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

PRESENT: PART 54

Index Number : 106820/2005

TOWER INSURANCE

VS

S&H BONDI

Sequence Number : 001

SUMMARY JUDGMENT

INDEX NO.

MOTION DATE

MOTION SEQ. NO.

MOTION CAL. NO.

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

The following papers, numbered 1 to 5 were read on this motion to/for

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1, 2
Answering Affidavits — Exhibits	3, 4
Replying Affidavits	5

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION AND ORDER.

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

Dated: May 14, 2007

SHIRLEY WERNER KORNREICH J.S.C.

J.S.C.

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: IAS PART 54

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TOWER INSURANCE COMPANY OF NEW YORK,

Plaintiff,

-against-

S&H BONDI INC., S&H BARGAIN TIME INC., JACKS & MORE INC., SAM HAFIF and MOUSSA DIAGNE,

Defendants.

DECISION and ORDER

Index No. 106820/05

KORNREICH, SHIRLEY WERNER, J.:

This action seeks a declaratory judgment that plaintiff Tower Insurance Company of New York ("Tower") has no duty to defend or indemnify defendants in the action entitled *Moussa Diagne v. Northfork Bancorporation, 101-115 West 116th Street Corp., Bargain Time, Inc. and Mitchell Enterprises* (Index No. 14563/03), currently pending in New York State Supreme Court, Kings County (The "Underlying Action"). Tower now moves for summary judgment and defendants S&H Bondi Inc., S&H Bargain Time Inc. ("Bargain Time"), Jacks & More Inc. and Sam Kafif[1] (collectively, "S&H") opposes. Defendant Moussa Diagne cross-moves (1) to extend his time to move for summary judgment and (2) for summary judgment.

I. ***Background***

The Policy

Plaintiff Tower "issued a commercial general-liability policy to S&H bearing policy number CPP 2213287," for the term of April 4, 2002 through April 4, 2003 (the "policy"). The policy provided coverage for a junior department store located at 111 West 116th Street, New

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[1] Although the caption has misspelled Mr. Kafif's name as "Hafif," for purposes of this motion the court will refer to him by his correctly spelled name.

York, N.Y. 10026 (the "Store") and required the following:

> Duties in the Event of Occurrence, Offense, Claim Or Suit
> A. [S&H] must see to it that [Tower is] notified as soon as practicable of an "occurrence" or an offense which may result in a claim. To the extent possible, notice should include:
> (1) How, when and where the "occurrence" or offense took place;
> (2) The names and addresses of any injured persons and witnesses; and
> (3) The nature and location of any injury or damage arising out of the "occurrence" or offense.

The Underlying Action

The complaint in the underlying action claims that Mr. Diagne was injured on April 15, 2002, when he allegedly fell though a trap door at the Store. At his deposition, Jack Marachi, an S&H employee, testified as follows. At the time of the alleged accident, he entered the Store's basement and found Mr. Diagne there. While Mr. Diagne claimed he had fallen through a trap door and was injured, Mr. Marachi did not believe him. In any event, Mr. Marachi witnessed Mr. Diagne being removed from the premises by ambulance. Mr. Marachi testified that he did not report the accident to the Store's owner, Sam Kafif, because "it [was] nothing serious, it's like a game. . . . It's a lying thing." Mr. Marachi described his position at the Store as that of "store manager" and his duties there included supervising employees, taking care of the store, intake of merchandise. He worked there for seven years and directly reported to Mr. Kafif. On the date of the accident, Mr. Marachi was one of three employees working in the Store; a cashier and security person were also there.

Sam Kafif, the Store's owner, testified to the following at his deposition. He first learned of Mr. Diagne's accident when he received the "court papers" by mail about "two, two and a half years ago" in February of either 2004 or 2005. He then faxed the papers to his insurance broker, Elliot Waxleman who advised Mr. Kafif that he would send the papers to the insurance company.

Approximately a couple of weeks later, a woman who may have identified herself as an attorney contacted Mr. Kafif. Additionally, another party from Tower called Mr. Kafif and said "he wants to see [Mr. Kafif] at the site, to ask [him] questions about the site." Mr. Kafif did not recall when this person called but admitted that he had "called [Mr. Kafif] a few times until [Mr. Kafif] met with him, because [Mr. Kafif] was busy, had a busy schedule." Mr. Kafif finally met with the Tower representative at the site of Mr. Diagne's alleged accident.

Mr. Kafif testified that Mr. Marachi was "the person in charge" of the Store on the date of the accident. The day he received the "court papers," was the first time Mr. Kafif spoke with Mr. Marachi about the events of April 15, 2002.

The affidavit of service in the underlying action indicates that S&H was served with the Diagne papers on April 26, 2004, through an agent at the Store. Mr. Diagne commenced a second action against Mr. Kafif and Bargain Time, and an affidavit of service in that action indicates that service was made upon Mr. Kafif and S&H on January 28, 2005. Additionally, other defendants in the underlying action, *viz.*, the S&H's landlord, filed a third-party action against Mr. Kafif and Bargain Time with service upon the S&H defendants on January 12, 2005, via service on Mr. Kafif's wife and, thereafter, by mail.

Notice of Claim

On February 24, 2005, S&H's broker forwarded a copy of the third-party summons and complaint as well as a notice report. Four business days later, on March 2, 2005, Tower's administrative unit assigned the claim to Richard Dillon, an examiner. On that same day, Mr. Dillon called the telephone number that S&H had included on its notice report and spoke with a person who claimed to be Mr. Kafif's accountant. This person refused to provide Mr. Dillon with Mr. Kafif's telephone number but said he would inform Mr. Kafif of the call. On March 9,

2005, Mr. Dillon called again, leaving the same message for Mr. Kafif. Mr. Dillon then assigned the matter to Daniel J. Hannon & Associates ("DJH") "to investigate the circumstances of the alleged accident as well as issues concerning coverage under the policy, including late notice." Aff. of Lowell Aptman, para. 8.

Mr. Dillon first received the papers in the underlying action when he spoke with Dinkes & Schwitzer, Mr. Diagne's attorneys on March 15, 2005. The next day, DJH informed Tower that while it had made an appointment to interview Mr. Kafif, Mr. Kafif canceled the appointment. *Id.* at 10. On March 18, 2005, Mr. Dillon finally spoke to Mr. Kafif, who informed Mr. Dillon that he first learned of the accident when he was served one or two months ago. DJH continued its investigation, meeting with Mr. Kafif on March 23, 2005. Tower received a hard copy of DJH's report on April 6, 2005 and "disclaimed coverage under the policy by letter dated April 14, 2005, based on S&H's failure to provide Tower with prompt notice of the occurrence as required by the policy."

Mr. Diagne has submitted evidence demonstrating that, on April 19, 2002 and November 26, 2002, his counsel forwarded letters to S&H seeking insurance information from them. According to Mr. Diagne's counsel, those letters "remained unanswered." On March 11, 2005, defendant Diagne's counsel "was able to learn through counsel for co-defendant [in the underlying action] . . . that Tower Insurance Co. insured the defendant." Consequently, in a fax dated March 15, 2005, Mr. Diagne's counsel sent documents to Tower concerning the subject claim arising from the alleged accident.

II. ***Conclusions of Law***

A. *Plaintiff Tower's Motion for Summary Judgment*

Where an insurance policy requires notice "as soon as practicable" after an occurrence,

the absence of such timely notice constitutes a failure to comply with a condition precedent and, as a matter of law, cancels the contract. *Argo Corp. v. Greater N.Y. Mut. Ins. Co.*, 4 N.Y.3d 332, 339 (2005). The insurer need not show prejudice. *Id.*

Although the parties dispute the time that S&H itself first knew about the occurrence, uncontested evidence demonstrates that, at the latest, S&H knew of the underlying action and alleged accident on April 26, 2004, when it was served with the summons and complaint in that action. Nonetheless. S&H did not notify Tower of the action until February 28, 2005, ten months later. This did not meet the policy's requirement of notice "as soon as practicable." *See Doe Fund, Inc. v. Royal Indem. Co.*, 34 A.D.3d 399 (1st Dept. 2006) (delay of eight months after incident and three months after service of summons and complaint untimely); *Figueroa v. Utica Natl. Ins. Group*, 16 A.D.3d 616 (2d Dept. 2005) (two month delay unreasonable), *lv denied* 5 N.Y.3d 709 (2005); *US Pack Network Corp. v. Travelers Prop. Cas.*, 23 A.D.3d 299 (1st Dept. 2005) (six month delay untimely).

The S&H defendants and Mr. Diagne argue that, however, Tower's motion should be denied since Tower failed to disclaim coverage in a timely manner. This argument is unavailing. Pursuant to Insurance Law § 3420 (d), an insurer "shall give written notice as soon as is reasonably possible of such disclaimer of liability or denial of coverage to the insured and the injured person or any other claimant." *See Ace Packing Co., Inc. v. Campbell Solberg Assoc., Inc.*, __ AD3d __, 2007 NY Slip Op 3022 (1st Dept. 2007) (insurer must "disclaim coverage without delay when the grounds for disclaiming are readily apparent based upon the documents delivered to the insurer"). "The timeliness of an insurer's disclaimer is measured from the date it first receives information that would disqualify the claim[.]" *Ace*, 2007 NY Slip Op 3022 at 5. (finding that "insurer's decision to conduct an investigation [prior to disclaiming coverage] . . .

was imminently reasonable" and not in bad faith).

The First Department's decision in *Ace* is particularly instructive here. In *Ace*, the insurer disclaimed coverage on the basis of untimely notice of claim, thirty-right days after it had received the insured's notice of claim. Once the insurer received notification of the claim—two and a half years after the underlying accident—it "immediately retained an adjuster to investigate the claim, and more importantly, the issue regarding late notice." *Id.* While the insurance adjuster sought to interview plaintiff about both the circumstances of the accident as well as plaintiff's actions upon first receiving notice of the claim and the resulting lawsuit, "[p]laintiff refused to cooperate with the adjuster and persisted in that refusal for 30 days[.]" When plaintiff finally did provide such information to the adjuster, "the adjuster promptly completed its investigation, and eight days later filed its final report with the insurer with appropriate findings." That same day, the insurer notified plaintiff in writing that it was disclaiming coverage under the policy.

The First Department determined that when presented with this issue, the following questions must be asked: "(1) what did the insurer know on [the notice] date about the accident and the resulting claim, and (2) did that information make it readily apparent at that time that it had the right to disclaim coverage under the policy?" *Id.* Specifically, the First Department held that upon the insured's submission of its claim,

> [the insurer] did not know on that date when [the insured] first learned of either the accident or the lawsuit, facts essential to the insurer in determining whether to disclaim. More importantly, it did not know what plaintiff did with that information when it was received, and could not have known if plaintiff would subsequently claim that it had ever notified the insurer about either event. Only an investigation of the type ordered by the insurer would yield answers to those questions, answers which the insurer needed in order to make a good faith decision regarding disclaimer. The fact that this inquiry took 38 instead of 8 days to complete was due entirely to plaintiff's refusal to cooperate with the adjuster in its investigation. . . . In short, merely because the insurer knew on June 7,

> 2004 that the claim involved an accident that occurred on December 19, 2001 did not make it "readily apparent" that it had the right to disclaim coverage. It needed to know more, and its investigation provided the additional information that was required for the insurer in good faith to disclaim coverage under this policy. Furthermore, the insurer's decision to conduct an investigation on those facts was imminently reasonable, and no one involved in this litigation has claimed that it did so to gain a tactical advantage or had in any way acted in bad faith. In fact, if any party to this transaction was guilty of unreasonable conduct, it was the insured; its refusal to honor its contractual obligation and cooperate in the adjuster's inquiry was the primary reason why it took more than a month to complete this investigation.

Id.

