

**IDI Constr. Co. v Interstate Ins.
Group**

2007 NY Slip Op 30976(U)

April 25, 2007

Supreme Court, New York County

Docket Number: 0107885/2005

Judge: Carol R. Edmead

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

CAROL EDMOND

PRESENT:

~~CLARENCE THOMAS~~
Justice

J.S.C.

PART 35

IDI

INDEX NO. 107885/05

MOTION DATE

MOTION SEQ. NO. 001

MOTION CAL. NO.

- v -

Interstate

Original

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

PAPERS NUMBERED

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

Answering Affidavits — Exhibits

Replying Affidavits

Cross-Motion: Yes

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be entered based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Upon the foregoing papers, it is ordered that this motion

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

Motion sequences (001), (002), and (003) are decided in accordance with the accompanying Memorandum Decision. It is hereby

ORDERED that as to motion sequence 001, IDI Construction Company's motion for summary judgment against Interstate Fire and Casualty Company s/h/a/ Interstate Insurance Group is denied, and the complaint is dismissed as to Interstate Fire and Casualty Company; and it is further

ORDERED that as to motion sequence 002, IDI Construction Company's motion for summary judgment against defendant Commerce and Industry Insurance Company is denied; and it is further

ORDERED that as to motion sequence 003, IDI Construction Company's motion for summary judgment against defendant National Fire & Marine Insurance Company s/h/a National Indemnity Company is granted and it is

Dated: _____

J.S.C.


Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

ADJUDGED that National Fire & Marine Insurance Company is obligated to assume, as a co-insurer, the defense of IDI in connection with the underlying action entitled 620 Broadway Housing et al. v Rusabo 610 LLC et al., New York County Index No. 120942/03.

UNFILED JUDGMENT
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Dated 4/25/07

ENTER: 
J.S.C.
CANCELED HEAD

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: I.A.S. PART 35

-----X
IDI CONSTRUCTION COMPANY, INC.,

Plaintiff,

-against-

Index No. 107885/05
DECISION AND ORDER

INTERSTATE INSURANCE GROUP, FIREMAN'S FUND
INSURANCE COMPANY, ISLAND FOUNDATION CORP.,
NATIONAL INDEMNITY COMPANY, RICHARD C.
MUGLER COMPANY, INC., COMMERCE & INDUSTRY
INSURANCE COMPANY, and GRAMERCY GROUP, INC.,

Defendants.

UNFILED JUDGMENT
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and notice of entry cannot be given based hereon. To
obtain entry, counsel or authorized representative must
appear in person at the Judgment Clerk's Desk (Room
141B).

CAROL EDMEAD, J:

MEMORANDUM DECISION

Motion sequence numbers 107885/05-001 through 003 are consolidated for disposition.

In motion sequence 001, plaintiff IDI Construction Company, Inc. (IDI) moves, pursuant to CPLR 3212, for summary judgment against defendant Interstate Fire and Casualty Company s/h/a Interstate Insurance Group (Interstate), declaring that Interstate is obligated to: (1) assume the defense of IDI in connection with an underlying action; and (2) reimburse IDI for any and all defense fees and costs incurred by IDI to date in connection with that underlying action. In motion sequence 002, IDI moves for summary judgment against defendant Commerce and Industry Insurance Company (Commerce) declaring that Commerce is also obligated to assume IDI's defense and is liable for its costs incurred in the underlying action. In motion sequence 003, IDI moves against defendant National Fire & Marine Insurance Company s/h/a/ National Indemnity Company (National Fire) for summary judgment seeking the same declaratory and monetary relief with respect to the underlying action. National Fire cross-moves for partial

summary judgment on its counterclaim against IDI and cross-claim against its co-defendants.

Plaintiff IDI, a construction company and the general manager of a construction project at 610 Broadway, New York, New York (the Project Site), brings this action seeking coverage as an additional insured under its 12 subcontractors' general liability policies, for defense costs and indemnity in connection with an underlying action entitled 620 Broadway Housing et al. v Rusabo 610 LLC et al., New York County Index No. 120942/03 (the 620 Action).

The plaintiffs in the 620 Action are the co-op board and various individual shareholder residents of the building located at 620 Broadway, New York, New York, which is immediately adjacent to the Project Site. In the 620 Action the plaintiffs seek to recover damages sustained to their building as a result of demolition of an underground parking garage and other construction activity at the Project site.

