

Suffolk County Sheriff's Dept. v Sumitomo Marine & Fire Ins. Co. of Am.
2013 NY Slip Op 30771(U)
April 9, 2013
Sup Ct, Suffolk County
Docket Number: 12-20624
Judge: Peter H. Mayer
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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 17 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. PETER H. MAYER
Justice of the Supreme Court

MOTION DATE 8-7-12
ADJ. DATE 11-27-12
Mot. Seq. # 001 - MotD
002 - XMotD

-----X
SUFFOLK COUNTY SHERIFF'S
DEPARTMENT and COUNTY OF SUFFOLK,

Plaintiffs,

- against -

SUMITOMO MARINE AND FIRE
INSURANCE COMPANY OF AMERICA,

Defendant.
-----X

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Suffolk County Attorney

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Upon the reading and filing of the following papers in this matter: (1) Notice of Motion/Order to Show Cause by the defendant, dated July 10, 2012, and supporting papers 1-16 (including Memorandum of Law dated July 10, 2012); (2) Notice of Cross Motion by the plaintiffs, dated July 31, 2012, and supporting papers 19-43; (3) Affirmation in Opposition by the plaintiffs, dated July 31, 2012, and supporting papers 17-18; (4) Affirmation in Opposition by the defendants, dated August 20, 2012, and supporting papers 44-50 (including Memorandum of Law dated August 20, 2012); (5) Reply Affirmation by the plaintiffs, dated August 24, 2012, and supporting papers 51-53 (~~and after hearing counsels' oral arguments in support of and opposed to the motion~~); and now

UPON DUE DELIBERATION AND CONSIDERATION BY THE COURT of the foregoing papers, the motion is decided as follows: it is

ORDERED that this motion by the defendant Sumitomo Marine and Fire Insurance Company of America for an order pursuant to CPLR 3212 granting summary judgment in its favor and declaring that it does not have a duty to defend or indemnify the plaintiffs or its insured, nonparty Island Elevator Corporation, is granted to the extent that the defendant is entitled to a declaration that it is not obligated to defend the plaintiffs in a certain underlying action, and is otherwise denied; and it is further

ORDERED that this cross motion by the plaintiffs Suffolk County Sheriff's Department and County of Suffolk for an order pursuant to CPLR 3212 granting summary judgment in their favor and

declaring that the defendant Sumitomo Marine and Fire Insurance Company of America has a duty to defend and indemnify the plaintiffs and its insured, nonparty Island Elevator Corporation, is granted to the extent that the plaintiffs are entitled to summary judgment and a declaration that the defendant is obligated to defend Island Elevator Corporation in said underlying action and to indemnify the plaintiffs and Island Elevator Corporation for that portion of any verdict in the underlying action which holds Island Elevator Corporation liable to the plaintiffs based on common-law indemnification for the injuries to the plaintiff in the underlying action, and is otherwise denied.

This declaratory judgment action seeks to determine the duties of the defendant Sumitomo Marine and Fire Insurance Company of America (Sumitomo) with regard to a personal injury action, *Williams v Suffolk County Sheriff's Department*, Index No. 03-30751, Supreme Court, Suffolk County. In the underlying action, Sha-kie Williams (Williams) seeks damages for personal injuries he allegedly sustained on July 29, 2003, when he fell into an elevator shaft at the Suffolk County Jail. It appears that Williams was handcuffed at the time, that he leaned against the closed elevator doors of an elevator, and that the bottom of one of the doors came off its track and swung into the elevator shaft, causing Williams to fall. Williams commenced the underlying action against the plaintiffs and two elevator maintenance companies, one of which is Island Elevator Corporation (Island). It appears that Island failed to notify its insurer, Sumitomo, about the incident or the service of a complaint in the underlying action, and that Sumitomo disclaimed coverage as a result thereof. Thereafter, the plaintiffs commenced a third-party action against Island's insurer, Sumitomo, alleging that Sumitomo had the obligation to defend and indemnify the plaintiffs and Island. By order dated January 23, 2012, the Court (Baisley, J.) severed the third-party action from the underlying action, creating the instant action.

