Lafarge Bldg. Materials, Inc. v Harleysville Ins. Co. of N.Y.
2017 NY Slip Op 33089(U)
July 5, 2017
Supreme Court, Albany County
Docket Number: 4492-14
Judge: Roger D. McDonough
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[* 1]

STATE OF NEW YORK
SUPREME COURT **COUNTY OF ALBANY**

LAFARGE BUILDING MATERIALS, INC.,

Plaintiff,

DECISION AND ORDER

-against-

Index No.: 4492-14
RJI No.: 01-15-117279

HARLEYSVILLE INSURANCE COMPANY OF NEW YORK,

Defendant.

(Supreme Court, Albany County All Purpose Term)

Appearances:

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Attorneys for Plaintiff
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Roger D. McDonough, J.:

Plaintiff seeks to recover damages for defendant's purported breaches of its duties to defend and indemnify in a related matter. Discovery has been completed. Defendant moves for summary judgment based on plaintiff's purported failure to provide timely notice of the related matter. Plaintiff maintains that issues of fact preclude summary judgment.

Background

An individual employed by Adirondack Mechanical Services LLC ("Adirondack") was injured at plaintiff's premises in Ravena, New York on July 9, 2005 ("the Incident"). Adirondack was working on a project at plaintiff's premises pursuant to a Purchase Order entered into between Adirondack and plaintiff. The Purchase Order required Adirondack to provide plaintiff with a Certificate of Insurance naming plaintiff as an additional insured.

Adirondack secured a general liability insurance policy with defendant that was effective from 1/23/2005 to 1/23/2006 ("the Policy"). A Certificate of Insurance, provided by Adirondack's insurance broker and dated April 26, 2005, failed to indicate that plaintiff was an additional insured. The Certificate of Insurance did list defendant as Adirondack's commercial general liability carrier for the project. One of plaintiff's employees testified that he believed the Certificate of Insurance was eventually corrected because the Purchase Order was approved and went forward. Said employee had initially refused to accept the Purchase Order because the Certificate of Insurance lacked, *inter alia*, plaintiff's name as an additional insured. The Court has not been provided with any "corrected" Certificate of Insurance. The Policy provides standard notice requirements for claims.

A summons and complaint in a related matter was filed on March 28, 2008. The summons and complaint arose from the Incident. Plaintiff was served with the summons and complaint on April 7, 2008. The summons and complaint were forwarded within plaintiff's offices to plaintiff's risk management group. Plaintiff's risk management group contacted outside counsel. Additionally, plaintiff gathered documents related to the Adirondack project and contacted representatives of Adirondack to ascertain information about the July 9, 2005 incident. Plaintiff did not provide any relevant deposition testimony about efforts to request insurance coverage information from Adirondack or Adirondack's broker. On January 5, 2009, plaintiff's outside counsel sent a letter to defendant ("Tender Letter"). Therein, plaintiff requested defense and indemnity from defendant. Defendant responded with a Disclaimer Letter dated January 19, 2009. Therein, defendant advised that plaintiff had failed to provide timely notice of the claim set forth in the March 28, 2008 summons and complaint.

In the related matter between Adirondack's employee and plaintiff, the plaintiff brought in Adirondack as a third-party defendant. Adirondack settled with plaintiff for $150,000 and plaintiff settled with Adirondack's employee for $1,425,000. The instant litigation for defendant's purported breaches of its duties to defend and indemnify ensued.

Summary Judgment Standard

To obtain summary judgment, it is necessary that movant establish his cause of action "sufficiently to warrant the court as a matter of law in directing judgment" (Friends of Fur

Animals, Inc. v. Associated Fur Manufacturers, Inc., 46 NY2d 1065 [1979]; CPLR § 3212(b)). The proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law by providing sufficient evidence to eliminate any genuine material issues of fact from the case. The failure to make such a showing mandates denial of the motion, regardless of the sufficiency of the opposing papers (Alvarez v. Prospect Hosp., 68 NY2d 320 [1986]; Winegard v. New York Univ. Med. Center, 64 NY2d 851 [1985]).

Once such a showing is made, however, the burden shifts to the party opposing the motion for summary judgment to come forward with evidentiary proof, in admissible form, to establish the existence of material issues of fact which require a trial (Zuckerman v. City of New York, 49 NY2d 557, 562 [1980]). In order to defeat a motion for summary judgment, the opponent must present evidentiary facts sufficient to raise a triable issue. Averments merely stating conclusions are insufficient (Bethlehem Steel Corp. v. Solow, 51 NY2d 870 [1980]; Capelin Assoc. v. Globe Mfg. Corp., 34 NY2d 338 [1974]).

Summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue (Sternbach v. Cornell University, 162 AD2d 922, 923 [3rd Dept. 1990]). The focus is upon issue finding, not issue resolving, and all inferences and evidence must be viewed in a light most favorable to the party opposing the motion for summary judgment (see, B. S. Industrial Contractors, Inc. v. Town of Wells, 173 AD2d 1053 [3rd Dept. 1991]).

Discussion

Defendant argues that summary judgment is warranted based on plaintiff's failure to comply with the notice requirements of the Policy. Specifically, defendant argues that it has established that plaintiff was an additional insured under the Policy and that the Policy was in effect at the time of the Incident. Defendant further notes that the Purchase Order required Adirondack to purchase additional insured commercial general liability coverage for plaintiff. The defendant also asserts that the March 28, 2008 summons and complaint provided plaintiff with the Incident date, Adirondack's name as the employer and the location of the Incident. Defendant maintains that this information was sufficient for plaintiff to send a tender of defense letter on the day that plaintiff was served. In this vein, defendant notes that plaintiff's employee

[who was produced for a deposition in this matter] was able to discuss the Incident with Adirondack personnel within days of service of the summons and complaint. Finally, defendant stresses the absence of due diligence on the part of plaintiff to identify and notify defendant as the insurance carrier and issuer of the Policy. In sum, defendant argues that plaintiff failed to comply with the notice requirements of the Policy and has failed to provide any reasonable excuse for said failure. As such, defendant seeks summary judgment dismissing the complaint.

In opposition, plaintiff maintains that triable questions of material fact exit as to whether the alleged notice delay was reasonable and justifiable. Plaintiff describes the Premises as a vast facility with work being conducted by Adirondack in various locations. Additionally, plaintiff maintains that the summons and complaint in the related matter incorrectly described the Incident as involving construction work as opposed to a routine maintenance project. Plaintiff describes its searches for purchase orders and certificates of insurance after the summons and complaint was served. The plaintiff also notes that the Certificate of Insurance in this matter did not list plaintiff as an additional insured. Further, the plaintiff states that it wasn't until December of 2008 that it secured a copy of the Purchase Order and saw the relevant terms requiring plaintiff's status as an additional insured. The January 5, 2009 tender letter followed. Plaintiff asserts that it is entitled to have the trier of fact determine whether the notice provided in this matter was timely. The primary argument advanced by plaintiff is that it justifiably lacked knowledge of the insurance coverage until December 2008/January 2009. Plaintiff also points to its justifiable reliance on the information/misinformation in the Certificate of Insurance. Finally, plaintiff maintains that it conducted a reasonably diligent investigation to ascertain the availability of insurance coverage.

In reply, defendant reiterates the vast knowledge that plaintiff possessed in April of 2008 including: (1) that the Incident involved an employee of Adirondack, one of plaintiff's contractors; (2) the date and location of the Incident; (3) Adirondack's coverage at the time of the injury with defendant; (4) the standard terms of all purchase orders that required Adirondack to obtain additional insured coverage for plaintiff; and (5) the name of Adirondack's insurance broker. Defendant also notes that there is no evidence that Adirondack had a policy with anyone other than defendant during the relevant time period. Accordingly, defendant contends that

plaintiff had all the information needed to confirm its status and send a tender letter in April of 2008 as opposed to January of 2009. Further, defendant notes that there is no explanation from plaintiff as to why the investigation took over eight months. Defendant also again mentions that plaintiff's employee was in touch with Adirondack's owners within days of receiving the summons and complaint.

The Court finds that summary judgment dismissing plaintiff's complaint must be granted in this matter. Defendant has conclusively established that plaintiff had contemporaneous knowledge when the summons and complaint was served that: (1) the Incident involved an Adirondack employee; (2) the date and location of the Incident; and (3) that all of plaintiff's Purchase Orders required the contracting party to name plaintiff as an additional insured (*see*, Zadrima v PSM Ins. Cos., 208 AD2d 529, 530 [2nd Dept. 1994]). Plaintiff has also conceded that its employee [the employee produced for a deposition in this matter] spoke to Adirondack's owners within days of service of the summons and complaint. Said employee also testified as to his knowledge of plaintiff's requirement that it be named as an additional insured pursuant to all Purchase Orders. Additionally, plaintiff has not provided the Court with any meaningful detail as to how it conducted its records searches and any investigation it performed regarding insurance coverage. The plaintiff was obligated to lay bare its proof in this summary judgment motion and the Court has only been provided with conclusory assertions about the searches and the investigation. The Court simply cannot conclude that plaintiff has offered a valid reason for the March/April to January delay in providing defendant with notice of the summons and complaint (*see*, Whitney M. Young, Jr. Health Ctr. v New York State Dept. of Ins. Liquidation Bur., 252 AD2d 835. 836-837 [3rd Dept. 1989]). This is particularly true in light of all of the information plaintiff possessed upon service of the summons and complaint, both in terms of the information in the summons and complaint and plaintiff's institutional knowledge of its procedures for Purchase Orders and status as an additional insured. Finally, in light of the detailed testimony by plaintiff's employee about Purchase Orders, the Court was not persuaded by plaintiff's purported reliance on the incomplete Certificate of Insurance.

Based on all of the foregoing, it is hereby

ORDERED[1] that defendant's summary judgment motion for dismissal of plaintiff's complaint is hereby granted.

This shall constitute the Decision and Order of the Court. The original decision and order is being returned to the counsel for defendant who is directed to enter this Decision and Order without notice and to serve plaintiff's counsel with a copy of this Decision and Order with notice of entry. The Court will transmit a copy of the Decision and Order and the papers considered to the County Clerk. The signing of the Decision and Order and delivery of a copy of the Decision and Order shall not constitute entry or filing under CPLR Rule 2220. Counsel is not relieved from the applicable provisions of that rule respecting filing, entry and notice of entry.

SO ORDERED.

ENTER.

Dated: Albany, New York
July 5, 2017

Roger D. McDonough
Acting Supreme Court Justice

Papers Considered:

JM 7-12-17

Defendant's Notice of Motion for Summary Judgment, dated March 3, 2017;
Affirmation of Jessica L. Darrow, Esq., dated March 3, 2017, with annexed exhibits;
Affirmation of David A. Rosenberg, Esq., dated March 23, 2017, with annexed exhibits;
Reply Affirmation of Jessica L. Darrow, Esq., dated March 31, 2017.

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[1] Plaintiff objected to defendant's request for CPLR §§ 3001 and 3017 declaratory relief. The Court agrees that such relief is not warranted as this is not a declaratory judgment action and defendant did not assert any counterclaims in this matter.