[* 1] SCANNED ON 2/22/2008

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY
PRESENT: HON. MARYLIN G. DIAMOND PART 48
Justice

INDEX NO. 604393/06

QBE INSURANCE COMPANY,

MOTION DATE

Plaintiff,

MOTION SEQ. NO. 002

-against-

MOTION CAL. NO.

D. GANGHI CONTRACTING CORP. et al,

Defendant.

FILED
DEC 22 2008
COUNTY CLERK'S OFFICE
NEW YORK

Cross-Motion: [X] Yes [ ] No

Upon the foregoing papers, it is ordered that: In this action, plaintiff seeks a declaratory judgment that it is not obligated to defend and indemnify the defendants in an underlying personal injury action commenced in Supreme Court, Kings County *(see D'Ambrosi v. Ward Realty Corp. et al.*, Kings Co Index No. 39316/05). In the underlying action, Mineo D'Ambrosi, one of the defendants named herein, alleges that he was injured on January 23, 2003 while working on a construction project at Deno's Wonder Wheel Amusement Park, a facility located on the Coney Island boardwalk. Deno's retained defendant D. Gangi Contracting Corp. to be the site contractor of the project. In turn, Gangi hired D'Ambrosi's employer, Tiffany Tile and Marble, as a subcontractor.

D'Ambrosi alleges that he fell twenty feet off of a ladder, breaking his right leg and thereafter requiring four surgical procedures, including the installation and removal of hardware from his leg. One of Deno's owners, defendant Dennis Vouderis, was present at the time of the accident and saw D'Ambrosi lying on the ground and then taken by ambulance to the hospital. In fact, he went the next day to see D'Ambrosi in the hospital. Similarly, Gangi's principal, Donald Gangichiodo, was advised of the accident soon after it occurred and of the fact that D'Ambrosi had been taken to the hospital by ambulance. He, too, went to visit D'Ambrosi in the hospital soon after the accident.

The underlying action against Gangi and a number of companies and individuals affiliated with Deno's (hereafter "Deno's defendants") was commenced on December 30, 2005. The plaintiff herein, the QBE Insurance Corporation, had issued a comprehensive general liability insurance policy to Gangi which was in effect at the time of the accident. The Deno's defendants were covered under an insurance policy issued by the St. Paul's Travelers Insurance Company. In addition, Gangi allegedly agreed to name the Deno's defendants as additional insureds on its QBE policy and provided them with a Certificate of Insurance to that effect. The QBE policy provides liability coverage for sums that the insureds are legally obligated to pay as damages because of bodily injury or property damage caused by an occurrence. An occurrence is defined in the policy as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." The policy contains language requiring the insured to notify the insurers as soon as practicable of an "occurrence" or offense which may result in a claim.

On January 5, 2006, six days after the underlying action was commenced, the Deno's defendants' insurance broker, Naughton Insurance, Inc., forwarded a copy of the complaint to Gangi's insurance broker, James C. Hermann & Associates, requesting that QBE defend and indemnify the Deno's defendants, as additional insureds, in the underlying action. Hermann, in turn, forwarded the claim to QBE's agent, Hartan Brokerage, which received the letter on or about January 11, 2006 and sent it to QBE's claims handler, the Claims Service Bureau, which received the correspondence on or about January 17, 2006. This was the first notice that QBE had ever received about the January, 2003 accident.

By letter dated February 1, 2006, QBE informed the Deno's defendants that it was disclaiming

coverage on the grounds that they had failed to provide timely notice of the accident and that, in any event, there were not additional insureds under the QBE policy. A copy of this letter was also sent to Gangi, and to D'Ambrosi's counsel in the underlying action, Leav and Steinberg, LLP. On that same day, QBE sent Gangi a letter noting that a period of three years had elapsed between the accident and the notice of claim and reserved QBE's rights to disclaim on the ground of late notice pending an investigation. A copy of this letter was sent also to Leav & Steinberg. In addition, QBE sent Gangi a letter containing twelve requests for information sought in connection with this investigation. Upon its receipt on February 27, 2006 of Gangi's response to this letter, QBE sent another letter on March 1, 2006 seeking additional information. This information was received on March 27, 2006. Following a conversation between a Claims Bureau agent and Mr. Gangichiodo on March 28, 2006, QBE sent Gangi a letter, dated March 30, 2006, disclaiming coverage on the ground of late notice. Thereafter, on April 12, 2006, Leav & Steinberg sent a letter to QBE advising it of D'Ambrosi's underlying action and requesting that a claim be opened. QBE never responded to this letter. Instead, it commenced this declaratory judgment action in December, 2006.

D'Ambrosi has now moved for summary judgment seeking a declaration that QBE's March 30, 2006 disclaimer is invalid and that it is obligated to defend and indemnify Gangi and the Deno's defendants. Gangi has cross-moved for summary judgment seeking the same relief. QBE has cross-moved for summary judgment for an order declaring that it is not obligated to defend and indemnify any of the defendants herein in the underlying action.

