## Document(1)

1. Pavarini McGovern, LLC v Airflex Indus. Inc., 30 Misc. 3d 1232(A)

   **Client/matter:** -None-

# Pavarini McGovern, LLC v Airflex Indus. Inc.

Supreme Court of New York, New York County
January 31, 2011, Decided
110199/08

**Reporter:** 30 Misc. 3d 1232(A); 926 N.Y.S.2d 345; 2011 N.Y. Misc. LEXIS 839; 2011 NY Slip Op 50312(U)

Pavarini McGovern, LLC, Plaintiff, against Airflex Industrial Inc., GREAT AMERICAN E & S INSURANCE COMPANY, ILLINOIS NATIONAL INSURANCE COMPANY, MT. HAWLEY INSURANCE COMPANY, and ATLANTIC SPECIALITY INSURANCE COMPANY, Defendants.

**Notice:** THIS OPINION IS UNCORRECTED AND WILL NOT BE PUBLISHED IN THE PRINTED OFFICIAL REPORTS.

PUBLISHED IN TABLE FORMAT IN THE NEW YORK SUPPLEMENT.

**Prior History:** *Airflex Industrial, Inc. v. Fifth @ 42nd LLC, 2008 N.Y. Misc. LEXIS 8859 (N.Y. Sup. Ct., Mar. 19, 2008)*

**Core Terms**

coverage, specialty, underlying action, notice, additional insured, summary judgment, insurance company, property damage, endorsement, occurrence, notify, sequence, commercial general, insurance policy, indemnify, liability policy, provide coverage, certificate, photograph, adjacent, deny coverage, cross motion, cross claim, prima facie, contractor, procure, insurance certificate, disclaim, holder

**Headnotes/Syllabus**

**Headnotes**

**; 2011 N.Y. Misc. LEXIS 839, ***839; 2011 N.Y. Misc. LEXIS 839, ***839 [**345] ; 2011 N.Y. Misc. LEXIS 839, ***839; 2011 N.Y. Misc. LEXIS 839, ***839 [*1232A]** Insurance --Disclaimer of Coverage--Failure to Give Timely Notice of Claim. Insurance--Duty to Defend and Indemnify--Coverage of Additional Insured.

**Counsel: ; 2011 N.Y. Misc. LEXIS 839, ***839; 2011 N.Y. Misc. LEXIS 839, ***839 [***1]** For Pavarini McGovern, LLC, plaintiff: Edwin F. Lambert, Jr., Esq. of Barry, McTiernan & Moore.

For Great American E & S Insurance Company, defendant: Michael A. Kotula, Esq. and ***Michael J. Slevin***, Esq. of Rivkin Radler LLP.

For Illinois National Insurance Company, defendant: Kevin F. Cavaliere, Esq. of Steinberg & Cavaliere, LLP.

For Atlantic Specialty Insurance Company, defendant: Alan R. Peterman, Esq. of Hiscock & Barclay, LLP.

For Airflex Industrial, Inc., defendant: Alexander D. Tuttle, Esq. of LePatner & Associates LLP.

**Judges:** Hon. Eileen Bransten, J.S.C.

**Opinion by:** Eileen Bransten

**Opinion**

Eileen Bransten, J.

Motion sequence numbers 002, 003 and 004 are consolidated for disposition.

In motion sequence number 002, defendant Great American E & S Insurance Company (″Great American″) moves for summary judgment dismissing plaintiff Pavarini McGovern, LLC's (″Pavarini″) complaint as against it; dismissing defendant Airflex Industrial, Inc.'s (″Airflex″) cross claims as against it; and for a declaration that Great American is not obligated to provide defense or indemnity for either Pavarini or Airflex in the underlying action.

In motion sequence number 003, defendant Atlantic Specialty Insurance Company (″Atlantic Specialty″) **[***2]** moves for summary judgment dismissing Pavarini's complaint as against it; dismissing Airflex's cross claims as against it; and for a declaration that its insurance policy at issue does not provide coverage for the claims brought against Pavarini by the owner of the property in the underlying action.

