

Ruiz v Port Auth. of N.Y. & N.J.

2008 NY Slip Op 30222(U)

January 17, 2008

Supreme Court, New York County

Docket Number: 0110862/2006

Judge: Judith J. Gische

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

Index Number : 110862/2006

PART 10

SONIA RUIZ

vs.

THE PORT AUTHORITY OF NY AND NJ

SEQUENCE NUMBER : 001

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

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

Upon the foregoing papers, It is ordered that this motion

FILED

JAN 28 2008

NEW YORK
COUNTY CLERK'S OFFICE

**MOTION IS DECIDED IN ACCORDANCE WITH
THE ACCOMPANYING MEMORANDUM DECISION.**

*and p/c is scheduled for
Feb 28 2008 @ 9:30
am*

Dated: January 17 2008

J.S.C.

Check one: FINAL DISPOSITION
Check if appropriate: DO NOT POST

NON-FINAL DISPOSITION
 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: PART 10**

-----X
Sonia Ruiz,
Plaintiff

-against-

The Port Authority of New York and
Defendant.

DECISION/ORDER
Index No.: 590223/07
Seq. No. : 001

Present:
Hon. Judith J. Gische
J.S.C.

-----X
The Port Authority of New York and
New Jersey,
3rd Party Plaintiff

-against-

Thyssenkrupp Elevator Corporation and
Lexington Insurance Company,
3rd Party Defendants.

-----X
Recitation, as required by CPLR 2219 [a], of the papers considered in the review of this
(these) motion(s):

Papers	Numbered
3 rd party Lexington n/m §§ 3211 (c); 3212 w/BMY, exhs	1
3 rd party pltf PA x/motion w/DDH, exhs	2
Defs' Lexington/Thyssenkrupp's opp and Reply w/MS affirm, exhs	3
3 rd party pltf PA reply	4

Upon the foregoing papers the court's decision is as follows:

GISCHE, J.;

The overarching action is brought by plaintiff Sonia Ruiz ("Ms. Ruiz") to recover damages from defendant ("the Port Authority") for personal injuries she claims to have sustained when an escalator allegedly jerked to a stop, causing her to fall and fracture

her jaw. The third party action by the Port Authority against the company that serviced the escalator ("Thyssenkrupp") and its insurer ("Lexington") is for indemnification and defense under Thyssenkrupp's policy with Lexington.

Presently before the court is Lexington's pre-answer motion to dismiss the 3rd party complaint against it. Thyssenkrupp, though not jointly moving, supports the application. The movants ask that the court apply CPLR § 3211 (c) and convert the motion to one for summary judgment on notice, or to hold an immediate trial to resolve any factual disputes. The Port Authority opposes the motion to dismiss or to have it converted to summary judgment. It has cross moved for entry of a default judgment [CPLR § 3215] against Lexington on the basis that it agreed to extend the defendant's time to answer, but Lexington failed to meet the deadline. Both Thyssenkrupp and Lexington oppose the Port Authority's cross motion.

At the outset, the court denies Lexington's application to have its dismissal motion converted to one for summary judgment. The disputes presented cannot and should not be decided summarily at this stage, but should wait until after issue has been joined and so they can be decided on the merits. There is no pressing reason why this case requires the expedited treatment sought. CPLR § 3211 [c]; Gifts of the Orient v. Linden Country Club, 89 A.D.2d 508 (1st dept. 1982).

The court also denies the Port Authority's motion for entry of a default judgment against Lexington. While the parties may have agreed to an extension of time for the defendant to answer, and it failed to meet that deadline, nothing in their written stipulation provides for the draconian relief Port Authority now seeks. Moreover, there is

a strong public policy in this state that matters be disposed of on their merits in the absence of real prejudice to the plaintiff. Lirit v. S.H. Laufer World, Inc., 84 A.D.2d 704 (1st Dept 1981). Port Authority has not pled any prejudice nor made the requisite showing.

Turning to the merits of the 3rd party defendants' motion to dismiss, the court accepts the facts as alleged by the 3rd party plaintiff as true, affording them the benefit of every possible favorable inference (EBC I, Inc v Goldman, Sachs & Co., 5 NY3d 11, 19 [2005]; Sokoloff v Harriman Estates Development Corp., 96 NY2d 409, 414 [2001]; P.T. Bank Central Asia v ABN AMRO Bank NV, 301 AD2d 373, 375-6 [1st Dept 2003]), unless clearly contradicted by evidence submitted in connection with the motion (see Zanett Lombardier, Ltd v Maslow, 29 AD3d 495 [1st Dept 2006]). Since Lexington and Thyssenkrupp's motion to dismiss is premised upon the existence of documentary evidence that they contend is a complete defense to the claims asserted against them, such evidence must definitively and unequivocally dispose of the claims against them. CPLR § 3211 (a) (1); Bronxville Knolls Inc. v. Webster Town Center Partnership, 221 A.D.2d 248 (1st dept. 1995).

