

**City of New York v Arch Ins. Co.**

2012 NY Slip Op 30619(U)

March 5, 2012

Sup Ct, NY County

Docket Number: 400360/10

Judge: Paul Wooten

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. PAUL WOOTEN  
Justice

PART 7

THE CITY OF NEW YORK,

INDEX NO. 400360/10

Plaintiff,

MOTION SEQ. NO. 001

- against-

ARCH INSURANCE COMPANY and PETROCELLI  
ELECTRIC CO., INC.,

Defendants.

The following papers, numbered were read on this motion by plaintiff for summary judgment pursuant to CPLR 3212.

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

PAPERS NUMBERED

1, 2

Answering Affidavits — Exhibits (Memo) \_\_\_\_\_

3, 4, 5, 6

Replying Affidavits (Reply Memo) \_\_\_\_\_

7

Cross-Motion:  Yes  No

Plaintiff, the City of New York (City) moves, pursuant to CPLR 3212, for summary judgment as against defendant Arch Insurance Company (Arch) or, in the alternative, summary judgment as against defendant Petrocelli Electric Co., Inc. (Petrocelli).

**BACKGROUND**

The City instituted this action seeking a declaratory judgment that Arch has a duty to defend the City in the underlying personal injury action entitled *Ian Gavigan v The City of New York, Petrocelli Electric Co., Inc., and Consolidated Edison Company of New York, Inc.*, Index No.: 109761/06, currently pending in the New York Supreme Court, New York County. The City also seeks reimbursement for all costs it incurred in defending the underlying action from February 1, 2010 until Arch assumes the defense. In the alternative, the City seeks summary judgment as against Petrocelli for breach of its contractual obligation to provide the City with insurance coverage for all claims arising out of Petrocelli's operations under its agreement with the City.

**UNFILED JUDGMENT**

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

In October of 2004, Petrocelli entered into a contract (Contract) with the City's Department of Transportation (DOT) to perform street lighting maintenance in the borough of Manhattan (Motion, exhibit 1). Among other things, this contract obligates Petrocelli to "keep in good repair" City-owned street lights in "parks, streets and public places in the Borough of Manhattan" (*id.* at 18), including, but not limited to, the replacement or correction of "dangerous conditions," "defective wiring," and "removing all illegal taps to lampposts" (*id.* at 19). Moreover, Petrocelli was obligated to inspect each lighting location once every 10 days (*id.*).

The Contract also mandated that Petrocelli obtain commercial general liability insurance in its own name and to include the City and DOT as additional insureds under such policy (*id.* at 33). The insurance policy was also required to

protect the City of New York, the Contractor and/or its Subcontractors performing work under [the] Contract from claims for property damage and/or bodily injury including death which may arise from operations under this Contract, whether such operations are performed by the Contractor or anyone directly or indirectly employed by the Contractor (*id.* at 34).

The insurance policy that Petrocelli was to obtain, pursuant to the Contract, was to provide insurance coverage in the amount of \$2,000,000.00 per occurrence and \$5,000,000.00 in the aggregate (*id.* at 32). Moreover, Petrocelli was required to "defend at its own expense" any claims "to which the City may be subjected or which it may suffer or incur allegedly arising out of or in connection with any operations of the Contractor ... or [its] failure to comply with the provisions of this Contract or of the Law" (*id.* at 24).

Pursuant to its contractual obligations, Petrocelli obtained a series of commercial general liability policies from Arch (Motion, exhibit 2). Under the terms of this insurance policy, Petrocelli is a named insured and the City is an additional insured. The policy includes a blanket additional insured endorsement that provides, in relevant part:

Section II—Who is an Insured is amended to include as

an insured any person or organization for whom you [Petrocelli] are performing operations when you and such person or organization have agreed in writing in a contract or agreement that such person or organization is an additional insured on your policy. Such person or organization is an additional insured only with respect to liability arising out of:

- i) 'your work' at the location designated; or
- ii) The 'products-completed operations hazard' (*id.* at 27, 73).

On December 8, 2005, the City's Office of the Comptroller (Comptroller) was served with a notice of claim filed on behalf of Ian Gavigan (Gavigan) (Motion, exhibit 3). The notice of claim alleges that, on October 8, 2005, Gavigan was allegedly injured when he "was caused to receive an electrical shock" at a "traffic light signal pole" on the sidewalk located at the southeast corner of Avenue A and 14<sup>th</sup> Street in the borough of Manhattan (*id.*). The Comptroller notified Arch of the notice of claim in February 2006 (Motion, exhibit 4).

On July 13, 2006, the City was served with a summons and complaint in the underlying personal injury action (Motion, exhibit 5). The complaint alleges that the City "contracted, permitted or otherwise arranged with defendant Petrocelli to construct, install, maintain and/or repair various electrical appurtenances in the City of New York, including the electrical pole located at the South East Corner of East 5<sup>th</sup> Street and Avenue A, New York, New York" (*id.*, ¶ 5). The complaint further alleges that Gavigan, while employed with the City's Department of Sanitation, suffered an electrical shock from an improperly installed, maintained and repaired electrical pole (*id.*, ¶ 10).

The City maintains that the allegations asserted in the complaint in the underlying personal injury action fall within the coverage of the policy with Arch. By letter dated January 17, 2007, the City forwarded the documents relating to the underlying personal injury action to Arch, through Petrocelli, and demanded a defense in that action (Motion, exhibit 6).

On January 30, 2007, the City was served with an amended complaint for the underlying action, which asserted the same claims as against the City but added Consolidated Edison

Company of New York, Inc. (Con Ed) as an additional defendant (Motion, exhibit 7).

By letter dated February 5, 2007, Arch's claims administrator responded to the City's demand for defense, agreeing to provide such defense with a reservation of rights (Motion, exhibit 8). Shortly thereafter, in light of Arch's letter, the City assigned its defense to the law firm of Conway, Farrell, Curtin & Kelly, P.C. (Law Firm), and the Law Firm began its representation of the City. According to the City, Arch was simultaneously providing a defense to Petrocelli, which was being represented by separate counsel.

Both the City and Petrocelli moved for summary judgment in the underlying action. Petrocelli's motion was granted and the complaint was dismissed as against it, but the City's motion was denied (Motion, exhibit 9). In rendering that decision, the Court stated that there was no evidence that Petrocelli created or exacerbated a dangerous condition, but that there was a question of fact as to whether the City either created the dangerous condition or had actual or constructive notice that such dangerous condition existed (*id.*). In addition, the Court denied as premature summary judgment on the City's cross claims asserted as against Petrocelli for indemnification, indicating that there were triable issues as to whether Petrocelli was in control of the lamppost pursuant to the agreement and whether Petrocelli failed to comply with the law or its contract with the City (*id.*).

By letter dated January 28, 2010, Arch's claims administrator revoked Arch's commitment to provide defense to the City, stating that the summary judgment decision determined that the cause of the accident was not related to Petrocelli's work (Motion, exhibit 10). Since then, Arch has refused to pay any of the legal costs associated with the City's defense of the underlying personal injury action.

The City contends that, based on the complaint in the underlying action, Arch has a duty to provide its defense costs, since the allegations contained therein potentially fall within the provisions of the insurance coverage. Further, the City maintains that the decision in the

summary judgment motion only concerns Petrocelli's direct tort obligation to a third person based on a contract, not Petrocelli's contractual obligation to the City for injuries arising to third persons.

In opposition to the instant motion, Arch contends that it is no longer liable to provide the City with defense costs in the underlying action since it was determined, in the summary judgment decision referenced above, that Petrocelli was not negligent and, hence, the injury could not have arisen out of Petrocelli's work. In addition, Arch maintains that discovery in this action is incomplete and that the City has yet to comply with its discovery demands. Finally, Arch argues that the motion should be denied because it was not supported by an affidavit of an individual with personal knowledge.

Petrocelli has also opposed the City's motion on the ground that discovery in this declaratory judgment action has yet to be completed. Further, Petrocelli asserts that the evidence submitted with the motion was not submitted in admissible form, because the portion of the contract submitted with the motion was not properly authenticated nor complete. In addition, Petrocelli says that, since the City alleges that there were "contracts" entered into between it and Petrocelli, and excerpts of only one contract have been provided, questions of fact exist as to the nature and extent of the contractual relationship between the City and Petrocelli. Lastly, Petrocelli maintains that the City's action asserted as against it is illogical because the City claims that Petrocelli did acquire the requisite insurance coverage and, if the City is not entitled to defense from Arch, it would be because the accident alleged in the underlying action did not arise out of Petrocelli's work.

