Vargas v City of New York
2016 NY Slip Op 30070(U)
January 15, 2016
Supreme Court, New York County
Docket Number: 154323/13
Judge: Michael D. Stallman
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 21

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ROBERT VARGAS and ELIZABETH VARGAS,

Plaintiffs,

-against-

THE CITY OF NEW YORK, NEW YORK CITY TRANSIT AUTHORITY, METROPOLITAN TRANSPORTATION AUTHORITY, E.E. CRUZ & TULLY CONSTRUCTION CO., A JOINT VENTURE, LLC, and L&L PAINTING CO., INC.,

Defendants.
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Index No. 154323/13

THE CITY OF NEW YORK, NEW YORK CITY TRANSIT AUTHORITY, and METROPOLITAN TRANSPORTATION AUTHORITY,

DECISION, ORDER AND JUDGMENT

Third-Party Plaintiffs,

-against-

L&L PAINTING CO., INC., LIBERTY INSURANCE UNDERWRITERS, THE EVANSTON INSURANCE COMPANY, CAMABO INDUSTRIES, INC., SCOTTSDALE INSURANCE COMPANY and AMERICAN SAFETY SERVICES, INC.,

Third-Party Defendants.
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HON. MICHAEL D. STALLMAN, J.:

This motion involves the third-party action, and third-party defendant Liberty Insurance Underwriters Inc.'s obligation to insure third-party plaintiffs the City of New York, New York City Transit Authority and the Metropolitan Transportation Authority (together, City defendants). Liberty Insurance Underwriters Inc. (LIUI) moves, pursuant to CPLR 3212, for summary judgment dismissing the third-party complaint as to it. Third-party defendant L&L Painting Co., Inc. (L&L) cross-moves, pursuant to CPLR 3025 (b), for leave to amend its answer to the third-party complaint to assert cross claims for breach of contract and declaratory judgment against LIUI and third-party defendant American Safety Services, Inc. (American Safety)[1].

The main action arises from injuries allegedly sustained by plaintiff Robert Vargas when he was exposed to lead dust while working on a project for the City defendants. Vargas was employed by third-party defendant Camabo Industries, Inc. (Camabo). Defendant E.E. Cruz & Tully Construction Co., a Joint Venture (Joint Venture) was the general contractor for the project. Joint Venture hired L&L as a subcontractor, who

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[1]American Safety states that its correct name is American Safety Indemnity Company.

then hired Camabo as a sub-subcontractor.

LIUI issued a commercial general liability policy of insurance to L&L which covered the period in question. Joint Venture was apparently an additional insured on the policy.

Joint Venture, on receiving the complaint in the main action, tendered a defense and indemnification to L&L in a letter dated September 20, 2013. LIUI received the tender from L&L on September 24, 2013. LIUI denied coverage based on a lead exclusion in the policy, in a letter dated October 24, 2014. No one denies the existence of that exclusion.

The City defendants are apparently additional insureds under the policy. The City defendants did not receive a copy of the disclaimer letter from LIUI.

The City defendants brought the third-party action for a declaration that they were owed a defense and indemnification from LIUI, and others, in the main action.[2] LIUI, relying on the lead exclusion, denies any obligation to defend or indemnify the City defendants. The City defendants, however, claim that LIUI failed to timely disclaim as against them, in violation of Insurance Law § 3420 (d).

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[2]The third-party complaint has been dismissed as to third-party defendant Scottsdale Insurance Company, Camabo's insurer.

Insurance Law § 3420 (d) (2) states that

> "[i]f under a liability policy issued or delivered in this state, an insurer shall disclaim liability or deny coverage for death or bodily injury arising out of a motor vehicle accident or any other type of accident occurring within this state, it shall give written notice as soon as is reasonably possible of such disclaimer of liability or denial of coverage to the insured and the injured person or any other claimant."

A denial based on a policy exclusion requires compliance with Insurance Law § 3420 (d) (2). *See Ciasullo v Nationwide Ins. Co.*, 32 AD3d 889, 890 (2d Dept 2006). Thus the "threshold issue" is whether LIUI disclaimed as soon as was "reasonably possible" as to the City defendants. *Bovis Lend Lease LMB, Inc. v Royal Surplus Lines Ins. Co.*, 27 AD3d 84, 88 (1st Dept 2005). This rule includes notice to additional insureds. *See Sierra v 4401 Sunset Park, LLC*, 101 AD3d 983, 985 (2d Dept 2012), *affd* 24 NY3d 514 (2014).

In bringing this motion, LIUI claims that it timely disclaimed as to the City defendants in the disclaimer letter. After responses to the motion were received from the various parties, LIUI claimed, for the first time, that it had not been obligated to disclaim as to the City defendants until they commenced the third-party complaint, because, up until that time, they had not yet tendered a claim. The third-party complaint was served February

21, 2014. LIUI answered, effectively disclaiming coverage for the City defendants, for the first time, on April 7, 2014, approximately 45 days later.

