

|  |
|--|
| <b>IBEX Constr., LLC v Utica Natl. Assur. Co.</b>  |
| 2008 NY Slip Op 30511(U)   |
| February 21, 2008  |
| Supreme Court, New York County   |
| Docket Number: 0106481/2006  |
| Judge: Louis B. York   |
| Republished from New York State Unified Court System's E-Courts Service.<br>Search E-Courts ( <a href="http://www.nycourts.gov/ecourts">http://www.nycourts.gov/ecourts</a> ) for any additional information on this case. |
| This opinion is uncorrected and not selected for official publication.   |

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

PRESENT: **LOUIS B. YORK**  
J.S.C.

PART 2

Index Number : 106481/2006  
IBEX CONSTRUCTION  
vs  
UTICA NATIONAL ASSURANCE  
Sequence Number : 003  
SUMMARY JUDGMENT

IDEX NO. 106481.06  
MOTION DATE 2/21/08  
MOTION SEQ. NO. 3  
MOTION CAL. NO. \_\_\_\_\_

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

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE  
WITH ACCOMPANYING MEMORANDUM DECISION

**FILED**

FEB 27 2008

NEW YORK  
COUNTY CLERK'S OFFICE

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

Dated: 2/21/08

Ley  
**LOUIS B. YORK** 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 2

-----X  
IBEX CONSTRUCTION, LLC & VIRGINIA SURETY  
COMPANY, INC.,

Plaintiffs,

-against-

INDEX NO. 106481/06

UTICA NATIONAL ASSURANCE COMPANY,

Defendant.

-----X  
**LOUIS B. YORK, J:**

Motion sequence numbers 003 and 004 are consolidated for disposition.

In motion sequence number 003, plaintiffs IBEX Construction, LLC (IBEX) and Virginia Surety Company, Inc. (collectively, IBEX), move for summary judgment declaring that defendant Utica National Assurance Company (Utica) was obligated to defend IBEX in connection with the claims asserted against IBEX in an underlying action entitled *Bradley v IBEX Construction, LLC* (Sup Ct, NY County, Index No. 108416/04) and to reimburse plaintiffs for the amounts incurred on behalf of IBEX's defense in that action. In motion sequence number 004, Utica moves for summary judgment in its favor.

**Motion Sequence Number 003: IBEX's Motion for Summary Judgment**

This insurance action results from an accident which occurred on or about April 27, 2004. Robert Bradley, an employee of Sage Electrical Contracting (Sage) was allegedly injured when he fell from a ladder at a construction site located at the Home

Depot store that was being constructed on West 23<sup>rd</sup> Street in Manhattan. Sage was a subcontractor of plaintiff IBEX, the general contractor at the site. Bradley brought an action against IBEX on or about June 4, 2004. *Bradley v IBEX Construction, LLC, supra*. The complaint alleged that Bradley was working on a ladder that was caused to slip, because it was placed on the floor that was covered with plastic, rendering the floor slippery. The complaint further alleges that Bradley was injured when he fell from the ladder and that his injury was due to the negligence and failure of defendants and "their agents, servants and/or employees" to follow applicable provisions of New York State's Labor Law and regulations, and their failure to provide, among other things, a safe place to work, proper safety equipment, a proper ladder, and a person to hold or otherwise secure the ladder, and permitting and/or allowing the ladder to be and remain on a defective surface. *Bradley Complaint*, ¶ 45.

In the October 2006 trial in the *Bradley* action, the jury determined that none of the defendants were at fault and the action was dismissed.

Bradley's employer, Sage, was insured by Utica; IBEX was listed as an additional insured on Sage's policy. IBEX also maintained its own insurance policy with Virginia Surety Co.

On or about September 2, 2004, Cambridge Integrated Services Group, Inc. (Cambridge), the third-party claims administrator for

Virginia Surety, tendered the defense and indemnification of IBEX with respect to the claims asserted in *Bradley* to Utica. On January 28, 2005, Utica responded, denying coverage and stating as follows:

Our investigation reveals that there was a contract between IBEX and Sage, therefore form 8E2737 applies. This coverage form applies to additional insured by contract and affords coverage but only with respect to liability arising out of the named insureds [sic] ongoing operations or their work. This insurance is subject to the same exclusions and limitations.

Our investigation indicates that the plaintiff tripped on plastic that had been laid on the floor by someone other than Sage Electric, and therefore, not a part of Sage Electrics [sic] work or ongoing operations.

Based upon all of the above cited policy exclusions, Utica National hereby denies your request for defense and indemnity of IBEX Construction.

As stated above, suit was filed against IBEX Construction 6/4/04. IBEX did not report this claim until 9/2/04, 3 months after suit was filed. This delay on the part of IBEX Construction is deemed a material breach of the policy conditions. Based on your dilatory action in failing to comply with any and all contractual obligations as set forth pursuant to the policy as defined above, we must disclaim all coverage. It is recommended that you refer to [sic] this suit to your personal attorneys to defend you in this litigation.

