

**Go N.Y. Tours, Inc. v Lancer Ins. Co.**

2022 NY Slip Op 32781(U)

August 17, 2022

Supreme Court, New York County

Docket Number: Index No. 651077/2022

Judge: Lyle E. Frank

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LYLE E. FRANK PART 11M

Justice

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GO NEW YORK TOURS, INC.,

Plaintiff,

- v -

LANCER INSURANCE COMPANY, SOUTH EAST PERSONNEL LEASING, INC., STATE NATIONAL INSURANCE COMPANY, INC., 501 FIFTH AVENUE COMPANY, LLC, ABRAMSON BROS. INC.

Defendant.

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INDEX NO. 651077/2022

MOTION DATE 06/01/2022, 06/01/2022

MOTION SEQ. NO. 001 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 43, 44, 52, 54, 55, 56

were read on this motion to/for DISMISS

The following e-filed documents, listed by NYSCEF document number (Motion 002) 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 45, 46, 47, 48, 49, 50, 51, 53

were read on this motion to/for DISMISSAL

Plaintiff, Go New York Tours, Inc., ("GNY") a third-party defendant in an underlying personal injury lawsuit<sup>1</sup> commenced by Ms. Maria Adorno ("Adorno action"), brings the instant action seeking, inter alia, declaratory judgment that defendants are obligated under their respective agreement and policy with GNY as the insured to defend and indemnify them in the Adorno action individually and/or jointly. Defendants, Lancer Insurance Company ("Lancer"), and State National Insurance Company, Inc. ("State National"), move to dismiss the complaint. Plaintiff opposes the instant motions. For the reasons set forth below, both motions to dismiss are granted.

<sup>1</sup> Maria Adorno v. 501 Fifth Avenue Company, LLC and Abramson Bros Inc., New York Supreme Court, Kings County, Index No. 516108/2019.

### Background

Ms. Adorno was a GNY employee and alleges that on September 2, 2017, she was injured during the course of her work on at a building located at 501 Fifth Avenue in Manhattan. Ms. Adorno commenced an action against 501 Fifth Avenue Company, LLC and Abramson Bros., Inc., which in turn filed a third-party action against GNY, seeking contribution, common law indemnity, contractual indemnity, and damages for breach of contract for failure to procure insurance.

### Motion Sequence 001

Defendant, State National, moves to dismiss the complaint on the grounds that coverage is unavailable to GNY because Ms. Adorno did not suffer a grave injury under New York's Workers' Compensation Law thus pursuant to CPLR § 3211(a)(7), the complaint fails to state a cause of action. State National also contends that its policy expressly excludes coverage for claims arising from a contract.

Preliminarily, State National contends, and this Court agrees, that it may rely on Ms. Adorno's bill of particulars, in the Adorno action, to satisfy its burden that a grave injury has not occurred. In support of this contention, State National cites to *Natl. Union Fire Ins. Co. of Pittsburgh, PA v 221-223 W. 82 Owners Corp.*, 120 AD3d 1140 [1st Dept 2014]. There, the First Department explicitly held that the defendant in that action was entitled to rely on the plaintiff's bill of particulars to establish a *prima facie* showing that the injuries alleged do not rise to the level of "grave injury" pursuant to the Workers' Compensation Law. *Id* at 1140. Ms. Adorno's bill of particulars does not allege any of the injuries enumerated in section 11 of the Workers' Compensation Law, thus by definition Ms. Adorno has not suffered a "grave injury".

In opposition, GNY cites to the decision of the Workers' Compensation Board that determined that Ms. Adorno suffered a permanent disability. This Court, however, does not deem the description of Ms. Adorno's injuries in the Workers' Compensation Board's decision as consistent with a finding of "grave injury". The language in the statute is clear as to what constitutes a "grave injury" and neither the bill of particulars nor the Board's decision allege any of the injuries enumerated in the statute.

As this Court finds that State National has no duty to defend or indemnify GNY, the Court does not reach the parties remaining arguments.

Motion Sequence 002

Defendant, Lancer, moves to dismiss on the grounds of policy exclusion. Specifically, GNY's policy with Lancer clearly excludes coverage for any claims arising from injury to the insured's employee. The endorsement cited by Lancer contains an "Employer's Liability" exclusion, precluding coverage for injuries sustained by an employee of GNY, concluded by this language:

This exclusion applies whether any insured may be liable as an employer or in any other capacity and to any obligation to share damages with or repay someone else who must pay damages because of the injury.

See NYSCEF Doc. 39 at pg. 12.

In opposition, GNY contends that the exclusion contained in the policy is inapplicable to the claims arising from negligence asserted against GNY by defendants/third-party plaintiffs in the Adorno action. GNY specifies that it is not requesting indemnification from Lancer but is requesting that Lancer provide defense to it against the tort claims made by the defendants/third-party plaintiffs in the Adorno action.

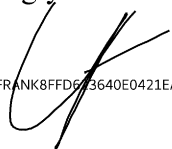
The Court is unconvinced that the third-party plaintiffs in the Adorno action are exempt from Lancer’s exclusion clause. The terms of the exclusion clause specifically disclaim coverage for any claims arising from injury to the insured’s employee. Accordingly, it is hereby

ORDERED motions sequence 001 and motion sequence 002 are granted in their entirety; and it is further

ORDERED that the all claims and cross claims are dismissed as against defendants Lancer Insurance Company and State National Insurance Company, Inc; and it is further

ORDERED that the claims against defendants, Lancer Insurance Company and State National Insurance Company, Inc., are severed, and the balance of the action shall continue; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

  
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8/17/2022  
DATE

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LYLE E. FRANK, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION		
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED	<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER		
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE