SHORT FORM ORDER

INDEX No. 04-8707
CAL. No. 07-00055-OT

SUPREME COURT - STATE OF NEW YORK
POST-NOTE MOTION PART - SUFFOLK COUNTY

P R E S E N T :

Hon. ROBERT W. DOYLE
Justice of the Supreme Court

MOTION DATE 3-14-07
ADJ. DATE 5-9-07
Mot. Seq. # 004 - MG
Mot. Seq. # 005 - XMD
Mot. Seq. # 006 - XMD

ANDREW REABER and LINDA REABER, Plaintiffs, -against- CONNEQUOT CENTRAL SCHOOL DISTRICT NO. 7, FORTUNATO SONS, INC. and SULLIVAN & NICKEL CONSTRUCTION CO., INC., Defendants.	GREY & GREY, L.L.P. Attorneys for Plaintiffs 360 Main Street Farmingdale, New York 11735-3298 JEFFREY S. SHEIN & ASSOCS, P.C. Attys for Defts/Third-Party Plaintiffs Connequot/Fortunato/Sullivan 575 Underhill Boulevard, Suite 112 Syosset, New York 11791
CONNEQUOT CENTRAL SCHOOL DISTRICT NO. 7, FORTUNATO SONS, INC. and SULLIVAN & NICKEL CONSTRUCTION CO., INC., Third-Party Plaintiffs, -against - REVCO CONSTRUCTION CORP. and COLONY INSURANCE., Third-Party Defendants.	WILSON, ELSER, MOSKOWITZ, et al. Attys for Third-Party Deft Colony Ins. 150 East 42nd Street New York, New York 10017-5639

Upon the following papers numbered 1 to 54 read on these motions for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 9 ; Notice of Cross Motions and supporting papers 10 - 25; 26 - 39 ; Answering Affidavits and supporting papers 40 - 45; 46 - 51 ; Replying Affidavits and supporting papers 52 - 53 ; Other memorandum of law 54 ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion (#004) by third-party defendant, Colony Insurance, for an order pursuant to CPLR 3212 granting it summary judgment dismissing the third-party complaint, is granted; and it is further

ORDERED that the cross motion (#005) by defendants/third-party plaintiffs for an order

pursuant to CPLR 3212 granting them summary judgment on their claim for a declaration that Colony Insurance is obligated to defend and indemnify them, is denied and it is further

ORDERED that the cross motion (#006) by plaintiffs for an Order pursuant to CPLR 3212 granting them summary judgment as to defendants' liability pursuant to Labor Law § 240(1), is denied.

Injured plaintiff, Andrew Reaber, commenced this action to recover damages pursuant to Labor Law §§ 200, 240(1), and 241(6), and for common-law negligence, for injuries he allegedly suffered in a fall from a ladder. His wife, Linda Reaber, sues derivatively. Plaintiff, an experienced drywall spackler, was employed by third-party defendant Revco Construction Corp.,[1] the drywall subcontractor. The general contractor, Fortunato Sons, Inc., and the construction manager, Sullivan & Nickel Construction Co., were employed by the property owner, Connequot Central School District No. 7, relative to an addition and renovation at its high school.

Plaintiff testified at his deposition that the only person directing or controlling his work was the foreman for Revco and that Revco supplied a scissor-lift and two or three Baker scaffolds used by its workers. Plaintiff was the only person spackling the drywall which was installed by his coworkers. He had utilized the scissor-lift to reach the top band of the gym, and had utilized a Baker scaffold to reach the ceiling area in the janitorial closet next to the gym. The ceiling in the closet had a "tube" or "tunnel" in the corner which provided access to the roof. It began at the ceiling level and extended up, ending at the roof. On the day of plaintiff's accident he was to apply the third coat of spackle to the top band of the gym and the ceiling area in the closet. After he finished using the scissor-lift for the gym, he went to his foreman, who was working on the second floor, and asked if he could again use the Baker scaffold. However, he was told that he could not have the scaffold because it was needed to complete ceilings for the second floor of the building, and school was opening the next week. Plaintiff testified that his foreman told him to use a ladder instead. The ladder was a five or six-foot, A-frame, fiberglass and aluminum ladder. Initially, he used the ladder to apply spackle while standing on the top rung, without incident. On his second time up the ladder, his "hawk" (a device used to carry spackle) was in his left hand, his spackle knife in his right hand, and he was leaning to reach the corners of the tube area. As he leaned over, about two to three feet to his right, to reach the top of one corner, the ladder tipped over to his left and he fell against the wall and to the floor, sustaining the injuries alleged herein.

