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

PRESENT: MARCY S. FRIEDMAN PART 57

Justice

Index Number : 601307/2006
PAV-LAK INDUSTRIES
VS
NATIONAL UNION FIRE
Sequence Number : 002
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. 002
MOTION CAL. NO. _____

this motion ~~to~~ for ~~summary judgment~~

	PAPERS NUMBERED
Notice of Motion/ ~~Order to Show Cause — Affidavits — Exhibits~~ and cross-motion ...	1, 1a, 2
Answering Affidavits — Exhibits	
Replying Affidavits	

Memo of Law MM-14

Cross-Motion: ☑ Yes ☐ No and cross-motion

Upon the foregoing papers, it is ordered that this motion is determined pursuant to this Court's accompanying decision/order dated 9-24-07.

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

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)

Dated: 9-24-07

MARCY S. FRIEDMAN J.S.C.

Check one: ☐ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK – PART 57

PRESENT: Hon. Marcy S. Friedman, JSC

PAV-LAK INDUSTRIES, INC. and COMMACK UNION FREE SCHOOL DISTRICT.,

Index No.: 601307/2006

Plaintiff(s),

- against -

DECISION/ORDER

NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA.,

Defendant(s).

In this declaratory judgment action, plaintiffs Pav-Lak Industries, Inc. ("Pav-Lak") and Commack Union Free School District seek a judgment declaring that defendant National Union Fire Insurance Company of Pittsburgh, Pa. ("National Union") is obligated to indemnify Pav-Lak and Commack as excess insureds in a personal injury action against them entitled Morgado v Commack Union Free School District et al., Suffolk County, Index No. 04605/05 ("Morgado action" or "underlying action"). National Union moves for summary judgment dismissing plaintiffs' complaint, and plaintiffs cross-move for summary judgment on their claims against National Union.

It is undisputed that plaintiffs are excess insureds under National Union's policy. National Union disclaims coverage on the ground that plaintiffs failed to give timely notice that the occurrence or underlying action was reasonably likely to involve the excess policy.

The material facts are not in dispute: The accident that is the basis of the Morgado action occurred on March 29, 2004. The Morgado action was commenced on February 18, 2005, and a bill of particulars was served in the Morgado action on or about September 13, 2005. By letter

dated January 27, 2006 and received by National Union on January 31, 2006 ("notice of claim"), Zurich American Insurance Company ("Zurich"), Pav-Lak's claims representative, notified National Union of Morgado's accident and of the underlying action and demanded indemnification under the National Union excess policy. The notice attached a copy of the summons and complaint and an incident report. It also stated, without any supporting detail: "We have recently obtained an update as to the plaintiff's injuries. We believe these injuries to be significant, and may exceed the Primary Layer of coverage." Twenty-eight days after receipt of the notice of claim, by letter dated February 28, 2006, National Union requested claims information regarding the Morgado claim from Merchants Mutual Insurance Company ("Merchants"), the primary insurer for non-party East End Concrete Corp., a subcontractor of Pav-Lak. National Union requested a copy of Merchant's file and all medical records regarding Morgado's accident. By letter dated March 1, 2006 and received by National Union on March 8, 2006, Merchants transmitted its investigative file to National Union. National Union issued its notice of disclaimer on March 24, 2006, 16 days after National Union's receipt of the investigative file, and 53 days after its receipt of Zurich's notice regarding the claim.

The standards for summary judgment are well settled. The movant must tender evidence, by proof in admissible form, to establish the cause of action "sufficiently to warrant the court as a matter of law in directing judgment." (CPLR 3212[b]; Zuckerman v City of New York, 49 NY2d 557, 562 [1980].) "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers." (Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 [1985].) Once such proof has been offered, to defeat summary judgment "the opposing party must 'show facts sufficient to require a trial of any issue of fact' (CPLR 3212,

subd. [b])." (Zuckerman, 49 NY2d at 562.)

