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

PRESENT: HON. SHIRLEY WERNER KORNREICH Justice

PART 54

Index Number : 102438/2006

MARKEL INTERNATIONAL INSURANCE

vs

LASH, JASON

Sequence Number : 001

SUMMARY JUDGMENT

INDEX NO.

MOTION DATE 3/27/07

MOTION SEQ. NO.

MOTION CAL. NO.

The following papers, motion to/for

PAPERS NUMBERED	
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1 - 3
Answering Affidavits — Exhibits	4 - 6
Replying Affidavits	7 - 9

Cross-Motion: [X] Yes [ ] 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)

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: 7/9/07

HON. SHIRLEY WERNER KORNREICH J.S.C.

Check one: [X] FINAL DISPOSITION [ ] NON-FINAL DISPOSITION

Check if appropriate: [ ] DO NOT POST [ ] REFERENCE

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

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MARKEL INTERNATIONAL INSURANCE CO., LTD.,

Plaintiff,

-against-

JASON LASH, SUTTON PLACE RESTAURANT and BAR, INC., ALLAN BRADBURY, JOHN DOES 1-10, CITY OF NEW YORK, CITY OF NEW YORK POLICE DEPARTMENT,

Defendants.

----------X

Index No.: 102438/06

DECISION, ORDER and JUDGMENT

KORNREICH, SHIRLEY WERNER, J.:

This is an action brought by plaintiff insurer seeking a declaration that it is not obligated, under a commercial general liability policy, to defend or indemnify defendants Sutton Place Restaurant and Bar, Inc. ("Sutton Place"), Allan Bradbury, and Sutton Place employees John Does 1-10 ("John Does")(collectively, "Defendants"), in an underlying personal injury action by Jason Lash (the "Lawsuit"). Plaintiff moves for default judgment against defendants the City of New York (the "City") and the City of New York Police Department (the "Police") and for summary judgment against Defendants. Defendants cross-move for summary judgment against plaintiff.

I. Background

The alleged incident giving rise to the Lawsuit occurred on January 15, 2005. The Lawsuit was filed on December 29, 2005. The complaint contains ten causes of action, arising from an alleged assault and battery of Mr. Lash by Sutton Place employees and Mr. Lash's subsequent arrest, including: assault and battery and false imprisonment against Defendants;

malicious prosecution against Sutton Place, Mr. Bradbury, the City and the Police; and false arrest and false imprisonment against the City and the Police.

Sutton Places's manager, Allan Bradbury, avers the following. He is a manager at Sutton Place and was present at the time of the subject incident. Sutton Place is a bar and restaurant in Manhattan, where patrons commonly must be removed from the premises due to misconduct and arrested by the police when necessary. Mr. Bradbury denies the allegations of the Lawsuit and submits that there was no reason to place plaintiff insurer on notice of the underlying, fairly common, incident until Sutton Place first received notice of the claim upon service of the complaint in January 2006. Sutton Place immediately forwarded the complaint to plaintiff. In addition, Mr. Bradbury states that he has always been available to plaintiff to provide information about the incident but has not been contacted regarding any investigation of the claim or coverage issues.

Plaintiff alleges that it received its first notice of the incident and the Lawsuit on January 17, 2006, from Kimberley Payne, Regional Claims Manager with Underwriting Management, Inc., the claims handler for plaintiff. Ms. Payne avers that she investigated the claim by speaking with Celina Stedinger, an employee of Sutton Place, on February 9, 2006. Ms. Payne states that Ms. Stedinger represented that she was authorized to speak with Ms. Payne on behalf of Sutton Place and told Ms. Payne that Mr. Lash was removed from the premises, but that the incident was not reported because Sutton Place was not aware they had to report such occurrences. Ms. Stedinger had no information regarding criminal charges arising out of the incident.

By letter dated February 14, 2006, Underwriting Management denied coverage to Sutton Place for the assault and battery claims on the grounds of an assault and/or battery exclusion and

lack of coverage for intentional torts as they are not "accidents." The letter also stated that "a question of coverage" existed for the false imprisonment and malicious prosecution claims because coverage for those claims excluded claims for "bodily injury" and "willful violation of penal statute or ordinance committed by or with the consent of the insured." These clauses were interpreted as negating coverage for false statements to the police and physical injuries. The letter further questioned whether defendant gave timely notice and stated that plaintiff would investigate defendant's reasons for the delay under a reservation of rights. Finally, the letter disclaimed coverage for punitive damages and damages in excess of the policy limit of $1,000,000, and advised Sutton that counsel had been retained to defend the Lawsuit.

