Romeo v Malta
2007 NY Slip Op 32049(U)
June 28, 2007
Supreme Court, New York County
Docket Number: 0100055/2005
Judge: Debra A. James
Republished from New York State Unified Court System's E-Courts Service. Search E-Courts (http://www.nycourts.gov/ecourts) for any additional information on this case.
This opinion is uncorrected and not selected for official publication.

SCANNED ON 7/9/2007

[* 1]

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

PRESENT: DEBRA A. JAMES, *Justice* — **PART 59**

LOUIS ROMEO,
Plaintiff,

- v -

ROBERT MALTA, CHELSEA TOMATO, INC., d/b/a INTERMEZZO RESTAURANT, 202 EIGHTH AVENUE, LLC and E&F CONSTRUCTION CORP.,
Defendants,

Index No.: 100055/05
Motion Date: 03/20/07
Motion Seq. No.: 05
Motion Cal. No.: 119

ROBERT MALTA, CHELSEA TOMATO, INC., d/b/a INTERMEZZO RESTAURANT,
Third-Party Plaintiffs,

- v -

THE TRAVELERS INDEMNITY COMPANY OF CONNECTICUT,
Third-Party Defendant,

Third- Party Index No.: 590248/05

CHELSEA TOMATO, INC.,
Third-Party Plaintiff,

- v -

202 EIGHTH AVENUE, LLC,
Third-Party Defendant.

Third- Party Index No.: 591176/05

CHELSEA TOMATO, INC., and ROBERT MALTA,
Third-Party Plaintiffs,

- v -

E&F CONSTRUCTION CORP.,
Third-Party Defendant.

Third- Party Index No.: 590337/05

CHELSEA TOMATO, INC.,
Third-Party Plaintiff

- v -

ATLANTIC CASUALTY INSURANCE COMPANY,
Third-Party Defendant.

Third- Party Index No.: 590748/06

ATLANTIC CASUALTY INSURANCE COMPANY,
Second Third-Party Plaintiff,

- v -

202 EIGHTH AVENUE, LLC, and LOUIS ROMEO,
Second Third-Party Defendant.

Second Third- Party Index No.: 591079/06

FILED
JUL 09 2007
NEW YORK
COUNTY CLERK'S OFFICE

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

	PAPERS NUMBERED
Notice of Motion/Order to Show Cause -Affidavits -Exhibits	1, 2
Answering Affidavits - Exhibits	3 - 5
Replying Affidavits - Exhibits	6 - 9

Cross-Motion: ☒ Yes ☐ No

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

Upon the foregoing papers,

The facts in this action are not in dispute. At the time of the accident on February 19, 2004, plaintiff, who was at the time 84 years old, fell while walking down the stairs from the main floor to the floor one level below. Plaintiff was at the Intermezzo Restaurant and was going to the restrooms at the time of the accident. Plaintiff allegedly sustained a hip fracture among other injuries. At the time of the accident, employees of the restaurant were on the scene and were aware of the accident. It is conceded that the restaurant through its employees was aware that the plaintiff's injuries were severe enough that the plaintiff was taken to the hospital by ambulance after the accident.

On this motion, defendant/third-party plaintiff Chelsea Tomato (the "restaurant") moves for summary judgment in its declaratory judgment action (Index No.: 590248/05) seeking defense and indemnification from its Commercial General Liability (CGL) carrier at the time of the accident, Travelers Indemnity Company. Travelers cross-moves to dismiss the third-party complaint.

The restaurant concedes that it knew of the accident when it occurred and did not provide notice to Travelers until November 9, 2004, following the restaurant's receipt of a letter from plaintiff's counsel. Travelers disclaimed coverage on the

[* 3]

plaintiff restaurant asserts that Travelers' disclaimer is improper because although it did not notify the insurer of the accident at the time it occurred, it did notify the insurer in a timely manner as measured from the time when the restaurant had a reasonable belief that the accident would result in a claim. The restaurant argues that the statement allegedly made by the plaintiff at the time of the accident that he "missed the last step" caused it to reasonably believe that it was not at fault for plaintiff's injuries thus excusing its late notice.

