Tower Ins. Co. of N.Y. v United Founders Ltd.
2013 NY Slip Op 32684(U)
October 24, 2013
Sup Ct, New York County
Docket Number: 152315/12
Judge: Anil C. Singh
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SUPREME COURT OF THE STATE OF NEW YORK-
NEW YORK COUNTY

PRESENT: HON. ANIL C. SINGH
SUPREME COURT JUSTICE
Justice

PART 67

Index Number : 152315/2012
TOWER INSURANCE COMPANY OF
vs.
UNITED FOUNDERS LTD.
SEQUENCE NUMBER : 001
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). _____

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 annexed memorandum opinion.

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

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

Dated: 10/24/13

HON. ANIL C. SINGH, J.S.C.
SUPREME COURT JUSTICE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 61

----------X

TOWER INSURANCE COMPANY OF NEW YORK,

Plaintiff,

-against- Index No.

UNITED FOUNDERS LTD., 702-694 ROCKAWAY AVENUE CORP. and BABU SINGH, 152315/12

Defendants.

----------X

HON. ANIL C. SINGH, J. :

Plaintiff moves for summary judgment on its declaratory judgment action for an order declaring that it has no duty to defend or indemnify defendant United Founders Ltd. (United) in the underlying personal injury suit entitled *Babu Singh v 702-694 Rockaway Avenue Corp,,* Index No. 17179/11, pending in Supreme Court, Queens County (the underlying action). United cross-moves for summary judgment.

Plaintiff issued a policy to United with an effective period from December 15, 2010 to December 15, 2011. The policy states that it will provide coverage for "those sums that the insured becomes legally obligated to pay as damages because of 'bodily injury'... caused by an 'occurrence,' which the policy defines in pertinent part as an 'accident.'" CG 00 63 04 09, p.1. The policy was issued with an endorsement that modifies the policy by limiting coverage as follows:

"COMMERCIAL GENERAL LIABILITY COVERAGE PART

'Coverage under this contract is specifically limited to those classifications codes listed in the Policy. No coverage is provided for any classification code or operation performed by the Named Insured not specifically listed in the Declarations of the Policy.

All other terms and conditions remain unchanged.'"

CG9 21 09 08 06 P. 1

The Declarations in the policy include the following classification codes and operations:

"91341 Carpentry-Interior
98305 Painting-Interior-Buildings or Structures
92338 Drywall or Wallboard Installation
98344 Paperhanging"

The policy also includes an independent contractors exclusion, which states:

" This endorsement modifies insurance provided under the following:

* * * *

"It is agreed that this policy shall not apply to 'bodily injury,' 'property damage' or 'personal injury' arising out of operations performed for any insured by independent contractors or acts or omissions of any insured in connection with his general supervision of such operations.

"All other terms and conditions remain unchanged."

CG9 21 08 08 06 P.1

On February 11, 2011, defendant Babu Singh (Singh) sustained injuries while performing work at 702 Rockaway Avenue, Brooklyn, New York (the premises). Singh was employed by a subcontractor named Apple City Construction (Apple). Defendant 702-698 Rockaway Avenue Corp. (Rockaway) is the owner of the premises, and United is the general contractor for the project. Pursuant to the contract between Rockaway and United, United was responsible for supervising the interior demolition and rehabilitation work on a four-story residential building located on the premises. Pursuant to United's contract with Apple, Apple

was responsible for demolishing partitions, and electrical and plumbing installations on the project.

On December 29, 2011, plaintiff received notice of the underlying action from United's broker, RWB Brokerage Corp., along with a copy of the underlying summons and complaint. Singh's summons and complaint alleges that United was the general contractor for the project, performed demolition work and violated sections 200, 240 and 241 of the Labor Law, resulting in Singh's personal injuries. On December 30, 2011, plaintiff acknowledged receipt of the claim and assigned liability examiner Susan Mischner (Mischner) to the claim. Plaintiff also assigned Bauer Trial Preparation, Inc. to investigate the claim. Derek Bauer (Bauer) was assigned from that office.

