SCAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. THOMAS P. PHELAN,

Justice

TRIAL/IAS PART 4
NASSAU COUNTY

CLARENDON NATIONAL INSURANCE CO.,

Plaintiff(s),

ORIGINAL RETURN DATE: 12/01/08
SUBMISSION DATE: 01/20/09
INDEX No.: 004607/06

-against-

CRABBY JOE'S, INC. d/b/a PADDY MCGEE'S, and JARROD COLACINO,

MOTION SEQUENCE #2

Defendant(s).

The following papers read on this motion:

Notice of Motion.....	1
Answering Papers.....	2,3,4
Affidavit of Alton Jones.....	5
Plaintiff's Reply Brief.....	6
Plaintiff's Memorandum of Law.....	7

Plaintiff's ("Clarendon") motion for summary judgment is denied for the reasons set forth below.

This matter involves an incident that occurred on July 14, 2002, at Paddy McGee's, a bar/restaurant in Island Park, Nassau County, New York. Jarrod Colacino ("Colacino"), defendant herein and plaintiff in the underlying federal action (*Colacino v Crabby Joe's Inc., d/b/a Paddy McGee's and Nassau County Police Dept.*), alleges that he suffered injuries in the course of a fight with another patron and further injuries when he was removed from Paddy McGee's by its employees/bouncers. In his federal action, Colacino alleges that Paddy McGee's employees assaulted him in that they used unreasonable force to remove him from Paddy McGee's. Colacino was allegedly treated for cuts and bruises by ambulance attendants called to the scene. Colacino allegedly was abusive to Nassau County Police Department ("NCPD") officers who responded to the scene, and Colacino was arrested.

Clarendon had issued a general liability policy to Paddy McGee's that was effective on the date of the incident. Clarendon states the policy had a prompt notice provision yet it was not notified of the action until over three (3) years later. On May 20, 2004, Colacino instituted an action in

U.S. District Court, Eastern District, against Paddy McGee's and the NCPD seeking $30,000,000+ in damages ("Colacino action"). Paddy McGee's was served via the Secretary of State on June 2, 2004. Paddy McGee's did not answer and defaulted.

Clarendon states it first found out about the Colacino action on September 14, 2005, in an e-mail from Paddy McGee's. On October 11, 2005, Clarendon denied coverage based on late notice (Jones Aff. Ex. D). Clarendon states it should have been notified as to the potential lawsuit shortly after it occurred in July 2002 due to the fact that NCPD, Nassau County District Attorney's office, Colacino's attorney and private investigators all investigated the Colacino incident. Clarendon alleges a reasonable person or entity such as Paddy McGee's would have thought that there was a possibility of a claim, and it should have been notified. Clarendon also contends that Colacino's action alleges assault by Paddy McGee's employees. Since assault is an expected or intended injury, i.e., an intentional act, the conduct is excluded under the policy.

Paddy McGee's states it gave notice of the Colacino action to Clarendon as soon as practicable. Paddy McGee's contends, using the reasonable person standard, that it would not have considered the events to rise to the level of a potential claim against it. Paddy McGee's contends it notified Clarendon of the Colacino action once it was aware of the action. Paddy McGee's notes the Colacino federal action summons and compliant was served on the Secretary of State on Jay J. Gurfein, P.C., 2 Park Avenue, New York, New York (Panetta Amended Aff. in Opp., Ex. A) who was Paddy McGee's agent for service. Apparently, Mr. Gurfein had moved his office and retired, but neglected to inform the Secretary of State (or, allegedly, his clients, such as Paddy McGee's, of his firm's new address and his status). Thus, allegedly, neither Mr. Gurfein nor Paddy McGee's was aware of the Colacino action until Paddy McGee's received the default notice in the Colacino federal action. Paddy McGee's submits that once it received the default notice, it moved quickly to notify Clarendon and to vacate the default. Its motion to vacate was granted.

Paddy McGee's contends it always cooperated with Clarendon. As to Clarendon's exclusion, Paddy McGee's claims that if the injuries allegedly inflicted by its employees upon Colacino resulted from the use of reasonable force (i.e., to carry Colacino out of the premises wherein he accidently fell to the ground) to expel Colacino to protect other persons, patrons, employees and property, then coverage should be provided by Clarendon. Paddy McGee's notes its annual premiums for the subject policy are in excess of $21,000.

Colacino's allegations in the federal action include assault and battery by Paddy McGee's employees, intentional infliction of emotional distress and negligence by Paddy McGee's employees. Colacino commenced his federal action allegedly because the NCPD officers that responded to the incident would not "take action," i.e., arrest Paddy McGee's employees for assault and battery. Colacino alleges the NCPD refused to take the appropriate action against Paddy McGee's and that NCPD officers struck Colacino "about the face, hand, chest, stomach, back and body" inflicting serious and severe permanent injuries on Colacino (Mot. Ex. F, ¶ 34th).