In reply, the City avers that Arch has misinterpreted the summary judgment decision, which only concerns Petrocelli's duty of care owed directly to third persons, not whether Petrocelli was negligent or whether the injury "arose out of" Petrocelli's work under its agreement with the City. Moreover, the summary judgment decision specifically indicated that,

among the questions of fact to be determined at trial, were: (1) whether Petrocelli was responsible for removing illegal taps; (2) whether the duty to inspect and maintain the lampposts was exclusively Petrocelli's; and (3) whether Petrocelli was "in control" of the lamppost.

### STANDARD

"The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case [internal quotation marks and citation omitted]" (*Santiago v Filstein*, 35 AD3d 184, 185-186 [1st Dept 2006]). The burden then shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact" (*Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006]; see *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). When deciding a summary judgment motion, the Court's role is solely to determine if any triable issues exist, not to determine the merits of any such issues (see *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). The Court views the evidence in the light most favorable to the nonmoving party, and gives the nonmoving party the benefit of all reasonable inferences that can be drawn from the evidence (see *Negri v Stop & Shop, Inc.*, 65 NY2d 625, 626 [1985]). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (see *Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 [1978]).

### DISCUSSION

The City's motion is granted with respect to declaring that Arch has a duty to defend the City in the underlying personal injury action and must reimburse the City for its defense costs sustained therein from February 1, 2010 until Arch resumes City's defense.

Arch's basic premise in opposition to the instant motion is that the Court's order

dismissing Gavigan's direct claim asserted as against Petrocelli determined all claims for negligence asserted as against Petrocelli. This is a misreading of the summary judgment decision in the underlying action as well as a misreading of the law.

In the Court's summary judgment determination, the Court stated the law of tort obligation of a contract service provider to third parties:

Under our decisional law a contractual obligation, standing alone, will generally not give rise to tort liability in favor of a third party. ... On the other hand, we have recognized that under some circumstances, a party who enters into a contract thereby assumes a duty of care to certain persons outside the contract (*Espinal v Melville Snow Contrs., Inc.*, 98 NY2d 136, 138-139 [2002] [internal citations omitted]).

The circumstances that would trigger a duty of care to third persons not a party to the contract are: (1) where "the contracting party, in failing to exercise reasonable care in the performance of its duties, launches a force or instrument of harm" that injures the third person; (2) where the contracting party "completely displaces a landowner's duty to maintain property in a reasonably safe condition pursuant to a comprehensive ... agreement," and a third person is injured thereby; and (3) where the injured third person detrimentally relies on the contracting party's performance of its contractual duties and is injured as a result of a breach of those duties (*Martin v Huang*, 85 AD3d 1132, 1133 [2d Dept 2011] [citation omitted]).

In the summary judgment decision of the underlying action, the Court found that the only possible theory under which Gavigan could hold Petrocelli directly liable, under the specific facts of the case, was if Petrocelli launched a force or instrument of harm that resulted in Gavigan's injuries, which the Court concluded Petrocelli did not do. This effectively discharged Petrocelli from any alleged duty of care owed to Gavigan as a third person. However, the Court also determined that there remained questions of fact as to whether the City is entitled to indemnification from Petrocelli based on Petrocelli's control of the lamppost, and whether



Petrocelli failed to comply with the law or the contract. In other words, there remains the question as to whether the City may be held vicariously liable to Gavigan based on Petrocelli's negligence with regard to fulfilling its duty to perform its contractual obligations to the City.

The above quoted insurance provisions state that Arch is to provide defense to any additional insured of Petrocelli's for injury arising from Petrocelli's work. As stated in *Worth Constr. Co., Inc. v Admiral Ins. Co.*,

An insurer's duty to defend 'arises whenever the allegations within the four corners of the underlying complaint potentially give rise to a covered claim.' This standard applies equally to additional insureds and named insureds. ... The phrase 'arising out of' has been interpreted by this Court to 'mean originating from, incident to, or having connection with', and requires 'only that there be some causal relationship between the injury and the risk for which coverage is provided (10 NY3d 411, 415 [2008] [internal citations omitted]).

"[T]he focus of an 'arising out of' clause is not on the precise cause of the accident but on the general nature of the operation in the course of which the injury was sustained. ... 'It requires only that there be some causal relationship between the injury and the risk for which coverage is provided'" (*Hunter Roberts Constr. Group, LLC v Arch Ins. Co.*, 75 AD3d 404, 408 [1st Dept 2010] [internal citations omitted]). Moreover the absence of negligence alone is insufficient to establish that the accident did not "arise out of" Petrocelli's work (*id.* at 407).