This declaratory judgment action was filed twelve days after Ms. Payne spoke with Ms. Stedinger on February 9, 2006 and thirty-four days after plaintiff received notice of the suit. The complaint asserts all of the grounds mentioned in the disclaimer letter, including the ones that were merely questioned therein.

II. Terms of the Policy

The general liability policy ("Policy") plaintiff issued to Sutton Place was effective April 1, 2004 to April 1, 2005 and, therefore, was in effect on the date of the incident. Section I, Coverage A, of the Policy covered bodily injury and property damage: "only if: (1) The "bodily injury" or "property damage" is caused by an "occurrence." Section V of the Policy contained the following definitions:

> 3. "Bodily injury" means bodily injury, sickness or disease sustained by a person...
>
> 12. "Occurrence" means an accident, including continuous or repeated exposure to substantially the same general harmful conditions.

13. "Personal injury" means injury, other than "bodily injury", arising out of one or more of the following offenses:

a. False arrest, detention or imprisonment;
b. Malicious prosecution.

Section I, Coverage B of the Policy provides as follows:

1. Insuring Agreement.
b. This insurance applies to:
(1) "Personal injury" caused by an offense arising out of your business, ...
2. Exclusions.

This insurance does not apply to:

a. "Personal injury" ...

(3) Arising out of the willful violation of a penal statute or ordinance committed by or with the consent of the insured.

Section IV of the Policy required the following notice for commercial general liability:

2. Duties In The Event Of Occurrence, Offense, Claim Or Suit.
a. You must see to it that we are notified as soon as practicable of an "occurrence" or an offense which may result in a claim....
b. If a claim is made or "suit" is brought against any insured, you must:
(1) Immediately record the specifics of the claim or "suit" and the date received; and
(2) Notify us as soon as practicable.
You must see to it that we receive written notice of the claim or "suit" as soon as practicable.

Finally, Policy excludes:

e) Punitive/Exemplary Damages Exclusion: This insurance does not apply to any claim or indemnification for punitive or exemplary damages...
g) Assault and/or Battery Exclusion: The coverage under this policy does not apply to any claim, suit, cost or expense arising out of assault and/or battery, or out of any act or omission in connection with the prevention or suppression of such acts, whether caused by or at the instigation or direction of any Insured or Insured's employees, patrons or any other person. Nor does this insurance apply with respect to any charges or allegations of negligent hiring, training, placement or supervision. Furthermore, assault and/or battery includes "bodily injury" resulting from the use of reasonable force to protect persons or

property.

III. *Conclusions of Law*

A. Default Judgment

Plaintiff named the City and the Police as defendants in the instant action, although the complaint does not seek relief from these two parties. Although it appears that the City and the Police were properly served with process, plaintiff failed to submit facts constituting a claim against the City or the Police, as required by CPLR §3215(f). Thus, plaintiffs' motion for a default judgment must be denied.

B. Summary Judgment

To prevail on a motion for summary judgment, the movant must establish a prima facie showing of entitlement to judgment as a matter of law by producing sufficient evidence to demonstrate the absence of any material issue of fact. *Giuffrida v. Citybank Corp.*, 100 N.Y.2d 72, 81 (2003). Once the movant has made a prima facie showing, the burden shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial. *Zuckerman v. New York*, 49 N.Y.2d 557, 560 (1980).

New York Insurance Law § 3420(d) provides that:

> If under a liability policy delivered or issued for delivery in this state, an insurer shall disclaim liability or deny coverage for death or bodily injury arising out of a motor vehicle accident or any other type of accident occurring within this states, it 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.

The timely notice requirement of Insurance Law § 3420(d) applies only when the incident is covered by the terms of the policy and disclaimer is based upon a policy exclusion. *See Handelsman v. Sea Insurance Co., Ltd.*, 85 N.Y.2d 96 (1994); *Zappone v. Home Insurance Co.*,

55 N.Y.2d 131 (1982); *Matter of Worcester Ins. Co. v. Bettenhauser*, 95 N.Y.2d 185 (2000). The underlying incident must also involve death or bodily injury. *Legum v. Allstate Insurance Co.*, 33 A.D.3d 670, 670 (2nd Dept. 2006); *Topliffe v. U.S. Art Co., Inc.*, 40 A.D.3d 967 (2nd Dept. 2007). The court in *Zappone* laid out three possible situations in which there is no coverage:

> (1) A claim is covered under the terms of the insurance policy, but the insured breaches the policy by, for example, failing to give timely notice of the incident. The insurer must disclaim liability on the basis of the insured's breach.
> (2) A claim is covered under the terms of the insurance policy, but there is an applicable policy exclusion such as an employee injury exclusion. The insurer must disclaim liability on the basis of the policy exclusion.
> (3) A claim is not covered under the terms of the insurance policy because, for example, the policy does not cover the party in question. Insurance Law § 3420(d) does not apply, and the insurer is not required to disclaim liability or otherwise respond to the claim.

