

QBE Ins.Corp. v Adjo Contr. Corp.

2010 NY Slip Op 30036(U)

January 8, 2010

Supreme Court, Nassau County

Docket Number: 601695/2009

Judge: Ira B. Warshawsky

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SHORT FORM ORDER

**SUPREME COURT : STATE OF NEW YORK
COUNTY OF NASSAU**

PRESENT:

**HON. IRA B. WARSHAWSKY,
Justice.**

TRIAL/IAS PART 8

QBE INSURANCE CORPORATION,

Plaintiff,

INDEX NO.: 601695/2009
MOTION DATE:
MOTION SEQUENCE: 015, 004,
005, 006, 009, 012 and 013

-against-

ADJO CONTRACTING CORPORATION,
TRAVELERS INDEMNITY COMPANY,
ARCHSTONE f/k/a ARCHSTONE-SMITH
OPERATING TRUST, TISHMAN SPEYER
ARCHSTONE-SMITH WESTBURY, L.P.
f/k/a ASN ROOSEVELT CENTER, LLC, ASN
ROOSEVELT CENTER, LLC d/b/a ARCHSTONE
WESTBURY, ARCHSTONE-SMITH TRUST,
ARCHSTONE-SMITH OPERATING TRUST,
ARCHSTONE-SMITH COMMUNITIES, LLC
ARCHSTONE-SMITH, INC., LEHMAN
BROTHERS HOLDINGS, INC., TISHMAN
SPEYER PROPERTIES, LP, TOCCI
BUILDING CORPORATION OF NEW JERSEY,
INC., LIBERTY MUTUAL INSURANCE
COMPANY, PERKINS EASTMAN ARCHITECTS,
INC., ELDORADO STONE, LLC, AMERICAN
ENGINEERING SERVICES, P.C., APRO
CONSTRUCTION GROUP, ATLAS COMFORT
SYSTEMS, USA L.P., d/b/a ATLAS AIR
CONDITIONING, BUILDERS HARDWARE,
CLEM'S ORNAMENTAL IRON WORKS,
DA VINCI CONSTRUCTION OF NASSAU,
INC., d/b/a DA VINCI CONSTRUCTION,
FOUR SEASONS INSULATION CORP.,
HAVANA CONSTRUCTION CORP., HOUSTON
STAFFORD ELECTRICAL CONTRACTORS,

L.P., d/b/a HOUSTON STAFFORD ELECTRIC, KLEET LUMBER COMPANY, KNIGHT WATERPROOFING COMPANY, INC., MANNING PLUMBING AND HEATING CORP., METRO PAINTING, M.I. CONCRETE CORP., MID-ATLANTIC STONE, INC., PATTI ROOFING, LLC, SIDNEY B. BOWNE & SON, LLP, SIPALA LANDSCAPE SERVICES, INC., STATE FIRE SUPPRESSION, INC., SUPERSEAL MANUFACTURING CO., THREE B'S PLUMBING HEATING AND AIR CONDITIONING CORP., UNIVERSAL FOREST PRODUCTS and JOHN DIGIOVANNA, RICHARDO FRANCOIS, TRENT HUNTER, PASQUALE MARCHESE, ANDREA SORRENTINO, JESSICA VENTIMIGLIA, individually, and on behalf of themselves and all other persons similarly situated,

Defendants.

THE TRAVELERS INDEMNITY COMPANY,

Third-Party Plaintiff,

- against -

ACE AMERICAN INSURANCE COMPANY, AMERICAN EUROPEAN INSURANCE COMPANY f/k/a MERCHANTS INSURANCE COMPANY OF NEW HAMPSHIRE, INC., AMERICAN STATES INSURANCE COMPANY, CONTINENTAL CASUALTY COMPANY, DELOS INSURANCE COMPANY f/k/a SIRIUS AMERICA INSURANCE COMPANY, ERIE INSURANCE EXCHANGE, EVEREST INDEMNITY INSURANCE COMPANY, FARM FAMILY CASUALTY INSURANCE COMPANY, INTERSTATE FIRE AND CASUALTY COMPANY, LIBERTY MUTUAL FIRE INSURANCE COMPANY, MERCHANTS MUTUAL INSURANCE COMPANY, NAVIGATORS SPECIALTY INSURANCE COMPANY f/k/a NIC INSURANCE COMPANY, OHIO CASUALTY INSURANCE COMPANY, PENNSYLVANIA NATIONAL MUTUAL CASUALTY INSURANCE COMPANY, SCOTTSDALE INSURANCE COMPANY,

Third-Party Defendants.

