

**Urban Found./Eng'g, LLC v Northland Ins. Co.**

2009 NY Slip Op 32806(U)

November 25, 2009

Supreme Court, New York County

Docket Number: 113293/08

Judge: Michael D. Stallman

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

PRESENT:

PART

Justice

Index Number : 113293/2008

URBAN FOUNDATION/ENGINEERING, LLC

VS.

NORTHLAND INSURANCE COMPANY

SEQUENCE NUMBER : # 001

SUMMARY JUDGMENT

INDEX NO. 113293-08

MOTION DATE

MOTION SEQ. NO. #001

MOTION CAL. NO.

were read on this motion to/for

PAPERS NUMBERED

1-2

3-6

7-8

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits <sup>(+memo)</sup> A-W

Answering Affidavits — Exhibits <sup>(+memo)</sup> A-H

Replying Affidavits <sup>(+2 memos)</sup>

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion and cross-motion are determined in accordance with the annexed memorandum Decision and Order of today's date, annexed hereto and filed herewith.

FILED

DEC 02 2009

NEW YORK COUNTY CLERK'S OFFICE

Dated: 11/25/09

*[Signature]* J.S.C.

Check one:  FINAL DISPOSITION <sup>(with Reference)</sup>  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 CITY OF NEW YORK  
COUNTY OF NEW YORK: PART 7

-----X  
URBAN FOUNDATION/ENGINEERING, LLC,

Plaintiff,

Index No.: 113293/08

-against-

NORTHLAND INSURANCE COMPANY,

Defendant.

-----  
HON. MICHAEL D. STALLMAN, J.:

**FILED**  
DECISION AND ORDER  
DEC 02 2009  
NEW YORK COUNTY CLERK'S OFFICE

Plaintiff Urban Foundation/Engineering, LLC (Urban) moves, pursuant to CPLR 3212 (b), for summary judgment declaring that defendant Northland Insurance Company (Northland) was required to defend and indemnify Urban in two underlying property damage actions, for which Urban seeks damages in the amount of \$152,778.04, plus interest. Northland cross moves, pursuant to CPLR 3126, to dismiss the complaint, based on Urban's alleged wilful failure to produce discovery documents, or, in the alternative, to grant Northland partial summary judgment, pursuant to CPLR 3212, declaring that it is not obligated to reimburse Urban for any defense costs in the underlying property damage action entitled *Labate v Urban Foundation/Engineering, LLC* (Sup Ct, Nassau County).

**BACKGROUND**

Northland issued Urban a commercial general liability

insurance policy for the period August 1, 2000 through August 1, 2001. In February, 2001, Urban was retained by Waters Edge Contracting Corp. (Waters Edge) to perform remedial pile installation to repair settlement problems associated with the premises owned by Joseph and Madeline Labate (together, Labate). Urban performed this work between February, 28, 2001, and March 16, 2001, when the work was completed.

On March 28, 2001, Paula Scappatura (Scappatura), the neighbor adjoining the Labate residence, commenced an action in Supreme Court, Nassau County, against Labate and Waters Edge (Index No.: 5032/01), alleging that the work being performed to construct the Labate residence had caused her adjacent property to become unstable and to move in a northerly direction. Motion Ex. D. Thereafter, Waters Edge commenced a third-party action against Urban and others, and on November 25, 2003, Scappatura commenced an action directly against Urban and others (Index No.: 11913/03). Motion Ex. G. These two actions were consolidated on February 4, 2004. Motion Ex. F.

In the Scappatura action against Urban, Scappatura alleges that "Defendant Urban breached its common law duties and obligations, by among other things, negligently failing to properly analyze the site conditions at [the Labate property], failing to properly analyze the plans, drawings and specifications, failing to obtain necessary information, and by

failing to use proper equipment to install the pilings." Motion Ex. G, ¶ 52. In this complaint, Scappatura alleges that, because of the negligence of another defendant, beginning in July of 2000, her property began to sink, and continued to sink because of Urban's negligence. *Id.*, ¶ 16.

On or about August 20, 2004, Labate and Waters Edge commenced an action in Supreme Court, Nassau County (Index No.: 11486/04), against Urban and others, for property damage allegedly caused by Urban's work on the Labate property. In this complaint, Labate and Waters Edge allege that the Labate residence collapsed because of the negligent work performed by Urban in installing the pilings. Motion Ex. K. There is no allegation that the Labate residence collapsed during the period of coverage by the Northland policy.

