

**Tower Ins. Co. of N.Y. v Hayes**

2007 NY Slip Op 31223(U)

May 7, 2007

Supreme Court, New York County

Docket Number: 0100906/2006

Judge: Emily Jane Goodman

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

PRESENT: EMILY JANE GOODMAN

PART 17

Justice

Tower Insurance

INDEX NO. 100906106

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 002

MOTION CAL. NO. \_\_\_\_\_

- v -

Hayes, S

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

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 decision on motion seq 001

**FILED**  
MAY 15 2007  
COUNTY CLERK'S OFFICE  
NEW YORK  
**FILED**  
MAY 15 2007  
COUNTY CLERK'S OFFICE  
NEW YORK

Dated: 5/7/07

[Signature]  
EMILY JANE GOODMAN J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK : I.A.S. PART 17

-----X  
TOWER INSURANCE COMPANY OF NEW YORK,

Plaintiff,

-against-

Index No. 100906/06

SHAWN K. HAYES, BRETT STRICKLAND, an Infant  
over the age of 14 years, by his mother and natural  
guardian, COURTNEY STRICKLAND, and  
COURTNEY STRICKLAND, Individually,

(Mot. Seq. 001 & 002)

Defendants.

-----X  
EMILY JANE GOODMAN, J.S.C.:

This is an action for a declaratory judgment that plaintiff Tower Insurance Company of New York (Tower) has no duty to defend or indemnify defendant Shawn K. Hayes (Hayes) in an underlying personal injury action where the Stricklands seek damages for an eye injury Brett Strickland allegedly sustained when Hayes shot him with a paintball gun.

Tower moves, pursuant to CPLR 3215(a), for a default judgment against Shawn K. Hayes, and, pursuant to CPLR 3212, for summary judgment against Brett and Courtney Strickland. Tower contends that it is entitled to a default judgment against Hayes, whose time to appear in this action has long since expired. Summary judgment against the Stricklands is warranted, according to Tower, because Hayes waited over a year before giving notice of the incident to Tower, thus breaching the homeowner policy's prompt notice requirement, and because the Stricklands never exercised their right to provide their own independent notice, although it is not clear how the Stricklands were in a position to know that Tower had issued a homeowner's policy.

On the evening of October 31, 2004, Brett Strickland, then 14 years old, was allegedly

struck in the face with a paintball fired by a masked person while out “trick or treating” in his hometown of Patchogue, New York, causing serious and permanent injuries to Brett Strickland’s left eye. As reflected in an unauthenticated report, dated 10/31/04, police officers went to Hayes’ residence in Patchogue to question him on December 15, 2004 and spoke to both Hayes and his mother. According to that report, Hayes made “several admissions” to the police, and initially refused to come to the precinct, before speaking to a lawyer. The report also indicates that the investigating officer later spoke to Hayes’ attorney, who said that Hayes would surrender on December 17, 2004, which he did.

Hayes was charged with assault in the second degree under Penal Law 120.05(4) for recklessly causing serious injury with a deadly weapon or dangerous instrument, a class D felony. The complainant was Brett Strickland. A temporary order of protection was issued against Hayes with respect to Strickland. Hayes entered a plea of not guilty, and was released on his own recognizance on December 18th. The felony charge was later dismissed, and, on or about May 12, 2006, he was charged with a misdemeanor assault under Penal Law 120.00(02). As of June 21, 2006, that charge was still pending.

The Stricklands commenced suit against Hayes and another individual in the Supreme Court of Suffolk County on October 28, 2005, alleging that they negligently and/or intentionally assaulted Brett Strickland on October 31, 2004. Hayes was served in the underlying action on or about November 2, 2005. The summons advised the defendants in that action in bold print on the first page “SEND TO YOUR INSURANCE CO. PROMPTLY.”

Plaintiff issued a homeowner’s policy to Hayes’ father, Kelly Hayes, effective August 27, 2004 to August 27, 2005, covering his home at 174 North Clinton Avenue, Patchogue, New

York. The policy defines as an insured relatives of the named insured who reside in the named insured's household. The policy's liability coverage part covers any claim or suit "brought against an 'insured' for damages because of 'bodily injury' . . . caused by an 'occurrence' to which this insurance applies." The policy defines an "occurrence" as including an "accident," but excludes coverage for bodily injury "which is expected or intended by one or more insureds." Section II, ¶ 3 conditions coverage under the policy on Tower's receipt of written notice "as soon as is practicable" of the details of the accident or occurrence.

It is undisputed that Tower was first notified of the incident on November 22, 2005, when Hayes' insurance broker faxed Tower a copy of the summons and complaint in the underlying action. It is equally undisputed that the Stricklands did not provide their own notice to Tower of the incident although it is not clear how the Stricklands were in a position to know that Tower had issued a homeowner's policy, absent discovery. After conducting an initial investigation, by letter dated December 6, 2006, Tower disclaimed coverage to Hayes for breach of the policy's notice conditions, and also under the intentional-injury exclusion.

