

**F.J. Sciame Constr. Co. v Burlington
Ins. Co.**

2007 NY Slip Op 32167(U)

July 12, 2007

Supreme Court, New York County

Docket Number: 0603622/2005

Judge: Carol R. Edmead

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

CAROL EDMEAD

PRESENT: J.S.C.

PART 25

Justice

F. J. Sciame

INDEX NO.

603622/05

MOTION DATE

3/30/07

MOTION SEQ. NO.

001

MOTION CAL. NO.

Burlington Insur. Co.

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 No

FILED

JUL 19 2007

NEW YORK COUNTY CLERK'S OFFICE

Upon the foregoing papers, it is ordered that this motion

this motion is decided in accordance with the accompanying Memorandum Decision. It is hereby

ORDERED that plaintiffs' motion for summary judgment is denied; and it is further

ORDERED that defendant Burlington Insurance Company's cross motion for summary judgment is granted and the complaint is hereby severed and dismissed as against said defendant with costs and disbursements to defendant as taxed by the Clerk of the Court upon the submission of an appropriate bill of costs; and it is further

ORDERED that said defendant's counterclaims are dismissed; and it is further

ORDERED that the remainder of the action shall continue. It is further

ORDERED that counsel for Burlington shall serve a copy of this order with notice of entry within twenty days of entry.

Dated: 7/12/07

CAROL EDMEAD 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: IAS PART 35

----- X
F.J. SCIAME CONSTRUCTION CO.,
NINETY-FIVE, LLC, and ZURICH AMERICAN
INSURANCE COMPANY,

Index No. 603622/05

Plaintiffs,

- against -

BURLINGTON INSURANCE COMPANY and
GOLD COIN IRONWORKS, INC.,

Defendants.

----- X

EDMEAD, CAROL, J.:

FILED
JUL 19 2007
NEW YORK
COUNTY CLERK'S OFFICE

MEMORANDUM DECISION

This is an insurance declaratory action arising out of a worker's accident on a construction site. Plaintiffs move for summary judgment declaring that: 1) the project owner and the contractor are additional insured parties under the subcontractor's policy; 2) the insurance coverage afforded to the owner and contractor under the contractor's policy is excess to the coverage afforded them under the subcontractor's policy, which is primary; and 3) the subcontractor's insurer must defend and indemnify the owner and contractor in the underlying personal injury action.

Defendant Burlington Insurance Company (Burlington) cross-moves for summary judgment dismissing the complaint on the ground that notice of the accident was not timely given.

Plaintiffs consist of F.J. Sciame (Sciame), the contractor, Ninety-Five, LLC (Ninety-

Five), the owner, and Zurich American Insurance Company (Zurich), their insurer. Defendants consist of Burlington Insurance Company (Burlington) and its insured, Gold Coin Iron Works, Inc. (Gold Coin), the subcontractor. The injured worker was a Gold Coin employee.

Plaintiffs' motion does not distinguish between the position of Sciamme and Ninety-Five, so what applies to one applies to both. The motion seeks to establish that they gave Burlington timely notice of the accident. An insurer's obligation to cover its insured's loss is not triggered unless the insured gives timely notice of loss in accordance with the terms of the insurance contract (*Great Canal Realty Corp. v Seneca Ins. Co.*, 5 NY3d 742, 743 [2005]; *Argo Corp. v Greater New York Mut. Ins. Co.*, 4 NY3d 332, 339 [2005]). Under Burlington's policy, notice of an occurrence or offense "which may result in a claim" was to be given "as soon as practicable" (Plaintiffs' Motion, Ex. D, at 8 of 12, ¶ 2). Such notice provisions have been uniformly interpreted to require that notice be given within a reasonable time under the circumstances (*Great Canal Realty Corp.*, 5 NY3d at 743-744; *Jenkins v Burgos*, 99 AD2d 217, 220 [1st Dept 1984]). Although what is reasonable is ordinarily left for determination at trial, where there is no excuse for the delay and mitigating considerations are absent, the issue may be disposed of as a matter of law in advance of trial (*Jenkins*, 99 AD2d at 220).

