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| Upgrade Contr. Co., Inc. v Aspen Specialty Ins. Co. |
| 2013 NY Slip Op 32162(U) |
| September 10, 2013 |
| Supreme Court, New York County |
| Docket Number: 102693/2012 |
| Judge: Donna Mills |
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SUPREME COURT OF THE STATE OF NEW YORK— NEW YORK COUNTY

PRESENT : DONNA M. MILLS
Justice

PART 58

UPGRADE CONTRACTING CO., INC.,

Plaintiff,

-v-

ASPEN SPECIALTY INSURANCE COMPANY
and ASPEN INSURANCE UK LIMITED,
Defendants.

INDEX No. 102693/12

MOTION DATE _____

MOTION SEQ. No. 003

MOTION CAL NO. _____

The following papers, numbered 1 to _____ were read on this motion for summary judgment.

PAPERS NUMBERED

Notice of Motion/Order to Show Cause-Affidavits- Exhibits... 1-3

Answering Affidavits- Exhibits 4-6

Replying Affidavits _____

CROSS-MOTION: YES NO

FILED

SEP 13 2013

COUNTY CLERK'S OFFICE
NEW YORK

Upon the foregoing papers, it is ordered that this motion

IS DECIDED IN ACCORDANCE WITH ATTACHED MEMORANDUM DECISION.

Dated: 9/10/13

Donna M. Mills
J.S.C.

Check one: FINAL DISPOSITION

DONNA M. MILLS, J.S.C.
NON-FINAL DISPOSITION

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 58**

UPGRADE CONTRACTING CO., INC.,
Plaintiff,

-against-

ASPEN SPECIALTY INSURANCE COMPANY
and ASPEN INSURANCE UK LIMITED,
Defendants.

INDEX NO. 102693/2012
Motion Sequence 003
DECISION & ORDER

FILED

SEP 13 2013

DONNA MILLS, J.:

**COUNTY CLERK'S OFFICE
NEW YORK**

In this action concerning liability insurance coverage for a personal injury, plaintiff

Upgrade Contracting Co., Inc. (Upgrade) moves for a declaratory judgment that defendant Aspen Insurance UK Limited (AIUK) must provide insurance coverage to Upgrade in the personal injury action, *Gutierrez v 120 Owners Corp.*, Supreme Court, index No. 304218/2010, New York County (the Gutierrez Action). In turn, defendants AIUK and Aspen Specialty Insurance Company (ASIC) (together, Aspen) cross-move, pursuant to CPLR 3212, for summary judgment dismissing the complaint.

Factual Background

On July 14, 2009, Angel Gutierrez (Gutierrez), an Upgrade employee, was allegedly injured at a job site at 120 Central Park South, where Upgrade was performing work under contract. AIUK provided commercial general liability insurance coverage to Upgrade for the period October 4, 2008 to October 4, 2009, under policy number CRA4M5808 (the General Policy). McCallion aff, exhibit A. The General Policy extended coverage to 120 Owners Corp. (the Owner), the property's owner, and Cooper Square Realty, Inc. (Cooper Square), the property's manager, as additional insureds. AIUK also provided commercial liability umbrella

insurance coverage to Upgrade under policy number CXA4N BG08 (the Umbrella Policy).

Deveau affirmation, exhibit C.

Upgrade paid Gutierrez's medical bills and compensated him while he was unable to work. Upgrade sent AIUK a notice of occurrence on January 18, 2010, describing the incident, and naming "120 Central Park South Corp." as "Premises: Insured" (the Notice). *Id.*, exhibit B. On May 24, 2010, Gutierrez commenced the Gutierrez Action, charging the Owner and Cooper Square with negligence and violations of New York State's Industrial Code. *Id.*, exhibit E. On or about November 9, 2010, the Owner and Cooper Square filed a third-party action against Upgrade for indemnification. *Id.*, exhibit F.

