

<b>City of New York v Folksamerica Reins. Co..</b>
2007 NY Slip Op 30385(U)
March 21, 2007
Supreme Court, New York County
Docket Number: 0401274
Judge: Eileen A. Rakower
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

**EILEEN A. RAKOWER**

PRESENT: \_\_\_\_\_ **J.S.C.** \_\_\_\_\_  
*Justice*

PART **Part 5**

Index Number : 401274/2006

CITY OF NEW YORK

vs

FOLKSAMERICA REINSURANCE

Sequence Number : 001

SUMMARY JUDGMENT

INDEX NO. \_\_\_\_\_

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. \_\_\_\_\_

MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ is motion to/for \_\_\_\_\_

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

Answering Affidavits -- Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

1, 2

3, 4

5, 6

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

**DECIDED IN ACCORDANCE WITH  
ACCOMPANYING DECISION / ORDER**

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

**FILED**  
MAR 28 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

Dated: March 21, 2007



**EILEEN A. RAKOWER** J.S.C.

Check one:  FINAL DISPOSITION

NON-FINAL DISPOSITION

[\* 1]

(check if appropriate:  DO NOT POST

REFERENCE

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

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

Plaintiffs,

- against -

FOLKSAMERICA REINSURANCE COMPANY,

Defendants.

Index No.  
401274/06

Decision  
and Order

Mot. Seq. 001

**FILED**  
MAR 28 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

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HON. EILEEN A. RAKOWER:

The City of New York (City) brings the instant lawsuit seeking indemnification and attorney fees. City alleges that it was forced to represent itself after defendant disclaimed on an insurance policy which listed City as an additional insured. The underlying claim involved an action filed in Bronx Supreme Court at or around March 1995, captioned *Maria Baez, an infant by her mother and natural guardian, Isabel Ruiz, and Isabel Ruiz, individually v. The City of New York, Renewal Housing Development Fund Company, Inc. and Mary Yung*. The summons and complaint on behalf of infant Maria Baez (the Baez action) alleged that the infant was injured due to exposure to an excessive amount of lead in the paint in a building at 2666 Valentine Avenue, Bronx, New York (the building) sometime between December, 1983 and December, 1994, and that City owned the building for a period during the exposure. City impleaded Fordham Bedford Housing Corp. (Fordham) in 1998, alleging that Fordham managed the building during the relevant time period. Ultimately, City settled the underlying action as against it in 2004. City by this motion seeks an order granting summary judgement and declaring that defendant herein, Folksamerica Reinsurance Company (Folksamerica), was obligated to defend City in the Baez action, requiring Foksamerica to indemnify it and requiring Folksamerica to reimburse City for the cost of defending the action. Folksamerica cross moves for summary judgment dismissing this action with prejudice. In the alternative, it requests that the Court deny City's motion for summary judgment.

The building, or insured property, was managed by John M. Reilly, (the Administrator) for Fordham, who was charged with using the tenants' rents to operate and repair the building.(See, Article 7-A, Real Property Actions and Proceedings Law [RPAPL]). Renewal Housing Development Fund (Renewal) was also involved with the operation, management and maintenance of the building. City's Department of Housing Preservation and Development (HPD) provided additional funding to the Administrator to make repairs. The Administrator obtained an insurance liability policy from Massachusetts Plate Glass Insurance Company (Mass Plate) with maximum coverage of \$300,000 per occurrence for effective dates of November, 1983 through November, 1984 to cover claims for bodily injury arising out of the ownership, maintenance and use of the building. The policy listed the insured as "John Reilly, 7-A Administrator c/o Fordham Bedford Housing Corp." HPD required the administrator to obtain general liability insurance which named "City of New York, Housing, Preservation and Development Corp. 100 Gold Street, NYC" as an additional insured. A modification to the existing policy dated July 18, 1984 provided for such "additional insured." HPD took title to the building because it was abandoned by its owner, (RPAPL Article 19-A) sometime in 1985. Eventually, in 1990, Renewal acquired title to the building from City.

City argues that the insurer was timely notified of its claim, that it wrongfully disclaimed on the basis of "untimely notice" and that the insurer's disclaimer was also untimely. The insurer <sup>1</sup> asserts that it never received notice of the claim from City, that the only notice it received was from a non insured party, and that City cannot now use a stranger's notice to assert timely notice.

New York State Insurance Law § 3420(d) states:

If under a liability policy delivered or issued for delivery in this state, an insurer shall disclaim liability or deny coverage for death or bodily injury arising out of a motor vehicle accident or any other type of accident occurring within this state, it shall give written notice as soon as is reasonably possible of such disclaimer of liability or denial of coverage to the insured and the injured person or any other claimant.

An insurer waives its right to deny coverage on the basis of late notice if the

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<sup>1</sup>Mass Plate issued the policy and was the predecessor to USF Reinsurance Company (USF). Folksamerica is USF's successor.

insurer's disclaimer is untimely. Although the legislature did not specify a particular length of time, the words "as soon as is reasonably possible" suggests that the insurer's decision should be made expeditiously to allow an insured to timely pursue its other options. (*First Financial Insurance Company, v. Jetco Contracting Corp.*, 1 N.Y.3d 64 [2003]). However, when the delay is occasioned by an insurance carrier's investigation as to whether it has reason to disclaim coverage, the delay may be excused (*Id.*) The period of time that is reasonable depends upon the facts and circumstances of the case and "timeliness is generally measured from the time that the insurer has sufficient information to disclaim liability in good faith." (*Admiralty Indemnity Company v. Pancas Restaurant, Inc.* ( Misc.3d 1121 [Sup. Ct., N.Y. County 2005] citing, *A.J. McNulty and Co., Inc. v. Loyds of London*, 306 A.D.2d 211[1st Dept. 2003]).

However, compliance with the notice provisions of an insurance contract is a condition precedent to the insurer's liability. (*White by White v. The City of New York*, 81 N.Y.2d 955[1993]). If the insured fails to provide timely notice to the insurer, then the insurer has no obligation to defend or indemnify the insured. (*Matter of the Arbitration between Allcity Ins. Co. v. Jiminez*, 78 N.Y.2d 1054 [1991]). Circumstances such as lack of knowledge or a reasonable belief in nonliability will excuse delay in giving notice but the burden is on the insured to demonstrate the reasonableness of the excuse. (*White by White v. The City of New York, supra*).

City, in support of its motion, provides the policy at issue with modification listing City as an additional insured, internal documents showing the settlement of the Bacz lawsuit along with a copy of the negotiated settlement check, a letter dated March 23, 1995 written by Renewal and directed to a Mr. Plum, a letter dated December 7, 1995 by Catherine Brady, Building Manager, to Mass Plate with proof of mailing, a letter dated January 12, 1996 from the Law Offices of Lester Schwab Katz & Dwyer on behalf of Mass Plate addressed to Kathy Brady, Administrator Fordham-Bedford Housing Corp., a letter dated January 24, 1996 written by USF to John Reilly, 7A Administration c/o Fordham Bedford Housing Corp., a letter dated March 22, 1996 by USF to Catherine M. Brady Renewal H.D.F.C., and a recitation in support of its application for attorney fees.

To grant summary judgment it must clearly appear that no material and triable issue of fact exists. The party opposing the motion must demonstrate by admissible evidence that a factual issue remains requiring the trier of fact to determine the issue.

The affirmation of counsel alone is not sufficient to satisfy this requirement. *Zuckerman v. City of New York*, 49 N.Y.2d 557, 404 N.E.2d 718, 427 N.Y.S.2d 595 (1980). In addition, bald, conclusory allegations, even if believable, are not enough. *Ehrlich v. American Moninger Greenhouse Mfg. Corp.*, 26 N.Y.2d 255, 309 N.Y.S.2d 341, 257 N.E.2d 890 (1970).

City argues that the March and December 1995 letters from Renewal's Administrator Brady served as notice to Mass Plate on behalf of both Renewal and City that it was being sued. It argues that both Mass Plate's and USF's January, 1996, letters indicate that they were investigating whether City was an insured on the policy. Additionally, it contends that USF's March, 1996 response to Renewal's inquiry "on behalf of itself and the City" disclaiming coverage on the basis of late notice was untimely and therefore, cannot be asserted as a basis for its failure to defend City.

One of the letters that City relies on as notice of the underlying claim is the letter dated March 23, 1995, on Renewal stationary, from the "building manager," Catherine M. Brady, (Brady) to Mr. Plum, an insurance broker. It states simply, "[c]nclosed please find a copy of the Summons and Complaint form that we received on March 22, 1995. This complaint is for the building 2666 Valentine Avenue which is part of RENEWAL HDFC. If you need any additional information please contact me at the above number or at my home. (718-324-8072)

The second letter the City relies on is the letter dated December 7, 1995, also from Catherine M. Brady, sent directly to Mass Plate. In this letter, Ms. Brady states:

Enclosed please find a copy of the Summons and Complaint form that we received in March 1995. This complaint is for the building 2666 Valentine Avenue. After researching our records we have determined that we had coverage with your Company in 1983 and 1984. Mr John Reilly 7A administrator was covered by policy number GL84599-31 from November 9, 1983 to November 8, 1985. Please contact me at the above number if you need any additional information regarding this matter.

The insurance contract City seeks to enforce here provides under Condition 4,

entitled "Ensured's duties in the event of Occurrence, Claim or Suit" provides:

a) In the event of an **occurrence**, written notice containing particulars sufficient to identify the **insured** and also reasonably obtainable information with respect to the time, place and circumstances thereof, and the names and addresses of the insured and of available witnesses, shall be given by or for the **insured** to the company or any of its authorized agents as soon as practicable.

(b) If claim is made or suit is brought against the **insured**, the **insured** shall immediately forward to the company every demand, notice, summons or other process received by him or his representative.

(c) The **insured** shall cooperate with the company and, upon the company's request, assist in making settlements, in the conduct of suits and in enforcing any right of contribution or indemnity against any person or organization who may be liable to the **insured** because of injury or damage with respect to which insurance is afforded under this policy; and the **insured** shall attend hearings and trials and assist in securing and giving evidence and obtaining the attendance of witnesses. The **insured** shall not, except at its own cost, voluntarily make any payment, assume any obligation or incur any expense other than for first aid to others at the time of the accident.

Defendant argues that neither of these letters constituted a claim for coverage by the insured, City of New York, Housing, Preservation and Development Corporation. Indeed, by letter dated January 12, 1996, counsel for Mass Plate wrote back to Ms. Brady, who was also, apparently, the new Administrator for Fordham, memorializing a conversation that the two had had earlier in the day. The letter states that they agreed that "John Reilly, 7A Administrator, c/o Fordham Bedford Housing Corp." is the named insured on the policy but they also agreed that "such person" is not named in the Baez action. Mass Plate also notes that Renewal is named in the Baez suit but is not an insured under the policy. The letter further states "[w]e will be advising as to whether the City is an insured on the Mass Plate Glass policy. However, Renewal H.D.F.C. does not appear to be named on the Mass Plate Glass Policy." Finally, it states, "[a]t this time, Mass Plate Glass's insurance is investigating **your claim** for coverage on behalf of Renewal H.D.F.C. and of course,

is reserving all of its rights in respect of the claim and its position on coverage pending receipt of the aforementioned and completion of its investigation.” (Emphasis added).

Additionally, by separate letter dated January 24, 1996, USF, (formerly known as Mass Plate) wrote to “Mr. John Reilly, 7A Administrator c/o Fordham Bedford Housing Corp.” as the named insured under the policy, and advised him of the Baez action. It stated that it has hired a New York law firm to investigate any potential claim for coverage under the policy.

Defendant formally disclaimed coverage by letter dated March 22, 1996. USF wrote to the new Administrator, Brady, care of Renewal, stating that Renewal is not an insured under the policy. The letter further instructs Renewal to notify USF immediately if it contends that Renewal is a division of The City of New York, Housing Preservation Development Fund Company, Inc., since it acknowledges it is a named insured on the policy. It states, “[h]owever, if Renewal . . . is a separate corporation/entity, there are no grounds for coverage under this policy . . .” The letter further notes that “[d]espite the pendency of the BAEZ lawsuit since December 1994, and despite a notice of claim served in December, 1993, this lawsuit was first brought to the attention of USF . . . on December 7, 1995. No notice of the claim nor any lawsuit papers were ever given to us as is required under the policy in the event of a claim or lawsuit.”

Defendant , in support of its motion to dismiss and in opposition to City’s motion, provides the affidavit of Daniel J. Wilson, Senior Vice President of defendant Folksamerica Reinsurance Company, a letter dated May 24, 2004 from Gordon & Silber, attorney for Fordham directed to Mr. Wilson of Folksamerica, a letter dated June 2, 2004 from Folksamerica responding to attorneys for Fordham, a letter dated June 15, 2004 to Folksamerica from Bleakley Platt & Schmidt, LLP, newly retained attorneys for Fordham, and a letter dated June 18, 2004 from Folksamerica to Bleakley responding to the June 15, 2004 communication.

Eight years of inaction was followed by a letter dated May 24, 2004 from counsel for Fordham, on behalf of his client and “on behalf of codefendant, the City of New York” demanding of Folksamerica (formerly known as USF) that it

“immediately take over the defense of [Fordham] in the Baez action as well as defend and indemnify the City of New York, the additional insured on the Mass Plate policy.” The letter states that USF’s March 22, 1996, disclaimer of coverage was not timely asserted and therefore is not valid. Additionally, the letter notes that the case was scheduled shortly for pre-trial conference “to discuss insurance issues” and for trial in August, 2004.

Folksamerica argues that this May 24, 2004 communication was the first time it was ever asked to defend on behalf of City, some ten years after Baez first sued City and six years after City impleaded Fordham. Folksamerica contends that having never before been notified by City of the Baez suit, its June 2, 2004 letter denying coverage was timely. It argues that even if the Court is to construe the 1995 letters from Renewal as notice of a claim on behalf of City, on the facts in this case, having repeatedly requested information to aid in its investigation which requests went ignored, a three month delay in denying coverage was timely notification of disclaimer. Moreover, Folksamerica points to a clause in City’s insurance policy, condition 4, which outlines the insured’s duties in the event of a lawsuit against it, which City failed to comply with. Finally, Folksamerica argues that if it had wrongfully disclaimed coverage on behalf of City in 1995, the proper remedy would be a claim for breach of contract, which is time barred, having accrued more than eleven years ago, well beyond the six year statute of limitations.

Notwithstanding City’s present contention that Renewal’s two 1995 letters to Mass Plate regarding the Baez action were on behalf of itself and City, there is nothing in the record to support that contention. The letters were clearly from and in the interest of Renewal alone and the City of New York, Housing, Preservation and Development Corp. had a separate obligation as the insured to contact its insurer in accordance with the notice provision of its policy of an outstanding claim against it. This is an obligation that is not excused because an insurer received notice of the occurrence from an independent source, nor will notice from one insured be imputed to another insured. (*Travelers Insurance Company v. Volmar Construction Co., Inc.*, 300 A.D.2d 40 [1<sup>st</sup> Dept. 2002]).

Further, the 1995 letters were met with additional requests for any information that would impact on their coverage determination. Under the circumstances of this case, where the insurer wrote twice requesting information to aid in its investigation

before disclaiming coverage and those requests went ignored, City cannot invoke the defense of late disclaimer since “timeliness is generally measured from the time that the insurer has sufficient information to disclaim liability in good faith.” (*Admiralty Indemnity Company v. Pancas Restaurant, Inc.* ( Misc.3d 1121 [Sup. Ct., N.Y. County 2005] citing, *A.J. McNulty and Co., Inc. v.Loyds of London*, 306 A.D.2d 211[1st Dept. 2003]))

Finally, the 2004 demand for coverage was not notice given “as soon as practicable” as required by Condition 4 of the policy. City was served with papers in the Bacz suit some nine years prior, and actively participated in that suit during that period, even to the extent of impleading a third party, Fordham. City did not meet the condition precedent to invoking coverage. Therefore, it cannot seek indemnification and reimbursement for defending the Bacz suit and its motion for summary judgment must be denied. Conversely, Folksamerica’s cross motion for summary judgment clearly demonstrates that no material and triable issue of fact exists as to whether it should indemnify and reimburse City. The insurer, pursuant to applicable law, sent a disclaimer in writing to the only entity it knew was making a claim pursuant to the policy. City fails to demonstrate by admissible evidence that a factual issue remains requiring the trier of fact to determine the issue. Accordingly, Folksamerica’s cross motion for summary judgment is granted.

Wherefore it is hereby

ORDERED that the City of New York’s motion for summary judgment is denied; and it is further

ORDERED that Folksamerica Reinsurance Company’s cross motion for summary judgment is granted.

All other relief is denied. This constitutes the decision and order of the court.

Dated: March 21, 2007



Eileen A. Rakower, J.S.C.

**FILED**  
MAR 28 2007  
NEW YORK  
COUNTY CLERK'S OFFICE