

**Time Warner Cable of N.Y.C. v Hyland
Datacom & Elec. Inc.**

2008 NY Slip Op 32607(U)

September 25, 2008

Supreme Court, New York County

Docket Number: 0107798/2005

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

Index Number : 107798/2005

TIME WARNER CABLE OF NEW YORK

VS.

HYLAN DATACOM & ELECTRICAL

SEQUENCE NUMBER : 004

RENEWAL

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this motion to/for renew & reargue

PAPERS NUMBERED

1, 2

3

4

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 by defendant Diamond State
to renew & reargue is granted in accordance with the
attached memorandum decision.

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).

DORIS LING-COHAN

Dated: [Signature]

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 IAS PART 36

-----x

TIME WARNER CABLE OF NEW YORK CITY,
a division of TIME WARNER ENTERTAINMENT
COMPANY, L.P.

Plaintiff,

DECISION AND
JUDGMENT

v.

Index. No. 107798/05

HYLAN DATACOM & ELECTRICAL INC.,
individually and as successor in interest to
TRINITY COMMUNICATIONS CORP.,
and TRINITY COMMUNICATIONS CORP.
individually, DIAMOND STATE
INSURANCE COMPANY and NEW
HAMPSHIRE INSURANCE COMPANY,
(Pertaining to an underlying action entitled
*Concord Village Owners v. Trinity
Communications Corp. et al*),

Motion Seq. No.: 004

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).
Defendant

-----x
LING-COHAN, DORIS, J.S.C.

Defendant Diamond State Insurance Company ("Diamond State") moves to renew and/or
reargue this court's decision filed April 26, 2007 which denied its cross motion for a declaratory
judgment that it had no duty to defend or indemnify Time Warner Cable Company of New York
City ("Time Warner") in the underlying Concord Village action. For the reasons stated below,
the branch of Diamond State's motion seeking renewal is granted and upon renewal, the Court
grants Diamond State's cross motion for a declaratory judgment that it has no duty to defend or
indemnify Time Warner in the underlying Concord Village action.

BACKGROUND

The facts of this case have been set forth in several prior decisions and will only be repeated herein as is relevant to the instant motion.

In 1996, Time Warner, a cable television provider, entered into a "Cable Television System Construction Agreement" (the "agreement") with defendant, Trinity Communications Corp. ("Trinity") wherein Trinity agreed to perform cable television construction services on behalf of Time Warner and to procure comprehensive general liability insurance naming Time Warner as an additional insured.

Pursuant to the agreement, Trinity purchased a general liability policy from New Hampshire and an umbrella liability policy, providing excess coverage, from Diamond State. Both policies were in effect at the time of the accident and both policies named Time Warner as an additional insured. Time Warner is the named insured under a general commercial liability insurance policy issued by St. Paul Travelers Insurance Company.

On May 6, 2004, Concord Village Owners filed a complaint against Trinity and Time Warner alleging that on November 19, 2002, it sustained property damage to its building at 225 Adams Street in Brooklyn when Trinity punctured a natural gas pipeline while digging a trench to install cable in the area (the Concord Village action). Time Warner answered the Concord Village complaint on May 21, 2004 and in that answer, Time Warner asserted cross claims against Trinity.

In June 2005, Time Warner commenced this declaratory judgment action seeking additional insured status under the New Hampshire and Diamond State policies. New Hampshire answered on August 1, 2005 and, in affirmative defenses 4, 5, and 6, it specifically disclaimed coverage on the ground that Time Warner had not provided New Hampshire with timely notice

of the Concord Village action. Diamond State answered on July 7, 2005 and generally disclaimed liability under the excess policy.

Thereafter, Time Warner moved for a declaratory judgment that New Hampshire and Diamond State are obligated to defend and indemnify it in the underlying Concord Village action. Diamond State and New Hampshire filed separate cross motions for declaratory judgments that they are not obligated to defend and indemnify Time Warner in that action.

