

City of New York v QBE Ins. Corp.

2011 NY Slip Op 32986(U)

November 10, 2011

Supreme Court, New York County

Docket Number: 403092/2008

Judge: Barbara Jaffe

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

PRESENT: JAFFE BARBARA JAFFE J.S.C.
Justice

PART 5

Index Number : 403092/2008
CITY OF NEW YORK
vs.
QBE INSURANCE CORPORATION
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT
CAL # 35

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

this motion to/for summary judgment

PAPERS NUMBERED	
1, 2	_____
3, 4	_____
5	_____

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

**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER**

FILED

NOV 14 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 11/10/11
NOV 10 2011

Barbara Jaffe
BARBARA JAFFE 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 : PART 5

-----X

THE CITY OF NEW YORK,

Index No. 403092/08

Plaintiff,

Motion Subm.: 8/16/11

Motion Seq. Nos.: 001

-against-

DECISION & ORDER

QBE INSURANCE CORPORATION,

FILED

Defendant.

-----X

BARBARA JAFFE, JSC:

NOV 14 2011

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COUNTY CLERK'S OFFICE
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By notice of motion dated June 13, 2011, plaintiff City moves pursuant to CPLR 3212 for an order granting it summary judgment. Defendant opposes and, by notice of motion dated June 17, 2011, moves pursuant to CPLR 3212 for an order summarily dismissing the complaint. City opposes.

I. BACKGROUND

On or about November 24, 2003, D&K Construction Co., Inc. (D&K) entered into a contract with City's Department of Education to perform construction work, which required D&K to obtain a comprehensive general liability insurance policy naming the City as an additional insured. (Affirmation of Elaine J. S. Chen, ACC, dated June 13, 2011 [Chen Aff.], Exh. A).

In 2005, D&K obtained from defendant a general liability insurance policy, effective from

August 13, 2005 to August 13, 2006. D&K is the named insured, and while City is not listed as an additional insured, the policy contains an additional insured endorsement which provides that "an insured" is amended to include as an insured a person or organization as required by written contract and/or evidenced by Certificate of Insurance on file with the company, but only with respect to liability arising out of "your work" for that insured by or for you. Section IV of the policy (Duties in the event of "Occurrence, Offense, Claim or Suit") contains the following provisions:

- a. You must see to it that we are notified as soon as practicable of an "occurrence" or an offense which may result in a claim . . .
- 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 a 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" . . .

The policy was issued by defendant as well as C & H Agency, Inc. (Agency) (*Id.*, Exh. B).

By work order dated February 27, 2006, City directed D&K to perform specific work at P.S. 46 in Staten Island (the school) between February 27, 2006 and April 30, 2006. (*Id.*, Exh. C). D&K then subcontracted with K.D. Construction, Inc. (K.D.) to perform work at the school. (*Id.*, Exhs. C, D).

On April 6, 2006, Malkit Singh, a K.D. employee, was allegedly injured while performing work at the school when he fell from a scaffold after it pulled away from the school building. (*Id.*, Exh. E).

On or about May 2, 2006, Singh served City with a notice of claim. (*Id.*).

By two letters dated July 7, 2006, one addressed to defendant care of Agency and reflecting Agency's address and the other addressed to Agency at its address, City advised that Singh had filed a claim against it. (*Id.*, Exh. F).

By letter dated July 26, 2006 and addressed to D&K and City, defendant's claims representative disclaimed coverage for D&K's failure to notify it pursuant to the conditions of the insurance policy. While acknowledging that City was listed as an additional insured on D&K's policy and that it had received City's letter on July 18, 2006, defendant also disclaimed coverage for City on the ground that City had received notice of Singh's claim on May 1 or 2, 2006 but did not notify defendant until July 18, 2006, and had thus provided late notice. (*Id.*, Exh. G).

On or about August 15, 2006, Singh commenced an action against City and D&K among others by serving them with a summons and complaint. (*Id.*, Exh. H). City was served with a copy of the pleadings on August 24, 2006. (Affirmation of Alexandra E. Rigney, Esq., dated July 18, 2011 [Rigney Aff.], Exh. B). By facsimile transmission dated October 23, 2006, City sent a copy of Singh's complaint to defendant's claim representative. (Chen Aff., Exh. I).

On or about December 19, 2008, City commenced the instant action seeking a declaration that defendant has a duty to defend it in two actions, including Singh's action. (*Id.*, Exh. J).

