

St. Paul Travelers v Mega Constr. Corp.

2007 NY Slip Op 33936(U)

November 29, 2007

Supreme Court, New York County

Docket Number: 0603836/2006

Judge: Martin Shulman

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

MARTIN SHULMAN

PRESENT: _____ J.S.C. _____

PART 1

Index Number : 603836/2006

ST. PAUL TRAVELERS

INDEX NO. 603836/06

vs

MEGA CONSTRUCTION

NOTION DATE _____

Sequence Number : 002

NOTION SEQ. NO. 002

SUMMARY JUDGMENT

NOTION CAL. NO. _____

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

Notice of Motion/ ~~Order to Show Cause~~ -- Affidavits -- Exhibits ...
Cross-Motion
Answering Affidavits -- Exhibits _____

PAPERS NUMBERED	
1, 2	_____
3	_____
4, 5	_____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion *and cross-motion*
are denied in accordance with the
attached decision

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

FILED
DEC 05 2007
NEW YORK
COUNTY CLERK'S OFFICE

Dated: November 29, 2007

MARTIN SHULMAN J.S.C.

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: IAS PART 1

-----X
ST. PAUL TRAVELERS and E&F WALSH BUILDING
COMPANY, LLC,

Index No. 603836/2006

Plaintiffs,

Decision and Order

-against-

MEGA CONSTRUCTION CORP. and FULCRUM
UNDERWRITING MANAGERS, INC.,

Defendants.

-----X
MEGA CONSTRUCTION CORP. and FULCRUM
UNDERWRITING MANAGERS, INC.,

Index No. 590135/2007

Defendants-Third Party Plaintiffs,

-against-

DOUGLAS GOULD d/b/a GOULD CONSTRUCTION
and INDIAN HARBOR INSURANCE COMPANY,
Third Party Defendants.

FILED
DEC 05 2007
NEW YORK
COUNTY CLERK'S OFFICE

-----X
SHULMAN, J.:

In this third-party action, defendants-third party plaintiffs Mega Construction Corp. ("Mega") and Fulcrum Underwriting Managers, Inc. ("Fulcrum")¹ (collectively "plaintiffs") *inter alia* seek a declaration that third-party defendant Indian Harbor Insurance Company ("Indian Harbor") is obligated to defend and indemnify Mega in connection with a wrongful death suit currently pending in the Supreme Court, Bronx County, under the caption Lawrence W. Rader, as administrator of the Estate of Luis Antonio Loja v. Peconic Landing at Southhold, Inc.; E&F Walsh Building Company, LLC; Mega Construction Corp. of New Jersey, Inc., Index No. 24177/03 (the

¹ Mega is Fulcrum's insured.

[* 3]

"Underlying Suit").² Indian Harbor now moves for summary judgment dismissing the third-party complaint and declaring³ that Indian Harbor owes no duty to defend or indemnify Mega in the Underlying Suit as an additional insured under Indian Harbor's policy with its insured, co-third-party defendant Gould.⁴ Plaintiffs oppose the motion and cross-move for summary judgment declaring that Indian Harbor and Gould are obligated to defend and indemnify Mega in the Underlying Suit.

Background

On February 8, 2002, Luis Antonio Loja ("Loja"), an employee of non-party Brothers Restoration, Inc., was fatally injured when he allegedly fell from a roof while working on a construction project in Suffolk County, New York (the "project"). At the time of the occurrence, Loja's employer was performing certain work at the site pursuant to an agreement with Mega, the project's general contractor. Gould also performed work at the site as a sub-contractor pursuant to a separate agreement with

² The Underlying Suit includes a third party action which Mega commenced against *inter alia* Douglas Gould d/b/a Gould Construction ("Gould"), who is also named as a third-party defendant herein.

³ Indian Harbor's answer to the third party complaint does not assert any cross-claims for declaratory relief.

⁴ Although Gould appeared in this third party action by counsel, by order dated June 13, 2007 this court granted counsel's motion to be relieved and *inter alia* stayed the action until July 16, 2007 in order for Gould to retain new counsel. To date, Gould has failed to appear by counsel or *pro se* and specifically defaulted in appearing for a July 17, 2007 compliance conference.

* 4]
Mega. It is not seriously disputed⁵ that Mega was an additional insured under Indian Harbor's policy with Gould as required by Mega's contract with Gould.

In support of its motion for summary judgment, Indian Harbor contends: 1) Mega failed to timely notify Indian Harbor of Loja's injury, claim and the Underlying Suit; 2) decedent was performing roofing work at the time of his injury, which is not covered under Indian Harbor's policy with Gould; and 3) in a federal declaratory judgment action Indian Harbor commenced against Gould, the United States District Court, Eastern District of New York (the "federal court") granted Indian Harbor summary judgment on default declaring that Indian Harbor owed no duty to anyone in connection with the Underlying Suit due to lack of timely notice from Gould and because the type of work decedent performed was not covered under Indian Harbor's policy.

