

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE CHARLES J. MARKEY IA Part 32
Justice

	x	Index Number <u>9119</u> 2007
233 EAST 17 TH STREET, LLC		
-against-		Motion Date <u>April 6,</u> 2009
L.G.B. DEVELOPMENT INC., et al.		Motion Cal. Number <u>5</u>
	x	Motion Seq. No. <u>3</u>

The following papers numbered 1 to 20 read on this motion by the plaintiff 233 East 17th Street, LLC (233 East 17th) to renew its motion for an award of summary judgment in its favor and declaring that it is an additional insured under a policy of insurance issued by defendant Mt. Hawley Insurance Co. (Mt. Hawley) to defendant L.G.B. Development (LGB) and that defendant Mt. Hawley owes 233 East 17th a complete defense and indemnification in an underlying action; and on the cross motion by defendant Mt. Hawley to renew its motion for an order, pursuant to CPLR 3212, declaring that plaintiff 233 East 17th is not entitled to a defense under the policy because the plaintiff failed to provide proper notice of an occurrence and due to the insured's failure to comply with conditions precedent for coverage.

	<u>Papers Numbered</u>
Notice of Motion - Affidavits - Exhibits.....	1-5
Notice of Cross Motion - Affidavits - Exhibits.....	6-12
Answering Affidavits - Exhibits.....	13-15
Reply Affidavits.....	16-20

Upon the foregoing papers, it is ordered that the motion and cross motion are determined as follows:

This motion for summary judgment was originally instituted in May 2008 and was followed by a cross motion for summary judgment by the defendant. By order dated September 15, 2008, this court denied the motion and cross motion with leave to renew upon the expiration of a stay imposed to permit counsel for co-defendant LGB to withdraw and directed that new or renewal motions for summary judgment should be filed by February 3, 2009. On January 5, 2009, a compliance conference was held before Justice Ritholtz. At this conference, the renewal of the motions was discussed. The motion and cross motion were then filed on February 2, 2009, but were rejected and the parties were instructed to file the motions with Justice Ritholtz. After a telephone conference, an expedited motion schedule was set. The motions were then re-filed and accepted by the court. The motion and cross motion were then referred to this court. As the order, dated September 15, 2008, was not decided on the merits and the motion and cross motion were denied with leave to renew, the motion and cross motion to renew are granted and the court will now decide the motion and cross motion on the merits.

In this declaratory judgment action, which was commenced on April 10, 2007, the plaintiff 233 East 17th Street, LLC seeks a declaration that it is an additional insured under a policy of insurance issued to defendant LGB by defendant Mt. Hawley under Mt. Hawley policy number MGL0142639 and that it is entitled to a defense and indemnification in an underlying personal injury action entitled, *Rogowski v 233 East 17th Street, LLC*, Index No. 16676/06, Supreme Court, Queens County.

On or about July 12, 2005, Mt. Hawley issued a commercial general liability policy to LGB. In early 2006, defendant LGB entered into a contract with the plaintiff pursuant to which LGB agreed to act as a general contractor for a demolition and construction job taking place at the premises located at 233 East 17th Street, New York, New York. Thereafter, LGB subcontracted the project's carpentry work to Hi-Lume Corporation (Hi-Lume). Hi-Lume hired John Rogowski, the plaintiff in the underlying personal injury action, to work on the project. Rogowski was allegedly injured as a result of a fall from a ladder at the work site, on May 1, 2006, and commenced the underlying action to recover damages for his injuries on July 19, 2006.

By letter dated June 5, 2006, Rogowski's counsel informed plaintiff 233 East 17th that Rogowski was injured during the course of his employment at the work site. Defendant Mt. Hawley indicates that it received its first notice of the incident from LGB on June 23, 2006. On or about July 6, 2006, Mt. Hawley sent a letter to LGB disclaiming coverage for the subject loss on the ground that LGB failed to comply with a condition of coverage in that

it did not obtain a hold harmless agreement from subcontractor Hi-Lume. On or about July 19, 2006, Rogowski commenced the underlying action. The plaintiff herein claims that it was served with process in the underlying action by service upon the Secretary of State on August 15, 2006 and that it received a copy of the underlying summons and complaint on September 5, 2006. Through its insurer, Illinois Union Insurance Co., on or about December 4, 2006, the plaintiff notified defendant Mt. Hawley of the underlying action and tendered a defense claiming that it is an additional insured under the subject policy. The plaintiff claims that Illinois Union Insurance Co. had previously notified Mt. Hawley of the underlying incident by certified mail on October 3, 2006, but received no response thereto. On or about December 19, 2006, defendant Mt. Hawley denied coverage to the plaintiff, consistent with its July 6, 2006 disclaimer to LGB, based upon its failure to obtain a hold harmless agreement from subcontractor Hi-Lume and also on late notice of claim grounds. There is no dispute that the subject policy was in effect on the date of the incident.

