

<b>Tower Ins. Co. of New York v Joseph T. Reilly Co., Inc.</b>
2008 NY Slip Op 32986(U)
October 31, 2008
Supreme Court, New York County
Docket Number: 0110479/2006
Judge: Carol R. Edmead
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

CAROL EDMEAD

PRESENT: J.S.C.

PART 35

Justice

Index Number : 110479/2006

INDEX NO.

TOWER INSURANCE

MOTION DATE

7/2/08

vs

REILLY, JOSEPH T.

MOTION SEQ. NO.

002

Sequence Number : 002

MOTION CAL. NO.

SUMMARY JUDGMENT

is motion to/for

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits

Answering Affidavits — Exhibits

Replying Affidavits

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).

Cross-Motion: [ ] Yes [ ] No

Upon the foregoing papers, it is ordered that this motion

The instant motion (sequence 002) is decided in accordance with the accompanying Memorandum Decision. It is hereby

ADJUDGED and DECLARED that plaintiff Tower Insurance Company of New York does not have a duty to defend and indemnify defendants/third-party plaintiffs Queen of the Most Holy Rosary Roman Catholic Church at Roosevelt, and the Roman Catholic Diocese of Rockville Center, and defendants Joseph T. Reilly and Company and John J. Reilly in the underlying action entitled Julio Echegaray and Maria Vega Echegaray v Queen of the Most Holy Rosary Roman Catholic Church, at Roosevelt, Roman Catholic Diocese of Rockville Centre and Joseph T. Reilly and Company, Inc., Index No. 8009/06 (Sup Ct, Queens County; and it is further

ORDERED that counsel for plaintiff shall serve a copy of this Order with notice of entry within twenty days of entry on counsel for defendants and third-party defendants.

Dated: 10/3/08

[Signature]

J.S.C.

CAROL EDMEAD

Check one: [ ] FINAL DISPOSITION [X] NON-FINAL DISPOSITION

Check if appropriate: [ ] DO NOT POST [ ] REFERENCE

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 35

-----X  
TOWER INSURANCE COMPANY OF NEW YORK,

Plaintiff,

Index No.:  
110479/06

- against -

JOSEPH T. REILLY COMPANY, INC., JOHN J.  
REILLY, JULIO ECHEGARAY and MARIA VEGA  
ECHEGARAY, QUEEN OF THE MOST HOLY ROSARY  
ROMAN CATHOLIC CHURCH AT ROOSEVELT and  
ROMAN CATHOLIC DIOCESE OF ROCKVILLE  
CENTRE,

Defendants.

-----X  
QUEEN OF THE MOST HOLY ROSARY ROMAN CATHOLIC  
CHURCH AT ROOSEVELT and ROMAN CATHOLIC  
DIOCESE OF ROCKVILLE CENTRE,

Third-Party Plaintiffs,

Index No.:  
590829/07

- against -

LIBARDI SERVICE AGENCY, INC.,

Third-Party Defendant.

-----X  
CAROL EDMEAD, J:

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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).*

In this declaratory judgment action, plaintiff, Tower  
Insurance Company of New York (Tower) moves, pursuant to CPLR  
3212, for an order granting it summary judgment declaring that it  
has no obligation to defend or indemnify defendants/third-party  
plaintiffs Queen of the Most Holy Rosary Roman Catholic Church at  
Roosevelt (the Church), Roman Catholic Diocese of Rockville  
Centre (the Diocese), defendants Joseph T. Reilly and Company,

Inc. or John J. Reilly (collectively Reilly) in a personal injury action entitled Julio ECHEGARAY and Maria Vega ECHEGARAY v Queen of the Most Holy Rosary Roman Catholic Church, at Roosevelt Roman Catholic Diocese of Rockville Centre and Joseph T. Reilly and Company, Inc., Index. No. 8009/06, (Sup. Ct., Queens County) [Underlying Action].

Based on the following reasons, plaintiff's motion is granted.

### Background

#### General Background

Reilly is a contractor specializing in liturgical restoration, which involves restoring religious artifacts, such as mosaics, sculptures and paintings. Reilly was hired by the Church to complete a number of restoration projects, dating back to February 2004.

In May 2005, Reilly and the Church negotiated the restoration of the Church's nave, which included on-site repair of the Church's wainscoting and dentil moulding. Jade Exterior Cleaning, Inc. (Jade) was hired by Reilly to restore the interior molding at the Church. According to the proposal from Jade to Reilly, dated May 11, 2005, Jade promised to provide all labor and materials for the job including the ladders and scaffolding needed to access the Church's crown moulding (see Seltzer Aff., Exh. D). Work on the project began on February 22, 2006.

On that day, defendant Julio Echegaray (Echegaray), a Jade employee, fell off a fully-extended 24-foot extension ladder. According to ECHEGARAY, the top of the ladder was angled against an interior wall, while its base rested on wooden planks positioned lengthwise across the top of an unsecured six foot high baker's scaffold (ECHEGARAY dep., at 53, Seltzer Aff., Exh. E). When a co-worker allegedly moved the scaffolding, ECHEGARAY slipped off the ladder, falling 25 feet onto the parish floor (ECHEGARAY dep., at 60-66, 68). The ladder and scaffolding were owned by Jade (ECHEGARAY dep., at 30-34; Reilly dep., at 61-68, Seltzer Aff., Exh. B). As a result, Echegaray allegedly sustained personal injuries. His wife defendant Marie Vega alleges a claim for loss of consortium.

#### The Insurance Policy

Tower issued a general liability policy to Reilly effective July 23, 2005 to July 23, 2006 (Policy). The policy's general liability coverage part covers "those sums that the insured becomes legally obligated to pay as damages because of 'bodily injury' caused by an 'occurrence' which the policy defines as an accident (see Policy, § 1 and § 5, Aptman Aff., Exh. 1). In addition, under the policy, the insured was required to notify Tower of any occurrence that may give rise to a claim "as soon as practicable" (see Policy, Commercial General Liability Coverage Form, § 4).

Under the Policy, the Diocese and St. Therese of Lisieux, another church within the Diocese, were listed as additional insureds; however, coverage was limited with respect to liability arising out of Reilly's ownership, maintenance or use of the premises (see Policy, Additional Insured - Managers or Lessors of Premises). Under the schedule of endorsements, 50 North Park Avenue, Rockville Centre, New York was the address provided for both premises (see Policy, Schedule of Endorsements).

#### Notice of the Underlying Claims and Timing of Disclaimer

Tower first received notice of the underlying claims on May 12, 2006, after Reilly informed its insurance broker of the summons and complaint it received in the Underlying Action. The notice did not disclose when Reilly knew about the accident, thereby requiring an investigation into that issue, as well as others. Three days later, Tower assigned an investigator to the case to investigate the underlying claim. On June 8, 2006, 28 days from receiving initial notice of the claim, Tower disclaimed coverage.

#### Discussion

In order to grant summary judgment, there must be no material or triable issues of fact presented (Ayotte v Gervasio, 81 NY2d 1062 [1993]; Esteva v City of New York, 30 AD3d 212 [1st Dept 2006]). The movant must proffer admissible evidence to make a prima facie showing that establishes the cause(s) of action

"sufficiently to warrant the court as a matter of law in directing judgment" (CPLR 3212 (b); see also Alvarez v Prospect Hosp., 68 NY2d 320, 324 [1986]; Zuckerman v City of New York, 49 NY2d 557, 562 [1980]; Esteve, 30 AD3d 212).

Once the moving party has made this showing, the burden is on the opposing party to demonstrate "the existence of a factual issue requiring a trial of the action or tender an acceptable excuse for his failure so to do" (Zuckerman, 49 NY2d at 562; see also Sheridan v Bieniewicz, 7 AD3d 508 [2d Dept 2004]).

Tower argues that it is entitled to summary judgment against the Church because the Policy does not provide the Church with named or additional-insured coverage. "[I]t is well established that the party claiming insurance coverage bears the burden of proving entitlement, and, ... a party that is not named an insured or an additional insured on the face of the policy is not entitled to coverage" (Tribeca Broadway Assoc. v Mount Vernon Fire Ins. Co., 5 AD3d 198, 200 [1<sup>st</sup> Dept 2004]).

Here, the policy declarations provide that the entities entitled to additional insurance coverage were the managers and lessors located at 50 North Park Avenue, identified therein as St. Therese of Lisieux and the Diocese of Rockville Centre, not the Church. While the Church argues that Tower should not be entitled to summary judgment against it because the court has yet to decide whether the Diocese is the owner of the Church, the

Church fails to address how the ownership issue may relate to its claim for additional coverage under the policy sufficient to raise a genuine question of fact which would support its claim for coverage.

Based on the foregoing, Tower Insurance is entitled to summary judgment declaring that it has no obligation to provide a defense in the underlying action as against the Church (see International Couriers Corp. v. North Riv. Ins. Co., 44 AD3d 568 [1<sup>st</sup> Dept 2007]).

Likewise, Tower contends that it is not obligated to provide coverage to the Diocese as an additional insured because the occurrence did not happen at an insured location (cf. Adames v Nationwide Mut. Fire Ins. Co., -- AD3d --, 2008 NY Slip Op 07597 [2d Dept Oct 7, 2008]). Specifically, as noted above, the Policy lists 50 North Park Avenue, Rockville Centre, New York, as the designated premises entitled to additional insurance coverage. Tower maintains that the additional-insured coverage is limited only to liability arising out of the ownership, maintenance or use of 50 North Park Avenue, which it claims is the parish of St. Therese of Lisieux, as provided for in the Policy. The court agrees (see Greater New York Mut. Ins. Co. v United States Underwriters Ins. Co., 36 Ad3d 441, 442 [1<sup>st</sup> Dept 2007]). Therefore, Tower Insurance is also entitled to summary judgment declaring that it has no obligation to provide a defense in the

underlying action as against the Diocese.

Furthermore, Tower argues that Reilly failed to promptly notify Tower of the accident in violation of the policy's notice provision, which requires the insured to notify Tower "as soon as is practicable." Irrespective of whether Reilly gave timely notice to Tower, the court must address whether Tower timely provided notice of its disclaimer of coverage for the Underlying Action (see Matter of New York Cent. Mut. Fire Ins. Co. v Aquirre, 7 NY3d 772 [2006], citing First Fin. Ins. Co. v Jetco Contr. Co., 1 NY3d 64, 67 [2003]).

Reilly claims that Tower improperly disclaimed coverage and, therefore, summary judgment on this ground should be denied. Tower counters that the timing of its disclaimer notice was reasonable, since it investigated whether or not the underlying lawsuit was covered in light of the alleged untimeliness of Reilly's notice. Where the grounds for a disclaimer were "readily apparent before the onset of the delay", from the documents submitted to defendant (Matter of New York Cent. Mut. Fire Ins. Co., 7 NY3d 772), the defendant has no need to conduct an investigation, and, therefore, any delay in disclaiming coverage is unreasonable as a matter of law (see 2833 Third Ave. Realty Assocs. v Marcus, 12 AD3d 329 [1st Dept 2004]). However, "[i]f it is not readily apparent, the insurer has the right, albeit the obligation, to investigate but any such investigation

must be promptly and diligently conducted" (Those Certain Underwriters at Lloyds, London v Gray, 49 AD3d 1, 4 [1<sup>st</sup> Dept 2007]).

Recently, the First Department explained that the questions which must be asked in such a scenario are: "(1) what did the insurer know on th[e] date [it first receives information] about the accident and the resulting claim, and (2) did that information make it readily apparent at that time that it had the right to disclaim coverage under the policy?" (Ace Packing Co., Inc. v Campbell Solberg Assocs., Inc., 41 AD3d 12, 14-15 [1<sup>st</sup> Dept 2007]).

