

Able Health Care Serv. Inc. v ACE Am. Ins. Co.

2009 NY Slip Op 31890(U)

July 8, 2009

Supreme Court, Queens County

Docket Number: 26958/2008

Judge: Orin R. Kitzes

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE ORIN R. KITZES IA Part 17
Justice

	x	Index Number <u>26958</u> 2008
- against -		Motion Date <u>April 22,</u> 2009
	x	Motion Cal. Number <u>1</u> Motion Seq. No. <u>1</u>

The following papers numbered 1 to 20 read on this motion by defendant ACE American Insurance Company (ACE) for summary judgment declaring that it is not obligated to defend and/or indemnify plaintiff Able Health Care Service, Inc. (Able) in the underlying personal injury action, entitled *Owens v Able Health Care Service, Inc.*, (Sup Ct, Queens County, Index No. 15398/07); and on this cross motion by defendant Maurice Berger, Ltd. (Berger) for summary judgment dismissing Able’s complaint insofar as asserted against it and declaring that ACE has a duty to defend and/or indemnify Able in the underlying personal injury action; and on this cross motion by plaintiff Able for summary judgment declaring that ACE has a duty to defend and/or indemnify it in the underlying personal injury action or, in the alternative, declaring that Berger has a duty to defend and/or indemnify Able in that action.

	<u>Papers Numbered</u>
Notice of Motion - Affidavits - Exhibits.....	1-4
Notices of Cross Motion - Affidavits - Exhibits.....	5-12
Answering Affidavits - Exhibits.....	13-20

Upon the foregoing papers it is ordered that the motion and cross motions are determined as follows:

On July 28, 2004, Dominique Owens allegedly was burned when hot soup prepared by her home health aide spilled on her lap. It is undisputed that, on September 13, 2004, Able, the home health aide's employer, received a letter from Dominique Owens' attorney advising Able of the personal injury claim being asserted against it as a result of the subject incident and that Able should forward the letter to its insurance liability carrier. By letter dated September 30, 2004, Able first notified Berger, its insurance agent, of the potential claim by providing Berger with a copy of the September 10, 2004 letter from Dominique Owens' attorney. Berger has denied receiving that letter. On January 26, 2007, Dominique Owens commenced a personal injury action against Able via service upon the Secretary of State. Able claims that it did not receive the summons and complaint until April 2, 2007, at which time Able immediately forwarded to Berger the summons and complaint along with a copy of the aforementioned September 10, 2004 letter and incident reports concerning Dominique Owens' accident. On April 3, 2007, Berger faxed a copy of these materials to ACE. Twenty-eight days later, in a letter dated May 1, 2007, ACE disclaimed coverage based on late notice. Able subsequently commenced the instant action for an order declaring that ACE or, alternatively, Berger, is obligated to defend and/or indemnify Able in the underlying personal injury action.

In this case, ACE issued a professional liability insurance policy to Able, a licensed healthcare provider. The policy obligated Able to notify ACE in writing of a claim or potential claim "as soon as practicable." The requirement that an insured notify its liability carrier of a potential claim "as soon as practicable" operates as a condition precedent to an insurer's obligation to defend or indemnify the insured (*see White v New York*, 81 NY2d 955, 957 [1993]; *Avery & Avery, P.C. v American Ins. Co.*, 51 AD3d 695, 697 [2008]). Notice of the occurrence must be given to the insurer within a reasonable time under all the circumstances, or promptly after the insured receives notice that a claim against him or her will be made (*see Donovan v Empire Ins. Group*, 49 AD3d 589, 590 [2008]). Failure to comply with the notice requirement vitiates coverage, absent a valid excuse (*see Rondale Bldg. Corp. v Nationwide Prop. & Cas. Ins. Co.*, 1 AD3d 584, 585 [2003]).

On its motion, ACE contends that it is relieved of any obligation to defend and/or indemnify Able in the underlying personal injury action because it received late notice of the subject accident. Specifically, ACE argues that Able first received notice of the claim in September 2004, but failed to provide notice to ACE until April 2007, almost three years later (*see Scordio Constr., Inc. v Sirius Am. Ins. Co.*, 51 AD3d 768 [2008]). In opposition and in support of its cross motion, Able asserts that it gave timely notice of the potential claim by forwarding the September 10, 2004 claim letter to its insurance broker, Berger, on September 30, 2004. Generally, an insurance broker is considered the agent of the insured, and notice to the broker is not deemed notice to the insurance company (*see Security Mut. Ins. Co. of N.Y. v Acker-Fitzsimons Corp.*, 31 NY2d 436, 442 [1972]; *MTO Assoc., Ltd.*

Partnership v Republic-Franklin Ins. Co., 21 AD3d 1008 [2005]). However, a broker will be held to have acted as the insurer's agent where there is some evidence of "action on the insurer's part, or facts from which a general authority to represent the insurer may be inferred" (see *Rendeiro v State-Wide Ins. Co.*, 8 AD3d 253 [2004]). Essential to the creation of apparent authority are words or conduct of the principal communicated to a third party that give rise to a reasonable belief that the agent has authority to bind the principal (see *Shaw Temple A.M.E. Zion Church v Mount Vernon Fire Ins. Co.*, 199 AD2d 374 [1993]). The agent cannot through his acts alone clothe himself with apparent authority (see *Ford v Unity Hosp.*, 32 NY2d 464, 471 [1973]). Here, Able failed to offer any evidence of action by ACE to support the conclusion that the broker had a general authority to represent the carrier for notice purposes (see *Serravillo v Sterling Ins. Co.*, 261 AD2d 384 [1999]). Rather, Able argues that it solely relied on Berger's representations that it was the authorized representative of ACE and that notice of all claims should go through Berger. Moreover, while it may have been Able's practice to notify its broker of a claim or lawsuit, the explicit policy requirement that notice must be sent to the insurance carrier trumps any informal arrangement between the insured and its broker (see *Gershow Recycling Corp. v Transcontinental Ins. Co.*, 22 AD3d 460 [2005]). Therefore, the fact that Able may have provided timely notice of the potential claim to Berger is of no consequence and does not constitute a valid excuse for receipt of late notice by the insurer (see *Paul Developers, LLC v Md. Cas. Ins. Co.*, 28 AD3d 443 [2006]).

Next, the court will turn to the issue of the timeliness of ACE's disclaimer of coverage. Pursuant to Insurance Law § 3420(d), an insurer must provide a written disclaimer of coverage "as soon as is reasonably possible." An insurer's failure to provide notice of disclaimer as soon as is reasonably possible precludes effective disclaimer, even where the insured's notice of the incident is untimely (see *Tex Dev. Co. v Greenwich Ins. Co.*, 51 AD3d 775 [2008]). Timeliness of an insurer's disclaimer is measured from the point in time when the insurer first learns of the grounds for disclaimer (see *id.* at 778). An insurer who delays in giving written notice of disclaimer bears the burden of justifying the delay (see *First Fin. Ins. Co. v Jetco Contr. Corp.*, 1 NY3d 64, 68-69 [2003]). When, as here, the explanation offered for the delay in disclaiming is an assertion that there was a need to investigate issues that will affect the decision on whether to disclaim, the burden is on the insurance company to establish that the delay was reasonably related to the completion of a necessary, thorough, and diligent investigation (see *Quincy Mut. Fire Ins. Co. v Uribe*, 45 AD3d 661 [2007]). Moreover, an insurer's explanation is insufficient as a matter of law where the basis for denying coverage was or should have been readily apparent before the onset of the delay (see *First Fin. Ins. Co.*, 1 NY3d at 68-69).

Based on the record, ACE failed to establish that its 28-day delay in disclaiming coverage was occasioned by the need to conduct a thorough and diligent investigation of the

reasons behind Able's failure to provide timely notice of the accident (*see Schulman v Indian Harbor Ins. Co.*, 40 AD3d 957 [2007]). In her affidavit, Mary Jo Quatrone, the claims analyst who was assigned the within claim, stated that she received the case file on April 6, 2007, three days after Berger forwarded the notice of claim to ACE on April 3, 2007. The claims documents included the summons and complaint, Able's incident reports dated July 29, 2004 and July 30, 2004, and the September 10, 2004 letter from Dominique Owens' attorney advising Able of the potential claim, which was stamped received by Able on September 13, 2004. Before ACE conducted any investigation, an initial review of these documents clearly showed that the accident occurred on July 28, 2004, that Able first learned of the accident the day after it occurred, and that Able had notice of a potential claim since September 2004. Unlike in *Ace Packing Co., Inc. v Campbell Solberg Assoc., Inc.*, 41 AD3d 12 [2007], upon which ACE primarily relies, the first claims materials provided to ACE, on their face, contained sufficient facts to allow the claims analyst to conclude that the insured breached the notice provisions of the insurance policy by reporting the accident to ACE almost three years after learning of the accident and receiving notice of the claim from the claimant's counsel. For similar reasons, the facts of the instant case can also be distinguished from those in *Steinberg v Hermitage Ins. Co.*, 26 AD3d 426 [2006]. In *Steinberg*, there was a need for the insurer to investigate into when the insured first received notice of the accident because the insurer initially received from the broker insufficient information from which to make that determination, namely an Accord Form Notice of Occurrence with an attached summons and complaint (*see Steinberg v Hermitage Ins. Co.*, Sup Ct, Queens County, Oct. 14, 2003, Hart, J., Index No. 27355/98). Only after conducting an investigation did the insurer then discover that the insured first received notice of the accident and claim one month after it occurred via letter from the claimant's attorney, but failed to forward that letter to its insurer (*see id.*). In contrast, the primary reason for ACE's disclaimer was readily apparent upon receipt of notice of the loss and, thus, the 28-day delay in disclaiming coverage was unreasonable as a matter of law (*see Allstate Ins. Co. v Cruz*, 30 AD3d 511 [2006]; *Allstate Ins. Co v Swinton*, 27 AD3d 462 [2006]; *Gregorio v J.M. Dennis Constr. Co. Corp.*, 21 AD3d 1056 [2005]; *Transcontinental Ins. Co. v Gold*, 18 Misc 3d 1135A [Sup Ct, Nassau County 2008]). Under these circumstances, any purported failure on the part of Able to provide ACE with timely notice of the underlying claim did not excuse ACE's unreasonable delay in disclaiming coverage (*see New York City Hous. Auth. v Underwriters at Lloyd's, London*, 61 AD3d 726 [2009]). Furthermore, in light of this court's finding, the alternative relief requested by Able is denied as moot, and that branch of Berger's cross motion which seeks dismissal of the remaining claims asserted against it is also denied as academic.

Accordingly, ACE's motion for summary judgment is denied and the cross motions are granted only to the extent that this court declares that ACE is obligated to defend and

indemnify Able in the underlying action, entitled *Owens v Able Health Care Service, Inc.*, (Sup Ct, Queens County, Index No. 15398/07).

Dated: July 8, 2009

J.S.C.