

<b>IBEX Constr., LLC v Utica Natl Assur. Co.</b>
2009 NY Slip Op 30267(U)
January 22, 2009
Supreme Court, New York County
Docket Number: 106481/06
Judge: Louis B. York
Republished from New York State Unified Court System's E-Courts Service. Search E-Courts ( <a href="http://www.nycourts.gov/ecourts">http://www.nycourts.gov/ecourts</a> ) for any additional information on this case.
This opinion is uncorrected and not selected for official publication.

PRESENT: LOUIS B. YORK  
J.S.C. Justice

PART 2

Index Number : 106481/2006

IBEX CONSTRUCTION

vs  
UTICA NATIONAL ASSURANCE

Sequence Number : 005

REARGUMENT/RECONSIDERATION

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_  
MOTION CAL. NO. \_\_\_\_\_

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

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

Cross-Motion:  Yes  No

Upon the foregoing papers, It is ordered that this motion

WITH ACCOMPANYING MEMORANDUM DECISION.

MOTION IS ~~GRANTED~~  
WITH ACCOMPANYING MEMORANDUM DECISION.

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

Dated: 1/22/09

**FILED**  
FEB 09 2009  
COUNTY CLERK'S OFFICE  
NEW YORK

Luy  
**LOUIS B. YORK**  
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 2

-----X  
IBEX CONSTRUCTION, LLC & VIRGINIA SURETY  
COMPANY, INC.,

Plaintiff

-against-

UTICA NATIONAL ASSURANCE COMPANY

Defendant

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

INDEX NO. 106481/06

**FILED**  
FEB 09 2009  
COUNTY CLERK'S OFFICE  
NEW YORK

Plaintiffs IBEX Construction, LLC (IBEX) and Virginia Surety Company, Inc. move: (1) pursuant to CPLR 2221, for leave to renew this court's decision and order dated February 13, 2008 (the prior decision), in light of the recent decision in *Bradley v IBEX Construction, LLC* (54 AD3d 626 [1<sup>st</sup> Dept 2008]) (the Bradley action), and on renewal, to grant plaintiffs' motion for summary judgment declaring that defendant Utica National Assurance Company (Utica) is obligated to defend IBEX, in connection with claims asserted against it in the Bradley action; (2) pursuant to CPLR 3212, permitting IBEX to move for summary judgment with respect to Utica's obligation to indemnify IBEX with respect to claims asserted against it in the Bradley action; and (3) for an order granting summary judgment declaring that Utica is obliged to indemnify IBEX with respect to claims asserted against it in the Bradley action.

Utica cross-moves, pursuant to CPLR 3211 and 3212, for an order dismissing plaintiffs' complaint against Utica.

This is a dispute concerning insurance coverage that arises out of a workplace accident that occurred when Robert Bradley, an employee of Sage Electrical Contracting (Sage), was injured when he fell from a ladder at a construction site. Utica issued an insurance policy to Sage, that allegedly covered IBEX as an additional insured. The facts of this case and the underlying Bradley action are set forth more fully in the prior decision, and will be repeated here only to the extent necessary.

In the prior decision, this court denied plaintiffs' motion for summary judgment on the basis that questions of fact existed concerning how Bradley had injured himself - i.e. whether he had fallen from the ladder provided to him by Sage, or whether he had tripped on plastic that was covering the floor, that allegedly was not placed there by Sage.

In Bradley's October 2006 trial, the jury determined that none of the defendants were at fault, and the action was dismissed. Bradley's motion to set aside the verdict was denied by the trial court. On appeal, the Appellate Division, First Department, reversed, ruling that, since the jury determined that Bradley had fallen off the ladder, "it could not have reasonably concluded, in light of the evidence, that the ladder was placed and used so as to give him proper protection in the performance of his work." *Bradley v IBEX Construction, LLC*, 54 AD3d at 627. The Court further concluded that the jury had clearly rejected

[\* 4 ]

the accident report suggesting that Bradley had slipped on the plastic that covered the floor. The Court directed judgment in Bradley's favor against IBEX and its co-defendants on the issue of liability, pursuant to Labor Law § 240 (1), and reinstated defendants' claims and cross claims against Sage for indemnification arising out of Bradley's Labor Law § 240 (1) claim. *Bradley v IBEX Construction, LLC*, 54 AD3d at 628.

