

**State Insurance Fund v Utica First Insurance
Company**

2004 NY Slip Op 30300(U)

August 13, 2004

Supreme Court, New York County

Docket Number: 601539

Judge: Shirley Werner Kornreich

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

PRESENT: Kornreich
Justice

PART 54

0601539/2000

STATE INSURANCE FUND
VS
UTICA FIRST INSURANCE

INDEX NO. 601539/00
MOTION DATE 7/8/04
MOTION SEQ. NO. 003
MOTION CAL. NO. _____

SEQ 3

REARGUMENT/RECONSIDERATION

The following papers, numbered 1 to 5 were read on this motion to/for renew/summary judgment

PAPERS NUMBERED
<u>1, 2-3</u>
<u>4</u>
<u>5</u>

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 is decided in accordance with the annexed Decision, Order and Judgment.

FILED
AUG 25 2004
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 8/13/04

[Signature]
SHIRLEY WERNER KORNREICH
J.S.C.

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

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

-----X

STATE INSURANCE FUND,

Plaintiff,

Index No.: 601539

-against-

**DECISION, ORDER
and JUDGMENT**

UTICA FIRST INSURANCE COMPANY,

Defendant.

-----X

HON. SHIRLEY WERNER KORNREICH, J.:

Before the Court are two separate motions which are consolidated herein for unitary disposition. In "cross-over" affirmations and submissions, plaintiff State Insurance Fund ("plaintiff" or "SIF") moves to renew its prior cross-motion for summary judgment, and, upon renewal, seeks summary judgment (Motion Sequence No. 3); and defendant Utica First Insurance Company ("defendant" or "Utica") similarly moves to renew its original motion for summary judgment, and, upon renewal, seeks a grant of summary judgment dismissing the complaint.

I. FACTUAL AND PROCEDURAL BACKGROUND:

A. The underlying "Avila" case:

On June 23, 1994, Juan Avila was seriously injured when he fell off a roof in the course of his employment with "Living Colors Painting Corp." d/b/a "Custom Colors Painting" ("Custom Colors"). At the time of his accident Avila was working on property owned by "The Estates at North Hills, II" ("Estates").

On or around August 10, 1995, Avila sued Estates in Supreme Court, Nassau County (Index #25823/85) seeking compensation for his injuries. See Exhibits B and E to Affirmation by

Edward P. Carroll, Esq., dated March 4, 2004, in Support of Defendant's Motion. On or around December 12, 1995, Estates commenced a third-party action against Custom Colors seeking common law indemnification (in that, according to Estates, Custom Colors had been the primarily negligent party), and invoking a "hold harmless" clause in the parties' contract (allegedly requiring Custom Colors to defend and indemnify Estates). Id. at Exhibit F.¹

At the time of Avila's accident, Custom Colors had a workers compensation and general liability insurance policy with SIF, and also maintained commercial liability coverage with defendant Utica. See Exhibit G to Affirmation in Support of Plaintiff's Motion by Michael M. Horowitz, Esq., dated February 19, 2004. The Utica policy contained an "exclusion," as follows:

8. We do not pay for:
 - a. bodily injury to an employee of an insured if it occurs in the course of employment;

Exclusion 8 applies where the insured is liable either as an employer or in any other capacity; or there is an obligation to fully or partially reimburse a third person for damages arising out of paragraph[] 8a.... above.

Utica's "disclaimer" based on the foregoing exclusion will be discussed a greater length below.

Pursuant to the terms of its insurance contract with Custom Colors, SIF assumed the defense of Estates as well as of its insured. After summary judgment had been granted to plaintiff against Estates, and to Estates for common law indemnification against Custom Colors, on or around December 10, 1999, SIF settled the action with Avila for \$450,000, and waived its statutory lien in the amount of \$81,250. Attorneys' fees for the defense allegedly amounted to \$52,918.

B. The instant declaratory judgment action:

¹Under current law, this entire matter would be rendered academic by Workers' Compensation Law §11.

