

State of New York v Titan Roofing, Inc.

2010 NY Slip Op 31133(U)

May 12, 2010

Supreme Court, Albany County

Docket Number: 6880-09

Judge: J. Teresi

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STATE OF NEW YORK
SUPREME COURT
THE STATE OF NEW YORK,

COUNTY OF ALBANY

Plaintiff,

-against-

DECISION and ORDER
INDEX NO. 6880-09
RJI NO. 01-09-0998375

TITAN ROOFING, INC. and
CONTINENTAL CASUALTY COMPANY,

Defendants.

Supreme Court Albany County All Purpose Term, April 21, 2010
Assigned to Justice Joseph C. Teresi

APPEARANCES:

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TERESI, J.:

Plaintiff commenced this declaratory judgment action seeking defense and indemnification in an action Joseph Gaschel (hereinafter "Gaschel") brought against it. Mr. Gaschel's action seeks damages for the personal injuries he allegedly sustained, on September 22, 2005, while working on a rehabilitation project involving The State Capitol building's roof. Titan Roofing, Inc. (hereinafter "Titan") was the general contractor for such roof rehabilitation

project, which provided Plaintiff with insurance coverage issued by Continental Casualty Company (hereinafter “Continental”). Plaintiff’s claim against Titan is premised upon the parties’ contract, while its claim against Continental is based upon its policy of insurance.

Prior to this motion being made, Plaintiff and Titan settled. Unaffected by such settlement is Plaintiff’s claim against Continental and the co-defendants’ cross claims against each other. Both Plaintiff and Titan also entered a Consent to Change Attorneys, whereby both are presently represent by the same attorneys.

Continental now moves for summary judgement dismissing Plaintiff’s claim and Titan’s cross-claim, while also objecting to Plaintiff and Titan’s representation by the same attorneys. Continental’s motion is opposed by Plaintiff and Titan, and Plaintiff moves for summary judgment granting its claim against Continental. Continental opposes Plaintiff’s motion. Preliminarily, on this record Continental failed to demonstrate the impropriety of both Plaintiff and Titan being represented by the same attorneys. However, because Continental did demonstrate its entitlement to judgment as a matter of law, and no issue of fact was raised, its motion for summary judgment against Plaintiff is granted.

Considering first the issue of Plaintiff and Titan being represented by the same attorneys, “[t]he right to choose one's own counsel is a valued right [and]... restriction of that right must be carefully scrutinized.” (Advent Associates, LLC v. Vogt Family Inv. Partners, L.P., 56 AD3d 1023 [3d Dept. 2008]). Continental’s objection is premised upon the alleged conflict that arises when considering the priorities between Continental and Titan’s defense and indemnification obligations to Plaintiff. Continental failed to demonstrate, however, that this dual representation requires their attorneys to “represent[] differing interests.” (Rules of Prof. Con., Rule 1.7).

Rather, on this record, it appears that the State's interest in obtaining coverage is satisfied whether provided by Continental or Titan, and Titan's priority dispute does not implicate the State. Nor does Continental demonstrate the viability of its "contractual interpretation" argument in future litigation. Accordingly, Plaintiff's and Titan's representation by the same attorneys will not be disturbed.

Turning next to Continental's summary judgment motion, it demonstrated its entitlement to judgment as a matter of law.

"Summary judgment is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue." (Napierski v. Finn, 229 AD2d 869, 870 [3d Dept. 1996]). "[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law." (Smalls v. AJI Industries, Inc., 10 NY3d 733 [2008] quoting Alvarez v. Prospect Hospital, 68 NY2d 320 [1986]). If the movant establishes their right to judgment as a matter of law, the burden then shifts to the opponent of the motion to establish by admissible proof, the existence of genuine issues of fact. (Zuckerman v. City of New York, 49 NY2d 557 [1980]).

"Where a policy of liability insurance requires that notice of an occurrence be given 'as soon as practicable,' such notice must be accorded the carrier within a reasonable period of time." (Great Canal Realty Corp. v. Seneca Ins. Co., Inc., 5 NY3d 742, 743 [2005]). Likewise, "an insurer that does not receive timely notice [of a lawsuit] in accordance with a policy provision may disclaim coverage, whether it is prejudiced by the delay or not." (Briggs Ave. LLC v. Insurance Corp. of Hannover, 11 NY3d 377 [2008], Argo Corp. v. Greater New York Mut. Ins. Co., 4 NY3d 332 [2005]).

Here, Continental's policy required Plaintiff to provide notice of both Gaschel's occurrence and his lawsuit. The policy specifically states that Plaintiff must notify Continental "as soon as practicable of an 'occurrence' which may result in a claim." It further requires notification "[i]f a claim is made or a suit is brought... as soon as practicable." The policy's "as soon as practicable" language "merely requires that notice be given within a reasonable time under all the circumstances." (Security Mut. Ins. Co. of New York v. Acker-Fitzsimons Corp., 31 NY2d 436, 441 [1972]).

First, Plaintiff's notice of Gaschel's "occurrence" does not satisfy its burden of notifying Continental of Gaschel's lawsuit. Gaschel was injured on September 22, 2005 and Plaintiff notified Continental of Gaschel's occurrence on May 3, 2006. Such notice of occurrence did not satisfy Plaintiff's "separate obligation to provide prompt notice of [Gaschel's] lawsuit." (Liberty Moving & Storage Co., Inc. v. Westport Ins. Corp., 55 AD3d 1014 [3d Dept. 2008]).

Similarly, Plaintiff's defective notice of "lawsuit" failed to satisfy its notice requirement. On October 4, 2007 and November 15, 2007, Plaintiff provided Continental with a notice of lawsuit relative to Gaschel's claims. Although Plaintiff provided this notice of lawsuit, due to Gaschel's procedural missteps, at the time such notices were made Gaschel had not yet commenced a suit against Plaintiff. By letter dated June 10, 2008, Continental informed Plaintiff of Gaschel's failure to commence a suit. Continental's June 10, 2008 letter specifically states that: "[s]ince there is no action pending in the Court of Claims at this time against [Plaintiff], Continental... will take no action in this matter... In the event additional information becomes available, we request that you send it to our attention..." Because no suit was actually pending when Plaintiff notified Continental of Gaschel's lawsuit and Continental specifically requested

further information, if any became available, Plaintiff's purported notice of lawsuit was a nullity and failed to sustain its burden of notifying Continental of Gaschel's lawsuit.

Gaschel's suit against Plaintiff was not actually commenced until he filed and served his claim, on September 8, 2008 and September 10, 2008 respectively. (Gaschel v. State, Ct. of Claims, December 15, 2008 Collins, JCC, Claim No. 115789 [hereinafter "Court of Claims Order"], Court of Claims Act §11[a]). Although Continental had previously requested additional information when it became available, Plaintiff did not immediately notify Continental of such commencement. Rather, Plaintiff answered the complaint, opposed Gaschel's motion for leave to file and serve a late notice of claim *nunc pro tunc*, and received Gaschel's bill of Particulars. Then, after ten months of participating in the Gaschel litigation, Plaintiff notified Continental of Gaschel's lawsuit by letter dated July 8, 2009. Considering all of the circumstances, including Plaintiff's participation in the Gaschel litigation, Continental's unanswered request for more information and the extensive delay, Plaintiff's notice of Gaschel's lawsuit was not given within a reasonable time. (Security Mut. Ins. Co. of New York, supra, Canal Realty Corp., supra [four month delay was unreasonable], Liberty Moving & Storage Co., Inc., supra [eleven month delay was unreasonable]). Because, "absent a valid excuse, a failure to satisfy the notice requirement vitiates the policy" Continental demonstrated its entitlement to judgment as a matter of law. (Security Mut. Ins. Co. of New York, supra, Briggs Ave. LLC, supra).

In opposition, Plaintiff raised no issue of fact. Plaintiff offers no excuse for its delay in notifying Continental of Gaschel's lawsuit. Instead, it relies on its irrelevant notification of occurrence and its invalid notice of lawsuit, to argue that Continental's disclaimer was untimely. Such reliance, however, is misplaced because the "timeliness of [Continental's] disclaimer is

measured from the point in time when [it] first learn[ed] of the grounds for disclaimer.” (First Fin. Ins. Co. v. Jetco Contr. Corp., 1 NY3d 64, 69 [2003][emphasis added] quoting Matter of Allcity Ins. Co. [Jimenez], 78 NY2d 1054, 1056 [1991]). Continental did not learn of the ground for disclaimer, i.e. late notice of lawsuit, until Plaintiff’s letter of July 8, 2009. Thereafter, Continental disclaimed coverage only nine days later, on July 17, 2009. Such disclaimer was not untimely. (See U.S. Underwriters Ins. Co. v. Carson, 49 AD3d 1061 [3d Dept. 2008], ALIB, Inc. Atlantic Cas. Ins. Co., 52 AD3d 419 [3d Dept. 2008], Smith v. Gen. Accident Ins. Co., 295 AD2d 738 [3d Dept. 2002]).

Accordingly, because Continental demonstrated its entitlement to judgment as a matter of law and Plaintiff failed to raise an issue of fact, Continental’s motion for summary judgment dismissing the complaint is granted. Closely related, Continental’s motion for summary judgment dismissing Titan’s cross claim is also granted¹ and Plaintiff’s motion is denied. To the extent not specifically addressed above, the parties’ remaining contentions have been examined and found to be lacking in merit.

This Decision and Order is being returned to the attorneys for Continental. 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

¹ Titan’s cross claim seeks a declaration that Continental’s policy provided indemnification and defense to Plaintiff on Gaschel’s claim and that it “provide[s] preliminary coverage.” As Continental properly disclaimed coverage, as per the above, Titan’s cross claim necessarily fails.

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: May 12, 2010
Albany, New York


JOSEPH C. TERESI, J.S.C.

PAPERS CONSIDERED:

1. Notice of Motion, dated February 3, 2010, Affirmation of Marian Hertz, dated February 3, 2010, with attached Exhibits 1-A5.
2. Notice of Cross-Motion, dated February 22, 2010, Affirmation of F. Douglas Novonty, dated February 22, 2010, with attached Exhibit A-E, Affidavit of Joan Matalavage, dated February 22, 2010.
3. Reply of Marian Hertz, dated March 8, 2010, with attached Exhibits A-I.
4. Affirmation of F. Douglas Novonty, dated April 15, 2010, with attached unnumbered exhibits.
5. Affirmation of Marian Hertz, dated April 20, 2010, with attached Exhibits A-D.