

Public Serv. Mut. Ins. Co. v Sirius Am. Ins. Co.

2008 NY Slip Op 30525(U)

February 13, 2008

Supreme Court, Suffolk County

Docket Number: 0022458/2004

Judge: Robert W. Doyle

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Public Service v Sirius

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ORDERED that the motion for summary judgment by third-party defendant Irving Weber Associates, Inc. to dismiss the third-party complaint is denied; and it is further

ORDERED that the motion for summary judgment by defendant/third-party defendant Sirius American Insurance Company and defendant UTC Management Services, Inc. is granted and the complaint and third-party complaint herein is hereby severed and dismissed as asserted against these parties; and it is further

ORDERED that the remainder of the action shall continue; and it is further

ADJUDGED AND DECLARED that plaintiffs Pinewood Estates Partners, LLC and Pinewood Estate Management, LLC are not named as additional insureds on the policy issued to Klein & Eversoll, Inc. by Sirius America Insurance Company; it is further

ADJUDGED AND DECLARED that Sirius America Insurance Company and UTC Management Services, Inc. did not receive timely notice; and it is further

ADJUDGED AND DECLARED that Sirius America Insurance Company is not obligated to provide a defense or indemnify Klein & Eversoll, Inc., or to reimburse plaintiff Public Service Mutual Insurance Company for the costs and attorneys fees incurred in defending Klein & Eversoll, Inc. in the underlying bodily injury action brought by Malcolm C. Sargent.

This is an action for a declaratory judgment to determine the rights of the parties under certain insurance policies. Specifically, the issues to be determined are whether plaintiffs Pinewood Estates Partners, LLC and Pinewood Estates Management, LLC (hereinafter collectively referred to as the "Pinewood Entities") were named as additional insureds on an insurance policy issued to defendant/third-party plaintiff Klein & Eversoll, Inc. ("Klein") by Sirius America Insurance Company ("Sirius"), and whether timely notice of the underlying bodily injury claim was given to Sirius or its administrator UTC Management Services, Inc. ("UTC"). In the third-party action, the issue to be decided is whether Klein provided timely notice to its broker, Irving Weber Associates, Inc. ("Irving Weber"), and Irving Weber failed to timely notify Sirius of the underlying bodily injury claim.

Malcolm C. Sargent ("Sargent") commenced the underlying action against Klein and the Pinewood Entities seeking damages for personal injuries he sustained on September 11, 2002 while working for a subcontractor at a construction site of new town homes on Coram Sweezytown Road in Middle Island, Suffolk County, New York (the "property"). At the time of the accident, the property was owned and managed by the Pinewood Entities, which hired Klein as the general contractor for the construction project. Klein hired the subcontractor for whom Sargent was working.

The Pinewood Entities are insured under a general liability insurance policy issued by plaintiff Public Service Mutual Insurance Company ("Public Service"). Klein hired third-party defendant Irving Weber Associates, Inc. ("Irving Weber") as its broker to procure insurance to cover its activities as general contractor. Irving Weber procured the insurance from a wholesale broker (not a party herein), and on the day of Sargent's accident Klein was insured as a general contractor under a commercial general liability policy issued by Sirius.

Public Service has provided a defense and indemnification to the Pinewood Entities in the underlying bodily injury action. In the instant action, it is alleged that the Pinewood Entities are named as additional insureds on the policy issued by Sirius to Klein. Thus, it is asserted that Public Service is entitled to have Sirius and/or UTC contribute to the defense of and pay any judgement against the Pinewood Entities in the underlying action. Similarly, it is asserted that the Pinewood Entities are entitled to a defense and to be indemnified by Sirius and UTC and that Sirius and UTC remain liable for all costs, expenses and attorney fees incurred in the defense of the underlying action.

In the third-party action, it is alleged that Klein's notice to Sirius was timely considering the facts and circumstances and that Sirius' disclaimer based on late notice was wrongful. It is also alleged that Klein timely notified Irving Weber and Irving Weber failed to properly notify Sirius. Thus, it is asserted that Sirius is obligated to provide Klein with a defense and indemnification and that Sirius and Irving Weber are responsible for the costs, expenses and attorneys fees incurred in defending and for any judgment rendered against Klein in the underlying bodily injury action.

