

Catlin Ins. Co., Inc. v United Specialty Ins. Co.

2023 NY Slip Op 32177(U)

June 28, 2023

Supreme Court, New York County

Docket Number: Index No. 650064/2023

Judge: Arlene P. Bluth

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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. ARLENE P. BLUTH PART 14

Justice

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CATLIN INSURANCE COMPANY, INC., ST. GEORGE
OUTLET DEVELOPMENT LLC, BFC PARTNERS, L.P.,
EMPIRE OUTLET BUILDERS LLC

Plaintiff,

- v -

UNITED SPECIALTY INSURANCE COMPANY, MITSUI
SUMITOMO INSURANCE COMPANY OF AMERICA, US
SPRAY NYC, INC.,

Defendant.

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INDEX NO. 650064/2023
MOTION DATE 06/07/2023
MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 11, 12, 13, 14, 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, 41, 42, 43, 44, 45, 46, 47

were read on this motion to/for DISMISSAL.

Defendants United Specialty Insurance Company and Mitsui Sumitomo Insurance Company (“Movants”)’s motion to dismiss is denied.

Background

This action arises out of an underlying personal injury action in Kings County (the “Kings County Action”) in which an injured worker (Corrol Maddox) insists that he was injured while working a job site on Staten Island. He brought an initial case in 2018 against only plaintiffs St. George Outlet Development, LLC (“St. George”) and BFC Partners L.P. Maddox later brought a case in 2021 against additional parties, including plaintiff Empire Outlet Builders, LLC and defendant US Spray NYC, Inc. The two cases were eventually consolidated in an order dated September 10, 2021 (NYSCEF Doc. No. 4).

The plaintiffs here contend that St. George, as the owner of the premises, hired Empire (as the contractor) to do work at the site. They allege that Empire then contracted with defendant US Spray NYC, Inc. (“US Spray”) to supply and install all closed cell spray and insulation. The contract required that plaintiffs St. George, BFC, and Empire be named as additional insureds on the insurance policy US Spray was required to procure.

Plaintiffs insist that they tendered to US Spray’s insurance providers. Defendant United Specialty Insurance Company (“USIC”) issued a commercial general liability policy to US Spray while defendant Mitsui Sumitomo Insurance Company (“Mitsui”) issued an excess policy to US Spray. Plaintiffs insist that they are entitled to a declaratory judgment that they are additional insureds under these policies and are entitled to defense and indemnity in the Kings County Action.

Movants seek dismissal of this case on the ground that plaintiffs failed to timely seek coverage under these policies. They observe that each policy has a timely notice provision which requires that notice seeking coverage be submitted as soon as practicable. Plaintiffs point to the affidavit of Michelle Owens (a senior claims specialist for a third-party administrator for Movants) who claims that she spoke with a principal for US Spray and he claimed that the US Spray never received notice of the Kings County Action because the company’s address with the Secretary of State was incorrect (NYSCEF Doc. No. 13 at 3-4). Ms. Owens maintains that is why US Spray defaulted in the Kings County case; moreover, US Spray is no longer in business (*id.* at 4). They claim that because US Spray did not provide notice to them, it need not provide any coverage to it.

With respect to plaintiffs, Movants argue that plaintiffs (as additional insureds) had an independent duty to provide them with timely notice and a demand for coverage. Movants stress

that plaintiffs knew, at the latest, that US Spray (and therefore Movants) were implicated in the Kings County action on November 12, 2020. That is when Maddox testified that he slipped and fell as a result of wet fireproofing spray on the floor. Movants maintain that Maddox later commenced an action against US Spray on April 14, 2021 and under either date, plaintiffs request for coverage in March 2022 was untimely.

Movants maintain that the Insurance Law provides that there is an irrebuttable presumption of prejudice where there has been a determination on the insured's liability (here, Maddox obtained a default judgment as against US Spray a few days before plaintiffs sought coverage from Movants). They argue that their disclaimer of coverage was timely as it was issued only a few weeks after receiving notice of the demand for coverage.

In opposition, plaintiffs argue that they must be treated as if they had separate policies with Movants. They argue that Movants did not meet their burden, on a motion to dismiss, to show that they suffered prejudice. Plaintiffs argue that the default judgment against US Spray has no bearing on the coverage they are seeking. They point out that they timely answered and there has not yet been a determination on the merits against them in the underlying action.

In reply, Movants assert that the facts are not in dispute and that their first notice about the subject claim for coverage was on March 8, 2022, almost four years after Maddox's injury. They insist that they clearly demonstrated late notice and that the irrebuttable presumption of prejudice requires the Court to issue declaratory relief in their favor.

Discussion

“Where an insurance policy requires that notice of an occurrence be given ‘as soon as practicable,’ notice must be given within a reasonable time in view of all of the circumstances.

The absence of timely notice of an occurrence is a failure to comply with a condition precedent which, as a matter of law, vitiates the contract” (*AH Prop., LLC v New Hampshire Ins. Co.*, 95 AD3d 1243, 1244, 945 NYS2d 391 [2d Dept 2012]). Insurance Law § 3420(a)(5) provides, in part that “A provision that failure to give any notice required to be given by such policy within the time prescribed therein shall not invalidate any claim made by the insured, injured person or any other claimant, unless the failure to provide timely notice has prejudiced the insurer.”

Here, the Court observes that there is no dispute that the subject policies issued by Movants contained a requirement that they be notified as soon as practicable (see NYSCEF Doc. No. 16 at 9; NYSCEF Doc. No. 17 at 9). The complaint mentions nothing about the timeliness of plaintiffs’ notice. Plaintiffs merely offer the conclusory assertion that they “satisfied all conditions precedent to obtaining coverage under the USIC and Mitsui Policies” (NYSCEF Doc. No. 1, ¶ 33).

However, the Court denies the motion because Movants did not meet their burden to show prejudice on a motion to dismiss. Movants focus on a separate provision of the Insurance Law that imposes an irrebuttable presumption of prejudice if “the insured’s liability has been determined by a court of competent jurisdiction” (Insurance Law § 3420[c][2]B). That is, there is an irrebuttable presumption of prejudice if coverage is sought after there has been a finding of liability against the insured. But there has not yet been a finding of liability as against plaintiffs. The default judgment Movants cite was against defendant US Spray.

“Each individual additional insured must be treated as if it had a separate policy of its own with the insurer” (*233 E. 17th St., LLC v L.G.B. Dev., Inc.*, 78 AD3d 930, 931, 913 NYS2d 110 [2d Dept 2010]). Therefore, the Court finds that the irrebuttable presumption does not apply here because plaintiffs, as additional insureds, must be treated as if they had separate policies

with Movants. Plaintiffs insist that they are actively defending the claims against them in the Kings County Action. That US Spray did not speak to or communicate with Movants is not a basis to find prejudice on this motion to dismiss. And Movants did not cite any other prejudice they might suffer from the allegedly late notice from plaintiffs.

To be clear, the Court merely finds that plaintiffs have stated a cognizable cause of action for coverage as additional insureds under the policies issued to US Spray. Discovery is necessary to explore the alleged prejudice suffered by Movants based on the purported untimeliness of the demand for coverage.


The Court also observes that Movants' motion to dismiss seeks declaratory relief against US Spray. But Movants have not yet answered and therefore have not yet asserted any crossclaims against this defendant. Therefore, the Court finds that it would be inappropriate to issue declaratory relief in favor of Movants and against US Spray.

Accordingly, it is hereby

ORDERED that defendants United Specialty Insurance Company and Mitsui Sumitomo Insurance Company's motion to dismiss is denied and they are directed to answer pursuant to the CPLR.

Conference: September 5, 2023 at 12 p.m. By August 29, 2023, the parties are directed to upload 1) a stipulation signed by all parties concerning discovery, 2) a stipulation of partial agreement about discovery that identifies the areas in dispute or 3) letters explaining no agreement about discovery could be reached. Based on these submissions, the Court will assess

whether or not an in-person conference is necessary. The failure to upload anything by August 29, 2023 will result in an adjournment of the conference.

6/28/2023					
DATE			ARLENE P. BLUTH, J.S.C.		
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	DENIED	<input type="checkbox"/> OTHER
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