

**Emanuel African Methodist Episcopal Church of
N.Y. Annual Conf. v Sirius Am. Ins.
Co.**

2009 NY Slip Op 30873(U)

April 16, 2009

Supreme Court, New York County

Docket Number: 112420-2007

Judge: Carol R. Edmead

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

HON. CAROL EDMEAD

PRESENT: _____

PART 35

Justice

Index Number : 112420/2007

EMANUEL AFRICAN METHODIST

vs.

SIRIUS AMERICA

SEQUENCE NUMBER : 001

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE 1/30/09

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

n 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

In accordance with the foregoing Memorandum Decision, it is hereby

ORDERED that defendant's motion for summary judgment dismissing this action is granted, and the branch of defendant's application to quash the subject subpoena is moot. And it is further

ORDERED that defendant serve a copy of this order with notice of entry upon all parties within 20 days of entry. And it is further

ORDERED that the Clerk may enter judgment according to the foregoing.

This constitutes the decision and order of the Court.

FILED

APR 20 2009

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 4/16/09

[Signature]

J.S.C.

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HON. CAROL EDMEAD

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: PART 35

-----X
EMANUEL AFRICAN METHODIST EPISCOPAL
CHURCH OF NEW YORK ANNUAL CONFERENCE,

Index No. 112420-2007

Plaintiff,

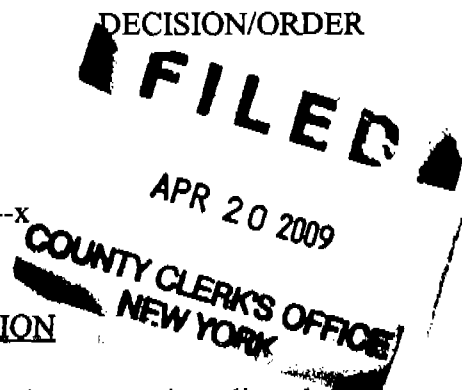
-against-

SIRIUS AMERICA INSURANCE COMPANY,

Defendant.

-----X
HON. CAROL ROBINSON EDMEAD, J.S.C.

MEMORANDUM DECISION



In this action seeking coverage as an additional insured on a certain policy, defendant Sirius America Insurance Company ("defendant") moves pursuant to CPLR §3212 for summary judgment dismissing the complaint, or in the alternative pursuant to CPLR §2304 quashing plaintiff's subpoena deuces tecum and *ad testificandum*.

Factual Background¹

Plaintiff entered into a contract with Maloy Corp. ("Maloy") for Maloy to serve as a general contractor for a construction project (the "Contract") at plaintiff's building located at 37-41 West 119th Street, New York, New York (the "Premises"). It is alleged that the Contract contained a hold harmless and indemnification provision in plaintiff's favor.² In order to obtain the required insurance coverage for the project, Maloy obtained a commercial general liability

¹ This information is taken in large part from defendant's motion.

² . . . The contractor shall indemnify and hold harmless the Owner, Architect, Architect's consultants and agents and employees of any of them from and against claims, damages, losses and expenses, including but not limited to attorneys' fees arising out of or resulting from performance of work. . . Contractor shall purchase and maintain in a company or companies lawfully authorized to do-business in the jurisdiction where the Project is located insurance for protection of claims under worker's or workmen's compensation acts and other employee benefit acts which are applicable, claims for damages because of bodily injury. . . ."

policy, effective between August 23, 2003, and August 23, 2004 from defendant (the "Policy"). Maloy, through the Michael Stoop Agency, entered into a premium finance agreement with Budget Installment Corporation ("BIC") to finance the Policy. Pursuant to the premium finance agreement, BIC paid the premium for the subject policy, and was to receive reimbursement from Maloy in the form of monthly payments.

An action was commenced against plaintiff wherein it is alleged that Maciej Wasyl (the "underlying plaintiff") sustained injuries on April 21, 2004, during the course of construction work at the Premises (the "underlying action").³ Plaintiff then commenced a third-party action against Maloy, and APA Restoration Corp. ("APA"). Maloy defaulted. This declaratory judgment action by plaintiff against Maloy's insurer, the defendant herein, ensued.

Motion

Defendant argues that there is no defense or indemnification coverage for either Maloy or the underlying plaintiff under Policy because the Policy was cancelled on March 29, 2004, and therefore, no longer in effect at the time of the subject accident on April 21, 2004.

In support, defendant contends that Diane Meagher ("Meagher"), BIC's vice-president of operations, testified at her deposition that when a client such as Maloy fails to timely pay its monthly installment, BIC issues a notice of intention to cancel the policy which is the subject of the premium finance agreement. The notice of intention to cancel the policy is issued fourteen days prior to the actual cancellation of the policy pursuant to New York law. According to Meagher, BIC issued four notices of intention to cancel to Maloy during the Policy period. Meagher testified that BIC does not retain copies of the notices, but retains a ledger showing that

³ *Maciej Wasyl v Emanuel African Episcopal Church of New York Annual Conference, et al.*

[* 4]

the notice of intention to cancel was mailed, and the ledger was certified by two employees. Meagher identified four proofs of mailing for notices of cancellation dated October 28, 2003, November 11, 2003, March 1, 2004, and March 15, 2004, which are provided with the motion.

Meagher testified that on March 1, 2004, BIC mailed to Maloy a notice of intention to cancel the subject policy as of March 15, 2004, which was followed by a notice of cancellation of the subject policy on March 15, 2004, effective March 22, 2004. A copy of the notice of cancellation was also sent to Michael Stoop Agency, Maloy's insurance broker. BIC sent the notice of cancellation to defendant (Maloy's insurer) on March 22, 2004.

Meagher testified that although BIC received a check for the premium owed through February, 2004 on March 15, 2004, the check was returned to BIC for insufficient funds. Thus, the Policy was cancelled effective March 22, 2004. There is no evidence that the subject policy was reinstated after the effective date of the cancellation.

Thereafter, defendant received notice of the subject accident on February 18, 2005, from the underlying plaintiff's counsel. UTC Risk Management Services, Inc. ("UTC Risk"), defendant's third-party claims administrator, determined that the Policy had been cancelled as of March 22, 2004, before the date of the accident. Defendant wrote to Maloy on February 18, 2005, and denied coverage based upon the cancellation. UTC Risk received a letter from plaintiff's counsel advising that a third-party action had been commenced in the underlying action against Maloy. Plaintiff's counsel wrote a second letter on August 25, 2006, advising that Maloy was in default in the underlying third-party action. UTC Risk wrote to plaintiff's counsel on October 11, 2006, advising that there was no coverage for the underlying third-party action as defendant had previously denied coverage based upon the cancellation by BIC.

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According to Patrick Conklin, the executive vice president of underwriting at Inter-Reco, Inter-Reco was defendant's underwriting agent regarding the Policy. After Inter-Reco received BIC's notice of cancellation on March 29, 2004, on behalf of defendant, it issued a change endorsement noting that the Policy was cancelled.

Contrary to plaintiff's claim in its bill of particulars, defendant's denial of coverage is not ineffective for failure to comply with New York State Insurance Law §3426(c). Banking Law §576 sets forth the procedures insurance premium finance agencies must follow to effect a cancellation of an insurance contract. The premium finance agreement herein contained a provision of power-of-attorney to BIC on behalf of Maloy. Maloy was in default on its payments, and BIC issued a notice of intention to cancel the subject policy on March 1, 2004. Based on the above, BIC complied with Banking Law §576 in cancelling the Policy. Therefore, BIC's cancellation of the subject policy has the same effect as though Maloy itself had cancelled the Policy. The Policy was cancelled almost one month prior to the underlying plaintiff's accident. Defendant, through its underwriting agent Inter-Reco, received the notice of cancellation on March 29, 2004. Thus, the effective date of the cancellation is March 29, 2004.

Further, contrary to plaintiff's claim, New York State Insurance Law §3426(c) is inapplicable to this case since defendant was not the party to cancel the subject policy.

