Atlantic Dev. Group, LLC. v Interstate Fire & Cas. Co.
2014 NY Slip Op 31914(U)
July 21, 2014
Supreme Court, New York County
Docket Number: 113972/11
Judge: Louis B. York
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: J. York PART 2
Justice

Atlantic Development Group, et al.,
-v-
Interstate Fire & Casualty Company, et ano.

INDEX NO. 113972/11
MOTION DATE 5/14/14
MOTION SEQ. NO. 001

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ No(s). _____

Answering Affidavits — Exhibits _____ No(s). _____

Replying Affidavits _____ No(s). _____

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the accompanying decision.

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

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Dated: 1/21/14

J.S.C.

1. CHECK ONE: ..... ☒ CASE DISPOSED ☐ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☒ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

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

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ATLANTIC DEVELOPMENT GROUP, LLC, BORICUA COLLEGE DEVELOPMENT CORPORATION, BORICUA VILLAGE ASSOCIATES, L.P., ELTON AVENUE, LLC, KNICKERBOCKER CONSTRUCTION II, LLC, and KNICKERBOCKER MANAGEMENT, LLC,

Plaintiffs,

Index No. 113972/11

-against-

INTERSTATE FIRE & CASUALTY COMPANY and NEW YORK STEEL FABRICATORS, LLC

Defendants.

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Defendants bring this motion for summary judgment dismissing plaintiff's complaint in its entirety. The complaint asserts two causes of action. The first is that plaintiffs qualify as additional insureds under the policy of insurance issued by Interstate to New York Steel. The second is that defendant is obligated to indemnify plaintiffs for any and all claims arising out of New York Steel's work. Plaintiff opposes the motion. For the reasons set forth below, the Court grants defendants' motion in part and denies it in part.

FACTS

The court draws the following facts from the record. Elton Avenue LLC ("Elton") is the owner of a structure known as the College Building, a property which was under construction at Boricua Village in Bronx County, New York. Atlantic Development Group, LLC ("Atlantic") was the developer for this project, Knickerbocker Management

("Knickerbocker") was the construction manager, and Knickerbocker Construction II LLC ("Knickerbocker II") was the general contractor hired to construct the College Building.

Knickerbocker II entered into a contractual agreement with New York Steel to perform steel work on the construction of the College Building at Boricua Village. Pursuant to the terms of the subcontract entered on or about May 7, 2008 between New York Steel and Knickerbocker II, New York Steel had to purchase commercial general liability insurance with limits of $5,000,000 per occurrence. Interstate Fire & Casualty Company issued Commercial General Liability Policy Number GL1000183 to New York Precast LLC, with a policy period of June 29, 2008 through June 29, 2009. New York Steel was a Named Insured under the policy pursuant to a Named Insured Endorsement. The Interstate Policy at Section IV.2 requires the insureds to provide notice of an occurrence and suit to Interstate as soon as practicable. The language of the Additional Insured Endorsement in the Interstate policy read as follows:

> Any person or organization for whom you are performing operations when you and such person or organization have agreed in writing in a contract or agreement that such person or organization be added as an additional insured on your policy.

The commercial general liability insurance named Elton Avenue LLC as an additional insured, as well as those on the attached summary sheet. The attached summary sheet - the Boricua College Insurance Summary - included Atlantic, Knickerbocker II, ad Elton as certificate holders and additional insureds. Additionally, New York Steel's broker issued a certificate of insurance, which named Atlantic, Knickerbocker II, and Elton as additional insureds under New York Steel's policy.

New York Steel employee Manueal Barbecho allegedly suffered personal injures on November 3, 2008 while working on the construction of the College Building at Boricua Village. Barbecho subsequently filed a personal injury action against Atlantic Development Group and the other plaintiffs in the current action on or about September 17, 2010, in the Supreme Court of the State of New York, County of the Bronx.

