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SCANNED ON 4/18/2007

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

PRESENT: Hon Joan A. Madden PART 11

Index Number : 101204/2005

TOWER INSURANCE COMPANY

vs

FELDMAN, ABRAHAM

Sequence Number : 001

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE 12/14/06

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

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

	PAPERS NUMBERED
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 this motion is decided in accordance with the annexed Memorandum Decision, Order + Judgment.

This judgment has been entered by the County Clerk and notice of entry cannot be served based thereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Dated: April 12, 2007

_____ 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 11

----------X INDEX NO. 101294/05

TOWER INSURANCE COMPANY OF NEW YORK,

Plaintiff,

--against--

ABRAHAM FELDMAN AND MORDECHAI FELDMAN d/b/a FELDMAN'S JEWELRY CREATIONS, BERTA LANDAU and JOSEPH BRACHFELD,

Defendants.

----------X

JOAN A. MADDEN, J.:

Plaintiff Tower Insurance Company of New York ("Tower") moves for an order granting it summary judgment declaring that it has no duty to defend or to indemnify defendants Abraham Feldman and Mordechai Feldman d/b/a Feldman's Jewelry Creations (together "the Feldmans") in an action captioned Joseph Brachfeld v. Abraham Feldman and Mordechai Feldman d/b/a Feldman's Jewelry Creations and Berta Landau; Index No. 40287/04, pending in the Supreme Court, Kings County (hereinafter "the underlying action"). The Feldmans and defendant Joseph Brachfeld ("Brachfeld") oppose the motion, which is granted for the reasons below.

Background

In the underlying action, Brachfeld seeks to recover damages for personal injuries he allegedly sustained on November 21, 2003, when he tripped and fell on a step in front of the Feldmans' jewelry store, known as Feldman's Jewelry Creations, which is located at 4861 16th Avenue, Brooklyn, NY 11204. The Feldmans leased the store from Berta Landau, who owns the building in which it is located. Defendant Mordecai Feldman owns and operates Feldman's Jewelry Creations, and his son, defendant Abraham Feldman ("Abraham"), who was 18 years-old at the time that Brachfeld fell, works at the store

as a salesperson.

Tower issued a commercial general liability policy to the Feldmans bearing policy number CPP 2103058, effective October 23, 2003 to October 26, 2004, which covers Feldman's Jewelry Creations and its executive officers. The policy's general liability coverage part covers "those sums that insured becomes legally obligated to pay as damages because of 'bodily injury' ... caused by 'an occurrence.' " Section I, ¶ 1, (a)(b). An occurrence is defined in pertinent part as "an accident." Section V, ¶ 12.

The policy contains the following notice provision:

> 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. To the extent possible, notice should include:
>
> > i. How, when and where the "occurrence" or offense took place;
> > ii. The names and addresses of any injured persons and witnesses; and
> > iii. The nature and location of any injury or damage arising out of the occurrence or offense .

Section IV, ¶ 2a.

By letter dated December 15, 2003, the law firm representing Brachfeld wrote to Feldmans Jewelry Creations, stating that it had been retained by Brachfeld in connection the November 21, 2003 accident, and that "[t]his matter is to be handled by your insurance company. Please advise this office of the name and address of your insurance company together with the policy number and/or claim number so that we may deal with them directly." The letter further stated that, "[i]f you did not have insurance coverage at the time of this accident, please contact us immediately." The Feldmans did not respond to the letter, or notify Tower that they had received it.

On November 15, 2004, Brachfeld commenced the underlying action to recover damages for personal injuries he allegedly sustained as a result of his fall on November 21, 2003 (hereinafter "the underlying action"). The complaint alleges that Brachfeld was injured on the step outside the jewelry store due to the negligence of the Feldmans and Landau.

On December 16, 2004, the Feldmans' insurance broker forwarded to Tower a copy of the summons and complaint in the underlying action. Tower subsequently commenced an investigation of the claim and interviewed Abraham and Mordechai Feldman. Following the investigation, Tower disclaimed coverage for failure to provide timely notice of the claim based on statements taken from the Feldmans that they knew of the accident a few days after it occurred, and that a letter was received from Brachfeld's attorney several weeks later, but was thrown away.

Tower subsequently commenced this action seeking to confirm the propriety of the disclaimer and now moves summary judgment declaring that it has no duty to indemnify or to defend the Feldmans in the underlying action since they failed to provide timely notice of the claim. In support of the motion, Tower relies on Abraham's deposition testimony in which he acknowledges that he first learned that Brachfeld fell a few days after the accident when Brachfeld came into the store with a bandage on his nose and told Abraham that he had fallen on the step and, as a result, had gone to the hospital.

Abraham also testified that he told his father about his conversation with Brachfeld, that he received a letter regarding the Brachfeld's fall from a law firm, but that he threw the letter out and did not tell his father about it. When asked the reason that he threw the letter away, Abraham testified that "usually,[an] important letter from a lawyer comes certified or registered mail. I

was thinking the first letter, I didn't think it was very serious and I was waiting for another letter to come." (Abraham Feldman, Dep. Tr. at 23).

