

**Abele Tractor & Equip. Co., Inc. v Fireman's Fund
Ins. Co.**

2010 NY Slip Op 30518(U)

March 15, 2010

Supreme Court, Albany County

Docket Number: 5611/09

Judge: Joseph C. Teresi

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STATE OF NEW YORK
SUPREME COURT

COUNTY OF ALBANY

ABELE TRACTOR & EQUIPMENT CO., INC.,

Plaintiff,

-against-

FIREMAN'S FUND INSURANCE COMPANY,
ROSE & KIERNAN, INC., and C.D. PERRY
& SONS, INC.,

Defendants.

DECISION and ORDER
INDEX NO. 5611-09
RJI NO. 01-09-98924

Supreme Court Albany County All Purpose Term, February 10, 2010
Assigned to Justice Joseph C. Teresi

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TERESI, J.:

Plaintiff commenced this breach of contract/negligence action on June 29, 2009. Prior to answering, defendant Fireman's Fund Insurance Company (hereinafter "FFIC") moves to dismiss

Plaintiff's complaint against it based upon documentary evidence and a shortened statute of limitations, pursuant to CPLR §§3211(a)(1) and (5)¹. Plaintiff opposes the motion. Defendant C.D. Perry & Sons, Inc. (hereinafter "CD Perry") controverted certain allegations made by FFIC, but did not substantively oppose the motion. Because FFIC demonstrated its prima facie entitlement to dismissal, and no factual or legal issue was raised, Plaintiff's complaint against it is dismissed.

"Upon a motion to dismiss, the pleadings are to be liberally construed and the allegations are deemed true." (Ganon v. City of Saratoga Springs, 14 AD3d 845 [3d Dept. 2005]; Leon v. Martinez, 84 NY2d 83, 87-88 [1994]). A CPLR §3211(a)(1) motion to dismiss "is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law." (Erie Ins. Group v. National Grange Mut. Ins. Co., 63 AD3d 1412 [3d Dept. 2009], quoting Leon v Martinez, 84 NY2d 83, 88 [1994]).

Accepting the facts alleged in Plaintiff's complaint as true, Plaintiff rented an excavator to CD Perry, pursuant to a written agreement. The agreement required, in part, CD Perry to provide insurance coverage to Plaintiff for the excavator. Plaintiff was named as Additional Insured and Loss Payee in the certificate of insurance provided by defendant Rose & Kiernan, Inc., which evidenced coverage by FFIC². While in CD Perry's possession, "on or about June 28,

¹ This motion was previously decided by this Court's Decision and Order, dated December 31, 2009. While the motion was pending with this Court, the parties had agreed to extend the return date of the motion between themselves. This Court was not informed of such agreement and issued the prior Decision and Order. Upon request of all counsel and in an exercise of discretion, this Court is again considering the motion upon a full record.

² CD Perry's opposition focuses solely on disputing FFIC's allegation that Plaintiff was not an additional insured of its insurance policy with FFIC. Such opposition is irrelevant to this motion, however, because FFIC's motion assumes, as Plaintiff's complaint alleges, that Plaintiff was an additional insured and that its insurance policy with CD Perry is applicable to Plaintiff.

2006”, the excavator was severely damaged. Plaintiff submitted its claim to FFIC for such damage on November 15, 2006, which was denied by FFIC’s “letter dated February 12, 2007”.

Here, FFIC demonstrated that its insurance policy shortened the applicable statute of limitations. (See CPLR §201; Vinci v Westchester County Health Care Corp., 55 AD3d 599 [2d Dept, 2008]; New Medico Assoc. v Empire Blue Cross & Blue Shield, 249 A.D.2d 760 [3d Dept. 1998]; Wayne Drilling & Blasting, Inc. v. Felix Industries, Inc., 129 AD2d 633 [2d Dept. 1987]). FFIC submitted a certified copy of the insurance policy it issued to CD Perry, which in turn applies to Plaintiff’s claim as an additional insured. (Pecker Iron Works of N.Y. v Traveler’s Ins. Co., 99 NY2d 391 [2003][an additional insured enjoys the same protections as the named insured]). Such insurance policy includes a provision that states: “You [Plaintiff] agree not to sue us [FFIC] or involve us in another action proceeding after 2 years have past since you discovered the occurrence giving rise to such action. If the state law applicable to this coverage requires a different time period within which suit may be brought, this provision is amended to conform to such law.” The insurance policy unambiguously shortened the statute of limitations to two years from discovery of “the occurrence giving rise to [the] action”. Moreover, because CPLR §201 allows parties to shorten the statute of limitations by written agreement no “state law... requires a different time period within which suit may be brought.” (emphasis added).