By notice to admit dated August 7, 2009, City admitted receipt of Singh's notice of claim on May 1, 2006, that it first notified defendant of Singh's claim in July 2006, that it received Singh's summons and complaint on August 24, 2006, and that it did not send defendant a copy of Singh's pleadings until October 23, 2006. (Rigney Aff., Exh. B).

II. CITY'S MOTION

A. Contentions

City argues that defendant has a duty to defend it in the Singh action as it, an additional insured under D&K's policy, was not required to give defendant notice of the claim but was only required to forward any legal papers it received, as defendant has shown no prejudice resulting from City's alleged untimely notice, and as defendant did not timely disclaim upon receipt of City's notice. (Mem. of Law, dated June 13, 2011).

Defendant asserts that City failed to provide timely notice of Singh's claim or lawsuit, that City had an independent obligation to provide notice as an additional insured, that it need not assert prejudice, and that its disclaimer was timely. It also maintains that having disclaimed coverage in July 2006, it was not required to issue another disclaimer upon receipt of City's October 2006 correspondence. (Rigney Aff.; Mem. of Law, dated July 18, 2011).

In reply, City reiterates its prior arguments, and denies that defendant had no duty to issue another disclaimer after it sent defendant a copy of Singh's pleadings. (Reply Mem., dated July 26, 2011).

B. Analysis

1. Notice by additional insured

It is well-settled that when an insurance policy requires an insured to provide "notice of a claim or 'suit' as soon as practicable," the notice must be provided "within a reasonable time in view of all the facts and circumstances." (*Security Mut. Ins. Co. of New York v Acker-Fitzsimons Corp.*, 31 NY2d 436, 440-441 [1972]; *Pile Found. Constr. Co., Inc. v Investors Ins. Co. of Am.*, 2 AD3d 611 [2d Dept 2003]). Notice is a condition precedent to coverage and absent a valid

excuse, “a failure to satisfy the notice requirement vitiates the [insurance] policy.” (*Security Mut. Ins. Co. of New York*, 31 NY2d at 440).

An additional insured has a duty to provide timely notice of a claim to the insurer, as “even if the insurance policy were construed as specifying that only the named insured [] was required to provide notice,” an implied duty arises. (*Structure Tone, Inc. v Burgess Steel Prods. Corp.*, 249 AD2d 144, 145 [1st Dept 1998] [citations omitted]; *see also 23-08-18 Jackson Realty Assocs. v Nationwide Mut. Ins. Co.*, 53 AD3d 541 [2d Dept 2008]; *City of New York v St. Paul Fire and Marine Ins. Co.*, 21 AD3d 978 [2d Dept 2005]; *Judlau Contr., Inc. v Westchester Fire Ins. Co.*, 24 Misc 3d 1228[A], 2009 NY Slip Op 51659[U] [Sup Ct, New York County 2009]; *Illinois Ntl. Ins. Co. v Illinois Union Ins. Co.*, 2008 WL 5197028, 2008 NY Slip Op 33225[U] [Sup Ct, New York County 2008]).

Thus, disclaimers of coverage have been upheld based on an additional insured’s failure to provide timely notice. (*Ciampa Estates, LLC v Tower Ins. Co. of New York*, 84 AD3d 511 [1st Dept 2011], *lv denied* 17 NY3d 709 [additional insured did not submit timely notice of claim and thus defendant had no duty to defend it]; *County of Orange v Reclamation Inc. of Kingston*, 81 AD3d 770 [2d Dept 2011], *lv denied* 17 NY3d 703 [insurer had no duty to defend County as additional insured under policy as County’s notice untimely]; *Bovis Lend Lease LMB, Inc. v Travelers Prop. Cas. Co. of Am.*, 78 AD3d 405 [1st Dept 2010] [as plaintiff was additional insured under policy, its failure to provide timely notice vitiated coverage]; *City of New York v Welsbach Elec. Corp.*, 49 AD3d 322 [1st Dept 2008] [City as additional insured had independent duty to provide timely notice]; *see also New York Univ. v Am. Bldg. Maintenance*, 78 AD3d 615 [1st Dept 2010] [insurer not required to indemnify plaintiff as additional insured on policy absent

timely notice by plaintiff)).

