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

PRESENT: HON. CAROL EDMEAD Justice PART 35

Index Number : 602578/2006
MACRO ENTERPRISES, LTD.
vs
QBE INSURANCE
Sequence Number : 001
SUMMARY JUDGMENT

INDEX NO.
MOTION DATE 3/20/07
MOTION SEQ. NO.
MOTION CAL. NO.

this motion to/for

PAPERS NUMBERED

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

Cross-Motion: X Yes No

Upon the foregoing papers, it is ordered that this motion

Plaintiff, Macro Enterprises, Ltd. ("Subcontractor") moves pursuant to CPLR 3212 for summary judgment on the issue of liabilty over and against defendant, QBE Insurance Corp. ("QBE Insurance") and declaring that QBE Insurance owes Subcontractor a defense and indemnification in the underlying third-party action titled *Trades Construction Services Corp. v Macro Enterprises, Ltd.* (the "underlying action"), and granting Subcontractor reasonable reimbursement for all out of pocket expenses, including but not limited to attorneys' fees and costs expended in the defense of the underlying action.

QBE Insurance cross moves for summary judgment declaring that QBE Insurance does not owe a defense and indemnity coverage to Subcontractor for a specific claim set forth in a separate personal injury action due to Subcontractor's failure to provide timely notice of such underlying claim.

Factual and Procedural Background

This dispute arises out of QBE Insurance's refusal to provide a defense and indemnification to Subcontractor in the underlying action as allegedly required under a Comprehensive General Liabilty Insurance policy entered into between the parties (the "Policy").

In November 2005, Subcontractor's employee, Thomas Forcina ("Forcina") commenced the underlying action against the owner of a certain property and its general contractor as a result of injuries he sustained in December 2003 in connection with a construction project at the

Dated: Page 16/6 J.S.C.

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

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property. Forcina's accident occurred in December 2003, and according to a Workers Compensation claim submitted on Forcina's behalf, Subcontractor was aware of the accident on the date it occurred.

In February 2006, the general contractor forwarded a copy of Forcina's pleadings to QBE Insurance,[1] and QBE Insurance acknowledged receipt of same. On March 3, 2006, QBE Insurance advised Subcontractor of Forcina's claim. On March 8, 2006, Subcontractor's insurance broker served a notice of claim form to QBE Insurance. On March 14, 2006 the general contractor initiated a third-party action against Subcontractor for contribution and indemnification. On April 20, 2006, Subcontractor's broker forwarded a copy of the third-party pleadings to QBE Insurance.

On May 4, 2006, QBE Insurance sent Subcontractor a letter disclaiming coverage on the basis of late notice. This action by Subcontractor against QBE Insurance ensued.

Motion

Subcontractor argues that as an employer of Forcina, it was entitled to rely on the exclusivity of the Workers Compensation remedy provided to Forcina, and was not required to provide notice of the accident to its liability insurance carrier, QBE Insurance. Subcontractor contends that it promptly reported Forcina's accident to its Workers Compensation carrier and that the matter was being handled under the Workers Compensation policy. Therefore, Subcontractor was not responsible to notify QBE Insurance of Forcina's accident due to its good faith and reasonable belief in its non-liability under the Worker's Compensation Law. As such, Subcontractor is entitled to a declaration that QBE Insurance owes Subcontractor a defense and indemnification in the underlying action and reimbursement of all out of pocket expenses expended in the defense of same.

In opposition and in support of its cross-motion, QBE Insurance contends that Subcontractor's failure to provide QBE Insurance with notice of the occurrence for more than two years precludes coverage under the Policy. QBE Insurance argues that the caselaw upon which Subcontractors rely are unreliable and do not reflect a fair statement of the law. Where a contractor is required to obtain both liability and Workers Compensation insurance, it is unreasonable for the contractor to assume that an accident involving one of its employees on a construction site with other contractors will not result in a claim against it or the general contractor. The mere existence of Workers Compensation does not provide an excuse of failing to notify the liability insurance carrier of an occurrence. Thus, QBE Insurance is entitled to a declaration that QBE Insurance has no obligation to provide a defense and indemnity coverage to Subcontractor for any damages related to the underlying action.

In reply, Subcontractor contends that on the date of the accident, Forcina did not request any medical attention and completed the work day. Further, Forcina returned to the construction site and worked for a few hours. Subcontractor also contends that for the next two years, the only thing that was brought to its attention concerning Forcina was that he continued to receive Workers' Compensation benefits under Subcontractor's policy. Furthermore, the Policy clearly excludes coverage for workers compensation obligations, and such statement created an

[1] Subcontractor obtained the Policy pursuant to its subcontract agreement with the general contractor.

ambiguity in the Policy, to be resolved in favor of Subcontractor. Thus, Subcontractor's notice to QBE Insurance upon being served with the third-party pleadings was timely.

