

**Tower Ins. Co. of N.Y. v Red Rose
Restaurant**

2009 NY Slip Op 30221(U)

January 30, 2009

Supreme Court, New York County

Docket Number: 109554/07

Judge: Doris Ling-Cohan

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PRESENT: Hon. Doris Ling-Cohan

PART 36

Index Number : 109554/2007

TOWER

VS.

RED ROSE

SEQUENCE NUMBER : 001

SUMMARY JUDGMENT

INDEX NO. 109554/07

MOTION DATE _____

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

this motion to/for Summary judgment

PAPERS NUMBERED

1, 2

3, 4, 5, 6

7

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 and cross motions are disposed of in accordance with the attached memorandum decision.


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 1492).

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

Dated: 1/30/09

HON. DORIS LING-COHAN



J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 36

----- X

TOWER INSURANCE COMPANY OF NEW YORK,

Plaintiff,

Index No. 109554/07

-against-

Motion Seq. No. 001

RED ROSE RESTAURANT, ANNA ROMANO,
ANTONIO ROMANO, MARYANN PELUSO,
GABRIEL PELUSO,

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk
and the date of entry cannot be served in person. To
obtain entry, counsel or authorized representative must
appear in person at the Judgment Clerk's Desk (Room
141B)
Defendants.

----- X

DORIS LING-COHAN, J.:

Plaintiff, Tower Insurance Company of New York ("Tower"), moves for an order pursuant to CPLR 3212 granting summary judgment declaring that it has no obligation to defend or indemnify Red Rose Restaurant, Inc., Anna Romano or Antonio Romano (collectively, the "Red Rose Defendants") in the underlying action entitled *Maryann Peluso and Gabriel Peluso v Red Rose Restaurant, Inc., Anna Romano, and Antonio Romano*, pending in the Supreme Court of the State of New York, Kings County, Index No. 10799/07.

The Red Rose Defendants cross-move for an order: (i) dismissing the complaint with prejudice, pursuant to CPLR 3211(a)(7) on the ground that it fails to state a cause of action; (ii) granting them summary judgment pursuant to CPLR 3211(c) dismissing the complaint as a matter of law; (iii) directing entry of judgment in their favor; and (iv) declaring that Tower should defend and indemnify them in the underlying action. Defendants Maryann and Gabriel Peluso cross-move for an order striking Tower's complaint, pursuant to CPLR 3126(3).

In this action, Tower is seeking a judgment declaring that it has no obligation to defend or indemnify its insureds, the Red Rose Defendants, in the underlying personal injury action brought by Maryann Peluso ("Peluso") and her husband Gabriel because the Red Rose Defendants failed to notify Tower of Peluso's accident as soon as practicable. In the underlying action, Peluso is seeking damages for personal injuries allegedly sustained on February 26, 2006 when she tripped and fell on an exterior stairway entrance to Red Rose Restaurant, which is owned and managed by Antonio and Anna Romano (collectively, the "Romanos"). At the time of Peluso's accident, the Red Rose Defendants were insured under a commercial general liability policy issued by Tower. The policy provides, in pertinent part, that the insured "must see to it that [Tower is] notified as soon as practicable of an 'occurrence' or an offense which may result in a claim" (Lowell Aptman Aff, Exh 1, Commercial General Liability Coverage Form, Section IV[2], p 10 of 16).

In support of its motion, Tower contends that, notwithstanding the fact that Antonio Romano along with two restaurant employees were aware of Peluso's accident when it occurred and that Anna Romano learned about the accident the next day, the Romanos failed to notify Tower of its occurrence until May 17, 2007, over 14 months after the accident occurred. On that date, Tower received a facsimile transmission from the Romanos' insurance broker, Modica Associates, Inc. ("Modica"), which included a copy of the summons and complaint in the underlying action, a notice report and a letter from the Pelusos' attorney (*see* Aptman Aff, Exh 3). By letter dated June 13, 2007, Tower disclaimed coverage on the ground that the Romanos failed to give it timely notice of Peluso's accident (*see id.*, Exh 4).

