

50 Hamilton Partners LLC v Hudson Excess Ins. Co.
2022 NY Slip Op 30407(U)
February 1, 2022
Supreme Court, New York County
Docket Number: Index No. 654057/2018
Judge: Debra A. James
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. DEBRA JAMES

PART 59

Justice

-----X

50 HAMILTON PARTNERS LLC, and SCOTTSDALE
INSURANCE COMPANY,

Plaintiffs,

- v -

HUDSON EXCESS INSURANCE COMPANY and P & R
REMODELING CORP.,

Defendants.

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INDEX NO. 654057/2018

MOTION DATE 06/25/2020

MOTION SEQ. NO. 002

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94

were read on this motion to/for SUMMARY JUDGMENT (AFTER JOINDER).

ORDER

Upon the foregoing documents, except the (Sur) Reply in Further Support of the Motion (NYSCEF Document Number 91), it is ORDERED that the motion of plaintiffs 50 Hamilton Partners, LLC, and Scottsdale Insurance Company for summary judgment on their first, second and third causes of action seeking a declaration that the disclaimer of coverage the defendant Hudson Excess Insurance Company issued on January 3, 2018 is untimely and inapplicable and that defendant Hudson Excess Insurance Company has a duty to defend and indemnify plaintiff 50 Hamilton Partners LLC, the defendant in the action of Quintuna v 50 Hamilton Partners, LLC, Index No. 702184/2017, New York State Supreme Court,

Queens County, as additional insured under general liability policy number HXMP100657, is DENIED; and it is further

ORDERED that the cross motion of defendants for summary judgment seeking the opposite declaration is GRANTED; and it is further

ADJUDGED and DECLARED that the disclaimer of coverage that the defendant Hudson Excess Insurance Company issued on January 3, 2018 is timely and applicable; and it is further

ADJUDGED and DECLARED that defendant Hudson Excess Insurance Company has no obligation to provide defense and indemnification to the plaintiff 50 Hamilton Partners, LLC, in Quintuna v 50 Hamilton Partners, LLC, Index No. 702184/2017, New York State Supreme Court, Queens County (such action); and it is further

ORDERED that motion of plaintiffs for summary judgment in their favor on their seventh count (cause of action) seeking reimbursement of defense costs incurred in such action from defendant Hudson Excess Insurance Company is DENIED, and the cross motion of defendant Hudson Excess Insurance Company to dismiss such cause of action is GRANTED; and it is further

ORDERED that the seventh cause of action is DISMISSED; and it is further

ORDERED that the Clerk shall enter judgment accordingly, without costs and disbursements.

DECISION

Defendants' (Sur) Reply submitted in Further Support of Cross Motion is not authorized under CPLR 2214 (b), and the court, therefore, disregards evidence submitted for the first time in defendants' surreply papers. See Meka v Pufpaff, 167 AD3d 1547, 1548 (4th Dept 2018).

As stated in Those Certain Underwriters at Lloyds, London v Gray, 49 AD3d 1, 4-5 (1st Dept 2007),

"For [defendant insurer] to prevail on the facts presented it must establish as a matter of law that 1) it was not 'readily apparent' from the content of the verified complaint that grounds for the disclaimer in fact existed; and 2) the investigation, which took a total of [210 days] to complete. . . was promptly and diligently conducted."

Plaintiffs cite GPH Partners, LLC v American Home Assurance Company, 87 AD3d 843, 844 [1st Dept 2011]), which states, in pertinent part,

"Even where the basis for disclaimer is not readily apparent, the insurer has a duty to promptly and diligently investigate the claim (see Those Certain Underwriters at Lloyds, London v Gray, 49 AD3d 1, 3 [2007]; City of New York v Welsbach Elec. Corp., 49 AD3d 322, 323 [2008])"

Plaintiffs argue that defendant insurer's disclaimer of coverage is untimely, urging that such defendant's investigation was neither prompt nor diligent. However, GPH Partners, LLC is distinguishable on its facts from those of the case at bar. While in GPH Partners, LLC, the appellate court observed "at a minimum, [the insurer] should have started an investigation at

that time", defendant insurer herein promptly started an investigation during the same month (April 2017) in which it received notice of the claim for coverage from the plaintiffs herein.