Id. at 136-138.

An insurer can disclaim coverage in several ways as long as it meets the requirement for proper written notice. *Norfolk & Dedham Mutual Fire Ins. Co. v. Petrizzi*, 121 A.D.2d 276, 277 (1st Dept. 1986). The commencement of a declaratory judgment action by the insurer constitutes sufficient notice of disclaimer. *Id.*; *Generali-U.S. Branch v. Rothschild*, 295 A.D.2d 236, 237 (1st Dept. 2002). A letter from the insurer to the insured which contains a reservation of the right to disclaim coverage is not sufficient notice of disclaimer, although it may be used to rebut the argument that, by defending the insured, the insurer waived the right to disclaim. *Norfolk & Dedham Mutual Fire Ins. Co. v. Petrizzi*, 121 A.D.2d, *supra*, at 277; *Hartford Ins. Co. v. County of Nassau*, 46 N.Y.2d 1028, 1029 (1979).

Once an insurer has sufficient knowledge of facts entitling it to disclaim, or knows that it will disclaim coverage, it must notify the policyholder in writing as soon as is reasonably possible. *First Financial Insurance Company v. Jetco Contracting Corp.*, 1 N.Y.3d 64, 66

(2003). Failure to disclaim in a timely manner precludes effective disclaimer, even if the policyholder's notice to the insurer was itself untimely. *Id.* at 67. Timeliness of an insurer's disclaimer is measured from the point in time when the insurer first learned of the grounds for disclaimer of liability or denial of coverage. *Id.* at 68-69. An insurer who delays in giving written notice of disclaimer bears the burden of justifying the delay. *Id.* at 68. However, a good faith investigation into issues affecting an insurer's decision whether to disclaim coverage is a reasonable justification for a delay in disclaiming. *Id.* at 69; *2540 Assocs. v. Assicurazioni Generali, S.P.A.*, 271 A.D.2d 282, 284 (1st Dept. 2000); *Ace Packing Co., Inc. v. Campbell Solberg Assoc., Inc.*, 2007 NY Slip Op 3022 (1st Dept. 2007)(n.o.r.). But, the explanation for a delay 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. *First Financial Insurance Company v. Jetco Contracting Corp.*, *supra*, 1 N.Y.3d at 69.

Timeliness is generally a question of fact; only in the exceptional case can the issue be decided as a matter of law. *First Financial Insurance Company v. Jetco Contracting Corp.*, *supra*, 1 N.Y.3d at 70; *Norfolk & Dedham Mutual Fire Ins. Co. v. Petrizzi*, *supra*, 121 A.D.2d at 277. There is no material difference between a delay that is unexplained and a delay that is unexcused, meaning the explanation is unsatisfactory. *First Financial Insurance Company v. Jetco Contracting Corp.*, *supra*, 1 N.Y.3d at 70.

Courts have found various periods of delay to be untimely. In *West 16th St. Tenants Corp. v. Public Serv. Mut. Ins. Co.*, 290 A.D.2d 278 (1st Dept. 2002), the court found a 30-day delay unreasonable as a matter of law when the insurer's disclaimer was based solely on late notice by the insured, which was readily apparent. In *First Financial Insurance Company v.*

Jetco Contracting Corp., *supra*, 1 N.Y.3d 64, the court found a 48-day delay unreasonable as matter of law when the delay was caused by an investigation into matters irrelevant to the reasons for disclaimer. The court in *Bovis Lend Lease LMB, Inc. v. Royal Surplus Lines Ins. Co.*, 27 A.D.3d 84 (1st Dept. 2005) found a 60-day delay caused by an internal staffing problem for the insurer to be unreasonable as a matter of law. In contrast, an insurer's delay of slightly more than two months was satisfactorily explained because: (1) a failure of the insurer's computer tracking system delayed notice of the claim, and (2) the insurer conducted an investigation, which found that a policy exclusion was applicable. *Stabules v. Aetna Life & Casualty Co.*, 226 A.D.2d 138 (1st Dept. 1996). Additionally, a delay of more than one year was found reasonable due to the disappearance and lack of cooperation of the insured. *Campbell v. Travelers Ins. Co.*, 35 A.D.2d 362 (3rd Dept. 1970).

In this case, the disclaimer letter was issued four weeks after plaintiff received notice of the Lawsuit. As it was apparent from the face of the forwarded complaint that the allegations of these three causes of action fell within the assault and/or battery and punitive damages exclusions, the delay of four weeks is not explained and the disclaimer was unreasonable as a matter of law. Investigation of the delay is no excuse, since plaintiff does not provide any details regarding its actions during the more than three week period after notice and before the conversation with Ms. Stedinger.

Additionally, the remainder of the disclaimer letter was equivocal and, therefore, there was no valid disclaimer until this action was filed on February 21, five weeks after the initial notice of the Lawsuit. The record does not support plaintiffs' claim that they were investigating the allegations. Plaintiff does not explain why it did not speak with Mr. Bradbury or any of the

other Sutton Place employees directly involved in the incident. Plaintiff does not provide evidence regarding any investigation it conducted after its conversation with Ms. Stedinger. Plaintiff has not come forward with evidence that it did more than have a single conversation on February 9, twelve days before the filing of this action. Accordingly, the balance of the disclaimer was likewise untimely as a matter of law.

Nor is the incident not a covered occurrence. Courts have rejected plaintiff's argument that there is no coverage because the claims arise from intentional actions of Sutton Place and its employees, rather than an accident. *Penn-America Group, Inc. v. Zoobar, Inc.*, 305 A.D.2d 1116, 1117 (4th Dept. 2003)(assault and battery fell within insurance policy's coverage for personal injury arising from accidental occurrence); *Siagha v. National Union Fire Ins. Co. of Pittsburgh, Pa.*, 306 A.D.2d 60 (1st Dept. 2003)(accident within policy covered because defendant bar did not intend or expect employee to commit assault); *U.S. Underwriters Ins. Co. v. Val-Blue Corp.*, 85 N.Y.2d 821, 822-823 (1995)(assault and/or battery exclusion permits insurer to disclaim all claims arising from, based on, or surrounding the assault and/or battery). Moreover, the terms of an insurance policy are to be strictly and narrowly construed and an ambiguity must be interpreted in favor of the insured, not the insurer. *West 56th St. Assocs. v. Greater N.Y. Mut. Ins. Co.*, 250 A.D.2d 109, 111 (1st Dept. 1998); *Miller v. Continental Ins. Co.*, 40 N.Y.2d 675, 678 (1976). In deciding whether a loss is the result of an accident, a court must determine, from the point of view of the insured, whether the loss was "unexpected, unusual and unforeseen." *Igoado Realty Corp. v. United Int'l Ins. Co.*, 95 N.Y.2d 141, 145 (2000); *Miller v. Continental Ins. Co.*, 40 N.Y.2d at 677. An accident can include the unintentional consequences of intentional acts. *Id.* at 677-678. In sum, the underlying incident is covered by the Policy, and

plaintiff should have disclaimed coverage on the basis of the exclusions in the Policy, which it failed to do in timely fashion. Accordingly, it is

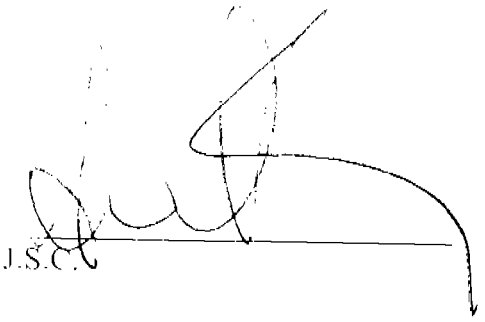
ORDERED that plaintiff's motion for default judgment against the City of New York and the City of New York Police Department is denied; and it is further

ORDERED that plaintiff's motion for summary judgment against Sutton Place Restaurant and Bar, Inc., Allan Bradbury, John Does 1-10, and Jason Lash is denied; and it is further

ORDERED that the cross-motion of Sutton Place Restaurant and Bar, Inc., Allan Bradbury, and John Does 1-10, is granted to the extent of the policy limit of $1,000,000.00, not including punitive damages; and it is further

ORDERED, ADJUDGED and DECLARED that MARKEL INTERNATIONAL INSURANCE CO., LTD., is required to defend and indemnify Sutton Place Restaurant and Bar, Inc., Allan Bradbury, and John Does 1-10 up to the policy limit of $1,000,000.00, not including punitive damages, in the action entitled Jason Lash v. City of New York, et al., Sup. Ct. N.Y. Co., Index No. 1000083/06.

Dated: July 9, 2007



J.S.C.