

**Novelty Crystal Corp. v Twin City Fire  
Ins. Co.**

2007 NY Slip Op 32239(U)

July 12, 2007

Supreme Court, Queens County

Docket Number: 0012114/2005

Judge: David Elliot

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE DAVID ELLIOT IA PART 14  
Justice

	<u>x</u>	Index
NOVELTY CRYSTAL CORPORATION and		Number <u>12114</u> 2005
JOSEPH MICHAELI,		
Plaintiffs,		Motion
		Date <u>March 13,</u> 2007
- against -		
		Motion
TWIN CITY FIRE INSURANCE COMPANY,		Cal. Number <u>31</u>
MT. HAWLEY INSURANCE COMPANY, and		Motion Seq. No. <u>2</u>
BURLINGTON INSURANCE COMPANY,		
Defendants.		

x

The following papers numbered 1 to 4 read on this motion by defendant Burlington Insurance Company for an order granting leave to reargue that portion of the order of December 29, 2006, which determined that the plaintiffs had timely notified the insurer of the occurrence, granted plaintiffs' motion for summary judgment and denied defendant's cross motion, and upon reargument denying plaintiffs' prior motion for summary judgment and granting defendant's prior cross motion to dismiss the complaint and all cross claims.

	<u>Papers</u> <u>Numbered</u>
Notice of Motion-Affidavit - Exhibits (A-V)	1-4
Memorandum of Law.....	
Memorandum of Law.....	
Memorandum of Law.....	

Upon the foregoing papers it is ordered that this motion is determined as follows:

In this action for declaratory judgment, the court in its order of December 29, 2009 (Geller, J.) determined that plaintiffs timely informed the insurer of the December 8, 2003 incident between Soona Lee and Joseph Michaeli, that Novelty Crystal Corporation and Mr. Michaeli were insureds under the terms of the

policy, and that the bodily injury exclusion did not apply here, as Mr. Michaeli used reasonable force to defend himself under the circumstances. The court determined that the insurer had a duty to defend Mr. Michaeli in the underlying action for assault which had been decided in his favor. The court granted the plaintiffs' motion for summary judgment and directed the parties to proceed to trial on the issue of attorney's fees, upon the filing of the note of issue and certificate of readiness. Defendant Burlington Insurance Company's cross motion for summary judgment dismissing the complaint and all cross claims was denied.

Defendant's motion for leave to argue that portion of the prior order which determined that timely notice was given to the insurer is granted. That portion of the court's order December 29, 2006 which reads:

"It is undisputed that shortly after being served with a summons and complaint, plaintiffs forwarded a copy of the necessary documents to Burlington. Burlington did not provide evidence, nor was it argued that Burlington was prejudiced in any way by receiving information shortly after plaintiffs were served with the summons and complaint. Once plaintiffs were informed of the commencement of an action them, they notified Burlington. This was sufficient."

is hereby vacated and the following is substituted in its place:

It is well settled that where an insurance policy requires that notice of an occurrence be given "as soon as practicable," notice must be given within a reasonable time under the facts and circumstances of each case, and the requirement operates as a condition precedent to coverage (see White v City of New York, 81 NY2d 955, 957 [1993]; Unigard Sec. Ins. Co. v North Riv. Ins. Co., 79 NY2d 576, 581 [1992]; Security Mut. Ins. Co. of N.Y. v Acker-Fitzsimons Corp., 31 NY2d 436, 440 [1972]). No showing of prejudice is required (*id.*). Strict compliance with the contract protects the carrier against fraud or collusion (Security Mut. Ins. Co. of N.Y. v Acker-Fitzsimons Corp., *supra*). However, circumstances may exist that will excuse or explain the insured's delay in giving notice, such as a reasonable belief in nonliability, but the insured has the burden of demonstrating the reasonableness of the excuse (see Great Canal Realty Corp. v Seneca Ins. Co., Inc., 5 NY3d 742, 743 [2005]; White v City of New York, *supra* at 957; Security Mut. Ins. Co. v Acker-Fitzsimons Corp., *supra* at 441; Blue Ridge Ins. Co. v Biegelman, 36 AD3d 736 [2007]). Whether there exists a good faith belief that an alleged injured party would not seek to hold the insureds liable and whether that belief was reasonable is a question for the trier of fact (see

