

**Tottenville Commons, LLC v ALEA N. Am.  
Ins. Co.**

2009 NY Slip Op 30611(U)

March 19, 2009

Supreme Court, New York County

Docket Number: 100567/07

Judge: Carol R. Edmead

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SCANNED ON 3/24/2009  
SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON CAROL EDMEAD  
J.S.C.  
Justice

PART 35

Tottenville Commons

INDEX NO. 100567/07

MOTION DATE 1/7/09

MOTION SEQ. NO. 001

MOTION CAL. NO. \_\_\_\_\_

- v -

Alca North America

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

PAPERS NUMBERED

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

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

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

Cross-Motion:  Yes  No

**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 141B).

Upon the foregoing papers, it is ordered that this motion

The instant motion and cross motion are decided in accordance with the accompanying Memorandum Decision. It is hereby

ORDERED that the portion of plaintiffs' motion seeking a declaration that defendants have a duty to defend plaintiffs in the underlying personal injury action is granted; and it is further

ADJUDGED and DECLARED that defendants have a duty to defend plaintiffs in the underlying personal injury action entitled *Christopher Constantino and Tina Bellino v Dock's Clam Bar and Pasta House, Trish Kim Leo, Tottenville Commons and John Noce*, Index No.: 101036/06, pending in the supreme court, Richmond County, is granted; and it is further

ORDERED that the portion of plaintiffs' motion seeking a declaration that defendants have a duty to indemnify them in the aforesaid underlying personal injury action is denied as premature; and it is further

Dated: \_\_\_\_\_

~~HON CAROL EDMEAD~~ 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):

ORDERED that the portion of plaintiffs' motion seeking summary judgment with respect to defendant Clam Bar Restaurant Inc. d/b/a Dock's Clam Bar being in breach of contract is denied; and it is further

ORDERED that defendant Alea North America Insurance Company's cross motion for summary judgment is denied as premature; and it is further

ORDERED that defendant Clam Bar Restaurant Inc. d/b/a Dock's Clam Bar's cross motion to dismiss the action is denied; and it is further

ORDERED that counsel for plaintiff shall serve a copy of this order with notice of entry within twenty days of entry on all counsel.

This constitutes the decision and order of the Court.

**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 141B).

Dated 3/19/09

ENTER: [Signature], J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION  
Hon CAROL EDMEAD J.S.C.

Check if appropriate:  DO NOT POST  REFERENCE

SUPREME COURT OF THE CITY OF NEW YORK  
COUNTY OF NEW YORK: PART 35

-----X  
TOTTENVILLE COMMONS, LLC and THE  
TRAVELERS INDEMNITY COMPANY OF  
AMERICA,

Plaintiffs,

Index No.: 100567/07

-against-

DECISION

ALEA NORTH AMERICA INSURANCE COMPANY  
and CLAM BAR RESTAURANT INC., d/b/a  
DOCK'S CLAM BAR,

Defendants.

-----  
EDMEAD, J.:

**BACKGROUND**

Plaintiffs, Tottenville Commons, LLC (Tottenville Commons), a shopping center, and The Travelers Indemnity Company of America (Travelers), Tottenville Commons' insurer, move, pursuant to CPLR 3212, for summary judgment declaring that: (1) defendants have a duty to defend and indemnify them in an underlying personal injury action; (2) that defendants have a duty to reimburse plaintiffs for the expenses incurred with respect to defending that underlying personal injury action; and (3) that defendant Clam Bar Restaurant Inc. d/b/a Dock's Clam Bar (Dock's) breached its lease obligation by failing to provide Tottenville Commons with required insurance. Tottenville Commons is the landlord of commercial tenant Dock's, and the claim arises out of the commercial lease provisions providing for defense and

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[\*4]  
indemnification.

Defendant Alea North America Insurance Company (Alea), Dock's insurer, while admitting the duty to defend, cross-moves for summary judgment on the issue of indemnification. Defendant Dock's cross moves to dismiss the complaint, pursuant to CPLR 3211 (a) (4), basing its cross motion on the fact that the identical issues are being litigated by the same parties in the underlying personal injury action.

