

**American Home Assur. Co. v Port Auth. of N.Y. & N.J.**

2014 NY Slip Op 31468(U)

June 4, 2014

Supreme Court, New York County

Docket Number: 651096/2012

Judge: Eileen Bransten

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART THREE

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AMERICAN HOME ASSURANCE COMPANY,

Plaintiff,

-against-

THE PORT AUTHORITY OF NEW YORK AND NEW  
JERSEY, ALCOA, INC., MARIO & DIBONO  
PLASTERING CO., INC., TISHMAN REALTY &  
CONSTRUCTION CO., INC., TISHMAN  
LIQUIDATING CORPORATION, TEECO PROPERTIES  
L.P., TMLC CORP., f/k/a TISHMAN MANAGEMENT &  
LEASING CORP., TISHMAN SPEYER PROPERTIES  
L.P., TISHMAN SPEYER PROPERTIES, INC.,  
TISHMAN CONSTRUCTION CORPORATION OF NEW  
YORK, EQUITY HOLDINGS I CORP., f/k/a TISHMAN  
CONSTRUCTION CORPORATION OF NEW YORK,  
f/k/a TISHMAN REALTY & CONSTRUCTION CO.,  
INC., f/k/a TISHMAN CONSTRUCTION & RESEARCH  
CO., INC., TISHMAN REALTY & CONSTRUCTION  
CO., INC., TTV REALTY HOLDINGS, INC., f/k/a  
TISHMAN REALTY & CONSTRUCTION CO., INC.,  
f/k/a TIONA REALTY & CONSTRUCTION CO. INC.,  
TISHMAN CONSTRUCTION CORPORATION OF  
MANHATTAN, f/k/a TISHMAN CONSTRUCTION &  
RESEARCH CORPORATION, AND TISHMAN  
CONSTRUCTION CORPORATION,

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Motion Date: 4/7/2014  
Motion Seq. No. 007

Defendants.

-----X  
**BRANSTEN, J.**

This matter comes before the Court on Defendant-Counterclaim Plaintiff The Port Authority of New York and New Jersey’s (“Port Authority”) motion for attorney’s fees. Port Authority seeks fees based on this Court’s August 15, 2013 declaration that Plaintiff-Counterclaim Defendant American Home Assurance Company (“American Home”) is

obliged to pay defense costs in full for asbestos personal injury lawsuits falling under Port Authority's insurance policy. American Home opposes the motion. For the reasons that follow, Port Authority's motion is granted.

### **I. Background**

This insurance coverage action, brought by Plaintiff-insurer American Home, seeks a declaratory judgment to determine the scope and nature of rights and obligations under an American Home policy (the "Policy") for underlying asbestos claims arising out of the construction of the original World Trade Center (the "WTC project"). American Home issued the Policy to Defendant Port Authority in 1966. (Compl. ¶ 1.)

Relevant to the instant motion, the Complaint alleges, *inter alia*, that the Port Authority has been named in thousands of asbestos-related injury claims arising from exposure to asbestos during the WTC project (the "WTC Asbestos Claims"). *Id.* ¶ 26. In count one of its Complaint, American Home sought a declaration that "under the terms, conditions, and exclusions contained in the Policy[,] it has no obligation, either in whole or in part, to defend or indemnify Port Authority ... against pending WTC Asbestos Claims." *Id.* ¶ 34. American Home further alleged that the Policy included a \$10 million per occurrence limit and that it made payments in excess of that limit. *Id.* ¶ 30.

The Port Authority answered and interposed four counterclaims, including one seeking a mirror-image declaration to the one sought by American Home, i.e. that American Home “is obligated to provide the Port Authority with insurance coverage for the WTC Asbestos Claims pursuant to the terms of the Policy and applicable law.” (Counterclaims ¶ 37.) In its counterclaim, Port Authority stated that “[c]ontrary to [the insurer’s] allegation, the Policy is not exhausted.” *Id.* ¶ 35.

In December 2012, Port Authority moved for partial summary judgment in its favor on its declaratory judgment claim. American Home opposed the motion, arguing that it was moot, given the fact that American Home was currently defending the WTC Asbestos claims. American Home also noted its belief that the limits of its indemnification obligations under the Policy had been exhausted and that discovery would demonstrate its entitlement to recoupment. The Court granted Port Authority’s motion, holding that “American Home’s duty to defend extends to the entirety of those WTC Asbestos Claims asserting claims covered by the Policy.” In addition, the Court noted American Home’s reference to exhaustion of the Policy but held that American Home failed to demonstrate that its recoupment claim limited its duty to defend.