By decision filed April 26, 2007, this Court denied the motion and cross motions for declaratory judgments finding that although New Hampshire failed to provide Time Warner with prompt written notice of disclaimer, there was a question of fact as to whether Time Warner had been prejudiced by New Hampshire's delay. (*See, Fairmont Funding, Ltd. v. Utica Mut. Ins. Co.*, 264 A.D.2d 581 [1st Dept 1999]) In opposition to New Hampshire's cross motion, Time Warner had argued that it was prejudiced because the St. Paul/Travelers policy had a \$1,000,000 deductible.

By notice of motion dated June 14, 2007, New Hampshire moved to reargue the April 26 decision and, in a decision dated April 14, 2008, this court granted reargument and, upon reargument, granted New Hampshire's motion for a declaratory judgment that it had no duty to defend and indemnify Time Warner in the underlying Concord Village action.¹

CONTENTIONS

In support of the motion, Diamond State claims that the renewal motion is timely because

¹ In response to New Hampshire Insurance Company's June 14, 2007 motion to reargue, defendant Diamond State submitted an "affirmation in limited support of reargument" in which it stated that if the court granted the relief that New Hampshire requested on reargument, then the court should also issue a ruling that Diamond State had no duty to defend or indemnify Time Warner. Because Diamond State had not properly moved for the relief it sought, the court declined to consider Diamond State's request.

this court's decision dated April 14, 2008, which determined that Time Warner was not prejudiced by New Hampshire's delay in disclaiming coverage, constituted new "law of the case". In addition, it argues that, in accordance with the April 26, 2007 decision, it also is entitled to a declaration that it has no duty to defend and indemnify Time Warner because Diamond State's failure to timely disclaim did not prejudice Time Warner.

In opposition to reargument, Time Warner asserts that the motion is not timely because it was not brought within thirty (30) days after entry of the April 13, 2007 judgment that denied the cross motion for summary judgment. In addition, Time Warner contends that renewal is not warranted because the April 14, 2008 decision that granted New Hampshire's reargument motion does not constitute a change in the law. Moreover, Time Warner asserts that it did not breach its duty to timely notify Diamond State of the claim and that Diamond State is obligated to defend and indemnify it because the insurer breached its duty to timely disclaim coverage.

DISCUSSION

That branch of the motion seeking reargument is denied. It is well settled that a motion for reargument must "be made within 30 days after service of a copy of the order determining the prior motion and written notice of its entry." (CPLR 2221[d][3]) Here, Diamond State does not deny that the decision on the prior motion was entered and served more than one year ago. Accordingly, that branch of the motion is untimely. (*See, e. g. Mejia v. Nanni*, 307 A.D.2d 870 [1st Dept. 2003]; *Neff v. Schwartzapfel, P.C.*, 254 A.D.2d 137 [1st Dept 1998])

However, Diamond State correctly argues that the Court's April 14, 2008 decision which, on reargument, granted New Hampshire's motion for summary judgment, provides a ground for its renewal motion. In *Koscinski v. St. Joseph's Medical Center*, 47 A.D.3d 850 (2nd Dept 2008), the court found that an appellate court's grant of a codefendant's motion to dismiss was

sufficient to support the non-appealing medical center's motion for renewal. So too, in this case, even though Diamond State did not formally move for reargument of the prior motion, this court's grant of New Hampshire's reargument motion is sufficient to support Diamond State's motion for renewal. (*See also, Tishman Construction Corp. of New York v. City of New York*, 280 A.D.2d 374 [1st Dept 2001])[“(E)ven if the vigorous requirements for renewal are not met, such relief may be granted so as not to defeat substantive fairness.”][citations and internal quotations omitted])

As to the issues of notice and disclaimer, this Court found in its decision dated April 13, 2007, that Time Warner provided late notice of the claim to both New Hampshire, the primary insurer, and Diamond State, the excess insurer. Indeed, in that decision this Court stated:

Moreover, it does not appear that Time Warner provided notice of the occurrence and claim to Diamond State, the excess insurer, until May 18, 2004, at the earliest, even though Time Warner became aware that it was reasonably likely that the excess policy could be involved when it received a letter from Concord Village Owners' attorney, on or about July 29, 2003 Time Warner's failure to proffer any excuse for this 10 month delay, renders the delay unreasonable as a matter of law. (Citations omitted)

The determination that Time Warner failed to provide both insurers with timely notice of claim is law of the case and will not be disturbed. (*See, Mohamed v. Defrin*, 45 A.D.3d 252 [1st Dept 2007])[“(t)he prior ruling, which was not appealed, was law of the case and properly adhered to by the motion court.”])