Knickerbocker II learned of the occurrence and suit on October 5, 2010. National Casualty Company ("Scottsdale"), the insurer for the plaintiffs, tendered notice of this action to defendants by letter dated December 2, 2010; the letter sought declaration that plaintiffs are entitled to defense and indemnification in the action brought by Barbecho as "Additional Insureds" under the commercial general liability insurance policy Interstate issued to New York Steel. Defendant did not receive the tender letter until December 13, 2010, which notified of the occurrence and suit. On December 17, 2010, Interstate requested further information including a copy of the complaint, which was forwarded to Interstate on January 13, 2011. Interstate then disclaimed coverage to the plaintiffs on January 13, 2011, based upon late notice of the occurrence and suit.

SUMMARY JUDGMENT STANDARD

The Court grants summary judgment when "the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party." C.P.L.R. §3212(b). If the movant submits enough evidence to eliminate all factual issues, then the burden shifts to the nonmoving party to present evidence of a triable factual issue. *Mazurek v. Metro. Museum of Art*, 27 A.D.3d 227, 228, 812 N.Y.S.2d 12, 14 (1st Dep't 2006). However, if the movant does not meet "the

initial burden of setting forth evidentiary facts sufficient to establish entitlement to judgment as a matter of law, the motion must be denied" and the nonmoving party does not need to present evidence. *Roman v. Hudson Tel. Assoc.*, 15 A.D.3d 227, 228, 791 N.Y.S.2d 6, 7 (1st Dep't 2005). "[A]ll of the evidence must be viewed in the light most favorable to the party opposing the motion, and all reasonable inferences must be resolved in that party's favor." *Udoh v. Inwood Gardens, Inc.*, 70 A.D.3d 563, 565, 897 N.Y.S.2d 12, 14 (1st Dep't 2010).

The Written Contract Requirement

Defendants claim that Knickerbocker II is the only plaintiff that qualifies as an additional insured under the commercial general liability policy issued from Interstate to New York Steel. Under the additional insured endorsement, each person or organization added as an additional insured must have "agreed in writing in a contract or agreement" with the named insured. Knickerbocker II entered into a written agreement with New York Steel through the Trade Contract. All remaining plaintiffs were incorporated by reference into the subcontract, but defendant argues this is insufficient to meet the written agreement requirement in the additional insured endorsement.

Defendants rely on First Department authority, which requires a direct written contract between the named insured and additional insured. *See AB Green Gansevoort, LLC v. Peter Scalamandre & Sons, Inc.*, 102 A.D.3d 425, 427 961 N.Y.S.2d 3, 5 (1st Dep't 2013); *Linarello v. City University of New York*, 6 A.D.3d 192, 195 774 N.Y.S.2d 517, 520 (1st Dep't 2004). In *Linarello,* the First Department held that a construction manager was not an additional insured under the additional insured endorsement because

it did not enter into written contracts with the named insured subcontractors. *See Linarello*, 6 A.D.3d at 195, 774 N.Y.S.2d at 520. Likewise, in *AB Green Gansevoort,* the First Department held that a direct contract between the named insured subcontractor and owner was necessary to satisfy the requirements of the additional insured endorsement. *See AB Green Gansevoort*, 102 A.D.3d at 427, 961 N.Y.S.2d at 5. The language of the additional insured endorsement in both cases mirrors the language of the additional insured endorsement in the case at hand. Therefore, the First Department has previously considered the exact language at issue here and found it insufficient absent a direct written contract between the parties in question.

In opposition, plaintiff argues that incorporation by reference establishes requisite intent of the named insured subcontractor to be bound and satisfies the written agreement language in the additional insured endorsement. *See Carlisle SoHo East Trust v. Lexington Ins. Co.*, 49 A.D.3d 272, 272, 852 N.Y.S.2d 118, 119 (1st Dep't 2008). While the subcontract in the case at hand did incorporate the prime contract and names of additional insured by reference, this case is distinguishable from the circumstances in *Carlisle.* In *Carlisle*, the named sub-subcontractor made specific revisions to the provisions that set forth the limits of umbrella coverage, but made no change to the reference of the plaintiff as an additional insured, thereby demonstrating an intent to be bound by such terms. *Id.* In the case at hand, no such revision or adaptation was made by the named subcontractor to demonstrate a specific intent that they are bound by the terms referenced. Plaintiffs also rely on additional case law to support their position that incorporation by reference can satisfy the written agreement language of the additional insured endorsement. *See Binasco v. Break-Away Demolition Corp.*, 256 A.D.2d 291,

291 681 N.Y.S.2d 309, 309 (2nd Dep't 1998); *see Nitis v. City of New York,* 242 A.D.2d 287, 288, 661 N.Y.S.2d 44, 45 (2nd Dep't 1997). However, the cited cases only act as persuasive authority to the court and are not binding precedent.

For the above reasons, the Court relies on binding precedent in the First Department that has considered the identical issue with matching language in the additional insured endorsement, which necessitates a direct written agreement with the named insured to satisfy a written agreement under language of the policy. Therefore the incorporation of plaintiffs by reference into the subcontract is not sufficient to comprise an agreement between the parties and does not provide for coverage under the additional insured endorsement.

The Notice Requirement of the Interstate Policy

Defendants' motion also seeks to dismiss plaintiff's claim on the ground that Knickerbocker II's notice of occurrence and suit were not as soon as practicable pursuant to the terms of The Interstate Policy. Here plaintiffs knew of the occurrence and suit on October 5, 2010 when they received the Barbecho complaint. Atlantic, Elton, and Knickerbocker II did not provide notice until 69 days after this date, when Interstate received the tender letter.

Insurance policies issued before January 17, 2009 must comply with the notice provisions of the policy as a condition precedent to the insurer's liability under the policy. The timeliness of notice is a subjective standard and has been given differing interpretations by the Court. Delays as short as 29 days have been determined to be unreasonable as a matter of law. *See Government Emp. Ins. Co. v. Elman*, 40 A.D.2d 994,

994, 338 N.Y.S.2d 666, 667 (2nd Dep't 1972); *see also Pandora Ind., Inc. v. St. Paul Surplus Lines Ins. Co.*, 188 A.D.2d 277, 277, 590 N.Y.S.2d 471, 471 (1st Dep't 1992) (finding a delay of 31 days unreasonable as a matter of law). However, much longer delays have also been considered unreasonable. Typically, the reasonableness of a delay in giving notice and the sufficiency of an excuse are issues of fact for trial. *See Jenkins v. Burgos*, 99 A.D.2d 217, 219, 472 N.Y.S.2d 373, 375 (1st Dep't 1984); *see also Travelers Ins. Co. v. Volmar Const. Co., Inc.*, 300 A.D.2d 40, 42 752 N.Y.S.2d 286, 288 (1st Dep't 2002) (citing *Hartford Accident & Indem. Co. v. CNA Companies*, 99 A.D.2d 310, 313, 472 N.Y.S.2d 342, 345 (1st Dep't 1984). While the insured bears the burden of offering a reasonable excuse, the court may still find an excuse to be unreasonable as a matter of law. *See 2130 Williamsbridge Corp. v. Interstate Indem. Co.*, 55 A.D.3d 371, 372, 866 N.Y.S.2d 105, 107 (1st Dep't 2008).

Plaintiffs claim that they offer a reasonable excuse for the delay in notification of occurrence and suit, which presents an issue of material fact for trial. Specifically, Knickerbocker II's Office Manager Eileen Glass states in her affidavit that the complaint in *Manuel Barbecho v. Atlantic Development Group, LLC et al.*, Index No.307755/2010, filed in the Supreme Court of the State of New York, County of the Bronx, identified "Boricua College" as one of the defendants and identified Barbecho's employer as New York Precast, LLC. On October 19, 2010, former Atlantic employee Rhonda Chiang asked Glass to provide her with a copy of the New York Precast subcontract with New York Precast. However, when she reviewed review of Knickerbocker II's file for the Boricua College Building she discovered that the subcontract was with New York Steel Fabricators, LLC. Thus, Glass had to determine which contract applied to Barbecho's

claim and which subcontractor and insurer plaintiffs should tender requests for indemnification. Glass inquired whether Boricua College was the actual premises where Barbecho's injury occurred and whether Barbecho worked for New York Steel. The Atlantic forwarded the correct insurance certificate of insurance to National Casualty on November 15, 2010.

The following information raises issues of fact as to whether the excuse for the delay in providing notification was reasonable. According to the affidavit, there was confusion as to the identity of Barbecho and as to the worksite where he was injured. Because of this confusion, plaintiffs did not have actual knowledge of the occurrence and lawsuit until long after they received the Barbecho complaint. Confusion in identifying correct information that affects coverage can be a good faith excuse for failing to notify. *See Brooks v. Zurich-American Ins. Group*, 300 A.D.2d 176, 177, 753 N.Y.S.2d 454, 455 (1st Dep't 2002) (holding confusion in identifying which party caused damages a good faith reason for delay). Determining which contract applies to Barbecho's claim and which insurer is sought for indemnification, affects coverage and presents issues of fact as to the reasonableness of the delay.

Additionally, even if notice of occurrence and suit were timely, plaintiffs raise issues of fact as to the timeliness of Interstate's disclaimer of coverage. Under New York law, an insurer "shall give written notice as soon as is reasonably possible of such disclaimer of liability or denial" to the insured party. NY Insurance Law §3420(d)(2). The reasonableness of a disclaimer is measured from the time when the insurer first knows or should have known of grounds for disclaiming coverage. *See Those Certain Underwriters at Lloyds, London v. Gray*, 49 A.D.3d 1, 3, 856 N.Y.S.2d 1, 1 (1st Dep't

2007). Delays in disclaiming of just over one month have been held unreasonable. *See Republic Franklin Ins. Co. v. Pistilli*, 16 A.D.3d 477, 479, 791 N.Y.S.2d 639, 641 (2nd Dep't 2005). If an insurer delays in disclaiming, although the grounds for disclaiming are readily apparent at the time the insurer receives notice, the disclaimer may be held unreasonable as a matter of law. *Id.* However, if the grounds for disclaiming are not readily apparent, the insurer has the right to investigate in a diligent and prompt manner and bears the burden of justifying any delay. *See id.* Generally, whether a notice of disclaimer is sent "as soon as is reasonably practicable" is a question of fact depending on all facts and circumstances, and only may be decided as a matter of law in an exceptional case. *See Hartford Ins. Co. v. Nassau County*, 46 N.Y.2d 1028, 1030, 416 N.Y.S.2d 539, 541 (1979).

Here, Interstate disclaimed coverage thirty-one days after receiving notice of the Barbecho action from the plaintiffs. Plaintiffs claim that Interstate knew of the Barbecho action after conducting its first electronic claims database search and could have relied on this to disclaim coverage. On December 17, 2010, defendants requested further information, including a copy of the Barbecho complaint. However, plaintiffs did not forward to defendants until January 13, 2011, and defendants disclaimed coverage later that day. Plaintiffs claim that the complaint does not identify the date the plaintiffs were served with the Barbecho lawsuit, and therefore is not a reasonable means for delaying disclaiming. A delay has been found unreasonable when an insurer has sufficient reason to disclaim coverage yet continues to engage in investigation. *See George Campbell Painting v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA*, 92 A.D.3d 104, 110, 937 N.Y.S.2d 164, 170 (1st Dep't 2010). Therefore, issues of fact remain as to whether

defendants were unreasonable in disclaiming coverage thirty-one days after receiving notice, based on the information defendants obtained at this point in time.

CONCLUSION

For the reasons set forth above, the court grants defendants motion in part and denies in part.

Therefore, it is

ORDERED that the motion of defendant for summary judgment is granted in part as to the first cause of action and is granted in part as to the second cause of action; and it is further

ADJUDGED AND DECLARED, as to the first cause of action, all plaintiffs with the exception of Knickerbocker II do not qualify as additional insureds under the policy of insurance issued from Interstate to New York Steel; and it is further

ADJUDGED AND DECLARED, that the defendant is not obligated to indemnify all plaintiffs with the exception of Knickerbocker II, who remains a party as to the second cause of action.

Dated: 7/21/14

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

ENTER:

LOUIS B. YORK, J.S.C.

LOUIS B. YORK J.S.C.