Sumitomo¹ now moves in the instant action for summary judgment and a declaration that it has no obligation to defend or indemnify the plaintiffs or Island. Initially, Sumitomo contends that the plaintiffs are not additional insureds under the commercial general liability policy it issued to Island. It is undisputed that, at the time Williams was injured, Island was insured under Sumitomo's policy number GL212215500, effective July 23, 2003 to July 23, 2004 (the Policy). The Policy, Form MS 6439 01 02, entitled "Blanket Additional Insured Endorsement," provides in pertinent part:

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

SECTION II - WHO IS AN INSURED is amended to include as an additional insured any person or organization (called Additional Insured) whom you are required to add as an Additional Insured on this policy under:

¹ The Court notes that much of the correspondence and some of the documents submitted herein are from a nonparty, Mitsui Sumitomo Insurance Group, or they involve the Mitsui Sumitomo Insurance Company of America. Sumitomo's submission herein acknowledges that the former serves as its claims management administrator, and that the latter is its new corporate name. In deciding these motions, the Court will refer to all three entities as Sumitomo.

1. a written contract or agreement; or
2. an oral agreement or contract where a certificate of insurance showing that person or organization as an Additional Insured has been issued; and
3. the contract or agreement must be:
 - a. currently in effect or becoming effective during the term of this policy; and
 - b. executed prior to the "occurrence" of any "bodily injury," "property damage," "personal injury," or advertising injury."

Sumitomo submits a copy of the contract between the plaintiffs and Island, designated as an "Elevator Preventive Maintenance & Service" contract, governing the period October 1, 2002 to September 30, 2003 (Elevator Contract). It is undisputed that the Elevator Contract does not include a provision which requires Island to name the plaintiffs as additional insureds under the Policy. In addition, Sumitomo submits a copy of a certificate of insurance dated November 11, 2002, which indicates that Island was insured under a liability policy issued by Great American Insurance Company (Great American) effective July 23, 2002 to July 23, 2003. It appears that Great American is a company related to Sumitomo. Regardless, said certificate does not name the plaintiffs as additional insureds.

Sumitomo has established its prima facie entitlement to summary judgment regarding that branch of its motion which seeks a declaration that it is not required to defend the plaintiffs in the underlying action. It is well settled that the party claiming the existence of insurance coverage has the burden of proving its entitlement (*York Restoration Corp. v Solty's Const., Inc.*, 79 AD3d 861, 914 NYS2d 178 [2d Dept 2010]; *Stillwater Cent. School Dist. v Great Am. E & S Ins. Co.*, 66 AD3d 1260, 887 NYS2d 719 [3d Dept 2009]; *National Abatement Corp. v National Union Fire Ins. Co. of Pittsburgh, Pa.*, 33 AD3d 570, 824 NYS2d 230 [1st Dept 2006]; *Kidalso Gas Corp. v Lancer Ins. Co.*, 21 AD3d 779, 802 NYS2d 9 [1st Dept 2005]; *Moleon v Kreiser Borg Florman Gen. Const. Co.*, 304 AD2d 337, 758 NYS2d 621 [1st Dept 2003]). A party that is not named as an insured or additional insured on the face of the policy, or not covered under the terms therein, is not entitled to coverage (*Stainless, Inc. v Employers' Fire Ins. Co.*, 49 NY2d 924, 428 NYS2d 675 [1980]); *Superior Ice Rink, Inc. v Nescon Contr. Corp.*, 52 AD3d 688, 861 NYS2d 362 [2d Dept 2008]; *Catholic Health Servs. of Long Is., Inc. v National Union Fire Ins. Co. of Pittsburgh, Pa.*, 46 AD3d 590, 847 NYS2d 638 [2d Dept 2007]; *Tribeca Broadway Assoc. v Mount Vernon Fire Ins. Co.*, 5 AD3d 198, 774 NYS2d 11 [1st Dept 2004]; *Moleon v Kreiser Borg Florman General Constr. Co., Inc.*, *supra*).

In opposition to this branch of Sumitomo's motion, the plaintiffs contend that the public bid documents which "formed the basis of each elevator maintenance contract" required Island to maintain insurance coverage and name the defendant County of Suffolk (County) as an additional insured. The

proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issue of fact (*see Alvarez v Prospect Hospital*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]). The burden then shifts to the party opposing the motion which must produce evidentiary proof in admissible form sufficient to require a trial of the material issues of fact (*Roth v Barreto*, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; *Rebecchi v Whitmore*, 172 AD2d 600, 568 NYS2d 423 [2d Dept 1991]; *O'Neill v Fishkill*, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]). Furthermore, the parties' competing interest must be viewed "in a light most favorable to the party opposing the motion" (*Marine Midland Bank, N.A. v Dino & Artie's Automatic Transmission Co.*, 168 AD2d 610, 563 NYS2d 449 [2d Dept 1990]). However, mere conclusions and unsubstantiated allegations are insufficient to raise any triable issues of fact (*see, Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]; *Perez v Grace Episcopal Church*, 6 AD3d 596, 774 NYS2d 785 [2d Dept 2004]; *Rebecchi v Whitmore, supra*).

