

**Norfolk & Dedham Mut. Fire Ins. Co. v
J.M.K. Corp.**

2007 NY Slip Op 31980(U)

June 15, 2007

Supreme Court, Queens County

Docket Number: 0017764/2004

Judge: Orin R. Kitzes

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE ORIN R. KITZES IA Part 17
Justice

NORFOLK & DEDHAM MUTUAL FIRE x Index
INSURANCE COMPANY Number 17764
2004

- against - Motion
Date March 7,
2007

J.M.K. CORP., et al. Motion
Cal. Number 45
x Motion Seq. No. 1

The following papers numbered 1 to 12 read on this motion by plaintiff Norfolk & Dedham Mutual Fire Insurance Company (Norfolk & Dedham) for summary judgment in its favor and on this cross motion by defendant J.M.K. Corp. (JMK) for summary judgment in its favor on the grounds that plaintiff Norfolk & Dedham failed to provide timely and proper notice of disclaimer.

	<u>Papers Numbered</u>
Notice of Motion - Affidavits - Exhibits	1-4
Notice of Cross Motion - Affidavits - Exhibits ..	5-8
Answering Affidavits - Exhibits	9-10
Reply Affidavits	11-12

Upon the foregoing papers it is ordered that the motion and cross motion are determined as follows:

In this action for a declaratory judgment, plaintiff Norfolk & Dedham seeks an order granting it summary judgment and declaring that it has no duty to defend and indemnify defendant JMK in an underlying personal injury action commenced in this court and entitled Lucia Garcia v J.M.K. Corp. (Index No. 3552/01) on the ground that defendant JMK failed to timely notify it of the claim as required under the policy and that it

timely denied coverage on that ground. Defendant JMK opposes the motion and cross-moves for summary judgment declaring that plaintiff Norfolk & Dedham has a duty to defend and indemnify it in the underlying action.

The underlying incident occurred on August 24, 2000. Lucia Garcia, a tenant of premises owned by defendant JMK, located at 32-56 96th Street Queens, New York and also known as 9513-19 Northern Boulevard, Jackson Heights, New York, allegedly tripped and fell at said premises. At the time of the occurrence, defendant JMK had a Business Owner's Liability Insurance Policy with plaintiff Norfolk & Dedham which required it to promptly notify Norfolk & Dedham "as soon as practicable" of the occurrence.

The underlying action was commenced by Lucia Garcia on February 8, 2001. The complaint asserts two causes of action, the first on behalf of Lucia Garcia for personal injuries and the second on behalf of Leo Garcia for loss of services. Lucia Garcia, however, is the only named plaintiff. Defendant JMK allegedly was served with the summons and complaint by service on the Secretary of State on February 20, 2001. Lucia Garcia moved for a default judgment against defendant JMK which was granted by order dated July 9, 2001. On December 3, 2003, Lucia Garcia moved to restore the case to active status and to amend the caption to reflect Leo Garcia as an additional plaintiff. In an order dated March 4, 2004, the motion was denied without prejudice to the commencement of a separate and independent plenary action on behalf of Leo Garcia. On April 28, 2004, Lucia Garcia moved to reargue which was denied by order dated June 9, 2004. Subsequently, defendant JMK made a motion to vacate its default which was granted by order dated November 26, 2004. On December 6, 2006, the Garcia action was settled before trial. Plaintiff Norfolk & Dedham paid no part of the settlement.

It is undisputed that defendant JMK's principal, John Zelenak, first received notice of Lucia Garcia's claim on or about December 8, 2003, when he was served with the motion papers seeking to restore and to amend the caption in the underlying action. Prior to that date, all pleadings and correspondence in the action were sent to an old corporate address of defendant JMK. John Zelenak testified that he brought the motion papers to his attorney, Ira Pollack, to review and to turn over to defendant JMK's insurer, plaintiff Norfolk & Dedham. John Zelenak also testified that a few days later, Ira Pollack advised him that he could have the case dismissed on a technical issue and his fee for same would be \$1,500. John Zelenak agreed and did not hear anything further

regarding the matter until April 30, 2004, when he received the reargument motion papers. John Zelenak testified that upon receipt of that motion, he contacted Ira Pollack, who informed him that he had done nothing in the case since he had not been paid.

