

Virginia Surety Co., Inc. v Lind-Ric Hous. Co., Inc.

2011 NY Slip Op 31703(U)

April 11, 2011

Supreme Court, New York County

Docket Number: 105400/06

Judge: Debra A. James

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

PRESENT: DEBRA A. JAMES
Justice

PART 59

VIRGINIA SURETY COMPANY, INC. f/k/a
COMBINED SPECIALTY INSURANCE COMPANY,

Plaintiff,

Index No.: 105400/06

Motion Date: 06/30/10

Motion Seq. No.: 02

Motion Cal. No.: 127

- v -

LIND-RIC HOUSING CO., INC., METRO
MANAGEMENT & DEVELOPMENT, INC., and HOWARD
KALE as Administrator of the Estate of BESS
KALE, Deceased,

Defendants.

The following papers, numbered 1 to 4 were read on this motion for summary judgment.

Notice of Motion/Order to Show Cause -Affidavits -Exhibits _____
Answering Affidavits - Exhibits _____
Replying Affidavits - Exhibits _____

PAPERS NUMBERED

1 - 2

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Cross-Motion: Yes No

Upon the foregoing papers,

The court shall grant plaintiff's motion for summary judgment declaring that VIRGINIA SURETY COMPANY, INC. f/k/a COMBINED SPECIALTY INSURANCE COMPANY ("Virginia Surety") has no obligation to defend or indemnify defendants Lind-Ric and Metro-Management in the underlying personal injury action.

This declaratory judgment action arises out of the personal injury action Bess Kale v Lind-Roc Housing Co., Inc. pending in

Check One: FINAL DISPOSITION NON-FINAL DISPOSITION

Check If appropriate: DO NOT POST REFERENCE

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

the Supreme Court of the State of New York, Bronx County, under Index Number 7069/06 which resulted from an accident that occurred when plaintiff Bess Kale ("Kale") fell while descending an egress ramp in front of a cooperative apartment building located at 2410 Barker Avenue, Bronx, New York on February 2, 2003. LIND-RIC HOUSING CO., INC. ("Lind-Ric") owns the premises and METRO MANAGEMENT & DEVELOPMENT, INC. ("Metro Management") manages the property.

Virginia Surety issued a Commercial General Liability insurance policy to Lind-Ric, bearing policy number VSL-2200517, with effective dates of November 12, 2002 through November, 12, 2003. Plaintiff seeks summary judgment on the grounds that defendants never reported the underlying incident as required by the policy, even though Lind-Ric and Metro Management had timely notice of the occurrence. Elizabeth Williams ("Williams"), a security guard employed by S.R.C. Security (a security firm retained by Metro Management) was alerted by two witnesses to Kale's fall shortly after the incident. Williams told the building's resident superintendent, Danilo Muniz ("Muniz"), of Kale's fall and her removal from the scene by ambulance. Williams gave Muniz a copy of the incident report that she prepared. Muniz allegedly notified Norman Schneider ("Schneider"), the Vice President of Metro Management, of the incident by leaving the incident report on Schneider's desk.

Part of Muniz's duties as building superintendent is to provide Schneider with notice of any incidents that might require the building management's attention.

Schneider denied receiving the incident report. In his deposition, he testified that he did not receive any notice of the Kale accident until the suit was filed in 2006, at which time Metro Management notified Virginia Surety of the suit. Based on its investigation, Virginia Surety alleges that Metro Management and Lind-Ric knew of the incident in 2003. Because defendants failed to provide Virginia Surety with prompt notice of the occurrence as required by the policy, Tower Risk, on Virginia Surety's behalf, disclaimed covered by letter dated February 17, 2006.

Defendants admit that Virginia is entitled to notice of an incident as soon as practicable after the occurrence. However, Defendants state that there is an issue of fact as to whether Lind-Ric and Metro had notice of the Kale accident prior to the commencement of the personal injury lawsuit and were therefore unable to timely notify Virginia of the incident.

Based upon the evidence adduced on this motion, defendants Lind-Ric and Metro Management did not timely notify plaintiff Virginia Surety of the February 2, 2003 accident involving Kale. Although the defendants state that Muniz's duties did not involve speaking with people who were injured on the premises or filing

incident reports of accidents on the the premises, the deposition testimony of both Muniz and Schneider contradict this claim. It is beyond dispute that Muniz, the building superintendent, knew of the accident and knew that Kale had been taken by ambulance to the hospital. "Knowledge of an occurrence obtained by an agent charged with the duty to report such matters is imputed to the principal". Paramount Ins. Co. v Rosedale Gardens, Inc., 293 A.D.2d 235 (1st Dept 2002). "A principal is bound by notice to or knowledge of his or her agent in all matters within the scope of the agency, notwithstanding the fact that such information is never actually communicated to the principal". Smalls v Reliable Auto Service, Inc., 205 A.D.2d 523 (2nd Dept 1994).

Since Lind-Ric and Metro Management through their own superintendent had immediate notice of the Kale accident and failed to report the accident promptly to Virginia Surety, defendants have therefore failed to comply with a contractual condition to coverage, which justified plaintiff's disclaimer. "The law is settled that an insurer is not obligated to pay for the loss of its insured in the absence of timely notice in accordance with the terms of the policy." Heydt Contracting Corp. v American Home Assur. Co., 146 AD2d 497, 498 (1st Dept 1989).

Accordingly, it is

ORDERED that plaintiff's motion for summary judgment against defendants LIND-RIC HOUSING CO., INC., METRO MANAGEMENT & DEVELOPMENT, INC., and HOWARD KALE as Administrator of the Estate of BESS KALE, Deceased, is GRANTED; and it is further

ORDERED, ADJUDGED and DECLARED that plaintiff VIRGINIA SURETY COMPANY, INC. f/k/a COMBINED SPECIALTY INSURANCE COMPANY has no duty to defend or indemnify defendants LIND-RIC HOUSING CO., INC. and METRO MANAGEMENT & DEVELOPMENT, INC. in connection with the action entitled Bess Kale v Lind-Ric Housing Co., Inc. Supreme Court of the State of New York, Bronx County, under Index Number 7069/06.

This is the decision and order of the court.

Dated: April 11, 2011

ENTER:

~~Handwritten signature~~
DEBRA A. JAMES J.S.C.
J.S.C.

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