

Citibank N.A. v National Union Fire Ins.

2007 NY Slip Op 30070(U)

March 6, 2007

Supreme Court, New York County

Docket Number: 0110416

Judge: Carol R Edmead

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

PRESENT: HON. CAROL EDMEAD
Justice

PART 35

Citibank N.A.

INDEX NO. 11046/05

MOTION DATE 3/6/07

MOTION SEQ. NO. 002

MOTION CAL. NO. _____

- v -

National Union Fire Insurance

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

Notice of Motion/ Order to Show Cause -- Affidavits -- Exhibits ... _____

Answering Affidavits -- Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

FILED
MAR 13 2007
COUNTY CLERK'S OFFICE
NEW YORK COUNTY

PAPERS NUMBERED _____

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

Upon the foregoing papers, it is ordered that this motion

Due to the completion of material discovery, and pursuant to this Court's order, dated October 3, 2006, plaintiffs, Citibank N.A. ("Citibank") and St. Paul Travelers (collectively "plaintiffs") again seek summary relief on their declaration judgment action. Plaintiffs seek a declaration of insurance coverage in their favor on an underlying personal injury claim entitled *Cynthia A. Gray and Steven Goldenberg v Citibank, et al.* (the "underlying action"). In the underlying action, Mrs. Gray alleges that she slipped and fell on snow and ice in front of a Citibank branch in Chappaqua, New York.

Citibank had a service contract with One Source Facility Services, Inc. ("One Source") (the "Contract") to perform custodial and cleaning services at certain Citibank branch locations. The Contract also required One Source to obtain a policy of insurance in favor of Citibank. Pursuant to the Contract, One Source obtained an insurance policy from American Home, which provides additional named insured coverage for Citibank based upon a blanket contractual endorsement (the "Policy").

In support of their motion, plaintiffs argue that pursuant to the Policy, One Source is obligated to defend and indemnify plaintiffs for Mrs. Gray's claims as such claims resulted from One Source's negligent snow and ice removal at the subject premises. Plaintiffs point out that the Town of New Castle had an easement for the parking lot adjoining the subject Branch location. Plaintiffs contend that although the Westchester Supreme Court recently determined on a motion in the underlying action that there were issues of fact regarding responsibilities for snow removal, it is undisputed that Citibank and its snow removal contractor, One Source, have responsibility for snow and ice removal. Plaintiffs maintain that if a fact finder determines that Citibank was negligent in failing to remove snow and ice on the sidewalk, "then obviously the

Dated: _____ Page 1 of 4 J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

contractor it hired to remove snow and ice is also negligent” and thus, Mrs. Gray’s claim will certainly arise out of the operations of One Source. Thus, summary judgment in plaintiffs’ favor is appropriate.

In opposition, defendant National Union Fire Insurance Company of Pittsburgh, PA (“defendant”) argues that issues of fact remain as to Citibank’s liability for Ms. Gray’s injuries. Defendant also points out that One Source did not receive plaintiffs’ prior motion for summary relief. According to defendant, counsel for One Source advises that One Source disputes that it is liable for Mrs. Gray’s injuries. Thus, any decision on defendant’s obligations under the Policy would be premature since such policy is not required to respond until One Source has paid its \$500,000 self insured retention to plaintiffs. Defendant also reserves its right to seek sanctions in the form of attorneys’ fees and costs, and cross moves to compel plaintiffs’ compliance with the Preliminary Conference Order, or strike the complaint or preclude evidence for plaintiffs’ failure to comply.

In reply, plaintiffs point out that One Source had an ongoing obligation to keep the premises free of snow and ice at all times. Plaintiffs also claim that it did not serve One Source with the previous motion papers, since the complaint does not seek relief against One Source.

Analysis

To obtain summary judgment, the movant must establish its cause of action by a preponderance of the evidence sufficiently to warrant the court as a matter of law in directing judgment in its favor (CPLR § 3212 [b]). This standard requires that the proponent of a motion for summary judgment make a *prima facie* showing of entitlement to judgment as a matter of law, by advancing sufficient “evidentiary proof in admissible form” to demonstrate the absence of any material issues of fact (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Silverman v Perlbinde*, 307 AD2d 230, 762 NYS2d 386 [1st Dept 2003]). Where the proponent of the motion makes a *prima facie* showing of entitlement to summary judgment, the burden shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action, or to tender an acceptable excuse for his or her failure to do so (CPLR § 3212 [b]; *Vermette v Kenworth Truck Co.*, 68 NY2d 714, 717 [1986]; *Zuckerman v City of New York*, *supra*, 49 NY2d at 560, 562; *Forrest v Jewish Guild for the Blind*, 309 AD2d 546, 765 NYS2d 326 [1st Dept 2003]).

The Contract states, *inter alia*, the following with respect to One Source’s obligations thereunder:

SERVICES-GENERAL CLEANING SPECIFICATIONS

Services will be provided by the Contractor [One Source] in accordance with the attached Schedules “A, B, C, D, & E”. . . . The intent of this agreement is that the premises be kept neat and clean at all times. The minimum specifications as set forth in schedules A, B, C, D, and E are a guide for, rather than a limitation to, services required to maintain the premises effectively. The contractor will provide sufficient staff to maintain the Premises effectively. . . .

