European Bldrs. & Contrs. Corp. v Arch Speacialty Ins. Co.
2014 NY Slip Op 31695(U)
June 23, 2014
Sup Ct, NY County
Docket Number: 150163/2012
Judge: Joan A. Madden
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 11

----------X INDEX NO. 150163/2012

EUROPEAN BUILDERS & CONTRACTORS CORP.,

Plaintiff,

-against-

ARCH SPEACIALTY INSURANCE COMPANY,

Defendants.

----------X

JOAN A. MADDEN, J.:

Defendant Arch Specialty Insurance Company ("Arch") moves for an order granting it summary judgment declaring that it has no duty to defend or indemnify plaintiff European Builders & Contractors Corp. ("European") in an action captioned Jozef Lezniak v. BSW LLC; Index No. 1547/2009, pending in the Supreme Court, Kings County (hereinafter "the underlying action"). European opposes the motion, which is denied for the reasons below.

Background

In the underlying action, plaintiff Jozef Lezniak ("Lezniak") seeks to recover damages for personal injuries he allegedly sustained on March 12, 2008, while using an electrically powered handheld tool during the course of construction work at 29 Lawrence Avenue, Brooklyn, New York, which is owned by BSW LLC ("BSW"). At the time of the accident, Lezniak was employed by European, which had been hired by BSW to construct a three-family house on the premises. The agreement between BSW and European dated March 15, 2005, required European to obtain liability insurance and to defend and indemnify BSW in any lawsuit resulting from the work covered by the agreement.

On the date of the accident, European had a commercial general liability insurance policy through Arch Specialty Insurance Company ("Arch") bearing policy number GAP002066700, effective March 29, 2007 to March 29, 2008 (hereinafter "the Policy"). The Policy's liability coverage part covers "those sums that the insured becomes legally obligated to pay as damages because of 'bodily injury'... caused by an 'occurrence.' " Section I, ¶1, (a)(b). An occurrence is defined in pertinent part as "an accident." Section V, ¶14.

The policy also contains the following notice provision:

> 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.

Secion IV, ¶ 2, (a).

On the date of the accident, the manager of BSW notified European's president George Roth ("Roth") that Lesniak had sustained a cut to his hand. In his sworn affirmation, Roth avers that the day after the accident he telephoned European's insurance agent, Yoel Braun ("Braun") and informed him of the accident, and that Braun told him that he should only notify European's Workers Compensation carrier, AIG-Chartis and no other carrier and that, as a result, he only notified AIG-Chartis and no other carrier. Roth Aff., ¶'s 6, 7. According to Roth, he "was aware that Lesniak was European's employee and Lesniak's exclusive remedy against his employer was through a workers' compensation claim." Id, ¶ 12. He further states that:

> There was otherwise no indication to me that a liability claim may

> be brought against European....I was merely told that Lesniak sustained a cut on his hand and was taken to a local hospital. I was never made aware that Lesniak sustained a severe or serious injury that would put me on notice that a liability or indemnification claim would be brought against European. I was neither aware that Lesniak ever hired an attorney to commence an action against BSW, nor that such action was ever commenced. I similarly was never notified by BSW that it was making a claim against European Builders for indemnification. I only first learned of [the underlying action] when my company, European Builders received the denial of claim letter from Arch on June 2, 2009.

Id.,¶ 13.

In his sworn affirmation, Braun confirms that he "advised Mr. Roth that only notice to European Builder's workers' compensation carrier, AIG-Chartis, was required without additional notice to any other insurance company." Braun Aff., at ¶4. According to Braun he told Roth that "the industry standard is to only notify the workers' compensation carrier and not the general liability carrier when you are dealing with a non-serious injury to an employee [and that he] explained that general liability carriers would be flooded with claims if they were notified of every minor incident regarding an insured's employee." Id. at ¶5.

On January 22, 2009, Lezniak commenced the underlying action to recover money damages for injuries he allegedly sustained as a result of the accident, which included multiple fractures to the wrist and hand in addition to severing tendons, ligaments and nerves. The complaint alleges that Lezniak was injured on the premises due to BSW's negligence in failing to maintain a safe construction site and other violations of the Labor Law.