The CGL policy at issue here requires notice "as soon as practicable of an 'occurrence' or an offense which may result in a claim." The Court of Appeals has held that

> 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).

The central issue on this motion is whether the restaurant has sustained its burden of excusing its failure to give timely notice. The court holds that the restaurant has failed to proffer a legally cognizable excuse. It is uncontroverted that the restaurant employees were on the scene of the accident upon restaurant premises immediately after the occurrence and observed the elderly plaintiff being taken to the hospital in an ambulance. Under these circumstances there could not be, as a matter of law, any reasonable belief in non-liability notwithstanding any statements of fault by the plaintiff. See SSBSS Realty Corp. v Public Service Mut. Ins. Co., 253 AD2d 583, 584 (1st Dept 1998) ("issue is not whether the insured believes he will ultimately be found liable for the injury, but whether he has a reasonable basis for a belief that no claim will be asserted against him"). Thus, courts have held that where "the plaintiffs were aware that [the victim] had been transported by ambulance to a hospital following his fall . . . no ordinary prudent person could have reasonably believed himself to be immune from potential civil liability under the circumstances." Zadrima v PSM Ins. Companies, 208 AD2d 529, 530 (2d Dept 1994); see also Paramount Ins. Co. v Rosedale Gardens, Inc., 293 AD2d 235, 241 (1st Dept 2002) (knowledge of the accident and that injured person had been taken by ambulance to the hospital is a

significant factor in determining the reasonableness of any delay in giving notice).

Nor does the law recognize the restaurant's reliance on the alleged admission of the plaintiff about the cause of his accident as the basis for a reasonable belief that no claim would be asserted against it. First, plaintiff's statement that he missed a step is consistent with a theory of comparative fault, and therefore it is consistent with potential liability on the part of the restaurant. Second, the statement attributed to plaintiff appears in a hospital chart and the hospital's recorded knowledge of such statement cannot be imputed to the insured restaurant. Nalsea Realty Corp. v Public Service Mut. Ins. Co., 238 AD2d 252 (1st Dept. 1997).

The restaurant's further argument, joined by the plaintiff, that plaintiff's notice of the accident to Travelers, which was made in response to an inquiry from Travelers subsequent to notice provided by the restaurant, satisfies its notice obligation pursuant to Insurance Law 3420 (a) (3) is meritless. As stated by the Court,

> Insurance Law § 3420 (a) (3) gives the injured party an independent right to give notice of an accident and to satisfy the notice requirement of a policy and, where the notice is provided directly by the injured party, the disclaimer must address with specificity the grounds for disclaiming coverage applicable to both the injured party as well as the insured. However, 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.

Ringel v Blue Ridge Ins. Co., 293 AD2d 460, 462 (2d Dept 2002) (citations omitted).

See also Wilson v Quaranta, 18 AD3d 324, 326 (1st Dept 2005) (no merit to argument that notice of the claim subsequently given to insurer by plaintiff's attorney was timely under Insurance Law § 3420).

Therefore, the court shall grant the cross-motion of Travelers Indemnity Company for summary judgment dismissing the third-party declaratory judgment action (Index No.: 590248/05) on the grounds that defendant/third-party plaintiff Chelsea Tomato failed to provide timely notice in compliance with the terms of the policy.

Accordingly, it is

ORDERED that the cross-motion of third-party defendant Travelers Indemnity Company for summary judgment dismissing the third-party declaratory judgment action (Index No.: 590248/05) is GRANTED and the Clerk is hereby directed to enter judgment DISMISSING the third-party declaratory judgment action); and it is further

ORDERED that the motion for summary judgment of defendant/third-party plaintiff Chelsea Tomato, Inc., is hereby DENIED; and it is further

ORDERED that the parties are directed to attend a pre-trial conference on July 10, 2007, at 2:30 P.M. to set a trial date.

[* 7]

This is the decision and order of the court.

Dated: June 28, 2007 ENTER:

DEBRA A. JAMES *J.S.C.*
J.S.C.

FILED
JUL 09 2007
NEW YORK
COUNTY CLERK'S OFFICE