

83rd St. Tenants, Inc. v Rockingham Ins. Co.

2023 NY Slip Op 31274(U)

April 10, 2023

Supreme Court, New York County

Docket Number: Index No. 656660/2022

Judge: Arlene P. Bluth

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

PRESENT: HON. ARLENE P. BLUTH PART 14

Justice

-----X

83RD STREET TENANTS, INC.

Plaintiff,

- v -

ROCKINGHAM INSURANCE COMPANY,

Defendant.

-----X

INDEX NO. 656660/2022

MOTION DATE 04/03/2023

MOTION SEQ. NO. 001 002

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 40, 41, 42

were read on this motion to/for SUMMARY JUDGMENT.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 43, 44, 45

were read on this motion to/for JUDGMENT - SUMMARY.

Motion Sequence Numbers 001 and 002 are consolidated for disposition. Plaintiff’s motion for summary judgment (MS001) is granted and defendant’s motion for summary judgment dismissing the complaint (MS002) is denied.

Background

This declaratory judgment action arises out of an underlying action filed in Supreme Court, Queens County. In that case, Wilson Saquicela Villa brought a Labor Law action against plaintiff and a contractor (William K. Construction Group, Inc.) for injuries he allegedly suffered while working for SRCC Corp. (a subcontractor at the job site). Plaintiff alleges that in connection with the work, SRCC agreed to procure liability insurance and name plaintiff (the owner of the property) as an additional insured on a primary and non-contributory basis.

Plaintiff maintains that defendant issued a policy to SRCC that contained an additional insured endorsement naming plaintiff as an additional insured. It argues that it tendered coverage to defendant on June 2, 2020 and that defendant did not timely respond to disclaim coverage. Plaintiff now seeks a declaration that defendant must defend it in the Queens action and moves for summary judgment on its claims in motion sequence 001.

In opposition and in support of its motion for summary judgment, defendant claims it sent a timely notice disclaiming coverage. It argues that it sent the disclaimer within 20 days, after it conducted an investigation, and so it should be awarded summary judgment. Defendant argues that an endorsement to the subject policy provides that there is no coverage for ‘bodily injury’ to an employee or contractor or subcontractor performing work at the site where SRCC is doing work. It insists that the policy does not offer coverage to Villa, an employee of SRCC. Defendant also points to an exclusion for work performed at a building in excess of three stories and that Villa was working on scaffolding above that height when he was injured.

In reply, plaintiff contends that defendant’s motion is wholly without merit. It argues that the disclaimer of coverage was only sent to Greater New York Mutual and not to the insured—plaintiff in violation of Insurance Law § 3420. Plaintiff observes that defendant does not contest that plaintiff was named as an additional insured on defendant’s policy. It also argues that the additional insured endorsements contain two requirements in order to trigger defense coverage: 1) that SRCC have agreed in a written contract to add plaintiff as an insured and 2) that there be a possibility that Mr. Villa’s injuries were cause in whole or in part by SRCC. Plaintiff contends that there is no dispute that plaintiff was added an insured and that Mr. Villa was hurt while working for SRCC. Plaintiff also argues that the disclaimer was not timely and, in fact, defendant never sent a disclaimer until the instant litigation was filed. It emphasizes that caselaw and the

statute requires that the disclaimer must be sent to the insured itself and not solely to another carrier.

Discussion

To be entitled to the remedy of summary judgment, the moving party “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 from the case” (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). The failure to make such a prima facie showing requires denial of the motion, regardless of the sufficiency of any opposing papers (*id.*). When deciding a summary judgment motion, the court views the alleged facts in the light most favorable to the non-moving party (*Sosa v 46th St. Dev. LLC*, 101 AD3d 490, 492 [1st Dept 2012]).