Insurance Law § 3420(d) provides that where a liability insurer disclaims liability for an accident occurring in this State, "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." It is undisputed that this statute applies to the disclaimer at issue. (See also Zappone v Home Ins. Co., 55 NY2d 131 [1982] [predecessor of Insurance Law § 3420(d) applies to a disclaimer by an excess liability insurer].) It is also undisputed that National Union's policy requires the insured both to notify it "as soon as practicable of an Occurrence which may result in a claim under this policy" (Policy, § VI [F][1]), and "[i]f a claim is made or suit is brought against any Insured that is reasonably likely to involve this policy," to notify National Union "in writing as soon as practicable." (Id., § VI [F][2].)

It is settled that "timeliness of an insurer's disclaimer is measured from the point in time when the insurer first learns of the grounds for disclaimer of liability or denial of coverage. Moreover, an insurer's explanation [for its 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 Fin. Ins. Co. v Jetco Contr. Corp., 1 NY3d 64, 68-69 [2003] [internal quotation marks and citations omitted].) "[I]nvestigation into issues affecting an insurer's decision whether to disclaim coverage obviously may excuse delay in notifying the policyholder of a disclaimer." (Id. at 69. See also Public Serv. Mut. Ins. Co. v Harlen Hous. Assocs., 7 AD3d 421 [1st Dept 2004].) It is reasonable for an insurer to investigate before deciding whether to disclaim, at least where the grounds for the disclaimer are not evident from the face of the notice of claim or supporting documents, or where the investigation is necessary to determine whether

the insured had a reasonable excuse for its delay in giving notice of claim. (See, e.g., Public Serv. Mut. Ins. Co., 7 AD3d at 423; West 16th St. Tenants Corp. v Public Serv. Mut. Ins. Co., 290 AD2d 278 [1st Dept 2002], lv denied 98 NY2d 605; Heegan v United Intl. Ins. Co., 2 AD3d 403 [2d Dept 2003], lv denied 2 NY3d 704 [2004]; Matter of Prudential Prop. & Cas. Ins. Co. (Mathieu), 213 AD2d 408 [2d Dept 1995]. See generally First Fin. Ins. Co., 1 NY3d at 69.) Where an investigation is made of the timeliness of a notice of claim to an excess insurer, "the focus is on when the insured reasonably should have known that the claim against it would likely exhaust its primary insurance coverage and trigger its excess coverage, and whether any delay between acquiring that knowledge and giving notice to the excess carrier was reasonable under the circumstances." (See Morris Park Contr. Corp. v National Union Fire Ins. Co., 33 AD3d 763, 765 [2d Dept 2006].)

A disclaimer issued after an investigation of a plaintiff's own untimely notice will not be held untimely where the investigation was prompt, diligent, and made in good faith. (See R.C. Dolner, Inc. v My-Way Contr. Corp., 41 AD3d 185 [1st Dept 2007]; DiGuglielmo v Travelers Prop. Cas., 6 AD3d 344 [1st Dept 2004], lv denied 3 NY3d 608; 2540 Assocs., Inc. v Assicurazioni Generali, S.p.A., 271 AD2d 282 [1st Dept 2000].) A delay in commencing or completing an investigation must be explained. (See Heegan v United Intl. Ins. Co., 2 AD3d 403, supra; Farmbrew Realty Corp. v Tower Ins. Co., 289 AD2d 284 [2d Dept 2001], lv denied 98 NY2d 601 [2002].) The question of whether notice has been given within a reasonable period of time is ordinarily one of fact for the jury. (See First Fin. Ins. Co., 1 NY3d at 70; Bovis Lend Lease LMB, Inc. v Royal Surplus Lines Ins. Co., 27 AD3d 84 [1st Dept 2005]; Morris Park Contr. Corp., 33 AD3d at 764-765.) However, "[i]t is the responsibility of the insurer to explain

its delay, and an unsatisfactory explanation will render the delay unreasonable as a matter of law." (Danna Constr. Corp. v Utica First Ins. Co., 17 AD3d 622, 623 [2d Dept 2005], lv denied 5 NY3d 714. See also Bovis Lend Lease LMB, Inc. v Royal Surplus Lines Ins. Co., 27 AD3d 84, supra.)

