Time Warner NY Cable LLC v Nova Cas. Co.
2013 NY Slip Op 32184(U)
September 11, 2013
Sup Ct, New York County
Docket Number: 651419/11
Judge: Barbara Jaffe
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: BARBARA JAFFE J.S.C. Justice — PART 12

Index Number : 651419/2011
TIME WARNER NY CABLE
vs.
NOVA CASUALTY COMPANY
SEQUENCE NUMBER : 002
SUMMARY JUDGMENT

INDEX NO. 651419/11
MOTION DATE ______
MOTION SEQ. NO. 002

The following papers, numbered 1 to ____, were read on this motion to/for S/J

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 ACCOMPANYING DECISION / ORDER

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

Dated: SEP 11 2013

______, J.S.C.
BARBARA JAFFE
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

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 12

---x

TIME WARNER NY CABLE LLC and
SMITH McCORD, INC.,

Plaintiffs,

- against -

NOVA CASUALTY COMPANY,

Defendant.

---x

Index No. 651419/11

Mot. seq. nos. 02, 03

DECISION AND ORDER

BARBARA JAFFE, J.:

For plaintiff:
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Defendant moves pursuant to CPLR 3212 for an order granting it summary judgment dismissing the complaint. Time Warner NY Cable LLC (plaintiff) opposes. Plaintiff also moves for an order amending the caption to add Road Runner HoldCo LLC (Road Runner) as a plaintiff, and for an order granting it summary judgment declaring that defendant has a duty to defend and indemnify it and RoadRunner. Defendant opposes.

I. BACKGROUND

By contract dated July 30, 2008, Road Runner hired Smith McCord Inc. (Smith McCord) to perform work at the Time Warner Cable Regional Data Center Project at 5120 Broadway in Manhattan. The contract requires all contractors and subcontractors doing business with plaintiff to provide evidence of various types of insurance coverage and to name plaintiff as an additional insured by policy endorsement. (NYSCEF 13-1).

On April 20, 2009, Smith McCord subcontracted with Joval Paint Corp. (Joval) for painting services. While the subcontract requires Joval to provide Smith McCord with coverage as an additional insured, it contains no provision requiring it to procure coverage for plaintiff as an additional insured. (NYSCEF 13-5).

Joval obtained a general liability insurance policy from defendant. The policy requires that Joval "immediately send [defendant] copies of any demands, notices, summonses or legal papers received in connection with the claim or 'suit.'" (NYSCEF 13-17). The policy also contains an endorsement which provides in part:

> A. Section II – Who Is An Insured is amended to include as an insured any person or organization for whom you are performing operations when you and such person or organization have agreed in writing in a contract or agreement that such person or organization be added as an additional insured on your policy.

(NYSCEF 13-18). "You" and "yours" are defined as "the Named insured shown in the declarations." (NYSCEF 13-17). This includes "any other person or organization qualifying as a Named insured under this policy." (*Id.*).

On April 23, 2009, Joval employee Frank Perez was injured when, while working at the Time Warner Project site, he fell through an opening where two steps had been removed. (NYSCEF 13-7). On or about October 15, 2009, Perez commenced a personal injury action, *Frank Perez v Time Warner NY Cable LLC*, Index No. 114472/09, in Supreme Court, New York County. (NYSCEF 13-9). By letter dated December 9, 2009, plaintiff tendered to defendant its defense in the *Perez* action based on Joval's contractual obligation to indemnify it and procure additional insurance coverage for it. (*Id.*). Defendant received the notice on December 15, 2009. (NYSCEF 13).

Specialty Claims Management (SCM), third party claim administrator for defendant, commenced an investigation into whether the notice was timely filed and determined that Joval was not contractually required to procure additional insured coverage for plaintiff and that plaintiff's notice to defendant of the *Perez* action was untimely. Thus, by letter dated Jan 14, 2010, on behalf of defendant, SCM denied plaintiff coverage. (NYSCEF 13).

On May 25, 2011, Joval filed a complaint against defendant, Perez, plaintiff, and Smith McCord, seeking a declaration that defendant is obligated to defend and indemnify it in the *Perez* action. (NYSCEF 13-19). On July 20, 2011, defendant answered, asserting as an affirmative defense that Joval breached the notice requirement set forth in the policy. (NYSCEF 13-20). Thereafter, Smith McCord and plaintiff asserted cross-claims against defendant, to which defendant answered, asserting as an affirmative defense that plaintiff does not qualify as an insured under defendant's policy and that plaintiff breached the notice conditions of the policy. (NYSCEF 10, 11).

