

Gilbane Bldg. Co. v St. Paul Fire & Mar. Ins. Co.

2014 NY Slip Op 33766(U)

May 30, 2014

Supreme Court, New York County

Docket Number: 653199/2011

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

PART 61

Index Number : 653199/2011
GILBANE BUILDING CO./TDX
vs
ST. PAUL INSURANCE COMPANY
Sequence Number : 007
SUMMARY JUDGEMENT

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: 5/30/14

hlc, J.S.C.
HON. ANIL C. SINGH
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

GILBANE BUILDING CO./TDX CONSTRUCTION
CORP., A JOINT VENTURE; GILBANE BUILDING
COMPANY; TDX CONSTRUCTION CORPORATION,

Plaintiffs ,

Index No. 653199/2011

- against-

ST. PAUL FIRE AND MARINE INSURANCE
COMPANY; FIDELITY AND GUARANTY INSURANCE
COMPANY; UNITED STATES FIDELITY AND
GUARANTY COMPANY;
SELECT INSURANCE COMPANY; ZURICH AMERICAN
INSURANCE COMPANY; ROYAL SURPLUS LINES
INSURANCE COMPANY; ARROWOOD SURPLUS LINES
INSURANCE COMPANY; NEW HAMPSHIRE INSURANCE
COMPANY; PACIFIC EMPLOYERS INSURANCE
COMPANY; ILLINOIS UNION INSURANCE COMPANY;
GREAT AMERICAN INSURANCE COMPANY;
WESTCHESTER FIRE INSURANCE COMPANY;
LIBERTY INTERNATIONAL UNDERWRITERS;
GREENWICH INSURANCE COMPANY; UNITED
NATIONAL CASUALTY INSURANCE COMPANY;
LIBERTY MUTUAL INSURANCE COMPANY; WESTPORT
INSURANCE CORPORATION;
NATIONAL CASUALTY COMPANY; AMERICAN HOME
ASSURANCE COMPANY; INSURANCE CO. OF THE
STATE OF PA.; NATIONAL UNION FIRE INSURANCE
COMPANY OF PITTSBURGH, PA.; HAYWARD BAKER,
INC.; SAMSON CONSTRUCTION, INC.; PILE
FOUNDATION CONSTRUCTION CO.; PERKINS
EASTMAN ARCHITECTS, P.C.; IRON & STEEL CO.,
INC.; CRUM & FORSTER SPECIALTY COMPANY;
ROADWAY CONTRACTING, INC.; SOIL SOLUTIONS,
INC.; CONSOLIDATED EDISON COMPANY OF NEW
YORK, INC; and SPX CORPORATION,

DECISION AND ORDER

Defendants.

----- X

HON. ANIL C. SINGH, J.:

Defendant Liberty International Underwriters (Liberty) moves

(motion sequence no. 007) for summary judgment, pursuant to CPLR 3212, dismissing the complaint as against it on the grounds that plaintiffs are an additional insureds under a policy (the Policy), numbered EGLNY199518012 (exhibit 2 to Lippman affidavit), issued by Liberty to defendant Samson Construction Inc. (Samson). Alternatively, Liberty moves for summary judgment of dismissal on the ground that plaintiffs have not satisfied the notice conditions precedent to coverage contained in the Policy.

The motion is denied. Liberty has not met its burden of making a prima facie showing establishing as a matter of law that plaintiffs are not additional insureds, and questions of fact are presented whether the notice conditions of the Policy have been satisfied.

This action seeks damages and declaratory relief related to insurance coverage in an action pending in Supreme Court, New York County, captioned *Dormitory Auth. of the State of New York v Samson Constr., et al.*, index no. 403436/2006 (the underlying action), which was commenced on February 1, 2007.

The underlying action involves a construction project (the Project) on property owned by the City of New York (the City), that is part of the Bellevue Hospital campus in Manhattan. The Dormitory Authority of the State of New York (the Dormitory Authority), the City, and New York City Health and Hospitals Corp. are the plaintiffs in the underlying action. The Project

involves the construction of a 15-story building with a double basement for use as a DNA lab by the Chief Medical Examiner of the City of New York, pursuant to a 2001 contract between the City and the Dormitory Authority to finance and manage the Project. Pursuant to a January 11, 2002 contract with the Dormitory Authority (exhibit C to plaintiff's memorandum), Samson agreed to act as the foundation and excavation contractor for the project.

