

SCANNED ON 8/19/2009
SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MON. EILEEN BRANSTEN
Justice

PART 3

The Travelers Indemnity Company

INDEX NO. 603601/2002

MOTION DATE 1/26/09

MOTION SEQ. NO. 014

MOTION CAL. NO. _____

- v -

ORANGE AND ROCKLAND UTILITIES, INC.
AND JOE DOE CORPORATIONS 1-100

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION.

FILED

AUG 19 2009

COUNTY CLERK'S OFFICE
NEW YORK

RECEIVED
AUG 19 2009
JAS MOTION SUPREME COURT OFFICE
NYS SUPREME COURT - CIVIL

Dated: 8-18-09

Eileen Bransten
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART THREE

-----X

THE TRAVELERS INDEMNITY COMPANY,
Plaintiff,

-against-

ORANGE AND ROCKLAND UTILITIES, INC. and
JOHN DOE CORPORATIONS 1-100,
Defendants.

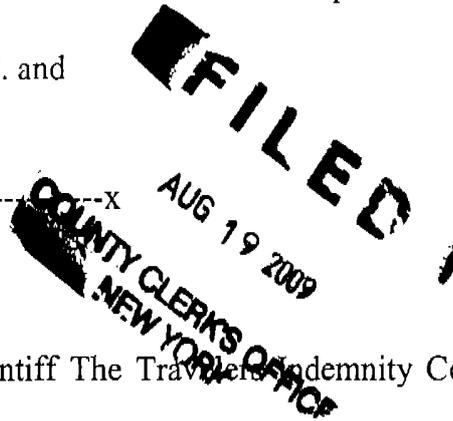
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BRANSTEN, J.:

In this declaratory judgment action, plaintiff The Travelers Indemnity Company (“Travelers”) seeks an order declaring that it is not liable under certain insurance policies issued by it or its predecessors to defendant Orange and Rockland Utilities, Inc. (“ORU”) in connection with ORU’s costs for investigation and/or remediation of pollution/contaminants at seven former Manufactured Gas Plants (“MGPs”) owned or previously owned by ORU. The primary policies under which ORU seeks coverage were issued by Travelers or its predecessors between 1955 and 1978.

MGPs operated primarily between the years 1830 and 1915 during what has been referred to as the “Gaslight Era.” At that time, MGPs delivered gas into residential homes and businesses through a network of underground pipes. Each town generally had its own gas plant(s). While some plants survived well beyond the advent of electricity, generally, the availability of natural gas via interstate pipelines eventually brought the MGPs to an end during the mid-20th century.

Index No. 603601/02
Motion Date: 1/26/09
Motion Seq. Nos.: 014, 015



In motion sequence number 014, Travelers moves for an order granting partial summary judgment, pursuant to CPLR 3212, declaring that coverage is excluded under any comprehensive general liability insurance policies issued by Travelers to ORU for any and all costs and/or losses associated with the investigation and remediation of pollution at the subject MGP sites on the ground that ORU failed to provide timely notice of its claims to Travelers.

In motion sequence number 015, ORU moves for an order granting partial summary judgment in its favor declaring that Travelers may not assert a late notice of claim defense on the ground that Travelers waived, or is otherwise estopped from asserting said defense.

Travelers and ORU have designated the MGP located on Gedney Street in Nyack, New York, as a “test” site for purposes of this motion and limit arguments to that site alone.

BACKGROUND

During various periods from approximately 1852 until 1965, ORU (or its predecessors) owned and operated MGPs in Orange County and Rockland County, New York.* The Nyack site was operated by ORU from approximately 1852 until 1964. It

* The MGPs were located at: (1) Fulton and Canal Streets, Middletown, NY; (2) Genung and Phillip Streets, Middletown, NY; (3) Pike and King Streets, Port Jervis, NY; (4) Gedney Street, Nyack, NY; (5) Chestnut Street, Ramapo Avenue and Pat Malone Drive, Suffern, NY; (6) 93B Maple Avenue, Haverstraw, NY; (7) Clove and Maple Avenue, Haverstraw, NY; and (8) McVeigh Road, Middletown, NY.

initially produced coal gas, then carbureted water gas, and then high British thermal units (“BTU”) oil gas.