Letter to Cambridge Integrated Services Group, dated January 28, 2005, from John Nasta, Supervising Litigation Specialist.

IBEX contends that Bradley, an employee of Sage, was injured while performing work on behalf of Sage, thus his claims arose out of the performance of Sage's ongoing work for IBEX. According to IBEX, had Bradley succeeded in his claims alleged

pursuant to Labor Law §§ 240 and 241, IBEX would have been found strictly liable for Sage's acts or omissions, since under its subcontract with IBEX, Sage was contractually obligated to furnish and install protection, provide scaffolding and ladders and provide supervision. According to IBEX, there was a reasonable possibility of coverage for IBEX under the terms of the policy and, therefore, Utica was obligated to defend claims against IBEX in the *Bradley* action.

Utica contends that IBEX is not entitled to coverage because, under the insurance policy, an additional insured is covered only for liability arising out of Sage's acts or omissions and not those of IBEX itself. Utica specifically relies on the following provision in Sage's insurance policy:

a. Additional Insureds - By Contract, Agreement or Permit

(1) Any person or organization with whom you have entered into a written contract, agreement or permit requiring you to provide insurance such as is afforded by this Commercial General Liability Coverage Form will be an additional insured only:

(a) To the extent that such additional insured is held liable for your acts or omissions arising out of and in the course of ongoing operations performed by you and your subcontractors for such additional insured....

b. Additional Exclusions or Limitations

(1) \*\*\*  
 This insurance does not apply to "bodily injury" or "property damage" arising out of the sole negligence of such additional insured.

Policy No. CPP 3017504 Named Insured: Sage Electrical Contracting, Inc., ¶ 11.

According to Utica, this clause is more restrictive than many "additional insured" provisions, in that it applies only to the acts and omissions of Sage, rather than injuries generally arising out of Sage's work. Utica argues that the *Bradley* complaint alleges actions and omissions of IBEX and not Sage: that IBEX was in control of the work, that IBEX had authority to stop the work, that the ladder was placed on a floor covered with plastic and that IBEX, not Sage, knew about the plastic. For these reasons, according to Utica, under paragraph 11 of the insurance policy, IBEX is not entitled to coverage.

In reply, IBEX argues that the complaint refers not only to IBEX, but to its agents, servants and/or employees, which includes Sage, and that it mentions some of Sage's responsibilities, including but not limited to providing a safe ladder and providing another worker to hold the ladder. IBEX cites the testimony of Salvatore Badalamenti, a Sage sub-foreman, who was Bradley's supervisor. Badalamenti testified, inter alia, that he and the foreman were responsible for assigning work to an employee (Deposition of Salvatore Badalamenti, at 12), that Sage provided ladders for the employees (*id.* at 23), that Bradley told him that the ladder slipped on the plastic (*id.* at 30-31), and that he had been in the room and walked on the plastic prior to

the accident, thus demonstrating that he was aware that the floor was covered with plastic when he directed Bradley to work there. *Id.* at 38.

There is some question as to how the accident occurred, however, in light of the accident report written by Sage controller, Carole Costa, which includes the following descriptions of the accident: "walking with ladder, tripped on plastic on floor," "tripped on plastic floor covering," "fell while carrying ladder hurt left shoulder." Accident Report, dated 4/27/04.

IBEX argues that Utica failed to respond to Cambridge's September 2, 2004 tender request until January 28, 2005, and that, therefore, pursuant to Insurance Law §§ 2601 and 3420 (d),<sup>1</sup> Utica waived any defenses that it might have to the request for representation in the *Bradley* action.

There is considerable case law to the effect that a delay of approximately four months in denying coverage is unreasonable as a matter of law. *Matter of Aull v Progressive Cas. Ins. Co.*, 300 AD2d 302 (2d Dept 2002) (delay of nearly four months unreasonable, citing among others *Bernstein v Allstate Ins. Co.*, 199 AD2d 358 [2d Dept 1993]). The burden of justifying the delay is placed on

---

<sup>1</sup> Pursuant to section 2601, failing to acknowledge pertinent communications "with reasonable promptness" is considered an unfair claim settlement practice. Pursuant to section 3420 (d), the insurer must give written notice "as soon as reasonably possible" of its intention to disclaim or deny coverage.

the insurer, and where no satisfactory justification has been given for the delay, 48 days has been found unreasonable as a matter of law. *First Fin. Ins. Co. v Jetco Contr. Corp.*, 1 NY3d 64 (2003). Moreover, failure to give reasonable notice precludes disclaimer even where the policyholder's notice of incident is itself untimely. *Id.* at 67; *All City Ins. Co. v Pioneer Ins. Co.*, 194 AD2d 424 (1<sup>st</sup> Dept 1993); see also *Matter of Nationwide Mut. Ins. Co. v Steiner*, 199 AD2d 507 (2d Dept 1993).

