Woltmann Assoc., Inc. v Preferred Mut. Ins. Co.
2010 NY Slip Op 30286(U)
February 8, 2010
Supreme Court, Suffolk County
Docket Number: 06-10519
Judge: Peter Fox Cohalan
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[* 1]

SHORT FORM ORDER

INDEX No. 06-10519

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 24 - SUFFOLK COUNTY

PRESENT:

Hon. PETER FOX COHALAN
Justice of the Supreme Court

MOTION DATE 7-6-09 (#003)
MOTION DATE 9-14-09 (#004)
ADJ. DATE 10-14-09
MNEMONIC: # 003 - MD
004 - MD

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WOLTMANN ASSOCIATES, INC., and
UTICA NATIONAL INSURANCE CO.,

Plaintiffs,

- against -

PREFERRED MUTUAL INSURANCE CO.,
and SMS RESISTENCIA CARPENTRY CO.,

Defendants.

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PREFERRED MUTUAL INSURANCE,

Third-Party Plaintiff,

- against -

FERRY STREET INSURANCE AGENCY, INC.,

Third-Party Defendant.

---X

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Upon the following papers numbered 1 to 31 read on this motion and cross-motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers (003) 1 - 12; Notice of Cross-Motion and supporting papers (004) 13-18; Answering Affidavits and supporting papers 19-21; 22-23 (untabbed exhibits); Replying Affidavits and supporting papers 24-29; 30-31; Other, (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that this motion (003) by the defendant, Preferred Mutual Insurance Company, pursuant to CPLR §3212 for summary judgment dismissing the plaintiffs' complaint, is denied; and it is further

ORDERED that this cross-motion (004) by the plaintiffs, Woltmann Associates, Inc. and Utica National Insurance Co., pursuant to Insurance Law §3420 and CPLR §3212 for summary judgment declaring that Preferred Mutual Insurance Co. has failed to timely disclaim coverage and that the plaintiffs are entitled to $210,000 as damages pursuant to the judgment is denied.

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The complaint asserts that the defendant Preferred Mutual Insurance Co. (hereinafter Preferred) issued a policy of insurance to SMS Resistencia Carpentry Co., Inc. (hereinafter SMS) under policy # 3190646, effective August 27, 2002 through August 27, 2003, with bodily injury limits of $1,000,000 per occurrence and $2,000,000 aggregate. On or about September 6, 2002, the plaintiff Woltmann Associates Inc., (hereinafter Woltmann) hired SMS to perform subcontracting work at the project known as Sunken Ponds Estates, Building 20, Middle Road, Riverhead, Suffolk County, Long Island, New York (hereinafter Sunken Ponds). The parties entered into a Blanket Subcontractor Agreement-Indemnification Agreement whereby Woltmann was to be named an additional insured under the liability, excess and/or umbrella policies issued to SMS and was to be held harmless from all claims, damages, losses and expenses, including attorney's fees, arising out of or resulting from the performance of the work provided the damage was attributable to, inter alia, bodily injury caused in whole or in part by any negligent act or omission of the subcontractor and subcontractors of the subcontractor, directly or indirectly employed by them. On September 6, 2002 Cezar DeMoura (hereinafter DeMoura) was injured while performing carpentry work at Sunken Ponds when he fell from a ladder provided to him by SMS, and he commenced an action for damages arising from that incident, alleging Woltmann was statutorily liable under Labor Law §240. Woltmann, in turn, commenced a third-party action against SMS as a third-party defendant in the negligence lawsuit commenced by DeMoura. By order, dated August 30, 2005, Supreme Court Justice Daniel Martin granted Woltmann a default judgment against SMS for its failure to appear and answer the third-party summons and complaint. On December 6, 2005, the action brought by DeMoura was settled before the Supreme Court Justice Thomas Feinman in the amount of $210,000, which amount was paid in full by the plaintiff Utica National Insurance Co., the insurance company for Woltmann. By order of Supreme Court Justice R. Bruce Cozzens, dated January 11, 2006 and entered in the office of the Clerk on January 31, 2006, judgment was entered against SMS in favor of Woltmann in the amount of $210,000. On February 7, 2006, a copy of the Judgment with Notice of Entry was served upon SMS and Preferred. More than thirty days have lapsed since service of the Judgment with Notice of Entry on SMS and Preferred and no part of the judgment has been paid.