Tower commenced this action to confirm the propriety of its disclaimer on January 20, 2006. The Stricklands appeared on February 1, 2006. Hayes was served with process by substituted service upon his father, Kelly Hayes, on January 27, 2006, and mailing at his residence. Proof of service was filed with the court on February 14, 2006, therefore, service was complete on February 24, 2006 (CPLR 308[2]), and defendant Hayes had 30 days from that date to make an appearance (CPLR 320[a]). In addition, he was served with a copy of these motion papers on or about June 19, 2006. He is clearly in default.

Tower argues that summary judgment is appropriate since the year-long delay in giving

notice under the policy was unreasonable as a matter of law. New York courts have concluded that the phrase “as soon as is practicable” calls for notice “within a reasonable time in the light of the facts and circumstances of the case at hand.” Mighty Midgets, Inc. v Centennial Ins. Co., 47 NY2d 12, 19 (1979). The insured’s failure to satisfy the notice requirement constitutes “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); see also Khan v Convention Overlook, Inc., 253 AD2d 737, 739 (2d Dept 1998). A delay of one year, absent a reasonable excuse, is sufficient to vitiate the insurance contract as a matter of law. See, e.g., Matter of Travelers Ins. Co. (DeLosh), 249 AD2d 924 (4th Dept 1998); New York Cent. Mut. Fire Ins. Co. v Filakouris, 240 AD2d 481 (2d Dept 1997).

There may be circumstances that excuse a failure to give timely notice, such as where the insured lacks knowledge that an accident has occurred or was under a reasonable and good-faith belief that the injured person would not seek to hold them liable in a civil suit for damages. Security Mut. Ins. Co. of New York v Acker-Fitzsimons Corp., 31 NY2d 436, 441 (1972); Winstead v Uniondale Union Free School Dist., 170 AD2d 500, 503 (2d Dept 1991). However, the insured has the burden of establishing that there was a reasonable excuse for the delay. Argentina v Otsego Fire Ins. Co., 86 NY2d 748, 750 (1995); Security Mut. Ins. Co. v Acker-Fitzsimons Corp., 31 NY2d at 441; Paramount Ins. Co. v Rosedale Gardens, Inc., 293 AD2d 235, 240 (1st Dept 2002). The existence of an insured's claimed good faith belief, as well as the question of whether the belief was reasonable, are ordinarily questions of fact for the fact finder. Argentina v Otsego Mut. Fire Ins. Co., 86 NY2d at 750; Winstead v Uniondale Union Free School Dist., 170 AD2d at 503. Where, however, there is no excuse or mitigating factor, the

issue of whether an insured's belief as to nonliability is reasonable is one for the court, rather than the trier of fact. SSBSS Realty Corp. v Public Serv. Mut. Ins. Co., 253 AD2d 583, 584 (1st Dept 1998); 319 McKibben Street Corp. v General Star Nat. Ins. Co., 245 AD2d 26, 29 (1st Dept 1997).

Counsel for the Stricklands argues that a triable issue of fact exists as to Hayes' belief in his non-liability because a fair assumption can be made, based on the pending status of Hayes' criminal matter, that he believes that he is not guilty of the criminal charges against him as well as not civilly liable for the injuries to Brett Strickland. Defense counsel also argues that an equally important consideration is the fact that Hayes was only 17 years old at the time of the incident, and that a reasonable person in his position should not be expected to know: (a) that he might be civilly liable for Brett Strickland's injuries; (b) about the coverage afforded to him as an additional insured under his father's homeowner's policy for an off-premises incident; or (c) that he had an obligation to provide timely notice of that incident to the insurance company. The Stricklands have failed to raise a triable issue of fact as to Hayes' purported belief in non-liability. There is no admissible evidence that Hayes delayed giving notice to Tower because he believed that he would not be sued for Brett Strickland's injuries. Hayes has not appeared in this action, and the Stricklands do not present any testimonial evidence from Hayes to support their claims as to what he may have believed or did not believe. Government Employees Ins. Co. v Blecker, 150 AD2d 428 (2d Dept 1989). Nor can the court make any assumptions about Hayes' beliefs from the fact that he pled not guilty to criminal charges, where the burden of proof is much higher and requires a showing of criminal intent, as opposed to mere negligence.

In addition, Hayes's arrest in December 2004 established that the matter was a serious

one for which, rightly or wrongly, he was being blamed. The duty to give notice arises when, from the information available relative to an incident, an insured could glean a reasonable possibility of the policy's involvement. Security Mut. Ins. Co. v Acker-Fitzsimons Corp., 31 NY2d at 441-43; DiGuglielmo v Travelers Prop. Cas., 6 AD3d 344, 245 (1st Dept), lv denied 3 NY3d 608 (2004); Paramount Ins. Co. v Rosedale Gardens, Inc., 293 AD2d at 239-40 . Courts have ruled that police intervention and resulting criminal prosecution for an incident in which another person is seriously injured is a signal that a civil lawsuit may follow.

