New York Marine & Gen. Ins. Co. v Sirius American Ins. Co.
2012 NY Slip Op 31375(U)
May 11, 2012
Sup Ct, Suffolk County
Docket Number: 38640-08
Judge: Thomas F. Whelan
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SHORT FORM ORDER

INDEX No. 38640-08

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 33 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE 4/16/12
ADJ. DATES 5/4/12
Mot. Seq. # 004 - MD
Mot. Seq. # 005 - XMG
CDISP

NEW YORK MARINE AND GENERAL INSURANCE COMPANY and ANDRESSON & BULGIN CONSTRUCTION INC.,

Plaintiffs,

-against-

THE SIRIUS AMERICAN INSURANCE COMPANY, JEFFREY D. GAGLIOTTI d/b/a EMINENCE ENTERPRISES, ALEXANDER PETERSEN and MARIE PETERSEN,

Defendants.

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Upon the following papers numbered 1 to 14 read on this motion to amend answer and cross motion for an order discontinuing plaintiff's claims; Notice of Motion/Order to Show Cause and supporting papers 1 - 3; Notice of Cross Motion and supporting papers 4-6; Answering Affidavits and supporting papers 7-8; 9-10; Replying Affidavits and supporting papers 11-12; 13-14; Other ______; (~~and after hearing counsel in support of and in opposition to the motion~~) it is,

ORDERED that this motion (#004) by defendants, Jeffrey D. Gagliotti and Eminence Enterprises, for an order granting them leave to serve an amended answer that includes a cross claim against defendant, Sirius America Insurance Company, n/k/a/ Delos Insurance Company (hereinafter "Delos"), is considered under CPLR 3025(b) and is denied; and it is further

ORDERED that the cross motion (#005) by the plaintiffs for an order directing the discontinuance of all claims asserted by them in their complaint against defendant, Sirius America Insurance Company, is considered under CPLR 3217 and is granted.

This declaratory judgment action, commenced by the plaintiffs in October of 2008, arises out of a work related injury sustained by defendant, Alexander Petersen, at a residential construction site in Watermill, New York in August of 2004. At the time of the accident, Petersen was employed by defendants Gagliotti and/or Eminence Enterprises (hereinafter "Gagliotti").

In 2005, Petersen and his wife commenced a personal injury action against Andrew Borrok and plaintiff, Andreasson and Bulgin (hereinafter "A&B"). Several third party actions were commenced by A&B, including one against the Gagliotti defendants that was filed in April of 2006. Gagliotti appeared by answer to the third party complaint in May of 2006. The Petersen action, with its attendant five, third party actions, is next scheduled to appear on the trial calendar of this court on June 26, 2012.

By the complaint filed herein, the plaintiffs seek a judgment declaring that defendant Delos (s/h/a/ Sirius) is obligated to defend and indemnify the plaintiff, A&B, with respect to the claims asserted against Gagliotti in the separate action commenced by the Petersens. The plaintiffs also demand a declaration that Delos is obligated to defend and indemnify defendant Gagliotti. The plaintiffs further seek a declaration that the coverage afforded plaintiff, A&B, under a policy issued by plaintiff, New York Marine Insurance Company, is in excess or secondary to the coverage afforded A&B by Delos under the policy it issued to Gagliotti and to Andreasson and Bulgin as an additional insured under such policy.

The answer of the Gagliotti defendants includes the assertion of several affirmative defenses and a demand in the wherefore clause for the same judicial declarations that are set forth in the complaint of the plaintiffs, including that Delos is obligated to defend and indemnify defendant Gagliotti for "any and all judgments, costs, disbursements and attorneys' fees including but not limited to sums Gagliotti may become obligated to pay plaintiff A&B on account of liability assumed by Gagliotti under its subcontract". However, the answer of the Gagliotti defendants does not include a demand by way of cross claim for declaratory relief in their favor.

By the instant motion (#004), the Gagliotti defendants seek leave to amend their answer so as to assert a cross claim for declaratory relief against Delos, the terms of which will obligate Delos to defend and indemnify the Gagliotti defendants with respect to the claims interposed against them in the Petersen action. The plaintiffs "cross" move for an order permitting them to discontinue their claims against Delos and, as enlarged by their reply papers, those, if any, asserted against the remaining defendants as well.

Defendant Delos opposes the motion-in-chief upon the grounds that the Gagliotti defendants failed to satisfy a condition precedent to coverage under the policy issued by Sirius (n/k/a Delos) in as much as they failed to notify Sirius of the Petersen accident and the claims arising therefrom as required by its policy. Delos also supports the plaintiff in its cross motion for a judicial discontinuance of the plaintiff's claims, which was allegedly necessitated by the failure of the Gagliotti defendants to sign a stipulation of discontinuance.

The Gagliotti defendants oppose the plaintiffs' cross motion and seek, without benefit of a notice of motion or cross motion the following relief: 1) a continuation and severance of those portions of Gagliotti defendants' wherefore clause wherein an allegedly de facto cross claim for a judicial declaration that Delos is obligated to defend and indemnify defendant Gagliotti against "any and all judgments, costs,

disbursements and attorneys' fees including but not limited to sums Gagliotti may become obligated to pay plaintiff A&B on account of liability assumed by Gagliotti under its subcontract; 2) a continuation and severance of those portions purported in plaintiffs' complaint that asserts claims for a judicial declaration that Delos is obligated to defend and indemnify defendant Gagliotti against "any and all judgments, costs, disbursements and attorneys' fees including but not limited to sums Gagliotti may become obligated to pay plaintiff A&B on account of liability assumed by Gagliotti under its subcontract" (*see* plaintiffs' complaint subparagraph B of Wherefore Clause) and a substitution of the Gagliotti defendants for the plaintiffs with respect to such claim.

For the reasons stated below, the motion-in-chief (#004) by the Gagliotti defendants is denied as is all of their other demands for relief. The plaintiffs' cross motion (#005) for relief pursuant to CPLR 3217(b) is granted.

"Applications for leave to amend pleadings under CPLR 3025(b) should be freely granted unless the proposed amendment (1) would unfairly prejudice or surprise the opposing party, or (2) is palpably insufficient or patently devoid of merit" (***Maldonado v Newport Gardens, Inc***., 91 AD3d 731, 937 NYS2d 260 [2d Dept 2012]). The sufficiency or underlying merit of the proposed amendment is not subject to further examination by the court (*see* ***Lucido v Mancuso***, 49 AD3d 220, 222, 851 NYS2d 238 [2d Dept 2008]). This standard is applicable to amendments of both complaints and answers (*see* ***Giuffre v DiLeo,*** 90 AD3d 602, 934 NYS2d 449 [2d Dept 2011]).

It is well established that "[w]here, as here, a contract of primary insurance requires notice 'as soon as practicable' after an occurrence, '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'" (***Lobosco v Best Buy, Inc***., 80 AD3d 728, 915 NYS2d 305 [2d Dept 2011] *quoting* ***Argo Corp. v Greater N.Y. Mut. Ins. Co.***, 4 NY3d 332, 339, 794 NYS2d 704). With respect to policies issued before January 17, 2009 (*see* Insurance Law § 3420[c][2][A]), as was the Gagliotti policy, an insurer could disclaim coverage without regard to prejudice when the insured failed to satisfy the notice condition (*see* ***Zimmerman v Peerless Ins. Co.***, 85 AD3d 1021, 926 NYS2d 124 [2d Dept 2011]). Where the insurer issues a valid disclaimer, coverage is vitiated and claims by the insured for a defense and indemnification under the policy are rendered nonactionable.

This result is unaltered by the statutory right of the injured party to give notice to the defendants' insurer that is conferred by the provisions of Insurance Law § 3420(a)(3) (*see* ***Konig v Hermitage Ins. Co.***, 93 AD3d 643, 940 NYS2d 116 [2d Dept 2012]; ***Becker v Colonial Coop. Ins. Co.***, 24 AD3d 702, 704, 806 NYS2d 720 [2d Dept 2005]). Nevertheless, where an injured party fails to exercise the independent right to notify the insurer of the occurrence, a disclaimer issued to an insured for failure to satisfy the notice requirement of the policy will be effective as against the injured party as well (*see* ***Maldonado v C.L.–M.I. Props., Inc***., 39 AD3d 822, 823, 835 NYS2d 335 [2d Dept 2007]). The result is the same in those cases wherein the policy insures persons or entities not directly, but rather, as additional insureds, who give notice of an occurrence to the insurer. The issuance of such notice by an additional insured will not defeat a coverage disclaimer issued by the insurer to its direct insured since "[t]he law is clear that an insured's obligation to provide timely notice is not excused on the basis that the insurer has received notice of the underlying occurrence from an independent source" (***Travelers Ins. Co. v Volmar Const. Co., Inc***. 300 AD2d 40, 752 NYS2d 286 [1st Dept. 2002]). The contractual obligation of an insured to give timely notice is not satisfied where notice is provided by another insured or where the insurer acquires actual knowledge of the claim from an independent source (*see* ***Roofing Consultants, Inc. v Scottsdale Ins. Co.***, 273 AD2d 933, 709 NYS2d 782 [4th Dept 2000]).

Here, defendant Delos established that the proposed amendment of the answer originally served by the Gagliotti defendants is devoid of merit since there is no coverage available to Gagliotti under the liability policy issued to it by Sirius due to Gagliotti's failure to notify Sirius of the occurrence of Petersen's August 23 2004 accident. Instead, Sirius learned of the occurrence on November 1, 2004 upon its receipt of an October 25, 2004 letter describing Petersen's accident that was issued by plaintiff, New York Marine. On December, 8, 2004, Sirius issued, through its designated agent, a letter to Gagliotti advising that due to a lack of timely reporting of the of the Petersen accident, coverage under the Sirius policy had been vitiated. The notice provided by plaintiff New York Marine on its own behalf and on behalf of plaintiff, A&B, an additional insured under the Sirius policy to Gagliotti, did not satisfy the obligations imposed upon Gagliotti to notify Sirius as required by the terms of the policy. Gagliotti's proposed new cross claim is thus totally devoid of merit and as such, warrants a denial of its motion to amend its answer.

Rejected as unmeritorious are the claims that the existing answer of the Gagliotti defendants contains a defacto cross claim for declaratory relief identical to that set forth in their proposed cross claim because a demand for such relief is set forth in the wherefore clause of the answer of the Gagliotti defendants. Pursuant to CPLR 3017(a), a demand for relief is a necessary element of a "complaint, counterclaim, cross claim, interpleader complaint and third party complaint". A naked demand for relief set forth the wherefore clause of an answer that is not preceded by a pleaded cross claim or counterclaim for such relief is thus a nullity for want of legal sufficiency. This rule is applicable to declaratory judgment actions, wherein the court is required to declare the rights and other legal relations of the parties to a justiciable controversy even where such declaration favors a defendant rather than the plaintiff irrespective that further relief is or could be claimed (*see* CPLR 3001), since only the complaint in a declaratory judgment action must contain a demand for relief which must specify the rights and legal relation on which a declaration is requested (*see* CPLR 3017). The court thus denies all demands for a continuation and severance of the purportedly existing "cross" claim for a defense and indemnification which was allegedly asserted by the Gagliotti defendants in their wherefore clause.

Also denied are the demands by the Gagliotti defendants for a substitution that would enable Gagliotti defendants to take up the prosecution of the plaintiffs' pleaded demands for a judicial declaration that Delos is obligated to defend and indemnify defendant Gagliotti for "any an all judgments, costs, disbursements and attorneys' fees including but not limited to sums Gagliotti may become obligated to pay plaintiff A&B on account of liability assumed by Gagliotti under its subcontract" (*see* plaintiffs' complaint, subparagraph B of Wherefore Clause). Such demands are improperly asserted in the opposing papers of the Gagliotti defendants to the plaintiffs' cross motion for an order directing a judicial discontinuance of the plaintiffs' claims and are otherwise lacking any basis in law or fact. All affirmative relief demanded by the Gagliotti defendants in their opposing papers is thus denied.

The cross motion (#005) by the plaintiffs for an order directing a discontinuance of all claims asserted by them in their complaint is granted. Because a party may not ordinarily be compelled to litigate, a discontinuance should generally be granted (*see* ***Tucker v Tucker***, 55 NY2d 378, 383, 449 NYS2d 683 [982]). It is only where special circumstances, such as prejudice to a substantial right of the defendant or other improper consequences are shown to exist, should a motion for a voluntary discontinuance be denied (*see* ***Blackwell v Mikevin Mgt. III, LLC.***, 88 AD3d 836, 931 NYS2d 116 [2 Dept 2011]; ***Expedite Video Conferencing Servs., Inc. v Botello***, 67 AD3d 961, 961, 890 NYS2d 82 [2d Dept 2009]). It is clear that the foregoing rules are applicable to actions for declaratory relief (*see* ***Hockmeyer v Bloch***, 159 AD2d 444, 553 NYS2d 126 [1st Dept 1990]). Here, there was no showing of the existence of special circumstances which would warrant a denial of the plaintiffs' cross motion for an order directing a voluntary discontinuance of the claims asserted by the plaintiffs in their complaint. The cross motion is thus granted and the plaintiffs' claims are discontinued pursuant to CPLR 3217(b) and (c).

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Since the record reflects the absence of any counterclaims or cross claims asserted by any of the defendants herein, and in light of the discontinuance fo the plaintiffs' claims pursuant to CPLR 3217, the clerk shall mark this action disposed upon receipt of this order for entry into the court's electronic filing system.

DATED: 5/11/12

THOMAS F. WHELAN, J.S.C.