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

PRESENT: SHIRLEY WERNER KORNREICH PART 54
Justice

National Fire Ins. Co. of Hartford

- v -

G-Unit Records, Inc. and Curtis Jackson III, a/k/a, "50-Cent"

INDEX NO. 604239/06

MOTION DATE 6/7/07

MOTION SEQ. NO. 001

MOTION CAL. NO. ____

The following papers, numbered 1 to ____ were read on this motion to/for ____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits	2
Replying Affidavits	3

Cross-Motion: | | Yes | X | No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION AND ORDER.

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 11B)

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

Dated: July 19, 2007

HON. SHIRLEY WERNER KORNREICH
J.S.C.

Check one: X FINAL DISPOSITION | | NON-FINAL DISPOSITION

Check if appropriate: | | DO NOT POST

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

----------X

NATIONAL FIRE INSURANCE COMPANY OF HARTFORD,

Index No: 604239/06

Plaintiff,

-against-

DECISION ORDER and JUDGMENT

G-UNIT RECORDS, INC. and CURTIS JACKSON III a/k/a "50-Cent",

Defendants.

----------X

KORNREICH, SHIRLEY WERNER, J.:

This action, seeking a declaration that plaintiff insurer is not obligated to defend and indemnify defendants, arises out of a claim for defense and indemnity coverage relating to two complaints served against defendants. Plaintiff National Fire Insurance Company of Hartford ("National Fire") denied coverage based on untimely notice. Defendants G-Unit Records, Inc. and Curtis Jackson III, a/k/a, "50-Cent" (collectively referred to as "G-Unit") justify the delay claiming a reasonable belief that they were not liable for the incident that provoked the claims. National Fire now moves for summary judgment declaring that G-Unit is not entitled to coverage for failure to comply with the policy's notice condition.

I. *Facts*

National Fire and G-Unit executed a contract for the provision of defense and indemnification coverage from April 29, 2004, to April 29, 2005. The relevant provisions of the policy are as follows:

E. GENERAL CONDITIONS

13. **Duties in the Event of Occurrence, Offense, Claim or Suit**

8. You must see to it that we are notified as soon as practicable of an "occurrence" or offense which may result in a claim. To the extent possible, notice should include:

i. How, when and where the "occurrence" or offense took place;

ii. The names and addresses of any injured persons or witnesses; and

iii. The nature and location of any injury or damage arising out of the "occurrence" or offense.

9. If a claim is made or "suit" is brought against any insured, you must:

i. Immediately record the specifics of the claim or "suit" and the date received; and

ii. 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.

F. DEFINITIONS

12. "**Occurrence**" means an accident, including continuous or repeated exposure to substantially the same general harmful conditions.

13. "**Suit**" means a civil proceeding, in which damages because of "bodily injury," "property damage," "personal injury," or "advertising injury" to which this insurance applies are alleged[.]

On January 21, 2005, recording artist Jayceon Taylor and his manager James J. Redmond purported agents of G-Unit—allegedly assaulted film-maker Kwasi Jones and radio host Richard Dunkerson after an interview at WKYS radio station in Lanham, Maryland. In March, 2006, Jones brought suit against G-Unit (the "first *Jones* action"), alleging assault and battery against Taylor and Redmond, and intentional infliction of emotional distress against G-Unit. The complaint alleged that G-Unit participated in a "campaign of harassment" and "intentional, calculated, deliberate, and malicious taunting" by releasing a song entitled "Hate It or Love It," which "gloats, reminds, and references the attack on Plaintiff." On May 31, 2006, Jones filed an amended complaint (the "second *Jones* action") which included G-Unit in the assault and battery counts and added counts of civil conspiracy, false imprisonment, invasion of privacy, and negligent hiring, training, supervision and retention. On October 2, 2006,

Dunkerson served G-Unit with a nearly identical complaint (the "*Dunkerson* action"). G-Unit tendered claim for both actions on October 18, 2006.

National Fire accepted the defense on November 14, 2006, but reserved the right to modify its position "in response to additional information or future developments[.]" On December 7, 2006, National Fire withdrew its coverage on the basis of G-Unit's late notice of the *Jones* action and of the January, 2005 incident. The disclaimer explained:

> "At the time of our reservation of rights letter we were not aware that the Jones complaint was filed and served in March of 2006. Or that an appearance was made on [G-Unit's] behalf on April 21, 2006. It was not until Boyd Sleeth's email of November 15, 2006 that we were made aware that G-Unit Records, Inc. and Curtis Jackson III were on notice of this incident and Jones' complaint in March, 2006. NFIH did not receive notice from G-Unit Records, Inc. or Curtis Jackson III of either the incident or either of the complaints until October 18, 2006."

