

Illinois Natl. Ins. Co. v Illinois Union Ins. Co.
2008 NY Slip Op 33225(U)
November 26, 2008
Supreme Court, New York County
Docket Number: 106392/07
Judge: Louis B. York
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: LOUIS B. YORK
J.S.C. Justice

PART 2

Illinois National Ins. Co.

INDEX NO. 106392/07

MOTION DATE 001

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

- v -
Illinois Union Ins. Co.

The following papers, numbered 1 to _____ were read on 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

MOTION IS DENIED BY ACCORDANCE WITH ACCOMPANYING 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).

Dated: 11/26/08

Ley
J.S.C.

Check one: FINAL DISPOSITION

LOUIS B. YORK
J.S.C.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

respect to the discovery requests, by which depositions were ordered to take place. That order allows defendants to make a later motion to dismiss if its directives are not followed.

The underlying action involves an alleged injury sustained by an employee of Navillus on September 19, 2006, while working at a job site on property owned by Claremont Square LLC (Claremont). HHR Construction, LLC (HRH) is the construction manager for work at that site, and Navillus is the concrete subcontractor engaged by HRH. Pursuant to the agreement between HRH and Navillus, Navillus was required to indemnify and hold HRH harmless for claims arising out of or resulting from performance of its work under the contract, and was to have plaintiffs listed as "additional insureds" on Navillus' general liability insurance policy.

Navillus' general commercial liability insurance policy was issued by Illinois Union, effective from February 7, 2006, through March 15, 2007. Plaintiffs were named as additional insureds, evidenced by a Certificate of Liability Insurance dated March 24, 2006, annexed as Exhibit F to plaintiffs' motion.

On October 10, 2006, counsel for the injured worker forwarded a letter to Claremont and HRH advising them of the occurrence on September 19, 2006. This letter was received by Claremont and HRH on October 16, 2006.

On November 9, 2006, the injured worker commenced suit

against Claremont and HRH, and the summons and complaint were served on November 14, 2006. On December 19, 2006, 64 days after Claremont and HRH first received notice of the occurrence, Illinois Union's claims administrator was advised by Claremont and HRH that they were seeking coverage as additional insureds under Navillus' policy.

According to Section IV of the policy,

2. Duties in the Event of Occurrence, Claim or Suit
 - a. You must see to it that we are notified as soon as practicable of an "occurrence" or an offense which may result in a claim
 - b. If a claim is made or 'suit' is brought against any insured, you must:
 - (1) Immediately record the specifics of the claim or "suit" and the date received; and
 - (2) Notify us as soon as practicable.You must see to it that we receive written notice of the claim or "suit" as soon as practicable.
 - c. You and any other involved insured must:
 - (1) Immediately send us copies of any demands, notices, summonses, or legal papers received in connection with the claim or "suit";
 - (2) Authorize us to obtain records and other information;
Cooperate with us in the investigation or settlement of the claim or defense against the "suit"; and
 - (3) Assist us, upon our request, in the enforcement of any right against any person or organization which may be liable to the insured because of injury or damage to which this insurance may also apply.

Subsequent to the institution of the underlying action by Navillus' employee, Claremont and HRH filed a third-party complaint against Navillus for claims of contractual indemnity, common law indemnity/contribution, and breach of contract for

failure to procure insurance.

It is noted that there is no question as to Navillus' timely notice of the occurrence to Illinois Union.

DISCUSSION

Summary judgment is appropriate when the movant establishes a prima facie entitlement to judgment as a matter of law by the submission of competent evidence. See *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). Summary judgment is warranted where there are no genuine issues of material fact and, therefore, the moving party is entitled to judgment as a matter of law. *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 (1986). Therefore, summary judgment must be precluded if, upon the papers submitted, there remains a question in the mind of the court.

The issues presented with these motions for summary judgment pertain to whether plaintiffs, as additional insureds, were required to notify Illinois Union as soon as practicable about the occurrence involving Navillus' employee, or whether Navillus' notification, as the named insured, suffices.

Plaintiffs argue that the insurance contract requires the party identified as "you" under Section IV of the policy to notify Illinois Union, and that the definition section of the policy defines the persons referred to as "you" to be the named insured. Therefore, plaintiffs maintain, the notice obligation inures to Navillus, not to them, and Navillus' timely

notification meets the policy requirements.

However, current law holds to the contrary. In *1700 Broadway Co. v Greater New York Mutual Insurance Co.* (54 AD3d 593, 594 [1st Dept. 2008]), the court stated that "the notice requirement in the policy applies equally to both primary and additional insureds, and notice provided by one insured in accordance with the policy terms will not be imputed to another [internal citations omitted]."

"The plaintiffs, as additional insureds, had an implied duty, independent of [Navillus], to provide [Illinois Union] with the notices required under the policy, i.e., 'as soon as practicable' of both the 'occurrence' and of any 'claim' or 'suit' arising therefrom. The fact that an insurer may have received notice of the claim from the primary insured, or from another source, does not excuse an additional insured's failure to provide notice [internal quotation marks and citations omitted]."

23-08-18 Jackson Realty Associates v Nationwide Mutual Ins. Co., 53 AD3d 541, 542-543 (2d Dept. 2008). "Even if the insurance policy were construed as specifying that only the named insured [Navillus] was required to provide notice of occurrences, demands and suits to [Illinois Union], the duty to give reasonable notice as a condition of recovery is implied in all insurance contracts [citations omitted]." *Structure Tone, Inc. v Burgess Steel Products Corp.*, 249 AD2d 144, 145 (1st Dept. 1998).

Although an exception to the above-stated rule, that notice by one insured does not satisfy the notice obligations of another

insured, "might exist where two claimants are similarly situated, i.e., where their interests are not adverse to each other (1700 *Broadway Co. v Greater New York Mutual Ins. Co.*, 54 AD3d at 594), no such situation exists in the instant matter, since plaintiffs have instituted a third-party action against Navillus.

Plaintiffs have offered no excuse for their delay of 64 days in notifying Illinois Union.

"Where an excuse or explanation is offered for delay in furnishing notice, the reasonableness of the delay and the sufficiency of the excuse are matters to be determined at trial. However, where there is no excuse or mitigating factor, the issue poses a legal question for the court, and courts have found relatively short periods to be unreasonable as a matter of law [internal quotation marks and citations omitted]."

Travelers Insurance Co. v Volmar Construction Co., Inc., 300 AD2d 40, 42-43 (1st Dept 2002). Periods of delay in notification as short as 31 days have been found to be unreasonable (*Pandora Industries, Inc. v St. Paul Surplus Lines Ins. Co.*, 188 AD2d 277 [1st Dept 1992]), and plaintiffs bear the burden of proving the reasonableness of any delay. *Herold v East Coast Scaffolding, Inc.*, 208 AD2d 592 (2d Dept 1994). Since plaintiffs have failed to raise an issue of fact with respect to an excuse for the delay (See *Young Israel Co-Op city v Guidcone Mutual Ins. Co.*, 52 AD3d 245 [1st Dept 2008]), their 64 day delay is deemed unreasonable as a matter of law.

"New York has generally adhered to a no-prejudice rule,

which allows a personal injury insurer in commercial general liability cases to disclaim coverage due to late notice of claim regardless of whether or not the insurer suffered any harm by reason of the delay [citations omitted]." *1700 Broadway Co. v Greater New York Mutual Ins. Co.*, 54 AD3d at 594. Therefore, based on the foregoing, plaintiffs' motion is denied and Illinois Union's motion is granted.

CONCLUSION

It is hereby

ORDERED and ADJUDGED that plaintiffs' motion for summary judgment is denied; and it is further

ORDERED that Illinois Union Insurance Company's and Navillus Tile Inc.'s cross motions for summary judgment are granted and the complaint is dismissed with costs and disbursements to defendants as taxed by the Clerk of the Court upon the submission of an appropriate bill of costs; and it is further

ADJUDGED and DECLARED that Illinois Union Insurance Company is not obligated to defend or indemnify plaintiffs Claremont Square LLC and HRH Construction LLC in the action entitled James Parker and Dorcen Parker against Claremont Square LLC and HRH Construction LLC.

Dated: 11/26/08

ENTER:

LY

Louis B. York, J.S.C.

LOUIS B. YORK
J.S.C.

UNFILED JUDGMENT
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