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

PRESENT: KAREN SMITH J.S.C. PART 44

- Index Number : 602835/2006
CIRONE, BARBARA J.

VS
TOWER INS. CO. OF N.Y.

Sequence Number : 001
SUMMARY JUDGMENT

INDEX NO.

MOTION DATE 10/23/06

MOTION SEQ. NO.

MOTION CAL. NO.

The following papers, numbered 1 to 5 were read on this motion and cross-motion for Summary Judgment

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ..Memorand	1-2
Answering Affidavits — Exhibits Cross-Motion and Memorandum	3-4
Opposition to Cross Motion and Replying Affidavits on Motion	5

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion and cross-motion are decided in accordance with the attached memorandum decision and order

FILED
DEC 27 2006
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 12-18-06

K.S.S.
KAREN SMITH J.S.C.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 44

----------X

BARBARA J. CIRONE and WILLIAM J. CIRONE,

Plaintiffs,

-against-

TOWER INSURANCE COMPANY OF NEW YORK,

Defendant.

----------X

Index no.: 602835/2006
Motion seq.: 001
Motion date: 10/23/2006

DECISION AND ORDER

PRESENT: KAREN S. SMITH, J.S.C.:

Defendant's motion for summary judgment is denied to the extent that it seeks dismissal of the complaint and granted to the extent that it seeks to limit the amount of defendant's liability to the amount of its insurance policy. Plaintiffs' cross-motion for summary judgment is granted on the issue of liability only.

Plaintiffs (hereafter collectively referred to as "Cirone") brought this action directly against defendant insurer, "Tower" of tortfeasor, "Navana", pursuant to a provision in Navana's insurance policy with Tower which is mandated by New York State Insurance Law § 3420(a)(2). The required provision allows an injured party to bring such an action; 1) after a judgment has been rendered against a tortfeasor, 2) certain requirements have been met, and 3) the insurer has not paid judgment, up to the amount of the insurance policy limit, for more than thirty days. Tower answered the complaint in this action and asserts it is not liable because both Navana and Cirone failed to comply with the insurance policy's "notice of occurrence requirement" (see Tower's answer to the complaint attached to its motion papers as "Exhibit H").

Tower now moves for summary judgment dismissing the complaint or, in the alternative,

limiting its liability to the policy limit. Tower contends it is not liable to Cirone because Cirone; "... failed to provide direct, written notice of the underlying occurrence to Tower for more than a year and a half after learning that Tower insured Navana ..." (Affirmation in Support of Motion, Paragraph 5). Cirone opposes the motion and cross-moves for summary judgment on the complaint.

The fallacy in Tower's argument is that, although written notice is necessary, there is no requirement, in either the subject insurance policy or the insurance law, for the injured party to provide the insurer with a separate written notification of the occurrence, which is the subject of the litigation, prior to serving the insurer with a judgment. Tower contends that the language of Paragraph B.2 of the "New York Changes" form requires such written notice by an injured party. However, that contention ignores the fact that the "New York Changes" form specifically states it is applicable to the "Commercial Property Coverage Part" and, even more specifically, relates to the "Mortgageholders Errors and Omissions Coverage Form". The language applicable to the circumstances at hand is contained in the "New York Changes Commercial General Liability Coverage Form" and the "New York Changes - Legal Action Against Us" form. None of the provisions contained in either of those forms or the "Commercial General Liability Coverage Form" require a separate written notification to Tower by an injured party. "The obligation of the injured party to protect his interests by seeing that proper notification is given to the wrongdoer's carrier is independent of and secondary to the contractual duties of the insured..." (*Massachusetts Bay Insurance Company v Flood, et al*, 128 AD2d 683,684 [2nd Dept, 1987], lv. denied 70 NY2d 612 [1987]). "Where, as here, the insurer does not dispute receiving notice from its insured, the only issue with respect to the injured party is whether the efforts of the injured party to facilitate

the providing of proper notice were sufficient in light of the opportunities to do so afforded it under the circumstances" (*Appel v Allstate Insurance Company*, 20 AD 3d 367,369 [1st Dept, 2005], internal quotations and citations omitted).

In the matter presently before this court, the accident allegedly occurred on October 15, 2003. Shortly thereafter, Cirone retained counsel who engaged an investigator to obtain police reports and other available information. When he obtained information that Navana was a potentially responsible party, he interviewed an individual who claimed he was the owner of Navana. However, the individual refused to identify his insurance carrier. Cirone's counsel immediately commenced litigation on behalf of Cirone against Navana. When Navana received the summons and complaint, they were apparently forwarded to Tower. On or about December 29, 2003, Tower contacted Cirone's attorney to request an extension of Tower's time to answer the complaint on behalf of Navana. Thus, despite the Cirone's diligent efforts, including the engagement of an investigator, to determine Tower's identity, Tower had notice of the incident involved in this matter before Cirone could have provided Tower with any independent, direct notice thereof. Additionally, it is clear that Tower received notice of the incident within three months after it happened. Accordingly, in the instant matter, Cirone's efforts to provide Tower notice of the incident were sufficient, giving consideration to the opportunities available to Cirone to do so. Therefore, the court determines that Tower is liable to Cirone, as injured parties, to the limit of Navana's insurance policy and Tower cannot disclaim liability to Cirone on the basis of late notice of the incident which caused Cirone's injury.

In the cross-motion, Cirone asserts that summary judgment should be entered against Tower requiring Tower to satisfy the judgment in favor of Cirone against Navana; "...to the

extent of its policy limits" (Affirmation in Support of Cross-motion, Paragraph 27). The guiding principles in awarding summary judgment are that the moving party must: "... establish his cause of action or defense sufficiently to warrant the court as a matter of law in directing judgment in his favor, and he must do so by tender of evidentiary proof in admissible form" (*Zuckerman v City of New York, et al.*, 49 NY2d 557,562 [1980], internal quotations and citations omitted) and that; "...the proponent of a summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, by tendering sufficient evidence to demonstrate the absence of any material issues of fact (*Alvarez v Prospect Hospital, et al.*, 68 NY2d 320,324 [1987], internal quotations and citations omitted). In the instant matter, neither Tower, in its motion, nor Cirone, in their cross-motion, have provided the court with evidence in admissible form to make a *prima facie* showing of the absence of material issues of fact concerning the amount of the insurance policy limit under the circumstances presented. Most importantly, there is no evidence before the court to allow it to determine if the striking of Mr. Cirone constitutes a separate "occurrence" from the striking of Mrs. Cirone. If they constitute two separate occurrences as defined in Tower's insurance policy, the aggregate limit of the policy is $600,000.00 with a limit of $300,000.00 for each occurrence (See Exhibit 1 to the affidavit of Lowell Aptman in support of Tower's motion). Additionally, neither party has provided the court with any evidence of the additional amounts for such items as, *inter alia*, prejudgment interest and costs. As provided in the policy, Tower is liable for these items above its policy limits (See Exhibit 1 to the affidavit of Lowell Aptman in support of Tower's motion at page 6 of the "Commercial General Liability Coverage Form"). Thus, based upon the papers submitted on this motion and cross-motion, the court is unable to award summary judgment in favor of either party on the issue of the amount of

Tower's liability to Cirone. Accordingly, it is;

ORDERED that the branch of Tower's motion seeking summary judgment dismissing the complaint is denied, the branch of Tower's motion seeking a declaration that it is only liable to Cirone up to the limit of Tower's insurance policy is granted, and it is further;

ORDERED that Cirone's cross-motion is granted to the limited extent that Cirone is granted summary judgment on the issue of Tower's liability to Cirone based upon the insurance policy issued by Tower to Navana and denied to the extent that it seeks a determination of the amount of Tower's liability to Cirone, and it is further;

ORDERED that this matter be scheduled for a preliminary conference[1].

The foregoing constitutes the decision and order of this court.

Dated: December 18, 2006

ENTER:

Hon. Karen S. Smith, J.S.C.

[1] Counsel are advised that Justice Smith is being re-assigned to a new part beginning in January 3, 2007. As a result, all of Justice Smith's current cases are being reassigned to other IAS Parts. Counsel should contact the Differentiated Case Management Office to determine where this matter will be transferred and in order to preclude the possibility that the scheduling of the conference will be overlooked in the transfer.