It is not disputed that on October 18, 2002, Klein received a letter from Sargent's counsel dated October 16, 2002 regarding the injuries Sargent sustained at the construction site. Klein maintains that on the same day the letter was faxed to Irving Weber. Klein contends that Irving Weber, as its broker and agent, agreed to receive notices of claims and to timely forward such notices to the insurance carrier. However, by letter dated January 28, 2003, UTC informed Klein that the first notice received by UTC and Sirius was by fax dated January 23, 2003. UTC noted that by letter dated October 16, 2002 Klein had been apprised of Sargent's claim. Reciting language from the commercial general liability policy regarding Klein's obligation to notify Sirius "as soon as practicable" of any claim for bodily injury, UTC denied coverage. Specifically, UTC advised Klein, "there is no coverage for this loss due to your violation of the policy conditions regarding notice" and that as a result of the denial of coverage, Sirius "will not indemnify, provide a defense nor contribute to any settlement, verdict, award or judgment, which may arise out of this incident."

Irving Weber maintains that it first received notice of Sargent's claim in January 2003 via a telephone call and fax transmission from Klein's Vice President of Finance, Arlene Senatore ("Senatore"). The phone call discussed the subsequently faxed correspondence from Public Service demanding a defense and indemnity be provided by Klein to the Pinewood Entities. Irving Weber contends that upon receiving the correspondence from Klein in January 2003, notice was provided to Sirius.

The Court will first address the motion (002) by Sirius and UTC. 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, 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 (*Stainless, Inc. v Employers' Fire Ins. Co.*, 49 NY2d 924, 428 NYS2d 675 [1980]); *Moleon v Kreiser Borg Florman General Constr. Co., Inc.*, 304 AD2d 337, 758 NYS2d 621 [2003]).

Here, Sirius has established that the Pinewood Entities are not named as additional insureds on the subject policy. During her deposition, Senatore testified she was responsible for providing the information to Irving Weber to procure the general commercial liability coverage. Senatore admitted

during questioning that she prepared and forwarded to Irving Weber the list of additional insureds to be included on the Sirius policy, and that the list did not include the Pinewood Entities. Senatore also testified that prior to Sargent's accident, she never requested that the Pinewood Entities be named as additional insureds. Similarly, John Purpura, claims manager at UTC, testified that the Pinewood Entities were not named as additional insureds on the subject Sirius policy.

The Pinewood Entities' argument in opposition that the phrase, "As on file with the company" in the additional insureds endorsement, creates an ambiguity as to whether the words, "the company" refer to Sirius or Klein, is specious. Klein clearly understood the term "the company" referred to a list of additional insureds kept in Sirius' file. Indeed, Senatore testified that she composed and provided the list of additional insureds to Irving Weber for the purpose of obtaining the subject policy. Thus, the Pinewood Entities argument is a feigned issue which is insufficient to defeat Sirius' prima facie showing. Therefore, as the Pinewood Entities are not named as additional insureds on the subject policy, Sirius is not obligated to provide a defense or indemnify Klein in the underlying bodily injury claim brought by Sargent.

As to the issue of notice, it is well settled that where an insurance policy requires an insured to provide written notice of the claim or suit "as soon as practicable" such notice is a condition precedent which must be provided within a reasonable time in view of all the facts and circumstances (*White v City of New York* 81 NY2d 955, 598 NYS2d 759 [1993]; *Merchants Mut. Ins. Co. v Hoffman*, 56 NY2d 799, 452 NYS2d 398 [1982]; *Paul Developers, LLC v Maryland Cas. Ins. Co.*, 28 AD3d 443, 816 NYS2d 75 [2006]; *Pile Foundation Constr. Co., Inc. v Investors Ins. Co. of Am.*, 2 AD3d 611, 769 NYS2d 290 [2003]). "Absent a valid excuse, failure to satisfy the notice requirement vitiates the policy" (*Security Mut. Ins. Co. of N.Y. v Acker-Fitzsimmons Corp.*, 31 NY2d 436, 440, 340 NYS2d 902 [1972]). Further, where, as here, there is no excuse for the delay and mitigating circumstances are absent, the issue of timeliness of notice to an insurer may be disposed of as a matter of law (*see, Power Auth. of State of N.Y. v Westinghouse Elec. Corp.*, 117 AD2d 336, 502 NYS2d 420 [1986]).

