SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS Part 8

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Aleksandr Goldshmidt and Inna Goldshmit,
Plaintiff,

-against-

DECISION AND ORDER
Index Number: 653304/2013
Motion Seq. No.: 002

Endurance American Specialty Insurance Co.,
Defendant.

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KENNEY, JOAN M., J.

Recitation, as required by CPLR 2219(a), of the papers considered in review of these motions for summary judgment.

Papers	**Numbered**
Notice of Motion, Affirmation, and Exhibits	
Notice of Cross-Motion, Opposition Affirmation, and Exhibits	
Reply Affirmation, Opposition to Cross-Motion, Exhibits	

The within application to renew is gratned and the underlying motions are decided as follows:

In this declaratory judgment action, plaintiffs Aleksandr Goldshmidt and Inna Goldschmidt (Goldschmidts) move for summary judgment seeking a declaration that they are entitled to defense and indemnity from defendant Endurance American Specialty Insurance Company (Endurance) on a primary and non-contributory basis in an underlying action pending in Supreme Court, Kings County.

Defendant cross-moves for summary judgment seeking a declaration that it has no duty to defend or indemnify plaintiffs in the underlying action.

Factual Background

This action arises from a demand by plaintiffs for defense and indemnity from Endurance in connection with an underlying action, captioned *Vasyl Kintsak and Vira Kintsak v. Aleksandr Goldschmidt and Inna Goldschmidt,* Supreme Court, Kings County, Index Number 14983/2012

(Kintsak action). In the Kintsak action, it is alleged that on January 5, 2012, plaintiff Vasyl Kintsak was injured while performing construction work at the building owned by the Goldschmidts, located at 45 Coleridge Street, Brooklyn, New York (the premises). Kintsak was an employee of Kadar Elite Construction, Inc. (Kadar Elite), the contractor hired by the Goldschmidts to perform the construction work at the premises. Kadar Elite was insured by Endurance.

The contract between Kadar Elite and the Goldschmidts, executed on August 22, 2011, obligated Kadar Elite to maintain general liability insurance identifying owners Goldschmidts as an additional insured with limits of $1,000,000.00 per occurrence. The contract also included an indemnification provision obligating Elite to indemnify, defend and hold harmless the property owner against all claims. The contract further requires that the contractor's insurance to be primary. The relevant provision states:

> To the fullest extent permitted by law, the contractor shall indemnify, defend, and hold harmless the property owner, and its agents and employees from and against all claims, damages, losses and expenses, including but not limited to attorney fees, arising out of or resulting from performance of the work, provided that such claim, damage, loss or expense is attributable to bodily injury, sickness, disease or death, or to injury or destruction of tangible property, but only to the extent caused by the negligent acts or omissions of the contractor, anyone directly or indirectly employed by it or anyone for whose acts the contractor may be liable, regardless of whether or not such claim, damage, loss or expense is caused part by a party indemnified hereunder. Such obligation shall not be construed to negate, abridge or reduce other rights or obligations of indemnity, which otherwise exist.
>
> Also, the contractor's insurance, evidenced by certified annexed, will be the primary insurance in case of a loss caused by their operation and shall remain in effect till completion of work by the contractor.

Endurance's commercial general liability policy issued to Kadar Elite for the period of October 25, 2011 through October 25, 2012, included an additional insured-blanket endorsement

which provided in pertinent part:

> The following are included as additional insureds:
> Any entity required by written contract or as required in writing from a municipality as a condition of issuing a permit (hereinafter for purposes of this endorsement called "additional insured") to be named as an insured is an insured but only with respect to liability arising out of your premises, "your work" for the additional insured, or acts or omissions of the additional insured, in connection with their general supervision of "your work" to the extent set forth below...

The Endurance policy also included a primary and non-contributory endorsement which provided in pertinent part:

> It is hereby agreed that where required by written contract, or as required in writing from a municipality as a condition of issuing a permit, this policy shall be primary to any insurance carried by an additional insured, and any insurance carried by such an additional insured shall not be called upon to contribute to any claim covered under this policy, provided that the claim arises directly from work performed by the insured or others working directly on behalf of the insured and provided further that the "occurrence" that gives rise to such claim happened subsequent to the execution of the written contract.
>
> It is warranted that whenever the insured has agreed by written contract to be primary to any insurance carried by an additional insured, the insured will require by written contract that the Commercial General Liability policy of any contractor of subcontractor of the insured will be primary to any insurance carried by the insured and that the insured's Commercial General Liability policy shall not be called upon to contribute to any claim covered under any policy of such contractor or subcontractor.

The Endurance policy also provided a section of duties in the event of occurrence, offense, claim or suit, stating:

> 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" of 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.

b. 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

(2) Notify us as soon as practicable.

You must see to it that we receive written notice of the claim or "suit" as soon as practicable.

c. You and any other involved insured must:

(1) Immediately send us copies of any demands, notices, summonses or legal papers received in connection with the claim or "suit';

(2) Authorize us to obtain records and obtain other information;

(3) Cooperate with us in the investigation or settlement of the claim or defense against the "suit"; and

(4) Assist us, upon our request, in the enforcement of any right against any person or organization which may be liable to the insured because of injury or damage to which this insurance may also apply.

d. No insured will, except at that insured's own cost, voluntarily make a payment, assume any obligation, or incur any expense, other than for first aid, without our consent.

On July 23, 2012, the underlying Kintsak action was commenced against the Goldschmidts, alleging that on January 5, 2012, Vasyl Kintsak, in his capacity as an employee of Kadar, was injured when he fell on a stairway at the premises. On September 10, 2012, the Goldschmidts interposed a Verified Answer to the complaint. On May 10, 2012, the Kintsaks filed a motion by Order to Show Cause seeking to enjoin the Goldschmidts from altering and changing the stairway/location of the accident until Kintsak's attorney and expert had an opportunity to access and inspect the premises. The Order to Show Cause was granted, and an Order was issued on May 17, 2012, granting Kintsak access to the accident site for inspection. Thereafter, counsel for Kintsak and the Goldschmidts coordinated a date and time for inspection. On May 30, 2012, when the parties arrived at the premises to conduct the inspection, the stairs

leading from the first floor, or the "accident causing instrumentality" as described by Kintsak's counsel, allegedly had been removed. On June 5, 2013, the Goldschmidts then commenced a third-party action against Kadar.

On June 12, 2013, Kintsak served a motion to strike Goldschmidt's Answer "on the grounds of spoliation of crucial evidence which have substantially and irreparably prejudiced [Kintsaks'] causes of action." The Goldschmidts maintain that the stairs from which plaintiff allegedly fell were not in existence on the day of the incident, and therefore there was no spoliation of evidence. Following oral argument, on January 30, 2014, Judge Debra Silver ordered that "plaintiffs' motion to dismiss defendants Goldschmidts' Answer for spoliation of evidence is denied as premature. Plaintiff may renew its application when the note of issue is filed" (see Order dated January 30, 2014).

On June 26, 2013, the Goldschmidts notified Endurance by letter tendering the defense and indemnification of the Kintsak action to Endurance. Endurance responded by letter dated July 11, 2013, offering to defend the Goldschmidts subject to co-insurance with their insurance on a 50/50 basis while reserving the right to deny coverage based upon late notice.

Arguments

Plaintiffs move for summary judgment on the grounds that Endurance is obligated to afford primary coverage for their benefit and to reimburse them for the costs incurred in their defense of the underlying Kintsak action because the contract between contractor and owner obligated contractor to obtain insurance and name plaintiffs as additional insured for loss or injury that may arise out of or result from the contractor's operations under the project, and that such insurance was to be primary.

Defendant cross-moves for summary judgment declaring that it has no duty to defend or

indemnify plaintiffs on the basis that the notice of loss provided by plaintiffs was untimely and caused defendant prejudice in investigating and/or defending the action. In the alternative, defendant contends that plaintiff's motion must be denied as premature pending a determination on the question of spoliation of evidence in the underlying Kintsak action.

Discussion

Pursuant to CPLR 3212(b), "a motion for summary judgment shall be supported by affidavit, by a copy of the pleadings and by other available proof, such as depositions and written admissions. The affidavit shall be by a person having knowledge of the facts; it shall recite all the material facts; and it shall show that there is no defense to the cause of action or that the cause of action of defense has no merit. The motion shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party. Except as provided in subdivision 'c' of this rule the motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact. If it shall appear that any party other than the moving party is entitled to a summary judgment, the court may grant such judgment without the necessity of a cross-motion."

To obtain summary judgment, the moving party must make a prima facie showing of entitlement to judgment as a matter of law, through admissible evidence eliminating all material issues of fact. CPLR 3212(b); *Vega v Restani Constr. Corp.,* 18 NY3d 499, 503 (2012); *Smalls v AJI Indus., Inc.,* 10 NY3d 733, 735 (2008); *JMD Holding Corp. v Congress Fin. Corp.,* 4 NY3d 373, 384 (2005); *Giuffrida v Citibank Corp.,* 100 NY2d 72, 81 (2003). Only if the moving party satisfies this standard, does the burden shift to the opponent to rebut that prima facie showing, by producing evidence, in admissible form, sufficient to require a trial of material factual issues. *Morales v D & A Food Serv.,* 10 NY3d 911, 913 (2008); *Hyman v Queens County Bancorp, Inc.,*

3 NY3d 743, 744 (2004). If the moving party fails to meet its initial burden, the court must deny summary judgment despite any insufficiency in the opposition. *Vega v Restani Constr. Corp.,* 18 NY3d at 503; *JMD Holding Corp. v Congress Fin. Corp.,* 4 NY3d at 384; *Scafe v Schindler El. Corp.,* 111 AD3d 556, 557 (1st Dept 2013); *Williams v New York City Hous. Auth.,* 99 AD3d 613 (1st Dept 2012). In evaluating the evidence for purposes of the parties' summary judgment motions, the court construes the evidence in the light most favorable to the motion's opponent. *Vega v Restani Constr. Corp.,* 18 NY3d at 503; *Cahill v Triborough Bridge & Tunnel Auth.,* 4 NY3d 35, 37 (2004). If the trial judge is unsure whether a triable issue of fact exists, or can reasonably conclude that fact is arguable, the motion must be denied. *Bush v. Saint Claire's Hospital,* 82 NY2d 738 (1993); *Bronx Country Public Adm'r v. New York City Housing Authority,* 182 AD2d 517 (1st Dept 1992).

