

**Phoenix Bldrs., Inc. v Sirius Am. Ins.  
Co.**

2008 NY Slip Op 32535(U)

September 11, 2008

Supreme Court, New York County

Docket Number: 0601692/2005

Judge: Joan A. Madden

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

PRESENT: MADSON  
Justice

PART 11

PHOENIX BUILDERS INC  
- v -

INDEX NO. 601692/05

MOTION DATE \_\_\_\_\_

SIRIUS AMERICA INSURANCE  
Company

MOTION SEQ. NO. 2

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 *and motion sequence no. 003* are consolidated for determination and the consolidated motions are determined in accordance with the annexed decision and order.

**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 141B).

Dated: Sept 11, 2008

[Signature]  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  DEFERENCE

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

PHOENIX BUILDERS, INC.,

INDEX NO. 601692/05

Plaintiff,

-against-

SIRIUS AMERICA INSURANCE COMPANY  
and BOLLINGER INC.,

Defendants.

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JOAN A. MADDEN, J.:

In this action for a declaratory judgment as to insurance coverage, defendant Bollinger, Inc. moves for an order pursuant to CPLR 3212 granting summary judgment dismissing all claims and all cross-claims asserted against it (Motion Sequence No. 002). Defendant Sirius American Insurance Company ("Sirius") is also moving for an order pursuant to CPLR 3212 granting summary judgment dismissing all claims and cross-claims asserted against it (Motion Sequence No. 003). Plaintiff Phoenix Builders, Inc. ("Phoenix") opposes both motions, and cross-moves for an order pursuant to CPLR 3212 granting summary judgment in its favor as against Bollinger. Motion Sequence Nos. 002 and 003 are consolidated for disposition.

I. BACKGROUND

The following facts are not disputed unless otherwise noted. The lawsuit underlying this action was brought by Jueng Zhao, who was employed by Phoenix, a construction company hired to work at 734 East 5<sup>th</sup> Street in Manhattan (the "premises"). Zhao alleges he sustained personal

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

injuries on July 30, 2004, when he was working at the premises and fell from a steel beam on third floor and landed on the second floor. On March 7, 2005, Zhao commenced an action (the “underlying action”) for damages for personal injuries, asserting claims based on violations of Labor Law §§ 200, 240 and 241, against the owner of the property (Jueng Zhao v. Isla Nena Housing Development Fund Company, Inc. and Lower East Side Coalition, Inc., Index No. 103124/05, Supreme Court, New York County).<sup>1</sup> By a decision and order dated September 18, 2007, this court granted Zhao’s motion for partial summary judgment as to liability on his Labor Law § 240(1) claim.

On May 11, 2005, Phoenix commenced the instant action seeking a judgment declaring that Sirius American Insurance Company (“Sirius”) is obligated to defend and indemnify Phoenix in the underlying action, based on a commercial general liability policy that Sirius issued to Phoenix. Phoenix alleges that on or about March 7, 2005, it received notice of the underlying action and that on March 14, 2004, it notified Sirius, through its third-party claims administrator UTC Risk Management Services, Inc. (“UTC Risk”), so that Sirius “would provide a defense thereto.” It is not disputed that by letter dated April 6, 2005, UTC Risk on behalf of Sirius denied coverage based on “late notice,” explaining that Phoenix “knew about the injuries to the plaintiff [Zhao] on the day that the incident happened” and that “[i]t took ten months to report it to this office.”<sup>2</sup>

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<sup>1</sup>Defendants Isla Nena Housing Development Fund Company (“Isla Nena”) and Lower East Side Coalition, Inc. (“Coalition”), hired Phoenix. Coalition is the owner of the property and Isla Nena is a subsidiary of Coalition.

<sup>2</sup>The letter inaccurately states the period of the delay as “ten months.” Phoenix notified Sirius on March 14, 2005, which is approximately 7 ½ months after the July 30, 2004 accident date.

Phoenix subsequently moved for leave to amend its complaint to add its insurance broker, Bollinger, Inc. (“Bollinger”), as a defendant in the instant action. By order dated January 27, 2007, the motion to amend was granted in the absence of opposition. The amended complaint adds Second and Third Causes of Action against Bollinger, alleging that in the event Sirius’ defense of untimely notice succeeds, then “Bollinger was negligent in failing to provide timely notice to Sirius” and “Bollinger breached the agreement with plaintiff by failing to provide timely notice to Sirius.” Both the Second and Third Causes of Action seek “damages including any moncy’s plaintiff maybe required to pay in the Zhao action plus attorneys fees in the Zhao action and this action.”

