

**York Hunter Constr. Serv., Inc. v Great Am. Custom  
Ins. Serv., Inc.**

2010 NY Slip Op 32547(U)

September 16, 2010

Supreme Court, New York County

Docket Number: 109049/06

Judge: Judith J. Gische

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

PRESENT: HON. JUDITH J. GISCHE  
*Justice*

PART 10

Index Number : 109049/2006  
**YORK HUNTER INSURANCE SERVICES**  
VS.  
**GREAT AMERICAN CUSTOM**  
SEQUENCE NUMBER : 005  
PARTIAL SUMMARY JUDGMENT

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

n this motion to/for \_\_\_\_\_

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

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

Cross-Motion:  Yes  No

**FILED**  
SEP 17 2010  
NEW YORK  
COUNTY CLERK'S OFFICE

Upon the foregoing papers, it is ordered that this motion

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

SEP 16 2010

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

\_\_\_\_\_  
HON. JUDITH J. GISCHE *L.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 10**

-----X  
YORK HUNTER CONSTRUCTION  
SERVICES, INC.,

Plaintiff

-against-

GREAT AMERICAN CUSTOM INSURANCE  
SERVICES, INC., GREAT AMERICAN E & S  
INSURANCE COMPANY, GREAT AMERICAN  
ALLIANCE INSURANCE COMPANY, GREAT  
AMERICAN ASSURANCE COMPANY, GREAT  
AMERICAN CONTEMPORARY INSURANCE,  
GREAT AMERICAN INSURANCE COMPANY,  
GREAT AMERICAN INSURANCE COMPANY  
OF NEW YORK, GREAT AMERICAN SECURITY  
INSURANCE COMPANY, GREAT AMERICAN  
SPIRIT INSURANCE COMPANY, NATIONAL  
CASUALTY INSURANCE COMPANY, UNITED  
NATIONAL CASUALTY INSURANCE  
COMPANY, NATIONAL CASUALTY COMPANY,  
SCOTTSDALE INSURANCE GROUP, FARM  
FAMILY CASUALTY INSURANCE COMPANY  
f/k/a FARM FAMILY MUTUAL INSURANCE  
COMPANY, OHIO CASUALTY INSURANCE  
COMPANY, AMERICAN EMPIRE INSURANCE  
COMPANY, UTICA FIRST INSURANCE COPANY  
f/k/a UTICA FIRE INSURANCE COMPANY OF  
ONEIDA COUNTY N.Y., U.S. UNDERWRITERS  
INSURANCE COMPANY,

Defendants.

-----X  
U.S. UNDERWRITERS INSURANCE  
COMPANY,

Third-party Plaintiff,

- against -

DENNIS TOAL, KATHLEEN TOAL, and  
NOVA STAR ELECTRIC CORP.,  
Third party Defendants.

-----X

**DECISION/ ORDER**

Index No.: 109049/06

Seq. No. : 005

**PRESENT:**

Hon. Judith J. Gische  
J.S.C.

**FILED**  
SEP 17 2010  
NEW YORK  
COUNTY CLERK'S OFFICE

T.P. Index No.:  
590723/06

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

Papers	Numbered
Utica n/m (§ 3212) w/ ASZ affirm, SW affid, exhs	1
York Hunter opp w/MJD affirm, exhs	2
Utica further support w/ASZ affirm, exhs	3
Various correspondence by each side, pre oral argument	4

Upon the foregoing papers the court's decision is as follows:

**Gische, J.:**

This is an action by plaintiff York Hunter Construction Services, Inc. ("York Hunter") for a declaratory judgment that it is an additional insured under a policy issued by defendant Utica Fire Insurance Company of Oneida County, N.Y. ("Utica") to High Tech Enterprises & Electrical Services of N.Y., Inc. ("High Tech") and, therefore, Utica was required to provide York Hunter with defense and indemnification in connection with a personal injury action against York Hunter that has settled (Toal v. York Hunter Construction Services, Inc., Take One LLC and Nova Star Electric Corp., Sup Ct., N.Y. Co. Index No., 112541-03) ("personal injury action" or "Toal action").

A prior motion by defendant U.S. Underwriters Insurance Company for summary judgment was granted, dismissing York Hunter's claims against that insurer (Order, Gische J., 1/8/. Other claims have since been settled and Utica is the sole remaining defendant.

Since issue has been joined by Utica and this motion was brought timely after plaintiff filed the note of issue, the court can and will decide the motion for summary judgment on the merits (CPLR § 3212, Brill v. City of New York, 2 NY3d 648 [2004]).

The court's decision is as follows:

## **Background and Arguments Presented**

Dennis Toal ("Toal"), a plumber, contends he was injured on April 10, 2003 ("date of the accident") when he stepped on, and his foot got tangled in, wire mesh at 491 Greenwich Street, New York, New York, where a construction project was underway. The construction site was owned by Take One, LLC ("owner") and on the date of the accident, York Hunter had a written construction contract with the owner to provide construction services as the general contractor and construction manager of the project. York Hunter had subcontracts with other contractors to do work on the project, including a company called James M. Inman Construction Corp. ("Inman") ("York Hunter/Inman subcontract" at times the "prime contract"). The York Hunter/Inman subcontract is dated December 13, 2001. Inman subcontracted some of the concrete work to High Tech (Inman/High-Tech subcontract). The Inman/High-Tech subcontract agreement, dated September 16, 2002 indicates that High-Tech is responsible for the scope of the work set forth in "exhibit B" which is a purchase order dated November 29, 2001. The scope of the work is broadly stated: "concrete." The body of the purchase order indicates that High-Tech is to provide "all labor, material, taxes, equipment, tracking, hoisting, supervision, layout, clean-up, insurance ...for the complete performance of the concrete work in its entirety..." and reference is made to drawings, specification, reinforcing steel, and reinforced concrete.

High-Tech brought in Crown Contracting Industries ("Crown") to, among other things, purchase and place the rebar and wire mesh necessary for the concrete work, because High-Tech was not a union shop, but Crown was. High-Tech's contract with Crown ("High-Tech/Crown subcontract") is dated July 12, 2002.

The Inman/High-Tech subcontract provides that High-Tech is bound by the terms of the York Hunter contract:

"The Subcontractor [High-Tech] agrees to be bound to Owner and G.C. [Inman] by each and all of the terms and provisions of the Prime Contract and all of the other Subcontract Documents and to assume towards the Owner and G.C. all of the duties, obligations and responsibilities that G.C. shall have [sic] the same rights and remedies as against the Subcontractor as the Owner, under the terms and provisions of the Prime Contract and the other Subcontract documents, has against G.C. with the same force and effect as though each duty, obligation, responsibility, right or remedy were set forth herein in full..."

The High-Tech/Crown subcontract also incorporates the York Hunter (prime) contract by reference, stating that Crown agrees: "2. To be bound by the terms of said Main Contract with the Owner . . ." and that "subcontractor [Crown] certifies that the Main Contract has been read by him."

High-Tech obtained a commercial general liability policy from Utica which was in effect from March 27, 2003 to March 27, 2004 [ART 1222146 00], encompassing the date of Toal's accident ("High-Tech's policy"). High-Tech's policy contains a "Blanket Additional Insured" endorsement for contractors [Form BAI-1] defined as :

"(7) (d) . . . any person or organization whom you are required to name as an additional insured on this policy under a written contract or written agreement . . . (1) Currently in effect or becoming effective during the terms of this policy . . ."

Coverage for such additional insureds is, however, limited to:

"7 (d) (3) . . . liability arising out of  
(A) "Your work" for that additional insured for or by you  
(4) The limits of insurance applicable to the additional insured are those specified in the written contract or agreement or the limits available under this policy whichever is less . . .  
(5) The insurance provided the additional insured does not apply to liability arising out of the sole negligence of the

additional insured."

After these contracts were made and work began on the project, Inman evidently walked off the job and Crown became insolvent. At that point, according to John Arnone, High-Tech's President ("Arnone"), who was deposed, "High-Tech came in and finished the job." Arnone testified that there was already mesh wire on the 2<sup>nd</sup> and 3<sup>rd</sup> floor and that it had been installed by Inman. Furthermore, according to Arnone, Crown only installed wire mesh on the 8<sup>th</sup>, 9<sup>th</sup> and 10<sup>th</sup> floors and all High-Tech did was pour concrete on the 2<sup>nd</sup> and 3<sup>rd</sup> floors.

In its complaint, York Hunter contends, and seeks a declaration that, it is an additional insured under the policy issued by Utica to High-Tech because under the Inman/High-Tech subcontract, High-Tech was required to procure additional insurance coverage for the benefit of York Hunter. York Hunter claims that Toal sustained his injuries when he step into wire mesh on the second floor landing of the construction site. Thus, it is York Hunter's contention that although High-Tech subcontracted out the mesh work to Crown, it maintained a contractual obligation to York Hunter to have that work completed, otherwise it would have breached its contract with York Hunter. Furthermore, the insurance that High-Tech was required to obtain was for the benefit of York Hunter (and the owner), to protect York Hunter against any liability and insure the risks "arising out of" the work High-Tech was contractually obligated to do for York Hunter.

Utica seeks summary judgment, dismissing the claims against it based on arguments that it is not contractually obligated to provide York Hunter with a defense or indemnification. Utica argues that High-Tech's policy requires that there be an effective written contract with High-Tech before the additional insured provision is triggered. Utica

denies that there is any contract between its insured (High-Tech) and York Hunter requiring High-Tech to name York Hunter as an additional insured. Although Utica acknowledges that this may be required under the Inman/High-Tech subcontract, Utica argues that once Inman walked off the job, the contract was "nullified," excusing High-Tech from any obligation to procure additional insurance coverage for York Hunter's benefit. Utica argues further that even if the contract was not nullified, but still effective, Toal's accident did not "arise out of" High-Tech's work for York Hunter because there is no evidence High-Tech installed the wire mesh on the 2<sup>nd</sup> and 3<sup>rd</sup> floors. Utica points out that Toal's foot got caught in mesh wiring on the 2<sup>nd</sup> floor and, according to the testimony by High-Tech's principal (Arnone), that mesh wiring was installed by Inman before it walked off the job. Utica states that all High-Tech did was pour the concrete on the mesh that had already been installed.

York Hunter first opposes Utica's motion on procedural grounds arguing that the transcripts provided in support of its motion for summary judgment are unsigned, unsworn and the pages are non-sequential, and therefore, the motion should be denied for that reason.

On the merits, York Hunter argues that there is no evidence that Inman "walked off the job" as Utica claims, this is simply the testimony by High-Tech's principal (Arnone) who cannot recall when that happened or whether it actually happened that way. In any event, York Hunter maintains that even if that happened, Inman's breach of its contract did not cancel it or relieve High-Tech of its own contractual obligation to procure and maintain insure for York Hunter's benefit. In its contract with Inman, High-Tech expressly agreed to be bound by York Hunter's contract with Inman (i.e. the prime contract).

Furthermore, Article XXVII of the Inman/High-Tech contract requires that:

“Subcontractor shall procure and maintain, at its own expense, until completion of the Work, the following insurance from insurance companies acceptable to the G.C.; as noted in Contract Documents (copy attached) . . . if the subcontractor shall sublet any of his work ...it agrees to see that said party shall carry insurance as mentioned above ...”

Furthermore, under the terms of the prime contract, each subcontractor is responsible for instituting a safety program for its work and cooperating with all other subcontractors. Thus, according to York Hunter, not only was High-Tech responsible for making sure all areas where it did work were maintained in a safe condition, Utica’s insured (High-Tech) specifically – and admittedly– did concrete work on the 2<sup>nd</sup> and 3<sup>rd</sup> floors where Toal was injured.

York Hunter also relies on letters exchanged by York Hunter, Inman and High-Tech addressing the concrete job and payment to High-Tech. In one letter to Inman dated September 16, 2002, High-Tech’s project manager wrote that High-Tech had “arrived at the site on September 12, 2002...” ready to work but encountered unfinished areas. Another letter from York Hunter to Inman states that the owner had agreed to make payments to High-Tech in a check payable to York Hunter and High-Tech for the work by Inman to High-Tech.

**Applicable Law**

A movant seeking summary judgment in its favor 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 ” (Winegrad v. New York Univ. Med. Ctr., 64 N.Y.2d 851, 853 [1985]). The evidentiary proof tendered, however, must be in admissible form (Friends of Animals v. Assoc. Fur Manufacturers, 46 N.Y.2d 1065

[1979]). Once met, this burden shifts to the opposing party who must then demonstrate the existence of a triable issue of fact (Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324 [1986]; Zuckerman v. City of New York, 49 N.Y.2d 557 [1980]).

### Discussion

York Hunter's argument, that the court cannot consider unsigned deposition transcripts or copies of the contract which are unexecuted, does not defeat Utica's motion. The deposition transcripts are of another case (the personal injury action) to which Utica was not a party, but York Hunter was. York Hunter does not deny their contents and it relies upon their contents itself. In any event, pursuant to CPLR 3116 [a], an unsigned transcript can be deemed and used as if it had been signed where the witness does not sign and return it within 60 days of it being sent to him or her. Therefore, the documents and transcripts addressed by both sides are considered.

Turning to the merits, although Utica contends that Inman walked off the project and that this "nullified" Inman's contract not only with York Hunter, but also with High-Tech, a breached contract does not render it a nullity. Were this true, then any party to a contract could excuse his own performance by breaching it (Indovision Enterprises, Inc. v. Cardinal Export Corp., 44 A.D.2d 228 [1<sup>st</sup> Dept 1974] *aff'd* 36 N.Y.2d 811 [1975]).

The intention of the parties to a contract must be gleaned from all corners of the document rather than from discrete sentences or clauses viewed in isolation (Williams Press v. State of New York, 37 N.Y.2d 434, 440 [1975]). The insurance provision in the Inman/High-Tech subcontract is for the protection of the general contractor – "litigation insurance" – effectively shifting the cost of defense from one party to another

(Automobile Ins. Co. of Hartford v. Cook, 7 NY3d 131, 137 [2006]). Utica's argument, that Inman's breach excused High-Tech's separate obligation to name York Hunter as an additional insured, would render the insurance provision futile or meaningless.

Utica identifies no provision in the Inman/High-Tech subcontract that would excuse High-Tech of its separate obligation to name York Hunter an additional insured in the event Inman defaults under its contract with York Hunter (and/or High-Tech); there is no such provision. The subcontract specifically provides that where any conflict arises between the subcontract and the prime contract, "the provision imposing the greater duty or obligation on the Subcontractor shall govern" (Article II Inman/High-Tech subcontract). Such language boldly underscores High-Tech's separate obligations to the general contractor pursuant to the prime contract which is expressly incorporated by reference in the subcontract, and the acceptance of which was a condition to the subcontract being approved. Moreover, the breach of contract argument raised by Utica, actually belongs to its insured (High-Tech) since Utica is not a party to either the York Hunter/Inman or Inman/High-Tech contracts. Thus, not only are the Inman contracts enforceable, Utica cannot disavow its insurance agreement with Hi-Tech based on Inman's default. Therefore, Utica's argument, that Inman's breach relieves Utica from providing its additional insured with defense and indemnification, is erroneous and does not support the granting of summary judgment to Utica.

Where there is a written contract and the liability "arises out of" the work done for the additional insured, both prongs of the Blanket Additional Insured endorsement in the Utica insurance policy are satisfied and the additional insured provisions of the policy are triggered. Utica contends that even if there is a written contract, the liability (i.e. Toal's

accident) did not "arise out of" High-Tech's work because High-Tech only did work on the job after Inman left and it was Inman, not High-Tech, that actually installed the wire mesh where Toal was injured.

Pursuant to Article XXVI ("Hold Harmless") of its contract with Inman, High-Tech assumed responsibility and liability for "any and all damages or injury of any kind ... whatsoever (including death therefrom) to all persons, whether employees of the Subcontractor or otherwise ... caused by, resulting from, arising out of or occurring in connection with the execution of its Work, or in preparation of the Work ..." Article XXVII ("Insurance") further provides that the hold harmless agreement is effectuated by High-Tech obtaining and maintaining insurance for York Hunter's benefit (the "G.C."). High-Tech's duty to indemnify against any loss arising out of its work or in preparation of the work is not limited to claims arising out of High-Tech's work only when High-Tech is negligent (Santos v. BRE/Swiss, LLC, 9 A.D.3d 303 [1<sup>st</sup> Dept 2004]). Thus, whether High-Tech actually installed the wire mesh where Toal sustained injuries is not decisive of whether the liability "arises out of" High-Tech's work. High-Tech's contract is broad and all encompassing: High-Tech subcontracted the wire mesh work to Crown only because Crown was a union shop. Clearly, High-Tech was responsible for that work too.

Even assuming, arguendo, that Utica can prove that it was not its insured (High-Tech) that physically installed the wire mesh on the 2<sup>nd</sup> and 3<sup>rd</sup> floors, and it was Inman (or another contractor) who did it, this is not an available defense to York Hunter's claim for indemnification as an additional insured under High-Tech's insurance policy. High-Tech's obligation was to obtain insurance to protect against the risk attendant to doing the "concrete" work. If another contractor actually did some of the work High-Tech was

contractually obligated to do, then High-Tech/Utica may have a claim against that contractor.

Having failed to meet its burden of proving that it is entitled to summary judgment as a matter of law, Utica's motion is denied.

**Conclusion**

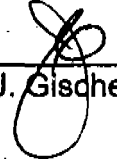
For the reasons set forth above, Utica's motion for summary judgment is denied. The parties have one more opportunity for mediation which is presently scheduled for November 18, 2010. In the event no settlement is reached on or before November 18, 2010, this matter should be forthwith sent to the trial assignment part so it can be scheduled for trial.

Any relief requested but not specifically addressed is hereby denied.

This constitutes the decision and order of the court.

Dated: New York, New York  
September 16, 2010

So Ordered:

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

**FILED**  
SEP 17 2010  
NEW YORK  
COUNTY CLERK'S OFFICE