

**ACHS Mgt. v Chartis Prop. Cas. Co.**

2014 NY Slip Op 30380(U)

February 10, 2014

Supreme Court, New York County

Docket Number: 653720/12

Judge: Joan M. Kenney

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 8

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ACHS MANAGEMENT, 8930 SUTPHIN BLVD., LLC,

Plaintiff,

Index No. 653720/12

-against-

CHARTIS PROPERTY CASUALTY COMPANY f/k/a  
AMERICAN INTERNATIONAL SPECIALTY LINES  
INSURANCE COMPANY,

Defendant.

-----X  
**Kenney, J.:**

In motion sequence 002, defendant Chartis Property Casualty Company f/k/a American International Specialty Lines Insurance Company (Chartis) moves, pursuant to CPLR 3212, for summary judgment dismissing the amended complaint and declaring that Chartis has no duty to indemnify plaintiff ACHS Management, 8930 Sutphin Blvd., LLC (ACHS). ACHS cross-moves, pursuant to CPLR 3212, granting summary judgment against Chartis.

**Background**

On August 30, 2007, while ACHS was building a supermarket at 8930-8936 Sutphin Boulevard, Jamaica, New York, the adjacent building located at 90-02 Sutphin Boulevard (the adjacent property) collapsed due to improper underpinning. As a result, the owners and occupants of the adjacent property brought an action against ACHS asserting various causes of action, including negligence, and sought monetary damages for loss of business, property damage, and storage, moving, and relocation costs

allegedly exceeding \$5 million (the Underlying Action).

ACHS has primary insurance coverage through nonparty Zurich, who defended ACHS in the Underlying Action. The Zurich policy limit is \$1 million. Chartis is ACHS' excess insurance carrier. The Chartis policy has a \$50,000,000 each occurrence limit, and \$50,000,000 in the aggregate, and attaches once the Zurich policy limit is exhausted.

There is no dispute that Chartis was first notified of the Underlying Action's claims on September 5, 2007. On November 7, 2007, Chartis informed ACHS, by letter, that it did not believe that the excess coverage would be reached and that it was closing the file (the November 7<sup>th</sup> Letter). Further, in the November 7<sup>th</sup> Letter, Chartis reserved its right to assert any coverage defenses. On September 26, 2012, shortly before the Underlying Action was to go to trial, Chartis disclaimed coverage on the grounds that the retained limit was not exhausted, and, that, under the Chartis policy, construction operations were excluded from coverage. On October 9, 2012, ACHS wrote to Chartis objecting to Chartis' disclaimer. On October 17, 2012, ACHS entered into a settlement on the record in the Underlying Action. ACHS alleges that it exhausted the Zurich policy limit and contributed \$93,000 to the overall settlement.

On October 24, 2012, ACHS brought this action seeking a declaratory judgment and monetary damages of \$107,945, comprised

of the \$93,000 paid in the Underlying Action's settlement and \$14,945 for retaining counsel to prosecute this matter.

### **Analysis**

ACHS argues that Chartis' disclaimer of coverage was untimely, and, thus, Chartis should be estopped from disclaiming or denying coverage regardless of any policy exclusions that may apply.

Insurance Law § 3420 (d) (2) provides that an insurer "shall give written notice as soon as is reasonably possible of such disclaimer of liability or denial of coverage to the insured." However, Insurance Law § 3420 (d) (2) is inapplicable to this case since it only applies to claims involving death or bodily injury.

Instead, common-law principles govern, and "[u]nder the common-law rule, delay in giving notice of disclaimer of coverage, even if unreasonable, will not estop the insurer to disclaim unless the insured has suffered prejudice from the delay" (*Fairmont Funding, Ltd. v Utica Mut. Ins. Co.*, 264 AD2d 581, 581-582 [1<sup>st</sup> Dept 1999] [citations omitted]; see also *Topliffe v US Art Co., Inc.*, 40 AD3d 967, 969 [2d Dept 2007]). "In order to show prejudice, the insured must demonstrate reliance and a change of position resulting from the delay. Mere speculation as to prejudice is insufficient to estop an insurer" (*Fook Cheung Lung Realty Corp. v Yang Tze Riv. Realty Corp.*, 2010

NY Slip Op 30986[U], \*11 [Sup Ct, NY County Apr. 21, 2010], *affd* 94 AD3d 560 [1<sup>st</sup> Dept 2012] [citations omitted]).