ARCHSTONE f/k/a ARCHSTONE-SMITH OPERATING TRUST, ARCHSTONE WESTBURY, LP, f/k/a TISHMAN SPEYER ARCHSTONE-SMITH WESTBURY, L.P., f/k/a ASN ROOSEVELT CENTER, LLC, ARCHSTONE MULTIFAMILY SERIES I TRUST, f/k/a ARCHSTONE-SMITH TRUST, ARCHSTONE COMMUNITIES, LLC, f/k/a ARCHSTONE-SMITH COMMUNITIES, LLC and TISHMAN SPEYER PROPERTIES, LP,

Second Third-Party Plaintiffs,

- against -

ACE AMERICAN INSURANCE COMPANY, AMERICAN EUROPEAN INSURANCE COMPANY, f/k/a MERCHANTS INSURANCE COMPANY OF NEW HAMPSHIRE, INC., AMERICAN STATES INSURANCE COMPANY, ATLANTIC CASUALTY INSURANCE COMPANY, CONTINENTAL CASUALTY CO., DELOS INSURANCE COMPANY, f/k/a SIRIUS AMERICA INSURANCE COMPANY, DISCOVER PROPERTY & CASUALTY INSURANCE COMPANY, ERIE INSURANCE EXCHANGE, EVEREST INDEMNITY INSURANCE COMPANY, FARM FAMILY CASUALTY INSURANCE COMPANY, FEDERATED MUTUAL INSURANCE COMPANY, HARTFORD FIRE INSURANCE COMPANY, INTERSTATE FIRE AND CASUALTY COMPANY, LIBERTY MUTUAL FIRE INSURANCE COMPANY, MERCHANTS MUTUAL INSURANCE COMPANY, NAVIGATORS SPECIALTY INSURANCE COMPANY, f/k/a NIC INSURANCE COMPANY, OHIO CASUALTY INSURANCE COMPANY, PENNSYLVANIA NATIONAL MUTUAL CASUALTY INSURANCE COMPANY, SCOTTSDALE INSURANCE COMPANY, ZURICH AMERICAN INSURANCE COMPANY,

Second Third-Party Defendants.

CONSOLIDATED FOR DISCOVERY WITH ACTION BEARING NASSAU COUNTY INDEX NO. 001018/2008.

The following papers read on this motion:

| | |
|--|----|
| Notice of Motion (Sequence No. 015) by Adjo for a Limited Stay | 1 |
| Affirmation in Support | 2 |
| Memorandum of Law in Support | 3 |
| Tocci and Liberty Affirmation in Partial Opposition (filed under Index No. 001018/2008) | 4 |
| Reply Affirmation to Tocci and Liberty by Adjo | 5 |
| QBE's Affirmation in Partial Support and partial Opposition to Adjo's Motion for a Limited Stay | 6 |
| Traveler's Affirmation in Opposition to Adjo's Motion for a Limited Stay | 7 |
| Notice of Motion (Sequence No. 004) for a Limited Stay by Ace American Insurance Company in Traveler's Third-Party Action | 8 |
| Notice of Cross Motion (Sequence No. 005) by American States Insurance Company for a Limited Stay | 9 |
| Notice of Cross Motion (Sequence No. 006) by Interstate Fire and Casualty Company for a Limited Stay of QBE's and Traveler's Complaints | 10 |
| Affirmation of Farm Family Casualty Insurance Company in Opposition to Motion and Cross Motions for a Limited Stay (Response to Sequence No. 006) | 11 |
| Reply Affirmation of Interstate Fire and Casualty Company to Affirmations Opposing its Motion for a Limited Stay (Sequence No. 006) | 12 |
| Notice of Cross Motion (Sequence No. 009) for a Limited Stay by Navigators Specialty Insurance Company of Traveler's Third-Party Complaint with Supporting Affidavit | 13 |
| Notice of Cross Motion (Sequence #012) for a Limited Stay by Archstone and in Opposition (Partial) to Adjo's Motion for a Limited Stay | 14 |
| Memorandum of Law in Partial Opposition to Adjo's Motion and in Support of Archstone's Motion | 15 |
| Affidavit of Edward Henderson in Partial Opposition to Adjo's Motion for a Limited Stay and in Support of Cross Motion for a Limited Stay (Archstone's) | 16 |
| Notice of Cross Motion (Sequence No. 013) by Continental Casualty Company for a Stay of Travelers Indemnity Company's Third-Party Complaint | 17 |
| Affirmation by Traveler's in Opposition to Cross Motions for a Limited Stay of Traveler's Third-Party Action filed by Ace American Insurance Company (Sequence No. 004), American States Insurance Company (Sequence No. 005), Interstate Fire and Casualty Company (Sequence No. 006), Navigators Specialty Insurance Company (Sequence No. 009) and Continental Casualty Company (Sequence No. 013) | 18 |