While the insurance policy does not specifically define “occurrence” as it applies to Plaintiff’s claim, this action was commenced more than two years after any applicable “occurrence” date. As set forth in Plaintiff’s complaint and above, the excavator was damaged “on or about June 28, 2006”, Plaintiff discovered such damage by “November 15, 2006” and FFIC allegedly breached the policy by its denial of coverage “on or about February 12, 2007”.

The shortened statute of limitations arguably began to run, i.e. discovery of the “occurrence”, on any one of these three dates. (*compare* Blitman Const. Corp. v. Insurance Co. of North America, 66 NY2d 820 [1985] and Proc v. Home Ins. Co., 17 NY2d 239 [1966] with John J. Kassner & Co., Inc. v. City of New York, 46 NY2d 544 [1979]). However, regardless of which date is applied, Plaintiff failed to commence this action within the shortened statute of limitation period because it did not commence this action until June 29, 2009. Providing Plaintiff’s complaint with every possible favorable inference, it commenced this action more than two years and four months after the shortened two year statute of limitations began to run. As such, FFIC demonstrated its entitlement to dismissal as a matter of law.

In opposition, Plaintiff failed to demonstrate an issue of fact or law. Plaintiff neither alleged nor demonstrated “duress, fraud or misrepresentation.” (Wayne Drilling & Blasting, Inc., *supra* at 634). Nor did it demonstrate any act by FFIC that “lulled [it]... into sleeping on its rights under the insurance contract.” (Gilbert Frank Corp. v. Federal Ins. Co., 70 NY2d 966 [1988]). Rather, Plaintiff incorrectly alleges that its action against FFIC was “not ripe for review” until FFIC denied its claim. Such allegation disregards the plain language of the insurance contract which, as set forth above, provides that the statute of limitations accrues upon “the occurrence giving rise to [the] action.” (*see* Id. and Proc v. Home Ins. Co., *supra*). Moreover, such assertion wrongly relies upon the parties’ settlement negotiations to toll or waive the statute of limitations. “[C]ommunications or settlement negotiations between an insured and its insurer either before or after expiration of a limitations period contained in a policy is not, without more, sufficient to prove waiver or estoppel.” (Gilbert Frank Corp., *supra* at 968). Similarly, Plaintiff’s contention that the statute of limitations did not begin to run until FFIC provided Plaintiff with a copy of the

insurance policy is also unavailing. "Neither delivery nor actual possession by the insured is essential to the completion of a contract of insurance." (68A NY Jur2d Insurance §758). Here, Plaintiff was bound by the terms of the policy and set forth no factual proof that FFIC caused its failure to timely commence this action within the policy's shortened statute of limitations period.

Accordingly, FFIC's motion is granted and the complaint against it is dismissed.

This Decision and Order is being returned to the attorneys for FFIC. A copy of this Decision and Order and all other original papers submitted on this motion are being delivered to the Albany County Clerk for filing. The signing of this Decision and Order shall not constitute entry or filing under CPLR §2220. Counsel is not relieved from the applicable provision of that section respecting filing, entry and notice of entry.

So Ordered.

Dated: March 15, 2010
Albany, New York


Joseph C. Teresi, J.S.C.

PAPERS CONSIDERED:

1. Notice of Motion, dated November 25, 2009; Affirmation of Glenn Kramer, dated November 25, 2009 with attached Exhibits A-D.
2. Affirmation of James Barriere, dated December 15, 2009, with attached Exhibits A-B.
3. Affirmation of Linda Mandel Clemente, dated January 28, 2010, with attached Exhibits A-G.
4. Affirmation of Glenn Kramer, dated February 4, 2010 with attached Exhibit A.