

**Penguin Air Conditioning Corp. v QBE Ins.  
Corp.**

2009 NY Slip Op 31030(U)

May 1, 2009

Supreme Court, New York County

Docket Number: 602613/07

Judge: Emily Jane Goodman

Republished from New York State Unified Court  
System's E-Courts Service.  
Search E-Courts (<http://www.nycourts.gov/ecourts>) for  
any additional information on this case.

This opinion is uncorrected and not selected for official  
publication.

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: EMILY JANE GOODMAN  
*Justice*

PART 17

Index Number : 602613/2007

PENGUIN AIR CONDITIONING

vs

QBE INSURANCE

Sequence Number : 002

SUMMARY JUDGMENT

INDEX NO. \_\_\_\_\_

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. \_\_\_\_\_

MOTION CAL. NO. \_\_\_\_\_

1 this motion to/for \_\_\_\_\_

PAPERS NUMBERED

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 cards motion are decided per attached*

**FILED**

MAY - 8 2009

NEW YORK  
COUNTY CLERK'S OFFICE

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

Dated: 5/7/09

*[Signature]*  
**EMILY JANE GOODMAN** 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 17

-----X

PENGUIN AIR CONDITIONING CORP.,

Plaintiff,

Index No. 602613/07

-against-

QBE INSURANCE CORPORATION,

Defendant.

-----X

EMILY JANE GOODMAN, J.S.C.:

In this action, plaintiff Penguin Air Conditioning Corp. (Penguin) seeks judgment of \$114,382.39 against defendant QBE Insurance Corporation (QBE), as payment for a judgment that Penguin entered against QBE's insured, nonparty River Trucking & Rigging, Inc. (River Trucking) and nonparty River Hauling, Inc. (River Hauling)<sup>1</sup> (collectively, River). Penguin now moves for summary judgment against defendant for a sum certain, pursuant to CPLR 3212 and Insurance Law § 3420 (b). QBE cross-moves for summary judgment dismissing the complaint.

FACTS

QBE issued a general liability policy to River that was in effect when the events underlying this action took place. Penguin was named as an additional insured on the policy, as of

---

<sup>1</sup> As River Trucking and River Hauling are treated as one entity by the parties, they will be treated as such in this decision.

April 23, 2002. On August 24, 2002, River was performing a rigging operation with a crane, while installing air-conditioning units, for Penguin, at a building located at 666 Fifth Avenue, New York, New York. In the course of the work, River damaged the nickel facade on the exterior of the premises. Penguin was present at the site, and recommended that the glass being supported by the damaged panel be removed. The glass was removed, and the opening boarded up.

On October 18, 2002, Penguin advised River of the claim, occasioned by the corrective work that Builders Group, the contractor, was completing as a result of the damage done to the facade of the building. Notice of Cross Motion, Ex. D, at 00390-391. Penguin's claim specialist, Emcor, advised QBE of the claim on March 4, 2004, and also informed QBE that it had sent several notices and requests to River regarding indemnification of the loss. On May 21, 2004, Penguin's third-party administrator requested defense and indemnification for the damages that arose out of River's work. By letter dated July 20, 2004, and addressed to River Hauling, with a copy to Penguin, QBE denied coverage for the loss on the ground - as relevant to this action - of late notice<sup>2</sup>.

Penguin obtained a default judgment against River in an

---

<sup>2</sup> QBE initially denied coverage also on the ground of the "loading and unloading" exclusion in the policy, but later withdrew that basis for denial.

action commenced in Supreme Court, Queens County (index No. 19646/05) to recover money damages sustained by Penguin. The judgment, following an inquest, was in the amount of \$79,935.00 with interest from August 24, 2002, and attorneys' fees in the amount of \$3,545.00 with costs and disbursements of \$1,274.00. Penguin then sought payment of the judgment from QBE by service of a copy of the order, by correspondence dated February 12, 2007. When QBE failed to pay the judgment, Penguin commenced this action.

#### DISCUSSION

There is no dispute that Penguin was covered by the QBE policy to the same extent as River. Nor is defendant disputing that the policy could cover the incident involved. Rather, the dispute involves the timeliness of the notice to QBE of the claim, and the timeliness of QBE's disclaimer.