In motion sequence number 004, defendant Illinois National Insurance Company (″Illinois National″) moves for summary judgment declaring that its insurance policy at issue does not provide coverage for Pavarini for the claims brought against Pavarini by the owner of the property in the underlying action; declaring that its policy does not provide coverage for the counterclaims brought by the owner of the property against Airflex in the underlying action; or alternatively, dismissing Pavarini's complaint as against it and dismissing Airflex's cross claims as against it.

Pavarini cross-moves for summary judgment compelling defendants to provide coverage for it in the underlying action; and/or an order requiring the parties to proceed with discovery in the actions which are consolidated for discovery.

Airflex cross-moves for summary judgment as against Pavarini, to dismiss all causes of action **[***3]** by Pavarini against Airflex.

## FACTS

This action arises out of problems at a construction site at the corner of Fifth Avenue and 42nd Street in Manhattan, New York. The owner of the property, Fifth @ 42nd LLC (the ″Owner″), entered into an agreement with Pavarini, in which Pavarini agreed to be the construction manager and agent of the Owner. Pavarini entered into a contract with Airflex to provide the exterior metal panel wall system for the building.

Airflex encountered difficulties with performing pursuant to the contract due to alleged problems with other contractors' work, including the walls being out of plumb and not built according to specification. The allegedly deficient work is stated to have impeded Airflex's installation of the exterior metal panel wall system and led to extra work. Airflex informed Pavarini of these problems in and prior to June 2005. Pavarini issued ″Notification of Potential Claim″ letters to other contractors, advising those contractors that Pavarini would seek additional insured coverage from those contractors' insurers if any suit were filed.

Pavarini was also notified of alleged property damage to skylights on the adjacent premises, as well as damage **[***4]** to the project, including damage to a freight elevator, curtain wall coping and water damage, allegedly caused by Airflex's failure to timely and properly install the metal panels on the exterior of the building. During May and June 2006, letters regarding these issues were exchanged among Airflex, Pavarini and the Owner.

On May 12, 2006, Airflex filed a notice of mechanics' lien on the property in the sum of $4.5 million.

On May 11, 2006, Airflex filed a summons and complaint against the Owner (*Airflex Indus. Inc. v. Fifth @ 42nd LLC*, Sup. Ct., NY County,index No. 601851/06), alleging that the Owner promised to pay Airflex for the extra work, but later refused to do so. The Owner answered and asserted counterclaims against Airflex, alleging that the Owner incurred numer-

ous costs and expenses as a result of Airflex's failure to perform in accordance with the contract. On or about July 26, 2007, the Owner filed a third-party summons and complaint against Pavarini, seeking damages for breach of contract, negligence, contribution and common -law indemnification. Pavarini filed a third-party answer with counterclaims and cross claims against Airflex and others.

On or around August 17, 2006, **[***5]** Pavarini wrote to its insurer, AIG, seeking coverage in the underlying action. Pavarini sent a similar notice to Great American on or about August 28, 2007, more than a year later. Pavarini sought coverage from Great American as an additional insured under the policy issued to Airflex. At approximately the same time, Pavarini gave notice to Mt. Hawley Insurance Company ("Mt. Hawley"). Although Mt. Hawley was a defendant in this action, Pavarini discontinued its claims against Mt. Hawley voluntarily and it is no longer a party.

The Great American policy contains a requirement that the insured notify the company "as soon as practicable" of any "occurrence" which could result in a claim. Great American Policy, § IV(2)(a). The policy further requires that Great American be provided notice of a claim or lawsuit as soon as practicable. *Id*., (2)(b). Great American disclaimed coverage based upon untimely notice. Great American further disclaimed upon the grounds that the claims for construction defects, delays and similar claims did not constitute "property damage" caused by an "occurrence" as defined in the insurance policy, and, therefore, were not covered.

Atlantic Specialty issued a commercial **[***6]** general liability insurance policy and an excess liability insurance policy to Airflex for the policy period of July 1, 2004 to July 1, 2005. Atlantic Specialty contends that Pavarini was not a named insured or additional insured on either policy. Like the Great American policy, the Atlantic Specialty commercial general liability policy requires notification of an "occurrence" "as soon as practicable." Atlantic Specialty Commercial General Liability Policy,§ IV(2)(a). The commercial general liability policy also contains exclusions, including an exclusion for damage to property on which the insured or any other contractors or subcontractors were working on the insured's behalf, if the property damage arises out of that work. *Id*.,§§ I, J.

Pavarini notified Atlantic Specialty of this dispute by letter dated August 23, 2007. Atlantic Specialty disclaimed coverage by letter dated September 20, 2007. Atlantic Specialty contends that it never received any tender from Airflex for defense and indemnification regarding this matter. The certificate of insurance produced by Pavarini states that "[i]f the certificate holder is an ADDITIONAL INSURED, the policy(ies) must be endorsed. A statement **[***7]** on this certificate does not confer rights to the certificate holder in lieu of such endorsement(s)." Certificate of Insurance, Ex. D to Pavarini's complaint. The parties dispute whether there was an endorsement naming Pavarini as an additional insured.

Illinois National issued an umbrella/excess commercial general liability insurance policy ("Umbrella Policy") to Airflex. The Umbrella Policy provides excess coverage for property damage caused by an "occurrence." Occurrence is defined as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." Umbrella Policy, at 20, Ex. H to Cavaliere Aff., motion seq. no. 004. The Umbrella Policy also contains "Business Risk" exclusions, which exclude coverage for damage arising out of any operations being performed on real property if the damage is to that real property. *Id*. at 6.

After being denied coverage by the various insurance companies, Pavarini commenced this declaratory judgment action seeking a declaration that Airflex, Great American, Illinois National and Atlantic Specialty owe Pavarini a duty to defend, indemnify and provide insurance coverage for Pavarini in the underlying action.

Airflex **[***8]** cross-claims against Great American, Illinois National and Atlantic Spe-

cialty, contending that they have a duty to defend, indemnify, and/or otherwise provide insurance coverage to Airflex in the underlying action.

**DISCUSSION**

A motion for summary judgment pursuant to *CPLR 3212* requires the movant to "make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers." *Smalls v. AJI Industries, Inc.*, 10 NY3d 733, 735, 883 N.E.2d 350, 853 N.Y.S.2d 526 (2008) quoting *Alvarez v. Prospect Hospital*, 68 NY2d 320, 324, 501 N.E.2d 572, 508 N.Y.S.2d 923 (1986). "Once the movant has demonstrated a prima facie showing of entitlement to judgment, 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 of the action." *Prudential Home Mortgage Company, Inc. v. Cermele*, 226 AD2d 357, 357, 640 N.Y.S.2d 254 (2d Dep't 1996).

*Motion Sequence Number 002*

Great American seeks summary judgment declaring that it is not obligated to provide defense **[***9]** or indemnification to either Pavarini or Airflex due to lack of receiving timely notice of the claim. Pavarini maintains that the late notice is excusable because it was not aware that Great American was the insurer. Pavarini contends that, previously, Mt. Hawley had insured Airflex, and Pavarini alleges that it was never informed of the change. Additionally, Pavarini argues that it was acting as the Owner's agent, and that the Owner did not assert any claims as against it until it filed suit, at which time Pavarini gave notice to all known insurers. Pavarini maintains that it had a good-faith belief in nonliability until the Owner filed suit.

When an insurance policy requires an insured to notify the insurer of a potential claim as soon as practicable, the courts have held that a delay in so informing the company results in the company being permitted to disclaim coverage. This is true because notice is a condition precedent to coverage, and it does not matter whether the insurance company has been prejudiced by the delay or not. *Briggs Ave. LLC v. Insurance Corp. of Hannover*, 11 NY3d 377, 381-82, 899 N.E.2d 947, 870 N.Y.S.2d 841 (2008); *Sorbara Constr. Corp. v. AIU Ins. Co.*, 11 NY3d 805, 806, 897 N.E.2d 1054, 868 N.Y.S.2d 573 (2008)). Although this **[***10]** rule was changed by the New York State Legislature's amendment of *Insurance Law § 3420* in 2008, the underlying action was commenced before the enactment of the amendment, so the common-law rule applies. *Id*.