On February 9, 2010, Upgrade received a "Declination of Coverage" from ASIC, based on late notice of the occurrence. Deveau affirmation, exhibit D. This letter only refers to Upgrade, not any additional insureds by name or category. ASIC sent Upgrade a "Supplemental Declination of Coverage" (*id.*, exhibit E), and a letter to the same effect on August 31, 2010 (*id.*, exhibit F). In these documents, ASIC denied coverage to the Owner and Cooper Square because of the absence of an indemnity contract. On January 24, 2011, ASIC again notified Upgrade that it was denying defense and indemnity coverage to Upgrade in the Gutierrez Action because of late notice, and to its reputed additional insureds because of either the absence of an indemnity contract or contractual limitations. *Id.*, exhibit G. ASIC denied coverage under both the General Policy and, for the first time, the Umbrella Policy.

On May 14, 2012, Upgrade commenced the instant action against ASIC, requesting declaratory judgments on liability insurance coverage to Upgrade, the Owner and Cooper Square. Haddad affirmation, exhibit A. On June 12, 2012, Upgrade filed a supplemental summons and amended complaint, adding AIUK as a defendant. *Id.*, exhibit B.

Discussion

Upgrade states that, sometime after sending AIUK the Notice, it was interviewed by an AIUK claims representative, at which time it made her

“aware that if there were a suit, it would be a suit against the additional insured 120 Owners Corp. . . . [and that] Upgrade was making AIUK aware of this potential claim to obtain the benefits of the policy for Upgrade as well as for the additional insureds, 120 Owners Corp. and Cooper Square Realty.”

McCallion aff, ¶ 12. Upgrade knew that, as Gutierrez’s employer, it was not subject to a personal injury action.

“[F]ailure to comply with [Insurance Law] section 3420 (d) notice requirements bars an insurer from seeking to disclaim coverage” *Roman Catholic Diocese of Brooklyn v National Union Fire Ins. Co. of Pittsburgh, Pa.*, 21 NY3d 139, 146 (2013). Upgrade argues that a disclaimer of coverage that is insufficiently specific does not comply with Insurance Law § 3420 (d). *General Acc. Ins. Group v Cirucci*, 46 NY2d 862, 864 (1979) (“the notice of disclaimer must promptly apprise the claimant with a high degree of specificity of the ground or grounds on which the disclaimer is predicated”).

Upgrade claims that the disclaimer that it received, in multiple versions, from ASIC was legally insufficient because AIUK was its insurer. Each of the three disclaimer documents (February 9, 2010, August 31, 2010 and January 24, 2011) had a cover sheet (for facsimile transmission) on ASIC letterhead and a formal statement that “Aspen Specialty Insurance Company (‘Aspen’) issued a commercial general liability policy” to Upgrade. Upgrade’s principal maintains that “the letter[s] did not make me sufficiently aware that ASIC was not the same company as AIUK.” McCallion aff, ¶ 29. The General Policy is clearly headed Aspen Insurance UK Limited, and the Notice is addressed that way. On the other hand, each disclaimer letter from ASIC correctly identified the AIUK General Policy number.

Upgrade argues that “AIUK and ASIC are completely separate, unique, distinct persons. They are not alter egos. They are not successors in interest. They are not ‘dba’s.’ They are not agents one for the other.” Haddad support affirmation, ¶ 11. Further, the insurers have not requested reformation of its disclaimers. Upgrade provides ample evidence, using industry reference sources and government filings, that AIUK is located in London, England, and ASIC is domiciled in North Dakota. Upgrade allows that AIUK and ASIC are affiliates, commonly-owned by Aspen Insurance Holdings Limited, a Bermuda company.

Upgrade also contends that the disclaimers were legally inadequate because of the initial failure to include the Owner and Cooper Square in the disclaimer in spite of the information that Upgrade provided in the Notice and the interview with the AIUK claims representative.

What Upgrade fails to explain is the six-month delay in sending its insurer the Notice. The General Policy contains the standard language that “You must see to it that we [the insurer] are notified of an ‘occurrence’ or an offense which may result in a claim.” The incident occurred on July 14, 2009; the Notice was sent on January 18, 2010. All Upgrade offers is that “the notice of claim and occurrence that Upgrade sent to AIUK on January 18, 2010, [was] well before any underlying lawsuit.” Upgrade memorandum of law at 7.