The accident happened on November 3, 2004. The construction superintendent, a Sciamme employee, made an accident report (Plaintiffs' motion, Ex. F). The report states that the Gold Coin employee was cleaning steel with a handheld grinder and the blade jumped back and hit him in the lower jaw. The employee "received a deep cut to his lower lip ... broken teeth and a broken jaw" (*id.*). The report states that there were no witnesses to the accident.

On April 4, 2005, the employee commenced an action for personal injury against Ninety-

Five and Sciame. On April 15, 2005, Sciame sent the complaint to its broker, and the broker sent it to Zurich. On April 26, 2005, Zurich agreed to defend Sciame and on the same day tendered the defense to Burlington. On May 5, 2005, Burlington denied coverage to Ninety-Five, Sciame, and Gold Coin because of the time lapse, more than five months, between the accident and the notice.

Sciame's and Ninety-Five's reason for not giving earlier notice of the accident is that they did not believe that they might be liable for the employee's injuries. At the time of his accident, the employee was using a grinder owned and maintained by Gold Coin. Gold Coin allegedly failed to ensure that the grinder had the customary handle used to stabilize it and failed to provide the employee with a face guard. After the accident, the employee had no communication with Sciame or Ninety-Five until he commenced his action. Also, they emphasize that, when the accident happened, they did not know that the employee would claim he fell off a ladder. This information was revealed in the employee's complaint. For these reasons, plaintiffs did not believe that they were responsible for the accident.

“[A] good-faith belief of nonliability” may excuse seemingly untimely notice (*Security Mut. Ins. Co. of N.Y. v Acker-Fitzsimmons Corp.*, 31 NY2d 436, 441 [1972]). However, the belief must be reasonable under all the circumstances. The estimation in this case was not reasonable, given the information in Sciame's accident report. In addition, the notice provision in the policy unambiguously requires notice of every occurrence which may give rise to a claim. No exception is made for losses which in the insured's estimation may not ultimately ripen into a claim (*Power Auth. of State of New York v Westinghouse Electric Corp.*, 117 AD2d 336, 340 [1st Dept 1986]).

Therefore, as a matter of law, plaintiffs failed to give timely notice of the accident to Burlington. The court need not determine whether Sciamé and Ninety-Five were additional insured parties under Burlington's policy or whether Zurich's policy is excess to Burlington's. Burlington is not obligated to defend and indemnify them.

Burlington's counterclaims against plaintiffs are contingent on Burlington being found liable to defend and indemnify them. As the complaint is being dismissed, the counterclaims may also be dismissed.

To conclude, it is

ORDERED that plaintiffs' motion for summary judgment is denied; and it is further

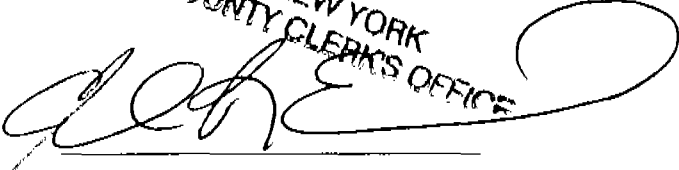
ORDERED that defendant Burlington Insurance Company's cross motion for summary judgment is granted and the complaint is hereby severed and dismissed as against said defendant with costs and disbursements to defendant as taxed by the Clerk of the Court upon the submission of an appropriate bill of costs; and it is further

ORDERED that said defendant's counterclaims are dismissed; and it is further

ORDERED that the remainder of the action shall continue. It is further

ORDERED that counsel for Burlington shall serve a copy of this order with notice of entry within twenty days of entry.

Dated: July 12, 2007

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NEW YORK

Carol Robinson Edmead, J.S.C.