QBE Ins. Corp. v M&R European Constr. Corp.
2012 NY Slip Op 31851(U)
July 10, 2012
Supreme Court, New York County
Docket Number: 602293/00
Judge: Marcy S. Friedman
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SCANNED ON 7/16/2012

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: MARCY S. FRIEDMAN, J.S.C. PART _____

Justice

Index Number : 602293/2009
QBE INSURANCE CORPORATION
vs.
M&R EUROPEAN CONSTRUCTION
SEQUENCE NUMBER : 002
SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). 1, 1a

Answering Affidavits — Exhibits _____ | No(s). 2, 3

Replying Affidavits _____ | No(s). 4

Upon the foregoing papers, it is ordered that this motion is decided in accordance with accompanying decision/order dated 7-10-12

FILED

JUL 16 2012

NEW YORK
COUNTY CLERK'S OFFICE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 7-10-12

_____, J.S.C.
MARCY S. FRIEDMAN, J.S.C.

1. CHECK ONE: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☒ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☒ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK – PART 57

PRESENT: Hon. Marcy S. Friedman, JSC

x

QBE INSURANCE CORPORATION,

Plaintiff,

- against -

Index No.602293/00

M&R EUROPEAN CONSTRUCTION CORP., MARTIN MCKERNAN, JAMES LONG, 143-145 LEXINGTON AVENUE, LLC, GREEN CIRCLE CONSTRUCTION, LLC., JOHN LAYTON, HOWARD I. SHAPIRO & ASSOCIATES CONSULTING ENGINEERS, P.C., JAMES SHIELD, MANUEL GLAS and MARBILLA, LLC.,

Defendant(s.

DECISION/ORDER

FILED

JUL 16 2012

NEW YORK
COUNTY CLERK'S OFFICE

x

143-145 LEXINGTON AVENUE, LLC, GREEN CIRCLE CONSTRUCTION, LLC., JOHN LAYTON,

Third-Party Plaintiffs.

Third Party
Index No.590300/10

-against-

GREAT AMERICAN INSURANCE COMPANY and AMERICAN GUARANTEE AND LIABILITY INSURANCE COMPANY,

Third-Party Defendants

x

These declaratory judgment actions involve an insurance coverage dispute between two insurers, QBE Insurance Corp. (QBE) and Great American E&S Insurance Co., incorrectly named as Great American Insurance Co. (Great American), of M&R European Construction Corp. (M&R),

an underpinning subcontractor on a construction project at 143-145 Lexington Avenue. QBE insured M&R under a general liability policy for the period from February 8, 2006 to February 8, 2007. Great American insured M&R under a general liability policy for the period from February 8, 2005 to February 8, 2006. In the main action, QBE seeks a judgment declaring that it has no duty to defend or indemnify M&R or its alleged additional insureds 143-145 Lexington Avenue, LLC (143-145), the owner of the construction site, Green Circle Construction, LLC (Green Circle), the general contractor, and its member, John Layton. In the third party action, 143-145, Green Circle, and Layton seek a judgment declaring that they are entitled to defense and indemnification under the policy issued to M&R by third-party defendant Great American. Great American moves for summary judgment dismissing the third-party complaint on the ground, among others, that third-party plaintiffs failed to comply with the timely notice requirements of its policy. Third-party plaintiffs and QBE oppose the motion.

An underlying property damage action (Marbilla, LLC v 143/145 Lexington LLC, et al., Sup Ct, New York County, Index No. 117132/06) was brought by the owner of the property at 141 Lexington Avenue (Marbilla property), which is adjacent to the construction site, against M&R, 143-145, Green Circle, Layton, and various other defendants. The complaint alleges that the Marbilla property was damaged by defendants' negligent failure "to take adequate precautions in the demolition and/or excavation and/or underpinning and/or otherwise in the performance of construction work" at 143-145 Lexington Avenue. (Compl., ¶ 21 [Ex. D to Aff. of Erik Lindemann in Support of Great American Motion [Lindemann Aff.].)