Here, Chartis is not estopped from disclaiming coverage because it reserved its right to do so in the November 7<sup>th</sup> Letter, and, thus, ACHS cannot demonstrate reliance (*State Farm Fire & Cas. Co. v Horton*, 37 AD3d 820, 820 [2d Dept 2007], citing *General Acc. Ins. Co. v 35 Jackson Ave. Corp.*, 258 AD2d 616, 618 [2d Dept 1999]). While ACHS presents evidence that Chartis was monitoring the underlying action, this is not a basis for estoppel when there has been a reservation of rights (*K. Bell & Assoc., Inc. v Lloyd's Underwriters*, 1997 WL 96551, \*6, 1997 US Dist LEXIS 2417, \*18 [SD NY March 5, 1997, No. 92 Civ. 5249 (AJP/KTD)], citing *Sulner v G.A. Ins. Co.*, 224 AD2d 205, 206 [1<sup>st</sup> Dept 1996]).

Therefore, as Chartis is not estopped from disclaiming coverage, the court will examine whether coverage is barred by the "Construction Excluded Hazards Exclusion Endorsement" contained in the Chartis policy (the Construction Operations Exclusion).

The Construction Operations Exclusion, states, in relevant part,

"This insurance does not apply to any liability arising out of **Construction Operations** .... However, this exclusion does not apply to **Bodily Injury** or **Property Damage** arising out of **Non-Structural Improvements** performed by or on behalf of the **Insured**"

(Chartis' notice of motion, exhibit A).

The Construction Operations Exclusion defines "Construction Operations" and "Non-Structural Improvements" as follows,

**"Construction Operations** means any activity by or on behalf of any **Insured**, in any capacity, regarding to, or in support of the erection, remodeling, or structural repairing of a building on land.

**Non-Structural Improvements** means **Construction Operations** that do not relate to the erection, repair, improvement, or replacement of:

1. building frames,
2. building foundations,
3. load-bearing walls,
4. columns, girders, trusses, beams and spandrels that are necessary to the stability of the building structure, or
5. any other element or component of a building necessary to the stability of the building structure.

**Non-Structural Improvements** include the installation, repair, improvement, and replacement of fixtures"

(Chartis' notice of motion, exhibit A).

There is no dispute that the Underlying Action arose out of the improper underpinning work performed in connection with the construction of ACHS' supermarket, which caused the adjacent building to collapse. ACHS argues that the Construction Operations Exclusion does not apply because the underpinning work that caused the building collapse was in no way related to the erection, remodeling, or structural repair of a building. It further argues that, since improper underpinning is not specifically stated in the Exclusion, then damages as a result cannot be excluded under the Chartis policy, and that

underpinning would be considered a "Non-Structural Improvement," as it does not fit within the five enumerated operations stated in the Exclusion. The court disagrees.

"As with any contract, unambiguous provisions of an insurance contract must be given their plain and ordinary meaning, and the interpretation of such provisions is a question of law for the court" (*White v Continental Cas. Co.*, 9 NY3d 264, 267 [2007]). "It is well settled that '[a] contract is unambiguous if the language it uses has "a definite and precise meaning, unattended by danger of misconception in the purport of the [agreement] itself, and concerning which there is no reasonable basis for a difference of opinion"' (id., quoting *Greenfield v Philles Records*, 98 NY2d 562, 569 [2002] [brackets in original]).

The Construction Operations Exclusion is clear on its face that activity by or on behalf of the insured, in any capacity, regarding to, or in support of the erection, remodeling, or structural repairing of a building on land is excluded from coverage. The claims in the Underlying Action arose from an activity, i.e., the underpinning, which was performed in regard to the erection of a building by ACHS, i.e., the supermarket. It is not reasonable, as ACHS argues, that the underpinning was in no way related to the erection of the supermarket. Further, ACHS' contention that underpinning is a "Non-Structural Improvement" is

also unreasonable. The underpinning work was performed because of a construction operation, the erection of the supermarket. Thus, applying the plain and ordinary meaning of this Exclusion, the Chartis policy does not provide coverage, and Chartis has no duty to indemnify ACHS.

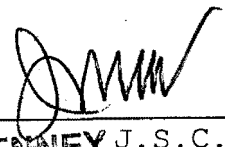
Accordingly, it is

ORDERED that Chartis Property Casualty Company's motion for summary judgment is granted and the complaint is dismissed; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: February 10, 2014

ENTER:



**JOAN M. KENNEY J.S.C.**  
**J.S.C.**