On May 7, 2004, John Zelenak brought the Garcia motion papers to another attorney, Eugene Levy, who instructed him to go directly to his insurance broker, Marino Coverage Group (Marino). Mr. Zelenak went to Marino that same day and an insurance agent thereat telephoned plaintiff Norfolk & Dedham advising it of the claim and the date of the alleged incident. The agent also sent a follow-up letter with accompanying documentation. Plaintiff Norfolk & Dedham acknowledges having received this "panic call" and letter from the Marino agent. On May 20, 2004, thirteen days after the "panic call" regarding the Garcia claim, plaintiff Norfolk & Dedham assigned an investigator, Nixx Investigations & Claims Service, to the claim. The Nixx investigator submitted its report to plaintiff Norfolk & Dedham on May 27, 2004. On June 16, 2004, 40 days after the claim was initially reported to it, plaintiff Norfolk & Dedham disclaimed coverage on the ground that it was not timely notified of the occurrence resulting in the underlying Garcia action.

Where an insurance policy, such as the one here, requires an insured to provide notice of an accident or loss as soon as practicable, such notice must be provided within a reasonable time in view of all the facts and circumstances. (See Merchants Mutual Insurance Co. v Hoffman, 56 NY2d 799 [1982]; see also Steinberg v Hermitage Insurance Co., 26 AD3d 426 [2006]; Travelers Indemnity Co. v Worthy, 281 AD2d 411 [2001].) 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 policy. (See Argo Corp. v Greater New York Mutual Insurance Co., 4 NY3d 332 [2005]; see also Steinberg v Hermitage Insurance Co., supra; Sayed v Macari, 296 AD2d 396 [2002].) However, a carrier waives its affirmative defense of late notice if it fails to disclaim coverage "as soon as is reasonably possible" (Insurance Law § 3420[d]) after it first learns of the grounds for disclaimer of liability or denial of coverage. (See First Financial Insurance Co. v Jetco Contracting Corp., 1 NY3d 64 [2003]; see also Matter of Allcity Insurance Co. v Jimenez, 78 NY2d 1054 [1991]; Pennsylvania Lumbermans Mutual Insurance Co. v D & Sons Construction Corp., 18 AD3d 843 [2005].) It is the insurer's responsibility to explain its delay, and an unsatisfactory explanation will render the delay unreasonable as a matter of law. (See First Financial Insurance Co. v Jetco Contracting Corp., supra; see also Pennsylvania Lumbermans

Mutual Insurance Co. v D & Sons Construction Corp., supra; Moore v Ewing, 9 AD3d 484 [2004].) An insurer's explanation is insufficient as a matter of law where the basis for denying coverage was or should have been readily apparent before the onset of the delay. (See First Financial Insurance Co. v Jetco Contracting Corp., supra; see also Danna Construction Corp. v Utica First Insurance Co., 17 AD3d 622 [2005].)

In this case, although defendant JMK failed to provide timely notice of the occurrence as required by the policy, plaintiff Norfolk & Dedham failed to comply with the condition precedent to timely disclaim coverage. Plaintiff Norfolk & Dedham's 40-day delay in disclaiming coverage was too long since the basis for the disclaimer, that is, defendant JMK's failure to comply with the applicable notice requirements, was evident from the May 7, 2004 "panic call" received by plaintiff Norfolk & Dedham from Marino regarding the Garcia claim. (See Schulman v Indian Harbor Insurance Co., ___ AD3d ___, 2007 NY Slip Op 4468 [2d Dept, May 22, 2007]; see also Pennsylvania Lumbermans Mutual Insurance Co. v D & Sons Construction Corp., supra; Matter of Colonial Penn Insurance Co. v Pevzner, 266 AD2d 391 [1999].) Plaintiff Norfolk & Dedham's attempt to justify its delay based on changes to its computer system, its need to verify the loss location, and its need to evaluate the investigation material and to consult with counsel is unpersuasive. Thus, plaintiff Norfolk & Dedham's delay in disclaiming coverage was unexcused and unreasonable as a matter of law.

Accordingly, plaintiff Norfolk & Dedham's motion for summary judgment is denied and defendant JMK's cross motion for summary judgment is granted.

It is declaration of this court that plaintiff Norfolk & Dedham has duty to provide coverage to its insured, defendant JMK, and to defend and indemnify defendant JMK in the underlying action.

Dated: June 15, 2007

J.S.C.