

**Bovis Lend Lease LMB v Nationwide Mut. Fire Ins.
Co.**

2009 NY Slip Op 32101(U)

September 11, 2009

Supreme Court, New York County

Docket Number: 111413/07

Judge: Shirley Werner Kornreich

Republished from New York State Unified Court
System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for
any additional information on this case.

This opinion is uncorrected and not selected for official
publication.

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

PRESENT: JUSTICE SHIRLEY WERNER KORNREICH PART 54
Justice

Index Number : 111413/2007
BOVIS LEND LEASE LMB INC
vs
NATIONWIDE MUTUAL FIRE
Sequence Number : 002
DISMISS ACTION

C

INDEX NO. _____
MOTION DATE 5/19/08
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

Is motion to/for _____

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

PAPERS NUMBERED
1-2
3-5
6

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

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

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: 5/11/09

JUSTICE SHIRLEY WERNER KORNREICH
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 STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

-----X
BOVIS LEND LEASE LMB, ASHLAND PARTNERS,
LLC, CLARETT CAPITAL, LLC, THE CLARETT
GROUP, LLC, and ZURICH AMERICAN INSURANCE
COMPANY,

Plaintiffs,

-against-

Index No. 111413/07

NATIONWIDE MUTUAL FIRE INSURANCE, COMPANY

(related to an underlying action entitled
*Kathleen A. Martinez, Administratrix ad
Prosequendum of the Estate of John
Martinez, deceased v. Bovis Lend Lease
LMB, Inc.*),

Defendants.

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).

-----X
SHIRLEY WERNER KORNREICH, J.:

This is a declaratory judgment action brought to compel defendant Nationwide Mutual Fire Insurance Company (Nationwide) to defend and indemnify various parties named in a construction-related wrongful death action styled *Kathleen A. Martinez, Administratrix ad Prosequendum of the Estate of John Martinez, deceased v Bovis Lend Lease LMB, Inc., Ashland Partners, LLC, Clarett Capital, LLC and The Clarett Group, LLC*. (New York County Index No. 107289/07) (the *Martinez* Action).

Nationwide moves to dismiss pursuant to CPLR 3211(a)(7), on the ground that this action is moot insofar as it has fully acknowledged its obligations under the relevant policy and has designated defense counsel.

Plaintiffs oppose the motion, contending that Nationwide has qualified its offer to defend with a reservation of rights as to indemnity. Plaintiffs also cross-move for partial summary judgment (CPLR 3212), seeking a declaration that Nationwide must defend and indemnify plaintiffs Bovis Lend Lease LMB (Bovis), Ashland Partners, LLC, Clarett Capital, LLC and The Clarett Group, LLC, (collectively "Ashland") as additional insureds on a primary and non-contributory basis and must reimburse Bovis and

plaintiff Zurich American Insurance Company (Zurich) for attorneys' fees, costs and disbursements in defending the underlying action.

I. *FACTS*

The *Martinez* wrongful death action was commenced in May 2007 and amended to add additional parties in December 2007. The complaint alleges that the decedent, John Martinez, was killed at a construction site on February 5, 2007, when he was struck by a descending hoist/manlift which caused him to fall 30 feet. At the time, Martinez was an employee of non-party Three D Erectors Corp. (Three D). Three D was a subcontractor retained by Finest Windows, Inc. (Finest), and Finest was a subcontractor of Bovis, the construction manager. Ashland, and Clarett Capital, LLC, and the Clarett Group, LLC (collectively "the Ashland entities") were the owners of the project.

During the relevant period, Bovis was insured by Zurich under a commercial general liability (CGL) policy naming the Ashland entities as additional insureds. However, pursuant to its subcontract, Finest obtained a CGL policy (the Policy) from Nationwide also covering Bovis and the Ashland entities as additional insureds. Pursuant to the terms of the Policy, the coverage was primary to other insurance. In addition, Finest procured an excess policy from Nationwide.

In February 2007, prior to the commencement of the *Martinez* action, Zurich sent Nationwide letters giving notice of the potential claim and attempting to tender the defense. The parties thereafter commenced negotiations to establish the terms under which Nationwide would replace Zurich. After plaintiffs' counsel rejected two letter proposals from Nationwide in June and July 2007, the instant action was commenced in August 2007. Nationwide sent a third letter proposal in November 2007, but that was also rejected as inadequate.

Each of Nationwide's three letter proposals acknowledged Nationwide's obligation to defend Bovis and Ashland as additional insureds. However, with respect to indemnification, the letters stated

that Nationwide's "obligation\duty will be determined by the terms and conditions of the policy including but not limited to the additional insured endorsement." The letters also set forth verbatim the language of the additional insured endorsement and provided contact information in the event the insured "wish[ed] to take this matter up with the New York State Insurance Department."

Plaintiffs objected to the language of the letters as constituting a disclaimer or reservation of rights. In an effort to settle this action, in December 2007, plaintiffs drafted a letter agreement for Nationwide's signature outlining the terms under which the insurer would assume the defense. Specifically, plaintiffs sought Nationwide's agreement to defend the *Martinez* action on "a primary and non-contributory basis"; to prosecute cross-claims and third-party claims to protect Bovis and Ashland; to permit Bovis and Ashland to "monitor the files maintained by Nationwide's designated counsel as it pertains to the *Martinez* action"; and to reimburse Zurich for the reasonable attorneys' fees, costs and disbursements expended in the underlying litigation. Nationwide declined to execute the letter and this motion followed.