Plaintiff's reliance on *City of New York v Continental Cas. Co.* is misplaced as the sole issue before the court was whether the defendant-insurer properly disclaimed coverage based on the plaintiff's failure to forward it pleadings immediately. (27 AD3d 30 [1st Dept 2005]). The duty of an additional insured to provide timely notice was not before the court and to the extent that it found that the notice given by the named insured in that case was sufficient to constitute notice by the additional insured, that finding constitutes dicta. (*Accord Time Warner Cable of New York City v Hylan Datacom & Elec., Inc.*, 2007 WL 2176562, 2007 NY Slip Op 30936[U] [Sup Ct, New York County 2007]).

2. Prejudice

While an insurer may not disclaim coverage based on untimely notice if it was not prejudiced thereby (Insurance Law § 3420[5]), section five became effective on January 17, 2009 and applies only to policies issued or delivered on or after that date. (*Briggs Ave., LLC v Ins. Corp. of Hannover*, 11 NY3d 377 [2008] [reaffirming that insurer may disclaim coverage based on late notice regardless of prejudice as amendment to Insurance Law § 3420 not yet effective]). As the policy here was issued in 2005, long before the amendment's effective date, defendant need not demonstrate that it was prejudiced by City's untimely notice in order to disclaim coverage based on untimeliness. (*Zimmerman v Peerless Ins. Co.*, 85 AD3d 1021 [2d Dept 2011]; *Ponok Realty Corp. v United Ntl. Specialty Ins. Co.*, 69 AD3d 596 [2d Dept 2010]; *Bd. of Mgrs. of the 1235 Park Condominium v Clermont Specialty Mgrs., Ltd.*, 68 AD3d 496 [1st Dept 2009] [no merit to insured's argument that showing of prejudice required as policy issued in 2003]).

3. Timely disclaimer

Absent any dispute that City's notice to defendant was late, the remaining issue is whether defendant's disclaimer was timely. Pursuant to Insurance Law § 3420(d), if an insurer disclaims coverage, it must give the insured or claimant written notice of the disclaimer as soon as reasonably possible.

Here, as it is undisputed that City sent its notice to defendant on or about July 7, 2006, that defendant received it between July 8 and 18, 2006, and that it issued its disclaimer on July 26, 2006, defendant's disclaimer was timely as a matter of law. (*See Ins. Corp. of New York v U.S. Fire Ins. Co.*, 63 AD3d 455 [1st Dept 2009], *lv denied* 13 NY3d 707 [disclaimers issued eight days after receiving notice held timely as matter of law]; *ALIB, Inc. v Atlantic Cas. Ins. Co.*, 52 AD3d 419 [1st Dept 2009] [disclaimer issued 20 days after receipt of notice timely]; *Matter of Temple Constr. Corp. v Sirius Am. Ins. Co.*, 40 AD3d 1109 [2d Dept 2007] [disclaimer within eight days of receipt of claim not unreasonable as matter of law]; *see also Huguens v Vil. of Spring Valley*, 82 AD3d 1159 [2d Dept 2011] [disclaimer issued eight days after conclusion of investigation held valid]).

City cites no authority, nor is there any, to support its contention that defendant was required to issue a second disclaimer upon its receipt of City's transmission of Singh's summons and complaint in October 2006. (*See eg Assoc. Mut. Ins. Co-op v Bader*, 10 Misc 3d 1028 [Sup Ct, Sullivan County 2005] [as insurer had already disclaimed coverage, it was not required to send another disclaimer in response to insured's notice advising of claim made against it in amended complaint]; *see also Moyer v Thomas*, 153 AD2d 673 [2d Dept 1989] [as insurer had already disclaimed coverage, defendant's forwarding of legal papers would have been "useless

act").

III. DEFENDANT'S MOTION

As defendant's motion addresses the same arguments advanced in its opposition to City's motion, the motion is granted for the reasons stated above.

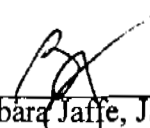
IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that plaintiff's motion for an order granting it summary judgment is denied; and it is further

ORDERED, that defendant's motion for an order granting it summary judgment is granted, and the complaint is dismissed with costs and disbursements to defendant as taxed by the clerk of the court upon the submission of an appropriate bill of costs; and the clerk of the court is directed to enter judgment accordingly.

ENTER:



Barbara Jaffe, JSC

BARBARA JAFFE
J.S.C.

DATED: November 10, 2011
New York, New York

NOV 10 2011

FILED

NOV 14 2011

NEW YORK
COUNTY CLERK'S OFFICE