

**US Pack Network Corp. v Travelers Property
Casualty**

2004 NY Slip Op 30262(U)

October 6, 2004

Supreme Court, New York County

Docket Number: 603875/01

Judge: Richard B. Lowe

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

PRESENT: _____
Justice

PART 54

US Park Network Corp

INDEX NO. 160.38 75/01

MOTION DATE 5/17/04

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

- v -

Fraudsters Property Casualty

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

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

FILED
OCT 25 2004
NEW YORK
COUNTY CLERK'S OFFICE

NOTICE IS HEREBY GIVEN THAT THE
WITH ACCOMPANYING AFFIDAVITS AND EXHIBITS

MOTION/CASE IS RESPECTFULLY REFERRED TO
JUSTICE

Dated: 10/6/04

[Signature]
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 56

-----X
US PACK NETWORK CORP and
US PACK COURIER SERVICES, INC.,

Plaintiffs,

- against -

TRAVELERS PROPERTY CASUALTY, TANENBAUM-
HARBER CO., INC., MICHAEL KRAVITZ and
JOHN DOES,

Defendants.
-----X

Index No. 603875/01

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RICHARD B. LOWE, III, J.:

Plaintiffs commenced this action to compel their insurer to provide coverage for certain losses. The insurer, defendant Travelers Property Casualty, moves for summary judgment dismissing the complaint.

Plaintiffs were under a courier contract with a bank to transport documents of value, including notes, securities, checks, drafts, and commercial papers. Tanenbaum-Harber is an insurance broker, alleged by plaintiffs to be the insurer's agent. Michael Kravitz and the unknown John Does are the broker's employees. Travelers sold plaintiffs two insurance policies, covering the period from June 1, 1999 to June 1, 2001. The policies indemnified plaintiffs for damage to the property that plaintiffs were transporting for the bank.

Allegedly, two losses occurred during the policy period, on October 22, 1999, and June 30, 2000. Each time, a bag containing checks was stolen. The insurer disclaimed coverage for two reasons. One, the insurer claimed that the insurance policies excluded checks from

coverage. Two, the insurer claimed that plaintiffs did not give the insurer timely notice of the losses. The insurer bases its motion for summary judgment on these claims.

Plaintiffs oppose the motion on the ground that the policy exclusion applied to active and bankroll checks, and not to the kind stolen, allegedly cancelled and non-negotiable checks. They also contend that they gave timely notice of the thefts to the insurer through the insurance broker. According to plaintiffs, the broker was the insurer's agent, and the broker's knowledge must be attributed to its principle, the insurer.

On a motion for summary judgment, a movant is required to establish, by competent and admissible evidence, a prima facie entitlement to judgment (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). If this burden is met, then the opponent to a motion for summary judgment has the affirmative burden of coming forward with competent, admissible evidence establishing the existence of a genuine triable issue of fact (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Generally, on a motion for summary judgment, statements made in opposition to the motion must be accepted as true (*Jimenez v Cummings*, 226 AD2d 112, 113 [1st Dept 1996]).

First for discussion is the question of timely notice. An insurer's obligation to cover its insured's loss is not triggered unless the insured gives it timely notice of loss in accordance with the terms of the insurance contract (*White by White v City of New York*, 81 NY2d 955, 957 [1993]; *Security Mut. Ins. Co. of New York v Acker-Fitzsimons Corp.*, 31 NY2d 436, 440 [1972]). Without timely notice, an insurer may not be able to properly investigate a claim and is rendered susceptible to fraud (*Heydt Contr. Corp. v American Home Assur. Co.*, 146 AD2d 497, 498 [1st Dept 1989]; *Power Auth. of the State of New York v Westinghouse Elec. Corp.*, 117

AD2d 336, 339 [1st Dept 1986]). As a consequence, the insurer may disclaim liability on the basis of late notice without showing prejudice on account of the late notice (*id.*).

The policies required that the insured give the insurer “prompt notice” of any loss (Commercial Inland Marine Conditions, at 1 of 2, ¶ C [2]). Policy provisions requiring prompt notice are construed to require notice within a reasonable time after the incident giving rise to a claim (*New York Cent. Mut. Fire Ins. Co. v Riley*, 234 AD2d 279, 279-280 [2d Dept 1996]; *Metropolitan New York Coordinating Council on Jewish Poverty v National Union Ins. Co. of Pittsburgh, PA*, 222 AD2d 420, 421 [2d Dept 1995]). There may be circumstances, such as lack of knowledge that an accident has occurred or a reasonable belief in nonliability, that will excuse or explain delay in giving notice, but the insured has the burden of showing the reasonableness of such excuse (*Security Mut. Ins. Co. of New York*, 31 NY2d at 441). What is reasonable is generally a question for the factfinder, but where the insured has no excuse for the delay and no mitigating considerations are present, the issue may be disposed of on a summary judgment motion (*Heydt Contr. Corp.*, 146 AD2d at 498; *Power Auth. of the State of New York*, 117 AD2d at 339-340).

The insurer alleges that it received notice of the losses 15 months after the first loss occurred, and six months after the second loss. The insurer alleges that it first received notice of the claim arising from the June 30, 2000 theft on January 12, 2001. Subsequently, the claims investigator discovered that plaintiffs were presenting another claim for the theft on October 22, 1999.

The affidavit by plaintiffs’ president states that he “verbally notified [the insurance broker] that a loss was incurred” and that he “informed Traveler’s agent, the insurance broker

shortly after each loss” (Glazman Affidavit, ¶¶ 14, 16). No actual or approximate dates are given regarding these allegations. Nor is there any reference to any event that might show that the notices took place “shortly after” the loss.

The party opposing summary judgment must assemble and lay bare its evidence in order to show its defenses are real and capable of being established on trial (*Tobron Off. Furniture Corp. v King World Prod., Inc.*, 161 AD2d 355, 357 [1st Dept 1990]). In order to defeat the motion, plaintiffs must make some allegations that would raise a triable issue as to whether they gave timely notice to the insurance broker. Such a showing would then give rise to a triable issue regarding the date that the broker gave notice to the insurer, assuming that the insurer can be charged with the broker’s knowledge. Plaintiffs have failed to make the required showing. The court concludes that the losses were not reported promptly. In addition, plaintiffs have not given any reasonable excuse or explanation for the delay. The insurer is not obligated to provide coverage to plaintiffs.

As the issue of timely notice of claim resolves this motion, the court has no need to discuss whether the policy covers plaintiffs’ losses, or other points raised by the parties.

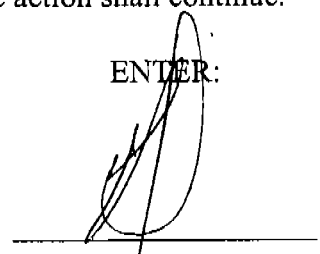
In conclusion, it is

ORDERED that the motion for summary judgment by defendant Travelers Property Casualty is granted, and the complaint is hereby severed and dismissed as against defendant Travelers Property Casualty with costs and disbursements to said defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment in favor of said defendant; and it is further

ORDERED that the remainder of the action shall continue.

Dated: October 6, 2004

ENTER:

A handwritten signature in black ink, appearing to be 'J.S.C.', written over a horizontal line.

J.S.C.

FILED
OCT 25 2004
NEW YORK
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