By decision and order dated May 16, 2012, the justice previously assigned to this part granted Nova's motion for an order dismissing Joval's complaint to the extent of declaring that defendant had no duty to defend and/or indemnify Joval in the underlying *Perez* action, and severed the cross claims asserted by Smith McCord and plaintiff as against defendant and continued them in this action. (NYSCEF 23).

By stipulation dated September 5, 2012, Smith McCord discontinued its claim against defendant. (NYSCEF 26).

II. DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

A party seeking summary judgment must demonstrate *prima facie,* that it is entitled to

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judgment as a matter of law, by presenting sufficient evidence to negate any material issues of fact. (*Forest v Jewish Guild for the Blind*, 3 NY3d 295, 314 [2004]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). If the movant meets this burden, the opponent must offer admissible evidence to demonstrate the existence of factual issues that require a trial. (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). If the movant does not meet this burden, the motion must be denied, regardless of the sufficiency of the opposition. (*Winegrad,* 64 NY2d at 853). A defendant moving for summary judgment must negate, *prima facie*, an essential element of the plaintiff's cause of action. (*Rosabella v Metro. Trans. Auth.*, 23 AD3d 365, 366 [2d Dept 2005]).

A. Plaintiff's qualification as an additional insured

1. Relevant law

Persons other than the named insured who are covered by an insurance policy are "additional insureds." (70 NY Jur 2d Insurance § 1628). Status as an additional insured may be granted either by "a specific endorsement expressly naming the individual or entity as an additional insured on the policy or by a blanket additional insured endorsement which provides coverage to a limited category of individuals or entities without having to be expressly identified." (9 Lee Russ, *et. al.*, Couch on Insurance 3d § 126:7 [2012]).

A purported additional insured, like the insured, bears the burden of proving that a policy exists and that the loss is within the coverage of the policy. (*Tribeca Broadway Assoc., LLC v Mount Vernon Fire Ins. Co.*, 5 AD3d 198, 200 [1st Dept 2004]; *see generally* Couch on Insurance 3d § 254:11). The party will not be entitled to coverage if it is not named as an insured or an additional insured on the face of the policy. (*Mount Vernon*, 5 AD3d at 200). In determining

whether parties are covered by a policy as additional insureds, courts generally look to the "plain meaning" of the policy's terms. (*AB Green Gansevoort, LLC v Peter Scalamandre & Sons, Inc.*, 102 AD3d, 425, 426 [1st Dept]).

"Additional insured coverage does not exist under a liability insurance policy when the policy provides for such coverage only if required by written contract, and no such contract exists at the time of the accident giving rise to the personal injury action against the claimants ." (70 NY Jur 2d Insurance § 1628; *see also AB Green Gansevoort, LLC*, 102 AD3d 425; *City of New York v Nova Casualty Co.*, 104 AD3d 410 [1st Dept 2013]; *Natl. Abatement Corp. v Natl. Union Fire Ins. Co. of Pittsburg, PA*, 33 AD3d 570 [1st Dept 2006]; *Linarello v City Univ. Of N.Y.*, 6 AD3d 192 [1st Dept 2004]). The existence of a legally binding obligation on the part of the insured to procure additional insured status for a third party, in and of itself, does not confer additional insured status upon that third party in the absence of a written agreement between them. (*Linarello*, 6 AD3d at 195). And, that an unsigned contract may be enforceable under state law "has no bearing on whether there is a 'written contract' pursuant to the policy endorsement." (*Natl. Abatement Corp.*, 33 AD3d at 571). Additionally, even where a contract between the insured and the party seeking additional insured status exists, "contract language that merely requires the purchase of insurance will not be read as also requiring that a contracting party be named as an additional insured." (*Trapani v 10 Arial Way Assoc.*, 301 AD2d 644, 647 [2d Dept 2003]).

2. Analysis

The insurance policy at issue in this case is a blanket policy that extends coverage to people or organizations for which the insured is performing services, but only if the insured has

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agreed in writing with such person or organization that it will be covered as an additional insured.

