Add Plumbing, Inc. v Burlington Ins. Co.
2020 NY Slip Op 30261(U)
January 14, 2020
Supreme Court, New York County
Docket Number: 652899/2016
Judge: Nancy M. Bannon

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. NANCY M. BANNON** **PART** **IAS MOTION 42EFM**

Justice

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ADD PLUMBING, INC.

Plaintiff,

- v -

THE BURLINGTON INSURANCE COMPANY,

Defendant.

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INDEX NO. 652899/2016

MOTION DATE 10/20/2019, 10/20/2019

MOTION SEQ. NO. 003 004

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 95, 98, 99, 100, 104, 106

were read on this motion to/for SUMMARY JUDGMENT.

The following e-filed documents, listed by NYSCEF document number (Motion 004) 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 96, 101, 102, 103, 105, 107

were read on this motion to/for SUMMARY JUDGMENT.

In this action for a judgment declaring that the defendant insurer, The Burlington Insurance Company, is obligated to defend or indemnify the plaintiff in an action titled Cristian Roblero a/k/a Cristian Roblero Zambrano v Bais Ruchel High School, Inc., (the Roblero action), pending in the Supreme Court, Kings County, under Index No. 507818/2014, the plaintiff moves for summary judgment on the complaint (MOT SEQ 001). The defendant opposes the motion and moves for a declaration that it is not obligated to defend or indemnify the plaintiff for the underlying action and for attorneys' fees (MOT SEQ 004). The plaintiff's motion is denied and the defendant's motion is granted in part.

At issue in this action is whether an insurer's knowledge of an underlying accident is sufficient to trigger an insurer's duty to disclaim coverage under Insurance Law § 3420(d)(2). The underlying facts are not in dispute. During the construction of Bais Ruchel High School in Brooklyn, there was an accident on June 18, 2014 where the plaintiff's employee, Cristian Roblero, allegedly fell from scaffolding. At the time of the accident, the plaintiff was insured by the defendant under a commercial general liability policy with a term from June 1, 2013 to July

1, 2014. The policy, in section 2(e)(1), states that "[t]his insurance does not apply to...'bodily injury' to...an 'employee of the insured arising out of and in the course of employment by the insured," and further contains an "Exclusion – Cross Liability" endorsement, which states in relevant part: "This insurance does not apply to any actual or alleged 'bodily injury' , 'property damage' or personal and advertising injury' to: 3. [a] present, former, future or prospective partner, officer, director, stockholder or employee of any insured."

On July 15, 2014, the plaintiff's retail broker, Fairmont Insurance (Fairmont), emailed the defendant notice of the underlying accident. The notice stated that it was "For Records Only." The notice did not contain any demand for coverage from the defendant, but advised of a worker's compensation claim that was tendered to the plaintiff's worker's compensation carrier. Then, on September 5, 2014, Fairmont forwarded a copy of the underlying summons and complaint in the Roblero action to the defendant. At that time, neither the plaintiff in the instant case nor the defendant were parties to the underlying case and there was no demand tendered to the defendant.

The first demand for coverage on the defendant for the Roblero action was sent by the putative additional insured, Bais Ruchel High School, and received by the defendant on December 16, 2014. Eight days after receiving the demand, the defendant disclaimed coverage to Bais Ruchel High School and the plaintiff, despite the plaintiff having not tendered a demand up to that point.

The plaintiff now moves for summary judgment contending that, even were the employer's liability exclusion under section 2(e)(1) and the "Exclusion – Cross Liability" endorsement in the commercial general liability policy applicable, as Cristian Roblero was an employee of the plaintiff at the time of the accident, the defendant is still required to defend and indemnify the plaintiff in the instant action because the defendant failed to issue a timely disclaimer as required by Insurance Law § 3420(d)(2). The defendant also moves for summary judgment, arguing that its disclaimer was timely, as it disclaimed coverage shortly after there was a demand for such coverage.

The movant on a summary judgment motion "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case." See Winegrad v New York Univ. Med. Ctr., 64 NY2d 851,

853 (1985). The motion must be supported by evidence in admissible form (see Zuckerman v City of New York, 49 NY2d 557 [1980]), and the pleadings and other proof such as affidavits, depositions, and written admissions. See CPLR 3212. The "facts must be viewed in the light most favorable to the non-moving party." Vega v Restani Constr. Corp., 18 NY3d 499, 503 (2012) (internal quotation marks and citation omitted). Once the movant meets its burden, it is incumbent upon the non-moving party to establish the existence of material issues of fact. See id., citing Alvarez v Prospect Hosp., 68 NY2d 320 (1986). The "[f]ailure to make [a] prima facie showing [of entitlement to summary judgment] requires a denial of the motion, regardless of the sufficiency of the opposing papers." Vega v Restani Constr. Corp., supra, at 503. "The drastic remedy of summary judgment, which deprives a party of his [or her] day in court, should not be granted where there is any doubt as to the existence of triable issues or the issue is even 'arguable.'" De Paris v Women's Natl. Republican Club, Inc., 148 AD3d 401, 403-404 (1st Dept. 2017); see Bronx-Lebanon Hosp. Ctr. v Mount Eden Ctr., 161 AD2d 480 (1st Dept. 1990).

Insurance Law § 3420(d)(2) provides: "[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." The plaintiff contends that the timeliness requirement of Insurance Law § 3420(d)(2) is measured from the point in time that the insurer first learns of grounds to disclaim liability or deny coverage, and thus when the defendant learned of the underlying accident and Roblero's employment by the plaintiff, they should have disclaimed coverage.

