MEMORANDUM

SUPREME COURT : QUEENS COUNTY
IA PART 14

ENERGY BRANDS, INC.,

Plaintiff,

- against -

UTICA MUTUAL INSURANCE COMPANY, HERMITAGE INSURANCE COMPANY, and JASPAN SCHLESINGER HOFFMAN, LLP.,

Defendants.

INDEX NO. 26793/02

BY: POLIZZI, J.

DATED: May 26, 2005

Defendant Hermitage Insurance Company has moved for summary judgment dismissing the complaint against it.

The complaint alleges the following: Plaintiff Energy Brands, Inc., a manufacturer of enhanced water products (water beverages enriched with nutrients, electrolytes, and flavors), obtained a commercial general liability policy from defendant Hermitage Insurance Company which was in effect from March 28, 1998 through March 28, 2000. The policy required the insurer to defend and, if necessary, indemnify the insured in law suits involving an "advertising injury," defined as an injury arising out of either the "[m]isappropriation of advertising ideas or style of doing business" or "[i]nfringement of copyright, title, or slogan." Defendant Utica Mutual Insurance Company subsequently issued to plaintiff Energy Brands a commercial

policy covering an "advertising injury" which was in effect from March 28, 2000 to March 28, 2002. Between October, 1999 and May, 2002, plaintiff Energy Brands used the designation "GLACEAU WATER +" in an advertising campaign for a line of water products. On October 18, 2001, the CEO of Global Brands, Inc., a competitor, spoke by telephone to the plaintiff's CEO, and the former asserted that the designation "GLACEAU WATER +" infringed on Global Brands' trademark rights in the designation "WATER PLUS." On October 30, 2001, Global Brands sent a cease and desist letter to Panagiota Betty Tufariello, a partner at defendant Jaspan, Schlesinger, Hoffman LLP, formerly a law firm representing the plaintiff. Tufariello responded by letter dated November 26, 2001, denying the claim of trademark infringement and demanding evidence of it. Global Brands responded by letter dated February 14, 2002. On March 1, 2002, Tufariello notified defendant Utica of Global Brand's claim against Energy Brands. On March 4, 2002, Global Brands began an action for trademark infringement and unfair competition against Energy Brands (Global Brands, Inc. v Energy Brands, Inc.) in the United States District Court for the Eastern District of New York. Tufariello did not inform Utica that Global Brands had filed a complaint. On or about May 8, 2002, Energy Brands retained Debevoise & Plimpton to represent it in the federal action, and on May 15, 2002, the law firm notified Utica of the action. On June 10, 2002, Utica disclaimed coverage on the ground of, inter alia, untimely notice. In response

Energy Brands sent a letter dated June 26,2002 to defendant Hermitage Insurance Company, its insurer for an earlier period, notifying it of Global Brands' claims. On July 10, 2002, defendant Hermitage denied coverage on the ground of, inter alia, untimely notice.

Defendant Hermitage alleges the following: The policy issued by defendant Hermitage to plaintiff Energy Brands contained the following clause: "2. Duties in The Event of Occurrence, Claim, or Suit: a. 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. *** b. If a claim is made or 'suit' is brought against any insured, you must: *** (2) Notify us as soon as practicable. *** c. You and any other involved insured must: (1) Immediately send us copies of any demands, notices, or summonses or legal papers received in connection with the claim or 'suit' ***." On or about October 18, 2000, J. Darius Bikoff, the President of Energy Brands, received a phone call from Dr. Ferrante, the President of Global demands, who, in Bikoff's words " was the most overt about wanting money, but not being clear why or for what reason." Bikoff called his trademark attorney, Betty Tufariello, and told her, inter alia, that Ferrante "was looking for a meeting prior to taking legal action." Upon being shown the cease and desist letter from White & Case, Tufariello alleges that she told Bikoff to inform his insurance carrier. Bikoff alleges that Tufariello thought that the letter was just a

nuisance. Hermitage first received notice of Global Brands' claims against Energy Brands on July 1, 2002. By this time, Energy Brands had already selected its own attorneys to defend it in the federal action, answered the complaint, and engaged in discovery. In answering the complaint, Energy Brands admitted using the "water +" trademark during the Hermitage policy period. Indeed, Energy Brands began to use the "water +" trademark in 1999. Energy Brands settled the action brought against it by Global Brands for only $75,000, but incurred legal fees in excess of $300,000.

