Consolidated Edison Co. of N.Y., Inc. v Interstate Fire & Casualty Co.
2014 NY Slip Op 32704(U)
October 3, 2014
Supreme Court, New York County
Docket Number: 159536/13
Judge: Nancy M. Bannon
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Hon. Nancy Bannon PART 42
Justice

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.

- v -

INTERSTATE FIRE AND CASUALTY COMPANY and INSIGHT COMPANIES, INC.

INDEX NO. 159536/13

MOTION DATE 5/21/14

MOTION SEQ. NO. 001

The following papers, numbered 1 to 3, were read on this pre-answer motion to dismiss the complaint.

Notice of Motion/ Order to Show Cause — Affirmation — Affidavit(s) — Exhibits — Memorandum of Law	No(s). 1
Answering Affirmation(s) — Affidavit(s) — Exhibits	No(s). 2
Replying Affirmation — Affidavit(s) — Exhibits	No(s). 3

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

In this action to recover damages for, inter alia, negligence, the defendant Insight Companies, Inc. moves to dismiss the complaint on the grounds that a defense is founded upon documentary evidence (CPLR 3211[a][1]), the plaintiff lacks legal capacity (CPLR 3211[a][3]), the plaintiff's claims are barred by the applicable statute of limitations (CPLR 3211[a][5]), and the plaintiff failed to state a cause of action (CPLR 3211[a][7]). For the reasons set forth below, the defendant's motion is granted pursuant to CPLR 3211(a)(1) and (a)(7).

In its verified complaint, dated October 16, 2013, the plaintiff alleges that on or about September 26, 2006, the plaintiff and non-party Case Contracting Ltd. (hereinafter "Case") entered into a contract whereby Case agreed to perform certain work and render services to the plaintiff at the East River Generating Station, 801 East 14th Street, New York, NY. Pursuant to this contract, Case procured an excess insurance policy through insurance broker, defendant Insight Companies. Inc. (hereinafter "Insight"), with insurance company, defendant Interstate Fire and Casualty Company (hereinafter "Interstate"). The policy, in effect from June 20, 2006 to June 20, 2007, provided for liability above $1,000,000 with limits of $5,000,000 per occurrence and named the plaintiff as an additional insured.

On or about November 8, 2006, non-parties Thomas Mackey and Steven Silverstein allegedly sustained personal injuries at the East River Generating Station site. Thomas Mackey commenced an action against the plaintiff to recover damages for personal injuries on March 13, 2007. Steven Silverstein commenced a separate action against the plaintiff on May 17, 2007.

In its complaint, the plaintiff avers that it notified Interstate of the November 8, 2006, incident by mailing letters dated June 18, 2007, and June 20, 2007, to "Interstate Fire & Casualty Company c/o Insight Companies Inc." The plaintiff alleges that Insight did not return the letters to it and did not communicate to it any rejection or disclaimer. Interstate declined the plaintiff's request for coverage on May 20, 2013, on the grounds that its notification was untimely and that the indemnification agreement between the plaintiff and Case is void under New York law and cannot be cited to create an "insured contract" under the Interstate policy.

The plaintiff asserts causes of action alleging that Insight, acting as broker for the plaintiff, was negligent in processing and/or transmitting the Mackey and Silverstein claims to Interstate and that Insight negligently failed to deliver the letters to Interstate. The plaintiff asserts a third cause of action alleging that Insight breached "a duty to warn, disclose, or otherwise communicate to [the plaintiff] that it was not an agent of Interstate or that it was not taking action on behalf of [the plaintiff]" regarding the November 8, 2006 incident.

On December 13, 2013, Insight moved to dismiss the plaintiff's complaint insofar as asserted against it, pursuant to CPLR 3211(a)(1), (a)(3), (a)(5), and (a)(7), on the grounds that Insight owed no duty to the plaintiff, Insight's nonfeasance was not the proximate cause of Interstate's denial of coverage, and the plaintiff's claims are barred by the three year statute of limitations applicable to negligence claims under CPLR 214(4).

In considering a motion to dismiss for failing to state a cause of action under CPLR 3211(a)(7), the pleading is to be afforded a liberal construction and the court should accept as true the facts alleged in the complaint, accord the pleading the benefit of every reasonable inference, and only determine whether the facts, as alleged, fit within any cognizable legal theory. See Hurrell-Harring v State of New York, 15 NY3d 8 (2010); Leon v Martinez, 84 NY2d 83 (1994). However, where the allegations contained in the pleadings consist of bare legal conclusions, they are not entitled to such consideration. See Beattie v Brown & Wood, 243 AD2d 395 (1st Dept. 1997). Dismissal under CPLR 3211(a)(1) is warranted only if the documentary evidence submitted "resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim" Fortis Financial Services, LLC v Fimat Futures USA, 290 AD2d 383, 383 (1st Dept. 2002); see Amsterdam Hospitality Group, LLC v Marshall-Alan Assoc., Inc., 120 AD3d 431, 433 (1st Dept. 2014). The plaintiffs' complaint fails to meet this liberal standard in that it fails to state a cognizable claim against the defendant Insight.

