SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND DCM PART 3

Index No.:103777/2006
Motion No.:001

R&L RICHMOND AVE. CORP.,

Plaintiff

against

PUBLIC SERVICE MUTUAL INSURANCE COMPANY

Defendants

DECISION & ORDER

HON. JOSEPH J. MALTESE

The following items were considered in the review of this motion for summary judgment.

Papers	Numbered
Notice of Motion and Affidavits Annexed	1
Order to Show Cause	
Answering Affidavits	2
Replying Affidavits	3
Exhibits	Attached to Papers

Defendant's motion for summary judgment pursuant to CPLR § 3212 is denied in its entirety.

Facts

This is an action arising out of a slip and fall that allegedly occurred at or near plaintiff's place of business on or about December 4, 2005. It is alleged that Nilda Velasquez ("Velesquez") fell down a stairs providing ingress and egress to the shopping center in which plaintiff was a tenant. The fall was allegedly caused by ice or snow left on the stairs. At the time of the alleged incident plaintiff maintained an insurance policy with the defendant. Plaintiff received a letter from Nilda Velasquez's attorney, Philip J. Sporn ("Sporn"), on December 19, 2005. Plaintiff admits that it received said letter. However, plaintiff asserts that it believed that it was not liable for the injury under the terms of its lease agreement and forwarded the letter to its landlord, Holiday Plaza, LLC for consideration. In addition, Robert Mignosi ("Mignosi"), an officer from the plaintiff corporation, contacted Nilda Velasquez's attorney and advised him that he should seek recovery from the landlord. Mignosi avers that after this conversation he believed that the matter was concluded with respect to plaintiff.

On or about August 1, 2006, Velazquez through her attorney Sporn served plaintiff with a Summons and Complaint for injuries arising out of the alleged slip and fall down the stairs. Plaintiff then forwarded the Summons and Complaint to the defendant through its insurance agent the Demetriou Group. On or about September 13, 2006 defendant denied coverage of the claim on the basis that plaintiff failed to provide timely notice.

Defendant now moves for summary judgment seeking an order dismissing plaintiff's complaint. Defendant argues that plaintiff's failure to notify it in a timely manner constituted a failure to meet a condition precedent in its contract; defendant asserts that it is absolved of any duty defend plaintiff in the underlying cause of action brought by Velasquez.

Plaintiff opposes defendant's motion arguing that an issue of fact exists and it is therefore improper to grant summary judgment.

Discussion

A motion for summary judgment must be denied if there are "facts sufficient to require a trial of any issue of fact (CPLR §3212[b]). Granting summary judgment is only appropriate where a thorough examination of the merits clearly demonstrates the absence of any triable issues of fact. "Moreover, the parties competing contentions must be viewed in a light most favorable to the party opposing the motion".[1] Summary judgment should not be granted where there is any doubt as to the existence of a triable issue or where the existence of an issue is arguable.[2] As is relevant, summary judgment is a drastic remedy that should be granted only if no triable issues of fact exist and the movant is entitled to judgment as a matter of law.[3] On a motion for summary judgment, the function of the court is issue finding, and not issue determination.[4] In making such an inquiry, the proof must be scrutinized carefully in the light most favorable to the party

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[1] *Marine Midland Bank, N.A., v. Dino*, et al., 168 AD2d 610 [2d Dept 1990].

[2] *American Home Assurance Co., v. Amerford International Corp*., 200 AD2d 472 [1st Dept 1994].

[3] *Rotuba Extruders v. Ceppos,,* 46 NY2d 223 [1978]; *Herrin v. Airborne Freight Corp.,* 301 AD2d 500 [2d Dept 2003].

[4] *Weiner v. Ga-Ro Die Cutting,* 104 AD2d 331 [2d Dept 1984]. *Aff'd* 65 NY2d 732 [1985].

opposing the motion.

The general rule is that " . . . [a]n insurance carrier is not obligated to pay for a loss if the insured does not provide timely notice of the underlying occurrence."[5] Defendant's primary arguments are that: 1) the plaintiff was required to notify it of the Velasquez action with in a reasonable amount of time;[6] and 2) that plaintiff's late notice is not excusable, because according to defendant plaintiff's excuse is not reasonable as a matter of law.

