

**Guzman v Ascension Evangelical Lutheran Church,  
Inc.**

2010 NY Slip Op 30039(U)

January 8, 2010

Supreme Court, New York County

Docket Number: 109874/08

Judge: Judith J. Gische

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

HON. JUDITH J. GISCHE

PRESENT: \_\_\_\_\_

PART 10

Index Number : 109874/2008  
**GUZMAN, GUADALUPE URAGE**  
 VS.  
**ASCENSION EVANGELICAL LUTHERAN**  
 SEQUENCE NUMBER : 001  
 DISMISS

INDEX NO. \_\_\_\_\_  
 MOTION DATE \_\_\_\_\_  
 MOTION SEQ. NO. 001  
 MOTION CAL. NO. \_\_\_\_\_

in this motion to/for \_\_\_\_\_

PAPERS NUMBERED  
 \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_

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

Cross-Motion:  Yes  No

Upon the foregoing papers, It is ordered that this motion  
*3P it failed to appear at motion  
 EBT's scheduled - try to expedite*

**FILED**  
 JAN 12 2010  
 COUNTY CLERK'S OFFICE  
 NEW YORK

**MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION**

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S): \_\_\_\_\_

Dated: JAN 08 2010  
1/08/10

*JJ*  
HON. JUDITH J. GISCHE *JJ* c.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION  
 Check if appropriate: DO NOT POST ~~WILL BE REMOVED~~

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 10**

-----X  
**GUADALUPE URAGA GUZMAN**, *mother and  
natural guardian of ISSAC MORAN,*  
*an infant over the age of 14 years,* and  
**GUADALUPE URAGA GUZMAN**

Plaintiff (s),

**-against-**

Ascension Evangelical Lutheran  
Church, Inc. and Improvements by  
Design, LLC,

Defendant (s).

-----X  
Improvements by Design, LLC,

3<sup>rd</sup> Party Plaintiff

**-against-**

Joe Koenig Construction, Inc. and Utica  
First Insurance Company,

3<sup>rd</sup> Party Defendants

**DECISION/ ORDER**

Index No.: 109874/08

Seq. No.: 001

**PRESENT:**

Hon. Judith J. Gische

**J.S.C.**

T.P. Index No.:

590419/09

-----X  
Recitation, as required by CPLR § 2219 [a] of the papers considered in the review of  
this (these) motion(s):

<b>Papers</b>	<b>Numbered</b>
3 <sup>rd</sup> PΔ JK, Utica n/m (3211) w/SNP affirm, SW affid, exhs .....	1
Guzman/Moran opp w/GSK affirm .....	2
3 <sup>rd</sup> PΠ Improvements opp w/SMD affirm .....	3
3 <sup>rd</sup> PΔ JK, Utica reply w/SNP affirm .....	4

*Upon the foregoing papers, the decision and order of the court is as follows:*

Gische J.;

This is an action brought on behalf of Isaac Moran ("Moran") a minor who was employed on a renovation project at the Ascension Evangelical Lutheran Church Inc. ("the church"). Moran sustained injuries to his fingers while operating a power driven saw, allegedly as a result of violations of the Labor Law. The third party action is for indemnification and other related relief.

Presently before the court is the pre-answer motion by Joe Koenig Construction, Inc. ("Koenig") and Utica First Insurance Company ("Utica") (collectively "3<sup>rd</sup> party defendants") who seek an order dismissing the 3<sup>rd</sup> party complaint against them based upon documentary evidence (CPLR § 3211 [a][1]) and because the complaint fails to state a cause of action (CPLR § 3211 [a][7]). Although issue has not been joined, both 3<sup>rd</sup> party defendants urge the court to treat their motion as one for summary judgment on the basis that they have submitted evidence that could be considered on a motion for summary judgment (CPLR 3211 [c]). Alternatively, if neither of those branches of its motion are granted, then the 3<sup>rd</sup> party defendants ask that the third party action be severed from the underlying personal injury action.

This motion is opposed by Improvements by Design, LLC ("IBD"), defendant in the personal injury action and the third party plaintiff ("3<sup>rd</sup> party plaintiff"). Moran is partially opposed to the relief sought as well. The church takes no position on the motion, though due proof of service of the motion has been filed.

