Century Surety Ins. Co. v All in One Roofing, LLC
2014 NY Slip Op 32912(U)
October 8, 2014
Supreme Court, Westchester County
Docket Number: 57683/2011
Judge: William J. Giacomo
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To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER
PRESENT: HON. WILLIAM J. GIACOMO, J.S.C.

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CENTURY SURETY INSURANCE COMPANY,
Plaintiff,

-against-

ALL IN ONE ROOFING, LLC, ZDENO JADRON, MCALPINE CONSTRUCTION COMPANY, INC., 10 LEONARD STREET, LLC and 10 BOULEVARD, LCC,
Defendants.

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Index No. 57683/2011

DECISION & ORDER

The following documents numbered 1 to 14 were read on defendants Mcalpine Construction Company, LLC, 10 Leonard Street and 10 Boulevard, LLC's ("MCC") motion for summary judgment declaring that plaintiff provide MCC and All in One Roofing ("AIO") with coverage and a defense in the underlying personal injury action and defendant Jadron's motion dismissing the complaint against him and for an order directing plaintiff to provide coverage and a defense for AIO in the underlying action.

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Factual and Procedural Background:

Defendant Zdeno Jadron commenced a personal injury action in Supreme Court, Suffolk County, against 10 Leonard Street, LLC, 10 Boulevard, LLC, MCC, and AIO.

Jadron is seeking damages for severe personal injuries sustained on October 21, 2010 when he fell from an elevated height at a construction site located at 10 East Main Street a/k/a 10 Leonard Street, Beacon, NY. In his complaint, Jadron asserts claims under the Labor Law. At the time of the accident Jadron was an employee of Vasyl Berezhansky. Berezhansky was a roofing contractor hired by AIO.

Defendants 10 Leonard Street, LLC and 10 Boulevard, LLC are the owners of the premises under construction. Defendant MCC was the general contractor for the construction project. MCC hired AIO as its roofing subcontractor. AIO has only one employee, Operations Manager Edmond Warwick and, therefore, further subcontracted out the job to Vasyl Berezhansky to do the roofing work.

On August 12, 2010, plaintiff issued a Commercial Liability Insurance Policy to AIO.

The policy contains the following "BODILY INJURY TO INDEPENDENT CONTRACTORS EXCLUSION" which provides in relevant part:

> It is agreed that this insurance does not apply to "bodily injury" to:
>
> (1) Any independent contractor or the "employee" of any independent contractor while such independent contractor or their "employee" is working on behalf of the insured; or * * *

The policy also contains an "INDEPENDENT CONTRACTORS EXCLUSION" which provides in relevant part:

> In consideration of the premium charged the following changes are made to this policy:
>
> It is agreed that this insurance does not apply to "bodily injury" or "property damage" arising out of:
>
> 1. The acts or omission of independent contractors while working on behalf of any insured, or

2. The negligent:

a. hiring or contracting;
b. investigation;
c. supervision;
d. training;
e. retention;

of any independent contractor for whom any insured is or ever was legally responsible and whose acts or omissions would be excluded by **1.** above.

This exclusion does not apply if the work was performed on your behalf by a subcontractor, pursuant to a written contract, and that subcontractor:

1. Had a valid and enforceable certificate of insurance on file with you at the time the work was completed for occurrence coverage at least as board as this policy, and you can produce that certificate for us when we ask for it; and

2. That certificate of insurance was with an insurance company with an AM Best rating of A- or better at the time the certificate issuance; and

3. The limits on the certificate are equal to or greater than this policy; and

4. You are named as an additional insured on the subcontractor's policy for both ongoing operations and 'products-completed operations hazard".

On April 22, 2011, plaintiff issued a written disclaimer to AIO as well as to all the defendants in this action based upon these exclusions since it claimed that Jadron was an employee of the independent contractor/subcontractor Vasyl Berezhansky. Further, according to plaintiff, AIO did not provide any evidence to allow an exception to the policy's exclusions. Nevertheless, plaintiff advised that it would afford AIO a courtesy defense unless AIO provided it with a written objection. AIO did not issue a written objection. Plaintiff also notified AIO that it reserved its right to recover any defense costs if it was determined that there was no insurance coverage for AIO under the policy.

By amended decision and order dated December 23, 2013, this Court granted plaintiff a default judgment against AIO, but denied its application declaring that it did not

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owe any party a defense or coverage based upon an exclusion in the policy which excludes coverage for independent contractors. The Court found that plaintiff may have to provide a defense and coverage if Jadron is determined to be an employee of a subcontractor rather than an independent contractor. The Court expressly found that there was an issue of fact regarding Jadron's status as either an employee of a subcontractor or an independent contractor.

MCC now moves for summary judgment declaring that plaintiff owes it and AIO coverage in the underlying action. MCC argues that the deposition testimony in this action and the underlying action establishes that Jadron was a subcontractor not an independent contractor. Therefore, plaintiff must provide coverage. MCC also argues that the policy issued by plaintiff is illusory and that any ambiguity must be resolved in favor of the insured. MCC further argues that plaintiff's disclaimer was untimely.

Plaintiff opposes the motion arguing that Jadron's employer Vasyl Berezhanskyy ("VB") was an independent contractor not a subcontractor. Further, plaintiff argues that MCC never asserted a counterclaim challenging the propriety of the disclaimer. Plaintiff also argues that the tender letter never sought coverage for defendant 10 Boulevard, LLC; therefore, MCC cannot seek coverage for it now.

In reply, MCC argues that plaintiff commenced this action seeking a determination that it does not owe a defense or coverage for all defendants therefore, defendants did not have to raise coverage as a counterclaim in its answer. MCC also argued that a 21-day delay in issuing a denial letter is untimely. Finally, MCC argues that summary judgment in its favor must be granted because Jadron was an employee of a subcontractor not an independent contractor.

Defendant Zdeno Jadron moves for summary judgment dismissing the complaint against him and for an order directing plaintiff to provide coverage to MCC and AIO. Jadron argues that the policy is ambiguous and that it must be construed against the insurer. Further, he argues that he was an employee of VB and that VB was a subcontractor of AIO. Jadron relies on the deposition testimony of Edmond Warchick the sole employee of AIO. Jadron notes that Warchick testified that he went to the work site to monitor VB's progress. Further, Warhcick instructed VB regarding how to install the roof in question. He also ordered the materials to be used by VB.

Jadron also relies on the deposition testimony of VB. At his deposition, VB testified that he answered AIO's Craig's List ad for a roofing subcontractor and was hired by Warchick. It was VB's understanding that he was a subcontractor and that his work was monitored by Warchick. According to VB, Warchick instructed him to rip off the old roof, install roof insulation and install a rubber roof. Warchick directed VB where to start installing the roof insulation and how to perform parts of the roofing work. VB testified that if he wanted to change how the roof was installed he would have to ask Warchick first and get Warchick's approval.

Jadron also relies on the deposition testimony of Douglas Lorenz, MCC's foreman. At his deposition, Lorenz testified that he was led to believe that VB was an employee of AIO.

Jadron also relies on a November 26, 2013, decision and order of the Supreme Court, Suffolk County (Mart, J.) who held that AIO had the authority to control the roofing work of VB.

In opposition, plaintiff argues that the policy is not ambiguous. Plaintiff argues that in the December 23, 2013 decision the Court did not determine that the policy was ambiguous, but rather that coverage was dependent on whether Jadron was an employee of an independent contractor or a subcontractor. Plaintiff argues that VB was an independent contractor and, therefore, the policy excludes coverage for plaintiff. Plaintiff argues that AIO had no control of VB's work. Plaintiff claims Warchick did not tell VB how many people to hire and did not give him instructions regarding the method of his work. Plaintiff argues that while the contract between AIO and VB is entitled a Subcontract, use of the word subcontract is not dispositive on the issue.

Plaintiff also argues that the decision in the underlying action of the Supreme Court, Suffolk County is not dispositive in this case, since it was not a party to that action.

Discussion

"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 demonstrate the absence of any material issues of fact." (*Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 501 N.E.2d 572, 508 N.Y.S.2d 923 [1986]). "Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action." (*Id.* at 324, *citing Zuckerman v. City of New York*, 49 N.Y.2d 557, 404 N.E.2d 718, 427 N.Y.S.2d 595 [1980]).

Is Jadron an Employee of an Independent Contractor or a Subcontractor?

In the December 23, 2013 Amended Decision and Order, this Court expressly found that there was an issue of fact regarding whether Jadron was an independent contractor

or an employee of a subcontractor. That finding is law of the case and will not be reviewed in the context of these motions (*see Fudge v. North Shore Long Island Jewish Health Services Plainview Fudge v. North Shore Long Island Jewish Health Services Plainview and Manhasset Hospitals*, 177 A.D.3d 783, 986 N.Y.S.2d 490[2nd Dept2014].

Nevertheless, even if the issue was not law of the case, the Court concludes that based upon the conflicting deposition testimony Jadron's employment status is a question of fact *(see Lopez v. Beltre*, 59 A.D.3d 683, 873 N.Y.S.2d 726 [2nd Dept 2009]).

Accordingly, to the extent MCC and Jadron seek a determination that MCC and AIO are afforded coverage under the policy in question based upon Jadron's status as an employee of a subcontractor, the motions are DENIED.

Is the Policy Illusory?

In its December 23, 2013 decision, the Court did not find that the policy isued by plaintiff was illusory. The policy is not illusory (*see 720-730 Fort Washington Ave. Owners Corp. v Utica First Ins. Co.*, 26 Misc.3d 503, 893 N.Y.S.2d 426 [NY Sup 2009]).

Accordingly to the extent MCC and Jadron argue that MCC and AIO are entitled to coverage because the policy in question is illusory, those applications are DENIED.

Was Plaintiff's Disclaimer Timely

There is no definite time limit within which an insurer must disclaim coverage for its disclaimer to be deemed timely (*see* Insurance Law § 3420; *First Fin. Ins. Co. v. Jetco Contr. Corp.*, 1 N.Y.3d 64, 70, 769 N.Y.S.2d 459, 801 N.E.2d 835). The Insurance Law provides only that an insurer must give notice of disclaimer "as soon as is reasonably possible" (Insurance Law § 3420[d][2]). An insurer's delay is measured from the point at which it "has sufficient knowledge of facts entitling it to disclaim, or knows that it will

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disclaim coverage" (*First Fin. Ins. Co. v. Jetco Contr. Corp.*, 1 N.Y.3d at 66, 769 N.Y.S.2d 459, 801 N.E.2d 835; *see Tully Constr. Co., Inc. v. TIG Ins. Co.*, 43 A.D.3d 1150, 1152, 842 N.Y.S.2d 528; *Moore v. Ewing*, 9 A.D.3d 484, 488, 781 N.Y.S.2d 51). It is the insurer's burden to demonstrate a reasonable excuse for its delay in disclaiming coverage and an insufficient explanation will render a delay unreasonable as a matter of law (*see First Fin. Ins. Co. v. Jetco Contr. Corp.*, 1 N.Y.3d at 70, 769 N.Y.S.2d 459, 801 N.E.2d 835; *Magistro v. Buttered Bagel, Inc.*, 79 A.D.3d 822, 824, 914 N.Y.S.2d 192; *Sirius Am. Ins. Co. v. Vigo Constr. Corp.*, 48 A.D.3d 450, 452, 852 N.Y.S.2d 176), even when the insured failed in the first instance to give timely notice of a claim (*see First Fin. Ins. Co. v. Jetco Contr. Corp.*, 1 N.Y.3d at 67, 769 N.Y.S.2d 459, 801 N.E.2d 835; *Magistro v. Buttered Bagel, Inc.*, 79 A.D.3d at 824, 914 N.Y.S.2d 192).

In *Quincy Mut. Fire Ins. Co. v. Enoe*, (107 A.D.3d 775, 967 N.Y.S.2d 130 [2nd Dept 2013]), the Appellate Division, Second Department held that a 21-day delay in sending a notice of disclaimer did not render the disclaimer untimely and invalid as a matter of law. Although, MCC claims that plaintiff was in possession of all the information necessary to issue a disclaimer letter sooner than 21 days because it had previously disclaimed coverage to AIO on the same grounds using a similar disclaimer letter, MCC did not provide the Court with legal authority supporting its claims a 21-day delay in issuing a disclaimer was untimely.

Accordingly, to the extent MCC seeks summary judgment declaring plaintiff's disclaimer letter to be untimely the motion is DENIED.

Coverage fo 10 Boulevard, LLC

To the extent plaintiff claims that it does not have to provide a defense to 10 Boulevard, LLC the Court notes that there is no motion before the Court seeking that relief (*see* CPLR 2215). Nevertheless, the Court finds that 10 Boulevard, LLC is united in interest with 10 Leonard Street, LLC as owners of the premises. Therefore, the tender letter is deemed to have been made on behalf of 10 Boulevard, LLC despite the fact that it was not named in the tender letter (*see 23-08-18 Jackson Realty Assoc. v Nationwide Mut. Ins. Co.*, 53 A.D.3d 541, 863 N.Y.S.2d 35 [2nd Dept 2008][Where two or more insureds are defendants in the same action, notice of the occurrence or of the lawsuit provided by one insured will be deemed notice on behalf of both insureds only where the two parties are united in interest or where there is no adversity between them.]).

Summary

MCC's motion for summary judgment seeking a declaration that plaintiff is required to provide coverage in the underlying action is DENIED.

Jadron's motion for summary judgment dismissing the complaint against him and for an order directing plaintiff to provide coverage to AIO is DENIED.

The parties are directed to appear in the Settlement Conference Part on October 28, 2014 at 9:15 a.m. room 1600 for further proceedings.

Dated: White Plains, New York
October 8, 2014

WILLIAM J. GIACOMO, J.S.C.

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