

**Hanover Ins. Group v City of New York**

2013 NY Slip Op 32125(U)

September 5, 2013

Supreme Court, New York County

Docket Number: 152436/2012

Judge: Anil Singh

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

HON. ANIL C. SINGH  
SUPREME COURT JUSTICE

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

PART 61

Index Number : 152436/2012  
HANOVER INSURANCE GROUP  
vs  
CITY OF NEW YORK  
Sequence Number : 002  
COMPEL OR STAY ARBITRATION

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

The following papers, numbered 1 to \_\_\_\_\_, were read on this motion to/for \_\_\_\_\_

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____	No(s). _____
Answering Affidavits — Exhibits _____	No(s). _____
Replying Affidavits _____	No(s). _____

Upon the foregoing papers, it is ordered that this motion is *decided in accordance with the annexed order.*

**DECIDED IN ACCORDANCE WITH  
ACCOMPANYING DECISION / ORDER**

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

Dated: 9/5/13

*Dec 2*  
HON. ANIL C. SINGH, J.S.C.  
SUPREME COURT JUSTICE

1. CHECK ONE: .....  CASE DISPOSED  NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: ..... MOTION IS:  GRANTED  DENIED  GRANTED IN PART  OTHER
3. CHECK IF APPROPRIATE: .....  SETTLE ORDER  SUBMIT ORDER
- DO NOT POST  FIDUCIARY APPOINTMENT  REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 61

-----X  
THE HANOVER INSURANCE GROUP on behalf of  
ONE BEACON AMERICA INSURANCE COMPANY,  
ARROW CARS LTD, and ARROW RENTS, LTD,

Plaintiffs,

-against-

CITY OF NEW YORK, NEW YORK CITY POLICE  
DEPARTMENT, and JASON O'NEILL,

Defendants.  
-----X

DECISION AND  
ORDER  
Index No. 152436/2012

Mot. Seq. 001 and 002

HON. ANIL C. SINGH, J.:

Motions sequences 001 and 002 are duplicative and are consolidated for disposition.

Plaintiff's motion seeks a declaratory judgment regarding the responsibility of the City of New York (CITY) and the New York City Police Department (NYCPD) to defend and indemnify plaintiff as well as a permanent stay of arbitration until such time as the issue of defense and indemnity is determined. Defendant, Jason O'Neill, opposes that portion of the motion which seeks a stay of the supplementary underinsured motorist (SUM) arbitration. Defendants CITY and NYCPD oppose the motion and cross-move for summary judgment dismissing the action. In motion sequence 001, Plaintiff also seeks to compel Mr. O'Neill to comply with discovery requests prior to proceeding to arbitration.

On October 23, 2012 a stipulation was entered into between Plaintiff and the CITY to restore the motion to the submissions calendar. On the same date, this Court signed an order restoring the motion to the submissions calendar on November 30, 2012. The stipulation also

provided that Plaintiff would file an amended Notice of Motion and supporting papers on or before November 21, 2012. Plaintiff failed to file any further papers with regards to motion sequence 001. Defendants did not respond in motion sequence 001.

Plaintiff, Hanover Insurance Group (Hanover), is the successor of One Beacon America Insurance Company (One Beacon). Arrow Rents, Ltd. (Arrow) is a company which rents vehicles to the NYCPD. Jason O'Neill is a New York police officer who was driving one of the vehicles rented by the NYCPD from Arrow when he was involved in a collision with another vehicle and sustained injuries. The insurance coverage on the other vehicle was insufficient to compensate Mr. O'Neill for his injuries. Therefore, Mr. O'Neill applied to the American Arbitration Association seeking supplementary underinsured motorist coverage from One Beacon.

When interpreting a contract, we must look first at the "words the parties used." See *Louis Dreyfus Energy Corp. v. MG Ref. & Mktg.*, 2 N.Y.3d 495, 500 (2004)(internal citations and quotation marks omitted).

"When a party is under no legal duty to indemnify, a contract assuming that obligation must be strictly construed to avoid reading into it a duty which the parties did not intend to be assumed." *Hooper Associates, Ltd. v. AGS Computers, Inc.*, 74 N.Y.2d 487, 491 (1989) (internal citations and quotation marks omitted).

