

Joy Constr. Corp. v Acceptance Indem. Ins. Co.

2022 NY Slip Op 31070(U)

March 22, 2022

Supreme Court, New York County

Docket Number: Index No. 650447/2020

Judge: Nancy M. Bannon

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. NANCY BANNON PART 42

Justice

-----X

JOY CONSTRUCTION CORPORATION and
HFZ 11 BEACH STREET LLC

Plaintiffs,

- v -

ACCEPTANCE INDEMNITY INSURANCE COMPANY,

Defendant.

-----X

INDEX NO. 650447/2020

MOTION DATE 09/09/2021,
09/09/2021

MOTION SEQ. NO. 001 002

**DECISION, ORDER and
JUDGMENT ON MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 60, 61, 64, 66

were read on this motion to/for SUMMARY JUDGMENT.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 62, 63, 65, 67

were read on this motion to/for SUMMARY JUDGMENT.

The plaintiffs, Joy Construction Corporation (Joy), the general contractor at a residential renovation project at 11 Beach Street in Manhattan, and HFZ 11 Beach Street LLC (HFZ), the property owner, seek a judgment declaring that the defendant, Acceptance Indemnity Insurance Company (Acceptance), has a duty to defend and indemnify in an underlying personal injury action entitled *Yuldashev v HFZ 11 Beach Street LLC and Joy Construction Corporation*, (Supreme Court, Kings County, Index No. 519673/2018), brought by a glass installer who was injured on the site. The injured worker was employed by non-party Prime NY City Group, who was issued a primary general liability policy by Acceptance. The plaintiffs, who maintain that they qualify as additional insureds under that policy, now move for summary judgment against defendant Acceptance (MOT SEQ 001) and the defendant moves for summary judgment

declaring it had no such duty and for dismissal of the complaint (MOT SEQ 002). The relevant facts are largely undisputed. At issue on these motions is the timeliness and validity of the defendant's disclaimer under Insurance Law §3420(d).

It is well settled that the movant on a summary judgment motion "must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case." Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 (1985). The motion must be supported by evidence in admissible form (see Zuckerman v City of New York, 49 NY2d 557 [1980]), as well as the pleadings and other proof such as affidavits, depositions, and written admissions. See CPLR 3212. Once the movant meets his burden, it is incumbent upon the non-moving party to establish the existence of material issues of fact. See Vega v Restani Constr. Corp., *supra*.

Applying these standards, the plaintiffs have met their burden on their motion and the defendant failed to raise any triable issue of fact in opposition, for reasons stated in the plaintiff's papers (MOT SEQ 001). For the same reasons, the court finds that the defendant failed to meet its burden in the first instance on its own motion (MOT SEQ 002).

On the date of the subject accident, September 10, 2018, the plaintiffs were named insured under a commercial general liability policy issued by non-party RLI Insurance Company, which is currently defending the plaintiffs in the underlying action. On October 4, 2018, RLI issued a tender letter to Acceptance on behalf of the plaintiff demanding defense and indemnification in the underlying action as they were additional insureds under the Acceptance policy. The letter was received by Acceptance on October 26, 2018. On October 26, 2018, a representative of Acceptance requested additional information regarding the claim including the date of loss and the insured's phone number and address. RLI provided the requested

information on October 29, 2018. On November 19, 2018, 42 days after receiving the notice, Acceptance issued a disclaimer of coverage for the plaintiffs. Acceptance disclaimed coverage for Joy and HFZ based on an “Employer’s Liability Exclusion” and an “Injury to Employees, Workers or Contracted Persons of Insureds or Contracted Organizations Exclusion.” Notably, the letter does not deny that the plaintiffs qualify as additional insured under the Acceptance policy but nonetheless disclaims coverage under two exclusions.

Insurance Law § 3420(d)(2) provides that “an insurer shall disclaim liability or deny coverage” by “written notice as soon as is reasonably possible.” See Vista Engineering Corp. v Everest Indemnity Ins. Co., 161 AD3d 596 (1st Dept. 2018). “[I]nsurers have a duty to ‘expedite’ the disclaimer process.” City of New York v Greenwich Ins. Co., 95 AD3d 732, 733 (1st Dept. 2012) quoting First Fin. Ins. Co. v Jetco Contr. Corp., 1 NY3d 64, 69 (2003). Acceptance asserts that their delay was due to the fact that the plaintiffs sent the initial notice to one of its corporate locations in Raleigh, North Carolina, which was an office of, and an address provided by, Acceptance but was not the designated claims center for Acceptance. The Raleigh office sent the plaintiff’s notice, apparently by regular mail, to the claims center in Omaha, Nebraska which was received there on October 26, 2018. As previously stated, the disclaimer letter that followed is dated November 19, 2018. The plaintiffs correctly assert that this 42-day delay was largely attributable to Acceptance and renders the disclaimer untimely as a matter of law. See Brother Jimmy’s BBQ, Inc. v American Int’l. Group, Inc., 96 AD3d 429 (1st Dept. 2012) [38-day delay untimely under Insurance Law § 3420 where ground alleged for disclaimer was clear from the face of the notice of claim]; Pav-Lak Indus., Inc. v Arch Ins. Co., 56 AD3d 287 (1st Dept. 2008) [45-day delay was unreasonable where there was no need for any investigation, the basis for the disclaimer was readily apparent from the tender letter]; West 16th St. Tenants Corp. v Public

Serv. Mut. Ins. Co., 290 AD2d 278 (1st Dept. 2002) [30-day delay unreasonable where there was no need for any investigation before determining to disclaim].

Furthermore, the disclaimer letter merely quotes the language of the policy provisions without any further explanation and thus lacks the requisite specificity. It is well settled that “the notice of disclaimer must promptly apprise the claimant with a high degree of specificity of the ground or grounds on which the disclaimer is predicated.” General Accident Ins. Group v Cirucci, 46 NY2d 862, 864 (1979); see Matter of Global Liberty Ins. Co. of New York v Avangard Supply, Inc., 18 AD3d 568 (1st Dept. 2020); Matter of Aetna Casualty and Surety Co., v Rodriguez, 115 AD2d 418 (1st Dept. 1985).

On March 3, 2020, more than one year after the first disclaimer letter and nineteen months after being placed on notice of the claim, Acceptance issued a second disclaimer under a different policy provision - the “Limitation of Coverage to Designated Premises or Project” endorsement. In that disclaimer Acceptance took the position that any coverage available under the policy would apply to the Brooklyn location of the injured worker’s employer, Prime, only and not to the Manhattan location of the renovation project where the glass was being installed and that the injured worker was performing a category of work that was excluded. In the second disclaimer, Acceptance acknowledged that it was belated but proffered that this delay was due to an “inadvertent omission” in the November 19, 2018, disclaimer letter. Acceptance also asserted, and now argues, that the requirements of Insurance Law § 3420(d)(2) do not apply to the “Limitation of Coverage to Designated Premises or Project” endorsement. Regardless of the basis asserted therein, the March 3, 2020, disclaimer was clearly untimely. Indeed, the fact that Acceptance was attempting in 2020 to provide or explain the grounds for the disclaimer only supports the conclusion that the initial disclaimer was insufficiently specific as well as untimely.

The First Department expressly cautioned that it has “disapproved” of the policy to “disclaim now and investigate later.” Admiral Ins. Co. v State Farm Fire, 86 AD3d 486, 490 (1st Dept. 2011) quoting Ace Packing Co., Inc. v Campbell Solberg Assoc., Inc. 41 AD3d 12, 15-16 (1st Dept. 2007).

The court has considered and rejected the defendant’s arguments to the contrary.

Accordingly, upon the foregoing papers and after oral argument, it is

ORDERED that the plaintiffs’ motion for summary judgment (MOT SEQ 001) is granted, and it is further

ORDERED that the defendant’s motion for summary judgment (MOT SEQ 002) is denied, and it is further

ADJUDGED and DECLARED that the defendant, Acceptance Indemnity Insurance Company, is required to defend and indemnify the plaintiffs in the underlying action, *Yuldashev v HFZ 11 Beach Street LLC, LLC and Joy Construction Corporation*, pending in the Supreme Court, Kings County, under Index No. 519673/2018; and it is further,

ORDERED that the Clerk shall enter judgment accordingly.

This constitutes the Decision and Order of the court.


NANCY M. BANNON, J.S.C.
HON. NANCY M. BANNON

3/22/2022
DATE

CHECK ONE:	<input checked="" type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> DENIED	<input type="checkbox"/> NON-FINAL DISPOSITION	<input type="checkbox"/> OTHER
	<input checked="" type="checkbox"/> GRANTED		<input type="checkbox"/> GRANTED IN PART	
APPLICATION:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE