

City of New York v General Star Indemnity Co.

2006 NY Slip Op 30490(U)

July 3, 2006

Supreme Court, New York County

Docket Number: 401916/03

Judge: Michael D. Stallman

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

PART 5

Index Number : 401916/2003
CITY OF NEW YORK

vs
GENERAL STAR INDEMNITY
Sequence Number : 001
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE 5/1/06
MOTION SEQ. NO. _____
MOTION CAL. NO. 21

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

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...
Answering Affidavits — Exhibits _____
Replying Affidavits + Exhibits 1 & 2

PAPERS NUMBERED	
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	<u>1</u>
Answering Affidavits — Exhibits _____	<u>2</u>
Replying Affidavits + Exhibits <u>1 & 2</u>	<u>3</u>

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

"Is determined in accordance with the annexed memorandum decision and order."

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

HON. MICHAEL D. STALLMAN

Dated: 7/3/06



J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 5**

-----X
THE CITY OF NEW YORK,

Plaintiff,

-against-

GENERAL STAR INDEMNITY COMPANY,

Defendant.

-----X
HON. MICHAEL D. STALLMAN, J.:

Index No.: 401916/03

Decision, Order and Judgment

In this declaratory judgment action against General Star Indemnity Company, the City of New York seeks to obtain defense and indemnification, and reimbursement of the City's attorneys' fees and expenses incurred in defending and settling a tort action. The City moves pursuant to CPLR 3212 for summary judgment dismissing the complaint.

BACKGROUND

In September of 2000, non-party MVN Associates, Inc. entered into a contract (the contract) with the City's Department of Parks and Recreation for emergency stabilization of the piling and deck at a recreation center in Staten Island, New York. Under the contract, MVN agreed to obtain a commercial general liability policy to protect MVN and its contractors against claims for property damage and personal injury. In addition, MVN was to obtain protective liability and property damage insurance naming the City as an additional insured, in order to protect the City from any claims of property damage or personal injury arising from MVN's operations under the contract (MVN/General Star Contract, Art. 22, Exhibit 1 to Reply Affirmation, at 82). The contract also required MVN to obtain and maintain insurance for the City, as an additional insured, in the amounts outlined in Schedule A of the contract (*id.* at 377).

Pursuant to its agreement, MVN purchased a commercial general liability insurance policy, numbered 95AF0027E, from General Star for a period of 12 months from the inception date of April 28, 2001 (the policy). Non-party East Coast Diving, Inc. and MVN were listed as the named insureds under the policy. Both entities, East Coast and MVN, were listed under the policy as having the same business address, business description and rate schedule. General Star had insured East Coast and MVN since April 28, 1996. The original policy, numbered 95AF0027, had been updated yearly, with each progressive policy set apart by an ascending letter of the alphabet. Under Section I(A)(1)(a), the policy covers claims “that the insured becomes legally obligated to pay as damages because of ‘bodily injury’ or ‘property damage’ to which this insurance applies.”

Endorsement 008 to the policy, issued to East Coast Diving, Inc., pursuant to certificate number 95AF0027, and effective April 28, 1996, states that “[c]ach of the following is an insured under this insurance to the extent set forth below:

- A) The named insured shall be the organization stated in the declarations of this policy and;
- B) Anyone to whom a certificate of insurance has been issued under this policy;
- C) Any additional insured named by endorsement or certificate to this policy”

(Policy, Exhibit 2 to Reply Affirmation, at 59).

Endorsement 009 to the policy was also issued to East Coast Diving, Inc., pursuant to Certificate Number 95AF0027, and effective April 28, 1996. Endorsement 009, characterized as an “Additional Insured Blanket Form,” modifies the “Commercial General Liability Coverage Part and Owners” and the “Contractors Protective Liability Coverage Part” to include as insureds, “person(s) or organization(s) shown in the schedule as an insured” and “[a]ll certificate of insurance holders you have agreed to include as an insured prior to an ‘occurrence’ or offense” (*id.* at 60).

Endorsement 009 states that the “endorsement is invalid unless signed by an Authorized Representative of the Company” (id. at 60). The line requiring an authorized representative’s signature is blank, as are most of the endorsements pertaining to the April 28, 1996 policy (id. at 60, 51-70, 72-76). Multiple endorsements are attached to the policy; all are issued to East Coast Diving, Inc. for the year beginning April 28, 1996, and all are left unsigned, with the exception of one endorsement listing Consolidated Edison as an additional insured (id.).

