

**Arnell Constr. Corp. v QBE Ins. Corp.**

2012 NY Slip Op 32192(U)

August 14, 2012

Supreme Court, New York County

Docket Number: 600738/2010

Judge: Cynthia S. Kern

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SCANNED ON 8/20/2012

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

**PRESENT:** \_\_\_\_\_  
*Justice*

**PART** \_\_\_\_\_

Index Number : 600738/2010  
ARNELL CONSTRUCTION  
vs.  
QBE INSURANCE  
SEQUENCE NUMBER : 001  
SUMMARY JUDGMENT

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_, were read on this motion to/for \_\_\_\_\_

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____	<b>No(s).</b> _____
Answering Affidavits — Exhibits _____	<b>No(s).</b> _____
Replying Affidavits _____	<b>No(s).</b> _____

Upon the foregoing papers, it is ordered that this motion is

is decided in accordance with the annexed decision.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE  
FOR THE FOLLOWING REASON(S):

RECEIVED  
AUG 16 2012  
**FILED**  
MOTION SUPPORT OFFICE  
NYS SUPREME COURT - CIVIL  
AUG 17 2012

NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 8/14/12

CR, J.S.C.

1. CHECK ONE: .....  CASE DISPOSED  NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: ..... MOTION IS:  GRANTED  DENIED  GRANTED IN PART  OTHER
3. CHECK IF APPROPRIATE: .....  SETTLE ORDER  SUBMIT ORDER
- DO NOT POST  FIDUCIARY APPOINTMENT  REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: Part 55

-----X  
ARNELL CONSTRUCTION CORP. AND VIRGINIA  
SURETY COMPANY, INC.

Plaintiffs,

Index No.600738/2010

-against-

QBE INSURANCE CORPORATION AND ANTOVEL  
GELBERG PAINTING AND WALLPAPERING, INC.,

**DECISION/ORDER**

Defendants.

**FILED**

-----X  
HON. CYNTHIA S. KERN, J.S.C.

AUG 17 2012

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion  
for : \_\_\_\_\_

NEW YORK  
COUNTY CLERK'S OFFICE

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	<u>1</u>
Notice of Cross Motion and Answering Affidavits.....	<u>2</u>
Affirmations in Opposition to the Cross-Motion.....	<u>3</u>
Replying Affidavits.....	<u>4</u>
Exhibits.....	<u>5</u>

Plaintiffs have commenced the present action against defendants for a declaratory judgment that defendant QBE Insurance Corporation ("QBE") has a duty to defend and indemnify plaintiff Arnell Construction, Corp ("Arnell") in an underlying personal injury action. Defendants have brought the present motion for summary judgment dismissing the complaint and declaring that as a matter of law QBE has no duty to defend and indemnify Arnell in the underlying personal injury action. Plaintiffs have brought a cross motion for summary judgment for a declaration that QBE is obligated to defend and indemnify Arnell in the underlying personal

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injury action. As will be explained more fully below, defendants' motion is denied in its entirety and plaintiff's cross-motion is granted to the extent that it is entitled to summary judgment declaring that QBE is obligated to defend it in the underlying personal injury action.

On or about May 19, 2004, Antovel and Arnell entered into an agreement for painting work to be rendered by Antovel. The subcontract between the parties provided that the subcontractor "assumed the entire responsibility and liability for any and all injury to, or death of any and all persons, including the subcontractor's agents, servants and employees, and for any and all damages to property caused by or resulting from or arising out of the work or any breach or default hereunder by the Subcontractor, or arising out of or related to any act of negligence of the Subcontractor..." In accordance with the requirements of the subcontract, Antovel obtained a policy of commercial general liability insurance with QBE. The QBE policy contained a blanket Additional Insured Endorsement which included those parties as additional insureds as required by written contract but only with respect to liability arising out of "your work.."

In or about November 2005, Michael Satter, an employee of Antovel, sustained bodily injuries as a result of a physical altercation with Richard Smith, an employee of Sound Beyond Electrical Corp., at the premises. In September of 2006, Satter commenced the underlying action. In November 2006, Gallagher Bassett Services, Inc, as the third party administrator for Arnell, sent correspondence seeking a defense and indemnification for Arnell. On December 8, 2006, the lawyers for defendant QBE sent a letter to Gallagher Bassett Services, Inc. denying its request for defense and indemnification on the ground that plaintiff's injuries in the underlying action did not arise out of the execution of Antovel's work as a painting subcontractor. In or about March 2010, plaintiffs commenced the instant declaratory judgment action against QBE

and Antovel.

There is no dispute in the instant case that Arnell is an additional insured under the QBE policy issued by QBE to Antovel with respect to liability arising out of Antovel's work and that the QBE insurance is primary. The issue which the parties do dispute is whether the incident in the underlying action, the physical assault, is covered by the QBE policy—whether QBE has a duty to defend and indemnify Arnell in the underlying personal injury action commenced by Satter.

On a motion for summary judgment, the movant bears the burden of presenting sufficient evidence to demonstrate the absence of any material issues of fact. *See Wayburn v Madison Land Ltd. Partnership*, 282 A.D.2d 301 (1<sup>st</sup> Dept 2001). Summary judgment should not be granted where there is any doubt as to the existence of a material issue of fact. *See Zuckerman v City of New York*, 49 N.Y.2d 557, 562 (1980). Once the movant establishes a prima facie right to judgment as a matter of law, the burden shifts to the party opposing the motion to “produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim.” *Id.*

There are a number of cases which state the very well established principle that “an insurer's duty to defend its insured is exceedingly broad and an insurer will be called upon to provide a defense whenever the allegations of the complaint suggest a reasonable possibility of coverage.” *BP Air Conditioning Corp v One Beacon Insurance group*, 8 NY 3d 708, 714 (2007). *See also Fitzpatrick v American Honda Motor Co. Inc.*, 78 NY 2d 61(1991); *Continental Cas. Co. v Employers Ins. Co. of Wausau*, 60 AD 3d 128 (1st Dept 2008). The Court of Appeals has held that :

[\* 5]

The duty to defend an insured... is derived from the allegations of the complaint and the terms of the policy. If a complaint contains any facts or allegations which bring the claim even potentially within the protection purchased, the insurer is obligated to defend.