When an insurance policy requires the insured to provide an insurer with notice of an incident or loss as soon as practicable, such notice must be provided within a reasonable time in view of all of the facts and circumstances (*Donovan v Empire Ins. Group*, 49 AD3d 589 [2d Dept. 2008]; *Steinberg v Hermitage Ins. Co.*, 26 AD3d 426 [2d Dept. 2006]). The requirement that an insured notify its liability carrier of a potential claim as soon as practicable operates as a condition precedent to coverage (*Morris Park Contracting Corp. v National Union Fire Ins. Co. of Pittsburgh, PA*, 33 AD3d 763 [2d Dept. 2006]; *Fischer v Centurion Ins. Co.*, 9 AD3d 381 [2d Dept. 2004]). The phrase "as soon as practicable" is an elastic one, and "soon" is expressly qualified by the word "practicable" (*Great Canal Realty Corp. v Seneca Ins. Co.*, 13 AD3d 227 [1st Dept. 2004]).

An insurer need not demonstrate actual prejudice from the delay by an insured in providing a notice of occurrence in order to successfully disclaim coverage under a liability insurance contract provision requiring notice as soon as practicable (*Briggs Avenue LLC v Insurance Corp. of Hanover*, 11 NY3d 377 [2008]; *Board of Hudson River-Black River Regulating Dist. v Praetorion Ins. Co.*, 56 AD3d 929 [3d Dept. 2008]).

An insured's failure to satisfy the notice requirement in a liability policy constitutes a failure to comply with a condition precedent, which, as a matter of law, vitiates the contract (*Modern Cont'l. Constr. Co., Inc. v Gianola*, 27 AD3d 431 [2d Dept. 2006]).

The duty to give an insurer notice arises when, from the information available relative to the accident, the insured would glean the reasonable possibility of the insurance policy's involvement (*Figueroa v Utica Nat'l. Ins. Group* , 16 AD3d 616 [2d Dept. 2005]). Thus, an insured's good faith belief in non-liability for a potential claim, when reasonable under the circumstances, may excuse a delay in notifying the insurer of the potential claim (*Spa Steel Prod. Co., Inc. v Royal Ins.*, 282 AD2d 864 [3d Dept. 2001]).

An insured's reasonable belief in non-liability will excuse the delay in giving notice to an insurer in compliance with the notice provision of an insurance policy, but the insured has the burden of showing the reasonableness of such excuse (*White v City of New York* , 81 NY2d 955 [1993]; *Rondale Bld. Corp. v Nationwide Prop. & Cas. Ins. Co.* ,1 AD3d 584 [2d Dept. 2003]); and it may be relevant on the issue of reasonableness, whether and to what extent, the insured has inquired into the circumstances of the occurrence (*Felix v Pinewood Bldrs., Inc.*, 30 AD3d 459 [2d Dept. 2006]).

Where an incident occurs that may fall within the coverage of an insurance policy, the insured may not, without some investigation, conclude that coverage does not exist (*Empire City Subway Co. v Greater N. Y. Mut. Ins. Co.*, 35 NY2d 8 [1974]).

Where the insured provides no excuse for the delay and mitigating circumstances are absent, the issue may be disposed of as a matter of law in advance of trial (*Mount Vernon Fire Ins. Co. v DLRH Associates*, 967 F. Supp. 105 [1997]). The reasonableness of a particular insured's delay

in providing notice is ordinarily a question of fact reserved for trial (*Christiana Gen. Ins. Co. of N. Y. v Great Am. Ins. Co.*, 745 F.Supp. 150 [1990]; *Spa Steel Prod. Co., Inc. v Royal Ins.*, 282 AD2d 864 [3d Dept. 2001].

Contractual notice requirements are to be liberally construed in favor of the insured; and when the excuse or explanation is offered for the insured's delay in furnishing the notice, the reasonableness of the delay and sufficiency of the excuse are matters to be determined at trial (*Morris Park Contracting Corp. v National Union Fire Ins. Co. of Pittsburgh, PA,* 33 AD3d 763).

First, Clarendon's disclaimer letter was, as a matter of law, issued to Paddy McGee's within a reasonable time after Clarendon learned of the Colacino action (*New York Cent. Mutual Fire Ins. Co. v Majid*, 5 AD3d 447 [2d Dept. 2004]).

In the federal action, service was made on the Secretary of State. Service upon the Secretary of State as agent for Paddy McGee's constituted valid service under BCL § 306(b) and CPLR 311(1).

Paddy McGee's failure to receive the summons and complaint is attributable to its failure and that of its attorney (now deceased) to notify the Secretary of State of the change of address of Paddy McGee's agent for the purpose of the service. There is no indication that Paddy McGee's default was deliberate or intentional (*Pabone v Jon-Bar Enter. Corp.*, 140 AD2d 872 [3d Dept. 1988]).

