

Tower Ins. Co. of N.Y. v Gundersen

2008 NY Slip Op 32599(U)

September 24, 2008

Supreme Court, New York County

Docket Number: 0103672/2008

Judge: Doris Ling-Cohan

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

PRESENT. Hon. Doris Ling-Cohan

PART 36

Justice

Index Number : 103672/2008

TOWER INSURANCE CO. OF NEW YORK

VS.

GUNDERSEN, DAN

SEQUENCE NUMBER : # 001

DISMISS COMPLAINT

INDEX NO. 103672-08

MOTION DATE

MOTION SEQ. NO. #001

MOTION CAL. NO.

are read on this motion to/for

PAPERS NUMBERED

1, 2

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits

Replying Affidavits

3, 4

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion and cross motion are resolved in accordance with the accompanying memorandum decision.

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

FILED

SEP 29 2008

COUNTY CLERK'S OFFICE NEW YORK

DORIS LING-COHAN

Dated:

9/24/08

J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 36

-----X
TOWER INSURANCE COMPANY OF NEW YORK,

Plaintiff,

-against-

DAN GUNDERSEN and GUNDERSEN QUALITY
HOMES and GALO URIBE, JR.,

Defendants.
-----X

Index No. 103672/08

Motion Seq. No.: 001

FILED
SEP 29 2008
COUNTY CLERK'S OFFICE
NEW YORK

DORIS LING-COHAN, J.:

Defendant Galo Uribe, Jr. ("Uribe") moves to dismiss the complaint as against him for failure to state a cause of action, pursuant to CPLR § 3211(a)(7). Plaintiff Tower Insurance Company of New York ("Tower Insurance") cross-moves for summary judgment against defendants Dan Gundersen and Gundersen Quality Homes (collectively, the "Gundersen Defendants"), pursuant to CPLR § 3212.

BACKGROUND

Tower Insurance commenced this action, seeking a declaratory judgment that it has no duty to defend or indemnify the Gundersen Defendants in an underlying action brought against them, entitled *Galo Uribe, Jr. v. Dan Gundersen and Gundersen Quality Homes*, Index No. 00248/08, pending in the Supreme Court of the State of New York, County of Westchester.

In December 2006, the Gundersen Defendants entered into an oral agreement with John Weber to perform internal renovation work at his residence located at 7 Windcrest Road, Rye, New York. Plaintiff alleges that Gundersen Quality Homes was hired as the general contractor

for the renovation and that it subcontracted various work to several subcontractors, including Mount Kisco Mechanical Service Corporation (“Kisco”). Kisco was hired to install a ventilation unit and Uribe, Kisco’s employee, was responsible for overseeing the installation.

On January 2, 2008, Uribe commenced the underlying action against the Gundersen Defendants alleging that he suffered bodily injury while in the course of his employment with Kisco. Uribe alleges that on September 28, 2007, he was injured while descending a ladder being used to install the ventilation unit.

Tower Insurance issued a commercial liability policy to the Gundersen Defendants, effective August 14, 2007 to August 14, 2008 (the “Policy”). Tower Insurance was first notified of the accident on January 16, 2008, when it received a facsimile transmission from The Wallberg Companies, the Gundersen Defendants’ broker. Tower Insurance disclaimed coverage by letter dated February 14, 2008, on the basis of the independent contractors exclusion and late notice. However, Tower Insurance nevertheless assigned counsel to defend the Gundersen Defendants in the underlying action and notified them that it would be initiating this action to determine their responsibility pursuant to the Policy.

The Policy states that it covered “sums that the insured [became] legally obligated to pay as damages because of ‘bodily injury’” caused by an occurrence, or accident. (Aptman Aff., Ex. 1.) However, the Policy excluded coverage when operations were performed for the Gundersen Defendants by independent contractors. The exclusion provides: “It is agreed that this policy shall not apply to ‘bodily injury’ . . . arising out of operations performed for any insured by independent contractors or acts or omissions of any insured in connection with his general supervision of such operations.” (*Id.* at TG 43.) The Policy also requires that the policyholder

notify Tower Insurance of any occurrence or accident that may result in a claim “as soon as practicable.” (*Id.* at Section IV(2)(a).)

DISCUSSION

Motion to Dismiss

Uribe’s motion to dismiss the complaint as against him is granted, without opposition.

In reviewing the complaint, it is clear that there is no stated cause of action against defendant Uribe. The only causes of action found in the complaint are against the two other defendants. Since the action is seeking a declaratory judgment that plaintiff is not required to indemnify or defend the insurance policyholder, there is no reason why the injured employee suing in the underlying action must be a defendant in this case, which is evident given that there are no causes of action brought against him.

Cross Motion for Summary Judgment

A motion for summary judgment should be granted if the moving party has sufficiently established that it is warranted as a matter of law, pursuant to CPLR § 3212(b). *Alvarez v. Prospect Hosp.*, 68 NY2d 320, 324 (1986). However, the motion should be denied if the opposing party presents evidence establishing that there is an issue of fact remaining. *Zuckerman v. City of New York*, 49 NY2d 557, 560 (1980).

Plaintiff cross-moves for summary judgment, declaring that it is not required to indemnify or defend the Gundersen Defendants because: (1) Tower Insurance did not receive timely notice of the occurrence as provided in the Policy; and (2) the Policy excludes coverage for bodily injury arising from operations performed for the Gundersen Defendants by independent contractors. No opposition was filed to plaintiff’s cross motion.

Tower Insurance has made a sufficient showing that judgment is warranted as a matter of law and the Gundersen Defendants have failed to provide any opposition that there are material facts remaining to warrant denial of the motion.

Timely notice has been held fundamental to an insurer's ability to investigate a claim and protect itself against fraud. *Power Auth. v. Westinghouse Elec. Corp.*, 117 AD2d 336, 339 (1st Dep't 1986). As such, an insurer is not required to make payment pursuant to an insurance policy in the absence of timely notice, even if there has been no prejudice. *Heydt Contracting Corp. v. Am. Home Assurance Co.*, 146 AD2d 497, 498 (1st Dep't 1989).

A provision that dictates notice should be given "as soon as practicable," as is the case here, requires that "notice be given within a reasonable time under the circumstances." *Id.* Typically, what is reasonable is a determination left to a jury; however, where the insurer provides no excuse for the delay, the issue may be disposed as a matter of law. *Power Auth.*, 117 AD2d at 339–40.

Tower Insurance first received notification of Uribe's accident on January 16, 2008, when it received a facsimile transmission from the Gundersen Defendants' broker. (Aptman Aff. ¶ 7; Ex. 2.) In his statement to Oscar Alzate, an investigator assigned by Tower Insurance to investigate the circumstances surrounding the accident, Gundersen acknowledged that he received notification of the accident on the date it occurred. (Alzate Aff., Ex. 1 at 3.) He was informed that Uribe had been injured, 911 was called, police and an ambulance responded and Uribe was taken to the hospital. (*Id.*)

Thus, Gundersen was aware of the accident almost four months earlier than when Tower Insurance was notified. Such long periods of time have been considered unreasonable as a matter

of law. *Power Auth.*, 117 AD2d at 342; *see also Figueroa v. Utica Nat'l Ins. Group*, 16 AD3d 616, 617 (2d Dep't 2005) (two-month delay held unreasonable). In fact, in *Power Authority*, 53 days alone was said to be an unreasonable delay. 117 AD2d at 342.

As such, plaintiff's motion for summary judgment is granted and it is determined that Tower Insurance is not required to indemnify or defend the Gundersen Defendants in the underlying lawsuit brought by Uribe.

Accordingly, it is


ORDERED that the motion to dismiss is granted and the complaint is dismissed as against Uribe with costs and disbursements to defendant Uribe as taxed by the Clerk of the Court; and it is further

ORDERED that the plaintiff's cross motion for summary judgment is granted in favor of plaintiff and against defendants Gundersen and Gundersen Quality Homes, declaring that Tower Insurance is not legally obligated to defend or indemnify those defendants in the underlying lawsuit; and it is further

ORDERED that within 30 days of entry of this order, plaintiff shall serve a copy upon defendants with notice of entry.

Dated: September 24, 2008

ENTER:



J.S.C.
FILED
SEP 29 2008
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NEW YORK