SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 36

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200 WEST END AVENUE CONDOMINIUM, CARAN PROPERTIES, INC. and ADMIRAL INDEMNITY COMPANY,

Plaintiffs,

-against-

Index № 150426/12

MT. HAWLEY INSURANCE COMPANY,

Motion Seq. 001

Defendant.

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DORIS LING-COHAN, J.:

This is an insurance dispute in which defendant Mt. Hawley Insurance Company (Mt. Hawley) moves for an order, pursuant to CPLR 3212, granting summary judgment in its favor and dismissing the complaint of plaintiffs 200 West End Avenue Condominium (West End Condo), Caran Properties, Inc. (Caran) and Admiral Indemnity Company (Admiral), and declaring that Mt. Hawley is not obligated to defend or indemnify West End Condo or Caran in connection with an underlying personal injury action. Plaintiffs, who commenced this action for a judicial declaration that Mt. Hawley has such obligation, oppose the motion.

In the underlying personal injury action, currently pending under New York County Index No. 115400/08, Thomas J. Bedson (Bedson) and his wife allege that, on July 21, 2008, while working as an electrician on a construction project, a 27-story residential condominium building located at 200 West End Avenue in Manhattan and known as 200 West End Ave Condominium (the Building), he was caused to slip and fall while descending a wet, slippery interior staircase often used by project workers (the underlying action, or Bedson litigation, as appropriate). Bedson commenced his action on or about November 17, 2008, naming as defendants, three

entities involved in the construction project, nonparties herein, The Clarett Group, LLC (Clarett), the real estate developer for the project, 200 WEA Sub Co., LLC (WEA SubCo), a related entity, and Bovis Lend Lease, Inc. (Bovis), the construction manager for the project. On or about February 23, 2009, WEA SubCo, Clarett and Bovis impleaded Bedson's employer, S.J. Electric, Inc., into the underlying action. After a period of discovery, Bedson served and filed a supplemental summons and amended complaint, in or about August 2010, adding West End Condo, the owner of the common areas upon completion of the project, and the property manager, Caran, and as direct defendants.

A disagreement between insurance carriers for West End Condo and Caran - - Admiral and Mt. Hawley - - regarding the latter's obligation to defend and indemnify these insureds, with respect to the underlying action, resulted in this declaratory judgment action. It is undisputed that Admiral issued a general liability policy, under policy number 21-2-10940-31-09, which covered the period of July 2, 2008 to July 2, 2009 (Admiral Policy), Mt. Hawley issued a general liability policy, under policy number MGL0153084, which covered the period of December 5, 2007 to December 5, 2008 (Mt. Hawley Policy), and that both policies were in effect at the time of Bedson's accident. It is also undisputed that Admiral was promptly notified about the underlying action and accepted the tendered claims. Mt. Hawley, which was not notified at or about the same time as Admiral, sent a disclaimer letter in September 2011.

In support of its summary judgment motion, Mt. Hawley submits copies of the pleadings in this action and some of the pleadings for the underlying action, as well as copies of interrogatories with responses, letters, emails, and faxed communications between the various parties, including nonparty Bollinger (the insurance broker alleged to have procured the policies),

the Mt. Hawley Policy, the disclaimer letter, and the deposition transcript of Caran employee and property manager for the Building, Molly Shifrin (Shifrin).

Mt. Hawley also supports its motion with a brief history of the two actions. As relevant here, upon receipt of process in the Bedson litigation, Shifrin, the Building's property manager, notified Bollinger, the insurance broker alleged to have processed the policies, by email dated August 16, 2010, that West End Condo and Caran had been added as defendants in that action. On August 17, 2010, Bollinger sent a reply email stating: "Molly, we are putting Admiral on notice of this claim. They are the carrier for 200 West End Ave and they will also defend you. I will keep you informed" (Mt. Hawley's exhibit O). By letter dated August 19, 2010, Admiral acknowledged to Bollinger that it had received the supplemental summons and amended complaint for the Bedson litigation and that it had assigned claim No. 1023707 to the liability file. Admiral had also sent a letter to "200 West End Ave. Condominium c/o Caran Properties, Inc." on August 20, 2010, confirming tender of the claim, and providing contact information for the law firm assigned to defend their interests (*id.* at exhibit Q). The assigned law firm served a joint answer on behalf of West End Condo and Caran, on or about September 27, 2010, and participated in discovery proceedings. Despite these actions, no one notified Mt. Hawley, at or about that time, of the insureds' involvement in the Bedson litigation.