National Fire subsequently brought suit seeking a declaratory judgment that it is not obligated to defend and indemnify G-Unit against both the *Jones* and *Dunkerson* actions.

II. *Conclusions of Law*

A. *The Jones Action*

National Fire seeks summary judgment based on G-Unit's untimely notice of the *Jones* actions. Whether notice is timely under an "as soon as practicable" clause is a question of reasonableness under the circumstances. *Great Canal Realty Corp. v. Seneca Ins. Co.*, 5 NY3d 742, 743 (2005); *Sorbara Const. Corp. v. AIU Ins. Co*, 2007 WL 1746907, at *1 (1st Dept. 2007). The reasonableness of a delay is usually a question for the jury, but in appropriate contexts courts may assume the function of determining fulfillment of the condition as a matter of law. *Deso v. London & Lancashire Indem. Co. of Am.*, 3 NY2d 127, 129 (1957); *Power Authority v. Westinghouse Elec. Corp.*, 117 AD2d 336, 339 (1st Dept. 1986)

Here, G-Unit failed to give any notice of the incident, and waited seven months after the first *Jones* action in March, 2006 before notifying National Fire of the complaint. In addition, G-Unit's notice on October 18, 2006 came nearly five months after the second *Jones* action and after it had appeared in the action. Absent a valid excuse, such a delay is unreasonable as a matter of law. *Goodwin Bowler Associates, Ltd. v. Eastern Mut. Ins. Co.*, 259 AD2d 381 (1st Dept. 1999); *U.S. Pack Network Corp. v. Travelers Property Cas.*, 23 AD3d 299, 300 (1st Dept. 2005).

G-Unit proffers two excuses for the delay. First, it asserts that it reasonably believed it was not liable for the January, 2005 incident provoking the *Jones* action. A good-faith belief of non-liability may excuse a failure to give timely notice, provided that belief is reasonable under all the circumstances. *Great Canal Realty Corp.*, 5 NY3d at 743. The reasonableness of such belief is ordinarily a question of fact precluding summary judgment. *White v. City of New York*, 81 NY2d 955, 957 (1993); *Witriol v. Travelers Ins. Group*, 251 AD2d 497, 498 (1st Dept. 1998). However, G-Unit's belief in non-liability for the incident was no longer a viable excuse once the *Jones* complaint was served in March, 2006. Once suit was filed, G-Unit was under the further obligation to notify National Fire of both the *Jones* action and the underlying incident. Even if G-Unit believed that it the suit was meritless, "[t]his belief would no doubt be based upon factual investigation of the occurrence and legal analysis of the claim. The opportunity to conduct such investigation and research is the very reason for the notification requirement." *State of N.Y. v. Blank*, 27 F3d 783, 796 (2d Cir. 1994) (applying New York law).

Relying on *Morris Park Contr. Corp. v. National Union Fire Ins.*, 33 AD3d 763, 765 (2d Dept. 2006), G-Unit nonetheless contends that the delay should be excused because the first *Jones* complaint was too "vague and generalized" to be properly understood as implicating G-

Unit. In *Morris Park*, the insured failed to timely notify its excess liability carrier of a complaint which contained an *ad damnum* clause seeking an amount well in excess of its primary coverage. The Second Department held that the *ad damnum* clause was insufficient to trigger a duty to notify because the complaint contained "only vague and generalized allegations of injury without any particularity or substantiation." *Id.* The instant case is distinguishable. Here, timely notice was not given of the occurrence, the original action or the amended action. Further, the *Morris Park* court expressly limited its holding to situations where notice to an excess liability carrier is at issue. *Id.* National Fire is not an excess liability carrier; it provides "first-dollar" defense and indemnification. In order to fulfill this function, it must have a reasonable opportunity to investigate the merits of the claim and prepare a competent defense. That the first *Jones* action was "vague and generalized" did not relieve G-Unit of its duty to notify either after the occurrence or after the second *Jones* action was served. Moreover, even if the uncertainty surrounding the first *Jones* action was a sufficient excuse for the delay, the 4½ months after receiving the amended complaint before tendering claim, would be unreasonable as a matter of law. *See Power Authority*, 117 AD2d at 342.