Once a movant meets its initial burden, the burden shifts to the opponent, who must then produce sufficient evidence to establish the existence of a triable issue of fact (*Zuckerman v City of New York*, 49 NY2d 557, 560, 427 NYS2d 595 [1980]). The court’s task in deciding a summary judgment motion is to determine whether there are bonafide issues of fact and not to delve into or resolve issues of credibility (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 505, 942 NYS2d 13 [2012]). If the court is unsure whether a triable issue of fact exists, or can reasonably conclude that fact is arguable, the motion must be denied (*Tronlone v Lac d’Amiante Du Quebec, Ltee*, 297 AD2d 528, 528-29, 747 NYS2d 79 [1st Dept 2002], *affd* 99 NY2d 647, 760 NYS2d 96 [2003]).

“In determining a dispute over insurance coverage, we first look to the language of the policy. We construe the policy in a way that affords a fair meaning to all of the language employed by the parties in the contract and leaves no provision without force and effect”

(*Consol. Edison Co. of New York, Inc. v Allstate Ins. Co.*, 98 NY2d 208, 221-22, 746 NYS2d 622 [2002] [internal quotations and citations omitted]).

Insurance Law § 3420(d)(2) provides that “If under a liability policy issued or delivered in this state, an insurer shall disclaim liability or deny coverage for death or bodily injury arising out of a motor vehicle accident or any other type of accident occurring within this state, it shall give written notice as soon as is reasonably possible of such disclaimer of liability or denial of coverage to the insured and the injured person or any other claimant.”

As an initial matter, the Court grants plaintiff’s motion because there is no dispute that defendant did not give notice to the insured—plaintiff—as required under Insurance Law § 3420(d)(2) (*Sierra v 4401 Sunset Park, LLC*, 24 NY3d 514, 518, 2 NYS3d 8 [2014]). In *Sierra*, the Court of Appeals found that notice provided by an insurance company to another carrier instead of to the additional insureds did not constitute proper notice under the Insurance Law (*id.* at 518).

Similarly, here, defendant only provided notice disclaiming coverage to Greater New York Mutual Insurance Company (“GNY”) and not to plaintiff, the insured. Defendant’s memorandum of law in opposition,¹ despite quoting the specific Insurance Law provision, does not sufficiently address the fact that it never gave notice to plaintiff. The Court recognizes that the demand for coverage came from GNY and that is the party to whom defendant responded. But the Court of Appeals, in *Sierra*, made clear that the insured must be notified. Moreover, the demand for coverage specifically mentioned that coverage was sought on behalf of plaintiff (NYSCEF Doc. No. 34) and defendant’s purported disclaimer also mentions plaintiff (NYSCEF Doc. No. 35). Yet, plaintiff claims that it never received actual notice about defendant’s

¹ As plaintiff points out, this memo of law (NYSCEF Doc. No. 17) far exceeds the word limits. However, the Court will overlook that error.

purported disclaimer until commencing this action. Obviously, disclaiming coverage about two years after it was requested (this case was commenced nearly two years after GNY sought coverage on plaintiff’s behalf) is not a timely denial under any interpretation of the Insurance Law.

In other words, defendant knew it was asked about providing coverage for plaintiff and it never provided the proper notice disclaiming coverage under the Insurance Law. Therefore, the Court grants plaintiff’s motion and denies defendant’s motion. Because this initial issue is dispositive, the Court need not address the remaining arguments about whether various exclusions apply with respect to the duty to defend.


Accordingly, it is hereby

ORDERED that plaintiff’s motion (MS001) for summary judgment is granted and defendant’s motion (MS002) for summary judgment is denied; and it is further

DECLARED that defendant owed a duty to defend plaintiff since June 2, 2020 in connection with the underlying action in Supreme Court, Queens County under Index Number 703381/2020 and that defendant must continue to defend plaintiff in that action until it is completed or resolved; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly along with costs and disbursements upon presentation of proper papers therefor.

4/10/2023
DATE



ARLENE P. BLUTH, J.S.C.

CHECK ONE:

CASE DISPOSED
GRANTED DENIED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION
GRANTED IN PART
SUBMIT ORDER
FIDUCIARY APPOINTMENT

OTHER

REFERENCE