

Spoleta Constr., LLC v Aspen Ins. UK Ltd.
2012 NY Slip Op 33829(U)
November 21, 2012
Supreme Court, Monroe County
Docket Number: 2012/01694
Judge: Thomas A. Stander
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SUPREME COURT
STATE OF NEW YORK . MONROE COUNTY

SPOLETA CONSTRUCTION, LLC,

Plaintiff,

- vs -

INDEX #2012/01694

ASPEN INSURANCE UK LIMITED c/o
ASPEN SPECIALTY INSURANCE
MANAGEMENT COMPANY,
1255 PORTLAND, LLC,
HUB-LANGIE PAVING, INC.
and
SHANE VANDERWALL,

DECISION and ORDER

Defendants.

APPEARANCES:

Attorney for Plaintiff:

Eric B. Schoenfeld, Esq.
Schoenfeld Moreland, P.C.
61 Broadway - 18th Floor
New York, New York 10006

Attorney for Defendant,
Aspen Insurance UK Limited
c/o Aspen Specialty Insurance
Management Company:

Antoinette Banks, Esq.
Lewis Brisbois Bisgaard & Smith, LLP
77 Water Street, Suite 2100
New York, New York 10005

Attorney for Defendant,
Hub-Langie Paving, Inc.:

David H. Ealy, Esq.
Trevett Cristo Salzer & Andolina, P.C.
2 State Street, Suite 1000
Rochester, New York 14614

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DECISION and ORDER

Thomas A. Stander, J.

The Defendant, Aspen Insurance, UK Limited c/o Aspen Specialty Insurance Management Company ("Aspen"), submits this motion seeking an order dismissing Plaintiff's, Spoleta Construction, LLC ("Spoleta"), Complaint for Declaratory Judgment dated February 13, 2012 as against Aspen in its entirety, with prejudice. Defendant, Aspen, submits this motion to dismiss pursuant to CPLR 3211[a][7], as Plaintiff fails to state valid causes of action as a matter of law, and pursuant to CPLR 3211[a][1], as Plaintiff's claims are barred by the documentary evidence.

I. MOTION PREVIOUSLY DECIDED

The motion of Aspen and the cross motion of Defendant, Hub-Langie Paving, Inc., both seeking an order pursuant to CPLR §3212 granting summary judgment on their behalf was previously decided. A Bench Decision dated October 19, 2012 granted the motion of the Defendant-Aspen for summary judgment dismissing co-defendant Hub-Langie Paving, Inc.'s cross-claims for a declaration of coverage with respect to Aspen's obligations to provide a defense and indemnity to Hub-Langie, and right to receive a defense and indemnity coverage with respect to claims made by Spoleta in a third-party action. The Bench Decision denied the motion of the Defendant, Hub-Langie Paving, Inc. for an order granting summary judgment to Defendant, Hub-Langie, on its cross-claim against Defendant, Aspen Insurance, UK Limited c/o Aspen Specialty Insurance Management Company. The Court reserved on the Aspen motion to dismiss Spoleta's complaint against Aspen.

II. FACTS

The facts in this case are that an employee of Hub-Langie, Shane Vanderwall, allegedly injured his wrist on October 20, 2008 while operating a jackhammer at a work site when he was struck by a swinging bucket of an excavator being operated by another Hub-Langie employee. Hub-Langie was advised of the accident on the date it occurred, October 20, 2008. An Injury/Illness Incident Report was completed and known by Hub-Langie. As the injury involved only Hub-Langie employees, Spoleta was not notified of the accident or injury. Hub-Langie contacted its insurance agent who submitted a claim under Hub-Langie's Workers Compensation insurance policy on October 23, 2008.

Hub-Langie and Spoleta entered into a construction contract for sub-contract work on a construction project. Aspen issued a general commercial liability insurance policy to Hub-Langie for the project which contained an Additional Insured Endorsement. Spoleta was listed as an additional insured under the Aspen Policy on a primary and non-contributory basis.

By letter dated December 30, 2009 Shane Vanderwall's attorney notified Spoleta of the October 20, 2008 accident and of the intention to file a lawsuit for compensation for bodily injuries allegedly sustained in the accident. Spoleta notified its insurance carrier, Lincoln General Insurance Company ("Lincoln") who provided a general commercial liability insurance policy to Spoleta. Lincoln sent a letter dated January 27, 2010 to Hub-Langie regarding the notice of claim by Shane Vanderwall. This letter states:

Per the contract that you had with our insured [Spoleta], you agreed to defend and indemnify and hold harmless our insured (general contractor) against all claims arising out of your performance or work. Therefore, we request that you place your insurance carrier on notice of this claim so that they may [sic] do their own investigation of this claim.