On April 14, 1995, ORU notified Travelers of potential environmental liabilities at certain MGPs, including Nyack. In its letter, ORU informed Travelers that the New York State Department of Environmental Conservation (“DEC”) intended to require ORU to investigate, and, if necessary, remediate any contamination that may be found to exist at any of its MGP sites. Together with the notice, ORU sent Travelers a draft consent order from the DEC, requiring ORU to conduct a preliminary investigation for each MGP site. The purpose of the preliminary investigation was to enable the DEC to determine the presence of any hazardous substances at the MGP sites, and to develop and implement a remediation plan with respect to any of the sites that the DEC determined required more comprehensive action.

On May 1, 1995, Travelers acknowledged receipt of ORU’s notice. Travelers made no determination of coverage, reserving its rights to do so at a later time.

In January 1996, ORU sent a finalized copy of the DEC consent order to Travelers and, again requested coverage. What followed, for years, were a series of letters from ORU to Travelers. ORU continued to send Travelers information regarding its MGP sites, including Nyack and continued to provide updates with respect to any pertinent facts, such as developments with the DEC and/or reports regarding environmental investigations at the

MGP sites. Travelers answered with vague responses, each letter closing with boilerplate reservation of rights language. None of the evidence indicates that Travelers conducted a substantive investigation into the environmental claims or issues.

On February 4, 2002, ORU sent Travelers a settlement proposal, seeking to reach a final resolution on coverage for all of the subject MGPs. On September 20, 2002, seven years after the April 14, 1995 notice, Travelers rejected the settlement proposal, and, for the first time, disclaimed coverage for the MGP sites because, among other reasons, “Orange & Rockland failed to provide written notice of any accident or occurrence giving rise to a claim for damage as soon as practicable as required by the express terms of the policies.”

Two weeks later, Travelers commenced the instant declaratory judgment action asserting that it owes no coverage under the subject policies for any costs associated with property damage at the MGP sites. One of the grounds asserted by Travelers is that ORU did not give timely notice of its claims as required by the policies.

The Insurance Policies, and Pertinent Facts Surrounding ORU’s Claims

The Travelers Policies generally require that ORU provide notice of an accident or occurrence “as soon as practicable” and notice of a claim or suit “immediately” to Travelers.

According to Travelers, ORU was sufficiently aware of its potential liability at the MGP sites dating back to at least 1981. Travelers contends that, despite ORU's obligation to provide prompt notification of accidents, occurrences and/or claims, it waited 14 years before providing such notice to Travelers. Travelers points out that: (a) on June 9, 1981, ORU forwarded correspondence to the Environmental Protection Agency (EPA), notifying the EPA that three of its MGPs, including the Nyack site, contained "[p]ossible residual from utility gas manufacturing" stemming from "[s]pillages during normal operations and closure;" (b) in 1984, an investigation for a planned waterfront development of the property adjacent to the Nyack MGP noted the presence of "'fuel oil type odors' . . . 'in subsurface soil;'" (c) in September 1985, ORU was required to and did investigate and remediate coal tar contamination at the MGP site known as the Middletown Fulton MGP; (d) in 1987, the EPA began an environmental investigation of the Nyack site; (e) in 1988, the American Gas Association inquired about MGP byproducts; and (f) in April 1991, the DEC requested that ORU submit data "explaining the coal tar site activities of your company. . . for all of your company's sites listed in the Registry. . . as well as any unlisted and potential sites," and ORU responded to the DEC by letter, dated May 10, 1991, which attached reports of the history and operations of all of the MGP sites.