Affirmation by Thomas Maeglin, Esq. for QBE in Partial Opposition to Archstone’s Cross Motion (Sequence No. 012) for a Limited Stay, with Reference to Traveler’s Opposition to Cross Motions of Interstate Fire and Casualty Company (Sequence No. 006), Continental Casualty Company (Sequence No. 013), American States Insurance Company (Sequence No. 005), Navigators Specialty Insurance Company (Sequence No. 009) and Ace American Insurance Company (Sequence No. 004) 19

QBE Insurance Corporation is the insurer of Adjo Contracting Corporation. It began this action seeking a declaration as to its duty to defend and/or indemnity to Adjo. In QBE’s complaint, it alleges that Travelers tendered the defense of Tocci, the general contractor, and the “owner” of the project (Archstone), as additional insureds under the QBE CGL policies to Adjo. More specifically, that Travelers tendered to QBE the defense and indemnity of Tocci in the Archstone Action contending that Tocci is an additional insured (under Adjo’s policy with QBE). Similarly, Travelers also tendered to QBE the defense and indemnity of the “owner” (Archstone) in the Tenants’ Actions (individual and class action brought by tenants against Archstone) as an additional insured in the QBE policies. QBE’s action asks for a declaration that the CGL policies it issued to Adjo do not provide coverage for Tocci or the “owners” as additional insured.

In Travelers’ Third-Party Complaint, it alleges that Travelers tendered the defense of Tocci and the “owner” as additional insureds under the CGL policies issued by the Third-Party Defendant insurers to the subcontractors (in the Archstone – Tocci action). Third-Party Defendant insurers (of the subcontractors in the Archstone Action) have taken the position that the CGL policies issued to the various subcontractors do not provide coverage to Tocci and/or Archstone as additional insured under the policies.

The Second Third-Party Complaint brought by Archstone against the insurers of the subcontractors, claims that said subcontractors were required to add Archstone and its related entities as additional insureds under their general liability policies which cover liability for bodily injury, property damages and personal injury, amongst other coverages, thus, requiring the subcontractors’ carriers (the Defendants in the Second Third-Party Complaint) to pay for the defense of the Archstone Third-Party Plaintiffs against the actions by the residents (also known

as the tenant actions).

The first cause of action is for a declaratory judgment for a duty to defend Archstone. The second cause of action is for a declaratory judgment to indemnify Archstone. The third cause of action is for a breach or anticipatory breach of the contracts which require the carriers to defend and indemnify Archstone as an additional insured. The damages would be the sums Archstone become obligated to pay as a result of the residents' actions.

Defendant, Adjo Contracting Corporation, filed a motion for a partial stay (CPLR 2210) of the above-captioned main action (QBE coverage action) on October 16, 2009. Regretfully, it was filed under the incorrect index number, the number for what has been called the underlying or Archstone Action, Index No. 001018/2008. It has now been re-filed and is known as Motion Sequence No. 015.