On January 2, 2012, Bauer interviewed Fred Pouratian (Pouratian), the principal of United, and secured a signed written statement in which Pouratian admitted that United was the general contractor for the project and that he had hired Apple to conduct work that was outside the classifications in the policy. Bauer also obtained copies of United's work permit records with the Department of Buildings indicating that United was the general contractor for the project.

Bauer attached the statements to the investigation report dated January 9, 2012, and forwarded the material to plaintiff. Mischner reviewed the report and discussed the matter with plaintiff's coverage supervisor, who decided to disclaim coverage. By letter dated January 25, 2012, plaintiff notified United of its disclaimer of coverage. The disclaimer stated that United had served as a general contractor for a project whose work was excluded under the classification limitation endorsement. In addition, plaintiff stated that the disclaimer was due to Singh performing work as an independent contractor at the time of the accident. A copy of the

disclaimer was sent to all interested parties.

Plaintiff moves for summary judgment on its declaratory judgment, claiming that it has no obligation to United, and has provided a valid disclaimer. Plaintiff refers to the relevant provisions of the policy which specifically exclude United from coverage and submits the signed statements of Pouratian, which are considered admissions. Pouratian states that, as a principal of United, he was hired by Rockaway to remove interior partitions and various installations for the purpose of reconstruction. Apple, according to him, was hired as a subcontractor to perform demolition activities at the premises. Copies of work permits allegedly confirm United's role in the project. Plaintiff also submits a copy of its disclaimer letter, claiming that it was clearly provided the cause for denial of coverage. Plaintiff avers that since United's claim did not arise from acts involving carpentry, painting, drywall or wallboard installation, or paperhanging, there was no coverage pursuant to the policy. Moreover, as stated in the disclaimer letter, a claim based on the injuries sustained by an independent contractor like Singh was explicitly excluded under the policy. Thus, plaintiff argues that it is entitled to summary judgment as a matter of law.

In opposition, United states that there is an issue as to what United did at the premises. United as a general contractor, claims that it did not actually perform the work called for in the contract and contracted the work to another entity. United avers that the policy does not provide that work not specifically listed in the declarations that is performed on behalf of the insured is not subject to coverage. United contends that it cannot be subject to denial of coverage simply because it was the general contractor.

United states that the statements made by its principal indicate that United performed no

work at the premises at the time of the injury. United asserts that this, in itself, undermines plaintiff's argument that United is subject to denial of coverage over the subject claim. United also avers that Pouratian's use of the term "demolition," which is synonymous with the work of the subcontractor Apple, i.e., the removal of interior partitions, can be read to encompass work covered by the policy. According to United, the removal of drywall is necessary before new drywall can be installed. United contends that such work could arguably be within the contemplation of classified work.

United argues that the disclaimer sent by plaintiff must be declared void because it was untimely. United states that there was an unexplained 16-day delay after the decision was made to deny coverage, as well as a 15-day delay in mailing after the letter was written. United contends that, in the absence of a reasonable explanation for the delay, plaintiff should not only have its motion denied, but United's cross motion for summary judgment, which has been brought to compel plaintiff to assume its duty to defend and indemnify United, should be granted.

In reply, plaintiff argues that United has only provided affirmations from its counsel, which is not admissible evidence in opposing summary judgment. Moreover, plaintiff argues that the statements made by Pouratian, while admissible against United, cannot be used by United to support its position. Plaintiff avers that, even if United was not directly working on the premises during the time of the accident, it had been contracted to do work not covered by its policy.

Plaintiff argues that the disclaimer was timely. According to plaintiff, the timeliness requirement does not apply when there is no coverage at all in a claim, as opposed to denial

based on a policy exclusion. In this case, plaintiff claims that its disclaimer was based on both the lack of any coverage and a policy exclusion. Plaintiff, nevertheless, argues that, in any case, the disclaimer was not untimely due to its investigations. Plaintiff contends that it sent the letter 15 days after deciding to disclaim and that this is not an untimely period.

Rockaway opposes plaintiff's motion for summary judgment, contending that it is premature, and that outstanding discovery, including deposition of all parties, is necessary before this matter is to be decided.