The Marbilla action was filed on November 16, 2006. On December 1, 2006, M&R tendered its defense to QBE. In October 2007, 143-145, Green Circle, and John Layton filed a

third-party complaint in the Marbilla action, alleging causes of action against M&R for common law and contractual indemnification with respect to Marbilla's claims, and for alleged breach of M&R's contractual obligation to provide them with insurance coverage. (Third-Party Summons & Compl. [Ex. O to Lindemann Aff.].) By certified letter dated November 14, 2007, their counsel notified M&R's insurance broker, BNC Insurance Agency (BNC), of the third-party claims. The letter stated:

> "I provide you with a copy of this Third-Party Summons and Complaint so that you can place Great American Insurance Company who issued a general liability policy under number GLO5849981 policy period 2/8/05 - 2/8/06 with umbrella coverage with American Guarantee under policy number AUC5327456MR on notice of this litigation so that they can interpose an answer thereto.
>
> Please bear in mind that failure of M & P [sic] European Construction Corp. to respond to this third-party action will result in a default judgment being taken."

(Ex. P to Lindemann Aff.) Great American acknowledges that it received this letter in November 2007. (See Aff. of Jean M. Osborne, Senior Claim Technical Director for Great American's claims handler, in Support of Motion, ¶ 7.) By letter dated February 12, 2008, Great American denied coverage to M&R based on its failure to provide timely notice of the occurrence, claim, and suit, and to timely provide copies of the summonses and complaints to Great American. It also reserved the right to disclaim on the ground that the damage to the Marbilla property did not take place during the Great American policy period.

On or about April 9, 2010, third-party plaintiffs filed the instant third-party declaratory judgment action against Great American, alleging entitlement to coverage as additional named insureds under M&R's Great American policy, and claiming that they had "duly demanded that Great American and American Guarantee defend and indemnify them in the aforementioned underlying actions. Great American and American Guarantee did not accept that tender." (Third-

Party Summons and Compl., ¶12 [Ex. A to Lindemann Aff.].) The complaint does not specify the date when third-party plaintiffs allegedly tendered their defense to Great American. Nor does it state when their tender was allegedly declined.

Great American asserts that the first notice it received from anyone of the occurrence (i.e., the damage to the Marbilla building), and of the Marbilla property damage action against M&R, was the letter of November 14, 2007 to M&R's insurance broker. (Osborne Aff.,¶7; Ex. 2 to Osborne Aff.) Great American further claims that the first time third-party plaintiffs sought coverage from Great American as additional insureds under M&R's policy was when they filed the third-party complaint in this action on April 9, 2010. (Osborne Aff., ¶9; Lindemann Aff. ¶38.)

143-145, Green Circle, and Layton contend that although some damage was observed at the Marbilla property in January, 2006, the damage was minor, and it initially appeared that the owner of the Marbilla property and 143-145 would resolve the damage between themselves. (Aff. of William Mitchell [third-party plaintiffs' attorney], ¶¶19-20.) They also contend that cracking did not become an issue until May 2006, a time within the QBE policy period and after expiration of the Great American policy. (See id., ¶ 21.) Third-party plaintiffs assert, moreover, that the complaint in the Marbilla action did not give notice of the date of the occurrence of damage to the property, and that it was not until Marbilla served an amended bill of particulars on December 30, 2008 that the damage was put into the Great American policy period for the first time. (Id.,¶ 84.) They therefore claim that their November 14, 2007 notice was timely. (Id., ¶¶ 83-85.)

With respect to third-party plaintiffs' knowledge of the occurrence that precipitated Marbilla's claim, it is undisputed that 143-145 and John Layton received a letter from attorneys for Marbilla, LLC, dated May 9, 2006, "confirm[ing] that you are aware that cracks have been observed in, among other places, the facade, interior wall, ceiling, apartment walls, archways and

brickwork of the Subject Premises, as a result of the construction work you have performed in the adjacent building." This letter further demanded that they notify their insurance carrier(s) of the damage to the Marbilla property. (Ex. F to Lindemann Aff.) Four months later, on September 15, 2006, Layton wrote on behalf of Green Circle to M&R, notifying M&R to advise its insurance carrier of Green Circle's intention to commence a lawsuit against M&R for damage to buildings adjacent to the project site. (Ex. G to Lindemann Aff.) This letter was copied to M&R's insurance broker, BNC. (Id.) More than two months later, on December 1, 2006, BNC forwarded a Notice of Occurrence/Claim to Harlan Brokerage, notifying it of the claim against M&R and identifying plaintiff QBE as the insurer. (Ex. K to Lindemann Aff.) Neither broker notified Great American.