Here, the plaintiffs have submitted a single page document entitled "Insurance" which they assert is included within the bid documents underlying the Elevator Contract. In support of their contention the plaintiffs submit the affirmation of their attorney who has no personal knowledge of the facts herein, which is insufficient on a motion for summary judgment (*Sanbria v Paduch*, 61 AD3d 839, 876 NYS2d 874 [2d Dept 2009]; *Warrington v Ryder Truck Rental, Inc.*, 35 AD3d 455, 826 NYS2d 152 [2d Dept 2006]; *9394, LLC v Farris*, 10 AD3d 708, 782 NYS2d 281 [2d Dept 2004]; *Deronde Prods., Inc. v Steve Gen. Contr., Inc.*, 302 AD2d 989, 755 NYS2d 152 [4th Dept 2003]). In addition, the page is unsigned, it is not referenced in the Elevator Contract, nor is there any evidence that it was made part of, or incorporated into, the Elevator Contract. The plaintiffs have failed to submit evidence in admissible form which would require a trial of the material issues of fact. Accordingly, that branch of Sumitomo's motion which seeks summary judgment and a declaration that it is not obligated to defend the plaintiffs in the underlying action is granted.

The Court notes that the motion and cross motion are mirror images of the other and raise the same issues regarding the four branches of relief sought therein. That is, whether Sumitomo is obligated to: defend the plaintiffs, indemnify the plaintiffs, defend Island, or indemnify Island in the underlying action.² The first branch of the motion and cross motion have been addressed above. It is beyond cavil that a determination that Sumitomo is not obligated to defend the plaintiffs in the underlying action requires a denial of that branch of the plaintiff's motion which seeks the opposite relief. For reasons that will become apparent below, the Court will address the last three branches of the plaintiffs' cross motion for summary judgment before it addresses the remainder of Sumitomo's motion.

The plaintiffs cross-move for summary judgment on the grounds that, among other things, they are an additional insured under the Sumitomo insurance policy issued to Island, that Sumitomo's disclaimer of coverage was untimely, and that they filed a timely "notice of loss" regarding the subject incident with Sumitomo. In support of their motion, the plaintiffs submit, among other things, the pleadings in the underlying action, the pleadings in the instant action, the affirmation of their attorney, a

² The Court will discuss the branches of the motion and cross motion in the order set forth herein although the cross motion addresses the issues in a different order.

copy of their notice of loss letter dated September 5, 2003, and a copy of Sumitomo's letter to Island dated June 1, 2005 disclaiming coverage in the underlying action.

The disclaimer letter dated June 1, 2005 (Disclaimer), reads in part: "Mutsui Sumitomo Marine Management (U.S.A.), Inc. ("MSMM") is the claims administrator for Sumitomo Marine and Fire Insurance Company of America ("Sumitomo") which issued Policy No. GL212215500 to Island Elevator Corp. ("Island"). The letter goes on to state that said policy was effective July 23, 2003 to July 23, 2004, and that the policy requires Island to notify Sumitomo as soon as practicable of the occurrence and when suit is brought. In addition, the disclaimer letter reads in pertinent part:

The plaintiff initiated the underlying lawsuit in or about November 23, 2003 for injuries he allegedly sustained on or about July 29, 2003. Although Island was served through the New York Department of State on or about March 23, 2004, Sumitomo did not receive notice of the underlying lawsuit, or the claim upon which the lawsuit is based, until on or about April 19, 2005, approximately 13 months after Island was served with summons and complaint, at which time Sumitomo received a copy of the summons and complaint. Even then, it was not Island that provided a copy of the summons and complaint, but rather, the Plaintiff's attorney. Island has breached the Policy's notice conditions. Sumitomo, therefore, denies that it has any duty under the Policy to defend or indemnify Island in the underlying lawsuit.