Defendant also argues that plaintiff's subpoena to Inter-Reco should be quashed. Since Inter-Reco is the underwriting agent for defendant, party disclosure is a more appropriate avenue than non-party witness subpoenas. Further, the subpoenas issued by plaintiff are overly broad. The subpoenas seek: "Complete copies of the insurance files" for Maloy, "including but not limited to the Underwriting files and any claims communications for Policies issued to Maloy

[*6]
Corp. for the policy Years 2002-2004.” The “complete copies” language is tantamount to the “any and all” language, held to be overly broad. Beyond the underwriting file for Policy, any underwriting files and any claims communications for policies issued to Maloy between 2002 and 2004 are wholly irrelevant. The Policy is a commercial general liability policy; yet, the subpoena seeks disclosure of information which may involve other types of insurance policies. Thus, plaintiff’s subpoena is also vague.

Opposition

Defendant failed to proffer any admissible evidence establishing that BIC properly mailed the “Notices of Intent to Cancel” the Policy to Maloy pursuant to Banking Law §576. There must be proof that there is an office practice and procedure of duly addressing and mailing notices, that the procedure has been carefully followed and that the practice is “geared so as to ensure the likelihood that a notice of cancellation is always properly addressed and mailed.” Although Meagher testified that on four separate occasions, a Notice of Intent to Cancel the Policy was mailed to Maloy, BIC did not retain copies of such notices; it merely retains a “ledger” which purportedly shows that the notices were sent. There is no showing of any office practice and procedure to cancel insurance, office procedures relating to the delivery of mail to the post office, whether a practice existed of comparing the names on the mailing list with the names and addresses on the envelopes for accuracy, or whether anyone routinely checked that the total number of envelopes matched the number of names on the mailing list so as to ensure that the notice was in fact received by Maloy. Therefore, there is a triable issue of fact as to whether the Policy was properly cancelled by BIC. As defendant has failed to meet its burden of strict compliance with Banking Law §576, its motion for summary judgment should be denied.

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Further, as to the subpoena, plaintiff merely seeks to inspect the underwriting file for Maloy maintained by Inter-Reco, defendant's underwriting agent for the Policy. Defendant denies, in its Answer, that the plaintiff was an additional insured under the policy. Pursuant to the additional insured endorsement of the Policy, an insured is defined as ". . . the person or organization shown in the Schedule, but only with respect to liability arising out of your ongoing operations performed for that insured. The Schedule contains the following "as on file with company." Therefore, pursuant to the language of the endorsement the Church would be an additional insured if it is "on file with [the] company." In other words, if the documents possessed by Inter-Reco contain reference to the plaintiff as an additional insured for the subject construction project, plaintiff would be entitled to additional insured status. Accordingly, the documents sought from Inter-Reco are relevant to the issues of insurance coverage, which is at the heart of this litigation and are necessary for the proper prosecution of plaintiff's claims against defendant.

Reply

Meagher testified with respect to the office procedures for the mailing of notices of intent to cancel policies as well as the notice of cancellation. Meagher testified that customer service representatives would generate the notices by a computer, place them into a windowed envelope, and run them through a postage machine for mailing. The notices are recorded on a "register," which reflected the name and address of the recipient, and which was accompanied by a "proof of mailing" that referred to the register rather than an individual "proof of mailing" for each individual notice. Therefore, there is ample evidence that the notice of intent to cancel the subject policy and the notice of cancellation were both properly mailed to Maloy. As far as the

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contention that there was some failure to check the mailing address of Maloy, this unsupported assertion is without merit. It is evident that the BIC mailed the notices to the address listed on the Policy and on the premium finance agreement. Further, while it had the opportunity to do so, Plaintiff never deposed a witness on behalf of Maloy or produced any evidence to demonstrate that Maloy did not receive either notice. Nor did Plaintiff depose any of the employees identified during the course of Meagher's deposition.

Further, plaintiff's opposition does not address the argument that the subpoena is overly broad, or refute that the proper course of disclosure should be through party disclosure under the CPLR as Inter-Reco is the underwriting agent of defendant.

Analysis

To obtain summary judgment, the movant must establish its cause of action or defense sufficiently to warrant the court as a matter of law in directing judgment in its favor (CPLR § 3212 [b]). This standard requires that the proponent of a motion for summary judgment make a *prima facie* showing of entitlement to judgment as a matter of law, by advancing sufficient "evidentiary proof in admissible form" to demonstrate the absence of any material issues of fact (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Silverman v Perlbinde*r, 307 AD2d 230, 762 NYS2d 386 [1st Dept 2003]; *Thomas v Holzberg*, 300 AD2d 10, 11, 751 NYS2d 433, 434 [1st Dept 2002]). Thus, the motion must be supported "by affidavit [from a person having knowledge of the facts], by a copy of the pleadings and by other available proof, such as depositions" (CPLR § 3212 [b]). A party can prove a *prima facie* entitlement to summary judgment through the affirmation of its attorney based upon documentary evidence (*Zuckerman, supra*; *Prudential Securities Inc. v*

[* 9]
Rovello, 262 AD2d 172, [1st Dept 1999]).

Where the proponent of the motion makes a *prima facie* showing of entitlement to summary judgment, the burden shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action, or to tender an acceptable excuse for his or her failure to do so (CPLR §3212 [b]; *Vermette v Kenworth Truck Co.*, 68 NY2d 714, 717 [1986]; *Zuckerman v City of New York*, *supra*, 49 NY2d at 560, 562; *Forrest v Jewish Guild for the Blind*, 309 AD2d 546, 765 NYS2d 326 [1st Dept 2003]). Like the proponent of the motion, the party opposing the motion must set forth evidentiary proof in admissible form in support of his or her claim that material triable issues of fact exist (*Zuckerman*, *supra* at 562).

New York State Banking Law §576 provides that the cancellation of an insurance contract by a premium finance agency be effectuated in accordance with the following relevant provisions:

- (a) Not less than ten days written notice shall be mailed to the insured at his last known address as shown on the records of the premium finance agency, of the intent of the premium finance agency to cancel the insurance contract unless the default is cured within such ten day period and that at least three days for mailing such notice is added to the ten day notice. A copy of the notice of intent to cancel shall also be mailed to the insurance agent or broker.
 - (b) Service of the notice of intent to cancel or notice of cancellation by mail shall be effective provided that the notices are mailed to the insured's last known address as shown on the records of the premium finance agency. The records of the premium finance agency shall be presumptive evidence as to the correctness of such address.
- * * * * *
- (d) After such notice in paragraph (a) above has expired, the premium finance agency may thereafter, in the name of the insured, cancel such insurance contract by mailing to the insurer a notice of cancellation stating when thereafter the policy shall be cancelled, and the insurance contract shall be cancelled as if such notice of cancellation had been submitted by the insured himself, but without requiring

the return of the insurance contract. A copy of the notice of cancellation shall also be mailed to the insured. . . .

The insurer bears the burden of establishing strict compliance with the notification requirements of Banking Law §576 (*Lumbermens Mut. Cas. Co. v Berkovic*, 74 AD2d 496, 428 NYS2d 7 [1980] ["There must be compliance with the statutory requirements of these sections or the purported cancellation will be deemed a nullity"]). "For the presumption to arise that a notice of cancellation has been duly mailed to and received by the insured, sufficient to prove cancellation of insurance under Banking Law §576, there must be proof submitted that there is an office practice and procedure of duly addressing and mailing notices, that the procedure has been carefully followed and that the practice is 'geared so as to ensure the likelihood that a notice of cancellation is always properly addressed and mailed'" (*Lumbermans Mut. Cas. Co. v Collins*, 135 AD2d 373, 521 NYS2d 432 [1st Dept 1987] citing *Nassau Ins. Co. v Murray*, 46 NY2d 828, 830 [1978]; see also *L.Z.R. Raphaely Galleries v Lumbermens Mut. Cas. Co.*, 191 AD2d 680, 681-682, 595 NYS2d 802 [2d Dept 1993] ["[a]bsent proof of mailing," the insurer must provide evidence of an office practice designed to insure that the subject notices are always properly addressed and mailed]; *Parkside Food Center, Inc. v United International Ins. Co.*, 193 AD2d 658, 659, 597 NYS2d 467 [2d Dept 1993] ["We find that the defendant failed to offer any proof that an employee of the premium finance agency normally checked the names and addresses on the envelopes with those on either the notices of intent to cancel or with a master list in the regular course of business"]).

As long as there is adequate testimony by one with personal knowledge of the regular course of business, it is not necessary to solicit testimony from the actual employee in charge of

the mailing (*Lumbermans Mut. Cas. Co. v Collins, citing Bossuk v Steinberg*, 58 NY2d 916, 919 [1983]).

BIC's office procedure with respect to the notices is that the notices are generated by a computer, after which the particular notice is placed into a windowed envelope, and run through a postage machine for the affixation of proper postage. As pointed out by plaintiff, Meagher also testified that BIC has two people "in the office" certify that such notices were mailed. She testified that as to the ledger, "we keep a list of the late notices that are being printed that day and we have two people in the office certify that they were mailed." Fourteen days later, on March 15, 2004, BIC issued a notice of cancellation of the subject policy to Maloy, a copy of which was sent to both Maloy's insurance agent (Michael V. Stoop) and defendant. The notice of cancellation provided that the subject policy was cancelled effective March 22, 2004. At the time the notices at issue in this action were issued, it was the duty of the customer service representative to follow this process. The customer service representative who followed this procedure with respect to the notice of cancellation in this matter was Kim Giarraffa.

Each notice of intent to cancel and notice of cancellation mailed was entered on a "Late Notice Register" which reflects the name of Maloy and its address, or a "Cancellation Register," which also reflects Maloy and its address. Meagher identified the late notice register for March 1, 2004, and the cancellation register for March 15, 2004. Meagher explained that the registers are a list of all cancellation notices sent out on a particular date, and that it was company policy to sign a "proof of mailing" that referred to the register rather than an individual "proof of mailing" for each individual notice. Meagher identified the "proof of mailing" for the late register for March 1, 2004, and the cancellation register for March 15, 2004. The proof of

mailing for the March 1, 2004 register was signed by Kim Giarrafa, in front of a witness, whereby she certified that on March 1, 2004, she compared the attached late notice register (notice of intent to cancel) and verified that each notice of intent to cancel on the attached list was mailed to the insured and insurance broker with proper first class postage affixed to each and every notice and was deposited in a depository maintained by the United States Postal Service." Ms. Giarrafa executed an identical certified statement with respect to the notices of cancellation mailed on March 15, 2004.⁴

As set forth above, there is ample evidence to demonstrate that there were in place procedures designed to ensure that BIC properly mailed the notices at issue herein. Where, as here, the proof exhibits an office practice and procedure followed by the insurers in the regular course of their business, which shows that notices of cancellation have been duly addressed and mailed, a presumption arises that those notices have been received by the insured." *Nassau Insurance Company v. Murray*. 46 N.Y.2d 828, 414 N.Y.S.2d 117 (1978).

Therefore, contrary to defendant's contention, plaintiff has submitted deposition testimony regarding BIC's mailing methods and procedures utilized to ensure that the notice of the intent to cancel are properly addressed and mailed, and a procedure at BIC of comparing the names on the mailing list with the names and addresses on the *windowed* envelopes for accuracy so as to ensure Maloy's receipt of same.

⁴ Although not dispositive, there is no indication in the record that Maloy did not receive any of the notices, and BIC received a check from Maloy on March 15, 2004, but the check was returned for insufficient funds.

Conclusion

Based on the foregoing, it is hereby


ORDERED that defendant's motion for summary judgment dismissing this action is granted, and the branch of defendant's application to quash the subject subpoena is moot. And it is further

ORDERED that defendant serve a copy of this order with notice of entry upon all parties within 20 days of entry. And it is further

ORDERED that the Clerk may enter judgment accordingly.

This constitutes the decision and order of the Court.

April 16, 2009


Hon. Carol Robinson Edmead, J.S.C.

HON. CAROL EDMEAD

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