

Plainview Diner Inc. v Discover Prop. & Cas. Ins. Co.

2007 NY Slip Op 33659(U)

November 7, 2007

Supreme Court, Nassau County

Docket Number: 0264-06/

Judge: Geoffrey J. O'Connell

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. GEOFFREY J. O'CONNELL

Justice

TRIAL/IAS, PART 4
NASSAU COUNTY

PLAINVIEW DINER INC. D/b/a PLAINVIEW DINER,

Plaintiff(s),

INDEX No. 264/06

-against-

MOTION DATE: 8/13/07

DISCOVER PROPERTY & CASUALTY INSURANCE
COMPANY, STRATFORD AGENCY LTD.,

MOTION SEQ. No. 2-MG
3-MD
4-MD

Defendant(s).

The following papers read on this motion:

- Discover Notice of Motion/Affirmation/Exhibits
- Notice of Cross Motion/Affirmation/Exhibits
- Plaintiff Notice of Cross Motion/Affirmation/Exhibits
- Plaintiff Opposition
- Discover Reply

In this action plaintiff the PLAINVIEW DINER ("DINER") seeks a declaratory judgment stating that it is entitled to coverage under an insurance policy issued by the defendant. Defendants DISCOVER PROPERTY & CASUALTY INSURANCE ("DISCOVER") and the STRATFORD AGENCY ("STRATFORD") seek Orders dismissing the complaint pursuant to CPLR § 3211(a)(7). Plaintiff opposes.

Defendant DISCOVER claims that it properly disclaimed for the underlying incident as the plaintiff failed to notify the insurer of the potential claim in a timely manner. It is undisputed that the claim arose out of an incident allegedly occurring on March 8, 2005. In May 2005 a woman, Katherine Latanza, now deceased, brought an action against the DINER claiming that an unsafe condition caused her to fall and resulted in injuries. The defendant insurer claims that it was not notified of the incident until September 7, 2005, some six months later, which unduly prejudiced it.

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Plaintiff opposes dismissal against DISCOVER. It argues that the DINER employee who was present at the time of the fall stated that Ms. Latanza told her that she had fallen due to her medical condition. Therefore, it claims that the DINER was unaware of any potential claim. In addition, the plaintiff claims that it was not notified of the Summons and Complaint until late May, 2005 at which time it notified its insurance broker, STRATFORD, which it believed notified DISCOVER.

Counsel for DISCOVER argues that any notification to STRATFORD is insufficient to notify DISCOVER under plaintiff's policy, as STRAFORD is not an agent of DISCOVER. In the alternative, counsel argues that plaintiff's notice to STRATFORD is inadequate to be considered timely.

DISCOVER contends that there is no excuse for plaintiffs not notifying the carrier of the incident until, September, 2005, some six months after the occurrence. It claims that any delay from the date of occurrence should be considered unreasonable under the circumstances.

The Court agrees. Plaintiff claims that it did not foresee a claim against it as the patron stated that she fell due to a medical condition. However it concedes that it was served with the Summons and Complaint in May, 2005 and failed to notify DISCOVER until September, 2005. This is an unreasonable delay. *1700 Associates v. Public Service Mutual Ins. Co.*, 256 AD2d 456 (2nd Dept. 1998).

It is well settled that where an insurance policy requires the insured to provide notice as soon as practicable of an occurrence, such notice must be provided within a reasonable time under the circumstances, *Boutin v. Aetna Casualty & Surety Co.*, 264 AD2d 434 (2nd Dept 1999). Compliance with an insurance notice provision in a policy operates as a condition precedent to coverage. *White v. City of New York*, 81 NY2d 955 (1993). The insured has the burden of establishing that there was a reasonable excuse of the delay. *Lukralle v. Durso Supermarkets*, 238 AD2d 318 (2nd Dept. 1997). The failure to comply with the condition notice vitiates coverage. *Matter of Allcity Insurance Co.*, 78 NY2d 1054 (1001). An insured's belief that they would incur no liability for an occurrence and therefore had no obligation to notify their insurance carrier is not a reasonable excuse for a delay in notification. *Heydt Contracting Corp. v. American Home Assurance Co.*, 146 AD2d 497 (1st Dept. 1989).

In this instance plaintiff knew of the underlying cause of action on the date of occurrence. It did not notify even its insurance agent, STRATFORD, until either two, or four months later when actually served.

