

**Mavrakis v Preferred Contrs. Ins. Co.**

2021 NY Slip Op 33117(U)

November 8, 2021

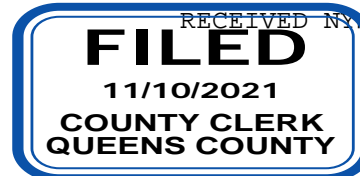
Supreme Court, Queens County

Docket Number: Index No. 711910/20

Judge: Robert I. Caloras

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY
PRESENT: HON. ROBERT I. CALORAS
Justice

PART 36

-----X
NIKOLAOS MAVRAKIS,

Index No. 711910/20
Seq. No. 1

Plaintiff,

-against-

PREFERRED CONTRACTORS INSURANCE
COMPANY,

Defendant.
-----X

The following papers numbered EF13 to EF47 read on this motion by defendant for summary judgment in its favor dismissing the complaint pursuant to CPLR 3212.

Table with 2 columns: Papers, Numbered. Rows include Notice of Motion - Affidavits - Exhibits, Answering Affidavits - Exhibits, Reply Affidavits.

Upon the foregoing papers it is ordered that the motion is granted in part and denied in part for the following reasons:

In this direct action ("Direct Action"), plaintiff seeks insurance coverage for a default judgment and resulting monetary judgment ("Judgment") he obtained against Dahill Construction Company, Inc. ("Dahill") and Uddin Consultants, Inc. ("Uddin") in an underlying action entitled, Nikolaos Mavrakis v. Mohammad S. Haque, Dahill Construction Co., Inc., and Uddin Consultants, Inc., No. 8676/2015 (New York Supreme Court, Queens County) (the "Underlying Action"), for alleged injuries Plaintiff sustained on April 26, 2015 due to the alleged negligence of Dahill and Uddin (the "Accident"). Briefly, the underlying complaint alleges that on April 26, 2015, plaintiff was injured when he fell due to a dangerous, hazardous and unsafe condition allegedly created by Dahill and/or Uddin. Plaintiff seeks coverage from Preferred Contractors Insurance Company ("PCIC"), under liability policy number PCIC5020PCA5159 issued to Dahill for the policy period February 28, 2014 to February 28, 2015 (the "PCIC Policy").

Plaintiff filed the Underlying Action against Mohammad Haque, the owner of the Premises, on July 16, 2015. Thereafter, Plaintiff amended his complaint to include Dahill and Uddin as defendants. Dahill and Uddin were served with an amended summons and amended complaint on September 20, 2017, but both failed to appear. On March 27, 2018, the court in the Underlying Action granted Plaintiff a default judgment against Dahill and Uddin. An inquest on damages was held on January 14, 2020, and, by Short Form Order dated January 29, 2020, the court in the Underlying Action awarded Plaintiff \$300,000 against Dahill and Uddin. Judgment was entered against Dahill and Uddin on May 22, 2020 (the "Judgment").

Defendant submits that its first notice of the Accident, Underlying Action, and Judgment was August 4, 2020, when PCIC received Plaintiff's complaint in this Action. PCIC issued the PCIC Policy to Dahill for the policy period February 28, 2014 to February 28, 2015. Uddin is not an insured under the PCIC Policy. The policy period of the PCIC Policy was not extended and the PCIC Policy expired on February 28, 2015. The PCIC Policy was not renewed and PCIC did not issue a

general liability policy to Dahill and/or Uddin after the expiration of the PCIC Policy on February 28, 2015. On its face, it appears that the PCIC Policy expired before the date of the Accident.

Subject to its terms, conditions, and exclusions, the PCIC Policy provides coverage for sums the insured becomes legally obligated to pay as damages because of “bodily injury” or “property damage” *that takes place during the policy period* and is caused by an “occurrence”, defined as an “accident”, and a duty to defend any “suit” seeking such damages (emphasis added). As a condition precedent to coverage, the PCIC Policy requires timely notice, to wit, “no event later than thirty (30) days after any insured first becomes aware of such “occurrence”....” Further, the Policy provides that “[i]f 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 [PCIC] as soon as practicable but in no event later than thirty (30) days after your first knowledge of such claim or “suit”.

PCIC investigated Plaintiff’s claim for coverage and by letter dated August 19, 2020, disclaimed coverage to Dahill and Uddin for the Underlying Action and Judgment under the PCIC Policy on the bases that (I) Uddin is not an insured under the PCIC Policy; (ii) the Underlying Action does not allege “bodily injury” during the policy period of the PCIC Policy, as required to trigger coverage under the PCIC Policy; (iii) PCIC did not issue a policy of insurance to Dahill and/or Uddin covering April 26, 2015, the date of the Accident; (iv) the breach of the timely notice conditions precedent to coverage under the PCIC Policy; and (v) certain exclusions contained in the PCIC Policy apply to preclude coverage in any event. PCIC also disclaimed coverage to Plaintiff for his independent failure to comply with the timely notice condition in the PCIC Policy.

