

**Carroll v Nostra Realty Corp.**

2007 NY Slip Op 31384(U)

May 22, 2007

Supreme Court, New York County

Docket Number: 0109293/2002

Judge: Carol R. Edmead

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

PRESENT: HON. CAROL EDMEAD  
*Justice*

PART 35

Carol, S

INDEX NO. 109293/02

MOTION DATE 8/31/07

MOTION SEQ. NO. 08

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

- v -

Nostra

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

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

Answering Affidavits — Exhibits \_\_\_\_\_

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

PAPERS NUMBERED

**FILED**

MAY 30 2007

NEW YORK  
COUNTY CLERK'S OFFICE

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

In accordance with the accompanying Memorandum Decision, it is hereby

ORDERED that the motion by third-party plaintiffs Nostra Realty Corporation, Greater New York Insurance Company, and Centennial Insurance Company for summary judgment pursuant to CPLR 3212 against Fireman's Insurance Company of Washington D.C., for FICO's *pro rata* share of legal fees and expenses to date, is granted; and it is further

ORDERED that third-party plaintiffs shall serve a copy of this Order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: 5/22/07

HON. CAROL EDMEAD J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

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 35

-----x  
SAMANTHA CARROLL, and ZACHARY CARROLL,  
Infants under the age of fourteen years, by their Mother and  
Natural Guardian, DEBRA CARROLL, and DEBRA  
CARROLL and JAMES CARROLL, Individually,

Index No. 109293-2002

Plaintiffs,

-against-

DECISION/ORDER

NOSTRA REALTY CORPORATION,

Defendant.

-----x  
NOSTRA REALTY CORPORATION, GREATER NEW  
YORK INSURANCE COMPANY, CENTENNIAL  
INSURANCE COMPANY,

Third-Party Plaintiffs,

-against-

FIREMAN'S INSURANCE COMPANY OF  
WASHINGTON D.C.,

Third-Party Defendant.

-----x  
HON. CAROL ROBINSON EDMEAD, J.S.C.

MEMORANDUM DECISION

Third-party plaintiffs Nostra Realty Corporation ("Nostra"), Greater New York Insurance Company ("New York Insurance"), and Centennial Insurance Company ("Centennial") (collectively, "third-party plaintiffs") move pursuant to CPLR 3212 for summary judgment against Fireman's Insurance Company of Washington D.C., ("FICO") for its *pro rata* share of legal fees and expenses to date, on the ground that no triable issue of fact exists as to FICO's

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liability.<sup>1</sup>

Third-party plaintiffs contend that Centennial insured Nostra for the premises, *to wit*: apartment, 5E located at 845 West End Avenue, New York, New York (the “premises”) pursuant to two insurance policies with respective policy periods of July 20, 1991 to August 5, 1992, and July 20, 1992 to July 20, 1993 (the “Centennial Policy”).<sup>2</sup> New York Insurance insured Nostra for the premises pursuant to an insurance policy with policy period of July 20, 1997 to July 20, 2002 (the “New York Policy”).<sup>3</sup> FICO insured Nostra pursuant to five consecutive policies with policy periods of August 5, 1992 to July 20, 1997 (the “FICO Policies”).<sup>4</sup> Pursuant to the Centennial and New York Insurance policies, third-party plaintiffs New York Insurance and Centennial agreed to provide Nostra with a defense in the underlying action. Such policies predate and post date the policy periods of the FICO policies.

According to third-party plaintiffs, in the main action, plaintiffs Debra and James Carroll, and their children Samantha and Zachary Carroll (collectively, “Tenants”) allege that they were forced to vacate the premises on January 10, 2001, and suffered personal injuries due to the existence of mold and asbestos at the premises. Third-party plaintiffs maintain that the Tenants allege that Nostra failed to maintain the premises prior to January 10, 2001 (the “underlying action”).

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<sup>1</sup> Although third-party plaintiffs also sought summary judgment on its claim for full indemnification from third-party defendant, which would be premature at this juncture, counsel in the third-party action clarified that the instant motion is one solely for defense costs under the insurance agreement.

<sup>2</sup> The Centennial Policy numbers are 299012604 and 299009108, respectively.

<sup>3</sup> The New York Policy numbers is 1131M83671.

<sup>4</sup> The FICO Policy numbers are I1-2-2211-31 (1992-1993), I1-2-2211-31-94 (1993-1994), I1-2-2211-31-95 (1994-1995), I1-2-2211-31-96 (1995-1996), I1-2-2211-31-97 (1996-1997).

\* 4 ]

Third-party plaintiffs contend that on July 18, 2002, Nostra's insurance broker, BWD Group LLC ("Nostra's Broker") provided FICO with the Summons and Complaint in the underlying action and a General Liability Notice of Occurrence/Claim form as to the underlying action for all of the FICO policies. Although FICO acknowledged receipt of such documents, FICO failed to respond to Nostra's request for a defense and indemnity.

On August 29, 2002, New York Insurance notified FICO that both New York Insurance and Centennial were providing a defense to Nostra in the underlying action and requested that FICO participate in the defense as well. However, FICO failed to respond. When New York Insurance demanded that FICO participate in the defense of Nostra in January 2004, FICO again failed to respond. As a result, this third-party declaratory action seeking a declaration that FICO is obligated to provide a defense and indemnity to Nostra in the underlying action ensued.

FICO has failed to provide third-party plaintiffs with certified copies of FICO's insurance policies, despite repeated requests by third-party plaintiffs for same. And, Nostra's delay in filing this action has no affect on FICO's obligations to Nostra under the FICO policies. Nor does the fact that New York Insurance and Centennial were not named as defendants in the underlying action justify FICO's failure to provide coverage. FICO never explained its failure to respond to Nostra's demand for coverage, or the basis for not providing coverage.

FICO opposes summary judgment, arguing that the Bill of Particulars does not allege any injury that occurred during FICO's policy periods. The Complaint made vague allegations, without a definite time frame as to when the damages occurred. A Bill of Particulars amplifies the Complaint, and here, the Bill of Particulars established that the damages occurred from January 1, 2001 and continuing. According to the Bill of Particulars, a steam pipe burst at the

\* 5 ]

end of 1999, and that in June 1999, the Tenants noticed an offensive odor in the subject apartment. The Bill of Particulars further alleges that actual notice was given to Nostra several weeks prior to December 5, 2000 and in writing on December 5, 2000, and that the Tenants began treatment with doctors in January 2001. It is alleged that the Tenants suffered injuries from January 2001. Tenants are not claiming damages for the period of time prior to January 2001. Thus, FICO argues, FICO policies, which insured Nostra from 1992 through 1997, do not afford coverage, in that the damages occurred after the termination of the policies. And, even if Tenants' apartment had a leak and they smelled odors in 1999, damages, if any, occurred at that time after termination of the FICO policies. Thus, there is no possible factual or legal basis on which FICO might be eventually obligated to indemnify Nostra under any policy provision.

At the time tender was made upon FICO in August 2002, FICO had no knowledge that Tenants were only claiming damages after January 2001. Therefore, FICO had a duty to defend at the time of tender. However, such duty terminated upon service of the Bill of Particulars on January 29, 2002, when such disclosure revealed that the harm sustained was not covered by the policy. Thus, FICO concedes that it had such a duty, but only for one-third of the defense costs from the period from August 29, 2002, when the tender was made, through January 29, 2003, when the Bill of Particulars was disclosed.

Further, Nostra's contention that FICO is estopped from denying coverage by reason of FICO's failure to issue a disclaimer lacks merit, since no disclaimer is required where the damages fall outside FICO's policy periods and are not within the scope of the Insuring Agreement.

In reply, third-party plaintiffs point out that FICO admits that it had a duty to defend

\* 6 ]

Nostra in the underlying action, and that FICO's attempt to limit the time period of its duty to defend is based on a misreading of the Bill of Particulars. The Bill of Particulars is silent as to the exact date of the alleged injury, and merely establishes that the Tenants' injuries manifested themselves after January 2001. Further, the Complaint alleges that Nostra failed to maintain the premises prior to January 10, 2001. The injuries stem from a water leak that caused damages in the premises that the Tenants first noticed in 1999, but stem from Nostra's negligence, which allegedly caused the leak, and which necessarily predated the Tenants' noticing the results of the leak in 1999. Further, FICO misinterprets the language of its policy. FICO's policies require an injury caused by occurrence, which includes inhalation of pollutants during the policy periods, even if the actual onset of a bodily injury did not occur until after the policy periods. Here, Tenants seek damages for injuries that manifested themselves after January 2001, but which were caused by alleged exposure to mold and asbestos that commenced at some time prior to 1999. FICO's contention that its duty to defend ceases as of the date of the Bill of Particulars ignores the fact that the duty to defend is broader than the duty to indemnify. In addition, FICO's focus upon the Bill of Particulars ignores the sworn deposition testimony that both the water leaks and the injuries alleged began during the FICO policy periods. Specifically, deposition testimony indicates that Mrs. Carrolls' joint pain began in October 1994, that Samantha suffered allergy symptoms in 1995 and 1996, and that the family's health problems began in 1993. And, in light of FICO's concession that it owned Nostra defense in the underlying action, and the fact that the Tenants have alleged damages for bodily injury as a result of the negligence of its insured during the relevant policy periods, FICO's failure to respond to Nostra's tenders operates to estop FICO from denying coverage.

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Analysis

FICO concedes that it had a duty to defend Nostra in connection with the underlying action pursuant to the FICO commercial general liability insurance policies, and that such policy covers the period beginning on August 5, 1992 and terminating on July 20, 1997. It is uncontested that the underlying action was commenced against Nostra on or about April 30, 2002, and that New York Insurance tendered the defense of Nostra to FICO on August 29, 2002.

“It is well settled that an insurance company’s duty to defend is broader than its duty to indemnify. Indeed, the duty to defend is ‘exceedingly broad’ and an insurer will be called upon to provide a defense whenever the allegations of the complaint ‘suggest ... a reasonable possibility of coverage’” (*BP Air Conditioning Corp. v. One Beacon Ins. Group*, 33 A.D.3d 116, 821 N.Y.S.2d 1 [1<sup>st</sup> Dept 2006]; citing *Continental Cas. Co. v. Rapid-American Corp.*, 80 N.Y.2d 640, 648, 593 N.Y.S.2d 966 [1993]). “If, liberally construed, the claim is within the embrace of the policy, the insurer must come forward to defend its insured no matter how groundless, false or baseless the suit may be” (*BP Air Conditioning Corp. v. One Beacon Ins. Group*, 33 A.D.3d 116, 821 N.Y.S.2d 1 [1<sup>st</sup> Dept 2006] citing *Ruder & Finn Inc. v. Seaboard Sur. Co.*, 52 N.Y.2d 663, 670, 439 N.Y.S.2d 858 [1981]). “The duty remains ‘even though facts outside the four corners of [the] pleadings indicate that the claim may be meritless or not covered’ (*Fitzpatrick v. Am. Honda Motor Co., Inc.*, 78 N.Y.2d 61, 63, 571 N.Y.S.2d 672 [1991]).

The FICO policy provides coverage as follows:

SECTION I - COVERAGES  
COVERAGE A. BODILY INJURY AND PROPERTY DAMAGE LIABILITY  
1. Insuring Agreement.

(a) We will pay those sums that the insured become legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies. We will have the right and duty to defend any "suit" seeking those damages. . . .

(b) This insurance applies to "bodily injury" or "property damage" only if:

\* \* \* \* \*

(2) The "bodily injury" or "property damage" occurs during the policy period.

FICO's duty to defend is triggered by a "suit" against Nostra, its insured, such duty arose upon the commencement of the underlying action against Nostra, not upon notice to the insurer of the accident and initial tender of the defense (*see HRH Const. Interiors, Inc. v. Royal Surplus Lines Ins. Co.*, 16 A.D.3d 115, 791 N.Y.S.2d 76 [1<sup>st</sup> Dept 2005]). Thus, the duty of FICO to defend Nostra began upon the commencement of the underlying action against Nostra.

However, it has been held that "[A]n insurer can be relieved of its duty to defend if it establishes as a matter of law that there is no possible factual or legal basis on which it might eventually be obligated to indemnify its insured under any policy provision" (*Tortoso v. MetLife Auto & Home Ins. Co.*, 21 A.D.3d 276, 799 N.Y.S.2d 506 [1<sup>st</sup> Dept 2005] *citing Allstate Ins. Co. v. Zuk*, 78 N.Y.2d 41, 45, 571 N.Y.S.2d 429, 574 N.E.2d 1035 [1991]). "So far as concerns the obligation of the insurer to defend, the question is not whether the injured party can maintain a cause of action against the insured, but whether he can state facts which bring the injury within the coverage (*Schnipper v. Home Indem. Co.*, 99 A.D.2d 959, 472 N.Y.S.2d 653 [1<sup>st</sup> Dept 1984] *citing Grand Union v. General Accident Fire and Life Assurance Society*, 254 A.D. 274, 280, 4 N.Y.S.2d 704, *aff'd* 279 N.Y. 638; *see also Goldberg v. Lumber Mutual Casualty Ins. Co.*, of N.Y., 297 N.Y. 148, 149; *Sturges Manufacturing Company v. Utica Mutual Ins. Co.*, 37 N.Y.2d

69, 371 N.Y.S.2d 444; *International Paper Co. Continental Casualty Co.*, 35 N.Y.2d 322, 361 N.Y.S.2d 873). If “no basis for recovery within the coverage of the policy is stated in the complaint, [the court] may sustain [the insurer's] refusal to defend” (*Hartford Acc. and Indem. Co. v. Roerig*, 93 A.D.2d 933, 462 N.Y.S.2d 315 [3d Dept 1983] citing *Lionel Freedman, Inc. v. Glens Falls Ins. Co.*, 27 N.Y.2d 364, 368, 318 N.Y.S.2d 303, 267 N.E.2d 93).

In their Verified Bill of Particulars, the Tenants allege that in June 1999, the Tenants began smelling an odor “around the wall” of the master bathroom. At the end of 1999, “a steam pipe in the master bathroom floor burst.” The Tenants also allege that Nostra’s improper installation or repair of the lead pan water catchment under the master bathroom caused the lead pan water catchment to leak. This leak caused toxic mold to grow, and “its spores and fungi and friable asbestos” caused Tenants to become sick. The Tenants notified Nostra of the water leaks and the odor in November 2000, and from that date to present, Nostra has “failed to repair and remediate the premises to cleanse it of toxic mold, fungi, and friable asbestos.” The Tenants allege that Nostra’s negligence during an undefined period prior to January 10, 2001 caused injuries to the Tenants on and after January 10, 2001 and caused the Tenants to vacate the premises on January 10, 2001 (Verified Bill of Particulars ¶¶1-5; Complaint ¶2). Based on a fair reading of the Verified Bill of Particulars, it appears that the “bodily injury” suffered by the Tenants’ occurred on or after the end of 1999, after the FICO policies expired.

However, contrary to the contention of FICO, the deposition testimony submitted to the Court raises an issue as to whether the Tenants’ injuries for which Nostra may be held liable were sustained in 1994 as a result of mold conditions that began in 1993. Consistent with the principle that an insurer’s duty to defend is exceedingly broad, the record does not permit this

Court to conclude, as a matter of law, that the damages claimed in the underlying action fall squarely outside the coverage provisions of the FICO policies. Therefore, it cannot be said that the duty of FICO to defend Nostra in the underlying action ceased upon the issuance of the Bill of Particulars (*Bravo Realty Corp. v. Mt. Hawley Ins. Co.*, 33 A.D.3d 447, 823 N.Y.S.2d 360 [1<sup>st</sup> Dept 2006]).

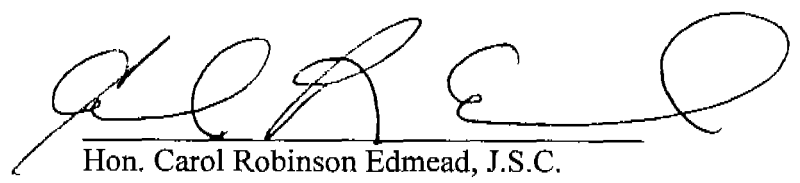
Based on the foregoing, it is hereby

ORDERED that the motion by third-party plaintiffs Nostra Realty Corporation, Greater New York Insurance Company, and Centennial Insurance Company for summary judgment pursuant to CPLR 3212 against Fireman's Insurance Company of Washington D.C., for FICO's *pro rata* share of legal fees and expenses to date, is granted; and it is further

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Dated: May 22, 2007

  
Hon. Carol Robinson Edmead, J.S.C.

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