However, even though Time Warner's notice of claim was late, both New Hampshire, the primary insurer, and Diamond State, the excess insurer, had an obligation to give a written notice of a disclaimer of coverage “as soon as reasonably possible” (Ins. Law Section 3420) after they learned “of the accident or of grounds for disclaimer of liability or denial of coverage.” (*Reyes v.*

Diamond State, 35 A.D.3d 830, 831 [2nd Dept 2006][quoting *Hartford Ins. Co. v. County of Nassau*, 46 N.Y.2d 1028, 1029 [1979]; *Mann v. Gulf Ins. Co.*, 3 A.D.3d 554, 555-556 [2nd Dept 2004]) Here, it is undisputed that Diamond State did not disclaim coverage until it filed its answer on July 7, 2005, more than one year after Time Warner provided it with the notice of claim. Under the circumstances, its delay in disclaiming coverage was unreasonable. (See, *City of York v. Investors Ins. Co. Of America*, 287 A.D.2d 394 [1st Dept 2001][three and one-half month delay in disclaiming coverage unreasonable])

“Under the common law rule², [however], delay in giving notice of disclaimer of coverage, even if unreasonable, will not estop the insurer to disclaim unless the insured has suffered prejudice from the delay.” (*Fairmont Funding, Ltd. v. Utica Mutual Ins. Co.*, 264 A.D.2d 581 [1st Dept 1999]; *O’Dowd v. Am. Sur. Co. Of New York*, 3 N.Y.2d 347, 355 [1957]) In order to show prejudice, the insured must show reliance and a change of position resulting from the delay. (*William Crawford, Inc. v. Travelers Ins. Co.*, 838 F. Supp; 157, 160 [S.D.N.Y. 1993], *aff’d* 23 F.3d 663 [2nd Cir. 1994]; *Chester v. Mutual. Life Ins. Co. of N.Y.*, 290 A.D.2d 317 [1st Dept 2002])

On renewal, this court finds that Time Warner has failed to demonstrate reliance and a change of position as a result of the Diamond State’s delay in disclaiming coverage. Mere speculation as to prejudice is insufficient to estop an insurer based on delay in issuing a disclaimer. (*Topliffe v. U.S. Art Co., Inc.*, 40 A.D.3d 967 [2nd Dept 2007]). First, it is undisputed that immediately after receiving the summons in the Concord Village action, St. Paul/Travelers, Time Warner’s liability insurer, retained a law firm to represent Time Warner in the Concord

² Ins. Law Section 3420(d) which requires an insurer to give a prompt written notice of disclaimer in cases of bodily injury or death, is inapplicable here because this case only involves a claim for property damage.

Village action. (See, *Sedgwick Avenue Associates v. Ins. Co. of the State of PA*, 203 A.D.2d 93, 94 [1st Dept 1994]) Moreover, Time Warner's previous assertion that it was prejudiced because it had a \$1 million deductible under the St. Paul/Travelers policy does not demonstrate reliance or a change in position caused by Diamond State's delay in disclaiming coverage. Time Warner made its decision to purchase the St. Paul/Travelers insurance policy with that deductible well before the underlying lawsuit was commenced.

Accordingly, it is

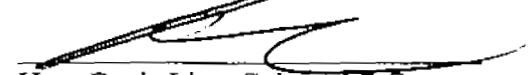
ORDERED that the branch of Diamond State's motion seeking renewal is granted and upon renewal Diamond State's cross motion for a declaratory judgment that it has no duty to defend or indemnify Time Warner in the underlying Concord Village action is granted and the complaint is dismissed as against it; and it is further

ORDERED that within 30 days of entry of this order, Diamond State shall serve a copy upon all parties with notice of entry.

This decision constitutes the judgment of the court and the clerk is directed to enter judgment accordingly.

DATE 9/25/02

DORIS LING-COHAN


Hon. Doris Ling-Cohan, J.S.C.

J:\Renew.Reargue\timewarner3 Diamond.wpd

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 7415).