On Halloween, 2004, Christopher Constantino (Constantino), a 19-year old patron at Dock's, was assaulted by Luigi Esposito (Esposito), who has since been found guilty of the assault and is serving a three-year prison sentence. The complaint alleges that Esposito was employed by Dock's as a bouncer to maintain crowd control for Dock's on Halloween. In his answer to the underlying personal injury action, and at his criminal trial, Esposito stated that he was so employed by Dock's.

The sole owner of Dock's, in her deposition, denies that Esposito was ever employed by the company, but does not deny that he was at Dock's at the night in question.

On the night in question, Constantino went outside Dock's to urinate. Sometime shortly thereafter, Constantino was assaulted by Esposito, but there is conflicting evidence by various eyewitnesses as to whether the assault took place in Dock's, outside Dock's entrance, or approximately 200 feet away in the

[\*5]  
parking area controlled by Tottenville Commons.

Dock's acquired general commercial liability insurance, as required by the commercial lease, but obtained such insurance only up to an amount of one million dollars. The commercial lease requires Dock's to obtain such insurance in the amount of two million dollars.

Both commercial liability insurance policies involved in this suit, the Travelers policy acquired by Tottenville Commons, and the Alea policy acquired by Dock's, contain identical provisions, in the main body of the policy, with respect to "Other Insurance." According to these provisions, each policy indicates that it is the primary insurance, except in limited situations which are inapplicable here, and each insurer agrees to share the ultimate liability with any other applicable insurer. Alea Policy § 4; Travelers Policy § 4.

However, in an Endorsement to the Travelers policy, the above-referenced provision in the main body of the policy is amended to state:

"This insurance is excess over any of the other insurance, whether primary, excess, contingent or on any other basis:  
...  
(4) that is valid and collectible insurance available to you if you are added as an additional insured under any policy."

The Endorsement goes on to state that, if the above-provisions apply, Travelers has no duty to defend if such other insurance provides for defense, and that it will pay only its

[\*6]  
share of the amount of any liability that exceeds the amount paid by such other insurance. It is noted that Tottenville Commons was named as an additional insured on the Alea policy.

#### DISCUSSION

"The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case [internal quotation marks and citation omitted]." *Santiago v Filstein*, 35 AD3d 184, 185-186 (1<sup>st</sup> Dept 2006). The burden then shifts to the motion's opponent to "present facts in admissible form sufficient to raise a genuine, triable issue of fact." *Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 (1<sup>st</sup> Dept 2006); see *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied. See *Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 (1978).

Plaintiffs' motion with respect to a declaration that defendants have a duty to defend them in the underlying personal injury action is granted.

Alea has admitted that it has a duty to defend plaintiffs in the underlying personal injury action. See *BP Air Conditioning Corp. v One Beacon Insurance Group*, 8 NY3d 708 (2007).

"The general rule is ... that where there are multiple

\* 7

policies covering the same risk, and each generally purports to be excess [or primary] to the other, the excess [or primary] clauses are held to cancel each other and each insurer contributes in proportion to its [policy] limits [internal quotation marks and citation omitted]."

*Cheektowaga Cental School District v The Burlington Insurance Company*, 32 AD3d 1265, 1267 (4<sup>th</sup> Dept 2006).

"[H]owever, if one party's policy is primary with respect to the other policy, then the party issuing the primary policy must pay up to the limits of its policy before the excess coverage becomes effective."

*Osorio v Renart Realty, Inc.*, 48 AD3d 650, 653 (2d Dept 2008).

In the instant case, Travelers Endorsement

"specifically provides, 'The insurance provided by this endorsement is excess over any other collectible insurance, whether primary, excess or contingent.' Thus, the plaintiff's endorsement negates contribution and manifests an intention that the plaintiff's insurance coverage is to be excess over any other ... insurance coverage. Consequently, [it is properly] determined that [Alea's] policy ha[s] to be exhausted before the plaintiff would be required to contribute to the settlement of the underlying action [citations omitted]."

