

All Am. Flooring, Ltd. v Sirius Am. Ins. Co.

2008 NY Slip Op 31102(U)

April 2, 2008

Supreme Court, New York County

Docket Number: 0105901/2006

Judge: Louis B. York

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

PRESENT: **LOUIS B. YORK**
J.S.C. Justice

PART 2

Index Number : 105901/2006
ALL AMERICAN FLOORING
VS.
SIRIUS AMERICA INSURANCE
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT

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

in this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause - Affidavits - Exhibits ...

Answering Affidavits - Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

**MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM DECISION.**

FILED
APR 09 2008

**NEW YORK
COUNTY CLERK'S OFFICE**

UNFILED JUDGMENT

**This judgment has not been entered by the County Clerk
and notice of entry cannot be given based hereon. To
obtain entry, counsel or authorized representative must
appear in person at the Judgment Clerk's Desk (Room
1415).**

Dated: 4/2/08

Luy

LOUIS B. YORK J.S.C.

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate DO NOT POST REFERENCE

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

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 2**

-----X
ALL AMERICAN FLOORING, LTD.,

Plaintiff,

Index No. 105901/06

-against-

**THE SIRIUS AMERICA INSURANCE CO. and
UTC RISK MANAGEMENT SERVICES, INC.,**

Defendants.

-----X
Plaintiff moves for summary judgment in this action seeking a declaration that one or more of the defendants are contractually obligated to defend and indemnify the insured, All American Flooring, in the underlying action entitled, Rivera v. All American Flooring, Ltd, et al. Defendants, Sirius Insurance Company and its claims adjuster UTC Risk Management, cross-move for summary judgment in opposition to the motion. The main issue is whether plaintiff's delay in reporting an accident to its insurance carrier was based on a good-faith belief that it would not be liable to the injured party. For the reasons that follow, the Court denies plaintiff's motion and grants defendants' motion for summary judgment.

The underlying claim was brought by Isabel Rivera after she was allegedly injured as of result of the negligence of All American's employees who were hired to replace floor tiles in her apartment. Ms. Rivera claims that on July 2, 2004 she was struck by a falling closet door, which the plaintiff's workers had removed during the course of their work. The next day the president of All American, Brian Murray, spoke with the building's superintendant, Senad Djokovic ("Sam"). Sam informed Murray that there had been an accident in Ms. Rivera's apartment and that she had been hurt, but

she refused medical attention (Defendants' Exhibit C, Murray Deposition, p. 22-25).

Following these events, Sam made a written report of the incident, and forwarded a copy to Murray a few weeks later. The report contained the following comments:

Resident in Apt 3E Isabel Rivera was hit by a closet door in the work area inside her apt, while All American Flooring Company was doing the repair on the floor. Pain in the left hand and the shoulder (sic). Isabel Rivera refused offer by [Sam] to call the ambulance on a couple of occasions.

While All American's policy on investigating this type of incident is unclear, Murray admits that, following his phone call with Sam, he did not make any effort to follow-up on Ms. Rivera's condition or to contact her. Murray made no additional inquiries regarding the accident and presumed from his contact with Sam that Ms. Rivera had not been injured.

All American choose not to apprise defendants of any of the above events until January, 2005, when All American received written notification of Ms. Rivera's claim from her attorneys. At that time, All American forwarded the claim to its insurance broker, who forwarded it to UTC. After reviewing the claim, UTC disclaimed coverage due to late notice of the incident. The general liability policy issued by defendants required plaintiff to notify its carrier "as soon as practicable of an 'occurrence' or offense which may result in a claim."

The phrase, "as soon as practicable," is common among insurance policies and has been interpreted to require notice "within a reasonable time under all circumstances" (Security Mut. Ins. Co. of New York v. Acker-Fitzsimons Corp., 31 N.Y.2d 436, 441, 340 N.Y.S.2d 902, 906 (1972)). Further, timely notification is a condition precedent to coverage and non-compliance vitiates the policy, as a matter of

law (Great Canal Realty Corp. v. Seneca Ins. Co., 5 N.Y.3d 742, 743, 800 N.Y.S.2d 521, 522 (2005)). The failure to satisfy this condition may be excused "where the insured has a good-faith belief of non-liability, provided that belief is reasonable" (Great Canal, 5 N.Y.3d 742, 743, 800 N.Y.S.2d 521, 522).