Since this motion attacks the sufficiency of the 3<sup>rd</sup> party complaint, the pleadings are afforded a liberal construction, the allegations therein are taken as true, and the 3<sup>rd</sup>

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party plaintiff is given the benefit of every possible inference (Goshen v. Mutual Life Ins. Co. of N.Y., 98 NY2d 314, 326 [2002]; Leon v. Martinez, 84 NY2d 83 [1994]; Morone v. Morone, 50 NY2d 481 [1980]; Beattie v. Brown & Wood, 243 AD2d 395 [1<sup>st</sup> Dept. 1997]). Furthermore, since this motion is also based upon documentary evidence (see Zanett Lombardier, Ltd v Maslow, 29 AD3d 495 [1<sup>st</sup> Dept 2006]), such evidence must definitively dispose of 3<sup>rd</sup> party plaintiff's claims (Bronxville Knolls Inc. v. Webster Town Center Partnership, 221 AD2d 248 [1<sup>st</sup> dept. 1995]).

The court has considered the following arguments and facts:

### **Arguments and Facts**

Moran claims he was injured on September 19, 2007 while working at defendant's church. He was 16 years old at the time of the accident. He is the son of a Koenig employee. Moran claims he was also employed by Koenig at the time of his accident. It is undisputed that Moran filed a worker's compensation claim and the administrative law judge made a decision in his favor (discussed at greater length later in this decision)

The church had a contract with IBD, the contractor for the project, dated March 17, 2007. It requires that IBD, among other things, make the church an additional insured on its liability insurance policy and that "[a]ny sub-Contractor contracted directly by [IBD] will provide appropriate Workers' Compensation and will "Additionally Insure" [the church] on the sub-Contractor's policies against any issues or claims that may arise."

IBD also entered into "Subcontract Agreement" with Koenig, its subcontractor, dated August 25, 2002 ("IBD/Koenig subcontract") regarding window installation and

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removal, etc., at the church. There is also another document dated March 19, 2007 signed by Koenig and IBD. This document also indicates it is the "Contract for: Joe Koenig Construction . . . Installation for: Ascension Lutheran E.V. Church of Babylon . . ." and then sets forth the "Outline for Scope of Work per Blue Print for Ascension Lutheran Church by Nystrom and Associates . . ." This document sets forth the price of the project and contains a list of the work to be done by Koenig, for example: replacement of 14 new Bonneville windows, wrapping the exterior of church with Tyvek, trimming of gutter lines and caulking all seams. At the end of the document, it provides that "signature is required to proceed." According to Koenig, this is the operative document which regulates and is decisive of the parties' dispute.

The IBD/Koenig subcontract provides, among other things, that:

"This agreement is being provided to Improvements by Design, LLC (hereinafter known as Contractor) by Joe Koenig Construction and/or Koenig Construction and any and all employees or independent contractors of Joe Koenig Construction (hereinafter known as Sub-Contractor) and in full agreement to insure Contractor and Contractors [clients'] hold harmless conditions outlined below and pertains to all work performed during the life of said relationship which verbally began August 15, 2002 and extending until said relationship is terminated in writing.

Prior to commencement of any work under this contract and until completion and final acceptance of said work, the Sub-Contractor shall, at [its] sole expense maintain the following insurance on [its] own behalf and furnish it to the Contractor listing the Contractor as and with (*sic*) an additional insured to the Sub Contractor's policy in the name of [IBD] . . ."

The IBD/Koenig subcontract also identifies the type of insurance Koenig was obligated to obtain; such insurance includes worker's compensation insurance,

employer's liability Insurance, "Broad Form Blanket Contractual Liability for liability assumed under this contract and all Contracts relative to the project," and personal and advertising Injury Liability. Pursuant to the contract, such "coverage is to be endorsed to reflect that insurance is to be primary with respect to any other insurance for the Owner, General Contractor, [IBD], their officers . . . agents and employees and all other parties to be named as additional insured."

The later, March 19, 2007 document provides that "[Koenig] will provide [IBD] and [the church] with, and "additionally insure" them on, its Liability and Indemnification Insurance Policy against any and all issues or claims that may arise."

Koenig seeks the pre-answer dismissal of the 3<sup>rd</sup> party complaint which seeks contractual and common law indemnification against Koenig and Utica and judgment over, based upon the 3<sup>rd</sup> party defendants having committed "tortious acts."