The insurance policy requires that notice of an incident be given as soon as practicable. Notice was not given to QBE until more than a year and a half after the damage occurred. Unless the insured has an explanation for such a delay, usually a reasonable belief as to nonliability, or unawareness of the underlying event, such a delay is unreasonable as a matter of law. *See Kamyr, Inc. v St. Paul Surplus Lines Ins. Co.* 152 AD2d 62, 65-66 (3d Dept 1989).

Penguin contends that it has an adequate explanation for the

delay. It maintains that it had a reasonable belief that it was not liable for the damages caused by River. Penguin points out that River's president stated that he did not know of the claim. He knew that the window had been removed, and that it was replaced a few days later, and he thought that was the end of the incident. He further stated that he did not know until late February or early March 2004 that there was a claim against his company. Reply Affirm., Ex. D. In turn, Penguin contends that it, too, had a reasonable belief of its nonliability. In a letter dated November 8, 2002, Penguin provided the information that it had to its risk manager, Professional Risk Managers, Inc., with instructions to forward it to the proper insurance company. It also made reference to its belief that River was responsible for the damage. Penguin appears to maintain that it had a reasonable belief of non-liability because it believed that River was responsible, and any claim would proceed against River, rather than against Penguin.

QBE has demonstrated that Penguin's notice to it of the occurrence was late. While Penguin asserts that the delay was based upon its reasonable belief that it had no liability, it has not offered evidence of such reasonable belief. The letter that it submits indicates that it was unaware of the claim until November 2002. However, Penguin does not offer any explanation for its failure to advise QBE of the incident until more than a

year later. The fact that it instructed its claim manager to inform QBE does not relieve it of its obligation. Similarly, the fact that it believed that River was responsible for the damage would not relieve it of liability, since it was responsible for hiring River. Additionally, the letter from Builders Group advised it that payment for repairs would be deducted from its payment unless alternate payment arrangements were made. Notice of Cross Motion, Ex. D, at 00391. Penguin does not offer any evidence that alternate arrangements were, in fact, made. Therefore, Penguin has failed to demonstrate a reasonable belief in its nonliability that would excuse its failure to give timely notice to QBE.

Despite Penguin's failure to give timely notice to QBE, it can still obtain coverage if Penguin can demonstrate that QBE's notice of disclaimer was untimely, and that Penguin suffered prejudice as a result<sup>3</sup>. *Fairmont Funding, Ltd. v Utica Mut. Ins. Co.*, 264 AD2d 581, 582 (1<sup>st</sup> Dept 1999).

QBE did not disclaim coverage to River until July 20, 2004. Penguin sought insurance coverage on February 27, 2004. Thus, it was nearly five months before QBE disclaimed. The Court of Appeals has held that unexplained delays of two months is unreasonable as a matter of law. *Hartford Ins. Co. v County of*

---

<sup>3</sup> The parties agree that Insurance Law § 3420 (d) does not apply in this case, because there was no bodily injury.

*Nassau*, 46 NY2d 1028, 1029-1030 (1979). QBE has not offered any explanation for its delay. Therefore, the delay is unreasonable as a matter of law.

Penguin contends that it was prejudiced by the delay, because River Trucking was dissolved on June 30, 2004. Thus, any remedy that Penguin may have had against River was extinguished. This assertion, supported by evidence of River Trucking's dissolution, suffices to raise the question of prejudice. However, this argument was raised in Penguin's reply papers, in response to QBE's assertion that Penguin has no right of recovery. Thus, QBE has not had an opportunity to contest Penguin's claim of prejudice. As a result, summary judgment is not appropriate at this time, and the question of whether QBE's delay in disclaiming caused prejudice must await trial.

In view of this result, it is unnecessary for the court to address the question of whether Penguin's motion was premature due to outstanding discovery.

#### CONCLUSION

Accordingly, it is hereby

ORDERED that plaintiff's motion for summary judgment is denied; and it is further

ORDERED that defendant's cross motion for summary judgment

is denied.

This Constitutes the Decision and Order of the Court.

Dated: May 1, 2009

ENTER:



J.S.C.

**EMILY JANE GOODMAN**

**FILED**  
MAY - 8 2009  
NEW YORK  
COUNTY CLERK'S OFFICE