

**Neighborhood Partnership Hous. Dev. Fund Co., Inc.
v HUB Intl. Northeast Ltd.**

2008 NY Slip Op 33043(U)

November 6, 2008

Supreme Court, New York County

Docket Number: 118512/06

Judge: Louis B. York

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

LOUIS B. YORK
J.S.C.

PRESENT: _____

PART 2

Index Number : 118512/2006

NEIGHBORHOOD PARTNERSHIP

VS.

HUB INTERNATIONAL NORTHEAST

SEQUENCE NUMBER : 007

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

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

FILED
NOV 13 2008
COUNTY CLERK'S OFFICE
NEW YORK

**MOTION IS DECIDED IN ACCORDANCE WITH
WITH ACCOMPANYING MEMORANDUM DECISION.**

Dated: 11/6/08

Lby

J.S.C.

LOUIS B. YORK
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 CITY OF NEW YORK
COUNTY OF NEW YORK: PART 2

-----x
NEIGHBORHOOD PARTNERSHIP HOUSING
DEVELOPMENT FUND COMPANY, INC. and
WEST 128TH STREET LLC,

Plaintiffs,

Index No.: 118512/06

-against-

DECISION AND ORDER

HUB INTERNATIONAL NORTHEAST LIMITED,
SIRIUS AMERICA INSURANCE COMPANY and
DEBORAH O'NEAL,

Defendants.

-----x
HUB INTERNATIONAL NORTHEAST LIMITED,

Defendant/Third-
Party Plaintiff

Third Party
Index No. 590026/07

-against-

GREMESCO CORPORATION,

Third-Party
Defendant.

-----x
LOUIS B. YORK, J.:

FILED
NOV 13 2008
COUNTY CLERK'S OFFICE
NEW YORK

FACTUAL BACKGROUND

Defendant Sirius America Insurance Company (Sirius) moves for summary judgment declaring that it is not liable to defend or indemnify plaintiffs with respect to an underlying personal injury action, pursuant to the Commercial General Liability insurance policy it issued to plaintiffs. Sirius' motion is based on the assertion that the location of the loss is not a

covered location under the policy, and that the alleged accident did not occur "in connection with contracted construction, reconstruction repair or erection work being performed at an insured location."

Plaintiff Neighborhood Partnership Housing Development Fund Company, Inc. (NPHD) is a not-for-profit corporation engaged in developing affordable housing. On October 3, 2001, a net lease already in effect between it and the City of New York was amended to include the premises located at 46-50 West 129th Street, New York, New York. At the same time, a site development and management agreement between NPHD and T & M Realty Management, NPHD's management agent, was amended to include the premises at 46-50 West 129th Street. During this period, which the parties refer to as the licensing period, insurance coverage was in effect with Sirius for license phase liability coverage. The premises at 46-50 West 129th Street was included as part of this policy, pursuant to the above-referenced amendments.

On May 28, 2003, a construction loan closing took place, thereby enabling NPHD to acquire title to the property from the City of New York. At the same time, NPHD signed an amended and restated site development and management agreement with West 128th Street LLC, the co-plaintiff in this action.

At the May 28, 2003, closing, a representative from HUB International Northeast Limited (HUB), an insurance broker,

produced a Certificate of Insurance that transferred coverage from the license phase policy to a construction phase policy issued by Sirius. The effective dates of the construction phase policy were November 3, 2002 through November 3, 2003.

On September 28, 2003, Deborah O'Neal, a tenant at the premises at 46-50 West 129th Street, was allegedly injured when a portion of the ceiling at the premises fell on her. She commenced the underlying personal injury action against the NPHD and West 128th Street LLC in 2004.

Prior to the alleged occurrence, NPHD instituted a holdover proceeding against O'Neal. NPHD was attempting to have the entire building gutted for a complete renovation, and the holdover proceeding was allegedly part of the process of emptying the building. The actual gut renovation process did not begin until January of 2004.

The summons and complaint received from O'Neal was forwarded to Sirius, and on August 13, 2004, Sirius, through its risk management agent, disclaimed liability, asserting that 46-50 West 129th Street was not a covered location under the policy. In response to this disclaimer, NPHD commenced the instant action.

NPHD asserts that the premises at 46-50 West 129th Street were part of the insured premises, since that location was included in the license phase insurance policy which was, according to its belief, incorporated into the instant

construction phase policy. To substantiate this claim, NPHD includes as part of its documentation the amendments to its license phase policy that include the subject premises in the insurance coverage, and documentation from HUB that coverage was transferred from the license phase policy to the construction phase policy by Sirius.

Sirius maintains that, although it received a request to add 46-50 West 129th Street to the construction phase policy from NPHD's insurance brokers, the request did not contain all of the information needed to add the premises to the policy. There is apparently some question as to whether the brokers attempted to respond to the information requests from Sirius by e-mail, which was allegedly not received, and, regardless, was allegedly non-responsive to the request.

NPHD further asserts that the alleged accident is covered by the terms of the construction phase policy because removing the tenant was done "in connection with" the construction and rehabilitation of the building. Conversely, Sirius contends that the construction phase policy only covers occurrences that take place in vacant buildings during construction, not occupied premises. To support this contention, Sirius states that the insurance policy was subject to its classification codes, which were incorporated by reference, even though they were not specified in the policy. The classification code indicates that

the policy only covers actual construction in vacant premises.

NPHD insists that the construction phase policy became effective once the loan was approved so that construction could commence, and that the holdover proceeding was done "in connection with" the gut rehab, as a preliminary phase. Further, NPHD argues that, had it known that the policy was not intended to insure the premises until the building was vacant and the demolition started, it would not have agreed to the terms, which, in effect, would leave the premises in an uninsured status.

DISCUSSION

Summary judgment is appropriate when the movant establishes a prima facie entitlement to judgment as a matter of law by the submission of competent evidence. See *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). Summary judgment is warranted where there are no genuine issues of material fact and, therefore, the moving party is entitled to judgment as a matter of law. *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 (1986). Therefore, summary judgment must be precluded if, upon the papers submitted, there remains a question in the mind of the court.

In a prior ruling of this court on July 2, 2008, in denying third-party defendant Gremesco Corporation's motion for summary judgment involving the identical issue, this court stated that

"[t]he court views the issue of whether the underlying action plaintiff's injury is covered by the policy as ambiguous. In one place the policy appears to limit the coverage to accidents

only attributable to situations where construction is ongoing. It seems to be clear that the underlying accident occurred when there was no construction going on. But in another section coverage of personal injury is attributable for, among other things, the maintenance ... of the building. Further, clarif [sic] of these seemingly contradictory provisions must await trial, keeping in mind that these provisions are the individual companies [sic] product and must be strictly construed against it."

Therefore, based on the prior ruling of this court, which is the law of the case, Sirius' motion for summary judgment on this issue must be denied.

Sirius' other contention, that the premises were not a covered location, also raises questions of fact. Documents submitted demonstrate that the premises were included as part of the license phase policy in effect when the policy was changed over to a construction phase policy. Further, there is some indication that, for whatever reason, the location of the alleged accident may not have been included in the construction phase policy. The ultimate trier of fact must determine whether the location of the accident was incorporated into the construction phase policy. For this reason, Sirius' summary judgment on this issue must also be denied.

CONCLUSION

Based on the foregoing, it is hereby

ORDERED that defendant Sirius America Insurance Company's motion for summary judgment is denied.

Dated: 11/6/08

ENTER:

LY
Louis B. York, J.S.C.

**LOUIS B. YORK
J.S.C.**

FILED
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COUNTY CLERK'S OFFICE
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