

City of New York v Greenwich Ins. Co.

2011 NY Slip Op 31008(U)

April 15, 2011

Supreme Court, New York County

Docket Number: 111104/09

Judge: Jeffrey K. Oing

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

PRESENT: Hon. Jeffrey K. Oing

PART 418

Index Number : 111104/2009
 CITY OF NEW YORK
 VS.
 GREENWICH INSURANCE COMPANY
 SEQUENCE NUMBER : 002
 SUMMARY JUDGMENT

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

this motion to/for _____

PAPERS NUMBERED

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 is decided in accordance with the annexed ~~order~~ memorandum decision & order of the Court.

FILED
 APR 19 2011
 NEW YORK
 COUNTY CLERK'S OFFICE

Dated: 4/15/11 _____

 JEFFREY K. OING ^{J.S.C.}

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

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 48

-----x

THE CITY OF NEW YORK, DEPARTMENT OF
EDUCATION OF THE CITY OF NEW YORK, and
TEMCO SERVICE INDUSTRIES, INC.

Plaintiffs,

Index No. : 111104/09

-against-

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DECISION AND ORDER

GREENWICH INSURANCE COMPANY and
TRANSEL ELEVATOR INC.,

Defendants.

-----x

JEFFREY K. OING, J. :

Defendants, Greenwich Insurance Company ("Greenwich") and
TranSel Elevator Inc. ("TranSel"), move, pursuant to CPLR 3212,
for an order granting them summary judgment dismissing the
complaint.

Plaintiffs, The City of New York, Department of Education of
the City of New York (collectively "the City"), and Temco Service
Industries, Inc. ("Temco"), cross-move, pursuant to CPLR 3212,
for an order granting them summary judgment against Greenwich for
a declaration that Greenwich has duty to defend and indemnify
plaintiffs.

Background

On June 19, 2006, Maria Cabrera, plaintiff in an underlying
action, was allegedly "caused to trip and fall ... as a result of
the uneven raised surface between the elevator and the floor
caused by the elevator jerking up and down after the doors had

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opened" at the premises located at 28-11 Queens Plaza North, Long Island City, New York ("the premises") ((Moving Papers, Ex. A). The City owns the premises and contracted with Temco to inspect and maintain the elevators at the premises (Id.). Further, Temco had an agreement with defendant Transel to "regularly and systematically examine, adjust, clean and lubricate" the elevators ("the agreement") (Cross-motion, Ex. C). Also, pursuant to the agreement, Transel agreed to obtain insurance for comprehensive general liability with Temco as a certificate holder and the City named as an additional insured (Cross-motion, Ex. C).

Greenwich insured Transel under a commercial general liability policy ("the policy"), effective May 15, 2006 to May 15, 2007 (Moving Papers, Ex. K). The policy contained an additional insured endorsement providing that coverage will include any organizations in which Transel was required to add as an additional insured under a written "contract or agreement" (Cross-motion, Ex. E).

Cabrera commenced a personal injury action against plaintiffs herein on or about August 22, 2007 (Moving Papers, Ex. A). Plaintiffs commenced the instant declaratory judgment action on August 4, 2009 when Greenwich disclaimed coverage (Moving Papers, Ex. H).

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In support of their motion, defendants argue that Cabrera served her notice of claim on the City on September 13, 2006 (Moving Papers, Ex. L). Temco received notice of Cabrera's claim from the City on November 13, 2006, and from Cabrera's attorneys on November 16, 2006 (Moving Papers, Exs. M and N). Defendants claim, however, that Temco did not provide any notice of Cabrera's claim to Greenwich until May 17, 2007, approximately six months later.

On May 17, 2007, counsel for Temco wrote to Greenwich tendering Cabrera's action for additional insured coverage and contractual indemnity on behalf of Temco, and placing Greenwich on notice of the matter on behalf of the City (Moving Papers, Ex. O). Greenwich contends that the letter made reference to the agreement between Temco and Transel, the certificate of insurance, and a notice of claim served by Cabrera against the City, however, none of these documents were enclosed with the letter (Moving Paper, Ex. O). As such, on or about June 21, 2007, Greenwich wrote to Temco's counsel requesting copies of these documents as well as information regarding how and when Temco first learned of Cabrera's incident (Moving Papers, Ex. P). On or about August 1, 2007, Temco's counsel responded to Greenwich's letter, and provided a copy of the agreement and certificate of insurance, but, according to Greenwich, failed to provide a copy of the notice of claim and did not provide any

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details of the manner in which Temco first learned of Cabrera's incident (Moving Papers, Ex. Q).

