2016 WL 1136297

THIS DECISION IS UNCORRECTED AND SUBJECT TO REVISION BEFORE PUBLICATION IN THE NEW YORK REPORTS.
Court of Appeals of New York.

SPOLETA CONSTRUCTION, LLC, Respondent,
v.
ASPEN INSURANCE UK LIMITED, & c., Appellant,
1255 Portland, LLC, et al., Defendants.

March 24, 2016.

Synopsis
Background: Construction contractor brought action against subcontractor, subcontractor's employee, and subcontractor's commercial general liability insurer, seeking declaration that insurer was obligated to provide coverage in employee's negligence action against contractor. The Supreme Court, Monroe County, Thomas A. Stander, J., granted insurer's motion to dismiss based on documentary evidence, and contractor appealed. The Supreme Court, Appellate Division, 991 N.Y.S.2d 183, reversed and certified question regarding whether its order was properly made.

Holding: The Court of Appeals held that letter forwarded to subcontractor's insurer qualified as a notice of an "occurrence" under subcontractor's policy.

Affirmed; question answered.

West Headnotes (1)

[1] **Insurance**

Persons Giving Notice or Proof
Insurance

Of Notice

Contractor's letter forwarded to subcontractor's commercial general liability insurer after subcontractor's employee sued it for work-related personal injuries qualified as notice of an "occurrence" under subcontractor's policy, which named contractor as an additional insured; although the letter did not expressly state that contractor was seeking coverage as an additional insured, it requested defense and indemnity under the contract without specifically invoking either policy's indemnification or additional insurance provisions, requested that insurer be placed on notice of "this claim," and identified injured employee, as well as date, location and general nature of the accident.

Cases that cite this headnote

Attorneys and Law Firms

Stephanie A. Nashban, for appellant.

Janet P. Ford, for respondent.

MEMORANDUM.
The order of the Appellate Division should be affirmed, with costs, and the certified question answered in the affirmative.

Plaintiff Spoleta Construction seeks a declaration that defendant Aspen Insurance UK Limited c/o Aspen Specialty Insurance Management Company is obligated to defend and indemnify Spoleta in a personal injury action commenced by an employee of Spoleta's subcontractor, Hub–Langie Paving, Inc. The subcontract required that Spoleta be named as an additional insured on Hub–Langie's commercial general liability insurance policy, and that Hub–Langie defend and indemnify Spoleta for all claims of bodily injury or physical injury to property arising out of Hub–Langie's work. Shortly after receiving notice of the injury to Hub–Langie's employee, Spoleta's insurer sent a letter to Hub–Langie about the claim, seeking the contact information for Hub–Langie's insurer and its insurance policy number, stating that Hub–Langie

had agreed to defend and indemnify Spoleta and hold it harmless, and requesting that Hub–Langie "place [its] insurance carrier on notice of this claim so that they m [a]y do their own investigation of this claim." Hub–Langie's broker forwarded the letter to Aspen—as its insurer—along with a general liability notice of occurrence/claim form describing the employee's injury. Hub–Langie also sent a copy of the subcontract at Aspen's request.

Approximately three months later, Hub–Langie's employee commenced the underlying action against Spoleta and the property owner, seeking to recover for his injuries. Spoleta's counsel notified Aspen thereof, by letter, and indicated that Spoleta had not yet received a response to its previous request for defense and indemnification. This time, counsel expressly stated that Hub–Langie was required to defend and indemnify Spoleta and name it as an additional insured, and included a certificate of insurance demonstrating that Spoleta was named as an additional insured on the policy that Aspen issued to Hub–Langie. Aspen denied coverage due to late notice because, in its initial letter, Spoleta "framed" itself only as a claimant against Hub–Langie, not as an additional insured of Aspen, and coverage had been denied to Hub–Langie for unrelated reasons.

Spoleta then commenced this declaratory judgment action against Aspen, among others. In lieu of answering, Aspen moved to dismiss the complaint based on documentary evidence pursuant to CPLR 3211(a)(1). Supreme Court granted the motion. However, on Spoleta's appeal, the Appellate Division reversed, holding that the documentary evidence proffered did not establish a defense to Spoleta's claim as a matter of law (119 A.D.3d 1391, 1394 [2014]). The Appellate Division, therefore, denied Aspen's motion and reinstated the complaint against it (*see id.* at 1391, 991 N.Y.S.2d 183). The court thereafter certified the following question: "Was the order of this Court entered July 11, 2014, properly made?"

At the relevant time, "the rule in New York [was] that where a contract of primary insurance require[d] notice 'as soon as practicable' after an occurrence, the absence of timely notice of an occurrence [constituted] a failure to comply with a condition precedent which, as a matter of law, vitiate [d] the contract ... [and][n]o showing of prejudice [was] required" (*Argo Corp. v. Greater N.Y. Mut. Ins. Co.,* 4 N.Y.3d 332, 339 [2005]). The Appellate Division, therefore, properly stated the issue as whether Spoleta's initial letter—forwarded to Aspen by Hub–Langie's broker at Spoleta's request—constituted notice of an "occurrence" under the policy issued by Aspen. The pertinent notice provision of the policy stated: "You must see to it that [Aspen is] notified as soon as practicable of an 'occurrence' or an offense which may result in a claim." Notice was to include, to the extent possible: "(1) How, when and where the 'occurrence' or 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."

We reject Aspen's argument that the documentary evidence established as a matter of law that Spoleta did not timely see to it that Aspen was notified of an occurrence. Aspen claims that it interpreted Spoleta's initial letter as seeking only a defense and indemnity from Hub–Langie pursuant to the indemnification provision of the subcontract because Spoleta did not expressly state that it was seeking coverage as an additional insured. However, the letter itself did not identify the indemnification provision of the subcontract as the basis for the communication—it simply requested a defense and indemnity under the contract without specifically invoking either the indemnification or additional insurance provisions. Moreover, the letter requested that Hub–Langie "place [its] insurance carrier on notice of *this claim* " (emphasis added) and provided information about the identity of the injured employee, as well as the date, location and general nature of the accident. That is, in addition to requesting that the insurer be put on notice, the letter provided the details that the policy required to be included by an insured in notice of an occurrence.

Under these circumstances, it cannot be said that the "documentary evidence submitted conclusively establishe[d] a defense to the asserted claims as a matter of law" (*Beal Sav. Bank v. Sommer,* 8 N.Y.3d 318, 324 [2007]; *see Leon v. Martinez,* 84 N.Y.2d 83, 88 [1994]). Accordingly, the Appellate Division properly denied Aspen's motion and reinstated the complaint. Aspen's remaining arguments have been considered and determined to be lacking in merit.

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Order affirmed, with costs, and certified question answered in the affirmative, in a memorandum.

Chief Judge DiFIORE and Judges PIGOTT, RIVERA, ABDUS–SALAAM, STEIN, FAHEY and GARCIA concur.

All Citations

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