

**Consolidated Edison Co. of N.Y., Inc. v Old Republic
Ins. Corp.**

2014 NY Slip Op 31642(U)

June 25, 2014

Supreme Court, New York County

Docket Number: 153685/2012

Judge: Shlomo S. Hagler

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 17

----- X
CONSOLIDATED EDISON COMPANY
OF NEW YORK, INC.,

Plaintiff,

Index No. 153685/2012

- against-

DECISION AND ORDER

OLD REPUBLIC INSURANCE CORPORATION,

Defendant.

----- X

HON. SHLOMO S. HAGLER, J.S.C.:

In this insurance coverage declaratory judgment action, plaintiff Consolidated Edison Company of New York, Inc. ("Con Ed") moves for summary judgment, pursuant to CPLR § 3212, seeking a judgment declaring that defendant Old Republic Insurance Corporation ("Old Republic") has a duty both to defend and indemnify Con Ed with respect to an action entitled *Miller v. Con Ed, et al.*, under Index No. 108972/2009, in Supreme Court, New York County ("the Underlying Action"), which was settled. Old Republic opposed the motion and cross-moved for summary judgment in its favor and against Con Ed. Both the motion and cross-motion are consolidated herein for disposition.

Background

The Underlying Action which was commenced in or about June 24, 2009, arose from an accident that occurred on September 24,

2008, involving a fall from a scooter that plaintiff Miller was riding at the site of a trench excavation on a public street at Sixth Avenue and Ninth Street in Manhattan.

Old Republic issued insurance policy number A-2CG-497807-02 ("the Policy") to non-party Safeway Construction, Inc. ("Safeway"), which names Con Ed as an additional insured. Pursuant to a contract with Con Ed, Safeway performed excavation, conduit installation, and backfilling at the site, and had left a one and one-half inch gap between the grade of the roadway and the surface of the filled-in trench, as required by Safeway's contract with Con Ed. At the time of the accident, Safeway had fully performed and had left the site. Non-party Nico Asphalt, Inc. ("Nico"), was scheduled to finish the re-surfacing.

Initially, the Underlying Action named only Con Ed and the City of New York as defendants, but Con Ed filed a third-party complaint on October 30, 2009, naming Safeway and Nico as third-party defendants. In January 2010, Safeway and Nico was named as defendants pursuant to a supplemental summons (Exhibit "A" to the Affirmation of Geraldine O'Donnell, Esq., dated February 28, 2013 ["O'Donnell Aff."], in support of the motion). Paragraphs 54 and 55 of the supplemental summons allege that defendants, including Safeway, negligently created a dangerous condition on the roadway, causing plaintiff's injuries.

In the Underlying Action, both Safeway and Nico moved for summary judgment dismissing the plaintiff's complaint and third-party complaint. By Decision and Order dated November 3, 2011 (2011 NY Slip Op 32934[U]), the Hon. Barbara Jaffe, J.S.C., granted their motions for summary judgment dismissing the action as against them, on the ground that neither was negligent. (Exhibit "C" to O'Donnell Aff.) The Appellate Division, First Department, affirmed that order on November 27, 2012 (100 AD3d 561). (Exhibit "E" to O'Donnell Aff.).

By letter dated September 22, 2009, Con Ed tendered the defense of the Underlying Action to Old Republic (Exhibit "K" to O'Donnell Aff.). In response, by letter dated December 7, 2009, Old Republic disclaimed any duty to defend or indemnify Con Ed in the Underlying Action on the ground that "the loss did not arise from Safeway's work," and therefore Con Ed was not entitled to the status of an additional assured under the Policy (Exhibit "L" to O'Donnell Aff.). Old Republic also based its disclaimer on the ground that the delay of nearly three months in notifying Old Republic of the Underlying Action did not satisfy the condition of the Policy that Con Ed notify Old Republic "as soon as practicable" of any suit (*id.*).