In opposition to Indian Harbor's motion and in support of its cross-motion, Mega argues: 1) Indian Harbor's motion is premature since discovery has not been completed;⁶ 2) Indian Harbor's June 7, 2005 disclaimer of coverage was untimely and ineffective as to Mega; 3) notice from Gould,⁷ the main insured, is sufficient to entitle Mega, as additional insured, to defense and indemnification from Indian Harbor; and 4)

⁵ Although Indian Harbor's answer to the third party complaint alleges as an affirmative defense that Mega is not an additional insured under its policy with Gould and the motion refers to Mega as an "alleged additional insured", this issue is not briefed and the arguments set forth in the motion necessarily presume that Mega is in fact an additional insured.

⁶ Mega served its discovery demands upon Indian Harbor simultaneously with its cross-motion.

⁷ Mega contends that Indian Harbor received notice of the claim from Gould in April 2004 but did not disclaim coverage as to Mega until June 2005.

an issue of fact exists as to whether Loja's presence on the roof was incidental to the ceiling and wall work covered under Indian Harbor's policy.

Discussion

An award of summary judgment is appropriate when no issues of fact exist. See CPLR 3212(b); *Sun Yau Ko v. Lincoln Sav. Bank*, 99 A.D.2d 943, 473 N.Y.S.2d 397 (1st Dept., 1984), *aff'd* 62 N.Y.2d 938, 479 N.Y.S.2d 213 (1984); *Andre v. Pomeroy*, 35 N.Y.2d 361, 362 N.Y.S.2d 131 (1974). In order to prevail on a motion for summary judgment, the proponent must make a *prima facie* showing of entitlement to judgment as a matter of law by providing sufficient evidence to eliminate any material issues of fact. *Winegrad v. New York University Medical Center*, 64 N.Y.2d 851, 853, 487 N.Y.S.2d 316 (1985); *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324, 508 N.Y.S.2d 923 (1986). Indeed, the moving party has the burden to present evidentiary facts to establish his cause sufficiently to entitle him to judgment as a matter of law. *Friends of Animals, Inc. v. Associated Fur Mfrs., Inc.*, 46 N.Y.2d 1065, 416 N.Y.S.2d 790 (1979).

While the moving party has the initial burden of proving entitlement to summary judgment (*Winegrad v. N.Y. Univ. Med. Center*, 64 N.Y.2d 851, 487 N.Y.S.2d 316 (1985)), once such proof has been offered in support of the summary judgment motion, the opposing party must "show facts sufficient to require a trial of any issue of fact." CPLR 3212(b); *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562, 427 N.Y.S.2d 595, 597 (1980); *Freedman v. Chemical Const. Corp.*, 43 N.Y.2d 260, 401 N.Y.S.2d 176 (1977); *Friends of Animals, Inc. v. Associated Fur Mfrs., Inc.*, 46 N.Y.2d 1065, 416 N.Y.S.2d 790 (1979). Further, upon the movant establishing entitlement to summary

judgment, the burden of proof shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial. *Zuckerman, supra*; see also, *DeSouter v. HRH Const. Corp.*, 216 A.D.2d 249, 628 N.Y.S.2d 691 (1st Dept., 1995); *Commissioners of State Ins. Fund v. Photocircuits Corp.*, 773 N.Y.S.2d 190, 2 Misc.3d 300 (Sup. NY 2003). As set forth in *Spearmon, supra*:

“It is incumbent upon a defendant who opposes a motion for summary judgment to assemble, lay bare and reveal his proofs, in order to show that the matters set up in his answer are real and are capable of being established upon a trial.” Bare conclusory allegations are insufficient to defeat a motion for summary judgment [citations omitted]. *Id.*, 96 A.D.2d at 553.

If the opposing party fails to submit evidentiary facts to controvert the allegations set forth in the movant's papers, the movant's allegations may be deemed admitted.

Kuehne & Nagel, Inc. v. F.W. Baiden, 36 N.Y.2d 539, 544, 369 N.Y.S.2d 667, 671 (1975). Summary judgment may then be granted, as no triable issue of fact exists. *Id.*

It is well established that the contractual obligations of an insured to provide notice of a claim to its liability insurer, as soon as practicable, serve as a condition precedent to coverage (see *White v. City of New York*, 81 N.Y.2d 955 [1993]). “Absent a valid excuse, a failure to satisfy the notice requirement vitiates the policy” (*Security Mut. Ins. Co. of N.Y. v. Acker-Fitzsimons Corp.*, 31 N.Y.2d 436, 440 [1972]).

