

**Gotham Construction Co., LLC v United National
Insurance Co.**

2006 NY Slip Op 30509(U)

May 26, 2006

Supreme Court, New York County

Docket Number: 601557/04

Judge: Marylin G. Diamond

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

PRESENT: HON. MARYLIN G. DIAMOND

PART 48

Justice

GOTHAM CONSTRUCTION COMPANY, LLC and
METROPOLITAN PARTNERS II, LLC.,

Plaintiffs,

- v -

UNITED NATIONAL INSURANCE COMPANY and
D.J.M. REBAR, INC.,

Defendants.

And Related Third-Party Action.

INDEX NO. 601557/04

MOTION DATE

MOTION SEQ. NO. 001

MOTION CAL. NO.

FILED

JUN 05 2006

COUNTY CLERK'S OFFICE
NEW YORK

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that: This is a declaratory judgment action in which the plaintiffs Gotham Construction Company, LLC and Metropolitan Partners II, LLC seek an order declaring that defendant United National Insurance Company owes them a complete defense and indemnification with respect to an underlying lawsuit which was brought against them in this court by an individual named Justin O'Donell (*O'Donell v. Gotham Constr. Co., LLC et al.*, NY Co. Index No. 116006/03).

The underlying action was commenced in September, 2003. Mr. O'Donell, an employee of defendant/third-party plaintiff D.J.M. Rebar, Inc., seeks to recover damages for personal injuries which he allegedly suffered on August 8, 2003 while he was working at a site where a 9-story residential building was being constructed. Metropolitan was the owner of the premises and Gotham was the construction manager. Gotham had entered into a construction contract with the Cosner Construction Company to perform certain concrete work at the site. In turn, Cosner entered into a subcontract with Rebar for the installation of steel in connection with the concrete work.

The Steadfast Insurance Company had issued a commercial general liability policy to Gotham and Metropolitan which was in effect at the time of the accident and which covered claims arising out of work performed at the construction site where Mr. O'Donell was allegedly injured. Under its contract with Cosner, Rebar was required to obtain a commercial general liability policy covering its work at the project and to have Metropolitan and Gotham named as additional insureds. In attempting to comply with this requirement, Rebar requested its broker, third-party defendant Professional Risk Managers ("PRM"), to obtain such insurance. On June 16, 2003, PRM issued a Certificate of Insurance which indicated that a commercial general liability policy which was already in effect between Rebar and defendant United National Insurance Company had been extended to Metropolitan and Gotham as additional insureds.

By letter dated November 19, 2003 and received on November 24, 2005, Steadfast tendered the defense of Metropolitan and Gotham in the underlying action to United National. By letter dated January 13, 2004, United National rejected the tender on the ground that its policy with Rebar contained a "Residential Projects Exclusion" which excluded insurance coverage for work performed on projects involving the construction of residential buildings such as the building where Mr. O'Donell was injured.

Thereafter, the plaintiffs brought this declaratory judgment action. In addition to the declaratory relief which they seek against United National, the plaintiffs also seek an order declaring, in the event the court should determine that they are not covered under the United National policy, that Rebar breached its contractual obligation to procure insurance on their behalf and that Rebar is therefore contractually obligated to indemnify them for all expenses which they incur in the underlying action. In its answer, Rebar

asserted a cross claim against United National for the costs they incur in having to defend this declaratory judgment action. In addition, Rebar commenced a third-party action against PRM asserting that PRM negligently failed to procure a policy naming Metropolitan and Gotham as additional insureds with respect to the construction project at which Mr. O'Donell was injured.

The plaintiffs have now moved for summary judgment granting them the declaratory relief sought in the complaint and setting the matter down for an inquest to determine the amount United National must reimburse them for their defense costs to date. PRM has cross-moved for summary judgement dismissing the third-party complaint and all other claims which have been asserted against it. Rebar has cross-moved for summary judgment declaring that United National is obligated to reimburse it for the defense costs it has incurred in this declaratory judgment action and setting the matter down for an assessment of damages.

Discussion

1. Plaintiffs' Motion for Summary Judgment - On their motion for summary judgment, the plaintiffs have submitted documentation establishing that Rebar was contractually obligated to procure insurance naming them as additional insureds with respect to any claims arising out of work which Rebar performed pursuant to its contract with Cosner and that the claims asserted against them in the underlying action arose out of Rebar's work. In opposing the plaintiffs' motion, United National contends, as it did in its letter disclaiming coverage, that since the underlying accident occurred as part of the construction of a residential building, it falls within the policy's Residential Projects Exclusion and is not therefore a covered claim. In reply, the plaintiffs argue that United National's disclaimer of coverage was untimely and that United National is therefore precluded under Insurance Law § 3420(d) from denying coverage on the basis of this exclusion. The court agrees.