The Certificate of Liability Insurance lists “The City of New York, Parks and Recreation” as a “certificate holder” and “additional insured,” within a box at the bottom of the certificate (Plaintiff’s Affirmation, Exhibit 6, Certificate of Liability Insurance).

In November of 2001, Glenn D. Rolph, a dock builder and employee of MVN, was injured by a fall during the course of his employment. In January and February of 2002, the Office of the Comptroller of the City of New York received two Notices of Claim filed on behalf of Rolph. On June 7, 2002, the City’s Law Department sent, by certified mail, a tender letter to MVN, notifying MVN of the Rolph Notices of Claim (June 7, 2002 Law Department Letter to MVN, Plaintiff’s Affirmation, Exhibit 8). At the same time, the tender letter of June 7, 2002 and the Rolph Notices of Claim, were copied to the claim manager at General Star (id.). MVN received the City’s tender letter on June 11, 2002, as evidenced by a United States Postal Service return receipt. On July 2, 2002, the City re-transmitted, by facsimile, its tender letter of June 7, 2002 to General Star.

On July 31, 2002, General Star responded to the City’s June 7, 2002 tender letter, notifying the City that it was declining coverage on the ground of late notice, and because it had not been contacted at any time by anyone on behalf of the City directly in regard to the Rolph Notices of Claim. In disclaiming coverage for the City, General Star asserted that, although Rolph’s accident

allegedly occurred in November of 2001, General Star had not received any notification until July 8, 2002, when it received the City's letter and Rolph's Notices of Claim, eight months later (Denial of Coverage Letter, Plaintiff's Affirmation, Exhibit 9). General Star further quoted that portion of the policy requiring that it be notified of claims "as soon as practical" (id.; see Policy, Exhibit 2 to Reply Affirmation, at 42).

In December of 2002, the City was served with a summons and complaint in the action entitled Rolph v City of New York, Civil Action No. 02-6420 (ED NY) (Rolph action). As General Star refused to defend the City in the Rolph action, the City's Law Department defended the action. In defending and settling the action in November of 2004, the City incurred the costs of litigation, including medical examinations, transcripts and other disbursements, plus attorneys' fees and paralegal expenses.

On July 16, 2003, General Star filed a notice of removal of the instant declaratory judgment action from this Court to the United States District Court for the Southern District of New York. On August 6, 2003, the City filed a motion for remand. On August 25, 2005, the federal court held that General Star's notice of removal was time-barred and granted the City's motion for remand and its request for its attorney's fees on the removal application. The court directed remand of the action to state court, and set a briefing schedule on the issue of the City's attorneys' fees. The City's application for attorney's fees was due by October 3, 2005, but it appears that the City did not submit a fee application to the federal court by that date.

The City here moves for summary judgment, pursuant to CPLR 3212, declaring that General Star had a duty to defend and indemnify the City in the Rolph action; requiring General Star to pay the City for its costs, including attorneys' fees and interest, incurred in defending the Rolph action

from June 7, 2002 to settlement; and requiring General Star to indemnify the City for the cost of the settlement, plus interest, from November 17, 2004. In addition, the City contends that General Star's disclaimer was untimely, and therefore invalid.

In response to the City's motion for summary judgment, General Star asserts that the City is not an additional insured under the insurance policy it provided to MVN, and that, notwithstanding its assertion of non-coverage, General Star had grounds for denying coverage due to the City's delay in notifying General Star of the occurrence of the claim.

I

“The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact” (Wolff v New York City Tr. Auth., 21 AD3d 956, 956 [2d Dept 2005], quoting Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 [1985]). The burden then shifts to the motion's opponent to “present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact” (Mazurek v Metro. Museum of Art, 27 AD3d 227, 228 [1st Dept 2006]; see also Zuckerman v City of New York, 49 NY2d 557, 562 [1980]). If there is any doubt as to the existence of a triable issue of fact, the motion for summary judgment must be denied (Rotuba Extruders v Ceppos, 46 NY2d 223, 231 [1978]; Grossman v Amalgamated Hous. Corp., 298 AD2d 224, 226 [1st Dept 2002]).

