

**Travelers Insurance Company v Volmar
Construction Co., Inc.**

2002 NY Slip Op 30033(U)

January 9, 2002

Supreme Court, New York County

Docket Number:

Judge: Marilyn Shafer

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PRESENT: MARILYN STAFEN

J.S.C. Justice

PART 36

105392

She Truella Pruca INDEX NO. _____
et al MOTION DATE _____
Kerner Crest Street MOTION CAL. NO. _____

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

PAPERS NUMBERED

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion in part is granted denied - both present to attached Dear/Order

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE _____

Dated: 1/19/02 _____ MARILYN STAFEN J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 36

-----X
THE TRAVELERS **INSURANCE** COMPANY, THE
TRAVELERS CASUALTY COMPANY and E & Y
GENERAL CONSTRUCTION CO., INC., a/k/a
E & Y GENERAL CONSTRUCTION, INC.

Plaintiffs,

INDEX NO. : 105392/00

-against-

VOLMAR CONSTRUCTION CO., INC., AIU
INSURANCE COMPANY and ST. PAUL FIRE &
MARINE INSURANCE COMPANY, a/s/o NEW
YORK CITY SCHOOL CONSTRUCTION
AUTHORITY,

Defendants.

MARILYN SHAFER, J.:

Plaintiffs in this declaratory judgment action seek to compel the defendants to defend and indemnify them in an underlying property damage action, and to obtain a judgment against defendants in an amount equal to the costs, expenses and attorney's fees expended in defense of the underlying action. Plaintiffs now move for summary judgment on the Complaint. Defendants oppose the motion, and have cross-moved for a declaratory judgment as to their non-liability. Plaintiffs claim that the underlying action was settled prior to trial, and that all parties have stipulated that the settlement does not affect any parties' right to recover in the present action.

The Complaint alleges that defendant AIU Insurance Company ("AIU") issued a policy of comprehensive general liability insurance to defendant Volmar Construction, Inc. ("Volmar") on or before January 22, 1997, policy number GL 817-64-22 RA. The policy

allegedly named plaintiff E&Y General Construction Company, Inc. a/k/a E&Y General Construction, Inc. (“E&Y”) as an additional insured.

In a subrogation action captioned *St. Paul Fire & Marine Insurance Company a/s/o New York City School Construction Auth. v E&Y General Construction Co., Inc.*, Sup Ct, New York County, index No. 116137/97 (“the St. Paul action”) the Complaint alleges that Volmar was the general contractor for a renovation project at Prospect Heights High School, located in Brooklyn, New York, on January 22, 1997, when a fire allegedly occurred at the school. E&Y is alleged to have been hired by Volmar to repair and renovate window bars at the premises prior to the fire. “St. Paul” allegedly paid “the Authority” \$750,000 under its policy of insurance with the Authority, and thereafter commenced the suit against Volmar and E&Y to recover such subrogated sum. In a third-party action, index No. 591385/98, E&Y sued Volmar for indemnification and contribution.

Here, the Complaint alleges that Travelers Insurance Company and/or The Travelers Casualty Company (collectively, “the Travelers”) and E&Y hired attorneys to represent E&Y in the St. Paul’s action. However, plaintiffs seek to compel AIU to assume the defense and indemnification of that action, based on the property damage coverage allegedly afforded to E&Y under Volmar’s policy with AIU, or, if it is found that E&Y is not entitled to such, a declaration of Volmar’s liability to E&Y based on its failure to secure such insurance coverage for E&Y.

AIU has refused to defend or indemnify E&Y due to an alleged late notice of loss, and late notice of the underlying action.

Plaintiffs claim that AIU received notice of the loss, within days of the loss, from both E&Y and from injured parties. Plaintiffs further claim that AIU was notified of the claims in issue in the St. Paul's action in September 1998, but that AIU did not disclaim coverage until May 1999. The Complaint alleges that the delay in disclaiming coverage until 28 months after notice of the loss, and seven months after notice of the claim, was unreasonable, and that AIU should be directed to defend and indemnify E&Y.

According to AIU, Section IV of the policy of insurance required E&Y to notify it of the accident "as soon as practicable." AIU claims that it never received notice of the occurrence from E&Y, although it concedes that it did receive such notice within days of the fire, from its insured, Volmar, as well as from the New York City School Construction Authority. AIU also concedes that it made payments pursuant to the policy, prior to receiving any notice from E&Y. AIU claims that E&Y may not rely on AIU's actual knowledge of the occurrence, without having complied with the notice provisions of the policy itself. AIU also argues that, since E&Y has interposed third-party claims against Volmar in the underlying action, notice of the occurrence received from Volmar will not act as notice from E&Y, since the two claimants are adversaries in the underlying litigation.

Further, AIU claims that it did not receive notice of the claim from E&Y, via correspondence from E&Y's attorney, until May 12, 1999, almost 19 months after the

Complaint in the St. Paul's action had been served on E&Y.

In opposition to the cross motion, E&Y claims that AIU received notice of the occurrence from another subcontractor at the site, within days of the accident. Although E&Y does not argue that it gave written notice of the occurrence to AIU, E&Y claims to have given oral notice through its president, Yasar Tahmaz ("Tahmaz"), who was allegedly interviewed by an independent insurance adjustor for AIU, on February 10, 1997, two weeks after the alleged occurrence. The adjustor allegedly submitted a report of his investigation to AIU on March 4, 1997. In reply papers, E&Y claims that it never received a copy of the AIU insurance policy from Volmar until May 11, 1999, a date that was several weeks beyond the date that such had been ordered to be disclosed.