Discussion

A. Gangi and the Deno's Defendants - - It is well settled that a notice requirement in a policy is a condition precedent to coverage and that the failure to provide such notice in a timely fashion thus vitiates the contract of insurance. *See Great Canal Realty Corp. v. Seneca Ins. Co.*, 5 NY3d 742, 743 (2005); *Ocean Partners, LLC v. North River Insurance Co.*, 25 AD3d 514, 515 (1st Dept. 2006). The duty to give notice of an occurrence arises when, from the information available relative to the accident, an insured could discern a reasonable possibility of the policy's involvement. *See Security Mut. Ins. Co. v. Acker-Fitzsimons Corp.*, 31 NY2d 436, 441 (1972); *Paramount Ins. Co. v. Rosedale Gardens, Inc.*, 293 AD2d 235, 239 (1st Dept. 2002). The insured bears the burden of proving, under all the circumstances, the reasonableness of any delay in the giving of notice. *See Argentina v. Otsego Mut. Fire Ins. Co.*, 86 NY2d 748, 749-750 (1995). In this respect, the failure to give immediate notice of an occurrence may be excused where it appears that the insured reasonably believed that no claim would be asserted against it. *See Great Canal Realty Corp. v. Seneca Ins. Co.*, 5 NY3d at 743. Relevant to the issue of reasonableness is the consideration of whether, and to what extent, the insured has inquired into the circumstances of the accident or occurrence. *See White v. City of New York*, 81 NY2d 955, 958 (1993).

Here, the court is persuaded that neither the Deno's defendants nor Gangi had a reasonable basis to believe in 2003 that D'Ambrosi would never assert a claim against them. Both Dennis Vouderis and Donald Gangichiodo were informed of the accident on the day it occurred and of the fact that D'Ambrosi had been taken to the hospital. Indeed, both of these individuals visited him at the hospital and were aware of the serious injury he had suffered to his right leg. Although Mr. Vouderis suggests that he had no reason to believe that D'Ambrosi would later assert a claim against the Deno's defendants and thus no reason to notify QBE about the incident, he nevertheless notified his own insurance broker, Naughton Insurance, about the incident within days of its occurrence and thereafter sent Naughton an accident report on January 27, 2003. Thus, Mr. Vouderis's conduct undercuts his claim that he had no reason to believe that D'Ambrosi or any other party would later bring suit against the Deno's defendants. In any event, given the fact that D'Ambrosi was a construction worker who fell from a height on Deno's property and that he had been taken to the hospital, some further inquiry should have been made to support a decision not to report the occurrence to QBE. *See Philadelphia Indem. Ins. Co. v. Genesee Val. Improvement Corp.*, 41 AD3d 44, 46-47 (4th Dept. 2007); *Zadrima v. PSM Ins. Cos.*, 208 AD2d 529, 530 (2nd Dept. 1994). Since no such further inquiry was ever made, the court concludes that the Deno's defendants did not have a reasonable basis for believing that D'Ambrosi would never assert a claim against them for his injuries. *See Tower Ins.*

Co. v. Lin Hsin Long Co., 50 AD3d 2008 305 (1st Dept 2007). Their three-year delay in notifying QBE of the accident was thus unreasonable as a matter of law.

As to Gangi, its principal, Donald Gangichiodo, claims that his failure to give QBE notice of the incident was attributable to the fact that D'Ambrosi allegedly told him in the hospital that the accident had nothing to do with Gangi and that he had no reason to worry. This statement was hardly a promise not to sue and does not provide a reasonable excuse for Gangichiodo, an experienced construction manager, not to notify his insurer about an incident involving a serious injury to a worker. Indeed, Gangichiodo has not even suggested that he ever followed-up that conversation with a later discussion with D'Ambrosi about the incident and about D'Ambrosi's intentions. His three-year delay in notifying QBE of the accident was also unreasonable as a matter of law.

Faced with their unexcused three-year delay in notifying QBE about a serious accident which occurred on their construction site, the Deno's defendants and Gangi each argue, respectively that, in fact, the notice requirement in the QBE policy was never triggered between 2003 and 2006. In making this argument, all of these defendants rely on a provision in the QBE policy which states that knowledge of an occurrence by one of the insured's agents, servants or employees "shall not in itself constitute knowledge by you unless the Corporate Risk Manager of your corporation shall have received notice of such occurrence from its agent, servant or employee." The Deno's defendants argue that although Dennis Vourderis testified at his deposition that he was their risk manager, they do not actually have a corporate risk manager. They suggest that in the absence of any such risk manager, knowledge of the incident cannot be imputed even if one of their officers, Dennis Vourderis, was aware of the accident. As to Gangi, it argues that it has a Corporate Risk Manager and that since Donald Gangichiodo never informed her of the accident, it cannot be charged with knowledge thereof. Thus, even though Donald Gangichiodo is Gangi's sole officer and shareholder, Gangi argues that his knowledge of the incident does not constitute knowledge by the corporation. These arguments are without merit. Clearly, the provision at issue is intended to protect a company against the failure of an employee or agent to report an accident to the company's management. The defendants' contrary interpretation of the provision makes little sense. Indeed, it would be absurd to conclude that knowledge of an occurrence by an owner or officer of a company, especially, as here, a small company, could somehow not be imputed to the company. Notably, the defendants have not cited any case where the knowledge of someone who actually runs a company about an incident is not imputed to the company for insurance purposes.

In claiming that the notice provision of the QBE policy was never triggered prior to January, 2006, the Deno's defendants and Gangi each make an additional argument. First, the Deno's defendants argue that, as additional insureds, they were not obligated under the policy to provide QBE with notice of an occurrence. According to the Deno's defendants, the notice provision in the policy only places this obligation on "you" and "you" is defined elsewhere in the policy as the named insured. Thus, they argue that only Gangi, the company which procured the policy, is obligated to notify QBE of an occurrence. The problem with this argument is that even if the policy is construed as specifying that only Gangi is required to provide notice of an occurrence, it is nevertheless well settled that the duty to give reasonably prompt notice as a condition of recovery is implied in all insurance contracts and is applicable to an additional insured. *See 23-08-18 Jackson Realty Assocs. v. Nationwide Mutual Ins. Co.*, 53 AD3d 541542-543 (2nd Dept 2008); *Structure Tone v. Burgess Steel Products Corp.*, 249 AD2d 144, 145 (1st Dept 1998); *American Manufacturers Mutual Insurance Co. v. CMA Enterprises, Ltd.*, 246 AD2d 373 (1st Dept. 1998).

As to Gangi, its argument is based on the fact that the policy requires that notice of an occurrence be given "as soon as practical" rather than "as soon as practicable." According to Gangi, even if it was "practicable," i.e., feasible, to have given QBE notice of the occurrence in 2003, it was not "practical," i.e., useful or sensible, to have done so. This argument is also without merit. Practically speaking, it would have been entirely sensible and useful for Gangi to have given its insurer prompt notice of the accident so that QBE could have investigated the matter while the incident was still relatively recent. In any event, the courts have treated the phrases "as soon as practicable" and "as soon as practical" interchangeably in the context of determining whether notice was timely and this court sees no reason to do otherwise. *See Those*

Certain Underwriters at Lloyd's, London v. Gray, 49 AD3d 1, 6 (1st Dept 2007); *Safer v. Govt Employees Ins. Co.*, 254 AD2d 344 (2nd Dept 1998); *Ambra v. Awad*, 2007 WL 2409600 * 3 (Sup Ct Nassau Co).

Finally, Gangi argues that the plaintiff's March 30, 2006 disclaimer was ineffective due to untimeliness. Under section 3420(d) of the Insurance Law, an insurer which wishes to disclaim liability or deny coverage for death or bodily injury must "give written notice as soon as is reasonably possible of such disclaimer or denial of coverage." A failure by the insurer to give such prompt notice precludes an effective disclaimer or denial unless the delay was justifiable. *See Hartford Ins. Co. v. County of Nassau*, 46 NY2d 1028, 1029 (1979). One of the justifiable reasons for a delay is that the insurer needed to obtain additional facts in order to determine whether the claim is covered. *See Mount Vernon Fire Ins. Co. v. City of New York*, 236 AD2d 296, 297 (1st Dept 1997). Here, QBE responded to Gangi's notice of the underlying action within three weeks of its receipt. As already noted, by letter dated February 1, 2006, QBE advised Gangi that it was reserving its rights to disclaim on the ground of late notice pending an investigation. This response was certainly timely and Gangi does not argue otherwise. Rather, Gangi argues that the investigation, which resulted in a disclaimer letter issued on March 30, 2006, was inexcusably lengthy. The court disagrees. Gangi does not deny that it failed to respond to QBE's February 1, 2006 letter seeking information until on or about February 23, 2006. Upon its receipt from Gangi of this letter on February 27, 2006, QBE sent another letter two days later seeking additional information. Gangi does not deny that it did not respond to this letter until March 24, 2006. Nor does Gangi deny that QBE disclaimed coverage based upon late notice two days after a claims agent was first told by Donald Gangichiodo that he was aware of the underlying accident on the day of its occurrence. Thus, much of the delay was attributable to Gangi's failure to promptly respond to QBE's inquiries. Indeed, once it received the requested information from Gangi, QBE acted promptly. Gangi, however, argues that the three-month delay was unnecessary because QBE never asked when Gangi's Risk Manager first learned of the accident. According to Gangi, if QBE had asked this question, it would have determined early on that there was no basis to disclaim since the Risk Manager was not aware of the accident until the commencement of the underlying action. This argument is without merit. As the court has already found, Donald Gangichiodo's knowledge is imputed to the company and the issue of when the Risk Manager first learned of the occurrence is thus irrelevant.

B. D'Ambrosi - - On his motion for summary judgment, D'Ambrosi argues that OBE is obligated to provide coverage to the defendants based on his independent notice of claim which his counsel, Leav & Steinberg, sent to QBE on April 12, 2006. Under Insurance Law § 3420(a)(3), an injured party has an independent right to provide an insurance carrier with written notice of an accident and is not charged vicariously with the insured's delay in providing such notice. *See Becker v. Colonial Coop. Ins. Co.*, 24 AD3d 702, 706 (2nd Dept 2005); *Lauritano v. American American Fid. Fire Ins. Co.*, 3 AD2d 564, 568 (2nd Dept 1957), *aff'd*, 4 NY2d 1028 (1958). However, in order to rely on this provision, the injured party is required to demonstrate that he or she acted diligently in attempting to ascertain the identity of the insurer, and thereafter expeditiously notified the insurer. *Steinberg v. Hermitage Ins. Co.*, 26 AD3d 426, 428 (2nd Dept 2006). *See also Becker v. Colonial Coop. Ins. Co.*, 24 AD3d at 704-705. Here, as already noted, on February 1, 2006, QBE sent D'Ambrosi's counsel, Leav & Steinberg, a copy of its disclaimer letter to the Deno's defendants and a copy of its reservation of rights letter to Gangi. Although, on D'Ambrosi's initial motion papers, Edward A. Steinberg has submitted an affirmation in which he states that he was unaware that QBE was Gangi's insurer until his receipt of QBE's March 30, 2006 disclaimer letter to Gangi, he has not submitted any reply in which he denies that his firm received the February 1, 2006 letter almost two months earlier. The court must therefore assume that Leav & Steinberg knew or should have known in early February, 2006 of QBE's identity and address. Since D'Ambrosi failed to provide QBE with notice of D'Ambrosi's claim until more than two months later and has not offered the court any excuse for this failure, the court must conclude that D'Ambrosi's notice was untimely. *See Steinberg v. Hermitage Ins. Co.*, 26 AD3d at 428.

D'Ambrosi also argues that QBE is estopped from raising his alleged untimely notice as a defense since its March 30, 2006 disclaimer was based solely on Gangi's untimely notice and failed to mention that

D'Ambrosi had yet to provide QBE with notice of his claim. It is true that where the insurer receives a notice of claim from the injured party before it receives such a notice from the insured, its disclaimer letter based on untimely notice will be ineffective with respect to the injured party unless it specifies that the injured party's notice was untimely. *See Gen. Acct. Ins. Group v. Cirucci*, 46 NY2d 862, 864 (1979); *Vacca v. State Farm Ins. Co.*, 15 AD3d 473 (2nd Dept 2005). However, where, as here, the insured is the first to notify the carrier, the disclaimer letter need not mention that the injured party also failed to give timely notice since "any subsequent information provided by the injured party is superfluous for notice purposes." *Ringel v. Blue Ridge Ins. Co.*, 1293 AD2d 460, 462 (2nd Dept 2002). *See also Steinberg v. Hermitage Ins. Co.*, 26 AD3d at 428; *Rochester v. Quincy Mutual Fire Ins. Co.*, 10 AD3d 417, 418 (2nd Dept 2004). Although the Fourth Department has issued two decisions in which it expressed disagreement with this line of Second Department decisions and held that the disclaimer must mention the injured party in order to be effective, *see Utica Mutual Ins. Co. v. Gath*, 265 AD2d 805 (4th Dept 1999) and *Wraight v. Exchange Ins. Co.*, 234 AD2d 916 (4th Dept 1996), it is far from clear in these cases that the Fourth Department would impose such a requirement where, as here, the disclaimer was issued before the injured party even provided notice to the insurer. At the very least, this court agrees with QBE that the disclaimer need not mention the injured party's failure to give timely notice where the disclaimer is issued before such notice is ever given.

Since neither D'Ambrosi, Gangi or the Deno's defendants gave QBE timely notice of the underlying incident and since QBE's disclaimer was timely and proper, the plaintiff is entitled to a declaration that it is not obligated to defend or indemnify any of the defendants in the underlying action.

Accordingly, it is hereby declared that plaintiff is not obligated to defend and indemnify any of the defendants in the underlying action.

The Clerk Shall Enter Judgment Herein

MGD

Dated: 12/9/08

MARYLIN G. DIAMOND, *J.S.C.*

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