Defendant submits that, upon review of Plaintiff’s complaint in this Direct Action and the PCIC Policy, defense counsel contacted plaintiff’s counsel, advised that the PCIC Policy was not in effect on the date of the Accident, offered to provide any affidavits necessary to support a voluntary discontinuance, and inquired as to the basis for Plaintiff’s claim that the PCIC Policy was in effect on April 26, 2015, the date of the Accident. In response, plaintiff’s counsel provided a New York City Department of Buildings (“NYCDOB”) document that identifies Dahill as a contractor and the PCIC Policy as Dahill’s general liability insurance, and states that the expiration date of the PCIC Policy was May 28, 2015.

By letter dated August 31, 2020, defendant provided plaintiff with a certified copy of the PCIC Policy and correspondence from TDS Insurance Brokerage Corp (“TDS Insurance”), Dahill’s insurance broker identified on the PCIC Policy, confirming that the PCIC Policy expired on February 28, 2015 and that there was no renewal. Defendant explained that since the PCIC Policy was not in effect on the date of the Accident, there was no coverage for the Accident. Based thereon, defendant requested that Plaintiff voluntarily discontinue the Direct Action against PCIC Policy in good faith, and reserved PCIC’s right to seek fees and costs. By correspondence dated September 3, 2020, Plaintiff’s counsel refused to voluntarily discontinue this action based solely upon the NYCDOB document. Defendant’s counsel then submitted a request to the NYCDOB pursuant to the Freedom Of Information Law for documentation regarding Dahill’s liability insurance coverage in 2015. In response, the NYCDOB advised that a diligent search of its files revealed no documents responsive to defendant’s request.

On October 1, 2020, PCIC served and filed an answer to Plaintiff’s complaint. On October 1, 2020, PCIC also served Plaintiff with a First Set of Interrogatories and First Set of Document Demands (collectively, “Discovery Demands”). Plaintiff responded to PCIC’s Discovery Demands. In response to PCIC’s Interrogatories, Plaintiff referred PCIC to Plaintiff’s Response to Defendant’s First Set of Document Demands to Plaintiff.

Defendant submits that by letter dated January 6, 2021, its attorney again requested that Plaintiff voluntarily discontinue this Direct Action in good faith to avoid unnecessary expense to plaintiff and PCIC, and reserved PCIC's right to seek costs and fees incurred defending against this "frivolous" action. Defendant requested a response from Plaintiff's counsel by January 30, 2021. Defendant submits that Plaintiff's counsel did not respond to its January 6, 2021 letter. Defendant's attorney then called Plaintiff's counsel to inquire whether Plaintiff would voluntarily discontinue the Direct Action in good faith and plaintiff's counsel advised that Plaintiff would not.

By the instant motion, PCIC seeks a declaration that PCIC has no coverage obligation for the Judgment under the PCIC Policy because (I) the Judgment is not for damages because of "bodily injury" that took place during the policy period of the PCIC Policy; and (ii) PCIC was not provided notice of the Accident and Underlying Action until after the Judgment, in breach of the notice conditions in the PCIC Policy. The motion is opposed by the Plaintiff.

#### Discussion

In the first instance, the branch of the motion which seeks to dismiss the complaint on the ground that the policy was not in effect at the time of the underlying accident, is granted. While it is axiomatic that a contract of insurance is to be construed liberally in favor of the insured, where its terms are clear and unambiguous, they must be so read (*Albert J. Schiff Assoc., Inc. v Flack*, 51 NY2d 692, 699 [1980]; *Government Employees Ins. Co. v Kligler*, 42 NY2d 863, 864 [1977]). Here, the record clearly indicates that PCIC issued the Policy to Dahill for the policy period of February 28, 2014 to February 28, 2015. The policy period of the PCIC Policy was not extended, and the PCIC Policy expired on February 28, 2015, before the date of the underlying Accident. Therefore, the accident is not covered under the Policy at issue (*see generally, Empire Group Allcity Ins. Co. v Cicciaro*, 240 AD2d 362, 363 [2d Dept 1997]; *American Home Assur. Co. v Aprigliano*, 161 AD2d 357 [1<sup>st</sup> Dept 1990]; *Employers Ins. of Wausau v County of Nassau*, 141 AD2d 496 [2d Dept 1988]).