Here, the burden of establishing the reasonableness of the excuse rests on All American (Id., at 744, 800 N.Y.S.2d at 522). The facts in the record are not analogous to those in the following cases, relied on by All American to excuse its delay. A delay of 171 days was excused based on a policyholder's reasonable belief that he would be aware of the likelihood of a claim, due to his close familial relationship with the injured party (Argentina v. Otsego Mut. Fire Ins. Co., 86 N.Y.2d 748, 631 N.Y.S.2d 125 (1995)); failure to give immediate notice was excused where there was no indication of any injury to a third party and only trivial damage to insured's own property (Kelly v. Nationwide Mut. Ins. Co., 174 A.D.2d 481, 483, 571 N.Y.S.2d 258, 259 (1st Dept., 1991)); and a 7 ½ month delay was overlooked when a young, unsophisticated policyholder genuinely believed that his oral notice to the insurance broker was sufficient (Mighty Midgets, Inc. v. Centennial Ins. Co., 47 N.Y.2d 12, 416 N.Y.S.2d 559 (1979)).

It may also be relevant on the issue of reasonableness, "whether and to what extent, the insured has inquired into the circumstances of the accident or occurrence" (Security Mut. Ins. Co. of New York v. Acker-Fitzsimons Corp., 31 N.Y.2d 436, 441, 340 N.Y.S.2d 902, 906). After being informed that Ms. Rivera had been hurt, All American made no additional inquiry into the incident and relied solely on the fact that Ms. Rivera had refused medical attention to conclude its belief of non-liability. Had plaintiff made

any attempt to a follow-up, it may have discovered that, several weeks later, Sam observed Ms. Rivera wearing a cast or what appeared to be a cast on her arm.

All American cites cases that the Court, again, finds unpersuasive on the issue of whether the insured's inquiry was sufficient to excuse a delay. Unlike the present action, the following cases involve a policyholder who had some direct contact with the injured party. In Briggs v. Nationwide Mut. Ins. Co., 176 A.D.2d 1113, 1114, 575 N.Y.S.2d 413, 414 (3rd Dept., 1991), an eight month delay was excused after the insured was aware of the nature of the injured party's medical treatment, x-ray results, and release, and requested that she contact him if she experienced any further medical problems. In Deutsch v. Paramount Ins. Co., 247 A.D.2d 272, 667 N.Y.S.2d 908, (1st Dept. 1998), a week delay was excused after plaintiffs believed they had repaired all the property damage, paid all the attendant bills and the property damage claim had been settled.

The Court cannot say that as a matter of law that plaintiff's failure to notify defendants of the occurrence on July 2, 2004 was based on a good-faith and reasonable belief that no claim would result from such events. All American had notice that Ms. Rivera was hurt. At the very least it should have followed up to see the extent of her injuries. Therefore, plaintiff's motion is denied. Nor does plaintiff raise any issue of fact regarding why the delay should be excused. Unlike 426-428 46th Street Owners, Inc. v Greater N.Y. Mutual Ins. Co., 23 A.D.3d 207, 804 N.Y.S.2d 61 (1st Dept. 2005), the relevant facts in the present action are not in dispute and do not require inquiry into the parties' credibility (See facts discussed in 426-428 46th Street Owners, Inc. v Greater N.Y. Mutual Ins. Co., (Sup. Ct., N.Y. County, July 6, 2004), aff'd 23 A.D.3d 207

(1st Dept., 2005)).

A plaintiff's reasonableness may be determined as a matter of law, where there is no excuse or mitigating factor (Paul Developers, LLC v. Maryland Cas. Ins. Co. 28 A.D.3d 443, 445, 816 N.Y.S.2d 75, 77 (2nd Dept., 2006)). All American's knowledge that Ms. Rivera was injured, but refused medical care, is not a sufficient excuse for the delay (Aetna Casualty & Surety Co. v. Lanza, 70 A.D.2d 508, 509, 415 N.Y.S.2d 859, 860 (1st Dept. 1979)). Furthermore, the "mere possibility of a claim should have alerted plaintiff to the necessity of promptly informing its insurance carrier" of its awareness of Ms. Rivera's injuries (Heydt Contracting Corp. v. American Home Assur. Co., 146 A.D.2d 497, 499, 536 N.Y.S.2d 770, 773 (1st Dept. 1989)).

Therefore, under the facts presented, All American failed to raise a triable issue of fact as to whether its delay in giving notice to its carrier was based on a reasonable, good-faith belief in non-liability (Great Canal Realty Corp. v. Seneca Ins. Co., 5 N.Y.3d 742, 800 N.Y.S.2d 521, (2005)). Accordingly, it is

ADJUDGED and **DECLARED** that defendants are not required to defend or indemnify plaintiff in the action Rivera v. All American Flooring, Ltd. et al, currently pending in New York County, under Index No. 115159/05; and it is further

ADJUDGED that plaintiff's motion for summary judgment is denied.

Dated: April 2, 2008

ENTER:



Louis B. York, J.S.C.

LOUIS B. YORK
J.S.C.