

**American Empire Surplus Lines Ins. Co. v
Merchants Mut. Ins. Co.**

2010 NY Slip Op 32766(U)

October 4, 2010

Supreme Court, New York County

Docket Number: 103656/10

Judge: Joan M. Kenney

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

PRESENT: _____

PART 8

Index Number : 103565/2010
AMERICAN EMPIRE SURPLUS
vs
MERCHANTS MUTUAL INSURANCE
Sequence Number : 001
SUMMARY JUDGMENT

INDEX NO. 103565/10
MOTION DATE 9/20/10
MOTION SEQ. NO. 001
MOTION CAL. NO. _____

The following papers, numbered 1 to 18 were read on this motion to Summary judgment

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits <u>+ Memo of Law</u>	<u>1-11</u>
Answering Affidavits — Exhibits _____	<u>12, 13</u>
Replying Affidavits <u>+ Memo of Law</u>	<u>14-18</u>

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

MOTION IS DECIDED IN ACCORDANCE WITH THE ATTACHED MEMORANDUM DECISION

FILED
OCT 06 2010
NEW YORK COUNTY CLERK'S OFFICE

Dated: October 1, 2010

J. M. Kennedy
J.S.C.
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE
 SUBMIT ORDER/JUDG. SETTLE ORDER /JUDG.

SUPREME COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK: PART 8

-----x

AMERICAN EMPIRE SURPLUS LINES
INSURANCE COMPANY,

Plaintiff,

-against-

DECISION & ORDER
Index No.: 103656/10
Motion Seq.: 001

MERCHANTS MUTUAL INSURANCE COMPANY,

Defendant.

JOAN M. KENNEY, J.:

Papers considered in review of this motion to remove and cross motion to dismiss:

FILED
OCT 06 2010
NEW YORK
COUNTY CLERK'S OFFICE

Papers	Numbered
Notice of Motion, Affirmation, Exhibits & Memo of Law	1 - 11
Affirmation in Opposition and Exhibit	12-13
Affirmation in Reply and Exhibits & Memo of Law	14-18

Plaintiff moves, pursuant to CPLR 3212, for summary judgment declaring that the commercial general liability insurance policy issued by defendant is applicable to the claim asserted against Blitman Development Corp. (Blitman), Changebridge Construction Corp. and Changebridge Construction White Birch Corp. (collectively, Changebridge), Pondview Partners Acquisition, LLC and Pondview Partners, LLC (together, Pondview) in the action entitled *Benjamin Millar v Blitman Development Corp., et al.*, index number 05210/09, which is currently pending in the New York Supreme Court, Westchester County. Plaintiff also seeks a declaration that defendant's coverage is primary.

FACTUAL BACKGROUND & ARGUMENTS

On March 18, 2009, Benjamin Millar (Millar) commenced the underlying personal injury action against Blitman, Changebridge and Pondview, alleging that he was seriously injured when a ladder that he was descending slipped out from underneath him while he was working at a construction site located on Shirley Lane in Fishkill, New York, on March 23, 2006.

At the time of the alleged accident, Millar was employed by Empire Plumbing & Heating (Empire). Blitman and Pondview were the owners of the property, and they contracted with Changebridge to be the construction manager/general contractor for the project. Changebridge thereafter subcontracted with Empire to perform plumbing work on the construction project.

Pursuant to the subcontract between Changebridge and Empire, Empire was required to obtain commercial general liability insurance naming Blitman, Pondview and Changebridge as additional insureds. Motion, Ex. B.

Plaintiff issued a commercial general liability insurance policy to Beaver Brook Associates, LLC (Beaver Brook), under which, in endorsement 5, the named insureds include Pondview and Changebridge Construction Corp. In endorsement 6, Changebridge Construction Merrit Corp. and Blitman Development Corp. are added as named insureds. In endorsement 7, Changebridge Construction White Birch, Inc. is added as an additional insured. Further, this policy provides additional insured coverage, by way of endorsement,

to any person or organization that the insured is required to name as an additional insured by reason of a written contract. Motion, Ex. C. In addition, plaintiff's policy indicates that it is excess to any primary insurance available to the additional insured under its policy. *Id.*

On May 12, 2009, plaintiff issued correspondence to Empire, tendering defense and indemnification for the underlying personal injury action. Motion, Ex. E. According to the motion papers, plaintiff is currently defending Blitman, Pondview and Changebridge in the underlying action.

