

Lavandier v Landmark Ins. Co.

2007 NY Slip Op 30693(U)

April 9, 2007

Supreme Court, New York County

Docket Number: 0113913/2001

Judge: Alice Schlesinger

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PRESENT: ALICE SCHLESINGER

PART IA Part 16

Index Number : 113913/2001
LAVANDIER, JOEL
vs
LANDMARK INSURANCE
Sequence Number : 005
SUMMARY JUDGMENT

Justice

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

The following papers, numbered _____ motion to/for _____

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

FILED
PAPERS NUMBERED _____
APR 13 2007
NEW YORK COUNTY CLERK'S OFFICE

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion for summary judgment by defendant Landmark Insurance Company is granted in accordance with the accompanying memorandum decision. The Clerk is directed to sever and dismiss all claims against Landmark and to enter judgment accordingly. The claims against defendant Sobel shall continue.

Dated: APR 09 2007

Alice Schlesinger
ALICE SCHLESINGER J.S.C.

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

-----X
JOEL LAVANDIER, f/k/a JOEL ROSARIO, and
STEPHANIE CARRERO, Infants, by their Mother and
Natural Guardian, RAMONA ROSARIO,
individually and as assignees of 22 HOLDING CORP.
and CHAMA HOLDING CORP.,

Plaintiffs,

Index No. 113913/01

-against-

Motion Seqs. 005, 006 & 007

LANDMARK INSURANCE COMPANY, YORK CLAIMS
SERVICE and SOBEL AFFILIATES, INC.,

Defendants.

-----X
SCHLESINGER, J.:

FILED

APR 13 2007

NEW YORK
COUNTY CLERK'S OFFICE

Before the Court at this time are motions for summary judgment by the various defendants, Landmark Insurance Company (Landmark), York Claims Service (York), and Sobel Affiliates, Inc. (Sobel).

On January 18, 2005, this Court granted the motion by plaintiffs/assignees to amend the complaint against defendants Landmark, York, and Sobel. The original action was one for a declaratory judgment, but it lacked detail and specified causes of action. The amended complaint brought clarity to the relief sought and also asked for money damages. The defendants all opposed the motion, arguing that for one reason or another the amended complaint lacked merit. For example, Sobel argued that the amended claims, which included ones sounding in breach of contract and negligence, were barred by the statute of limitations or were in some generalized way prejudicial. Sobel appealed my decision, mainly on the above argument that the claims were time-barred, but the

amendment was allowed in *Lavandier v. Landmark Insurance Company, et al.*, 26 AD3d 264 (1st Dep't February 21, 2006).

The underlying controversy involves the plaintiffs, two children who were/are victims of lead poisoning. The infant plaintiffs obtained judgments in the Civil Court after trial against 22 Holding Corp. and Chama Holding Corp., the original defendants/assignors and owners of the building where plaintiffs resided. The amended complaint relates to efforts by these plaintiffs to enforce the greater part of those judgments against one or more of the three named defendants.

Landmark is one insurance company that issued liability policies to 22 Holding and Chama for the building at issue, 321 Edgecombe Avenue, for the applicable times. Landmark has disclaimed on these policies for failure to receive timely notice. York served as a third-party administrator engaged by Boruch Greisman, former principal of 22 Holding and Chama; who had allegedly been notified of the claims in 1997 but did nothing in the way of forwarding them to Landmark. Sobel is a licensed broker who had obtained these and other policies for Greisman's building and serviced them. Sobel also never notified Landmark of the claims. Interestingly, Sobel did notify a different insurer, Generali, who did not disclaim and who satisfied a small part of the judgments obtained by the children.¹

Interestingly, a single document forms the sole basis for the two causes of action being asserted against York by the plaintiffs. That document is a letter dated January 23, 1997 from Generali's counsel, Maria Fazzolieri of Pino & Associates, to York

¹The Civil Court awarded Joel Rosario the aggregate amount in total present value of \$2,234,145.25. Generali satisfied \$342,000 of this judgment. Stephanie Carrero was awarded the aggregate amount in total present value of \$1,676,564.53 and Generali satisfied \$258,000 of this judgment.

containing Chama's name and some information about the claim. However, York was never able to locate this letter in its files and never acted upon it or forwarded it to Landmark.

Plaintiffs' claims sound in breach of contract and negligence against York. These are the same two causes of action against Sobel. As for Landmark, there are also two causes of action, but they are different. The first is that, pursuant to §3420(a)(2) of the Insurance Law, Landmark did receive timely notice of the claim from Sobel or York. Second, if it did not, its disclaimer was either ineffective or untimely.