Exhibits A through D contain specifications for cleaning areas mainly within and inside the various Branch locations. The cleaning of external areas includes wiping metal window frames and door frames, the removal of gum and foreign objects from sidewalks, and removing and sweeping trash and debris from sidewalks, parking lots and landscaped areas.

Exhibit E, however, is entitled "Snow Removal," and specifically addresses snow and ice removal services as follows:

. . . all snow shall be removed after 2 inches of accumulation upon authorization from a Citibank representative or in accordance with governmental regulations. . . . Snow will be removed as follows: Sidewalks, walkways and parking lots are to be maintained free of snow and ice at all times to prevent hazard to public and personnel.

As stated in this Court's earlier decision, the additional insured endorsement under the Policy provides coverage for:

f) Any person or organization to whom you become obligated to include as an additional insured under this policy. . . . but only with respect to liability arising out of your operations
(see Section II-Who is Insured)

Plaintiffs, as the movants, failed to demonstrate the absence of factual issues as to whether Mrs. Gray's accident arose out of One Source's operations.

As stated in this Court's earlier decision, plaintiffs failed to demonstrate that One Source's obligation to remove snow had been triggered at the time of the underlying accident. Moreover, plaintiffs failed to demonstrate that Mrs. Gray's injuries were the proximate cause of One Source's breach of its obligations under the Contract. One Source's obligation to remove snow triggers "after" 2 inches of snow accumulation and upon either authorization from a Citibank representative or pursuant to governmental regulations. It is not clear from the record that One Source's obligation under the contract ever triggered, or that Citibank authorization or governmental regulations required the removal of snow by One Source at the time of Mrs. Gray's accident (*see Yansak v Blackburn Group, Inc.*, 8 Misc 3d 460, 793 NYS2d 698 [Sup. Ct. New York County 2004] [finding that issues of fact as to whether snow removal company was contractually obligated to plow parking lot, and whether ice formed in parking lot as result of snow removal company's failure to properly plow lot days earlier precluded summary relief on claim against snow removal company for contractual indemnity in connection with slip-and-fall accident]).

Further, as noted in the decision in the underlying case, issues of material fact exist as to "which party was responsible for clearing snow and ice in the area of the subject accident . . . and/or who may have created said icy condition." (Decision, J. Bellantoni, at 3). Notably, the decision in the underlying case states that Mrs. Gray's fall allegedly occurred on "a five foot patch of black ice . . . resulting either from piles of snow which melted and refroze or *dipping roof gutters*." (Emphasis added). As the underlying complaint also alleges that Mrs. Gray's injury resulted from Citibank's failure to repair the roof from which water dropped to the

sidewalk, liability for Mrs. Gray's accident may not have arisen out of One Source's operations.

A party is not entitled to summary judgment on its claims of indemnification where an issue of fact concerning that party's possible proximate negligence remains unresolved (*Suh v Fleet Bank, N.A.*, 5 Misc 3d 1012, 798 NYS2d 713 [Sup. Ct. New York County 2004]). Since the issues of fact remain as to whether Citibank's alleged independent act of negligence was the proximate cause of plaintiffs' injuries, plaintiffs cannot receive a judgment for defense and indemnification in their favor at this juncture.

With respect to defendants' cross-motion to compel discovery, the Court directs that the parties enter into a preliminary conference order forthwith.

Based on the foregoing, it is hereby

ORDERED that plaintiffs' motion for summary judgment on their declaratory judgment cause of action is denied; and it is further

ORDERED that to the degree the cross-motion by defendant seeks sanctions in the form of attorneys' fees and costs, such application is denied; and it is further

ORDERED that the cross-motion by defendant National Union Fire Insurance Company of Pittsburgh, PA to compel plaintiffs' compliance with the Preliminary Conference Order, or strike the complaint or preclude evidence for plaintiffs' failure to comply is granted in accordance with the annexed order; and it is further

ORDERED that plaintiffs serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

FILED
MAR 13 2007
COUNTY CLERK'S OFFICE
NEW YORK

Dated 3/6/07

ENTER:  J.S.C.
HON. CAROL EDMEAD

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

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

INDIVIDUAL ASSIGNMENT PART 35

STIPULATION

INDEX NO. 110412-05

MOTION CALENDAR NO.

DATE 3/6/07

City Bank,

National Union Kin Inc.

IT IS HEREBY STIPULATED AND AGREED by and between the below-named attorney(s) as follows:

It will respond to outstanding discovery demands &
the ~~cost~~ for discovery & inspection formally w/in
30 days.

FILED

MAR 13 2007

COUNTY CLERK'S OFFICE
NEW YORK

[Signature]
Attorney for Plaintiff

William Chang-Green-Lavelle
Attorney for Defendant National Union

Date: 3/6/07

So Ordered.

[Signature]
Attorney for Defendant

ENTER:

[Signature]
HON. CAROL EDMEAD ^{J.S.C.}