

**Illinois Natl. Ins. Co. v Zurich-American Ins. Co.**

2011 NY Slip Op 33545(U)

January 9, 2011

Supreme Court, New York County

Docket Number: 603184/08

Judge: Donna M. Mills

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

PRESENT : DONNA M. MILLS  
*Justice*

PART 58

ILLINOIS NATIONAL INSURANCE COMPANY,

INDEX No. 603184/08

Plaintiff,

MOTION DATE \_\_\_\_\_

-v-

MOTION SEQ. No. 001

ZURICH-AMERICAN INSURANCE COMPANY,  
HAYWARD BAKER, INC., ROBERT BOYD AND  
PATRICIA MAGEE-BOYD,

Defendants.

MOTION CAL NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion for \_\_\_\_\_.

PAPERS NUMBERED

Notice of Motion/Order to Show Cause-Affidavits- Exhibits.... 1

Answering Affidavits- Exhibits 2+3

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

CROSS-MOTION:  YES  NO

Upon the foregoing papers, it is ordered that this motion is:

**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).

DECIDED IN ACCORDANCE WITH THE ATTACHED ORDER.

Dated: 1/9/11

Donna M. Mills  
J.S.C.  
DONNA M. MILLS, J.S.C.

Check one:  FINAL DISPOSITION

NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 55

-----X  
ILLINOIS NATIONAL INSURANCE  
COMPANY,

Index No. 603184/2008

Plaintiff,

DECISION AND ORDER

-against-

ZURICH-AMERICAN INSURANCE COMPANY  
HAYWARD BAKER, INC., ROBERT BOYD  
AND PATRICIA MAGEE-BOYD,

Defendants.

**UNFILED JUDGMENT**  
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appear in person at the Judgment Clerk's Desk (Room  
141B).

-----X  
MILLS, J.:

This is a declaratory judgment action. Plaintiff Illinois National Insurance Company (Illinois) sues defendants Zurich-American Insurance Company (Zurich), Hayward Baker, Inc. (Hayward), Robert Boyd (Boyd) and Patricia Magee-Boyd (Magee-Boyd), seeking to determine the rights and obligations of the parties regarding the defense and indemnification of Schiavone Construction Co., Inc. (Schiavone), with respect to the pending matter of *Robert Boyd and Patricia Magee-Boyd v Schiavone Construction Co.* (Index No. 114739/2007 [Sup Ct, New York County]) (the Underlying Action). Illinois is presently defending Schiavone in that action. Plaintiff moves, pursuant to CPLR 3212, for summary judgment on the ground that Schiavone is covered by Zurich's policy. Zurich cross-moves for summary judgment dismissing the complaint, on the ground that it properly disclaimed coverage.

FACTS

Schiavone was hired by the New York City Transit Authority to construct/excavate/renovate the South Ferry Terminal subway station (the Project), a major construction project in Manhattan. Schiavone hired Baker as one of its subcontractors (see Subcontract, Padua Aff., Ex. H). Boyd was employed by Baker. The underlying complaint alleges that, while working on Sunday, July 24, 2005, Boyd was injured at the job site. He filed a workers' compensation claim (Padua Aff., Ex. K), which was reported to Zurich on July 27, 2005. Zurich, Baker's insurer, responded by filing a "Notice to Chair of Carrier's Action on Claim for Benefits," which stated that the claim was not disputed, and payment would begin upon receipt of proof of long-term injury (*id.*, Ex. L). Boyd's health care providers sent medical reports to Zurich (*id.*, Ex. M).

In March 2007, Boyd hired counsel to file a negligence claim on his behalf. On March 26, 2007 his counsel forwarded a letter of representation to Schiavone, which states:

"Location: South Ferry, Whitehall & State Streets  
\* \* \*

Please be advised that this office represents Robert Boyd in connection with all of his claims arising from an accident which occurred on July 24, 2005 as a result of the negligence of your agents, servants and or employees.

Please turn this letter over to your insurance carrier for its prompt consideration ..."

(*id.*, Ex. N).

Schiavone investigated the claim to determine if Boyd was an employee, who employed him, and the nature and specific location of the accident. The investigation took two months,

and, on May 30, 2007, Schiavone forwarded Boyd's letter to Illinois by e-mail (*id.*, Exs. O & P). In the e-mail, Schiavone's claims agent stated that none of its safety representatives had knowledge of Boyd's accident (*id.*).

After its own investigation, Illinois identified that Boyd was employed by Baker, and Zurich was Baker's general liability carrier. On June 29, 2007, Illinois tendered the defense and indemnification of Schiavone to Zurich, claiming additional insured status (Tender Letter, Padua Aff., Ex. U). On July 25, 2007, Zurich disclaimed due to late notice (*id.*, Ex. X).

On November 2, 2007, Boyd filed his complaint in the Underlying Action. On December 19, 2007, Illinois sent a second Tender Letter to Zurich and Baker (Post-Suit Tender Letter, Padua Aff., Ex. Z). Zurich has not responded to this letter, and has not accepted the tender of defense. This action followed.