In Winstead v Uniondale Union Free School Dist., supra, the insurer disclaimed coverage to the infant insured because he failed to give prompt notice under his father's homeowners' policy of an incident in which he injured a fellow high-school student by propelling a heavy object. In reversing the judgment after trial in favor of the insured, and awarding judgment in favor of the insurance company, the Second Department stated that because the incident resulted in the student's hospitalization and "was serious enough to warrant intervention of the police . . . [n]o ordinary prudent person could reasonably have felt immune from potential civil liability under these circumstances." Winstead v Uniondale Union Free School Dist., 201 AD2d 721, 723 (2d Dept 1994).

Likewise, in Allstate Ins. Co. v Grant (185 AD2d 911 [2d Dept 1992]), the court rejected, as a matter of law, the insured's alleged belief in non-liability where the altercation that gave rise to the underlying claim resulted in injury to the underlying plaintiff and criminal charges against the insured. Accord New York Central Mut. Fire Ins. Co. v Filakouris, Sup Ct, Nassau County, Feb. 13, 1996, Ain, J., Index No. 6173/95, revd 240 AD2d 481 (2d Dept 1997) (one-year delay in giving notice under homeowner's policy after learning son had sexually molested neighbor's

child, resulting in son's arrest and guilty plea, was unreasonable as a matter of law); Biondo v Travelers Indem. Co., NYLJ, August 26, 2003, at 20, col 1 (Sup Ct, Queens County, Taylor J.) (court ruled "no ordinarily prudent person could reasonably have felt immune from potential civil liability" where he had been criminally prosecuted for assaulting his neighbor, who had been taken by ambulance to the hospital); Tower Ins. Co. of New York v Adams, Sup Ct, Nassau County, June 30, 2005, Bucaria, J., Index No. 9699/04 (insured who pled guilty to assault on another patron in a bar was obligated to give notice of the altercation to his insurance company).

The Stricklands rely on Vradenburg v Prudential Prop. & Cas. Ins. Co. (212 AD2d 913 [3d Dept 1995]), where summary judgment was granted to the insureds. In that case, the insured father and son challenged their insurance company's disclaimer based on the insureds' three-year delay in giving notice of an incident in which one of the son's friends accidentally shot another friend at the insureds' home with one of his father's guns. The son was asleep at the time and the father was out of the house. In finding that the insured had established a reasonable good faith belief in non-liability sufficient to excuse their delay in reporting the incident until they were sued, the court relied on the fact that the injury was caused by the reckless conduct of the son's friend, who was the only person charged with criminal responsibility for the incident after a police investigation. Id. at 915. Here, in contrast, Hayes' alleged personal involvement in the shooting incident and his resulting arrest and indictment undermine any reasonable excuse.

Nor is there any admissible evidence in this case that Hayes delayed giving notice to Tower because he did not know this off-premises incident was covered under his father's homeowner's policy. Compare Seemann v Sterling Ins. Co., 267 AD2d 677 (3d Dept 1999) (insured testified that he obtained homeowner's policy to comply with mortgage lender's

requirement, believed that only injuries on his house in New York were covered, and had good-faith belief that injury to a co-worker from insured's firing of a paintball gun at his place of employment in New Jersey was not covered). Nor can the court make any such inferences based solely on the fact that Hayes was 17-years old at the time of the incident. "[T]he mere fact of infancy is insufficient to toll the notice requirement contained in the policy." Winstead, 170 AD2d at 502-03, quoting Virtuoso v Aetna Cas. & Sur. Co., 134 AD2d 252, 253 (2d Dept 1987), in turn citing Allstate Ins. co. v Furman, 84 AD2d 29 (2d Dept 1981), affd 58 NY2d 613 (1982). This circumstance is also unpersuasive since Tower has presented evidence that at the time Hayes was confronted by the police, he was being counseled by both his adult mother and by an attorney.

While the Court recognizes the significance to the parties of Tower providing defense and indemnification, they have failed to raise a triable issue of fact to excuse the year-long delay in giving notice to Tower of the underlying incident. Accordingly, Tower's motion for summary judgment is granted. It is hereby

**ORDERED** that plaintiff Tower Insurance Company of New York's motion for default judgment against defendant Shawn K. Hayes and for summary judgment against the answering defendants granted to the extent that summary judgment is awarded in favor of plaintiff against defendants; and it is further


**ADJUDGED and DECLARED** that plaintiff Tower Insurance Company of New York has no duty to defend or indemnify the defendant Shawn K. Hayes under policy number HOP-9906370-04 against the claims made by Brett Strickland and Courtney Strickland in the action entitled *Brett Strickland, et al. v Shawn K. Hayes*, Index No. 26069/05, pending in the Supreme

Court of the State of New York, County of Suffolk.

**This constitutes the Decision, Order and Judgment of the Court.**

Dated: May 7, 2007

ENTER:

  
\_\_\_\_\_  
J.S.C.  
**EMILY JANE GOODMAN**

**FILED**  
MAY 15 2007  
COUNTY CLERK'S OFFICE  
NEW YORK