Now before me are motions made by all of the defendants for summary judgment. Sobel brings on its motion first and is the only party, including the plaintiff, who opposes York's motion. Sobel presents a panolopy of arguments, none of which, in this Court's opinion, is ultimately persuasive. The arguments in summary form are that the claims are time-barred, both the one sounding in breach of contract and the one sounding in negligence. Next Sobel argues, vis-a-vis the contract claim, that there is not really a contract at all. Why? Because nothing is explicitly written, and if the alleged contract is oral, it violates the Statute of Frauds and it lacks consideration. Finally, Sobel asserts that if there was a contract, it was only with Boruch Greisman, who was never a party to these actions. Regarding the claim sounding in negligence, besides it being untimely, Sobel argues that it breached no duty and if it did, no damages have been suffered because Landmark's disclaimer was incomplete and defective.

York presents better arguments. Its motion is accompanied by an affidavit from Peter Lind, its senior vice president and general counsel, who explains the following. York is a third-party administrator, nothing more. For it to perform work on behalf of its client,

work which includes notifying the insurer, there first must be a request by the client, here Greisman, to adjust a claim. That request is made once it appears likely that the Self-Insured Retention ("SIR") limit will be exceeded or that the claim is otherwise reportable pursuant to the SIR endorsement. Here, while York did find a contract with Greisman for the period 1994-95, the company was never informed by Greisman that he wished them to adjust the claim. So they never did. In fact, York never opened a claims file or even billed for any services.

With regard to the January 23, 1997 letter, while York acknowledges that a Ms. Janet Rios worked for the Company and apparently signed a receipt acknowledging receipt of something, they point out that there is nothing definitive to show that the item received was this letter. With regard to the letter itself, counsel points out that there is no way this letter can be construed as a request by Boruch Greisman to adjust or investigate the claim. The letter did not even mention Greisman, only Chama, and it was not even addressed to York. It was instead addressed to Landmark, attempting to ascertain its coverage position.

Therefore, York's position is that after all the smoke has cleared, the only connection here to York is the January 1997 letter which is far from sufficient to establish that Greisman sought York's services and that York somewhere breached its contractual obligations to him. I agree, and all claims against York are therefore dismissed.

Turning to the motion by Landmark, Landmark had three relevant insurance policies. The first, policy number 5002550, was issued to "Boruch Greisman, et al." and did cover the subject premises. It was effective for the period August 1, 1992 through August 1, 1993. It names Chama Holding Corp. as an insured. The second policy,

number 5043084, also issued to "Greisman, et al.", names Chama and 22 Holding Corp. as insureds and is effective from August 15, 1993 through August 15, 1994. The third, policy number 4095727, is the same except it runs from August 15, 1994 through August 15, 1995.

Section IV of those policies requires that the insured notify them "as soon as practicable" of an "occurrence" or an offense which may result in a claim. "Occurrence" is then defined in Section V, paragraph 9, in a way that clearly covers this situation: "including continuous or repeated exposure to substantially the same general harmful conditions." No one argues otherwise, i.e., that notice of the lead paint situation which was allegedly causing lead paint poisoning was not a reportable occurrence.

In 1994, the owners of the building did receive notice from the City of New York as to a lead paint condition. However, since there was another child in this building, a Jose Rosario (not "Joel") who was also afflicted with this poisoning, it is unclear in that year 1994 when Sobel was notified of claims by the insured, whether that notification applied to these claims (see the discussion of Sobel's motion below).

However, what is clear is that the underlying action here was commenced on June 18, 1996 and the insureds on the Landmark policies, Chama and 22 Holding, were served on July 1, 1996. Further, on July 10, 1996, two letters were sent by Boruch Greisman to his broker Sobel referencing two of the Landmark policies. Also, what is absolutely clear is that Landmark never received any notification from Greisman, Sobel, or anyone else until May 22, 2001. This notice was a fax sent by Bill Dondiego of Sobel Affiliates to Doris Ockel of AIG Toxic Tort Claims, attaching: "self-explanatory correspondence from Frank Pellegrino, defense attorney for Generali Ins. Co." seeking Landmark's involvement "to provide a united insurance front."

Landmark immediately investigated and on June 7, 2001 disclaimed for all three policies. Several grounds for the disclaimer were given, but the first and foremost ground was "Greisman's, et al.'s", failure to comply with the policy's notice requirements. Copies of the disclaimers were also sent to Fitzgerald and Fitzgerald, claimants' attorneys. It should also be noted here that the May 22, 2001 communication stated that the trial on the underlying action was to begin in approximately one month.

Finally, and relevant to the arguments made as to the defective nature of the disclaimers, a declaratory judgment action, this action, was commenced by 22 Holding and Chama Holding Corp. against Landmark within two² weeks of the disclaimer notices.

