

<b>Tower Ins. Co. of N.Y. v 458 E.144th St. Realty Corp.</b>
2010 NY Slip Op 30519(U)
March 8, 2010
Supreme Court, New York County
Docket Number: 103282/08
Judge: Emily Jane Goodman
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

**EMILY JANE GOODMAN**

PRESENT:

PART 17

Index Number : 103282/2008  
TOWER INSURANCE CO OF  
vs  
458 E.144TH STREET REALTY  
Sequence Number : 001  
DEFAULT JUDGEMENT

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_  
MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

Cross-Motion:    Yes     No

Upon the foregoing papers, it is ordered that this motion

*is accorded for*

*attachee*

**FILED**

MAR 15 2010

NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 3/8/10

*[Signature]*  
\_\_\_\_\_  
J.S.C.

Check one:        FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate:        DO NOT POST

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

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 17

-----X

TOWER INSURANCE COMPANY OF NEW YORK,

Plaintiff,

Index No. 103282/08

-against-

458 E. 144TH STREET REALTY CORP., ERC  
HOLDING, LLC, RICARDO FLORES and  
WEST STAR CONSTRUCTION CORP.,

Defendants.

-----X

Emily Jane Goodman, J.S.C.:

In this action to determine plaintiff Tower Insurance Company of New York (Tower) obligation to defend and indemnify its insured, 458 E. 144th Street Realty Corp. (458), Tower moves for (1) an order pursuant to CPLR 3215 (a) for a default judgment against defendants 458 and West Star Construction Corp. (West Star), and (2) for summary judgment, pursuant to CPLR 3212, against defendants ERC Holding, LLC (ERC) and Ricardo Flores (Flores), declaring that Tower is not obligated to indemnify 458 in an underlying action, *Flores v ERC Holding, LLC*, Index No. 8996/07 (Sup Ct, Bronx County) (*Flores* action). Flores cross-moves for summary judgment pursuant to CPLR 3212 and Insurance Law § 3420 (d), dismissing Tower's action.

I. Background

Tower insured 458 under a commercial general liability

policy (Policy) for premises located at 458 East 144th Street, Bronx, New York (premises). Flores claims that he sustained injuries on the premises on July 1, 2006 while performing construction work, due to negligence on 458's part.

The Policy required that 458 notify Tower of any "occurrence" which might result in a claim "as soon as reasonably practicable." However, Tower first learned of the accident on May 11, 2007, when it received a copy of the summons and complaint in the *Flores* action by fax from Anchor Brokerage Co., Inc. The *Flores* action was commenced in March 2007.

George Malliarakis (Malliarakis), 458's principal, and principal of non-party Kriti Construction (Kriti), Flores's employer, testified at his deposition that he saw the accident on July 11, 2006, and that it was he who called the ambulance which transported Flores to the hospital. Subsequently, Flores filed a Workers' Compensation claim, while remaining in the employ of Kriti, until he precipitously disappeared from work in March 2007, immediately before the *Flores* action was commenced.

Upon receipt of the summons and complaint, Tower assigned a liability examiner to investigate the claim. Apparently, the examiner detected that Malliarakis knew of the accident upon its occurrence. However, according to Tower's vice president of liability claims, Lowell Aptman, rather than deny coverage to 458 at that time, Tower hired an investigator on May 15, 2007, who

endeavored for the next two months to interview Malliarakis about the 10 month delay. By June 15, 2007, as a result of its investigator's failure to reach Malliakaras by telephone, after leaving several messages, Tower sent a letter of disclaimer to 458 claiming a failure on 458's part to timely notify Tower of the accident. Tower does not dispute that it was aware at the time it received the summons and complaint that Malliakaras knew of the accident the day it occurred. Tower did offer to defend 458 pending the outcome of the question of coverage.

On this motion, Tower claims that 458 and West Star are in default in failing to respond to the complaint. It argues that it is entitled to a ruling that it is not obligated to defend and indemnify 458 because of 458's failure to give notice of the occurrence as "soon as practicable," which, in this case, would have been immediately after the accident. 458, on the other hand, claims that it could not have known that Flores would sue it until he did, because he had effectively lulled 458 into believing that he was happy with his Workers Compensation award, and that he had no further intention to seek damages against anyone.

## II. Discussion

### A. Default Judgment

458 and West Star first argue that they were never informed by Tower that any investigator had been assigned to investigate

these parties, as an explanation, it appears, for why telephone calls from Tower's investigator were not responded to.

As to the present action, 458 and West Star claim that, having received service of process, their attorney, James P. Demetriou (Demetriou) spoke with Tower's counsel several times, in an attempt to resolve the issues herein. Demetriou claims that Tower's counsel "agreed that no responsive pleadings would be required until notice from Plaintiff's counsel," and that, during the year that followed, "reliance was had upon professional courtesy and oral agreement between attorneys." Demetriou Aff., at 4. Thus, 458 and West Star maintain that they reasonably relied on Tower's statements that an answer was not yet required, excusing 458 and West Star from a default for failing to timely appear in this action.

