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

J.T. MAGEN,

Plaintiff,

- v -

HARTFORD INSURANCE COMPANY et al.,

Defendants.

INDEX NO. **113095/06**

MOTION DATE

MOTION SEQ. NO. 001

MOTION CAL. NO.

Cross-Motion: [X] Yes [ ] No

Upon the foregoing papers, it is ordered that: This is a declaratory judgment action in which the plaintiff J.T. Magen seeks an order declaring that defendant Hartford Insurance Company owes it and nonparties The New York City Industrial Development Agency ("IDA") and The Magen David Yeshiva ("Yeshiva") a defense and indemnification with respect to an underlying lawsuit which was brought against them in Supreme Court, Kings County by Richard and Ellen Seifert (*Seifert v. The New York City Industrial Development Agency et al.*, Kings Co. Index No. 14714/05). The plaintiff also seeks a judgment declaring that the Hartford policy is primary to any other policy covering J.T. Magen and that Hartford is obligated to reimburse it for the expenses incurred in the underlying action.

The underlying action was commenced on or about May 9, 2005. The plaintiffs in that action allege that Richard Seifert, an employee of William Erath & Sons, was injured in an accident on July 6, 2004 while working at a construction site owned by IDA and Yeshiva. J.T. Magen was the general contractor on the construction project and Erath was a subcontractor. At the time of the accident, J.T. Magen was the named insured under a commercial general liability policy issued by the St. Paul Traveler's Insurance Company. In addition, J.T. Magen, along with IDA and Yeshiva, were named as additional insureds under a policy which Hartford had issued to Erath.

By letter dated June 24, 2005, St. Paul Travelers advised Hartford of the underlying action and requested that Hartford defend and indemnify J.T Magen, IDA and Yeshiva as additional insureds under the policy which Hartford had issued to Erath. By letter dated August 10, 2005, Harford contended that St. Paul's tender letter had failed to include a copy of the summons and complaint in the underlying action and requested a copy. Although it claimed that a copy of the summons and complaint had been included in its tender letter, St. Paul's nevertheless mailed Hartford another set of the pleadings on August 16, 2005. Fifty-one days later, by letter dated October 6, 2005, Hartford informed St. Paul that it was disclaiming coverage on the ground that J.T. Magen, IDA and Yeshiva had failed to comply with the policy requirement that they provide notice "as soon as possible" of any "occurrence" which may result in damages covered under the policy, even if no demand has been made against them. A copy of the disclaimer letter was also sent to the additional insureds. This declaratory judgment action then followed.

Hartford has now moved for summary judgment dismissing the complaint. J.T. Magen has cross-moved for summary judgment granting it the declaratory relief sought in the complaint.

Discussion

As already noted, by letter dated October 6, 2005, Hartford disclaimed coverage on the ground that plaintiff, IDA and Yeshiva failed to comply with the policy requirement that they provide notice "as soon as possible" of any "occurrence" which may result in damages covered under the policy. It is well settled that where a policy contains such a requirement, notice must be provided within a reasonable time under all of the circumstances and the burden is on the insured to show that there was a reasonable excuse for any delay. *See SSBSS Realty Corp. v. Public Service Mutual Insurance Co.*, 253 AD2d 583, 584 (1st Dept

1998); *Lukralle v. Durso Supermarkets*, 238 AD2d 318, 319 (2nd Dept. 1997). This notice requirement is a condition precedent to coverage and, absent a valid excuse, the failure to satisfy the notice requirement vitiates the policy. *See Travelers Ins. Co. v. Volmar Construction Co.*, 300 AD2d 40, 42 (1st Dept 2002). In moving for summary judgment, Hartford argues that, as a matter of law, J.T. Magen's 11-month delay in notifying it of the Seifert accident was unreasonable because plaintiff has failed to proffer a valid excuse. *Id.* at 43. *See also Serravilo v. Sterling Ins. Co.*, 261 AD2d 384, 385 (2nd Dept 1999); *Safer v. Govt. Employees Ins. Co.*, 254 AD2d 344, 345 (2nd Dept 1998).