The letter also requested information regarding the claims from Hub-Langie.

Hub-Langie forwarded this Lincoln General Insurance Company letter to its broker, the Landmark Group of Brighton, Inc. ("Landmark"). On February 9, 2010 Landmark faxed to David Leahy, of Risk Placement Services, Inc., a "General Liability Notice of Occurrence/Claim" form listing all the pertinent information and attaching the January 27, 2010 letter from Lincoln to Hub-Langie.

On February 18, 2010 Aspen sent a letter to Hub-Langie confirming that Aspen

received, on February 16, 2010, its first notice of this loss and claim by way of a copy of: a) an accord form dated February 9, 2010, and b) a letter from Lincoln General Insurance Company dated January 27, 2010.

In this letter Aspen also confirmed that it issued the Commercial General Liability policy to Hub-Langie. The letter requests that Hub-Langie provide a stated list of information to Aspen and stated its reservation of rights. On March 2, 2010 Aspen again sent a letter to Hub-Langie requesting documents.

On March 9, 2010 Aspen sent a letter to Lincoln advising:

Aspen has received a copy of your January 27, 2010 letter to Hub Langie Paving, Inc. making a claim of contractual indemnity against it on behalf of your insured Spoleta Construction.

The letter also advises, among other things, that Aspen has denied defense and indemnity coverage to Hub-Langie for the loss and claim.

On April 15, 2010 the injured worker, Shane Vanderwall commenced a lawsuit against Spoleta and others by filing a complaint. On May 27, 2010 counsel retained by Spoleta to defend the lawsuit commenced by Vanderwall, sent a letter to Aspen advising they were retained in the Vanderwall lawsuit. The letter states that Aspen has "failed to address any rights that Spoleta Construction LLC has under the policy issued by Aspen Specialty Insurance Company or [Spoleta's] specific rights to

contractual indemnity." The letter also sets forth terms from the subcontract agreement between Hub-Langie and Spoleta and that a certificate of insurance issued indicating that Spoleta was an additional insured under the Aspen policy. Demand is made by this letter that Aspen undertake the obligation to defend and indemnify Spoleta with respect to the Vanderwall action.

Aspen, by letter of June 2, 2010 to counsel for Spoleta, denies coverage to Spoleta. Aspen states:

Your May 27, 2010 is the first claim by Spoleta construction, LLC for coverage under the Aspen policy. In prior letters Spoleta Construction was framed as a claimant against Hub.

The basis provided by Aspen for denial of coverage was twofold. Aspen claims that Spoleta is not named on the policy and "there is no evidence that Hub performed work for Spoleta Construction, LLC." The second basis was that Spoleta was "on notice of the loss and claim since at least January 27, 2010 and yet failed to request coverage from Aspen until June 2, 2010. Therefore, Aspen denies defense and indemnity coverage to Spoleta."

Thereafter, Counsel for Spoleta by letter dated June 17, 2010 notified Aspen and Hub-Langie that "Lincoln General does hereby formally tender the defense and indemnity of Spoleta and Portland to Hub Langie and Aspen Specialty Insurance Company for the claims of Shane Vanderwall in the . . . matter." By letter of June 24, 2010 Aspen continued to deny coverage to Spoleta.

Spoleta commenced this declaratory judgment action against Aspen for coverage on February 13, 2012.

III. MOTION TO DISMISS OF ASPEN

Defendant, Aspen, seeks dismissal of the Plaintiff's declaratory judgment action. Aspen argues that it is entitled to dismissal pursuant to CPLR 3211[a][1] on the basis that Plaintiff's claims are barred by the documentary evidence.

Under the policy terms Aspen was to be notified "as soon as practicable" of an "occurrence" (Policy Section IV(2)(a)). "The notice provision in the general liability policy operates as a condition precedent to coverage, and absent a valid excuse, failure to comply with the requirement vitiates the contract (*citation omitted*)" (*National Union Fire Ins. Co. of Pittsburgh, PA v Great American E&S Ins. Co.*, 86 AD3d 425 [1st Dept. 2011]). Here the incident occurred on October 20, 2008, and the Plaintiff, Spoleta, was notified of the accident by letter of counsel for Vanderwall dated December 30, 2009.¹

Spoleta notified its carrier, Lincoln General, of the claim by Vanderwall. Lincoln sent a letter to Hub-Langie dated January 27, 2010 advising of the claim; stating that per the subcontract Hub-Langie "agreed to defend and indemnify and hold harmless" Spoleta; and requested that Hub-Langie place its insurance carrier on notice of this claim. Hub-Langie, through its broker, sent on February 9, 2010 a "General Liability Notice of Occurrence/Claim" attaching the Lincoln letter on behalf of Spoleta to Risk Placement Services, Inc. to be forwarded to Aspen Insurance. Aspen confirmed to Hub-Langie by letter of February 18, 2010 that it received this notice of the claim with Lincoln's letter attached to the claim.