Defendants Sirius and Bollinger are now each moving for summary judgment dismissing the claims and cross-claims against them, and plaintiff is cross-moving for summary judgment against Bollinger.

## II. SIRIUS’ MOTION FOR SUMMARY JUDGMENT

Sirius contends that Phoenix’s notice of the occurrence of Zhao’s accident is untimely as a matter of law, since at the time of the accident, Phoenix notified only its insurance broker Bollinger and Bollinger did not notify Sirius, and Phoenix did not notify Sirius until 7½ months later, when Phoenix received Zhao’s complaint. Sirius also contends that its disclaimer of coverage sent 23 days after it received notice of Zhao’s claim, is “reasonable as a matter of law.”

In opposing the motion, Phoenix argues that issues of fact exist as to: 1) whether Sirius received actual notice of the accident shortly after it occurred, from Phoenix’s insurance broker Bollinger; 2) whether Phoenix had a good faith belief in nonliability so as to excuse its 7½ month

delay in notifying Sirius; and 3) whether the 23 days that Sirius took to disclaim coverage was timely in light of its “extremely brief investigation.”

Generally, where a policy of liability insurance requires that the insured provide notice of an occurrence “as soon as practicable,” such notice must be given within a reasonable period of time. See Great Canal Realty Corp. v. Senaca Insurance Co., Inc., 5 NY3d 742, 743 (2005); York Speciality Food, Inc. v. Tower Insurance Co., 47 AD3d 589, 590 (1<sup>st</sup> Dept 2008). This requirement is considered a condition precedent to the insurer’s obligation to defend or indemnify the insured, and a failure to comply with this requirement vitiates the insurance contract as a matter of law, even without a showing of prejudice. See Argo Corp. v. Greater New York Mutual Insurance Co., 4 NY3d 332, 339 (2005); York Spcciality Food, Inc. v. Tower Insurance Co., supra at 589. Under certain circumstances, a delay in giving timely notice may be excused, such as where the insured can show that it had a “good faith belief in nonliability,” provided such belief is reasonable. Great Canal Realty Corp. v. Senaca Insurance Co., Inc., supra at 743. The Court of Appeals explains that “the insured’s belief must be reasonable under all the circumstances, and it may be relevant on the issue of reasonableness, whether and to what extent, the insured has inquired into the circumstances of the accident or occurrence.” Id at 744 (citing Security Mutual Insurance Co. v. Acker-Fitzsimons Corp., 31 NY2d 436 [1972]).

In opposing Sirius’ motion for summary judgment, Phoenix identifies three triable issues fact, but fails to satisfy its burden as to any one of them’. First, Phoenix argues that a triable issue exists as to whether Sirius received actual notice of Zhao’s accident in August 2004 from Phoenix’s insurance broker, Bollinger. To support its argument, Phoenix relies solely on the

deposition testimony of Bollinger's Manager of Claims, Robert Foglio, when he was asked about Zhao's claim, and testified that a Bollinger employee, Ellen Reilly, was the "commercial lines claim representative" who first received notice of Zhao's claim in August 2004. Phoenix cites to the following portion of Foglio's testimony:

Q. And do you know whether she [Ellen Reilly] in fact, forwarded the claim on to Sirius?

A. Yes.

Q. In what form was the claim forwarded to Sirius?

MR. WRIGHT: Can we just – you just need to be more specific as to what claim you're talking about, what time you're talking about, what the communication was. I think it's misleading. Not intentionally, but it's misleading.

Q. First, I'll ask you about the general policy, and then we'll get to the specifics involving Mr. Zhao. As of August 2004, her [Ellen Reilly] duties included opening up a file on the computer and forwarding a claim to Sirius?

A. Correct.

Q. With respect to any claim that came in, how did she physically forward the claim to Sirius?

A. I believe by fax.

Q. Have you spoken to her prior to testifying here today about this case?

A. I spoke to her about this, yes.

Q. And did you ask her how she conveyed notice of the claim to Sirius?

MR. WRIGHT: Which claim are you talking about? Objection to the form.

Q. So you believe that the general policy in August of 2004 was for her to fax notice of the claim to Sirius; is that correct?

A. Correct.

Q. Did anyone within Bollinger ever tell anyone within Phoenix, if you get a claim, you're supposed to file it not with us, but directly with Sirius?

A. Repeat the question.

Q. Did anyone within –

MR. HERSHENSON: Strike that.

