Sorbara Construction Corporation v AIU Insurance Company
2006 NY Slip Op 30440(U)
December 8, 2006
Supreme Court, New York County
Docket Number: 602317/05
Judge: Marcy S. Friedman

[*1]

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

PRESENT: MARCY S. FRIEDMAN Justice

PART 57

Sorbara Constr. Co.

-v-

AIU Ins. Co. et al.

INDEX NO. 602317/05

MOTION DATE

MOTION SEQ. NO. 001

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion & cross-motion for Dismiss - judgment

	PAPERS NUMBERED
Notice of Motion/ ~~Order to Show Cause — Affidavits — Exhibits~~ & cross-motion	1, 2
Answering Affidavits — Exhibits	3, 4, 5
Replying Affidavits	5, 6

Memo of Law M1

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion and cross-motions are

DECIDED IN ACCORDANCE WITH ACCOMPANYING DECISION/ORDER.

[illegible] JUDGMENT

[illegible] this judgment [illegible] the County Clerk and notice of [illegible] hereon. To obtain entry, counsel [illegible] must appear in person at the [illegible] Clerk's Desk (Room 141B).

Dated: 12/8/06

Mary S. Friedman J.S.C.

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

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK – PART 57

PRESENT: Hon. Marcy S. Friedman, JSC

SORBARA CONSTRUCTION CORPORATION,

Plaintiff,

- against -

AIU INSURANCE COMPANY, et al.,

Defendants.

Index No.: 602317/05

DECISION/ORDER

In this declaratory judgment action, plaintiff Sorbara Construction Corporation ("Sorbara") moves for summary judgment declaring that defendant AIU Insurance Company ("AIU") is required to defend and indemnify Sorbara with respect to all claims for indemnification, in excess of the limits of Sorbara's primary insurance policy, arising out of an underlying personal injury action entitled Datello v HRH Constr. Corp. (Supreme Court, New York County, Index No. 10055/01) ("Datello action"). AIU cross-moves for summary judgment declaring that AIU is not obligated to defend or indemnify Sorbara in the third-party action brought in connection with the Datello action.

The Datello action, which was commenced in January 2001, arose out of an accident that occurred in January 1998 at a construction site at 401 Chambers Street in Manhattan. Plaintiff Datello, an employee of Sorbara, sought damages under the Labor Law from HRH Construction Corp. ("HRH") and Rockrose Construction (River Terrace-GC), L.L.C. ("Rockrose"), the construction manager and general contractor, respectively, for the project. Under its subcontract

with Rockrose, Sorbara was required to procure insurance for HRH and Rockrose as additional insureds. Sorbara obtained a primary liability insurance policy with a policy limit of 1 million dollars from Investors Insurance Company ("Investors"). Sorbara also obtained an excess liability policy from AIU. Investors provided a defense to HRH and Rockrose in the Datello action. On or about August 22, 2003, Investors provided notice to AIU that HRH's and Rockrose's liability in the Datello action could exceed the 1 million dollar limit of the Investors policy. By letter of disclaimer dated September 22, 2003, AIU notified Investors that AIU "has no obligation to defend or indemnify Sorbara, HRH Construction Corp., HRH Corporation or Rockrose Development Corp., for the claims asserted in the Datello Action." The ground for the disclaimer was failure to satisfy the notice conditions of the AIU policy. In December 2004, HRH and Rockrose commenced a third-party action against Sorbara, which is still pending, for common law and contractual indemnification and failure to procure insurance. By letter dated December 30, 2004, Sorbara submitted the third-party complaint to AIU. By letter dated January 28, 2005, AIU disclaimed coverage for the claims asserted in the third-party complaint. The grounds for the disclaimer were that there was no coverage under the AIU policy by virtue of the retained limit provision and, alternatively, that Sorbara had failed to comply with the notice provisions of the policy as stated in the September 22, 2003 disclaimer.

The Datello action was settled on or about November 1, 2005 for the sum of 3.5 million dollars. Of this sum, Investors paid 1 million dollars, and the remaining 2.5 million dollars were paid by the insurers for HRH and Rockrose. In the instant action, Sorbara seeks a declaration that AIU is liable to indemnify it in the third-party action brought by HRH and Rockrose to recover the 2.5 million dollars.