The timeliness of a disclaimer "generally presents a question of fact . . ." *City of New York v Greenwich Ins. Co.*, 95 AD3d 732, 733 (1st Dept 2012). However, if the basis for the disclaimer is readily apparent, as in the present instance, the insurer's explanation for the delay will be ineffective as a matter of law. *Id.*; *see also Matter of New York Cent. Mut. Fire Ins. Co. v Aguirre*, 7 NY3d 772, 774 (2006).

The disclaimer sent to the Joint Venture is not an effective disclaimer as to the City defendants. As additional insureds, the City defendants were entitled to receive their own disclaimer directly from the insurer. *See Sierra v 4401 Sunset Park, LLC*, 101 AD3d 983 (2d Dept 2012), *affd* 24 NY3d 514 (2014); *see Robert Pitt Realty, LLC v 19-27 Orchard St., LLC*, 101 AD3d 404, 405-06 (1st Dept 2012) (additional insured was entitled to is own disclaimer).

Apparently recognizing that its disclaimer letter was not effective against the City defendants, LIUI has changed tack, and now argues that the City defendants first made their tender on the day they served the third-party complaint. This argument does not aid LIUI.

It has been found that, as a matter of law, delays in disclaiming claims of more than approximately 30 days are untimely. *See Bovis Lend Lease LMB, Inc. v Royal Surplus Lines Ins. Co.*, 27 AD3d at 89-90 (illustrative cases). The only disclaimer LIUI has ever made concerning the City defendants' "tender" is in its answer, which was served 45 days after its receipt of the third-party complaint. That delay is untimely as a matter of law. *Id.* Therefore, LIUI must defend and indemnify the City defendants in the main action. LIUI's motion for summary judgment is denied, and the proper course is to issue a declaratory judgment in favor of the City defendants. *Maurizzio v Lumbermens Mut. Cas. Co.*, 73 NY2d 951 (1989).

L&L's cross motion for leave to amend its answer to the third-party complaint to add cross claims against LIUI and American Safety for breach of contract and for a declaratory judgment is granted. Pursuant to CPLR 3025 (b), leave to amend pleadings shall be freely given, absent surprise or prejudice to any party, so long as the proposed amendment is not "palpably insufficient or patently devoid of merit." *JFK Family L.P. v Millbrae Natural Gas Dev. Fund, 2005, L.P.*, 132 AD3d 729, 731 (2d Dept 2015). Neither American Safety nor LIUI has alleged any prejudice which would spring from the amendment, and neither has sufficiently alleged that

the amendment would be meritless. Therefore, L&L's cross motion to amend is granted, and the answer to the third-party complaint is amended in the form provided in the cross motion.

Finally, the Court notes that third-party action, which asserts causes of action involving insurance coverage, was improperly joined with the main action.

> "While there does exist a common question of fact . . . to permit the dispute as to insurance coverage to be tried before the same jury charged with determining the negligence issue would be prejudicial, since it would bring before the jury the fact of the existence of liability insurance coverage."

Transamerica Ins. Co. v Tolis Inn, Inc., 129 AD2d 512, 513-514 (1st Dept 1987). This was discussed with the parties at prior court conferences, but no party has moved to sever the third-party action from the main action. Meanwhile, discovery in the main action has been delayed due to summary judgment motions regarding insurance coverage in the third-party action. However, the City defendants and Joint Venture have separately moved on another cause of action involving insurance coverage under a policy issued by Evanston Insurance Company. Severance of the third-party action into a new, separate action while this other motion is pending would complicate the entry of the declaration that is expected to issue with respect to that

motion.

CONCLUSION

Accordingly, it is

ORDERED that the motion brought by third-party defendant Liberty Insurance Underwriters for summary judgment dismissing the fifth cause of action of the third-party complaint is denied; and it is further

ADJUDGED and DECLARED that third-party defendant Liberty Insurance Underwriters is obligated to defend and indemnify third-party plaintiffs the City of New York, New York City Transit Authority and the Metropolitan Transportation Authority in the action *Vargas v The City of New York*, Index No. 154323/2013, pending in this court; and it is further

ORDERED that the cross motion brought by third-party defendant L&L Painting Co., Inc. for leave to amend its third-party answer in the form appended to the cross motion is granted, and the third-party answer is deemed served upon the other parties in this action upon L&L Painting Co., Inc.'s service of a copy of this order with notice of entry upon the other parties in this action; and it is further

ORDERED that the action and the third-party action are severed and continued against the remaining defendants and third-party defendants.

Dated: January 15, 2016
New York, New York

ENTER:

J.S.C.

MICHAEL D. STALLMAN
J.S.C.