

**Vertex Eng'g Servs., Inc. v Lexington
Ins. Co.**

2008 NY Slip Op 33308(U)

December 4, 2008

Supreme Court, New York County

Docket Number: 108236/06

Judge: Donna M. Mills

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

PRESENT : DONNA M. MILLS
Justice

PART 21

*VERTEX ENGINEERING SERVICES, INC. and
HARTFORD INSURANCE GROUP,*
Plaintiff,

-v-

NEW YORK CITY TRANSIT AUTHORITY, et al.,
Defendants.

INDEX No. 108236/06

MOTION DATE _____

MOTION SEQ. NO. 002

MOTION CAL No. _____

The following papers, numbered 1 to 6 were read on this motion for declaratory judgment.

PAPERS NUMBERED

Notice of Motion/Order to Show Cause-Affidavits- Exhibits... 1, 2

Answering Affidavits- Exhibits 3

Replying Affidavits 4, 5, 6

CROSS-MOTION: YES NO

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 147B).

Upon the foregoing papers, it is ordered that this motion

IS DECIDED IN ACCORDANCE WITH ATTACHED MEMORANDUM DECISION WHICH IS ATTACHED.

Dated: 12/4/08

J.M.M.
J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 21

----- x
VERTEX ENGINEERING SERVICES, INC. and
HARTFORD INSURANCE GROUP,

Plaintiffs,

- against-

LEXINGTON INSURANCE COMPANY, MAINCO
ELEVATOR & ELECTRICAL CORP. a/k/a MAINCO
ELEVATOR SERVICES CO., STEPHEN SICILIA,
CITY OF NEW YORK, NEW YORK CITY TRANSIT
AUTHORITY, PRUDE CONSTRUCTION CORPORATION,
and JB ELECTRIC CORPORATION,

Defendants.
----- x

Index No.
108236/06

Motion Sequence
Nos. 001 & 002

NOTICE
This judgment shall be served by the County Clerk
and notice of it shall be served based hereon. To
obtain entry, counsel or authorized representative must
appear in person at the Judgment Clerk's Desk (Room
1419).

DONNA MILLS, J. :

In this declaratory judgment action, plaintiffs seek a declaration that Vertex Engineering Services, Inc. (Vertex) is an additional insured on defendant Mainco Elevator & Electrical Corp. a/k/a Mainco Elevator Services Co.'s (Mainco) general liability policy with defendant Lexington Insurance Company (Lexington). Further, plaintiffs seek a declaration that Vertex is entitled to defense and indemnification in the action *Sicilia v The City of New York* (the underlying)¹ from Lexington, and that Lexington's general liability insurance policy should be primary, and not in excess or on a contributing basis with any other available insurance policies.

In motion sequence number 001, plaintiffs seek a declaration that Lexington is obligated to defend and indemnify Vertex, The City of New York (NYC), and the New York City Transit Authority (NYCTA), and reimburse plaintiff Hartford Insurance Group (Hartford) for defense costs in the underlying action.

In motion sequence 002, defendant Lexington seeks a declaration that the employee exclusion in its policy numbered 1320253 precludes coverage for Vertex in the underlying action.

Lexington has additionally cross moved for a declaration that Vertex is not entitled to defense or indemnification in the underlying action. In its cross motion, Mainco seeks summary judgment dismissing plaintiffs' complaint.

For the reasons stated below, both plaintiffs' motion and Mainco's cross motion are denied. Lexington's cross motion is granted, and its motion is denied as moot.

Background

On February 26, 2003, Stephen Sicilia (Sicilia) commenced the underlying action to recover monetary damages for injuries he allegedly sustained in a February 4, 2002 workplace accident. Sicilia was an employee of Mainco, the subcontractor on the site, and in his complaint, Sicilia he alleged that his injuries were the result of the general contractor's, i.e., Vertex's, negligence.

On May 12, 2004, Vertex filed a third-party complaint against Mainco in the underlying action, seeking defense and indemnification based upon an April 14, 1999 contract between the parties (the Vertex/Mainco Contract). Under that contract, Mainco allegedly agreed to provide liability insurance for Vertex in the event of suit being brought as the result of performance of Mainco's work.

In its instant cross motion, Mainco avers that any finding of Vertex's entitlement to defense and indemnification in this action is premature, as there has been no finding that Sicilia's accident arose out of his work. Additionally, Mainco maintains that it is entitled to dismissal of the complaint, because the indemnification and insurance language in the contract at issue violates General Obligations Law § 5-322.1.

Lexington admits that it issued a commercial general liability policy (# 1320253) to Thyssenkrupp Elevator Corporation for the period 12/31/01 to 10/01/03 (the insurance policy) and that Mainco is an insured under that policy. The insurance policy contains \$4 million per occurrence and \$8 million aggregate policy limits, with a \$250,000 each occurrence retention.