In motion (003) Preferred seeks dismissal of the complaint because the policy is void in that SMS made material misrepresentations in procuring the liability insurance policy. Preferred claims that Sidney Martin Santos (hereinafter Santos), on behalf of SMS, listed on two separate portions of the application that SMS performed work in New Jersey, knowing the work was to be done in New York. Preferred claims it cancelled the policy in June 2003, approximately ten months after the policy was issued. Preferred further claims that the Ferry Street Insurance Agency, Inc. (hereinafter Ferry), the insurance agent for SMS, is an independent broker, and any mistakes alleged by SMS are not binding on Preferred. In support of its motion Preferred has submitted, inter alia, copies of the pleadings and answer; a copy of the Commercial Lines Policy issued by Preferred; answers to interrogatories; and copies of the transcripts of the examinations before trial (hereinafter EBT) of Santos, dated July 21, 2005, Maritza Ferreira (hereinafter Ferreira) on behalf of Ferry, dated November 3, 2008, Linda J. Howard (hereinafter Howard) on behalf of Preferred, dated January 5, 2009; and a copy of a letter, dated January 23, 2001.

In cross-motion (004), the plaintiffs seek summary judgment because Preferred is legally obligated to pay the judgment obtained by the plaintiffs against Preferred's insured, SMS, in the amount of $210,000, and because Preferred did not disclaim liability or coverage. In support of their cross-motion the plaintiffs have submitted, inter alia, an attorney's affirmation; copies of the pleadings and answers in the instant action and in the underlying action and a copy of the Judgment with Notice of Entry, dated February 7, 2006, with affidavits of service.

The proponent of 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. To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (***Sillman v Twentieth Century-Fox Film Corporation***, 3 NY2d 395, 165 NYS2d 498 [1957]). The movant has the initial burden of proving entitlement to summary judgment (***Winegrad v N.Y.U. Medical Center***, 64 NY2d 851, 487 NYS2d 316 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (***Winegrad v N.Y.U. Medical Center***, *supra*). Once such proof has been offered, the burden then shifts to the opposing party who, in order to defeat the motion for summary judgment, must proffer evidentiary proof in admissible form sufficient to require a trial of any issue of fact (***Joseph P. Day Realty Corp. v Aeroxon Prods.***, 148 AD2d 499, 538 NYS2d 843 [1979]) and must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (***Castro v Liberty Bus Co.***, 79 AD2d 1014, 435 NYS2d 340 [1981]). Summary judgment shall only be granted when there are no issues of material fact and the evidence requires the court to direct a judgment in favor of the movant as a matter of law (***Friends of Animals v Associated Fur Mfrs.***, 46 NY2d 1065, 416 NYS2d 790 [1979]).

Sydney Martin Santos

Santos, at his EBT on July 21, 2005, testified through an interpreter that he came to the United States from Brazil and began working in construction framing buildings and houses. In 2002 in New Jersey he started his own framing and construction company, SMS, of which he was president. He performed work for Woltmann, his only client, at jobs located in New Jersey and Melville, Port Washington, Westhampton and Bay Shore, all in Long Island, New York. SMS did not subcontract out its work and had had twelve employees since its inception, some working full-time and about six working part-time. When shown the Blanket Subcontractor Agreement-Indemnification Agreement entered into with Woltmann, he indicated he signed it but did not know it was a contract as he did not know much English, did not know what he was reading, and no one read it for him. He knew the job involved in this lawsuit was in New York.

Santos stated he had gone to Ferry for the insurance and told Ferreira, the owner of Ferry, that he needed insurance to do carpentry work. She filled out the application for him because he could not speak English. When shown a document, dated August 26, 2000, he stated it was for the insurance for SMS. He testified that when Ferreira asked him how many years experience he had, he told her five years. New Jersey was the only state listed on the insurance application as to where he worked. The supplemental application listed SMS as working in New Jersey. Ferreira did not ask him what states he worked in and just filled in New Jersey on the application.

He paid what she asked for and went to work at the River Edge, New York job only after he obtained the insurance. (Based on all the other testimony in this case, the witness meant Riverhead, Long Island, New York). He believed the policy covered liability and worker's compensation. He did not tell Ferreira how many employees he had and she wrote down "one." He did not know there was a difference between New Jersey and New York. He stated he speaks Portuguese and Ferreira speaks Spanish. The policy was obtained through the Preferred Artisan Contractors' Program. He asked Ferreira to add Woltmann to the policy. He did not know he needed different insurance to work in New York, but he told Ferreira he worked in New York, and asked her to fax the information to his boss in New York, which she did. His employee, DeMoura, who was his partner's brother, was injured while working at River Edge, New York (Riverhead, New York) when his ladder slid while he was nailing on a wall, giving rise to the underlying action.

Maritza Ferreira

Ferreira at her EBT, on November 3, 2008, testified that she had been licensed as a broker in property and casualty insurance in New Jersey for 15 years and was the owner of Ferry. Ferry was not an agent for Preferred. Ferry brokered business with Morstan Insurance Agency (hereinafter Morstan) and was a subagent for it. She also worked for other general agencies. Through Morstan, she placed insurance with Preferred and others. When she had a client who was going to do business in a state other than New Jersey, she went through Morstan as it had companies that wrote standing coverage for New York. She stated Preferred only wrote insurance in New Jersey. She knew in 2002 that Preferred would not accept a risk for a contractor under its Artisan Contractors' Program if the artisan contractor was going to be doing the work in New York. She would have had to place the contractor with a different company for work in New York.

She testified that she is Peruvian but spoke a little Portuguese. She was familiar with SMS as Santos came to her office alone to open a general liability policy and they spoke Portuguese. She was of the opinion that she was sufficiently fluent in Portuguese to speak to Santos in Portuguese. She filled out the application with him as he told her he needed liability insurance and worker's compensation insurance and Santos told her he worked in New Jersey. If he told her he was doing work in New York she would never have given him the Preferred application. She also asked him about the nature of the business as Preferred did not cover roofing.

She stated that she faxed the application to Morstan and asked that it add an additional insured to the insurance policy as Santos asked for a certificate of insurance and gave her information about listing an additional insured. The fax indicated that work was going to be done in New York for the additional insured. She then testified that the work was going to be done in New Jersey. Woltmann was listed as an additional insured and she stated Woltmann was located in New York, but could have been located anywhere as long as the work was done in New Jersey. The address listed for Woltmann was Port Jefferson, New Jersey with a zip code of 11777. She testified that she was not familiar with any New Jersey zip code starting with any number other than "0". She indicated that New Jersey did not have a telephone area code of

631 but she did write the 631 area code down for Woltmann. She testified that Santos told her Woltmann was in New Jersey and that the work was being done in New Jersey. She assumed the application would be accepted so she prepared the certificate of insurance on August 26, 2002 and gave it to Santos.

She did not know if Morstan did any verification of the information she sent. She believed Preferred's auditors conduct a follow-up phone call to the applicant to verify the information on the application. She did not know if there was a town in New Jersey called Port Jefferson, whether Preferred knew that, or whether Preferred checked the zip code for Woltmann. There was an additional fax to Morstan on June 3, 2003 as Santos came in with an address correction advising that Woltmann was in New York working in New Jersey, and the correction was made. Later Santos said that Woltmann was working in New York and she told him that he could not stay with Preferred, so she placed him with another company, Burlington Insurance Company (hereinafter Burlington). She did not know why the new request was made on June 3, 2003 to add an additional insured. She had nothing to show that before June 3, 2003 that she ever brought to Morstan the subject of an additional insured. She made no contact with Woltmann regarding the type of work and where the work was being done. Neither Morstan nor Preferred expressed to her any concerns regarding the policy or information provided to them. She would have been able to place Santos with another company for doing business in New York, but the company would not be competitive and the cost would be a lot higher, but she never indicated this to Santos. The policy with Preferred was not scheduled to run out until August 27, 2003 as it was a one-year policy.

Linda J. Howard

Howard testified at her EBT on January 5, 2009 on behalf of her employer Preferred that her office was in New Berlin, New York, which had been Preferred's main office since 1896. She described Preferred as a mutual company, an advanced premium cooperative, incorporated in New York. She was the assistant vice president commercial lines territorial manager and oversaw all the commercial lines underwriting for New York and had been working for Preferred for over 35 years. All policies were written through licensed agents with Preferred who did not do business directly with brokers. Morstan was an authorized agency for Preferred and had offices in New York and New Jersey and could write policies in both states. Morstan had binding authority up to $1,000,000 for contractor liability.

She further testified that Ferry was not licensed by Preferred. It was totally up to Morstan to decide from whom it accepted applications. Preferred had no say at all in the approval process of the brokers with whom it did business and Preferred did not deal directly with the brokers.

In a bulletin letter, dated January 23, 2001, addressed and sent to all its New York agents, Preferred implemented a policy that it would no longer write new business carpentry risks in New York. Howard believed that the bulleting was sent to Morstan only at its New York office. Ferry, as a broker, would not have received Preferred's bulletin letter unless Morstan had sent the bulletin letter to Ferry. She testified that she had a copy of the SMS application from 2002 and the application did not indicate that it could not be used for New York business or New York

carpentry policies. Neither the broker nor the insured would know from the application that New York coverage could not be applied for. The brochure for the Preferred Artisan Contractors' Program did not indicate that the policy was not available for New York insureds and the insured would not know otherwise.

