

Great Am. E & S Ins. Co. v New York City Hous. Auth.

2009 NY Slip Op 30702(U)

March 30, 2009

Supreme Court, New York County

Docket Number: 110893/07

Judge: Jane S. Solomon

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

PRESENT: JANE S. SOLOMON

PART 55

Index Number : 110893/2007
GREAT AMERICAN
VS.
NEW YORK CITY HOUSING
SEQUENCE NUMBER : 002
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE 12/17/08
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

1-7
8-9
10-13

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

Answering Affidavits — Exhibits _____

Replying Affidavits - Letter from counsel


Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion is decided in accordance with the annexed memorandum decision and order.

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: 3/3/09


JANE S. SOLOMON 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 CITY OF NEW YORK
COUNTY OF NEW YORK: PART 55

-----X
GREAT AMERICAN E & S INSURANCE COMPANY
and GREAT AMERICAN ASSURANCE
COMPANY,

Plaintiffs,

Index No.: 110893/07

-against-

DECISION AND ORDER

NEW YORK CITY HOUSING AUTHORITY,
TR PIPE CO., INC a/k/a TR PIPE INC.
and MARIA OVANDO,

Defendants.

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk
and notice of entry cannot be served by the County Clerk
until the judgment is filed with the County Clerk. To
obtain a copy, contact the County Clerk at the County Clerk's
Office at the County Clerk's Office at the County Clerk's Office.

SOLOMON, J.

Plaintiffs Great American E & S Insurance Company and

Great American Assurance Company (together, Great American) move
for summary judgment in this declaratory judgment action.

Great American insures a contractor, defendant T.R.
Pipe Co., Inc., a/k/a TR Pipe Inc. (TR Pipe), that was hired to
perform work at a New York City Housing Authority (NYCHA)
development in the Bronx. The contract, dated January 11, 2002,
provides that TR Pipe was to replace an underground steam
distribution system. TR Pipe was obligated to procure a
commercial general liability policy naming NYCHA as an additional
insured, and to provide Owner's and Contractor's Protective
Liability insurance, both with coverage for bodily injury claims
arising from TR Pipe's work. TR Pipe procured the necessary
insurance from Great American. TR Pipe began its work under the
contract on January 6, 2003. The nearly one-year delay was

caused by the need for certain pipe to be delivered.

Defendant Maria Ovando (Ovando) has alleged that on December 5, 2002, she fell on a walkway in front of a NYCHA building at 710 Tinton Avenue in the Bronx. She served a notice of claim on NYCHA, and later filed suit against NYCHA in New York State Supreme Court, Bronx County, index number 18395/2003 (Underlying Action). Ovando has not appeared in this action.

In her notice of claim, Ovando alleged that she fell after slipping or tripping on a walkway that was negligently maintained because it was kept in broken, upraised and uneven condition, and NYCHA failed to remove ice and snow from the walkway. It appears that she fell in the area where TR Pipe was to work, and that work was to involve breaking up the pathway.

By a letter dated August 12, 2003, NYCHA contacted Great American and tendered to it the defense of Ovando's claim. By a letter dated October 20, 2003, Great American acknowledged receipt of NYCHA's tender and assumed its defense (Aff. In Opp. of Luis G. Sabillon, Ex. G).

Great American designated the law firm Hoffman & Roth, LLP (Hoffman & Roth) to defend the claim. Hoffman & Roth determined that Chatterjee International Contracting, Corp. (Chatterjee) was an asphalt contractor at the accident site prior to, and unrelated to, the TR Pipe contract. In the course of the Underlying Action, Chatterjee was added as a defendant.

According to NYCHA, Hoffman & Roth did not adequately report to NYCHA, despite requests that it do so, and failed to disclose to NYCHA that TR Pipe might not be liable, and that TR Pipe's policy might not afford coverage. NYCHA further complains that Hoffman & Roth did not seek to protect NYCHA's rights by filing a cross-claim against Chatterjee, and the firm failed to make a timely motion to dispose of Ovando's lawsuit. The Underlying Action was on the trial calendar in Bronx Supreme Court when this motion was submitted.