In response numerous parties either opposed, partially opposed, or filed cross motions, in support or partial support of the Adjo motion. Other cross motions moved to stay the third-party action brought by Travelers Indemnity Company, or to stay the second third-party action brought by Archstone (see list above).

The essence of the cross motions was that no one really objected to the stay of the main action for a declaratory judgment on the issue of the duty to indemnify the defendants in the QBE action (for various reasons), but the parties differed on the extent of the involvement of those QBE parties, including third-party defendants, who were not already parties in the Archstone matter, in the depositions and future discovery in the Archstone matter. As reflected by the caption, the number of parties in the instant case, combined with the number of parties in the Archstone matter, is very substantial.

Adjo requested that all QBE parties be granted permission to participate in the Archstone depositions, but not be required to participate. Thus allowing them to continue with the same witnesses as need be after the Archstone matter concluded.

Tocci and Liberty's opposition asks that the QBE parties be required to participate in the Archstone depositions or they be deemed to have waived their rights to participate to depose these witnesses. Cross movant, Archstone, agreed that the QBE parties could observe the depositions and be given copies of previously produced discovery (current count on produced

disks containing ESI is 125), but not participate in the depositions.

QBE, agreeing with Adjo that factual findings in the underlying action could be determinative of the QBE coverage action, also acknowledge the Court's power under CPLR § 2201 to stay all litigation of the coverage action, including discovery, solely relating to the coverage action.

QBE's main objection is that, if during the discovery in the Archstone Action, evidence is revealed that would support a summary judgment motion, they should be allowed to make the motion. Pursuant to the Commercial Division Rules, the Court will hear all requests to make dispositive motions. When the time comes, the Court will allow such motions by a party (not only QBE) if it determines that evidence has been produced that establishes the determination of rights and obligations of that party; otherwise, all such motions will only be made after the matter has been certified for trial.

American States Insurance Company (Motion Sequence No. 005) requests that all litigation, including discovery, solely related to the coverage action be stayed, but parties be allowed to participate in, receive and attend discovery in the underlying action.

Cross movants argued that to preclude the individual carriers from participating in the depositions (assuming no duplication of other attorney's questions) would/could result in having to recall one or more of what we expect to be at least sixty witnesses after the Archstone matter is settled or is tried by the Court or a jury.

Travelers has cross moved against QBE and has filed its own Third-Party Action for a declaratory judgment declaring that Travelers is entitled to recover as against QBE and Travelers' Third-Party Defendants, any and all amounts paid by Travelers for the defense of Tocci, the "Archstone Action", and for the defense of Archstone in what has been called the "Tenant Suits" (or Residents' Actions) (pending before Justice Driscoll in Supreme Court, County of Nassau).

Adjo's motion cannot be considered to stay Travelers' Third-Party Action, but could be interpreted to stay Travelers' counterclaim against QBE. Thus, to that extent, Travelers opposes it. Travelers objects to a stay of its crossclaims against QBE or its Third-Party Action against the other insurers of the Archstone Action's Third-Party Defendants.

Travelers argues that “equity demands that the parties, including QBE, bear the costs of defense as they incur.” If the Court stays its Third-Party Action, Travelers will bear a disproportionate cost of the defense.

In Motion Sequence No. 004, Ace American Insurance Company has moved for a limited stay of Travelers’ Third-Party Action. Its arguments are similar to Adjo’s. However, they do request the Court allow the parties in the Third-Party Action “to participate in, receive discovery, and attend depositions in connection with the underlying Archstone Actions (Index No. 001018/2008) as well as in the instant QBE action (the First-Party Coverage Action).

In requesting its stay of the Third-Party Action, Ace argues that the coverage issues in the First-Party Action are nearly identical to those in Travelers’ Third-Party Action and should be stayed and await the results of the Archstone underlying action. Travelers is requesting that its Third-Party Defendants contribute to the cost of defending Tocci that has to date been funded by Travelers.

American States Insurance Company has filed a cross motion (Motion Sequence No. 005) also requesting a stay of all litigation, including discovery, solely related to the coverage Action, and allow all parties to participate in, receive and attend discovery in the underlying action. Again, the differences amongst those wishing that the Coverage Action be stayed are the degree of participation a party will have at a deposition — a participant or an observer.

