

**Reckson Assoc. Realty Corp. v Valley Forge  
Ins. Co.**

2009 NY Slip Op 30016(U)

January 6, 2009

Supreme Court, New York County

Docket Number: 107062/06

Judge: Marilyn Shafer

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

PRESENT: HON. MARILYN SHAFER, JSC  
*Justice*

PART 8

Reckson Assoc

INDEX NO. 107062/06

- v -

MOTION DATE \_\_\_\_\_

Valley Forge

MOTION SEQ. NO. 001

MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

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

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

Cross-Motion:  Yes  No

Upon the foregoing papers, It is ordered that this motion is denied  
pursuant to attached Mem

**FILED**  
JAN 08 2009  
COUNTY CLERK'S OFFICE  
NEW YORK

Dated: 1/6/09

HON. MARILYN SHAFER, JSC  
*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 5

**FILED**  
JAN 08 2009  
COUNTY CLERK'S OFFICE  
NEW YORK

RECKSON ASSOCIATES REALTY CORP. and  
DIAMOND STATE INSURANCE COMPANY,

Plaintiffs

-against-

Index No. 107062/06

VALLEY FORGE INSURANCE COMPANY,

Defendant.

-----X  
**MARILYN SHAFER, J.:**

Defendant Valley Forge Insurance Company (Valley Forge) moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint. Plaintiffs Reckson Associates Realty Corp. (Reckson) and Diamond State Insurance Company (Diamond) cross-move, pursuant to CPLR 3212, for an order granting summary judgment in their favor compelling Valley Forge to reimburse Diamond for the money it expended defending Reckson in the underlying action entitled *Johnston v Reckson Assoc. Realty Corp.* (Sup Ct, Suffolk County, index No. 02259/04).

The complaint in the underlying action alleges that Noreen Johnston tripped and fell while walking from her car via the parking lot steps, in a parking lot located at 6900 Jericho Turnpike, Syosset, N.Y. Reckson owned the building and parking lot located at 6900 Jericho Turnpike and non-party Fantastic Contracting Inc. (Fantastic) had a maintenance agreement with Reckson to provide snow and ice removal for the building and ancillary facilities. Johnston sued both Reckson and Fantastic,

alleging that the parking lot was negligently operated, maintained and controlled by Reckson and Fantastic.

As part of the maintenance contract between Fantastic and Reckson, Fantastic was obligated to defend and indemnify Reckson for any claims against Reckson "arising out of or incident to or in connection with the performance of [Fantastic's] work and resulting from: (1) any negligent act or omission or willful misconduct of [Fantastic]" (Service Contract, ¶ 9), and to have insurance and to obtain coverage for Reckson as an additional insured. *Id.*, ¶ 10. Fantastic obtained general liability insurance from defendant Valley Forge, including coverage for Reckson as an additional insured. Under the policy, that coverage was limited to liability arising out of "'Your work' for that additional insured by or for you." Policy # 1081596133, Blanket Additional Insured Endorsement.

On September 28, 2007, motions to dismiss of both Reckson and Fantastic were granted in the underlying action, and the complaint was dismissed as against both defendants. *Johnston v Reckson Assoc. Realty Corp.*, *supra*, September 28, 2007, Costello, J. In this action, Reckson and Diamond are, therefore, seeking only reimbursement of the costs of Reckson's defense expended by Diamond up until the time that the underlying action was dismissed as against Reckson and Fantastic.

Relying on the affirmation of Fantastic's attorney, A. G.

Chancellor, III, which Fantastic submitted in support of its motion for summary judgment in the underlying action, Valley Forge contends that discovery in the underlying action established that Johnston's accident occurred on a walkway that was outside the area of Fantastic's responsibility to Reckson.<sup>1</sup> According to the Chancellor affirmation, Johnston indicated at deposition that she had fallen when she was stepping down from the sidewalk and her heel became caught in the concrete, causing her to fall forward. Her incident report apparently states that she fell off the curb due to defects in the concrete and the loose accumulation of sand. Valley Forge further argues that in dismissing the underlying action against Fantastic, the court ruled that Fantastic was not responsible for the area where Johnston allegedly fell. Valley Forge finally contends that because Johnston's alleged accident occurred in an area for which Fantastic had no responsibility, it did not arise out of Fantastic's work, and the additional insured coverage for Reckson was not triggered. Thus, Valley Forge is not responsible for Reckson's defense costs.

