

Hedvat v New York Cent. Mut.

2007 NY Slip Op 31478(U)

June 4, 2007

Supreme Court, New York County

Docket Number: 0122196/2003

Judge: Jane S. Solomon

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

PRESENT: SOLOMON
Justice

PART 55

HEDVAT, EZZAT

INDEX NO. 122196/03

MOTION DATE 3-23-07

- v -

NEW YORK CENTRAL MUTUAL

MOTION SEQ. NO. 002

MOTION CAL. NO. _____

The following papers, numbered 1 to 9 were read on this motion to Summary judgment

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...
Answering Affidavits — Exhibits _____
Replying Affidavits _____

PAPERS NUMBERED
<u>1-4</u>
<u>5-7</u>
<u>8-9</u>

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed memorandum decision and order and judgment.

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

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).

Dated: 6/4/07

[Signature]
J.S.C.
SOLOMON

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 55

EZZAT HEDVAT,

Plaintiff,

- against -

NEW YORK CENTRAL MUTUAL,

Defendant.

----- X
JANE S. SOLOMON, J.:

Index No. 122196/2003

DECISION, ORDER and
JUDGMENT

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).

In this CPLR § 3001 action in which plaintiff Ezzat Hedvat ("Ezzat") seeks a declaration that defendant New York Central Mutual ("Central Mutual") has a duty to defend and indemnify her under the terms of a homeowners policy it issued to her, Central Mutual moves under CPLR § 3212 for summary judgment dismissing the Complaint. For the reasons described herein, Central Mutual's motion is granted and the Complaint is dismissed.

Timeliness of Notice to Central Mutual

This declaratory judgment action arises from a negligence action entitled Shahram Hedvat and Mojdeh Hedvat against Ezzat Hedvat, Index No. 116387/2003 (the "Underlying Action"). The Underlying Action seeks damages for personal injuries allegedly suffered by plaintiff's son Shahram Hedvat ("Shahram") in Ezzat's home as a result of a fall during a New Year's Eve party on January 1, 2001. Ezzat notified Central Mutual of the occurrence on February 13, 2002, more than a year and a month after the occurrence. The homeowners policy required

Ezzat to give Central Mutual "prompt notice" upon becoming "aware of anything that indicates there might be a claim under this policy."

When an insurance policy requires that notice of an occurrence or action be given promptly, this means within a reasonable time in view of all of the facts and circumstances. See Deso v. London & Lancashire Indem. Co., 3 N.Y.2d 127, 129 (1957) (holding an un-excused delay of 51 days unreasonable as a matter of law); Steinberg v. Hermitage Ins. Co., 26 A.D.3d 426 (2nd Dep't 2006) (57 days); US Pack Network Corp. v. Travelers Prop. Cas., 23 A.D.3d 299 (1st Dep't 2005) (6 months); DiGuaglielmo v. Travelers Prop. Cas., 6 A.D.3d 344 (1st Dep't 2004) (7 months).

Central Mutual has established its entitlement to judgment as a matter of law by presenting evidence that Ezzat learned of the occurrence within a matter of days and did not give the notice required under the policy to Central Mutual for more than thirteen months. The burden then shifts to Ezzat to establish the existence of a reasonable excuse for the delay. See Argentina v. Otsego Mut. Fire Ins. Co., 86 N.Y.2d 748, 750 (1995); Security Mut. Ins. Co. v. Acker-Fitzsimons, 31 N.Y.2d 436 (1972); Blue Ridge Ins. Co. v. Biegelman, 36 A.D.3d 736 (2nd Dep't 2007).

In his affidavit, Ezzat's counsel submits the following three excuses for the delay:

1) the insured was not at home at the time of the incident, and was in fact outside the United States; 2) although the claimant was her son, she was not aware of the severity of the injury; and 3) the claimant gave no indication until February 2002, at which time the Defendant was notified.

That she was out of the country at the time of the incident is immaterial considering that she learned of the incident within a matter of days, and returned to the United States in February 2001. An un-excused delay of twelve months would still be unreasonable in any event.