Plaintiff Energy Brands began this action on October 15, 2002 for, inter alia, a judgment declaring its rights under the Hermitage and Utica policies, damages resulting from the insurers' alleged breach of contract, and damages resulting from Tufariello's alleged commission of legal malpractice concerning timely notice to the insurers.

Summary judgment is warranted where, as in the case at bar, there is no issue of fact which must be tried. (See, Alvarez v Prospect Hospital, 68 NY2d 320.) In the case at bar, defendant Hermitage established as a matter of law that it properly disclaimed coverage.

Absent a valid excuse, where an insured has failed to give timely notice of an occurrence, the insurer may disclaim coverage without demonstrating prejudice. (See, Security Mut. Ins. Co. v Acker-Fitzsimons Corp., 31 NY2d 436; Quality

Investors, Ltd. v Lloyd's London, England, 11 AD3d 443; Blue Ridge Ins. Co. v Jiminez, 7 AD3d 652; Reynolds Metal Co. v Aetna Cas. & Sur. Co., 259 AD2d 195; Smalls v Reliable Auto Service, Inc., 205 AD2d 523.) "The requirement that an insured notify its liability carrier of a potential claim 'as soon as practicable' operates as a condition precedent to coverage ***." (White v City of New York, 81 NY2d 955, 957; Unigard Sec. Ins. Co., Inc. v North River Ins. Co., 79 NY2d 576; Security Mut. Ins. Co. of New York v Acken-Fitzsimons Corp., supra; SSBSS Realty Corp. v Public Service Mut. Ins. Co., 253 AD2d 583.) The courts have held unexcused delays of even a short duration unreasonable as a matter of law. (See, e.g., Goodwin Bowler Associates, Ltd. v Eastern Mut. Ins. Co., 259 AD2d 381 [two month delay]; Horowitz v Transamerica Ins. Co., 257 AD2d 560 [48-day delay]; Safer v Government Employees Ins. Co., 254 AD2d 344 [one month delay].) In the case at bar, even assuming that Energy Brands had a valid excuse based on the alleged advice of counsel for not notifying Hermitage of the letters from its competitor's attorneys, nevertheless, Energy Brands breached the notice of occurrence condition of the policy by not notifying Hermitage of its competitor's claims until approximately four months after the commencement of the federal action. (See, Brownstone Partners/AF & F, LLC v A. Aleem Const., Inc., ___ AD3d ___, ___ NYS2d ___, 2005 WL 1018068 [insurer properly disclaimed where additional insureds did not tender their defense of the underlying action to

insurer until nearly five months after the accident and four months after the underlying action was commenced against them].)

The requirement of a liability policy that the insured give notice to the insurer of the commencement of an action is a condition precedent to the insurer's obligations under the policy. (See, Argo Corp. v Greater New York Mut. Ins. Co., 4 NY3d 332; Fisher v Hanover Ins. Co., 288 AD2d 806; Centennial Ins. Co. v Hoffman, 265 AD2d 629 [insurer properly disclaimed where insured did not forward the summons and complaint until some 4-1/2 months after he received them].) Late notice of a lawsuit vitiates the insurance contract and permits the insurer to properly disclaim without showing prejudice. (See, Argo Corp. v Greater New York Mut. Ins. Co., supra; Centennial Ins. Co. v Hoffman, supra.) "Absent a valid excuse, failure to satisfy an insurance policy notice requirement vitiates coverage ***." (Matter of Arbitration Between Allcity Ins. Co. and Jimenez, 78 NY2d 1054, 1055; see, Fisher v Hanover Ins. Co., supra; Centennial Ins. Co. v Hoffman, supra.) In the case at bar, Energy Brands did not offer a valid excuse for not notifying Hermitage of the federal action until approximately four months after its commencement.

The requirement of a liability policy that an insured must immediately send to the insurer copies of any notices, summonses or legal papers pertaining to a claim or law suit is also a condition precedent to coverage. (See, Steadfast Ins. Co.

v Sentinel Real Estate Corp., 283 AD2d 44 [insurer properly disclaimed where insured did not send it papers from an underlying action until approximately ten months after the action was commenced]; Viles Contracting Corp. v Hartford Fire Ins. Co., 271 AD2d 349 [insurer properly disclaimed where insured did not have a valid reason for an almost two-month delay in notifying the insurer of a receipt of a conditional default order].) In the case at bar, Hermitage established as a matter of law that there was a failure of this condition precedent to coverage.

Accordingly, the motion by defendant Hermitage Insurance Company for summary judgment dismissing the complaint against it is granted.

Short form order signed herewith.

J.S.C.