

<b>City of New York v General Star Indem. Co.</b>
2011 NY Slip Op 30296(U)
February 8, 2011
Sup Ct, NY County
Docket Number: 401916/03
Judge: Cynthia S. Kern
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

CYNTHIA S. KERN  
J.S.C.

PRESENT: \_\_\_\_\_  
Justice

PART 52

The City of NY

- v -

General Stop

INDEX NO. 401916/03

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 9

MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed decision.

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

**FILED**

FEB 09 2011

NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 2/8/11

CK  
\_\_\_\_\_ J.S.C.

CYNTHIA S. KERN

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: Part 52

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

Plaintiff,

Index No. 401916/03

-against-

DECISION/ORDER  
**FILED**

GENERAL STAR INDEMNITY COMPANY  
and MVN ASSOCIATES, INC.,

FEB 09 2011

Defendants.

NEW YORK  
COUNTY CLERK'S OFFICE

-----X  
HON. CYNTHIA S. KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for : \_\_\_\_\_

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	<u>1</u>
Notice of Cross Motion and Answering Affidavits.....	<u>2</u>
Replying Affidavits.....	<u>3</u>
Exhibits.....	<u>4</u>

Plaintiff the City of New York (the "City") commenced the instant declaratory judgment action against defendants General Star Indemnity Company ("General Star") and MVN Associates, Inc. ("MVN") seeking a declaratory judgment that General Star was required to defend and must now indemnify the City in a now-settled action entitled Glenn D. Rolph v City of New York, Civil Action No. 02-6420 (E.D.N.Y.) (the "Rolph Action"). The City now moves for renewal of a prior summary judgment motion, seeking a declaration that General Star's disclaimer of coverage was untimely. For the reasons set forth below, plaintiff's motion is denied.

The relevant facts are as follows. On or around September 29, 2000, MVN entered into a

contract with the City's Department of Parks and Recreation to stabilize a piling and deck at a pier in Staten Island. Pursuant to the contract, MVN was obligated to obtain liability insurance "to protect the City of New York against claims for property damage and personal injuries, including accidental death caused by the operation of [MVN] or his subcontractors during the performance of work at the site or adjacent thereto." Specifically, the contract required MVN to obtain a commercial general liability insurance policy which named the City as an additional insured. The City was named as an additional insured in a type of certificate known in the insurance industry as an ACORD certificate. Although it previously disputed the existence of coverage, General Star now concedes that the City is an additional insured under the policy.

On November 12, 2001, Glenn D. Rolph was allegedly injured at the worksite during the course of his employment. On January 22, 2002, the City received a Notice of Claim filed on behalf of Rolph and the City received a second Notice of Claim on February 4, 2002. On May 29, 2002, the City held a 50-h hearing where it examined Rolph under oath. By letter dated June 7, 2002, the New York City Law Department forwarded the Notices of Claim to MVN, General Star and MVN's excess liability insurance carrier. The June 7<sup>th</sup> letter requested defense and indemnification with respect to the Rolph claims. It appears that General Star received this letter by June 27, 2002 at the latest. Defendants did not reply to the letter. The Law Department then sent a follow-up letter, attaching the June 7<sup>th</sup> letter, by fax on July 2, 2002, which was received that day. On July 8, 2002, General Star received a fax from Adco General Corporation, its agent, providing notice of the claim, the policy number and the name of the named insured. General Star asserts that this was the first time it had received a document that included the policy

number and the name of the insured and that such information was necessary for it to determine whether to disclaim coverage. By letter dated July 31, 2002, General Star disclaimed coverage on the ground of late notice of claim. However, although the letter is dated July 31, 2002, it appears that it was not sent until August 7, 2002, when General Star faxed it to the Law Department. The same letter was sent to MVN the next day, August 8, 2002.

In December 2002, Rolph initiated a lawsuit against the City. The City settled the Rolph action for \$475,000 in November 2004.

In June 2003, the City commenced the instant action. It moved for summary judgment against General Star on or around March 28, 2006 on the same ground, late disclaimer, as it now moves. By a decision dated July 5, 2006, Justice Michael D. Stallman granted the City's motion on the ground that General Star's disclaimer of coverage was untimely. General Star appealed the July 5<sup>th</sup> decision. By order dated November 20, 2007, the First Department reversed Judge Stallman's decision, finding that "an issue of fact... exists as to the timeliness of defendant's disclaimer of coverage." *City of New York v Gen. Star Indem. Co.*, 45 A.D.3d 430 (1<sup>st</sup> Dept 2007). The First Department goes on to say that, according to General Star, it disclaimed coverage 23 days after it received notice of the claim. Such an assertion would be based on the allegations that it had received notice on July 8, 2002 and disclaimed on July 31, 2002.

On a motion for leave to renew, the movant must allege new facts not offered on the prior motion and a reasonable justification for the failure to present those facts on the prior motion or shall demonstrate that there has been a change in the law that changes the court's prior determination. CPLR 2221(e)(2) and (3). Plaintiff asserts that it is now clear from discovery

that General Star received notice of the claim on June 27, 2002 and did not issue its disclaimer until August 7, 2002. General Star does not dispute the date of the disclaimer but alleges that it did not receive notice of the claim until July 8, 2002, when the documentation it received included the policy number and name of the insured.

In the instant case, the First Department has already found that there was an issue of fact as to whether General Star's disclaimer was timely. Plaintiff submits nothing additional with this motion to change that determination. In its decision, the First Department stated that, if General Star were to be believed, it disclaimed coverage 23 days after receiving the notice of claim. Although subsequent discovery has revealed General Star did not disclaim coverage until August 7, 2002, those additional 7 days do not suffice for this court to conclude that its disclaimer was late as a matter of law in light of the fact that the First Department already found an issue of fact as to timeliness and failed to specify exactly what that issue was. Furthermore, although discovery has also shown that General Star received some notice by June 27, 2002, there is a question of fact as to whether that notice was sufficient. Therefore, since plaintiff has failed to allege new facts which resolve the factual issue of whether General Star's disclaimer was late, its motion must be denied.

Accordingly, plaintiff's renewed motion for summary judgment is denied. This constitutes the decision and order of the court.

Dated: 2/8/11

Enter: CK  
J.S.C.

**FILED**

**CYNTHIA S. KERN**  
J.S.C.

FEB 09 2011

NEW YORK 4  
COUNTY CLERK'S OFFICE