Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE PATRICIA P. SATTERFIELD IA Part 19
Justice

FAHIM MAJAWALLA, etc., et al., x
Plaintiffs,
- against -
UTICA FIRST INSURANCE COMPANY,
Defendant.
x

Index Number 12810 2006
Motion Date August 13, 2008
Motion Cal. Number 9
Motion Seq. No. 2

The following papers numbered 1 to 11 read on this motion by defendant Utica First Insurance Company (Utica) for an order granting summary judgment and dismissal of the complaint, and declaring that Utica does not have a duty to either defend or indemnify the plaintiffs in the underlying action.

	Papers Numbered
Notice of Motion - Affirmation - Affidavit Exhibits (1, A-U).....	1-4
Opposing Affirmation - Affidavit Exhibits (A-D).....	5-9
Reply Affirmation.....	10-11

Upon the foregoing papers this motion is determined as follows:

In the underlying action, Janet Mangerino alleges that on January 14, 2004 she tripped and fell on the cracked pavement outside of the premises located at 6500 Myrtle Avenue, Glendale, New York. She alleged that the precise location of the defective condition was either the public sidewalk adjacent to the premises,(as alleged in her bill of particulars) or actually on the property owned by Yashi Associates (as testified to at her deposition). At the time of the accident the entire premises was leased to Glendale Convenience Store, Inc. (Glendale), and was

owned by Yashi Associates. In an order dated April 20, 2007, the Hon. Peter J. Kelly dismissed Ms. Mangerino's claim and all cross claims against Glendale, as the tenant had established prima facie its entitlement to judgment as a matter of law. The court stated that the lease between Glendale and Yashi specified that the landlord was responsible for making structural repairs at the premises, and that the defect in question whether on the adjoining sidewalk or on the premises was structural in nature. The order of April 20, 2007 was not appealed.

Utica First Insurance Company (Utica) issued an insurance policy to Glendale, effective September 8, 2003 to September 8, 2004, which only lists Glendale as the named insured. The policy states in pertinent part that:

"If shown on the Declaration as an 'organization' (other than a partnership or joint venture), Insured means you and all your executive officers and directors but only with respect to the scope of their duties. It also includes your stockholders, only for liability as such."

Insured also includes:

"d. your employees, for acts within the scope of their employment by you (this does not include executive officers)." "No person or organization is an insured with respect to the conduct of a current or past partnership or joint venture that is not shown on the Declaration as an Insured."

The policy further provides as follows:

EXCLUSIONS THAT APPLY TO ALL COVERAGES

"**We** do not pay for **bodily injury** or **property damage** liability which is assumed under a contract or an agreement. This exclusion does not apply to an **incidental contract**."

The policy states in its definition section as follows:

"**Incidental Contract** – This means a written:
a. lease of premises."

It is well established that the party claiming to be an additional insured bears the burden of proving its status, and that a party not named or shown to be an insured or additional insured is not entitled to coverage (see Metropolitan Heat & Power Co. v AIG Claims Serv., ___ AD3d ___, 47 AD3d 621 [2008]; Tribeca Broadway Assoc LLC v Mount Vernon Fire Ins Co, 5 AD3d 198 [2004]).

Plaintiffs Fahim Majawalla, as Executor of the Estate of Yusif K. Majawalla, deceased, Shoaib F. Haveliwala, and Ghanshyam Mirani, are partners in Yashi Associates. It is undisputed that Glendale is the named insured under the Utica policy, and that neither Yashi Associates nor its individual partners are names insureds or named additional insured under said policy. Moreover, there is no evidence that Utica ever received any request from Glendale to name the plaintiffs as insureds or additional insureds under the subject policy.

However, the plaintiffs may qualify as additional insureds pursuant to the written lease, as it is an "incidental contract," as defined by the insurance policy. Although Utica argues that the lease agreement between Yashi Associates and Glendale was not fully executed, Mr. Majawalla, in opposition to the motion, has produced an executed copy of the lease which was recently found among his late father's papers. The court notes that although Mr. Mirani stated at his deposition that the copy he was shown was not fully executed, that he did not think that he had a fully signed copy and did not know if one existed, he did not state that such an agreement did not exist. Rather, he stated that he signed the agreement, that Glendale's president was to have then signed it and to have sent it to Majawalla. To the extent that Utica claims that said lease agreement is not authentic, it is noted that Utica has not submitted an affidavit from an expert in support of its claims regarding the signatures. To the extent that Utica claims that there is no evidence that the lease was signed prior to Ms. Mangerino's accident of January 14, 2004, the court notes that the agreement and rider are dated January 1, 2001, and the insurer's speculations are insufficient to overcome the written agreement.