Here, the facts are remarkably similar to those in the *Ace* action. While Tower dispatched an investigator to investigate the circumstances of S&H's claim upon learning of it, the investigator ran into difficulties in obtaining Mr. Kafif's cooperation with the investigation. Indeed, the unrefuted evidence demonstrates that Tower first received the papers in the underlying action on March 15, 2005, and even then did not receive the papers via the cooperation of their own insured but, instead, received such information from Mr. Diagne's attorneys. Due to Mr. Kafif's lack of cooperation, the investigator did not meet with Mr. Kafif until March 23, 2005. Tower received a hard copy of the investigator's report on April 6, 2005 and it disclaimed coverage by April 14, 2005, six business days after receiving and reviewing the investigative report, by which it found grounds to disclaim coverage. *See Farmbrew Realty Corp. v. Tower Ins. Co.*, 289 A.D.2d 284, 285 (2d Dept. 2001) (insurer's 58-day delay in disclaiming coverage reasonable where "delay in disclaiming was clearly needed to allow the defendant to receive, evaluate, and act upon the [investigator's] report"), *lv denied* 98 N.Y.2d 601 (2002).

B. *Defendant Diagne's Cross-Motion for Summary Judgment*

Initially, defendant Diagne has failed to set forth any good cause for its motion to extend

its time to file a summary judgment motion. CPLR 2004 provides that:

> Except where otherwise expressly prescribed by law, the court may extend the time fixed by any statute, rule or order for doing any act, *upon such terms as may be just and upon good cause shown*, whether the application for extension is made before or after the expiration of the time fixed.

CPLR 2004 (emphasis supplied). Even were Mr. Diagne to have shown such good cause, which he has not, his summary judgment motion is without merit. While Mr. Diagne claims to have given independent notice to Tower of his claim, such notice was untimely.

New York Insurance Law provides that "written notice by or on behalf of the injured person or any other claimant, to any licensed agent of the insurer in this state, with particulars sufficient to identify the insured, shall be deemed notice to the insurer." NY Ins Law 3420 (a) (3). Where 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 Ins. Co.*, 20 A.D.3d 367, 369 (1st Dept. 2005). An injured party is required "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 A.D.3d 426, 428 (2d Dept. 2006).

While Mr. Diagne may have provided Tower with notice of his claim on March 15, 2005, he offers no evidence that he made any effort to learn the identity of S&H's insurer. While he may have sent two letters to S&H inquiring as to its insurance coverage, which S&H ignored, this does not constitute a "diligent" effort in attempting to ascertain the identity of S&H's insurer. *See Steinberg*, 26 A.D.3d at 428 (injured party was not diligent where she sent one letter to insured regarding notifying its insurer over five-month period between accident and date she

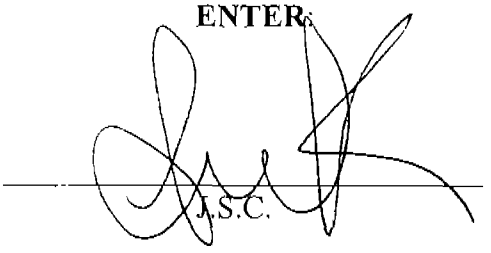
notified insurer of incident). Finally, Mr. Diagne's argument that by failing to address his notice to it in its disclaimer letter, Tower has not properly disclaimed coverage as to him, is similarly meritless. *See Steinberg*, 26 A.D.3d at 428 (2d Dept. 2006) ("Where the insured is the first to notify the carrier, even if that notice is untimely, any subsequent information provided by the injured party is superfluous for notice purposes and need not be addressed in the notice of disclaimer issued by the insurer"). Accordingly, it is

ORDERED that plaintiff Tower's motion for summary judgment against defendant is granted; and it is further

ORDERED and ADJUDGED that plaintiff Tower Insurance Company of New York has no duty to defend or indemnify defendants S&H Bondi Inc., S&H Bargain Time Inc., Jacks & More Inc. and Sam Kafif (s/h/a Sam Hafif) and it is further

ORDERED that the Clerk shall enter judgment accordingly.

ENTER:



Dated: May 14, 2007
New York, N.Y.