

**Delos Ins. Co. v STL Assoc., LLC**

2010 NY Slip Op 30157(U)

January 22, 2010

Supreme Court, New York County

Docket Number: 112559/008

Judge: Judith J. Gische

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

PRESENT: HON. JUDITH J. GISCHE

PART 10

**HON. JUDITH J. GISCHE**  
*Justice* J.S.C.

Delos Insurance Company  
F/K/A Sirius Plaintiff (s),  
American Ins. Co.  
STL ASSOC, LLC  
Defendant(s)

INDEX NO. 112559-08  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. 001  
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 \_\_\_\_\_

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH  
THE ACCOMPANYING MEMORANDUM DECISION.

**FILED**  
JAN 26 2010  
NEW YORK  
COUNTY CLERK'S OFFICE

Dated: JAN 22 2010

Hon. Judith J. Gische, J.S.C.  
**HON. JUDITH J. GISCHE**

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: IAS PART 10**

-----x  
Delos Insurance Company f/k/a  
Sirius America Insurance Company,

Plaintiff (s)

**-against-**

STL Associates, LLC,  
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**DECISION/ ORDER**  
Index No.: 112559-008  
Seq. No.: 001

**PRESENT:**  
Hon. Judith J. Gische  
J.S.C.

**FILED**  
JAN 26 2010  
COUNTY OF NEW YORK  
CLERK'S OFFICE

Recitation, as required by CPLR § 2219 [a] of the papers considered in the review of this (these) motion(s):

<b>Papers</b>	<b>Numbered</b>
Delos n/m (default j/m) w/ SGB affirm, JP affid, exhs .....	1
STL x/m (extend time to answer) w/JGO affirm, RJS affid, exhs .....	2
Delos reply and opp w/SGB affirm, exhs .....	3
STL reply w/JGO affirm, exhs .....	4
Delos reply to reply w/ATM affirm .....	5

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*Upon the foregoing papers, the decision and order of the court is as follows:*

**Gische J.;**

This is an action by plaintiff, an insurance company ("Delos") for a declaratory judgment that it does not have to provide defendant STL Associates LLC ("STL") with defense in connection with an underlying personal injury action against STL (Huertas v. STL Associates, LLC, Sup Ct, Bronx Co., Index No. 301073-2008) ("Huertas action").

Presently before the court is Delos' motion for entry of a default judgment against STL because STL's time to answer or appear in this action has expired. STL opposes the motion and has cross moved for an extension of time to answer (CPLR §

3012[d]). Delos opposes STL's motion in all respects.

### **Arguments and Discussion**

STL, plaintiff's insured, is a contractor who worked on a construction project at Bronx Lebanon Hospital in which Huertas was injured. Huertas was employed by Erin Mechanical ("Erin"), the company that STL hired as a subcontractor to do certain work on the project. Delos contends that STL's policy contains a contractual liability endorsement, also known as the "022 endorsement." In relevant part, the endorsement provides as follows:

"This insurance does not apply to "bodily injury" or "property damages" or "personal injury" and "advertising injury" arising out of work performed on behalf of the Named Insured [STL] by a contractor, subcontractor and/or sub-subcontractor of the Named Insured that provides labor, services and/or materials with respect to any construction, alteration, demolitions or repair of real property . . .

(ii) when the Named Insured's [STL] contractor, subcontractor and/or sub-subcontractor fails to have in force commercial general liability insurance including contractual liability coverage for the benefit of the contractor, subcontractor and/or sub-subcontractor, as well as the Named Insured [STL] for indemnification and/or contribution claims to the fullest extent permissible by applicable law. . .

B. In the event this insurance does not apply pursuant to Paragraph A (i) and (ii) above, without limitation this policy will not provide coverage for bodily injury to the employees, agents, or principals of the Named Insured's contractors, subcontractors and/or sub-sub contractors."

Thus under this endorsement whenever a Delos named insured retains a contractor, it must do so pursuant to a written contract with a hold harmless agreement so that if an injured plaintiff attempts to recover damages from the Delos named

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insured, Delos retains the right to pass on such liability to the subcontractor. The endorsement also requires that the named insured's subcontractor have a commercial general liability policy in force for the benefit of the Delos named insured.

Delos claims that STL did not make sure that Erin had the insurance it was required to have, and therefore, Delos is not obligated to provide STL with a defense. Delos contends that after Huertas brought his lawsuit, Delos provided STL with legal defense while its tender to Erin's insurer was processed. Erin's insurer, United States Liability Insurance Group ("USLIG") disclaimed coverage, however, for two reasons. First, that Erin's policy was not in effect on March 3, 2005, the day of the accident, but became effective thereafter. The other was that Erin's policy specifically excludes coverage for injuries to employees, contractors, subcontractors, employees of contractors, and employees of subcontractors ("employee exclusion" or "L500 exclusion").

According to Delos, STL's failure to comply with the requirements of the 022 policy endorsement, i.e. failure to make sure Erin had an effective policy providing contractual coverage for STL's benefit, supports the decision by Delos to disclaim coverage.

Delos contends that STL has neglected this action and STL has derived significant benefits from being represented in the Huertas' action. It is unrefuted that the Delos provided lawyer continues to represent STL in the personal injury action, and part of the relief sought by Delos is a declaration that it no longer has to pay for that lawyer to represent STL. Delos contends STL has known about this case for more than nine months (it was commenced in September 2008), but has not answered the

complaint or appeared. Delos seeks entry of a default judgment not only because STL has not appeared, but also because (according to Delos) STL has no defense to this action.