Howard further testified that if a mistake were made on the policy or inaccurate information provided, there would be no way that it would be caught by Preferred. She testified that she found a file copy of the policy issued to SMS, effective August 27, 2002, for $1,000,0000 per occurrence and $2,000,000 aggregate. Preferred had no procedure in place for any application to catch either errors or misrepresentations on applications that would be obvious by either addresses or phone numbers or area codes or zip codes. Preferred did not verify addresses or phone numbers on the applications or share or obtain information about prior claim histories or policies with other insurance companies. There was no indication on her policy file to indicate that a phone call was made to confirm the information on SMS's application. There was no additional insured named on the policy other than SMS. No copy of the applicant's certificate of incorporation was requested with the application. The only request it received to name an additional insured was dated June 2, 2003 from Ferry and sent by fax from Morstan on June 10, 2003. The policy was then endorsed effective June 2, 2003 adding an additional insured into the policy. The supplemental form for the request for additional insured endorsement set forth that the work was being done in New Jersey. The policy was cancelled on June 10, 2003 with a signed loss policy release generated by Ferry with the insured because coverage was rewritten with another company, Burlington, effective June 3, 2003. Barring any reasons, incidents which occurred between the inception date of August 27, 2002 and the cancellation date would be covered under the Preferred policy. Preferred did not know about DeMoura's claim at the time the policy with Preferred was cancelled.

Howard stated that there was a material misrepresentation on the application for insurance wherein it indicated the insured's work was in New Jersey, and New Jersey was the only state listed on the application. In 2002, under the Preferred Artisan Contractors' Program, if a worker was injured doing framing in New Jersey, he would have been covered under the policy. If the worker's line of work took him outside New Jersey, he would still be covered if he listed the other state on the application. However, if at the time of the application he was not working outside of New Jersey, and no other state were listed on the application, then there would not have been a misrepresentation on the application.

Based upon the foregoing, the Court finds that neither the plaintiffs nor the defendant Preferred have demonstrated prima facie entitlement to summary judgment as the moving papers raise factual issues which preclude summary judgment.

The policy in effect at the time of the accident indicates at "New Jersey Changes-Cancellation and Nonrenewal" at paragraph C that a policy in effect for 60 days or more may be cancelled for: "(3) Material misrepresentation or nondisclosure to us of a material fact at the time of acceptance of the risk."

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Insurance Law §3420(d) mandates that an insurer must as soon as is reasonably possible give written notice to the insured and the injured person or any other claimant of disclaimer of liability or denial of coverage for death or bodily injury under a liability policy. (***Bovis Lend Lease M\LMB, Inc. et al v Royal Surplus Lines Insurance Company,*** 27 AD3d 84, 806 NYS2d 53 [1st Dept 2005]). Notice provisions in insurance policies afford the insurer an opportunity to protect itself and the giving of the required notice is a condition to the insurer's liability; absent a valid excuse, a failure to satisfy the notice requirement vitiates the policy and the insurer need not show prejudice before it can assert the defense of noncompliance; what is reasonable notice is usually left for determination at trial, However, where there is no excuse for the delay and mitigating considerations are absent, the issue may be disposed of as a matter of law (see, ***Schlesinger et al v Nationwide Mutual Insurance Company***, 294 AD2d 421, 742 NYS2d 352 [2nd Dept 2002]; ***Rafael Martini a/k/a Rafael Pandas et al v Lafayette Studios Corp. et al,*** 177 Misc2d 383, 676 NYS2d 808 [Supreme Court of New York, New York County 1998]). "It is well settled that the phrase 'as soon as practicable' is an elastic one, not to be defined in a vacuum which calls 'for a determination of what was within a reasonable time in light of the facts and circumstances of the case at hand'; and thus the term requires a case by case analysis rather than an 'ironbound' yardstick" (***State Farm Mutual v Kathehis,*** 4 Misc3d 1012A, 791 NYS2d 874 [Supreme Court of New York, Bronx County 2004]).

There are many factual issues concerning whether Preferred failed to timely disclaim coverage and whether the plaintiffs are entitled to $210,000 as damages. There are factual issues concerning whether Santos gave misinformation to the broker at Ferry, or if the information he gave at the time of making the application for insurance with Ferry was correct when given by him. There are factual issues concerning whether Santos and Ferriera were able to effectively communicate in Portuguese and whether Ferreira understood Santos and/or mistakenly completed the application for insurance. There are factual issues concerning whether or not Morstan was notified of the change in Preferred's policy concerning its decision not to write coverage after January 23, 2001 for carpentry work in New York. There are further factual issues concerning whether Preferred's application form and the Artisan brochure put either Morstan, Ferry, or Santos on notice that the policy would not cover work being done in New York. There are factual issues whether or not mistake or misrepresentation preclude recovery by the plaintiffs.

Accordingly, motions (004) and (005) are denied.

Dated: January 8, 2010

J.S.C.

____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**