

<b>West St. Props., LLC v American States Ins. Co.</b>
2012 NY Slip Op 33760(U)
October 5, 2012
Supreme Court, Westchester County
Docket Number: 54513-2012
Judge: Joan B. Lefkowitz
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SUPREME COURT : STATE OF NEW YORK  
IAS PART WESTCHESTER COUNTY  
PRESENT: HON. JOAN B. LEFKOWITZ, J.S.C.  
-----X  
WEST STREET PROPERTIES, LLC,

Plaintiff,

-against-

AMERICAN STATES INSURANCE COMPANY,  
LIBERTY MUTUAL INSURANCE COMPANY GROUP,  
SAFECO INSURANCE COMPANY OF AMERICA and  
SCOTTSDALE INSURANCE COMPANY

Defendants.  
-----X

To commence the statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

DECISION & ORDER

Index No: 54513-2012

Motion and Cross-Motion  
Date: July 27, 2012

Motion Seq. #1,#2 & #3

The following papers numbered 1 through 49 were read on the following **E-filed** motions: (1) motion by the plaintiff for an order granting summary judgment in lieu of a complaint against all defendants pursuant to CPLR §3213; (2) the cross-motion by the defendants, AMERICAN STATES INSURANCE COMPANY, LIBERTY MUTUAL INSURANCE COMPANY GROUP and SAFECO INSURANCE COMPANY OF AMERICA, for an order dismissing the action against it; and (3) the cross-motion of the defendant, SCOTTSDALE INSURANCE COMPANY, for an order dismissing the action against it.

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Upon reading the foregoing papers it is

ORDERED the motion is denied; and it is further

ORDERED the cross-motions are denied with leave to move for summary judgment after the completion of discovery; and it is further

ORDERED that pursuant to CPLR §3213 the moving papers are deemed to be the complaint and the cross-motions and their supporting papers are deemed to be the answers; and it is further

ORDERED the parties are directed to appear on November 13, 2012, at 9:30 a.m. in the Preliminary Conference Part, Courtroom 800, Westchester County Supreme Court, 111 Martin Luther King Boulevard, White Plains, New York, prepared to conduct a preliminary conference.

Plaintiff seeks an order pursuant to Insurance Law §3420(b)(1) for a judgment in the sum of the policy limits of the insurance policies issued by defendants up to a total of \$2,000,000.00 in order to satisfy a judgment entered in an underlying action entitled *West Street Properties, L.L.C., v A & A Industries, LLC, Anthony Casterella, Cast Construction, LLC, and Cast Construction & Son, Inc.*, Westchester County Index No. 14364-2009.

In the underlying action plaintiff alleged it hired the defendant, Anthony Casterella, and the companies he controlled, A & A Industries, LLC, Cast Construction, LLC, and Cast Construction & Son, Inc. (hereinafter collectively Casterella), to grade and landscape premises on which plaintiff was constructing a dwelling. Plaintiff claims that between December 6, 2007, and December 14, 2007, Casterella negligently ruptured a oil line on the premises, spilling more than 200 gallons of fuel oil and contaminating nearby wetlands. Plaintiff alleges Casterella failed to report the oil spill and failed to act to minimize the damage it caused. As a result, plaintiff was required to clean the spill and remediate the resulting damage.

The defendant herein, AMERICAN STATES INSURANCE COMPANY (hereinafter AMERICAN STATES), insured Richard Casterella and A & A Industries. AMERICAN STATES claims that, while it did not insure Cast Construction, LLC, or Cast Construction & Son, Inc., it nevertheless provided a defense to those entities as a courtesy.

As a result of the oil spill, Richard Casterella was

indicted. In November 2009 he pled guilty, both individually and on behalf of Cast Construction, LLC, to the felony of Endangering the Public Health, Safety and Environment under the Environmental Conservation Law. In the course of his guilty plea Casterella admitted to recklessly releasing more than 200 gallons of petroleum, a substance hazardous to the public health, safety or environment.