Koenig argues that its contract with IBD does not contain a contractual indemnification or hold harmless provision, requiring it to indemnify IBD and therefore, IBD's claim for contractual indemnification fails to state a cause of action. Koenig denies that there is any basis for common law indemnification cause of action against it (Moran's employer) because Moran did not suffer a "grave injury" within the meaning of section 11 of the Worker's Compensation Law, just some injuries to his fingers.

Koenig contends that it obtained insurance for IBD's benefit, as it was required to do under its contract with IBD's and, therefore, IBD's claim for breach of contract is without any factual support, even though Utica has denied IBD coverage under an exclusion.

Utica separately argues that IBD and Utica have no privity of contract because

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the contract at issue is the Koenig's contract with IBD and Utica is not a party to it or bound by its terms. Utica argues further that IBD's negligence claim against Utica fails because denial of insurance coverage does not give rise to a viable tort claim against the insurer. Moreover, IBD is not seeking declaratory judgment against Utica and, therefore, IBD has no claim at all against the insurer.

Utica contends it properly denied coverage because of the employee exclusion provision in Koenig's insurance policy which applies to "any insured," whether it is the named insured or an additional insured. The section Utica relies upon (XCNTR [1.0]) ("employee exclusion") provides as follows:

"Exclusions that apply to all liability coverages

Contractors and Employees of Contractors

This insurance does not apply to:

"(i) bodily injury to any employee of any insured, to any contractor hired or retained by or for any insured or to any employee of such contractor, if such claim for bodily injury arises out of and in the course of his/her employment or retention of such contractor by or for any insured, for which any insured may become liable in any capacity;

(ii) any obligation of any insured to indemnify or contribute with another because of damage arising out of the bodily injury; or

(iii) bodily injury sustained by the spouse, child, parent, brother or sister of an employee of any insured, or of a contractor, or of an employee of a contractor of any insured as a consequence of bodily injury to such employee, contractor, or employee of such contractor, arising out of and in the course of such employment or retention by or for any insured."

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Utica argues that it was also appropriate for it to deny IBD's claim because it was untimely. Although Moran was injured on September 19, 2007, Utica was first notified of the occurrence on September 2, 2008 - almost a year later.

Alternatively, Utica argues that if the court denies their motion to dismiss and decides there are viable claims asserted by IBD, the 3rd party action should be severed and allowed to proceed separately from the personal injury action because the third party defendants will be unduly prejudiced by having the insurance issues injected into the personal injury action.

IBD, in opposition to the motion, argues that Moran was not an employee, although IBD apparently agrees that Moran submitted a claim to the Worker's Compensation Board ("the board"). IBD argues that Moran was a minor at the time of his accident (age 16), he did not participate in the worker's compensation hearing, and IBD has not yet received discovery in connection with respect to those issues. IBD contends the board's decision was based upon Moran being an employee of the owner/church when the accident occurred. Thus, IBD contends there is a triable issue of fact about whether Moran was Koenig's employee at the time of the accident and therefore, excluded from coverage, as Koenig contends.

The board's decision, dated March 25, 2008 provides as follows:

"At the Worker's Compensation hearing held on March 20, 2008 involving the claim of Isaac Moran at the Manhattan hearing location, Judge Toni Katz made the following decision and directions:

DECISION: The claimant Isaac Moran had a work related injury to the right hand. Claimant did not appear to pursue the claim. Medical treatment and care, as necessary, for established sites of injury and/or

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conditions, is authorized. Joseph Koenig Construction Company is proper employer. Remove Improvement by Design from Notice. No further action is planned by the Board at this time."

Below the decision, appears the following information: "Claimant: Isaac Moran" and "Employer: Improvements By Design."

Moran argues that there is no triable issue of fact that he was employed by Koenig at the time of his accident. Koenig argues it makes no difference (for purposes of this case) that Moran was only 16 years at the time of the accident, or that IDB has not received Moran's employee file, because Moran's age does not affect his employee status, he did not suffer a grave injury which would allow a tort action against his employer, and Koenig cannot collaterally attack the board's determination, that Moran was employed by Koenig at the time of his accident.

#### **Discussion**

For reasons that will become clear, the court will not treat this motion as one for summary judgment because Koenig and Utica have successfully established they are entitled to the pre-answer dismissal of some of the claims pursuant to CPLR § 3211 [a][1] and [7].