The vehicle driven by Mr. O'Neill was subject to a Hold Harmless and Indemnification Agreement (Agreement). The agreement was between the NYCPD "and Arrow Cars Ltd / Arrow Rents Ltd. Located at 145 Denton Avenue, New Hyde Park, NY 11040, (hereinafter referred to as the "Company") and One Beacon America...." The Agreement goes on to state that :

1. The City of New York will indemnify and hold the Company, its successors, assigns, employees and agents, and their heirs, distributees, executors or administrators harmless from any judgements, awards, debts, expenses, damages, executor's claims and demands arising against the Company, its successors, assigns, employees and agents, and their heirs, distributees, executors or administrators as a result of the NYCPD's use of the Vehicle subject to the following provisions:

- a. The indemnification and hold harmless provisions of this agreement shall not apply to damages caused, in whole or in part, by the tortious conduct of either the COMPANY, its employees or agents, or the manufacturer of the VEHICLE or any of its component parts;
  - b. The COMPANY shall forward a copy of all legal papers served upon it, pursuant to the use of the VEHICLE by the NYCPD, within three days from the date it is served with said papers to the New York City Police Department Legal Bureau, One Police Plaza, Room 1406, New York, NY 10038 together with a copy of this agreement and a statement requesting that the City of New York indemnify and hold the COMPANY harmless pursuant to the terms of this agreement;
  - c. The City of New York shall provide defense counsel and exclusively control the defense in any action commenced pursuant to this agreement;
  - d. This agreement shall apply to both bodily injury and property damage caused pursuant to the NYCPD's use of the VEHICLE. ...
3. This agreement may not be orally changed.

Plaintiff contends that, pursuant to the Agreement, the CITY agreed to defend and indemnify One Beacon. The CITY argues that Arrow, and only Arrow, is designated as the "Company". Therefore, only claims against Arrow, not One Beacon, are covered because the Agreement only indemnifies claims made against the "Company".

The CITY further contends that a SUM claim is not a claim against Arrow, it is, as a matter of law, a first party claim against Arrow's insurer. In support of this position, CITY cites *Gan National Ins. Co. V. City of New York*, Index No.103240/01 (Sup. Ct. NY Co. Feb. 16, 2002 (Stallman, J.), *aff'd* 304 AD 2d 415 (1st Dep't 2003)). The primary difference in the indemnity agreements at issue in *Gan* and the present case is that, the agreement in *Gan* did not mention the insurance company whereas, in the present case, the Agreement states that it is between the

[\*5]  
NYCPD and Arrow and One Beacon.

Plaintiff points out that, after the decision in *Gan, supra*, the form contract used between Arrow and the City changed, and the insurance company is mentioned. However, it is only Arrow which is referred to as the "Company. The contract states that the City will indemnify "the Company" The contract fails to provide any protection to any entity besides the "Company."

Strictly construing the contract, the CITY does not have a duty to indemnify One Beacon or its successor Hanover.

Plaintiff argues that, through its course of dealing with Arrow, the CITY has shown that it intended to indemnify One Beacon at the time the contract was entered into. Alternatively, Plaintiff argues that the course of dealing has modified the contract. In support of this position, Plaintiff references the SUM claim of Colin Belle, which was purportedly tendered and accepted by the CITY. Plaintiff has also attached numerous third party claims which it claims show that the CITY has agreed to defend and indemnify the plaintiffs. With the exception of the Colin Belle claim, the claims relied upon by Plaintiff are third party, not first party, claims and, therefore, do not show a course of dealing applicable in the present case.

"The law is clear that a course of dealing can only be established by the previous conduct of the parties to the contract (cf., UCC 1-205 [1]) and cannot be inferred from a single transaction (see, *Rotuba Extruders v Ceppos*, 46 NY2d 223, 230)." *V.J. Gautieri, Inc. v. State*, 195 A.D.2d 669, 671 (3d Dep't 1993).

Therefore, Plaintiff has failed to show that there is a course of conduct showing the parties intent or modifying the contract.

Upon all of the papers submitted in support of and opposition to the present motion, it is

