

**Ability Transmission, Inc. v John's Transmission,
Inc.**

2015 NY Slip Op 30509(U)

March 23, 2015

Supreme Court, Suffolk County

Docket Number: 026161-2013

Judge: John H. Rouse

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INDEX NO. 026161-2013

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 12 - SUFFOLK COUNTY

PRESENT:

Hon. John H. Rouse
Acting Supreme Court Justice

MOTION DATE: 08/25/14
ADJ. DATE: 03/18/15
Mot. Seq. 001-MG

MOTION DATE: 11/12/14
ADJ. DATE: 03/18/15
Mot. Seq. 002-MD

CASEDISP.

ABILITY TRANSMISSION, INC.,

Plaintiffs

-against-

DECISION & ORDER

JOHN'S TRANSMISSION, INC., and MERCHANTS MUTUAL
INSURANCE COMPANY,

Defendants

TO:

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**ADDITIONAL MAILING TO PLAINTIFF ON
RELATED CASE, INDEX NO. 033708-2012;
CRESCIMANO vs. ABILITY TRANSMISSION, INC.:**

BAUMAN KUNKIS & OCASIO-DOUGLAS
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NEW YORK, NY 10122
212-564-3555

Upon the reading and filing of the following papers in this matter: (1) Notice of Motion by Plaintiff dated July 11, 2014, the Affirmation of Tina Yanover, Esq. dated July 11, 2014 and

Exhibits A-D attached thereto; (2) Notice of Cross Motion dated November 4, 2014, the Affirmation of Arthur J. Smith, Esq., dated November 4, 2014 and Exhibits A-O attached thereto; (3) Affirmation in Reply and in Opposition to Defendants' Cross Motion by Rebecca J. Moulton, Esq. dated January 16, 2015; and (4) Reply Affirmation by Arthur J. Smith, Esq. dated February 17, 2015; it is:

ORDERED that the motion (Seq. #001) by Plaintiff is granted in that Merchants Mutual Insurance Company must provide for the defense of Ability Transmission, Inc. and, if Crescimano should prevail upon the claim, as pleaded, against Ability Transmission, Inc. (*Crescimano vs. Ability Transmission, Inc.; Index No. 033708-2012*), Merchants Mutual Insurance Company must indemnify Ability Transmission, Inc.; and it is further

ORDERED that the cross motion (Seq. #002) by Defendants is denied; and it is further

ORDERED that all counsel are directed to examine the interests of their respective clients and if a potential conflict exists to take such steps as necessary to promptly resolve such conflict(s).

DECISION

The Related Tort Action

An action was commenced against Plaintiff herein, Ability Transmission, Inc. arising out of an injury alleged to have occurred at the premises owned by Ability Transmission, Inc. on May 14, 2012 when the plaintiff (Hereinafter "Tort-Plaintiff") tripped because of a pothole. *Crescimano vs. Ability Transmission, Inc.; Index No. 033708-2012*. Ability Transmission, Inc. brought a Third-Party action against its lessee, John's Transmission, Inc., and Merchants Mutual Insurance Company. *Ability Transmission, Inc. vs. John's Transmission, Inc., and Merchants Mutual Insurance Company; Third-Party Index No. 76-0014*.

This Declaratory Judgment Action

The Plaintiff in this third action, Ability Transmission, Inc., is the owner of the property where the related tort action arose (Hereinafter "Plaintiff-Owner"). This Declaratory Judgment Action brought by Plaintiff-Owner against Defendant Merchants Mutual Insurance Company (Hereinafter "Defendant-Insurer") is for a determination of Defendant-Insurer's duty to defend and indemnify the Plaintiff-Owner upon the Tort-Plaintiff's claim. The Plaintiff-Owner upon this Declaratory Judgment Action seeks the alternative relief that, if Defendant-Insurer has no duty to defend or indemnify then John's Transmission, Inc., the lessee of the premises (Hereinafter "Defendant- Lessee") has a duty to indemnify predicated upon the Defendant-Lessee's failure to obtain the insurance required under the lease.

Defendant-Insurer contends that Plaintiff-Owner is not an Additional Insured with respect to the

Tort-Plaintiff's claim because coverage under the policy of insurance in effect was subject to an exclusion for this claim. Plaintiff-Owner now moves for summary judgment and Defendant-Insurer and Defendant-Lessee have cross moved for summary judgement.

