

**MAH Realty LLC v Public Serv. Ins. Co.**

2016 NY Slip Op 32461(U)

October 28, 2016

Supreme Court, Rockland County

Docket Number: 031481/16

Judge: Gerald E. Loehr

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

To commence the statutory time period of appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF ROCKLAND

-----X  
MAH REALTY LLC, KIEV REALTY LLC,  
MARIA HRYNENKO and MICHAEL HRYNENKO, JR.,,

Plaintiffs,

**DECISION AND ORDER**

Index No.: 031481/16

-against-

PUBLIC SERVICE INSURANCE COMPANY and  
PARAMOUNT INSURANCE COMPANY,

Defendants.

-----X

LOEHR, J.

The following papers numbered 1- 4 were read on the Plaintiff's motion for a preliminary injunction ordering Defendants to pay for Plaintiffs' defense costs, including fees for counsel of their own choosing.

	<u>Papers Numbered</u>
Order To Show Cause - Affirmation - Affidavits - Exhibits	1
Affirmation in Opposition - Exhibits	2
Reply Affirmation - Exhibits	3
Reply Affirmation of Law	4

Upon the foregoing papers, it appears that on March 26, 2015 a gas explosion occurred at 121 Second Avenue, New York, New York which also involved 119 Second Avenue and other adjacent properties. The explosion resulted in two deaths and multiple personal injuries as well

as extensive property damage. On such date, Plaintiff Kiev Realty LLC owned the property located at 119 Second Avenue and Plaintiff MAH Realty LLC owned the property located at 121 Second Avenue, Plaintiff Maria Hrynenko was and is a member of both Kiev Realty and MAH Realty, and Plaintiff Michael Hrynenko was employed by the managing agent for both properties: CMSN Management Ltd.. Additionally, at that time, Defendant insurance companies had issued liability and umbrella policies in favor of all the Plaintiffs. As a result of the explosion, numerous lawsuits were commenced against the Plaintiffs. Plaintiffs notified Defendants of these and demanded a defense and, initially, Defendants assigned each Plaintiff separate counsel to defend them in such lawsuits under Reservation of Rights Letters pursuant to which Defendants reserved the right to disclaim if, after investigation, it was determined, inter alia, that the occurrence arose out of a criminal or illegal act committed by an insured as defined in the applicable policy. On February 11, 2016, Maria and Michael Hrynenko were both indicted for Manslaughter in the Second Degree and related crimes in connection with the gas explosion. On March 8, 2016, the Defendants disclaimed insurance coverage based on the criminal or illegal acts exclusion. On April 28, 2016, Plaintiffs commenced this action which seeks a permanent injunction compelling the Defendants to provide a defense by paying for counsel of Plaintiffs' choosing in the various lawsuits, and, on the next day, Plaintiffs moved for a preliminary injunction for the same relief.

To obtain a preliminary injunction, the moving party must establish, by clear and convincing evidence, (1) a likelihood of success on the merits, (2) irreparable injury absent a preliminary injunction and (3) that the equities balance in her or her favor (*Chase Home Finance, LLC v Cartelli*, 140 AD3d 911 [2d Dept 2016]).

The duty to defend is broader than the underlying potential insurance contract liability (*Global Constr. Co. v Essex Ins. Co.* 52 AD3d 655 [2d Dept 2008]) and is triggered where the facts alleged in the complaint fall within the scope of coverage intended by the parties at the time the contract was made (*Worth Constr. Co., Inc. v Admiral Ins. Co.*, 10 NY3d 411, 414 [2008]). The duty to defend arises whenever the allegations in a complaint against the insured fall within the scope of the risks undertaken by the insurer, regardless of how false or groundless those allegations might be. The duty is not contingent on the insurer's ultimate duty to indemnify should the insured be found liable, nor is it material that the complaint against the insured asserts additional claims which fall outside the policy's general coverage or within its exclusory provisions. Rather, the duty of the insurer to defend the insured rests solely on whether the

complaint alleges any facts or grounds which bring the action within the protection purchased (*Zurich-American Insurance Company v Atlantic*, 139 AD2d 379, 384 [1<sup>st</sup> Dept 1988], *affd* 74 NY2d 621 [1989]). Moreover, the insurer bears the burden of proving that the underlying claim falls entirely within the exclusion (*Utica First Insurance Co. v Star-Brite Painting & Paperhanging*, 36 AD3d 794,796 [2d Dept 2007]).

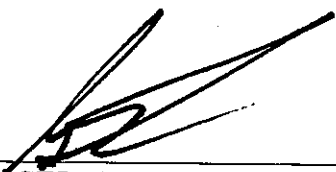
Here, neither side has seen fit to submit any of the hundreds of complaints that have been filed against the Plaintiffs. The Court assumes that they allege the Plaintiffs' negligence as the defense here seems to be that regardless of what they allege, the Plaintiffs' engaged in criminal acts. Rather than submitting evidence thereof, Defendants rely on the fact that the Hrynenkos have been indicted. As an indictment is only an accusation (*see People v Iannone*, 45 NY2d 589 [1978]),<sup>1</sup> Defendants have failed to establish that the Plaintiffs engaged in criminal acts (*cf Worth Constr. Co., Inc. v Admiral Ins. Co.*, 10 NY3d 411 [2008]). Unless and until there is a conviction, or other equivalent evidence, to establish that the Hrynenkos engaged in criminal acts (*see, eg, Slayko v Security Mututal Insurance Company*, 98 NY2d 289, 293-94 [2002]; *Gruniger v Nationwide Mutual Insurance Company*, 74 AD3d 1762 [4<sup>th</sup> Dept 2010]; *New York Central Mutual Fire Insurance Company v Nationwide Mutual Insurance Company*, 307 AD2d 449, 450 [3d Dept 2003]), Defendants have failed to establish the exclusion and Plaintiffs have established a likelihood of success on the merits of their claim for a defense under the policies (*Dupree v Scottsdale Insurance Company*, 96 AD3d 546 [1<sup>st</sup> Dept 2012]). Moreover, the failure to pay contracted for defense costs, resulting in hundreds of default judgments, constitutes immediate and irreparable injury as a matter of law (*id.*). And, as there is a conflict between the Plaintiffs and the Defendants, Plaintiffs are entitled to retain counsel of their own choosing to be paid by contemporaneous interim advances by defendants, but subject to recoupment should it turn out the Plaintiffs were not entitled to a defense (*Federal Insurance Company v Kozlowski*, 18 AD3d 33, 42 [1<sup>st</sup> Dept 2005]). Finally, as the grant of a preliminary injunction requires that it be conditioned on the posting of an undertaking (*see Soldiers, Sailors, Marines and Airmen's Club, Inc. v Carlton Regency Corp.*, 128 AD3d 593, 595 [3d Dept 2015]), the Court fixes the undertaking at \$100,000.

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<sup>1</sup> The record here is silent as to whether the indictment has been reviewed yet by the criminal court for legal sufficiency.

This constitutes the decision and order of the Court.

Dated: New City, New York  
October 28, 2016



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HON. GERALD E. LOEHR  
J.S.C.

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