

=====
This opinion is uncorrected and subject to revision before
publication in the New York Reports.

1 No. 42
The Argo Corporation, et al.,
 Appellants,
 v.
Greater New York Mutual Insurance
Company,
 Respondent.

David R. Hornig, for appellants.
Thomas D. Hughes, for respondent.
Catholic Health Services of Long Island; New York
Insurance Association, Inc.; Complex Insurance Claims Litigation
Association; KeySpan Corporation; Athari Law Office; Crucible
Materials Corporation, et al., amici curiae.

G.B. SMITH, J.:

The issue in this case is whether a primary insurer can
disclaim coverage based solely upon a late notice of lawsuit or
must show prejudice. We hold that, under the circumstances of
this case, plaintiffs' late notice was unreasonable as a matter

of law, that the Appellate Division correctly applied Matter of Brandon v Nationwide Mut. Ins. Co. (97 NY2d 491 [2002]) and that the insurer need not show prejudice.

On January 2, 1997, Igo Maidenek slipped and fell on ice on the sidewalk adjacent to 137-01, 83rd Avenue in Kew Gardens, New York. Maidenek was a tenant of the premises. The property was owned by Henry Moskowitz and managed by two companies owned by Moskowitz, Argo Corporation and Martinique Realty Associates (Argo).

On February 23, 2000, Maidenek brought suit for personal injuries against Argo by serving a summons and complaint on the New York Secretary of State. Argo acknowledged receipt of the summons and complaint by signing a return-receipt dated February 28, 2000. On November 10, 2000, Argo was served with a default judgment. On February 13, 2001, Argo received a notice of entry of the default judgment and of the scheduling of a hearing on that judgment. On February 21, 2001, Argo received service of a note of issue for trial readiness.

Argo notified Greater New York Mutual Insurance Company (GNY), its commercial liability insurance carrier,¹ on May 2, 2001. On June 4, 2001, GNY disclaimed coverage because of the late notice of the lawsuit, and occurrence, which, according to GNY, was a "condition precedent" to coverage under the insurance

¹Previously, "GNY issued a commercial-package insurance policy to Henry Moskowitz that included commercial-liability insurance coverage for some 35 buildings in New York City."

policy.²

In January, 2003, Argo brought a declaratory judgment action against GNY challenging GNY's disclaimer. GNY responded with a motion to dismiss for failure to comply with the contract provision which required timely notice to the carrier of the occurrence and of the lawsuit against the insured. The contract required notice "as soon as practicable."³

²"A condition precedent is 'an act or event, other than a lapse of time, which, unless the condition is excused, must occur before a duty to perform a promise in the agreement arises'" (Oppenheimer & Co. v Oppenheimer, Appel, Dixon & Co., 86 NY2d 685, 690 [1995][citations omitted]).

³Section IV--Commercial General--Liability Conditions
2.Duties in The Event of Occurrence, Offense, Claim or Suit

a. You must see to it that we are notified as soon as practicable of an "occurrence" or an offense which may result in a claim (emphasis added). To the extent possible, notice should include:

- (1) How, when and where the "occurrence" or offense took place;
- (2) The names and addresses of any injured person and witnesses; and
- (3) The nature and location of any injury or damage arising out of the "occurrence" or offense.

b. If a claim is made or "suit" is brought against any insured, you must:

1. Immediately record the specifics of the claim of "suit" and the date received; and
2. Notify us as soon as practicable.

c. You and any other involved insured must:

1. Immediately send us copies of any demands, notices, summonses or legal papers received in connection with the claim or "suit";
2. Authorize us to obtain records and other information;

Supreme Court agreed that defendant failed to comply with a condition precedent to coverage under the contract, stating, "Plaintiff's policy required them to "see to it that we [the insurer] are notified as soon as practicable of an 'occurrence' or an offense which may result in a claim. Plaintiffs did not notify defendant of Maidenek's suit until 14 months after service of the complaint upon the Secretary of State as their agent, until 6 months after service of the default motion upon plaintiffs, until more than 3 months after default was entered and until almost 3 months after service of the Note of Issue upon plaintiffs." As a result, Supreme Court granted defendant's motion to dismiss for failure to timely notify the insurer.

The Appellate Division affirmed, stating:

"[T]he insureds are unable to provide an excuse for their failure to comply with the policy's notice provisions. Unlike in Matter of Brandon v Nationwide Mut. Ins. Co., (97 NY2d 491), this is not a case where the carrier had prior notice of the claim before the action was commenced (citations omitted)."

3. Cooperate with us in the investigation or settlement of the claim or defense against the "suit" and;

4. Assist us, upon our request, in the enforcement of any right against any person or organization which may be liable to the insured because of injury or damage to which this insurance may also apply.

d. No insured will, except at that insured's own cost, voluntarily make a payment, assume any obligation, or incur any expense, other than for first aid, without our consent.

We granted leave to appeal and now affirm.

For years the rule in New York has been that where a contract of primary insurance requires notice "as soon as practicable" after an occurrence, the absence of timely notice of an occurrence is a failure to comply with a condition precedent which, as a matter of law, vitiates the contract (see Security Mut. Ins. Co. of NY v Acker-Fitzsimons Corp., 31 NY2d 436, 440-43 [1972]) [failure to notify in a timely manner allowed insurer to disclaim coverage]). No showing of prejudice is required (id.). Strict compliance with the contract protects the carrier against fraud or collusion (id.); gives the carrier an opportunity to investigate claims while evidence is fresh; allows the carrier to make an early estimate of potential exposure and establish adequate reserves and gives the carrier an opportunity to exercise early control of claims, which aids settlement (Unigard Sec. Ins. Co. v North River Ins. Co., 79 NY2d 576, 582 [1992]).

We have applied the no-prejudice rule in various contexts in recent years: supplementary underinsured motorist insurance (SUM) (Matter of Metropolitan Prop. & Cas. Ins. Co. v. Mancuso, 93 NY2d 487, 495-96 [1999]; cf. Matter of Brandon and Rekemeyer v State Farm Mutual Automobile Ins. Co. _____ NY _____ [decided today]); and excess insurance (American Home Assur. Co. v International Ins. Co., 90 NY2d 433, 442-47 [1997]). We have held, however, that the rule enunciated in Security Mutual does not apply to reinsurance and a reinsurer must show prejudice

before it can be relieved of its obligations to perform under a contract (Unigard Sec. Ins. Co. v North River Ins. Co., 79 NY2d 576, 582-84 [1992]).

In Matter of Brandon (Nationwide Mut. Ins. Co.) (97 NY2d 491 [2002]), we again departed from the general "no prejudice" rule and held that the carrier must show prejudice before disclaiming based on late notice of a lawsuit in the SUM context (see 97 NY2d 491, 498, supra). Under the facts of Brandon, the carrier received timely notice of claim but late notice of a lawsuit (see id. at 494-95). We were unwilling to extend the no prejudice exception in regard to late notice of a lawsuit because "unlike most notices of claim -- which must be submitted promptly after the accident, while an insurer's investigation has the greatest potential to curb fraud -- notices of legal action become due at a moment that cannot be fixed relative to any other key event, such as the injury, the discovery of the tortfeasor's insurance limits or the resolution of the underlying tort claim" (see id. at 498).

Brandon did not abrogate the no-prejudice rule and should not be extended to cases where the carrier received unreasonably late notice of a claim. The facts here, where no notice of claim was filed and the first notice filed was a notice of law suit, are distinguishable from Brandon where a timely notice of claim was filed, followed by a late notice of law suit, and distinguishable from Rekemeyer, where an insured gave timely

notice of the accident, but late notice of a SUM claim. Argo was notified of the lawsuit against it in February, 2000 but did not notify GNY until May, 2001. The burden of establishing that the delay was not unreasonable falls on the insured (see U.S. Underwriters Ins. Co. v A&D Maja Const. Inc., 160 F Supp2d 565, 569, [SDNY 2001]).

Argo admits that Maidenek filed the lawsuit against it in late 1999, and that it received notice of the claim in early 2000. Argo further admits that its notice to GNY was late but argues that GNY has not shown prejudice as a result of this late notice. Argo notified GNY 14 months after it was first served with the lawsuit, and six months after a default judgment was entered against it. Argo asks this court to extend the Brandon "prejudice analysis to notice of suit in commercial policies where the notice was admittedly late."

The rationale of the no-prejudice rule is clearly applicable to a late notice of lawsuit under a liability insurance policy. A liability insurer, which has a duty to indemnify and often also to defend, requires timely notice of lawsuit in order to be able to take an active, early role in the litigation process and in any settlement discussions and to set adequate reserves. Late notice of lawsuit in the liability insurance context is so likely to be prejudicial to these concerns as to justify the application of the no prejudice rule. Argo's delay was unreasonable as a matter of law and thus, its

failure to timely notify GNY vitiates the contract. GNY was not required to show prejudice before declining coverage for late notice of law suit.

Accordingly, the order of the Appellate Division should be affirmed, with costs.

* * * * *

Order affirmed, with costs. Opinion by Judge G.B. Smith. Judges Ciparick, Rosenblatt, Graffeo, Read and R.S. Smith concur. Chief Judge Kaye took no part.

Decided April 5, 2005