According to Mt. Hawley, the first notice it received was on August 25, 2011, in the form of a "faxed" transmission from Bollinger to the Mt. Hawley claims department. The transmittal cover page identified the insured as "200 West End Avenue Condominium," the date of loss as "7/21/2008," the claimant as "Thomas Chris Bedson," and the policy number as "MGL0153084" (*id.* at exhibit N). The accompanying cover letter directs Mt. Hawley's claims department to see

an attached form, and requests information as to the assigned claim number and adjuster. The attached form, consisting of a one-page ACORD form, identifies the name and address of the insured as "200 West End Ave Condominium // c/o Caran Properties Inc. // 148 Madison Avenue, 8th Fl. // New York NY 10016" (*id.*). The ACORD form provides a description of the occurrence as "Bedson, Thomas & Chris Summons & Complaint allegation. [P]laintiff an employee of a sub-contractor alleges injuries while working on the insured's premises," and the location of the occurrence as "200 West End Avenue // New York, NY" (*id*).

Less than two weeks later, on September 6, 2011, Mt. Hawley employee Deborah Lewis (Lewis) sent a letter responsive to the tendered claim. The letter was addressed to "200 West End Avenue Condominium // Attention: Molly Shifrin // c/o Caran Properties Inc // 148 Madison Avenue, 8th Floor // New York, NY 10016," and the insured was identified as "200 West End Avenue Condominium // c/o Caran Properties Inc" (*id.* at exhibit R). In the letter, Lewis, who made the decision to deny coverage, states that Mt. Hawley was disclaiming coverage for the Bedson litigation due to a breach of the notice conditions in the policy. The letter also states, in relevant part, that the policy, at "Section IV - Commercial General Liability Conditions," subsections (2) (a - c), requires insureds to provide notification "as soon as practicable of an 'occurrence' . . . which may result in a claim," and that they forward "copies of any demands, notices, summonses or legal papers received in connection with the claim or 'suit'" (*id.*). Lewis explains that the lengthy period of time between service of process on 200 West End Avenue Condominium and Caran Properties (no later than August 16, 2010), and the date on which Mt. Hawley was notified of the claim and litigation (on August 25, 2011), constitutes a breach of the policy's notification conditions, necessitating a denial of coverage.

The second ground identified in the letter for disclaiming coverage was that the incident appeared to be a construction accident and the Mt. Hawley Policy excluded projects of this nature.

Receipt of Mt. Hawley's disclaimer letter triggered commencement of the instant action. Following joinder of issue, the parties exchanged documents, and pursued written interrogatories and oral depositions.

In their response to Mt. Hawley's interrogatories, plaintiffs stated that Shifrin, the Building's property manager, was the person responsible for reporting accidents, claims and suits, involving West End Condo and Caran, to insurers (*id.* at exhibit E, response 1). Plaintiffs also stated that West End Condo and Caran learned of Bedson's accident and litigation, on or around September 16, 2009, when Clarett contacted Shifrin seeking information as to the building maintenance company and logs (*id.* at responses 2 and 3), and that notice was given to Bollinger when the third-party action was served on Caran (*id.* at response 5).

During Shifrin's deposition, she confirmed that she was aware of the underlying action in the summer of 2009, which was when she was asked to provide the above referenced information and documents to Clarett (Shifrin tr at 97). When asked if the request prompted her to notify her insurance broker, Shifrin responded in the negative, explaining that, because she did not have information about the accident, or "fall," she did not know on what basis Caran or West End Condo could be held responsible (*id.* at 99). Shifrin also stated that, when she received legal papers adding them as defendants in Bedson's litigation, she promptly notified Bollinger (*id.* at 99).

Following the completion of discovery and the filing of the note of issue on September

11, 2013, Mt. Hawley served the instant motion, asserting that, because it did not receive notice of the accident for more than three years after the accident took place, and more than a year after West End Condo and Caran had been added as direct defendants in Bedson's litigation and were actively defending themselves in that action, their notice was untimely as a matter of law. In response, plaintiffs argue that the disclaimer is ineffective as to Caran and demand a judicial declaration in their favor, declaring that Mt. Hawley is obligated to defend and indemnify Caran as to the underling action, and to do so on a primary basis with no contribution by Admiral.

It appears from an examination of the parties' submissions and arguments, that Mt. Hawley has abandoned its second ground for disclaiming coverage, and that plaintiffs have abandoned their claims on behalf of West End Condo. For the following reasons, the motion of Mt. Hawley is granted.

It is well settled in New York that:

> "[w]here a policy of liability insurance requires that notice of an occurrence be given as soon as practicable, such notice must be accorded the carrier within a reasonable period of time . . . [and] 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"

(*Great Canal Realty Corp. v Seneca Ins. Co., Inc.*, 5 NY3d 742, 743 [2005] [internal quotation marks and citation omitted]).

Here, the only justification plaintiffs offer for failing to provide the requisite notification to Mt. Hawley is that, in 2009, Shifrin, did not have adequate information about Bedson's accident or have any reason to think that West End Condo or Caran was implicated (Shifrin tr at 99). Nevertheless, and without passing on the question of whether the Shifrin should have notified Mt. Hawley in or before 2009, there is no question that West End Condo and Caran had

knowledge of the lawsuit by August 16 and 17, 2010, the dates on which Shifrin, according to her own testimony, notified Bollinger and Admiral that she had received legal papers naming them as defendants. Plaintiffs offer no evidence that Mt. Hawley was notified prior to August 25, 2011, over one year later, nor do they provide any explanation, reasonable or otherwise, as to why this carrier was not notified at or about the same time as Admiral, or at any other time prior to August 25, 2011.