In support of its claim defendants cites two Appellate Division, First Department cases *SSBSS Realty Corp. v. Public Service Mutual Ins. Co.*[7] and *Heydt Contracting Corp. v. American Home Assur. Co;*[8] and a Second Department case, *Rondale Building Corp. v. Nationwide Prop. & Cas. Ins. Co.*[9]

The *Heydt* case is distinguishable from the case presently before this court. First, procedurally, the vice-president of the plaintiff corporation submitted to an examination before trial. From that testimony defendant learned that the plaintiff believed that the damages would be paid by other third parties. The plaintiff in *Heydt* therefore, did not inform its insurance carrier for 131 days about the incident.

In the same vein, the *SBSS* case is also distinguishable from the matter currently before the court. In that case, the plaintiff corporation had knowledge that an individual had sustained injuries on its property. Additionally, representatives of the plaintiff corporation readily observed the cause of injuries to the individual. The most important distinguishing fact from the case at bar is that the officers of the plaintiff corporation in *SBSS* made the determination that a claim would not be brought by the individual that sustained injuries on its property even though " . . . a relative stranger suffered an injury as a result of a clearly discernible condition on the

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[5] *St. James Mechanical, Inc. v. Royal & Sunalliance*, 44 AD3d 1030 [2d Dep't. 2007].

[6] *Great Canal Realty Corp. v. Seneca Ins. Co.*, 5 NY3d 742 [2005].

[7] 253 AD2d 583 [1998].

[8] 146 AD2d 487 [1989].

[9] 1 AD3d 584 [2d Dep't. 2003].

insured's property, and had to be taken away in an ambulance to a hospital."[10]

Similarly, the Appellate Division, Second Department case cited by defendant in support of their argument, *Rondale Building Corp. v. Nationwide Property and Casualty Insurance Company*,[11] is also distinguishable from the case before this court. In that case, the insured plaintiff corporation observed a dog that was kept on its property attack an individual on its property. The victim of the dog attack was subsequently removed from its property by ambulance and hospitalized for three days. In that case the plaintiff corporation only notified the defendant insurance company several years after the incident when it was served with a Summons and Complaint.

In the present matter, an officer from the plaintiff has yet to be deposed with respect to its reasoning regarding why it did not contact the defendant sooner. More importantly, unlike the plaintiff in *Heydt, SBSS*, and *Rondale* an officer of the plaintiff corporation in the present action avers that he did not notify the defendant because a conversation with the Velasquez's attorney led him to believe that the matter was conclude with respect to the plaintiff corporation.

The insured may be absolved of the consequences of failing to timely notify their insurance carrier if it can be shown that the insured " . . . Does not know about the accident or has a good-faith believe in nonliability."[12] Where notice is required the ". . . insured's belief in nonliability 'must be reasonable under all the circumstances, and it may be relevant on the issue of reasonableness, whether and to what extent, the insured inquired into the circumstances of the accident or occurrence."[13]

In the case presently before the court, defendant made a prima facie showing of entitlement as a matter of law based on the plaintiff's eight month delay in reporting the occurrence to the insurance carrier. However, the plaintiff raised a triable issue of fact as to whether the delay was reasonably based on a good-faith belief in nonliability.

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[10] 253 AD2d at 585.

[11] 1 AD3d 584 [2003].

[12] *St. James Mechanical, Inc. v. Royal & Sunalliance*, 44 AD3d at 1031.

[13] *Id.*

It is the finding of this court that triable issues of fact exist with respect to the reasonableness of the plaintiff's failure to notify defendant until August 2006.

Conclusion

As triable issues of fact exist the defendant is not entitled to a finding of summary judgement. At this early stage it is impossible for this court to state with absolutely certainty that the plaintiff's excuse for not notifying the defendant about Velasquez's fall sooner than August 2006 is unreasonable as a matter of law. As such the defendant's motion for summary judgment is denied in its entirety.

Accordingly, it is hereby:

ORDERED, that the defendant's motion for summary judgment dismissing the plaintiff's complaint is denied in its entirety; and it is further

ORDERED, that all parties return to DCM 3 at **9:30AM on March 11, 2008** for a compliance conference.

ENTER,

DATED: February 25, 2008

Joseph J. Maltese
Justice of the Supreme Court