By a letter dated December 1, 2004, Great American notified NYCHA that although it had assumed NYCHA's defense based on the terms of the contract and the facts alleged in Ovando's complaint, its investigation revealed that TR Pipe had not started work at the site until after the accident, so it had no duty to defend or indemnify NYCHA for that claim (December 2004 Letter, annexed to Sabillon Aff, Ex. H). The Letter invited NYCHA to submit information showing that the accident may have arisen from TR Pipe's work, and stated that Great American would await a response from NYCHA before formally withdrawing. A lawyer for NYCHA responded at length, but offered no proof that Ovando's claim could have arisen from TR Pipe's work (Sabillon Aff, Ex. I). Great American did not respond to NYCHA's letter, but continued to provide NYCHA with a defense.

This declaratory judgment action was commenced on or

about August 6, 2007. While this motion was sub judice, the court in the Underlying Action granted Chatterjee's and NYCHA's motions for summary judgment dismissing Ovando's complaint (an unentered decision and order of Justice Salerno, Supreme Court, Bronx County, dated February 2, 2009, is annexed to a letter from Great American's attorney of March 11, 2009, which is made a part of the record herein, together with a letter from NYCHA's attorney). Justice Salerno found that Chatterjee had completed asphalt work at the site of Ovando's fall in August 2002, but Ovando failed to establish that Chatterjee or NYCHA were liable for her accident. Ovando has filed a notice of appeal.

Great American's argument on this motion is straightforward: It has no duty to indemnify or defend NYCHA in the Underlying Action because Ovando's injury did not arise from TR Pipe's work. NYCHA counters that Great American did not give a timely disclaimer, even after Great American learned the relevant facts, and NYCHA has been prejudiced by the delay. NYCHA further argues that it is entitled to additional discovery, including communications between Great American and Hoffman & Roth to establish when Great American first learned that its policy did not cover Ovando's claim, and depositions of Great American employees in connection with the notice issue, and to aid in establishing laches as a defense herein.

Under Insurance Law § 3420(d), an insurer must give

written notice to the insured of a disclaimer of liability or denial of coverage as soon as is reasonably possible. Great American argues that it notified NYCHA that the claim did not arise from TR Pipe's work within a reasonable time after it learned that fact.

NYCHA is an insured under the Great American policies, and as such, NYCHA is entitled to prompt notice of a disclaimer if one is required under Insurance Law § 3420(d). Such notice is required where the disclaimer arises from a policy exclusion on a claim for death or bodily injury; a disclaimer pursuant to Insurance Law § 3420(d) is not necessary when the claim does not fall within the coverage terms of an insurance policy (Worcester Ins. Co. v Bettenhauser, 95 NY2d 185 [2000]); and see, 70A NY Jur2d Insurance § 1926.

Here, it is undisputed that the Great American policy does not cover claims which do not arise from TR Pipe's work, and that Ovando's alleged accident could not have arisen from TR Pipe's work because the accident predates the work. Therefore, Ovando's claim does not fall within the coverage terms of the policy, and Great American is not obligated to indemnify and defend NYCHA due to a failure to provide prompt notice under Insurance Law § 3420(d).

NYCHA's contention that it was prejudiced by the delay is misplaced. Great American's delay in disclaiming did not

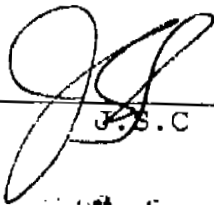
create coverage where none had existed. And the alleged failings of the law firm Great American designated to defend NYCHA also do not create coverage, and damages arising from said failings are not chargeable to Great American. Finally, the contention that NYCHA was prejudiced in defending the Underlying Action is negated by the dismissal of Ovando's claim by the Bronx Supreme Court. In the event Ovando pursues the appeal, NYCHA will be able to regain control of its defense of the Underlying Action with appellate counsel of its choice. Accordingly, it hereby is

ORDERED that Great American's motion for summary judgment is granted; and it further is

DECLARED and ADJUDGED that plaintiffs Great American E & S Insurance Company and Great American Assurance Company have no duty to defend or indemnify defendant New York City Housing Authority in the Underlying Action.

Dated: March 30, 2009

ENTER:



J.S.C.