Defendant issued a commercial general liability insurance policy to Empire, which policy, according to defendant's denial of claim letter, provides that it will provide additional insured coverage to any person or organization for whom Empire is required to obtain insurance coverage by reason of a written contract. Motion, Ex. D.

On May 12, 2009, plaintiff wrote to defendant, tendering defense and indemnification for the underlying personal injury action. Motion, Ex. E. On May 28, 2009, defendant denied coverage based on an untimely notice of claim and asserting that the additional insured coverage under its policy had not been triggered. Motion, Ex. D.

In a letter sent to defendant dated July 1, 2009, plaintiff requested that defendant reconsider its position. Motion, Ex. F.

When defendant failed to respond to that letter, a third-party action was commenced against Empire in the underlying personal injury action, seeking common-law indemnification on behalf of Blitman, Pondview and Changebridge. Motion, Ex. G.

Plaintiff contends that it did provide defendant with a timely notice of claim, arguing that notice by a named insured is applicable to an additional insured, provided that their interests are not adverse. However, plaintiff fails to identify the named insured that gave such notice, to whom such notice was given, or at what point in time after the accident such notice was tendered. According to the motion papers, the notice given to defendant was the tender letter sent to defendant by plaintiff three years after the occurrence. Plaintiff does not indicate when or how it received its initial notice of claim, or from whom.

In opposition, defendant asserts that the motion is defective because it is not supported with an affidavit of an individual with personal knowledge of the facts, because it fails to provide a copy of defendant's insurance policy, and because the first time defendant was apprised of the claim was three years after the accident took place, which makes the notice of claim untimely. In addition, defendant contends that material questions of fact exist as to whether the defendants in the underlying personal injury action, Blitman, Pondview and Changebridge, gave timely notice to defendant.

In reply, plaintiff states that it need not attach a copy of defendant's policy with its motion because defendant's denial letter, which is attached, references the pertinent provisions of that policy, and that, under New York law, the notice requirements of defendant's policy do not apply to additional insureds.

DISCUSSION

"The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case [internal quotation marks and citation omitted]." *Santiago v Filstein*, 35 AD3d 184, 185-186 (1st Dept 2006). The burden then shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact." *Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 (1st Dept 2006); see *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied. See *Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 (1978).

Plaintiff's motion for summary judgment, is denied.

At the outset, the court finds unpersuasive defendant's first argument, that the motion papers are insufficient as a matter of law because they are not accompanied by an affidavit of an individual with personal knowledge of the facts. It is well-settled law that a motion for summary judgment may be supported by

an attorney's affirmation used to introduce documentary evidence (see *Zuckerman v City of New York*, 49 NY2d 557, *supra*; *Prudential Securities Inc. v Rovello*, 262 AD2d 172 [1st Dept 1999]), which is what transpired in the instant matter.

However, the court finds that plaintiff's motion papers are insufficient to meet its burden of establishing a *prima facie* entitlement to judgment.

Plaintiff has failed to provide a signed copy, or even a complete copy, of defendant's insurance policy, the terms of which would determine any rights to the relief sought. In its reply, plaintiff makes the blanket assertion that, because defendant provided excerpts of its policy in its denial letter, that should be sufficient as an admission for the purposes of the instant motion. However, not only has plaintiff failed to provide any precedential support for that contention, but, even if the court were to agree with that position, plaintiff also seeks a declaration regarding the priority of coverage, and that section of defendant's policy, if the policy has such a section, is not mentioned in defendant's denial of coverage letter. This failure on the part of plaintiff, standing alone, would be sufficient to deny its motion. *Cendant Car Rental Group v Liberty Mutual Insurance Company*, 48 AD3d 397 (2d Dept 2008).

However, even if the court were to accept plaintiff's argument with respect to the lack of a signed copy of defendant's insurance

policy in the motion papers, too many questions of fact exist to grant plaintiff's motion.

The accident occurred in 2006, and the underlying personal injury action was not commenced until 2009, a three-year gap. Plaintiff makes the statement that, "under New York law, notice by a named insured to its insurer is applicable to an additional insured, as long as their interests are not adverse." Plaintiff's Memorandum of Law, p. 6. In support of this proposition, plaintiff cites to three cases, each of which will be discussed in turn.

In *Rosen v City of New York* (245 AD2d 202 [1st Dept 1997]), the Court stated that notice to the insurer by the insured was applicable to the named insureds as well. However, in that case, the notice was given to the same insurer. In the case at bar, not a shred of evidence has been presented that anyone notified defendant of the occurrence prior to 2009, either its insured or its additional insured. Further, the *Rosen* Court went on to say that the issue of timeliness of such notice raised a question of fact that precluded granting summary judgment.

In *New York Telephone Company v Travelers Casualty and Surety Company of America* (280 AD2d 268 [1st Dept 2001]), the Court again held that the insured's forwarding of the complaint in the underlying personal injury action to the insurer was sufficient notice to the insurer of possible claims against the additional insureds. However, as with the *Rosen* case, the notice was given to

the insurer of both the insured and the additional insureds. In the instant matter, the first evidence of defendant being notified of the accident was the letter sent to it by plaintiff three years after the occurrence, and there is no indication that Empire, defendant's insured, ever notified defendant of the occurrence.

Lastly, plaintiff cites to *Ambrosio v Newburgh Enlarged City School District* (5 AD3d 410 [2d Dept 2004]), in which notice was given a few weeks after the accident by the additional insured, but the insurer denied coverage to the named insured based on a late notice of claim. Once again, the notice was given to the same insurer, which is clearly distinguishable from the case at hand.

It is noted that plaintiff, in its opposition, also cites to a federal case, *Wausau Underwriters Insurance Co. v QBE Insurance Corp.* (496 F Supp 2d 357 [SD NY 2007]), which similarly holds that an additional insured may rely upon the notice given to the insurer by the named insured. However, whereas a federal case is merely persuasive but not binding on this court, that decision presents the same situation indicated in the state cases, in which the notice by the named insured was given to the insurer of the additional insured. No documentation has been provided that Empire, the named insured, ever notified defendant of the occurrence before 2009, so that such notice by Empire might be deemed notice to defendant by the additional insureds as well.

No reason or information has been provided to the court as to

why defendant was not notified of a potential claim until three years after the accident, nor is any information provided as to whom any notice was given.

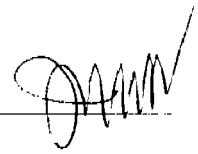
Plaintiff's posture is that, according to section IV (2) of the portion of defendant's policy quoted in its disclaimer letter, defendant was notified immediately after suit was filed, pursuant to section IV (2) (b) of that policy. However, plaintiff neglects to discuss section IV (2) (a) of that presumptive policy, which requires notification as soon as practicable after an occurrence. No information is given as to why no notification was given as soon as practicable after the accident in 2006.

Moreover, any request for indemnification prior to liability being determined in the underlying personal injury action would have to be denied as premature. *Bovis Lend Lease LMB Inc. v Garito Contracting, Inc.*, 65 AD3d 872 (1st Dept 2009); *Crespo v City of New York*, 303 AD2d 166 (1st Dept 2003).

Based on the foregoing, plaintiff's motion for summary judgment is denied; and it is further

ORDERED that counsel are directed to appear for a preliminary conference in Room 304 located at 71 Thomas Street, New York, NY 10013 at 9:30 a.m. on December 9, 2010.

ENTER:



Joan M. Kenney, J.S.C.

10/4/10

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