“The requirement that an insured notify its liability carrier of a potential claim ‘as soon as practicable’ operates as a condition precedent to coverage.” *White v City of New York*, 81 NY2d 955, 957 (1993).¹ Further, “the insured bears the burden of proving, under all the circumstances,

¹Insurance Law § 3420 (a) (5) has changed in regard to policies issued after January 17, 2009, invalidating a late claim only if “the failure to provide timely notice has prejudiced the insurer” The Policy, in this instance, was issued before January 17, 2009 eliminating the need to show prejudice to the insurer. *AH Prop., LLC v New Hampshire Ins. Co.*, 95 AD3d 1243 (2d Dept 2012) (“because the subject policy was issued in 2007, the amendment to Insurance Law § 3420, which became effective for policies issued on or after January 17, 2009, and which allows an insurer to disclaim coverage only upon a showing of prejudice to it, is not applicable. Thus, the common-law rule that an insurer may disclaim coverage for untimely notice, even without prejudice, applies”).

the reasonableness of any delay in the giving of notice.” *Paramount Ins. Co. v Rosedale Gardens*, 293 AD2d 235, 240 (1st Dept 2002). Unexcused delays of even short duration have been found to be a breach of the insurance contract as a matter of law. *Deso v London & Lancashire Indem. Co. of Am.*, 3 NY2d 127 (1957) (51 days); *Modern Cont. Constr. Co., Inc. v Giarola*, 27 AD3d 431 (2d Dept 2006) (nearly five months); *SSBSS Realty Corp. v Public Serv. Mut. Ins. Co.*, 253 AD2d 583 (1st Dept 1998) (91 days); *Power Auth. of State of N.Y. v Westinghouse Elec. Corp.*, 117 AD2d 336 (1st Dept 1986) (*Power Auth.*) (53 days).

“The proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law.” *Dallas-Stephenson v Waisman*, 39 AD3d 303, 306 (1st Dept 2007), citing *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985). Upon proffer of evidence establishing a prima facie case by the movant, “the party opposing a motion for summary judgment bears the burden of ‘produc[ing] evidentiary proof in admissible form sufficient to require a trial of material questions of fact.’” *People v Grasso*, 50 AD3d 535, 545 (1st Dept 2008), quoting *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). “If there is any doubt as to the existence of a triable issue, the motion should be denied.” *Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226 (1st Dept 2002). “But only the existence of a bona fide issue raised by evidentiary facts and not one based on conclusory or irrelevant allegations will suffice to defeat summary judgment.” *Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 (1978).

Under the circumstances described above, Upgrade’s motion for a declaratory judgment is denied, and Aspen’s cross motion for summary judgment dismissing the complaint is granted. “Absent a valid excuse, the failure to satisfy this notice requirement, which is a condition precedent to coverage, vitiates the policy.” *1700 Broadway Co. v Greater N.Y. Mut. Ins. Co.*, 54

AD3d 593, 593 (1st Dept 2008); *Power Auth.*, 117 AD2d at 339 (“[a]n insurer’s obligation to cover its insured’s loss is not triggered unless the insured gives timely notice of loss in accordance with the terms of the insurance contract”).

Accordingly, it is

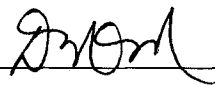
ORDERED that plaintiff Upgrade Contracting Co., Inc.’s motion for a declaratory judgment that defendant Aspen Insurance UK Limited must provide it insurance coverage in the personal injury action, *Gutierrez v 120 Owners Corp.*, Supreme Court, index No. 304218/2010, New York County, is denied; and it is further

ORDERED that defendants Aspen Insurance UK Limited and Aspen Specialty Insurance Company’s cross motion, pursuant to CPLR 3212, for summary judgment dismissing the complaint is granted, and the complaint is dismissed in its entirety, with costs and disbursements to said defendants as taxed by the Clerk of the Court upon submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk shall enter judgment accordingly.

DATED: ~~Sept~~ Sept 10, 2013

ENTER:



J.S.C.

DONNA M. MILLS, J.S.C.

FILED

SEP 13 2013

COUNTY CLERK'S OFFICE
NEW YORK