“An insurer may be relieved of its duty to defend only if it can establish, as a matter of law, that there is no possible factual or legal basis upon which it might eventually be obligated to indemnify its insured, or by proving that the allegations fall within a policy exclusion” (*Frontier v Insulation Contrs. v Merchants Mut. Ins. Co.*, 91 NY2d 169 [1997]). Here, the defendant Mt. Hawley established its entitlement to a declaration that it does not have a duty to provide a defense or indemnity to the plaintiff. The disclaimer issued by the defendant Mt. Hawley to LGB on July 6, 2008 and again to plaintiff on December 19, 2006 states that due to LGB’s failure to comply with a condition precedent to coverage in failing to obtain a hold harmless agreement from its subcontractor, Hi-Lume, as required by the policy of insurance, coverage was voided. The Contractors-Condition of Coverage endorsement states in pertinent part that the

“Insured will obtain hold harmless agreements from subcontractors indemnifying against all losses from the work performed for the insured by any and all subcontractors...In the event the insured fails to comply with the above conditions for a subcontractor whose work directly or indirectly gives rise to a claim, coverage for such claim will be voided under this policy. Insured agrees that we need not demonstrate any prejudice to us in order to enforce these conditions of coverage.”

Due to the breach of this provision, coverage has been voided and the plaintiff is not entitled to a defense and indemnity (*see, Wilson v Sirius Am. Ins. Co.*, 44 AD3d 754 [2nd Dept. 2007]). The plaintiff’s argument that the contract at issue is the one between it and LGB is without merit. While that contract may have required LGB to procure insurance and name the plaintiff as an additional insured, it cannot require the insurer to provide a defense in the event the policy was voided. A breach of contract claim does not arise against the insurer.

The plaintiff can only bring such a claim, for breach of contract in the failure to procure insurance, directly against the defendant LGB.

Furthermore, the defendant Mt. Hawley established that it properly disclaimed coverage as the plaintiff provided late notice. “The duty to give notice arises when, based on the information available an insured ‘could glean a reasonable possibility of the policy’s involvement’” (*Figueroa v Utica Natl. Ins. Group*, 16 AD3d 616, 617 [2nd Dept.], *lv. to appeal denied*, 5 NY3d 709 [2005], quoting *Paramount Ins. Co. v Rosedale Gardens*, 293 AD2d 235 [1st Dept. 2002]). Here, the plaintiff was placed on notice of the accident and the forthcoming suit by letter dated June 5, 2006. There is a dispute between the parties over whether the first notice was sent on October 3, 2006 or December 4, 2006. The defendant Mt. Hawley argues that the notice the Illinois Union Insurance Co. sent on behalf of the plaintiff on October 3, 2006, was insufficient as it only contained the insurance contract and did not contain the tender letter. The plaintiff argues that it has established that the October 3, 2006 mailing did contain the tender letter by the providing of a certified receipt and an affidavit attesting to the custom and practice of how a mailing is done. However, this dispute is immaterial. Inasmuch as the October 3, 2006 notice was sent almost four months after the plaintiff received notice of the claim, it is untimely as a matter of law (*see, Seneca Ins. Co. v W.S. Distribution, Inc.*, 40 AD3d 1068 [2nd Dept. 2007]; *City of New York v St. Paul Fire & Marine Ins. Co.*, 21 AD3d 978 [2nd Dept. 2005]; *Winstead v Uniondale Free School Dist.*, 201 AD2d 721 [2nd Dept. 1994]).

Accordingly, the motion by the plaintiff to renew the motion is granted, and, upon renewal, the motion for summary judgment is denied. The cross motion by the defendant to renew the motion for summary judgment is granted, and, upon renewal, the cross motion is granted, and it is ordered that a judgment is entered declaring that defendant Mt. Hawley Insurance Co. is not obligated to defend and indemnify the plaintiff 233 East 17th Street, LLC with respect to Supreme Court, Queens County action, captioned, *Rogowski v 233 East 17th Street, LLC*, and filed under Index No. 16676/06.

The foregoing constitutes the decision and order of the Court.

Hon. Charles J. Markey
Justice, Supreme Court, Queens County

Dated: Long Island City, New York
June 29, 2009

Appearances:

For the Plaintiff: Barry, McTiernan & Moore, by Katherine Hargas, Esq., 233 E. 17th St. [14th fl.], New York, NY 10046

For the Defendant: Goldberg Segalla, LLP, by Joanna M. Roberto & Jeffrey L. Kingsley, Esqs., 200 Old Country Rd. [suite 210], Mineola, NY 11501-4293

No appearance by L.G.B. Development, Inc. [in default]