Interstate Fire and Casualty Company, in its cross motion (Motion Sequence No. 006), seeks a stay of the QBE Coverage Action and of Travelers’ Third-Party Complaint. It also requests that all parties be allowed to participate in the discovery of the underlying Archstone Action. In fact, counsel for Interstate basically says that if the Court grants Adjo’s motion for a limited stay, it should also grant Interstate’s, seeing no difference in the actions.

In reply to a counterclaim by Tocci to QBE’s initial complaint, QBE took the position (again) that it is not obligated to indemnify nor defend Tocci or Archstone as additional insureds under the CGL policies issued to Adjo; then, even if they are, their policies are “excess.” They go on to cite twelve exclusions of their policies which would preclude their liability from providing coverage to Tocci. They include a Fungi Bacteria Exclusion, a Property Exclusion, a Wrap Up Exclusion, a Total Pollution Exclusion, and a prohibition in the policies of a duty to

defend or indemnify with respect to any claims that do not allege “bodily injury” or “property damage.”

Interstate points out that in its answer to Travelers’ Third-Party Complaint it set forth twenty-seven affirmative defenses disputing Travelers’ contention that Tocci and Archstone entities are additional insureds under the Interstate policy; in the alternative, Interstate claims that its policy is excess.

Tocci commenced coverage litigation in June 2008 against both Virginia Surety Company and Travelers in the United States District Court for the District of Massachusetts (the “Tocci Coverage Action”). Interstate is not a party to the Tocci Coverage Action. In the Tocci Coverage Action, Travelers disclosed in a Statement of Undisputed Facts that it had been paying 100% of the reasonable and necessary costs incurred since April 2008 on behalf of Tocci related to the Archstone Action. Eventually, in August 2009, the Court in the Tocci Coverage Action ruled that both Travelers and Virginia Surety have a duty to defend Tocci on a 50-50 allocation. As such, the defense of Tocci is being funded and the issues involving Tocci’s coverage are being litigated in Federal District Court in Massachusetts.

Moreover, in March 2008, the Archstone entities commenced coverage litigation in Denver, Colorado, seeking a defense and indemnity against eleven carriers, including Travelers, but not including Interstate (the “Archstone Coverage Action”). Although the Archstone Coverage Action was stayed until December 1, 2009, Travelers has admitted in its Third-Party Complaint that it is paying the reasonable defense costs of Archstone-Smith Operating Trust in the Tenants’ Actions. Again, the coverage issues involving the Archstone entities are already being litigated in Colorado.

Interstate requests a stay of all litigation and to allow QBE and Travelers’ parties to attend and participate in the depositions in the underlying matter (Archstone).

Farm Family Casualty Insurance Company, insurer of Sipala Landscape Services, Inc. and a Third-Party Defendant in the Travelers’ Third-Party Complaint, submitted an affirmation in partial support of the motion and cross motion to stay discovery. It was most specifically directed at Interstate’s Motion Sequence No. 006 and the Adjo motion (Motion Sequence No. 015), but generically applies to all similar motions.

Farm Family agrees there are overlapping coverage issues in the QBE Complaint and Travelers' Third-Party Complaint. However, it points out that there are several issues which it raised in a "disclaimer and denial" letter written to Tocci, dated February 13, 2009. These would not otherwise be addressed in QBE's Action, in that they relate to timeliness of notification to Farm Family of the incidents, claims and lawsuits, in violation of Farm Family's policy. It requests limited discovery on issues that relate to its disclaimer and denial of coverage. It notes it may have to wait many months or years if it must put off its discovery until discovery in the QBE Action against Travelers is completed. Thus, it supports coordination of discovery, but opposes any application that would prevent it from moving forward on discovery of its own issues unique to its own defense.

The "letter of February 13, 2009" (seventeen pages) specifically referred to a request by Archstone that Farm Family, as Sipala's insurer (issuer of commercial general liability policies) defend Archstone in specific Tenants' Actions filed against it. The letter carefully sets forth grounds for disclaiming under various sections of the policy.

