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SHORT FORM ORDER

INDEX No. 27302-2004

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART XIII SUFFOLK COUNTY

PRESENT:
Hon. MELVYN TANENBAUM
Justice

MOTION #001-Mot D
R/D: 073007
S/D 110707

OMEGA MOULDING COMPANY, LTD.

PLTF'S/PET'S ATTY:
ANDREW D. PRESBERG, P.C.
100 Corporate Plaza, Suite B102
Islandia, New York

Plaintiff,

against -

TRAVELERS INDEMNITY COMPANY OF AMERICA and JAMES J. ROMANO.

DEFT'S/RESP'S ATTY:
(Atty for Travelers)
LAZARE POTTER GIACOVAS KRANJAC
950 Third Avenue, 27th Floor
New York, New York 10022

(Atty for Romano)
TINARI, O'CONNELL, OSBORN, LLP
320 Carleton Avenue, Suite 6800
Central Islip, New York 11722

Defendants.

Upon the following papers numbered 1 to 27 read on this motion for an order pursuant to _____ Notice of Motion/Order to Show Cause and supporting papers 1-14; Notice of Cross Motion and supporting papers 15-23 Answering Affidavits and supporting papers 24-25 Replying Affidavits and supporting papers 26-27 Other _____; ~~(and after hearing counsel in support and opposed to the motion)~~ it is,

ORDERED that this motion by defendant TRAVELERS INDEMNITY COMPANY OF AMERICA ("TRAVELERS") for an order pursuant to CPLR Section 3212 granting summary judgment dismissing plaintiff's declaratory judgment complaint declaring that "TRAVELERS" is not obligated to provide a defense or to indemnify plaintiff OMEGA MOULDING COMPANY, LTD. ("OMEGA") for liability in a personal injury action entitled JAMES J. ROMANO, Plaintiff against OMEGA MOULDING COMPANY, LTD. Defendant under Index # 19227-2004 and the cross motion by plaintiff "OMEGA" seeking an order pursuant to CPLR Section 3212 granting summary judgment against defendant "TRAVELERS" declaring that the insurer is obligated to defend and indemnify "OMEGA" in the underlying personal injury action and awarding reasonable attorneys fees are determined as follows:

On March 19, 2003 defendant JAMES J. ROMANO ("ROMANO") was struck on the head by a box containing moulding which was being removed from storage shelves by plaintiff "OMEGA's" employees. "ROMANO" was transported to a nearby hospital and treated for his injuries in the emergency room. "OMEGA" leased the premises where the incident occurred. In August, 2004 "ROMANO" commenced a personal injury action against "OMEGA" claiming "OMEGA" negligently failed to maintain the premises in a reasonably safe condition.

Beginning in March, 2002 defendant "TRAVELERS" issued a commercial general liability insurance policy to "OMEGA" insuring the leased premises. "TRAVELERS" claims that "OMEGA" first notified the insurer about the incident on October 28, 2003 more than seven months after it had occurred. On November 11, 2003, it disclaimed coverage on the basis that "OMEGA" failed to timely notify the insurer about the claim and violated policy terms by paying "ROMANO's" hospital emergency room bill and a subsequent dental bill. Plaintiff's declaratory judgment complaint seeks a judgment declaring that the insurer is obligated to defend and indemnify "OMEGA" in the underlying personal injury action.

In support of its summary judgment motion and in opposition to plaintiff's cross motion defendant "TRAVELERS" submits an affidavit from a senior technical specialist and two affirmations of counsel and claims that judgment must be granted dismissing plaintiff's complaint and declaring that the insurer has no obligation to provide coverage for "OMEGA" for the March 19, 2003 accident. Defendant contends that the "TRAVELERS" policy required that the insured provide notice of an occurrence or offense which may result in a claim "as soon as practicable" and argues that plaintiff's more than seven month delay in notifying the insurance company about the incident vitiates "TRAVELERS" obligation to provide coverage. It is defendant's position that "OMEGA's" extended delay violated the policy's unambiguous terms which merely require reasonable notice to the insurance company. Defendant asserts that there was always a reasonable possibility that the injured party would bring a claim against "OMEGA" and therefore plaintiff's claimed good faith belief that "ROMANO" never intended to commence an action is not supportable.

In opposition and in support of plaintiff's cross motion seeking summary judgment against "TRAVELERS", plaintiff submits an affidavit from "OMEGA's" president and two affirmations of counsel and claims that notice of the accident was not given to "TRAVELERS" until October, 2003 since it appeared that "ROMANO" had not sustained a significant injury. Plaintiff claims that "ROMANO" did not appear to be injured when the incident occurred and only went to the hospital emergency room at the insistence of the premises owner's principal. Plaintiff asserts that "ROMANO" returned to work the same day and never missed any days from work due to the injury. It is plaintiff's contention that "OMEGA" had no reason to believe a claim would ever be asserted by "ROMANO" with respect to the incident and that "OMEGA" promptly notified the insurer after receiving a claim letter from "ROMANO's" attorney in October, 2003. Plaintiff also claims that under the policy's terms the insurer was obligated to pay for all medical expenses regardless of fault so long as the expense was incurred and reported within one year of the date of the incident. Plaintiff contends that no basis exists to deny "OMEGA" coverage based upon plaintiff's payment of certain medical expenses incurred by "ROMANO". Plaintiff contends that under circumstances where: 1) "OMEGA" has demonstrated its reasonable belief that the underlying incident would not result in a claim, and 2) prompt notice was given the insurer once the injured party's intent to make a claim was given, summary judgment must be granted declaring that "TRAVELERS" is obligated to defend and indemnify "OMEGA" in the personal injury action and awarding plaintiff all reasonable defense expenses incurred to date.

