

Merchants Mut. Ins. Co. v Rutgers Cas. Ins. Co.

2010 NY Slip Op 30506(U)

March 11, 2010

Supreme Court, Richmond County

Docket Number: 100256/09

Judge: Philip G. Minardo

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND**

-----x
MERCHANTS MUTUAL INSURANCE COMPANY,

Plaintiff,

-against-

RUTGERS CASUALTY INSURANCE COMPANY
and TANACHION ELECTRICAL CONTRACTING,
INC.,

Defendants.
-----x

DCM Part 6

Present:
Hon. Philip G. Minardo

**DECISION, ORDER
and JUDGMENT**

Index No. 100256/09
Motion No. 3436-001
4038-002

The following papers numbered 1 to 5 were submitted on the 28th day of January, 2010:

Papers	Numbered
Notice of Motion for Summary Judgment by Defendant Tanachion Electrical Contracting, Inc. with Supporting Papers and Exhibits (dated October 19, 2009).....	1
Notice of Cross Motion for Summary Judgment by Defendant Rutgers Casualty Insurance Company, with Supporting Papers, Exhibits and Memorandum of Law (dated December 1, 2009).....	2
Attorney’s Affirmation by Plaintiff Merchants Mutual Insurance Company with Exhibit (dated December 10, 2009).....	3
Reply Affirmation and Affirmation in Opposition by Defendant Tanachion Electrical Contracting, Inc., with Exhibits (dated January 21, 2010).....	4
Reply Affirmation by Defendant Rutgers Casualty Insurance Company (dated January 26, 2010).....	5

Upon the foregoing papers, the motion (Mot. Seq. No. 001) and the cross motion (Mot. Seq. No. 002) for summary judgment are disposed as follows.

This is an action for declaratory judgment initially commenced by plaintiff Merchants Mutual Insurance Company (hereinafter “Merchants”) compelling defendants to provide defense and indemnification in an underlying personal injury action. That action was commenced by a worker allegedly injured at a construction site owned by Merchants’ insured (not a party herein). Defendant

Tanachion Electrical Contracting, Inc. (hereinafter “Tanachion”) is a third-party defendant in that action. Defendant Rutgers Casualty Insurance Company (hereinafter “Rutgers”) has disclaimed coverage under its policy with Tanachion. Both defendants have cross-claimed against each other for declaratory judgment respecting coverage.

Merchants since has discontinued its action against the defendants. The sole issue remaining before the court is determination of defendants’ respective cross-claims.

The material facts are not in dispute.

Rutgers issued a commercial general liability insurance policy to Tanachion for the period from February 2, 2004 to February 2, 2005.

The policy contained the following endorsement:

**EXCLUSION OF INJURY TO EMPLOYEES, CONTRACTORS AND
EMPLOYEES OF CONTRACTORS**

This insurance does not apply to:

- I.** “Bodily injury” to any “employee” of any insured arising out of or in the course of:
 - a) Employment by any insured; or
 - b) Performing duties related to the conduct of any insured’s business;
- II.** “Bodily injury” to any contractor or any “employee” of any contractor arising out of or in the course of the rendering or performing services of any kind or nature whatsoever by such contractor or “employee” of such contractor for which any insured may become liable in any capacity; or
- III.** Any obligation of any insured to indemnify or contribute with another because of damages arising out of such “bodily injury”; or
- IV.** “Bodily injury” sustained by the spouse, child, parent brother or sister of any “employee” of any insured, or of a contractor, or any “employee” of any contractor as a consequence of any injury to any person as set forth in paragraph (I) and (II) of this endorsement.

This exclusion applies to all claims and suits by any person or organization for damages because of such “bodily injury”, including damages for care and loss of services.

In November, 2004, Tanachion was working as a sub-contracted electrician at a construction

site located at 1217 Hylan Blvd on Staten Island.

On November 3, 2004, Alan Andrade, an employee of Final Touch Glass and Mirror (a glazing contractor unrelated to Tanachion, and not a party herein) allegedly was injured during the course of his employment when he tripped over an electrical cable at the construction site. He commenced a personal injury action against the owner of the site and its general contractor on December 9, 2005 (*Andrade v. American Parkinson Disease Association, Inc* [Supreme Court, Richmond County Index No.103640/05]).

By letter dated March 9, 2007, Merchants, as the insurer of American Parkinson Disease Association, demanded coverage from Rutgers under the Tanachion policy.

Rutgers disclaimed coverage on March 13, 2007 on the grounds that (1) notice was untimely under Section IV of the policy; and (2) the underlying personal injury was excluded from coverage under the above policy endorsement. Tanachion requested reconsideration of the disclaimer on March 30, 2007, and Rutgers reaffirmed its disclaimer on April 5, 2007.