Moreover, unlike defendant insurer in ADD Plumbing, Inc. v Burlington Insurance Company, 192 AD3d 496 (1st Dept 2021), defendant insurer at bar was not sufficiently aware of the facts to support a disclaimer until defendant P&R Remodeling Corp. provided such insurer with a copy of the subcontract between P&R Remodeling Corp. and non-party FJP Services Corporation ("FJP"), Quintuna's employer, and the certificate of insurance issued to FJP, which took place on November 29, 2017. In fact, until defendant insurer received the disclaimer of coverage by Utica First Insurance Company, FJP's insurer, on December 15, 2017, it was not aware of the facts of the ""Exclusion of Injury to Employees, Contractors, and Employees of Contractors" endorsement ("Exclusion of Injury") of the policy issued by Utica First Insurance Company.

In addition, the delay in defendant insurer's receipt of the documents arose not from a lack of diligence on its part, but due to the failure over many months of P&R Remodeling Corp. to respond to defendant insurer's repeated requests for such documents. It is of no moment, as plaintiffs contend, that defendant insurer made many of the requests to FJP, in the

English language, which neither FJP's owner nor manager spoke, as FJP was nevertheless bound by the terms of the subcontract and Utica First's policy of insurance that covered such subcontract, notwithstanding that such agreements were written in the English language. See Kassab v Marco Shoes Inc., 282 AD2d 316 (1st Dept 2001).

Finally, defendant insured's delay was justifiable, as several months were attributable to defendant P&R Remodeling Inc., the insured, having not provided a change of address to the Secretary of State.

Based on the foregoing, defendant insurer has prima facie established that much of the delay is attributable to the failure of defendant insured P&R Remodeling, which was plaintiff insured owner's general contractor, to be forthcoming with the documents continuously sought by defendant insurer. Plaintiffs raise no issue of fact, as they do not deny their obligation to provide defendant insurer Hudson with copies of any subcontract and insurance policy related to Quintuna's, the subcontractor's employee's claim. See Structure Tone, Inc. v Burgess Steel Products Corp., 249 AD2d 144, 145 (1st Dept 1988).

Therefore, contrary to plaintiffs' contentions, defendant's disclaimer was timely, as its investigation was prompt and diligent, and defendant served written notice on plaintiff of its intent to disclaim coverage under its policy "as soon as

reasonably possible" pursuant to Insurance Law § 3420[d], as a matter of fact and law.

Finally, the Limited Exclusion Endorsement (Form HXMG1190114) of the policy issued by defendant insurer is clear and unambiguous, and such Limited Exclusion triggered by the "Exclusion of Injury" endorsement of the policy issued by Utica First Insurance Company should be enforced as written. See Bretton v Mutual of Omaha Ins. Co., 110 AD2d 46, 49 (1st Dept 1985), aff'd, 66 NY2d 1020 (1985). See also Tudor Insurance Company v Sundaresen, 143 AD3d 642 (1st Dept 2016).

Thus, defendant insurer's disclaimer of coverage arising from the "Exclusion of Injury" endorsement on the policy issued by Utica First Insurance Company, which disclaimer defendant issued on January 8, 2018, was timely, given defendant insurer's reasonably prompt and diligent investigation.

Debra A. James

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<u>2/1/2022</u>			<u>DEBRA JAMES, J.S.C.</u>	
DATE				
CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	NON-FINAL DISPOSITION
	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	DENIED
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	GRANTED IN PART
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	SUBMIT ORDER
			<input type="checkbox"/>	FIDUCIARY APPOINTMENT
			<input type="checkbox"/>	REFERENCE
			<input type="checkbox"/>	OTHER