CPLR §3212(b) states that the motion for summary judgment "shall be supported by affidavit, by a copy of the pleadings and by other available proof, such as depositions and written admission." If an attorney lacks personal knowledge of the events giving rise to the cause of action or defense, his ancillary affidavit, repeating the allegations or the pleadings, without setting forth evidentiary facts, cannot support or defeat a motion by summary judgment (OLAN v. FARRELL LINES, INC., 105 AD 2d 653, 481 NYS

2d 370 (1st Dept., 1984; aff'd 64 NY 2d 1092, 489 NYS 2d 884 (1985); SPEARMAN v. TIMES SQUARE STORES CORP., 96 AD 2d 552, 465 NYS 2d 230 (2nd Dept., 1983); Weinstein-Korn-Miller, NEW YORK CIVIL PRACTICE Sec. 3212.09)). Moreover, it is well settled that a party opposing a motion for summary judgment must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (CASTRO v. LIBERTY BUS CO., 79 AD 2d 1014, 435 NYS 2d 340 (2nd Dept., 1981).

Insurance contracts are liberally construed in favor of the insured and the Court must consider the plain language of the contract as it would be understood by an average or ordinary citizen (MILLER v. CONTINENTAL INS. CO., 40 NY 2d 675, 389 NYS 2d 565 (1976)). The insurer bears the burden of proving that the loss falls within the exclusion and that there is no reasonable interpretation of the exclusion that supports the claim of the insured (SEABOARD SUR. CO. v. GILLETTE CO., 64 NY 2d 304, 486 NYS 2d 873 (1984)).

The notice provisions set forth in the "Travelers"/"Omega" policy provide:

Duties in the Event of Occurrence, Offense, Claim or Suit:

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

(1) How, when and where the "occurrence" or offense took place;
(2) The names and addresses of any injured persons and witnesses; and
(3) The nature and location of any injury or damage arising out of the "occurrence' or offense.

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

(1) Immediately record the specifics of the claim or "suit' and the date received; and
(2) 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.

c. You and any other involved insured must:

(1) Immediately send us copies of any demands, notices, summonses or legal papers received in connection with the claim or "suit";

(2) Authorize us to obtain records and other information;

(3) Cooperate with us in the investigation or settlement of the claim or defense against the 'suit'; and

(4) Assist us, upon request, in the enforcement of any right against any person or organization which may be liable to the "insured" because of injury or damage to which this insurance may also apply.

d. No insured will, except at that insured's own cost, voluntarily make a payment, assume any obligation, or incur any expense; other than for first aid, without our consent.

e. Notice given by or on behalf of the insured, or written notice by or on behalf of the injured person or any other claimant, to any agent of ours in new York State, with particulars sufficient to identify the insured, shall be considered to be notice to us.

Notice of an "occurrence" or of an offense which may result in a claim under this insurance shall be given as soon as practicable after knowledge of the "occurrence" or offense has been reported to you, one of your executive officers (if you are a corporation), one of your partners (if you are a partnership), one of your managers (if you are a limited liability company), or an "employee" (such as an insurance, loss control or risk manager or administrator) designated by you to give such notice.

Knowledge by other "employee(s)" of an "occurrence" or of an offense does not imply that you also have knowledge.

Notice shall be deemed prompt if given in good faith as soon as practicable to your workers' compensation insurer. This applies only if you subsequently give notice to us as soon as practicable after you, one of your "executive officers" (if you are a corporation), one of your partners (if you are a partnership), one of your managers (if you are a limited liability company), or an "employee" (such as an insurance, loss control or risk manager or administrator) designated by you to give such notice discovers that the "occurrence, offense or claim may involve this policy.

The Appellate Division, Second Department in Travelers v. Worthy, 281 AD2d 411, 721 NYS2d 400 (2nd Dept., 2001) reviewed the applicable principles of law with regard to notice provisions identical to the one set forth in the policy in issue:

> Where an insurance policy, such as the one in this case, requires an insured to provide notice of an accident or loss as soon as practicable, such notice must be provided within a reasonable time in view of all of the facts and circumstances (see Merchants Mut. Ins. Co. v. Hoffman, 56 NY2d 799). Providing an insurer with timely notice of a potential claim is a condition precedent, and thus "[a]bsent a valid excuse, a failure to satisfy the notice requirement vitiates the policy" (*412 Security Mut. Ins. Co. v. Acker-Fitzsimons, 31 NY2d 436, 440). While a good-faith belief of nonliability may excuse or explain a failure to give timely notice, the insured bears the burden of demonstrating that the delay in giving notice was reasonable (see, Interboro Mut. Indem,. Ins. Co. v. Mendez, 253 AD2d 790). (ID at 411-412).

Based upon the submission of evidence by the parties significant questions of fact exist concerning the notice provided by the plaintiff sufficient to require a plenary trial. Both motions seeking summary judgment must therefore be denied. Accordingly it is

ORDERED that defendant's motion and plaintiff's cross motion each seeking an order pursuant to CPLR Section 3212 are denied, and it is further

ORDERED that this action shall be placed on the trial calendar by filing a note of issue, a certificate of readiness signed by the parties, a copy of the certification order signed by the Court and payment of all required fees on or before February 19, 2008. A certification conference shall be held on February 19, 2008 at 9:30 a.m. at the Supreme Court Trial Term Part XIII, Central Islip, NY. All parties must either attend that conference or file a written statement with the calendar clerk of this Court at 400 Carleton Avenue, Central Islip, NY 11722 certifying that the action has been placed on the trial calendar. There shall be no adjournment of this date except upon prior Court order.

Dated: January 2, 2008

MELVYN TANENBAUM

J.S.C.