Neighborhood Partnership Hous., Dev. Fund Co., Inc. v Everest Natl. Ins. Co.
2016 NY Slip Op 31041(U)
January 29, 2016
Supreme Court, New York County
Docket Number: 157393/2013
Judge: Manuel J. Mendez
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MANUEL J. MENDEZ **PART** 13
Justice

NEIGHBORHOOD PARTNERSHIP HOUSING, DEVELOPMENT FUND COMPANY, INC.,

Plaintiffs,

-against-

EVEREST NATIONAL INSURANCE COMPANY,

Defendants.

EVEREST NATIONAL INSURANCE COMPANY,

Third-Party Plaintiff,

-against-

MT. HAWLEY INSURANCE COMPANY,

Third-Part Defendant.

INDEX NO. 157393/2013

MOTION DATE 01-13-2016
MOTION SEQ. NO. 002
MOTION CAL. NO.

The following papers, numbered 1 to 21 were read on this motion and cross-motions for Summary Judgment.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1-5, 6-10
Answering Affidavits — Exhibits	11-13, 14-17
Replying Affidavits	18-19, 20-21

Cross-Motion: X Yes ☐ No

Upon a reading of the foregoing cited papers, it is Ordered that defendant's motion for summary judgment is granted, the cross-motions by plaintiff and third-party defendant for summary judgment are denied.

This action seeks a declaration regarding the insurance obligations of defendant Everest National Insurance Company (herein "Everest") to additional insured Neighborhood Partnership Housing Development Fund Company (herein "Neighborhood"). Everest commenced a third-party action seeking a declaration regarding the insurance obligations of third-party defendant Mt. Hawley Insurance Company (herein "Hawley).

This action arises from an underlying action involving an accident on August 25, 2007 wherein Mahamadou Gory, while in the course of his employment as a construction worker, injured his foot when a staircase collapsed causing Gory's fall while working at a construction site located at 153 West 132nd St., New York, N.Y. (herein "Site") which is owned by West 132nd Street, LLC (herein "West").

West entered into a contract for the development of the site into housing (herein "Project") with A Leem Construction, Inc. (herein "Aleem"). Neighborhood claims that it was created to assist the New York City Department of Housing Preservation and Development (herein "HPD") in the administration of HPD's Neighborhood Entrepreneurs Program (herein "NEP"). Neighborhood contends that it acted as a "sponsor" for the various NEP rehabilitation projects, and as such was an out-of-possession owner holding title to the Site during the construction phase with no day-to-day contact with the Project.

The Project was funded pursuant to a building loan agreement between West and Neighborhood as owners and Enterprise Community Loan Fund, Inc. (herein "Enterprise") as the lender. Neighborhood entered into an agreement with West on June 19, 2007 wherein West agreed to operate, manage, lease and direct the operation and redevelopment of the Project (see NYSCEF Doc. No. 114). Neighborhood was to hold title to the site during the demolition and construction phases and transfer title once a certificate of occupancy was issued.

West obtained a commercial general liability policy from Everest for the Project, covering the period from June 19, 2007 to July 19, 2008. Aleem obtained a commercial general liability policy from Mt. Hawley Insurance Company (herein "Hawley") covering the period from September 1, 2007 to September 1, 2008. West was named as an additional insured on the policy Aleem held with Hawley. Neighborhood was defended in the Underlying Action as an additional insured by Hawley under their policy issued to Aleem.

Gory commenced an action by summons and complaint dated December 9, 2007(herein "Underlying Action;" see NYSCEF Doc. No. 73, Ind. No. 303856/2007) against West, Aleem, New York Residential Works, Inc., and Neighborhood asserting causes of action for negligence, and violations of Labor Law §§ 200, 240(1), and 241(6). West commenced a third-party action against Aleem, Everest, and Hawley in September 2009.

Everest moved for summary judgment in the Underlying Action dismissing all claims asserted against it by West, arguing that it timely declined coverage to West because it didn't notify Everest of Gory's claim until four months after his accident occurred. Hawley cross-moved for summary judgement alleging that it timely declined coverage to West as an additional insured because Hawley never received notice of Gory's accident. West also cross-moved for summary judgment as against Everest and Hawley seeking a declaration that their denial of West's claim was improper.

In an Order dated July 9, 2010, Justice Lucindo Suarez, J.S.C. granted Everest and Hawley's motion and cross-motion for summary judgment and denied West's cross-motion for summary judgment (see NYSCEF Doc. No., 92). Justice Suarez determined that West was given notice of Gory's accident approximately five (5) days after it occurred, and improperly failed to notify Everest and Hawley, who only received notice when they received Gory's summons and complaint approximately four (4) months after the accident occurred. After the motions for summary judgment were decided, the parties in the Underlying Action settled (see NYSCEF Doc. No., 143).