Indian Harbor asserts, and plaintiffs do not refute, that it first obtained notice of Loja's claim and the Underlying Suit from Mega on June 6, 2005, the date it received a letter dated May 18, 2005 and sent not to Indian Harbor, but to Gould's then counsel. More specifically, plaintiffs do not dispute Indian Harbor's claim that Mega failed to provide Indian Harbor notice of Loja's accident and the Underlying Suit “for years”.

Rather, plaintiffs argue that Indian Harbor had independent knowledge of Loja's claim as early as April 2004 and as a result, Indian Harbor's June 7, 2005 disclaimer of coverage to Mega was untimely.

However, "[t]he law is clear that an insured's obligation to provide timely notice is not excused on the basis that the insurer has received notice of the underlying occurrence from an independent source" (*Travelers Ins. Co. v. Volmar Const. Co., Inc.*, 300 A.D.2d 40, 43 [1st Dept., 2002], citing *American Mfrs. Mut. Ins. Co. v. CMA Enterprises, Ltd.*, 246 A.D.2d 373 [1st Dept., 1998]; see also, *Ocean Partners, LLC v North River Ins. Co.*, 25 A.D.3d 514 [1st Dept., 2006]). Thus, generally, notice provided by one insured in accordance with the policy terms will not be imputed to another insured (see *Roofing Consultants, Inc. v. Scottsdale Ins. Co.*, 273 A.D.2d 933 [4th Dept], *lv denied* 95 N.Y.2d 770 [2000] [neither notice provided by another insured nor the insurer's actual knowledge of the claim satisfies the contractual obligation of the insured to give timely notice]).⁸ As Mega had an independent obligation to notify Indian Harbor, it cannot rely upon Gould's April 2004 notification, which the federal court already found to be untimely, to support its claim that Indian Harbor's June 7, 2005 disclaimer was untimely.

⁸ Timely notice by one insured can constitute notice by an additional insured where the two parties are similarly situated and not adverse (see *New York Telephone Co. v. Travelers Cas. and Sur. Co. of Am.*, 280 A.D.2d 268 [1st Dept., 2001]; see also *Ambrosio v. Newburgh Enlarged City School Dist.*, 5 A.D.3d 410 [2nd Dept., 2004]; *National Union Fire Ins. Co. of Pittsburgh, Pa. v. Insurance Co. of North America*, 188 A.D.2d 259 [1st Dept., 1992], *lv denied* 81 N.Y.2d 709 [1993]). Here, Mega and Gould are not similarly situated and their claims are adverse, as evidenced by Mega's third party action against Gould in the Underlying Suit.

It is readily apparent that Mega failed to timely notify Indian Harbor of both Loja's accident and claim and the Underlying Suit. Plaintiffs do not refute deposition testimony that Mega was present at the project site on the date Loja was injured and was again notified of the incident a few days thereafter (see Smith Aff. in Support at Exh. G). Moreover, Mega was named as a defendant in the Underlying Suit in or about September 2003 and commenced the third party action therein against Gould in December 2003. Over three years elapsed from the time Mega learned of Loja's injury and over a year elapsed from the commencement of the Underlying Suit before Mega's purported May 2005 notice to Indian Harbor via its insured's counsel. Such delay is unreasonable as a matter of law.

As Mega has proffered no valid excuse for its failure to provide notice of either the occurrence or the Underlying Suit to Indian Harbor and cannot establish that Indian Harbor's denial of coverage was untimely, Indian Harbor's motion for summary judgment dismissing the third-party complaint must be granted, and Mega's cross-motion for summary judgment denied. As plaintiffs are not entitled to any defense or indemnification under Indian Harbor's policy with Gould due to lack of timely notification, the court need not address the parties' remaining arguments.

Accordingly, it is

ORDERED that third-party defendant Indian Harbor Insurance Company's motion for summary judgment is granted solely to the extent that third-party plaintiffs Mega Construction Corp. and Fulcrum Underwriting Managers, Inc.'s third party complaint is dismissed as to third-party defendant Indian Harbor Insurance Company, and is otherwise denied; and it is further

ORDERED that the New York County Clerk is directed to enter judgment accordingly; and it is further

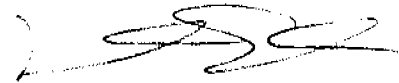
ORDERED that third-party plaintiffs' cross motion is denied in its entirety; and it is further

ORDERED that the third-party action is severed and continued as to third-party defendant Douglas Gould d/b/a Gould Construction.

This constitutes the decision and order of this court. A copy of this decision and order has been sent to counsel for plaintiff, third-party plaintiffs and third party defendant Indian Harbor.

The parties are directed to appear for a status conference on December 18, 2007 at 9:30 am, 111 Centre Street, Room 1127B, New York, New York.

Dated: New York, New York
November 29, 2007



Hon. Martin Shulman, J.S.C.

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