Here, there is no dispute that Great American was not notified of the claim until September 2007, more than a year after suit had been filed. Thus, Great American has made a prima facie showing of entitlement to summary judgment. *See, e.g., Briggs Ave. LLC*, 11 NY3d at 381-82.

Pavarini claims that it did not know that Great American was the insurer, and, therefore, the late notice should be excused. However, Pavarini has the burden of demonstrating that its delay was, under the circumstances, reasonable. *Great Canal Realty Corp. v. Seneca Ins. Co., Inc.*, 5 NY3d 742, 744, 833 N.E.2d 1196, 800 N.Y.S.2d 521 (2005); *Paramount Ins. Co. v. Rosedale Gardens*, 293 AD2d 235, 240, 743 N.Y.S.2d 59 (1st Dep't 2002). While Pavarini claims that it did not know that Great American had replaced Mt. Hawley as the insurer for Airflex, Airflex submits an affidavit from its president stating that it did notify Pavarini of the change. Further, Pavarini makes no showing that it timely notified Mt. Hawley of the claim. In fact, the evidence before the court **[***11]** indicates that Pavarini did not notify Mt. Hawley of the claim until the same time that it notified Great American (*see* Ex. I to Lambert Affirm, at 12). If Pavarini had notified Mt. Hawley as soon as it knew of the claim, it would have discovered that Mt. Hawley did not maintain the insurance policy for Airflex at

the time the claim arose. Furthermore, Pavarini does not offer any evidence that it made any attempt to ascertain who the correct insurer was. Thus, Pavarini's reliance on its supposed ignorance of the identity of the insurance company is unavailing.

Pavarini next posits that, because Airflex sued the Owner, not Pavarini, and Pavarini was the Owner's agent, it did not, in good faith, believe that there was any claim that would be asserted against it. It claims that, until the Owner sued it, it was unaware of any potential claim, and, therefore, was not obligated to inform the insurance companies. This, too, is without merit.

In the summer of 2006, more than a year before Pavarini notified Great American of the claim, Pavarini informed its own insurance company, AIG, about the dispute, and advised it that it was entirely possible that the Owner would seek damages from Pavarini **[***12]** (*See* Slevin Affirm., ¶¶ 9 and 13, Ex. E). Hence, Pavarini was aware of the possibility of a suit, and its assertion of ignorance is belied by its communications with its own insurer.

Consequently, Pavarini has failed to raise a genuine issue of fact to counter Great American's prima facie showing of entitlement to judgment. Summary judgment is granted to Great American as against Pavarini.

Airflex also opposes Great American's motion, contending that the motion is premature because discovery is ongoing. Airflex contends that it provided timely notice of the claims, whether verbally or in writing. Airflex maintains that the question of whether the insurance companies received timely notice is a question of fact that cannot be resolved at this stage. Airflex also joins in Pavarini's arguments in opposing the motions.

Airflex does not offer any evidence that it provided notice to Great American. In the absence of such evidence, or a reason that Airflex cannot provide evidence of its actions, Airflex has failed to rebut Great American's prima facie showing of entitlement to summary judgment.

Accordingly, Great American's motion for summary judgment is granted as against Airflex.

*Motion Sequence* **[***13]** *Number 003*

Atlantic Specialty maintains that it has no obligation to defend, indemnify, or otherwise provide coverage to Pavarini or Airflex in the underlying action. It contends that Pavarini is not named as an additional insured under the commercial general liability policy issued to Airflex, and, in any event, the claims asserted by the Owner against Airflex and Pavarini are not covered by the policy. Atlantic Specialty also avers that any damage to third-party property is not covered because Airflex failed to provide proper notice, which is a breach of the obligations under the policy, and grounds to deny coverage.

Pavarini contends that it is an additional insured under the policy, as evidenced by the certificate of insurance. However, the certificate of insurance states that it does not confer any benefit unless the certificate holder is named as an additional insured in a policy endorsement. Atlantic Specialty contends that there is no such endorsement.