Summary Judgment

The movant under CPLR § 3212 has the initial burden of proving entitlement to summary judgment. (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985].) Once such proof has been offered, in order to defend the summary judgment motion, the opposing party must "show facts sufficient to require a trial of any issue of fact." (CPLR § 3212[b]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]; *Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065 [1979]; *Freedman v Chemical Construction Corp.*, 43 NY2d 260 [1977]; *Spearmon v Times Square Stores Corp.*, 96 AD2d 552 [2d Dept 1983].) "It is incumbent upon a [litigant] who opposes a motion for summary judgment to assemble, lay bare and reveal [his, her, or its] proof, in order to show that the matters set up in [the] answer are real and are capable of being established upon a trial." (*Spearmon*, 96 AD2d at 553, quoting *Di Sabato v Soffes*, 9 AD2d 297, 301 [1st Dept 1959].) If the opposing party fails to submit evidentiary facts to controvert the facts set forth in the movant's papers, the movant's facts may be deemed admitted and summary judgment granted since no triable issue of fact exists. (*Kuehne & Nagel, Inc. v F.W. Baiden*, 36 NY2d 539 [1975].)

Untimely Disclaimer

Old Republic's disclaimer, more than two months after receiving notice of the suit is, without explanation, untimely as a matter of law (*Hartford Ins. Co. v County of Nassau*, 46 NY2d 1028, 1030 [1979]; *Nationwide Mut. Ins. Co. v Steiner*, 199 AD2d 507, 508 [2d Dept 1993]) (holding that unexplained 41-day delay in disclaiming coverage was unreasonable as a matter of law).

Old Republic is required by Insurance Law § 3420(d)(2) to give notice of disclaimer "as soon as reasonably possible" (*id.*; *George Campbell Painting v National Union Fire Ins. Co. of Pittsburgh, PA*, 92 AD3d 104, 114 [1st Dept 2012]).¹

"Timely notice of disclaimer must be given even where the injured claimant has in the first instance failed to provide the insurer with timely notice of the accident [citation omitted]" (*Nationwide Mut. Ins. Co. v Steiner*, 199 AD2d at 507).

Failure to give the required prompt notice precludes an effective disclaimer (*J.T. Magen v Hartford Fire Ins. Co.*, 64 AD3d 266, 268-69 [1st Dept 2009]). Thus, Old Republic has waived

¹ There is no merit to Old Republic's argument that the fact Con Ed sent its notice to an address for Old Republic in Wisconsin rather than New York should excuse its delay in disclaiming. The disclaimer would still be untimely even if Old Republic were credited another full week for the delay. The notice was sent September 24, 2009. Old Republic does not state the actual date that it received the notice in New York other than that it was in October, 2009 (*see* Affidavit of Robert E. Granger, sworn to on April 9, 2013, ¶ 10).

its right to enforce the conditions of the Policy² requiring timely notice by the insured of both the occurrence and the Underlying Action. It is, therefore, necessary to determine the extent, if any, of Old Republic's duty to defend and indemnify Con Ed in the Underlying Action.

Duty to Defend and Indemnify

The issue as to whether Old Republic owes Con Ed a duty to indemnify depends upon whether the underlying action "arose from Safeway's work," as provided for in the additional insured endorsement of the Policy (Exhibit "J" to O'Donnell Aff.), which amends the provision in Section II governing "who is an insured," to include Con Ed, "but only with respect to liability arising out of 'your work' for that insured by or for you" (*id.*). In the preamble to the Policy, the words "you" and "your" refer to the "named Insured," which is Safeway. Thus, the issue of whether Old Republic has a duty to defend Con Ed as an additional insured under the Policy depends upon whether the liability arises out of Safeway's work.

While at first blush it would seem self-evident that the liability for a fall under the circumstances would "arise out of

² Section IV of the Policy, captioned, "Commercial General Liability Conditions," provides, in subdivision (b) (2) that the insured must notify Old Republic as soon as practicable if suit is brought against any insured. Subdivision (c) requires that any "insured," which would include Con Ed, to "immediately send us copies of any demands, notices, summonses or legal papers received in connection with the claim or suit."

[Safeway's] work." But for Safeway's work, performed at the site of the accident pursuant to a contract with Con Ed, the road surface would not have contained the one and one-half inch gap or hole into which the plaintiff in the Underlying Action fell. Indeed, the cases characterize the "arising out of" clause as "focus[ing] not upon the precise cause of the accident ... but upon the general nature of the operation in the course of which the injury was sustained"³ (*Consolidated Edison Co. of N.Y. v Hartford Ins. Co.*, 203 AD2d 83, 83 [1st Dept 1994]; *Chelsea Assoc., LLC v Laquila-Pinnacle*, 21 AD3d 739, 740 [1st Dept 2005])).

