

**State of New York v One Beacon Ins. Co.**

2011 NY Slip Op 30099(U)

January 18, 2011

Supreme Court, Albany County

Docket Number: L45-10

Judge: Joseph C. Teresi

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STATE OF NEW YORK  
SUPREME COURT  
STATE OF NEW YORK,

COUNTY OF ALBANY

Plaintiff,

-against-

**DECISION and ORDER**  
**INDEX NO. L45-10**  
**RJI NO. 01-10-102010**

ONE BEACON INSURANCE COMPANY,

Defendant.

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Supreme Court Albany County All Purpose Term, December 30, 2010  
Assigned to Justice Joseph C. Teresi

**APPEARANCES:**

Eric T. Schneiderman, Esq.  
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Attn: Alison Pesca, Esq.  
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Denis M. Farrell, Esq.  
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**TERESI, J.:**

Plaintiff commenced this action to recover its cleanup costs for a petroleum discharge in the vicinity of 344 Burgoyne Road, Ticonderoga, New York (hereinafter "spill site"). Issue was joined by Defendant, alleged to be the insurer of one of the dischargers<sup>1</sup>, who set forth a counterclaim seeking a declaration of non-coverage due to its insurance policy's pollution exclusion. Discovery is ongoing. Defendant now moves for summary judgement, and Plaintiff

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<sup>1</sup> The insured, which is named in Plaintiff's complaint as Florence B. Deyo, Inc., a/k/a Deyo's Heating Fuels and LP Gas, will be referred to herein as Deyo.

opposes the motion. Because Defendant demonstrated its entitlement to judgment as a matter of law and no triable issue of material fact was raised, its motion is granted.

“Summary judgment is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue.” (Napierski v. Finn, 229 AD2d 869, 870 [3d Dept. 1996]).

It is well established that “the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law” (Barra v. Norfolk Southern Ry. Co., 75 AD3d 821 [3d Dept. 2010], quoting Winegrad v. New York Univ. Med. Ctr., 64 NY2d 851 [1985]), “by proffering evidentiary proof in admissible form.” (DiBartolomeo v. St. Peter's Hosp. of City of Albany, 73 AD3d 1326 [3d Dept. 2010]; Alvarez v. Prospect Hospital, 68 NY2d 320 [1986]). If the movant establishes their right to judgment as a matter of law, the burden then shifts to the opponent of the motion to establish, by admissible proof, the existence of genuine issues of fact. (Zuckerman v. City of New York, 49 NY2d 557 [1980]).

“When addressing an insurance coverage dispute, a court looks first to the language of the policy.” (Travelers Indem. Co. v. Commerce & Industry Ins. Co. of Canada, 36 AD3d 1121, 1122 [3d Dept. 2007]). “[T]o gain the benefit of an exclusion clause in an insurance policy, the insurer has the burden of demonstrating that the exclusion is stated in clear and unmistakable language, is subject to no other reasonable interpretation, and applies in the particular case.” (Nova Cas. Co. v. Central Mut. Ins. Co., 59 AD3d 777, 778 [3d Dept. 2009] quoting Continental Cas. Co. v. Rapid-American Corp., 80 NY2d 640 [1993]). Moreover, “[u]nambiguous provisions of an insurance contract must be given their plain and ordinary meaning.” (Vigilant Ins. Co. v. Bear Sterns Companies, Inc., 10 NY3d 170, 177 [2008] quoting White v. Continental

Cas. Co., 9 NY3d 264, 267 [2007]).

Defendant first established its policy's clear and unmistakable exclusion language. (Nova Cas. Co. v. Central Mut. Ins. Co., supra). Defendant, by its attorney, properly submitted the insurance policy upon which Plaintiff's claim is based. The policy, paragraph (1) of the pollution exclusion subsection, specifically states: "[t]his insurance does not apply to... 'property damage' arising out of the actual, alleged or threatened discharge... of 'pollutants'... [w]hich are or were at any time transported, handled, stored, treated, disposed of or processed as waste by... any insured..." As it is uncontested that petroleum is a "pollutant" under the policy, this exclusion's language clearly and unmistakably excludes coverage for property damage caused by petroleum discharged when transported or handled. No other reasonable interpretation applies, nor has Plaintiff proffered one.

Defendant further established that the exclusion applies in this particular case. (Nova Cas. Co. v. Central Mut. Ins. Co., supra; Bruckner Realty, LLC v. County Oil Co., Inc., 40 AD3d 898, 901 [2d Dept. 2007]). Defendant submits both the complaint herein and Plaintiff's complaint against Deyo. Plaintiff's instant complaint alleges Defendant insured Deyo when petroleum was discharged at the spill site. The Deyo complaint names the owner of the spill site, Charles Eisenberg, and alleges that the discharge occurred "from an overfill." Although not explicitly stated, the Deyo complaint implicitly alleges that Deyo did not own the spill site but rather was delivering petroleum thereto.<sup>2</sup> Delivery of petroleum unquestionably constitutes transporting or handling petroleum. As such, considering the two closely related complaints

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<sup>2</sup> Additionally, the affirmation Plaintiff's attorney submitted on this motion acknowledges that its claim is based upon "Deyo's overfill of petroleum at Eisenberg's residence."

together, Defendant demonstrated its non coverage of Deyo's petroleum discharge, due to their policy's pollution exclusion. This sufficiently established Defendant's entitlement to judgment, shifting the burden to Plaintiff to raise an issue of fact.

In opposition, however, Plaintiff raised no issue of material fact. Plaintiff cites an exception contained in paragraph (2) of the pollution exclusion subsection, alleging that its language and the ambiguity it causes negates the exclusion. However, as set forth above, Defendant relies on paragraph (1) of the pollution exclusion, and paragraph (2)'s exception is wholly separate from and inapplicable to paragraph (1). Nor does paragraph (2)'s exception create an ambiguity in paragraph (1). The paragraph (2) exception specifies, by its language and drafting, that it applies to paragraph (2) only. As such, the exclusion that negates Defendant's coverage of Deyo is wholly unaffected by paragraph (2)'s exception and Plaintiff has raised no issue of material fact.

Accordingly, Defendant's motion is granted and the complaint is dismissed.

To the extent that the Defendant's motion also sought summary judgment because it did not insure "Deyo's Heating and Fuels and LP Gas," its claim is moot and was not established with evidentiary proof in admissible form.

This Decision and Order is being returned to the attorneys for the Defendant. A copy of this Decision and Order and all other original papers submitted on this motion are being delivered to the Albany County Clerk for filing. The signing of this Decision and Order shall

not constitute entry or filing under CPLR §2220. Counsel is not relieved from the applicable provision of that section respecting filing, entry and notice of entry.

So Ordered.

Dated: January 18, 2011  
Albany, New York

  
JOSEPH C. TERESI, J.S.C.

**PAPERS CONSIDERED:**

1. Notice of Motion, dated October 18, 2010, Affirmation of Denis Farrell, dated October 18, 2010, with attached Exhibits A-G.
2. Affirmation of Alison Pesca, dated November 22, 2010, with attached Exhibits A-B.
3. Affirmation of Denis Farrell, dated December 28, 2010.