In support of its cross motion for an extension of time to answer the complaint STL argues it has excusable default and a meritorious defense. STL contends it relied on its insurance broker's ("Brazzano") representation that Erin did, in fact, have an effective policy in place for STL's benefit, based upon the Certificate of Insurance Erin produced. Randolph J. Silverstein ("Silverstein"), STL's principal, alleges that STL had a long standing (30 year) relationship with Brazzano and it relied upon his expertise in navigating any insurance issues, problems, disputes, and claims for them. Silverstein contends he thought everything was under control, but learned of this law suit by Delos for the first time in September 2009 and he did not know that coverage had been denied.

STL contends that it should be permitted to interpose a late answer so that this case can be decided on the merits and it can obtain discovery. STL seeks to depose anyone associated with or employed by USLIG about the denial of coverage to Erin. Specifically, STL wants to depose the person who wrote the letter on behalf of USLIG denying coverage, someone employed by Erin with knowledge of the facts, and the author of Delos' letter denying coverage to STL. STL also seeks a complete policy of Erin's policy with USLIG so it can independently ascertain its terms and conditions.

#### **Discussion**

To obtain relief from an order or judgment on the basis of excusable default, a party must provide a "reasonable excuse" and demonstrate the merit of the cause of

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action or defense (CPLR § 5015 [a] [1]). While the excuses provided by STL are imperfect, they are accepted as "reasonable," so that the court can move on to consider whether STL has a meritorious defense to plaintiff's claims.

At the outset, the court notes that Delos' decision to provide legal representation in the Huertas action should not be taken as any indication (as suggested by STL) that Delos either agreed it had to defend STL in that action. It is well settled law that an insurance company's duty to defend is broader than its duty to indemnify. Thus, an insurer will be called upon to provide a defense whenever the allegations of the complaint "suggest ... a reasonable possibility of coverage" (BP Air Conditioning Corp. v. One Beacon Ins. Group, 8 NY3d 708, 714 [2007]). Thus, Delos properly offered a defense to STL pending the resolution of the coverage issues presented in this declaratory judgment action.

USLIG has denied coverage because Erin's policy contains an employee exclusion (L500). Employee exclusion provisions similar to the one at bar have been held by various courts of this State to be unambiguous and accorded their plain and ordinary meaning ( Moleon v. Kreisler Borg Florman General Const. Co., Inc., 304 A.D.2d 337 [1<sup>st</sup> Dept 2003]; 720-730 Fort Washington Ave. Owners Corp. v. Utica First Ins. Co., \_\_ Misc.3d \_\_, 2009 WL 3645656 [Sup Ct Bronx Co. 2009]). The plain meaning of the employee exclusion in Erin's policy with USLIG bars coverage for the accident that is the subject of the underlying personal injury action. Taking this one step further, given the endorsement in STL's policy with Delos, requiring that any subcontractor hired by STL have an insurance policy containing a contractual liability endorsement, Delos is relieved of any responsibility to provide STL with a defense in the Huertas action.

In the context of this action for a declaratory judgment, STL's claims against USLIG and/or Erin are ineffective against Delos. Since Delos has proved USLIG's denial is based upon a policy containing an employee exclusion, Delos has met its burden on its motion for entry of a default judgment because STL does not have a meritorious defense.

Although there is a strong policy of deciding cases on the merits, and the court has the discretion to allow service of a late answer (Khadem v. Pan American World Airways, Inc., 151 A.D.2d 311 [1<sup>st</sup> Dept. 1989]), STL has not set forth any defense in its proposed verified answer that are effective against Delos' claims (Nason v. Fisher, 309 A.D.2d 526 [1<sup>st</sup> Dept 2003]; Bergida v. Wassen, 186 A.D.2d 522 [1<sup>st</sup> Dept 1992]). The existence of a certificate of insurance in STL's name does not defeat Delos' motion for a default judgment under the facts of this case because USLIG has denied coverage to Erin based upon its interpretation of Erin's policy with USLIG. It is the policy, not the certificate, that determines whether there is coverage (Mic Property and Cas. Ins. Corp. v. Custom Craftsman of Brooklyn, Inc., 269 A.D.2d 333 [1<sup>st</sup> Dept 2000]).

Given these circumstances, Delos has proved it is entitled to a default judgment on the complaint, which is a declaration that Delos is not obligated to defend or indemnify its named insured, STL, in the Huertas action. STL's cross motion, for permission to serve a late answer is denied.

Delos' motion for an order relieving the attorney it provided to STL in the Huertas' action is, however, denied without prejudice. Although Delos' is entitled to a declaration that it no longer has to provide (or pay for) a lawyer to represent STL in the Huertas' action, it is up to that law firm to bring a motion in the Huertas action to be

relieved.

**Conclusion**

Based upon the foregoing,

*IT IS HEREBY:*

**ORDERED** that plaintiff's motion for entry of a default judgment is granted; and it is further

**ORDERED** that defendants' cross motion is denied; and it is further

**ORDERED, ADJUDGED AND DECREED** that Delos is not obligated to defend or indemnify its named insured, STL, in the Huertas action; and it is further


**ORDERED** that Delos' motion for an order relieving the attorney it provided to STL in the Huertas' action is denied without prejudice to that law firm bringing a motion to be relieved in the personal injury action; and it is further

**ORDERED** that any relief requested that has not been addressed has nonetheless been considered and is hereby expressly denied; and it is further

**ORDERED** this constitutes the decision and order of the court.

Dated: New York, New York  
January 22, 2010

So Ordered:



Hon. Judith J. Gische, J.S.C.

**FILED**  
JAN 26 2010  
NEW YORK  
COUNTY CLERK'S OFFICE