

<b>Fireman's Fund Ins. Co. v European Builders &amp; Contr. Corp.</b>
2009 NY Slip Op 30353(U)
February 4, 2009
Supreme Court, Nassau County
Docket Number: 5849-04
Judge: Michele M. Woodard
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**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NASSAU**

-----X  
FIREMAN'S FUND INSURANCE COMPANY, AS  
SUBROGEE OF DAVID J. DEUTSCH AND LISA C.  
DEUTSCH,

Plaintiffs,

-against-

EUROPEAN BUILDERS & CONTRACTORS CORP.,

Defendants.

-----X  
EUROPEAN BUILDERS & CONTRACTORS CORP.,

Third-Party Plaintiffs,

-against-

U.S. UNDERWRITERS INSURANCE COMPANY,

Third-Party Defendant.

-----X  
**Papers Read on this Motion:**

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**MICHELE M. WOODARD  
J.S.C.  
TRIAL/IAS Part 14  
Index No.: 5849/04  
Motion Seq. Nos.: 06, 07 & 08**

**DECISION AND ORDER**

**Third-Party Index No.: 5849/04**

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Motion by Third-Party Defendant U.S. Underwriters Insurance Company ("Underwriters") for summary judgment dismissing the Third-Party complaint (Sequence #6) is **denied**. The Court declares that Underwriters has the obligation to defend Defendant European Builders & Contractors Corp. ("European") in the lawsuit brought by Fireman's Fund Insurance Co, as subrogee of David J. Deutsch and Lisa C. Deutsch ("Fireman's Fund"), against European. The issue of whether Underwriters is obligated to indemnify European for the loss will be decided at trial.

Cross-motion by Defendant/Third-Party Plaintiff European for summary judgment in the captioned Third-Party action and a declaration in its favor (Sequence #7) is **granted**. Motion by Plaintiff for partial summary judgment on the issue of liability in favor of Fireman's Fund and against European (Sequence #8) is **granted**.

This is an action by a homeowner's insurer, as subrogee of its insured, to recover for fire damage to the premises caused by a home improvement contractor. David and Lisa Deutsch are the owners of a single family home located in Lawrence. The Deutschs had a homeowners policy issued by Plaintiff Fireman's Fund Insurance Company. The Deutschs had untaken to renovate their home, and Defendant European Builders & Contractors Corp. was the general contractor for the project. European had a commercial general liability policy issued by Third-Party Defendant U. S. Underwriters Insurance Company.

On October 16, 2001, while European was in the midst of the construction work, a fire occurred at the premises. After indemnifying the Deutschs, Plaintiff Fireman's Fund commenced the present

action, as subrogee of its insured, to recover from European for causing the fire. After Underwriters denied coverage, European commenced a Third-Party action against Underwriters, seeking a declaratory judgment that the insurer is obligated to defend and indemnify European in the main action.

The commercial general liability policy issued by Underwriters was in the amount of \$1 million per occurrence.<sup>1</sup> The total advance annual premium was \$27,619. The premium was computed based upon the different “classifications,” or types of construction work, performed by European.<sup>2</sup> These classifications include carpentry, “carpentry-interior,” drywall/wallboard, “plumbing-residential,” “painting-interior,” “tile, stone-interior,” “electrical-within bldg.,” and subcontracted work in connection with the “construction, reconstruction, repair” of one or two-family dwellings. There is no dispute that the policy did not cover roofing work.

Underwriters moves for summary judgment and a declaration that it has no duty to defend and indemnify European in the main action. Underwriters argues that the loss is not covered because European’s employee, Carlos Cerqueria, was performing roof work when his soldering torch started the fire. European cross-moves for summary judgment declaring that Underwriters is under a duty to defend and indemnify. European asserts that Cerqueria was removing and reinstalling cedar planks, which was carpentry work preliminary to the installation of sheet metal flashing.<sup>3</sup> Plaintiff Fireman’s Fund cross-moves for partial summary judgment as to liability against European, arguing that regardless of whether Cerqueria was performing carpentry or roof work, as a matter of law, European negligently

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<sup>1</sup>Affidavit of James Hannigan, ex. A.

<sup>2</sup>Affidavit of James Hannigan, ex. B and C.

<sup>3</sup>“Flashing” is sheet metal used in waterproofing, as at roof valleys or hips or the angle between a chimney and a roof (Merriam-Webster’s Collegiate Dictionary 10<sup>th</sup> ed.).

caused the fire.

Principles generally applicable to contract interpretation apply equally to insurance contracts (*New York Central Mutual Fire Ins. Co. v Ward*, 38 AD3d 898 [2d Dept 2007]). Analysis begins with the specific language of the policy (*TAG 380, LLC v ComMet380, Inc.*, 10 NY3d 507, 512 [2008]). An insurance policy is to be read in light of “common speech” and the reasonable expectations of a businessperson (*Belt Painting Corp. v TIG Ins. Co.*, 100 NY2d 377, 383 [2003]). The court must also consider the nature of the risk and the subject matter of the policy (*New York Central Mutual Fire Ins. Co. v Ward*, supra, 38 AD3d 898). An insurance contract is to be construed liberally in favor of the insured and against the insurer who drew the policy (*New York Central Mutual Fire Ins. Co. v Ward*, supra, 38 AD3d 898). An insurer’s duty to defend is “exceedingly broad” and applies “whenever the allegations of the complaint suggest a reasonable possibility of coverage” (*BP Air Conditioning Corp. v One Beacon Ins. Group*, 8 NY3d 708, 714 [2007]). If a complaint contains any facts or allegations which bring the claim “even potentially within the protection purchased,” the insurer is obligated to defend.

