

City of New York v Investors Ins. Co. of Am.
2010 NY Slip Op 30901(U)
April 12, 2010
Supreme Court, New York County
Docket Number: 401385/06
Judge: Barbara Jaffe
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: JAFFE BARBARA JAFFE
J.S.C.
Justice

PART 5

Index Number : 401385/2006
CITY OF NEW YORK
VS.
INVESTORS INSURANCE COMPANY
SEQUENCE NUMBER : 002
SUMMARY JUDGMENT
CAL 1+40

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

this motion to/for summary judgment

PAPERS NUMBERED
12
5
6,7

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

FILED

APR 19 2010

NEW YORK
COUNTY CLERK'S OFFICE

**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER**

Dated: 4/12/10
APR 12 2010

[Signature]
BARBARA JAFFE J.S.C.

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 : PART 5

-----X
THE CITY OF NEW YORK,

Index No. 401385/06

Plaintiff,

Motion subm.: 3/9/10

-against-

Motion seq. nos.: ,002

Cal. nos.: 40

INVESTORS INSURANCE COMPANY OF
AMERICA,

Defendant.

FILED
APR 19 2010
NEW YORK
COUNTY CLERK'S OFFICE

-----X
BARBARA JAFFE, JSC:

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212-788-

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By notice of motion dated November 9, 2009, plaintiff moves pursuant to CPLR 3212 for an order granting it summary judgment and declaring that defendant must defend it in an action entitled *Eric Brown v The City of New York, et al.* Defendant opposes the motion and, by notice of motion dated November 10, 2009, moves pursuant to CPLR 3212 for an order summarily dismissing the complaint, and pursuant to CPLR 3001 for an order declaring that it has no duty to defend or indemnify plaintiff in *Brown*.

I. BACKGROUND

In or about October 1998, Trocom Construction Corp. (Trocom) entered into a contract with plaintiff for the construction of a path along the Hudson River. (Affirmation of William H. Miller, ACC, dated Nov. 9, 2009 [Miller Aff.], Exh. C). The contract required Trocom to obtain a commercial general liability insurance policy naming plaintiff as an additional insured.

Trocom purchased the policy from defendant in April 1999. (*Id.*, Exhs. C, D). Section IV of the policy contains the following provisions:

2. Duties in the Event of Occurrence, Offense, Claim or Suit.

- a. You must see to it that we are notified as soon as practicable of an "occurrence" or an offense which may result in a claim . . .
- b. If a claim is made or "suit" is brought against any insured, you must:
 - (1) Immediately record the specifics of the claim or "suit" and the date received; and
 - (2) Notify us as soon as practicable.

You must see to it that we receive written notice of the claim or "suit" as soon as a practicable.

- c. You and any other involved insured must:
 - (1) Immediately send us copies of any demands, notices, summonses or legal papers received in connection with the claim or "suit" . . .

(*Id.*, Exh. D).

On or about November 6, 1999, a car collided with another car and went into a guardrail and/or compressor on a roadway where Trocom was performing construction work. The driver of one of the cars died and his passenger, Eric Brown, was allegedly injured. (*Id.*, Exh. G).

On February 1, 2000, Brown served a notice of claim on plaintiff, and on February 3, 2000, he served it on plaintiff's Law Department. (Affirmation of Aaron Brouk, Esq., dated Nov. 10, 2009 [Brouk Aff.], Exh. M). On or about January 30, 2001, Brown served plaintiff with a summons and complaint. Trocom was not named as a defendant. (Miller Aff., Exh. G).

By letter dated March 9, 2001, plaintiff's Law Department notified defendant of its receipt of the *Brown* pleadings and demanded that defendant defend it pursuant to the policy. (*Id.*, Exh. I). By letter dated March 27, 2001, defendant disclaimed coverage due to plaintiff's

late notice of Brown's claim, observing that plaintiff had been served with Brown's notice of claim on February 3, 2000. (*Id.*, Exh. J).

On or about October 31, 2002, the *Brown* complaint was amended to add Trocom as a defendant. (*Id.*, Exh. H). On or about December 13, 2002, Trocom's broker sent defendant the amended complaint. (Brouk Aff., Exh. P). Defendant is defending Trocom in *Brown*. (Brouk Aff.)

On or about April 12, 2006, plaintiff commenced the instant action against defendant, seeking a declaration that defendant has a duty to defend it in *Brown*, along with recovery of its defense costs. On or about May 23, 2006, defendant served its answer. (Brouk Aff., Exhs. A, B). In June 2006, plaintiff served defendant with an amended complaint, and on June 5, 2006, defendant served its answer to the amended complaint. (*Id.*, Exhs. C, D).