Neighborhood commenced this action against Everest seeking a declaration that Everest is obligated under its policy with West to indemnify Neighborhood, provide Neighborhood with a defense including reimbursing Neighborhood their legal fees and expenses in this action and the Underlying Action. In its Answer, Everest asserted multiple affirmative defenses including that Neighborhood failed to comply with the policy issued by Everest because Neighborhood did not provide timely notice of Gory's accident.

Everest commenced a third-party action seeking a declaration that to the extent Everest owes any defense of indemnity obligation to Neighborhood, Hawley's policy provides primary coverage to Neighborhood in Relation to the Underlining Action.

Everest now moves under Motion Sequence 002 for summary judgment dismissing the Complaint, declaring that Everest has no duty to defend and indemnify Neighborhood in the Underlying Action, declaring that the policy issued by Hawley is the primary policy in relation to Neighborhood, and that Everest's policy is an excess policy to Hawley's policy.

Hawley opposes and cross-moves for a declaration that Everest has a duty to defend and indemnify Neighborhood in the Underlying Action and that the Everest policy is co-primary to Hawley's policy in relation to Neighborhood.

Neighborhood opposes Everest's motion for summary judgment and cross-moves (under Motion Sequence 003) to strike Everest's late-notice affirmative defense, declaring that Everest is obligated to reimburse Neighborhood for one-half of its defense costs and contribution to the settlement in the Underlying Action, and declaring that a second endorsement change made to the Everest policy by it, removing Neighborhood as an additional insured, is invalid and inapplicable to the Underlying Action.

In order to prevail on a motion for summary judgment, the proponent must make a prima facie showing of entitlement to judgment as a matter of law, through admissible evidence, eliminating all material issues of fact.(Klein V. City of New York, 89 NY2d 833; Ayotte V. Gervasio, 81 NY2d 1062, Alvarez v. Prospect Hospital, 68 NY2d 320). Once the moving party has satisfied these standards, the burden shifts to the opponent to rebut that prima facie showing, by producing contrary evidence, in admissible form, sufficient to require a trial of material factual issues (Kaufman V. Silver, 90 NY2d 204; Amatulli V. Delhi Constr. Corp.,77 NY2d 525; Iselin & Co. V. Mann Judd Landau, 71 NY2d 420).

The Everest policy defines an "occurrence" as "an accident" (see NYSCEF Doc. No. 89, Section V, PP 13). Section III - Limits of Insurance - of the Everest policy requires that the insured "see to it that we [Everest] are notified as soon as practicable of an 'occurrence' or an offense which may result in a claim" (Id., Section III, PP 2[a]).

"Where ... the policy requires prompt notice of an 'occurrence' that 'may result in a claim,' the issue is not 'whether the insured believes he will ultimately be found liable for the injury, but whether he has a reasonable basis for a belief that no claim will be asserted against him"(Tower Ins. Co. of N.Y. v Classon Hgts., LLC, 82 A.D.3d 632, 634, 920 N.Y.S.2d 58 [1st Dept., 2011]). "Where an insurance policy requires an insured to provide notice 'as soon as practicable' after an occurrence, such notice must be provided within a reasonable time under all the facts and circumstances of each case, and the question of such reasonableness is generally a factual question for a jury" (24 Fifth Owners, Inc. v. Sirius America Ins. Co., 124 A.D.3d 551, 998 N.Y.S.2d 632, 633 [1st Dept., 2015]). However, delays of forty (40) days (see Young Israel Co-Op City v Guideone Mut. Ins. Co., 52 AD3d 245 [2008]), two (2) months (see Juvenex Ltd. v Burlington Ins. Co., 63 AD3d 554 [2009]),, and four (4) months (see Heydt Contr. Corp. v American Home Assur. Co., 146 AD2d 497, 498 [1989]) have been determined to be untimely as a matter of law.

Neighborhood contends that it received notice of Gory's accident when it was served with the Summons and Complaint in the Underlying action, four months after Gory's accident occurred. Neighborhood further argues because it was an out-of-possession owner that did not oversee or supervise the Project, that it could not and did not receive notice of Gory's accident prior to receiving the pleadings in the Underlying Action.

Stephanie Becker testified on behalf of Neighborhood in the Underlying Action. Becker stated that Neighborhood has no employees; that Enterprise employees performed on behalf of Neighborhood; that Neighborhood paid the salary and benefits of the Enterprise employees working for the benefit of Neighborhood; and that Enterprise employees associated with the project were present daily at the Site during the construction, and participated in weekly and monthly meetings (see NYSCEF Doc. No. 71, Pg. 13-14, and 17-23).