Third-party plaintiffs contend that, prior to receiving the letter of May 9, 2006 from Marbilla's attorneys, they had no notice that Marbilla would initiate a lawsuit. Layton avers in opposition to the motion that, beginning in January 2006, he was made aware by William Rosner, the principal of Marbilla, LLC of minor, superficial cracking in the walls of the Marbilla building. Layton claims that he represented to Rosner that repairs would be made and that he (Layton) concluded that the issue was resolved. (Aff. of John Layton, Oct. 19, 2011, ¶¶ 6-10.) He states that "[t]here was no damage in summer 2005, cracking or otherwise, to the Marbilla building that has been caused by the construction." (Id., ¶17.) As to when third-party plaintiffs could reasonably have been expected to notify Great American, he further states: "I am also advised by my attorneys that much later, Marbilla's Amended Bill of Particulars for the first time stated that damages had occurred in 'summer 2005.' In fact, to that time, no one from Marbilla ever indicated to me that they would claim damages from 2005, nor do I know any basis for such a claim." (Id., ¶16.)

Layton's deposition testimony, taken on August 9, 2011, diverges from his affidavit in many critical particulars. Layton testified as follows: He was at the site on a daily basis during the demolition, excavation, and underpinning phases, and the latter two phases occurred simultaneously. (Layton Dep. at 67 [Ex. A to Reply Aff. of Michael Kotula].) The demolition phase was completed in the second or third quarter of 2005. (Id. at 67.)[1] A crack or cracks appeared in a Marbilla building wall starting in late 2005 or early 2006, and the cracks grew progressively wider, longer, and more numerous. (See id. at 45-47.) Bracing was installed in the first quarter of 2006, and prevented some but not all of the damage. (Id. at 48, 54.) In the first quarter of 2006 he received a letter from the subcontractor that installed the bracing, charging that M&R was creating problems with the underpinning. (Id. at 55-56.) He requested that M&R stop the underpinning work because it was not conforming to project documents. (Id. at 81.) M&R nevertheless elected to proceed. (Id. P 85). Layton testified that "any time that M&R was on the job, those damages were always discussed once they started to occur because that was the reason for all of the work we did to mitigate further damage." (Id. at 90.) In the first quarter of 2006 as the underpinning was progressing, Layton solicited other contractors to replace M&R but was unsuccessful. (Id. at 104-106.)

At Layton's continued deposition on August 10, 2011, he was also questioned about a complaint on the Department of Buildings website, dated December 5, 2005, stating: "building shaking vibrating and structural stability affected due to work being done at 143 Lexington." (Layton Dep. at 238 [Ex. B to. Kotula Reply Aff.].) Layton believed that, at that time, demolition at the site was complete. (Id.) He remembered someone from Delta Testing, a company retained

[1]Mr. Layton testified that he did not keep daily logs on the project because he was directed by the owners not to do so. (Id. at 69070.)

to do controlled inspections, "at some point in the first quarter or end of the fourth quarter of 2005 or the beginning of or the middle of the first quarter 2006 making mention of cracks on the buildings." (Id. at 272.)

The documentary evidence submitted on the motion includes a report of another complaint filed with the Department of Buildings on January 13, 2006, that the Marbilla building had a cracked wall in the lobby and an apartment door that would not close.[2] (Ex. D to Kotula Reply Aff.) Mark Zweibon, a member of 143-145, testified that on January 6 or 7, 2006, he was notified that the building at 141 Lexington Avenue was shifting or had moved. (Zweibon Dep. at 88 [Ex. E to Kotula Reply Aff.) He further testified that the damage to the Marbilla building occurred between "December '05 through April or May of '06." (Zweibon Dep. at 252 [Ex. F to Kotula Reply Aff].)

William Rosner, the owner of Marbilla, LLC, was not aware of when excavation at the adjacent premises took place, and did not know exactly when he first discovered damage to his building. He repaired a crack in the back wall in 2005 that he associated with the ongoing work next door, but made no complaint to any of the third-party plaintiffs at that time. (Rosner Dep. at 106-108 [Ex. B to Mitchell Aff. in Opp.].) He wrote a letter to the commercial tenant in the Marbilla building, dated January 19, 2006, acknowledging reports of damage from various tenants, and stating that Layton had assured him that all damaged apartments would be repaired and restored within the next four to five weeks. (Ex. E to Lindemann Aff.) As noted above, an attorney for Marbilla, LLC wrote to 143-145 on May 9, 2006, advising that its insurance carrier should be notified of the damage caused to the Marbilla building. (Ex. F to Lindemann Aff.)

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[2] This complaint was marked "resolved" on January 16, 2006, with a notation of " no structural damage observed." (Id.)