A duty to defend is triggered by the allegations contained in the underlying complaint. The inquiry is whether the allegations fall within the risk of loss undertaken by the insured ... The merits of the complaint are irrelevant and, an insured's right to be accorded legal representation is a contractual right and consideration upon which a person's premium is in part predicated, and this right exists even if debatable theories are alleged in the pleading against the insured.

*BP Air Conditioning*, 8 N.Y.3d at 714.

In the present case, QBE is obligated to defend Arnell with respect to the claims asserted by Satter in the underlying action because the allegations in the complaint suggest that there is a reasonable possibility of coverage for Arnell under the QBE policy. In the verified complaint in the Satter action, Satter alleges that he was lawfully working at the premises within the course of his employment as an employee of Antovel when Richard Smith came into contact with him and caused bodily injuries, as a result of the negligence of the defendants, including Arnell. It is further alleged in the Satter action that the accident and injuries that were sustained by Satter were caused by the negligence of defendants, including Arnell, in the ownership, operation, design, construction, maintenance, control, service, supervision, inspection, management, maintenance, caring for and authorizing the use and control of the premises,, and failing to provide Satter with a reasonably safe place to work and failing to ensure that the area in which construction was performed was so constructed, equipped, guarded, operated, maintained and conducted so as to provide reasonable and adequate protection and safety to Satter in the course of employment and generally failing to exercise reasonable care, prudence and diligence in and about the construction site, and in being careless, reckless and negligent in the premises.

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The court finds that the foregoing allegations in the complaint in the underlying action create a duty on the part of QBE to defend Arnell in the underlying action as a matter of law. The complaint clearly contains allegations which potentially bring the claim within the protection purchased. Pursuant to the additional insured endorsement that is contained in the QBE policy, Arnell is an additional insured with respect to liability arising out of Antovel's work for Arnell. The underlying complaint clearly alleges that Satter sustained injury when he was working at the premises in the course of his employment as an employee of Antovel. As the Court of Appeals held in BP, the merits of the underlying complaint are irrelevant and the right to a defense exists even if debatable theories are alleged in the pleading against the insured. The issue is not whether it might ultimately be found that only the person who allegedly assaulted Satter is responsible for Satter's injuries—the issue is whether the complaint contains allegations which bring the claim potentially within the protection purchased. Since the underlying complaint does contain these type of allegations—that Satter sustained injuries while he was working for Antovel and the injuries were based on the negligence of the defendants, including Arnell—QBE's duty to Arnell has been triggered and Arnell is entitled to summary judgment declaring that QBE is required to defend Arnell in the Satter action. Virginia Surety is also entitled to reimbursement for the amounts it incurred in connection with Arnell's defense in the Satter action.

However, neither plaintiffs or defendants are entitled to summary judgment with respect to the issue of whether QBE is required to indemnify Arnell in connection with the underlying Satter action. Neither side is entitled to summary judgment as there are clearly disputed issues of fact as to whether Satter's injuries resulted from Antovel's work at the premises, especially in light of the fact that the altercation did not occur until the end of the work day after Satter had

already changed into his street clothes and not when he was performing his painting work.

Since there are disputed issue of fact as to whether the altercation between Satter and Smith arose out of Antovel's work performed on behalf of Arnell, it cannot be determined as a matter of law that there is coverage under the policy for the actions complained of in the underlying complaint.

Defendants have also moved for summary judgment on the ground that Arnell never asserted a claim for coverage as an additional insured under the QBE policy until it commenced the present action and that the claim for coverage is therefore time barred. It argues that the letter sent in November 2006 simply requested indemnification from Antovel based upon the subcontract agreement. The court rejects this argument as without basis. The November 2006 letter sent by Gallagher Basset sufficiently constitutes a claim for coverage under the QBE policy as it notifies QBE of the underlying complaint, references the policy number of the QBE policy and requests defense and indemnification. Moreover, QBE waived any defense of late notice based on its December 2006 letter disclaiming coverage which did not raise any defense of late notice.

Plaintiffs have cross moved for summary judgment on the ground that QBE failed to timely disclaim coverage and is estopped from contesting coverage. The court also finds this argument to be without basis. Just as the November 2006 letter constitutes a claim for coverage under the policy, the December 2006 letter from defendant's counsel constitutes a disclaimer of coverage. This letter clearly disclaims coverage on the ground that the injuries sustained in the underlying action did not arise out of the execution of Antovel's work.

Finally, the motion to disqualify defendants' counsel is denied as without basis. Plaintiffs have failed to establish a sufficient basis for disqualifying defendants' counsel at this time. The

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court also rejects defendants' argument that the court should deny plaintiffs' cross motion as untimely.

Based on the foregoing, the defendants' motion for summary judgment is denied in its entirety. The plaintiffs' cross motion is granted to the extent that the court declares that QBE is required to defend Arnell in the underlying Satter action. If the parties are unable to resolve the issue of the outstanding attorney fees owed to Virginia Surety Company, Inc, by QBE, that issue will be resolved with the remainder of the declaratory judgment action determining indemnification. This constitutes the decision and order of the court.

**FILED**

AUG 17 2012

Dated: 8/14/12

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