

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

D32749
O/ct

_____AD3d_____

Argued - October 13, 2011

DANIEL D. ANGIOLILLO, J.P.
ANITA R. FLORIO
JOHN M. LEVENTHAL
JEFFREY A. COHEN, JJ.

2010-08060

DECISION & ORDER

Columbia University Press, Inc., respondent, v
Travelers Indemnity Company of America, appellant.

(Index No. 09274/08)

Goldberg Segalla, LLP, Buffalo, N.Y. (Sarah J. Delaney and Joanna Roberto of counsel), for appellant.

David S. Klausner, PLLC, White Plains, N.Y. (David S. Klausner and Evelyn Miller of counsel), for respondent.

In an action, inter alia, for a judgment declaring that the defendant is obligated to defend and indemnify the plaintiff, Columbia University Press, Inc., in an underlying action entitled *George Balloutine v Columbia University Press*, pending in the Supreme Court, New York County, under Index No. 11425/07, the defendant appeals, as limited by its brief, from so much of an order of the Supreme Court, Westchester County (Lefkowitz, J.), dated June 29, 2010, as denied that branch of its motion which was for summary judgment declaring that it is not obligated to defend or indemnify the plaintiff in the underlying action.

ORDERED that the order is affirmed insofar as appealed from, 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 given to the carrier within a reasonable period of time (*see Sorbara Constr. Corp. v AIU Ins. Co.*, 11 NY3d 805, 806; *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). With respect to policies issued before January 17, 2009 (*see Insurance Law* §

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3420[c][2][A]), as the subject policy was, an insurer could disclaim coverage when the insured failed to satisfy the notice condition, without regard to whether the insurer was prejudiced by the insured's failure to satisfy such condition (see *Zimmerman v Peerless Ins. Co.*, 85 AD3d 1021, 1023; *Ponok Realty Corp. v United Natl. Specialty Ins. Co.*, 69 AD3d 596, 596-597). The insured's failure to satisfy the notice requirement constitutes "a failure to comply with a condition precedent which, as a matter of law, vitiates the contract" (*Argo Corp. v Greater N.Y. Mut. Ins. Co.*, 4 NY3d 332, 339; see *Sorbara Constr. Corp. v AIU Ins. Co.*, 11 NY3d at 806; *Great Canal Realty Corp. v Seneca Ins. Co., Inc.*, 5 NY3d at 743; *Security Mut. Ins. Co. of N.Y. v Acker-Fitzsimons Corp.*, 31 NY2d 436, 440). However, "there may be circumstances that excuse a failure to give timely notice, such as where the insured has 'a good-faith belief of nonliability,' provided that belief is reasonable" (*Great Canal Realty Corp. v Seneca Ins. Co., Inc.*, 5 NY3d at 743, quoting *Security Mut. Ins. Co. of N.Y. v Acker-Fitzsimons Corp.*, 31 NY2d at 441; see *White v City of New York*, 81 NY2d 955, 957; *Zimmerman v Peerless Ins. Co.*, 85 AD3d at 1023-1024; *Ponok Realty Corp. v United Natl. Specialty Ins. Co.*, 69 AD3d at 597). The insured bears the burden of establishing the reasonableness of such excuse (see *Great Canal Realty Corp. v Seneca Ins. Co., Inc.*, 5 NY3d at 743; *White v City of New York*, 81 NY2d at 957; *Security Mut. Ins. Co. of N.Y. v Acker-Fitzsimons Corp.*, 31 NY2d at 440), which is ordinarily an issue of fact and not one of law (see *Argentina v Otsego Mut. Fire Ins. Co.*, 86 NY2d 748, 750; *Deso v London & Lancashire Indem. Co. of Am.*, 3 NY2d 127, 129; *St. James Mech., Inc. v Royal & Sunalliance*, 44 AD3d 1030, 1031).

Here, the defendant made a prima facie showing of entitlement to judgment as a matter of law based on the plaintiff's approximately eight-month delay in notifying the defendant of the underlying incident (see *Great Canal Realty Corp. v Seneca Ins. Co., Inc.*, 5 NY3d 742; *Argentina v Otsego Mut. Fire Ins. Co.*, 86 NY2d at 750; *Zimmerman v Peerless Ins. Co.*, 85 AD3d 1021; *McGovern-Barbash Assoc., LLC v Everest Natl. Ins. Co.*, 79 AD3d 981, 983; *Evangelos Car Wash, Inc. v Utica First Ins. Co.*, 45 AD3d 727; *120 Whitehall Realty Assoc., LLC v Hermitage Ins. Co.*, 40 AD3d 719). However, 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 *25th Ave., LLC v Delos Ins. Co.*, 84 AD3d 781; *North Country Ins. Co. v Jandreau*, 50 AD3d 1429; *St. James Mech., Inc. v Royal & Sunalliance*, 44 AD3d at 1031-1032; *Jordan Constr. Prods. Corp. v Travelers Indem. Co. of Am.*, 14 AD3d 655; *G.L.G. Contr. Corp. v Aetna Cas. & Sur. Co.*, 215 AD2d 821, 822; *Triantafillou v Colonial Coop. Ins. Co.*, 178 AD2d 925, 926). Accordingly, the Supreme Court properly denied that branch of the defendant's motion which was for summary judgment declaring that it was not obligated to defend or indemnify the plaintiff in the underlying action.

ANGIOLILLO, J.P., FLORIO, LEVENTHAL and COHEN, JJ., concur.

ENTER:



Matthew G. Kiernan
Clerk of the Court