Argentina v Otsego Mut. Fire Ins. Co., 86 NY2d 748, 750 [1995]). Summary judgment on this issue may be granted in favor of the insurance company only if the evidence, construing all inferences in favor of the insured, establishes as a matter of law that the belief of the insured that the plaintiff in the underlying action would not assert claims against the insured was unreasonable or in bad faith (see Jordan Constr. Prods. Corp. v Travelers Indem. Co. of Am., 14 AD3d 655, 656 [2005]; Genova v Regal Marine Indus., 309 AD2d 733 [2003]; SSBSS Realty Corp. v Public Serv. Mut. Ins. Co., 253 AD2d 583, 584 [1998]; Realty Corp. v Public Serv. Mut. Ins. Co., 253 AD2d 583, 584 [1998]).

Here, Mr. Michaeli asserts that he had no reason to believe that Ms. Lee would bring an action against him for assault. He testified at his deposition that on December 8, 2003 there was a pending eviction proceeding against Ms. Lee, that she came to his place of business to plead her case, and that she became agitated, grabbed his shirtfront twice, and that he in turn grabbed her wrists and removed her hands from his chest. He stated that he asked his mother to call the police, but that she did not, that Ms. Lee became hysterical and laid down on the floor and cried. He stated that Ms. Lee was removed by ambulance. He further stated that although Ms. Lee later went to the police, he was unaware of this at the time, as no complaint was ever filed against him. Finally, Mr. Michaeli stated that although Ms. Lee complained about him during the landlord tenant proceeding, she was evicted from the premises, and that the judge in that proceeding admonished her and rejected her claims.

Defendant, in its cross motion, asserts that as Mr. Michaeli was involved in the altercation with Ms. Lee and knew that she was removed from his office by ambulance, and as she made charges against him in the eviction proceeding some two weeks later, he was sufficiently aware of the incident and should have reported it to the insurer no later than the end of December 2003.

Based upon the evidence presented, the court finds that triable issues of fact exist as to whether the insureds' delay in notifying the insurer of the December 8, 2003 occurrence was reasonably founded upon a good faith belief that a claim would not be filed against them (see Argentina v Otsego Mut. Fire Ins. Co., supra; D'Aloia v Travelers Ins. Co., 85 NY2d 825, 826 [1995]; Merchants Mut. Ins. Co. v Hoffman, 56 NY2d 799, 801 [1982]; Jordan Constr. Prods. Corp. v Travelers Indem. Co. of Am. Genova v Regal Marine Indus., supra; Bassi v New York Ladder Corp., 289 AD2d 431 [2001]; Robustelli v Chicago Ins. Co., 288 AD2d 456 [2001]; Sobers v Lopresti, 283 AD2d 633 [2001]; Levine v Drake Manor, 256 AD2d 448 [1998]).

The final paragraph of the court's order of December 29, 2006 which reads "Accordingly, plaintiff's motion for summary judgment is granted. Upon filing of a note of issue/certificate of readiness, plaintiffs' action shall proceed to trial on the issue of attorney's fees to be awarded herein. The cross motion is denied" is hereby vacated and the following is substituted in its place:

Accordingly, plaintiffs' motion for summary judgment is granted to the extent that it is the declaration of the court that Novelty Crystal Corporation and Joseph Michaeli are insureds under the terms of the subject policy, and that the bodily injury exclusion is not applicable here. The remainder of the plaintiff's motion and the defendant's cross motion are denied, as a triable issue of fact exists as to whether the insureds' delay in notifying the insurer was based upon a reasonable belief that no claim would be brought against them for assault.

Dated: July 12 , 2007

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J.S.C.