Rosner testified that Layton had "pretty much, free access to the building at any and all times" due to his relationship with the commercial tenant in the Marbilla building. (Rosner Dep. at 98.) He further testified that while he made numerous repairs to the building in response to his tenants' complaints (id. at 101-106), third-party plaintiffs made no repairs prior to 2009, when they repaired the roof. (Id. at 98.) The residential tenants have all moved out of the building, and the Marbilla, LLC's insurance company has deemed the building uninhabitable. (Id. at 122.)

Great American's policy contains notice requirements that are conditions precedent to coverage. The policy provides in pertinent part:

> "Section IV(2)
>
> a. You must see to it that we are notified as soon as practicable of an 'occurrence' or an offense which may result in a claim. To the extent possible, notice should include:
>
> (1) How, when and where the 'occurrence' or offense took place;
> (2) The names and addresses of any injured persons and witnesses; and
> (3) The nature and location of any injury or damage arising out of the 'occurrence' or offense.
>
> b. If a claim is made or 'suit' is brought against any insured, you must:
>
> (1) Immediately record the specifics of the claim or 'suit' and the date received; and
> (2) Notify us as soon as practicable. You must see to it that we receive written notice of the claim or 'suit' as soon as practicable.
>
> c. You and any other involved insured must:
> (1) Immediately send us copies of any demands, notices, summonses or legal papers received in connection with the claim or 'suit'. . . ."

(Ex. 1 to Osborne Aff. in Support.)

It is well settled that prompt notice is a condition precedent to coverage, and that an insurer may disclaim coverage in the event of non-compliance with prompt notice provisions in its policy. (Sorbara Constr. Corp. v AIU Ins. Co., 11 NY 3d 805, 806 [2008]; Argo Corp. v

Greater New York Mut. Ins. Co., 4 NY3d 332, 340 [2005].)[3] The requirement that notice be given as soon as practicable applies to an additional insured and is independent of the primary insured's obligation. (City of New York v Investors Ins. Co. of Am., 89 AD3d 489 [1st Dept 2011]; Structure Tone, Inc. v Burgess Steel Prods. Corp., 249 AD2d 144, 145 [1st Dept 1998]; 23-08-18 Jackson Realty Assocs. v Nationwide Mut. Ins. Co., 53 AD3d 541, 542 [2d Dept 2008].) "Absent a valid excuse, a failure to satisfy the notice requirement vitiates the policy." (Security Mut. Ins. Co. v Acker-Fitzsimons Corp., 31 NY2d 436 , 440 [1972]; Bovis Lend Lease LMB, Inc. v Travelers Property Cas. Co. of Am., 78 AD3d 405 [1st Dept 2010]; 1700 Broadway Co. v Greater New York Mut. Ins. Co., 54 AD3d 593 [1st Dept 2008].)

As a threshold matter, the court holds that third-party plaintiffs' November 14, 2007 letter to M&R's insurance broker did not constitute notice of a claim against third-party plaintiffs in their capacity as additional insureds. The notice given was of third-party plaintiffs' claim against Great American's insured M&R. It did not identify third-party plaintiffs as additional insureds or address the claims against them. Nor did it request their defense or indemnification in the Marbilla action. Notice of a third-party complaint against an insured does not fulfill the obligation of an additional insured to give notice of a claim against it. (See A.J. McNulty & Co. v Lloyds of London, 306 AD2d 211, 212 [1st Dept 2003].)

Even if the November 14, 2007 letter were deemed to constitute the requisite notice, it was not sent until nearly two years after the occurrence and one year after the Marbilla action was

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[3]The court notes that §3420(a) of the New York Insurance Law now provides that failure to give notice within the prescribed time will not invalidate any claim made by the insured, unless the failure to provide timely notice has prejudiced the insurer. However, the new law was prospective and applies to policies issued after the effective date of January 17, 2009.

commenced. The notice was therefore untimely as a matter of law. (See e.g. Tower Ins. Co. of New York v Classon Heights, LLC, 82 AD3d 632, 634 [1st Dept. 2011] [five month delay in giving notice of occurrence unreasonable absent valid excuse]; Tower Ins. of New York v Amsterdam Apts., LLC, 82 AD3d 465, 466 [1st Dept. 2011] [76 day delay unreasonable]; Hermany Farms , Inc. v Seneca Ins. Co., Inc., 76 AD3d 889, 890 [1st Dept. 2010] [one year delay unreasonable]; Steinberg v Hermitage Inc. Co., 26 AD3d 426, 427 [2d Dept. 2006] [57 day delay unreasonable].)