However, the defendant is correct that New York law is clear that there must be a demand for coverage or, at least a lawsuit upon which the insurer could potentially disclaim coverage before an insurer's duty to disclaim is triggered. See Nat'l Union Fire Ins. Co. of Pittsburgh, PA v State Ins. Fund, 18 AD3d 202 (1st Dept. 2005); Almalabeh v Chelsea 19 Assocs., 273 AD2d 261 (2nd Dept. 2000). The mere occurrence of an event which could potentially implicate coverage if a claim is later made does not mean than an insurer's responsibility to timely disclaim has been triggered. See A.J. McNulty & Co. v Volmar Constr. Co., 300 AD2d 40 (1st Dept 2003). Particularly, to the extent that an insurer may receive notice of an accident and become aware of an underlying action, such knowledge is insufficient to

trigger the time to issue a disclaimer. See Travelers Ins. Co v Volmar Constr. Co., 300 AD2d 40 (1st Dept. 2002).

Since the defendant did not receive any demand for coverage until December 16, 2014 from putative additional insured, Bais Ruchel High School, and the defendant disclaimed coverage relating to the Roblero action as to the putative additional insured and the plaintiff eight days later, the issue is whether the eight-day delay in disclaiming coverage was within a reasonable period of time. The defendant conclusively states that the eight-day delay between the demand and its disclaimer was timely. Where no excuse is offered the question of whether notice was timely is one of law for the court. See Greenwich Bank v Hartford Fire Ins. Co. of Hartford, Conn., 250 NY 116 (1961). While the courts have found relatively short periods to be unreasonable as a matter of law, such as unexcused delays of 51 days (Deso v Londong & Lancashire Indem. Co. of America, 3 NY2d 127 [1st Dept. 1957]) and 22 days (Rushing v Commercial Casualty Ins. Co., 251 NY 537 [1929]), the plaintiff does not argue any prejudice from the delay, but rather argues that the delay may be longer than eight days. It submits a letter from Bais Ruchel High School to the plaintiff, that was also provided to the defendant, dated November 6, 2014, which seeks defense and indemnification as additional insureds, per its contract with the plaintiff.

However, the plaintiff's argument elides the fact that the contract and the certificate of liability insurance sent along with Bais Ruchel High School's November 6, 2014 letter contains both the defendant's policy and an additional workers compensation and employer liability policy. Under such circumstances, where the defendant had not received any demand for defense or indemnification and an additional insurance policy is implicated, the requirements under Insurance Law § 3420(d)(2) are not triggered. See Travelers Ins. Co v Volmar Constr. Co., 300 AD2d 40 (1st Dept. 2002). Moreover, the plaintiff fails to discuss how a disclaimer of coverage relating to the Roblero action on December 24, 2014, prior to any demand for defense and indemnification by the plaintiff, or the plaintiff's forwarding of the third-party complaint on December 31, 2014, could be considered untimely as to its demand for coverage. Taking these factors into consideration, the unexcused delay of eight days is not unreasonable.

As such, the plaintiff fails to establish that the defendant did not timely disclaim coverage under Insurance Law § 3420(d)(2), and therefore the plaintiff's motion for summary judgment

seeking a declaration that the defendant is obligated to indemnify the plaintiff in the Roblero action is denied.

In support of its motion for a declaration that it is not required to defend or indemnify the plaintiff in the underlying action, the defendant submits, *inter alia*, the policy, the deposition transcript of Abraham Deutsch, the president of the plaintiff, the deposition of Thomas Wilkinson, a claim specialist for the defendant, the tender letter from Bais Ruchel High School, dated December 16, 2014, and the subsequent disclaimer letter dated December 24, 2014. These submissions establish that the defendant had no duty to defend or indemnify under the commercial general liability policy, as Cristian Roblero was an employee of the plaintiff at the time of his alleged injury, and coverage for bodily injury to employees was excluded under section 2(e)(1) of the policy and the "Exclusion – Cross Liability" endorsement of the policy. The submissions further establish that the first tender the defendant received was on or about December 16, 2014, and that it timely disclaimed coverage for the Roblero action on December 24, 2014, even as to the plaintiff, which had not tendered any demand for defense and indemnification. As the defendant has shown a timely and proper disclaimer of coverage as to the Roblero action, summary judgment is proper.

In its Notice of Motion, the defendant requests attorney's fees. Since the motion papers submitted reveal no basis for such relief, that application is denied.

Accordingly, it is,

ORDERED that the plaintiff's motion for summary judgment is denied; and it is further,

ORDERED that the defendant's motion for summary judgment seeking a declaration that it is not obligated to defend or indemnify the plaintiff in the underlying Roblero action, is granted to the extent below, and is otherwise denied; and it is further,

ADJUDGED and DECLARED that the defendant, The Burlington Insurance Company, is not obligated to defend or indemnify the plaintiff, ADD Plumbing, Inc., in the action entitled Cristian Roblero a/k/a Cristian Roblero Zambrano v Bais Ruchel High School, Inc., pending in the Supreme Court, Kings County, under Index No. 507818/2014; and it is further,

ORDERED that the branch of the defendant's motion seeking attorney's fees is denied.

This constitutes the Decision and Order of the Court.

1/14/2020
DATE

NANCY M. BANNON J.S.C.
HON. NANCY M. BANNON

CHECK ONE:	[X]	CASE DISPOSED		[ ]	NON-FINAL DISPOSITION		
	[ ]	GRANTED	[ ] DENIED	[X]	GRANTED IN PART	[ ]	OTHER
APPLICATION:	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER		
CHECK IF APPROPRIATE:	[ ]	INCLUDES TRANSFER/REASSIGN		[ ]	FIDUCIARY APPOINTMENT	[ ]	REFERENCE