*American Transit Insurance Company v Continental Casualty Insurance Company*, 215 AD2d 342, 343-344 (2d Dept 1995).

Therefore, based on the foregoing, defendants have a duty to reimburse plaintiffs for expenses incurred to date in defending the underlying personal injury litigation, and to provide the defense for the remainder of that action.

However, '[w]hile the duty to defend is clear, issues of fact as to liability in the underlying personal injury action render premature the conclusion that the insurers have a duty to

[\*8]

indemnify [Tottenville Commons]." *Chunn v New York City Housing Authority*, 55 AD3d 437, 438 (1<sup>st</sup> Dept 2008). The triable issues of fact precluding summary judgment in the instant action include, among other things, whether Esposito was employed by Dock's, whether the incident occurred on Dock's premises or the area controlled by Tottenville Commons, and whether Dock's was negligent, or violated the Dram Shop Act, by serving liquor to an under-age and/or intoxicated person. *Murphy v Chaos*, 26 AD3d 231 (1<sup>st</sup> Dept 2006); *Pierce v Moreau*, 221 AD2d 763 (3d Dept 1995).

Consequently, the portion of plaintiffs' motion seeking to declare that defendants have a duty to indemnify them in the underlying personal injury action is denied as premature, and Alea's cross motion seeking summary judgment on this issue is likewise denied as premature.

That portion of plaintiffs' motion seeking to declare that Dock's violated its lease obligations to Tottenville Commons by obtaining general commercial liability insurance in the amount of one million dollars instead of two million dollars is denied.

In order to prevail on this breach of contract claim, plaintiffs must demonstrate damages, which they have failed to do. Furthermore, even if defendants were in breach, Tottenville Common's recovery would be limited to its actual out-of-pocket expenses. See *Inchaustegui v 666 5<sup>th</sup> Avenue Limited Partnership*, 96 NY2d 111 (2001).

[\*9]

Lastly, Dock's motion with respect to dismissing this action, pursuant to CPLR 3211 (a) (4), is denied. Despite Dock's assertion that the identical issues are being litigated in the underlying personal injury action, the issue with respect to insurance liability is not part of that lawsuit. Regardless, all such actions concerning insurance liability "should be severed to avoid the prejudice ... that would result from the jury's awareness of the existence of liability insurance." *Chunn v New York City Housing Authority*, *supra* at 438.

#### CONCLUSION

Based on the foregoing, it is hereby

ORDERED that the portion of plaintiffs' motion seeking a declaration that defendants have a duty to defend plaintiffs in the underlying personal injury action is granted; and it is further

ADJUDGED and DECLARED that defendants have a duty to defend plaintiffs in the underlying personal injury action entitled *Christopher Constantino and Tina Bellino v Dock's Clam Bar and Pasta House, Trish Kim Leo, Tottenville Commons and John Noce*, Index No.: 101036/06, pending in the supreme court, Richmond County, is granted; and it is further

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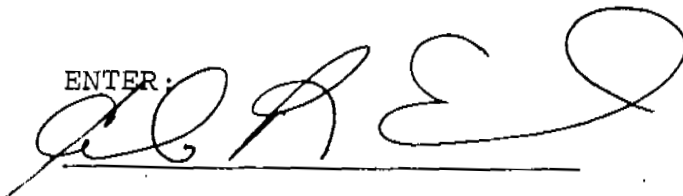
ORDERED that defendant Alea North America Insurance Company's cross motion for summary judgment is denied as premature; and it is further

ORDERED that defendant Clam Bar Restaurant Inc. d/b/a Dock's Clam Bar's cross motion to dismiss the action is denied; and it is further

ORDERED that counsel for plaintiff shall serve a copy of this order with notice of entry within twenty days of entry on all counsel.

Dated: March 19, 2009

ENTER:



Carol R. Edmead, J.S.C.

Hon. **CAROL EDMEAD**  
J.S.C.

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This judgment has not been entered by the Deputy 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 141B).