemnify Food Scope and UN “as well as the third-party defendant Kudos” in the main action (which, according to Food Scope and UN, includes the first third-party action) creates a patent conflict of interest and makes little sense given the fact that Food Scope is suing Kudos.

The first branch of the motion by Food Scope and UN (seq. no. 010) seeks a conditional order of summary judgment (conditioned on a finding that Food Scope was not actively negligent) declaring that Kudos is liable to Food Scope for contractual indemnification.

The indemnification provision in the contract between Food Scope, as lessee of the premises, and Kudos, as Contractor, provides in pertinent part: “[t]o the fullest extent permitted by law and to the extent claims are not covered by [Kudos’] insurance, [Kudos] will indemnify and hold Food Scope harmless “from and against claims damages, losses and expenses ... arising out of or resulting from performance of the Work, provided that such claim ... is attributable to

bodily injury ... but only to the extent caused by the negligent acts or omissions of [Kudos or a subcontractor] ... regardless of whether or not such claim ... is caused in part by the party to be indemnified hereunder” (see Food Scope’s exhibit B, p 18, § 3.18.1).

According to Kudos, the fact that Food Scope can be indemnified for its negligence renders the provision void under General Obligations Law § 5-322.1, which renders void and unenforceable agreements exempting owners and contractors from liability for their own negligence. The court disagrees. There is not one iota of evidence in the papers before the court showing that Food Scope had any active involvement with the construction activity or was in any way negligent. In the absence of some showing of negligence on Food Scope’s part, enforcement of the contractual indemnification provision does not violate General Obligations Law § 5-322.1 (see Velez v. Tishman Foley Partners, 245 AD2d 155,157 [1<sup>st</sup> Dept 1997] and cases cited therein; see also, Masciotta v. Morse Diesel International, 303 AD2d 309, 311-12 [1<sup>st</sup> Dept 2003] [GOL § 5-322.1 does not bar enforcement of a contractual indemnity provision where the indemnitee was strictly liable under Labor Law § 240(1) and there was no evidence of negligence on its part]). Accordingly, the first branch of Food Scope’s motion will be granted.

Utica has moved (seq. no. 009) for an order granting summary judgment declaring that Utica has no obligation to defend and indemnify Kudos in the third-party action brought by Food Scope against Kudos. In opposition, Kudos points out that summary judgment is inappropriate because Utica has not joined issue by serving an answer to the second third-party complaint served upon it by Kudos. Kudos is correct (see CPLR 3212[a]). Utica’s instant motion was served on January 31, 2008. Kudos’ opposing affirmation is dated March 10, 2008 and was served on March 14, 2008, at which time Utica had yet to serve its answer to Kudos’ second

third-party complaint which was filed in June 2007 (see Kudos affirmation in opposition, exhibit A). Nevertheless, the court will address Utica's motion because the two main issues were raised by Utica and fully addressed by Kudos at the time of the court's June 19, 2008 order (cf. Elsky v. Hearst Corporation, 232 AD2d 310 [1<sup>st</sup> Dept 1996] [court may treat motion to dismiss pursuant to CPLR 3211 as a motion for summary judgment where parties' evidentiary submissions clearly indicate that they were charting a summary judgment course]).

Utica previously moved (seq. no. 003) pursuant to CPLR 3211(a)1 and 7 and CPLR 3211(c) for an order dismissing the second third-party complaint and declaring that Utica had no obligation to defend or indemnify Kudos in connection with the third-party action brought against Kudos by Food Scope. Utica argued then, as it does now, that Kudos is not an additional insured under the Utica policy because Kudos is not specifically named as such and that Kudos does not fall within the definition of insured under the blanket additional insured endorsement because there is no written contract obligating Ram to name Kudos as an additional insured. In opposition, Kudos argued that it was an additional insured under the Utica policy because the certificate of insurance which names Kudos as a certificate holder provides that the certificate holder is included as an additional insured. Kudos argued further that the blanket additional insured endorsement in the Utica policy does not exclude coverage based on the fact that plaintiff was an employee of Kudos.

