

Munoz v City of New York

2011 NY Slip Op 32082(U)

July 28, 2011

Sup Ct, NY County

Docket Number: 108634/07

Judge: Jane S. Solomon

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

PRESENT: JANE S. SOLOMON

PART 55

Index Number : 108634/2007

MUNOZ, JORGE

vs
CITY OF NEW YORK

Sequence Number : 006

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE 2/14/11

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

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

Notice of Motion/ Order to Show Cause — UNFILED JUDGMENT

Answering Affidavits — Exhibit and notice of entry cannot be served based hereon To

Replying Affidavits _____ appear in person at the Judgment Clerk's Desk (Room 141B).

PAPERS NUMBERED

1-3

4-8

9-11

Room

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

is decided in accordance with the annexed memorandum decision, order and declaratory judgment.

NB Compliance Conference set at end for 2/28/11. All parties to attend. Plaintiffs to notify them immediately upon receipt of courtesy copy sent by my staff.

Dated: 2/28/11

Jane S. Solomon 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 55

-----X
JORGE MUNOZ and JONATHAN SALAZAR,

Index No. 108634/07

Plaintiffs,

DECISION, ORDER &
DECLARATORY JUDGMENT

-against-

THE CITY OF NEW YORK, BATTERY PARK
CITY AUTHORITY, SOUTH COVE 11 ASSOCIATES,
REGATTA CONDOMINIUM and BOARD OF
MANAGERS OF REGATTA CONDOMINIUM

Defendants,

and ARK GENERAL CONSTRUCTION, INC.

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).

Additional Defendant
on cross-claims pursuant to
CPLR 3019(d).

-----X

THE BOARD OF MANAGERS OF REGATTA
CONDOMINIUM and BATTERY PARK
CITY AUTHORITY,

Index No. 590497/09

Third-party Plaintiffs,

-against-

ADMIRAL INDEMNITY COMPANY and
CLERMONT SPECIALTY MANAGERS, LTD.,

Third-party Defendants.

-----X

JANE S. SOLOMON, J.:

Defendants and third-party plaintiffs The Board of Managers of Regatta Condominium (Regatta Condominium) and Battery Park City Authority (BPCA) move for summary judgment on their third-party complaint for declaratory judgment. Third-party defendants Admiral Indemnity Company (Admiralty) and Clermont Specialty Managers, Ltd. (Clermont) cross-move for summary judgment dismissing the third-party complaint and granting them

declaratory judgment that no insurance coverage is due to third-party plaintiffs under a policy issued by Admiralty.

The Regatta Condominium is located in Battery Park City, on property owned by BPCA and leased to the Regatta Condominium pursuant to a lease that requires Regatta Condominium to indemnify BPCA from claims for personal injury arising from the condominium's use of the property, including claims due to the acts of the condominium's contractors (Lease, Notice of Motion, Ex. L, Article 19).

This lawsuit arises from a July 7, 2006 accident, whereby plaintiffs allegedly fell from a scaffold while painting in front of the Regatta Condominium building. On July 10, 2006, the property manager for Regatta Condominium prepared an incident report and allegedly sent it to the condominium's insurance broker. The broker denies that it received the incident report. In any event, notice of the accident was not sent to the Regatta Condominium's insurance company, Admiral, or Admiral's claims handling service, Clermont.¹ Admiral had issued an insurance policy to Regatta Condominium with coverage from June 30, 2006 through June 30, 2007. It required the insured to give notice of a potential claim as soon as reasonably practicable as a condition for coverage. The parties do not refer to any part of the policy that obligates Admiral to insure BPCA.

¹ It is not disputed that notice given to Clermont is given to Admiral, so the two are hereinafter referred to simply as "Admiral".

Plaintiffs commenced this lawsuit by filing on June 21, 2007. The summons and complaint were served on Regatta Condominium in early July, 2007; it sent a copy to its insurance broker on July 11, 2007, together with a copy of the July 10, 2006 incident report. On July 12, 2007, the broker faxed a copy of the summons and complaint and the incident report to Admiral. The fax cover sheet states that it is the first report of loss. On July 17, 2007, Admiral sent a letter acknowledging receipt of the notice. On August 24, 2007, Admiral issued a disclaimer letter to the Regatta Condominium, stating that the sole ground for disclaimer was late notice. More specifically, it stated that because Regatta Condominium received notice of the accident alleged in the complaint more than a year before, and failed to timely notify Admiral, coverage is barred by reason of the condominium's breach of the timely notice condition.