In opposition and in support of their cross motion, the Romanos have submitted an

affidavit in which they state that they “first learned of the occurrence” giving rise to the underlying action in April 2007 when they were served with the summons and complaint therein and that their insurance broker, Modica, notified Tower as soon as practicable thereafter (Marina Dushnas Affirm, Exh B ¶¶ 1-2).

Tower’s motion for summary judgment is granted. “The requirement that an insured notify its liability carrier of a potential claim ‘as soon as practicable’ operates as a condition precedent to coverage” (*White v City of New York, et al.*, 81 NY2d 955, 957 [1993] [internal citation omitted]). According to Antonio Romano’s deposition testimony in the underlying action, he learned of Peluso’s accident “three or four minutes” after it occurred and that Peluso was brought into Red Rose Restaurant by Gabriel Peluso and a Red Rose Restaurant employee where she sat on a chair until an ambulance arrived (Joshua L. Seltzer Affirm, Exh D at 56-57, 59). At that point, or shortly thereafter, it was incumbent upon the Red Rose Defendants to notify Tower of the accident as soon as practicable. However, no notice was given.

The Red Rose Defendants argue that they were never informed that Peluso fell on the exterior landing of their premises and, thus, they did not know of the potential claim until they received the summons and complaint. However, the Red Rose Defendants did not take reasonable steps in further inquiring into a potential claim, as they should have done after Peluso appeared in Red Rose Restaurant injured and was taken to the hospital in an ambulance. “Where a reasonable person could envision liability, that person has a duty to make some inquiry as to potential liability” (*York Speciality Food, Inc. v Tower Ins. Co. of New York*, 47 AD3d 589, 590 [1st Dept 2008]). It was unreasonable for the Red Rose Defendants not to make any inquiry, at the time of the accident or soon thereafter into how and where Peluso fell, especially in light of

the fact that an ambulance was needed to be called to the scene. The Red Rose Defendants have failed to show that they had a reasonable basis for believing no claim would be filed against them (*see SSBSS Realty Corp. v Pub. Serv. Mut. Ins. Co.*, 253 AD2d 583, 584 [1st Dept 1998]). As a result, judgment in favor of Tower is warranted (*see id.* at 585 [three month delay without reasonable excuse warrants judgment in favor of insurer]).

The Pelusos have cross-moved to strike Tower's complaint pursuant to CPLR 3126(3) on the ground that Tower has failed to furnish them with full copies of its investigative reports and statements "despite . . . its severe prejudice to the Pelusos in their personal injury lawsuit" (Fontanelli Affirm in Support ¶ 3). There is little basis for the Pelusos' cross motion. Tower's complaint seeks no relief from from the Pelusos (*see Compl, Seltzer Affirm, Exh J*)¹, and Tower is not a party to the underlying action. The Pelusos have given no basis for their apparent belief that Tower's function herein is to assist them in prosecuting the underlying action.

Accordingly, it is hereby

ORDERED that Tower's motion for summary judgment is granted; and it is further

ORDERED, ADJUDGED and DECLARED that Tower has no obligation to defend or indemnify the Red Rose Defendants in the underlying action; and it is further

ORDERED that the cross motion by the Red Rose Defendants is denied in its entirety; and it is further


ORDERED that the cross motion by the Pelusos to strike Tower's complaint is denied; and it is further

¹ Tower's exhibit B, which Tower refers to as its complaint herein, is a complaint in an unrelated action.

ORDERED that within 30 days of entry of this order/judgment, plaintiff shall serve upon all parties a copy of this order/judgment with notice of entry.

This constitutes the decision, judgment and order of the court.

DATED: 1/30/09


Doris Ling-Cohan, J.S.C.

J:\INDEMNIFICATION\Tower Ins Co.Red Rose - inquire as to liability, golub, updated.wpd

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 1475).