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

PRESENT: DEBRA A. JAMES *Justice* **PART 59**

GREAT CANAL REALTY CORP.,

Plaintiff,

- v -

SENECA INSURANCE COMPANY,

Defendant.

Index No.: 100273/02

Motion Date: 11/17/03

Motion Seq. No.: 002

Motion Cal. No.:

The following papers, numbered 1 *to* 3 were read on this motion for summary judgment

	PAPERS NUMBERED
Notice of Motion/Order to Show Cause -Affidavits -Exhibits	1
Answering Affidavits - Exhibits	2
Replying Afffidavits - Exhibits	3

Cross-Motion: ☐ **Yes** ☒ **No**

Defendant insurer moves for summary judgment dismissing the complaint in this declaratory judgment action seeking insurance coverage with respect to an accident on plaintiff's premises on the grounds of untimely notice. Plaintiff opposes the motion stating that there are issues of fact as to plaintiff's argument that untimely notice of the claim, if any, was excusable.

This action arises out of a lawsuit (Song Thor Chong v Great Canal Realty Corp., Sup Ct, NY County) seeking damages for personal injuries allegedly suffered by Song Thor Chong on May 7, 2002, in a fall from a ladder on premises at 31 Howard Street, owned by Great Canal. According to the affidavit of Dunnie Lai,

Check One : ☐ **FINAL DISPOSITION** ☒ **NON-FINAL DISPOSITION**

President of Great Canal, she was informed of the incident by the contractor sometime in late May of 2002. She states that she was told that someone had fallen while working and that "I did not know then and I still do not know the extent of Mr. Chong's injuries. I did not know if Mr. Chong was taken to a hospital, or if he was hurt in any significant way. All I know is that a fall took place. . . When I was informed of this accident, I was informed by Mr. Law [the foreman] that he would take care of this 'problem' through his insurance company. When I had this conversation with Mr. Law, I believed that to the extent any claim would be made by Mr. Chong, that Worker's Compensation coverage was the exclusive coverage for this employee, as the occurrence took place while he was working. . . I did not know at the time that any serious injury was involved, or that anyone had been taken away by ambulance to the hospital, or that any significant medical treatment was necessary."

Ms. Lai further stated that she only became aware that the incident was serious upon receipt of a Summons and Complaint on September 10, 2002. She states that she then called the insurance broker immediately and sent them a copy of the Summons and Complaint. Defendant Seneca thereafter declined coverage based upon late notice.

On this motion both parties agree that the operative issue is whether the plaintiff complied with the timely notice provisions of the insurance policy issued by defendant or was

excused from strict compliance with such provision as a matter of law.

> It is well settled that compliance with an insurance policy notice provision operates as a condition precedent to coverage. Absent a showing of legal justification, the failure to comply with the notice condition vitiates coverage. The obligation to give notice "as soon as practicable" of an occurrence that may result in a claim is measured by the yardstick of reasonableness. It has generally been held that a failure to give notice may be excused when an insured, acting as a reasonable and prudent person, believes that he is not liable for the accident. It is clear from this principle that, in assessing the timeliness of the notice given, the courts have not turned over to the insured, or its agents, the exclusive responsibility for determinating when an accident is likely to give rise to a liability claim. The 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. Moreover, knowledge of an occurrence obtained by an agent charged with the duty to report such matters is imputed to the principal. It also bears noting that the insured bears the burden of proving, under all the circumstances, the reasonableness of any delay in the giving of notice.

Paramount Ins. Co. v Rosedale Gardens, Inc., 293 AD2d 235, 239-240 (1st Dept 2002) (citations omitted).

Defendant argues that plaintiff's four month delay in providing notice of the accident violated the reasonable notice provision of the insurance policy. Thus in Paramount, supra, the First Department held that where the insured's principals knew of the accident, a slip and fall, immediately after it happened and were aware that the injured party had been taken to the hospital, the insured failed to provide a reasonable excuse for failing to timely notify the insurer as a matter of law. Id. at 241-242. Similarly in Heydt Contracting Corp., v American Home Assurance

Co. (146 AD2d 497 [1st Dept 1989]), the Court held where the insured did not claim that it was unaware of a fire on its premises, a delay of four months in notifying the insurer was unreasonable as a matter of law and justified dismissing the insured's declaratory judgment action. The Court stated that "plaintiff's assumption that other parties would bear ultimate responsibility for its property loss is insufficient as a matter of law to excuse the more than four-month delay in giving notice. The fact that a particular occurrence may not in the end result in a ripened claim does not relieve the insured from advising the carrier of that event, and plaintiff's policy with defendant dictates that timely written notice be provided whenever a claim 'may' arise. Thus, the mere possibility of a claim should have alerted plaintiff to the necessity of promptly informing its insurance carrier of the fire and its loss therefrom." Id. at 499; see also Security Mutual Ins. Co. of New York v Acker-Fitzsimons Corp., 31 NY2d 436 (1972).

However, the Court of Appeals has stated that in the type of action presented here, "The existence of [a] 'good-faith belief', as well as the question of whether the belief was reasonable, are ordinarily questions of fact for the fact finder." Argentina v Otsego Mut. Fire Ins. Co., 86 NY2d 748, 750 (1995). In this case, summary judgment is not appropriate as the plaintiff has raised triable issues of fact as to the issue of plaintiff's reasonableness in providing delayed notice. In this case, the

affidavit of plaintiff's President indicates that the plaintiff had no direct knowledge of the accident and was told of the occurrence some time after the accident. Thus there are issues of fact as to whether the information provided to the plaintiff, which apparently did not include any reference to any injuries possibly suffered by any person upon the premises, was of such a character that a reasonable person would have understood that its duty to notify its insurer was implicated. See 875 Forest Ave. Corp., v Aetna Casualtv and Suretv Co., 37 Ad2d 11 (1st Dept 1971) (delay of over one year in giving notice of accident where child fell from window was reasonably excusable where plaintiff's president was informed of the accident two days thereafter, but there was no indication plaintiff knew of any defective condition which would lead to liability).

Unlike the cases relied upon by the defendant, plaintiff in this case based upon the facts adduced on this motion, had no direct knowledge of the accident nor is it alleged that the condition of the premises itself would have given rise to such knowledge. Therefore summary judgment is inappropriate. Accordingly, it is

ORDERED that defendant's motion for summary judgment is DENIED.

This is the decision and order of the court.

Dated: December 16, 2003

ENTER:

DEBRA A. JAMES J.S.C.
J.S.C.