Travelers contends that, pursuant to the terms of the insurance policies, ORU was required to give notice of the likely pollution liability at the MGP sites, including the need

to conduct investigations and remediations at the subject MGPs, approximately 14 years before it was finally given. Travelers asserts that, for the 14 years during which it was delinquent, ORU continued to be actively aware of the pollution problems at the MGPs. Travelers contends that the evidence, including an internal memorandum drafted by an ORU employee, which warned that “the buried tar and other residue may be coming back to haunt us,” confirms ORU’s knowledge of the grave environmental problems at the MGPs and that notice should have been furnished years earlier.

ORU counters that its April 14, 1995 notice was timely and fully complied with the policies’ notice requirements. ORU explains that, prior to giving notice, in 1994, it had discussions with the DEC regarding an investigation of the MGP located in Middletown, New York, but that the DEC indicated that it wanted to broaden the scope of the investigation to encompass all of ORU’s MGPs. ORU claims that, even at this point, no remedial activities were discussed, and that the DEC’s first draft of a consent order required nothing more than investigations of the MGPs. A later draft consent order that DEC prepared and forwarded to ORU on December 27, 1994, provided for investigation, and, if necessary, remediation of sites that were found to be contaminated. This, ORU contends, was the first time it was apprised of a potential remediation obligation with respect to the Nyack site in the event a pollution problem was found to exist. In its February 8, 1995 response to the draft consent order, ORU objected to the inclusion of all of its MGPs in the

investigation, and suggested that the consent order be limited to the Middletown site. ORU then notified Travelers, on April 14, 1995, of the possibility of liability at the MGP sites, nine months before a final consent order was signed requiring the investigation of the MGPs.

ORU maintains that Travelers cannot demonstrate that it was obligated to give notice related to the Nyack site at any time prior to April 14, 1995. ORU submits that it had no obligation to investigate, let alone clean up the Nyack site, until 1995. It contends that it promptly gave notice to Travelers after appreciating that it potentially would face liability with respect to the Nyack site.

Thus, ORU claims that, prior to giving notice to Travelers in 1995, it had no knowledge that contamination had occurred at Nyack, and that, as soon as it was aware that there was potential liability, it notified Travelers. ORU further contends that Travelers failed to either investigate or to provide a prompt coverage determination, and instead repeatedly sent letters containing boilerplate reservation of rights language. Travelers attributes its delay in reaching a coverage determination to ORU, maintaining that any delay was caused by ORU's failure to provide full disclosure of information.

ANALYSIS

Travelers' Claim of Late Notice by ORU

As explained by the Appellate Division, First Department:

“Where a liability insurance policy requires that notice of an occurrence be given ‘as soon as practicable,’ such notice must be accorded the carrier within

a reasonable period of time (*Great Canal Realty Corp. v Seneca Ins. Co.*, 5 NY3d 742, 743 [2005]). ‘The duty to give notice arises when, from the information available relative to the accident, an insured could glean a reasonable possibility of the policy's involvement’ (*Paramount Ins. Co. v Rosedale Gardens*, 293 AD2d 235, 239-240 [1st Dept 2002]). “[W]here there is no excuse or mitigating factor, the issue [of reasonableness] poses a legal question for the court,’ rather than an issue for the trier of fact” (*SSBSS Realty Corp. v Public Serv. Mut. Ins. Co.*, 253 AD2d 583, 584 [1st Dept 1998], quoting *Hartford Acc. & Indem. Co. v CNA Ins. Cos.*, 99 AD2d 310, 313 [1st Dept 1984])”

(*Tower Ins. Co. of New York v Lin Hsin Long Co.*, 50 AD3d 305, 307 [1st Dept 2008]; see also *St. Nicholas Cathedral of the Russian Orthodox Church in North America v Travelers Property Cas. Ins. Co.*, 45 AD3d 411 [1st Dept 2007]; *SSBSS Realty Corp. v Public Serv. Mut. Ins. Co.*, 253 AD2d 583 [1st Dept 1998]).

Therefore, Travelers must show that ORU failed to give notice “within a reasonable time under all the circumstances” once notice was due (see *Security Mut. Ins. Co. of New York v Acker-Fitzsimons Corp.*, 31 NY2d 436, 441 [1972]).