Several New York courts addressing identical or nearly identical provisions have read such provisions to require written contracts between the insured and the party seeking additional insured status. (*See AB Green Gansevoort.*, 102 AD3d 425; *Nova Casualty Company*, 104 AD3d 410; *Linarello*, 6 AD3d at 195). In *Linarello*, the Appellate Division, First Department, addressing language identical to that in issue here, declined to extend coverage to parties with no written contracts with the insured, reasoning it would constitute an improper rewrite of the policy. (*Id.*). The court in *AB Green Gansevoort* reached the same conclusion. (102 AD3d at 426). Thus, under New York case law the instant policy does not confer additional insured status upon plaintiff as plaintiff did not enter into such a contract with Joval.

Although the terms "you" and "yours" bring plaintiff within the policy, plaintiff never entered into a contract directly with Joval expressly stating that it would name plaintiff as an additional insured under defendant's policy. Rather, plaintiff is a third party beneficiary to the contract between Roadrunner and Smith McCord, and as the court observed in *Linarello*, this status is insufficient to confer coverage. (6 AD3d at 195). Nor would Joval's obligation to confer additional insured status on plaintiff require defendant, who did not enter into any contract with plaintiff, to provide plaintiff with coverage. (*Id.*).

Therefore, as plaintiff had not entered into a contract with Joval providing for its coverage as an additional insured, as required by the policy, the accident is not covered.

B. Breach of notice condition

Under New York law, where an insurance contract requires notice of a claim "as soon as practicable" after an occurrence, the absence of timely notice constitutes a failure to comply with

a condition precedent which, as a matter of law, vitiates the contract. (*Argo Corp. v Greater New York Mutual Ins. Co.*, 4 NY3d 332, 339 [2005]). New York courts have interpreted provisions like those set forth in the instant policy to negate coverage where unexcused delays have been as short as 31 days. (*Pandora Indus., Inc. v St. Paul Surplus Lines Ins. Co.*, 188 AD2d 277 [1st Dept 1992]; *see also Young Israel Co-Op City v Guildeone Mut. Ins. Co.*, 52 AD3d 245 [1st Dept 2008] [unexcused 40-day delay unreasonable]; *Republic New York Corp. v American Home Assur. Co.*, 125 AD2d 247 [1st Dept 1986] [unexcused 45-day delay in providing notice invalidated coverage]).

Here, plaintiff waited at least 45 days before giving notice of the *Perez* action, well beyond the amount of time ordinarily held to be unreasonable.

It was also not readily apparent to defendant upon receipt of plaintiff's notice whether or not the notice was timely filed. The *Perez* complaint tendered by plaintiff in its notice does not reflect when the complaint was initially received by plaintiff. Therefore, defendant was entitled to some delay in order to investigate whether plaintiff had timely filed and if it was otherwise covered as an additional insured under Joval's policy. Having issued its disclaimer three days after being notified of the results of its investigation, defendant did not unduly delay in disclaiming. In *Public Serv. Mut. Ins. Co. v Harlen Hous. Assoc.*, the court found that the insurer's 27-day delay in disclaiming coverage after the completion of an investigation was reasonable as a matter of law. (7 AD3d 421, 423 [1st Dept 2004]). Thus defendant's delay of only three days after receiving the results of the investigation was reasonable.

For these reasons, plaintiff is not covered as an additional insured under the Joval policy.

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III. PLAINTIFF'S MOTION

In light of the foregoing, plaintiff's motion for an order amending the caption to add its subsidiary Road Runner as an additional plaintiff and for an order granting it summary judgment declaring that defendant has a duty to defend and indemnify it and Road Runner in the *Perez* action is moot.

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that defendant Nova Casualty Company's motion for an order dismissing plaintiff Time Warner Cable LLC's complaint is granted, and the complaint is dismissed in its entirety, with costs and disbursements to said defendant as taxed by the Clerk upon the submission of an appropriate bill of costs, and the Clerk is directed to enter judgment accordingly; and it is hereby

ORDERED that plaintiff's motion for an order to amend the caption and granting it summary judgment declaring that defendant has a duty to indemnify it in the action *Perez v Time Warner NY Cable LLC*, Index No. 114472/09 is denied as moot.

ENTER:

Barbara Jaffe, JSC

DATED: September 11, 2013
New York, New York