Nor has Ezzat established the existence of a question of fact with respect to her other two defenses. At her deposition, Ezzat testified that Shahram told her "maybe two to three weeks" after he had surgery that he wanted to sue her. It is undisputed that the surgery took place in August 2001. Thus, a period of approximately five months elapsed between the time Ezzat learned that Shahram wanted to sue her and the date Ezzat notified Central Mutual of the claim. This uncontested admission of a direct expression of intent to sue distinguishes this case from a situation where the insured held a good faith belief that the injured family member would not sue. See Argentina v. Otsego Mutual Fire Ins. Co., *supra*.

Thus, Ezzat's excuses are insufficient as a matter of law. See Blue Ridge Ins. Co. v. Biegelman, *supra*; SSBSS Realty Corp. v. Public Serv. Mut. Ins. Co., 253 A.D.2d 583 (1st Dep't

1998); Power Auth. v. Westinghouse Elec. Corp., 117 A.D.2d 336 (1st Dep't 1986).

Timeliness of the Notice of Disclaimer

Central Mutual first received notice of Ezzat's claim on February 13, 2002. It disclaimed by letter dated March 21, 2002, thirty-six days later. That letter shows that Central Mutual retained the services of a third-party claims adjuster to conduct an investigation and submit a report.

An insurance company must provide timely written notice of disclaimer, even where the insured has not given timely notice of the occurrence. See AIU Ins. Co. v. Investors Ins. Co., 17 A.D.3d 259, 260 (1st Dep't 2005). Indeed, an insurer may not disclaim coverage unless it gives the insured timely notice of disclaimer. See Generali-U.S. Branch v. Rothschild, 295 A.D.2d 236 (1st Dep't 2002). The disclaimer must be made in writing "as soon as reasonably practicable." Insurance Law § 3420(d); see Bovis Lend Lease LMB, Inc. v. Royal Surplus Lines Insurance Co., 27 A.D.3d 84, 91 (1st Dep't 2005).

However, an insurer is not required to disclaim on timeliness grounds before conducting a prompt, reasonable investigation into other possible grounds for disclaimer. In fact, a "reasonable investigation is preferable to piecemeal disclaimers." 2540 Assocs. v. Assicurazioni Generali, S.P.A., 271 A.D.2d 282, 284 (1st Dep't 2000); see also Blue Ridge Ins. Co. v.

Jiminez, 7 A.D.3d 652 (2nd Dep't 2007).

This case is not within the rule that a delay of more than thirty days in disclaiming coverage solely on timeliness grounds is unreasonable as a matter of law where the timeliness determination is evident from the face of the claim. See 2833 Third Ave. Realty Assoc. v. Marcus, 12 A.D.3d 329 (1st Dep't 2004); West 16th St. Tenants Corp. v. Public Serv. Mut. Ins. Co., 290 A.D.2d 278 (1st Dep't 2002).

In Ace Packing Co. v. Campbell Solberg Assoc., Inc., 2007 NY Slip Op 3022, (1st Dep't 2007), a recent case involving remarkably similar facts, the Appellate Division reversed a holding that a thirty-eight day delay in disclaiming coverage was unreasonable. The First Department disagreed with the lower court's conclusion that the grounds for the disclaimer were readily apparent from the face of the file, and held that the investigation conducted was necessary, as a "disclaim now and investigate later" approach would not be in anyone's interest.

The Ace Packing Co. court examined the reasonableness of the insurer's conduct after receiving notice of the claim, noting that the insurer knew when it received the claim that there had been an accident a year earlier, but it did not know when the insured learned of the accident or of the lawsuit, and had no basis at that time to disclaim coverage. The same can be said here.

Central Mutual has demonstrated its entitlement to judgment as a matter of law with respect to the timeliness of its notice of disclaimer by conducting an investigation and submitting the disclaimer letter dated March 21, 2002 (Ex. H to moving papers). In light of the investigation into the claim, the thirty-six days taken by Central Mutual was reasonable. See Ace Packing Co. v. Campbell Solberg Assoc., Inc., *supra*.

Accordingly, it is

ORDERED, that Central Mutual's motion for summary judgment dismissing the complaint is granted; and it further is

ORDERED, ADJUDGED and DECLARED that Central Mutual does not have a duty to defend and indemnify Ezzat in the Underlying Action.

This constitutes the order and judgment of the court.

Dated: ~~May~~ June 4, 2007

ENTER:



J. S. C.
JAMES H. BALTAZAR

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).