

<b>Vindas v Toll Bros., Inc.</b>
2011 NY Slip Op 33239(U)
August 1, 2011
Supreme Court, Putnam County
Docket Number: 603-2007
Judge: Lewis Jay Lubell
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Conference September 12, 2011 @ 11:00 AM  
2x

To commence the 30 day statutory  
time period for 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 PUTNAM

-----X  
CAMILO VINDAS

Plaintiff,

-against -

TOLL BROS., INC., TOLL BROTHERS REAL  
ESTATE INC., and TOLL LAND V LIMITED  
PARTNERSHIP,

Defendants.

-----X  
TOLL BROS., INC. TOLL BROTHERS REAL  
ESTATE INC., and TOLL LAND V LIMITED  
PARTNERSHIP,

Third-Party Plaintiffs,

-against-

UPSTATE CONCRETE, INC.,

Third-Party Defendant.

-----X  
UPSTATE CONCRETE, INC.,

Second Third-Party Plaintiff,

-against-

NATIONAL INSURANCE BROKERAGE OF NEW  
YORK INC., and ESSEX INSURANCE, INC.,

Second Third-Party Defendants.

-----X  
LUBELL, J.

**DECISION & ORDER**

Index No. 603-2007

Sequence Nos. 6 & 7

The following papers were considered in connection with (Sequence 6) this motion by Essex Insurance Company, as the second third-party defendant in the second third-party action for an ORDER (a) pursuant to CPLR §3212 granting summary judgment in its favor and against defendants/third-party plaintiffs Toll Bros. Inc., Toll Brothers Real Estate Inc. and Toll Land V Limited Partnership and third-party defendant/second third-party plaintiff Upstate Concrete Inc. ("Upstate"), (b) pursuant to CPLR §3001 declaring that Essex is not obligated to defend and/or indemnify defendants/third-party plaintiffs Toll Brothers for the personal injury claims or underlying personal injury lawsuit brought by plaintiff Camilo Vindas, any action brought by Toll Brothers arising thereunder as well as any subsequent claims or lawsuit filed by Vindas arising out of the subject incident; and (c) that said declaration be deemed a full and complete defense to Essex in any action brought against it by any of the parties to this matter arising out of the subject incident; and (Sequence 7) the **CROSS-MOTION** of Upstate for an Order (1) granting summary judgment in favor of Upstate and against Essex and issuing a declaration pursuant to CPLR §3001 that Essex is obligated to defend and indemnify Upstate in the underlying action and third-party action commenced by Toll Brothers and to reimburse Upstate for all reasonable attorney's fees and disbursements incurred in the defense of the underlying action and third-party action commenced by Toll, as well as reimbursement of all reasonable attorney's fees and disbursements incurred in prosecuting the instant declaratory judgment action against Essex, and (2) denying the summary judgment motion of Essex Insurance Co. insofar as same seeks a declaration that Essex is not obligated to defend or indemnify Upstate in the underlying action and third-party action commenced by Toll; and for such other and further relief as this Court may deem just and proper:

<b>PAPERS</b>	<b>NUMBERED</b>
<b><u>SEQ 6</u></b>	
Motion/Affirmation/Affidavit	1A
Exhibits A-J	1B
<b><u>SEQ 7</u></b>	
Cross-Motion/Affirmation/Exhibits A-D	2
Affirmation in Opposition (NIBONY)/Exhibit A	3
Reply Affirmation (Essex)	4
Reply Affirmation (Upstate)	5

On March 22, 2007, Plaintiff, Camilo Vindas ("Vindas"), commenced this personal injury action against Toll Bros. Inc., Toll Brothers Real Estate Inc. and Toll Land V Limited Partnership (collectively "Toll Brothers"), owners of certain premises located at 61 Somerset Road, Hopewell Junction, New York (the "Construction

Site"), for injuries allegedly sustained on November 26, 2004 when, while in the course of his employment with third-party defendant Upstate Concrete, Inc. ("Upstate") at the Construction Site, Vindas was struck in the eye by a ricocheting nail. There is no dispute that Toll Brothers and Upstate were aware of the accident when it occurred.

In his action against Toll Brothers, Vindas advances negligence and Labor Law §200, 240 and 241 causes of action in Toll Brothers capacity as the owners of the Construction Site and/or as the general contractor of the underlying construction project. In turn and through the third-party action, Toll Brothers advances claims for common-law and contractual indemnification against Vindas' employer, Upstate, based upon an agreement between Toll Brothers and Upstate which, among other things, obligates Upstate to purchase liability insurance for its own benefit as well as for the benefit of Toll Brothers by having Toll Brothers named as an additional insured therein.

The motions currently before the Court deal with a general liability insurance policy dated November 18, 2004 (Policy Number 3CP9883) (the "Insurance Policy") issued by Second-Third Party defendant Essex Insurance Company, Inc. ("Essex") through National Insurance Brokerage of New York, Inc. ("NIBONY") upon application of Upstate and wherein Upstate is listed as the named insured and Toll Brothers an additional insured.

By way of the Second-Third Party Action, Upstate seeks declaratory relief in connection with the Insurance Policy and damages against NIBONY for alleged insurance broker negligence. Among other things, Upstate alleges that, although NIBONY had been advised of the accident within one business day of its November 24, 2004 occurrence, NIBONY failed to notify Essex.<sup>1</sup> Upstate also claims that, in any event, the Insurance Policy issued by Essex through NIBONY contains inappropriate coverage exclusions, given the liability sought to be insured.

Essex first received notice of Vindas' claims against Toll Brothers and of the ensuing lawsuit on May 18, 2007, some thirty months after the accident and two months after Toll Brothers became aware of Vindas' lawsuit against it. Such notice occurred when Toll Brothers tendered its defense and indemnification to Essex through NIBONY as a purported additional insured. The underlying Toll Brothers' notice of loss letter to NIBONY is dated April 10, 2007

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<sup>1</sup> NIBONY denies the allegation that notice had been provided to it by Upstate.

and includes a copy of Vindas' summons and complaint, the construction contract between Toll Brothers and Upstate, and Upstate's certificate of insurance. Therein, Toll Brothers requests that Essex defend and indemnify Toll Brothers in Vindas's action against it pursuant to the indemnification provision of the contract and its additional insured status. Toll Brothers also asks Essex to confirm that "Upstate and its insurers will defend and indemnify Toll [Brothers] against the above captioned lawsuit."

Without any documentary or other evidentiary support, the Court is advised, through counsel for Essex, that Essex received notice from Upstate of the accident and of Vindas' action against Toll Brothers sometime in May 2007, i.e., some thirty months after the accident and Upstate's knowledge of same and approximately two months after Upstate became aware of the lawsuit.

On or about May 24, 2007, six days after the May 18, 2007 notification by Toll Brothers to Essex of Vindas' claims against Toll Brothers and of the pending lawsuit, Essex issued a disclaimer letter addressed to Toll Brothers and allegedly carbon copied to Upstate advising Toll Brothers that it is not entitled to additional insured coverage under the Essex policy with respect to the allegations and claims advanced by Vindas. This is so, Essex explains, because of the specific exclusions and conditions contained in the Insurance Policy. Therein, Essex acknowledged receipt of copies of Vindas' summons and complaint, the construction contract between Toll and Upstate and Upstate's certificate of insurance. Essex also expressly acknowledged the employer/employee relationship between Upstate and Vindas and the allegation that Vindas was injured during the course of his employment with Upstate.

Some seventeen months after Essex's May 24, 2007 disclaimer letter to Toll Brothers, on or about October 31, 2008, Toll Brothers brings the third-party action against Upstate claiming that Upstate owes it contractual indemnification, common law contribution and common law indemnification. Upstate tendered the defense and indemnity of that action to Essex on December 12, 2008.

By way of letter correspondence to Upstate dated December 29, 2008, Essex disclaimed coverage to Upstate. This letter comes some nineteen months after Upstate admittedly provided Essex with notice of the accident (by whatever means and in whatever form). Therein, Essex acknowledged receipt from Upstate of Toll Brothers' lawsuit against Upstate but, nevertheless, disclaimed coverage for the claims and allegations contained in Toll Brothers' lawsuit against Upstate because of the various exclusions and conditions contained in the Essex policy. Some twenty months later on August 27, 2010, Upstate commenced the second third-party action against Essex

seeking, among other things, a declaration of coverage for the Toll Brothers' lawsuit.

Essex's disclaimer letters, first to Toll Brothers dated May 24, 2007 and then to Upstate dated December 29, 2008, advance the same five grounds: (1) late notice; (2) contractual liability exclusion; (3) employer's liability exclusion; (4) exclusion for negligent hiring/supervision; and (5) exclusion for independent contractors/subcontractors.