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<sup>1</sup> The Chancellor affirmation refers to the testimony and incident report of Johnston, as well as the conflicting testimony of Reckson's employee, Joseph Ropulo, and Fantastic's owner, Christopher DiOrio, regarding whether Fantastic was responsible for snow removal in the walkway, where Johnston allegedly fell. Valley Forge fails to submit any of the documents referred to in Chancellor's affirmation; however, Valley Forge's characterization of those documents is not disputed by the plaintiffs; thus, the court will assume that it is accurate.

However, as Valley Forge does indicate, although Fantastic's owner, Christopher DiOrio, testified that Fantastic had no responsibility for snow removal or repair of the walkway, Reckson's employee, Joseph Ropulo, testified that Fantastic was responsible for snow removal in the walkway. Furthermore, in granting Reckson and Fantastic's motions for summary judgment, Judge Costello did not rule directly on the factual or legal positions taken by either defendant, but rather, granted their motion on default, stating: "the Court has given the Plaintiff and both moving parties it believes sufficient time to answer these motions and both of them, both 003 and 004 are before the court without opposition and sufficient time having passed, sufficient opportunity being given, the Court grants both motions...." *Johnston v Reckson Assoc. Realty Corp, supra*, at 6.

In their cross motion for summary judgment in their favor, Reckson and Diamond contend that an insurer's duty to defend is triggered "whenever the four corners of the complaint suggest - or the insurer has actual knowledge of facts establishing - a reasonable possibility of coverage." *Continental Cas. Co. v Rapid-American Corp.*, 80 NY2d 640, 648 (1993). Citing *Ruder & Finn Inc. v Seaboard Sur. Co.* (52 NY2d 663, 670 [1981]), Reckson and Diamond argue that the duty to defend is triggered even where the allegations are groundless. Here, because Johnston's complaint alleged that she fell on the parking lot stairs and

that Fantastic was responsible for the condition of the area, Reckson and Diamond argue that the duty to defend existed until the underlying action was dismissed.

Valley Forge submits a recent opinion of the Court of Appeals in the case of *Worth Construction Co., Inc. v Admiral Ins. Co.* (10 NY3d 411 [2008]), which appears to somewhat alter the well-established principles regarding the duty to defend relied on by Reckson and Diamond. In *Worth Construction*, the underlying complaint alleged that the plaintiff was injured on a staircase installed by Worth's subcontractor, Pacific Steel, Inc. (Pacific). Pacific had purchased insurance for Worth as an additional insured, providing coverage for Worth with respect to liability arising out of Pacific's operations. In the course of the underlying litigation, Worth conceded that the staircase was merely the situs of the accident, but that the accident was unconnected to any work done by Pacific. While recognizing that, generally, an insurer's duty to defendant arises "whenever the allegations within the four corners of the underlying complaint potentially give rise to a covered claim" (*id.* at 415 [citation omitted]), the Court concluded that the additional insured coverage was not triggered, because, as the plaintiff had conceded, there was no connection between the accident and the risk that was covered. The Court, therefore, reinstated the decision of the Supreme Court which granted summary judgment

dismissing Worth's third-party action against Pacific's insurer.

Here, however, in the underlying case, there was conflicting testimony concerning whether Fantastic was responsible for snow removal in the area where Johnston allegedly fell. Therefore, it cannot be said that Reckson has conceded that the accident was unconnected to any work done by Fantastic, nor has that question been conclusively resolved.

In a summary judgment motion, the movant must make a prima facie showing that it is entitled to summary judgment as a matter of law. *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 (1985). Where, however, a triable issue of fact exists, summary judgment must be denied. Here, an issue of fact exists regarding whether Fantastic had responsibility for the area where Johnston's accident allegedly occurred, and, therefore, whether the accident could have arisen from Fantastic's work, and the additional insured coverage triggered. It is, therefore, not necessary at this time to reach the question of whether the additional insured coverage is primary or excess.

Accordingly, it is hereby

ORDERED that defendant Valley Forge's motion for summary judgment is denied and the cross motion of plaintiffs Reckson and Diamond for summary judgment is also denied.

Dated:

1/6/09

ENTER:

~~MARILYN SHAFER~~

**FILED**

JAN 08 2009

COUNTY CLERK'S OFFICE  
NEW YORK