

**Inner City Redevelopment Corp. v Thyssenkrupp
El. Corp.**

2008 NY Slip Op 33356(U)

December 15, 2008

Supreme Court, New York County

Docket Number: 103830/07

Judge: Milton A. Tingling

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

PRESENT: HON. MILTON A. TINGLING
Justice
U.S.C.

PART 44

Index Number : 103830/2007
INNER CITY REDEVELOPMENT
VS.
THYSSENKRUPP ELEVATOR
SEQUENCE NUMBER : 003
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE 7/23/08
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

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 is *granted* in accordance with the annexed decision.

FILED

DEC 16 2008

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 12/15/08

mat
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):

* 2]
SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 44

HON. MILTON A. TINGLING
J.S.C.

-----x
INNER CITY REDEVELOPMENT CORP.,

Plaintiff,

-against-

Index No.
103830/07

THYSSENKRUPP ELEVATOR CORPORATION and
LEXINGTON INSURANCE COMPANY,

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NEW YORK

MILTON TINGLING, J. :

Mot. Seq. Nos. 002 and 003 shall be consolidated for disposition.

In Mot. Seq. No. 002, defendant Lexington Insurance Company (Lexington) moves for summary judgment dismissing the complaint. Defendant Thyssankrupp Elevator Corporation (Thyssankrupp) cross-moves for summary judgment. Plaintiff cross-moves for summary judgment. In Mot. Seq. No. 003, Lexington moves for summary judgment.

This case arises out of a personal injury action, *Kenneth A. Smith v Inner City Redevelopment Corp.*, Index No. 101574/05, in Supreme Court, New York County. The *Smith* action names plaintiff as a defendant and seeks a recovery for injuries suffered by an employee of Thyssankrupp in the course of his employment. Plaintiff and Thyssankrupp were contractors in a project in which Thyssankrupp was to install an elevator at Upper East Side High School located in New York, New York. The accident occurred on July 9, 2003.

The *Smith* complaint is dated September 8, 2004. On May 25, 2005, plaintiff instituted a third-party action against Thyssankrupp, Lexington's insured. Plaintiff is seeking coverage under the Lexington policy, claiming to be an additional insured under the policy. On March 8, 2007, plaintiff commenced this declaratory judgment action against defendants. Plaintiff is seeking a

judgment declaring that defendants have a duty to defend and indemnify plaintiff in the *Smith* action.

Lexington brings its first motion for summary judgment and seeks an order from this court declaring that plaintiff failed to provide timely notice of an occurrence and that Lexington does not owe plaintiff a duty to defend and/or indemnify plaintiff in the *Smith* action.

Lexington argues that plaintiff did not provide it with timely notice of the *Smith* action. An insured's obligation to provide notice is detailed under Section VII, subsection I of the subject policy, which states:

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.

Lexington claims that there is no dispute that plaintiff received notice of the Smith accident as early as March 2, 2004. Lexington provides the following timeline: on March 19, 2004, plaintiff advised Thyssenkrupp of the Smith claim. On July 30, 2004, Gallagher Bassett Services, Inc., an administrator of Thyssenkrupp, wrote a letter to plaintiff acknowledging the Smith claim. On September 8, 2004, Smith commenced the action against plaintiff. On May 25, 2005, plaintiff commenced a third-party action against Thyssenkrupp. On March 8, 2007, plaintiff commenced the instant declaratory judgment action against Lexington. Lexington asserts that this was the first time that Lexington was aware of the Smith claim. Lexington contends that it took plaintiff more than two years after the commencement of the *Smith* action to notify Lexington, thus breaching the policy condition of timely notice.

Lexington refers to Endorsement No. 20 of its policy, which is titled "Self-Insured

Retention- per Occurrence,” and provides the following:

The company’s obligation under all coverages provided by this policy to pay ultimate net loss on behalf of the insured, applies only to the ultimate loss in excess of the self-insured retention stated below, and subject to the limits of liability stated in the policy. The terms of the policy include those with respect to the company’s rights and duties with respect to defense of suits apply in excess to the application of the self insured retention amount.

* * * * *

The self insured retention stated below shall apply to the coverages afforded by this policy on a per occurrence basis to the ultimate net loss as a result of any one occurrence regardless of the number of persons or organizations who sustained damages because of the occurrence.

Lexington states that the amount of the retention is \$1.25 million and that, pursuant to the policy, Lexington has no duty to defend or indemnify for this or any other claim until the self-insured retention has been satisfied.

Thyssenkrupp cross-moves for summary judgment dismissing the complaint, arguing that plaintiff, in its third-party suit in the *Smith* action and in its present declaratory judgment action, is seeking identical relief as against Thyssenkrupp, namely, indemnification and insurance procurement. Thyssenkrupp asserts that the seeking of indemnification by plaintiff is premature because there has been no finding of liability as against plaintiff in the *Smith* action.

Thyssenkrupp also asserts that since the relief sought in this action is duplicative of the relief sought in the *Smith* action, the declaratory judgment action should be dismissed.

Plaintiff cross-moves for summary judgment declaring both defendants as having the duty to defend and indemnify plaintiff in the *Smith* action. Plaintiff argues that it is an additional

insured under the Lexington policy and that the additional insured obligation is triggered by the injury sustained by Thyssenkrupp's employee. Plaintiff contends that notice was properly and timely given to Thyssenkrupp. Plaintiff also contends that notice was not required by plaintiff to Lexington due to Endorsement 20. The notice provision states:

The insured shall immediately notify the Company in writing of any claim to which the policy applies which

- a) involved serious Bodily injury or fatality;
- b) the insured has received notice of suit in which the damage exceeds the Self Insured Retention;
- c) may exceed 25 % of the Self Insured Retention.