As the notice to Great American was prima facie untimely, third-party plaintiffs must raise a triable issue of fact as to whether their delay in giving notice was reasonable. (Great Canal Realty Corp. v Seneca Ins. Co., Inc., 5 NY3d 742, 743-744 [2005].) A failure to give timely notice may be excused under appropriate circumstances, "as where the insured has 'a good-faith belief of nonliability,' provided that belief is reasonable." (Id. at 743, quoting Security Mut. Ins. Co., 31 NY2d at 441; White v City of New York, 81 NY2d 955, 957 [1993].) Where there is a "reasonable possibility" that a claim may be initiated, even though some factors may suggest otherwise, the policy's notice provision is triggered. (See Paramount Ins. Co. v Rosedale Gardens, Inc., 293 AD2d 235, 239-240 [1st Dept. 2002].)

Here, third-party plaintiffs contend that prior to receiving a letter in May 2006 from Marbilla's attorneys, they had no basis to believe that they would be sued. However, the record on this motion establishes as a matter of law that Layton was apprised that damage to the Marbilla building was ongoing during the course of the excavation and underpinning work at the site. He received complaints from Marbilla tenants, the Department of Buildings, and other subcontractors about M&R's work. He acknowledged that cracks developed in the Marbilla

building in late 2005, and that he had undertaken to make repairs as of January 2006. These events, to which Layton himself testified (see supra at 6-7), began during the Great American policy period. While Layton claims in the affidavit submitted on this motion that he was aware at the beginning of 2006 of only "very minor" or "superficial" cracks in the Marbilla property (Layton Aff., ¶¶ 4, 6), this conclusory self-serving affidavit cannot serve to avoid summary judgment. (See generally Mayancela v Almat Realty Dev., LLC, 303 AD2d 207 [1st Dept 2003]; Naposki v Au Bar, 271 AD2d 371 [1st Dept 2000].)

Moreover, even if third-party plaintiffs' asserted belief in non-liability were initially reasonable, it was no longer so after Marbilla's attorney's May 9, 2006 letter, advising them to notify their insurance carrier of damage to the Marbilla property. Third-party plaintiffs fail to offer a plausible explanation for their continuing failure, after receipt of that letter, to notify Great American. Layton claims that he made arrangements with Rosner in late January 2006 to do patch-type repairs, and believed that the issue was resolved. (See Layton Aff., ¶ 6.) However, that belief did not continue to be reasonable as Layton does not dispute Rosner's testimony (see supra at 8) that Layton never made the repairs. (Compare U.S. Underwriter's Ins. Co. v Ziering, 2009 US Dist Lexis 7077 [ED NY 2009].)

To the extent that third-party plaintiffs contend that they had an excuse for not notifying Great American of the occurrence or claim because the Marbilla complaint did not put them on notice that Marbilla would assert that damage occurred during the Great American policy period, that contention is plainly without merit. As noted above, third-party plaintiffs argue that the amended bill of particulars, served on December 30, 2008, first put them on notice that the Great American policy was implicated. However, the original bill of particulars, dated May 9, 2007,

expressly stated: "Upon information and belief, the construction project . . . started in or about summer, 2005, and is continuing up to the present time. The damage ("Damage") to plaintiff's building located at 141 Lexington Avenue . . . occurred during that time frame." (Bill of Particulars, ¶ 1[Ex. C to Kotula Reply Aff.].)

Under all of these circumstances, the court holds as a matter of law that third-party plaintiffs fail to offer a valid excuse for their delay in notifying Great American of the occurrence. They offer no explanation for their failure to provide Great American with a copy of the summons and complaint in the Marbilla action until one year after its filing.

The court has considered third-party plaintiffs' remaining contentions and finds them to be without merit. QBE also fails to raise a triable issue of fact. It submits no support for its assertion that Great American was a co-insurer under these circumstances in which QBE and Great American issued policies for different periods.

It is hereby ORDERED that the motion of third-party defendant Great American E&S Insurance Co. (incorrectly sued as Great American Insurance Company) is granted to the extent of dismissing the third-party complaint; and it is further

ORDERED that the remaining claims are severed and shall continue.

This constitutes the decision and order of the court.

FILED
JUL 16 2012
NEW YORK
COUNTY CLERK'S OFFICE

Dated: New York, New York
July 10, 2012

MARCY FRIEDMAN, J.S.C.