In opposing Sorbara's summary judgment motion, AIU first argues that there is no coverage under its policy by virtue of the retained limit provision. The AIU policy has a limit of 10 million dollars for each occurrence and is excess to the 1 million limit of the underlying Investors policy and the applicable limits of any other underlying coverage to Sorbara. (Aff. Of Kevin Szczepanski In Opp. To Sorbara's Motion ("AIU Aff. In Opp.", ¶ 6.) The retained limit provision, Section III(E), provides in pertinent part: "We will be liable only for that portion of damages in excess of the Insured's Retained Limit which is defined as the greater of either: 1. The total of the applicable limits of the underlying policies listed in the Schedule of Underlying Insurance and the applicable limits of any other underlying insurance providing coverage to the Insured." It is conceded, for purposes of this motion, that the Investors policy is listed in the AIU Schedule of Underlying Insurance; that there is no evidence of any other underlying insurance for the Datello action; and that the retained limit of the AIU policy – that is, "the limit that must be paid before the AIU policy is potentially applicable" – is 1 million dollars. (AIU Aff. In Opp., ¶ 9.) AIU appears to argue that because the Datello action was settled on Sorbara's behalf for 1 million dollars, and the additional 2.5 million dollar payment was made on behalf of HRH and Rockrose, not Sorbara, the action was settled as to Sorbara within the 1 million dollar retained limit, and no further payment is available under the excess policy. AIU does not expressly argue, nor cite any authority for the proposition, that the AIU excess policy does not provide coverage for amounts, above the 1 million dollars paid by Investors, for which Sorbara may be obligated to indemnify HRH and Rockrose in the third-party action. The court finds AIU's argument as to non-coverage wholly unpersuasive.

To the extent that AIU abandons this argument in its reply and contends only that

coverage may not be implicated because there has been no determination in the third-party action as to whether Sorbara is obligated to indemnify HRH and Rockrose, this contention does not render the instant action premature. As AIU has not shown that there is "no possible factual or legal basis upon which it might eventually be obligated to indemnify [Sorbara] in the underlying [third-party action]," a declaration as to its obligations under the policy may be made but conditioned upon the ultimate determination in the third-party action of Sorbara's liability to HRH and Rockrose for contractual or common law indemnification. (See City of New York v Insurance Corp. of New York, 305 AD2d 443, 444 [2d Dept 2003].)

AIU further argues that Sorbara failed to comply with any of the notice provisions of the AIU policy which required Sorbara to give AIU timely notice of the occurrence and of the lawsuit. It is well settled that prompt notice is a condition precedent to coverage by both excess carriers and primary carriers, and that such insurers need not demonstrate prejudice in order to disclaim coverage in the event of non-compliance with prompt notice provisions in their policies. (American Home Assur. Co. v International Ins. Co., 90 NY2d 433 [1997] [excess]; Security Mut. Ins. Co. v Acker-Fitzsimons Corp., 31 NY2d 436 [1972] [primary].) "Absent a valid excuse, a failure to satisfy the notice requirement vitiates the policy." (Id. at 440.)

AIU's policy, Section VI(F), requires the named insured, Sorbara, to give notice to AIU "as soon as practicable" of an Occurrence which may result in a claim under this policy," and of a claim or suit "brought against any Insured that is reasonably likely to involve this policy."[1]

It is undisputed that Sorbara did not directly give any notice to AIU of the accident or the

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[1]Contrary to plaintiff's contention, AIU's September 22, 2003 disclaimer was based on non-compliance with both notice requirements.

Datello action until December 2004, when it forwarded to AIU copies of the third-party complaint brought against it by HRH and Rockrose. Moreover, AIU fails to demonstrate a valid excuse for its delay in giving notice.

Contrary to Sorbara's contention, the notice that it gave to AIU shortly after the accident, under a separate Worker's Compensation policy issued to Sorbara by AIU, is not notice to AIU under the policy issued to Sorbara by AIU for excess coverage. (See Nationwide Ins. Co. v Empire Ins. Group, 294 AD2d 546 [2d Dept 2002]; 57th St. Mgt. Corp. v Zurich Ins. Co., 208 AD2d 801 [2d Dept 1994].)

Nor may Sorbara establish timely compliance with its notice obligations based on its further contention that HRH's timely notice to AIU under a separate policy issued by AIU to HRH, satisfied Sorbara's notice obligations to AIU under Sorbara's policy. Sorbara cites no authority for the contention that insureds under separate policies are "similarly situated" such that "notice by one may be also deemed applicable to a claim by another." (See Delco Steel Fabricators, Inc. v American Home Assur. Co., 40 AD2d 647, 648 [1st Dept 1972], affd without op 31 NY2d 1014 [1973].) On the contrary, as Sorbara had an "independent obligation" to give notice under its own policy, it is "irrelevant whether [AIU] acquired actual knowledge of the occurrence" from another insured or from another source. (See American Mfrs. Mut. Ins. Co. v CMA Enters., Ltd., 246 AD2d 373 [1st Dept 1998]. See also Travelers Ins. Co. v Volmar Constr. Co., 300 AD2d 40 [1st Dept 2002] [citing Roofing Consultants, Inc. v Scottsdale Ins. Co., 273 AD2d 933 [4th Dept 2000], lv denied 95 NY2d 770].)

Finally, Sorbara argues that notice of the occurrence and lawsuit, given to AIU by HRH and Rockrose in their capacity as additional insureds under the AIU policy issued to Sorbara,

served as timely notice on Sorbara's behalf. On the above authority, Sorbara had an independent obligation to give notice.[2] Significantly, however, even if HRH and Rockrose's notice were sufficient to satisfy Sorbara's notice obligation, their notice was untimely as a matter of law. The Datello accident occurred in January 1998, but it was not until August 2003, more than 5 ½ years after the accident and 2 ½ years after the commencement of the Datello action, that HRH and Rockrose, through Investors, gave notice to AIU that their liability in the Datello action could exceed the 1 million dollar limit of the Investors policy.