In his affirmation in support of the cross motion, counsel for the plaintiffs contends that Insurance Law 3420 (a) (3) provides that "any third party may give notice to the insurance carrier or any licensed agent of an insurance carrier following a claimed loss," and that the plaintiffs gave Sumitomo notice of the subject claim by letter dated September 5, 2003. Based on these alleged facts, the plaintiffs assert that the purported disclaimer by Sumitomo was untimely as a matter of law in that it was made almost two years after receipt of the notice of loss from the plaintiffs.

Initially, the Court notes that it is undisputed that Sumitomo did not give notice of its Disclaimer to Williams or the plaintiffs. Insurance Law 3420 (d) (2) provides: "If under a liability policy issued or delivered in this state, an insurer shall disclaim liability or deny coverage ... it shall give written notice as soon as is reasonably possible of such disclaimer of liability or denial of coverage to the insured and the injured person or any other claimant." It has been held that a third-party to an insurance contract with a claim for indemnification is a claimant entitled to notice under the statute (*Hartford Acc. & Indem. Co. v J.J. Wicks, Inc.*, 104 AD2d 289, 482 NYS2d 935 [4th Dept 1984] (holding that even a party who is a merely a crossclaimant seeking indemnification from the insured is entitled to notice of disclaimer); *see also 474431 Assoc. v AXA Global Risks US Ins. Co.*, 18 AD3d 604, 795 NYS2d 626 [2d Dept 2005]; *Massachusetts Bay Ins. Co. v Flood*, 128 AD2d 683, 513 NYS2d 182 [2d Dept 1987]; *see generally State v General Star Indem. Co.*, 299 AD2d 537, 751 NYS2d 47 [2d Dept 2002]; *Excelsior Ins. Co. v Antretter Contr. Corp.*, 262 AD2d 124, 693 NYS2d 100 [1st Dept 1999]). Here, it is undisputed that the plaintiffs have asserted cross claims against Island for indemnification in the underlying action.

Insurance Law 3420 (a) (3) provides that every policy issued in New York State must, with certain exceptions not relevant herein, contain “[a] provision that notice given by or on behalf of the insured, or written notice by or on behalf of the injured person or any other claimant, to any licensed agent of the insurer in this state, with particulars sufficient to identify the insured, shall be deemed notice to the insurer.” A review of the record reveals that the plaintiffs mailed a notice of loss dated September 5, 2003 to a nonparty, the Great American Insurance Company, referencing policy number GLP 5762453, and that Sumitomo acknowledged receipt of said notice in a letter to the plaintiffs’ correctional facility dated October 7, 2003. In said letter, Sumitomo states: “Please be advised that we have received a notice of loss referencing a General Liability claim for an inmate for the date of loss 7/29/03. According to our records, the General Liability Policy was non-renewed ...” It is undisputed that Sumitomo eventually acknowledged the existence of the Policy, and that the Disclaimer was issued pursuant to the Policy.

It is well settled that a notice of disclaimer addressed only to an insured and only based on the ground that the insured has failed to provide timely notice of a claim against the insured is not effective against a claimant, and that an insurer is estopped from raising a claimant’s alleged failure to provide timely notice of the claim (*General Acc. Ins. Group v Cirucci*, 46 NY2d 862, 414 NYS2d 512 [1979]; *Hereford Ins. Co. v. Mohammad*, 7 AD3d 490, 776 NYS2d 87 [2d Dept 2004]; *Hazen v Otsego Mut. Fire Ins. Co.*, 286 AD2d 708, 730 NYS2d 156 [2d Dept 2001]; *Legion Ins. Co. v Weiss*, 282 AD2d 576, 723 NYS2d 235 [2d Dept 2001]; *Utica Mut. Ins. Co. v Gath*, 265 AD2d 805, 695 NYS2d 839 [4th Dept 1999]). This is especially true where the claimant has provided notice of loss to the insurer; and the result is that the insurer must defend and indemnify the insured regardless of the insured’s failure to provide notice (*Hereford Ins. Co. v Mohammad*, *supra*; *Hazen v Otsego Mut. Fire Ins. Co.*, *supra*; *Legion Ins. Co. v Weiss*, *supra*; *Utica Mut. Ins. Co. v Gath*, *supra*). Here, the Court finds that the plaintiffs have established their prima facie entitlement to summary judgment regarding their claim that the Disclaimer is untimely as to them.