In *Briggs Avenue LLC v Insurance Corp. of Hanover* , 11 NY3d 277, Briggs' Articles of Organization designated the Secretary of State as its agent to receive process. The articles included Briggs' address but Briggs moved, and Briggs' manager/only member did not notify the Secretary of State of the address change. A tenant in the building Briggs owned commenced a personal injury action against Briggs. Because of the change of address, Briggs did not know of the action until one year later when the tenant served Briggs directly with a default judgment. The Court of Appeals held that Briggs should have notified the Secretary of State of the address change, Briggs was directly responsible for the error, and Briggs' liability carrier could disclaim coverage.

A case more analogous to Paddy McGee's situation, however, is that of *Agoado Realty Corp. v United Int'l. Ins. Co.*, 95 NY2d 141 [2000]. In *Agoado,* the Secretary of State sent notice to the insured's attorney/agent, but the attorney/agent had died; and the insureds claimed they were unaware of the attorney's death. The Court of appeals held that it may have been impracticable for the insureds to find out about the lawsuit and give timely notice to the insurer (Id.).

Thus, the delay in the notice of Colacino's federal action from the Secretary of State to Gurfein to Paddy McGee's appears to be the fault of its agent/attorney and not that of Paddy McGee's. The record reveals Paddy McGee's moved quickly to open the default.

As noted, there may be circumstances that excuse a failure to give timely notice such as where the insured has a good faith belief of non-liability provided that the belief is reasonable (*Security Mut'l. Ins. Co., Inc. v Acker-Fitzsimons Corp.* , 31 NY2d 436 [1972]). If an insured has

established a good-faith belief of non-liability, such belief may excuse the claimed untimely notice (*Kambousi Restaurant, Inc. v Burlington Ins. Co.*, 53 AD3d 513 [1st Dept. 2009]).

Paddy McGee's has submitted an affidavit of John Vitale, president of Crabby Joe's, Inc. Mr. Vitale states that Paddy McGee's did not alert Clarendon to the event due to the fact that Colacino had initiated contact with the other allegedly offending patron; Colacino was a regular patron at Paddy McGee's, and he knew the "drill"–if you were involved in an altercation at Paddy McGee's, you were escorted out of the premises.

Mr. Vitale notes the criminal investigation of NCPD was closed without any of Paddy McGee's employees being charged with wrongful conduct. Mr. Vitale states that Paddy McGee's is a large and active seasonal business. Mr. Vitale contends that the Paddy McGee's staff escorts unruly patrons from the premises for their behavior on a fairly regular basis. He notes that Paddy McGee's insurance carrier is not notified of a potential claim upon each ejection of a patron even when the patron refuses to leave voluntarily.

The existence of a good-faith belief, as well as the question of whether the belief was reasonable, are ordinarily questions of fact for the fact finder (*Argentina v Otsego Mut. Fire Ins. Co.*, 86 NY2d 748 [1995]). That is the situation here. Thus, Paddy McGee's has offered some "good faith belief" in its non-liability and its failure to report the incident to Clarendon.

An insurer shall not be relieved of its extremely broad duty to defend unless it demonstrates that the allegations of the underlying complaint place that pleading solely and entirely with exclusions of the policy and that the allegations are subject to no other interpretation, i.e., the only interpretation of the allegations was that they fall wholly within specific policy exclusions (*Global Constr. Co., LLC v Essex Ins. Co.*, 52 AD3d 655 [2d Dept. 2008]).

The conduct of the Paddy McGee's' employees could be determined to be negligence. Allegedly, the employees were forced to carry Colacino out, and they stumbled and fell while in the process of ejecting Colacino. Colacino supposedly hit the parking lot pavement.

The liability insurance policy exclusion for any claim, demand or suit based on assault and battery encompasses claims based on assault committed by employees of insured or unrelated third parties; "[i]f no cause of action would exist 'but for' the assault, it is immaterial whether the assault was committed by the insured or an employee of the insured on the one hand, or a third party on the other" (*Mt. Vernon Fire Ins. Co. v Creative Hous. Ltd.*, 88 NY2d 347, 353). Here, the operative acts giving rise to recovery could be the negligence of Paddy McGee's' employees, i.e., they inadvertently dropped him in the parking lot.

The standards for summary judgment are well settled. A court may grant summary judgment where there is no genuine issue of a material fact and the moving party is, therefore, entitled to judgment as a matter of law (*Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]). Thus, when faced with a summary judgment motion, a court's task is not to weigh the evidence or to make the

ultimate determination as to the truth of the matter; its task is to determine whether or not there exists a genuine issue for trial (*Miller v Journal News*, 211 AD2d 626 [2d Dept. 1995]). Thus, the burden on the moving party for summary judgment is to demonstrate a *prima facie* entitlement to judgment as a matter of law by tendering sufficient evidence to demonstrate the absence of any material issue of fact (*Ayotte v Gervasio*, 81 NY2d 1062 [1993]).

Clarendon has not met its burden. It is apparent that issues of fact abound in this matter.

This decision constitutes the order of the court.

Dated: 3-17-09

HON THOMAS P. PHELAN

J.S.C.

ENTERED

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NASSAU COUNTY

COUNTY CLERK'S OFFICE

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