Labor Law § 240(1), commonly known as the "scaffold law," creates a duty that is nondelegable, and an owner or general contractor who breaches that duty may be held liable in damages regardless of whether they had actually exercised any supervision or control over the work (***Ross v Curtis-Palmer Hydro-Elec. Co.***, 81 NY2d 494, 601 NYS2d 49 [1993]). Specifically, Labor Law § 240(1) requires that safety devices, such as ladders, be so "constructed, placed and operated as to give proper protection to a worker" (***Klein v City of New York,*** 89 NY2d 833, 834, 652 NYS2d 723 [1996]). In order to prevail upon a claim pursuant to Labor Law § 240(1), a plaintiff must establish that the statute was violated and that this violation was a proximate cause of his injuries (*see*, ***Bland v Manocherian,*** 66 NY2d 452, 497

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[1] Revco has not appeared in the action and an order of default was filed in the Suffolk County Clerk's Office on June 28, 2006.

NYS2d 880 [1985]; ***Sprague v Peckham Materials Corp.,*** 240 AD2d 392, 658 NYS2d 97 [1997]). An injured plaintiff's contributory negligence will not exonerate a defendant who has violated § 240(1) (*see,* ***Raquet v Braun***, 90 NY2d 177, 184, 659 NYS2d 237 [1997]). Conversely, a defendant is not liable under § 240(1) where there is no evidence of a violation and the proof reveals that the plaintiff's own negligence was the sole proximate cause of the accident (***Robinson v East Med. Ctr.,*** 6 NY3d 550, 814 NYS2d 589 [2006]; ***Blake v Neighborhood Hous. Serv. of N.Y. City,*** 1 NY3d 280, 290-291, 771 NYS2d 484 [2003]).

Where, as here, a ladder collapses, slips or otherwise fails to perform its function of safely supporting the worker, a statutory violation, and thus prima facie entitlement to summary judgment, has been established (***Morin v Machnick Bldrs., Ltd.,*** 4 AD3d 668, 669-670, 772 NYS2d 388 [2004]; ***O'Connor v Enright Marble & Tile Corp.,*** 22 AD3d 548, 802 NYS2d 506 [2005]). "Once the plaintiff makes a prima facie showing[,] the burden then shifts to the defendant, who may defeat plaintiff's motion for summary judgment only if there is a plausible view of the evidence--enough to raise a fact question--that there was no statutory violation and that plaintiff's own acts or omissions were the sole cause of the accident" (***Blake v Neighborhood Hous. Servs. of N.Y. City***, *supra* at 289; ***Squires v Robert Marini Bldrs***., 293 AD2d 808, 809, 739 NYS2d 777 [2002], *lv denied* 99 NY2d 502, 752 NYS2d 589 [2002]).

In opposition to plaintiff's motion for summary judgment defendants argue that plaintiff's own actions were the sole proximate cause of his accident. They offer, *inter alia*, the deposition transcript of Fortunato's site supervisor, Kevin Morgan. Mr. Morgan testified that he was present on the day of plaintiff's accident and that he went to the area immediately after it occurred. He stated that he saw a Baker scaffold just fifty feet away from where plaintiff's accident occurred and was told by plaintiff's supervisor that he did not understand why plaintiff chose to use the ladder. Defendants argue that since there were two or three Baker scaffolds at the site, even if one were in use there would have been another available for plaintiff to use. Therefore defendants argue, it was plaintiff's own action in choosing to use the ladder and to stand on the top rung, instead of using a scaffold, which was the sole proximate cause of the accident[2].