BSW's attorneys forwarded a copy of a third-party summons and complaint to Arch and European on May 21, 2009, impleading European as a third-party defendant, which demanded relief that European indemnify BSW from any judgment or settlement it may be required to pay

and that European compensate BSW for counsel fees and costs. BSW's insurance carrier, Quaker Special Risk, subsequently forwarded a copy of the complaint in the underlying action to both European and Arch on December 17, 2009, demanding that Arch defend and indemnify BSW in the underlying action, pursuant to the construction contract between BSW and European. In a letter dated June 2, 2009, Arch notified European that it was disclaiming coverage in the underlying action because European failed to provide timely notice of the occurrence.

European then commenced this action on February 3, 2012, seeking a declaratory judgment that Arch is required to indemnify and defend European in the Third-Party Action and reimburse European for all counsel fees. Arch now moves for summary judgment declaring that it has no such obligation for lack of timely notice pursuant to Section IV ¶2(a) of the policy.

Arch argues that as the undisputed record shows that European knew about the accident when it occurred on March 12, 2013, and Arch was not made aware of the claim until 14 months later when BSW forwarded a copy of the summons and complaint, the delay in its notification precludes coverage as such a period is not a practicable time under New York law and does not comport with the notice provision of the policy. Arch further argues that European's asserted belief that Workers' Compensation was Lezniak's sole remedy does not provide a reasonable basis for failing to timely notify it of the accident, particularly as European has entered into a contract with BSW requiring European to indemnify BSW for incidents like the one involving Lezniak. Arch also contends that notice to an insurance broker does not constitute notice to Arch.

Arch alternatively argues that plaintiff's claims are precluded by various exclusions in the Policy, including an exclusion for "Workers' Compensation and Similar Laws," which excludes coverage for "any obligation of the insured under Workers' Compensation Laws."

Policy, Section I, ¶2 (d). Arch also maintains that the Employer's Liability Exclusion bars claims, like the instant one, which are related to a workplace injury. See Policy, Section I, ¶2 (e). Lastly, Arch asserts that the Policy does not provide coverage for a breach of contract claim. See Policy, Section I, ¶2 (b).

In opposition, European argues that there was a reasonable basis for its failure to notify Arch based on its insurance agent's instruction that notice to other insurance carriers was not necessary and its understanding that Workers' Compensation was the exclusive remedy available to Lezniak. European claims that it otherwise had no indication that a liability claim would be brought against it since Roth was never made aware that Lezniak sustained a serious injury. In addition, European argues that it was unaware that Lezniak had commenced an action against BSW until it received the denial of claim letter from Arch in June of 2009.

European also argues that the exclusions for Workers' Compensation and similar laws do not apply since Mr. Lezniak is suing BSW on tort claims and has already obtained Workers' Compensation relief. As for the Employer's Liability exclusion, European maintains that it falls within the exception to that provision which states, "[t]his exclusion does not apply to liability assumed by the insured under an 'insured contract.' " Section I, ¶2, (e). An "insured contract" is defined in relevant part as "[t]hat part of any other written contract or agreement pertaining to your business...under which you assume the tort liability of another party to pay for 'bodily injury' or 'property damage' to a third person or organization." Section V, ¶10, (f). Because the contract between BSW and European required European to defend and indemnify for all liability resulting from bodily injury and Lezniak is seeking relief from such injuries, European argues that its agreement with BSW constitutes an "insured contract" under the policy and therefore,

coverage is not barred.

Discussion

On a motion for summary judgment, the proponent "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case . . ." Winegrad v. New York Univ. Med. Center, 64 N.Y.2d 851, 852 (1985). Once the proponent has made this showing, the burden of proof shifts to the party opposing the motion to produce evidentiary proof in admissible form to establish that the material issues of fact exist which require a trial. Alvarez v. Prospect Hospital, 68 N.Y.2d 320, 324 (1986).