In opposition, the Feldmans argue, based on the affidavits of Abraham and Mordechai Feldman, that there was a reasonable basis for their failure to notify Tower of the accident since it occurred outside the store after it had closed and therefore they did not think they were subject to liability, and that they notified Tower of the underlying action as soon as they became aware of it. The Feldmans also maintain that as Abraham was uneducated and unsophisticated, he could not have known that the letter from the Brachfeld's lawyer required him to notify Tower of Brachfeld's claim.

The Feldmans next argue that the language of the policy is not sufficiently clear to warrant a disclaimer based on the alleged lack of timely notice of "an occurrence" since Tower's deposition witness did not know whether occurrence was defined under the policy and testified that six months from the incident constituted timely notice based on guidelines not set forth in the policy. The Feldmans also note that the policy does not delineate a penalty for failure to promptly notify the insurer of an occurrence. The Feldmans alternatively argue that as the duty to defend is broader than the duty to indemnify, that Tower must defend them in the underlying action.

Brachfeld separately opposes the motion, arguing that, under Insurance Law § 3420(3),(4), as the "injured party" he has an independent right to provide notice to Tower, and to recover any unsatisfied judgment directly from Tower based on such notice. Moreover, Brachfeld asserts that the December 15, 2003 letter from his attorneys to Feldman's Jewelry Creations evidences that he took all reasonable steps available to ensure that Tower received

timely notice of his claim, since he had no means of learning the identity of Feldman's insurer, other than from the Feldmans who did not respond to the letter.

Discussion

It is well established that when, as here, "a contract of primary insurance requires notice 'as soon practicable' after an occurrence, the absence of timely notice of an occurrence is a failure to comply with a condition precedent which, as a matter of law, vitiates the contract." Argo Corp v. Greater New York Mut. Ins. Co., 4 NY3d 332, 339 (2005)(citation omitted). Moreover, "no showing of prejudice is required." Id. The rule, which requires "strict compliance with the contract, protects the carrier against fraud and collusion; gives the carrier an opportunity to investigate claims while evidence is fresh; allows the carrier to make an early estimate of potential exposure and establish adequate reserves and gives the carrier an opportunity to exercise early control of claims, which aids settlement." Id. (citation omitted).

"[T]he provision that notice be given 'as soon as practicable' requires the court to examine whether notice was given within a reasonable time in light of the facts and circumstances of the case at hand." Mighty Midgets, Inc. v. Centennial Ins. Co., 47 NY2d 12, 19 (1979). Applying this standard, it has been held that "[t]he duty to give notice arises when, from the information available relative to the accident, an insured could glean a reasonable possibility of the policy's involvement." Paramount Ins. Co. v. Rosedale Gardens, Inc., 293 AD2d 235, 239-240 (1st Dept 2002). "Although what is reasonable is ordinarily left for determination at trial, where there is no excuse for the delay and mitigating considerations are absent, the issue may be disposed of as a matter of law in advance of trial." Power House Authority v. Westinghouse Elec. Corp., 117 AD2d 336, 339 (1st Dept 1986).

In addition, "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 of the circumstances." SSBSS Realty Corp. v. Public Serv. Mut. Ins. Co., 253 AD2d 583, 584 (1st Dept 1998)(citation omitted). Moreover, "the issue is not whether the insured believes he will ultimately be found liable for the injury, but whether he has a reasonable basis for the belief that no claim will be asserted against him." Id.

Here, based on the undisputed record, the Feldmans' duty to give notice to Tower arose a few days after the November 21, 2003 accident when Brachfeld went to the store and informed Abraham that he fell on the step and went to the hospital as a result, or, at the very latest, on or about December 15, 2003, when a letter was received at the Feldmans' store indicating that Brachfeld had retained counsel in connection with the November 21, 2003 accident and that the Feldmans should notify their insurance company of Brachfeld's claim. The record shows, however, that the Feldmans did not inform Tower of Brachfeld's claim until in or about December 2004, about a year after they learned about the accident and received the letter from Brachfeld's attorney.

Moreover, the Feldmans' contention that they believed they were not liable to Brachfeld as the accident occurred outside the store after it had closed is insufficient to meet their burden of demonstrating that they had a reasonable basis for a belief that no claim would be made against them. Notably, the insured's subjective belief that a claim would not be made, standing alone, is insufficient to exempt it from the notice requirement. Paramount Ins. Co. v. Rosedale Gardens, Inc., 293 AD2d at 241 ("the notice requirement does not exempt occurrences, which, in the insured's estimation, do not portend probable liability on its part"). In addition, here, there are no

extenuating factors which have been associated with a reasonable belief that a plaintiff would not assert a claim, such as where there is no indication of injury or no defect at the accident site. SSBSS Realty Corp. v. Public Serv. Mut. Ins. Co., 253 AD2d at 585. To the contrary, the Feldmans were informed by Brachfeld that he was injured as the result of a fall on their step, and went to the hospital.