The court finds that Kudos' reliance on the certificate of insurance is not justified (see Glynn v. United House of Prayer, supra, 292 AD2d at 322). Furthermore, Kudos does not dispute that the Utica policy does not name Kudos as an additional insured on its face or that Kudos is not covered under the blanket additional insured endorsement because there is no

written contract obligating Ram to name Kudos as an additional insured.. Accordingly, the summary relief requested by Utica will be granted. Utica's alternative request for a severance is denied as moot in view of the court's June 19, 2008 decision, which severed the third-party coverage actions, and the court's findings herein.

In support of its motion for summary judgment (seq. no. 012) dismissing the second and third third-party complaints against it for contribution and indemnification and all cross-claims Ram argues that it owes no legal obligation to plaintiff because, according to uncontradicted deposition testimony, Ram was not present on the jobsite on the date of plaintiff's accident and neither plaintiff nor his employer, Kudos, got permission from Ram to use its scaffold. In "opposition" Kudos reiterates its position that plaintiff's injury did not arise out of work performed on behalf of Ram; a position with which this court agrees (see p 6, supra). UN and Food Scope contend that Ram's motion, which was served on February 12, 2008, is untimely because the court's preliminary conference order dated November 15, 2006 (Richter, J) stated that dispositive motions must be made within 60 days from the date plaintiff filed his note of issue and plaintiff filed his note of issue on December 3, 2008 (see Polin March 14, 2008 affirmation in opposition, exhibits A and B).

Ram's motion is both timely and well founded. Ram cannot be bound by the November 2006 preliminary conference order because it was not a party to this action in November 2006 and did not become a party until August 2007 when it served its answer to Kudos' second third-party complaint. Furthermore, in its June 19, 2008 decision and order, this court severed the third-party coverage actions from the main action which, as noted in the court's short-form order of such date, rendered the matter of plaintiff's note of issue in the main action moot. Although

the second third-party action by Kudos against Everest, Ram and Utica is primarily a coverage action, the claims asserted against Ram are for contribution and indemnification (see Ram's moving papers, exhibit F, pp 13-14, 17). While the third third-party action by UN and Food Scope against Ram for contribution and indemnification does not involve insurance coverage, that action will nevertheless be dismissed because the court has determined herein that the action is without basis because plaintiff's injury arose out of work performed on behalf of Kudos and Ram was not implicated.

Accordingly, it is hereby

ORDERED, ADJUDGED and DECLARED that the motion by Everest (seq. no. 008) for an order granting summary judgment declaring that Everest has no duty to defend and indemnify UN and Food Scope in the main action brought by plaintiff and no duty to defend and indemnify Kudos in the first third-party action brought by Food Scope is granted to the extent that the court finds that Everest has no duty to defend and indemnify UN and Food Scope in the main action brought by plaintiff; In all other respects the motion is denied; and it is further

ORDERED, ADJUDGED and DECLARED that the motion by Utica (seq. no. 009) for an order granting summary judgment dismissing Kudos' second third-party complaint against it together with any and all cross-claims and counterclaims and declaring that Utica has no obligation to defend and indemnify Kudos in connection with the first third-party action brought by Food Scope is granted. The alternative branch of Utica's motion for an order severing the second third-party action from the main action is denied as moot; and it is further

ORDERED, ADJUDGED and DECLARED that the motion by Food Scope and UN (seq. no. 010) for an order granting Food Scope conditional summary judgment on its third-party cause

of action against Kudos for contractual indemnification and granting Food Scope and UN summary judgment on their fourth third-party complaint against Everest declaring that Everest is obligated to defend and indemnify Food Scope, UN and Kudos in the main action is granted to the extent that Food Scope is granted conditional (conditioned on plaintiff prevailing) summary judgment against Kudos on Food Scope's third-party cause of action for contractual indemnification. In all other respects the motion is denied; and it is further

ORDERED, ADJUDGED and DECLARED that the motion by Kudos (seq. no. 011) for an order granting it summary judgment on its second third-party complaint against Everest declaring that Everest is obligated to defend and indemnify Kudos and Food Scope in the main action is granted to the extent that the court finds that Everest is obligated to defend and indemnify Kudos in the first third-party action brought by Food Scope. In all other respects the motion is denied; and it is further

ORDERED that the motion by Ram (seq. no. 012) for an order granting summary judgment dismissing the second and third third-party complaints against it is granted.

This constitutes the decision, order and judgment of the court.

DATED: *Oct 14*, 2008

J:\Summary Judgment\Sisalima II.845.wpd

**UNFILED JUDGMENT**  
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).