In cross-moving for summary judgment, J.T. Magen contends that Hartford is precluded from disclaiming coverage because its delay in doing so was unreasonable as a matter of law. The court agrees. Under section 3420(d), 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. *See Hartford Ins. Co. v. County of Nassau*, 46 NY2d 1028, 1029 (1979). This provision only applies to an insurer's denial of liability based upon a policy exclusion without which the claim would otherwise be covered. *See Matter of Worcester Ins. Co. v. Bettenhauser*, 95 NY2d 185, 188-89 (2000). The question of whether a notice of disclaimer has been sent "as soon as is reasonably possible" is usually a question of fact which depends on all the circumstances, including the length of the delay and the reason for the delay. *See Hartford Ins. Co. v. County of Nassau*, 46 NY2d at 1030. One of the justifiable reasons for the 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). Where the insurer fails to provide any valid justification for the delay, a delay of even one month is, as a matter of law, unreasonable. *See Hartford Ins. Co. v. County of Nassau*, 46 NY2d at 1030; *Bovis Lend Lease LMB, Inc. v. Royal Surplus Lines Ins. Co.*, 27 AD3d 84 (1st Dept 2005).

Here, Hartford has not made any attempt to justify its 45-50 day delay in disclaiming coverage of the underlying accident. Rather, it argues that section 3420(d) is inapplicable since the tender letter was from an insurer and the statute does not require a prompt response to claims asserted by other insurers.

It is well settled that section 3420(d) is inapplicable to a request for pro rata contribution between coinsurers. *See Tops Markets, Inc. v. Maryland Casualty*, 267 AD2d 999, 1000 (4th Dept 1999); *Thomson v. Power Auth of State of New York*, 217 AD2d 495, 497 (1st Dept 1995). In *Bovis Lend Lease LMB, Inc. v. Royal Surplus Lines Ins. Co.*, 27 AD3d at 84, the First Department extended this rule to an insurer's request for a full defense and indemnity. However, in doing so, the court distinguished between an insurer's own claim for a defense and indemnity and a letter which an insurer writes on behalf of its insured to another insurer asking that the insured be provided with a defense and indemnity. Indeed, in *Bovis*, the First Department specifically found that that the disclaimer letter which was issued in response to an insurer's tender of a defense and indemnity on behalf of its two insureds was untimely under section 3420(d) and that the issue of whether the disclaimer letter was substantively valid therefore need not be reached with respect to the two insureds. *Id.* at 84.

Here, it is clear that St. Paul's tender letter of June 24, 2005 was sent on behalf of J.T. Magen, IDA and Yeshiva seeking coverage for them with respect to the underlying action. Indeed, the fact that Hartford, in responding to the tender letter, sent a copy of its disclaimer to its additional insureds, as well as to St. Paul, certainly suggests that it recognized that the tender letter from St. Paul had been sent on the additional insureds' behalf. Moreover, unlike *Bovis*, where one of the plaintiffs seeking declaratory relief was an insurer, the only plaintiff in this action is J.T. Magen, which seeks a declaration that the Hartford policy affords it, IDA and Yeshiva primary coverage for the claims asserted against them in the underlying action and that it is entitled to reimbursement from Hartford for the expenses it has incurred. No relief is sought by or on behalf of St. Paul.

The court therefore concludes that Hartford's disclaimer letter was untimely and that, as a result, it is precluded under section 3420(d) from disclaiming coverage on the ground that it was not given notice

of the accident within a reasonable time of the occurrence.

Accordingly, Hartford's motion for summary judgment is hereby denied and the plaintiff's cross-motion is granted. In doing so, the court notes that Hartford has not suggested that its policy is not otherwise primary to St. Paul's policy or any other policy covering the same risk. If it wishes to assert such an argument, it should promptly do so on a motion to renew. Otherwise, the parties should settle judgment.

ENTER ORDER

MGD

Dated: 1/7/08

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

Check one: [X] FINAL DISPOSITION

[] NON-FINAL DISPOSITION