Having failed to raise a question of material fact as to whether plaintiffs fulfilled the notice conditions set forth in Mt. Hawley Policy § IV (2) (a-c), plaintiffs try to forestall summary judgment by claiming that coverage is not to be denied as to Caran, because the disclaimer notice was ineffective as to Caran. Plaintiffs assert that, under Insurance Law § 3420 (d), an insurance carrier is required to provide a separate notice of disclaimer of liability or denial of coverage to each insured, injured claimant, or interested party seeking coverage under the carrier's policy (*see Hartford Acc. & Indem. Co. v J. J. Wicks, Inc.*, 104 AD2d 289, 294 [4th Dept 1984], *appeal dismissed* 65 NY2d 691 [1985]; *Matter of Eveready Ins. Co. v Dabach*, 176 AD2d 879, 879-880 [2d Dept 1991]). Inasmuch as a disclaimer sent to one does not operate as a disclaimer as to another, Mt. Hawley's disclaimer to West End Condo is ineffective as to Caran, regardless of whether it was sent to the address at which both receive mail (*see Maughn v RLI Ins. Co.*, 68 AD3d 1067, 1068 [2d Dept 2009]).

Plaintiffs offer statements made by Lewis, during her deposition in this matter, to establish that Caran was, in fact, an insured under Mt. Hawley's policy. When shown the policy's declarations page, Lewis testified "it appears that Caran Properties was an insured" (Lewis tr at 18). When asked "[w]ould that be because Caran [] was the real estate manager of

200 Est End Avenue?" Lewis responded "I don't know why. I just know that on the dec [sic] page, it says 200 West End Avenue Condominium care of Caran Properties. So I would assume that the Caran Properties was the managing agent, but I didn't know that for a fact" (*id.* at 19).

Lewis's testimony notwithstanding, Mt. Hawley's failure to send a separate disclaimer to Caran does not necessitate a denial of Mt. Hawley's motion, nor does it mandate coverage under its policy. In New York, "[a]n insurer must give written notice of a disclaimer on the ground of late notice as soon as is reasonably possible after it first learns of the accident or of grounds for disclaimer of liability, and failure to do so precludes effective disclaimer" (*Matter of Firemen's Fund Ins. Co. of Newark v Hopkins*, 88 NY2d 836, 837 [1996] [internal quotation marks and citations omitted]). "However, an insurance carrier's duty to timely disclaim is not triggered until an insured satisfies a notice of claim provision in an insurance contract, because that provision is a condition precedent to coverage, and absent a valid excuse, the failure to satisfy the notice requirement vitiates the policy" (*J.T. Magen v Hartford Fire Ins. Co.*, 64 AD3d 266, 269 [1st Dept], *lv dismissed* 13 NY3d 889 [2009], citing *Security Mut. Ins. Co. of N.Y. v Acker-Fitzsimons Corp.*, 31 NY2d 436, 440 [1972]; *Paramount Ins. Co. v Rosedale Gardens*, 293 AD2d 235, 239 [1st Dept 2002]; and *Town of Smithtown v National Union Fire Ins. Co.*, 191 AD2d 426, 427 [2d Dept 1993]). Here, plaintiffs offer no evidence that Caran, as a separate entity from West End Condo, provided its own notice to Mt. Hawley, or a valid excuse for such failure.

Although plaintiffs gloss over this issue, the August 25, 2011 notice to Mt. Hawley identifies only West End Condo, specifically, "200 West End Condominium," as the insured. Merely including the words "c/o Caran Properties Inc." to an address for West End Condo, does

not constitute notice, or substitute for notice, to Mt. Hawley that Caran is seeking coverage under the Mt. Hawley policy in its own right.

The *Eveready* court explained the purpose of Insurance Law § 3420 (d), "which is to avoid prejudice to the insured and injured claimants from delay in learning of the carrier's position" (176 AD2d at 880). Caran cannot be prejudiced by Mt. Hawley's a failure to provide it with its own disclaimer letter when its duty to timely disclaim was never triggered due to Caran's failure to provide the requisite notice on its own behalf.

Accordingly, it is

ORDERED that the defendant Mt. Hawley Insurance Company's motion for summary judgment dismissing the complaint is granted, and the complaint is dismissed with costs and disbursements to defendant as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ADJUDGED AND DECLARED that Mt. Hawley Insurance Company has no duty to defend and indemnify plaintiffs in the action entitled *Thomas J. Bedson and Christine Bedson v The Clarett Group, LLC, et al.*, under New York County index No. 115400/08; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that within 30 days of entry of this order, defendant shall serve a copy upon all parties, with notice of entry.

Dated: December 17, 2014

Doris Ling-Cohan, J.S.C.

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