#### DISCUSSION

##### The Policies

The Schiavone/Baker subcontract required Baker to procure a Commercial General Liability (CGL) policy naming Schiavone as an additional insured (Subcontract, Padua Aff., Ex. H, at Schedule B, ¶ C). Zurich issued a CGL policy to Keller Foundations Inc. (Keller) (Padua Aff, Ex. AA). Baker is one of the named insureds on the policy (*id.* at Z0046). The policy covered any organization named as an additional insured as required in a written contract with the named insured (*id.* at Z0045), and stated: "THIS INSURANCE IS PRIMARY FOR THE PERSON OR

ORGANIZATION SHOWN IN THE SCHEDULE, BUT ONLY WITH RESPECT TO THE LIABILITY ARISING OUT OF 'YOUR WORK'..."

The Zurich policy contains a notice requirement:

"2. Duties in the Event of Occurrence, Offense, Claim or Suit

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 ... notify us as soon as practicable."

(*id.* at Z0031). This clause is modified by a "Notice of Error in Claim Reporting Endorsement" (Reporting Endorsement), as follows:

"e. In the event that an insured reports an "occurrence" to the workers compensation carrier of the named insured, and this "occurrence" later develops into a General Liability claim covered by this policy, the failure to report such "occurrence" to us at that time of the "occurrence" shall not be deemed in violation of this condition. You must, however, give us notice as soon as practicable after being made aware that the particular claim is a General Liability rather than a Workers Compensation claim."

(*id.* at Z0018). Finally, the policy does not contain a choice of law provision.

#### Additional Insured Status

Illinois makes several arguments to establish Schiavone as an additional insured to Baker under the Zurich policy (see Padua Aff., ¶¶ 37-77). These arguments are not opposed. Accordingly, Schiavone is an additional insured on the Zurich policy.

#### Choice of Law

Illinois argues that Zurich's disclaimer was invalid

under Maryland law because the length of the delay was short and justified, and caused no prejudice to Zurich. Zurich counters that New York law is controlling, and under it, Schiavone's notice was unreasonably late.

"The first step in any case presenting a potential choice of law is to determine whether there is an actual conflict between the laws of the jurisdiction involved" (*Matter of Allstate Ins. Co. (Stolarz-New Jersey Mfrs. Ins. Co.)*, 81 NY2d 219, 223 [1993]). Here, there is such a conflict.

In Maryland, an insurer must establish "by a preponderance of the evidence that the lack of cooperation or notice has resulted in actual prejudice to the insurer" (*Elste v ISG Sparrows Point, LLC.*, 188 Md App 634, 651 [2009] [emphasis added]). In New York, for policies issued before January 17, 2009, an insured's failure to timely give notice is grounds for disclaiming, regardless of prejudice (*see Briggs Ave. LLC v Insurance Corp. of Hanover*, 11 NY3d 377, 381-2 [2008]).

Once a conflict has been established, "New York applies a 'grouping of contacts' or 'center of gravity' approach to choice of law questions in contract cases" (*Ackerman v Price Waterhouse*, 252 AD2d 179, 192 [1st Dept 1998] [citation omitted]).

"The five generally significant contacts in contract cases are: the place of contracting, negotiation and performance of the contract; the location of the subject matter of the contract; and the domicile of the parties" (*id.* at 192, citing Restatement

[\* 7]  
[Second] of Conflict of Laws § 188 [2]). "A court considering these factors must focus on the contacts that are significant in the particular contract dispute" (*id.* [citations omitted]; *Certain Underwriters at Lloyd's, London v Foster Wheeler Corp.*, 36 AD3d 17 [1st Dept 2006], *affd* 9 NY3d 928 [2007] [hereinafter, *Foster Wheeler*]).

Illinois argues that Maryland law should apply because both Keller and Baker are companies with principal places of business in Maryland that conduct construction operations nationwide, and because the Zurich policy lists its "coverage territory" as "The United States of America" (Padua Aff, Ex. AA, at Z0033). In support, it cites to *Foster Wheeler, supra*, where the Court noted "where it is necessary to determine the law governing a liability insurance policy covering risks in multiple states, the state of the insured's domicile should be regarded as a proxy for the principal location of the insured risk" (*Foster Wheeler*, 36 AD3d at 24). However, Illinois claims, specifically, that Schiavone is an additional insured, a claim that is not refuted. In *Lufthansa Cargo, AG v New York Mar. & Gen. Ins. Co.* (40 AD3d 444 [1st Dept 2007]), the First Department held that "each individual additional insured ... must be treated as if separately covered by the policy and indeed as if he ... had a policy of his own" (*id.* at 445, citing *Greaves v Public Serv. Mut. Ins. Co.*, 5 NY2d 120, 124-125, [1959]). The coverage sought here is coverage for Schiavone, not Baker or its parent company,

Keller. Schiavone's domicile is relevant to this analysis; Baker's is not. Illinois does not articulate any other reason to apply Maryland law. Accordingly, there is no basis to use any other law but the law of New York.