Lexington contends that it is not required to defend or indemnify Vertex, because although Vertex tendered Sicilia's claim to Mainco through its third party administrator, Gallagher Bassett Services, Inc. (Gallagher), it never tendered the Sicilia claim to Lexington.

Vertex asserts, however, that it provided notice to Hartford (its own carrier) and to Mainco, and that Mainco provided notice to Lexington. Vertex additionally contends that, if it failed to provide timely notice of Sicilia's claim to Lexington, such failure was unintentional and inadvertent, and should be excused based upon Endorsement # 13 in the Lexington policy that provides coverage under those circumstances.

Discussion

Plaintiffs, Mainco, and Lexington seek summary judgment (CPLR 3212) in their motions and cross motions. To obtain summary judgment, a movant must establish entitlement to a court's directing judgment in its favor as a matter of law. *See Alvarez v Prospect Hosp.*, 68 NY2d 320 (1986). "[I]t must clearly appear that no material and triable issue of fact is presented" (*Glick & Dolleck v Tri-Pac Export Corp.*, 22 NY2d 439, 441 [1968]; *see also Giuffrida v Citibank Corp.*, 100 NY2d 72 [2003]), because summary judgment is a drastic remedy that should not be invoked where there is any doubt as to the existence of a triable issue or when the issue is even arguable. *See Zuckerman v City of New York*, 49 NY2d 557, 562 (1980).

Paragraph 7 of the Vertex/Mainco Contract states that, Vertex "shall not be responsible for any injury to any person including death, whether employed by [Mainco] or otherwise ... arising

from the acts of [Mainco] during the progress of the work, against all of which injuries [Mainco] must properly guard, and make good all such damage from whatever cause."

Paragraph continues to state that:

[i]n the event of suit being brought against [Vertex] for any claim growing out of any of the above causes, [Mainco] shall pay all expenses of such litigation as soon and as often as incurred, and in the event of judgment being entered against the defendant in any such action, [Mainco] shall and hereby agrees to pay to [Vertex], the amount of such judgment.

Although Lexington and Mainco assert that the above clauses violate General Obligations Law § 5-322.1, this court's December 13, 2007 Decision and Order in the underlying action has already determined that, because Vertex was not negligent in Sicilia's alleged accident, paragraph 7 of the Vertex/Mainco Contract does not violate General Obligations Law § 5-322.1. *See* December 13, 2007 Decision in *Sicilia v New York City Transit Authority*, Plaintiffs' Affirmation in Opposition to Mainco, Exh. B, herein.

Given that Vertex has submitted the Vertex/Mainco Contract, the indemnification provision of which this court has already determined does not violate General Obligations Law § 5-322.1, and that there is no indication that Vertex has waived any of its claims against Mainco, Mainco's cross motion is denied.

As respects, plaintiffs' allegation that Mainco was required to procure liability insurance on Vertex's behalf, paragraph 7 of the Vertex/Mainco Contract includes the following language:

[b]efore commencing work thereunder, [Mainco] shall ... procure and keep in full force and effect during the performance of the work and up to the date of final acceptance thereof ... Public Liability ... Contractual Liability and Contingent Liability Insurance and insurance covering special hazards and all other types of insurance required by the "Construction Contract," covering and indemnifying [Vertex] as required by the "Construction Contract" with the limits not less than those specified in the "Construction Contract" and said insurance shall be so written that the same cannot be cancelled without at least ten days notice in writing to [Vertex].

Clearly, the language of the clause indicates an intention between the parties to have

Mainco provide insurance on Vertex's behalf. Lexington, however, contends that because the "Construction Contract," which was not included in plaintiff's papers, contained the insurance requirements under the Vertex/Mainco Contract, there is no independent obligation to do so.

Although there is some dispute among the parties as to which document was the "Construction Contract" referred to in the Vertex/Mainco Contract, the second paragraph of the Vertex/Mainco Contract states, "[whereas], on the 14th day of April 1999, the Contractor and St. Paul Surety ... entered into a certain contract in writing, hereinafter referred to as the 'Construction Contract.'"

Plaintiff was thus required to proffer such document to sustain their burden of proof as to Mainco's insurance obligations under the Vertex/Mainco Contract. Plaintiffs, however, have not done so. Instead, they have proffered an unreadable cover page of a document that appears to have been drawn up by the New York City Transit Authority, and a portion of chapter 6, entitled "Contractor's Liability and Insurance." *See* Plaintiffs' Notice of Motion, Exh. C. Neither the page that indicates the parties to the contract and the work contracted for nor a signature page was proffered.