On or around April 10, 2000 SIF sued Utica for its alleged 50% share of the foregoing settlement and defense expenses. See Exhibit A to Horowitz Affirmation in Support. SIF sought a declaratory judgment that Utica is obligated to pay SIF \$265,625, representing half of the Avila settlement, plus \$19,250, or its moiety of the Avila defense costs. In a separate cause of action, SIF charged that Utica was estopped to deny coverage under the policy, and had waived any defense,

{i}nsofar as defendant issued a disclaimer which was not [set] forth in clear and unmistakable language, which was subject to varying reasonable interpretations, and did not clearly apply to the facts of the Avila action, said disclaimer was ambiguous, unclear and non-specific, therefore defendant failed to effectively disclaim its obligations under the policy.

Id.

The ensuing motion in late 2002 by Utica for summary judgment and cross-motion by SIF focused, ultimately, on the adequacy and timeliness of Utica's disclaimer.

In its Decision and Order dated March 12, 2003, this Court, in denying summary judgment to both sides, ruled that the only question of fact left unresolved was whether Utica's January 26, 1996 letter to Custom Colors -- disclaiming coverage on the ground, inter alia, that its policy, by its express terms, did not cover "bodily injury to an employee of an insured [sustained] in the course of employment" -- "was late at all, and if so, to what extent. Thus, a triable issue of fact exists as to the timeliness of Utica's disclaimer." See Decision, Exhibit A to Carroll Affirmation in Support.

Except for the "timeliness" issue, the Court expressly ruled that Utica's "employee" exclusion is applicable to the facts of the Avila case; that Utica's disclaimer letter of January 26, 1996 was not vague or misleading, even though it incorrectly stated that Utica's policy was not in

effect at the time of the accident; and that the record established that the January 26, 1996 letter had been mailed.

II. THE PARTIES' CURRENT MOTIONS TO RENEW AND FOR SUMMARY

JUDGMENT:

A. SIF's Motion:

Relying on selected testimony from a recently-taken deposition of Utica Claims Examiner Jeffrey Mountz, SIF seeks essentially to reargue a number of already-decided issues. For example, SIF rehashes its argument that Utica's January 26, 1996 disclaimer letter was rendered invalid by its mistaken assertion -- in addition to the otherwise accurate announcement that the "employee" exclusion vitiated coverage -- that its policy was not yet in effect on the date of Avila's accident. SIF additionally reiterates that the "employee exclusion" was not "fully and accurately" set forth in the January 26th letter because the letter failed to fully quote, along with the actual exclusion, the definition of "incidental contract." See Exhibit I to Horowitz Affirmation in Support. As before, SIF again urges that Utica is estopped from denying coverage because it did not also send a "timely" and "proper" disclaimer to "Estates" -- an additional "claimant" under Insurance Law §3420(d).

Counsel's sole argument addressed to the "timeliness of the disclaimer" issue -- the only actual issue remaining in the case -- quotes Mr. Mountz's deposition testimony to the effect that his predecessor, Utica Claims Examiner Susan Engelbrekt Wheaton -- who had mailed Utica's January 26th, 1996 disclaimer letter to Custom Colors -- had left Utica's employ by the time Mountz was hired.² By dint of some very clever if dishonest ellipses, in which significant

²Counsel neglects to mention that Susan Engelbrekt Wheaton has since been re-hired as a Claims Examiner by Utica.

omissions in the testimony are not indicated in his quoted text, counsel contrives to make it appear that Mr. Mountz's admitted ignorance of certain procedures followed by Engelbrekt in 1996 (e.g., under what circumstances she would have requested copies of pleadings, would have discussed a case with the broker, etc.) contradict Mountz's averment in his original affidavit of August 5, 2002 that the presence of Utica's January 26th letter in his file indicated to him that, in conformity with Utica's usual practice, the original had been mailed out in the regular course of business in response to a notice of claim. See Mountz deposition testimony, Exhibit I to Horowitz Affirmation in Support, at 11, 38-42.

The Court concludes that SIF has presented no "new facts not offered on the prior motion that would change the prior determination." CPLR 2221(e)(2). The only novelties in SIF's papers are distortions and contrivances by counsel. Indeed, SIF's motion is essentially one to reargue, although the time to bring such a motion has long expired, and counsel in any event fails to identify any "matter[] of fact or law allegedly overlooked or misapprehended by the Court in determining the prior motion." CPLR 2221(d)(2), (3). Accordingly, SIF's motion is denied.