Broadway Houston Mack Development LLC (BHMD) is the developer and ground lessee of the Project Site. Rusabo 610 LLC (Rusabo) is the fee owner. In June 2003, BHMD retained IDI as the general contractor and/or construction manager to demolish the existing structure at the Project Site, and construct a new, six-story office building with three underground parking levels in its place.

IDI subcontracted the shoring, bracing and/or underpinning work for the north area of the construction site adjacent to the 620 building to Richard C. Mugler Co. Inc. (Mugler), and entered into a subcontract agreement with Mugler dated January 28, 2003 (the IDI / Mugler Agreement). The IDI / Mugler Agreement contained a provision requiring Mugler to maintain comprehensive general liability insurance and to name IDI, BHMD, and Rusabo as additional insureds. Mugler obtained insurance with National Fire covering the period January 24, 2003 to

January 24, 2004.

IDI subcontracted the demolition work to Gramercy Group, Inc. (Gramercy) and entered into a subcontract agreement with Gramercy dated August 6, 2003 (the IDI / Gramercy Agreement). The IDI / Gramercy Agreement contained a provision requiring Gramercy to maintain comprehensive general liability insurance and to name IDI, BHMD and Rusabo as additional insureds on such policy. Gramercy obtained insurance coverage with Commerce covering the period from November 6, 2002 to November 6, 2003.

IDI subcontracted the foundation work to Island Foundation Corp. (Island), and entered into a subcontract agreement with Island dated July 28, 2003 (the IDI/ Island Agreement). The IDI / Island Agreement obligated Island to defend and indemnify IDI and BHMD for any damages or losses arising out of Island's work. The IDI / Island Agreement also obligated Island to maintain comprehensive general liability insurance and to name IDI and BHMD as additional insureds on the policy. Island obtained a commercial general liability policy with Interstate for the policy period encompassing August 1, 2003 through August 1, 2004 (the Interstate policy). It obtained an excess umbrella policy with National Surety Corporation s/h/a Fireman's Fund Insurance Company (National Surety).

Work on the Project Site began in September, 2003. On October 24, 2003, the residents of 620 Broadway began to observe cracks and defects in the ceilings, walls and door frames in both the individual residential units, as well as common areas of their building. On October 24th the New York City Department of Buildings issued a Stop Work Order at the Project Site.

On October 29, 2003, and again on November 10, 2003, James Stumpf, the President of IDI, wrote a letter to James Pugh, the President of 620 Broadway Housing Corporation assuring

Mr. Pugh that IDI would repair any damage to the residents' apartments which occurred after the commencement of construction work at 610 Broadway.

Despite Stumpf's attempt to resolve the issue, the Board and the residents of 620 Broadway commenced the 620 Action on December 2, 2003, naming Rusabo, BMHD and IDI as defendants. In March 2004, the plaintiffs served an amended complaint. On February 12, 2004, and April 20, 2004, Rusabo and BHMD appeared and answered the complaint and amended complaint, respectively, and asserted cross-claims against IDI for contribution indemnification and failure to procure insurance. On February 12, 2004 and on June 4, 2004, IDI appeared and answered, asserting cross-claims against Rusabo and BHMD. Shortly thereafter, IDI initiated third-party actions against ten other subcontractors and professional service firms which, it alleged, were involved with the work that took place at the Project Site.

On July 12, 2004, defense counsel hired by Virginia Surety Company, Inc. (VSC), successor in interest of Combined Specialty Insurance Company (CSIC), which issued a commercial general liability policy to IDI, informed Interstate of the 620 Action, and demanded that, as Island's insurer, Interstate acknowledge its duty to provide coverage to IDI, BHMD and Rusabo as additional insureds under a commercial general liability policy issued to Island. Interstate did not respond to that request.

On May 20, 2005, Cambridge informed National Fire of the 620 Action and requested that, as Mugler's insurer, National Fire acknowledge its duty to provide coverage to IDI, BHMD, and Rusabo as additional insureds under its policy issued to Mugler.

On June 13, 2005, National Fire responded to that request denying coverage on the grounds IDI, BHMD and Rusabo were not additional insureds under the policy in that IDI had

not provided National Fire with a copy of an signed subcontract agreement.

On May 20, 2005, defense counsel for VSC informed Commerce of the 620 Action, and requested that Commerce acknowledge its duty to defend and indemnify IDI, Rusabo and BHMD with respect to the 620 Action, pursuant to its policy with Gramercy.