Interstate replies to the opposing papers of Travelers, and in further support of its motion for a partial stay of each of the Complaints, that of QBE, of Travelers' Third-Party Complaint, and of the Second Third-Party Complaint filed by Archstone. It is also in opposition to certain relief requested by Archstone in its notice of cross motion for a limited stay (Motion Sequence No. 012). The Second Third-Party Action was filed after Interstate's original filing, and the current Interstate filing is expanded to cover a stay of said Second Third-Party Complaint.

Interstate argues, again, that any duty to defend should await the resolution of the case filed by Archstone in Denver, Colorado. The problem with that theory is that that case has been stayed apparently pending the resolution of the instant case. Interstate sees no urgency to determine the coverage issues when the underlying action has produced 125 CDs of discovery material yet to be viewed by the QBE parties.

Of course, this assumes that the insurance carriers who are Defendants or Third-Party Defendants in QBE are unaware of discovery having been exchanged in the underlying action with each of the Defendants therein, whom they insure.

Finally, Interstate joins the position of others that if the QBE parties are allowed to appear

at the depositions in the underlying case, they should participate fully (i.e., asking questions).

Motion Sequence No. 009 is a cross motion for a limited stay brought by Navigators Specialty Insurance Company in opposition to Travelers' Third-Party Complaint. It reflects a stay, including that of discovery, and allow these Third-Party Defendants "to participate in, receive, and attend discovery in the Underlying Archstone Action, as well as the instant QBE Action."

NIC Insurance Company, f/k/a Navigators Specialty Insurance Company, issued Commercial Lines Policy to "Integrated Electrical Services, Inc." for the period November 1, 2006 to November 1, 2007. They deny any duty to defend or indemnify Tocci or Archstone as additional insureds (as claimed by Travelers' Third-Party Complaint).

In Motion Sequence No. 012, Archstone has filed a cross motion for a limited stay and a partial opposition to Adjo's motion for a limited stay. They request that all litigation related solely to the duty to defend Archstone as an additional insured go forward forthwith and that all litigation related to indemnity issues of the Coverage Actions be stayed.

It would agree to passive participation of the parties to this action in the discovery process of the underlying Archstone Action (the Construction Action). This would mean receipt of all written discovery propounded by and responded to by the parties in the underlying action, but would preclude their participation at depositions or propounding any written discovery in said underlying Construction Action.

Archstone argues the duty to defend is not dependent on the results of the Construction Action, while the duty to indemnify may be so implicated. They argue that determination of the duty to defend would not put "any undue burden" on the Court, and that the issue of the duty to defend Archstone in the Tenants' Action by QBE and the Second Third-Party Defendants, should immediately go forward. They argue that a review of the allegations of the Complaints in the Tenants' Actions and reviewing the terms of the insurance policies at issue could resolve the matter of duty to defend. "The duty to defend is measured against the allegations of the pleadings." Servidone Construction Corporation v. Security Insurance Company of Hartford, 64 N.Y.2d 419, 424 (1985). The duty to defend "is not contingent on the insurer's ultimate duty to indemnify." Seaboard Surety Co. v. Gillette Co., 64 N.Y.2d 304 (1984). The duty to defend "the

insured rests solely on whether the complaint alleges any facts or grounds which brings the action within the protection purchased.” Ruder & Finn v Seaboard Surety Co., 52 N.Y.2d 663, 669-670; see also, Fitzpatrick v. American Honda Motor Co., 78 N.Y.2d 61 (1991) — “duty to defend its insured arises whenever the allegations in a complaint state a cause of action that gives rise to the reasonable possibility of recovery under the policy.” At p. 65. “In other words, as the four corners rule has developed, an insurer may be contractually bound to defend even though it may not ultimately be bound to pay, either because its insured is not factually or legally liable or because the occurrence is often proven to be outside the policy’s coverage.”

Thus, Archstone argues the duty to defend issues should move forward toward resolution while the duty to indemnify be stayed.

Continental Casualty Company filed a cross motion (Motion Sequence No. 013) to stay Travelers’ Third-Party Action (entirely) and in support of Adjo’s limited stay of the QBE Action, to facilitate discovery and the resolution of the underlying lawsuit (the Archstone Action).