Q. I believe you testified earlier that Bollinger tells the customer, if you have a claim, let us know, give us notice?

A. Yes.

Based on the testimony quoted above, Phoenix asserts that "Robert Foglio a claims manager at Bollinger, testified at his deposition in this case that notice was given to Sirius in

August 2004.” Phoenix also asserts that “Mr. Foglio testified when being asked about notice being given in August of 2004 that it was forwarded by facsimile to Sirius by Ellen Reilly an employee of Bollinger.” A careful reading of Foglio’s testimony shows that Phoenix mischaracterizes the content and meaning of the questions and Foglio’s responses to those questions. Although Foglio answered “yes” when he was asked if he *knew whether* Reilly “in fact” forwarded the claim to Sirius, he was simply stating that he had such knowledge as to *whether* or not she forwarded the claim. Foglio did not answer the next question, “In what form was the claim forward to Sirius?,” because of Mr. Wright’s interruption to clarify which claim they were asking about. When the questioning resumed, the direction of the questions turned to Bollinger’s “general policy” in 2004 for notifying Sirius. Foglio was never asked if Reilly forwarded Zhao’s claim to Sirius in August 2004, and absent an affirmative answer to that question, Foglio’s testimony as to “whether he knew” is insufficient to create an issue as to whether Sirius was notified at that time. Moreover, since Foglio was only asked about Bollinger’s “general policy” in August 2004 for forwarding a claim Sirius, he did not testify that Zhao’s claim in particular, was faxed to Sirius in August 2004.

At another point in the deposition, Foglio as specifically asked about August 2004 and he admitted that Bollinger did not notify Sirius at that time. Foglio was asked “Why did Bollinger not report this loss to Sirius?,” and he responded: “It was reported to us as a Workers’ Compensation claim.” The testimony of Phoenix’s General Manager Nancy Chan is consistent with Foglio’s testimony. Chan testified that at the time of the accident, in August 2004, she called Bollinger to say that she needed to file a Worker’s Compensation claim, and then in March 2005, when she received Zhao’s complaint and sent it to Bollinger, “Doug [from Bollinger]

called me and said Bollinger did not at the time of the accident inform Sirius.” Significantly, in its motion for summary judgment, Bollinger takes the position that it did not notify Sirius at the time of the accident, and that it had no obligation to do so. Thus, the undisputed evidentiary proof in the record establishes that Bollinger did not notify Sirius in August 2004.

Phoenix argues that a triable issue of fact also exists as whether it had a good faith belief in nonliability so as to excuse its 7½ month delay in notifying Sirius. Phoenix does not submit an affidavit, and relies solely on the deposition testimony of its General Manager Nancy Chan. Chan testified that on Friday, July 30, 2004, at 4:00 p.m., Mr. Wong, the site/project manager, called her from the job site and “said that the temporary worker, Mr. Zhao hurt himself,” and “they called the ambulance, and Mr. Zhao said he was fine, he didn’t want to go to the hospital.” Chan also testified that since it was Friday afternoon, the following Monday, August 2, 2004, she telephoned Bollinger, her insurance broker for the State Insurance Fund, who is her Workers’ Compensation carrier, and told “Sylvia . . . that there was an accident at the job site and I needed to file a Workers’ Compensation claim.” Chan explained that Bollinger sent her the “C-2 form” for Workers’ Compensation, which Phoenix prepared on August 4, 2004 and forwarded to Bollinger. When Chan was asked if she contacted “anybody else about the accident at that time,” and if she ever contacted Sirius “directly,” she answered “no.” She also answered “no,” when asked if “there was anything else you did to investigate the claim after you filed the C-2 form,” and testified that she heard nothing further about the incident involving Zhao until she received the complaint in March 2005.

Citing Chan’s testimony, Phoenix asserts that an issue of fact exists as to whether Chan had a good faith belief in nonliability, since she had reason to believe that Zhao was not injured

and that any potential claim by Zhao would be covered by Workers' Compensation. While the reasonableness of an insured's belief in nonliability is ordinarily a matter for the fact finder, where as here the facts are undisputed and not subject to conflicting inferences, the issue can be decided as a matter of law. See St. James Mechanical, Inc. v. Royal & Sunalliance, 44 AD3d 1030, 1031-1032 (2<sup>nd</sup> Dept 2007); SSBSS Realty Corp. v. Public Service Mutual Insurance Co., 253 AD2d 583 (1<sup>st</sup> Dept 1998).