"Summary judgment must be granted if the proponent makes a 'prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issue of fact,' and the opponent fails to rebut that showing." *Brandy B. v Eden Cent. School Dist.,* 15 NY3d 297, 302 (2010), quoting *Alvarez v Prospect Hosp.,* 68 NY2d 320, 324 (1986).

Allegations from the parties indicate a conflict over the interpretation of the policy. "The inquiry is whether the allegations fall within the risk of loss undertaken by the insured." *BP A.C. Corp. v One Beacon Ins. Group,* 8 NY3d 708, 714 (2007).

"[I]f the allegations interposed in the underlying complaint allow for no interpretation which brings them within the policy provisions, then no duty to defend exists [citations omitted] 'An insurer can be relieved of its duty ... if it establishes as a matter of law that there is no possible factual or legal basis on which it might eventually be obligated to indemnify its insured under any policy provision [citations omitted].'"

Atlantic Mut. Ins. Co. v Terk Tech. Corp., 309 AD2d 22, 29 (1st Dept 2003).

Plaintiff has alleged that it denied coverage under United's policy because the demolition work performed on the premises was not classified work. United asserts that it cannot be denied

coverage simply because it was a general contractor, that a subcontractor was performing the work which resulted in the accident, and that it is not conclusive that the work involved was not classified according to the terms of the policy. Plaintiff also denied coverage because the injured party was subject to the independent contractor exclusion in the policy. This has not been challenged by United.

"An insurer's 'notice of disclaimer must promptly apprise the claimant with a high degree of specificity of the ground or grounds on which the disclaimer is predicated. '" *Estee Lauder Inc. v Onebeacon Ins. Group, LLC,* 62 AD3d 33, 35 (1st Dept 2009), quoting *General Acc Ins. Group v Cirucci,* 46 NY2d 862, 864 (1979). "Of course, an insurer may reserve the right to disclaim on such different or alternative grounds as it may later find to be applicable."

> "However, '[a]n insurer must give written notice of disclaimer on the ground of late notice as soon as is reasonably possible after it learns of the accident or of grounds for disclaimer of liability and failure to do so precludes effective disclaimer.'"

Estee Lauder, 62 AD3d at 35, quoting *Matter of Firemen's Fund Ins. Co. of Newark v Hopkins,* 88 NY2d 836, 837 (1996).

The two grounds for denial of coverage are that the type of work performed prior to the accident was not covered under the policy, and that the injured individual was an independent contractor, which excluded coverage under the policy's independent contractor exclusion. The independent contractor exclusion is a valid ground for denial. There is no evidence indicating that Singh was not an independent contractor, and in its papers, United has chosen not to challenge this ground. The court holds that this exclusion is an adequate ground for denial. The other ground need not be considered as to its sufficiency.

The remaining issue concerns the timeliness of the disclaimer. It is held that disclaimers issued two months or longer after an insurer receives first notice are timely, when the insurer is performing an investigation into the claim. *See Stabules v Aetna Life & Cas. Co.*, 226 AD2d 138, 139 (1st Dept 1996). Here, plaintiff undertook an investigation to determine the validity of the claim it received from United. The court finds that, considering the circumstances, a period of approximately two weeks was not unreasonable for plaintiff to send the disclaimer, after a significant investigation was timely completed.

The court finds that plaintiff has provided a timely and valid disclaimer to its insured, United, and is entitled to its relief.

Accordingly, it is

ORDERED that plaintiff Tower Insurance Company of New York's motion for summary judgment is granted; and it is further

ADJUDGED and DECLARED that plaintiff Tower Insurance Company of New York has no duty to defend or indemnify defendant United Founders Ltd. in the underlying action entitled *Babu Singh v 702-694 Rockaway Avenue Corp,* Index No. 17179/11, pending in Supreme Court, Queens County; and it is further

ORDERED that defendant United Founders Ltd.'s cross motion for summary judgment denying the aforesaid declaration and compelling plaintiff Tower Insurance Company of New York to defend and indemnify said defendant in the aforesaid underlying action, is denied.

DATED: Oct 24, 2013 ENTER:

Anil C. Singh