In response, Tower alleges that it only gave 458 and West Star a 30-day extension to answer, and not an open-ended option.

**i. Reasonable Excuse for Delay**

In order to open a default, and, by extension, avoid one, the defaulting party must show that it has a reasonable excuse for failing to answer, and where a default judgment has not yet been granted, a meritorious defense need not be shown. *Nason v Fisher*, 309 AD2d 526 (1st Dept 2010). Law office failure can be a reasonable excuse for failing to answer (*see id*; *Youni Gems Corp. v Bassco Creations Inc.* \_\_\_AD3d\_\_\_, 2010 NY Slip Op 00907

[1st Dept 2010]). Of central importance is whether there has been a pattern of default. In fact, it was error to deny a plaintiff's motion to compel defendant's acceptance of a complaint served improperly on the eve of the expiration of the statute of limitations due to law office failure, in absence of a pattern of default and in absence of prejudice. *Gazes v Bennett*, \_\_AD3d\_\_, 2010 NY Slip Op 01575 [1st Dept 2010]).

CPLR 2104 states, in pertinent part, that "[a]n agreement between parties or their attorneys relating to any matter in an action ... is not binding upon a party unless it is in writing subscribed by him or his attorney or reduced to the form of an order and entered." A stipulation extending the time to answer a complaint need not necessarily be in writing "if it appears that [an oral] stipulation was made and that the adverse party relied upon it." *Leemilt's Petroleum, Inc. v Public Storage, Inc.*, 193 AD2d 650, 650 (2d Dept 1993).

This court finds that a default judgment is not appropriate herein. As noted above, although Demetriou did not timely respond to the summons and complaint, he had several conversations with Tower's counsel, and believed, whether true or not, that Tower's counsel had agreed that no responsive pleading need be served until Tower's counsel notified Demetriou. No activity was had in court until this motion was filed, which Demetriou timely opposed. Although Demetriou's failure to either

memorialize such an agreement, or alternatively to file an answer to protect his client was unwise, it is law failure, and as no pattern of default has been exhibited or prejudice has arisen, a decision on the merits is preferred. Accordingly, the default is excused.

**ii. Meritorious Defense**

458 and West Star have a meritorious defense to the action because, although 458 failed to give Tower notice of the occurrence until 10 months later, Tower failed to timely deny coverage as required by Insurance Law § 3420 (d).

"Where a liability insurance policy requires that notice of an occurrence be given 'as soon as practicable,' such notice must be accorded the carrier within a reasonable period of time." *Tower Insurance Company of New York v Lin Hsin Long Co.*, 50 AD3d 305, 307 (1st Dept 2008). 458 essentially claims that, despite its immediate knowledge of the accident, it was lulled into believing that Flores would not institute a lawsuit, because he seemed content with his Workers' Compensation award, and continued to stay in Kriti's employ.

An insured may delay giving notice to its carrier of an occurrence under the policy if it "has 'a good-faith belief of non liability,' provided that belief is reasonable [internal citation omitted]." *Great Canal Realty Corp. v Seneca Insurance Company*, 5 NY3d 742, 743 (2005). However, "the insured's belief

must be reasonable under all the circumstances, [internal citation omitted]." *Id.* at 744; see also *Ponok Realty Corp. v United National Specialty Insurance Company*, \_\_\_ AD3d \_\_\_, 2010 NY Slip Op 00124 (2d Dept 2010). The insured bears the burden of showing that it acted reasonably under the circumstances. *Great Canal Realty Corp. v Seneca Insurance Company*, 5 NY3d 742, *supra*.

Reasonableness under the circumstances is often a question of fact (see *Ponok Realty Corp. v United National Specialty Insurance Company*, \_\_\_AD3d\_\_\_, 2020 NY Slip Op 00124, *supra*). At least one Appellate Division First Department case has held that a two year delay in notification of the accident was unreasonable even though the insured asserted that it had a reasonable belief on non-liability on the basis that the injured employee's exclusive remedy was under Workers' Compensation. *Macro Enterprises, Ltd. v QBE Ins. Corp.*, 43 Ad2d 728 (1st Dept 2007).

However, the court need not decide whether 458's belief was unreasonable, as a matter of law. Once Tower received notice of the occurrence, it was required to issue a disclaimer or denial within a reasonable amount of time under Insurance Law § 3420 (d). Insurance Law § 3420 (d) requires that an insurer give notice of disclaimer "as soon as is reasonably possible." While an insurer should be allowed a sufficient time to conduct an investigation of the incident, if the ground for disclaimer is "obvious on the face" of the notice of claim, no investigation is

necessary, and as little as a 30-day delay in giving notice of disclaimer is unreasonable. *West 16th Street Tenants Corp. v Public Service Mutual Insurance Company*, 290 AD2d 278, 279 (1st Dept 2002); see also *Pav-Lak Industries, Inc. v Arch Insurance Company*, 56 AD3d 287 (1st Dept 2008).

