

Church of St. Paul v Zurich Am. Ins. Co.

2013 NY Slip Op 31202(U)

May 30, 2013

Supreme Court, New York County

Docket Number: 0107272/2011

Judge: Louis B. York

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: LOUIS B. YORK
J.S.C.
Justice

PART 2

Church of St. Paul and St. Andrew,
Zurich American Insurance Company

INDEX NO. 107272/11
MOTION DATE 3/27/15
MOTION SEQ. NO. 001

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

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

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is decided in accordance
with the accompanying short form order and
decision.

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

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

Dated: 5/30/13

L. York, 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

LOUIS B. YORK
J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 2

-----X
CHURCH OF ST PAUL AND ST. ANDREW,

Plaintiff,

INDEX NO.
107272/2011

-against-

DECISION
UNFILED JUDGMENT

ZURICH AMERICAN INSURANCE COMPANY
Defendant.

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-----X

YORK, J.:

Movant-defendant Zurich American Insurance Company moves for summary judgment, dismissing the plaintiff's declaratory judgment action herein. Plaintiff, Church of St. Paul and St. Andrew, a Methodist Church demands judgment that defendant be directed to defend and indemnify plaintiff in a personal injury lawsuit brought by Ines Jimenez in Supreme Court, Bronx County. Defendant contends that the contract of insurance issued by defendant to the New York Conference of the United Methodist Church, and applicable to plaintiff, contains obligations of timely notice on the part of the insured that plaintiff failed to observe, thus breaching the contract and absolving the defendant of any further performance.

It is undisputed that on September 13, 2007 at approximately 1:00 p.m., Ines Jimenez, a customer of the plaintiff's on site food bank for the needy, was reported to the plaintiff's director of social services, Holly Park, to have fallen on the plaintiff's basement floor. Ms. Park personally observed Ms, Jimenez seated, breathing deeply, and holding her arm. A family member accompanying her handed Ms. Park a cell phone and asked her to call for an ambulance. In response to that call, EMT personnel arrived within single digit minutes, briefly examined Ms. Jimenez and escorted her to the ambulance. Ms. Jimenez and her companion both reported

to Ms. Park, in response to her inquiry, that the former had fallen while walking across the waiting area, hurting her arm. A report of this incident was reduced to writing and filed by Ms. Park, and entered into an incident report log. No action was taken by plaintiff in regard to the foregoing. No inquiries were made, no investigation conducted, and no notice conveyed to the defendant (See affidavit of Holly Park, sworn to on January 17, 2013, annexed to the plaintiff's affidavit in opposition).

On June 3, 2008, plaintiff was served with process in the cause of action for personal injury commenced by Ines Jimenez in the Bronx County Supreme Court. The affidavit of service sets forth personal service made on Danton Bankay, the plaintiff's building manager at the time. Mr. Bankay, now relocated to Kyle, Texas, on inquiry, has no recollection of the matter. A summons was also served on Doreen Wohl, director of the food bank conducted at the church. Ms Wohl recollects only that she gave the summons to someone in the church office (answer to interrogatory no. 9 annexed as Exhibit "B" to defendant's supporting affirmation of Steven D. Cantarutti dated December 12, 2012). No follow-up was undertaken, no report was made to the defendant, and, apparently and surprisingly, no advice was sought from legal counsel.

On February 24, 2009, the plaintiff received a letter from the lawyers representing Ines Jimenez in her personal injury case, advising plaintiff that a default judgment would be entered if, in 10 days, no one responded on plaintiff's behalf. Three months thereafter, this letter was sent to defendant, approximately four years after the incident.

Plaintiff's rebuttal to the instant motion is that it had a good faith belief that no liability had been occasioned by Ms. Jimenez's fall, thus excusing their failure to notify. In *Tower Ins. Co. of N.Y. v Jason John Realty Corp.*, 60 AD3d 418,419 [1st Dept 2009]), the insured, the owner-

manager of an apartment complex, received a telephone call from the police that one of his tenants had fallen down the stairs of the complex (*id.*). The insured had, that same day, observed, that a section of the handrail was missing from the place in the stairs where the tenant had fallen (*id.*). Under these circumstances, it was unreasonable for the insured to believe that there was no likelihood of the tenant making a claim and to wait five months before notifying the insurer (*id.*).

An insured's failure to comply with notice requirements within a reasonable period of time leaves unsatisfied a condition precedent to performance under the contract which, "as a matter of law, vitiates the contract" (*Great Canal Realty Corp. v. Seneca Ins. Co., Inc.*, 5 NY3d 742 [2005] [citation omitted]). The court recalled its prior circumstantial exception to this rule where the insured has "a good-faith belief of non-liability" (*id.*, at 743-44)[citation omitted]). However, such belief must be "reasonable under all the circumstances and it may be relevant on the issue of reasonableness, whether and to what extent, the insured has inquired into the circumstances of the accident or occurrence" (*id.*) [Citation omitted] . Moreover, it is the insured's burden to establish the reasonableness of its good faith belief (*id.*).

It is clear that, having waited to first report the underlying incident of Ms. Jimenez's injury to defendant for more than 20 months, and more than one year from the time of the first service of a summons based on the same incident, that, plaintiff has failed to raise a triable issue of fact that failure of notice to the defendant was in any way reasonable. In all that time there was no investigation nor inquiry into the incident, simply total neglect.

Accordingly, the defendant's motion for summary judgment is granted and the complaint is dismissed.

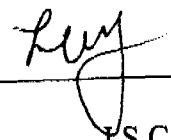
Accordingly, it is

ORDERED and ADJUDGED that the defendant's motion for summary judgment dismissing the complaint is granted, and it is further

ORDERED and ADJUDGED that the complaint is dismissed.

Dated: 5/30/13

Enter:



J.S.C.

LOUIS B. YORK
J.S.C.

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