

**Gershow Recycling Corporation v Trans Continental
Insurance Company**

2003 NY Slip Op 30082(U)

Supreme Court, Suffolk County

Docket Number: 1002960/2002

Judge: William L. Underwood

Republished from New York State Unified Court
System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for
any additional information on this case.

This opinion is uncorrected and not selected for official
publication.

**SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM. PART XIV - SUFFOLK COUNTY**

PRESENT:

Hon. WILLIAM L. UNDERWOOD, JR.

GERSHOW RECYCLING CORPORATION,

Plaintiff(s),

-against-

TRANS CONTINENTAL INSURANCE
COMPANY,

Defendant(s).

**ORIG. RETURN DATE: 06/05/03
FINAL RETURN DATE: 09/16/03
MTN. SEQ. #: 001-MG/CDISPSUBJ**

**PLTF'S/PET'S ATTORNEY:
MEYER, SUOZZI, ENGLISH & KLEIN, P.C.
1505 Kellum Place
Mineola, New York 11501**

**DEFT'S/RESP ATTORNEY:
AHMUTY, DEMERS & MC MANUS
BY **NEIL J. PALMIERI**
200 I.U. Willets Road
Albertson, New York 11507**

Upon the following papers numbered 1 to 23 read on this motion summary judgment
Notice of Motion/Order to Show Cause and supporting papers 1-8; Notice of Cross Motion and supporting papers _____;
Answering Affidavits and supporting papers 9-22; Replying Affidavits and supporting papers 23; Other _____; (and
~~after hearing counsel in support of and opposed to the motion~~) it is,

ORDERED that the defendant Transcontinental Insurance Company's motion for summary judgment is granted under the circumstances presented herein. (CPLR 3212).

This is an action for a declaratory judgment wherein the plaintiff Gershow Recycling Corporation ("Gershow") seeks a judgment declaring that its insurer, defendant Transcontinental Insurance Company ("Transcontinental") is obligated to provide a defense and indemnity to it with regard to an underlying personal injury action commenced by Thomas Gibbs. (Supreme Court, Suffolk County; Index No. 11179-2001).

The underlying personal injury action was commenced on or about May 14, 2001, pursuant to Business Corporation Law, by the service of a summons and complaint upon the

Gershow Recycling Corp., v. Transcontinental Ins. Co.

Index No.: 29601-02

Page Two

New York State Secretary of State. The summons and complaint were forwarded to Murray S. Bornstein at 165 Broadway, New York, N.Y., the individual who was designated by the defendant for service on its behalf. On June 4, 2001, the summons and complaint were returned to the Secretary of State marked "attempted, but **unknown.**" The plaintiffs moved for a default judgment by Notice of Motion dated January 24, 2002. By decision and order of the Hon. Denise P. Molia, J.S.C. dated February 27, 2002, the motion was granted and the matter was placed on the inquest calendar for May 2, 2002.

The plaintiff avers that it that it did not have knowledge of the instant action until March 4, 2002, when its Chief Financial Officer Scott Bohan became aware of the aforesaid Notice of Motion seeking a default judgment which immediately forwarded to Gershow's insurance broker, Steven Fuoco of Profile Coverage Corporation. Bohan did not hear anything further regarding this matter until August 23, 2002, when he received a call from Gibb's counsel advising him that the a default judgment had been granted and an inquest was scheduled on September 18, 2002. After inquiring of his insurance broker as to why Gershow's insurance carrier had not responded, Fuoco informed him that the papers had been forwarded to the wrong company and they had now sent them to CNA Insurance Company, the insurer who sold the subject policy to Gershow. Defendant Transcontinental, an affiliated company of CNA, underwrote the policy which provided coverage for bodily injury and property damage. Transcontinental received notice of the underlying claim on or

Gershow Recycling Corp., v. Transcontinental Ins. Co.

Index No.: 29601-02

Page Three

about August 27, 2002. On September 5, 2002, Transcontinental disclaimed coverage as to the subject incident due to its failure to receive timely notice of the action. Defendant Transcontinental now moves for summary judgment based upon such untimely notice.

Section IV (2) (a) and (c) of the subject policy provides in pertinent part as follows:

You must see to it that we are notified as soon as practicable of an "occurrence" or an offense which may result in a claim.....
Immediately send us copies of any demands, notices, summonses, or legal papers received in connection with the claim or "suit".

A party moving for summary judgment must make a prima facie showing of entitlement as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact. (*Winegrad v. New York University Medical Center*, 64 N.Y.2d 851, 853, 487 N.Y.S.2d 316; *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562). Of course, summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue (*State Bank of Albany v. McAuliffe*, 97 A.D.2d 607, 467 N.Y.S.2d 944), but once a prima facie showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish material issues of fact which require a trial of the action. (*Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 324, 508 N.Y.S.2d 923 [1986]).

It is well settled that "where an insurance policy requires that notice of an occurrence be given promptly, notice must be given within a reasonable time in view of all the facts and

Gershow Recycling Corp., v. Transcontinental Ins. Co.

Index No.: 29601-02


Page Four

circumstances. [citations omitted].” (*Eagle Insurance Company v. Zuckerman*, 301 A.D.2d 493, 753 N.Y.S.2d 128 [2nd Dept. 2003]). In the matter at bar, defendant Transcontinental was not notified of the underlying action until fifteen months after its commencement. Although the plaintiff had an opportunity to notify its insurer of the pending litigation when it became aware of the notice of motion for a default judgment, it chose to notify its insurance broker instead, doing so on March 4, 2002, approximately five months prior to Transcontinental receiving notice. Clearly, such notification does not excuse the plaintiff from its obligation under the policy to provide notice to its insurer as “soon as practicable”. It is well established that under such circumstances, the broker is deemed the agent of the insured and notice to him cannot be treated as notice to the insurer. (*Shaw Temple A.M.E. Zion Church v. Mount Vernon Fire Insurance Company.*, 199 A.D.2d 374, 605 N.Y.S.2d 370 [2nd Dept. 1993]). Accordingly, pursuant to the foregoing and the circumstances presented herein, the defendant’s motion for summary judgment is granted.

Submit judgment.

So ordered.

Dated: December 2, 2003


 HON. WILLIAM L. UNDERWOOD, JR.
 J.S.C.

CHECK ONE: FINAL DISPOSITION

NON-FINAL DISPOSITION