New York courts have held repeatedly that where a certificate of insurance states that it confers no rights on its recipient, such certificate does not, by itself, establish that the recipient is insured by an insurer. *ALIB, Inc. v. Atlantic Cas. Ins. Co.*, 52 AD3d 419, 861 N.Y.S.2d 28 (1st Dep't 2008). **[***14]** Where the certificate holder was never named as an additional insured, an insurer is entitled to a declaration that it has no duty to defend or indemnify the certificate holder. *Glynn v. United House of Prayer*, 292 AD2d 319, 322, 741 N.Y.S.2d 499 (1st Dep't 2002).

Pavarini maintains that it was named as an additional insured on the additional insured endorsements issued on behalf of Airflex. Counsel attaches endorsements to his affirmation to demonstrate that Pavarini is an additional insured, as set forth in the endorsements. How-

ever, counsel fails to provide an affidavit from someone with knowledge to explain what the endorsements mean, or to authenticate them. Airflex also submits copies of endorsements that name Pavarini as an additional insured. Atlantic Specialty provides a copy of a different endorsement, with different provisions. It also points out that there was a pre-existing relationship between Airflex and Pavarini that required waivers of subrogation. Thus, it is impossible to tell from Airflex and Pavarini's exhibits whether the endorsements were from this project or another, prior construction project unrelated to the underlying actions.

Consequently, there is a question of fact as to **[***15]** whether Pavarini was named as an additional insured under Atlantic Specialty's policy.

Nonetheless, the policy issued by Atlantic Specialty does not cover the claims in the underlying action. The Owner's claims against Pavarini, and the breach of contract claims against Airflex, are not ″occurrences″ giving rise to ″property damage″ within the meaning of the policy. Faulty workmanship does not constitute an ″occurrence″ and does not trigger coverage under a commercial general liability policy, because it does not constitute an accident or continuous or repeated exposure to a harmful condition. *George A. Fuller Co. v. United States Fid. & Guar. Co.*, 200 AD2d 255, 613 N.Y.S.2d 152 (1st Dep't 1994).

Pavarini contends that there was property damage which is covered by Atlantic Specialty's insurance, and attaches photographs of property damage to its attorney's affirmation. As with the endorsements, counsel does not state that he has personal knowledge that these photographs are accurate representations of the damage which occurred at the job site or the adjacent building. Nor does counsel explain what is depicted in the attached photographs. At oral argument, counsel asserted that ″everybody in the underlying **[***16]** action was there [at the depositions], and knows″ what the photographs depicted. August 18, 2010 Oral Argument Transcript (″Tr.″), at 63-64. However, the court certainly did not attend depositions, nor does it have any other way of knowing what the photographs depict. Counsel has failed to include deposition transcripts which would have either authenticated the photographs or explained what they depicted. Counsel's failure to follow proper procedure has resulted in making the photographs of no value in opposing the summary judgment motion. Thus, Pavarini has not presented any admissible evidence of damage to the adjacent property or property of others, as required.

Further, Airflex worked on the project until May 10, 2006. Atlantic Specialty's policy expired on July 1, 2005. Airflex's complaint in the underlying action complains of breaches that occurred in December 2005. The first mention of any problem on the site was in June 2005, and there is no evidence of covered damage at that time. There is no evidence of when any other damage occurred. Therefore, Pavarini has failed to demonstrate that this policy was in effect at the time of the claimed damage.

Finally, the Atlantic Specialty **[***17]** policy contains a number of exclusions that preclude coverage for claims for property damage arising out of the insured's work. For example, the policy specifically excludes:

> ″Property damage″ to (5) That particular part of real property on which you or any contractors or subcontractors working directly or indirectly on your behalf are performing operations, if the ″property damage″ arises out of those operations; or (6) That particular part of any property that must be restored, repaired or replaced because ″your work″ was incorrectly performed on it.

Such exclusions are enforceable. *George A. Fuller Co.*, 200 AD2d 255, 613 N.Y.S.2d 152, *supra*. The court need not recite all of the other exclusions that would, likewise, preclude coverage. Suffice it to say, the policy was not meant to, and does not, insure against the failure to perform the work properly. Therefore, it does not

cover the matters at issue in the underlying action.