Travelers contends that, under the applicable standard, ORU was required to give notice of its claim many years prior to the time when it actually gave notice because, at least ten years prior to the time of notice, “from the information available . . . [ORU] could glean a reasonable possibility of the policy's involvement” (see *Paramount Ins. Co. v Rosedale Gardens, Inc.*, 293 AD2d 235, 239-240 [1st Dept 2002]).

ORU counters that: (a) Travelers' motion is built upon disparate events relating to sites other than the Nyack site; and (b) no regulatory authority, at any level, advised ORU that it could be liable for cleanup of contamination at the Nyack MGP site, in any concrete manner, until the DEC sent the December 27, 1994 draft consent order that potentially required an investigation and possible remediation at the MGP sites. Although ORU objected to the draft consent order, it gave Travelers notice in April 1995.

To trigger the notice requirement in the environmental context, New York cases require some realistic and certain action from a regulatory agency or third party showing some reasonable possibility of liability (*see e.g., Consolidated Edison Co. of New York v American Home Assurance Co.*, Index No. 600527/01 [July 18, 2006]). Thus, as a general matter, "[k]nowledge of an insured's potential general liability is insufficient to give notice of an occurrence to an insurance carrier" (*Stone & Webster Mgmt. Consultants, Inc. v Travelers Indem. Co.*, 1996 WL 180025 *18 [SD NY April 16, 1996]). Similarly, in *Reynolds Metal Co. v Aetna Cas. & Sur. Co.* (259 AD2d 195, 203 [3d Dept 1999]), the Third Department refused to find that a consent order required the insured to give notice, because the order did not specifically mandate any remediation. Here, as in *Reynolds*, the consent order was in its early stage, it called only for an investigation of the site; not remediation.

In *Century Indem. Co. v Brooklyn Union Gas Co.* (58 AD3d 573 [1st Dept 2009]), the Appellate Division, First Department unanimously affirmed Supreme Court's determination

that an issue of fact existed as to whether the insured's duty to give notice to an excess insurer had arisen before the City of New York advised it that it intended to bring an action with respect to one of the insured's MGPs. While the standard is not identical in the excess insurance context, the case provides useful guidance. The First Department concluded that giving "the insured the benefit of the inferences as opponent of the motion, it cannot be determined . . . that the insured's duty to provide notice had arisen from its knowledge of consultant reports, which were not definitive as to the extent of the contamination, the degree of remediation needed or the actual rather than the generalized projected remediation costs, and the regulatory agency involvement that did not mandate any significant action" (*Century Indem. Co. v Brooklyn Union Gas Co.*, 58 AD3d at 574 [citation omitted]).

Here, the record supports the conclusion that ORU disclosed pertinent facts pertaining to the Nyack MGP in a timely manner, and that its April 14, 1995 notice was reasonable under the circumstances. In order to bolster its conclusions, Travelers simply culls together general reports and events, some of which transpired at separate MGPs, as well as non-definitive steps by regulatory agencies that did not mandate any significant action. Travelers' assertions are not supported by the evidence (*Century Indem. Co. v Brooklyn Union Gas Co.*, *supra*). Furthermore, despite Travelers' sweeping accusations of concerted action by ORU to cover up pertinent facts, there is no evidence of any material nondisclosure. Instead, the evidence supports the conclusion that ORU did not have any concrete knowledge that the

Nyack site was contaminated at any level necessitating regulatory action before giving notice to Travelers.

Accordingly, Travelers' motion for partial summary judgment on the late notice ground is denied.

ORU's Claim of Late Denial of Coverage by Travelers

ORU contends that Travelers failed to meet its obligation to promptly investigate and timely respond to its claim for coverage of costs related to the Nyack site. It submits that the repeated transmission of boilerplate reservation of rights letters by Travelers, without even a cursory investigation, does not satisfy its obligations as a matter of law, and thus, that Travelers should not be permitted to assert a late-notice defense. ORU urges, among other things, that Travelers waived its right to assert a late-notice defense by failing to deny coverage for more than seven years after receipt of ORU's notice, failing to conduct a timely investigation and failing to make a final coverage determination in a reasonable period of time, all of which prejudiced ORU.

