

Time Warner Cable of N.Y. City v PRWT/CFG, LLC

2009 NY Slip Op 32224(U)

September 25, 2009

Supreme Court, New York County

Docket Number: 113570/06

Judge: Walter B. Tolub

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

PRESENT: **WALTER B. TOLUB**

PART 15

Index Number : 113570/2006
TIME WARNER OF NEW YORK CITY
vs
PRWT/CFG, LLC
Sequence Number : 001
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

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

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

IS DECIDED

IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

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: _____

2/21/09

WALTER B. TOLUB

G

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 15

----- X

TIME WARNER CABLE OF NEW YORK CITY,
a division of TIME WARNER ENTERTAINMENT
COMPANY, L.P.,

Plaintiff,

INDEX NO.
113570/06

-against-

PRWT/CFG, LLC, individually and as successor in
interest to TRINITY COMMUNICATIONS CORP., and
TRINITY COMMUNICATIONS CORP., individually,
and NEW HAMPSHIRE INSURANCE COMPANY,

UNFILED JUDGMENT
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appear in person at the Judgment Clerk's Desk (Room
141B).

WALTER B. TOLUB, J.:

Defendant New Hampshire Insurance Company ("New Hampshire") moves for an order pursuant to CPLR 3212 and 3001 granting it summary judgment declaring that it has no obligation to defend or indemnify plaintiff, Time Warner Cable of New York City ("Time Warner"), in the underlying personal injury action entitled *Denise Erwin v Consolidated Edison Company of New York, et al.*, index no. 121648/03. In the alternative, New Hampshire seeks a judgment declaring that its obligation to defend is co-primary with the insurance policy issued to Time Warner by Travelers Property Casualty ("Travelers").

Plaintiff Time Warner cross-moves for an order pursuant to CPLR 3212 and 3001 granting it summary judgment declaring that defendant New Hampshire had a duty to defend

* 3]
Time Warner in the underlying action.

This declaratory judgment action pertaining to insurance coverage stems from the underlying personal injury action brought against Con Edison, Time Warner, *et al.* in or about January 2004 by Denise Erwin ("Erwin"), who allegedly sustained personal injuries on January 3, 2003 when she was caused to trip and fall at a construction site at 48th Street and Lexington Avenue in Manhattan. Time Warner's defense in the Erwin action was provided by its carrier, Travelers. In November 2004 Time Warner brought a third-party action (index no. 591122/04) against its contractor, Trinity Communications Corp., Trinity's successor PRWT/CFG, LLC (collectively "Trinity"), and Trinity's insurance company, New Hampshire, seeking, *inter alia*, a judgment declaring that the New Hampshire policy afforded primary coverage for Time Warner in the Erwin action. By short form order dated May 31, 2006 Justice Shafer of this court granted a motion by a "movant [presumably New Hampshire]," not identified in the order, stating "[this motion] requesting an order severing the third party action against New Hampshire Insurance Company is granted without opposition."¹ On June 9, 2006, three days after the order was filed with the County Clerk, Justice Shafer amended it stating: "Movant is purchase[sic] new Index #, file an RJI and state related case, and serve a copy of this amended order with notice of entry on all parties." The new index number (this one, 113570/06) was purchased on September 21, 2006 and was filed along with a copy of Justice Shafer's amended order, a copy of the third-party summons in the Erwin action with the words "amended third-party" preceding the word "summons" scratched out but still listing Trinity as a defendant, and an intact copy of the third-

¹ Unless otherwise indicated, orders referred to herein have not been furnished by the parties, but rather obtained by this court from computerized Court and County Clerk's records for the Erwin action.

party complaint. An RJI listing the Erwin action as a related case was also purchased September 21, 2006. However, the RJI was not filed at that time and no judicial intervention (e.g., a preliminary conference) was sought. As a result, this matter, which was obviously related to the underlying action, was not assigned to Justice Shafer as it should have been (see Local Rules of Procedure I B. Related Cases).

Meanwhile, the third-party action was continued independently in the Erwin action before other Justices who made rulings which may have impacted this case. By bench order issued on March 29, 2007, another Justice of this court (Smith, J), directed Trinity to pay Time Warner's defense costs in the Erwin action (see Time Warner's exhibit A). The March 29 bench order was memorialized by short form order dated June 6, 2007 (Smith, J). At a hearing held before JHO Ira Gammerman on July 9, 2007, Erwin discontinued her claims against Time Warner (see New Hampshire's exhibit G). By order dated December 18, 2008, a third Justice of this court (James, J) denied Trinity's motion to vacate Justice Smith's June 6, 2007 order, on the ground, *inter alia*, that Trinity's motion was untimely, and denied Time Warner's cross-motion for a hearing on the issue of attorney's fees as moot. By order dated June 9, 2009 the court (James, J) granted Time Warner's motion for reargument to the extent of directing a hearing before a special referee on the issue of the reasonable value of attorney's fees incurred by Time Warner in defending the Erwin action.

