

Branic Intl. Realty Corp. v CNA Ins. Co.

2008 NY Slip Op 30999(U)

April 1, 2008

Supreme Court, New York County

Docket Number: 0110101/2007

Judge: Joan Madden

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HON. JOAN A. MADDEN

PRESENT:

J.S.C. Justice

PART 11

Index Number : 110101/2007

BRANIC INTERNATIONAL REALTY

vs.

CNA INSURANCE COMPANY

SEQUENCE NUMBER : 001

SUMMARY JUDGMENT

INDEX NO.

MOTION DATE

MOTION SEQ. NO.

MOTION CAL. NO.

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

and cross motion are determined in accordance with the annexed decision, order and judgment.

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 1118).

Dated:

April 4, 2008

HON. JOAN A. MADDEN 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: PART 11

-----X
BRANIC INTERNATIONAL REALTY CORP.,
GLENN WESTERLIND and INDIAN HARBOR,

INDEX NO. 110101/07

Plaintiffs,

-against-

CNA INSURANCE COMPANY and
FORGE INSURANCE COMPANY,

Defendants.
-----X

UNFILED JUDGMENT
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and notice of entry cannot be served based hereon. To
obtain entry, counsel or authorized representative must
appear in person at the Judgment Clerk's Desk (Room
141B).

JOAN A. MADDEN, J.:

In this action for a declaratory judgment as to insurance coverage, defendant Valley Forge Insurance Company (“Valley Forge”) moves for an order pursuant to 3212 granting summary judgment dismissing the complaint. Plaintiffs oppose the motion and cross-move for summary judgment declaring that defendants CNA Insurance Company (“CNA”)¹ and/or Valley Forge are obligated to indemnify plaintiff Indian Harbor for the costs of providing a defense to their insured, Branic International Realty Corp. (“Branic”) and Glenn Westerlind, in the underlying personal injury action (Nixy Varghese v. Planet Kids of Broadway, Inc., Planet Kids, Branic International Realty Corp. and Glen Westerlind, Supreme Court, New York County, Index No. 101348/06).²

¹According to defendants’ counsel, the entity named in the caption as “CNA Insurance Company” is a “non-existent entity.”

²On January 24, 2008, this court issued a decision and order in the underlying action, awarding summary judgment to Branic and Westerlind, and dismissing the complaint as against them. Since Branic and Westerlind are no longer parties to the underlying action, the only claim remaining in the instant action, is Indian Harbor’s claim for a declaratory judgment that Valley

The plaintiff in the underlying action alleges that he was injured on February 8, 2003, when he slipped and fell as a result of snow and ice on the sidewalk adjacent to the building located at 2688 Broadway in Manhattan. Branic is the owner of the building, Westerlind is the managing agent, and Planet Kids of Broadway, Inc. leases the premises directly adjacent to the sidewalk and operates a retail store known as Planet Kids (collectively "Planet Kids"). The defendants in the underlying action are adverse parties, as Branic and Westerlind's answer asserts a number of cross-claims against Planet Kids.

The parties do not dispute that the issue as to whether Valley Forge is obligated to provide coverage to the additional insureds, Branic and Westerlind, must be resolved by determining whether Branic and Westerlind gave timely written notice to Valley Forge. Plaintiffs contend that they can rely on the timely written notice Planet Kids gave to Valley Forge, and additionally, that Branic and Westerlind, on their own, gave timely written notice to Valley Forge. These contentions are without merit.

Based on the recent decision in City of New York v. Welsbach Electric Corp., ___ AD3d ___, 852 NYS2d 134, 135 (1st Dept 2008), plaintiffs cannot rely on the notice given by Planet Kids to Valley Forge. Since Planet Kids, the named insured under the policy issued by Valley Forge, and Branic and Westerlind, the additional insureds under the Valley Forge policy, were adverse parties in the underlying action, Branic and Westerlind had an independent obligation to provide timely written notice of the claim to Valley Forge. See id.

The question remains as to whether Branic and Westerlind, on their own, provided

Forge is obligated to reimbursement Indian Harbor for its costs of providing a defense to Branic and Westerlind in the underlying action.

Valley Forge with timely written notice.³ It is not disputed that on September 25, 2006, the attorney for Branich and Westerlind sent a letter to “CNA Insurance Company,” stating that such “correspondence will serve as a tender of defense and for indemnification under Planet Kids of Broadway, Inc. and/or Planet Kids’s comprehensive commercial general liability policy issued by CNA Insurance Company covering the date of loss of February 8, 2003.” By letter dated November 8, 2006, CNA responded and disclaimed coverage based on late notice. Specifically, CNA stated that the complaint “filed by Nixy Varghese against the defendants . . . was filed on or about January 31, 2006. Based on the information presently available, Branich International Realty Corp. would have had notice of this matter for at least seven months. Since the letter of September 22, 2006 was the first time this matter was been tendered to VFIC [Valley Forge Insurance Company], we are disclaiming coverage based upon late notice.”