Here, Sirius has established that Klein received notice of the underlying personal injury on October 18, 2002, yet failed to give notice to Sirius until January 23, 2003, approximately three months later. Such a delay has been deemed untimely as a matter of law (*see, Figueroa v Utica Ins. Group*, 16 AD3d 616, 792 NYS2d 556 [2005] [2-month delay]; *Sayed v Macari*, 296 AD2d 396, 744 NYS2d 509 [2002] [nearly 3-month delay]; *Viles Contr. v Hartford Fire Ins.* 271 AD2d 349, 708 NYS2d 281 [2000] [2-month delay]; *Power Auth. of State of N.Y. v Westinghouse Elec. Corp., supra* [53-day delay]). The opposing papers fail to raise a triable issue of fact as to whether Sirius or UTC received notice from Klein of the underlying bodily injury claim prior to January 2003. The fact that Klein may have provided timely notice to Irving Weber, its own broker, is of no moment as notice to a broker of the insured cannot be deemed notice to the insurer (*see, Security Mut. Ins. Co. of N.Y. v Acker-Fitzsimmons Corp., supra; Paul Developers, LLC v Maryland Cas. Ins. Co., supra*). Thus, Klein has failed to provide a valid excuse for its 3-month delay in notifying Sirius of the occurrence. Hence, the delay by Klein was unreasonable as a matter of law and justified the denial of a defense and

indemnification (*see, Paul Developers, LLC v Maryland Cas. Ins. Co., supra*).¹ Therefore, Sirius and UTC are entitled to summary judgment.

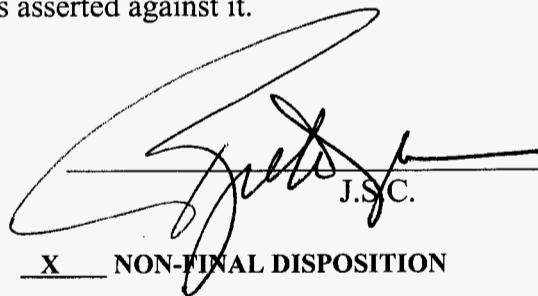
The Court will now address the motion (001) by Irving Weber. In support of its contention that it did not receive notice from Klein of the underlying bodily injury claim in October 2002, but first received notice in January 2003 via a telephone call and fax from Senatore, Irving Weber has submitted Klein's telephone records produced by Verizon pursuant to a judicial subpoena. The telephone records clearly indicate that no fax transmittals or phone calls were made from Klein to Irving Weber on October 18, 2002, or the days immediately preceding or subsequent to that date. Irving Weber maintains that since Klein predicates its claim of timely notice on a fax transmission, and the telephone records establish that there was no fax on about October 18, 2002, summary dismissal of the third-party complaint is warranted.

Irving Weber also has submitted its computerized activity log which purportedly cannot be altered once an entry is made. The activity log, as testified to by Marie Castelli ("Castelli"), an account executive for Irving Weber, includes entries for every activity made regarding a policy, including notices of claims. Castelli testified that the activity log shows that the first entry regarding the Sargent incident was on January 23, 2003. Nevertheless, Castelli testified that she is not a claims representative and would not take calls regarding loss claims. Castelli also testified that the account executive files for Klein were separate from and did not include the files for reported claims.

In opposition, Klein argues, among other things, the telephone records indicate that in October 2002 1,087 calls were made to Western Suffolk where Irving Weber receives calls. However, the Verizon records give the details for only 21 of the 1,087 calls made in October 2002. As there were numerous calls for which no detail is provided, Klein contends the records are not dispositive. Klein also argues that the activity log is not dispositive, as the log does not include all activity, and points out correspondence which was not posted to the activity log.

Based on the missing detail in the telephone records and the discrepancies pointed out by Klein regarding the activity log, the documentary evidence as well as the deposition testimony submitted are insufficient to establish that no issues of fact exist as to whether Irving Weber was notified on or about October 18, 2002 of Sargent's bodily injury claim. Hence, Irving Weber is not entitled to summary judgment dismissing the third-party complaint as asserted against it.

Dated: FEB 13 2008



J.S.C.

 FINAL DISPOSITION X NON-FINAL DISPOSITION

¹The issue raised by Sargent's counsel in opposition, as to whether Sargent, as the injured party, provided timely notice thereby preserving his right to proceed directly against Sirius has no bearing on the Court's determination herein.