On September 19, 2007, Temco's counsel wrote to Greenwich informing it that Cabrera had commenced a lawsuit (Moving Paper, Ex. R). Greenwich maintains that the letter did not include a copy of Cabrera's summons and complaint, notice of claim, and again failed to include any details of how and when Temco first became aware of Cabrera's incident. In fact, Greenwich claims that on October 1, 2007 Temco's counsel first provided it with copies of the summons and complaint, the notice of claim, and copies of correspondence sent by Cabrera's counsel and the City in November 2006 to Temco informing it of Cabrera's claim.

By a letter dated October 29, 2007, Greenwich disclaimed coverage to both Temco and the City (Moving Papers, Ex. S). Referring to Section IV-Commercial General Liability Conditions of the Commercial General Liability Coverage Form in the policy, Greenwich disclaimed coverage pursuant to paragraph 2, entitled "Duties in the Event of Occurrence, Offense Claim or Suit" (Moving Papers, Ex. S). The relevant language provides that the insured:

(a) has a duty to see to it that Greenwich is notified as soon as practicable of an 'occurrence' or an offense which may result in a claim. To the extent possible, notice should include:

- 1) How, when and where the "occurrence" or offense took place;

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* * *

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 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".

(Moving Papers, Ex. S). Based on the foregoing provision, Greenwich disclaimed coverage to both Temco the City based on the following:

The incident allegedly occurred on June 19, 2006. The City has had notice of the plaintiff's claim since, at least, September 13, 2006, when the plaintiff filed a Notice of Claim against it. However, the City waited two months until November 13, 2006 to advise Temco of the plaintiff's incident. Moreover, to date, the City has failed to provide Greenwich with its own written notice of the claim and to provide any claim or suit papers to Greenwich. Greenwich did not receive first notice of the claim on behalf of the City from Temco until May 17, 2007, approximately eight months after the Notice of Claim was filed against the City.

Temco has had notice of the plaintiff's claim since June of 2006, at the earliest, and since November of 2006, at the latest. However, it waited until May 17, 2007 to first provide Greenwich with notice of the loss. It also waited until October 10, 2007 to first provide Greenwich with copies of the plaintiff's Notice of Claim and Summons and Complaint.

(Moving Papers, Ex. S).

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In its motion, Greenwich argues that because the policy required the insured to notify Greenwich "as soon as practicable of an 'occurrence' or an offense which may result in a claim," Temco's notification on May 17, 2007 constitutes late notice as a matter of law¹ (Republic New York Corporation v American Home Assurance Company, 125 AD2d 247 [1st Dept 1986]; Zadrina v PSM Insurance Companies, 208 AD2d 529 [2nd Dept 1994]).

Plaintiffs argue that Greenwich waited five and a half months before taking a position on coverage thus its disclaimer is invalid under Insurance Law § 3420(d), which provides as follow:

If ... an insurer shall disclaim liability or deny coverage for death or bodily injury arising out of a motor vehicle accident or any other type of accident occurring within this state, it shall give written notice as soon as is reasonably possible of such disclaimer of liability or denial of coverage to the insured and the injured person or any other claimant.

Plaintiffs argue that where the basis for disclaimer is late notice an insurer is required to take a coverage position and to respond to the insured promptly with a statement of its coverage position. In that regard, citing the case West 16th Street Tenants Corp. v Public Service Mutual Insurance Company, 290 AD2d

¹In its motion papers, Greenwich also seeks to dismiss plaintiffs' claims that Transel breached its contract with plaintiffs by failing to cause Greenwich to add plaintiffs as additional insureds on its insurance policy. Because Greenwich does not set forth any arguments addressing this branch of its motion is denied.

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278 [1st Dept 2002], plaintiffs argue that a disclaimer must reach the insured within thirty days where the underlying facts are clear from the initial notification. Plaintiffs argue that in this case the underlying facts were clear from Temco's May 17, 2007 letter in that Greenwich had all the information it needed to determine that plaintiffs had provided late notice of the Cabrera occurrence or claim. Plaintiffs point out that the May 17, 2007 letter provided the date of Cabrera's accident of June 19, 2006. Further, the May 17, 2007 letter placed Greenwich on notice, and Greenwich's initial 42-day delay prior to taking any action, served as a waiver of any notice condition in the policy. Plaintiffs also claim that in their August 1, 2007 response to Greenwich's letter a copy of the notice of claim was provided (Cross-motion, Ex. J).

Discussion

As an initial matter, plaintiffs contention that upon receipt of the May 17, 2007 letter from Temco's counsel, Greenwich had all the information it needed to disclaim coverage based on late notice, is unavailing. While the letter provides the date of loss of June 19, 2006, there is nothing in the letter indicating when plaintiffs learned of Cabrera's incident. And, the timeliness of an insurer's disclaimer is measured from the point when the insurer first learns of the grounds for disclaimer (First Financial Insurance Company v Jetco Contracting Corp., 1

NY3d 64 [2003])). That basis is not the case with the May 17, 2007 letter.

Having said that, based on this record, there are issues of fact as to when Greenwich was first informed of the dates in which the City and Temco first received notice of Cabrera's claim. In that regard, by letter dated August 1, 2007, Temco's counsel indicated that it was responding to Greenwich's June 28, 2007 correspondence (Moving Papers, Ex. Q). Temco's counsel also indicates that it enclosed a copy of Cabrera's notice of claim with its letter (Moving Papers, Ex. Q). The notice of claim would have at least informed Greenwich as to when the City first learned of Cabrera's claim. Greenwich's counsel, however, asserts that the notice of claim was not provided with the August 1, 2007 letter, nor did Temco's counsel provide any details as to when it first learned of Cabrera's incident or claim (Spira Affirm., 8/20/10, ¶ 23). Plaintiffs' counsel asserts that the notice of claim was provided with its August 1, 2007 letter (Mitchell Affirm., 10/4/10, ¶ 16). Since neither of the parties' counsel has personal knowledge of these facts, neither statement by counsel is of probative value.

Moving on, assuming arguendo that Temco's counsel failed to provide a copy of the notice of claim in its August 1, 2007 letter, the evidence Greenwich proffers to show when it was first informed is contradictory. In that regard, Greenwich first

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claims that Temco did not provide a copy of the notice it received from the City informing Temco of Cabrera's notice of claim until it received Temco's September 19, 2007 correspondence (Spira Affirm., 8/20/10, ¶ 18). Indeed, Greenwich refers to Exhibit M in the moving papers, which includes a copy of Temco's September 19, 2007 letter, the City's letter to Temco, dated November 13, 2006, informing Temco of Cabrera's claim, and a copy of the notice of claim. In a complete turnaround, Greenwich then goes on to claim that Temco's September 19, 2007 letter did not enclose a copy of the notice of claim or provide any details of how and when Temco first became aware of Cabrera's incident (Spira Affirm., 8/20/10, ¶ 24). Greenwich next claims the following:

On October 1, 2007, counsel for Temco first provided copies of the Summons and Complaint and Notice of Claim in the underlying action to Greenwich. In addition, on the same date, counsel for Temco first provided Greenwich with copies of correspondence sent by both the plaintiff's attorneys and The City to Temco in November of 2006. The October 1, 2007 letter from counsel for Temco to Greenwich is annexed ... as Exhibit S.

(Spira Affirm., 8/20/10, ¶ 25). Exhibit S, however, provides only Greenwich's disclaimer letter. Furthermore, in its disclaimer letter, Greenwich states that it "is in response to [Temco's counsel's] letter, dated September 19, 2007 and that it first received the documents on October 10, 2007 (Moving Papers, Ex. S). These inconsistencies in Greenwich's counsel's

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affirmation, and the annexed exhibits raise factual issues as to whether Greenwich obtained the information it needed to disclaim on August 1, September 19, October 1, or October 10 of 2007. Such inconsistencies preclude a summary determination as to whether Greenwich delayed disclaiming coverage and, if so, whether such delay was reasonable (Hunter Roberts Construction Group, LLC v Arch Insurance Company, 75 AD3d 404 [1st Dept 2010]; West 16th Street Tenants Corp. v Public Service Mutual Insurance Company, 290 AD2d 278, supra). For example, if Greenwich had received the information it needed to disclaim coverage for late notice on September 19, 2007, it would need to provide a reasonable justification for waiting until October 29, 2007 to send a letter disclaiming coverage (see West 16th Street Tenants Corp. v Public Service Mutual Insurance Company, 290 AD2d 278, supra, [finding 30-day delay in disclaiming coverage was unreasonable]). For these reasons, the fact that the City may not have provided Greenwich with notice of Cabrera's claim, as argued by Greenwich, is of no moment.

Accordingly, defendant's motion is denied.

As for plaintiffs' motion for summary judgment, it is denied. As discussed above, Temco's counsel's May 17, 2007 letter did not provide Greenwich with the information it needed to become sufficiently aware of the facts which would support a disclaimer for late notice. And there are clearly issues of fact

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as to when plaintiffs provided Greenwich with the dates they learned of Cabrera's claim.

Accordingly, it is

ORDERED that defendants' motion for summary judgment is denied; and it is further

ORDERED that plaintiffs' cross-motion is denied; and it is further

ORDERED that the parties are directed to appear for a compliance conference in Part 48, Room 242, on June 10, 2011 at 10:00 a.m.

This memorandum opinion constitutes the decision and order of the Court.

Dated: 4/15/11



HON. JEFFREY K. OING, J.S.C.

FILED

APR 19 2011

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