

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

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_____AD3d_____

Argued - December 10, 2009

REINALDO E. RIVERA, J.P.
JOHN M. LEVENTHAL
ARIEL E. BELEN
LEONARD B. AUSTIN, JJ.

2009-07712

DECISION & ORDER

Bauerschmidt & Sons, Inc., respondent, v Nova Casualty
Company, appellant.

(Index No. 677/08)

Melito & Adolfsen, P.C., New York, N.Y. (Ignatius John Melito and Rippi Gill of
counsel), for appellant.

Meyer, Suozzi, English & Klein, P.C., Garden City, N.Y. (Robert N. Zausmer of
counsel), for respondent.

In an action, inter alia, for a judgment declaring that the defendant is obligated to
defend and indemnify the plaintiff in an underlying action entitled *Fiore v Bauerschmidt & Sons, Inc.*,
commenced in Supreme Court, Kings County, under Index No. 4645/08, the defendant appeals from
an order of the Supreme Court, Queens County (James Golia, J.), dated June 30, 2009, which denied
its motion for summary judgment.

ORDERED that the order is affirmed, with costs.

Where, as here, a policy of liability insurance requires that notice of an occurrence be
given “as soon as practicable,” such notice must be accorded to the carrier within a reasonable period
of time (*see Great Canal Realty Corp. v Seneca Ins. Co., Inc.*, 5 NY3d 742, 743; *Security Mut. Ins.
Co. of N.Y. v Acker-Fitzsimons Corp.*, 31 NY2d 436, 441). However, there may be circumstances
where the insured’s failure to give timely notice is excusable, such as where the insured has a good-
faith belief in nonliability (*see Security Mut. Ins. Co. of N.Y. v Acker-Fitzsimons Corp.*, 31 NY2d at
441). The insured bears the burden of establishing the reasonableness of the proffered excuse (*see*

Great Canal Realty Corp. v Seneca Ins. Co., Inc., 5 NY3d at 744). “Ordinarily, the question of whether the insured had a good faith belief in nonliability, and whether that belief was reasonable, presents an issue of fact and not one of law” (*St. James Mech., Inc. v Royal & Sunalliance*, 44 AD3d 1030, 1031; *see Hermitage Ins. Co., v Arm-ing, Inc.*, 46 AD3d 620, 621; *Hudson City School Dist. v Utica Mut. Ins. Co.*, 241 AD2d 641, 642; *Kim v Maher*, 226 AD2d 350; *G.L.G. Contr. Corp. v Aetna Cas. & Sur. Co.*, 215 AD2d 821, 822-823).

Here, the defendant made a prima facie showing of entitlement to judgment as a matter of law based on the plaintiff’s approximately four-month delay in notifying the defendant of the underlying incident (*see Avery & Avery, P.C., v American Ins. Co.*, 51 AD3d 695, 697-698). In opposition, the plaintiff raised a triable issue of fact as to whether the delay was reasonably based on a good-faith belief of nonliability (*see St. James Mech., Inc. v Royal & Sunalliance*, 44 AD3d at 1031). Accordingly, the Supreme Court properly denied the defendant’s motion for summary judgment.

RIVERA, J.P., LEVENTHAL, BELEN and AUSTIN, JJ., concur.

ENTER:



James Edward Pelzer
Clerk of the Court