Therefore, plaintiffs have not satisfied their burden of proof regarding Mainco's obligation to procure insurance on Vertex's behalf. However, given the clear indication that Mainco was to procure some amount of insurance on behalf of Vertex, that portion of Lexington's cross motion that seeks an order that Mainco was not obligated to procure insurance on behalf of Vertex is denied. There remain material issues of fact as to what the terms of the "Construction Contract" were and whether or not Mainco fulfilled them.

Lexington further seeks an order that it is not required to defend or indemnify Vertex in

the underlying action, based upon late notice and upon the insurance policy's employee exclusion.

The Conditions section of the Commercial General Liability Policy Provisions, contained in the insurance policy, details the "Insured's Duties in the Event of Occurrence or Suit." See Lexington's Notice of Cross Motion, Exh. C. Under subsection I, "if claim is made or suit is brought against the Insured, the Insured shall immediately forward to the Company every demand, notice, summons or other process received by his or her representative." The word "claim" is defined in the Definitions section of the insurance policy, as follows: "written notice received by the Insured of an intention to hold the Insured responsible for an occurrence covered by this policy, and shall include Service of Suit proceedings against the Insured."

However, the insurance policy did contain an Endorsement # 13, which provided that: "[t]he company shall not deny coverage as the result of an unintentional failure by you to give notice as respects any occurrence, provided notice is given as soon as practicable after becoming aware that this policy may apply to such occurrence."

Compliance with the notice provision of a liability insurance policy is a condition precedent to coverage under such policy. See *Security Mut. Ins. Co. of New York v Acker-Fitzsimons Corp.*, 31 NY2d 436 (1972). Such compliance requires an insured to notify an insurer as soon as reasonably possible of any claim. See *White by White v City of New York*, 81 NY2d 955 (1993).

There is no question that Vertex informed its own insurance carrier, Hartford, of Sicilia's potential claim. On July 30, 2002, subsequent to Vertex's notification to Hartford, Hartford notified Mainco, through Gallagher, of Sicilia's claim. According to plaintiffs, they were unaware, and Gallagher failed to make them aware, that Gallagher was not accepting notice on behalf of Lexington.

However, in its letter, Gallagher did inform Joseph Marchese (Marchese), the Claims Representative at Hartford, that Gallagher was the third party administrator for Mainco. *See* Affidavit of Fiona Kissane, Exh. A. Upon receipt of the letter from Gallagher, Marchese, who handled claims regularly, should have been alerted to the fact that Gallagher was not acknowledging receipt on the part of Lexington. Gallagher's letter was not addressed to Vertex, Hartford's insured, who might have misunderstood the letter to mean that notice was given to Lexington.

Plaintiffs, in fact, concede that no other notice was sent to Lexington prior to the commencement of this action. However, they seek to invoke Endorsement # 13 to excuse such failure to give Lexington notice. Although Mainco's insurance had a \$250,000 retention, once they received Sicilia's summons and complaint in the underlying action, plaintiffs could not have believed that the insurance policy would not be implicated in Sicilia's claim. And that is the only unintentional failure that would have been covered under this endorsement. Therefore, this court holds that Endorsement # 13 does not excuse plaintiffs' failure to provide timely notice to Lexington.

Thus, this court holds that plaintiffs did not provide timely notice to Lexington and that, therefore, Lexington is entitled to a declaration that it is not obligated to defend or indemnify Vertex in the underlying action.

Additionally, based upon this determination, this court holds that plaintiffs are not entitled to a declaration that Lexington is obligated to defend and indemnify Vertex, NYC and NYCTA.

Finally, Lexington's motion, which seeks a declaration that the employee exclusion of the insurance policy precludes coverage for Vertex in the underlying action is denied as moot.

ORDER

Accordingly, it is hereby

ORDERED that plaintiffs' motion is denied; and it is further

ORDERED that Lexington Insurance Company's motion is denied as moot; and it is further

ORDERED that Mainco Elevator & Electrical Corp. d/b/a Mainco Elevator Services Co.'s cross motion is denied; and it is further

ADJUDGED and DECLARED that Lexington Insurance Company's cross motion is granted, in that Lexington Insurance Company is not obligated to indemnify and defend Vertex Engineering Services in the action denominated Sicilia v The City of New York, Index No. 103443/03; and it is further

ORDERED that all other claims in the above-entitled action are severed and continued.

Dated:

12/4/05

ENTER:

[Handwritten Signature]

JSC
DONNA M. MILLS, J.S.C.

1. Sicilia v The City of New York (Index # 103443/03) is currently an active case in this court.

UNFILED JUDGMENT
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