

**Mandel v Benn**

2007 NY Slip Op 34120(U)

December 3, 2007

Supreme Court, Nassau County

Docket Number: 0079-05/

Judge: Steven M. Jaeger

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEVEN M. JAEGER,  
Acting Supreme Court Justice

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ALLEN MANDEL,

Plaintiff,

-against-

GEORGE E. BENN, MSBA/MTA LONG ISLAND  
BUS, JOHN M. POWER, CON-KEL  
LANDSCAPING and JOHN N. VILLANI,

Defendants.

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JOHN M. POWER and CON-KEL  
LANDSCAPING,

Third-Party  
Plaintiffs,

-against-

GENERAL CASUALTY COMPANY OF  
WISCONSIN,

Third-Party  
Defendant.

TRIAL/IAS, PART 48  
NASSAU COUNTY

INDEX NO.: 10079-05

MOTION SUBMISSION  
DATE: 9/10/07

MOTION SEQUENCE  
NO. 005, 006

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The following papers read on this motion:

- Notice of Motion, Exhibits & Affirmation X
- Notice of Cross-Motion, Exhibits & Affirmation X
- Affirmation by Third Party Defendant X
- Reply Affirmation by Third Party Defendant X
- Affirmation in Reply to Third Party Defendant's Notice in  
Further Opposition to Third Party Plaintiff's Motion for  
Summary Judgment X
- Affirmation in Reply to Third Party Defendant's  
Cross Motion for Summary Judgment X

The defendants and third-party plaintiffs John M. Power and Con-Kel Landscaping (Power defendants) request leave to renew a prior determination of this court that denied the Power defendants' previous cross-motion. Upon such renewal, the Power defendants seek an order granting their previous cross-motion for summary judgment and have this Court declare General Casualty Company of Wisconsin provide insurance coverage to Power.

The third-party defendant, General cross-moves for summary judgment on the issue that General does not have a duty to indemnify or defend the Power defendants in the underlying action.

The underlying action brought by plaintiff Allen Mandel arose from alleged injuries he sustained in a motor vehicle accident when Mandel was a passenger on a bus operated by defendant MSBA/MTA Long Island Bus driven by defendant George E. Benn ("Benn"). The accident occurred on April 11, 2005 on Stewart Avenue at or near the intersection of Merrick Avenue in Westbury, N.Y. involving a collision of the vehicles of defendant John N. Villani ("Villani") and the Power defendants. Benn stated the Villani vehicle cut in front of him, causing him to turn suddenly to avoid the vehicle and hit a pole (see Exhibit G, pg. 121 annexed to Power defendants' motion). As to the Power defendants' vehicle and the Villani vehicle, Power agreed at the accident scene to pay for the damages to Villani's vehicle, which was later determined to be \$2,500. Power contends he did not know a passenger had been injured on the bus due to its impact with the pole. Power stated he never observed the bus strike any object after Power's collision with the Villani vehicle (see Exhibit F, pg. 34 annexed to the Power

defendants' motion). Power did not talk to Villani about the bus (p. 42). The police arriving at the scene did not speak to Power about the bus (p. 47, 48). Power never went over to the bus to speak with the bus driver or bus passengers (p. 48). Power did not observe the light pole that had been damaged by the bus (p. 49). Power did not see any ambulance at the scene (p. 50).

Power contends he first learned of Mandel's alleged injury approximately five (5) months after the collision when Mandel commenced the action and served Power as a defendant. Power contends he, Power, settled with Villani (see Exhibit F, pgs. 52-53 annexed to Power's motion) and felt his obligations as to the collision of April 11, 2005 were over. General contends Power should have known that a passenger on the bus had been injured when Power's vehicle struck Villani's vehicle. General notes testimony that an ambulance arrived at the scene and took Mandel off the bus to the hospital (see Exhibit H., pg. 26 annexed to Power's motion). Villani testified that he and Power were still at the scene when Mandel was taken off the bus and placed in the ambulance (see Exhibit A, pg. 49-53 annexed to the Sauer affirmation).

When a policy of liability insurance requires that notice of the occurrence be given as soon as practicable, such notice must be provided to the carrier within a reasonable period of time. The insured's failure to satisfy the notice requirement constitutes a failure to comply with a condition precedent which, as a matter of law, vitiates the contract (*Great Canal Realty Corp. v Seneca Insurance Co., Inc.*, 5 NY3d 742; *Philadelphia Indemnity Insurance Co. v Genesee Valley Improvement Corp.*, 41 AD3d 44).