Here, Tower claims that it first received notice on May 12, 2005. The notice did not disclose when Reilly knew about the accident, thereby requiring an investigation into that issue, as well as others. Tower assigned an investigator to the case three days later to investigate the underlying claim. On June 8, 2006, 28 days from receiving initial notice of the claim, Tower disclaimed coverage.

As in Ace Packing, Tower, the insurer, maintains that it did not know when Reilly, the insured, learned of the accident, a "fact essential to the insurer in determining whether to disclaim" (see id. at 15). An investigation was therefore "required for an insurer in good faith to disclaim coverage under th[e] policy" (id.). Based on the foregoing, the court holds

that Tower's disclaiming coverage 28 days after receiving initial notice of the underlying claims is timely (see e.g., Wausau Business Ins. Co. v 3280 Broadway Realty Co. LLC, 47 AD3d 549 [1<sup>st</sup> Dept 2008]).

The court, therefore, turns to the issue as to whether Reilly failed to promptly notify Tower of the accident in violation of the policy's notice provision. The defendants counter that the notice provision was not breached because Reilly believed it was not liable for the accident. While the defendants claim that Reilly's testimony established that he was told that ECHEGARAY was not really hurt, Reilly testified that: (1) on the day of the accident, Jade's principal, John Guerrero, told Reilly that a Jade employee fell from a ladder, injured his arm and was hospitalized (Reilly dep. at 36-37); (2) the next day, Reilly visited the Church and again discussed the accident with the Church's bookkeeper, John T. Walsh, and Guerrero (Reilly dep. at 37). Yet, Reilly informed his insurance broker of the accident nearly three months later, after receiving the summons and complaint in the Underlying Action.

As a general rule, unexcused delays of a month or more have been held to breach a policy's notice provision as a matter of law (see Figueroa v Utica Nat'l Ins. Group, 16 AD3d 616 [2d Dept 2005] [over two months held in breach]).

While the defendants argue that Reilly had a reasonable

excuse for the delay, where, as here, the insured is aware of an occurrence resulting in an injury requiring emergency medical attention, courts have held that the insured's notification delay is inexcusable (see Tower Ins. Co. of New York v Lin Hsin Long Co., 50 AD3d 305 [1<sup>st</sup> Dept 2008]; Sorbara Constr. Corp. v AIU Ins. Co., 41 AD3d 245 [1<sup>st</sup> Dept 2007], aff'd - NY3d -, 2008 WL 4620642, 2008 NY Slip Op 07949 [Oct 21, 2008]; SBSS Realty Corp. v Pub. Serv. Mut. Ins. Co., 253 AD2d 583 [1<sup>st</sup> Dept 1998]).

As such, Tower's motion for summary judgment declaring that it is not obligated to defend or indemnify Reilly or the Diocese is granted.

In light of the above, the court need not reach the remainder of Tower's arguments.

#### Conclusion

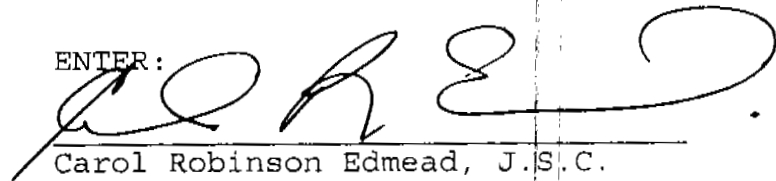
Accordingly, it is

ADJUDGED and DECLARED that plaintiff Tower Insurance Company of New York does not have a duty to defend and indemnify defendants/third-party plaintiffs Queen of the Most Holy Rosary Roman Catholic Church at Roosevelt, and the Roman

Catholic Diocese of Rockville Center, and defendants Joseph T. Reilly and Company and John J. Reilly in the underlying action entitled Julio Echegaray and Maria Vega Echegaray v Queen of the Most Holy Rosary Roman Catholic Church, at Roosevelt, Roman Catholic Diocese of Rockville Centre and Joseph T. Reilly and Company, Inc., Index No. 8009/06 (Sup Ct, Queens County).

Dated: October 31, 2008

ENTER:



Carol Robinson Edmead, J.S.C.

**UNFILED JUDGMENT**

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