

Tower Ins. Co. of N. Y. v Ubah

2008 NY Slip Op 31133(U)

April 14, 2008

Supreme Court, New York County

Docket Number: 0110481/2006

Judge: Doris Ling-Cohan

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

Hon. Doris Ling-Cohan

PR Index Number : 110481/2006

PART 36

TOWER INSURANCE COMPANY OF

vs
UBAH, FLORENCE

Sequence Number : 001

SUMMARY JUDGEMENT

EX NO. _____

FILED DATE _____

FILED SEQ. NO. _____

FILED CAL. NO. _____

The following papers, numbered 1 to 6 were read on this motion to/for ✓ Cross-motion

for summary

Judgment

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

1, 2

Answering Affidavits — Exhibits _____

3

Replying Affidavits _____

5, 6

10/10/02 Order

7, 8

Cross-Motion: Yes No

3, 4

Upon the foregoing papers, it is ordered that this motion

✓ Cross-motion for summary

judgment are ^{decided} denied in accordance with the attached memorandum decision.

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 1410).

HON. DORIS LING-COHAN

Dated: _____

[Handwritten signature]

[Handwritten signature]
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 36

-----x
TOWER INSURANCE COMPANY OF NEW YORK,

Plaintiffs,

Index No.11048/06

-against-

Motion Seq. No.: 001

FLORENCE UBAH AND JOANN FIGUEROA

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141B).

DORIS LING-COHAN, . :

Plaintiff Tower Insurance Company of New York ("Tower") moves for an order granting it summary judgment declaring that it has no duty to defend or to indemnify defendants Florence Ubah (Ubah) and Joann Figueroa (Figueroa) in an action captioned *Joann Figueroa v Florence Ubah* Index No. 237545/06, pending in Supreme Court, Bronx County (hereinafter, the underlying action). Defendant Figueroa opposes the motion and cross-moves for an order granting her summary judgment declaring that Tower has a duty to defend or indemnify Ubah in the underlying action. The motion is granted and the cross motion is denied for the reasons set forth below.

Background

In the underlying action, Figueroa seeks to recover damages for personal injuries she allegedly sustained on June 6, 2005, when she allegedly tripped and fell on a broken step between the first and

second floor of Ubah's building, located at 1535 E 172nd Street, Bronx, New York 10472 (the premises).

Tower issued a homeowner's policy (Policy) to Ubah effective March 17, 2005 to March 17, 2006, which covers Ubah and the premises. The Policy's general liability coverage part covers those sums that the "insured" is legally obligated to pay as damages because of "bodily injury" caused by "an occurrence" (Policy, Coverage L- Personal Liability, annexed to August 2007 affirmation of Lowell D. Aptman, Vice President of liability claims for Tower as Ex 1). An "occurrence" is defined, in pertinent part, as "an accident" (Policy, definitions, Section 5).

The Policy contains the following notice provision:

3. In case of an accident or 'occurrence', the 'insured' ... will perform the following duties

...

- a. Give written notice to us or any of our agents in this state as soon as is practical which sets forth:
 - 1. The identity of the policy and 'insured';
 - 2. Reasonably available information on the time, place and circumstances of the accident or 'occurrence'; and
 - 3. Names and addresses of any claimants and witnesses;
- b. promptly forward to us every notice, demand, summons or other process relating to the accident or 'occurrence'.

(Policy Conditions, Sections 3a and 3b).

On June 6, 2005 Ubah was told that someone fell on her steps.

On November 16, 2005 the complaint was filed in the underlying action. On December 5, 2005 the complaint was served on Ubah. On January 12, 2006, Ubah notifies her broker. On January 13 2006, Tower Insurance received a copy of the complaint and on February 10, 2006 Tower sent out a denial of claim.

Tower subsequently commenced this action, seeking to confirm the propriety of the disclaimer and now moves for summary judgment declaring that it has no duty to indemnify or defend Ubah in the underlying action since she failed to provide timely notice of claim by waiting seven months from the date of her learning of the accident. In support of the motion, Tower relies on Ubah's signed statement dated January 31, 2006 given to Tower's investigator, Nick Bavarro, in which Ubah acknowledges that she first learned that Figueroa fell and was sent away by ambulance on the day of the accident when her superintendent told her what happened (Ubah Statement, annexed as Ex 1 to Affidavit of Nick Bavarro, Tower investigator). In addition, in her statement she states that a fire truck also showed up at the premises and that later in the day someone came by and took pictures of the scene of the accident (id.).

In opposition, counsel for defendant Figueroa argues that Ubah had no reason to know if a claim was going to be made until she was served with the complaint and in any event, there was not a significant delay on notifying Tower. Figueroa further argues that

the man who notified Ubah on the date of the incident was actually her handyman, not her superintendent, and that this handyman did not take the name of the injured person. Thus, it is argued that Ubah did not know who fell or the extent of the injuries. Figueroa also argues that Tower unreasonably delayed in giving written notice of disclaimer.

Discussion

It is well established that when, as here, "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" (*Argo Corp v Greater New York Mut. Ins. Co.*, 4 NY3d 332, 339 [2005]). Moreover, "[n]o showing of prejudice is required" (*id.*). The rule, which requires "[s]trict compliance with the contract protects the carrier against fraud or collusion [internal citations omitted]; 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" (*id.*) (citation omitted).

"[T]he provision that notice be given 'as soon as practicable' call[s] for a determination of what was within a reasonable time in light of the facts and circumstances of the case at hand" (*Mighty*

Midgets, Inc., v Centennial Ins. Co., 47 NY2d 12, 19 [1979]).

Applying this standard, it has been held that "[t]he duty to give notice arises when, from the information available relative to the accident, an insured could glean a reasonable possibility of the policy's involvement" (*Paramount Ins. Co. v. Rosedale Gardens, Inc.*, 293 AD2d 235, 239-240 [1st Dept 2002]). "Although what is reasonable is ordinarily left for determination at trial, where there is no excuse for the delay and mitigating considerations are absent, the issue may be disposed of as a matter of law in advance of trial" (*Power Authority v. Westinghouse Elec. Corp.*), 117 AD2d 336, 339 [1st Dept 1986]). In addition, "[a] reasonable belief in non-liability may excuse an insured's failure to give timely notice, but the insured has the burden of showing the reasonableness of such excuse, given all of the circumstances" (*SSBSS Realty Corp. v Public Serv. Mut. Ins. Co.*, 253 AD2d 583, 584 [1st Dept 1998]). Moreover, the "issue is not whether the insured believes he will ultimately be found liable for the injury, but whether he has a reasonable basis for the belief that no claim will be asserted against him" (*id.*).

Here, based on the undisputed record, and the controlling case law, the Court is constrained to find that the notice provided to Tower was untimely as a matter of law. Ubah's duty to give notice arose the day of the June 6, 2005 accident, when she was concededly told of the accident by her handyman. The record indicates, however,

[*7] . . .
that Ubah did not inform Tower of Figueroa's accident, by notifying her broker, until January 12, 2006, about seven months after she learned about the accident.

Moreover, Ubah's subjective belief that a claim would not be made, standing alone, is insufficient to exempt her from the notice requirement (*Paramount Ins. Co. v Rosedale Gardens, Inc.*, 293 AD2d at 241). In addition, here, there are no extenuating factors which have been associated with a reasonable belief that a plaintiff would not assert a claim, such as where there is no indication of injury or no defect at the accident site (*SSBSS Realty Corp., v Public Serv Mut Ins Co.*, 253 AD2d at 585). To the contrary, Ubah was informed by her handyman that someone was injured and that an ambulance took her to the hospital and that a fire truck showed-up, as well as someone taking pictures. Since the notice provision in the Tower insurance policy is a condition precedent to coverage, the failure to give timely notice of a claim relieves the insurer of both the duty to defend and to indemnify (*Travelers Ins. Co., v Volmar Construction Co., Inc.*, 300 AD2d 40 [1st Dept 2002]).

Moreover, Figueroa's argument that Tower's 28-day delay in disclaiming coverage was unreasonable, is not supported by case law.

Accordingly, as Ubah has no reasonable explanation for the approximate seven month delay between the time she learned of the accident and providing of notice, Tower is entitled to disclaim coverage based upon the failure to comply with a condition precedent

to coverage.

In view of the above, it is

ORDERED that the motion for summary judgment by plaintiff Tower Insurance Company is granted; and it is further

ORDERED that the cross motion for summary judgment by defendants is denied; and it is

ADJUDGED and DECLARED that Tower Insurance Company has no duty to defend or to indemnify defendant Florence Ubah in the underlying action; it is further

ORDERED that within 30 days of entry of this order, plaintiff shall serve a copy upon defendants with notice of entry.

DATED: April 14, 2008



Hon. Doris Ling-Cohan, J.S.C.

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