The motions before this court were marked submitted on October 29, 2008. On December 4, 2008, however, the Appellate Division decided IBEX's appeal from this court's prior decision which denied IBEX's motion for summary judgment. Modifying this court's prior decision on the basis of *Bradley v IBEX Construction, LLC* (54 AD3d 626, *supra*), the Appellate Division held that IBEX is an additional insured under Sage's insurance policy and is an entitled to a defense in the underlying Bradley action. *IBEX Constr., LLC v Utica Natl. Assur. Co.*, \_\_\_ AD3d \_\_\_, 868 NYS 2d 652 (1<sup>st</sup> Dept 2008). As a result, the branch of plaintiffs' motion seeking renewal, and on renewal, summary judgment declaring the right to a defense, and defendant's cross motion for summary judgment dismissing the complaint are denied as moot. Plaintiffs' request for leave to move for summary judgment declaring that Utica is obliged to indemnify IBEX in the underlying action, and for an order so declaring, remain to be decided.

At trial, Bradley testified that in the course of his work, he was standing on a ladder, pulling fire alarm conduit through a pipe. Trial Transcript, at 94-96. The jury found that Bradley was injured when he fell from the ladder. *Bradley v IBEX Construction, LLC*, 54 AD3d 626, *supra*.

Under the contract between IBEX and Sage, Sage was required to provide ladders for its workers. Subcontractor Agreement, ¶ 22; *see also* deposition testimony of Salvatore Badalamenti that the ladder from which Bradley fell was provided by his employer, Sage (Deposition of Salvatore Badalamenti, dated November 9, 2005, at 23). Furthermore, under the Subcontractor Agreement, Sage was required to supervise its workers. Subcontractor Agreement, ¶ 30.

At the trial, the court dismissed the Labor Law § 200 and common-law claims against IBEX, leaving only the strict liability Labor Law § 240 (1) claims. Trial Transcript, at 983. Furthermore, the trial court found that there was no claim that the plastic had been laid on the floor improperly and there was no evidence that the plastic where Bradley was working was rumpled or in an unsafe condition. *Id.* at 983.

Plaintiffs have made a prima facie case that Sage, rather than IBEX, is at fault for Bradley's injuries. It is, therefore, incumbent on the defendant to show by evidentiary facts that it has a real defense that can be established at trial. *Alvarez v*

*Prospect Hosp.*, 68 NY2d 320, 324 (1986). This defendant has failed to do. The court, therefore, finds that IBEX is entitled to indemnification for claims asserted against it in the Bradley action.

Having found liability against IBEX and the other Bradley defendants, pursuant to Labor Law § 240 (1), the Appellate Division remanded the matter for a trial on damages and apportionment of fault among defendants and second third-party defendant Sage Electrical Contracting, Inc. That trial has not yet occurred. Since the extent of IBEX's liability has not yet been determined, the amount of the indemnification cannot be determined at this time.

Accordingly, it is hereby

ORDERED that plaintiffs' motion is disposed of as follows:

- 1) the branch seeking to renew and on renewal, for summary judgment as to costs of defense is denied as moot;
- 2) the branch for leave to move for summary judgment as to Utica's obligation to indemnify IBEX is granted;
- 3) the branch seeking a judgment declaring that IBEX is entitled to be indemnified is granted; and it is hereby

ADJUDGED that Utica National Assurance Company is obliged to indemnify IBEX with respect to claims asserted against IBEX in *Bradley v IBEX Construction, LLC* (Sup Ct, NY County, index No. 108416/04), in an amount to be determined after the trial on

damages in that matter; and it is further

ORDERED that defendant's motion for summary judgment is denied as moot.

Dated: 1/22/09

ENTER:

*lby*  
\_\_\_\_\_  
J.S.C.  
**LOUIS B. YORK**  
J.S.C.

**FILED**  
FEB 09 2009  
COUNTY CLERK'S OFFICE  
NEW YORK