On April 17, 2007, the contractor commenced the third-party action against Tanachion seeking indemnification. Tanachion forwarded the third-party complaint to Rutgers on April 24th, again requesting that Rutgers defend and indemnify it in the action. Rutgers once again reaffirmed its disclaimer of coverage.

Merchants thereupon commenced the instant action. As noted, Merchants now has discontinued its action against defendants. Accordingly, the sole remaining issue involves the cross claims between the defendants as to coverage under the policy issued by Rutgers to Tanachion.

In moving for summary judgment on its cross claim to compel Rutgers to provide coverage, Tanachion alleges that it was not at the construction site on the date of the injury, and had no knowledge of any alleged connection between it and the injury until 2007. Accordingly, it argues that it notified Rutgers of the claim as soon as practicable after receiving notice. In addition, it alleges that it did not receive a copy of the endorsement upon which Rutgers relied in disclaiming coverage, and that, in any event, the endorsement is inapplicable.

In cross-moving for summary judgment, Defendant Rutgers relies on its initial disclaimer, arguing that it did not receive timely notice of the underlying incident and that the above-quoted endorsement specifically applies to the category of injury sustained by Andrade.

Notice by Insured.

Section IV of the Rutgers' insurance policy requires that the insured "see to it that we [Rutgers] are notified as soon as practicable of an 'occurrence' or an offense which may result in a claim."

In disclaiming coverage on March 13, 2007, Rutgers advised Tanachion that: "Our investigation into this occurrence reveals that although the claimant [Andrade] was injured on November 3, 2004, we were not notified of this matter until March 13, 2007," the date on which Merchants first demanded that Rutgers defend and indemnify Merchants' insured in the underlying personal injury action.

It is undisputed that Tanachion learned of an injury at the site on the day following its occurrence, although it apparently did not know the details of the accident, including how the injury occurred. Tanachion's principal testified at his deposition that he did not learn of the company's alleged involvement until March of 2007, when Rutgers disclaimed coverage.

An insurer's obligation to cover its insured's loss is not triggered unless the insured gives timely notice of loss in accordance with the terms of the insurance contract (*Security Mut. Ins. Co. of New York v. Acker-Fitzsimons Corp.*, 31 NY2d 436 [1972]). Where a liability insurance policy requires that notice of an occurrence be given "as soon as practicable," the notice must be provided "within a reasonable time under all the circumstances" (*Security Mut. Ins. Co. of New York v. Acker-Fitzsimons Corp.*, 31 NY2d at 441; *Great Canal Realty Corp. v. Seneca Ins. Co.*, 5 NY3d 742, 743 [2005]). "The duty to give notice arises when, from the information available relative to the accident, an insured could glean a reasonable possibility of the policy's involvement" (*Paramount Ins. Co. v. Rosedale Gardens*, 293 AD2d 235, 239-240 [1st Dept 2002]).

Here, without more, the mere knowledge that an accident had occurred at the site on a day

that Tanachion was not present did not give rise to a duty upon it to report the incident to its insurer. Rather, Tanachion's "knowledge of the incident at the time was not such as to lead it to believe that an accident [had] occurred for which [it] may or could have been liable. . . . [and] it would be unfair (under the provisions of the policy) to charge [it with such knowledge] when all it knew was simply that an injury occurred on [the] premises" (*875 Forest Ave. Corp. v. Aetna Cas. & Sur. Co.*, 37 AD2d 11, 13 [1st Dept.1971], *affd* 30 NY2d 726 [1972]).

Employee Exclusion Clause.

The duty of an insurer to defend its insured arises whenever the allegations within the four corners of the underlying complaint potentially give rise to a covered claim, or where the insurer "has actual knowledge of facts establishing a reasonable possibility of coverage" (*Fitzpatrick v. American Honda Motor Co.*, 78 NY2d 61, 65-67 [1991]). To be relieved of its duty to defend on the basis of a policy exclusion, the insurer bears the heavy burden of demonstrating that the allegations of the complaint cast the pleadings wholly within that exclusion, that the exclusion is clearly stated and subject to no other reasonable interpretation, and that there is no possible factual or legal basis on which the insurer may eventually be held obligated to indemnify the insured under any policy provision (*Continental Cas. Co. v. Rapid-American Corp.*, 80 NY2d 640, 652 [1993]).

Here, Rutgers relies on the employee exclusion provision it had drafted in order to disclaim coverage on the ground that Andrade was an "'employee' of any contractor" at the site and therefore was excluded from coverage. In essence, it argues that "as long as Andrade was a worker performing work at the site, coverage would not be available for his incident" (*Affirmation in Support of Rutgers' Cross Motion for Summary Judgment*, ¶19). When read in the context of the provision, this forced interpretation of its own language is overly expansive and does not relieve Rutgers of its obligation to defend and indemnify Tanachion in the underlying action.

Although Rutgers correctly points out that various courts have upheld the validity of the same or similar policy language in an appropriate case (*see e.g. Utica First Ins. Co. v. Santagata*, 66 AD3d 876 [2nd Dept. 2009]), it points to no decision at either the state or federal level that has upheld the

interpretation of the provision it proffers here.¹ Rather, the caselaw establishes that, given the plain meaning of the exclusion, its purpose is to relieve the insurer of liability for a claim arising out of bodily injury to an employee of a contractor in privity with the insured (*see* footnote 1 and cases cited therein; also see *e.g. Beach 20th Realty LLC v U.S. Liability Ins. Group*, NYLJ, September 24, 2009, p. 27, col. 1 [Sup Ct, Queens Co 2009] (decedent was an employee of the electrical contractor hired by the insured to perform work at the premises); *York Hunter Constr. Servs. v. Great Am. Custom Ins. Servs., Inc.*, 2008 WL206950 [Sup Ct, NY Co 2008] (injured worker was employed by a subcontractor of insured); *Alcon Bldrs. Group, Inc v U. S. Underwriters Ins Co*, 20 Misc3d 1115(A) [Sup.Ct, NY Co 2008] (injured worker was an employee of electrical subcontractor hired by insured).

Here, the record is devoid of any evidence, or even the suggestion, that Tanachion contracted with, or otherwise was in privity with, Final Touch Glass and Mirror, Andrade's employer. Therefore, Rutgers' reliance on the employee exclusion clause of the subject policy is without merit.

¹ For instance, Rutgers' counsel argues that "the Federal District Court reviewing a substantially similar Employee Exclusion in *U.S. Underwriters Insurance Company v. Congregation Kollel Tisereth Tzvi*, 2004 WL 2191051 (E.D.N.Y. 2004) found the language of the employee injury exclusion to be clear and unambiguous precluding coverage under the U.S. Underwriters Insurance Company's policy of insurance for bodily injury sustained by an employee of a contractor." However, counsel for Rutgers fails to disclose that in the *Congregation Kollel Tisereth Tzvi* case, the injured worker was an employee of a contractor of the insured.

Thus, while the *Congregation Kollel Tisereth Tzvi* Court found the language unambiguous, its holding actually is consistent with the position of the insured here concerning the scope of liability::

[The injured's] claim for personal injury is therefore excluded from coverage under plaintiff's policy since he incurred his alleged injuries in the course of his employment with a contractor of the Congregation, the insured entity (2004 WL 2191051 at 6).

To the extent Rutgers' counsel cites to similar cases that in fact involved injured employees of either the insured or those in privity with the insured, his argument is equally without merit (*see e.g. U.S. Underwriters Ins. Co v 614 Construction Corp*, 142 FSupp2d 491, 492 [SDNY 2001], in which the exclusionary clause specifically provided that coverage did not apply to "bodily injury to any employee of any insured, to any contractor hired or retained by any insured or to any employee of such contractor . . ."); *Mount Vernon Fire Ins Co, v William Monier Constr*, 1996 WL 447747 [SDNY 1996] (injured worker was an employee of an independent subcontractor of the insured).; *U.S. Underwriters Ins Co v Congregation B'nai Israel*, 900 FSupp 641 (EDNY 1995) a similarly-worded "independent subcontractor" exclusion clause applied to employee of insured's construction contractor).

The Court has considered the parties' remaining arguments and finds them without merit.

Accordingly, it is

ORDERED that the motion (Motion Seq. No. 001) of Tanachion Electrical Contracting, Inc for summary judgment is granted solely to the extent indicated below and otherwise is denied; and it is further

ORDERED that the cross motion (Motion Seq. No. 002) of Rutgers Casualty Insurance Company for summary judgment is denied in all respects; and it is further

ADJUDGED and DECLARED that Rutgers Casualty Insurance Company is obligated to defend and indemnify Tanachion Electric Contracting, Inc. in the underlying action, *Andrade v. American Parkinson Disease Association, Inc* [Supreme Court, Richmond County Index No.103640/05]; and it is further

ORDERED that the Clerk shall enter judgment accordingly.

ENTER

Dated: March 11, 2010

/s/ Philip G. Minardo
J.S.C.