It is well established that when, as here, "a contract of primary insurance requires notice 'as soon as practicable' after an occurrence, the absence of timely notice of an occurrence is a failure to comply with a condition precedent which, as a matter of law, vitiates the contract." Argo Corp v. Greater New York Mut. Ins. Co., 4 N.Y.3d 332, 339 (2005). The rule, which requires "strict compliance with the contract, protects the carrier against fraud and collusion; gives the carrier an opportunity to investigate claims while evidence is fresh; allows the carrier to make an early estimate of potential exposure and establish adequate reserves and gives the carrier an opportunity to exercise early control of claims, which aids settlement." Id.

However, it is also widely recognized that "there may be circumstances that excuse a failure to give timely notice, such as where the insured has a 'good-faith belief of nonliability,' provided that belief is reasonable. . . . 'under all the circumstances.' " Great Canal Realty Corp. v. Seneca Ins. Co., Inc., 5 N.Y.3d 742, 743 (2005) (citing Security Mut. Ins. Co. of N.Y. v. Acker-Fitzsimons Corp., 31 N.Y.2d 436, 441 (1972). "The existence of such a 'good-faith

belief,' as well as the question of whether the belief was reasonable, are ordinarily questions for the fact-finder." Argentina v. Otsego Mut. Fire Ins. Co., 86 N.Y.2d 748, 750 (1985); See also Mighty Midgets, Inc. v. Centennial Ins. Co., 47 N.Y.2d 12, 19 (1979).

The mere existence of an excuse, however, does not necessarily warrant a trial determination and may be deemed unreasonable as a matter of law. It is clear from existing authority that an insured's reliance on Worker's Compensation as an employee's exclusive remedy, without more, will not survive a motion for summary judgment. See Macro Enterprises, Ltd. v. QBE Ins. Corp, 43 A.D.3d 728 (1st Dep't 2007); National Union Fire Ins. Co of Pittsburgh, PA v. Great Am. E&S Ins. Co., 86 A.D.3d 425 (1st Dep't 2011). Similarly, the fact that an insured notifies its insurance broker or agent alone will not justify an insured's failure to provide notice directly to the insurer absent a principal-agent relationship between the insurer and the broker or agent. Castlepoint Ins. Co. v. Mike's Pipe Yard & Bldg. Supply Co. of N.Y., 101 A.D.3d 504 (1st Dep't 2012); Tower Ins. Co. of N.Y. v. Mike's Pipe Yard and Bldg. Supply Corp., 35 A.D.3d 275 (1st Dep't 2006). For any other excuse raised, "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." Security Mut. Ins. Co., 31 N.Y.2d at 441.

Here, Arch has made a prima facie case entitling it to summary judgment based on the notification provision of the policy and evidence that it did not receive notice of the accident until approximately 14 months after it occurred. Deso v. London &Lancashire Indem. Co., 3 N.Y.2d 127 (1957) (fifty-one day delay); Power Auth. of State of New York v. Westinghouse Elec. Corp., 117 A.D.2d 336 (1st Dep't 1986) (fifty-three day delay); SSBSS Realty Corp. v. Pub. Serv. Mut. Ins. Co., 253 A.D.2d 583 (1st Dep't 1998) (ninety-one day delay).

The remaining issue is whether European has provided sufficient evidence of a good faith belief of non-liability to controvert this showing. As indicated above, reliance on Workers' Compensation as the employee's exclusive remedy is insufficient. Macro Enterprises Ltd., 43 A.D.3d 728. However, the record contains evidence that European's belief was premised on its insurance agent's specific instruction against notifying any other insurance carrier and the agent's assurance that such conduct was an industry standard. Under similar circumstances, the First Department has found that the insured demonstrated a reasonable and good-faith belief in non-liability. See Tesler v. Paramount Ins. Co., 220 A.D.2d 334 (1st Dep't 1995) (holding that "plaintiffs demonstrated a good-faith and reasonable belief in their non-liability under the Worker's Compensation Law, *their insurance agent having advised them to that effect*, and there otherwise having been no indication that a liability claim would be brought against them" (emphasis added)). However, Tesler, unlike the indemnification issue here, did not involve circumstances where an insured had a contractual agreement to defend and indemnify an owner or contractor.