Valley Forge argues that it is entitled to summary judgment based on Branich’s and Westerlind’s delay of “at least seven months” in reporting the incident and in providing the complaint to Valley Forge. It is undisputed that Branich and Westerlind were served in the underlying action on or about February 8, 2006, and that they did not notify Valley Forge until more than seven months later when their attorney sent the September 25, 2006 letter to CNA.⁴

In opposing summary judgment, plaintiffs argue that their seven-month delay was excusable and reasonable. Their attorney, Alexander Fisher, submits an affirmation stating that

³Valley Forge may have an issue as to whether Branich qualifies as an additional insured under the policy issued to Planet Kids. However, for the purposes of its motion for summary judgment, Valley Forge assumes that Branich is an additional insured under the policy.

⁴Valley Forge does not dispute that Branich and Westerlind were first notified of the Varghese incident, when they were served with the summons and complaint in the underlying action on February 8, 2006.

on April 25 and July 28, 2006, he sent letters to Planet Kids' counsel, requesting a copy of Planet Kids' answer, and that he also "made repeated attempts to obtain the name of Planet Kids' insurance carrier and a copy of the insurance policy, so that a tender of defense could be made on behalf of Branic and Westerlind," but Planet Kids' counsel "refused to provide this information until August 2006." According to counsel, once the identity of Planet Kids' carrier was ascertained in August 2006, "a tender letter was promptly sent" on September 25, 2006, and "[s]uch a time period is reasonable given the circumstances surrounding the incident, including the inability to determine who insured Planet Kids." In his affirmation, attorney Fisher asserts that "for over four months, this office was unable to determine the identity of the insurance carrier for Planet Kids" and "[a]dditionally, due to the length of time between the date of the alleged incident and the date the suit was filed, Plaintiff Branic no longer had the relevant Certificate of Insurance in its possession at the time the underlying action was commenced."

While circumstances may exist to excuse a failure to give timely notice, under the facts and circumstances presented herein, plaintiffs fail to raise a triable issue of fact as to whether their seven-month delay in giving notice was reasonable. See Great Canal Realty Corp. v. Senaca Insurance Co., 5 NY3d 742 (2005); RMD Produce Corp. v. Hartford Casualty Insurance Co., 37 AD3d 328 (1st Dept), app denied 8 NY3d 816 (2007). Plaintiff's counsel submits the bare and conclusory statement that he made "repeated attempts to obtain the name of Planet Kids' insurance carrier and a copy of the insurance policy." Plaintiff's counsel, however, provides no details as to nature of such "attempts," including the name of the person he contacted, whether such contact was in writing or by telephone, and the dates on which he made such attempts. Plaintiffs also fail to submit copies of any correspondence documenting such

“attempts” during the seven-month period from when they were served with the summons and complaint in February 2006, and tendered their defense in September 2006. Plaintiffs submit copies of three letters from this period. Two letters, dated April 25 and July 28, 2006, are addressed to the attorney for Planet Kids and request only a copy of Planet Kids’ answer, without mentioning Planet Kids’ insurance. The other letter specifically requests Planet Kids’ insurance information, but that letter was written on September 22, 2006, more than seven months after plaintiffs were notified of the underlying incident.

It is noteworthy that the parties’ lease required Planet Kids to provide Branich with a copy of its insurance policy or the certificate of insurance showing that Branich had been named as an additional insured. In his affirmation, plaintiffs’ counsel states that “due to the length of time between the date of the alleged incident and the date the suit was filed,” the owner no longer had the certificate of insurance. Counsel’s vague statement is not based on *first-hand knowledge*. Moreover, the passage of time alone does not adequately explain why Branich no longer had the insurance information provided by Planet Kids in accordance with the terms of their lease. Under these circumstances, plaintiffs fail to raise an issue of fact as to the reasonableness of the seven-month delay in notifying Valley Forge.

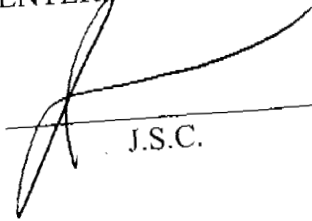
Thus, absent timely notice of the incident from plaintiffs, Valley Forge is not obligated to reimburse Indian Harbor for its costs of defending Branich and Westerlind in the underlying action.

Accordingly, it is hereby

ORDERED that defendants’ motion for summary judgment is granted and the complaint is dismissed in its entirety; and it is further

ADJUDGED and DECLARED that defendant Valley Forge Insurance Company is not obligated to reimburse plaintiff Indian Harbor for the costs of defending Branich International Realty Corp. and Glenn Westerlind in the underlying action; and it is further ORDERED and plaintiffs' cross-motion for summary judgment is denied.

DATED: April (, 2008

ENTER:


J.S.C.

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 1415).