Aside from the previously discussed grounds for a stay of the coverage issues found within the QBE/Travelers/Archstone Complaints, Continental urges the Court to consider the interaction of two out-of-state cases that overlap with the two cases in this part, the Archstone construction case (Index No. 001018/2008) and the QBE coverage case (Index No. 601695/2009), as well as the Residents’/Tenants’ Actions pending before Justice Driscoll (Index No. 021135/2007, Archstone Westbury Tenants’ Litigation). The cases referred to by Continental are those pending in Colorado and Massachusetts.

Archstone has brought a Coverage Action against First-Party insurance carriers and Tocci in Denver, Colorado. Tocci has brought an action in the Massachusetts Federal Court against Virginia Surety Company, a Third-Party carrier to which Travelers was added as a Third-Party Defendant. Thus, there are now three coverage cases involving the Archstone Westbury project pending in three different jurisdictions.

Travelers, who is paying for the Tocci defense in the underlying action, wants (through its Third-Party Action in the QBE Action) a determination of the duty of the insurance carriers of the Third-Party Defendants in the Archstone Construction Action to supplement/contribute to the cost of representation of Tocci in the Archstone Construction Action, and to the defense of

Archstone in the Tenants' Actions.

Continental points out that the Court of Appeals ruled in BP Air Conditioning Corp. v. One Beacon Insurance Group, 8 N.Y.3d 708 (2007) that in the context of whether an entity is an additional insured "in order to determine the priority of coverage among different policies, a court must review and consider all of the relevant policies at issue."

Thus, Continental argues, since Travelers is defending (translation: paying for the defense of) Tocci, there is no reason to expedite the massive discovery required in determining the "duty to defend" issue and equitable contribution from the fifteen carriers sought by Travelers. Such discovery would require the Court to examine the fifteen insurance policies (or more) of the third-party subcontractors from the Archstone Action. Continental finds no need to rush to judgment. Travelers and Archstone vehemently disagree with such a position.

Travelers has filed an affirmation in opposition to five motions for a limited stay of its Third-Party Complaint. Specifically, they oppose, at least in part, Ace American Insurance Company's Motion Sequence No. 004, American States Insurance Company's Motion Sequence No. 005, Interstate Fire and Casualty Company's Motion Sequence No. 006, Navigators Specialty Insurance Company's Motion Sequence No. 009, and Continental Casualty Company's Motion Sequence No. 013. They are collectively called the "Moving Third-Party Defendants."

Travelers also incorporates by reference its previously filed opposition to Adjo's motion for a limited stay to the extent that Moving Third-Party Defendants have adopted Adjo's positions.

As noted earlier, Travelers seeks equitable contribution from the fifteen insurance companies who issued Commercial General Liability ("CGL") insurance policies to the various subcontractors who contracted with Tocci in the building of Archstone Westbury (and whom are Third-Party Defendants in the underlying construction action). The contracts between Tocci and the subcontractors allegedly required that the subcontractors name Tocci (contractor) and Archstone (owner) as additional insureds on the subcontractors' insurance policies. Travelers also requests an Order requiring Third-Party Defendants to contribute to future defense costs. There is no request for indemnification. Travelers argues that its policy with Tocci is a Commercial General Liability policy which makes Travelers' policy excess to any other

insurance held by Tocci and Archstone.

Travelers is currently paying for or toward Tocci's defensive costs. However, they did so with a complete reservation of rights, including the right to seek recoupment of defense costs from any of their own Third-Party Defendants and also any of Archstone's (in the underlying action).

The "moving Third-Party Defendants" now seek to stay this action regarding their duty to defend Tocci and Archstone as additional insureds on their insureds' policy. They argue, as noted earlier, that this action on the duty to defend is "premature."

Travelers points to the language of BPAir Conditioning Corp. v. One Beacon, supra, that if the allegations of the Complaint "suggested a reasonable possibility of coverage" under the policies issued by Third-Party Defendants to the subcontractors and by QBE to Adjo, then the insurer will be called upon to provide a defense. That issue should proceed as expeditiously as possible – not as the moving Third-Party Defendants would want – waiting for a determination of liability. According to Travelers' reading of the CGL possibilities, an additional insured is entitled to the same defense as a named insured. And according to BPAir Conditioning Corp. v. One Beacon, supra, the "standard for determining whether an additional named insured is entitled to a defense is the same standard that is used to determine if a named insured is entitled to a defense."