At the same time, it cannot be said under these circumstances, that European's failure to inquire based on its contractual obligations owed to BSW to defend and indemnify was unreasonable as a matter of law. In this connection, Arch's reliance on National Union Fire Ins. Co of Pittsburgh, PA v. Great Am. E&S Ins. Co. National Union Fire Ins. Co., supra, which involved a contractual agreement, like the one involved here, in which the insured assumed liability for another party, is misplaced. In fact, in National Union, the First Department, in finding that the insured lacked a reasonable belief in its non-liability as a matter of law, specifically noted that there was no evidence that the insurance agent advised the insured as to its

non-liability. Id. at 427. Moreover, in National Union, the court noted that the injured party was taken by ambulance to the hospital and remained out of work for a month. In contrast, in the instant case, the record indicates that the European knew only that injured party, Lesniak, cut his hand and was taken to a local hospital, but was unaware that Lesniak was claiming that he suffered more serious injuries until European received notice that Arch was disclaiming coverage. Absent further information as to European's knowledge as to the extent of Lesniak's injuries or that Lesniak was out of work, the record is insufficient to establish that European lacked a good faith basis for its belief of non-liability. Accordingly, Arch's motion for summary judgment based on European's failure to provide timely notice is denied.

Arch alternatively argues that even if no duty to notify Arch was triggered, the exclusions in the Policy preclude coverage. When, as here, an insurer seeks relief from coverage under the exclusion provision of an insurance contract, the insurer bears the burden of proving the exclusion applies. Continental Cas. Co. v. Rapid-American Corp., 80 N.Y.2d 640, 652 (1993). Moreover, exclusions are strictly construed to give an interpretation favorable to the insured. Seaboard Sur. Co. v. Gilette Co., 64 N.Y.2d 304, 311 (1984).

Under this standard, Arch has not shown that the exclusions at issue apply. With respect to the Workers' Compensation and Similar Laws exclusion, Lezniak has already obtained Workers' Compensation benefits, which were covered by the workers' compensation insurance. Therefore, it cannot be said that the tort claims against BSW constitute an "obligation of the insured under a workers' compensation . . . law." Policy, Section 1, ¶2, (d).

As for the Employers' Liability Exclusion, while the Policy excludes liability for workplace injuries, it also specifically provides that "[t]his exclusion does not apply to liability

assumed by the insured under an 'insured contract.'" Policy, Section I, ¶2, (e). The Policy defines "insured contract" in Section V, 10(f) as "[t]hat part of any other written agreement pertaining to your business . . . under which you assume the tort liability of another party to pay for 'bodily injury' or 'property damage' to a third person or organization. Tort liability means a liability that would be imposed by law in absence of any written contract or written agreement." Id. Section V, ¶10, (f). Under this definition, European Builders and BSW is an "insured contract" as defined by the Policy, since it is a written agreement relating to European Builder's business, ie. Construction, in which European Builder's assumed the tort liability of another party, that is BSW, for the injury or property damage to a third person, here, Jozef Lesniak. Accordingly, the Employers' Liability Exclusion does not apply.

Finally, exclusion for contractual liability under Section I, ¶ 2 (b) is inapplicable, as European seeks coverage and defense for European and/or BSW for the bodily injuries sustained by Lezniak. In this connection, the Policy specifically provides that the contractual liability "exclusion does not apply to liability for damages ...assumed in a contract or agreement that is in 'an insured contract' [provided that] ...the 'bodily injury'... occurs subsequent to execution of the contract or agreement." See Policy, Section I, ¶ 2 (b)(2).

Accordingly, as Arch has not met its burden of demonstrated that the exclusions on which it relies preclude coverage, summary judgment based on these exclusions is denied.

Conclusion

In view of the above, it is

ORDERED that the motion for summary judgment by defendant Arch Specialty Insurance Company is denied and it is further

ORDERED that the parties shall appear for a status conference in Part 11, room 351, 60 Centre Street, New York, NY on August 7, 2014 at 9:30 am.

DATED: June 23, 2014.

HON. JOAN A. MADDEN
J.S.C.

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