Applying these principles to the instant case, the court holds that it was reasonable for National Union to conduct an investigation as to the timeliness of the notice of claim. As noted above, Zurich's January 27, 2006 notice of claim was accompanied by a copy of the summons and complaint in the underlying action and an incident report. However, the complaint did not contain an ad damnum clause or any specification of Morgado's injuries. The incident report stated that plaintiff hit his head and back, but also contained no specification of his injuries. (See Vierheilig Aff. in Support of Motion, Ex. C.) As noted above, the notice itself stated: "We have recently obtained an update as to plaintiff's injuries. We believe these injuries to be significant, and may exceed the Primary Layer of coverage." However, the notice contained no supporting detail for this assertion. This is therefore not a case in which the notice of claim or supporting documents provided information from which it was evident that plaintiffs had unreasonably delayed in notifying National Union of the claim.[1]

While it was reasonable for National Union to conduct an investigation, National Union fails to show that the investigation was prompt. In particular, National Union rests on the

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[1] The court rejects plaintiffs' contention that defendant made a judicial admission, on a prior motion to dismiss, that plaintiffs' notice of claim was not untimely. As defendant points out, on the prior motion, National Union argued that plaintiffs' complaint failed to allege that National Union's excess policy had been or would be triggered in the underlying action, and thus it contended that the complaint did not present a justiciable controversy. In determining the prior motion, the court, in its August 17, 2006 order, found that plaintiffs had sufficiently pled the likelihood that National Union's excess policy would be triggered in the Morgado action.

conclusory assertion that "[f]ollowing review of the preliminary materials provided by Pav-Lak's insurer, on February 27, 2006 National Union determined that certain questions were raised by the notice date, including when the Insured first knew about the loss and when the loss was reported to the primary insurer" and that it concluded that an investigation was required. (See Vierheilig Aff. in Support of Motion, ¶7.) National Union thus asserts that it made the determination to conduct the investigation 27 days after receipt of the notice of claim, and one day before it requested the primary insurer's investigative file; but it does not explain why it took 27 days to make the determination to conduct an investigation. (See Heegan v United Intl. Ins. Co., 2 AD3d 403, supra.) As the 27-day delay in commencing the investigation is unexplained, it cannot be excluded from the total 53-day period that National Union took to issue its disclaimer after receiving the notice of claim. Under well established case law, this 53-day delay in disclaiming coverage is unreasonable as a matter of law. (See, e.g., First Fin. Ins. Co. v Jetco Contr. Corp., 1 NY3d 64, supra [unexcused 48-day delay in issuing disclaimer unreasonable as a matter of law]; Bovis Lend Lease LMB, Inc., 27 AD3d at 88 ["almost 60 days" unreasonable]; West 16th St. Tenants Corp. v Public Serv. Mut. Ins. Co., 290 AD2d 278, supra; [30-day delay unreasonable]; Reyes v Diamond State Ins. Co., 35 AD3d 263 [2d Dept 2006] [50-day delay unreasonable]; Campos v Sarro, 309 AD2d 888 [2d Dept 2003] [39-day delay unreasonable].) Accordingly, National Union's motion must be denied.

Turning to plaintiffs' cross-motion, it is undisputed that plaintiffs are excess insureds under National Union's policy. It is well settled that "the insurer's failure to provide notice as soon as is reasonably possible precludes effective disclaimer, even though the policyholder's own notice of the incident to its insurer is untimely." (First Fin. Ins. Co., 1 NY3d at 67. Accord

Matter of New York Cent. Mut. Fire Ins. Co. v Aguirre, 7 NY3d 772 [2006].) In light of the holding above that Nation Union's disclaimer was untimely, even assuming arguendo that plaintiffs' notice of claim was untimely, National Union must indemnify plaintiffs in the Morgado action as excess insureds. Thus, Plaintiffs' cross-motion must be granted.

Accordingly, it is hereby

ORDERED that defendant's motion is denied; and it is further

ORDERED that plaintiffs' cross-motion is granted to the extent that it is

ORDERED, ADJUDGED, and DECLARED that defendant National Union Fire Insurance Company of Pittsburgh, Pa. is obligated to indemnify as excess insureds plaintiffs Pav-Lak Industries, Inc. and Commack Union Free School District in the underlying personal injury action against them entitled Morgado v Commack Union Free School District et al., Suffolk County, Index No. 04605/05.

This constitutes the decision and judgment of the court.

Dated: New York, New York
September 24, 2007

MARCY FRIEDMAN, J.S.C.