Under section 3420(d), an insurer which wishes to disclaim liability or deny coverage for death or bodily injury must "give written notice as soon as is reasonably possible of such disclaimer or denial of coverage." A failure by the insurer to give such prompt notice precludes an effective disclaimer or denial. *See Hartford Ins. Co. v. County of Nassau*, 46 NY2d 1028, 1029 (1979). This provision only applies to an insurer's denial of liability based upon a policy exclusion without which the claim would otherwise be covered. *See Matter of Worcester Ins. Co. v. Bettenhauser*, 95 NY2d 185, 188-89 (2000). The question of whether a notice of disclaimer has been sent "as soon as is reasonably possible" is usually a question of fact which depends on all the circumstances, including the length of the delay and the reason for the delay. *See Hartford Ins. Co. v. County of Nassau*, 46 NY2d at 1030. One of the justifiable reasons for the delay is that the insurer needed to obtain additional facts in order to determine whether the claim is covered. *See Mount Vernon Fire Ins. Co. v. City of New York*, 236 AD2d 296, 297 (1st Dept 1997). Where the insurer fails to provide any valid justification for the delay, a delay of even one month is, as a matter of law, unreasonable. *See Hartford Ins. Co. v. County of Nassau*, 46 NY2d at 1030; *Bovis Lend Lease LMB, Inc. v. Royal Surplus Lines Ins. Co.*, 27 AD3d 84 (1st Dept 2005).

Here, United National has not made any attempt to justify its 50-day delay in disclaiming coverage of the underlying accident. Indeed, it has not even suggested that the letter tendering the defense of Metropolitan and Gotham did not provide it with sufficient facts to disclaim coverage on the basis of the Residential Projects Exclusion. Rather, citing *Bovis Lend Lease LMB, Inc. v. Royal Surplus Lines Ins. Co.*, 27 AD3d at 84, it argues that section 3420(d) is inapplicable since the tender letter was from an insurer and the statute does not require a prompt response to claims asserted by other insurers.

It is well settled that section 3420(d) is inapplicable to a request for pro rata contribution between coinsurers. *See Tops Markets, Inc. v. Maryland Casualty*, 267 AD2d 999, 1000 (4th Dept 1999); *Thomson v. Power Auth of State of New York*, 217 AD2d 495, 497 (1st Dept 1995). In *Bovis Lend Lease LMB, Inc. v. Royal Surplus Lines Ins. Co.*, 27 AD3d at 84, the First Department extended this rule to an insurer's request for a full defense and indemnity. However, in doing so, the court distinguished between an insurer's own claim for a defense and indemnity and a letter which an insurer writes on behalf of its

insured to another insurer asking that the insured be provided with a defense and indemnity. Indeed, in *Bovis*, the First Department specifically ruled that the disclaimer letter which was issued in response to an insurer's tender of a defense and indemnity on behalf of its two insureds was untimely under section 3420(d) and that the issue of whether the disclaimer letter was substantively valid therefore need not be reached with respect to the two insureds. *Id.* at 84.

Here, it is clear that Steadfast's tender letter of November 19, 2003 was sent on behalf of Metropolitan and Gotham seeking coverage for them with respect to the underlying action. Indeed, unlike *Bovis*, where one of the plaintiffs seeking declaratory relief was an insurer, the only plaintiffs in this action are Metropolitan and Gotham, who seek not only a declaration that the United National policy affords them primary coverage for the claims asserted against them in the underlying action, but also monetary relief covering the costs which they have incurred in the underlying action. Neither Steadfast nor any other insurer has asserted a claim against United National.

The court therefore concludes that United National's disclaimer letter was untimely and that, as a result, United National is precluded under section 3420(d) from disclaiming coverage on the basis of the Residential Projects Exclusion. The court will therefore not address the issue of whether this exclusion is otherwise applicable to the claims asserted against Metropolitan and Gotham in the underlying action.

As already noted, the application of section 3420(d) is limited to an insurer's denial of liability based upon a policy exclusion without which the claim would otherwise be covered. *See Matter of Worcester Ins. Co. v. Bettenhauser*, 95 NY2d at 188-89. Thus, a disclaimer pursuant to section 3420(d) is unnecessary when a claim falls outside the scope of a policy's coverage portion since "requiring payment of a claim upon a failure to timely disclaim would create coverage where it never existed." *Id.* at 188-89. As the First Department has stated, coverage cannot be provided on liability for which insurance was not purchased. *See Holman v. Transamerica Ins. Co.*, 183 AD2d 589, 591 (1st Dept 1992).