On June 6, 2005, IDI commenced the within action against Mugler, Gramercy, Island and their insurers, including Interstate, Commerce and National Fire. IDI moves for summary judgment on its claims against these named insurers on the ground that it is an additional insured under each of those policies. Interstate, Commerce and National Fire each oppose the motion on the ground that their policies provide only for “excess insurance” and that they have no duty to defend IDI if any other insurer has a duty to defend it in the 620 Action.

Here, each of the policies in issue, including IDI’s policy with CSIC, clearly provides that it is an “excess” policy. The Interstate policy contains the following language:

SECTION IV– COMMERCIAL GENERAL LIABILITY

CONDITIONS

4. Other Insurance

If other valid and collectible insurance is available to the insured for a loss we cover under Coverages A or B of this Coverage Part, our obligations are limited as follows:

b. Excess Insurance

This insurance is excess over any of the other insurance, whether primary, excess, contingent or on any other basis:

(1) That is Fire, Extended Coverage, Builder’s Risk, Installation Risk or similar coverage for “your work”;

When this insurance is excess, we will have no duty under Coverages A or B to defend the insured against any “suit” if

any other insurer has a duty to defend the insured against that “suit.” If no other insurer defends, we will undertake to do so, but we will be entitled to the insured’s rights against all those other insurers.

(Williams Aff, May 5, 2006, Ex. J).

The Commerce policy, issued to Gramercy, provides, in part, under the heading “Other Insurance” as follows:

SECTION IV. CONDITIONS

6. Other Insurance

Applicable to Coverages A and B

If other valid and collectible insurance is available to an insured for a loss we cover under Coverages A or B of this Policy, our obligations are limited as follows:

a. Primary Insurance

This insurance is primary except when b. below applies. If this insurance is primary, our obligations are not affected unless any of the other insurance is also primary. Then, we will share with all that other insurance by the method described in c. below.

b. Excess Insurance

This insurance is excess over:

(1) Any of the other insurance, whether primary, excess, contingent or on any other basis

(a) That is Fire, Extended Coverage, Builder’s Risk, Installation Risk or similar coverage for **your work**;

(Novak Aff., Ex. 1) (emphasis in original)

The National Fire Policy obtained by Mugler, provides, in part, as follows:

SECTION IV –COMMERCIAL GENERAL LIABILITY

CONDITIONS

4. Other Insurance

If other valid and collectible insurance is available to the insured for a loss we cover under Coverages A or B of this Coverage Part, our obligations are limited as follows:

a. Primary Insurance

This insurance is primary except when **b.** below applies. If this insurance is primary, our obligations are not affected unless any of the other insurance is also primary. Then we will share with all that other insurance by the method described in **c.** below.

b. Excess Insurance

This insurance is excess over:

- (1) Any of the other insurance, whether primary, excess, contingent or on any other basis:
 - (a) That is Fire, Extended Coverage, Builder's Risk, Installation Risk or similar coverage for "your work";

(Williams Aff., May 8, 2006, Ex. I)

The CSIC policy, obtained by IDI, provides, in part, under the heading "Other Insurance," as follows:

4. Other Insurance

If other valid and collectible insurance is available to the insured for a loss we cover under Coverages A or B of this Coverage Part, our obligations are limited as follows:

a. Primary Insurance

This insurance is primary except when **b.** below applies.

If this insurance is primary, our obligations are not affected unless any of the other insurance is also primary. Then we will share with all that other insurance by the method described in c. below.

b. Excess Insurance

This insurance is excess over:

- (1) Any of the other insurance, whether primary, excess, contingent or on any other basis:
 - (a) That is Fire, Extended Coverage, Builder's Risk, Installation Risk or similar coverage for "your work";

(Novak Aff., Ex. 2).

It is a well established principle that an "additional insured" enjoys the same protection as the name insured. Coverage for additional insureds is primary coverage unless unambiguously stated otherwise (Pecker Iron Works of New York, Inc. v Traveler's Insurance Company, 99 NY2d 391 [2003]; BP Air Conditioning Corp. v One Beacon Insurance Group, 33 AD3d 116 [1st Dept 2006]). The relative liability of two or more insurers to defend an action depends upon a comparison of their "other insurance" provisions (State Farm Fire & Casualty Co. v LiMauro, 65 NY2d 369, 372 [1985]; American Ref-Fuel Co. of Hempstead v Resource Recycling, Inc., 248 AD2d 420, 425 [2d Dept 1998]). Where two policies covering the same accident both contain clauses limiting their liability to be excess over other valid insurance, such clauses cancel each other out and each policy will be considered primary (Federal Insurance Co. v Atlantic Nat'l Ins. Co., 25 NY2d 71, 75-76 [1969]; Avondale Indus., Inc. v The Travelers Indemnity Co., 774 F Supp 1416, 1436 [SD NY 1991]).