Chan's reliance on the fact that Zhao said he was okay and refused to go the hospital, is insufficient, as she admits that she did not inquire further into the circumstances and outcome of the accident, or the extent of Zhao's injuries. See Great Canal Realty Corp. v. Senaca Insurance Co., Inc., *supra* at 744; White by White v. City of New York, 81 NY2d 955, 958 (1993); York Speciality Food, Inc. v. Tower Insurance Co., *supra* at 590; Sorbara Construction Corp. v. AIS Insurance Co., 41 AD3d 245, 246 (1<sup>st</sup> Dept 2007), *lv app granted* 10 NY3d 706 (2008). Notably, the completed C-2 Workers' Compensation form that Chan faxed to Bollinger on August 4, 2004, shows that within days of the accident, Chan had actual knowledge that Zhao had injuries to his "back & head," had received medical treatment at Lutheran Medical Center, and had not returned to work, as that information was specifically included and reported on the C-2 form.

Chan's reliance on workers' compensation is likewise insufficient, as Phoenix knew or should have known of a potential claim at the time of the accident in July 2004, in light of its obligations under the construction contract to indemnify the owner and procure general liability insurance. See Scordio Construction, Inc. v. Sirius America Insurance Co., 51 AD3d 768 (2<sup>nd</sup> Dept 2008); Macro Enterprises, Ltd v. QBE Insurance Corp., 43 AD3d 728 (1<sup>st</sup> Dept 2007).

Under these circumstances, Phoenix fails to raise a triable issue of fact as to whether its delay in giving notice was reasonably founded upon a good faith belief in its nonliability. See Great Canal Realty Corp. v. Senaca Insurance Co., Inc., supra

Phoenix argues that additional issue of fact exists as to whether the 23 days that UTC Risk, on behalf of Sirius, took to disclaim coverage was reasonable. An insurer is obligated, under Insurance Law §3420(d) to disclaim coverage “as soon as is reasonably possible.” See Those Certain Underwriters at Lloyds, London v. Gray, 49 AD3d 1, 4 (1<sup>st</sup> Dept 2007); Ace Packing Co., Inc. v. Campbell Solberg Assocs, Inc., 41 AD3d 12, 14 (1<sup>st</sup> Dept 2007). The reasonableness of the timing of a disclaimer is measured from the date the insurer knew or should have known about the grounds for disclaiming coverage. See Those Certain Underwriters at Lloyds, London v. Gray, supra. If the ground for disclaiming coverage is “readily apparent” to the insured upon first learning of the claim, “any subsequent delay in issuing the disclaimer is unreasonable as a matter of law,” but if the ground “is not readily apparent, the insurer had the right, albeit the obligation, to investigate, but such investigation must be promptly and diligently conducted.” Id.

Here, it is not disputed that UTC Risk issued the disclaimer 23 days after receiving the complaint in the Zhao action, and that the ground for such disclaimer, i.e. untimely notice, was evident from the face of the complaint. In Public Service Mutual Insurance Co. v. Harlen Housing Assocs, 7 AD3d 421, 423 (1<sup>st</sup> Dept 2004), the Appellate Division First Department found a disclaimer timely as a matter of law, where it was issued 27 days after the insurer learned of the grounds for disclaiming. Since the instant disclaimer was issued 23 days after UTC Risk received the complaint and thereby learned of the grounds for disclaiming, under the First

Department holding in Public Service Mutual Insurance Co. v. Harlen Housing Assocs., this court must conclude as a matter of law that UTC Risk, on behalf of Sirius, timely disclaimed coverage. Id.

Based on the foregoing, Phoenix fails to make a sufficient showing as to a triable issue of fact to defeat Sirius' motion for summary judgment, and as such, Sirius is entitled to summary judgment.

### III. BOLLINGER'S MOTION AND PHOENIX'S CROSS-MOTION FOR SUMMARY JUDGMENT

It is well settled that an insurance broker is an agent of its insured. See Bohlinger v. Zanger, 306 NY 228, 231 (1954); Ribacoff v. Chubb Group of Insurance Cos., 2 AD3d 153, 154 (1<sup>st</sup> Dept 2003). As a general matter, insurance brokers and agents have "a common law duty to obtain requested coverage for their clients within a reasonable time or inform the client of the inability to do so; however, they have no continuing duty to advise, guide or direct a client to obtain additional coverage." Murphy v. Kuhn, 90 NY2d 266, 270 (1997). Nevertheless, "[e]xceptional and particularized situations may arise in which insurance agents [and brokers], through their conduct or by express or implied contract with customers and clients, may assume or acquire duties in addition to those fixed as common law." Id. at 272. For instance, as relevant to the case at bar, as the insured's agent, an insurance broker, such as Bollinger, is charged with notifying the proper insurance company after it is put on notice of a claim by its insured. See Martini v. Lafayette Studios Corp., 273 AD2d 112 (1<sup>st</sup> Dept 2000); Commissioners of the State Insurance Fund v. Sherry & Sons, Inc., 2002 WL 31107888 (Sup Ct, N.Y. Co. 2002), app withdrawn 303 AD2d 1057 (1<sup>st</sup> Dept 2003).