Further, E&Y claims that AIU failed to timely disclaim coverage.

A movant's burden on a motion for summary judgment is to establish that there are no material issues of fact. *Zuckerman v City of New York*, 49 NY2d 557 (1980). Once a movant has met this burden, the party opposing the motion must come forward with proof of the existence of a triable issue. *Indig v Finkelstein*, 23 NY2d 728 (1968).

It is well-settled that an insurer's duty to defend is broader than the duty to indemnify, and arises whenever the allegations in the complaint against the insured fall within the scope of the **risk** undertaken by the insurer, regardless of how false or groundless these allegations may be. *Seaboard Surety Co. v Gillette Co.*, 64 NY2d 304 (1984).

The timeliness and the reasonableness of notice of an occurrence to an insurer is generally a question of fact. *Kaiser v Motor Veh. Acc. Indem. Corp.*, 35 Misc 2d 636 (Sup Ct, Queens County 1962). The sufficiency of an insured's excuse for a delay in giving notice to an insurer is also a question of fact, unless the excuse given is totally without merit. *Public Serv. Mut. Ins. Co. v Levy*, 87 Misc 2d 924 (Sup Ct, **NY** County 1976), *aff'd* 57 AD2d 794 (1st Dept 1977).

The carrier bears the burden of proof for explaining a delay in disclaiming or denying coverage. *Zappone v Home Ins. Co.*, 55 NY2d 131 (1982). Whether an insurer will be estopped from disclaiming coverage based on its delay in giving notice of disclaimer is a question of fact. *Greater NY Mut. Ins. Co. v Powers*, 25 Misc 2d 393 (Sup Ct, NY County 1960).

The court finds that the reasonableness and timeliness of E&Y's notice of loss and notice of claim present questions of fact which preclude summary judgment on the issue of AIU's liability to indemnify E&Y under the policy of insurance. Similarly, the issue of AIU's delay in disclaiming liability presents questions of fact which preclude summary judgment. However, AIU's duty to defend E&Y in **the** underlying action does not **turn** on these factual issues, since AIU concedes that E&Y was an additional insured under the policy, and the duty to defend is broader than the duty to indemnify. E&Y is thus entitled to a declaration that AIU had a duty to defend it in the St. Paul's action, and a partial summary judgment against AIU, in an amount which represents the costs and expenses of

defending the St. Paul's action, including reasonable attorneys' fees. The application for a declaration of E&Y's right to indemnification is denied, and the parties are directed to proceed to trial on this issue. The cross motion for a declaratory judgment is also denied.

The application for a declaration of Volmar's duty to indemnify E&Y is denied, as premature. This application was conditioned on the court finding that AIU had no duty to indemnify E&Y. Such a determination must await the trial of this action.

Accordingly, it is

ORDERED that plaintiffs' motion for summary judgment is granted in part; and it is further

ORDERED and ADJUDGED that defendant AIU Insurance Company was obligated to defend plaintiffs in an action captioned "*St. Paul Fire & Marine Insurance Company a/s/o New York City School Construction Auth. v E&Y General Construction Co., Inc.*," (Sup Ct, NY County, index No. 116137/97); and it is further

ORDERED that plaintiffs shall have partial summary judgment against defendant AIU Insurance Company in an amount which represents the costs and expenses of defending that action, including reasonable attorneys' fees; and it is further

ORDERED that the issue of the amount to which plaintiffs are entitled as the costs of defending that action is referred to a Special Referee to hear and report with recommendations, except that, in the event of and upon the filing of a stipulation of the parties, as permitted by CPLR 4317, the Special Referee, or another person designated by

the parties to serve as referee, shall determine the aforesaid issue; and it is further

ORDERED that entry of partial summary judgment is held in abeyance pending receipt of the report and recommendations of the Special Referee or the designated referee; and it is further

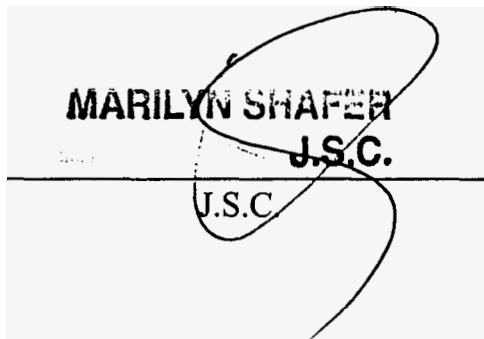
ORDERED that a copy of this order with notice of entry shall be served on the Clerk of the Judicial Support Office (Room 311) to arrange a date for the reference to a Special Referee; and it is further

ORDERED that that plaintiffs' motion for summary judgment is denied in all other respects; and it is further

ORDERED that defendant's cross motion for a declaratory judgment is denied; and it is further

ORDERED that the action shall continue and the parties shall appear on January 25, 2002 at 9:30 a.m. in Part 36 for a conference.

Dated: January 9, 2002



MARILYN SHAPER
J.S.C.
J.S.C.