

**West 16th Street Tenants Corp. v Public Service
Mutual Insurance Co.**

2001 NY Slip Op 30039(U)

March 20, 2001

Supreme Court, New York County

Docket Number: 0060279/2000

Judge: Marilyn Shafer

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

PRESENT: Shafar
Justice

PART 36

West 10th St Tenants

INDEX NO. 602798-00

- v -

MOTION DATE _____

Public Service Mutual

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	_____
Answering Affidavits — Exhibits _____	_____
Replying Affidavits _____	_____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is granted
& X motion denied pursuant to attached
Decision

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

Dated: 3/20/01

MARILYN SHAFER
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION J.S.C.

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

-----X
WEST 16TH STREET TENANTS CORP.,

Plaintiff,

Index No. 602798/2000

-against-

PUBLIC SERVICE MUTUAL INSURANCE COMPANY,

Defendant.

-----X

MARILYN SHAFER, J.:

The plaintiff West 16th Street Tenants Corp. (“Tenants Corp.”) moves, pursuant to CPLR 3215, for the entry of a default judgment against the defendant Public Service Mutual Insurance Company (“Public Service”).

Public Service cross-moves, pursuant to CPLR 3012(d), for an order compelling the plaintiff Tenants Corp. to accept the answer.

The plaintiff Tenants Corp. is a cooperative corporation located at 321 West 16th Street, in Manhattan. The defendant Public Service is an insurance company which sold both a commercial, and an umbrella, insurance policy to Tenants Corp.

On October 11, 1999, a worker sustained personal injury when he fell from a scaffold while repointing chimney bricks on the roof of 321 West 16th Street. On December 27, 1999, the worker filed an action against Tenants Corp. On March 17, 2000, Tenants Corp. alleges that it received notice of the lawsuit and notified its insurer, Public Service. On April 27, 2000, Public Service disclaimed coverage for lack of timely notice.

This action, for a judgment declaring that Public Service must defend and indemnify Tenants Corp. in the underlying personal injury action, was commenced on July 7, 2000.

In support of its motion for a default judgment, the plaintiff Tenants Corp. argues that no answer has been filed, and that there is no meritorious defense to its action for a declaratory judgment, as Tenants Corp. had a good-faith reasonable belief that no personal injury claim would be made against it.

In opposition to the motion for a default judgment, and in support of its cross motion to compel acceptance of the answer, the defendant Public Service argues that it mistakenly served its answer on the attorney in the underlying personal injury action. Allegedly, it was not until this motion was made that the mistake was discovered. Public Service also argues that late notice of occurrence from its insured is a meritorious defense.

In opposition to the cross motion, and in further support of its motion, the plaintiff Tenants Corp. argues that: the proposed answer is not verified; it is ironic that an insurer disclaiming coverage for late notice asks that the court overlook late service of the answer; and the building is a small cooperative with just 10 tenant shareholders, who have been forced to retain counsel and are exposed to a large recovery in the underlying personal injury suit.

The law favors the resolution of cases on the merits. A defendant seeking to be excused from the failure to timely file and serve an answer must demonstrate a meritorious defense and a reasonable excuse for the default (CPLR 2005; Santora & McKay v Mazzella, 211 AD2d 460 [1st Dept 1995]). Although the defendant Public Service demonstrates a reasonable excuse for the default, it fails to allege facts sufficient to establish the existence of a meritorious defense.

The requirement that an insured notify its liability carrier of a potential claim as soon as

practicable operates as a condition precedent to coverage (White by White v City of New York, 81 NY2d 955, 957 [1993]). 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 (Security Mut. Ins. Co. of New York v Acker-Fitzsimons Corp., 31 NY2d 436, 441 [1972]). Generally, questions of the insured's good faith and reasonableness in believing that it would not be sued, and in delaying notification to the insurer, are issues to be resolved by the trier of fact (Mighty Midgets, Inc. v Centennial Ins. Co., 47 NY2d 12, 21 [1979]).

However, an insurer must give written notice of disclaimer on the ground of late notice as soon as is reasonably possible after it first learns of the accident or of grounds for disclaimer of liability, and failure to so do precludes effective disclaimer (Insurance Law § 3420[d]; Hartford Ins. Co. v County of Nassau, 46 NY2d 1028, 1029 [1979]). This is true because the sole ground for disclaiming liability is readily apparent to the carrier when it receives notice of the accident; and where the carrier itself has unreasonably delayed in making a disclaimer, it cannot take advantage of a failure to give timely notice of the accident (Kramer v Interboro Mut. Indem. Ins. Co., 176 AD2d 308 [2d Dept 1991]).

Whether a particular lapse of time is reasonable is generally a question of fact for a jury (Allstate Ins. Co. v Gross, 27 NY2d 263 [1970]). However, an unexplained delay of two months in disclaiming liability for late notice has been held unreasonable as a matter of law (Hartford Ins. Co. v County of Nassau, *supra*). Similarly, an unexplained delay of 41 days was held to be unreasonable as a matter of law (Matter of Nationwide Mut. Ins. Co. v Steiner, 199 AD2d 507 [2d Dept 1993]). On the other hand, short explained delays of approximately three weeks have been held to be reasonable as a matter of law (State Farm Mut. Auto. Ins. Co. v Daniels, 269

AD2d 860 [4th Dept 2000]; Can-Am Roofing v American States Ins. Co., 229 AD2d 973 [4th Dept 1996]). Delays of 30 days have been held to be neither reasonable, nor unreasonable as a matter of law, requiring a trial (Hess v Nationwide Mut. Ins. Co., 273 AD2d 689 [3rd Dept 2000]; Murphy v Hanover Ins. Co., 239 AD2d 323 [2^d Dept 1997]).

In the instant case, the delay of 41 days in disclaiming was unreasonable as a matter of law. The defendant Public Service attempts to explain away the 41 days by alleging that it was investigating the claim. However, as mentioned above, delay by an insured in notifying an insurer of the claim, as a ground for disclaiming coverage is, as a matter of law, readily apparent to the carrier when it receives notice of the accident. Therefore, there was absolutely no need for a 41 day “investigation” by Public Service before it disclaimed. Public Service’s claims regarding its “investigation” are tailored to avoid the law’s requirement that it timely notify its insured of the disclaimer.

Furthermore, the delay, from March 17, 2000 to April 27, 2000, is exactly the same as the 41-day delay in Matter of Nationwide Mut. Ins. Co. v Steiner (*supra*), found to be unreasonable as a matter of law.

Accordingly, it is

ORDERED that the plaintiff’s motion for a default judgment is granted and the Clerk is directed to enter judgment in favor of the plaintiff and against the defendant, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

ORDERED that the defendant’s cross motion to compel acceptance of the answer is denied; and it is further

ADJUDGED AND DECLARED that the defendant Public Service Mutual Insurance Company must defend and indemnify West 16th Street Tenants Corp. in the underlying personal injury action (Index No. 125610/99 Sup. Ct. NY County); and it is further

ORDERED that Public Service Mutual Insurance Company reimburse West 16th Street Tenants Corp. for legal fees expended thus far; and it is further

ORDERED that the issue of the reasonable value of the legal services provided to West 16th Street Tenants Corp., thus far, is severed and referred to a Special Referee to hear and report; and it is further

ORDERED that that branch of the motion is held in abeyance pending receipt of the report and a motion pursuant to CPLR 4403; and it is further

ORDERED that a copy of this order and judgment with notice of entry shall be served on the Clerk of the Judicial Support Office (Room 311) to arrange a date for the reference to a Special Referee.

Dated: 3/20/01

Enter:

MARILYN SHAFER
J.S.C.

J.S.C.