Plaintiff states that this case does not involve serious bodily injury or fatality. Plaintiff asserts that it would be totally premature to state what damages would be at this time, when damages have not been assessed. Therefore, plaintiff assumes that under the circumstances, it was not required to give immediate notice. Alternatively, plaintiff claims that Endorsement 20 gives rise to an ambiguity that must be construed against Lexington, the drafter of the policy.

Plaintiff argues that Gallagher Bassett Services, Inc. should be considered an agent of Lexington that was authorized to receive notices of claim. Plaintiff also argues that its declaratory judgment action, brought against defendants on April 7, 2007, constitutes proper notice, given the terms of Endorsement 20.

In opposition to plaintiff's motion, Lexington states that it never received notice from plaintiff until the declaratory judgment action was brought against it. Lexington avers that by virtue of the fact that plaintiff filed a third-party action against Thyssenkrupp in the *Smith* action, plaintiff and Thyssenkrupp have adverse interests and notice received by Lexington from Thyssenkrupp cannot serve as notice from plaintiff.

Lexington denies that Endorsement 20 amended or abrogated the existing notice provisions in the policy. Lexington contends that there is no evidence that Gallagher Bassett Services, Inc. is an agent of Lexington. In fact, Gallagher Bassett Services, Inc. had stated by written correspondence that it was an agent of Thyssenkrupp. Lexington asserts that if plaintiff is an insured, then the policy requires an insured to exhaust the self-insured retention before coverage is triggered.

In its second motion for summary judgment, Lexington argues that plaintiff is not covered by the policy because of an employee exclusion in the policy. That provision states as follows:

This insurance does not apply; ...

To bodily injury to an employee of any insured arising out of and in the course of employment by any insured, or to any claims of the spouse, child, parent, legal guardian, brother or sister of that employee as a consequence of said bodily injury;

This exclusion applies:

1. Whether any insured may be liable as an employer or in any other capacity; and
2. To any obligation to share damages with or repay someone else who must pay damages because of the injury.

Lexington states that should this court deny its first motion for summary judgment, there is still no coverage under the policy based on the employee exclusion.

Plaintiff opposes the second motion, on the ground that since there is no newly discovered evidence involved, the motion should be denied as improper. Plaintiff argues that the employee exclusion is not applicable to plaintiff.

“Contracts of insurance, like other contracts, are to be construed according to the sense

and meaning of the terms which the parties have used, and if they are clear and unambiguous the terms are to be taken and understood in their plain, ordinary and proper sense.” *Matter of Covert*, 97 NY2d 68, 76 (2001) (internal quotation marks and citations omitted). Lexington’s first motion for summary judgment contends that plaintiff failed to make timely notice to Lexington with respect to the *Smith* action. Lexington states that the notice requirement in the policy is a condition precedent to coverage.

“[W]hen an insurance policy requires notice of an occurrence or action be given promptly, that means within a reasonable time in view of all the facts and circumstances.” *Doe Fund, Inc. v Royal Indem. Co.*, 34 AD3d 399, 399-400 (1st Dept 2006). Section VII, subsection I of the policy indicates that if a suit is brought against the insured, the insured is under an obligation to immediately forward to the insurer all papers related to the suit. This section is somewhat contradicted by Endorsement 20, which specifies certain circumstances in which immediate notice is required. There is a certain ambiguity when the two provisions are read together. For this reason, it would be appropriate for a trier of fact to make a determination as to whether plaintiff’s notice to Lexington was reasonable under the circumstances.

As for Lexington’s second motion for summary judgment, it is well settled that multiple summary judgment motions in the same action are discouraged in the absence of a showing of newly discovered evidence or other sufficient cause. *See National Enterps. Corp. v Dechert Price & Rhoads*, 246 AD2d 481 (1st Dept 1998). Lexington has not offered a sufficient explanation as to why it had to bring a second motion. Lexington could have used the ground of the employer exclusion in its first motion. The second motion is denied.

With respect to Thyssenkrupp’s obligation to plaintiff, Thyssenkrupp is contractually

obligated to defend, indemnify and hold harmless plaintiff and its employees from all damages arising out of or relating to Thyssenkrupp's work. This is to be found in the Supplemental Rider to the agreement between plaintiff and Thyssenkrupp. The *Smith* action relates to work performed by an employee of Thyssenkrupp. Therefore, plaintiff's cross motion for summary judgment shall be granted with respect to Thyssenkrupp's obligations, and Thyssenkrupp's cross motion for summary judgment shall be denied.

Accordingly, it is

ORDERED that Lexington's first motion for summary judgment is denied; and it is further

ORDERED that Lexington's second motion for summary judgment is denied; and it is further

ORDERED that plaintiff's cross motion for summary judgment is granted to the extent that it is adjudicated and declared that defendant Thyssenkrupp has a contractual duty to defend and indemnify plaintiff in the *Smith* action; and it is further

ORDERED that Thyssenkrupp's cross motion for summary judgment is denied.

DATED: 12/15/08

ENTER:

mat

HON. MILTON A. TINGLING
J.S.C. J.S.C.

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