

**QBE Ins. Corp. v ADJO Contr. Corp.**

2011 NY Slip Op 31338(U)

May 16, 2011

Supreme Court, Nassau County

Docket Number: 601695/2009

Judge: Ira B. Warshawsky

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publication.

**SHORT FORM ORDER****SUPREME COURT : STATE OF NEW YORK  
COUNTY OF NASSAU****PRESENT:****HON. IRA B. WARSHAWSKY,****Justice.****TRIAL/IAS PART 7**

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**QBE INSURANCE CORPORATION,**

Plaintiff,

INDEX NO.: 601695/2009  
MOTION DATE: 5/06/2011  
MOTION SEQUENCE: 036

-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.

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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.

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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.

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

The following papers read on this motion:

Notice of Liberty Mutual’s Motion for Leave to Reargue, Potashner Affirmation, and Exhibits ..... 1  
 Archstone Memorandum of Law in Opposition ..... 2  
 Liberty Mutual Memorandum of Law in Reply ..... 3

Liberty Mutual moves this court for leave to reargue this court’s decision dated April 5, 2011, which decided the issue of duty to defend by additional-insured carriers, on the ground that this court misapprehended or overlooked particular facts or law. Liberty Mutual does not point, however, to any *facts* or *law* that this court overlooked or misapprehended, or cite to any pages of its papers regarding any arguments that the court may have neglected to consider. Indeed, the court made Liberty Mutual’s very argument for it already, when the court considered the fact that the *In re Archstone* “consolidated complaint,” *singular*, does not identify “Archstone-Smith Operating Trust” as a defendant. (Memorandum Decision at 62). The court, however, went on to consider the fact that the consolidated complaints, *plural*, did sue Archstone-Smith Operating Trust—namely, in the *Marchese* and *Sorrentino* complaints. Liberty Mutual thus only quarrels with this court’s legal conclusion that the consolidated class actions by tenants should be treated as one action for purposes of the duty to defend, while any non-consolidated actions should be treated separately. (Memorandum Decision at 60-62; *cf. Wimberly Allison Tong & Goo, Inc. v. Travelers Prop. Cas. Co. of Am.*, 559 F.Supp.2d 504 [D.N.J. 2008] [treating consolidated actions together and non-consolidated actions separately]). Liberty Mutual, however, fails to address the key legal question for this argument, and that is the effect of consolidation on the claims by the *Marchese* and *Sorrentino* plaintiffs against Archstone-Smith Operating Trust.

By way of clarification, this court reasoned that at least two complaints of the consolidated tenant actions (again, *plural*)—the *Marchese* and *Sorrentino* complaints—named “Archstone-Smith Operating Trust” as a defendant, and the mere fact that these class actions joined into the *In re Archstone* complaint for purposes of consolidation, did not result in an automatic discontinuance for any prior claims by the class action plaintiffs in the *Marchese* and *Sorrentino* class actions, as against Archstone-Smith Operating Trust. As a general matter, “consolidation. does not merge the suits into a single cause, or change the rights of the parties, or make those who are parties in one suit parties in another.” (*Johnson v. Manhattan Ry. Co.*, 289

U.S. 479, 496-97 [1933]). While consolidation with the *In re Archstone* complaint could have included an order of discontinuance for the *Marchese* and *Sorrentino* matters, Liberty Mutual has not presented any evidence of this or even suggested the possibility. Again, Liberty Mutual has failed to address the key legal question of the effect of consolidation as to the continuing legal rights of the *Marchese* and *Sorrentino* plaintiffs, who had sued “Archstone-Smith Operating Trust.” (See “The Effects of Case Consolidation on the Procedural Rights of Litigants: What They Are, What They Might Be Part II: Non-Jurisdictional Matters,” 42 UCLA L. Rev. 967 [1995]).

To the extent that Liberty Mutual wishes to argue that there are particular defense costs incurred within these consolidated tenant actions—either for appearances, depositions, discovery requests, motion practice, or some such—which discretely excluded the class action plaintiffs in the *Marchese* and *Sorrentino* complaints and their claims against Archstone-Smith Operating Trust, those issues are better suited for resolution with all other issues regarding allocation of defense costs. Indeed, the court left such issues open by deciding only that there was a duty to defend Archstone-Smith Operating Trust in the consolidated tenant actions, *without prejudice to arguments that particular defense costs were not incurred in the defense of Archstone-Smith Operating Trust*. In other words, the AI Carriers may still argue that certain defense costs within any of the consolidated tenant actions do not pertain to Archstone-Smith Operating Trust, such as because Archstone-Smith Operating Trust had not been sued with respect to particular plaintiffs or claims, or any claims against it in the *Sorrentino* and *Marchese* complaints had not yet been consolidated, or those claims had been discontinued. The court notes that these issues with respect to whether defense costs were incurred in defending Archstone-Smith Operating Trust or ASN Roosevelt Center LLC, within the consolidated tenant actions, would become moot if this court holds on another motion that the AI Carriers owed a duty to defend ASN Roosevelt Center LLC, according to coverage evidenced by the Certificates of Insurance.

Leave to reargue is denied on motion by Liberty Mutual. This constitutes the Decision and Order of the court.

DATED: May 16, 2011

**ENTERED**

MAY 20 2011

**NASSAU COUNTY  
COUNTY CLERK'S OFFICE**

  
J.S.C.