

**Skyview Owners Corp. v Greater N.Y.
Mut. Ins. Co.**

2007 NY Slip Op 30286(U)

March 15, 2007

Supreme Court, New York County

Docket Number: 0600889

Judge: Jane S. Solomon

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SCANNED ON 3/22/2007
SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: JANE S. SOLOMON Justice

PART 55

Skyview Owners Corp.

INDEX NO. 600889/06

- v -

MOTION DATE 11/27/06

Greater New York Mut. Ins. Co.

MOTION SEQ. NO. 01

MOTION CAL. NO. _____

The following papers, numbered 1 to 8 were read on this motion to/for dismiss

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

1-3

4-6

7-8

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the enclosed memorandum decision and order.

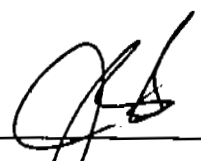
N.B. — preliminary conference is scheduled for April 30, 2007 at noon.

FILED

MAR 22 2007

NEW YORK COUNTY CLERK'S OFFICE

Dated: 3/15/07



J.S.C.
JANE S. SOLOMON

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: PART 55

----- X

SKYVIEW OWNERS CORPORATION,

Plaintiff,

- against -

GREATER NEW YORK MUTUAL INSURANCE
COMPANY and BWD GROUP, LLC,

Defendants.

----- X

JANE S. SOLOMON, J.:

In this action, Plaintiff Skyview Owners Corporation (Skyview) seeks a judgment declaring that defendant Greater New York Mutual Insurance Company (GNY) breached its contractual obligation to provide insurance coverage, and that the insurance broker, defendant BWD Group, LLC (BWD), negligently failed to properly or timely notify GNY of Skyview's claim for insurance coverage. BWD cross claims against GNY for indemnification and contribution.

GNY now moves, pursuant to CPLR 3211 (a) (1) and 3211 (a) (7), for dismissal of the complaint and the cross claims on the grounds that it properly disclaimed coverage (due to late notice), and the cross claims lack merit. For the reasons that follow, the motion is granted to the extent of dismissing the cross claims.

This action relates to an underlying action entitled *Spencer v Skyview Owners Corporation* in the Supreme Court, Bronx County (Index Number 6196/05) (Underlying Action). Plaintiff in that action, Trevor Spencer, alleges that on October 2, 2003 he was lawfully on the premises of a building owned by Skyview, located at 5800 Arlington Avenue, Bronx, New York

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DECISION AND ORDER

FILED
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NEW YORK
COUNTY CLERK'S OFFICE

(Premises), working in his capacity as an employee of Fordham Environmental Services, Inc. Allegedly, Skyview's negligence created a dangerous condition of a boiler that he was repairing which resulted in an injury (Occurrence).

Skyview alleges that prior to the date of the Occurrence, October 2, 2003, BWD, acting as an insurance broker, procured coverage with GNY, whereby GNY agreed to provide it with insurance coverage for the Premises (Policy).¹ Skyview contends that it complied with the Policy's condition precedents, and that GNY was timely notified of the Occurrence giving rise to the Underlying Action. GNY has refused to defend Skyview, thereby obligating Skyview to appoint defense counsel in the Underlying Action.

The complaint contains three causes of action. The first cause of action alleges that GNY breached its contractual obligation under the Policy, and it seeks a declaration that GNY is obligated to defend and indemnify Skyview against Spencer's claims up to the Policy limits, and to reimburse Skyview for all defense costs.

The second cause of action, sounding in unjust enrichment, alleges that GNY has benefitted from Skyview's defense expenditures caused by GNY's failure to comply with its contractual obligation to provide a defense in the Underlying Action.

The third cause of action alleges that BWD negligently failed to immediately notify GNY of the Occurrence, thereby breaching its obligations to Skyview as GNY's agent. Skyview seeks

¹According to GNY, its subsidiary, The Insurance Company of Greater New York (INSCO), issued the Policy, but it asks that the court disregard the technical error that Skyview sued it, rather than INSCO, because both GNY and INSCO use identical policy forms. It asks that the court determine whether, on the basis of documentary evidence, the suit properly states a cause of action against INSCO. In the absence of opposition, the court grants this request, and, for purposes of this motion, references in this decision to GNY may pertain to INSCO.

to recover all defense costs, fees, expenses, awards, and settlements that it has incurred, or may incur, in the Underlying Action.

In its answer, BWD asserts two cross claims against GNY. The first alleges that BWD acted as GNY's agent in procuring the Policy, and that if it is adjudged liable to Skyview as GNY's agent, then GNY's breach of contract will have caused such judgment, thereby entitling BWD to indemnification.

The second cross claim alleges that if BWD is found liable to Skyview, then GNY's negligence will have contributed in whole or in part to Skyview's damages, thereby entitling it to indemnification upon a theory of apportionment of responsibility.

GNY has not served an answer, arguing that it need not because, as against Skyview, it has a defense founded upon documentary evidence, and, as against BWD, the cross claims are not validly stated.

GNY argues for dismissal of the complaint on two grounds: first, GNY was not notified until April 12, 2005 of the October 2, 2003 Occurrence. Second, Skyview did not notify GNY until April 12, 2005 that it had been served with the summons and complaint of the Underlying Action on January 21, 2005. GNY contends that each ground warrants dismissal of the complaint because the Policy required Skyview to notify it "as soon as practicable" of the Occurrence as well as the commencement of the Underlying Action, and that it did neither. It argues that Skyview's unexcused late notice bars coverage.

Where a liability insurance policy requires that notice of an occurrence be given "as soon as practicable," then the insured's failure to satisfy this requirement vitiates the contract, because it has not complied with a condition precedent (*Great Canal Realty Corp. v Seneca Ins. Co.*, 5

NY3d 742 [2005]). The insurer need not demonstrate prejudice, because late notice of a lawsuit in the liability insurance context is so likely to be prejudicial as to justify the application of the no-prejudice rule (*see Argo Corp. v Greater N.Y. Mut. Ins. Co.*, 4 NY3d 332 [2005]). In determining whether the insurer may disclaim coverage, however, the court must consider whether the insured has a reasonable excuse for the delay, albeit the insured has the ultimate burden of demonstrating the validity of the excuse (*see Argentina v Otsego Mut. Fire Ins. Co.*, 86 NY2d 748 [1995]).

Skyview contends that it has a reasonable excuse for the delay. According to Don Wilson, President of Blue Woods Management Group, Skyview's agent with responsibility for the physical and financial management of the Premises, he was advised of the Spencer accident on the day that it occurred. Although he deemed it a worker's compensation matter, as a precaution, on the following day (October 3, 2003), he sent a letter to BWD, notifying the broker of the incident, and requested that it notify the carrier, GNY, on Skyview's behalf.

Wilson, again on behalf of Skyview, explains the late notice of the Underlying Action as follows: on January 26, 2005, Skyview received the summons and complaint naming it as a defendant in the Underlying Action. Whenever lawsuit papers are received, Skyview initiates an internal investigation, which it did in this instance. Unfortunately, it sent the lawsuit papers to the wrong broker, The Spain Agency, its current broker, and this resulted in a delay of the papers getting to the carrier, GNY. Thereafter, Spain conducted its own investigation, and later informed Skyview that it was not the broker for the relevant policy year, which caused additional delay. Spain forwarded the papers to Kerwick & Curran, Inc., which also conducted an investigation to determine whether it was the relevant broker, and there was additional delay

created in the forwarding of the papers to GNY.

Skyview has proffered an excuse for the delay, and GNY's response – wherein it challenges the validity of the excuse – serves only to demonstrate that it has not established entitlement to a pre-answer dismissal on the ground of a defense founded upon documentary evidence. A good faith belief in non-liability may constitute a reasonable excuse for the delay in providing notice of a potentially covered occurrence (*Security Mut. Ins. Co. of N.Y. v Acker-Fitzsimons Corp.*, 31 NY2d 436 [1972]; *RMD Produce Corp. v Hartford Cas. Ins. Co.*, __AD2d__, 2007 WL 528711 [1st Dept 2007]). Because the complaint states a cause of action, and the documentary evidence submitted does not conclusively establish a defense to the claims asserted as a matter of law, dismissal at this stage of the litigation is not warranted (*see 511 West 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144 [2002]). That this is so is exemplified by GNY's contention that notice to BWD does not constitute notice to it, because BWD's former status as its agent terminated prior to the Occurrence. Hence, the appropriate course is to resolve the issues raised here at trial or on a motion for summary judgment (*see e.g. Travelers Ins. Co. v Volmar Constr. Co.*, 300 AD2d 40 [1st Dept 2002]).

As for BWD's cross claims for common-law indemnification and contribution, GNY argues persuasively that they must be dismissed because these remedies are not available between an insurer and the insured's broker for claims of breach of contract.

Indemnity permits a party held legally liable to the plaintiff to shift the burden of liability and recover full reimbursement from another party who was the actual wrongdoer (*Trustees of Columbia Univ. in City of N.Y. v Mitchell/Giurgola Assocs.*, 109 AD2d 449, 452 [1st Dept 1985]). Thus, the first cross claim, for common-law indemnity, is untenable because Skyview

does not seek to hold BWD vicariously liable for the negligent acts of GNY (*Frank v Meadowlakes Dev. Corp.*, 6 NY3d 687 [2005]). Indeed, the negligence of GNY is not an issue in this action, and the claim against BWD is based upon its own alleged negligence in failing to timely or properly notify GNY of the Occurrence.

Moreover, the key element of a common-law cause of action for indemnification is a separate duty that the indemnitor owed to the indemnitee, and not a duty running from the indemnitor to the injured party (*Equitable Life Assur. Socy. of U.S. v Werner*, 286 AD2d 632 [1st Dept 2001]). GNY did not owe a duty to BWD vis-a-vis the Policy; the legal relationship between GNY and BWD has no bearing on whether GNY had the contractual right to disclaim coverage to Skyview.

The second cross claim alleges that if BWD is found liable to Skyview, then GNY's negligence will have contributed in whole or in part to Skyview's damages, thereby entitling it to indemnification upon a theory of apportionment of responsibility. In essence, BWD seeks contribution (*see Rosado v Proctor & Schwartz*, 66 NY2d 21 [1985]). Contribution is not available for economic loss in breach of contract actions (*Board of Educ. of Hudson City School Dist. v Sargent, Webster, Crenshaw & Folley*, 71 NY2d 21 [1987]; *Bleecker St. Health & Beauty Aids v Granite State Ins. Co.*, __AD3d__, 2007 WL 656291 [1st Dept 2007]). As stated above, the only claims involving GNY are based upon a contract of insurance.

Accordingly, it is

ORDERED that the motion by Greater New York Mutual Insurance Company is granted to the extent that the cross claims asserted by BWD Group, LLC against it are dismissed; and it is further

ORDERED that Greater New York Mutual Insurance Company is directed to serve an answer to the complaint within 20 days after service of a copy of this order with notice of entry; and it further is

ORDERED that counsel shall appear for a preliminary conference in Part 55, 60 Centre Street, Room 432, New York, NY on April 30, 2007 at 12 noon.

Dated: March 15, 2007

ENTER:



J.S.C.

JANE S. SOLOMON

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MAR 22 2007
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