#### Validity of the Disclaimer

"Where a policy of liability insurance requires that notice of an occurrence be given as soon as practicable, such notice must be accorded the carrier within a reasonable period of time" (*Great Canal Realty Corp. v Seneca Ins. Co., Inc.*, 5 NY3d 742, 743 [2005]). Absent a valid excuse, the failure to satisfy the notice requirement vitiates the policy (*American Home Assur. Co. v International Ins. Co.*, 90 NY2d 433, 440 [1997]). An unexcused delay greater than 30 days is unreasonable as a matter of law (see *West 16<sup>th</sup> Street Tenants Corp. v Public Service Mut. Ins. Co.*, 290 AD2d 278, 279 [1st Dept 2002] [30 days]; see also *First Fin. Ins. Co. v Jetco Contr. Corp.*, 1 NY3d 64, 70 [2003] [48 days]). Zurich disclaimed solely on the basis of late notice.

#### 1. Late notice of occurrence

Illinois argues that Zurich's disclaimer on the ground of late notice of occurrence is invalid due to the Reporting Endorsement which specifically excuses late notice where an insured reports an occurrence for workers compensation purposes which later develops into a General Liability claim (Padua Aff, Ex. AA, at Z0018). Zurich argues that the Reporting Endorsement only applies to named insureds, not additional insureds.

Specifically, it argues that "You" is defined to mean only named insureds. It is not. Moreover, the term "You" is not used at any relevant point in the Reporting Endorsement; rather, the undefined term "an insured" is used. Accordingly, Zurich had timely notice of occurrence based on its knowledge of Boyd's worker's compensation claim.

However, the inquiry does not end here, because the Reporting Endorsement requires independent notice of any further claims that stem from the worker's compensation claim.

## 2. Late Notice of Claim

Illinois first argues that, because Zurich had timely notice of occurrence, it also had timely notice of claim, and the Reporting Endorsement excuses the delay. It argues that, in 2005, Schiavone and Baker were united in interest, and Baker's notice of occurrence should serve as its notice of claim. This argument is unsuccessful. The Reporting Endorsement specifically notes that the insured must give additional notice to the insurer after being made aware that, as here, the worker's compensation claim is being pressed as a general liability claim.

Next, Illinois argues that its two-to-three month delay in giving notice of claim was excusable because the delay was caused by having to investigate Boyd's generic claim letter. Specifically, they contend that it was unclear from Boyd's attorney's letter whether Boyd was merely a pedestrian or a worker; and, if he was a worker, who he worked for, or whether the injury was even work related. In opposition, Zurich argues

that Schiavone's failure to give notice of the claim for over two months is an inexcusable and unreasonable delay.

From the evidence provided, Schiavone had notice of a general and nonspecific claim made by Boyd. It had no other information that would give rise to knowledge of Boyd's employment status, what trade he worked for, or at what job site he worked.<sup>1</sup> Schiavone's internal investigation revealed no safety report (see Padua Aff., Exs. O, P and II). Without this knowledge, Schiavone could not determine Boyd's employer's insurer, and could not give notice. Zurich argues that Schiavone knew of the accident in 2005 because the Baker injury report notes that a picture was taken of the accident "by SCC" (presumably the initials of Sciavone Construction Company) (Smith Aff., Ex. A). This argument is speculative. The photograph is not in evidence, and no one testifies as to who took the photo or who had/kept possession of it.

Illinois has provided evidence that it made efforts to locate Boyd's employer as late as July 19, 2007 (*id.*, Ex. II), and once it was determined that Baker was the employer, notice was promptly given on July 29, 2007. Illinois has sufficiently established a valid excuse for its delay, and, accordingly, Zurich's disclaimer was invalid.

In accordance with the foregoing, it is hereby  
ORDERED that the cross motion is denied; and it is

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<sup>1</sup> There are three separate work sites in the South Ferry area.

11]  
further

ORDERED that the motion of the plaintiff Illinois National Insurance Company for summary judgment on its first cause of action seeking a declaration that defendant Zurich American Insurance Company is obliged to provide coverage for Schiavone Construction Co. in the action of *Boyd v. Schiavone*, Index No. 114739/2007, New York County, is granted; and it further is

ORDERED that the motion on the second cause of action seeking a declaration that plaintiff Illinois National Insurance Company is entitled to restitution from defendant Zurich American Insurance Company for any monies paid in the defense of Schiavone in the said action, is granted; and it is further

ADJUDGED and DECLARED that the defendants Zurich American Insurance Company is obliged to provide a defense to, and coverage for, Schiavone Construction Co. in the said action pending in New York County.

Dated: 1/9/11

ENTER:

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

**DONNA M. MILLS, J.S.C.**

**UNFILED JUDGMENT**

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