Contrary to IBD's arguments, the administrative law judge decided that Moran was employed by Koenig at the time of his accident. IDB provides no legal authority for its argument, that Moran's non-participation in the board hearing is something to be considered by the court, or that it affects the administrative law judge's determination. Importantly, IBD was on notice of Moran's worker's compensation claim. Apparently both Koenig and IBD were identified as "employers" by Moran on his claim form. IBD

participated or could have participated in the hearing that was held and argued that Koenig was not the proper employer.

Although Moran was underage (age 16) at the time of his accident, this does not affect his employment status for purposes of Worker's Compensation, though it may affect his compensation and benefits (Worker's Compensation § 14-a; Kobre v. Camp Mogen Abraham, 293 A.D.2d 893 [3<sup>rd</sup> Dept. 2002]). An underage employee is still an "employee" within the meaning of the law.

Since the decision by the administrative law judge is final and binding on the parties who participated in the process (Feltt v. Owens, 247 AD2d 689 [3<sup>rd</sup> Dept 1998]), the decision that Moran was Koenig's employee at the time of his injury cannot be collaterally attacked by IBD in this action. Therefore, IBD is bound by the administrative law judge's decision that Moran was employed by Koenig at the time of his accident and therefore, subject to the employee exclusion in the Utica policy.

To be enforceable, an employee exclusion from coverage in an insurance policy must be specific and clear (Seaboard Sur. Co. v. Gillette Co., 64 N.Y.2d 304, 311 [1984]) and any ambiguities must be construed against the insurer (Ace Wire & Cable Co. v. Aetna Cas. & Sur. Co., 60 N.Y.2d 390, 398 [1983]). IBD does not raise any argument that the provision in Koenig's policy with Utica is vague or inapplicable, except that IBD claims that Moran was not a Koenig employee at the time of his accident and, therefore, the exclusion is inapplicable for that reason alone.

The court has examined the employee exclusion provision in Koenig's policy with Utica and finds that it is specific and clear. Employee exclusion provisions similar to the one at bar have been held by various courts of this State to be unambiguous and

accorded their plain and ordinary meaning ( Moleon v. Kreisler Borg Florman General Const. Co., Inc., 304 A.D.2d 337 [1<sup>st</sup> Dept 2003]; 720-730 Fort Washington Ave. Owners Corp. v. Utica First Ins. Co., \_\_\_ Misc.3d \_\_\_, 2009 WL 3645656 [Sup Ct Bronx Co. 2009]). The plain meaning of the employee exclusion in Koenig's policy with Utica bars coverage for the accident that is the subject of the underlying personal injury action and relieves Utica of any responsibility to provide IBD with a defense.

Utica has also established that it was first notified by IBD of the Moran claim and request for coverage on September 2, 2008. IBD has not provided any explanation for the almost one year delay, nor does it even address this point in its opposition to Utica and Koenig's motion. Even a short delay of only a few days in notifying a insurer may provide a basis for a disclaimer of coverage (DeSo v. London & Lancashire Indem Co. of America, 3 NY2d 127 [1957]). Since IBD raises no issue of fact that it timely notified Utica of an occurrence, the delay is unexplained and unaddressed, Utica has proved IBD failed to timely notify Utica of the Moran claim and suit, providing another basis for Utica to deny coverage.

Utica has met its burden on this motion for dismissal of the claims against it based upon documentary evidence and failure to state a cause of action. Even affording the 3<sup>rd</sup> party complaint a broad construction, IBD has failed to state a cause of action against Utica for coverage and defense. Therefore, Utica's motion to dismiss the 3<sup>rd</sup> party

The court has also considered Koenig's argument, that the third party complaint against it must be dismissed because there is no obligation to indemnify contained in its March 19, 2007 contract with IBD. That document consists of an outline of the work to

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be performed for the church in connection with the renovation and sets forth the cost of the project.

The IBD/Koenig subcontract dated August 25, 2002, however, provides that "[t]his agreement is being provided to [IBD] by [Koenig] . . . in full agreement to insure Contractor and Contractors clients' hold harmless conditions outlined below and pertains to all work performed during the life of said relationship which verbally began August 15, 2002 and extending until said relationship is terminated in writing . . ." The subcontract identifies the types of insurance Koenig has to provide IBD with, including "Commercial General Liability with a combined Bodily Injury and Property Damage Limit of not less than Two Million (\$2,000,000) Dollars per occurrence . . . on a per project basis . . ." and "personal and advertising injury liability." The IBD/Koenig subcontract also requires that "[c]overage is to be endorsed to reflect that insurance is to be primary with respect to any other insurance for the Owner, General Contractor [IBD] and all other parties to be named as additional insured." Another provision of the IBD/Koenig subcontract is that "[t]he carrying of insurance described shall in no way be interpreted as relieving the Sub Contractor/s of liability under this contract."