In October 2009, prior to Casterella's guilty plea, plaintiff commenced the underlying civil action. Defendant, AMERICAN STATES, Casterella's insurer, retained counsel on behalf of the defendants in the underlying action, and an answer to the complaint was interposed in January 2010. One year later, in January 2011, counsel for Casterella moved for an order permitting it to withdraw as counsel upon the grounds that Casterella failed to cooperate in his defense. The motion was granted in February 2011. Thereafter, AMERICAN STATES attempted to disclaim coverage upon the grounds of Casterella's noncooperation. In September 2011 plaintiff moved for summary judgment in the underlying action. The unopposed motion was granted on September 26, 2011, and plaintiff was permitted to enter judgment against the defendants in the underlying action in the sum of \$2,000,000.00.

Plaintiff has now moved, pursuant to CPLR §3213, for an order granting summary judgment against the defendant insurers pursuant to Insurance Law 3420(b)(1) claiming the defendant insurance companies are required to satisfy the judgment entered in plaintiff's favor in the underlying action.

In response, the defendants, AMERICAN STATES INSURANCE COMPANY, LIBERTY MUTUAL INSURANCE COMPANY GROUP and SAFECO INSURANCE COMPANY OF AMERICA, cross-moved for an order dismissing the action against them.

The defendants, LIBERTY MUTUAL INSURANCE COMPANY GROUP and SAFECO INSURANCE COMPANY OF AMERICA, claim that, while they are entities related to the defendant, AMERICAN STATES, neither of them issued a insurance policy to the defendants in the underlying action, and thus have no liability to the plaintiff.

The defendant, AMERICAN STATES, claims that the Insurance Law §3420(b)(1) action should be dismissed because AMERICAN STATES properly disclaimed coverage due to Casterella's failure to cooperate in the defense of the underlying action.

The defendant, SCOTTSDALE INSURANCE COMPANY, who once insured Cast Construction, LLC, a defendant in the underlying action, separately cross-moved for an order dismissing the action against it, claiming it had no duty to insure the defendants in the underlying action because (1) the policy was cancelled before the loss due to Cast's failure to pay premiums; (2) the policy excluded coverage for damages caused by an oil spill; and (3) Casterella failed to timely notify it of the underlying claim.

Plaintiff's CPLR §3213 Motion

Plaintiff is not entitled to summary judgment in lieu of a complaint. A motion pursuant to CPLR §3213 is inappropriate here because the underlying judgment does not name the defendants herein, and extrinsic evidence is required to demonstrate that the defendants herein insured the defendants in the underlying action (*Gottlieb v Blue Ridge Insurance Company*, 300 AD2d 541 [2d Dept 2002]).

The Cross-Motion of the Defendant, AMERICAN STATES

AMERICAN STATES seeks to dismiss the action against it upon the grounds that it properly and timely disclaimed coverage due to Casterella's failure to cooperate in the defense of the underlying action. AMERICAN STATES claims that Casterella's noncooperation started immediately upon the commencement of the underlying action, and continued throughout the course of the underlying litigation.

Specifically, AMERICAN STATES alleges that Casterella failed to respond to numerous requests for an initial interview by counsel causing multiple requests for extensions of time to answer the complaint; that Casterella only responded to the request for an initial interview through the intercession of his attorney in the criminal case; that Casterella cancelled several meetings with counsel; that Casterella failed to respond to requests from counsel to meet and prepare for depositions; that Casterella cancelled several scheduled meetings with counsel in July 2010; that Casterella ignored seven letters sent to him by his counsel between August 2010 and December 2010; that Casterella rejected or ignored correspondence AMERICAN STATES sent to Casterella imploring him to cooperate; that Casterella did not respond to seven voice mail messages left by AMERICAN STATES in October 2010 urging his cooperation; that on October 19, 2010, Casterella was advised by an investigator from AMERICAN

STATES of the risk of losing coverage if his failure to cooperate continued; that despite this warning Casterella failed to cooperate with counsel in preparing for the depositions which had been rescheduled; that Casterella refused to accept counsel's December 7, 2010, certified letter; that Casterella met with a representative of AMERICAN STATES on February 7, 2011, and advised the representative that he would not cooperate unless AMERICAN STATES indemnified him for his environmental claim; and that Casterella failed to appear at a February 28, 2011, conference before the court despite the court's mandate that he be present.