In any event, any arguable doubt that the Feldmans might have had regarding Brachfeld's intent to file a claim would have been eliminated upon the receipt of the December 15, 2003 letter from Brachfeld's attorney. Additionally, contrary to Feldmans' argument, as Abraham was given authority by the Feldmans to open the mail and thus had a duty to report its contents, his knowledge of the information in the letter from Brachfeld's attorney must be imputed to the Feldman's Jewelry Creations. Bauer v. Whispering Hills Associates, 210 AD2d 569 (3d Dept 1994), lv denied, 86 NY2d 701 (1995) (employee's knowledge of accident may be imputed to employer-insured); Paramount Ins. Co. v. Rosedale Gardens, Inc., 293 AD2d at 240 ("knowledge of an occurrence obtained by an agent charged with a duty to report such matters is imputed to the principal").

The Feldmans' remaining arguments are also without merit. Specifically, it is well established that a provision, like the one in the subject policy, which requires an insured to provide notice as soon as practicable, creates a condition precedent to recovery under the policy, and no penalty provision is required. Argo Corp v. Greater New York Mut. Ins. Co., 4 NY3d at 339. Furthermore, as "an occurrence" is defined under the policy to include "an accident" like the one at issue here, whether or not Tower's witness knew of this definition is irrelevant. Additionally, since the notice provision in the insurance policy is a condition precedent to

coverage, the failure to give timely notice of a claim relieves the insurer of both the duty to defend and to indemnify. Travelers Ins. Co. v. Volmar Construction Co., Inc., 300 AD2d 40 (1st Dept 2002).

Accordingly, as the Feldmans have no reasonable explanation for the approximate one year delay between the time that they learned of the accident and were notified that Brachfeld had retained counsel and providing of notice, Tower is entitled to disclaim coverage based on the failure to comply with a condition precedent to coverage.

The remaining issues relate to Brachfeld's asserted entitlement to relief under Insurance Law § 3420(a)(3) which gives "an injured party" an independent right to provide notice to the insurer, and potentially recover any unsatisfied judgment directly from the insurer based on such notice. In this case, although it is undisputed that Brachfeld did not provide Tower with any independent notice of the claim, Brachfeld maintains that he nonetheless can recover from Tower since by sending a letter from his attorney to Feldman's Jewelry Creations, he took all reasonable steps to ascertain Tower's identity.

"While Insurance Law § 3240(a)(3) provides an injured party an independent right to provide an insurance carrier with written notice of an accident, the injured party is required, in order to rely upon the provision, to demonstrate that he or she acted diligently in attempting to ascertain the identity of the insurer, and thereafter expeditiously notified the insurer." Steinberg v. Hermitage Ins. Co., 26 AD3d 426, 428 (2d Dept 2006); see also, Everready Ins. Co. v. Chavis, 150 AD2d 332, 333 (2d Dept), appeal withdrawn, 74 NY2d 844 (1989). When, as in this case, the insurer receive notice from the 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 under the circumstances.'" Rochester v. Quincy Mutual Fire Ins. Co., 10 AD3d 417, 418 (2d Dept 2004), quoting, Massachusetts Bay Ins. Co. v. Flood, 128 AD2d 683, 684 (2d Dept), appeal denied, 70 NY2d 612 (1987).

Under the circumstances here, where the Feldmans owned and operated a business and could have been contacted there regarding insurance information, Brachfeld's single letter from his attorneys to Feldman's Jewelry Creations is insufficient to demonstrate his diligence such as to give rise to right to recover under Insurance Law § 3240. See Steinberg v. Hermitage Ins. Co., 26 AD3d 426 (letter from claimant's attorney to defendant notifying defendant of claimant's injuries and suggesting that the defendant forward letter to insurance company insufficient to demonstrate that claimant acted with due diligence to ascertain and notify defendant's insurance carrier); see also, Jenkins v. Burgos, 99 AD2d 217 (1st Dept 1984)(plaintiff failed to exercise due diligence in identifying insurance carrier from police report); compare, Lauritano v. American Fidelity Fire Ins. Co., 3 AD2d 564 (1957)(injured party provided notice to insurance carriers as soon as reasonably possible where record indicated that his original attorney and successor "constantly and aggressively pressed the search for necessary information" to identify the owner of the vehicle involved in the accident and its insurance carrier); Denneny v. Lizzie's Buggies, Inc., 306 AD2d 89 (1st Dept 2003)(triable issue of fact raised as to whether injured party was diligent in notifying insured of claim where record indicated that injured party made "multiple efforts over the course of a year" to identify the defendant's insurer which included the search of public records and that defendant engaged in misleading conduct to prevent the identification of the insurer).

Finally, contrary to Brachfeld's argument, there is no basis for awarding him attorneys'

fees and expenses incurred in defending this declaratory judgment action.

Conclusion

In view of the above, it is

ORDERED that the motion for summary judgment by plaintiff Tower Insurance Company is granted; and it is

ADJUDGED and DECLARED that Tower Insurance Company has no duty to defend or to indemnify defendants Abraham Feldman and Mordechai Feldman d/b/a Feldman's Jewelry Creations in Joseph Brachfeld v. Abraham Feldman and Mordechai Feldman d/b/a Feldman's Jewelry Creations and Berta Landau; Index No. 40287/04, pending in the Supreme Court, Kings County.

DATED: April 2, 2007

J.S.C.