In response and further support of its cross-motion, QBE Insurance argues, *inter alia*, that Subcontractor's agreement with the general contractor plainly states that Subcontractor indemnifies and holds harmless the general contractor from the possibility of claims arising out of the performance of Subcontractor's work at the construction site. Further, the claim giving rise to Subcontractor's potential exposure in this case is related to a personal injury claim that is separate from the employee's Worker's Compensation claim. In addition, owners and general contractors are commonly sued for workplace accidents, and subcontractors are in turn commonly sued by such owners and general contractors for indemnification. Thus, Subcontractor cannot argue that it could not reasonably anticipate that it would be exposed to liability for a claim arising out of performance of work at the site.

Analysis

To obtain summary judgment, the movant must establish its cause of action or defense 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 Perlbinder*, 307 AD2d 230, 762 NYS2d 386 [1st Dept 2003]; *Thomas v Holzberg*, 300 AD2d 10, 11, 751 NYS2d 433, 434 [1st Dept 2002]).

Alternatively, to defeat a motion for summary judgment, the opposing party must show facts sufficient to require a trial of any issue of fact (CPLR §3212 [b]). Thus, 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 (*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]).

Where a policy of insurance requires that the insured give the insurer notice "as soon as practicable," notice must be afforded within a "reasonable time under the circumstances" (*Travelers Insurance Co. v Volmar Constr. Co.*, 300 AD2d 40, 42 [1st Dept 2002]). The notice requirement is a condition precedent to coverage and so, failure to provide such notice vitiates the contract of insurance (*Great Canal Realty Corp. v Seneca Ins. Co.*, 5 NY3d 742 [2005]; *Ocean Partners, LLC v North River Insurance Co.*, 25 AD3d 514, 515 [1st Dept 2006] ["[p]laintiff's failure to provide notice of its claim until 28 months after the fire constituted an unreasonable delay and a failure to satisfy a condition precedent to coverage under the policy"]). There is no need to show that the insurer suffered any prejudice as a result of tardy notice (*Id.*; *see also Argo Corp. v Greater New York Mutual Insurance Co.*, 4 NY3d 332 [2005]; *Security Mutual Ins. Co. of New York v Acker-fitzsimons Corp.*, 31 NY2d 436 [1972]).

Here, the undisputed terms of the Policy governing this dispute state as follows:

Duties in the event of Occurrence, Offense, Claim or Suit

> You Must see to it that we are notified as soon a [sic] practicable of an "occurrence" or an offense which may result in a claim. . . .

(Section IV (2) (a), p. 9 of 13)

Occurrence is defined in the Policy as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." (Section V(13), p. 12 of 13).

Forcina's accident constituted an "occurrence" as defined under the Policy, for which notice to QBE Insurance must be given as soon as practicable. It is also undisputed that no notice was provided to QBE Insurance of Forcina's accident until February 2006, two years after the accident. Thus, the notice given was untimely (*Brownstone Partners/A F & F, LLC v A. Aleem Constr., Inc.*, 18 AD3d 204 [1st Dept 2005][five months]; *Heydt Contracting Corp. v American Home Assurance Co.*, 146 AD2d 497 [1st Dept 1989][four months]).

However, it has been held that "there may be circumstances that excuse a failure to give timely notice, such as where the insured has a good faith belief of nonliability, provided that belief is reasonable" *(Great Canal Realty Corp. v Seneca Insurance Company, Inc.*, 5 NY3d 742 [2005] [internal quotation marks and citation omitted]). It has generally been held that a failure to give notice may be excused when an insured, acting as a reasonable and prudent person, believes that he is not liable for the accident (*875 Forest Ave. Corp. v Aetna Cas. & Sur. Co.*, 37 AD2d 11, 12-13, *affd* 30 NY2d 726). Relevant on the issue of reasonableness, is consideration of whether and to what extent, the insured has inquired into the circumstances of the accident or occurrence (*Id. citing White v City of New York*, 81 NY2d 955, 958 [1993] [stating that, "where a reasonable person could envision liability, that person has a duty to make some inquiry"]). Absent a showing of legal justification, the failure to comply with the notice condition vitiates coverage (*Matter of Allcity Ins. Co. [Jimenez]*, 78 NY2d 1054, 1055). It also bears noting that the insured bears the burden of proving, under all the circumstances, the reasonableness of any delay in the giving of notice (*see, Argentina v Otsego Mut. Fire Ins. Co.*, 86 NY2d 748, 749-750).

In *Great Canal Realty v Seneca Ins.* (5 NY3d 742 [2005]), the Court of Appeals reversed the First Department's affirmance of a decision holding that issues of fact existed as to the reasonableness of an insured's belief of non-liability, based in part on the fact that Workers' Compensation was the sole and exclusive remedy available to the injured party, and that such compensation was available through the general contractor's insurance policy.

