

**Supreme Court of the State of New York**  
**Appellate Division: Second Judicial Department**

D18508  
Y/kmg

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Argued - January 11, 2008

WILLIAM F. MASTRO, J.P.  
PETER B. SKELOS  
ANITA R. FLORIO  
THOMAS A. DICKERSON, JJ.

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2006-09438

DECISION & ORDER

Surgical Sock Shop II, Inc., appellant, v  
U.S. Underwriters Insurance Company, respondent  
(and a third-party action).

(Index No. 14155/04)

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Huttner, Berson & Budashewitz, P.C., New York, N.Y. (Jeffrey A. Berson of counsel), for appellant.

Miranda Sokoloff Sambursky Slone Verveniotis, LLP, Mineola, N.Y. (Adam I. Kleinberg and Steven Verveniotis of counsel), for respondent.

In an action, inter alia, for a judgment declaring that the defendant U.S. Underwriters Insurance Company is obligated to defend and indemnify the plaintiff in an underlying action to recover damages for personal injuries, the plaintiff appeals from so much of an order of the Supreme Court, Kings County (Harkavy, J.), dated August 16, 2006, as denied its motion for summary judgment and granted that branch of the cross motion of the defendant U.S. Underwriters Insurance Company which was for summary judgment.

ORDERED that the order is modified, on the law, by deleting the provision thereof granting that branch of the cross motion of the defendant U.S. Underwriters Insurance Company which was for summary judgment and substituting therefor a provision denying that branch of the cross motion; as so modified, the order is affirmed insofar as appealed from, with costs to the plaintiff.

On December 11, 2002, the plaintiff in the underlying action, who is the unserved

March 25, 2008

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third-party defendant in this action, Shulamit Razla, who was pregnant, fell on the staircase leading down to the premises of the plaintiff Surgical Sock Shop II, Inc., in a building owned by the third-party defendant, 59 Realty, Inc. (hereinafter 59). It is undisputed that the plaintiff, through its employees, became aware of the incident contemporaneously with its occurrence or within a very short time thereafter. Razla subsequently left the scene on her own. It is undisputed that at the time of the incident, the plaintiff did not notify its carrier.

By letter dated March 3, 2003, Razla's attorney sent the plaintiff a letter notifying it that he represented her in connection with the aforesaid incident and asking the plaintiff to forward the letter to its carrier. On March 10, 2003, the plaintiff apparently transmitted that letter and a cover letter to its insurance agency. The agency, in turn, on March 19, 2003, faxed the documents, and a notice of occurrence, to the defendant, the plaintiff's liability insurer. It is also undisputed that this was the first notice of the occurrence provided to the defendant. By letter dated May 16, 2003, the defendant affirmed its April 11, 2003, denial of coverage based on the plaintiff's failure to promptly notify it of the occurrence as required by its policy.

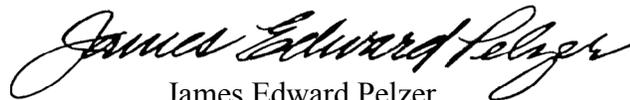
In February 2004 Razla commenced the underlying personal injury action against the plaintiff and 59. Shortly thereafter, the plaintiff commenced this action, inter alia, for a judgment declaring that the defendant was obligated to defend and indemnify it in the underlying personal injury action. The plaintiff subsequently moved for summary judgment in its favor. In response, the defendant cross-moved, inter alia, for summary judgment based upon the plaintiff's failure to timely notify it of the occurrence as required by the policy. The plaintiff opposed the cross motion, contending that its proof raised, at the least, a triable issue of fact as to whether any delay in notification was excusable based upon a reasonable nonbelief of any liability on its part. The Supreme Court denied the motion and granted the cross motion, finding, inter alia, that the plaintiff's nonbelief in its liability was not reasonable based upon the underlying circumstances. We now modify by also denying that branch of the defendant's cross motion which was for summary judgment.

In response to the defendant's prima facie showing that there was no reasonable basis for the plaintiff's belief as to its nonliability, the plaintiff raised a triable issue of fact. The affidavit of Rachel Posner, the plaintiff's former employee, showed the existence of a factual question as to whether the plaintiff's failure to immediately notify the defendant was reasonable. She averred that upon hearing a noise on the stairwell, she went out to investigate. Upon doing so, she discovered a woman (Razla) sitting on the steps above the landing. Upon Posner's inquiry as to whether she was all right and whether she required an ambulance, the woman answered she was all right but remained seated. After Posner brought her some water, she again stated she was all right, and after several minutes got up without assistance and left without entering the plaintiff's premises. Posner further averred that the person was not a regular customer, and was not known to her. This was sufficient, at the least, to show the existence of a factual question as to whether the plaintiff's belief in its nonliability was reasonable (*see D'Aloia v Travelers Ins. Co.*, 85 NY2d 825; *Nails 21st Century Corp., v Colonial Coop. Ins. Co.*, 21 AD3d 1069, 1070-1071; *Kaliandasani v Otsego Mutual Fire Ins. Co.*, 256 AD2d 310; *see also Jordan Constr. Prods. Corp., v Travelers Indem. Co. of Am.*, 14 AD3d 655; *cf. Deso v London & Lancashire Indem. Co. of Am.*, 3 NY2d 127, 129-131; *Paul Devs., LLC, v Maryland Casualty Ins. Co.*, 28 AD3d 443).

Razla testified at her deposition in the underlying personal injury action to a different factual scenario as to what happened. She claimed that after she fell she screamed “I am dying,” “my baby is dead,” and “help me,” but that the women who came out of the plaintiff’s premises did not want to touch her because of her condition, and that she was unable to move for 30 or 40 minutes. This testimony, if believed, would show that a belief by the plaintiff in its nonliability was not reasonable. Thus, because there is a factual question as to what occurred when Razla fell on the stairs, summary judgment should have been denied (*see generally Alvarez v Prospect Hosp.*, 68 NY2d 320, 324).

MASTRO, J.P., SKELOS, FLORIO and DICKERSON, JJ., concur.

ENTER:

A handwritten signature in cursive script that reads "James Edward Pelzer".

James Edward Pelzer  
Clerk of the Court