Atlantic Specialty contends that coverage is also properly denied because Airflex failed to provide notice of an occurrence or claim. As discussed above, the failure to provide such notice as required by the policy constitutes grounds to deny coverage. Airflex does not provide **[***18]** any evidence to dispute Atlantic Specialty's contention that it was never given notice. Rather, it makes only conclusory assertions that it provided either oral or written notice. This is insufficient to counter the evidence provided by Atlantic Specialty.

Pavarini contends that it gave notice to Atlantic Specialty of claims being asserted against it. However, that contention is made by counsel, who does not have any personal knowledge. While counsel refers to various exhibits in support, he does not point to any exhibit that specifically provided notice to Atlantic Specialty. Thus, neither Pavarini nor Airflex has presented evidence that Atlantic Specialty was provided with notice of the claims asserted in the underlying actions.

For all the reasons discussed above, Atlantic Specialty's motion for summary judgment is granted.

*Motion Sequence Number 004*

Illinois National issued the Umbrella Policy, which is designed to provide excess coverage above that provided by the commercial general liability policies. Illinois National contends that the Umbrella Policy does not provide coverage for the underlying action because that action does not involve an ″occurrence″ within the terms of the **[***19]** Umbrella Policy, and because the business risk exclusions in the policy bar coverage. Additionally, Illinois National maintains that there is no justiciable controversy, because the damage to the adjacent building, which is the only damage potentially covered by the Umbrella Policy, does not reach anywhere near the limits of the primary policy.

The Umbrella Policy is in excess of the Great American policy, which contains limits of $1 million per occurrence, subject to a $2 million aggregate, as well as in excess of any other primary policy affording coverage to the insured. As is true of the other policies at issue, it covers only ″property damage″ caused by an ″occurrence.″ Umbrella Policy, at 1. The definition of ″occurrence″ is the same as that in the other policies. *Id*. at 22. Thus, just as the underlying claims are not covered by Great American's policy, so too, they are not covered by the Umbrella Policy.

In addition, the Umbrella Policy contains ″Business Risk″ exclusions, which exclude coverage for damage to property on which the insured, or one of its subcontractors, is working, if the property damage arises out of that work. *Id*. at 6. Thus, there is an additional basis to exclude **[***20]** coverage.

Illinois National also argues that any demand for declaratory relief is premature, because there has been no showing that any covered damage is likely to exceed the level of primary insurance that is available. Only after all primary insurance is exhausted does the Umbrella Policy come into play. *Bovis Lend Lease LMB, Inc. v. Great Am. Ins. Co*., 53 AD3d 140, 855 N.Y.S.2d 459 (1st Dep't 2008); *Tishman Constr. Corp. Of NY v. Great Am. Ins. Co*., 53 AD3d 416, 419, 861 N.Y.S.2d 38 (1st Dep't 2008).

Because the only claims that might possibly be covered under the Umbrella Policy are those regarding the adjacent building, it is only the value of those claims that could give rise to any obligation for Illinois National to provide coverage. According to the papers before the court, the damage to the adjacent property is claimed to total no more that a few hundred thousand dollars. Since the Great American policy has a limit far greater, Pavarini has failed to demonstrate that it is entitled to any declaration that Illinois is obligated to defend and indemnify it with respect to the underlying action.

Pavarini contends that because Illinois National is part of the American International Group of

insurers (″AIG″), which **[***21]** is the parent company of Pavarini's coverage for the claims at issue, New Hampshire Insurance, Illinois National should be prohibited from making the argument that the court should overlook the damage to the adjacent property. Pavarini argues that one branch of the company should not be permitted to deny coverage for occurrences that another branch of the company is covering.

Pavarini offers no legal support for its argument, and its argument is specious. The fact that one insurance company issued a policy that covers the issues in the underlying action does not in any way require all related companies to cover those issues, regardless of the insured's adherence to preconditions or the type of policy involved.

Pavarini's attempt to introduce possible damages due to mold, which are not claimed in the underlying action, in order to support its attempt to obtain a declaration that Illinois National is obligated to defend and indemnify it is unavailing. If the underlying action does not seek to recover for mold- related damage, there is no basis for Pavarini to seek coverage on the basis of increased exposure due to such a hypothetical claim. If such a claim is raised in the future, Pavarini **[***22]** may seek coverage from Illinois National at that time. However, any such attempt at this time is premature, at best.

*Cross Motion by Pavarini*

Pavarini contends that if the court finds that any of the insurers are granted summary judgment, then the court must also find that Pavarini is entitled to summary judgment against Airflex for failure to procure the insurance required in the contract for the construction project.

Pavarini argues that Airflex's failure to procure proper additional insured coverage for Pavarini, as agent for the Owner, caused a breach of contract as a matter of law. Such breach, it asserts, renders Airflex liable for any resulting damages to Pavarini, including attorneys' fees and defense costs incurred by Pavarini in the underlying action.

Pavarini is mistaken. If, in fact, Airflex had not procured any insurance naming Pavarini as an additional insured, then Pavarini could claim a breach of contract. Here, however, the bases for denying coverage are Pavarini's own failure to timely give notification of the claim, and that a commercial general liability policy, as required under the contract, does not cover claims for a party's own negligence in performing contracted-for **[***23]** work. The only ground under which Pavarini would be entitled to summary judgment as against Airflex would be if Airflex failed to obtain required insurance. The only policy that may not have included Pavarini as an additional insured is the Atlantic Specialty policy. However, there are other bases on which coverage under that policy was denied. Therefore, it was not due to any failure of Airflex that Pavarini was denied coverage.

Airflex has produced evidence, included as exhibits in the affidavit of the president of the company, who has personal knowledge of the facts, that it obtained insurance coverage naming Pavarini as an additional insured.

Accordingly, Pavarini's cross motion against Airflex is denied.

*Cross Motion by Airflex*

Airflex cross-moves against Pavarini, seeking to dismiss Pavarini's claims as against it.

As discussed above, Airflex presented evidence that it procured insurance as required by its contract with Pavarini. Pavarini has not produced any evidence that the insurance procured did not comply with the contractual requirements. Further, Pavarini has failed to demonstrate that any denial of coverage that it received was due solely to any failure on Airflex's part. **[***24]** Rather, even in Atlantic Specialty's denial of coverage that asserts that Pavarini was not an additional insured under the policy, the insurer disclaimed on other grounds as well. Thus, Pavarini has failed to

counter Airflex's demonstration that it obtained insurance, and Airflex's cross motion to dismiss Pavarini's claims as against it is granted.

**CONCLUSION**

Accordingly, it is hereby

ORDERED that Great American E & S Insurance Company's motion (motion sequence number 002) for summary judgment dismissing the claims of Pavarini McGovern LLC and Airflex Industrial Inc. as against it is granted and the complaint and cross claims are dismissed as against said defendant with costs and disbursements as taxed by the clerk of the court; and it is further

ADJUDGED AND DECLARED that Great American E & S Insurance Company has no obligation to defend and/or indemnify plaintiff Pavarini McGovern, LLC or defendant Airflex Industrial Inc., in the underlying action entitled *Airflex v. 5th @ 42nd LLC*; and it is further

ORDERED that the motion of Atlantic Specialty Insurance Company (motion sequence 003) is granted and Pavarini McGovern LLC's complaint and Airflex Industrial Inc.'s cross claims are dismissed **[***25]** as against said defendant with costs and disbursements as taxed by the Clerk of the Court; and it is further

ADJUDGED AND DECLARED that Atlantic Specialty Insurance Company has no obligation to defend and/or indemnify Pavarini McGovern LLC or Airflex Industrial Inc. in the underlying action entitled *Airflex v. 5th @ 42nd LLC*; and it is further

ORDERED that the motion of Illinois National Insurance Company (motion sequence number 004) is granted to the extent that the claims of Pavarini McGovern LLC and Airflex Industrial, Inc. are dismissed; and it is further

ORDERED that the cross motion of Airflex Industrial Inc. is granted and Pavarini McGovern LLC's complaint is dismissed as against it; and it is further

ADJUDGED AND DECLARED that Airflex Industrial Inc. did not breach its obligation to procure insurance naming Pavarini McGovern LLC as an additional insured; and it is further

ORDERED that the cross motion of Pavarini McGovern LLC is denied.

Dated: New York, New York

January 31, 2011

**ENTER**

*/s/*

Hon. Eileen Bransten, J.S.C.