Essex, as the second third-party defendant in the second third-party action, now moves for an ORDER granting summary judgment in its favor and against Toll Brothers and Upstate and declaring that Essex is not obligated to defend and/or indemnify Toll Brothers or Upstate for the personal injury claims or underlying personal injury lawsuit brought by Vindas, any action brought by Toll Brothers arising thereunder, as well as any subsequent claims or lawsuit filed by Vindas arising out of the subject incident.

Upstate cross-moves for summary judgment in its favor and against Essex declaring that Essex is obligated to defend and indemnify Upstate in the underlying action and third-party action commenced by Toll Brothers and, further, that it is obligated to reimburse Upstate for all reasonable attorney's fees and disbursements incurred in the defense of the underlying action and third-party action commenced by Toll Brothers, as well as reimbursement of all reasonable attorney's fees and disbursements incurred in prosecuting the instant declaratory judgment action against Essex. Upstate also seeks an Order denying the summary judgment motion of Essex insofar as it seeks a declaration that Essex is not obligated to defend or indemnify Upstate in the underlying action and third-party action commenced by Toll Brothers.

Except as to the timeliness of disclaimer issue, the Court notes that there is no substantive opposition to or dispute that the specified policy exclusions of contractual liability, employer's liability, negligent hiring/supervision and independent contractors/subcontractors effectuate an exclusion of coverage to Upstate (as the named insured) and Toll Brothers (as the additional insured) for the claims arising out of the underlying accident, if timely and properly asserted.

As to the late notice issue, questions arise as to (1) whether Upstate and Toll Brothers can be said to have complied with the policy's notice provisions when in May 2007, approximately thirty months after Upstate and Toll Brothers became aware of the accident and approximately two months after the commencement of the Vindas lawsuit, notice of the occurrence and lawsuit was imparted to Essex

by Toll Brothers through NIBONY and by Upstate through yet to be disclosed means.

However, since "[an insurer's] failure to provide notice of disclaimer as soon as is reasonably possible precludes effective disclaimer, even where the insured's own notice of the incident is untimely" (Mid City Const. Co., Inc. v Sirius Am. Ins. Co., 70 AD3d 789, 790 [2d Dept 2010] citing Tex Dev. Co., LLC v Greenwich Ins. Co., 51 AD3d 775, 778 [2008]; Osterreicher v Home Mut. Ins. Co. of Binghamton, N.Y., 272 AD2d 926, 927 [2000]), the Court will first address the potentially dispositive issue as to whether Essex timely disclaimed.

In order to resolve the issue as to whether Essex disclaimed as against Upstate as soon as was reasonably possible, the Court must first determine (1) what constitutes the earliest date from which Essex's duty to disclaim to Upstate arose and (2) what constitutes the earliest date on which Essex did so.

In that regard, however, the Court finds that there are material questions of fact that preclude the granting of summary judgment in favor of one movant or the other. These material questions of fact include, but are not limited to, what was the nature, substance and means of Upstate's May 2007 notice to Essex and whether Essex's May 24, 2007 disclaimer letter to Toll Brothers was copied to Upstate. A determination as to what constitutes the trigger point from which to measure an insurer's duty to disclaim may not be so readily ascertainable where, as here, there are admittedly multiple policy exclusions which clearly except the underlying accident from coverage, the underlying negligence action does not directly implicate the insured, and the nature, substance and means of notice of the underlying event and ensuing lawsuit is not clear. Additionally, and with that background in mind, is the issue as to whether a disclaimer can be said to have been effectuated to an insured by way of receipt of a copy of a detailed disclaimer addressed to an additional insured.

Among other things, the facts and circumstances surrounding the admitted May 2007 notice from Upstate to Essex of the accident and of the Vindas/Toll Brothers lawsuit needs to be fleshed out and the issue of whether Upstate was copied with Essex's notice of disclaimer to Toll Brothers needs to be addressed as well as the legal implications of same.

Based upon the foregoing, it is hereby

ORDERED, that, except for Essex's motion for summary judgment as against Toll Brothers which is granted as unopposed, the motion

and cross-motion are denied for the reasons herein stated; and, it is further

ORDERED, that counsel are directed to appear before the Court at 11:00 on September 12, 2011, Room 401, for a conference regarding the logistics of addressing the factual issues herein raised and the legal issues related thereto.

The foregoing constitutes the Opinion, Decision, and Order of the Court.

Dated: Carmel, New York  
August 1, 2011

S/

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