Similarly, Subcontractor's reliance on the exclusivity of the Workers Compensation remedy provided to Forcina, was unreasonable under the circumstances. That Forcina's accident was being handled under the Workers Compensation policy is insufficient to sustain Subcontractor's claim that its delay in giving notice was reasonably founded upon a good faith belief of non-liability.

Subcontractor's reliance on *Tesler, et al. v Paramount Ins. Co.* (633 NYS2d 119 [1st Dept 1995]) and *Sabre v Rutland Plywood Corp. et al.* (461 NYS2d 596 [3d Dept 1983]) for the proposition that it may rely on the exclusivity of Workers Compensation and need not anticipate

that a third-party suit would be brought against it is misplaced.

In *Tesler*, the First Department held that plaintiffs demonstrated a good-faith and reasonable belief in their nonliability under the Workers' Compensation Law where their insurance agent advised them to that effect and there had been no other indication that a liability claim would be brought against them. There was no similar representation made to Subcontractor, on which Subcontractor could have reasonably relied to form a belief of non-liability for Forcina's accident.

In *Sabre*, the Court held that "absent special circumstances as herein . . . the employer of decedent[] was entitled to rely on the exclusivity of the workers' compensation remedy provided to its employee and on the coverage of its workers' compensation policy, and was not required to anticipate that a third-party suit under the doctrine of *Dole v. Dow Chem. Co.*, 30 N.Y.2d 143, 331 N.Y.S.2d 382, 282 N.E.2d 288 would be brought against it." However, as stated by the Northern District of New York,

> After contracting to provide additional coverage in the event that an employee might sue Dobler's, [the Building owner] it is antithetical for Riggalls [the insured] to argue that it failed to recognize Dobler's potential exposure. I also find unavailing plaintiff's reliance on *Sabre v. Rutland Plywodd Corp.*, 461 N.Y.S.2d 596 (3d Dep't 1983). In *Sabre,* the court held that an employer could rely on its workers compensation policy and was not required to anticipate a third-party suit. *Id.* at 598. However, unlike the case before me, in *Sabre* the parties had not specifically contracted to avoid liability. Moreover, the court in *Sabre* reached its conclusion after finding no "special circumstances" that required notification of the general liability carrier. *Id.* That situation is inapposite to the instant case, where a contract existed requiring additional coverage and specifically required the contractor to protect the owner from claims.
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> Based on the construction contract between Riggalls and Dobler's, I find that the circumstances would "have suggested to a reasonable person the possibility of a claim." *Sparacino,* 50 F.3d at 143. The contract language plainly states that Riggalls should insure for the possibility of a claim by its employees against Dobler's. Of course, that is precisely what occurred in this case, yet Riggalls failed to notify its general liability carrier. As a matter of law Riggalls failed to provide timely notice to Commercial Union.

Similarly here, Subcontractor agreed to contractually indemnify and hold harmless the general contractor (Notice of Motion, Exh. A). Therefore, having failed to satisfy its burden of proving, under all the circumstances, the reasonableness of its delay in the giving of notice to QBE Insurance, Subcontractor failed to comply with the condition precedent to coverage and such failure vitiates the contract of insurance herein.

The Court also notes that the Policy is unambiguous, and that the Policy exclusion applicable to Subcontractor's obligation under the Workers' Compensation law is separate and distinct from Subcontractor's potential liability for the personal injury claim at issue.

The Court has reviewed Subcontractor's remaining arguments, and find them without merit.

Based on the foregoing, it is hereby

ORDERED that the motion by plaintiff, Macro Enterprises, Ltd. pursuant to CPLR 3212 for summary judgment on the issue of liabilty over and against defendant, QBE Insurance Corp. and declaring that QBE Insurance owes Subcontractor a defense and indemnification in the underlying third-party action titled *Trades Construction Services Corp. v Macro Enterprises, Ltd.* (the "underlying action"), and granting Subcontractor reasonable reimbursement for all out of pocket expenses expended in the defense of the underlying action is DENIED; and it is further

ORDERED that the cross-motion by QBE Insurance for summary judgment declaring that QBE Insurance does not owe a defense and indemnity coverage to Subcontractor for a specific claim set forth in a separate personal injury action is GRANTED; and it is further

ORDERED, ADJUDGED, and DECLARED that Macro Enterprises, Ltd. is not entitled to a defense and indemnity coverage from QBE Insurance Corp. in the underlying action titled *Trades Construction Services Corp. v Macro Enterprises, Ltd.*

This constitutes the decision and order of the Court.

UNOFFICIAL DOCUMENT

his 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 County Clerk's Desk (Room 11B).

Dated 3/29/07 ENTER: J.S.C.

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