B. Utica's Motion:

As the Court wrote in Varsity Transit, Inc. v. Board of Education of the City of New York, 300 A.D.2d 38, 39 (1st Dept. 2002), where defendant brought on a second summary judgment motion after the conclusion of discovery without benefit of "newly discovered evidence":

Exceptions are permitted to the rule against successive summary judgment motions not only when evidence has been newly discovered since the prior motion (a circumstance concededly not obtaining here), but also when 'other sufficient cause' for the subsequent motion exists (see Freeze Right Refrig. & A.C. Servs. v. City of New York, 101 AD2d 175, 180 [1st Dept. 1984]). Here, sufficient cause to except to the rule exists inasmuch as the record, clarified in the wake of A.C.

Transportation (supra) demonstrates that the matter can be further disposed of without burdening the resources of the court and movants with a plenary trial [cases omitted; emphasis supplied].

Claims Examiner Susan Engelbrekt Wheaton, who has been re-employed by Utica, now submits an Affidavit, dated February 24, 2004, in which she avers that her review of Utica's Avila file reveals that Utica received its first notice of Avila's claim from its insured, Custom Colors, on January 16, 1996. See Sansol Industries, Inc. v. 345 East 56th Street Owners, 276 A.D.2d 370 (1st Dept. 2000); Santini v. Alexander Grant & Co., 272 A.D.2d 271 (1st Dept. 2000). According to Wheaton's assessment, as well as an updated affidavit from Jeffrey Mountz, this first notice of Avila's claim arrived in the form of a facsimile message from A.C. Edwards, Inc., the insurance broker for the insured. Attached to that message was an ACORD form known as "General Notice of Occurrence/Claim," which identified the insured and supplied the time and place of the occurrence. Also accompanying the Edwards facsimile was a letter from counsel for the injured plaintiff addressed to the insured, dated January 4, 1996, which identified the injured plaintiff as an employee of the insured by requesting a copy of the injured plaintiff's entire employment file and by providing an authorization for the release of his employment records. Both Claims Examiners agree that Utica's files confirm that on January 26, 1996 – i.e., ten days after receipt of the above-described facsimile package – Utica issued its disclaimer letter, specifically disclaiming coverage on the basis that plaintiff was an employee of the insured, and quoting the exact language of the applicable exclusion. The Court finds that, as a matter of law, ten days is a "reasonable" period within which to issue a written disclaimer under Insurance Law §3420(d). See, e.g., Travelers Ins. Co. v. Volmar Construction Co., Inc., 300 A.D.2d 40 (1st Dept. 2002) (disclaimer within 14 days timely as a matter of law); Dryden Mutual Ins. Co. v.

Greaser, 269 A.D.2d 792 (4th Dept. 2000) (disclaimer sent in 27 days timely as a matter of law).

On the instant, post-disclosure applications, SIF has demonstrated that even with full discovery in hand, it has no evidence to refute Utica's showing that its written disclaimer was timely.

Finally, there is no merit to SIF's additional contention that Utica was required to provide separate "timely" notice to Estates. See Ringel v. Blue Ridge Ins. Co., 293 A.D.2d 460, 462 (2d Dept. 2002). Notwithstanding that subsequent "timely notices" were not required, the record reflects that upon being notified of additional potential claimants on February 28, 1996, Utica responded by sending its disclaimer to Estates' insurer and attorneys within 13 days.

Accordingly it is

ORDERED that the motion by plaintiff SIF for renewal, and, upon renewal, for summary judgment, is denied in its entirety; and it is further

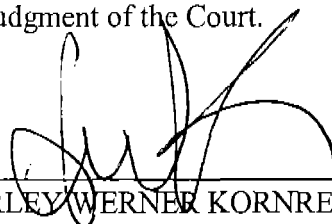
ORDERED that the motion by defendant Utica for renewal, and, upon renewal, for summary judgment, is granted; and it is further

ORDERED that the complaint is dismissed, with costs and disbursements to defendant as taxed by the Clerk of the Court upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

The foregoing constitutes the Decision, Order and Judgment of the Court.

Date: August 13, 2004
New York, New York



SHIRLEY WERNER KORNEICHH

FILED
AUG 25 2004
NEW YORK
COUNTY CLERK'S OFFICE