II. Discussion

The motion to dismiss is denied, and the cross motion for summary judgment is granted to the extent of granting a declaration that Nationwide must defend the *Martinez* action and reimburse plaintiffs for the litigation costs incurred to date. Although the commencement of this ever repudiated its policy obligations, the court will grant that limited relief in order to facilitate action and the pursuit of the cross motion were largely unnecessary given that Nationwide has the transfer of the defense.¹

¹ In their papers and the litigation-related correspondence, plaintiffs raise various claims regarding their right to monitor or control Nationwide's conduct of the *Martinez* action, and regarding the applicability of an excess insurance policy. However, because plaintiffs have not sought any affirmative relief based upon those claims, the court

As noted above, neither party has disputed Nationwide's obligation to provide a defense to the *Martinez* action under the Policy. A declaration to that effect, therefore, will be issued. But, a dismissal for mootness, as requested by defendant, is inappropriate, since the proper remedy in a declaratory judgment action, is to declare the relief granted rather than dismiss the action. *See Cohen v Employers Reinsurance Corp.*, 117 AD2d 435 (1st Dept 1986).

Furthermore, a declaration as to Nationwide's obligation to indemnify is premature. Unlike the duty to defend, "the duty to pay is determined by the actual basis for the insured's liability to a third person." *See Servidone Constr. Corp. v Security Ins. Co. of Hartford*, 64 NY2d 419, 424 (1985). The question of indemnification should await a determination of liability in the underlying action. *See Crespo v City of New York*, 303 AD2d 166 (1st Dept 2003); *79th Realty Co. v X.L.O. Concrete Corp.*, 247 AD2d 256 (1st Dept 1998); *Landpen Co., L.P. v Maryland Cas. Co.*, 2005 WL 356809*9 (SDNY 2005) ("courts considering the question on actions for declaratory relief have generally declined to rule on the issue of indemnity until resolution of the underlying liability claim"). In view of these principles, there is no need to review, at this juncture, the evidence submitted by plaintiff regarding decedent's status as an employee of Three D or the occurrence of the accident in the course of the "ongoing operations" of Finest. However, relevant that evidence may be to the issue of indemnity, consideration of that aspect of coverage must await an actual verdict against the insureds.

Plaintiffs' objections based upon Nationwide's alleged "disclaimer" or "reservations of rights" letters are similarly misguided. Nationwide has repeatedly affirmed that the letters are not intended to disclaim or reserve its rights. The letters merely identify the provisions of the Policy which govern plaintiffs' rights and confirm that Nationwide will abide by their terms. They do not announce the

will not address them.

insurers' intention to invoke or investigate a particular exclusion, a point plaintiffs tacitly concede in arguing that the language would be "invalid" if it were meant to disclaim.

Nationwide, of course, may later refuse to indemnify if it appears that the accident falls completely outside of the Policy's coverage provisions, regardless of whether it has issued a disclaimer. *See Crespo*, 303 AD2d 166. Plaintiffs' rights will ultimately depend on whether the insurance invokes the main coverage portion of the Policy or a policy exclusion. *Matter of Worcester Ins. Co. v Bettenhauser*, 95 NY2d 185 (2000). The relevant issues will not be ripe for determination until the resolution of the underlying action.

Finally, plaintiffs are entitled to reimbursement for attorney's fees and defense costs and disbursements incurred in the underlying action. As noted, Nationwide does not dispute that it was obligated to defend the *Martinez* action, and would have shouldered those expenses had the instant declaratory judgment action not delayed its substitution into the case. However, Nationwide cannot be held liable for any costs associated with the instant motion and litigation, as "such a recovery may not be had in an affirmative action brought by an assured to settle its rights . . . but only when [it] has been cast in a defensive posture by the legal steps an insurer takes in an effort to free itself from its policy obligations." *Mighty Midgets, Inc. v Centennial Ins. Co.* 47 NY2d 12, 21 (1979). Here, plaintiffs, not Nationwide, sought a declaration of rights.

Accordingly, it is

ORDERED that the motion by defendant Nationwide Mutual Fire Insurance Company to dismiss is denied, and it is further

ORDERED, ADJUDGED and DECLARED that plaintiff's cross-motion for partial summary judgment is granted to the extent that it is declared that defendant Nationwide Mutual Fire Insurance Company is obligated to defend plaintiffs Bovis Lend Lease LMB, Ashland Partners, LLC, Clarett

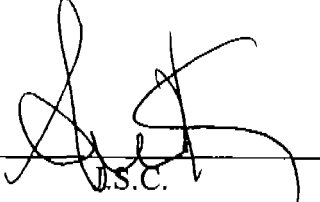
Capital, LLC and The Clarett Group, LLC, in the wrongful death action entitled *Kathleen A. Martinez, Administratrix ad Prosequendum of the Estate of John Martinez, deceased v Bovis Lend Lease LMB, Inc. Ashland Partners, LLC, Clarett Capital, LLC and The Clarett Group, LLC.*, (NY County Index No. 107289/07), and to reimburse plaintiffs for litigation expenses, including reasonable attorney's fees, incurred in defending that action from the date that plaintiffs first provided Nationwide with written notice of that action, until the date of the entry of this decision, order and judgment; and it is further

ORDERED, that within 60 days of entry of this decision, order and judgment, plaintiffs are directed to submit an accounting of the costs incurred in defending the *Martinez* action, and Nationwide is directed to review the accounting and, should it agree with such costs, satisfy such defense costs incurred by plaintiffs within 45 days from receipt of the plaintiffs' accounting or provide specific reasons for its disagreement within such time, and it is further

ORDERED, that if the parties are unable to agree on the amount of the defense costs owed to plaintiffs, either side shall file a motion to schedule an inquest to determine such costs, with a copy of this decision, order and judgment annexed, within 150 days of the date of entry.

Dated: 9/11/09

ENTER:


J.S.C.

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).