On a motion for summary judgment, it is the proponent’s burden to make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact (*JMD Holding Corp. v Congress Financial Corp.*, 4 NY3d 373, 384 [2005]). Failure to make such a prima facie showing requires denial of the motion, regardless of the sufficiency of the opposing papers (Id). However, if this showing is made, the burden shifts to the party opposing the summary judgment motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial (*Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]).

In support of its motion for summary judgment, Underwriters submits, among other documents, a report from James H. Mason's Sons, an insurance adjuster retained by Fireman's Fund.<sup>4</sup> According to the adjuster, "[T]he remodeling contractor was installing a new torched down roof on the rear section of this house, when they accidentally set fire to the framing of the third floor knee wall." The court concludes that Underwriters has met its burden to establish prima facie that the loss arose from roofing work and thus was not covered by the policy. Accordingly, the burden shifts to European to show a triable issue as to whether the fire was caused by construction activity covered by the contract.

At his deposition, Carlos Cerqueria testified:

A: I was warming up the copper to solder.

Q: At some point did you notice a fire?

A: Because the old wall had wood, cedar wood, old planks of cedar, we had removed some of them in order to do the proper flashing in order to then reinstall it back. The fire started, I don't know how, somehow the paper connected to the insulation behind the walls somehow started. Anyway, I just noticed when the fire started.<sup>5</sup>

Merriam-Webster's Dictionary defines "carpentry" as "the art of shaping and assembling structural woodwork." Based upon the policy language, a reasonable businessperson would expect that a loss arising from structural work on the home, not including the roof, would be covered. Based on Cerqueria's testimony, there is a reasonable possibility that he was working on the structure, and thus was involved in carpentry work covered by the policy. Accordingly, Underwriters has an obligation to defend European in the main action. Nevertheless, whether Underwriters has an obligation to

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<sup>4</sup>Underwriters' motion for summary judgment, ex. E.

<sup>5</sup>Plaintiff's ex. F, deposition of Carlos Cerqueria, at 36.

indemnify European for the loss will depend upon whether Cerqueria was actually working on a section of the structure other than the roof, which issue must be determined at trial. At trial, Underwriters may also offer evidence as to whether European misrepresented its involvement in roofing work in the insurance application, and whether knowledge of the true facts would have led Underwriters not to make the insurance contract (Insurance Law § 3105[b]; *Precision Auto Accessories, Inc. v Utica First Ins.*, 52 AD3d 1198 [4d Dept 2008]).

To prevail on a negligence claim, a plaintiff must establish the existence of a legal duty, a breach of that duty, proximate causation, and damages [*Luina v Katherine Gibbs School New York, Inc.*, 37 AD3d 555, 556 (2d Dept 2007)]. The doctrine of *res ipsa loquitur* may raise an inference of negligence where defendant is in exclusive control of the premises and the fire is of a type that does not occur in the absence of negligence (*Giaccio v. 179 Tenants Corp.*, 45 AD3d 454 [1<sup>st</sup> Dept 2004]). The court concludes, based on the adjuster's report and the deposition of Cerqueria, that Fireman's Fund has carried its prima facie burden that European was the only contractor working on the project at the time of the fire, and the fire would not have occurred but for European's negligence. Thus, the burden shifts to European to show a possible cause for the fire other than negligence or that another contractor was also working on the project.

In opposition, European has submitted the affidavit of Douglas Mackinney, a building consultant and general contractor. Mackinney states that, "There are a number of other trades whose employees would engage in this exact activity [installing a copper sheet in preparation for waterproofing.]"<sup>6</sup> However, European offers no evidence that the employees of any other contractor were actually working on the project at the time of the fire. Furthermore, Cerqueria's testimony that he

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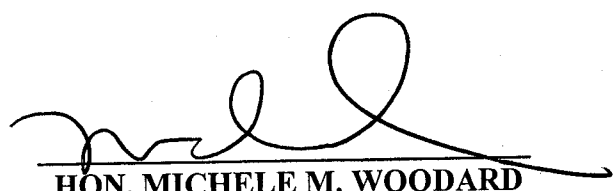
<sup>6</sup>Affidavit of Douglas Mackinney at ¶ 9.

did not know how the fire started does not show a triable issue as to whether he exercised due care in the circumstances. The court concludes that European has not carried its burden to show a triable issue as to another cause for the fire or that another contractor was working on the project. Accordingly, the motion by Plaintiff Fireman's Fund for partial summary judgment against European on the issue of liability is **granted**.

This constitutes the Decision and Order of the Court.

**DATED:** February 4, 2009  
Mineola, N.Y. 11501

**ENTER:**



**HON. MICHELE M. WOODARD**  
**J.S.C.**

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**ENTERED**  
**FEB 10 2009**  
**NASSAU COUNTY**  
**COUNTY CLERK'S OFFICE**