

**Vigilant Ins. Co. v Sibbio**

2011 NY Slip Op 32310(U)

August 19, 2011

Supreme Court, New York County

Docket Number: 102316/11

Judge: Joan A. Madden

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SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY

PRESENT: Hon. Joak A. Mudda

PART 11

Index Number : 102316/2011

VIGILANT INSURANCE COMPANY

INDEX NO. 102316/11

vs  
SIBBIO, RALPH

MOTION DATE 8-4-11

Sequence Number : 001

MOTION SEQ. NO. \_\_\_\_\_

SUMMARY JUDGMENT

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

\_\_\_\_\_ | No(s). \_\_\_\_\_

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

\_\_\_\_\_ | No(s). \_\_\_\_\_

\_\_\_\_\_ | No(s). \_\_\_\_\_

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the  
written Memorandum Decision & Order.

**FILED**

AUG 30 2011

NEW YORK  
COUNTY CLERK'S OFFICE

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

Dated: August 19, 2011

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

- 1. CHECK ONE: .....  CASE DISPOSED  NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: ..... MOTION IS:  GRANTED  DENIED  GRANTED IN PART  OTHER
- 3. CHECK IF APPROPRIATE: .....  SETTLE ORDER  SUBMIT ORDER
- DO NOT POST  FIDUCIARY APPOINTMENT  REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 11

-----X  
VIGILANT INSURANCE COMPANY,

Plaintiff,

-against-

RALPH SIBBIO,

Defendant  
-----X

INDEX NO. 102316/11

**FILED**

**AUG 30 2011**

JOAN A. MADDEN, J.:

NEW YORK  
COUNTY CLERK'S OFFICE

Plaintiff Vigilant Insurance Company ("Vigilant") moves for summary judgment on its complaint, and defendant Ralph Sibbio ("Sibbio") opposes the motion. For the reasons below, the motion is denied without prejudice to renewal.

Vigilant issued a Commercial General Liability Policy to Sibbio covering the period December 5, 2003 through December 4, 2004 (Policy No. 12654140-01) ("the Policy"). Sibbio purchased a house located at 16-18 York Avenue, Staten Island, New York ("the property") from Robert Demperio on or about March 9, 2004. By endorsement effective on February 19, 2004, liability coverage for the property was added to the Vigilant Policy.

In this action, Vigilant seeks a declaration that it is not required to defend or indemnify Sibbio in connection with a personal injury action commenced in the Supreme Court, Kings County entitled Ashelie Seye, an infant by her mother and natural guardian, Jamiylah Abdurrahman Seye and Jamiylah Abdurrahman Seye, individually v. Ralph Sibbio and Robert Demperio; Index No. 39948/04 (the "Underlying Action"). The Underlying Action, which was commenced on December 8, 2004, seeks damages for personal injuries caused by exposure to lead during the period of plaintiffs' tenancy between July 2003 and July 2004. On January 10, 2005, Sibbio's insurance broker sent a copy of the complaint in the Underlying Action to

Vigilant. On February 11, 2005, Vigilant notified Sibbio that there was no coverage under the Policy.

In support of its position, Vigilant relied on the following provisions in the Policy:

**Personal Liability Coverage**

We cover damages a covered person is legally obligated to pay for personal injury or property damages which takes place anytime during the policy period and are caused by an occurrence, unless stated otherwise or an exclusion applies. Exclusions to this coverage are described in **Exclusions**.

In lieu of the definition for "occurrence" in the Introduction, the following definition of "occurrence" applies to Personal Liability Coverage:

"Occurrence means an accident to which this insurance applies and *which begins within the policy period*. Continuous or repeated exposure to substantially the same general conditions unless excluded is considered to be one occurrence (emphasis supplied)....

"Damages" means the sum that is paid or is payable to satisfy a claim settled by us or resolved by judicial procedure or a compromise we agree to in writing.

"Personal injury" means the following injuries, and resulting death

- bodily injury....

"Bodily injury" means physical or bodily harm, including sickness or disease that results from it, and required care, loss of services and resulting death.

On February 24, 2011, Vigilant commenced this declaratory judgment action seeking to deny coverage based on these provisions and now moves for summary judgment.

Sibbio opposes the motion, arguing that Vigilant did not timely disclaim coverage, and in support of his position submits an affidavit from his wife, Lori Sibbio, who states that on October 4, 2004, when she received notice of the claim from counsel for plaintiffs in the Underlying Action, she informed her insurance broker, who assured her that Vigilant had been

notified. In addition, Sibbio argues that there are triable issues of fact as to when the occurrence began, noting that the lead in the infant plaintiff's blood was first discovered on July 14, 2004, during Sibbio's ownership of the property.<sup>1</sup> Sibbio also notes that Robert Demperio, his co-defendant in the Underlying Action, filed an answer denying the allegations in the complaint, including that the infant was poisoned by lead paint.

Sibbio's argument that Vigilant did not timely disclaim coverage is unavailing. First, it is well established that when, as here, a claim fails outside the scope of coverage (as opposed to within an exclusion), an insurer is not required to disclaim. Government Employees Ins. Co. v. Pagano, 251 AD2d 452 (2d Dept 1998). This rule is based on the concept that "[e]stoppel may not be used to create coverage where no insurance policy existed, regardless of whether or not the insurance company was timely in issuing its disclaimer." Wausau Insurance Cos. v. Feldman, M.D., 213 AD2d 179 (1<sup>st</sup> Dept 1995). In any event, as the denial of coverage here was based on the allegations in the complaint regarding the dates of exposure, it cannot be said that such denial of coverage was untimely since it was made about a month after the complaint was provided to Vigilant.

The next issue is whether there is an issue of fact as to the date of the occurrence. On a motion for summary judgment, the proponent "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case..." Winegrad v. New York Univ. Med. Center, 64 N.Y.2d 851, 852 (1985). Once the proponent has made this showing, the burden of proof shifts to the party opposing the motion to produce evidentiary proof in admissible form to establish that material issues of fact

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<sup>1</sup>Sibbio also argues that there is evidence that the infant plaintiff resided at the another apartment located at 116 Grove Street, Brooklyn, New York. Notably, however, the record shows that the plaintiffs in the Underlying Action were relocated to this apartment as a result of the lead condition in the apartment at the property.

exist which require a trial. Alvarez v. Prospect Hospital, 68 N.Y.2d 320, 324 (1986).

Here, Vigilant has not come forth with sufficient evidence to meet its burden of eliminating triable issues of fact. Vigilant's motion for summary judgment is supported by evidence submitted in the Underlying Action, including a lease showing that Jamilyah Abdurrahman ("Abdurrahman"), a plaintiff in the Underlying Action and the mother of the infant plaintiff was a tenant of an apartment at the property from June 1, 2003 and May 31, 2005. Vigilant also relies on paragraph 22 of the complaint in the Underlying Action and paragraph 3 of the bill of particulars which alleges that the infant plaintiff was exposed to lead paint commencing with the infant plaintiff's occupancy of the property. However, these assertions in the complaint and bill of particulars are verified by the attorney and not the mother, and are without probative value. See Marinelli v. Shifrin, 260 AD2d 227, 228 (1<sup>st</sup> Dept 1999); Younger v. Sparten Chemical Co., 252 Ad2d 265, 268 (3d Dept 1999).

In addition, Vigilant points to a sworn affidavit submitted by Sibbio in which he acknowledges he purchased the property in March 2004, and admits that at the time of the closing Abdurrahman resided in an apartment at the property, although he denies he was aware that a child under seven resided there. He also states that prior to the closing he was unable to gain access to the apartment and did not have an opportunity to observe its condition, including whether it had any dangerous condition involving lead paint. Vigilant also submits a notice to abate the nuisance from the Commissioner of the City Department of Health to Sibbio dated July 24, 2004, notifying Sibbio of the lead condition at the property.

The above evidence, however, is insufficient to establish when the infant plaintiff who was tested positive for lead in July, 2004 and was born in April 2002, first ingested the lead, or how long the lead paint hazard existed in the relevant apartment. Under these circumstances, it cannot be determined as a matter of law when the injury occurred and therefore whether the

[\* 6]

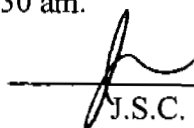
“occurrence” was within the policy period. Accordingly, summary judgment must be denied, without prejudice to renewal upon additional proof which may include the deposition testimony, if any, in the Underlying Action relevant and material to the issue of the commencement of exposure.

In view of the above, it is

ORDERED that motion for summary judgment is denied without prejudice to renewal; and it is further

ORDERED that the parties shall appear for a preliminary conference in Part 11, room 351, 60 Centre Street, on September 22, 2011, at 9:30 am.

DATED: August 19, 2011

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

**FILED**

**AUG 30 2011**

NEW YORK  
COUNTY CLERK'S OFFICE