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While the law does not impose a requirement of immediate notice, it does state that timely notice is necessary. *Metropolitan Property & Cas. v. Mancuso*, 93 NY2d 487 (1999). The obligation to notify the defendant is not triggered by suit itself, but of the fact supporting a potential suit.

As to the plaintiff's claim that the defendant's disclaimer is untimely, the Court does not find this argument meritorious. Insurance Law § 3420(d) requires that written notice of a disclaimer be given as soon as is reasonably possible. In the present instance DISCOVER issued a written disclaimer within two weeks of actual notice of the claims. Such a period has been found reasonable to afford the insurer the opportunity to investigate the circumstances surrounding the claim. *Hartford Ins. Co. v. County of Nassau*, 46 NY2d 1028 (1979).

Insurance Law § 3420(d) requires that written notice of a disclaimer be given as soon as practicable. The question of whether a notice of disclaimer of liability or denial of coverage has been sent as soon as is reasonably possible is generally a question of fact which depends on all the facts and circumstances, especially the length of and reason for the delay. *Hartford Insurance Company v. County of Nassau*, 46 NY2d 1028 (1979). The question of unreasonableness becomes a question of fact, or if extreme, of law, depending on the circumstances of the case which make it reasonable for the insurer to take more or less time to make, complete, and act diligently on its investigation of its coverage. *Allstate Insurance Company v. Gross*, 27 NY2d 263 (1970). The reasonableness of any delay in disclaiming coverage must be judged from that point in time when the insurer is aware of sufficient facts to issue a disclaimer. *Generali-U.S. Brand v. Rothschild*, 744 NYS2d 159, 161 (1st Dept. 2002).

In the present action, counsel for the insurance company argues that it is clear that DISCOVER was not notified of the claims in a timely fashion, and never appeared on behalf of the DINER. The insurer argues that it is not an attempt to disclaim on the eve of trial, after knowing all of the integral facts of the case, and clearly untimely. He notes that the insurer had only shortly been in possession of all sufficient information so as not to warrant a delay in disclaiming coverage.

In the present instance the plaintiff has failed to come forward with sufficient evidence to show that its delay in disclaiming was untimely or unnecessary. There is no apparent need to uncover more pertinent information, and there is no evidence that it alerted the insured in a timely fashion of possible grounds for

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a disclaimer. *Prudential Property and Casualty Insurance Company v. Mathieu*, 213 AD2d 408 (2nd Dept. 1995).

The proof demonstrates that the information which DISCOVER needed in making its determination to disclaim, including potential witnesses to the incident, defenses by the property owner, was not in its possession for an extended time period prior to its attempt to disclaim.

Based on the proof presented, the application of the plaintiff for summary judgment is Denied and defendant DISCOVER's motion for summary judgment dismissing the Complaint as against it, is Granted. CPLR § 3212.

Based on the proof presented, STRATFORD's motion for summary judgment is Denied. Plaintiff offers evidence that its principal personally notified his insurance agent, on the date the plaintiff was served with the Summons and Complaint by LATANZA. This is denied by STATFORD's agent, who states that he was never notified until September 2, 2005. This question of fact precludes summary judgment for either STRATFORD or the plaintiff.

While counsel for STATFORD argues that this is untimely in light of the accident occurring in March, 2005, the Court finds this argument unconvincing to support summary judgment. The uncontested evidence demonstrates that on the date of LATANZA's fall, the DINER was informed that her fall was due to her medical condition. There is no indication that the Diner was made aware of any change in LATANZA's opinion or any efforts to pursue a claim by an attorney or investigator working for Latanza, until it was served with the Summons and Complaint.

In addition STATFORD's argument that it cannot be liable due to the language of DISCOVER's disclaimer letter is also without merit. DISCOVER clearly references a disclaimer on both late notice of a lawsuit and late notice of the LATANZA occurrence.

Based on the proof presented, the motion of DISCOVER is Granted. The motions of both plaintiff and STATFORD, are Denied.

It is, SO ORDERED.

Dated:

Nov 7, 2007

ENTERED
NOV 13 2007

Geoffrey J. O'Connell

HON. GEOFFREY J. O'CONNELL, J.S.C.

NASSAU COUNTY
COUNTY CLERK'S OFFICE