In situations like the present scenario, where there is a question as to whether there was any violation of § 240(1), whether any alleged violation was the proximate cause of the accident (***Latino v Nolan & Taylor-Howe Funeral Home,*** 300 AD2d 631, 754 NYS2d 289 [2002]; ***Anspach v Miller Bluff's Constr. Corp***., 280 AD2d 564, 720 NYS2d 536 [2001]) and whether plaintiff's own actions were the sole proximate cause of his accident (***Robinson v East Med. Ctr.***, *supra*; ***Blake v Neighborhood Hous. Servs. of N.Y. City***, *supra*), summary judgment is inappropriate. Therefore, the Court concludes that plaintiff has not established his entitlement to summary judgment as a matter of law (*see generally*, ***Zuckerman v City New York,*** 49 NY2d 557, 427 NYS2d 595 [1980]).

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[2] Defendants also argue that plaintiff's decision to use a ladder instead of a scaffold must be viewed in light of his preexisting Parkinson's disease and daily use of narcotics for his chronic back pain.

The insurance claim

The contract between Revco and Fortunato provides, in relevant part at paragraph No. 10, that Revco would indemnify and save harmless defendants for claims in any way connected to the work, resulting from Revco's negligent act or omission. It also provides that Revco would purchase and maintain insurance that would protect itself and Fortunato, including contractual coverage.[3] The parties represent that Revco was out of business by the time they had notice of injured plaintiff's claim and Revco has not appeared in this action. Third-party defendant, Colony Insurance, seeks summary judgment dismissing the third-party claim as against it. It argues, in relevant part, that defendants/third-party plaintiffs are not additional insureds under the policy, notwithstanding the certificate of insurance prepared by Revco's insurance broker which names defendants as additional insureds; that the contract between Revco and Fortunato is not an "insured contract" under the policy; and that it was not informed of plaintiff's accident until almost six months after it occurred, even though Foturnato knew about it almost immediately, and, therefore, such notice was untimely.

The policy issued to Revco, a copy of which is annexed to Colony's motion, does not contain the names of any additional insureds. Defendants do not dispute that the policy does not name them as additional insureds, they rely upon the certificate of insurance given to them by Revco and prepared by Revco's broker, which lists them as additional insureds, to support their claim that they are additional insured. However, it is well settled that the party claiming the existence of insurance coverage has the burden of proving its entitlement (***Kidalso Gas Corp. v Lancer Ins. Co.,*** 21 AD3d 779, 780-791, 802 NYS2d 9 [2005]). A party that is not named as an insured or additional insured on the face of the policy is not entitled to coverage (***McKenzie v New Jersey Transit Rail Operation, Inc.*** 772 F.Supp 146, 149, [1991]citing to ***Stainless, Inc. v Employers' Fire Ins. Co.,*** 49 NY2d 924, 428 NYS2d 675 [1980]). Where, as here, the certificate of insurance offered to establish coverage states that it "is issued as a matter of information only and confers no rights upon the certificate holder" such certificate is insufficient, in and of itself, to establish that defendants are additional insureds (***Moleon v Kreisler Borg Florman Gen. Constr. Co.,*** 304 AD2d 337, 758 NYS2d 621 [2003]). "A certificate of insurance is only evidence of a carriers's intent to provide coverage but is not a contract to insure the designated party nor is it conclusive proof, standing alone, that such a contract exists" (***Tribeca Broadway Assoc. LLC v Mount Vernon Fire Ins. Co.,*** 5 AD3d 198, 774 NYS2d 11 [2004]; ***Buccini v 1568 Broadway Assoc.,*** 250 AD2d 466, 673 NYS2d 398 [1998]). Therefore, the Court concludes that the certificate of insurance does not establish that defendants are additional insureds under the policy issued to Revco.

Colony also argues that defendants are not covered by Revco's policy because the drywall contract is not an "insured contract" under the policy. Defendants argue that they are covered pursuant to an exception from the exclusions provided at paragraph 2.b (2) (page 1 of 13), which states that the

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[3] This differs from a contract which mandates that others be named as additional insureds, accompanied by a policy which provides for coverage for an "automatic additional insured" (*see,* ***Bruns v State of N.Y.,*** 13 Misc3d 1235A, 831 NYS2d 351 [2006]).

contractual liability exclusion does not apply to damages assumed in an "insured contract." An "insured contract" is defined, in relevant part at paragraph 8 (f) (page 11 of 13) as:

> That part of any other contract or agreement pertaining to your business (including an indemnification of a municipality in connection with work performed for the municipality) under which you assume the tort liability of another party to pay for "bodily injury" or "property damage" to a third person or organization. Tort liability means a liability that would be imposed by law in the absence of any contract or agreement.

