

**City of New York v Insurance Co. of State of Pa.**

2009 NY Slip Op 31611(U)

July 14, 2009

Supreme Court, New York County

Docket Number: 400061/09

Judge: Eileen A. Rakower

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

PRESENT: RAKOWER  
Justice

PART \_\_\_\_\_

Index Number : 400061/2009  
CITY OF NEW YORK  
vs.  
INS. CO. OF THE STATE OF PENNSYLVANIA  
SEQUENCE NUMBER : # 001  
SUMMARY JUDGMENT

INDEX NO. 400061-09  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. #001  
MOTION CAL. NO. \_\_\_\_\_

were read on this motion to/for \_\_\_\_\_

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

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

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

PAPERS NUMBERED

1, 2  
3  
4, 5

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

**FILED**

JUL 20 2009

COUNTY CLERK'S OFFICE  
NEW YORK

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

Dated: 7/14/09

[Signature]  
HON. EILEEN A. RAKOWER

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: PART 5

-----X  
THE CITY OF NEW YORK,

Index No.  
400061/09

Plaintiff

-against-

INSURANCE COMPANY OF THE STATE OF  
PENNSYLVANIA,

Defendant.

**FILED**  
**JUL 20 2009**  
**COURT OF CLERKS**  
**CITY OF NEW YORK**

DECISION and  
ORDER

Mot. Seq.: 001

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HON. EILEEN A. RAKOWER:

Plaintiff City of New York ("City") brings this action seeking a judgment from this court declaring that Defendant Insurance Company of the State of Pennsylvania ("INSCOPA") has a duty to defend the City in a civil action titled *Charles F. McMorrow v. City of New York, et. al*, Index No. 00927/2008, in New York City Civil Court, Queens County ("the *McMorrow* action"), and to reimburse the City for all costs incurred by the City in its defense of the action.

Presently before the court are opposing motions by both the City and INSCOPA for summary judgment - the City moving for an order declaring INSCOPA obligated to defend the City, and INSCOPA cross-moving for an order declaring that INSCOPA is not obligated to defend the City.

After submitting affirmations in support with annexed exhibits and accompanying memoranda of law, the parties appeared before this court for oral argument on June 16, 2009. There, the dispute was narrowed to the issue of whether the City is able to prove that it properly mailed a copy of the letter tendering the defense of the *McMorrow* action on August 24, 2004 ("the 8/24 letter") to INSCOPA. The City concedes that it did not give INSCOPA timely notice under the terms of the insurance contract. However, if the City is able to prove that INSCOPA received the City's 8/24 letter, which was addressed to INSCOPA at 99 High Street, 31<sup>st</sup> Floor, Boston, Massachusetts, INSCOPA will have waived its objection by failing to disclaim coverage in a timely manner. It is undisputed that INSCOPA did not disclaim coverage until October 24, 2005 - three

days after the City sent a second letter tendering the defense of the *McMorrow* action, in light of INSCOPA's failure to respond to the 8/24 letter. This letter was addressed to AIG Claims Services Regional Director Derek S. Patten at 175 Water Street, 6<sup>th</sup> Floor, New York, New York. Based upon the foregoing, the court gave the parties leave to submit additional papers regarding the specific issue of whether the City properly tendered the defense of the *McMorrow* action to INSCOPA on August 24, 2004.

“[L]etters properly addressed, stamped and mailed are presumed received by the addressee even though the addressee denies receipt of the same” (*Allstate Ins. Co. v. Patrylo*, 144 A.D.2d 243, 246 [1st Dept. 1988]). A party may demonstrate its entitlement to this presumption by submitting evidence of a standard office practice or procedure for mailing documents in the regular course of business (*Burr v. Eveready Ins. Co.*, 253 A.D.2d 650, 651 [1st Dept. 1998]) (*citing Spangenberg v. Chaloupka*, 229 A.D.2d 482 [2nd Dept. 1996]).

The City has submitted a Supplemental Affirmation, wherein the City states that it was unable to locate a copy of the certified mail receipt for the 8/24 letter. However, the City claims that it can demonstrate that INSCOPA received the 8/24 letter based upon the practices of the Early Intervention Unit of the New York City Law Department's Tort Division (“EIU”), which sends out defense tender letters. The City includes in its Supplemental Affirmation as exhibits the Affidavit of EIU Claims Specialist David Tay, attesting to the EIU's mailing practices vis-a-vis defense tender letters; as well as an e-mail dated October 13, 2005 from AIG Claim Services Regional Director Derek S. Patten to Mr. Tay, wherein Mr. Patten requests that the City provide INSCOPA with a copy of the 8/24 letter, along with any proof of mailing. The Tay Affidavit states that, after a Claims Specialist at EIU determines that a lawsuit against the City falls within the purview of an existing insurance agreement:

All EIU tender letters to insurance carriers are sent certified mail, return receipt requested. Once approval is received from the Paralegal Supervisor, the Claim Specialist drafts the tender letter, envelope and the required United States Postal Service forms (Form 3800 for certified mail; Form 3811 for return receipt requested). The completed mailing is then placed in the EIU outbox. Periodically throughout the day, such outgoing mail is retrieved by Law Department mailroom

employees, who then deliver all outgoing mail for the Law Department's offices originating at 100 Church Street, New York, New York to the United States Postal Service facility located at 90 Church Street, New York, New York. Copies of the letter and the USPS forms are usually placed in the EIU folder for the case. I also generally make a second copy of the letter and forms for my personal files.

Although Tay does not have "any independent recollection of sending the August 24 letter," Tay concludes that he sent the 8/24 letter at the time of its drafting based upon the fact that he "[has] been following the same mailing procedures since 2000," and because he "[has] no reason to believe" that he failed to follow those procedures in this particular instance.

In its supplemental submission, INSCOPA asserts that it "has submitted proof that [INSCOPA] did not receive [the 8/24 letter] because (1) [INSCOPA] had no employees working at that address in Boston and (2) [INSCOPA] neither owned nor leased offices in that Boston building where the letter was sent." In support of its assertion, INSCOPA submits the Affidavits of William Hakius and Stephen Signore, which were submitted in INSCOPA's prior papers as well. Mr. Hakius is an employee of the Corporate Human Resources Payroll Department for American International Group ("AIG"). As such, Mr. Hakius states that he is familiar with the list of payroll locations for INSCOPA, and can attest to the fact that INSCOPA "did not have any payroll employees at 99 High Street, Boston, Massachusetts in the year 2004." Mr. Signore is Director of Lease Administration with AIG. As such, he states that he is "familiar with the landlords of the building located at 99 High Street... for whom [he] process[es] rent payments to on behalf of certain tenants." In his affidavit, Signore states that he "did not process rent payments on behalf of or make rent payments to [INSCOPA] for office space at 99 High Street...."

However, it is undisputed that INSCOPA is a subsidiary of AIG, and that AIG maintains offices at 99 High Street; and importantly, the Certificate of Insurance, completed and signed by an "Authorized Representative" of INSCOPA, identifies 99 High Street, 31<sup>st</sup> Floor as INSCOPA's address. In addition, the record contains copies of correspondence whereby AIG's Construction Risk Management Group identifies itself as "the duly authorized representatives of [INSCOPA]" (albeit from an address in New York). Although INSCOPA points to a provision of

its policy which states that "Notice... to any agent of ours in New York State... shall be considered to be notice to us," this language is permissive in nature, and does not necessarily preclude an otherwise valid mailing of requisite notice upon INSCOPA or an authorized agent *outside* the State of New York.

Accordingly, the court finds that the City has adequately set forth proof of mailing of the 8/24 letter tendering the defense of the *McMorrow* action to INSCOPA by way of Mr. Tay's affidavit attesting to EIB's customary business practice of tendering defense letters to the City's insurers; and that it is thus entitled to the presumption that the 8/24 letter was mailed on or around the time of its drafting. Conversely, the court finds that INSCOPA has failed to rebut this presumption. Although the City failed to submit the letter tendering the defense of the action to INSCOPA in a timely fashion, INSCOPA waived its right to disclaim coverage on the ground of timeliness due to its own failure to so disclaim within a reasonable time.

Wherefore, it is hereby

ORDERED that the City's motion for summary judgment is granted. INSCOPA shall assume the City's defense in the *McMorrow* action upon service of a copy of this order with notice of entry, and shall reimburse the City for all reasonable costs incurred by the City in its defense of the action from August 24, 2004 until the date of service of a copy of this order with notice of entry; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that the cross motion is denied.

This constitutes the decision and order of the court. All other relief requested is denied.

Dated: July 14, 2009

  
EILEEN A. RAKOWER, J.S.C.

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