On December 10, 2009, the Court conducted a half-day of discussion and oral argument on these motions. It then conducted a half-day of discussion and oral argument related to the Archstone case. The parties indicated that they would like the opportunity, after the Court indicated a path it intended to follow on the partial stay and cross motion applications, to cobble together a protocol that would control the involvement of the QBE parties in the depositions and past and future discovery in the Archstone matter. The Court agreed that it would give the parties until January 12, 2010 to come up with a solution. After that date, the Court would rule.

This left for the Court's determination whether a stay should issue of Archstone's counterclaim against QBE; of the Third-Party Action, the action by Travelers against the insurers of the Defendants (Third-Party Defendants in the Archstone matter (Index No. 001018/2008)); and of the Second Third-Party Action, that of Archstone where they contend that they should

have been named as an additional insured on the insurance policies of each of the Defendants in the underlying action (Index No. 001018/2008), the Archstone Construction Action.

Conclusion on Requests to Stay

All requests to stay or partially stay the QBE Action, the Third-Party complaint of Travelers and/or the Second Third-Party Complaint of Archstone are decided as follows:

All litigation solely related to the indemnification claims is stayed pending the determination of the underlying action, along with discovery related thereto, Archstone v. Tocci Building Corporation of New Jersey, Index No. 001018/2008.

The Third-Party Action brought by Travelers for a determination of the duty of the Third-Party Defendants (or any one or more of them) to defend Tocci and Archstone as additional insureds of the Third-Party Defendants (the subcontractors in the underlying action) shall proceed.

“The duty to defend an insured is derived from the allegations of the Complaint and the terms of the policy. If a Complaint contains any facts or allegations which brings the claim even potentially within the protection purchased, the insurer is obligated to defend.” (Technician Elecs. Corp. v. American Home Assn. Co., 74 N.Y.2d 66 at 73) as quoted in BP Air Conditioning Corp. v. One Beacon, supra, at 714.

The Court of Appeals pointed out in BP Air Conditioning Corp. that the duty to defend is triggered by the allegations contained in the underlying Complaint.

A determination of the underlying Complaint is not required for a determination of the duty to defend. There is no basis at this point to preclude Travelers’ Action from proceeding.

As to Archstone’s Cross Complaint against QBE and its own Second Third-Party Action, the applications to stay those actions from proceeding are also denied.

Once again, an insurer may be required to defend under a contract of insurance even though it may not be required to pay once the litigation has run its course. See, Automobile Insurance Company of Hartford v. Cook, 7 N.Y.3d 131, at 137.

There is no basis for precluding those actions to determine the duty to defend from moving forward.

All that differentiates QBE and its Third-Party Actions from any other declaratory action

on the duty to defend and indemnify is their size. Their size should not preclude the Court from allowing the actions for a determination of whom must defend whom and to what degree to proceed. This will in no way deter the discovery process in the underlying action from moving forward.

There are currently pending multiple motions to dismiss in those matters. These will be addressed within the next sixty days.

One or more carriers, QBE and Farm Family Casualty Insurance Company specifically, also argue that even if there is a duty to defend under the policy, they have affirmative defenses which preclude their defending Archstone; most specifically, the failure to give timely notice of occurrence, claim or suit. They argue they are entitled to conduct full discovery on all issues that provide a defense to a claim for "a defense" by any of the parties. The Court agrees.

The Court directs that a Preliminary Conference be held on January 28, 2010, at 9:30 A.M., to lay out the discovery schedule for QBE and the Third-Party Actions (Travelers and Archstone as Third-Party Plaintiffs). Based upon the prior cooperation in this matter amongst the multiple parties, the Court relies upon them to establish such a schedule, subject to the Court's approval, and present it on or before that date.

Dated: January 8, 2010


J.S.C.

ENTERED

JAN 08 2010

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COUNTY CLERK'S OFFICE**