On August 21, 2003, Urban notified Northland of the third-party claims asserted against it by Waters Edge emanating from the Scappatura action. The notification was sent to Cardinal Claims Service, Inc. (Cardinal), pursuant to the provisions of the Northland policy discussed below. Motion Ex. N. On August 27, 2004, Urban notified Cardinal of the claims asserted against it by Labate and Waters Edge. Motion Ex. O.

On December 29, 2004, Northland sent Urban a letter disclaiming coverage in both the Scappatura and Labate actions. Motion Ex. P. In that letter, Northland stated that it had no

duty to defend or indemnify Urban in the Scappatura action. As part of its rationale, Northland stated that, pursuant to Urban's Self-Insured Retention Agreement, discussed below, Urban had allocated defense costs to this policy without first obtaining Northland's consent. Additionally, Northland asserted that the damage that was the subject of the underlying lawsuits did not occur within the policy coverage period. *Id.*

Pursuant to the terms of the general commercial liability policy in effect between Urban and Northland, Northland's obligation to provide defense and indemnification applies only if the property damage occurs during the policy period. Further, the policy states that "property damage" means "physical injury to tangible property, including all resulting loss of use of that property. All such loss shall be deemed to occur at the time of the physical injury that caused it." Motion Ex. Q, § V, ¶ 17.

Additionally, Urban had a Self-Insured Retention Agreement as an endorsement to the main policy. According to section 1.B of that endorsement, Urban had a retained limit of \$25,000.00 on each occurrence, including loss and/or legal expenses. Motion Ex. Q. Section 1.C of this endorsement states:

"In the event that the aggregate Retained Limit is exhausted by payments, arising from injury, damage, or expenses to which this insurance applies, the provisions of this endorsement are void and all terms and conditions of the policy are reinstated to their full force and effect; and we will then be obligated to assume charge of the settlement or defense of any claim or 'suit' against the insured not yet settled, whether or not reported to us."

Further, section 2.B of the endorsement states:

"Should any 'occurrence' appear likely to exceed the Retained Limit, no loss expense or legal expenses may be incurred on our behalf by an insured without prior consent."

Urban alleges that during the entire time that the two underlying property damage actions were pending, it kept Northland and Cardinal notified of all litigation activity, including all costs and expenses. Motion Ex. R.

The \$25,000.00 retained limit of the Self-Insured Retention endorsement was exhausted by July of 2004, Urban's litigation expenses between November 2, 2003, and June 10, 2004, totaling \$33,341.35. Urban's total litigation expenses for the two underlying actions was \$164,448.34. The court notes that Urban does not separate the litigation expenses between the two litigations. Urban asserts that Northland is obligated to reimburse it for \$139,448.34 of those expenses, its total costs less the retained limit.

The Scappatura action was eventually settled for a total amount of \$1,197,500.00, of which Urban contributed \$15,000.00 for its portion. The Labate action was eventually dismissed, based on the statute of limitations. Urban maintains that Northland is obligated to reimburse it for this \$15,000.00 settlement.

Northland avers, in its cross motion, that this action should be dismissed, because Urban has failed to produce any

documents in response to Northland's discovery demands, made on December 1, 2008, for copies of any commercial liability insurance policies issued to Urban by any insurer for the policy periods following the expiration of the Northland policy on August 1, 2001. Northland asserts that this information is necessary to determine allocation issues relevant to Urban's defense and indemnity claims. It is noted that, in response to Northland's cross motion, the requested policies have been provided.

Alternatively, Northland claims that it should be granted summary judgment with respect to costs associated with the Labate action defense, because the complaint does not allege any occurrence to the Labate property during the policy coverage period.

#### **DISCUSSION**

Northland's cross motion to dismiss the complaint, pursuant to CPLR 3126, is denied.

"A court may dismiss an action if the plaintiff 'wilfully fails to disclose information which the court finds ought to have been disclosed' (CPLR 3126). The sanction of dismissal may be warranted even where, as in the present case, the plaintiff committed no violation of a prior court order."

*Wolfson v Nassau County Medical Center*, 141 AD2d 815, 815 (2d Dept 1988).