There are two issues which must be resolved in deciding Landmark's dispositive motion. First, did Landmark have a right to disclaim under the policies for their insureds' failure to give timely notice, a condition precedent to coverage? Second, were these disclaimers so defective as to make them invalid? The answer to the first question is an emphatic "Yes" and to the second query, a "No".

Giving the assignor/insureds the benefit of the doubt that they did not receive notice of the "occurrence", the alleged lead paint poisoning of the children/plaintiffs, until they were served with a copy of the plaintiffs' complaint in 1996, it was five years before Landmark received notice, in May of 2001, and at that time by Sobel. In other words, the actual insureds never notified their insurer. Further, when Landmark was finally notified of the occurrence, it was because another insurer, Generali, who had been timely

²On September 17, 2003 this Court granted the original plaintiffs' motion to intervene in the action and on January 21, 2005 I allowed plaintiffs to amend their complaint.

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informed, wanted the company to defend the action at a trial scheduled to begin in less than a month. Landmark then timely disclaimed on June 7, 2001.

In decisions such as *Goodwin Bowler Associates, Ltd. v. Eastern Mutual Insurance Co.*, 259 AD2d 381, a case cited by Landmark, the First Department found a two-month delay in submitting a notice of claim unreasonable as a matter of law. And the cases are legion which hold that varying periods constitute unreasonable notice. In *New York City Transit Authority v. National Fire Insurance Co.*, 291 AD2d 213 (1st Dept 2002) the Court opined that a 27-month gap between the commencement of a lawsuit and notification to the insurance company was untimely as a matter of law.

Here, Greisman certainly knew of this lawsuit in 1996, at the latest. We know this because he promptly forwarded the papers to his broker Sobel. Sobel never informed Landmark until years later. Therefore, it is clear on these facts that while Landmark did not breach its contractual and legal obligations in failing to timely disclaim, assignors/insureds certainly failed to satisfy a condition precedent to coverage by not giving timely notice of this occurrence.

The second issue which the plaintiffs and Sobel argue has to do with the disclaimer notices themselves and how they were addressed. An insurance company when it disclaims must apprise the claimant with precision as to the reason for the disclaimer. As noted earlier, three disclaimer letters were sent out for each of the three policies.

The first notice referenced Policy No. 5002550 for the period 8/1/92-93 and indicated the insured was "Boruch Greisman, et al". It was sent to Boruch Greisman. It was copied to Bill Dondiego of Sobel Affiliates, Pino & Associates, Attn: Frank Pellegrino (Generali's attorney), 22 Holding Corp. at two addresses in Brooklyn and one in the Bronx,

[* 9]
and Boruch Greisman at a Bronx address. Mr. Greisman was also sent the notification at a Brooklyn address.

The second disclaimer referenced Policy No. 5043084 for the period 8/15/93 - 8/15/94 and also showed Boruch Greisman, et al., as the insured. It was sent to the same recipients and was otherwise identical to the first disclaimer.

The third Notice of "declination of coverage" was exactly the same except it referenced Policy No. 4095727 for the period 8/15/94 - 95. None of the letters mentioned Chama. Again, plaintiffs and Sobel argue these notices did not comply with Insurance Law §3420.

However, I disagree. Boruch Greisman was the sole principal of the nominal owners of the building. It was important for him and his broker to receive prompt notice of the disclaimers and the reasons why. This clearly occurred and is evidenced by the declaratory judgment action begun by the owners on July 19, 2001. Further, as pointed out by counsel for Landmark, the insurer received no queries as to whether Landmark was disclaiming against only some of the insureds. Instead, Sobel faxed Landmark on July 6, 2001 and stated "we have now received a declination of coverage letter regarding the three Landmark policies which may be involved in this claim."

Therefore, it is clear that there was no confusion as to the action Landmark was taking and the reason for that action. To find that minor deficiencies, such as the failure to mention Chama, invalidated the disclaimers would be to exert form over substance. Thus, I find the disclaimer letters were effective and in conformity with the insurer's statutory requirements.

Based on the above discussion, the other arguments made by Landmark, for example dealing with the Self-Insurance Retention clause, do not have to be reached. The motion by Landmark for summary judgment in its favor is in all respects granted and all claims are dismissed against it.

Finally, as to Sobel Associates. It is now apparent by the disposition of Landmark's motion that plaintiffs have in fact been damaged. Counsel for Sobel, in one of her arguments, had urged that no damage had been sustained by the plaintiffs in being able to enforce their judgments because coverage did exist under the Landmark policies. But now I have found that no coverage exists, so the question arises whether the plaintiffs can look to Sobel. The answer is yes.

As alluded to earlier in this decision, counsel proffers several arguments to support her view that Sobel should be let out of this case, the last being the no damage argument. The other arguments are ones sounding in violation of the statute of limitations for the breach of contract and negligence claims or untimeliness of the original complaint brought in July of 2001 and that no real contract existed between the assignor/insureds (the Greisman entities) and Sobel. For this argument, counsel cites a lack of consideration by the Greisman entities to them, a violation of the Statute of Frauds, General Obligations Law §5-701 pertaining to the inability of an oral contract to be performed within a year, and finally, if there was a contract, it was only with Boruch Greisman, not his corporate entities.

First, I will deal with the contract arguments, all of which, in my opinion, fail. As to consideration, despite Sobel's Neil Unger (Sobel's Executive Vice President) stating that the insured paid him nothing and that all compensation came to them from Landmark, this is still consideration whatever its source, since it derived from the premiums Greisman paid

* 11]

for the policies, a portion of which was sent to Sobel. Clearly Sobel was Greisman's broker on these policies for this building and as such had certain obligations, such as forwarding notification of occurrences, which they did for Greisman and his company vis-a-vis Generali. (In this connection, see the deposition testimony of Sobel's employee Maryanne Muscarnera). The policies, though purchased by Greisman clearly were for the benefit of his two companies 22 Holding and Chama in insuring this building, and the policies procured by Sobel indicated as much.

As for the Statute of Frauds argument, that is not persuasive for two reasons. First because, as argued by plaintiff, §5-701(a)(1) has been construed as limited to contracts which by their explicit terms have no possibility of being performed within one year. See, e.g., *D&N Boening, Inc. v. Kirsch Beverages, Inc.*, 63 NY2d 449 (1984) and *Lichtman v. Estrin*, 282 AD2d 326 (1st Dep't 2001). Here certainly, the obligations Sobel had to forward notices to insurers pursuant to the policies could have been performed within a year.

Secondly, Sobel partially performed its brokerage contract with Greisman. This is evidenced by the fact that it forwarded this claim to Generali, another of Greisman's insurers for this building.

As to the Statute of Limitations argument, Sobel urges that CPLR §213 which establishes a six-year limit for bringing breach of contract actions is violated here since any alleged breach occurred in April of 1994, more than six years before this declaratory judgment action was brought in July 2001. However, contrary to what counsel argues, August 1994 is not clearly the date when Sobel first received notice of this claim. The Appellate Division (26 AD3d 264) said as much in affirming this Court's decision allowing the plaintiffs to amend their complaint. And this confusion, contrary to Sobel's argument,

* 12]
is not cleared up by the plaintiffs' response to interrogatories #1, 3 and 9 dated December 1, 2005. Inquiring as to when the acts or omissions by Sobel occurred and how and when the contract was breached. The response given was:

Sobel failed and omitted to notify Landmark Insurance Company of plaintiffs' claims against Assignors 22 Holding Corp. and Chama Holding Corp. The omissions occurred over a period of time from 1994 through 1996.

The confusion comes because another claim was commenced against these same owners by a child, also by the name of Rosario, in 1994. That was Jose Rosario. But the plaintiff here was Joel Rosario and his action was not commenced until 1996. If the 1996 dated is used, and it could well be used, then the 2001 commencement date is timely.

As to the three-year statute of limitations on the negligence cause of action, that seems to have actually been decided by this Court and the reviewing court which said:

Particularly in view of the circumstances that the proposed negligence claim occurred not at the time of the alleged breach of duty but, subsequently, at the time of injury... i.e., in June 2001 when Landmark disclaimed.

Therefore, for all of the above reasons, I find that both claims against Sobel should go forward, based on breach of contract and negligence. Its motion for summary judgment is in all respects denied.

There is one final issue that should be resolved, the aspect of the amount of damages available to the plaintiffs. Here, I do agree with the argument put forth by counsel for Sobel. First, the damages claimed are limited by the parameters of the judgment entered in Civil Court in the underlying action. That is a final judgment which has been entered. Second, despite certain late submissions and arguments proffered by

counsel for plaintiffs, I find that the claims by these children constitute one occurrence under the policies.

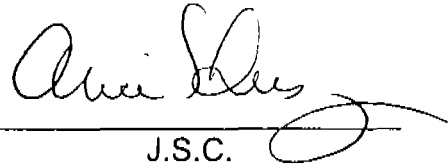
Accordingly, it is hereby

ORDERED that the motions for summary judgment by defendants Landmark Insurance Company and York Claims Service are granted, and the Clerk is directed to sever all claims against Landmark and York and to enter judgment dismissing them; and it is further

ORDERED that the motion for summary judgment by defendant Sobel Affiliates, Inc. is in all respects denied and the action shall continue against Sobel.

Dated: April 9, 2007

APR 09 2007



J.S.C.

ALICE SCHLESINGER

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