However, the policy also contains a separate endorsement which provides for a definition of "insured contract" which *does not* contain paragraph (f), as set forth above. Therefore, the drywall contract, which includes the indemnification provision, is not an "insured contract" under the policy, and defendants cannot base their entitlement to coverage based upon it.

Colony's remaining argument is that Fortunato knew about the accident immediately, on August 23, 2003, but did not notify Colony until February 3, 2004, almost six months later. Where, as here, an insurance policy requires that notice of an occurrence be give as soon as practicable, providing notice of a potential claim within a reasonable time, in view of all the facts and circumstances, is a condition precedent (***Merchants Mut. Ins. Co. v Hoffman,*** 56 NY2d 799, 801-802, 452 NYS2d 398 [1982]; ***Paul Dev., LLC v Maryland Cas. Inc. Co.,*** 28 AD3d 443, 816 NYS2d 75 [2006]). Absent a valid excuse or mitigating factor, a failure to satisfy the notice requirement vitiates the policy (***Sayed v Macari,*** 296 AD2d 396, 397, 744 NYS2d 509 [2002]). Here, the Court finds that, even if drywall contract was an insured contract under the policy, Fortunato's notice was untimely. Therefore, Colony established its entitlement to summary judgment.

Defendants/third-party plaintiffs' remaining argument is that Colony's disclaimer to it was untimely. It would appear that the defendants sought coverage by letter dated February 3, 2004, and Colony disclaimed coverage by letter dated March 4, 2004, and signed for on March 10, 2004. While an insurer is obligated, under Insurance Law § 3420(d) to disclaim coverage without delay when the grounds for disclaiming are readily apparent based upon the documents delivered to the insurer, the Court is unable to conclude that a one-month period is unreasonable as a matter of law (***Ace Packing Co. v Campbell Solberg Assoc.,*** __AD3d __, 2007 NY Slip Op 3022, 2007 NY App Div 4370). Further, a late disclaimer cannot impart coverage where none existed (***Matter of Worcester Ins. Co. v Bettenhauser***, 95 NY2d 185, 188, 712 NYS2d 433 [2000]). An additional insured endorsement is an addition, rather than a limitation of coverage (***Consolidated Edison Co., v Hartford Ins. Co.,*** 203 AD2d 83, 84, 610 NYS2d 219 [1994]). Where, as here, the claim falls outside the policy's coverage, the insurer is not required to disclaim as to coverage that did not exist (***National Abatement Corp., v National Union Fire Ins. Co. of Pittsburgh, PA,*** 33 AD3d 570, 824 NYS2d 230 [2006]; ***City of New York v St. Paul Fire & Marine Ins. Co.,*** 21 AD3d 978, 801 NYS2d 362 [2005]; ***National Union Fire Ins. Co. of Pittsburgh, PA. v State Ins. Fund,*** 18 AD3d 202, 204, 795 NYS2d 195 [2005]; ***Tribeca Broadway Assoc. LLC v Mount Vernon Fire Ins. Co.***, *supra* 200-201). As to the "insured contract" endorsement, defendants/third-party plaintiffs have not successfully rebutted Colony's showing that their notice of the accident was untimely (***Paul Dev., LLC v Maryland Cas. Inc. Co.,*** *supra* at 444-445; ***Pile Found. Constr. Co. v Investors Ins. Co. of Am.,*** 2 AD3d 611, 612, 769 NYS2d 290 [2003]).

Accordingly, Colony's motion for summary judgment dismissing the third-party complaint is granted and defendants/third-party plaintiffs' cross motion for summary judgment is correspondingly denied. The third-party action is dismissed as against Colony and is severed and shall continue as against Revco.

The Court makes the following declaration: Third-party defendant, Colony Insurance, has no duty to defend and indemnify defendants/third-party plaintiffs herein pursuant to the subject commercial general liability insurance policy issued to third-party defendant, Revco Construction Corp.

Submit judgment dismissing the third-party complaint as to Colony.

Dated: JUN 2 5 2007

J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION