

**Abramowitz v Lex Tenants Corp.**

2025 NY Slip Op 34887(U)

December 15, 2025

Supreme Court, New York County

Docket Number: Index No. 650417/2023

Judge: Mary V. Rosado

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. MARY V. ROSADO PART 33M

Justice

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INDEX NO. 650417/2023

HAROLD ABRAMOWITZ, as Administrator of the Estate of DEANE GROSS, Deceased,

MOTION DATE 09/11/2023

Plaintiff,

MOTION SEQ. NO. 003

- v -

LEX TENANTS CORP., INSURANCE COMPANY OF GREATER NEW YORK, FEDERAL INSURANCE COMPANY

DECISION + ORDER ON MOTION

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 116

were read on this motion to/for JUDGMENT - SUMMARY

Upon the foregoing documents, and after a final submission date of October 14, 2025, Plaintiff Harold Abramowitz, as Administrator of the Estate of Deane Gross ( "Gross"), Deceased's ("Plaintiff") motion for summary judgment against Defendants Lex Tenants Corp. ("Lex Tenants"), Insurance Company of Greater New York ("Greater New York"), and Federal Insurance Company ("Chubb") (collectively "Defendants") is granted in part and denied in part.1

I. Background

Gross served on the board of directors of Lex Tenants (the "Board"), an apartment cooperative. In December of 2021, Gross expressed her views as to who should be elected to the board in an e-mail to other Lex Tenants shareholders. Based on statements in that e-mail, the losing candidate in the election, Ryan Ackerhalt ("Ackerhalt"), filed a defamation action against Gross

1 This matter was reassigned to Part 33 on January 26, 2025.

and Lex Tenants captioned *Ryan Ackerhalt v. Lex Tenants Corp., Deane Gross in her individual capacity, Deane Gross, as board member of Lex Tenants Corp., et al.*, Index No. 151653/2022 (Sup. Ct., N.Y. County) (the “Underlying Action”).

Gross and Lex Tenants requested defense and indemnification from Greater New York, its general liability insurer, and Chubb, who issued a directors and officers (“D&O”) policy. In e-mail correspondence dated March 24, 2022, Chubb claimed that by operation of an “other insurance” clause, its D&O policy was excess to Greater New York’s general liability policy which Chubb believed was triggered by Ackerhalt’s defamation claim (NYSCEF Doc. 33). On March 25, 2022, Greater New York advised Maureen Smith (“Smith”), Lex Tenants’ managing agent, that Greater New York would be disclaiming coverage and advised Lex Tenants to seek defense and indemnification from Chubb under the D&O policy (NYSCEF Doc. 34).<sup>2</sup> On March 26, 2022, Chubb issued a letter to Smith advising it served only as an excess carrier for Lex Tenants and Gross sued in her capacity as board member, and there was no coverage for Gross to the extent she is sued in her individual capacity (NYSCEF Doc. 35).

The deadline to respond to the Complaint in the Underlying Action was April 18, 2022, and Greater New York still had not issued a formal disclaimer or reservation of rights letter, so on April 12, 2022, counsel for Gross and Lex Tenants asked again for Greater New York’s coverage position (NYSCEF Doc. 36). Greater New York again advised it would be forthcoming “shortly.” On April 18, 2022, Gross’ counsel filed a motion to dismiss the Underlying Action. On April 19, 2022, Greater New York changed course and advised it would provide Gross with defense counsel, but only in her capacity as board member (NYSCEF Doc. 38). On May 2, 2022, Ackerhalt agreed to discontinue his claims against all Defendants in the Underlying Action, with prejudice.

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<sup>2</sup> A formal disclaimer and reservation of rights letter was not issued by Greater New York until October 19, 2022 (NYSCEF Doc. 29)

In a letter dated October 19, 2022, Greater New York acknowledged Lex Tenants and Gross' request for coverage in the Underlying Action, and Greater New York agreed to defend Lex Tenants and Gross sued in her capacity as a board member, but would not defend and indemnify Gross to the extent she was sued in her individual capacity (NYSCEF Doc. 29). Greater New York agreed to reimburse Gross for reasonable defense fees incurred by her from the date of February 28, 2022, on an equal basis with Chubb and to the extent they were incurred by her in her capacity as a board member (*id.*). The Underlying Action was ultimately dismissed on November 2, 2022. On January 20, 2023, Plaintiff initiated this lawsuit to recoup from Defendants the legal fees incurred by Gross in defending the Underlying Action. Plaintiff seeks summary judgment against Defendants.<sup>3</sup> Defendants oppose on various grounds.<sup>4</sup> On January 21, 2024, while the motions were *sub judice*, Gross passed away (NYSCEF Doc. 111). On January 2, 2025, the prior Justice presiding over this action issued an order substituting Harold Abramowitz as Administrator of the Estate of Deane Gross (NYSCEF Doc. 118). The automatic stay imposed by Gross' death was then lifted and some weeks later the case was assigned to Part 33.

## II. Discussion

### A. Standard

“Summary judgment is a drastic remedy, to be granted only where the moving party has tendered sufficient evidence to demonstrate the absence of any material issues of fact.” (*Vega v*

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<sup>3</sup> Plaintiff's notice of motion violates CPLR 2214(a) in that it just states Plaintiff is seeking “summary judgment” but does not state on what grounds and what relief Plaintiff seeks on summary judgment. Plaintiff's memorandum of law is similarly vague – in some places stating it seeks summary judgment on liability with an inquest on damages, but simultaneously asking this Court to rule the accrued attorneys' fees in the Underlying Action are “reasonable.” The Court will consider the motion on the merits, but due to the vague relief sought limits the motion to the issue of liability on the breach of contract claim against Defendants.

<sup>4</sup> Chubb argues in its motion papers it should be dismissed but never filed a formal cross motion requesting this relief, therefore the Court does not entertain Chubb's request to be dismissed from this action (*see Fifth Partners LLC v Foley*, 227 AD3d 543 [1st Dept 2024]; *Onofre v 243 Riverside Drive Corp.*, 232 AD3d 443, 443-444 [1st Dept 2024]).

*Restani Const. Corp.*, 18 NY3d 499, 503 [2012]). The moving party's "burden is a heavy one and on a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party." (*Jacobsen v New York City Health and Hosps. Corp.*, 22 NY3d 824, 833 [2014]). Once this showing is made, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial (*See e.g., Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

### **B. Lex Tenants**

Plaintiff's motion for summary judgment against Lex Tenants is denied. On his motion-in-chief, Plaintiff did not include an authenticated and admissible copy of the By-Laws under which he claims Gross is entitled to indemnification. This is fatally defective to Plaintiff's *prima facie* burden on summary judgment (*see, e.g. Clarke v American Truck and Trailer, Inc.*, 171 AD3d 405, 406 [1st Dept 2019] citing *Zuckerman, supra*). While Plaintiff submitted the By-Laws and an affidavit from Gross for the first time on reply, evidence improperly submitted on reply in an attempt to remedy a fundamental deficiency in the moving papers cannot be considered (*see Blackstock v Accede Inc.* 194 AD3d 476, 476-77 [1st Dept 2021] citing *Amtrust-NP SFR Venture, LLC v Vazquez*, 140 AD3d 541, 541-42 [1st Dept 2016], *lv dismissed* 28 NY3d 1102 [2016]). Due to Plaintiff's failure to meet his *prima facie* burden, the motion is denied as to Lex Tenants.

### **C. Greater New York**

Plaintiff's motion for summary judgment on the issue of liability against Greater New York is granted. It is well established that "[i]f any of the claims against an insured arguably arise from covered events, the insurer is required to defend the entire action" (*Town of Massena v Healthcare Underwriters Mut. Ins. Co.*, 98 NY2d 435, 443-44 [2002] quoting *Frontier Insulation Contrs. v Merchants Mut. Ins. Co.*, 91 NY2d 169, 175 [1997]). It is immaterial "that the complaint against

the insured asserts additional claims which fall outside the policy's general coverage or within its exclusory provisions" (*Town of Massena, supra* quoting *Seaboard Sur. Co. v Gillette Co.*, 64 NY2d 304, 310 [1984]). Any ambiguity regarding an insurer's duty to defend is resolved in favor of the insured (*International Business Machines Corp. v Liberty Mut. Ins. Co.*, 363 F3d 137, 144 [2d Cir. 2004] citing *Charles F. Evans, Inc. v Zurich Ins. Co.*, 95 NY2d 779, 780 [2000]).

The insurer's duty to defend is broader than the duty to indemnify (*General Motors Acceptance Corp. v Nationwide Ins. Co.*, 4 NY3d 451, 456 [2005]). Where a duty to defend is triggered, so too is the obligation to pay defense costs (*Federal Ins. Co. v Kozlowski*, 18 AD3d 33, 40-41 [1st Dept 2005]). Until there is a final determination that an insured's actions fall squarely under an exclusion of a liability policy, the policy remains in effect and an insurer must pay attorneys' fees and defense costs related to the underlying action against the insured, subject to recoupment if it is ultimately found the exclusion applies (*Dupree v Scottsdale Ins. Co.*, 96 AD3d 546 [1st Dept 2012]).

Where a named defendant is sued both in their capacity as an employee or officer of a corporation and in their individual capacity, so long as the claims asserted against that defendant in their capacity as an employee or officer of a corporation are covered by an applicable insurance policy, the insurer is required to defend that individual against claims asserted against her in both her individual capacity and her capacity as an employee or officer of the insured corporation (*see National Union Fire Ins. Co. of Pittsburgh, Pa. v Insurance Co. of North America*, 188 AD2d 259, 260-62 [1st Dept 1992]). An insurer may not have to indemnify ultimately an insured employee or officer for liability found against the insured employee or officer for acts she took in her individual capacity not covered under the policy. However, if the insured employee or officer is being defended under the policy for allegedly tortious acts she took as an insured employee or

officer, pursuant to the “entire action” doctrine the insurer must also defend her for the allegedly tortious non-covered acts asserted against her in her individual capacity.

Here, Plaintiff met his *prima facie* burden of showing a right to indemnification for reasonable defense costs from Greater New York through the inclusion of Greater New York’s general liability policy (NYSCEF Doc. 45) and several e-mails from Greater New York’s adjuster conceding that Gross was entitled to defense and indemnification (as a board member) in the Underlying Action.<sup>5</sup> Moreover, the Complaint in the Underlying Action, while naming Gross as a defendant in both her individual capacity and as a board member, does not make any distinct allegations directed at Gross solely in her individual capacity, and all causes of action in the Complaint were asserted against Gross in both her individual capacity and as a board member. The hypothetical issue of whether Gross may ultimately be found liable in her individual capacity but not as a board member does not provide Greater New York Insurance with an excuse to provide Gross a defense for her allegedly tortious acts as a board member but not her allegedly tortious acts as an individual. The duty to defend required Greater New York to defend Gross on all claims asserted against her until the only remaining claims were those excluded or not covered by the policy. There is no dispute that Greater New York conceded it had the duty to defend Gross and agreed to pay Gross for incurred defense costs – but to date no fees have been paid. Thus, Plaintiff has shown entitlement to summary judgment on the issue of liability with respect to his breach of contract claim against Greater New York Insurance.

In opposition, Greater New York Insurance fails to raise an issue of fact. Greater New York Insurance argues that it should be entitled to discovery into the reasonableness of Plaintiff’s

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<sup>5</sup> Although the statements made in the e-mails are hearsay, they may be considered as admissible evidence under the party admission exception and under the statement against interest exception to the rule against hearsay (*see, e.g. Caminiti v Extell West 57<sup>th</sup> Street LLC*, 166 AD3d 440, 440 [1st Dept 2018]).

accrued attorneys' fees, but this does not preclude summary judgment on the issue of liability, which is premised on the undisputed fact that Greater New York has failed to pay Plaintiff for any of the accrued attorneys' fees. Greater New York further admits in its opposition that it has "agreed to reimburse reasonable and necessary fees incurred by Plaintiff from the date of tender" but has proffered no evidence in opposition of payments made to fulfill this obligation. The Court makes no judgment at this time as to whether the fees accrued were reasonable, nor does it make any adjudication as to whether Greater New York acted in bad faith, as that claim is not asserted in the Complaint, and is merely referenced in Plaintiff's memorandum of law. Nor was summary judgment on that issue specifically requested in the notice of motion.