On March 18, 2011, two months after counsel hired by AMERICAN STATES moved for permission to withdraw as Casterella's counsel upon the grounds of his noncooperation, AMERICAN STATES issued a letter disclaiming coverage due to Casterella's failure to cooperate. However, despite Casterella's long history of refusing to accept correspondence, AMERICAN STATES did not personally deliver the disclaimer letter to Casterella until one month later, on April 26, 2011.

"[S]ince a disclaimer based upon lack of cooperation penalizes the injured party for the actions of the insured and frustrates the policy of this State that innocent victims . . . be recompensed for the injuries inflicted upon them, an insurer seeking to disclaim for noncooperation has a heavy burden of proof. To sustain its burden of establishing lack of cooperation, the insurer must demonstrate that it acted diligently in seeking to bring about the insured's co-operation, that the efforts employed by the insurer were reasonably calculated to obtain the insured's co-operation, and that the attitude of the insured, after his co-operation was sought, was one of willful and avowed obstruction" (*Matter of Autoone Ins. Co, v Hutchinson*, 71 AD3d 1011, 1013 [2d Dept 2010] [internal quotation marks and citations omitted]).

"Even if an insurer possesses a valid basis to disclaim for noncooperation, it must still issue its disclaimer within a reasonable time . . . [C]ases in which the reasonableness of an insurer's delay may be decided as a matter of law are exceptional and present extreme circumstances" (*Continental Cas. Co., v Stradford*, 11 NY3d 443, 449 [2008] [citations omitted]).

"Fixing the time from which an insurer's obligation to disclaim runs is difficult. That period begins when an insurer

first becomes aware of the ground for its disclaimer. But unlike cases involving late notice of claims or other clearly applicable coverage exclusions, an insured's noncooperative attitude is often not readily apparent. Indeed, . . . such a position can be obscured by repeated pledges to cooperate and actual cooperation. The challenge of setting an appropriate date is only heightened by the heavy burden that an insurer seeking to establish a noncooperation defense must carry. To further this State's policy in favor of providing full compensation to injured victims, who are unable to control the actions of an uncooperative insured, insurers must be encouraged to disclaim for noncooperation only after it is clear that further reasonable attempts to elicit their insured's cooperation will be futile. In some cases, such as where an insured openly disavows its duty to cooperate little time is needed to evaluate the relevant noncooperative conduct before disclaiming" (*Continental Cas. Ins., supra*, at 449).

"The timeliness of a carrier's disclaimer based on its insured's alleged violation of the policy's cooperation clause almost always presents a factual question, requiring an assessment of all relevant circumstances surrounding the particular disclaimer" (*Gulf Ins. Co., v Stradford*, 59 AD3d 598, 598 [2d Dept 2009] [internal quotation marks and citations omitted]).

Applying these principles to the circumstances presented here, the court finds that the defendant, AMERICAN STATES, failed to establish as a matter of law that it was entitled to disclaim coverage based upon Casterella's noncooperation. Moreover, even if AMERICAN STATES did establish such entitlement as a matter of law, it failed to establish as a matter of law that it issued its disclaimer within a reasonable time after Casterella manifested his clear intent not to cooperate.

AMERICAN STATES may make a renewed motion for summary judgment upon the completion of discovery.

The Cross-Motion of the Defendants, LIBERTY MUTUAL INSURANCE COMPANY GROUP and SAFECO INSURANCE COMPANY OF AMERICA

No discovery has been conducted concerning the issues of whether these insurers insured any of the defendants in the underlying action. Thus, their motion to dismiss upon the grounds that neither is a proper party is denied without



prejudice to a motion for summary judgment at the completion of discovery.

The Cross-Motion of the Defendant, SCOTTSDALE INSURANCE COMPANY

SCOTTSDALE moves to dismiss upon the grounds that plaintiff has failed to state a cause of action. The motion for summary judgment in lieu of complaint sets forth a cause of action under Insurance Law §3420(b)(1). Thus, SCOTTSDALE's motion is denied without prejudice to a motion for summary judgment at the completion of discovery.

E N T E R,

Dated: White Plains, New York  
October 5, 2012

  
HON. JOAN B. LEFKOWITZ, J.S.C.

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