After the disclaimer was sent, Regatta Condominium's broker wrote to Admiral and stated that the condominium was under the impression that it would not be sued because it had nothing to do with the accident; it claimed that it hired defendant Ark General Construction, Inc. to do some painting, and the scaffold was erected by Ark and tipped over by its own employee.

The third-party complaint seeks declarations that Admiral is obligated to defend and indemnify Regatta Condominium and BPCA in the Munoz-Salazar action, and that Admiral must reimburse all defense costs, including reasonable attorneys fees,

already incurred in defending this action.

Admiral produced a claims manager for deposition in this action. He had no specific recollection of his investigation into Regatta Condominium's claim, but was able to explain Admiral's investigation process and the significance of various documents. There is no indication that the investigation involved any unusual problem that would cause delay. Admiral does contend, however, that after it disclaimed it learned that there were some irregularities in the condominium's pre-lawsuit reports and investigation of the accident, none of which explain Admiral's delay in disclaiming coverage.

Under Insurance Law § 3420(d), an insurer wishing to deny coverage is required to send written notice of the disclaimer as soon as is reasonably possible. New York courts have interpreted how soon "reasonably possible" is, and have held that a 30 day delay in disclaiming is unreasonable as a matter of law under § 3420(d) when it is obvious from the face of the notice that the insured is giving late notice (see, *West 16th Street Tenants Corp. v Public Service Mut. Ins. Co.*, 290 AD2d 278 [1st Dept 2002]). Here, the notice sent to Admiral states on the cover sheet that it is the first report of loss, and that the date of the underlying incident was more than a year before the notice. Since there is no explanation warranting the 43-day delay in notifying Regatta Condominium of its disclaimer, Admiral's notice is unreasonably late as a matter of law.

Finally, Admiral contends that there is no coverage for BPCA because it is not a named insured under the policy. Regatta Condominium and BPCA argue that BPCA is an insured under the "insured contract" coverage. The Admiral Policy defines an "insured contract" in part as a contract for a lease of premises (Commercial General Liability Coverage Form, Section V[9][a]). The policy excludes coverage for bodily injury damages that the insured is obligated to pay by reason of the assumption of liability in a contract, but this exclusion expressly does not apply if the assumption of liability arises from an "insured contract" (Commercial General Liability Coverage Form, Section I[2][b]).

Article 19 of the lease provides that Regatta Condominium will indemnify BPCA from bodily injury claims arising from work by the condominium's contractors. This indemnification includes BPCA's costs and attorney's fees of defending such a claim. By the terms of the Admiral policy, the lease between BPCA and the Regatta Condominium is an "insured contract", and as a result, the policy provides coverage for the liability assumed by Regatta Condominium pursuant to the lease. Accordingly, it hereby is

ORDERED, ADJUDGED and DECLARED that the motion for summary judgment is granted in part, and the cross-motion granted in part, as follows:

1. It is ADJUDGED and DECLARED that Admiral is

obligated to defend and indemnify Regatta Condominium and BPCA under Admiral's policy #21-1-9306-31-07 with respect to the suit commenced by plaintiffs Jorge Munoz and Jonathan Salazar arising out of the alleged July 6, 2006 accident.

2. It is ADJUDGED and DECLARED that Admiral is obligated to pay all costs and expenses, including reasonable attorneys fees, incurred by or on behalf of Regatta Condominium and BPCA in defending the suit commenced by plaintiffs Jorge Munoz and Jonathan Salazar arising out of the alleged July 6, 2006 accident.

And it further is

ORDERED that counsel shall appear for a compliance conference in Part 55, 60 Centre Street, Room 432, New York, NY on August 29, 2011 at 11 AM to discuss severing for trial the remaining issue in the third party action, namely a determination of the amount due to Regatta Condominium and BPCA pursuant to decretal paragraph 2 above, and setting a final deadline for plaintiffs to file their note of issue in this fairly old lawsuit.

Dated: July 28, 2011

ENTER:

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).



J. S. C.