Paragraph 11 of the rider to the lease agreement requires that the tenant provide and keep in force comprehensive public liability insurance, plate glass insurance and property damage insurance as follows:

> "protecting the Landlord, the Sublessor, or Subtenant against any and all liability occasioned by negligence, occurrence, accident, disaster and other risks including 'extended coverage' policies, occurring in or about the demised premises or any part thereof, in amounts approved from time to time by the Landlord."
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> "All insurance maintained by Tenant pursuant to this Article shall name Landlord, the Sublessor or Subtenant and Tenant as insureds

> shall provide that any loss shall be payable to Landlord notwithstanding any act or failure to act or negligence of Landlord, Tenant or any other person, shall provide no cancellation, reduction in amount or material change in coverage will be effective until at least ten days after receipt by Landlord of written notice thereof, and shall be satisfactory to Landlord, acting reasonably and in all respects. Tenant shall procure an appropriate clause in, or endorsement to, all such insurance whereby the insurance company waives subrogation or consents to a waiver of right of recovery."

It is well settled that when denying coverage based upon an exclusion in an insurance policy, the language in the exclusion must be clear and unmistakable and not subject to any other reasonable interpretation (see Pepsico, Inc. v Winterthur Int'l Am. Ins. Co., 13 AD3d 599, 600 [2004]; Village Mall at Hillcrest Condominium v Merrimack Mut. Fire Ins. Co., 309 AD2d 857, 857 [2003]; Consolidated Edison Co. of NY v Hartford Ins. Co., 203 AD2d 83, 84 [1994]). Ambiguities as to the existence of insurance coverage must be resolved in favor of the party seeking coverage and strictly construed against the insurer (see Westview Assocs. v Guaranty Natl. Ins. Co., 95 NY2d 334, 340 [2000]; Pepsico, Inc., 13 AD3d at 600; Village Mall at Hillcrest Condominium, 309 AD2d at 858; Consolidated Edison Co. of NY, 203 AD2d at 84).

Here, after the commencement of the first underlying action, counsel for Ghanshyam Mirani, in a letter dated March 21, 2005, and received by the insurer on March 24, 2005, notified Utica of the Mangerino action, stated that Mirani was a partner in Yashi Associates and requested that the insurer defend Mirani in the underlying action. It is noted that none of the other plaintiffs' notified the insurer of the underlying action or requested that the insurer defend them in the underlying action. In a letter dated March 24, 2005, Utica stated that "we must, respectively refuse your demand for defense and indemnification on behalf of Ghanshyam Mirani. While the lease specifies that your client be named as an additional insured on Glendale's policy, that additional insured status would apply only to incidents arising out of the demised premises. The demised premises is limited to the building. The accident in question occurred on an adjacent sidewalk as the result of a structural defect, of which Glendale Convenience Store had no obligation to maintain."

This denial of coverage is clearly timely. Contrary to Utica's assertions, the court in the underlying action did not determine that the alleged accident did not occur on the demised premises. Rather, the court determined that as the defect was structural in nature, the landlord, rather than the tenant, had the duty to repair it, whether it occurred on the demised premises, which included the parking lot, or the adjacent sidewalk. The court, however, made no determination as to the exact location of the accident.

The subject insurance policy explicitly provides coverage for the buildings and structures described in the Declarations. However under the provision entitled "PROPERTY NOT COVERED AND EXCLUSIONS," the policy states "5. Land, Cost of Excavation, Grading or Filing, Paved Surfaces or Underground Piles, Flues or Drains- We do not cover: ... c. paved outdoor surfaces, including driveways, parking lots, roads and walks;..."

In the underlying action Ms. Mangerino does not allege that her accident occurred within the insured building. Rather, she alleges that it occurred either on the adjacent public sidewalk or in the parking lot owned by Yashi Associates, and leased to Glendale. Both the sidewalk and the parking lot are specifically excluded from insurance coverage, and Utica explicitly disclaimed on this ground. The court therefore finds that Utica properly disclaimed coverage under the above provision, and therefore does not have a duty to defend and indemnify the plaintiffs in the underlying action.

In view of the foregoing, Utica's motion for an order granting summary judgment is granted, the complaint hereby is dismissed, and it is the declaration of this court that defendant Utica First Insurance Company does not have a duty to defend and/or indemnify the instant plaintiffs in the underlying action.

Dated: November 19, 2008

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J.S.C.