According to the verified complaint in the underlying action, vibrations in the soil from timber piles that were negligently driven into the ground in 2003 and 2004, in connection with the construction of the utility platform, caused cracking and subsidence to two adjacent buildings on the Bellevue Hospital campus.

In support of its motion for summary judgment, Liberty submits the affirmation of Steven P. Murray, Esq., annexing the pleadings; the affidavit of Adam Lippman, a claims officer of Liberty, annexing the Policy (exhibit 1), an April 25, 2011 letter (exhibit 8) on behalf of plaintiffs to Liberty giving notice of a claim made by plaintiffs as additional insureds under the Policy, resulting from a second-party complaint filed against plaintiffs by Perkins Eastman Architects, P.C., a defendant in the underlying action; and a July 20, 2011 letter from Liberty disclaiming coverage of plaintiffs for the second-party

complaint, based on late notice (exhibit 8 to Murray aff).

That letter states that plaintiffs had notice of the suit on December 13, 2010, but did not notify Liberty until its April 25, 2011 letter, more than five months later. Liberty's July 20, 2011 disclaimer followed the notice by approximately seven weeks. This motion, as limited by plaintiffs' brief, requires determinations on the issues of additional insured status and notice only with respect to the Policy. Plaintiffs have expressly waived any claims to other Liberty policies (see plaintiffs' memorandum of law at 1).

Section 15.01 (A) of Samson's contract with the Dormitory Authority, which is captioned, "Insurance provided by Contractor," required Samson to "procure and maintain all the insurance required under this Article until all work is complete," (*id.*). Subdivision (2) (b) requires an endorsement naming as additional insureds, "the Construction Manager (if applicable)" [parentheses in original]. Article 1, of the Policy defines "construction manager" as "a corporation regularly engaged in the management of construction projects, and so designated by the Owner" (*id.*). The Owner is defined as the Dormitory Authority.

Endorsement 21 of the Policy amends the provision, "who is an insured" to include as an insured any person or organization that Samson has "agreed to add as an additional insured by

written contract but only with respect to liability arising out of your operations ...” (*id.*).

By contract dated October 1, 2001 (exhibit B to plaintiffs’ memorandum), between the Dormitory Authority and plaintiffs, plaintiffs are designated by the Dormitory Authority as the construction manager.

Endorsement 21 requires only a written contract to which Samson is a party. It does not require that Liberty be a party to such a contract. Thus, there is no merit to Liberty’s argument that plaintiff cannot be additional insureds because they are not in privity with Liberty.

By reason of the foregoing, there can be no genuine dispute that plaintiffs qualify both as “insureds” and as “additional insureds” under the Samson policy. Thus, Liberty has failed to demonstrate its entitlement to judgment as a matter of law on the issue of whether plaintiffs are additional insureds under the Policy.

With respect to the notice issue, the Policy notice provisions are phrased in plain English, and speak in terms of “you.” The Policy provides: “[t]hroughout this policy the words “you” and “your” refer to the Named Insured shown in the Declarations [Samson], and any other person or organization qualifying as a Named Insured under this policy” (exhibit 1 to Lippman aff at 1). Plaintiffs is not named insureds under the

Policy.

There is no express provision in the Policy requiring an additional insured to give notice to the insurer of either an occurrence or a lawsuit.

The applicable provisions for notice are contained in two parts of the Policy. Section IV (2) (b) of the Policy, captioned, "Duties in the event of occurrence, offense, claim or suit," provides:

"if a claim is made or 'suit' is brought against any insured, you must (1) immediately record the specifics of the claim or 'suit' and the date received; and ... you must see to it that we receive written notice of the claim or 'suit' as soon as practicable"

(*id.* at 9).

Endorsement 19 of the Policy amends the Policy provision governing "Duties in the Event of an Occurrence, Claim or Suit," to add subdivisions (f) through (i), which, as pertinent, require Samson to provide additional notice to Liberty Surplus Corporation, in the event that any of several events occur, including, as applicable "(g) (4) Any claim which may equal or exceed 50% of the insured's retention; [and] (5) [a]ny lawsuit or arbitration proceeding involving this policy brought against any insured." Section (h) gives Liberty the right to deny coverage if Samson fails to provide the notice required by endorsement 19 "within 30 days of the date you know or should have known of a claim or injury meeting one or more of the descriptions set forth

in (g)," if Liberty's rights have been prejudiced.