Insurance Law §3420(a)(5) and (c)(2)(A) provides that for claims made under policies issued or renewed on or after January 17, 2009, an insurer seeking to disclaim coverage based upon late notice must demonstrate prejudice if the insured's notice is provided within two years of the time it was due. Insurance Law §3420(c)(2)(C) states that "the insurer's rights shall not be deemed prejudiced unless the failure to timely provide notice materially impairs the ability of the insurer to investigate or defend the claim." It is the burden of the insurer to show that it was prejudiced by the insurer's delay in providing notice.

While plaintiffs failed to notify Endurance of the occurrence as soon as practicable, as per the policy terms, it is undisputed that notice was provided to Endurance less than two years after the alleged accident occurred. Therefore, to deny coverage, Endurance must show that plaintiffs' late notice prejudiced it in a way that materially impaired its ability to investigate the claim (*see* Ins Law §3420(c)(2)(C)).

Plaintiffs argue that Endurance is unable to satisfy their burden of demonstrating that they were prejudiced because notice was given within the two years of time required. Plaintiffs cite to a case in which the Illinois Federal Court interpreting the law in Massachusetts offers some guidance on what constitutes prejudice by the delay in notice by an insured, stating that "where damages are at issue, the prejudice inquiry revolves around whether critical evidence has been lost, whether the insurer had sufficient opportunity to investigate the claims, and whether the insurer had a chance to settle the claim and avoid liability altogether" (*Am. Mut. Liab. Ins. Co. v Beatrice Companies, Inc.*, 924 F Supp 861, 871 [ND Ill 1996]). This, however, actually supports the defendant's position that it did indeed suffer prejudice by the delay. Here, it is unresolved whether critical evidence, namely the stairs at the premises, was destroyed. The alleged spoliation of evidence, if true, certainly affects Endurance's ability to investigate the claim.

Defendants first received notice of Goldschmidt's claim for additional coverage over a year after the underlying plaintiff's alleged accident occurred. In that time, an order to show cause was filed in the underlying action to preserve the stairs at the premises. Subsequently, upon inspection of the premises, it was discovered that the stairs at issue had been removed. Thereafter, a motion was served to strike the Goldschmidt's answer on the grounds of spoliation of critical evidence, which was denied as premature.

Defendants contend that failure to give prompt notice of the accident, as well as the alleged spoliation of evidence, is critical to its ability to conduct an investigation, causing them to suffer prejudice. While the motion to strike the answer for spoliation of evidence in the underlying action was denied without prejudice to renew after discovery was completed, the Goldschmidts argue nonetheless that an examination of the stairs in not critical to the defense of the underlying action. Plaintiffs argue that the defendant was not prejudiced because, based upon

the deposition testimony of Mr. Kintsak, there was no defect in the stairs, nor could he identify the condition of the stairs that caused his fall.

Contrary to the plaintiffs' argument, the condition of the stairs and the determination of the motion to strike the answer for spoliation of evidence in the underlying action is indeed critical to whether Endurance was prejudiced by the delay in notice. This precisely "materially impairs the ability of the insurer to investigate or defend the claim" (*see* Ins Law §3420(c)(2)(c)). Whether the evidence of the stairs was spoiled or not, or whether the stairs were even defective or not, will not be determined by this motion. Only whether the ability of the insurer to investigate the claim within a reasonable amount of time after the underlying event occurred so that the insurer could engage in the defense of the claim early on, or not, and whether the insurer has been substantially prejudiced by plaintiff's alleged late notice is what is to be determined.

Here, there remains an issue of fact as to whether plaintiff's late notice to Endurance of the claim will materially impair Endurance's ability to defend the claim. Plaintiffs first learned of the underlying accident over a year and a half before they placed Endurance on notice of their claim. By the time Endurance was finally placed on the notice, there had been pre-suit discovery, a complaint had been filed and answered, and a motion to strike the Goldschmidt's answer had been brought in the underlying action due to Goldschmidt's alleged spoilation of evidence. At this juncture, there remains issues of facts as to whether plaintiffs spoiled the evidence by destroying the stairs and thereby materially impairing Endurance's ability to investigate and defend the claim. Accordingly, it is

ORDERED that the application to renew is granted; and it is further

ORDERED that plaintiff's motion for summary judgment against Endurance American Specialty Insurance Co. is denied; and it is further

ORDERED that defendant's motion for summary judgment against Aleksandr Goldshmidt and Inna Goldshmit is denied; and it is further

ORDERED that the parties proceed to trial/meditation forthwith.

Dated: January 3, 2017

ENTER:

Joan M. Kenney, J.S.C.