“[T]he party asserting that someone other than a named insured is an insured under the policy bears the initial burden of submitting proof in evidentiary form that the alleged insured is, in fact, an insured within the meaning of the policy” (Preferred Mut. Ins. Co. v Ryan, 175 AD2d 375, 378 [3d Dept 1991]; see also Thomson v Power Auth. of State of New York, 217 AD2d 495, 496 [1st

Dept 1995][party seeking declaration of coverage must first demonstrate the existence of coverage and the satisfaction of all conditions precedent, such as timeliness of notice, if provided for in the policy]).

Here, the evidence demonstrates that the City is an additional insured under the policy General Star provided to MVN. Thus, General Star had a duty to defend and indemnify the City in the Rolph action. The policy itself provides that “any additional insured” named by a certificate “is an insured under this insurance” (Policy, Exhibit 1 to Reply Affirmation, at 59). The Certificate of Liability Insurance clearly lists “The City of New York, Parks and Recreation” as a “certificate holder” and “additional insured” (Plaintiff’s Affirmation, Exhibit 6, Certificate of Liability Insurance).

Furthermore, a blanket additional insured form provides evidence of coverage (see Perez v Morse Diesel Intl., Inc., 10 AD3d 497, 498 [1st Dept 2004]; New York Univ. v Royal Ins. Co., 200 AD2d 527, 528 [1st Dept 1994]). Here, Endorsement 008 to the policy, effective on April 28, 1996, provides that, in addition to the named insured under the policy, anyone to whom a certificate of insurance had been issued under the policy, or any additional insured named by endorsement or certificate to the policy, is also an insured. As noted, the City is listed as a certificate holder and additional insured on the Certificate of Liability Insurance. Endorsement 009 modifies the policy to include as insureds, persons and organizations shown in the schedule as insured and all certificate of insurance holders agreed to prior to the occurrence.

General Star argues that because the endorsements are issued to East Coast Diving, Inc., and not MVN, and reflect an earlier policy between MVN and/or East Coast Diving, Inc. and General Star, the endorsements are invalid as to the present policy at issue. However, “in construing an

endorsement to an insurance policy, the endorsement and policy must be read together, and the words of the policy remain in full force and effect except as altered by the words of the endorsement” (County of Columbia v Continental Ins. Co., 83 NY2d 618, 628 [1994]). Here, the endorsements must be read with the policy, which itself covers MVN and/or East Coast Diving, Inc. The schedule of endorsements to the policy in effect at the time of Rolph’s injuries lists an “Additional insured – Blanket Form,” which was Endorsement 009. The fact that Endorsement 009 refers to a policy in effect at an earlier time is not sufficient to raise an issue of fact as to whether Endorsement 009 was intended to be the “Additional Insured – Blanket Form” attached to the policy at issue, given that the original policy, numbered 95AF0027, was updated yearly with each progressive policy set apart by an ascending letter of the alphabet.¹

II

“The duty of an insurer to defend its insured arises whenever the allegations within the four corners of the underlying complaint potentially give rise to a covered claim, or where the insurer ‘has actual knowledge of facts establishing a reasonable possibility of coverage’” (Frontier Insulation Contr., Inc. v Merchants Mut. Ins. Co., 91 NY2d 169, 175 [1997][citation omitted]). If the allegations in the complaint are “even potentially within the language of the insurance policy,” the insured must defend the insured (Massena v Healthcare Underwriters Mut. Ins. Co., 98 NY2d 435, 443 [2002]; see also Fitzpatrick v American Honda Motor Co., 78 NY2d 61, 65 [1991]; Syvertsen v Great Am. Ins. Co., 267 AD2d 854, 856 [3d Dept 1999][“the duty to defend will be found whenever the allegations in the complaint against the insured fall within the scope of the risks taken by the insurer, irrespective of how false or groundless those allegations might be (internal quotation

¹ Thus, 95AF0027E indicates the fifth renewal of the policy.

marks omitted”)).

No duty to defend lies when the party asserting coverage is not an insured under the policy, or where claims are not covered by the policy (Seavey v James Kendrick Trucking, Inc., 4 AD3d 119, 119 [1st Dept 2004]; National General Ins. Co. v Hartford Acc. & Indem. Co., 196 AD2d 414, 415 [1st Dept 1993]). “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 wholly within a policy exclusion” (City of New York v Insurance Corp. of New York, 305 AD2d 443, 443-444 [2d Dept 2003]; see also Frontier Insulation Contr., Inc., 91 NY2d at 175).

Here, the claim in the Rolph action falls squarely within the coverage provided by General Star. The complaint in the Rolph action, which named the City as a defendant, states that Rolph was an employee of MVN on the date of his accident, and that he was injured by a fall during the course of his employment as a construction worker. Thus, because the claim falls squarely within the coverage provided by General Star to the City as an additional insured, and the allegations do not fall within a policy exclusion, General Star is liable to the City for its costs incurred in defending the Rolph action.

III

General Star’s disclaimer of liability was untimely as a matter of law, and therefore invalid. When the policy in question would otherwise cover a particular occurrence, but for an exclusion in the policy, Insurance Law § 3420 (d) requires the insurer to “give written notice as soon as is reasonably possible of such disclaimer of liability or denial of coverage to the insured” When the basis of disclaimer is the insured’s late notice of the claim, courts have interpreted the statute to

require an insurer to give written notice of disclaimer “after it first learns of the accident or of grounds for disclaimer of liability” (Firemen’s Fund Ins. Co. of Newark v Hopkins, 88 NY2d 836, 837 [1996]; 79th Realty Co. v Wausau Ins. Companies, 7 AD3d 507, 508 [2d Dept 2004]; Macari v Nationwide Mut. Ins. Co., 296 AD2d 384, 384-385 [2d Dept 2002]). The insurer’s failure to disclaim coverage within a reasonable time “precludes effective disclaimer” (Firemen’s Fund Ins. Co. of Newark, 88 NY2d at 837; Hartford Ins. Co. v Nassau County, 46 NY2d 1028, 1029 [1979]).

This rule applies even if the insured has failed to provide the insurer with timely notice of claim, the ground that General Star has asserted in disclaiming coverage for the City in the instant case. “An ‘insurer’s failure to provide notice as soon as reasonably possible precludes effective disclaimer, even [where] the policyholder’s own notice of the incident to its insurer is untimely.’” (Matter of New York Cent. Mut. Fire Ins. Co. v. Aguirre, ___ NY3d ___, 2006 NY Slip Op 04749 [June 13, 2006], quoting First Fin. Ins. Co. v Jetco Contr. Corp., 1 NY3d 64 [2003]). Thus, it is not relevant that the City itself delayed for six months before notifying General Star of Rolph’s claims against the City.

General Star did not send the City its letter of disclaimer until July 31, 2002, fifty four days after the City tendered, by certified registered mail, receipt requested, the Notices of Claim filed in the Rolph action to MVN by a letter dated June 7, 2002, with copies to General Star. General Star acknowledges receipt only of the City Law Department’s re-transmitted letter received by General Star on July 8, 2002. However, it fails to raise a triable issue of fact that it did not receive the City’s letter dated June 7, 2002. “Generally, proof of proper mailing gives rise to a presumption that the item was received by the addressee” (Residential Holding Corp. v Scottsdale Ins. Co., 268 AD2d 679, 680 [2d Dept 2001]; see also Badio v Liberty Mut. Fire Ins. Co., 12 AD3d 229 [1st Dept 2004]).

General Star does not rebut the presumption of receipt, given that the return receipt evidences that MVN received the City's letter on June 11, 2002. See Reply Mem, Ex 3.

Thus, even if an issue of fact exists as to whether the City's notification of the occurrence was unreasonably delayed, General Star was still required, as a matter of law, to give notice of disclaimer as soon as possible after learning of Rolph's alleged accident. By waiting 54 days before disclaiming coverage, General Star failed to give notice of disclaimer of liability as soon as possible after learning about the alleged accident (see First Fin. Ins. Co., 1 NY3d at 68-69; see Hartford Ins. Co., 46 NY2d at 1029 [insurer's delay of two months in disclaiming coverage on the grounds of late notice held unreasonable as a matter of law]; 2833 Third Ave. Realty Assocs. v Marcus, 12 AD3d 329, 329 [1st Dept 2004][insurer's delay of 37 days in disclaiming coverage unreasonable as a matter of law, even though plaintiff failed to provide timely notice of claim]; 79th Realty Co., 7 AD3d at 508; West 16th St. Tenants Corp. v Public Serv. Mut. Ins. Co., 290 AD2d 278, 279 [1st Dept 2002][insurer's delay of 30 days unreasonable as a matter of law, even though plaintiff waited five months before notifying insurer of occurrence]; City of New York v Northern Ins. Co. of New York, 284 AD2d 291, 292 [2d Dept 2001][insurer's two-month delay in disclaiming coverage unreasonable as a matter of law, even though additional insured did not notify insurer of occurrence for 16 months]).

In addition, a delay in disclaiming coverage is "unreasonable as a matter of law" when the basis for denying coverage "was or should have been readily apparent" before the onset of the delay (id. at 69; see Uptown Whole Foods, Inc. v Liberty Mut. Fire Ins. Co., 302 AD2d 592, 593 [2d Dept 2003][when insurer disclaimed coverage on the ground of late notice, court held that insurer's 57-day delay in disclaiming coverage was unreasonable as a matter of law, as the basis for the disclaimer

was obvious on the face of the complaint]; West 16th St. Tenants Corp., 290 AD2d at 279 [court held that a delay in disclaiming coverage was unreasonable as a matter of law, as the sole ground on which defendant disclaimed coverage was obvious from the face of the complaint]).

Acknowledging only the receipt of the City's re-transmitted letter of July 8, 2002, General Star disclaimed coverage on the ground of late notice by the City, quoting the policy, which requires that General Star be notified of claims "as soon as possible." As such, the primary reason for General Star's denial of coverage should have been "readily apparent" upon receipt of the City's notice of the accident (*see West 16th St. Tenants Corp.*, 290 AD2d at 279).

IV.

General Star is also liable for indemnifying the City for the amount of the settlement (*see City of New York v Insurance Corp. of New York*, 305 AD2d at 443-444). Rather than assuming the City's defense, General Star chose to disclaim coverage at its peril. "An insurer who breaches its obligation to defend subjects itself to liability for the amount of any reasonable settlement made by the insured" (*Rochester Woodcraft Shop, Inc. v Gen. Acc. Fire and Life Assur. Corp.*, 35 AD2d 186, 188 [4th Dcpt 1970]). Here, General Star does not challenge the reasonableness of the City's settlement.

However, the City has not proven that it is here entitled to recover its costs incurred in opposing General Star's untimely removal of this action to federal court. The federal court provided the City with the opportunity to submit its application for attorneys' fees to the federal court by October 3, 2005. The City apparently failed to make its application for attorneys' fees to the federal court within the specified period. Therefore, the City's request for attorneys' fees is denied without prejudice to an application in federal court (*see Bryant v Britt*, 420 F3d 161, 165 [2d Cir 2005]

[a district court has jurisdiction to resolve a motion for fees and costs under § 1447(c) after a remand order has issued]).

CONCLUSION

General Star is liable to the City for its reasonable counsel fees and necessary expenses incurred in defending itself in the Rolph action, and for the cost of settlement in that matter (see George Muhlstrock & Co. v American Home Assur. Co., 117 AD2d 117, 126 [1st Dept 1986][breach of covenant to defend results in liability to the insured for the reasonable costs of counsel fees and necessary expenses, in addition to the amount of settlement, if not unreasonable]).

For the foregoing reasons, it is hereby

ORDERED that the motion of the City is granted, except as to the City's application for its counsel fees in federal court respecting removal and remand of this action, which is denied without prejudice; and it is further

ADJUDGED AND DECLARED that defendant General Star Indemnity Company is obligated under the policy to defend the City of New York in Rolph v City of New York, Civil Action No. 02-6420 (ED NY) and to indemnify the City for the amount of settlement in that action, plus reasonable counsel fees and actually incurred and necessary expenses, costs and disbursements; and it is further

ORDERED that the issue of the amount of the City's reasonable counsel fees incurred in Rolph v City of New York, and necessary expenses, costs and disbursements is severed and referred to a Special Referee to Hear and Determine.

This opinion constitutes the decision, order and judgment of the Court.

Dated: July 3, 2006
New York, New York

ENTER:

J.S.C.

HON. MICHAEL D. STALLMAN

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerks Desk (Room 141B).