This notice of the occurrence and the commencement of the lawsuit was unreasonable as a matter of law. "There may be circumstances, such as lack of knowledge that an accident has occurred or a reasonable belief in nonliability, that will excuse or explain delay in giving notice, but the insured has the burden of showing the reasonableness of such excuse." (White v City of New York, 81 NY2d 955, 957 [1993] [citing Security Mut. Ins. Co., 31 NY2d at 441.) Moreover, "where a reasonable person could envision liability, that person has a duty to make some inquiry." (White, 81 NY2d at 958.) Where notice to an excess carrier is in issue, "the focus is on when the insured reasonably should have known that the claim against it would likely exhaust its primary insurance coverage and trigger its excess coverage, and whether any delay between acquiring that knowlege and giving notice to the excess carrier was reasonable under the

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[2]City of New York v Continental Cas. Co. (27 AD3d 28 [1st Dept 2005], lv denied 2006 NY App Div Lexis 2996 [2006]) is not to the contrary. There, the insurer did not contest the additional insured's contention that the obligation to give notice rested on the named insured.

The court notes that there is authority that notice by one insured may constitute notice for another insured under the same policy where the interests of the insureds are not adverse. (See, e.g., Rosen v City of New York, 245 AD2d 202 [1st Dept 1997]; National Union Fire Ins. Co. v Insurance Co. of No. Am., 188 AD2d 259 [1st Dept 1992], lv denied 81 NY2d 709 [1993]. But see, e.g., Travelers Ins. Co. v Volmar Constr. Co., 300 AD2d 40, supra; Structure Tone, Inc. v Burgess Steel Prods. Corp., 249 AD2d 144 [1st Dept 1998]; American Mfrs. Mut. Ins. Co. v CMA Enters., Ltd., 246 AD2d 373, supra.)

circumstances." (Morris Park Contr. Corp. v National Union Fire Ins. Co., ___ AD3d ___, 822 NYS2d 616, 619 [2d Dept 2006].) Moreover, "[t]he burden is on the insured to show the reasonableness of its belief." (Id.)

In the instant case, as attested by Mario Sorbara, president of plaintiff, Sorbara made no inquiry as to the likelihood that its excess policy would be reached, but merely forwarded the Datello complaint against HRH and Rockrose to its primary carrier, Investors, for a defense. Mr. Sorbara thus stated that, after Sorbara tendered the defense, no one at Sorbara discussed the Datello action with Investors or counsel for HRH and Rockrose, and no one at Sorbara received any correspondence about the Datello action prior to AIU's September 22, 2003 letter disclaiming coverage under the excess policy. (Sorbara Aff., ¶ 7.) In fact, Sorbara ignored a letter from Investors, dated February 1, 2001, which advised it that the amount of the damages in the Datello lawsuit was unspecified, and that "[a]s a result, this lawsuit may have the potential to exceed the amount of insurance applicable under the above stated policy. Therefore, you may wish to notify your excess carriers of this lawsuit." While Sorbara correctly argues that the failure to plead an amount of damages may not trigger an obligation to investigate in every case, here, given Sorbara's filing of a Workers' Compensation claim and its consequent familiarity with the mechanism of the accident and, therefore, the potential seriousness of the injuries,[3] it was highly imprudent for Sorbara not to undertake any investigation to determine whether its excess coverage might be implicated. Sorbara's protracted delay in notifying AIU of the

[3]According to the report filed by Sorbara with the Workers' Compensation Board, Datello was injured when a 140 ton truck crane swung a load of scaffold while Datello was still standing on the load, the load swung into a fence, and Datello flipped off and fell to the ground. (Ex. J to Sorbara's Amended Notice of Motion).

occurrence and lawsuit was therefore unreasonable as a matter of law. (Compare Long Is. Lighting Co. v Allianz Underwriters Ins. Co., 24 AD3d 172, 173 [1st Dept 2005], appeal dismissed 6 NY3d 844 [2006] [untimely notice found as a matter of law where there was "no evidence that the timing of [the insured's] notice was the result of a deliberate determination" that there was a reasonable possibility that the excess policies would not be reached] with Morris Park Contr. Corp. v National Union Fire Ins. Co., 822 NYS2d 616, supra [triable issue of fact as to timeliness of insured's notice to excess insurer found, where insured was actively engaged in an investigation as to its potential liability].)

The court has considered Sorbara's remaining contentions and finds them to be without merit.

It is accordingly hereby ORDERED that Sorbara's motion for summary judgment is denied; and it is further

ORDERED that AIU's cross-motion for summary judgment is granted to the extent that it is

ORDERED and ADJUDGED that AIU has no obligation to defend or indemnify Sorbara in an underlying third-party action entitled Datello v HRH Constr. Corp. (Supreme Court, New York County, Index No. 10055/01).

This constitutes the decision and order of the court.

Dated: New York, New York
December 8, 2006

MARCY FRIEDMAN, J.S.C.