

25 Avenue C New Realty, LLC v Alea N. Am. Ins. Co.
2010 NY Slip Op 33869(U)
August 9, 2010
Sup Ct, Bronx County
Docket Number: 304108/09
Judge: Stanley B. Green
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L.W.

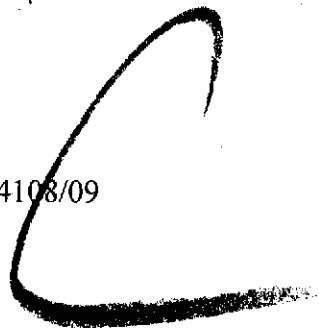
NEW YORK SUPREME COURT - COUNTY OF BRONX

IAS PART 27

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: IAS PART 27

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25 AVENUE C NEW REALTY, LLC, YAHYA
SARRAF and FAIRBANK INVESTMENT COMPANY,

INDEX NO. 304108/09



Plaintiff(s),

-against-

ALEA NORTH AMERICA INSURANCE COMPANY
and MERRIMACK MUTUAL FIRE INSURANCE
COMPANY,

Defendant(s)

Present:
HON. STANLEY GREEN
J.S.C.

-----X
The following papers numbered 1 to 8 read on this motion
No. on the Calendar of April 29, 2010

PAPERS NUMBERED

Notice of Motion -Exhibits and Affidavits Annexed.....	1,3,4
Answering Affidavit and Exhibits.....	5
Replying Affidavit and Exhibits.....	6,7,8
Sur-reply Affidavits and Exhibits.....	
Stipulation(s) - Referee's Report - Minutes.....	
Memoranda of Law.....	2

Upon the foregoing papers, this motion is decided in accordance with the attached memorandum decision.

Dated: August 9, 2010

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STANLEY GREEN, J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: IA-27

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25 AVENUE C NEW REALTY, LLC, YAHYA
SARRAF and FAIRBANK INVESTMENT COMPANY,

INDEX NO. 304108/09

Plaintiff(s),

-against-

ALEA NORTH AMERICA INSURANCE COMPANY
and MERRIMACK MUTUAL FIRE INSURANCE
COMPANY,

Defendant(s).

DECISION

-----X

HON. STANLEY GREEN:

The motion by plaintiffs for an order pursuant to CPLR §3001 and Insurance Law §3420(d), declaring that either Merrimack Mutual Insurance Company or Alea North American Insurance Company is obligated to defend and indemnify 25 Avenue C New Realty, LLC against the claims in the personal injury action commenced by Eamonn Grimes against 25 Avenue C, and for judgment against Alea for legal fees, costs and punitive damages allegedly sustained as a result of Alea's withdrawal of coverage, the cross-motion by Alea for a declaration that it is not obligated to defend or indemnify 25 Avenue C in the Grimes action and for dismissal of plaintiffs' claims and all cross-claims against it, and the cross-motion by Merrimack for a declaration that it is not obligated to defend and indemnify 25 Avenue C in the Grimes action, are hereby consolidated for decision with the motion by plaintiffs for an order pursuant to CPLR §3403 granting a special preference on the ground that plaintiff Yahya Sarraf has reached the age of 70 years. Upon consolidation: (1) the motion by plaintiffs is granted to the extent that

Merrimack must defend and indemnify 25 Avenue C in the action commenced by Eamonn Grimes against 25 Avenue C; (2) the cross-motion by Alea is granted in its entirety; and (3) the cross-motion by Merrimack is denied. This renders the motion by plaintiffs for a special preference, moot.

Plaintiffs commenced this action to obtain a declaration that Alea, Merrimack, or both are required, under existing insurance policies, to provide coverage, defense and indemnity to the plaintiffs in the action commenced by Eamonn Grimes against 25 Avenue C.

Plaintiffs also seek an order granting summary judgment on their claim for legal fees, costs and punitive damages allegedly sustained as a result of Alea's withdrawal of coverage and refusal to commence a declaratory judgment action.

The following facts are not disputed by the parties.

Alea had issued a general liability policy insuring plaintiffs against damages from personal injury claims arising during the period from June 20, 2005 through June 20, 2006.

Merrimack had issued a policy of insurance which insured 25 Avenue C against liability arising from personal injury claims during the period from December 31, 2002 through December 31, 2003.

On or about July 8, 2005, Yahya Sarraf, a principle of 25 Avenue C, received a complaint which sought damages for personal injuries allegedly sustained by Grimes in an accident that occurred on June 27, 2005, inside plaintiffs' premises, located at 25 Avenue C, New York, NY. Prior to receiving the complaint, plaintiffs knew nothing of Grimes' accident or claim.

Plaintiffs tendered their claim to Alea, whose policy was in effect on the accident date alleged in the complaint. Alea authorized Claims Administration Corporation (CAC) to

administer plaintiffs' claim and the Law Office of Jeffrey Samel and Partners was assigned to defend 25 Avenue C in the Grimes action.

In May, 2007, an investigator retained by CAC took a statement from Grimes in which he stated that the accident occurred on June 27, 2003. The investigator reported this information to CAC.

In August 2007, Samel's office received Grimes' Bill of Particulars, which also indicated that Grimes' accident occurred on June 27, 2003. Samel's office wrote to CAC, advising them that the Bill of Particulars indicated that the accident occurred on June 27, 2003, not 2005, as was alleged in the complaint, and that the medical records noted an earlier date for the incident.

In October 2007, a non-party deposition was conducted in which the witness also testified that the date of the accident was June 27, 2003.

On May 15, 2008, Dennis Ferraro, a CAC representative, contacted Sarraf and requested the name of the insurer whose policy covered 25 Avenue C in June 2003. On May 16, 2008, Sarraf informed CAC that Merrimack insured 25 Avenue C on June 27, 2003.

By letter dated May 23, 2008, Samel notified Merrimack of the Grimes action and explained that Alea had been defending 25 Avenue C in the action based upon the incorrect date of loss stated in the complaint. Samel requested that Merrimack assume the defense of its insured.

By letter dated July 8, 2008, Merrimack disclaimed coverage for 25 Avenue C on the ground that it was not given timely notice of the claim. Merrimack noted that the Complaint mistakenly alleged that the accident occurred on June 27, 2005, but suggested that Alea should have questioned the date as the complaint was dated the same day and was filed in the Bronx

County Clerk's office the following day. The letter also noted that Grimes' Bill of particulars, received by Samel's office on August 17, 2007, and a non-party witness deposed in October 2007 indicated that the accident occurred on June 27, 2003. In light of this information, Merrimack disclaimed coverage, stating that Alea's failure to report the action to Merrimack on behalf of 25 Avenue C, in a timely manner, constitutes a breach of the policy conditions.

By letter dated August 11, 2008, CAC informed Sarraf that the Grimes suit was not covered under the policy issued by Alea because the actual date of loss was two years prior to the effective date of Alea's policy. CAC suggested that plaintiffs refer the matter to Merrimack.

Plaintiffs' counsel contacted Samel's office to request that an action be commenced against Merrimack and/or Alea to determine which carrier must defend and indemnify 25 Avenue C, but the request was refused. Subsequently, Samel filed a motion to withdraw as counsel for 25 Avenue C in the Grimes action. The motion was granted by order of Justice Guzman, dated January 26, 2010. Thus, plaintiffs retained counsel and commenced the instant action.

Plaintiffs contend that they are entitled to coverage as a matter of law because they did not know of the correct accident date until May 15, 2008, less than two weeks prior to the date that Alea notified Merrimack of the Grimes claim on behalf of plaintiffs. However, if the court determines that the notice to Merrimack was untimely, plaintiffs then assert that the doctrine of estoppel precludes Alea from denying or disclaiming coverage because it had actual knowledge of the 2003 injury date as early as May 15, 2007, but failed to notify plaintiffs or Merrimack until May 2008, prejudicing plaintiffs by preventing them from giving timely notice of the claim to Merrimack.

Plaintiffs also contend that regardless of which carrier is required to defend and indemnify 25 Avenue C, they are entitled to recover damages from Alea due to its failure to exercise due care in investigating and defending the Grimes action and its bad faith in withdrawing coverage and defense of plaintiffs, which caused them to have to retain counsel to commence this proceeding.

In support of the motion, plaintiffs submit: (1) copies of Notices to Admit served on Merrimack and Alea and their responses which are consistent with the undisputed facts; (2) portions of the deposition testimony of Yahya Sarraf, which show that he first learned of a discrepancy in the date of the accident in May 2008 and of Alea's disclaimer in August 2008; (3) a copy of the Grimes Bill of Particulars; (4) copies of the insurance policies issued by Alea and Merrimack; and (5) copies of records and correspondence related to the disclaimers of coverage of Alea and Merrimack.

Merrimack cross-moves for a declaration that its disclaimer is valid and enforceable and that it is not obligated to defend and indemnify plaintiffs, that Alea is obligated to defend and indemnify 25 Avenue C and that Alea is barred from withdrawing the defense it has been providing to 25 Avenue C on grounds of laches and equitable estoppel.

Citing Security Mutual Insurance Co. of New York v. Acker-Fitzsimons Corp. (31 NY2d 4), Merrimack contends that even giving 25 Avenue C the benefit of the doubt and not measuring the time until its attorneys or CAC actually became aware of the correct accident date, more than a year elapsed before Merrimack was given notice of the claim and that 25 Avenue C has no excuse for not reporting the matter to Merrimack (by and through its agent, its attorney, the Law Office of Jeffrey Samel & Partners) when it became aware of the correct date of Grimes'

accident, not later than August 17, 2007.

Merrimack also contends that the delay was unreasonable as a matter of law, that Alea's disclaimer is invalid and untimely and that Alea is estopped from withdrawing its defense of 25 Avenue C on grounds of laches.

Alea cross-moves for an order declaring that it is not obligated to indemnify, insure and defend 25 Avenue C in the Grimes matter, that Merrimack's disclaimer is not valid and enforceable and that Merrimack is obligated to insure, defend and indemnify 25 Avenue C against the damage and loss allegedly sustained by Grimes.

Alea contends that the notice to Merrimack in May 2008, given on behalf of 25 Avenue C, was timely under the circumstances and that it cannot be estopped from disclaiming coverage for the Grimes action because it undertook the defense of 25 Avenue C based upon the inaccurate date set forth in the Grimes complaint and on the date that the accident actually occurred, the policy issued by Alea was not in existence.

Alea also contends that plaintiffs' claims for damages, including legal fees, costs and punitive damages must be dismissed because such fees are not recoverable in a declaratory judgment action commenced by an insured against an insurer and the facts alleged do not support a cause of action for bad faith or punitive damages.

Plaintiffs also seek an order granting a special preference in this action based upon the age of Yahya Sarraf, a principal of 25 Avenue C New Realty, LLC, who is 70 years old.

Where a contract of primary insurance requires notice "as soon as practicable" after an occurrence, timely notice of an occurrence is a condition precedent to an insurer's liability under the insurance policy and, absent a reasonable explanation or excuse, vitiates the contract

(Security Mutual Insurance Company of NY v. Acker-Fitzsimons Corp., 31 NY2d 436). No showing of prejudice is required (Id).

The rationale for requiring strict compliance with the contract is to protect the carrier against fraud or collusion, give the carrier an opportunity to investigate the claim while evidence is fresh, allow the carrier to make an early estimate of potential exposure and establish adequate reserves and to give the carrier an opportunity to exercise early control of claims, which aids in settlement (The Argo Corp. v. Greater New York Mutual Ins. Co., 4 NY3d 332).

Pursuant to Insurance Law §3420(d), an insurer wishing to disclaim liability or deny coverage for death or bodily injury must give written notice "as soon as is reasonably possible" of such disclaimer of liability or denial of coverage. Failure to give prompt notice precludes an effective disclaimer or denial of coverage (Matter of Firemen's Fund Ins. Co. Of Newark v. Hopkins, 88 NY2d 836).

However, where there is no coverage for the loss under an insurance policy because it was not in existence at the time of the accident, no notice of disclaimer is required (Commissioner of State Ins. Fund v. Aetna Casualty & Surety Co., 283 AD2d 335).

Furthermore, neither waiver nor estoppel can be invoked to create insurance coverage (Zappone v. Home Ins. Co., 55 NY2d 1313).

In this case, Sarraf first learned of Grimes' claim when he received the complaint in July 2005. He properly forwarded the complaint to Alea, which insured 25 Avenue C on the alleged date of the accident. Alea properly assigned counsel to defend 25 Avenue C until it became aware, during the course of discovery in 2007, that the accident actually occurred in 2003, when Alea had no contract of insurance with plaintiffs.

While plaintiffs and Merrimack cite cases in which insurers were estopped from denying coverage after having defended an insured for various periods of time, these cases are distinguishable from the instant case in that in those cases, the insurers had defended the actions with knowledge of a defense to the coverage of the policy, yet delayed in giving written notice of disclaimer. For example, in First Financial Ins. Co. v. Jetco Contracting Corp. (1 NY3d 64) and Allstate Insurance Company v. Gross (27 NY2d 263), the basis for denying coverage was or should have been readily apparent before the onset of the delay. This was also the case in Hartford v. Mello (81 AD2d 577), where Hartford had knowledge of the non-coverage two years prior to the institution of the declaratory judgment action, by virtue of its receipt of the pleadings and deposition of the plaintiff, yet it continued to defend the action even after it had been placed on the Trial Calendar. Under those circumstances, the disclaimer was not only untimely, but also prejudicial to the insured.

In this case, it was not until 2007 that discovery revealed that the date of loss stated in the complaint was incorrect and that Alea had no policy in existence at the time of the loss.

While there was a delay in this case from the time that Alea first had notice of the correct date of the accident until it notified plaintiffs and Merrimack of the correct accident date, it was not until August 2007 that plaintiff's verified bill of particulars was received, which indicated that the accident occurred in June 2003. In the only case cited that is on point with the instant case, Van Buren v. Employers of Wausau, (98 AD2d 774), the court decided that although the first insurer was dilatory in informing the insured that the loss was not within the period of coverage (a period of approximately 9 months), it could not be required to defend or indemnify the plaintiff because insurance coverage cannot be created by equitable estoppel where no policy

of insurance existed at the time and under the facts and circumstances, the second carrier was notified within a reasonable time. Similarly herein, the second carrier, Merrimack, was notified within a reasonable time under the facts and circumstances and there is no apparent prejudice, as plaintiffs have been represented by counsel since the Grimes action was commenced and discovery is ongoing. Accordingly, Merrimack is required to defend and, if necessary, indemnify and pay on behalf of 25 Avenue C, to the extent of its policy limits, any judgment rendered against it in the underlying Grimes action.

Insofar as plaintiffs' seek damages for bad faith, costs and attorneys fees incurred in bringing this action, the motion is denied.

"The holder of an insurance policy is not entitled to recover legal fees and expenses for the prosecution of a declaratory judgment action against an insurer, but only those necessitated when he has been cast in a defensive posture by legal steps taken by an insurer in an effort to free itself from its policy obligations" (Grasso v. Country-Wide Insurance Company, 132 AD2d 451, citing Mighty Midgets, Inc. v. Centennial Insurance Company, 47 NY2d 12). Here, Alea provided a defense to 25 Avenue C until the time that Merrimack issued its disclaimer and no evidence of damages relative to the underlying action have been alleged.

The sole instance in which a court will find bad faith breach of contract by an insurer is "limited to circumstances beyond merely a failure to perform the contract, and must involve egregious patterns of tortious conduct directed at the public at large as well as the individual claimant" (Batas v. Prudential Ins. Co. of America, 281 AD2d 260; Rocanova v. Equitable Life Assurance Society, 83 NY2d 603). Neither circumstance exists in this case. Accordingly, plaintiffs' claims for punitive damages, legal fees and costs are dismissed.

This renders the motion by plaintiffs for a special preference moot.

This constitutes the decision and order of the court.

Dated: August 9, 2010



STANLEY GREEN, J.S.C.