When an insurance policy so requires, notice of a claim or occurrence must be given within a reasonable amount of time, in light of the facts and circumstances. See Rosier v Stoeckeler, 101 AD3d 1310, 1312 (3d Dept. 2012); 2130 Williamsbridge Corp. v Interstate Indemnity Company, 55 AD3d 371, 371 (1st Dept. 2008); Gershow Recycling Corp. v Transcontinental Insurance Company, 22 AD3d 460, 461 (2d Dept. 2005). Failure to do so vitiates the insurance policy, absent a valid excuse. See 2130 Williamsbridge Corp. v Interstate Indemnity Company, 55 AD3d at 371-372. The insured party bears the burden of establishing the reasonableness of the excuse. See 2130 Williamsbridge Corp. v

Interstate Indemnity Company, 55 AD3d at 372. "It is well settled that notice to a broker cannot be treated as notice to the insurer since the broker is deemed to be the agent of the insured and not the carrier." Gershow Recycling Corp. v Transcontinental Insurance Company, 22 AD3d at 461; see Security Mutual Insurance Co. of New York v Acker-Fitzsimmons Corp., 31 NY2d 436 (1972); 2130 Williamsbridge Corp. v Interstate Indemnity Company, 55 AD3d at 372; Tower Insurance Co. of New York v Mike's Pipe Yard and Building Supply Corp., 35 AD3d 275 (1st Dept. 2006).

Accepting the facts alleged in the complaint as true, the plaintiff failed to sufficiently plead the causes of action asserted against Insight. The insurance policy in this case, set forth in Interstate's May 20, 2013 letter denying coverage, required the plaintiff to notify Interstate "as soon as practicable" of any occurrence that may result in a claim under the policy and of any claim made or "suit" brought. It is undisputed that the plaintiff and Case were immediately aware of the underlying incident. The plaintiff argues that it provided notice to Interstate via two letters sent in care of Insight to Interstate, over seven months after the underlying incident in this case. However, the plaintiff does not allege any facts that would establish that Insight was authorized to receive notice on behalf of Interstate. See Core-Mark International v Swett & Crawford Inc., 71 AD3d 1072 (2d Dept. 2010). The plaintiff's claim that it provided timely notice to Insight, the broker, is insufficient as a matter of law. See 2130 Williamsbridge Corp. v Interstate Indemnity Company, 55 AD3d at 372; Gershow Recycling Corp. v Transcontinental Insurance Company, 22 AD3d at 462.

The plaintiff further contends that Insight had a duty to process or transmit its notice to Interstate or to advise the plaintiff that it was not Interstate's agent and would not take any action on behalf of the plaintiff. However, the plaintiff failed to set forth any evidence or facts to support its contention that there existed privity between the plaintiff, as an additional insured, and Insight, the broker engaged by non-party Case. See Serravillo v Sterling Insurance Co., 261 AD2d 384, 385 (2d Dept. 1999). The plaintiff states only the bare legal conclusion that Insight was negligent in processing or transmitting the plaintiff's letters and that Insight breached its duty to communicate to the plaintiff that Insight was not Interstate's agent or that it would not take action on behalf of the plaintiff. See Peter F. Gaito Architecture, LLC v Simone Development Corp., 46 AD3d 530 (2d Dept. 2007).

Even if the two letters sent to Insight could be construed as notice to Interstate, the plaintiff does not explain its failure to notify Interstate of the "occurrence" for over seven months. Such delay renders the notice untimely as a matter of law. See e.g. Rosier v Stoeckeler, 101 AD3d at 1313; Tower Insurance Co. of New York v Classon Heights, LLC, 82 AD3d 632, 634 (1st Dept. 2011). Contrary to the plaintiff's contentions in the complaint, Insight's alleged negligence in processing or transmitting the subject notices of claim to Interstate was not the proximate cause of Interstate's denial of coverage to the plaintiff.

Insight's remaining contentions are without merit.

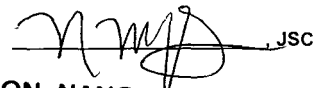
Accordingly, it is

ORDERED that Insight Companies Inc.'s motion to dismiss the complaint insofar as asserted against it is granted, and it is further,

ORDERED that the Clerk shall enter judgment accordingly.

This constitutes the Decision and Order of the court.

Dated: October 3, 2014



HON. NANCY M. BANNON, JSC
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 as appropriate:	☐ SETTLE ORDER	☐ SUBMIT ORDER				
	☐ DO NOT POST	☐ FIDUCIARY APPOINTMENT	☐ REFERENCE			