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

PRESENT: Saliann Scarpulla Justice PART 52

Index Number : 602189/2008
AMERICAN HOME ASSURANCE COMPANY
VS.
S. DIFAZIO & SONS CONSTRUCTION, INC.,
SEQUENCE NUMBER : # 001
SUMMARY JUDGMENT

INDEX NO. 602189-08
MOTION DATE
MOTION SEQ. NO. #001
MOTION CAL. NO.

were read on 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

The Motion is Decided in Accordance with Annexed Decision & 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).

This Constitutes the decision, order, and judgment of the Court.

Dated: June 22, 2009

Saliann Scarpulla J.S.C.
SALIANN SCARPULLA J.S.C.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 52

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AMERICAN HOME ASSURANCE COMPANY,

Plaintiff,

Index Number 602189/08
Submission Date 5/20/09
Mot. Seq. No. 001

-against-

DECISION & ORDER

S.DIFAZIO & SONS CONSTRUCTION INC., SHIRLEY RHODES, THE CITY OF NEW YORK, and VERIZON NEW YORK, INC.

Defendants.

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Appearances:

For Plaintiff :
Law Offices of Beth Zara Green
By Charmagne A. Padua
12 MetroTech Center, 28th Floor
Brooklyn, New York 11201
718-250-1400

For Defendant S. Difazio & Sons
Traub Lieberman Straus & Shrewsbury LP
By Alexis J. Rogoski, Esq.
Mid-Westchester Executive Park
Seven Skyline Drive
Hawthorne, New York 10532
914-347-2600

Papers considered in review of this motion for summary judgment:

Papers	Numbered
Notice of Mot. and Affirm. in Supp.	2
Memorandum in Oppos. To Summ. Judg.	
Affirm. in Oppos. to Summ. Judg.	3
Reply in Supp. of Mot. for Summ. Judg.	4

HON SALIANN SCARPULLA, J.:

In this declaratory judgment action, plaintiff American Home Assurance Company ("American") moves for summary judgment against all defendants to determine and declare pursuant to CPLR § 3001 that American Home Assurance Company Policy No. GL 644-76-02, issued to defendant S.Difazio & Sons Construction Inc. ("Difazio") for the period from February 21, 2007 to February 21, 2008, does not provide coverage for the claims asserted in the personal injury action entitled "Shirley Rhodes v The City of New York and Verizon

New York Inc. v S. Difazio and Sons Construction Inc.," Index No. 21897/04, filed in New York Supreme Court, Kings County ("the underlying action").

Shirley Rhodes filed the underlying action against the City of New York City on July 12, 2004. In her complaint Rhodes alleges that she sustained serious personal injury when she tripped and fell on broken and uneven pavement on April 14, 2003. Rhodes amended her complaint to add Verizon New York, Inc. as a defendant on March 29, 2006. Verizon impleaded Difazio, one if its subcontractors, on March 30, 2007.

On May 16, 2007, Difazio filed a notice of claim, together with the third-party complaint, with American. American initially assigned Difazio representation by the Law Offices of Edward Garfinkel, staff counsel for American, on July 6, 2007. A month later, on August 21, 2007, American's authorised representative, AIG Domestic Claims, Inc., disclaimed coverage on the grounds that the underlying incident occurred almost four years prior to the effective period of the policy and was, thus, not covered.

The Law Offices of Edward Garfinkel subsequently moved by order to show cause to be relieved as counsel. That application was denied, together with a motion to reargue, on the grounds that the court could not make a determination of the scope of the insurance coverage on a motion to be relieved as counsel. As a result, American filed the present action for declaratory judgment.

Discussion

Pursuant to CPLR § 3212(b), summary judgment "shall be granted if, upon all papers and proof submitted, the cause of action or defense shall be established sufficiently to

warrant the court as a matter of law in directing judgment in favor of any party." To warrant a court's directing judgment as a matter of law, it must clearly appear that no material issue is presented for trial. *Daliendo v Johnson*, 147 A.D.2d 312, 317 (2nd Dep't 1989). When a party has made a prima facie showing to entitle it to summary judgment, the burden shifts to the opposing party to show by evidentiary facts that there is an issue of fact requiring a trial. *Indig v Finkelstein*, 23 N.Y.2d 728 (1968); *see also Vogel v Blade Contr. Inc.*, 293 A.D.2d 376, 377 (1st Dep't 2002). Conclusory allegations or denials are insufficient to either warrant or defeat summary judgment. *McGahee v Kennedy*, 48 N.Y.2d 832, 834 (1979).

American argues that it is not responsible for Difazio's defense as a matter of law because the underlying accident happened well before the American policy became effective. Difazio opposes the summary judgment motion, arguing that American's failure to promptly disclaim liability or deny coverage in conformity with Insurance Law § 3420(d) obligates American to defend and indemnify Difazio.

Under New York law, an insurer must notify an insured as "soon as is reasonably possible" of its intention to "disclaim liability or deny coverage" for bodily injury under the policy. N.Y. Ins. Law § 3420(d). A failure by the insurer to give such notice as soon is reasonably possible after it first learns of the accident or of grounds for disclaimer of liability or denial of coverage precludes effective disclaimer or denial. *Hartford Ins. Co. v County of Nassau*, 46 N.Y.2d 1028, 1029 (1979). An insurer who delays in giving written notice of disclaimer bears the burden of justifying the delay. *See First Fin. Ins. Co. v Jetco Contracting Corp.*, 1 N.Y.3d 64, 69 (2003).

A timely disclaimer is not required, however, when the policy on which the claim rests does not under any circumstances cover the incident giving rise to liability. *Handelsman v Sea Insurance Company*, 85 N.Y.2d 96, 99 (1994). The Court of Appeals explained in *Zappone v Home Insurance Company*, 55 N.Y.2d 131 (1982), that the Legislature did not intend by its use of the words "deny coverage" to bring within the policy a claim for which no premium had ever been received. *Zappone*, 55 N.Y.2d at 135-36.

The critical distinction between a claim that triggers an obligation promptly to disclaim and a claim that does not require a timely disclaimer is that the former involves denial of coverage by reason of exclusion, where a policy of insurance would otherwise cover the particular accident, while the latter results in denial of coverage by reason of lack of inclusion, where the claim falls outside of the scope of the policy or arises when the policy was not in effect. *See Zappone*, 55 N.Y.2d at 138; *see also Handelsman*, 85 N.Y.2d at 99; *Perez v Hartford Accident & Indemnity Co.*, 31 A.D.2d 895, 896 (1st Dep't 1969) (concluding that Insurance Law § 167(8), predecessor to § 3420(d), did not apply where coverage terminated due to the cancellation of the policy long before the happening of the incident); *474431 Asscs. v AXA Global Risks US Ins. Co.*, 18 A.D.3d 604, 605 (2nd Dep't 2005).

The American policy at issue covered the period from February 21, 2007 to February 21, 2008. Rhodes' accident, for which Difazio seeks coverage, occurred on April 14, 2003, a little less than four years before the American policy was effective. Section I(1)(b) of American's policy limits coverage to an occurrence that takes place in the "coverage

territory" and during the policy period. While Rhodes accident falls within the category of injuries covered by the policy, there is no genuine dispute that it happened outside the policy period.

American's policy, which did not even come into existence until four years after Rhodes' accident, clearly did not cover the accident. Because no coverage existed at the time of the accident, Ins. Law § 3420(d) is inapplicable to Difazio's claim, and timely notice of disclaimer was not required.

Difazio also argues that American is equitably estopped from denying coverage, because American assumed defense of the underlying action without expressly reserving its rights, and the withdrawal of American's staff counsel will unfairly prejudice Difazio's ability to prosecute its defense.

The doctrine of equitable estoppel cannot be used "to create coverage where no insurance policy existed, regardless of whether or not the insurance company was timely in issuing its disclaimer." *Wausau Ins. Co. v Feldman*, 213 A.D.2d 179, 180 (1st Dep't 1995) (citation omitted) (finding that a clerical error resulting in assignment of defense for nine years did not create coverage by estoppel). This principle is particularly applicable where there is no evidence of unfair prejudice to the one claiming coverage. *See Federated Department Stores, Inc. v Twin City Fire Ins. Co.*, 28 A.D.3d 32, 34 (1st Dep't 2006) (estoppel not applicable despite insurer's 20-month pre-disclaimer defense without a reservation of rights where no prejudice existed). Prejudice is established only where the

insurer's control of the defense is such that the character and strategy of the lawsuit can no longer be altered. *Federated Department Stores, Inc.*, 28 A.D.3d at 39 (citation omitted).

Here, American disclaimed coverage only forty six days after the assigned counsel served an answer in the underlying action. Despite having been informed that the assigned counsel would not defend the underlying action Difazio failed to obtain its own counsel. On August 21, 2007, the date of effective disclaimer, there is nothing to suggest irreversible effects of actions taken by the American assigned counsel.[1]

Difazio counters that while no prejudice occurred by August of 2007, American's assigned counsel's failure to timely seek declaratory relief until a year later, followed by this motion for summary judgment on the eve of trial in the underlying case, at the very least, raises a triable issue as to the existence of unfair prejudice. This argument is unavailing.

American's early disclaimer of coverage, together with the assigned counsel's numerous attempts at withdrawal, show that Difazio could not have justifiably relied upon American's continued representation of it in the underlying action. Moreover, Difazio fails to explain its continuous refusal to secure its own representation. Difazio had simply no reasonable expectation of entitlement to insurance coverage and representation in the underlying action, because Rhodes' accident was patently outside the policy coverage. The

[1]While Difazio argues that American's summary judgment motion is premature and requests an opportunity to proceed with discovery on the issue of unfair prejudice, the attorney's affidavit lacks any specificity as to what discovery has already been sought by Difazio in the year since the commencement of the present action and what additional evidence is being sought to justify opposition. Therefore, a stay of the summary judgment motion pursuant to CPLR §3212(f) is unwarranted.

doctrine of equitable estoppel is not applicable here and American is entitled to a declaration that it is not obligated to defend and indemnify Difazio in the underlying action.[2]

In accordance with the foregoing, it is

ORDERED, ADJUDGED, AND DECREED that the insurance policy No. GL 644-76-02 issued to defendant S.Difazio & Sons Construction Inc. By plaintiff American Home Assurance Company does not obligate plaintiff American Home Assurance Company to defend and indemnify defendant S.Difazio & Sons Construction Inc. in the underlying action entitled "Shirley Rhodes v The City of New York and Verizon New York Inc. v S. Difazio and Sons Construction Inc.," Index No. 21897/04, filed in New York Supreme Court, Kings County; and it is further

ORDERED, ADJUDGED AND DECREED that the Clerk of the Court enter judgment accordingly.

This constitutes the decision, order and judgment of the Court.

Dated: New York, New York
June 22, 2009

ENTER:

Hon. Saliann Scarpulla, J.S.C.

[2] American's attorney also includes a reimbursement request for expenses incurred on behalf of Difazio's in the underling action. The Court does not address this issue, because American did not properly move for this relief and did not submit any competent evidence detailing either the nature or the amounts of the expenditures for which American seeks reimbursement.