## **II. Discussion**

Port Authority now brings a motion for attorney’s fees, stemming from the Court’s granting of declaratory judgment in its favor. In support of its request, Port Authority

cites to *Mighty Midgets, Inc. v. Centennial Insurance Company*, 47 N.Y.2d 12, 21 (1979), which held, in relevant part, that an insured “who has been cast in a defensive posture by the legal steps an insurer takes in an effort to free itself from its policy obligations” and who prevails on the merits, may recover attorney’s fees incurred in defending against the insurer’s action.

American Home opposes the motion, contending that attorney’s fees are unavailing under *Mighty Midgets* since the Port Authority prevailed on its own declaratory judgment counterclaim. According to American Home, a policyholder cannot recover defense costs unless and until it defeats a claim asserted by the insurer. Since Port Authority prevailed on its own counterclaim, American Home argues that Port Authority has not defeated or “prevailed on” any claim by American Home in this litigation and therefore is not entitled to attorney’s fees.

However, the Court’s ruling on Port Authority’s declaratory judgment counterclaim resolves American Home’s mirror-image declaratory judgment claim as it concerns the duty to defend. The claims are two sides of the same coin. American Home sought a declaration that “under the terms, conditions, and exclusions contained in the Policy[,] it has no obligation, either in whole or in part, to defend or indemnify Port Authority ... against pending WTC Asbestos Claims.” (Compl. ¶ 34.) Port Authority’s counterclaim requested a declaration that the insurer “is obligated to provide the Port Authority with insurance coverage for the WTC Asbestos Claims pursuant to the terms of

the Policy and applicable law.” (Counterclaims ¶ 37.) While neither party sought summary judgment on American Home’s claim, the Court’s granting of partial summary judgment in Port Authority’s favor on the mirror-image counterclaim is law of the case, which in effect, resolves the insurer’s claim as it pertains to the duty to defend. Therefore, Port Authority has prevailed that portion of the insurer’s claim.

Moreover, Port Authority prevailed after being cast in a defensive posture by the insurer’s filing of this action. The insurer commenced this action to free itself from its duty to defend the Port Authority in litigation against pending WTC Asbestos Claims. *See* Compl. ¶ 34. Port Authority’s mirror-image counterclaim functioned akin to a defense to the insurer’s claim, stating that the parties’ contract in fact obligated American Home to provide a defense.

Accordingly, the attorney’s fees incurred by Port Authority in defending against Plaintiff’s declaratory judgment action through the filing of its motion for partial summary judgment “arose as a direct consequence of [the insurer’s] unsuccessful attempt to free itself of its policy obligations.” *U.S. Underwriters Ins. Co. v. City Club Hotel, LLC*, 3 N.Y.3d 592, 598 (2004). Port Authority is therefore entitled to recovery those expenses from the insurer. *Id.*; *see also Chase Manhattan Bank, N.A. v. Each Individual Underwriter Bound to Lloyd’s Policy No. 790/004A89005*, 258 A.D.2d 1, 4 (1st Dep’t 1999) (“[W]here an insurer improperly disclaims coverage, it is liable for the attorneys’

fees incurred by the insured in defending a suit by the insurer to establish the insurer's nonliability for the underlying claim as well as in the liability action.”).

### **III. Conclusion**

For the foregoing reasons, it is

ORDERED that Defendant Port Authority's motion for attorney's fees is granted; and it is further

ORDERED that a Judicial Hearing Officer (“JHO”) or Special Referee shall be designated to determine the following issue of fact, which is hereby submitted to the JHO/Special Referee for such purpose:

- (1) the issue of the amount of reasonable attorney's fees that Defendant Port Authority may recover from Defendant American Home, with such fees being those incurred in securing this Court's judgment declaring that American Home has a duty to defend the Port Authority; and it is further

ORDERED that the powers of the JHO/Special Referee to determine shall not be limited further than as set forth in the CPLR; and it is further

ORDERED that counsel for Defendant Port Authority 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


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<sup>1</sup> <http://www.nycourts.gov/courts/1jd/supctmanh/refpart-infosheet-10-09.pdf>

Office (Room 119M), who is directed to place this matter on the calendar of the Special Referee Part for the earliest convenient date.

Dated: New York, New York  
June 4, 2014

**ENTER**

  
Hon. Eileen Bransten, J.S.C.