A duty to give an insurer notice arises when, from the information available relative to the accident, an insured could glean a reasonable possibility of the policy's involvement (*Figueroa v Utica National Insurance Group*, 16 AD3d 616, *lv to app den.* 5 NY3d 709). The Court of Appeals has recognized that there may be circumstances that excuse a failure to give timely notice such as where the insured has a good faith belief of non-liability, the belief is reasonable (*Great Canal Realty Corp. v Seneca Insurance Co., Inc., supra*). Thus, an insured's reasonable good faith belief in non-liability may excuse a delay in notifying the insurer of an accident (*Argentina v Otsego Mutual Fire Insurance Co.*, 86 NY2d 748).

At issue is not whether the insured believes he will be ultimately found liable for the injury, but whether he has a reasonable basis for belief that no claim will be asserted against him (*Philadelphia Indemnity Insurance Co. v Genesee Valley Improvement Corp., supra*). An insured that asserts that it was justified in failing to timely notify its liability carrier of a potential claim must shoulder the burden of demonstrating the reasonableness of the proffered excuse (*RMD Produce Corp. v Hartford Casualty Insurance Co.*, 37 AD3d 328).

As noted, the transcripts of Power's testimony and those of Mandel and Villani vary. The credibility of witnesses, the truthfulness and accuracy of testimony, whether contradicted or not, and the significance of weaknesses and discrepancies are all for the trier of the facts (*Pedone v B&B Equipment Co., Inc.*, 239 AD2d 397).

From the facts in the record herein, including the way the bus avoided the other two vehicles, the testimony of Mandel indicating he did not know other vehicles had

allegedly been involved in causing the bus to hit the pole (see Exhibit H, pgs. 27, 28 annexed to Power's motion), and that Power had paid Villani for the property damage and was unaware the bus was involved in the collision, and that a passenger (Mandel) allegedly had been hurt, raises issues of fact as to whether Power had other liability in the collision.

Power raises the issue of estoppel since General hired a law firm to represent Power in the Mandel proceeding. However, the firm sought only to extend the time for Power to submit an answer, and then was directed by General to cease defending Power. This fact does not prevent General from denying representation to Power.

When an insurer defends an action on behalf of an insured with knowledge of facts constituting a defense to the coverage of the policy, the insurer is thereafter estopped from asserting that the policy does not cover the claim. However, where the insurer does not have knowledge of the insured's (alleged) breach until after the insurer has commenced defense of the action, there is no estoppel through delay where the insurer gives prompt notice upon obtaining such knowledge (*Federal Department Stores, Inc. v Twin City Fire Insurance Co.*, 28 AD3d 807). That is the situation here.

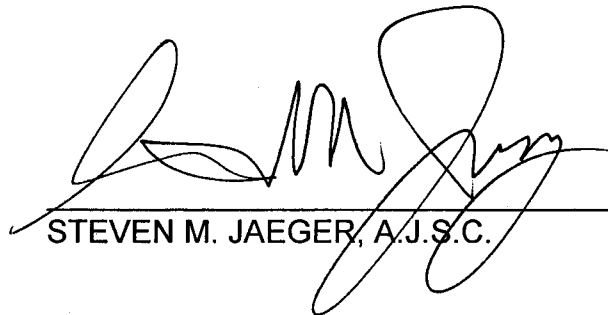
Further, estoppel cannot be used to create coverage where none exists (*Sedgwick Ave. Assoc. v Insurance co of State of Pennsylvania*, 203 AD2d 93), especially where the insured has not demonstrated prejudice by the insurer's actions (*National Indem. Co. v Ryder Truck Rental*, 230 AD2d 720). Power has not demonstrated prejudice by the counsel hired by General merely seeking an extension of time for Power to answer Mandel's complaint. Thus, there is not a valid claim of estoppel.

A motion to renew must be based upon facts not offered on the previous motion that would change the prior determination (CPLR 2221[e][2]; *Spa Realty Associates v Springs Associates*, 213 AD2d 781). Here, the Power defendants have offered deposition testimony that does not resolve the issue of "late" notice to General. There still remain issues of fact and the Court adheres to its original determination.

As to General's cross-motion, the record clearly reflects there are issues of fact as to whether Power's notice was reasonable under the circumstances and whether General has a duty to defend and indemnify Power. Therefore, the cross-motion is denied.

This shall constitute the Decision and Order of this Court.

Dated: December 3, 2007



STEVEN M. JAEGER, A.J.S.C.

**ENTERED**

DEC 14 2007

NASSAU COUNTY  
COUNTY CLERK'S OFFICE