

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

D34036
N/kmb

_____AD3d_____

Argued - December 6, 2011

REINALDO E. RIVERA, J.P.
RANDALL T. ENG
SHERI S. ROMAN
SANDRA L. SGROI, JJ.

2010-11363

DECISION & ORDER

Utica First Insurance Company, appellant,
v Debbie Vazquez, et al., respondents.

(Index No. 11632/09)

Farber Brocks & Zane, LLP, Mineola, N.Y. (Andrew J. Mihalick and Audra S. Zane of counsel), for appellant.

Paul L. Brozdowski, LLC, Cortlandt Manor, N.Y., for respondent Jose Sanchez.

In an action for a judgment declaring, inter alia, that the plaintiff is not obligated to defend or indemnify the defendants Debbie Vazquez, Debbie Vazquez, doing business as Debbie Construction, Debbie Construction, and Edgardo Almenden in an underlying personal injury action entitled *Sanchez v Vazquez*, pending in the Connecticut Superior Court, Judicial District of Fairfield, the plaintiff appeals from an order and judgment (one paper) of the Supreme Court, Orange County (Ritter, J.), dated July 29, 2010, which denied its motion for summary judgment declaring that it is not obligated to defend or indemnify those defendants in the underlying action, granted the cross motion of the defendants Debbie Vazquez, Debbie Vazquez, doing business as Debbie Construction, Debbie Construction, and Edgardo Almenden for summary judgment declaring that it is so obligated, and declared that it is obligated to defend and indemnify the defendants Debbie Vazquez, Debbie Vazquez, doing business as Debbie Construction, Debbie Construction, and Edgardo Almenden in the underlying action.

ORDERED that the order and judgment is modified, on the law, (1) by deleting the provision thereof granting the cross motion of the defendants Debbie Vazquez, Debbie Vazquez, doing business as Debbie Construction, Debbie Construction, and Edgardo Almenden for summary judgment declaring that the plaintiff is obligated to defend and indemnify them in the underlying action, and substituting therefor a provision denying the cross motion, and (2) by deleting the provision thereof declaring that the plaintiff is obligated to defend and indemnify the defendants Debbie Vazquez, Debbie Vazquez, doing business as Debbie Construction, Debbie Construction,

February 21, 2012

Page 1.

UTICA FIRST INSURANCE COMPANY v VAZQUEZ

and Edgardo Almenden in the underlying action; as so modified, the order and judgment is affirmed, without costs or disbursements.

“Where an insurance policy requires that notice of an occurrence be given promptly, notice must be given within a reasonable time in view of all of the facts and circumstances” (120 *Whitehall Realty Assoc., LLC v Hermitage Ins. Co.*, 40 AD3d 719, 721, quoting *Eagle Ins. Co. v Zuckerman*, 301 AD2d 493, 495). Absent a valid excuse for a delay in furnishing notice, failure to satisfy the notice requirement vitiates coverage (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; *Donovan v Empire Ins. Group*, 49 AD3d 589, 590). However, there may be circumstances, such as lack of knowledge that an accident has occurred, or a reasonable belief in nonliability, that will excuse a delay in giving notice (see *White v City of New York*, 81 NY2d 955, 957; *Felix v Pinewood Bldrs., Inc.*, 30 AD3d 459, 461). The insured has the burden of showing the reasonableness of such excuse (see *Great Canal Realty Corp. v Seneca Ins. Co., Inc.*, 5 NY3d at 744; *White v City of New York*, 81 NY2d at 957; *Security Mut. Ins. Co. of N.Y. v Acker-Fitzsimons Corp.*, 31 NY2d at 441).

Here, the plaintiff established its prima facie entitlement to judgment as a matter of law by demonstrating that it was not provided with notice of the subject accident until almost two years after it had occurred (see *Tower Ins. Co. of N.Y. v Alvarado*, 84 AD3d 1354, 1355-1356; *Hanover Ins. Co. v Prakin*, 81 AD3d 778, 780; *Lobosco v Best Buy, Inc.*, 80 AD3d 728, 731-732; *Ponok Realty Corp. v United Natl. Specialty Ins. Co.*, 69 AD3d 596, 597). However, in opposition to the plaintiff’s summary judgment motion, the defendants Debbie Vazquez, Debbie Vazquez, doing business as Debbie Construction, and Debbie Construction (hereinafter the Debbie Construction defendants) and the defendant Edgardo Almenden raised a triable issue of fact as to whether the delay in giving notice was reasonably based on Debbie Construction principal Debbie Vazquez’s lack of knowledge of the accident (cf. *Security Mut. Ins. Co. of N.Y. v Acker-Fitzsimons Corp.*, 31 NY2d 436), or on a good faith belief in the nonliability of her employee, Almenden (see *Tower Ins. Co. of N.Y. v Alvarado*, 84 AD3d at 1355-1356; *25th Ave., LLC v Delos Ins. Co.*, 84 AD3d 781, 783-784; *North Country Ins. Co. v Jandreau*, 50 AD3d 1429, 1430-1431; *Klersy Bldg. Corp. v Harleystown Worcester Ins. Co.*, 36 AD3d 1117, 1119; *G.L.G. Contr. Corp. v Aetna Cas. & Sur. Co.*, 215 AD2d 821, 822; *Triantafillou v Colonial Coop. Ins. Co.*, 178 AD2d 925, 926-927). Accordingly, the Supreme Court correctly denied the plaintiff’s motion for summary judgment.

Since, as noted above, there is a triable issue of fact as to whether the delay in giving notice was reasonable, the Supreme Court erred in granting the cross motion of the Debbie Construction defendants and Almenden for summary judgment, and in issuing a judgment declaring that the plaintiff is obligated to defend and indemnify those defendants in the underlying action.

The parties’ remaining contentions are without merit.

RIVERA, J.P., ENG, ROMAN and SGROI, JJ., concur.

ENTER:



Aprilanne Agostino
Clerk of the Court