Utica argues, in response, that the timeliness requirement of Insurance Law § 3420 (d) applies only where the denial is based on an exclusion or condition within the policy, rather than where a claim falls outside of the scope of coverage of the policy (*Matter of Worcester Ins. Co. v Bettenhauser*, 95 NY2d 185, 188-189 [2000]), as Utica contends it does here. However, as the Court of Appeals noted in *Worcester Ins. Co.*, "drawing the line between a lack of coverage in the first instance (requiring no disclaimer) and a lack of coverage based on an exclusion (requiring timely disclaimer) has at times proved problematic." *Id.* at 189. Here, whether the alleged injury resulted from the acts or omissions of Sage and falls within the coverage provisions for additional insureds, as IBEX contends, or from the acts or omissions of IBEX, and are outside of the policy, pursuant to paragraph 11 (a) (1) (a), as Utica contends, raises questions of fact. Therefore, factual questions also exist as to

the applicability of the timeliness requirements of Insurance Law § 3420 (d).

At least to the extent that Utica seeks to rely on paragraph 11 (b) (1) of the policy, as a bar to Additional Insured coverage, however, a timely disclaimer was required under the principles of *Worcester Ins. Co.*, since that paragraph is denominated as "Additional Exclusion[] or Limitation[]."<sup>2</sup>

Utica also contends that IBEX knew of the *Bradley* suit at least in July 2004, when it filed its answer, and that by waiting until September 2, 2004 to tender defense, it failed to timely notify Utica of the claim and the suit. With respect to this defense, however, the timeliness requirements of Insurance Law § 3420 (d) do apply, and Utica's defense of lack of timeliness is vitiated by its own lack of a timely disclaimer. See *First Fin. Ins. Co. v Jetco Contr. Corp.*, 1 NY3d 64, *supra*; *Matter of Nationwide Mut. Ins. Co. v Steiner*, 199 AD2d 507, *supra*; *All City Ins. Co. v Pioneer Ins. Co.*, 194 AD2d 424, *supra*.

---

<sup>2</sup> It is far from clear whether paragraph 11 (b) (1) applies here in light of the portion of the paragraph which Utica neglected to quote in its papers: "(b) Additional Exclusions or Limitations (1) *Lessor of Leased Equipment*: If an equipment lessor is an additional insured as a result of the provisions of paragraphs of paragraphs 11. a., (1), (2) and (3) above, the following additional exclusion applies: This insurance does not apply to 'bodily injury' or 'property damage' arising out of the sole negligence of such additional insured." Policy # CPP 3017504, § 11 (b) (1) (emphasis supplied).

Here, there is no suggestion that IBEX is covered as an equipment lessor.

Utica seeks to justify its own delay in disclaiming, arguing that its delay was caused by its lack of information regarding when IBEX first learned of the lawsuit against it. According to Utica, not until it obtained IBEX's documents in 2007 did it learn that IBEX knew about the lawsuit at least by July 2004. In light of the fact that Utica generally raised the matter of IBEX's untimeliness in its January 28, 2005 disclaimer letter, however, this argument fails. Therefore, the court need not consider IBEX's argument that the requirement in the policy that the insured give timely notice to Utica applies to Sage, the insured, rather than to IBEX, the additional insured.

Similarly, since IBEX's motion for summary judgment is denied because of questions of fact relating to Bradley's injury, and, therefore, IBEX's coverage as an additional insured, it is unnecessary to consider Utica's argument that IBEX has failed to provide proof of the over \$100,000 legal expenses that it has allegedly incurred.

**Motion Sequence Number 004: Utica's Motion for Summary Judgment**

Utica moves for summary judgment in its favor, on virtually the same bases that it opposes IBEX's motion for summary judgment.

IBEX opposes Utica's motion, arguing that it is untimely. IBEX's Note of Issue was filed on March 28, 2007, thus, according to IBEX, pursuant to the court's scheduling order, dated August

23, 2006, Utica's motion for summary judgment had to be filed by May 29, 2007. Utica's motion was not made until October 5, 2007, approximately four months late. Utica argues in reply that its motion was delayed because it filed a timely motion to vacate the Note of Issue, based upon IBEX's failure to produce documents that were the subject of discovery. According to Utica, it could not file its motion for summary judgment until its motion to vacate was decided and it obtained the documents it sought.

Utica's justification for its lateness is substantially undermined by this court's decision, filed on August 30, 2007, denying Utica's motion to vacate the Note of Issue on the basis that Utica had not received IBEX's documents due to its own failure to pay for them as agreed. In any case, Utica's motion for summary judgment is denied because of the questions of fact discussed above regarding the cause of Bradley's accident.

Accordingly, it is hereby

ORDERED that plaintiff's motion for summary judgment Motion Sequence No. 003 is denied; and it is further

ORDERED that defendant's motion for summary judgment in Motion Sequence No. 004 is denied.

Dated: 2/13/08

ENTER:

*[Signature]*  
\_\_\_\_\_  
J.S.C.

**FILED**  
FEB 27 2008  
NEW YORK  
COUNTY CLERK'S OFFICE