The following facts and documents are considered in connection with the arguments presented:

Plaintiff Ruiz was injured on an escalator maintained by 3rd party defendant Thyssenkrupp on December 5, 2005. The escalator is within the PATH station owned/operated/managed by the Port Authority. Thyssenkrupp is insured with defendant Lexington under Commercial General Liability Policy Number 1435830 ("the

Thyssenkrupp policy"). The Port Authority has requested that Lexington defend it in the personal injury action, but Lexington has declined coverage on the basis on late notice. There is no dispute presented in this motion about whether the Port Authority is an additional insured under the Thyssenkrupp policy. Lexington claims that it was not notified by the Port Authority of Ms. Ruiz's lawsuit until October 18, 2006, two months after she had commenced her action, and some 8 months after she had served the Port Authority with a Notice of Claim (i.e. on February 17, 2006).

The Port Authority seeks a declaration that it complied with its notice obligations and therefore Lexington must provide it with a defense in the personal injury action. The Port Authority contends that after Ms. Ruiz served it with a Notice of Claim on February 17, 2006, it promptly sent a copy to Thyssenkrupp on March 7, 2006 along with a letter asking it to handle and process the claim. Receiving no response, the Port Authority sent two followup letters to Thyssenkrupp, one on April 10, 2006 and the other on May 15, 2006.

On June 28, 2006, the Port Authority received a letter from Gallagher Bassett Services, Inc. ("Gallagher") asking for more information about the accident, such as a copy of surveillance tapes, the contract between the Port Authority and Thyssenkrupp, and the escalator involved. The Port Authority replied on July 3, 2006, providing a copy of the accident report. Gallagher is Thyssenkrupp's 3rd party administrator. Ms. Ruiz commenced the personal injury action August 3, 2006 with the filing of the summon and complaint, which was then served on the Port Authority on August 31, 2006.

By letter dated October 18, 2006, the Port Authority sent copies of the Summons

and Complaint to Gallagher and to Lexington. By letter dated November 9, 2006, Lexington disclaimed coverage on the basis that the first notice to it was on October 18, 2006.

In relevant part, the policy that Thyssenkrupp had in effect with Lexington on the date of the accident provides as follows:

Section V - Conditions

(2) Duties in the event of Occurrence, Offense, Claim or Suit

a. You must see to it that we are notified as soon as practicable of an "occurrence" or an offense which may result in a claim. . .

b. If a claim is made or "suit" is brought against any insured; you must:

(1) immediately record the specifics of the claim or "suit" and date received; and

(2) notify us as soon as practicable.

You must see to it that we receive written notice of the claim or suit as soon as practicable.

c. You and any other involved insured must:

(1) immediately send us copies of any demands, notices, summonses, or legal papers received in connection with the claim or 'suit'. . .

Lexington contends that the notice it received on October 18, 2006 was untimely. The Port Authority contends that it notified Thyssenkrupp as soon as practicable, which was when Ms. Ruiz served it with her Notice of Claim and that discovery is needed to ascertain when Thyssenkrupp notified Lexington.

Discussion

Although on a dispositive motion pursuant to CPLR § 3212 or at trial the burden will be on the Port Authority to prove that it did not delay in giving notice to Lexington, or provide an excuse for a failure to do so, at this stage of the case, their burden is far easier, which is to present facts that state a cause of action against Lexington. Argo

Corp. v. Greater New York Mutual Insurance Company, 4 N.Y.3d 332 (2005). The 3rd party plaintiff has easily met its burden through its factual claim that it notified Thyssenkrupp very soon after Ms. Ruiz served her Notice of Claim on the Port Authority. At this stage, these facts are afforded every favorable inference. EBC I, Inc v Goldman, Sachs & Co., *supra*.

A provision in an insurance policy, that notice of claim be accorded "as soon as practical" mandates that notice be given within a reasonable period of time under circumstances. Heydt Contracting Corp. v. American Home Assur. Co., 146 A.D.2d 497 (1st Dept. 1989). The factual dispute (among others) about whether under all the circumstances of this case the Port Authority notified Lexington "as soon as practicable" mandates against the dismissal of this action at this stage. See: Argentina v. Otsego Mutual Fire Insurance Co., 86 N.Y.2d 748 (1995).

The court has also considered that in certain cases, the additional insured may properly rely on the notice given to the primary insured, particularly where, as here, the additional insured later sent the papers involved in the lawsuit directly to the insurance company. City of New York v. Continental Casualty Company, 27 AD3d 28 (1st dept 2005). Moreover, where the primary insured and the additional insured are not in an adversarial stance, it has been held that notice by the insured party can constitute notice by the additional insured because they are united in interest. National Union Fire Insurance Company of Pittsburgh, Penn v. Insurance Company of North America, 188 A.D.2d 259, 261 (1st Dept 1992) lv den 81 NY2d 7091.

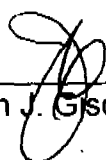
Since all of Lexington's arguments can be pled as affirmative defenses or claims, the motion to dismiss the complaint is denied. The time for Lexington to serve its

answer is hereby extended to Ten (10) Days after the date of this decision. The preliminary conference is hereby scheduled for **February 28, 2008 at 9:30 a.m.** in Part 10, 80 Centre Street, Room 122.

Any relief requested but not expressly addressed is hereby denied. This shall constitute the decision and order of the court.

Dated: New York, New York
January 22, 2008

So Ordered:



Hon. Judith J. Gische, JSC

FILED
JAN 28 2008
NEW YORK
COUNTY CLERK'S OFFICE