East Harlem Pilot Block HDFC, Inc. v Sirtus Am. Ins. Co.

2007 NY Slip Op 30914(U)

April 17, 2007

Supreme Court, New York County

Docket Number: 0105834/2006

Judge: Debra A. James

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SCANNED ON 4/25/2007

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

PRESENT: DEBRA A. JAMES Justice

PART 59

EAST HARLEM PILOT BLOCK HDFC, INC., and ARCO MANAGEMENT CORP.,

Plaintiffs,

- v -

SIRIUS AMERICA INSURANCE COMPANY,

Defendant.

Index No.: 105834/06

Motion Date: 12/19/06

Motion Seq. No.: 01

Motion Cal. No.: 31

The following papers, numbered 1 to 4 were read on this motion for summary judgment.

	PAPERS NUMBERED
Notice of Motion/Order to Show Cause -Affidavits -Exhibits	1
Answering Affidavits - Exhibits	2, 3
Replying Affidavits - Exhibits	4

FILED
APR 25 2007
COUNTY CLERK'S OFFICE
NEW YORK

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers,

The court shall deny plaintiffs' motion for summary judgment in this declaratory judgment insurance coverage action.

Plaintiff building owners argue that defendant insurer improperly denied their claim for coverage arising out of a lawsuit against plaintiffs under the Commercial General Liability (CGL) policy issued by defendant. On September 22, 2004, a tenant in plaintiffs' building was assaulted and stabbed in the lobby. Security personnel from the plaintiff responded to the incident and ultimately the attacker was arrested. The affidavit

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 ☐ REFERENCE

of the Assistant Manager of plaintiff Arco states that he learned of the incident that same day. The manager argues that he had no reason to believe and did not believe that the plaintiffs had any liability for the criminal act of a third-party and that the tenant who had been assaulted expressed gratitude for the efforts of the plaintiffs in helping her. Subsequently, on October 5, 2005, more than one year after the incident, the plaintiffs were served with a summons and complaint on behalf of the tenant. Plaintiffs state that they forwarded the documents to the defendant within two days after being served. Defendant by letter dated November 2, 2005, disclaimed coverage on the grounds of late notice.

Plaintiffs argue that they timely notified the insurer because even though plaintiffs knew of the incident at the time it occurred, they assert that they had a good faith belief in their non-liability so as to excuse prompt notification at the time of the incident. Defendant argues that plaintiffs' notice was untimely as a matter of law and that plaintiffs' excuse is insufficient. Section Four of policy provides that the insured is to provide notice "as soon as practicable of an 'occurrence' or an offense which may result in a claim."

With respect to an insured's obligation under the notification provisions of an insurance policy, the Court of Appeals has stated

> Notice provisions in insurance policies afford the insurer an opportunity to protect itself, and the giving of the required notice is a condition to the insurer's liability. Absent a valid excuse, a failure to satisfy the notice requirement vitiates the policy, and the insurer need not show prejudice before it can assert the defense of noncompliance.
>
> There may be circumstances, such as lack of knowledge that an accident has occurred, that will explain or excuse delay in giving notice and show it to be reasonable. But the insured has the burden of proof thereon. Moreover, he must exercise reasonable care and diligence to keep himself informed of accidents out of which claims for damages may arise.
>
> Then, too, a good-faith belief of nonliability may excuse or explain a seeming failure to give timely notice. 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.
>
> Finally, a provision that notice be given, "as soon as practicable" after an accident or occurrence, merely requires that notice be given within a reasonable time under all the circumstances.

Security Mut. Ins. Co of New York v Acker-Fitzsimons Corp., 31 NY2d 436, 440-441 (1972) (citations omitted).

"While a good-faith belief of nonliability may excuse or explain a seeming failure to give timely notice, that belief must be reasonable under all the circumstances." Empire City Subway Co. (Ltd.) v Greater New York Mut. Ins. Co., 35 NY2d 8, 13 (1974). Furthermore,

> The burden is on the insured to show such lack of knowledge or such other circumstances that will explain or excuse delay in giving notice and show that it is reasonable. Generally, the timeliness of notice presents a question of fact. The provision that notice be given 'as soon as practicable' called for a determination of what was within a reasonable time in the light of the facts and circumstances of the case at hand. Summary judgment should not be granted unless the moving party

> has made out a case on the undisputed material facts presented on the record by affidavit or other proof."

Home Mut. Ins. Co. v Presutti, (4th Dept 1980) (citations omitted).

The First Department has set forth the standard for summary judgment for a plaintiff under circumstances similar to the action at bar. In Agoado Realty Corp. v United Intern. Ins. Co. (260 AD2d 112, 114 [1st Dept 1999]), "a tenant of the building owned by plaintiffs, was murdered in the building by unknown assailants." The estate of the tenants sued nine months after the incident and the owners, upon receipt of the complaint, notified the insurer approximately one year after the incident. Id. The Court there found that

> A question of fact remains regarding plaintiffs' alleged good-faith belief that no covered event had occurred until they were sued. The IAS Court properly denied summary judgment to plaintiffs with respect to the insurer's first affirmative defense, namely, late notice of the occurrence. Although the landlord was not given notice of the murder until several days after it occurred, and the landlord was not questioned by the police, the landlord's alleged good faith is a question of fact that needs to be determined at trial. Plaintiffs cite Nalea Realty Co. v Public Serv. Mut. Ins. Co. (238 AD2d 252, lv dismissed 90 NY2d 927), which held that a landlord's belief of nonliability for the intentional criminal acts of a third person may be reasonable and can excuse a delay in notifying an insurer of the occurrence. While other cases similar to Nalea stand for the same proposition (see, e.g., Marinello v Dryden Mut. Ins. Co., 237 AD2d 795; D'Aloia v Travelers Ins. Co., 85 NY2d 825, reargd denied 85 NY2d 968), none of these cases, including Nalea, granted summary judgment to an insured on similar facts. Therefore, plaintiffs' alleged good-faith belief of nonliability is an issue to be resolved at trial

(Marinello v Dryden Mut. Ins. Co., 237 AD2d 795, 798, supra).

Agoado Realty Corp., supra, 260 AD2d at 118-119. On appeal, the Court of Appeals affirmed the Appellate Division on this claim stating "the Appellate Division was correct in concluding that a question of fact exists regarding the first affirmative defense alleging that plaintiffs failed to notify defendant as soon as practicable of the . . . occurrence." Agoado Realty Corp. v United Intern. Ins. Co., 95 NY2d 141, 146 (2000).

Based upon the facts presented in the plaintiffs' affidavit in support of their motion, plaintiffs have not met their burden of demonstrating that there is no factual issue as to the reasonableness of their belief in their non-liability as to justify the delay in notifying the insurer. Plaintiffs concede that they knew immediately of a serious criminal assault that occurred upon their premises. Agoado stands for the proposition that such an excuse under these circumstances creates an issue of fact as to the plaintiffs' good-faith belief in non-liability and plaintiffs have failed to distinguish the holding in that case.

Therefore, it is

ORDERED that the motion is DENIED; and it is further

ORDERED that the parties are directed to attend a preliminary conference on May 1, 2007, in IAS Part 59, Room 1254, 111 Centre Street, New York, New York 10013, at 9:30 A.M.

This is the decision and order of the court.

Dated: April 17, 2007 ENTER:

J.S.C.

DEBRA A. JAMES
J.S.C.

FILED
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