II. CONTENTIONS

Plaintiff alleges that the policy requires defendant to defend it in *Brown*, and that defendant's reason for disclaiming coverage is meritless. (Plaintiff's Memorandum of Law, dated Nov. 9, 2009 [Nov. 9 Memo.]). Specifically, it asserts that Section IV confers different obligations on the named insured (Trocom) and the additional insured (plaintiff), and that subsections 2(a) and (b) require only Trocom to notify defendant of an occurrence or offense which may result in a claim and of a claim or lawsuit, whereas subsection 2© requires both Trocom and plaintiff to send defendant copies of any notice or legal papers received in connection with the claim or lawsuit. This distinction between the named insured and the additional insured, plaintiff maintains, is recognized in *City of New York v Continental Cas. Co.*, 27 AD3d 28 (1st Dept 2005). Plaintiff thus denies any duty to notify defendant of Brown's claim

until it was served with process, and claims that its notice was timely. (Nov. 9 Memo.).

In support of its motion and in opposition to plaintiff's motion, defendant argues that plaintiff had an implied obligation to notify it of Brown's notice of claim, that having provided notice 13 months after receiving it, coverage under the policy was vitiated as a matter of law, and that it is entitled to summary dismissal of the action. Defendant distinguishes *Continental Cas. Co.* on the ground that the issue of whether an additional insured has a duty to notify the insurer was not before the court. (Brouk Aff.).

In opposition to defendant's motion, plaintiff asserts that having agreed to defend Trocom in *Brown*, defendant must also defend it, noting that its delay in notifying defendant of the *Brown* action did not much exceed Trocom's. (Plaintiff's Memorandum of Law, dated Feb. 5, 2010 [Feb. 5 Memo.]).

Defendant argues in opposition to plaintiff's motion that plaintiff failed to establish its right to reimbursement to defense costs absent an evidentiary hearing. (Affirmation of Aaron Brouk, Esq., dated Feb. 5, 2010).

In reply, plaintiff denies any implied obligation to notify defendant, absent adverse interests. (Plaintiff's Reply Memorandum of Law, dated Feb. 18, 2010 [Reply Memo.]).

In its reply, defendant contends that it properly distinguished between Trocom and plaintiff as plaintiff received Brown's notice of claim in February 2000 while Trocom had no notice of Brown's claim until it was served with Brown's amended complaint in October 2002. Thus, Trocom delayed only two months, while plaintiff delayed 13 months. (Reply Affirmation, dated Feb. 18, 2010).

III. ANALYSIS

It is well-settled that when an insurance policy requires an insured to provide “notice of a claim or ‘suit’ as soon as practicable,” the notice must be provided “within a reasonable time in view of all the facts and circumstances.” (*Security Mut. Ins. Co. of New York v Acker-Fitzsimons Corp.*, 31 NY2d 436, 440-441 [1972]; *Pile Foundation Constr. Co., Inc. v Investors Ins. Co. of Am.*, 2 AD3d 611 [2d Dept 2003]). Notice is a condition precedent to coverage and absent a valid excuse, “a failure to satisfy the notice requirement vitiates the [insurance] policy.” (*Security Mut. Ins. Co. of New York*, 31 NY2d at 440).

When a party fails to offer an excuse for its delay in providing notice to an insurer, the court must determine whether its delay was reasonable. (*Travelers Ins. Co. v Volmar Constr. Co., Inc.*, 300 AD2d 40, 43 [1st Dept 2002]). Delays of six months to one year have been held unreasonable. (*Anglero v George Units, LLC*, 61 AD3d 564 [1st Dept 2009] [one-year delay unreasonable as matter of law]; *2130 Williamsbridge Corp. v Interstate Indemn. Co.*, 55 AD3d 371 [1st Dept 2008] [more than seven-month delay unreasonable]; *Romeo v Malta*, 55 AD3d 330 [1st Dept 2008] [nine-month delay unreasonable]; *Bd. of Hudson River-Black River Regulating Dist. v Praetorian Ins. Co.*, 56 AD3d 929 [3d Dept 2008] [in absence of reasonable excuse, one-year delay unreasonable as matter of law]; *The Doe Fund, Inc. v Royal Indemn. Co.*, 34 AD3d 399 [1st Dept 2006] [absent valid excuse, eight-month delay in providing notice vitiated policy]; *U.S. Pack Network Corp. v Travelers Prop. Cas.*, 23 AD3d 299 [1st Dept 2005] [absent excuse or mitigating circumstances, six- and 15-month delays unreasonable]).

An additional insured also has a duty to provide timely notice of a claim to the insurer. “[E]ven if the insurance policy were construed as specifying that only the named insured [] was

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required to provide notice," an implied duty arises. (*Structure Tone, Inc. v Burgess Steel Prods. Corp.*, 249 AD2d 144, 145 [1st Dept 1998] [citations omitted]; *23-08-18 Jackson Realty Assocs. v Nationwide Mut. Ins. Co.*, 53 AD3d 541 [2d Dept 2008]; *City of New York v St. Paul Fire and Marine Ins. Co.*, 21 AD3d 978 [2d Dept 2005]; *Judlau Contracting, Inc. v Westchester Fire Ins. Co.*, 24 Misc 3d 1228[A], 2009 NY Slip Op 51659[U] [Sup Ct, New York County 2009]; *Illinois Ntl. Ins. Co. v Illinois Union Ins. Co.*, 2008 WL 5197028, 2008 NY Slip Op 33225[U] [Sup Ct, New York County 2008]).

Plaintiff's reliance on *Continental Cas. Co.* is misplaced as the sole issue before the court was whether the defendant-insurer properly disclaimed coverage based on the plaintiff's failure to forward its pleadings immediately. (27 AD3d at 30). The duty of an additional insured to provide timely notice was not before the court and to the extent that it found that the notice given by the named insured in that case was sufficient to constitute notice by the additional insured, that finding constitutes dicta. (*Accord Time Warner Cable of New York City v Hylan Datacom & Elec., Inc.*, 2007 WL 2176562, 2007 NY Slip Op 30936[U] [Sup Ct, New York County 2007]).

However, even though an additional insured has an independent obligation to provide notice, notice provided by a named insured may be deemed notice by an additional insured when their interests are not adverse. (*Eg Travelers Ins. Co.*, 300 AD2d at 43; *23-08-18 Jackson Realty Assocs.*, 53 AD3d at 542-553). Here, when Trocom provided notice to defendant of Brown's amended complaint, plaintiff's and defendant's interests were adverse as Trocom had recently been added as a co-defendant in *Brown*. (*Compare 1700 Broadway Co. v Greater New York Mut. Ins. Co.*, 54 AD3d 593 [1st Dept 2008] [primary and additional insureds' interests adverse from moment complaint named them as co-defendants], *with Ambrosio v Newburgh Enlarged City*

Sch. Dist., 5 AD3d 410 [2d Dept 2004] [insureds' interests not adverse as named insured not named as defendant in complaint, nor impleaded in action, against additional insured], and *New York Telephone Co. v Travelers Cas. and Sur. Co. of Am.*, 280 AD2d 268 [1st Dept 2001] [as named insured's interests not adverse to additional insured's interests at time named insured forwarded complaint to insurer, its notice deemed timely given by additional insured]).

Thus, given plaintiff's independent obligation to provide timely notice to defendant, and as Trocom's notice may not be deemed to have been given by plaintiff, it must be determined whether plaintiff's notice was timely. It is undisputed that although plaintiff received Brown's notice of claim in February 2000, it did not notify defendant of the claim until March 9, 2001, 13 months later; and plaintiff offers no explanation for the delay beyond its meritless assertion that it had no duty to give notice. As similar delays have been found unreasonable, plaintiff's 13-month delay was unreasonable as a matter of law, and thus, defendant properly disclaimed coverage.

Finally, plaintiff cites no authority for the proposition that defendant may not provide coverage to Trocom without also providing coverage to plaintiff. Rather, several courts have held that an insurer properly disclaimed coverage to an additional insured based on untimely notice notwithstanding the insurer's agreement to defend the named insured. (*See eg 23-08-18 Jackson Realty Assocs.*, 53 AD3d at 542; *Judlau Contracting, Inc.*, 24 Misc 3d at *3).

Moreover, it is undisputed that Trocom received notice of Brown's claim in September 2001 when it was served with the amended pleading and sent the pleading to defendant less than two months later. By contrast, plaintiff received notice of Brown's claim in February 2000. Consequently, defendant has a sound basis for providing a defense for Trocom and not for plaintiff.

IV. CONCLUSION

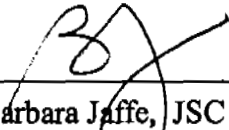
Accordingly, it is hereby

ORDERED, that plaintiff's motion for an order granting it summary judgment is denied;
it is further

ORDERED, that defendant's motion for an order granting it summary judgment is granted, and the complaint is dismissed with costs and disbursements to defendant as taxed by the clerk of the court upon the submission of an appropriate bill of costs; and it is further

ORDERED, that the clerk of the court is directed to enter judgment accordingly.

This constitutes the decision and order of the court.



Barbara Jaffe, JSC
BARBARA JAFFE
J.S.C.

DATED: April 12, 2010
New York, New York

APR 12 2010

FILED
APR 19 2010
NEW YORK
COUNTY CLERK'S OFFICE