Aspen sent a reservation of rights letter to Hub-Langie dated February 18, 2010. On March 9, 2010 Aspen sent a letter to Lincoln General stating "Aspen has received a copy of your January 27, 2010 letter to Hub Langie Paving, Inc. making a claim of contractual indemnity against it on behalf of your

¹

At the time of the occurrence Hub-Langie did not notify Spoleta of the accident or the injury; the first notice to Spoleta was the December 30, 2009 letter.

insured Spoleta Construction.” The letter also indicates that Aspen has denied defense and indemnity coverage to Hub Langie for the loss.

The Defendant Aspen seeks dismissal of the complaint based on a defense is founded upon documentary evidence (CPLR Rule 3211[a][1]). Aspen relies upon the policy and letters to show that the documentary evidence bars Plaintiff’s claim for a declaratory judgment. The documentary evidence presented shows that Aspen received a claim notice from the broker of Hub-Langie with a letter of Lincoln attached. The documentary evidence does not indicate that notice was given by Spoleta, or even its agent Lincoln, directly to Aspen; nor that there was a claim by Spoleta as an additional insured under the Aspen policy. The notice directly to Aspen from Spoleta as an additional insured was several months after Spoleta received notice of the underlying claim of Vanderwall.

At the relevant time related to this action, the law in effect is clearly set forth in case law. “Neither notice provided by another insured nor the insurer’s actual knowledge of the claim satisfies the contractual obligation of an insured to give timely notice” (*Roofing Consultants, Inc. v Scottsdale Ins. Co.*, 273 AD2d 933 [4th Dept. 2000]; *appeal denied* 95 NY2d 770 [2000]). “As an additional insured under the [policy, there is] an independent duty to provide the excess insurer with timely notice of the claim against it and its demand for coverage” (*City of New York v St. Paul Fire and Marine Ins. Co.*, 21 AD3d 978,981 [2d Dept 2005]; *see American Manuf. Mutual Ins. Co. v CMA Enterprises, Ltd.*, 246 AD2d 373 [1st Dept. 1998]; *Liberty Ins. Underwriters, Inc. v Great American Ins. Co.*, 2010 U.S. Dist. LEXIS 97722; 2010 WL 3629470 [S.D.N.Y. 2010]). “The fact that an insurer may have received notice of the claim from the primary insured, or from another source, does not excuse an additional insured’s failure to provide notice” (*City of New York* at 981; *see Guayara v Hudson Ins. Co.*, 48 AD3d 628 [2d Dept. 2008]).

Here the notice given to Aspen was sent from Hub-Langie and its Broker. Notice from the primary insured or any other source is insufficient notice. Spoleta failed to provide timely notice of the claim and its demand for coverage as an additional insured. On this motion to dismiss on the ground that

a defense is founded upon documentary evidence, Aspen demonstrates that it is entitled to dismissal.

Defendant, Aspen's, motion to dismiss the complaint of Spoleta based upon CPLR 3211[a][1], that a defense is founded upon documentary evidence, is GRANTED.

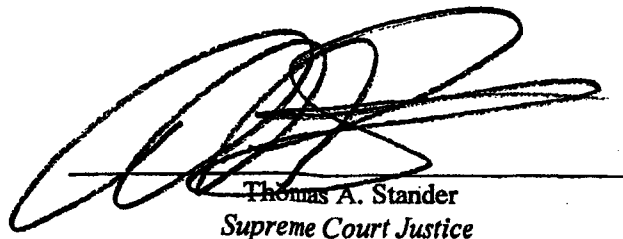
ORDER

Based upon all the papers submitted in support and in opposition to this motion, upon the above Decision, and after due deliberation, it is hereby

ORDERED that the motion of the Defendant, Aspen Insurance, UK Limited c/o Aspen Specialty Insurance Management Company, to dismiss the complaint of Spoleta Construction, LLC for a declaratory judgment as against Aspen is GRANTED; and it is further

ORDERED that the Complaint of Spoleta Construction, LLC as against Aspen Insurance is DISMISSED.

Dated: November 21, 2012
Rochester, New York



Thomas A. Stander
Supreme Court Justice