The Motions for Summary Judgment

Defendant-Insurer, argues as a threshold matter the Plaintiff-Owner's failure to provide a copy of the insurance policy at issue is fatal to Plaintiff-Owner's motion. However, Defendant-Insurer has provided the policy to the Court. *See Affirmation of Arthur J. Smith, Esq., dated November 4, 2014, Exhibit K.* Upon a motion and cross motion it is appropriate for the Court to consider the entire record presented in support of the two motions. *See Morris v. Pavarini Constr., 22 N.Y.3d 668 (2014).*

Substantively, Defendant-Insurer and Defendant-Lessee argue that the pothole was caused by construction of a new sewer system under the parking lot in 2007, and thereafter the parking lot remained pockmarked with potholes caused by this construction. Defendant-Insurer and Defendant-Lessee contend the trip and fall injury in 2012, five years after the construction, is excluded from coverage. The contractual language cited by Defendant-Insurer and Defendant-Lessee provides:

"The following exclusions area added:
This insurance does not apply to:

Structural alterations, new construction
or demolition operations performed by
or for the person or organization in the
Schedule."

The Plaintiff-Owner has presented evidence that after the construction of the sewer system the parking lot was paved, and the Defendant-Lessee maintained the parking lot for the ensuing five years in accordance with the terms of the lease, and argues that the exclusion does not apply to construction that had been concluded years earlier.

"The duty of an insurer to defend its insured arises whenever the allegations within the four corners of the underlying complaint potentially give rise to a covered claim, or where the insurer has actual knowledge of facts establishing a reasonable possibility of coverage. To be relieved of its duty to defend on the basis of a policy exclusion, the insurer bears the heavy burden of demonstrating that the allegations of the complaint cast the pleadings wholly within that exclusion, that the exclusion is subject to no other reasonable interpretation, and that there is no

possible factual or legal basis upon which the insurer may eventually be held obligated to indemnify the insured under any policy provision. If any of the claims against the insured arguably arise from covered events, the insurer is required to defend the entire action."

Frontier Insulation Contrs. v. Merchants Mut. Ins. Co., 91 N.Y.2d 169 at 175 (1997), citing *Seaboard Surety Co. v. Gillette Co.*, 64 N.Y.2d 304.

"Insurance contracts must be interpreted according to common speech and consistent with the reasonable expectation of the average insured" (*Cragg v Allstate Indem. Corp.*, 17 NY3d 118, 122, 950 NE2d 500, 926 NYS2d 867 [2011]). "[B]efore an insurance company is permitted to avoid policy coverage, it must satisfy the burden which it bears of establishing that the exclusions or exemptions apply in the particular case, and that they are subject to no other reasonable interpretation" (*Seaboard Sur. Co. v Gillette Co.*, 64 NY2d 304, 311, 476 NE2d 272, 486 NYS2d 873 [1984] [citations omitted]). "[A]mbiguities in an insurance policy are to be construed against the insurer" (*Breed v Insurance Co. of N. Am.*, 46 NY2d 351, 353, 385 NE2d 1280, 413 NYS2d 352 [1978]).

Dean v Tower Ins. Co. of N.Y., 19 N.Y.3d 704 at 708 (2012).

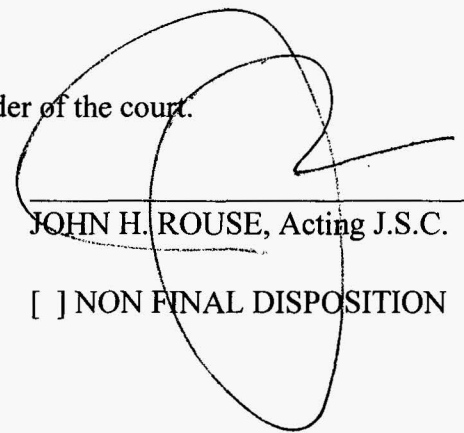
The exclusion language the Defendant-Insurer invokes to avoid coverage can reasonably be interpreted to exclude from coverage only current "operations" being undertaken to cause structural alterations, or new construction, or demolition at the time of the accident. The exclusion language can reasonably be understood to exclude from coverage claims arising at an active construction site, but not exclude old construction.

Accordingly, the Plaintiff-Owner's motion for summary judgment is granted to the extent that it is determined that the Defendant-Insurer has a duty to defend and, if the Tort-Plaintiff prevails upon her claim, to indemnify the Defendant-Lessee and Plaintiff-Owner. The cross motion is in all respects denied.

The Court notes that this determination brings into focus a potential conflict of interest. Upon the cross motion the Defendant-Insurer sought to avoid coverage. *See e.g. Matter of East 51st St. Crane Collapse Litig.*, 103 A.D.3d 401. Counsel are required to review the interests of their respective clients to ascertain whether this conflict, or any other persists in this case so as to require independent representation.

The foregoing shall constitute the decision and order of the court.

Dated: March 23, 2015



JOHN H. ROUSE, Acting J.S.C.

FINAL DISPOSITION

NON FINAL DISPOSITION