In the case at bar, the question remains as to whether Petrocelli was negligent in fulfilling its contractual obligations to the City regarding the repair, maintenance and inspection of lampposts, and whether that failure resulted in the injury to Gavigan, for which the City, as the landowner, will be held vicariously liable. Therefore, the City is entitled to a defense from Arch, pursuant to the terms of the insurance contract (*see Regal Constr. Corp. v National Union Fire Ins. Co. of Pittsburgh, PA*, 15 NY3d 34 [2010]).

In addition, since the City is entitled to a defense, it is also entitled to reimbursement for

its defense costs that it assumed from February 1, 2010, when Arch terminated its defense, until such time as Arch resumes that defense (*Serio v Public Serv. Mut. Ins. Co.*, 7 AD3d 277 [1st Dept 2004]; *ACP Servs. Corp. v St. Paul Fire and Mar. Ins. Co.*, 224 AD2d 961 [4th Dept 1996]).

The court is unpersuaded by Arch's argument that the motion should be denied because discovery is incomplete. Arch's mere hope that discovery might establish its right to summary judgment is insufficient to defeat the instant motion (*Steinberg v Abdul*, 230 AD2d 633 [1st Dept 1996]). Similarly, the court finds that the attorney's affirmation attached to the City's motion, used to provide documentary evidence and a legal argument, is sufficient support for a motion for summary judgment, contrary to Arch's contention (*Prudential Sec. v Rovello*, 262 AD2d 172 [1st Dept 1999]).

Based on the foregoing, the court grants the City's motion with respect to Arch and need not address the City's alternate request for relief asserted as against Petrocelli or Petrocelli's opposition thereto.

### CONCLUSION

Based on the foregoing, it is hereby

ORDERED that plaintiff's motion for summary judgment is granted with costs and disbursements to plaintiff as taxed by the Clerk of the Court upon submission of an appropriate bill of costs; and it is further,

ADJUDGED and DECLARED that defendant Arch Insurance Company is obligated to provide a defense for plaintiff The City of New York in the underlying personal injury action entitled *Ian Gavigan v The City of New York, Petrocelli Electric Co., Inc., and Consolidated Edison Company of New York, Inc.*, index No. 109761/06, currently pending in the New York Supreme Court, New York County; and it is further,

ORDERED that defendant Arch Insurance Company is directed reimburse plaintiff for its

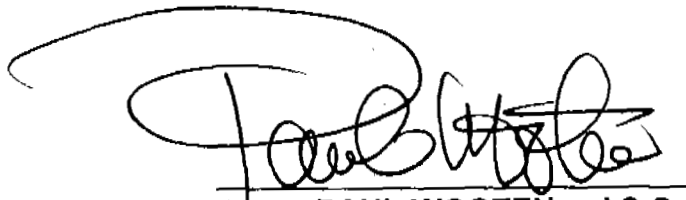
reasonable defense costs incurred in defending the underlying personal injury action entitled *Ian Gavigan v The City of New York, Petrocelli Electric Co., Inc., and Consolidated Edison Company of New York, Inc.*, Index No. 109761/06, currently pending in the New York Supreme Court, New York County, and the amount of reasonable defense costs plaintiff may recover from February 1, 2010 until Arch Insurance Company undertakes the cost of plaintiff's defense is referred to a Special Referee to hear and determine; and it is further,

ORDERED that counsel for plaintiff shall, within 30 days from the date of this order, serve a copy of this order with Notice of Entry, together with a completed Information Sheet,<sup>1</sup> upon the Special Referee Clerk in the Motion Support Office (Room 119M), who is directed to place this matter on the calendar of the Special Referee's Part for the earliest convenient date; and it is further,

ORDERED that plaintiff is directed to serve a copy of this Order with Notice of Entry upon all parties and the Clerk of the Court within 30 days of entry, who is directed to enter judgment accordingly.

This constitutes the decision of the Court.

Dated: 3-5-12

  
PAUL WOOTEN J.S.C.

Check one:  FINAL DISPOSITION       NON-FINAL DISPOSITION

Check if appropriate:       DO NOT POST  REFERENCE  
**UNFILED JUDGMENT**

**This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).**

<sup>1</sup> Copies are available in Rm. 119M at 60 Centre Street and on the Court's website at [www.nycourts.gov/supctmanh](http://www.nycourts.gov/supctmanh) under the "References" section of the "Courthouse Procedures" link.