In *Worth Constr. Co., Inc. v Admiral Ins. Co.* (10 NY3d 411 [2008]), the Court of Appeals held that an accident did not arise out of a subcontractor's work, in the context of an additional insured clause in the subcontractor's policy, that named the general contractor and owner as additional insureds. The facts are substantively indistinguishable from the present facts.

In *Worth*, the subcontractor, Pacific Steel, installed a staircase pursuant to a contract with the additional insured general contractor. In accordance with its contract, Pacific

³ In *Mount Vernon Fire Ins. Co. v Creative Hous.* (88 NY2d 347, 351 [1996]), the Court of Appeals held that "any minor variation in the language between 'arising out of,' used in the policy exclusion. . . and the 'based directly on' language, used in [another policy's] exclusions. . . was 'too insignificant to permit varying legal consequences (citation omitted).'"

installed the steel pans of the stairs, and then left the job, scheduled to return to install the handrails after two separate sub-contractors had poured concrete into the pans and installed fireproofing around the steps. Pacific had no contractual relation with either of these sub-contractors. The plaintiff in *Worth* fell on fireproofing that had been installed on the stairs by one of those sub-contractors.

The Court of Appeals stated that [t]he phrase 'arising out of' has been interpreted ... to mean originating from, incident to, or having connection with, and requires only that there be some causal relationship between the injury and the risk for which coverage is provided [internal quotation marks and citations omitted]" (*id.* at 415).

In *Worth*, the Court of Appeals further noted that the allegation in the complaint that Pacific had negligently constructed the staircase was

"the only basis for asserting any significant connection between Pacific's work and the accident. Once *Worth* admitted that its claims of negligence against Pacific were without factual merit, it conceded that the staircase was merely the situs of the accident. Therefore, it could no longer be argued that there was any connection between ...[the] accident and the risk for which coverage was intended"

(*id.* at 416).

Here, too, the only significant connection between Safeway's work and the accident was the allegation in the amended complaint in the Underlying Action that Safeway was negligent. Once Safeway was judicially determined not to have been liable for the Underlying Action, the "liability arising out of a named insured's work is absent where, as here, the named insured is absolved of liability" (*Bovis Lend Lease LMB Inc. v Garito Contr., Inc.*, 65 AD3d 872, 874 [1st Dept 2009])

A substantial connection between the accident and the risk for which additional insured coverage was obtained may exist even in the absence of liability on the part of the named insured where the person injured is an employee of the named insured "who is injured while performing the named insured's work under the subcontract" (*Hunter Roberts Constr. Group, LLC v Arch Ins. Co.*, 75 AD3d 404, 408 [1st Dept 2010] see also *Regal Constr. Corp. v National Union Fire Ins. Co. of Pittsburgh, PA*, 15 NY3d 34, 39 [2010]). That, however, is not the present factual context.

In *Regal*, the Court of Appeals held that there was "a connection between the accident and Regal's work, as the injury was sustained by Regal's own employee while he supervised and gave instructions to a subcontractor regarding work to be performed" (*id.* at 39).

By reason of the foregoing, Old Republic has no duty to defend and indemnify Con Ed in the Underlying Action. (See, also, *Tower Ins. Co. Of N.Y. v BCS Constr. Corp.*, 2014 NY Slip Op. 04420 [1st Dept 2014]).

Conclusion

Accordingly, it is

ORDERED, that the motion for summary judgment by plaintiff Consolidated Edison Company of New York, Inc. is denied; and it is further

ORDERED, that the motion for summary judgment by defendant Old Republic Insurance Corporation is granted; and it further

ORDERED, ADJUDGED and DECLARED, that defendant Old Republic General Insurance Corporation has no duty to defend and indemnify plaintiff Consolidated Edison Company of New York, Inc. in the underlying action captioned *Miller v. Con Ed, et al.* Index No. 108972/2009, in Supreme Court, New York County; and it is further

ORDERED, that the Clerk shall enter judgment accordingly.

The foregoing constitutes the decision and order of this Court.

Dated: June 25, 2014

ENTER :

Shlomo Hagler
J.S.C.

J.S.C.