The branch of the motion which is to dismiss the complaint on the ground that defendant did not receive timely notice of the claim, is also granted. The PCIC Policy required notice to PCIC of an "occurrence" and "suit" "as soon as practicable but in no event later than thirty (30) days after" an insured first becomes aware of the "occurrence" and/or "suit". The PCIC Policy further expressly provided that "[i]rrespective of reasons, excuse, justification, or prejudice", PCIC "will have no liability for any default judgment entered against any insured, nor for any judgment or settlement or determination of liability rendered or entered before notice to [PCIC]..." Also, the PCIC Policy expressly states that there is no coverage under the PCIC Policy where, as here, notice is after judgment against the insured, "[i]rrespective of reasons, excuse, justification, or prejudice." " 'Where an insurance policy requires that notice of an occurrence be given promptly, notice must be given within a reasonable time in view of all of the facts and circumstances' " (*Zeldin v Interboro Mut. Indem. Ins. Co.*, 44 AD3d 652, 652 [2d Dept 2007], quoting *Eagle Ins. Co. v Zuckerman*, 301 AD2d 493, 495 [2d Dept 2003]; *see Argo Corp. v Greater N.Y. Mut. Ins. Co.*, 4 NY3d 332, 339 [2005]; *White v City of New York*, 81 NY2d 955, 957 [1993]). The requirement that an insured comply with the notice provision of an insurance policy operates as a condition precedent to coverage (*see Security Mut. Ins. Co. of N.Y. v Acker-Fitzsimons Corp.*, 31 NY2d 436, 440 [1972]; *Quality Invs., Ltd. v Lloyd's London, England*, 11 AD3d 443 [2d Dept 2004]). Absent a valid excuse for a delay in furnishing notice, failure to satisfy the notice requirement vitiates coverage (*see Great Canal Realty Corp. v Seneca Ins. Co., Inc.*, 5 NY3d 742, 743 [2005]; *Sputnik Rest. Corp. v United Natl. Ins. Co.*, 62 AD3d 689 [2d Dept 2009]; *Ponok Realty Corp. v United Nat. Specialty Ins. Co.*, 69 AD3d 596, 597 [2d Dept 2010]). Here, PCIC's first notice of the Accident and Underlying Action was August

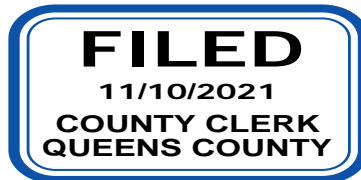
4, 2020, five years after the Accident occurred and the Underlying Action was filed, three years after Dahill and Uddin were served in the Underlying Action, and much more than thirty (30) days after Dahill first became aware of the Accident and the Underlying Action, as required by the PCIC Policy.

PCIC established its prima facie entitlement to judgment as a matter of law by demonstrating that it was not notified of the accident until approximately 5 years had elapsed (*see White v City of New York*, 81 NY2d at 957; *Jordan Constr. Prods. Corp. v Travelers Indem. Co. of Am.*, 14 AD3d 655, 656 [2005]). Once PCIC established its prima facie entitlement to judgment, the burden shifted to the plaintiff to raise a triable issue of fact as to whether there existed a reasonable excuse for their delay in notifying PCIC (*see Argentina v Otsego Mut. Fire Ins. Co.*, 86 NY2d 748, 750 [1995]). The plaintiff failed to do so (*see Seneca Ins. Co. v W.S. Distrib., Inc.*, 40 AD3d 1068, 1070 [2d Dept 2007]; *Blue Ridge Ins. Co. v Biegelman*, 36 AD3d 736 [2d Dept 2007]).

Moreover, although an injured party has an independent right to give notice to an insurer, and is not to be charged vicariously with an insured's delay (see Insurance Law § 3420 [a]; *Maldonado v C.L.-M.I. Proprs., Inc.*, 39 AD3d 822, 823 [2d Dept 2007]; *Seneca Ins. Co. v W.S. Distrib., Inc.*, 40 AD3d at 1070; *Becker v Colonial Coop. Ins. Co.*, 24 AD3d 702, 704 [2d Dept 2005]), here the plaintiff did not exercise his right to timely notify PCIC of his claim (*see Sputnik Rest. Corp. v United Nat. Ins. Co.*, 62 AD3d 689, 689-90 [2d Dept 2009]).

The branch of the motion which is for attorney's fees and costs, is denied. It is well settled in New York that a prevailing party may not recover attorneys' fees from the losing party except where authorized by statute, agreement or court rule (*see Chapel v Mitchell*, 84 NY2d 345, 349 [1994], quoting *Hooper Assoc., Ltd. v AGS Computers, Inc.*, 74 NY2d 487, 491 [1989]; *Mighty Midgets, Inc. v Centennial Ins. Co.*, 47 NY2d 12, 21-22 [1979]). Here, defendant has not presented evidence indicating that it is entitled to attorney's fees pursuant to a statute, agreement or court rule.

Furthermore, defendant failed to demonstrate that plaintiff engaged in frivolous conduct within the meaning of 22 NYCRR 130-1.1(c) (*see Sessa v Doxey*, 172 AD3d 939, 940 [2d Dept 2019]).



**DATED: November 8, 2021**

**ROBERT I. CALORAS, J.S.C.**