However, in those situations in which courts have granted dismissal of the action as a sanction, the failure of the

plaintiff to provide the requested discovery had continued for an extensive period of time (*id.* [over two and a half years]; *Chiambalero v Waldbaum's Supermarket, Inc.*, 250 AD2d 360 [1<sup>st</sup> Dept 1998] [over two years]), and the plaintiff's conduct was found to be willful and contumacious. *Id.*

In the present case, Urban did provide the requested insurance information within six months of the initial request, and, since Northland only asserts that the information demanded was for the purpose of potential allocation of liability, not liability itself, Northland has failed to demonstrate that it has been prejudiced to such an extent so as to warrant the imposition of "one of the most severe remedies that may be imposed upon a plaintiff [citation omitted]." *Smilovich v Rottenstein*, 266 AD2d 372, 372 (2d Dept 1999).

Northland also asserts, in its memorandum of law, that Urban's motion should be dismissed because the motion is only supported by an attorney's affirmation. However, the attorney's affirmation is used to present the supporting documents, and, as such, is appropriate for the instant motion. *Alvarez v Prospect Hospital*, 68 NY2d 320 (1986).

Northland's cross motion for partial summary judgment, pursuant to CPLR 3212, declaring that Northland is not obligated to reimburse Urban for its defense costs incurred in the underlying Labate litigation is granted.

"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 evidentiary 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).

It is well established that an insurer's duty to defend its insured is broader than its duty to indemnify. See *Fitzpatrick v American Honda Motor Company, Inc.*, 78 NY2d 61 (1991). An insurer's duty to defend is triggered whenever the allegations in the underlying complaint potentially give rise to a covered claim, or the insurer has actual knowledge of facts establishing a reasonable possibility of coverage. *Frontier Insulation Contractors, Inc. v Merchants Mutual Insurance Co.*, 91 NY2d 169 (1997). However, an insurer may be relieved of its duty to defend on the basis of a policy exclusion if the insurer can demonstrate that the allegations of the complaint cast the

pleadings wholly and entirely within that exclusion, and that the allegations are subject to no other interpretation. *Allstate Insurance Co. v Mugavero*, 79 NY2d 153 (1992).

As stated above, in the complaint filed in the Labate action, there is no allegation that the Labate residence collapsed during the period covered by the subject insurance policy. Moreover, it is inconceivable that Labate would have waited more than three years after the residence collapsed to institute a lawsuit alleging negligence that caused the collapse. Therefore, Northland properly disclaimed an obligation to defend Urban in that lawsuit.

However, Northland is obligated to reimburse Urban for its costs in defending against allegations made against it in the Scappatura litigation. The Scappatura litigation was instituted only weeks after Urban completed its work, and months before the insurance policy in question terminated. Further, the complaint alleges negligence on the part of Urban occurring during the period of coverage, and Northland does not oppose this portion of Urban's motion. Consequently, Urban's motion for summary judgment seeking reimbursement for its costs of defense in the underlying Scappatura action is granted.

Northland, in its cross motion, opposes that portion of Urban's motion seeking reimbursement for the amount Urban paid in settling the Scappatura litigation. Northland's argument is

based on the proposition that it might be entitled to contribution for any portion of the settlement for which it might be obligated from the insurers who insured Urban subsequent to the termination of the Northland policy. The court finds this argument unavailing.

"The New York rule is that where an insurer unjustifiably refuses to defend a suit, the insured may make a reasonable settlement or compromise of the injured party's claim, and is then entitled to reimbursement from the insurer, even though the policy purports to avoid liability for settlements made without the insurer's consent [internal quotation marks and citations omitted]."

*Ansonia Associates Limited Partnership v Public Service Mutual Insurance Co.*, 257 AD2d 84, 86 (1<sup>st</sup> Dept 1999); *City of New York v Zurich-American Insurance Group*, 27 AD3d 609 (2d Dept 2006).

Courts have held that where there is a possibility of coverage adduced from the allegations in the underlying action's complaint, even if that allegation forms the basis of only one of several theories of liability, and the insurer disclaims its obligation to defend, that disclaimer alone is sufficient to require the insurer to indemnify the insured for any reasonably arrived-at settlement, provided that the claim does not fall within a policy exclusion. *Servidone Construction Corp. v Security Insurance Company of Hartford*, 64 NY2d 419 (1985).

Further, any contribution to which Northland might be entitled from Urban's subsequent insurers may be determined in a separate action against those insurers, whose rights and

obligations cannot be determined by this court since they are not parties to this action.

#### CONCLUSION

Based on the foregoing, it is hereby

ORDERED that the part of defendant's cross motion which seeks to dismiss the complaint is denied; and it is further

ORDERED that the part of defendant's cross motion for a declaration that it is not obligated to reimburse plaintiff for any defense costs incurred on behalf of plaintiff in its defense of the underlying action entitled *Joseph Labate, Madeline Labate and Waters Edge v Ray Caliendo et al.*, Index No.: 11913/03, Supreme Court, Nassau County, is granted; and it is further

ORDERED that the part of defendant's cross motion which seeks a declaration that it is not obligated to reimburse plaintiff for plaintiff's costs in settling the underlying action entitled *Paula Scappatura v Urban Foundation/Engineering LLC*, Index No.: 11913/03, Supreme Court, Nassau County, is denied; and it is further

ORDERED that the part of plaintiff's motion which seeks a declaration that defendant is obligated to reimburse it for its costs in defending the above-referenced underlying actions is granted to the extent that defendant is ordered to reimburse plaintiff for plaintiff's costs in defending the underlying action entitled *Paula Scappatura v Urban Foundation/Engineering*

LLC, Index No.: 11913/03, Supreme Court, Nassau County; and it is further

ADJUDGED and DECLARED that the part of plaintiff's motion which seeks reimbursement from defendant for the \$15,000.00 it expended in settling the underlying action entitled *Paula Scappatura v Urban Foundation/Engineering LLC*, Index No.: 11913/03, Supreme Court, Nassau County, is granted and this portion of the action is severed and the Clerk of the Court is directed to enter judgment in favor of plaintiff and against defendant in the amount of \$15,000.00, together with interest as prayed for allowable by law at the rate of \_\_\_ % per annum from the date of June 19, 2006, until the date of entry of judgment, as calculated by the Clerk, and thereafter at the statutory rate, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

ORDERED that the issue of the amount expended by plaintiff in its defense of the underlying action entitled *Paula Scappatura v Urban Foundation/Engineering LLC*, Index No.: 11913/03, Supreme Court, Nassau County, is referred to a Special Referee to determine the aforesaid issue; and it is further

ORDERED that this portion of the motion is held in abeyance pending the determination of the Special Referee who shall direct entry of judgment thereon; and it is further

ORDERED that counsel for the party seeking the reference or, absent such party, counsel for the plaintiff shall, within 30 days from the date of this order, serve a copy of this order with notice of entry, together with a completed information sheet,<sup>1</sup> upon the Special Referee Clerk in the Motion Support Office in Rm. 119 at 60 Centre Street, who is directed to place this matter on the calendar of the Special Referee's Part (Part 50 R) for the earliest convenient date.

Dated: November 25, 2009

New York, NY

ENTER:



Michael D. Stallman, J.S.C.

**FILED**  
DEC 02 2009  
NEW YORK  
COUNTY CLERK'S OFFICE

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<sup>1</sup>Copies are available in Rm. 119 at 60 Centre Street, and on the Court's website.

**NEW YORK COUNTY SUPREME COURT - SPECIAL REFEREE CALENDAR****INFORMATION SHEET**

**Title of Action:** URBAN FOUNDATION/ENGINEERING, LLC V NORTHLAND INSURANCE COMPANY

**Index No.:** 113293/2008

**Issues Referred to HEAR AND DETERMINE:.** The amount expended by plaintiff in its defense of the underlying action entitled Paula Scappatura v Urban Foundation/Engineering LLC, Index #: 11913/03.

**Estimated Time Needed for Hearing:** ½ DAY TO 1 DAY

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Please attach this form to a copy of the order of reference or transcript and file, as soon as possible after issuance and in any event within 60 days thereof, with:

Special Referee Clerk - Motion Support Office  
60 Centre Street - Room 119, New York, New York 10007

- - You will be notified by mail of the date and time of the hearing.
- - Please direct all inquiries to the Special Referee Clerk (646-386-3028)
- - Usually, cases are assigned to a Referee and the hearing commences on the original hearing date. Counsel therefore should be prepared with witnesses and evidence on the original date. Counsel are required to consult with all adversaries in regard to requests or applications for an adjournment.