

Va. Sur. Ins. Co. v Morris Park Contr. Corp.

2008 NY Slip Op 30498(U)

February 20, 2008

Supreme Court, New York County

Docket Number: 0602190/2007

Judge: Helen E. Freedman

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

PRESENT: HELEN E. FREEDMAN
Justice

PART 39

Va. Sur. Ins. Co.,

Plaintiff,

- v -

Morris Park Contracting Corp. et al.,

Defendants

INDEX NO.

602190/07

MOTION DATE

MOTION SEQ. NO.

001

MOTION CAL. NO.

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

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

The motions with sequence numbers 001 and 002 are consolidated for joint disposition.

In this action for a declaratory judgment, plaintiff Virginia Surety Insurance Company, Inc. (“Virginia Surety”) seeks a ruling that the terms of a Virginia Surety liability insurance policy do not oblige it to defend or indemnify defendants in connection claims arising from the collapse in May 2005 of the retaining wall at the perimeter of a co-operative apartment complex in New York City (the “Wall”). Henceforth, the collapse of the Wall will be referred to as the “Collapse.”

In motion # 001, defendants Langan Engineering & Environmental Services, Inc. and Langan Engineering Services and Environmental Services, Inc. P.C. (collectively, “Langan”) move for an order dismissing the complaint as against it on the grounds that there is a prior

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

action pending between Virginia Surety and Langan before the United States District Court for the District of New Jersey. Plaintiff opposes and cross-moves for an order granting it summary judgment against all defendants on the grounds that they failed to timely notify Virginia Surety of their insurance claims. Defendants Langan, Castle Village Owners Corp. (“Castle Village”), and Morris Park Contracting Corp. (“Morris Park”) oppose Virginia Surety’s cross-motion.

In motion # 002, defendant Illinois National Insurance Company (“Illinois National”) moves for an order dismissing the complaint as against it for failing to state any claim.

Background – The following is undisputed: in August 2004, Castle Village, which owns the Wall and the adjoining premises, hired Morris Park to repair the Wall in accordance with Langan’s specifications. Langan, an engineering firm based in New Jersey, had been retained by Castle Village to assess the Wall’s condition and identify the necessary repair work. During all relevant times, Morris Park was the named insured, and Langan and Castle Village were named additional insureds, under a Commercial General Liability insurance policy issued by Virginia Surety (the “VS Policy”), and an Excess Liability insurance policy issued by Illinois National. The VS Policy requires claimants to notify it in writing “as soon as practicable” of occurrences that “may” result in a claim.

Virginia Surety alleges that Castle Village, Langan, and Morris Park knew about the Collapse on the day it occurred, but undisputedly Castle Village and Langan knew about it by, at the latest, December 2005, when Castle Village sued Langan and others to recover for property damage alleged caused by the Collapse. *Castle Village Owners Corp. v. Greater N.Y. Mut. Ins. Co.*, index no. 604415/2005 (Sup. Ct. N.Y. Co.) Morris Park knew of the collapse on or before February 2006, when the New York City Department of Buildings subpoenaed it to testify at proceedings before its Board of Inquiry. However, none of the insureds under the VS Policy ever notified Virginia Surety in writing about the Collapse until April 2007, when Langan sent a letter to plaintiff that referred to *Castle Village Owners Corp.* and requested defense and

indemnification.

On May 9, 2007, Langan filed suit in New Jersey against Virginia Surety, Illinois National, and other issuers of liability policies that named Langan as a named or additional insured. *Langan v. Greenwich Ins. Co.*, Dkt. no. L-3448-07 (Sup. Ct. N.J., Bergen Co. L. Div.) Langan seeks (1) a declaration that the policies obligate the insurers to defend and indemnify it for claims arising from the Collapse, and (2) monetary damages from Virginia Surety and defendant Lexington Insurance Company for breach of their contractual duty to defend under their policies. In June 2007, *Langan* was removed to the United States District Court for the District of New Jersey.