Here, since each of the "excess" provisions cancel each other out, Interstate, Commerce National Fire and CSIC are each primary insurers with respect to IDI and, absent other grounds

for invalidating the policies, have a co-insurer duty to defend IDI in the underlying action.

MOTION SEQUENCE 001

In addition to claiming that it is merely an excess insurer, Interstate also opposes the motion for summary judgment on the grounds that the Interstate policy requires timely notice of an “occurrence” and any ensuing claim or lawsuit. Interstate alleges that IDI did not inform it of the 620 Action until nine months after the occurrence and seven months after the commencement of the 620 Action.

Where a policy of liability insurance requires that notice of an occurrence be given “as soon as practicable,” such notice must be accorded the carrier within a reasonable period of time (Great Canal Rlty Corp. v Seneca Ins. Co., 5 NY3d 742 [2005]; Security Mutual Ins. Co. of N.Y. v Acker-Fitzsimons Corp., 31 NY2d 436 [1972]). The insured’s failure to satisfy the notice requirement constitutes “a failure to comply with a condition precedent which, as a matter of law, vitiates the contract” (The Argo Corp. v Greater N.Y. Mut. Ins. Co., 4 NY3d 332, 339 [2005]). The insured has the burden of demonstrating that the delay in question was reasonable (Security Mut. Ins. Co. of N.Y. v Acker-Fitzsimons Corp., *supra.*). While there is no set formula in determining an unreasonable delay, here, nine months from the occurrence, without any excuse for the delay, is, as a matter of law, unreasonable (see Heydt Contr. Corp. v American Home Assur. Co., 146 AD2d 497 [1st Dept 1989]).

IDI counters that Interstate’s failure to timely disclaim coverage precludes it from denying coverage based on any of the conditions or exclusions contained in the policy. Inasmuch as the underlying action is for property damage, IDI’s claim of estoppel must be supported by a showing of prejudice (Rodriguez v Metropolitan Life Ins. Co., 251 AD2d 208 [1st Dept 1998]).

IDI has not alleged any prejudice as a result of Interstate's delay in disclaiming coverage. For this reason, Interstate may not be held liable for IDI's defense costs in the 620 Action.

MOTION SEQUENCE 002

Commerce contends that IDI is not entitled to coverage as an additional insured under its policy issued to Gramercy, because the policy extends coverage to IDI only with respect to liability arising out of Gramercy's ongoing operations. Endorsement No. 8 to its policy provides additional insured coverage "where required by written contract . . . but only with respect to liability arising out of your ongoing operations performed by you or on your behalf for that insured" (Novak Aff., Ex. 2). Commerce contends that there are no facts or legal theories alleged in the underlying action to support IDI's claim that it qualifies as an additional insured and is entitled to defense coverage under the Commerce policy.

An insurer's duty to defend is "exceedingly broad" (Continental Cas. Co. v Rapid-American Corp., 80 NY2d 640 [1993]). "An insurer must defend whenever the four corners of the complaint suggest . . . a reasonable possibility of coverage" (*id.*, at 648). Here, the underlying complaint alleges that "subcontractors . . . were and continue to be negligent in the demolition, excavation, construction and all activity at the site" (Williams Aff., May 5, 2006, Ex. 2). Further, it is undisputed that Gramercy performed demolition work at the Project site prior to the time that the damage to 620 Broadway occurred. IDI has therefore stated facts sufficient to trigger Commerce's defense obligations.

Finally, Commerce contends that there is an issue of fact as to whether IDI gave timely notice of the occurrence and underlying lawsuit. Commerce notes that IDI asserts in its May 20, 2005 tender letter that it learned of the existence of the Commerce policy from discovery

responses of the third-party defendant Gramercy (Williams Aff., Ex. K).

Where an excuse or explanation is offered for delay in furnishing notice, the reasonableness of the delay and the sufficiency of the excuse are matters to be determined at trial (Travelers Ins. Co. v Volmar Const. Co., Inc., 300 AD2d 40 [1st Dept 2002]). The issue as to whether IDI provided prompt notice of the occurrence and underlying lawsuit to Commerce is therefore reserved for trial.

MOTION SEQUENCE 003

In motion sequence 003, National Fire opposes IDI's motion for summary judgment and cross-moves for partial summary judgment on its counterclaim against IDI and its cross-claim against its co-defendants. National Fire's counterclaim/cross-claim is for declaratory judgment holding that National Fire has no obligation to defend IDI against any liability for damages in the 620 Action.

National Fire raises a number of objections with respect to its liability for IDI's defense in the underlying action. First, it contends that, pursuant to its policy, IDI can only qualify as an additional insured, if Mugler agreed in a written contract to have IDI named as an additional insured. National Fire contends that the agreement between IDI and Mugler was not signed and is therefore not sufficient to bind National Fire. Second, National Fire contends that the complaint in the underlying action does not name Mugler as a defendant and that liability does not arise out of Mugler's "ongoing operations" as required by its policy. Third, National Fire asserts that its policy excludes property damage arising out of, or caused by the subsidence, settling, sinking, slipping, etc. or any other movement of earth.

Finally, National Fire relies on a provision of its policy which provides that it has the

option, but not the duty, to defend any suit if an insured requests that another company defend the suit.

As to the absence of the parties' signatures on the IDI / Mugler Agreement, an unsigned contract may be enforceable, provided there is objective evidence establishing that the parties intended to be bound (Flores v Lower East Side Service Center, Inc., 4 NY3d 363 [2005]). The parties' conduct indicates that they intended to be bound by the contract and IDI has submitted various work orders which were signed by both parties during October 2003, at the time the work was being performed.

As to National Fire's contention that the complaint in the underlying action does not name Mugler as a defendant and does not arise out of Mugler's "ongoing operations," as noted above "[a]n insurer must defend whenever the four corners of the complaint suggest . . . a reasonable possibility of coverage" (Continental Cas. Co. v Rapid-American Corp., *supra*, 80 NY2d at 648). There is no dispute that Mugler was performing shoring, bracing and underpinning work at the Project Site at the time the damage to 620 Broadway occurred. This nexus is sufficient to trigger National Fire's defense obligation.

As to National Fire's contention that its policy excludes coverage for damage caused by "subsidence, settling, sinking," etc., these exclusions are given strict and narrow construction, with any ambiguities resolved against the insurer (242-44 East 77th Street, LLC v Greater New York Mutual Insurance Co., 31 AD3d 100 [1st Dept 2006]). Further, the First Department has determined that a similar clause in an insurance contract was limited to damage caused by natural phenomena, and was not applicable to claims for property damage caused by demolition work on an adjoining property (*id.*).

Finally, the defense election clause, cited by National Fire, states as follows:

If any insured believes that more than one insurance company may have the duty to defend a "suit" for which coverage is provided under this Policy, the insured must elect in writing either to request us to defend the insured or to request one or more other insurance companies to defend the insured with regard to that "suit."

We have the option, but not the duty, to defend any "suit" if any insured has requested another insurance company or companies to defend the "suit" in whole or in part, regardless of whether such request has been accepted or accepted under a reservation of rights. We may request the insured to warrant that it has not requested and will not request another insurance company to defend the "suit" in whole or in part as a condition precedent to our defending the "suit."

(Williams Aff. May 8, 2006, Ex. I).

This provision provides only that National Fire may not be required to appoint defense counsel and/or otherwise undertake the defense of IDI in the 620 Action, should IDI choose to have another insurance company defend it; it does not relieve National Fire of its obligation to contribute to such defense costs (see Travelers Ins. Co. v General Accident, Fire & Life Assurance Corp., 28 NY2d 458, 463 [1971]).

Accordingly, based upon the foregoing, it is

ORDERED that as to motion sequence 001, IDI Construction Company's motion for summary judgment against Interstate Fire and Casualty Company s/h/a/ Interstate Insurance Group is denied, and the complaint is dismissed as to Interstate Fire and Casualty Company; and it is further

ORDERED that as to motion sequence 002, IDI Construction Company's motion for summary judgment against defendant Commerce and Industry Insurance Company is denied; and


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Dated: April 25, 2007

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CAROL EDMEAD
Carol Robinson Edmead, J.S.C. **J.S.C.**