In his affirmation in support of the cross motion, counsel for the plaintiffs also states that, unbeknownst to the plaintiffs, Sumitomo commenced a declaratory judgment action against Island and Williams in Supreme Court, New York County (New York Action), and that Sumitomo obtained a declaration that it had no duty to defend or indemnify the defendants in that action. Counsel contends that the judgment in the New York Action is not binding on the plaintiffs herein. Generally, where all parties who are interested in or might be affected by a declaration of rights and legal relations are not made parties to an action for declaratory judgment, courts refuse to render judgment (*Manhattan Stor. & Warehouse Co. v Movers & Warehousemen’s Assn.*, 289 NY 82 [1942]; *White v Nationwide Mut. Ins. Co.*, 228 AD2d 940, 644 NYS2d 590 [3d Dept 1996]; *National Grange Mut. Ins. Co. v Ogassian*, 45 Misc 2d 729, 257 NYS2d 451 [Sup Ct, Bronx County 1965], *affd without opinion* 26 AD2d 908, 274 NYS2d 1013 [1st Dept 1966]). Here, the Court finds that the plaintiffs, at a minimum, have established their prima facie entitlement to summary judgment regarding their claim that the New York Action is not binding as to them.

In opposition to the plaintiffs’ cross motion, Sumitomo submits an affirmation from its attorney and a memorandum of law. The affirmation addresses an issue regarding a discovery dispute between the parties. The memorandum of law discusses, among other things, whether notice to an insurer who

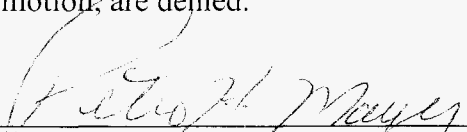
shares a parent corporation with another insurer can serve as notice to the latter. However, Sumitomo has not submitted any evidence as to its relationship to Great American, the insurer to which the plaintiffs submitted their notice of loss dated September 5, 2003, or any evidence indicating that said notice was not received by it at some point. In addition, the Court notes that all the correspondence regarding the underlying action is on Sumitomo letterhead, and that Sumitomo has consistently presented itself as the relevant insurer for Island in the underlying action. Thus, Sumitomo has failed to raise a material issue of fact requiring a trial of this action.

However, the Court notes that the plaintiffs' right to indemnification from Sumitomo is dependent upon a finding in the underlying action that it is entitled to common-law indemnification from Island. A review of the record reveals that the plaintiffs' answer in the underlying action asserts cross claims against Island sounding in contractual indemnification, common-law indemnification and contribution. In granting Sumitomo's request for a declaration that the plaintiffs are not additional insureds, the Court has necessarily determined that Sumitomo is not obligated to indemnify the plaintiffs based upon any contractual obligations of Island. In addition, the parties have not offered any authority for the proposition that a party seeking contribution is deemed a claimant entitled to provide notice of loss to an insurer under Insurance Law 3420 (a) (3). Based on the plaintiffs' notice of loss dated September 5, 2003, their status as claimants under the statute, Sumitomo's failure to provide notice of its Disclaimer to the plaintiffs, and the judgment entered in the New York Action, the Disclaimer is partially ineffective as to Island and the plaintiffs.

The Court notes that Island is not entitled to complete indemnification under the Policy based on the judgment in the New York Action. However, to afford the plaintiffs the relief that they are entitled to herein, the Court finds that Sumitomo is obligated to indemnify Island and the plaintiffs for that portion of any verdict in the underlying action which holds Island liable to the plaintiffs based on common-law indemnification. In addition, to ensure a fair trial of the issues in the underlying action, and based upon the Court's finding that Sumitomo's Disclaimer is partially ineffective, Sumitomo is obligated to defend Island in the underlying action. Accordingly, the plaintiffs are entitled to a declaration that Sumitomo is obligated to defend Island Elevator Corporation in the underlying action and to indemnify Island and the plaintiffs for that portion of any verdict in the underlying action which holds Island liable to the plaintiffs based on common-law indemnification.

In light of the Court's findings, the last three branches of Sumitomo's motion for summary judgment, which seek relief diametrically opposed to the cross motion, are denied.

Dated: 4/9/13


PETER H. MAYER, J.S.C.

TO: DINKES & SCHWITZER, P.C.
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