As explained by the Appellate Division, First Department:

“An insurer must serve written notice on the insured of its intent to disclaim coverage under its policy 'as soon as is reasonably possible' (Insurance Law 3420 [d]). The reasonableness of the timing of a disclaimer is measured from the date when the insurer knew or should have known that grounds for the disclaimer existed (*see First Fin. Ins. Co. v Jetco Contr. Corp.*, 1 NY3d 64,

68-69 [2003]). If such grounds were, or should have been, ‘readily apparent’ to the insurer when it first learned of the claim, any subsequent delay in issuing the disclaimer is unreasonable as a matter of law (*id.* at 69). If it is not readily apparent, the insurer has the right, albeit the obligation, to investigate, but any such investigation must be promptly and diligently conducted (*see id.*; *see also Ace Packing Co., Inc. v Campbell Solberg Assoc., Inc.*, 41 AD3d 12 [1st Dept 2007]; *Structure Tone v Burgess Steel Prods. Corp.*, 249 AD2d 144, 145 [1st Dept 1998]; *Norfolk & Dedham Mut. Fire Ins. Co. v Petrizzi*, 121 AD2d 276, 278 [1st Dept 1986])”

(*Those Certain Underwriters at Lloyds, London v Gray*, 49 AD3d 1, 2-3 [1st Dept 2007]).

Moreover, failure to timely disclaim coverage on specific grounds waives the insurer’s defense on those grounds (*see Hartford Ins. Co. v Nassau County*, 46 NY2d 1028, 1029 [1979]).

Here, during the more than seven years between ORU’s notice and Travelers’ disclaimer of coverage, Travelers failed to make a coverage determination. Instead, it responded to ORU’s requests for coverage by promising to investigate the claims and then enumerating numerous possible grounds upon which it might opt to disclaim coverage at a later time.

Travelers did not disclaim on late-notice grounds until 2002, although it had sufficient information to do so for many years. Instead, it sent only boilerplate reservation of rights letters to ORU. These letters were legally insufficient and did not relieve Travelers of the a duty to make a prompt investigation and disclaimer of coverage (*id.*; *see also Kutsher’s Country Club Corp. v Lincoln Ins. Corp.*, 119 Misc 2d 889, 894 [Sup Ct, Sullivan County,

1983]). Travelers did not meet its obligations to investigate and timely respond to ORU's claim with respect to the Nyack site, and, accordingly, waived its right to disclaim coverage.

Travelers' claims that it lacked relevant information to disclaim coverage earlier and that the reason it did not disclaim sooner was attributable to ORU's refusal to provide Travelers with historical information regarding the pollution at the MGPs are rejected. The arguments are unsupported by the evidence. To the contrary, the record demonstrates that, with respect to the Nyack MGP, ORU regularly sent information to Travelers, including any new developments. Clearly, Travelers had sufficient information to make a coverage determination with respect to the timeliness of ORU's notice long before it finally disclaimed coverage on that ground. Its disclaimer was woefully and inexcusably late.

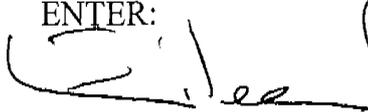
ORU's motion for partial summary judgment on the ground of late denial of coverage by Travelers is granted.

Accordingly, it is ORDERED that the motion by The Travelers Indemnity Company for partial summary judgment on the ground of late notice with respect to the Nyack MGP is denied; and it is further

ORDERED that the motion by Orange and Rockland Utilities, Inc. for partial summary judgment declaring that plaintiff waived its right to assert a late notice of claim defense with respect to the Nyack MGP is granted.

This constitutes the Decision and Order of the Court.

Dated: New York, New York
August 18, 2009

ENTER:

Hon. Eileen Bransten

FILED
AUG 19 2009
COUNTY CLERK'S OFFICE
NEW YORK