On July 2, 2007, Virginia Surety commenced this declaratory judgment action against Langan, Morris Park, and other additional insureds under the VS Policy. On July 23, it served an amended complaint adding Illinois National as a defendant.

Dismissal motion by Langan – Virginia Surety’s claims against Langan in this lawsuit are dismissed, because the question as to whether the VS Policy requires Virginia Surety to defend and indemnify Langan has already been raised in the previously-filed New Jersey action.

“When . . . another action between the same parties, in which all issues could be determined is actually pending at the time of the commencement of an action for a declaratory judgment, the court abuses its discretion when it entertains jurisdiction.” *Woolard v. Schaffer Stores Co.*, 272 N.Y. 304, 311 (1936). *See also Ithica Textiles v. Waverly Lingerie Sales Co.*, 24 A.D.2d 133, 134 (3d Dept.), *aff’d*, 18 N.Y.2d 885 (1965) (holding that “[t]he rule is clear that a declaratory judgment action should not be entertained if another action between the same parties raising the same issues was actually pending at the time of its commencement.”).

Plaintiff’s cross-motion for summary judgment – That branch of the cross-motion seeking summary judgment against Langan is denied, since the complaint as against it is dismissed.

That branch seeking summary judgment against Castle Village for failing to notify

Virginia Surety “as soon as practicable” is granted. In opposition, Castle Village submits the affidavit of its treasurer, who states that immediately after the Collapse in May 2005, Castle Village instructed its managing agent “to identify every insurance policy under which Castle Village had, or might have had, coverage in connection with the [Collapse] and to arrange for notice to be given to the insurer that issued those policies.” According to the treasurer, the managing agent reported that it had identified all relevant insurance policies and duly notified the issuers. As a matter of law, this explanation does not justify Castle Village’s delay. Plaintiff’s submissions demonstrate that Castle Village (1) had in August 2004 entered into a written contract with Morris Park which required Castle Village to be named as an additional insured on Morris Park’s liability insurance policies, (2) knew about the Collapse on the day it occurred in May 2005, and (3) brought suit in December 2005 to assert that the Collapse had caused it property damage. Under these circumstances, Castle Village’s failure to identify the VS Policy and comply with its notice provisions cannot be justified.

That branch of Virginia Surety’s motion which seeks summary judgment against Morris Park is denied because it has raised a triable issue as to whether its delay in notifying the insurer resulted from its reasonable “good-faith” belief that it was not liable for the Collapse. Morris Park submits the affidavit of its Vice President, Joseph Urbinati, Jr., who states that (1) Morris Park performed work on the Wall from September through November 2004 under Langan’s supervision, (2) when Morris Park learned about the Collapse, neither Urbinati nor anyone else at the company believed that its work caused or contributed to the Wall’s failure, (3) when Morris Park was served with subpoenas from the New York City Department of Buildings, and from Langan in connection with *Castle Village Owners Corp.*, Urbinati believed he “was only being called as a ‘witness’ and not as a ‘defendant’ or even a potential defendant”, and (4) Castle Village did not initially sue Morris Park, and in fact did not name Morris Park as a defendant in *Castle Village Owners Corp.* until it served its Third Amended Complaint in late March, 2007.

Morris Park also submits a letter from Virginia Surety's agent which acknowledges that "[n]otice was received by [Virigina Surety] on April 6, 2007, by way of faxed letter received from [Morris Park's] broker." Under these circumstances, it cannot be determined as a matter of law whether Morris Park notified Virginia Surety as soon as "practicable."

Dismissal motion by Illinois National – The complaint as against Illinois National is dismissed because no claim is asserted against it. Illinois National correctly points out that the only relief that plaintiff seeks in this action is a declaration that VS Policy does not cover certain claims made by named and additional insureds. However, Illinois National is another insurer, and is not an insured under the VS Policy.

Settle order and judgment.

Dated: February 20, 2008



Helen E. Freedman, J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST