Downey v 10 Realty Co., Inc.
2009 NY Slip Op 31951(U)
August 19, 2009
Supreme Court, New York County
Docket Number: 117110/04
Judge: Carol R. Edmead
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SCANNED ON 8/20/2009

[* 1]

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

PRESENT: HON. CAROL EDMEAD, Justice

PART 35

John Downey

- v -

10 Realty Co., Inc. et al

INDEX NO. 117110/04

MOTION DATE 6/19/09

MOTION SEQ. NO. 002

MOTION CAL. NO.

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

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

FILED AUG 20 2009 COUNTY CLERK'S OFFICE NEW YORK

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

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

The instant motion is decided in accordance with the annexed Memorandum Decision. It is hereby

ORDERED that third-party defendant Greater New York Insurance Company's motion to dismiss the third-party complaint is granted and the third-party complaint is severed and dismissed with costs and disbursements to third-party defendant as taxed by the Clerk of the Court; and it is further

ORDERED that counsel for third-party defendant Greater New York Insurance Company shall serve a copy of this order with notice of entry within twenty days of entry on all counsel; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: 8/19/09

J.S.C.
HON. CAROL EDMEAD

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

[* 2]

SUPREME COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK: PART 35

----------x

JOHN DOWNEY,

Plaintiff,

Index No.: 117110/04

-against-

DECISION

10 REALTY CO., INC.,

Defendant.

----------x

10 REALTY CO., INC.,

Third-Party Plaintiff,

-against-

GREATER NEW YORK MUTUAL INSURANCE COMPANY,

Third-Party Defendant.

----------x

FILED
AUG 20 2009
COUNTY CLERK'S OFFICE
NEW YORK

CAROL ROBINSON EDMEAD, J.:

Third-party defendant Greater New York Mutual Insurance Company (GNY) moves, pursuant to CPLR 3211 (a) (1), (3) and (7), to dismiss the third-party action against it, or, in the alternative, to sever the third-party insurance-coverage declaratory judgment action from the underlying negligence claim.

In 2000, GNY issued a general commercial liability insurance policy under which 10 Realty Co., Inc. (10 Realty) was a named insured. 10 Realty owns the building in which plaintiff is a tenant. The initial policy covered the period from July 1, 2000 to July 1, 2001, and was renewed to cover the period up to July

1, 2002.

Plaintiff, in his complaint, alleges that the injury occurred on October 1, 2002 (¶ 7), resulting from exposure to mold that had accumulated in his apartment since 1999. Plaintiff sued 10 Realty as his landlord, alleging negligence. Plaintiff first sought treatment for his alleged illness on October 2, 2002.

At his examination before trial, plaintiff testified that he began noticing various physical symptoms during the summer of 2002, starting around August of that year. Plaintiff also stated that in September, 2002, the building superintendent told him that the mold was caused by leaks from upstairs' bathroom pipes, which had been repaired. According to plaintiff's bill of particulars, the first time he sought medical treatment for the alleged injury was on October 2, 2002, and all of his related medical problems started after that date, continuing to the present.

After GNY initially denied coverage, plaintiff's attorney challenged that denial by alleging that the cause of plaintiff's injury was the constant exposure to mold, which dated from 1999, but the letter does not state that plaintiff suffered any injury. until October 1, 2002 (Motion Ex. H). However, this letter says that at his EBT plaintiff testified that he demonstrated some physical symptoms "weeks" before October 1, 2002, but fails to

specify the exact number of weeks. It is noted that the policy period ended approximately 13 weeks prior to the alleged date of injury, October 1, 2003.

10 Realty instituted the present third-party action against GNY, seeking defense and indemnification for the underlying negligence claim.

According to the Section I, Coverages, of the subject insurance policy, GNY agreed to defend and indemnify 10 Realty for bodily injury only if:

> "(1) The 'bodily injury' or 'property damage' is caused by an 'occurrence' that takes place in the 'coverage territory,' and
> (2) The 'bodily injury' or 'property damage' occurs during the policy period."

"Occurrence" is defined under the policy as:

> "an accident, including continuous or repeated exposure to substantially the same general harmful conditions."

GNY maintains that the injury occurred after July 1, 2002, the termination date of its policy that covered 10 Realty. 10 Realty asserts that the conditions that allegedly caused plaintiff's injuries existed during the coverage period, and that plaintiff's alleged injuries are the result of constant exposure to mold in the apartment.

DISCUSSION

CPLR 3211 (a), "Motion to dismiss cause of action," states that:

> "[a] party may move for judgment dismissing one or more

> causes of action asserted against him on the ground that: (1) a defense is founded upon documentary evidence; or
>
> ***
>
> (3) the party asserting the cause of action may has not legal capacity to sue[; or]
>
> ***
>
> (7) the pleading fails to state a cause of action ... ."

As stated in *Ladenberg Thalmann & Co., Inc. v Tim's Amusements, Inc.* (275 AD2d 243, 246 [1st Dept 2000]),

> "[T]he court's task is to determine only whether the facts as alleged, accepting them as true and according plaintiff every possible favorable inference, fit within any cognizable legal theory (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). Dismissal pursuant to CPLR 3211 (a) (1) is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law (*id.* at 88)."

To defeat a pre-answer motion to dismiss pursuant to CPLR 3211, the opposing party need only assert facts of an evidentiary nature which fit within any cognizable legal theory. *Bonnie & Co. Fashions, Inc. v Bankers Trust Co.*, 262 AD2d 188 (1st Dept 1999). Further, if any question of fact exists with respect to the meaning and intent of the contract in question, based on the documentary evidence supplied to the motion court, a dismissal pursuant to CPLR 3211 is precluded. *Khayyam v Doyle*, 231 AD2d 475 (1st Dept 1996).

GNY's motion to dismiss is granted.

In *Continental Casualty Co. v Employers Insurance Co. of Wausau* (60 AD3d 128 [1st Dept 2008]), a case involving an insurer's obligation to defend and indemnify an insured resulting

from claims of bodily injury arising from exposure to asbestos over time, the appellate court rejected the "exposure rule" in favor of the "injury-in-fact" test. Under the exposure rule, injury is deemed to occur during the period of exposure to a toxic substance, even though physical manifestations may not occur for years, or decades, later. Conversely,

> "an injury-in-fact test rests on when the injury, sickness, disease or disability actually began and, ... comports most closely with general principles of tort and insurance law."

Id. at 148.

The Court went on to say, quoting *American Home Products Corp. v Liberty Mutual Insurance Co.* (565 F Supp 1485, 1489 [SD NY 1983], *affd as mod* 748 F2d 760 [1984]):

> "although exposure to [mold] does not usually injure seriously enough to constitute an occurrence in the context of a liability insurance policy, a finder of fact might, nevertheless, find that a particular exposure or period of exposure contemporaneously caused a compensable injury."
>
> "[A] real but undiscovered injury proved in retrospect to have existed at the relevant time would establish coverage irrespective of the time the injury became manifest [internal quotation marks and citation omitted]."

Id. at 1499.

However, the Court concluded that the injury-in-fact test requires the allegedly injured person to demonstrate some actual damage or injury during the policy period. It is noted that the insurance policy provisions relevant to the issue at hand are the same in the instant case as they were in the policy scrutinized

by the Court in *Continental Casualty Co. v Employers Insurance Co. cf Wausau* (60 AD3d 128, *supra*).

In the case at bar, there is no evidence that plaintiff suffered any injury within the policy period that ended on July 1, 2002. In the complaint, plaintiff alleges that his injury occurred on October 1, 2002, and in his examination before trial he asserts that symptoms began during the summer preceding the date of injury, but he fails to specify an exact date during the summer in which those symptoms manifested themselves. In his examination before trial, plaintiff indicates that the summer period to which he alludes was only around August of 2002, and his estimate of when his symptoms first appeared is a general time-frame of "weeks" prior to October 1, 2002. At no time does plaintiff state or infer that his injuries occurred prior to July 1, 2002; plaintiff only asserts that his exposure to the mold occurred prior to July 1, 2002. As a consequence, the alleged occurrence took place outside of the coverage period, thereby relieving GNY from any obligation to defend or indemnify 10 Realty.

CONCLUSION

Based on the foregoing, it is hereby

ORDERED that third-party defendant Greater New York Insurance Company's motion to dismiss the third-party complaint is granted and the third-party complaint is severed and dismissed with costs and disbursements to third-party defendant as taxed by the Clerk of the Court; and it is further

ORDERED that counsel for third-party defendant Greater New York Insurance Company shall serve a copy of this order with notice of entry within twenty days of entry on all counsel; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: August 19, 2009

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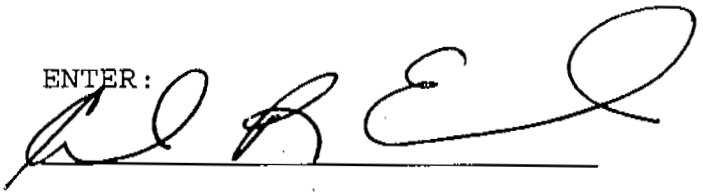

Carol Robinson Edmead, J.S.C.

HON. CAROL EDMEAD

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NEW YORK