An agreement requiring that a party provide insurance coverage for the benefit of another party or name another party as additional insured is not the same as requiring that the obligated party indemnify the other party (Becarie v. Union Bank of Switzerland, 272 AD2d 162 [1<sup>st</sup> Dept 2000]). The IBD/Koenig subcontract, however, requires that Koenig provide IBD with a certain level of insurance and that it be primary.

Although Koenig contends it fulfilled its contractual obligation to hold IBD harmless by simply naming IBD as an additional insured, there is an employee

exclusion in Koenig's policy with Utica. IBD has alleged facts showing that the insurance Koenig provided was inferior to what it was required to secure for the benefit of IBD. Where a party breaches its contractual obligation to procure insurance to cover the risk of liability, the usual penalty is liability for all the resulting damages (Inchaustegui v. 666 5th Ave. Ltd. Partnership, 268 AD2d 121 [1<sup>st</sup> Dept 2000] [internal citations omitted]). Therefore, the motion by Koenig to dismiss the contribution (judgment over) and contract based claims against it by IBD is denied.

The court otherwise grants the third party defendants' motion to dismiss all the claims against Utica on the grounds that there is documentary evidence resolving IBD's claims and IBD has failed to state a cause of action against Utica.

Except for the contribution (judgment over) and contract based claims against Koenig, the third party defendants' motion for the dismissal of the complaint against them is granted as well.

The court also grants the 3<sup>rd</sup> party defendants' motion to sever the third party action from the underlying personal injury action because generally, injection of the issue of insurance in a negligence case is inherently prejudicial and should be avoided (Southworth v. Macko, 294 A.D.2d 920 [4<sup>th</sup> Dept 2002]). Therefore, the third party action is severed and shall be tried separately. Koenig (the remaining 3<sup>rd</sup> party defendant) shall serve a copy of this decision/order with notice of entry on the Clerk of the Office of Trial Support so that the appropriate steps can be taken.

The court denies the 3<sup>rd</sup> party defendants' motion asking that this motion be treated as one for summary judgment. Since some of the claims have been dismissed for failure to state a cause of action or based upon documentary evidence, summary

judgment is academic as to these claims. As to the remaining claims against Koenig, there is no reason for the court to decide them on an expedited basis, before issue is joined. Nor is there any basis to decide the grave injury issue before joinder of issue.

### **Conclusion**

Koenig and Utica's motion to dismiss the 3<sup>rd</sup> party complaint against them is granted as to Utica. It is granted in part and partly denied as to Koenig. Furthermore, the motion for the severance of the 3<sup>rd</sup> party action (T.P. 590419/09) is granted as well. The third party action shall be tried separately from the personal injury action.

Koenig and Utica's motion to treat this motion to dismiss as one for summary judgment is denied for the reasons stated.

In accordance with the foregoing,

It is hereby

**Ordered** that third party defendants' motion to dismiss all the claims against Utica is granted and the clerk shall enter judgment in favor of Utica First Insurance Company dismissing the 3<sup>rd</sup> party complaint against it; and it is further

**Ordered** that third party defendants' motion to dismiss all the claims against Koenig is granted in part, but denied as to the contribution (judgment over) and contract based claims against Koenig; and it is further

**Ordered** that the third party action is hereby severed and Koenig shall serve a copy of this decision/order with notice of entry on the Clerk of the Office of Trial Support so that the appropriate steps to sever the action can be effectuated; and it is further

**Ordered** that the court denies the 3<sup>rd</sup> party defendants' motion asking that this


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motion be treated as one for summary judgment; and it is further

**Ordered** that any relief that has not been addressed has nonetheless been considered and is hereby expressly denied; and it is further

**Ordered** that this constitutes the decision and order of the court.

Dated: New York, New York  
January 8, 2010

So Ordered:

  
\_\_\_\_\_  
Hon. Judith J. Gische, JSC

**FILED**  
JAN 12 2010  
NEW YORK  
COUNTY CLERK'S OFFICE