Citing to the deposition testimony of Bollinger's Manager of Claims, Robert Foglio, Phoenix asserts that Bollinger, as its insurance broker, had a duty to be familiar with the provisions of Phoenix's policy with Sirius, and to report the Zhao accident to Sirius in August 2004. Specifically, Foglio testified that Bollinger was the insurance broker for Phoenix with respect to both the insurance policy with Sirius and Worker's Compensation claims. Foglio also testified that Bollinger had a standard company policy to tell its customers to report any loss to its agency, and that Bollinger was responsible for reporting the loss or claim to the insurance carrier. When Foglio was asked if it was "part of Bollinger's responsibility to know where a claim should be filed, with which carrier or carriers," he answered "yes." Phoenix also asserts that as a experienced broker securing general liability insurance for the commercial construction industry in New York, Bollinger should be aware of the Labor Law provisions imposing strict liability on property owners for height-related accidents, and the standard provisions in construction contracts obligating construction companies to indemnify owners, which necessarily implicate possible liability and coverage under a construction company's general liability insurance policy.

Bollinger, on the other hand, asserts that it fulfilled its duties as Phoenix's insurance broker, when it notified the State Insurance Fund of Zhao's Workers' Compensation claim as requested by Phoenix. Bollinger cites to the deposition testimony of Phoenix's General Manager, Nancy Chan, that on August 4, 2004, she telephoned Bollinger, her "brokers for the State Insurance Fund," her Workers' Compensation carrier, and told "Sylvia" that "there was an accident at the job site and I need to file a Workers' Compensation claim." Bollinger sent Chan a C-2 form for Workers' Compensation, Chan completed and returned to the form to Bollinger,

and Bollinger submitted it to the State Insurance Fund. Bollinger argues that since Chan reported the claim as a Workers' Compensation claim, it was obligated to notify only Phoenix's Workers' Compensation carrier, in accordance with Chan's instructions. Bollinger also asserts that it had no knowledge of the construction contract between Phoenix and the owner of the premises, Isla Nena, and Phoenix's obligations under that contract to indemnify the owner.

Under the circumstances presented, as to Bollinger's motion, since Bollinger admits that it had a standard company policy to inform its clients to notify Bollinger of any loss, and admits that it was responsible for notifying the client's insurance carrier of the loss or claim and for knowing which insurance carrier to notify, an issue of fact exists as to whether Bollinger was under a duty to notify Sirius at the time of the accident in August 2004. As to Phoenix's motion, since Phoenix admits that it specifically reported the claim to Bollinger as a Workers' Compensation claim and had Bollinger file the Workers' Compensation paperwork, an issue of fact exists as to whether Bollinger breached its duty to Phoenix by reporting the claim only to the Workers' Compensation carrier. Thus, neither Bollinger nor Phoenix is entitled to summary judgment. See Martini v. Lafayette Studios Corp., supra; Commissioners of the State Insurance Fund v. Sherry & Sons, Inc., supra.

Accordingly, it is hereby

ORDERED that motion by defendant Bollinger Inc. for summary judgment (Motion Sequence No. 002) is denied; and it is further

ORDERED that the cross-motion by plaintiff Phoenix Builders, Inc. for summary judgment (Motion Sequence No. 002) is denied; and it is further

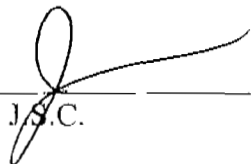
ORDERED that the motion by defendant Sirius American Insurance Company for summary judgment (Motion Sequence No. 003) is granted, and the claims and cross-claims against defendant Sirius American Insurance Company are severed and dismissed, and the Clerk is directed to enter judgment accordingly; and it is further

ADJUDGED AND DECLARED that defendant Sirius American Insurance Company is not obligated to defend or indemnify plaintiff Phoenix Builders, Inc., in the underlying action; and it is further

ORDERED that the balance of the action shall continue as to the remaining parties, Phoenix Builders, Inc. and Bollinger, Inc..

DATED: September // , 2008

ENTER:

  
\_\_\_\_\_  
J.S.C.

**UNFILED JUDGMENT**  
This judgment has not been entered by the County Clerk and therefore is not enforceable. To be enforceable, the judgment must be filed with the County Clerk. (C.S. 60.02)