The foregoing provisions apply only to "you," the named insured. Thus, by its terms the Policy's notice requirement is not applicable to any "insured" or additional insured, although it does pertain to any suit against an insured, which includes plaintiffs. Inasmuch as "[t]he policy requires only that a 'Named Insured' give the insurer notice of claim ... [the additional insured was] entitled to rely upon [the named insured's] notice" (*U.S. Underwriters Ins. Co of Pittsburgh v City Club Hotel, LLC*, 369 F 3d 102, 109 [2d Cir 2004]; see *National Union Fire Ins. Co of N. Am. v. Insurance Co.*, 188 AD2d 259, 261 [1st Dept 1992] (holding that "where two claimants are similarly situated, notice by one claimant may be deemed applicable to the other"); see also *1700 Broadway Co. v Greater N. Y. Mut. Ins. Co.*, 54 AD3d 593 [1st Dept 2008]).

In *1700 Broadway Co.*, the Appellate Division, First Department, noted the exception where "two claimants are similarly situated, i.e., where their interests are not adverse to each other, in which case notice by one may also be deemed applicable to a claim by another" (*id.* at 594), but held that the rule was inapplicable in that case because, unlike in the Policy here, "the notice requirement in the policy applies equally to both primary and additional insureds, and notice provided by one insured in accordance with the policy terms will not be imputed

to another" (*id.*).

The Policy, by its plain terms, places the duty to notify Liberty of both an occurrence and a suit against an insured, on the named insured, not the additional insured. Thus, plaintiff can rely upon Samson's notice of occurrence, inasmuch as plaintiffs' interests were not adverse to Samson's in 2003¹.

With respect to the second third-party complaint at issue here, it is not possible on this record to determine the rights of the parties as a matter of law. First, no copy of the second third-party complaint at issue is contained in the parties' submissions. According to the caption on the affidavits of service for the second third-party complaint, Samson is not a party and was not served with it. Thus, there is no basis to impose a duty upon Samson to notify Liberty of the suit.

Despite the absence of an express requirement in the Policy for an additional insured or an insured other than the named insured to provide notice to Liberty of a suit, under New York law, some "conditions may be so well understood as universally entering into insurance contracts, such as the necessity of notice and proofs of loss given to the insurer within a

¹ While the interests of plaintiffs and Samson were apparently not adverse at the time of the occurrence in 2003, Samson filed a cross claim against plaintiff. Neither the cross claim nor the date of its service is in the record, but a letter dated November 1, 2011 from Jeremiah M. Welch on behalf of plaintiffs refers to the filing of such a cross claim.

reasonable time, that the courts will imply them even though the binder be silent" (*Ell Dee Clothing Co. v Marsh*, 247 NY 392, 396, [1928]; see *Thomson v Power Auth. of State of N.Y.*, 217 AD2d 495, 497 [1st Dept 1995]; Insurance Law § 3420 [d]).

While an unexplained delay of nearly five months between the date that plaintiffs became aware of the second third-party complaint and the date that it notified Liberty would be untimely as a matter of law, at least for a named insured (see *Hartford Ins. Co. v County of Nassau*, 46 NY2d 1028, 1029 [1979]), the explanation given by James H. Jones (Jones), the president of TDX Corporation, in his affidavit (exhibit J to plaintiffs' memorandum) is sufficient to demonstrate the existence of a question of fact whether plaintiff provided Liberty with notice of the suit as soon as practicable.

Jones states that plaintiffs were served with the second third-party complaint on December 20, 2011, and immediately began identifying the parties who would need to be notified. The documents had to be retrieved from storage, and thousands of documents had to be reviewed and counsel retained. Plaintiffs did not have a copy of the Liberty policy, and it was only in the course of reviewing certificates of insurance that the existence of the Liberty policy came to plaintiffs' attention. Under the circumstances, a factual issue is presented as to the timeliness of notice.

Accordingly, it is

ORDERED that the motion of defendant Liberty International Underwriters for summary judgment declaring that plaintiffs, Gilbane Building Co./ TDX Construction Corp., a joint venture, Gilbane Building Company and TDX Construction Corp. are not additional insureds under the Policy number EGLNY199518012, and that Liberty does not have a duty either to defend or indemnify plaintiffs because it did not receive timely notice under the terms of the policy, is denied; and it is further

ORDERED, DECLARED, and ADJUDGED that plaintiff Gilbane Building Co./ TDX Construction Corp., a joint venture, qualifies as an additional insured under policy number EGLNY199518012; and it is further

ORDERED that the Clerk shall enter judgment accordingly.

Dated:

MAY 30 2014

E N T E R:



HON. ANIL C. SINGH
SUPREME COURT JUSTICE
J. S. C.
5/30/14