B. *The Dunkerson Action*

G-Unit argues that it reasonably believed it was not liable for the January, 2005 incident and, therefore, had no duty to notify of the *Dunkerson* incident until it was actually served. However, service of the *Jones* action belies any argument that G-Unit's belief in non-liability for the January, 2005 incident was reasonable. Jones clearly referenced Dunkerson as a second victim in the altercation and gave G-Unit notice that an action by Dunkerson would be forthcoming, or, at the very least, that the January, 2005 incident should be reported. Thus, once the *Jones* action was filed in March, 2006, G-Unit's belief in non-liability for the altercation was

no longer reasonable, and it was obligated to provide notice "as soon as practicable" of the Dunkerson occurrence.

C. *Timeliness of National Fire's Disclaimer*

Although G-Unit's notice was untimely, National Fire may nonetheless be estopped from denying coverage because of its own delay in disclaiming coverage. Insurance Law § 3420(d) requires an insurance company to give written notice of a disclaimer "as soon as is reasonably possible." "[T]he moment from which the timeliness of an insurer's disclaimer is measured is the date on which it first receives information that would disqualify the claim, not the date on which it receives the insured's notice of claim." *2540 Associates, Inc. v. Assicurazioni Generali, S.p.A.*, 271 AD2d 282, 283 (1st Dept. 2000); *First Financial Ins. Co. v. Jetca Contracting Corp*, 1 NY3d 64, 68 (2003). An "insurer's failure to provide notice as soon as is reasonably possible precludes effective disclaimer, even [where] the policyholder's own notice of the incident to its insurer is untimely." *First Fin. Ins. Co.*, at 68.

National Fire accepted the defense with reservation on November 14, 2006, then denied coverage three weeks later on December 7, 2006, citing G-Unit's failure to timely notify after service of the complaint. National Fire's reservation of rights letter indicates that as of November 14, 2006, it did not know the first *Jones* action had been served in March, 2006. Subsequent emails between National Fire and G-Unit's counsel show that National Fire learned of the March, 2006 service date on November 15, 2006. National Fire's subsequent 22-day delay in disclaiming coverage was reasonable as a matter of law, especially given that the delay spanned the Thanksgiving holiday. *See, e.g., Schoenig v. North Sea Ins. Co.*, 28 AD3d 462, 463 (2d Dept. 2006) (21-day delay reasonable); *Nationwide Ins. Co. v. Lukas*, 264 AD2d 778, 779

(2d Dept. 1999) (20-day delay reasonable); *Travelers Ins. Co. v. Volmar Const. Co.*, 300 AD2d 40, 44 (1st Dept. 2002) (14-day delay reasonable).

d. *G-Unit's Additional Claims*

G-Unit's cross-claim for bad faith and punitive damages is inappropriate. "[A] private party seeking to recover punitive damages must not only demonstrate egregious tortious conduct by which he or she was aggrieved, but also that such conduct was part of a pattern of similar conduct directed at the public generally." *Rocanova v. Equitable Life Assur. Soc. of U.S.*, 83 NY2d 603, 613 (1994). G-Unit has failed to establish that National Fire's conduct was improper, much less so egregious as to warrant punitive damages. At most, G-Unit has alleged a breach of contract claim, which by itself cannot be the basis for an independent tort. *Logan v. Empire Blue Cross and Blue Shield*, 275 AD2d 187, 192 (2d Dept. 2000); *New York Univ. v. Continental Ins. Co.*, 87 NY2d 308, 316 (1995).

Finally, G-Unit's cross-claim for violation of General Business Law § 349 is unsubstantiated and, thus, meritless. Accordingly, it is

ORDERED, ADJUDGED, AND DECLARED that plaintiff National Fire's motion for summary judgment is granted; and it is further

ORDERED that defendant G-Unit's counter-claims are dismissed; and it is further

ORDERED, ADJUDGED, AND DECLARED that National Fire is not obligated to defend and indemnify G-Unit Records, Inc. and Curtis Jackson III, aka, "50-Cent," in the actions filed by Kwasi Jones, Case No. CAL05 08517, and by Richard "Zxulu" Dunkerson, Case Number CAL06 21119, in the Circuit Court for Prince George's County, Maryland.

Date: July 17, 2007
New York, New York

ENTER:

SHIRLEY WERNER KORNREICH