This action, which had been moribund since its inception in September 2006, was revived by New Hampshire on December 30, 2008 when it served the instant motion for summary judgment and finally filed the RJI. New Hampshire now argues before this court that Time Warner was not entitled to coverage as an additional insured under the New Hampshire policy

because it was determined in the underlying action that Ms. Erwin's injuries did not arise out of Trinity's work. New Hampshire also argues that Time Warner's failure to give it timely notice of the underlying action precludes coverage in that action. New Hampshire alternatively argues that Travelers was obligated to provide co-insurance for Time Warner in the underlying action.

In opposition and in support of its cross-motion Time Warner makes the following arguments: New Hampshire's duty to defend its named insured, Trinity, and its additional insured, Time Warner, was triggered when Ms. Erwin's claim was made, regardless of its merit, because the claim invoked a reasonable possibility of coverage; New Hampshire is precluded under the principle of collateral estoppel from arguing that Ms. Erwin's claims against Time Warner did not arise from Trinity's work because the court in the underlying action (Smith, J) directed Trinity to reimburse Time Warner's legal fees pursuant to Time Warner's contract with Trinity;² and, Time Warner's notice to New Hampshire of Ms. Erwin's claim was timely.

It is well established that an insurer's duty to defend arises whenever the allegations of the complaint suggest a reasonable possibility of coverage (see, e.g. *BP Air Conditioning Corp. v One Beacon Ins. Group*, 8 NY3d 708, 714 [2007]). Ms. Erwin's complaint expressly alleges that Time Warner's negligence caused her accident (see New Hampshire's exhibit A). Coverage was thereby invoked. It matters not that Trinity and Time Warner were eventually exculpated (*id.*). New Hampshire's next argument involves timely notice. The New Hampshire policy provides that notice of an occurrence must be given "as soon as practicable" (see Time Warner's exhibit

² Given that New Hampshire was no longer a party to the third-party action when Justice Smith ordered Trinity to pay for Time Warner's defense in the Erwin action, it is questionable whether collateral estoppel applies here. However, it is not necessary to reach that issue to decide the motions at bar.

C, Section IV – Commercial General Liability Conditions, 2. a.). According to the uncontested affidavit of George Zaroogian, Traveler’s Claims Representative, Time Warner first learned of Erwin’s claims on January 13, 2004 when it received a copy of Erwin’s summons and complaint, which had been served on the Secretary of State on January 5, 2004 (see Zaroogian April 8, 2009 affidavit in support of Time Warner’s cross-motion, ¶¶ 7-8). An investigation was thereafter conducted to determine if Time Warner was performing work at the location where Erwin claimed her accident occurred (*id.* ¶¶ 10-11). This was followed by a further investigation to determine if the work was performed by one of Time Warner’s numerous contractors (*id.* ¶ 12). When it was determined that the work may have been performed by Trinity, Travelers sent its March 9, 2004 tender letter to Trinity and New Hampshire (*id.*, ¶ 14). Based on the above, the court finds that notice to New Hampshire was timely (*cf. Metropolitan Property and Cas. Ins. Co. v Mancuso*, 93 NY2d 487, 494 [1999]). The court finds further that the New Hampshire policy provided primary coverage for Time Warner in the underlying personal injury action. Time Warner’s construction contract with Trinity provides that Trinity will indemnify, defend, and hold harmless Time Warner for any losses, including reasonable attorneys’ fees, arising out of Trinity’s work (see New Hampshire’s exhibit J, § VIII A [1]). The contract provides further that Trinity will procure a comprehensive general liability insurance policy naming Time Warner as an additional insured and providing that the insurance obtained by Trinity “shall be primary and not contributing to or in excess of any insurance which may be obtained by [Time Warner] for its benefit” (*id.*, § VIII B[2][e]). The New Hampshire policy procured by Trinity provides in pertinent part that “[t]his insurance is primary except when b. below applies” (see New Hampshire’s exhibit K, § 4., Other Insurance: a. Primary Insurance). There is nothing in “b.

below" (Excess Insurance) which vitiates the immediately preceding quoted language since that subsection applies to fire damage, rental property, automobiles, and other additional insured coverage (*id.*).

Accordingly, it is hereby

ORDERED that New Hampshire's motion is denied in its entirety; and it is further

ORDERED that Time Warner's cross-motion is granted; and it is hereby

ADJUDGED and DECLARED that New Hampshire had a duty to defend Time Warner in the underlying personal injury action.

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

DATED: 9/25, 2009


WALTER B. TOLUB, JSC

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).