Leo Baez testified in the underlying action on behalf of Enterprise. Baez stated that although Neighborhood did not oversee the day-to-day construction of the Project, Enterprise employees had regular communication with the Project Manager assigned to Neighborhood. Baez also stated that Neighborhood and Enterprise shared a common office/work location (see NYSCEF Doc. No. 121, Pg. 29-33)

Neighborhood's four (4) month delay is untimely, as a matter of law. Neighborhood's argument that it did not receive notice of Gory's accident because it had no employees, at the Site or overseeing the Project is, unavailing. The agreement between Neighborhood and Enterprise dated July 1, 2009 states, in relevant part:

> "Whereas, the administration of the [NEP] of the City of New York's Department of [HPD] is performed by [Neighborhood], the control of which has been transferred to a board of directors affiliated with [Enterprise], which board has assumed control of [Neighborhood] effective as of the date hereof..." (see NYSCEF Doc. No. 104, Pg. 1).

"It is well-settled that the principal is bound by notice to or knowledge of his agent in all matters within the scope of his agency although in fact the information may never actually have been communicated to the principal" (White Plains Cleaning Services, Inc. v. 901 Properties, LLC, 94 A.D.3d 1108, 1109, 942 N.Y.S.2d 636, 638 [2nd Dept., 2012]).

Enterprise was the explicit agent of Neighborhood pursuant to the agreement between them, and Enterprise's employees controlled Neighborhood. The deposition testimony in the Underlying Action establishes that Neighborhood had no employees, and that Enterprise employees were performing work on behalf of, and being provided compensation and benefits by Neighborhood, while identifying themselves as Enterprise employees. Enterprise employees regularly visited the Project, were informed of Gory's accident within five (5) days of its occurrence (see NYSCEF Doc. No., 92); and shared a common office space (see NYSCEF Doc. No. 121, Pg. 29-33). Despite having notice of the "occurrence" involving Gory, Neighborhood waited four (4) months to provide Everest timely notice as required by the Everest policy.

Everest makes a prima facie showing of entitlement to judgment as a matter of law. Neighborhood and Hawley fail to rebut Everest's prima facie showing.

Everest's motion for summary judgment declaring that it does not owe a duty to defend and indemnify Neighborhood in the Underlying Action is granted, Neighborhood's Complaint is dismissed.

The cross-motions by Neighborhood and Hawley are denied. The issues of whether Everest's policy is an excess or co-primary policy to Hawley's policy, and whether the second endorsement to the Everest policy was valid are moot because Everest does not owe Neighborhood a duty to defend or indemnify it in the Underlying Action.

Accordingly, it is ORDERED that this motion by defendant EVEREST NATIONAL INSURANCE COMPANY for summary judgment dismissing the Complaint and declaring that it has no duty to defend or indemnify plaintiff NEIGHBORHOOD PARTNERSHIP HOUSING DEVELOPMENT FUND COMPANY, INC. in an underlying action (Index. No. 303856/2007) is granted, the Complaint is dismissed, and it is further,

ORDERED, ADJUDGED and DECLARED that EVEREST NATIONAL INSURANCE COMPANY is not required to provide primary coverage, indemnify or provide a defense to NEIGHBORHOOD PARTNERSHIP HOUSING DEVELOPMENT FUND COMPANY, INC in the underlying personal injury action brought in Supreme Court, Bronx County, entitled Mahamadou Gory v. Neighborhood Partnership Housing Development Fund, Company, Inc., et al., and filed under Index No. 303856/2007, and it is further,

ORDERED, that EVEREST NATIONAL INSURANCE COMPANY's counsel shall within thirty (30) days from the date of Entry of this Order, serve a copy of this Order with Notice of Entry upon the remaining parties, upon the Intake Clerk for Trial Support located in the General Clerk's Office (Room 119), and the County Clerk (Room 141B), and it is further,

ORDERED, that the cross-motions by third-party defendant MT. HAWLEY INSURANCE COMPANY (Motion Sequence 002) and by plaintiff NEIGHBORHOOD PARTNERSHIP HOUSING DEVELOPMENT FUND COMPANY, INC. (Motion Sequence 003) are denied, and it is further,

ORDERED, that upon receipt of this Order with Notice of Entry, the Clerk of the Court enter judgment accordingly.

MANUEL J. MENDEZ

ENTER: J.S.C.

Dated: January 29, 2016

MANUEL J. MENDEZ
J.S.C.

Check one: X FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE