

**Milbank Housing Development Fund v Royal
Indemnity Co.**

2003 NY Slip Op 30133(U)

May 5, 2003

Supreme Court, New York County

Docket Number: 0600527/2002

Judge: Karla Moskowitz

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

PRESENT: Hon. KARLA MOSKOWITZ PART 03
Justice

..... x
MILBANK HOUSING DEVELOPMENT FUND,

INDEX NO. 600527/02
MOTION DATE _____

Plaintiff,

MOTION SEQ. NO. 1

MOTION CAL. NO. _____

-against-

ROYAL INDEMNITY COMPANY,
Defendant.

SCANNED
MAY 12 2003

.....x

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

	<u>PAPERS NUMBERED</u>
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:

The motion is decided in accordance with the accompanying decision and order.

Dated: May 07 2003

KARLA MOSKOWITZ J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

FILED
MAY 12 2003
COUNTY CLERK'S OFFICE
NEW YORK

MOTION/CASE IS RESPECTFULLY REFERRED TO
JUSTICE
DATED: _____

J.S.C.

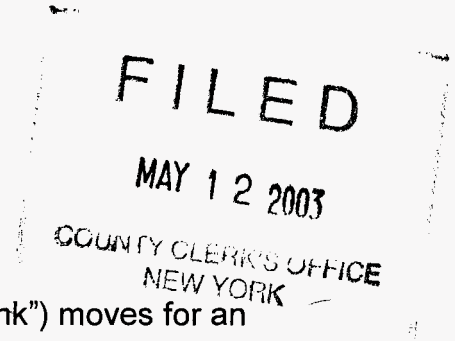
SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 3

..... X
MILBANK HOUSING DEVELOPMENT FUND,
Plaintiff,

Index No. 600527/02

-against-

ROYAL INDEMNITY COMPANY,
Defendant.
-----X



MOSKOWITZ, J.:

Plaintiff Milbank Housing Development Fund ("Milbank") moves for an

order, pursuant to CPLR 3212, granting summary judgment in its favor declaring that defendant Royal Indemnity Company ("Royal") must indemnify and defend it in connection with the personal injury action entitled Hussain v Milbank Housing Development Fund Corporation (Index No. 3759/01, Sup Ct, Queens Co). Royal opposes the motion and cross-moves for an order: (a) pursuant to CPLR 3212, granting summary judgment in its favor declaring that it does not owe Milbank coverage or a defense in the Hussain action; or (b) alternatively, pursuant to CPLR 3042(c) and CPLR 3124, compelling Milbank to respond to Royal's discovery demands and precluding Milbank from offering any evidence in support of the allegations for which Royal has demanded particulars, but Milbank has not responded.

As discussed *infra*, Milbank's motion and Royal's cross motion for summary judgment are both denied a premature. Royal's alternative request for relief is granted only to the extent that the parties are directed to proceed to conduct discovery.

BACKGROUND

Milbank, a division of the Children's Aid Society and the Junior League, is a not-for-profit organization that provides shelter to homeless families. One homeless shelter is the Pelham Fritz Houses, at West 118th Street, New York, New York.

Royal, an insurance company, issued a Commercial General Liability policy, No. RSP-258814, to Milbank with a limit of \$1 million per occurrence, in effect from February 22, 1998 through February 22, 1999 (the "Policy"). **As** to Milbank's duty to give notice to Royal, Section IV of the Policy, entitled "Commercial General Liability Conditions," provides, in relevant part:

2. Duties in the Event of Occurrence, Offense, Claim or Suit

- a. You must see to it that [Royal is] notified as soon as practicable of an occurrence or an offense which may result in a claim. . . .

On March 28, 1998, Shanzeb Hussain, an infant who resided with his family at an apartment at the Pelham Fritz Houses, was injured when a living room window fell on his fingers. According to Milbank, at the time of the incident, Hussain was playing alone and unsupervised in the living room; his mother was in another room. Milbank contends that, at the time of the accident, the window was not broken or defective, and, moreover, that prior to the incident, Milbank had not received any complaints about the window nor any indication that the window was broken or defective in any respect.

Immediately following the incident, two Milbank staff members and a security officer responded to the scene. They placed a 911 emergency call, and an ambulance took the child and his mother to a hospital. These employees prepared

an "Incident Report," that Milbank sent to Jose D. Alfaro, the Coordinator of Accident Claims for the Children's Aid Society (the Incident Report is annexed as Exhibit E to Alfaro's moving affidavit, sworn to September 23, 2002). Hussain's social worker, Denise Eugene, also investigated the incident and prepared a written report. In her report, the social worker stated that she questioned the infant's father about the window, who told her that the window worked fine, and that there were no problems with it (see, Alfaro affidavit, Exhibit F).

Three years later, on or about March 10, 2001, Shanzeb Hussain, by his parent or guardian Erbab Hussain, commenced the Hussain action against Milbank for the personal injuries the infant sustained. The complaint in the Hussain action alleges that the window was defective and charges Milbank with negligence and recklessness. Around March 12th, Milbank forwarded the summons and complaint to Royal and, two days later, on March 14th, Milbank forwarded a "First Notice of the Claim/Suit" to Royal.

On April 2, 2001, Royal sent a "reservation of rights" letter to Milbank, reserving Royal's right to disclaim coverage based upon late notice. Royal met with Milbank's representative, Alfaro, on May 1, 2001, to discuss the Hussain action, including Milbank's reasons for not providing prior notice of the incident. In a May 24, 2001 letter, approximately 70 days after Milbank forwarded the Hussain action pleadings to Royal, Royal disclaimed liability to Milbank in connection with the Hussain action on the ground that Milbank failed to give Royal notice of the incident at the time it occurred

Milbank commenced this action against Royal in February 2002, seeking, among other things, a declaration that Milbank is entitled to coverage, including

indemnity and a defense, from Royal with respect to the Hussain action, and that Royal's disclaimer of coverage was invalid (see, complaint, dated February 7, 2002). Milbank submits that it did not have a duty to report this incident to Royal under the terms of the Policy at the time it occurred, because Milbank reasonably believed that this was not an "occurrence or an offense which may result in a claim" against it. In support, Milbank alleges that, prior to its actual receipt of the summons and complaint, it had no indication that the Hussain family intended to assert a claim against Milbank, and that the accident was not the result of any negligence on Milbank's part, but, rather, was solely the result of the parents' failure to supervise their son.

Royal, however, contends that Milbank was required to give prompt notice of the underlying incident at the time it occurred, because Milbank was aware, at that time, of both the happening of the incident and the severity of the infant-plaintiff's injuries. In its answer, dated March 29, 2002, Royal contends that it is not bound to provide indemnification and a defense to Milbank with respect to the Hussain action. In particular, Royal's second affirmative defense states that "any coverage which was owed under [the Policy] was vitiated by [Milbank's] failure to provide timely notice of the occurrence and tender as required as a condition precedent under the terms and conditions of said policy." Royal also alleges that any alleged delay on its part in issuing the disclaimer of Milbank's claim is attributable to difficulty in securing Milbank's cooperation in Royal's investigation. On the other hand, Milbank denies any failure to cooperate, or any delay in cooperating, with Royal's investigation.

DISCUSSION

Milbank contends that: (a) its delay in notifying Royal of the occurrence

was reasonable because Milbank did not and could not have known that the underlying incident would give rise to a claim; and (b) Royal's disclaimer of liability is invalid because Royal did not disclaim "as soon as is reasonably possible" as Insurance Law §3420(d) requires.

Milbank claims that it reasonably believed that no claim could result from the incident for the following reasons: (a) its investigation indicated that the window that fell on the infant-plaintiffs hand was not broken; (b) prior to the time of the incident, Milbank had not received any complaints about the window or any other indication that the window was defective or in need of repair; (c) the accident occurred when the infant-plaintiff was outside of the supervision of either parent; and (d) the infant-plaintiffs family never indicated that they considered Milbank responsible for the accident or that they had any intent to sue Milbank.

Royal, however, claims that Milbank's delay in notifying Royal of the incident was unreasonable as a matter of law. Royal submits that Milbank's agent was aware of the accident on the day it occurred, was aware of the severity of the infant's injuries, and that the agent's purported estimation that the incident presented no threat of a claim, prior to receipt of the pleadings, is unsupportable. Royal contends that the steps Milbank took (or did not take) were wholly unreasonable and that Milbank failed to meet its burden to show the reasonableness of its excuses.

The law applicable to an insured's duty to give notice to the insurer is clear. As the First Department has explained:

The requirement that an insured notify its liability carrier of a potential claim " 'as soon as practical' " operates as a condition precedent to coverage (White v City of New York, 81 NY2d 955, 957). 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, given all the circumstances (Security Mut. Ins. Co. v Acker-Fitzsimons Corp., 31 NY2d 436, 441; White v City of New York, *supra*, at 957). At issue is not whether the insured believes he will ultimately be found liable for the injury, but whether he has a reasonable basis for a belief that no claim will be asserted against him (see, AMRO Carting Corp. v Allcity Ins. Co., 170 AD2d 394; see, White v City of New York, *supra*, at 958; Security Mut. Ins. Co. v Acker-Fitzsimons Corp., *supra*, at 441).

(see, SSBSS Realty Corp. v Public Service Mut. Ins. Co., 253 AD2d 583, 584).

The paramount issue here is whether Milbank's belief that it would not be liable was reasonable. In 875 Forest Ave. Corp. v Aetna Cas. and Surety Co. (37 AD2d 11, 13, *affd* 30 NY2d 726), the First Department stated:

Implicit in a number of the cases where late notice was excused is the principle that mere knowledge that an accident has occurred does not always give rise to a duty upon the insured to report such accident to his insurer. . . . The rule, as applicable to the case at bar is succinctly set forth in New York Jurisprudence (vol. 31, Insurance, § 1281, pp. 81-82) as follows: "It is generally recognized that the insured may be excused for a delay or failure in giving the required notice to the insurer where it appears that, acting as a reasonable and prudent person, he believed that he was not liable for the accident." This case falls squarely within such rule. Plaintiff's knowledge of the incident at the time was not such as to lead it to believe that an accident occurred for which he may or could have been liable. There was nothing in the manner in which the accident occurred which would have suggested the possibility of a liability claim against plaintiff, and we believe it would be unfair (under the provisions of the subject policy) to charge plaintiff in these circumstances with the duty of giving notice when all it knew was simply that an injury occurred on its premises.

Furthermore:

[A] good-faith belief of nonliability may excuse or explain a seeming failure to give timely notice (875 Forest Ave. Corp. v Aetna Cas. & Sur. Co., 37 AD2d 11, *affd* 30 NY2d 726; Woolverton v Fidelity & Cas. Co. of N. Y., 190 NY 41, *supra*; 31 NYJur., Insurance, § 1281). But the insured's belief must be reasonable under all the circumstances, and it may be relevant on the issue of reasonableness, whether and to what extent, the insured

has inquired into the circumstances of the accident or occurrence (Haas Tobacco Co. v American Fid. Co., 226 NY 343; Woolverton v Fidelity & Cas. Co. of N. Y., 190 NY 41, *supra*; Marallo v Aetna Cas. & Sur. Co., 148 NYS2d 378 [Sup Ct, Westchester County]; American Sur. Co. of N. Y. v Mariani, 130 NYS2d 755, *affd* 286 App Div 1083, *supra*; 31 NYJur, Insurance, § 1281; 8 Appleman, Insurance Law and Practice, § 4744).

(Security Mut. Ins. Co. v Acker-Fitzsimons Corp., 31 NY2d 436, 441).

Milbank likens the facts here to one line of cases where the courts found that the insured's belief of nonliability was reasonable (see e.g., North American Co. For Property & Cas. Ins. v York Equities, Inc., 81 AD2d 770; 875 Forest Ave. Corp. v Aetna Cas. & Sur. Co., *supra*; Aviles v Drvden Mut. Ins. Co., 278 AD2d 829). Royal, on the other hand, relies on another group of cases where the courts concluded that the insured's belief of nonliability was not reasonable (see, White v City of New York, 81 NY2d 955 [1993]; Security Mut. Ins. Co. v Acker-Fitzsimons Corp., *supra*; SSBSS Realty Corp. v Public Service Mut. Ins. Co., *supra*).

The reasonableness of an insured party's belief of nonliability is generally a question of fact (see, Generali-U.S. Branch v Rothschild, 295 AD2d 236; Galaxy Insur. Co. v 1454 Nicholas Ave. Assocs., 276 AD2d 424, 424-425). A review of the relevant decisions shows that most of them involved appeals from trials, hearings, or, in some instances, motions for summary judgment after the parties had conducted significant discovery. The First Department observed:

Although a reasonable belief in non-liability may excuse an insured's failure to give timely notice (see, SSBSS Realty Corp. v Public Service Mut. Ins. Co., 253 AD2d 583), whether an insured's belief in non-liability is reasonable generally presents an issue to be resolved at trial (Agoado Realty Corp. v United Intl. Ins. Co., 260 AD2d 112, 118-119 [1st Dept 1999], *affd in relevant part* 95 NY2d 141 [2000]). This case constitutes no exception. . . .

(Galaxy Insur. Co. v 1454 Nicholas Ave. Assocs., supra).

Here too, the record presents issues of fact concerning the reasonableness of Milbank's belief of nonliability that the court cannot resolve as a matter of law on this pre-discovery summary judgment motion. Questions of fact also exist with respect to the parties' contentions pertaining to whether Royal's letter disclaiming coverage was timely. Accordingly, both the motion for summary judgment and the cross motion for summary judgment are premature at this time and are therefore denied (see, First Bank of the Americas v Motor Car Funding, Inc., 257 AD2d 287, 293).

With respect to Royal's cross motion for discovery, the parties must conduct discovery about the issues in this case.

CONCLUSION

It is ORDERED that both Milbank's motion for summary judgment and Royal's cross motion for summary judgment are denied; and it is further

ORDERED that Royal's cross motion for discovery is granted only to the extent that the parties are directed to appear at IAS Part 3, Room 248, at 60 Centre Street, for a preliminary conference herein on June 19, 2003 at 10 a.m.

Dated: May 6, 2003

ENTER: 

J.S.C.

FILED

MAY 12 2003

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