

**City of New York v Universal Bldrs. Supply, Inc.**

2008 NY Slip Op 33039(U)

November 3, 2008

Supreme Court, New York County

Docket Number: 602466/2006

Judge: Marcy S. Friedman

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

PRESENT: **Hon. Marc S. Friedman**

PART 57

Index Number : 602466/2006  
**CITY OF NEW YORK**  
 vs.  
**UNIVERSAL BUILDERS SUPPLY, INC**  
 SEQUENCE NUMBER : 002  
 SUMMARY JUDGMENT

INDEX NO. 602466/06  
 MOTION DATE \_\_\_\_\_  
 MOTION SEQ. NO. 002  
 MOTION CAL. NO. \_\_\_\_\_

In this motion to/for Summary judgment

PAPERS NUMBERED  
 \_\_\_\_\_  
2, 3  
4, 5

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

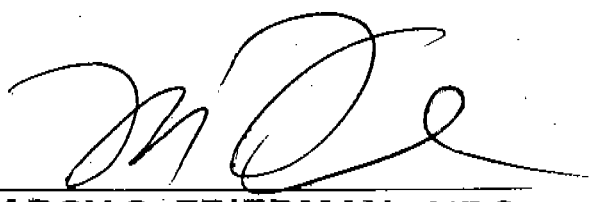
Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

**DECIDED IN ACCORDANCE WITH ACCOMPANYING DECISION/ORDER.**

**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 1612).

Dated: 11-3-08



**MARCY S. FRIEDMAN, J.S.C.**

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate  DO NOT POST  REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK – PART 57

PRESENT: Hon. Marcy S. Friedman, JSC

\_\_\_\_\_  
CITY OF NEW YORK, TURNER  
CONSTRUCTION, LIBERTY MUTUAL  
INSURANCE GROUP, and NEW YORK CITY  
HOST COMMITTEE 2004,

Index No.: 602466/2006

*Plaintiff(s),*

DECISION/ORDER

- against -

UNIVERSAL BUILDERS SUPPLY, INC. and  
AMERICAN HOME ASSURANCE CO.

**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 at the Judgment Clerk's Desk (Room  
\_\_\_\_\_) person at the Judgment Clerk's Desk (Room  
\_\_\_\_\_) Defendant(s)

\_\_\_\_\_  
x  
In this declaratory judgment action, plaintiffs the City of New York ("City"), Turner Construction ("Turner"), and the New York City Host Committee 2004 ("Host Committee") seek, among other things, a declaration that defendant American Home Assurance Co. ("American") has a duty to defend and indemnify them in an underlying personal injury action entitled Butkow v City of New York et al. (Index No. 112090/05, Supreme Court, New York County ["underlying action"]). In their motion, the City, Turner, and Host Committee seek summary judgment against defendant American on their claim for the above relief, and summary judgment on their claim against defendant Universal Builder Supply, Inc. ("Universal") for contractual indemnification and for failure to procure insurance. In the same motion, plaintiff Liberty Mutual Insurance Company ("Liberty") seeks summary judgment against Universal and American declaring that Liberty is entitled to reimbursement for defense costs in the underlying action.

The following relevant facts are undisputed: In the underlying action, plaintiff Pamela Butkow sued the City, Turner and Host Committee for injuries arising out of an accident on the sidewalk at the corner of Eighth Avenue and 33<sup>rd</sup> Street in Manhattan on July 2, 2004. Plaintiff tripped and fell on a piece of fencing in the vicinity of a pedestrian bridge that was erected near Madison Square Garden for the 2004 Republican National Convention. (See Dep. of Pamela Butkow at 15 [Ex. D to Ps.' Motion].) Host Committee hired Turner as a general contractor for work for the Convention, including installation of the pedestrian bridge. Turner hired Universal to do the bridge work.

American is Universal's general liability insurer. It is undisputed that the City, Turner, and Host Committee are additional insureds under Universal's American policy. Liberty is Turner's general liability insurer.

The standards for summary judgment are well settled. The movant must tender evidence, by proof in admissible form, to establish the cause of action "sufficiently to warrant the court as a matter of law in directing judgment." (CPLR 3212[b]; Zuckerman v City of New York, 49 NY2d 557, 562 [1980].) "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers." (Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 [1985].) Once such proof has been offered, to defeat summary judgment "the opposing party must 'show facts sufficient to require a trial of any issue of fact' (CPLR 3212, subd. [b])." (Zuckerman, 49 NY2d at 562.)

#### Plaintiffs' Claim Against American For A Defense And Indemnification

The City, Turner and Host Committee seek an unconditional declaration that American is obligated to defend them in the underlying action. By undated letter ("reservation letter"),

American agreed “to provide a defense to the City of New York, Turner Construction, and New York City Host Committee 2004 in the Underlying Action, subject to a complete reservation of its rights to disclaim any duty to defend or indemnify any insured for the Underlying Action.”

(Ex. A to American Aff. In Opp. at 2.) The letter continued: “American Home reserves the right to disclaim coverage in the event Ms. Butkow’s alleged injuries did not arise from the Insured’s work as set forth in the American Home Policy.” (Id. at 6.)

American sets forth no authority in support of its position conditioning the provision of a defense on the outcome of the underlying action. On the contrary, it is “well settled that an insurance company’s duty to defend is broader than its duty to indemnify.” (Automobile Ins. Co. of Hartford v Cook, 7 NY3d 131, 137 [2006].) “[A]n insurer’s duty to defend its insured is exceedingly broad and an insurer will be called upon to provide a defense whenever the allegations of the complaint suggest . . . a reasonable possibility of coverage. The duty to defend an insured . . . is derived from the allegations of the complaint and the terms of the policy. If a complaint contains any facts or allegations which bring the claim even potentially within the protection purchased, the insurer is obligated to defend.” (BP Air Conditioning Corp. v One Beacon Ins. Group, 8 NY3d 708, 714 [2007] [quotation marks, brackets, and internal citations omitted].) “Thus, an insurer may be required to defend under the contract even though it may not be required to pay once the litigation has run its course.” (Automobile Ins. Co. of Hartford, 7 NY3d at 137.)

It is undisputed that American’s policy with Universal requires American to defend any insured “only with respect to liability arising out of your [Universal’s] ongoing operations performed for that insured.” (American Policy, Additional Insured Endorsement at CG 20 10 10

01 [Ex. J to Ps.’ Motion].) It is now established that “the standard for determining whether an additional named insured is entitled to a defense is the same standard that is used to determine if a named insured is entitled to a defense.” (BP Air Conditioning Corp., 8 NY3d at 715.) Thus, a determination as to liability – i.e., as to whether the accident arose out of the work that the insured performed for the additional insured – is not required before the additional insured may be found entitled to a defense. (See id. at 714-715.)

Applying these standards, the court holds that plaintiff’s allegations in the underlying action – namely, that she fell on a piece of chain link fence lying in a pedestrian walkway constructed by Universal – suggest a reasonable possibility of coverage. On the above authority, American is therefore obligated to provide a defense to the City, Turner, and the Host Committee. Similarly, Liberty is entitled to reimbursement for any defense costs already expended.

The court reaches a different conclusion as to plaintiffs’ claim for a declaration at this juncture that American must indemnify them in the underlying action. The issue of whether plaintiff Butkow’s accident arose out of Universal’s work at the site has not yet been determined in the underlying action. Accordingly, the court cannot determine whether plaintiffs’ claim falls within the additional insured coverage of Universal’s policy with American. (See Chunn v New York City Hous. Auth., \_\_\_ AD3d \_\_\_ [1<sup>st</sup> Dept 2008], 2008 NY Slip Op 08019; Crespo v City of New York, 303 AD3d 166, 167 [1<sup>st</sup> Dept 2003]; 79<sup>th</sup> Realty Co. v X.L.O. Concrete Corp., 247 AD2d 256 [1<sup>st</sup> Dept 1998].)

Plaintiffs’ Claims Against Universal For Failure To Procure Insurance And For Contractual Indemnification

It is undisputed that Universal was obligated under its contract with Turner to obtain general liability insurance and to name the City, Turner and Host Committee as additional insureds, with a combined single limit of \$10 million. (See Contract, Art. XXIII[2] [Ex. H to Ps.' Motion].) However, Universal does not dispute that its policy with American provides a limit of \$2 million per occurrence, regardless of the number of insureds. (See Reservation Letter at 6 [Ex. A to American Aff. In Opp.].) Universal thus failed to obtain coverage in the amount required by the contract.

Failure to obtain insurance in the full amount required by a contract to procure insurance constitutes a breach of that contract. (See Nrecaj v Fisher Liberty Co., 282 AD2d 213 [1<sup>st</sup> Dept 2001].) Universal may be liable for any damages that plaintiffs may have to pay in excess of the two million dollars and less than the ten million dollars. (See id.). Plaintiffs should be granted summary judgment as to liability on their claim against Universal for failure to procure insurance, with an assessment of damages.

Finally, as to plaintiffs' claim against Universal for contractual indemnification, the court rejects Universal's contention that this claim is barred by plaintiffs' assertion of similar claims in the underlying action which have not yet been litigated. As to the merits, Universal does not argue that plaintiffs worked at the site or were otherwise negligent. However, as noted above, triable issues of fact exist in the underlying action as to whether Butkow's accident arose out of Universal's work at the site. The court accordingly holds that plaintiffs are entitled to summary judgment on their contractual indemnification claim against Universal, conditioned upon a finding in the underlying action that the accident arose out of Universal's work. (See Quichimbo v Vornado 640 Fifth Ave., L.L.C., 30 AD3d 194 [1<sup>st</sup> Dept 2006].)

It is accordingly hereby ORDERED that plaintiffs' motion for summary judgment is granted to the extent that it is

ORDERED, ADJUDGED and DECLARED that defendant American Home Assurance Co. is obligated to defend plaintiffs the City of New York, Turner Construction, and the New York City Host Committee 2004 in the underlying personal injury action against them entitled Butkow v City of New York et al., Supreme Court, New York County, Index No. 112090/05; and it is further

ORDERED that plaintiffs the City of New York, Turner Construction, and the New York City Host Committee 2004 are awarded judgment as to liability against Universal Builder Supply, Inc. on their claims against it for failure to procure insurance; and it is further

ORDERED that an assessment of damages, of any amount that plaintiffs have to pay in excess of two million dollars and less than ten million dollars, shall be held at the time of trial, or after any other disposition of the action, upon the filing of a note of issue and payment of the proper fees, if any. Provided that: Nothing herein authorizes the filing of the note of issue prior to the completion of discovery; and it is further

ORDERED, ADJUDGED and DECLARED that plaintiff Liberty Mutual Insurance Company shall recover from American Home Assurance Co. the costs expended for the defense in the underlying action entitled Butkow v City of New York et al., Supreme Court, New York County, Index No. 112090/05 from the date of tender to the date the defense is actually provided.

This constitutes the decision and order of the court.

Dated: New York, New York  
November 3, 2008

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