#### **D. Chubb**

Plaintiff's motion for summary judgment against Chubb is denied. When one insurance policy serves as excess to another, the excess insurer's duty to defend is only triggered upon the exhaustion of the primary insurance policy (*Auriemma v Biltmore Theatre, LLC*, 82 AD3d 1, 14 [1st Dept 2011] citing *Sport Rock Intl., Inc., v American Cas. Co. of Reading, Pa.*, 65 AD3d 12, 13 [1st Dept 2009]). According to Plaintiff's own Complaint, it is alleged that Greater New York provided a primary general liability policy and Chubb provided a "second, excess-coverage policy" (see NYSCEF Doc. 94 at ¶ 8). In his memorandum of law, Plaintiff also alleges Gross was covered under the "Chubb policy, on an excess basis" (NYSCEF Doc. 26 at p. 20).

Plaintiff failed to make any *prima facie* showing, let alone proffer any arguments, that Chubb had a duty to defend Gross prior to the exhaustion of the Greater New York policy. Plaintiff cannot allege in the Complaint, and argue in the memorandum of law, that Chubb provided an excess policy, and then on summary judgment argue that Chubb owed Plaintiff a defense and must indemnify Plaintiff for incurred defense costs without showing the alleged primary policy is

exhausted. Although Plaintiff claims he “should not be caught in the [i]nsurers’ crossfire”, this does not obviate Plaintiff’s heavy burden on summary judgment of showing Chubb breached its promise to defend and indemnify Gross. That burden requires a *prima facie* showing that (contrary to Plaintiff’s allegations) Chubb’s policy is co-primary to the Greater New York insurance policy, or that Chubb’s policy is excess (as alleged) and the duty to defend was triggered because Greater New York Insurance policy was exhausted. However, Plaintiff failed to make a *prima facie* showing under either scenario.

Given the insufficiency of and inconsistencies in Plaintiff’s own motion papers with respect to his claim against Chubb, Plaintiff has failed to make a *prima facie* showing of entitlement to summary judgment which “requires denial of the motion, regardless of the sufficiency of the opposing papers” (*see Johnson v CAC Business Ventures, Inc.*, 52 AD3d 327, 328 [1st Dept 2008] quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). In denying Plaintiff’s motion based on Plaintiff’s failure to meet his *prima facie* burden, the Court makes no judgment as to whether the Chubb policy is excess to the Greater New York policy, nor does it rule on Chubb’s request to be dismissed from this case as Chubb did not seek such relief via a motion or cross-motion.

Accordingly, it is hereby,

ORDERED that Plaintiff’s motion for summary judgment is granted solely to the extent that Plaintiff is granted partial summary judgment on the issue of liability with respect to his breach of contract claim against Defendant Insurance Company of Greater New York, with an inquest on attorneys’ fees owed to Plaintiff from Insurance Company of Greater New York to be scheduled upon the filing of the note of issue or the resolution of the remaining liability issues against Defendants Lex Tenants Corp. and Federal Insurance Company; and it is further

ORDERED that the remainder of Plaintiff’s motion for summary judgment is denied, without prejudice, with leave to renew upon proper supporting papers; and it is further

ORDERED that should the parties request an order of referral to the Court’s sponsored ADR program, they shall notify the Court via e-mail at SFC-Part33-Clerk@nycourts.gov so the appropriate referral order may be issued; and it is further<sup>6</sup>

ORDERED that should the parties elect not to resolve this case either independently or with the help of a third-party neutral, they shall submit a proposed updated case management order with proposed deadlines to complete discovery via e-mail to SFC-Part33-Clerk@nycourts.gov, no later than December 17, 2025. To the extent the parties cannot agree to a proposed case management order, they shall appear for a status conference on February 11, 2026; and it is further

ORDERED that within ten days of entry, counsel for Plaintiff shall serve a copy of this Decision and Order, with notice of entry, on all parties via NYSCEF.

This constitutes the Decision and Order of the Court.

12/15/2025  
DATE  
Mary V Rosado JSC  
HON. MARY V. ROSADO, J.S.C.

CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
	<input type="checkbox"/> GRANTED	<input checked="" type="checkbox"/> GRANTED IN PART
APPLICATION:	<input type="checkbox"/> DENIED	<input type="checkbox"/> OTHER
	<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

<sup>6</sup> Plaintiff is alleging damages of approximately \$205,381.00 in legal fees. Assuming Plaintiff’s demand has not changed, the Court encourages the parties to preserve litigation expenses and engage in good faith settlement negotiations.