In this respect, United National also argues that it never actually issued an effective policy covering Metropolitan and Gotham as additional insureds. Under the policy at issue, additional insured coverage is afforded only to those entities for which a Certificate of Insurance has been issued that is on file with the company. United National has submitted affidavits from one of its Claims Examiners and from the President of its insurance agent, Lambin Insurance Services, Inc., stating that no Certificate of Insurance naming Metropolitan and Gotham as additional insureds under the Rebar policy has ever been on file with the company. They assert that PRM is neither a United National agent nor a United National broker, was not authorized to issue Certificates of Insurance for United National policies, that a Certificate of Insurance issued by an unauthorized broker must first be submitted to and approved by Lambin before it is considered to be on file and that the Certificate of Insurance at issue herein was never submitted to Lambin for review and approval. Plaintiffs dispute this assertion, pointing out that, in response to their discovery demands, United National produced Lambin's underwriting file which contained a copy of the Certificate of Insurance issued by PRM. United National responds by claiming that the Certificate was merely part of the package which it received from Steadfast in its tender request and was never actually submitted by PRM for approval.

Clearly, there is a question of fact as to whether the Certificate of Insurance at issue was on file with United National at the time of Mr. O'Donnell's accident. There is also a question of fact as to whether PRM had actual or apparent authority to bind United National by a certificate of insurance. *See Shaw Temple A.M.E. Zion Church v. Mount Vernon Fire Ins Co.*, 199 AD2d 374, 376 (2nd Dept 1993); *Meade v. Finger Lakes-Seneca Cooperative Ins. Co.*, 184 AD2d 952, 953 (3rd Dept 1992). In view of these factual issues, the plaintiffs' motion for summary judgment must be denied.

2. PRM's Cross-Motion for Summary Judgment - In its third-party complaint, Rebar alleges that if it is found herein to have breached its contractual obligation to procure an insurance policy covering Metropolitan and Gotham as additional insureds, it is entitled to recover from PRM the damages which it will have incurred as a result of the breach since the breach was attributable to PRM's negligence in

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failing to procure an appropriate policy. In cross-moving for summary judgment dismissing the third-party complaint, PRM argues that Rebar was fully aware of the fact that its policy with United National contained a Residential Projects Exclusion and, in fact, signed a written acknowledgment in which it warranted that neither it nor anyone on its behalf would perform any residential work. PRM contends that by signing this warranty, Rebar ratified the policy and is barred from now seeking to hold PRM liable for the fact that the policy contained a Residential Projects Exclusion.

In view of this court's finding herein that United National is precluded from relying on the Residential Projects Exclusion as the basis for its disclaimer of coverage with respect to Metropolitan and Gotham in the underlying action, the issue of whether PRM was negligent contains this exclusion is moot. However, as already discussed, there is an issue of fact as to whether PRM was authorized to issue the Certificate of Insurance naming Metropolitan and Gotham as additional insureds and whether it ever submitted the Certificate to United National or Lambin Insurance for review and approval. In view of this factual issue, PRM's cross-motion for summary judgment must be denied.

3. Rebar's Cross-Motion for Summary Judgment - In its answer, Rebar has asserted cross claims against United National for indemnification for the expenses it incurs in defending against this declaratory judgment action and in resolving the underlying action. In cross-moving for summary judgment on these cross claims and on the issue of whether Metropolitan and Gotham are entitled to coverage by United National in the underlying action, Rebar adopted the plaintiffs' argument that United National's disclaimer based on the Residential Projects Exclusion was untimely and thus ineffective. In doing so, it suggests that its interests are the same as the plaintiffs' interests.

It is true that Rebar's interests are the same as plaintiffs' interests with respect to the issue of whether the plaintiffs are entitled to liability coverage by United National in the underlying action since a declaratory judgment to that effect would eliminate the plaintiffs' claims against Rebar for breach of its contractual obligation to procure insurance on their behalf. Insofar as D.J.M's cross-motion seeks such a declaratory judgment, it must be denied for the same reason that the plaintiffs' motion was denied herein since there is an issue of fact as to whether Metropolitan and Gotham were indeed additional insureds under the policy which United National issued to Rebar.

However, insofar as Rebar itself seeks indemnification from United National, its interests are separate from the plaintiffs' interests, as is its burden of proof. Unlike the plaintiffs, there is no question that United National issued a liability policy to Rebar. Moreover, unlike the plaintiffs, there is a question of fact as to whether United National timely disclaimed coverage on any claim filed by Rebar. Indeed, there is nothing in the record which indicates when, if ever, Rebar itself tendered a defense to United National with respect to the underlying action or the present declaratory judgment action. Under the circumstances, Rebar's cross-motion must also be denied with respect to the relief sought in its cross claims against United National.

Accordingly, the plaintiffs' motion for summary judgment is hereby denied, as are the cross-motions for summary judgment by PRM and Rebar.

The parties shall appear before the court in Room 412, 60 Centre Street, New York, New York on June 20, 2006 at 10:15 a.m. for a status conference.

ENTERED ORDER

Dated: 5/26/06

Check one: FINAL DISPOSITION

FILED
JUN 05 2006
COUNTY CLERKS OFFICE
NEW YORK

MGD
MARYLIN G. DIAMOND, J.S.C.
 NON-FINAL DISPOSITION