

Tower Ins. Co. of N.Y. v 572 Antillana Inc.

2002 NY Slip Op 30129(U)

June 27, 2002

Sup Ct, NY County

Docket Number: 104124/00

Judge: Edward H. Lehner

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

PRESENT: EDWARD H. LEHNER
Justice

PART 19

Tower Insurance Co. of
NY
- v -

572 Antillana Ave.

INDEX NO. 104124/02
MOTION DATE _____
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

_____ motion is decided in accordance
with accompanying memorandum decision
_____ in accordance
with accompanying memorandum decision

_____ motion is decided in accordance
with accompanying memorandum decision

JUN 27 2002

Dated: _____

[Signature]
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 19

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

Plaintiff,

INDEX NO.
104124/00

- against -

572 ANTILLANA INC., JAVIER CHECO,
YEHEZKEL & DISH, DISH, DISHMEL REALTY
CORP. and JOSE COLON

Defendants.

-----x

EDWARD H. LEHNER, J.:

On June 15, 1998, Jose Colon was injured in the store occupied by 572 Antillana Inc. (“Antillana”). Antillana and its president, Javier Checo, are insured under a commercial liability insurance policy issued by plaintiff Tower Insurance Company of New York (“Tower”). Under that policy, Antillana is required to notify Tower of any occurrence which may result in a claim against Antillana as soon as is practicable. The notice must include how, when and where the accident occurred, including any injuries which resulted.

Three days after the incident, Checo claims he called Antillana’s insurance broker, Mary Moya, and notified her of the accident. Ms. Moya stated that she has no recollection of receiving the call. On August 11, 1999, fourteen months after the incident, Antillana’s attorney faxed to Ms. Moya a letter from Jose Colon’s attorney

stating that he had been retained by Mr. Colon “in connection with personal injuries sustained at [Antillana’s] facility on June 15, 1998.”

While in an unsworn statement dated January 19,2000, Ms. Moya claims she recalls receiving a letter of representation “dated 9/99” and that she “referred” the letter to Tower, in an affidavit sworn to on February 4,2002, she stated she was not able to specifically recall the letter, but claimed it was her “habit, custom and business practice to *promptly* send letters” of representation to the Morstan Agency. During oral argument, Tower acknowledged that Morstan is its agent.

On September 8, 1999, Jose Colon filed a personal injury suit captioned “**Jose Colon v. 572 Antillana. Inc., Javier Checo and Dishmel Realty Corp.**” in this court (Index No. 118006/99). Tower states that on November 19, 1999 it received copies of the summons and the complaint in the Colon action, but the complaint fails to state details of the incident other than to allege that the plaintiff “was caused to fall from an elevated height thereby causing him to sustain certain severe personal injuries”.

After Tower received notice on November 19, 1999, it commenced an investigation of the incident. The only known component of the investigation was an interview of Mr. Checo which occurred on December 29, 1999. He and his lawyer claim they cooperated with Tower’s investigation. However, Tower claims that Checo was unavailable and that there were multiple attempts to contact him, but it

fails to provide any details with respect thereto.

Through their interview with Checo, Tower discovered that he had knowledge of the accident at the time it occurred and that grounds for disclaiming coverage due to untimely notice existed. Tower disclaimed coverage in a letter dated January 5, 2000, one week after the interview and 47 days after receiving copies of the summons and complaint.

On March 3, 2000, Tower filed this declaratory judgment action claiming that Antillana and Checo had failed to satisfy a condition precedent to coverage in that they failed to promptly notify Tower of the incident, and that hence it is not required to defend or indemnify Antillana or Checo in regard to any claim arising from the personal injury action. Furthermore, Tower requested Antillana and Checo be adjudged liable to Tower for any sums expended in their defense.

Before the court is a motion by Tower for summary judgment. A central issue on this motion is whether Tower disclaimed coverage in a timely manner.

Antillana's first attempt at notifying Tower was not sufficient notice to the insurer because notice to Antillana's broker is not notice to the insurer. [2540 Assocs. Inc. v. Assicurazioni Generali, 271 A.D.2d 282, 284 (1st Dept. 2000)]. Since there is no proof in admissible form that notice was sent to Tower in August 1999, the only proof of notice is Tower's receipt of the Colon summons and complaint on November

19, 1999. This delay of 17 months is clearly not timely notice of the accident [Power Auth. Of N.Y. v. Westinghouse Elec. Corp., 117 A.D.2d 336,342 (1st Dept. 1986) (53 day delay in notifying insurer of occurrence untimely); Goodwin Bowler Assocs., Ltd. v. E. Mut. Ins. Co., 259 A.D.2d 381,381 (1st Dept. 1999) (two month delay in submitting notice of claim untimely)]. Failure to give timely notice of the accident “vitiates” the coverage [Allcity Ins. Co. v. Jimenez, 78 N.Y.2d 1054, 1055 (1991); Brandon v. Nationwide Mut. Ins. Co., 284 A.D.2d 886, 887 (3rd Dept. 2001), *aff’d*, 97 N.Y.2d 491 (2002)].

However, if Tower failed to give timely notice of disclaimer as required by Insurance Law §3420(d), Antillana’s untimely notice would become irrelevant. See Allcity Ins. Co. v. Jimenez, *supra* at p. 1056. Said statute provides that:

“[i]f under a liability policy delivered ... in this state, an insurer shall disclaim liability or deny coverage for death or bodily injury arising out of ... [an] accident occurring within this state, it shall give written notice as soon as is reasonably possible of such disclaimer of liability or denial of coverage to the insured.”

“[A]n insurer who fails to timely disclaim liability or deny coverage ‘as soon as is reasonably possible,’ when required by Insurance Law § 3420(d), waives its affirmative defense of late notice.” [Allcity Ins. Co. v. Jimenez, *supra*, at p. 1056. Under the statute, an insured does not have to show prejudice to preclude an insurer’s claim of late notice as they would under a claim of common law estoppel [Dryden

Mutual Ins. Co. v. Michaud, 115 A.D.2d 150, 151 (3rd Dept. 1985)]. Without a reasonable excuse, a 47 day delay in disclaiming coverage is untimely as a matter of law. See West 16th Street Tenants Corp. v. Public Service Mut. Ins. Co., 290 A.D.2d 278, 279 (1st Dept. 2002) (30 day delay); Nationwide Mut. Ins. Co. v. Steiner, 199 A.D.2d 507, 508 (2d Dept. 1993) (41 day delay); Brandon v. Nationwide Mut. Ins. Co., 284 A.D.2d 886, 888 (3rd Dept. 2001), aff'd, 97 N.Y.2d 491 (2002) (38 day delay). However, delays may be justified by the circumstances of the case. [Norfolk and Dedham Mut. Fire Ins. Co. v. Petrizzi, 121 A.D.2d 276, 277 (1st Dept. 1986)].

When disclaiming coverage, the insurer must provide the insured with notice of disclaimer which describes the grounds for disclaimer “with a high degree of specificity.” [Gen. Accident Ins. Group v. Cirucci, 46 N.Y.2d 862, 864 (1979)]. Therefore, reasonable investigation is often required to disclaim coverage.

In 2540 Associates Inc. v. Assicurazioni Generali, 271 A.D.2d 282 (1st Dept. 2000), the insurer received notice in 1996 of an accident but did not know “when the insured became aware of the 1991 injury at its premises”, which accident was the subject of an action commenced in 1993. The insurer conducted an investigation and discovered that the insured knew of the accident when it occurred and failed to notify the carrier in a timely manner. The insurance company disclaimed coverage approximately two months after receiving notice but only one week after obtaining

information sufficient to allow it to disclaim coverage. In sustaining the timeliness of the disclaimer, the court stated that, “the moment from which the timeliness of an insurer’s disclaimer is measured is the date on which it first receives information that would disqualify the claim, not the date on which it receives the insured’s notice of claim” (p. 283). The court found a week was a timely period for disclaimer as a matter of law. However, in that case an investigation as to when the insured learned of the claim was required as the insured had disavowed knowledge of the accident or receipt of the pleadings, which had been served upon the Secretary of State, and claimed that he only learned about the matter in the course of refinancing its property in 1996.

In contrast, here there was no reasonable basis for an investigation as Tower had not received any assertion by the insured of lack of knowledge of the 1998 accident, and the 17 month delay in providing notice of the incident was obvious from the pleading received on November 19, 1999.

In West 16th Street Tenants Corp. v. Public Service Mut. Ins. Co., supra, under circumstances similar to those in the case at bar, the court wrote (p. 279):

“Plaintiffs delay in notifying defendant of the occurrence giving rise to the claim, the sole ground on which defendant disclaimed coverage, was obvious from the face of the notice of claim and the accompanying complaint, and defendant had no need to conduct an investigation before determining whether to disclaim.”

There the court held that the "30-day delay in disclaiming coverage was therefore unreasonable as a matter of law under Insurance Law §3420". See also, City of New York v. Northern Insurance Company of New York, 284 A.D.2d 291 (2nd Dept. 2001); Nationwide Mutual Insurance Company v. Steiner, supra, where the court said that since "the primary reason for disclaiming coverage (11 month delay in notifying the insurer of the accident) was readily apparent upon receipt of notice of the accident, we find the petitioner's unexplained delay (41 days) in disclaiming coverage was unreasonable as a matter of law".

While it is true that in some situations it may later develop that an insured had a valid excuse for not giving notice of the accident, i.e., lack of knowledge of the accident; a good faith belief that the accident would not give rise to a claim of liability, such a claim could be subsequently investigated. However, here there was nothing in the papers received by Tower that would put it on notice of such a claim and a need to investigate. Hence, there was no need for the investigation and the 47 day delay in giving notice of disclaimer was therefore unreasonable as a matter of law.

However, even if an investigation was warranted, Tower has failed to offer a reasonable explanation for its 47 day delay in disclaiming. Here the investigation involved interviewing only one person, Checo. During oral argument, the only reason

Tower presented for the delay in getting Checo's statement was that the investigation had been delayed by the Christmas holidays and Checo was unavailable. However, Tower has not provided any information showing what attempts it made to contact him.

Accordingly, Tower's motion for summary judgment is denied and, upon searching the record, the court finds that since Tower has failed to set forth any valid basis to justify its position of refusing to defend and indemnify Antillana and Checo, they are entitled to summary judgment declaring that Tower is obligated to defend and indemnify them with respect to the personal injury action commenced by Colon.

This decision constitutes the order of the court.

Dated: June 27, 2002

A handwritten signature in black ink, consisting of a large, stylized capital letter 'P' followed by a cursive flourish that ends in a horizontal stroke.

J.S.C.