Parkview Owners Inc. v DF Restoration Inc.
2011 NY Slip Op 33772(U)
May 3, 2011
Sup Ct, NY County
Docket Number: 104584/10
Judge: Milton A. Tingling
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SCANNED ON 5/5/2011

[* 1]

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

PRESENT: MILTON A. TINGLING Justice

PART 44

Parkview

- v -

DF Restz

INDEX NO. 104584/10

MOTION DATE 9/27/10

MOTION SEQ. NO. 1

MOTION CAL. NO. ______

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

	PAPERS NUMBERED
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 is decided in accordance with the annexed decision.

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

FILED
MAY 05 2011
NEW YORK COUNTY CLERK'S OFFICE

Dated: 5/3/11

[signature] J.S.C.

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY, PART 44

PARKVIEW OWNERS INC,

Plaintiff,

- *against* -

DF RESTORATION INC.,

Defendant.

Index No.: 104584/10

DECISION/ORDER

FILED

MAY 05 2011

NEW YORK
COUNTY CLERK'S OFFICE

TINGLING, MILTON, J.:

On July 2, 2010, Co- Defendant, Interstate Fire & Casualty d/b/a Fireman's Fund Insurance Companies ("Interstate"), filed a motion to dismiss with prejudice Plaintiffs' Complaint pursuant to CPLR §3211(a)(7), and also seeks to convert their motion into a summary judgment motion pursuant to CPLR §3211(c). Plaintiffs, Parkview Owners, Inc. ("Parkview") and Hudson River Property Management Corp. ("Hudson") now oppose.

This case arises out of an incident that occurred on December 13, 2008. On that day Miguel Flores, while in the employment of Lopez Construction Services Corp., was performing construction, renovation and demolition at 245 Rumsey Road, Yonkers, New York. He sustained injuries when he was struck by a parapet wall that collapsed upon him. On January 8, 2009, Flores sued Parkview Owners Inc., Hudson River Property Management Corp., and DF Restoration, Inc. for damages. This is an action which seeks, *inter alia,* a declaratory judgment that the Defendant, Interstate, is obligated to provide insurance defense and indemnification to the Plaintiffs for claims made by Flores as against the Plaintiffs Parkview and Hudson and Interstate's insured, DF Restoration Inc.

Here, Interstate's policy, under which Parkview and Hudson seek coverage, required notice of suit to be filed "as soon as practicable." This policy is the same for one seeking coverage as an additional insured. The tender letter which Plaintiffs forwarded to Interstate, seeking coverage as "additional insured" under Interstate's policy for the *Flores* suit was dated October 26, 2009. That tender letter however, was misaddressed to a Novato, California address as opposed to the proper Illinois address. According to Interstate, the letter was ultimately received in the mailroom at Interstate on November 5, 2009, which was ten months after Plaintiffs had knowledge of the accident, nine months after the filing of the *Flores* Complaint and more than eight months after Parkview and Hudson filed its responsive pleading to the *Flores* suit.

Interstate informed Parkview and Hudson by a letter dated December 11, 2009 that they would be denying tender on the basis of late notice. Plaintiffs argue that Interstate's disclaimer was untimely and unjustified. Defendant Interstate now contends that the tender was late as a matter of law, and that they therefore have no duty to defend or indemnify Plaintiffs in the underlying suit.

A court considering a motion to dismiss pursuant to CPLR § 3211 is required to accept the allegations as true and determine whether those facts are sufficient to plead any cause of action. *Leon v. Washington,* 84 N.Y.2d 83, 88, 638 N.Y.S.2d 972 (1994). Whether a plaintiff can ultimately establish its allegations is not taken into consideration in determining a motion to dismiss. *Philips South Beach, LLC v. ZC Specialty Insurance Company,* 55 A.D.3d 493, 867 N.Y.S.2d 386 (1st Dept. 2008).

Additionally, summary judgment should be denied if a reasonable opportunity to complete discovery has not occurred and where the facts essential to justify an opposition to a motion for summary judgment are exclusively within the knowledge and control of the movant. *Vitiello v. Mayrich Const. Corp.,* 225 A.D.2d 182, 680 N.Y.S. 2d 482 (1st Dept. 1998); *Baron v Incorporated Village of Freeport,* 143 A.D.2d 792, 533 N.Y.S.2dd 143 (2nd Dept. 1988); CPLR §3211 (d).

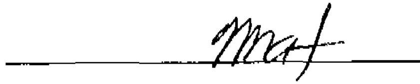
In the case at bar, the movant alleges that since Defendants tendered the *Flores* matter late, Interstate properly disclaimed coverage based upon this late notice and therefore the subject complaint against Interstate should be dismissed. Interstate's motion must be denied as Interstate failed to satisfy its burden of proof because material issues of fact still exist regarding whether the basis for denying coverage on the grounds of late notice was readily apparent. It is this Court's opinion that Plaintiffs have not had the opportunity to obtain complete discovery from Interstate regarding the issues germane to the timeliness of Plaintiffs tender of defense and indemnification and Interstate's untimely disclaimer of coverage. The need for discovery to be conducted is demonstrated by the dispute between Plaintiffs and Interstate as to when Interstate initially received notice of Plaintiff's claim for additional insured coverage. Interstate contends its first notice of Parkview's and Hudson's claim for additional insured coverage was receipt of the October 26, 2009 tender letter on November 5, 2009. In support of this contention, Interstate merely proffers the "affirmation" of Wendy Hicks, a claims examiner allegedly assigned to the underlying *Flores* case at Interstate's Chicago's office. This affirmation does not satisfactorily resolve the matter and therefore is insufficient as a basis to grant Interstate's motion to dismiss.

Summary judgment is also premature as Plaintiffs have not been afforded a chance to conduct any discovery and facts essential to oppose the motion are now exclusively within knowledge and control of Interstate. Specifically, Plaintiffs ask for complete certified copies of the applicable insurance policy, copies of Interstate's claims file, and to conduct discovery and EBTs to see when Interstate first received notice of Plaintiffs' request for additional insured coverage, when the grounds to disclaim coverage were, or should have been readily apparent, and whether Interstate's delay in response from October 29, 2009 to December 14, 2009 was unreasonable. Discovery would help to resolve the issue of when the October 26, 2009 tender of defense was actually received by Interstate in its Novato, CA office. Interstate's procedures

regarding its internal mail routing are relevant as to whether Interstate received notice of Plaintiff's claim for additional insured coverage when the ground for Interstate to disclaim coverage were or should have been readily apparent in light of the delays in disclaiming coverage. Alternatively, Interstate claims that the Court is able to grant the relief sought simply by reviewing the documentary correspondence that exists to date. The court finds this argument unconvincing. Summary judgment then, must be denied since facts essential to justify the opposition to the motion are exclusively within the knowledge and control of Interstate.

For the aforementioned reasons the motion to dismiss is denied. Additionally the motion for summary judgment is premature until further discovery is conducted.

DATED: May 3, 2011



MILTON A. TINGLING

FILED

MAY 05 2011

NEW YORK
COUNTY CLERK'S OFFICE