In *Ace Packing Company, Inc. v Campbell Solberg Associates*, (41 AD3d 12, 13 [1st Dept 2007]), the Court found that it would be "draconian" to require an insurer to disclaim on grounds of late notice before an investigation could be made as to the particulars of the insured's knowledge of the claim. In *Ace*, the insurer's investigator was thwarted by its insured from obtaining any evidence concerning "the circumstances surrounding the accident and what plaintiff did when it first received notice of the claim and the resulting law suit." *Id.* at 14. However, in *Ace*, the Court noted that the insurer did not know "when plaintiff first learned of either the accident or the lawsuit." *Id.* at 15.

Tower does not deny that it knew that Malliakarass was on the scene of the accident at about the time that Tower first received notice of the commencement of the *Flores* action. Thus, Tower knew that late notice would be the basis of its disclaimer at that time, even while it may have wished to interview Malliakarass for further information about the accident. Despite the holding in *Ace*, 41 AD3d 12, *supra*, the Court has more recently held that,

where an insurer knows that the sole basis for its disclaimer will be late notice on the part of its insured, a 30-day delay in disclaiming is unreasonable as a matter of law. *JT Magen v Hartford Fire Insurance Company*, 64 AD3d 266 (1st Dept 2009). Therefore, under Insurance Law § 3420 (d), Tower was late in disclaiming its obligation to defend and indemnify 458 in the *Flores* action, and 458 has a meritorious defense to Tower's action. Tower's motion for a default judgment against 458 and West Star is denied.

#### **B. Flores's Cross Motion to Dismiss**

On a motion to dismiss pursuant to CPLR 3211, we must accept as true the facts as alleged in the complaint and submissions in opposition to the motion, accord plaintiffs the benefit of every possible favorable inference and determine only whether the facts as alleged fit within any cognizable legal theory.

*Sokoloff v Harriman Estates Development Corp.*, 96 NY2d 409, 414 (2001); see also *Leon v Martinez*, 84 NY2d 83 (1994).

Flores (like ERC) was named in this action solely because he was a party to the *Flores* action. Flores has not been served in this action, and has not answered. He was supplied with the summons and complaint, however.

Flores is not a party to the Policy, is not an insured, does not stand in privity with Tower, and is not a third-party beneficiary of the Policy, even though it might benefit Flores if

Realty was provided coverage for the occurrence.<sup>1</sup> It is true that pursuant to Insurance Law §3420 (a) (2), that an injured party may maintain a direct action against the insurer where a judgment has been obtained which has gone unsatisfied for 30 days. Until this has occurred, it has been held that the injured party is neither a proper defendant or subject to permissive joinder. *Mount Vernon Fire Ins. Co. v NIBA Construction, Inc.*, 195 AD2d 425, 426 (1st Dept 1993). However, more recently, it has been held that an insurer may name an injured party as a defendant, to permit that party to contest the issue of coverage (*Cataract Sports & Entertainment Group, LLC.*, 59 AD3d 1083 [4th Dept 2009]; *3405 Putnam Realty Corp. v Ins. Corp. of New York*, 36 AD3d 565 [1st Dept 2007]). Here Flores was named, but not served, and apparently does not want to contest the issue by remaining in the action. Therefore, Flores's motion to dismiss the complaint as to him is granted.

#### **B. Tower's Motion for Summary Judgment**

As a result of the foregoing, Tower cannot be granted summary judgment against Flores or ERC.

#### **III. Conclusion**

As a result of the foregoing, the motion for a default judgment against 458 and West Star is denied, and these parties

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<sup>1</sup>Flores, if he receives a judgment in the *Flores* action, will only have a judgment against the defendants therein, not Tower.

may answer the complaint. Summary judgment against Flores and ERC is denied and Flores' cross motion to dismiss is granted.

Accordingly, it is

ORDERED that the part of the motion brought by plaintiff Tower Insurance Company of New York for a default judgment against defendants 458 E. 144th Street 458 Corp. and West Star Construction Corp. is denied, and it is further

ORDERED that the part of plaintiff Tower Insurance Company of New York's motion seeking summary judgment against defendants ERC Holding, LLC and Ricardo Flores is denied; and it is further

ORDERED that the cross motion brought by defendant Ricardo Flores to dismiss is granted and the Clerk is directed to sever Flores from the action and enter judgment in favor of him dismissing the complaint against him; and it is further

ORDERED that defendants 458 E. 144th Street Realty Corp. and West Star Construction Corp. are directed to serve an answer to the complaint within 10 days of receipt of a copy of this order with notice of entry.

This Constitutes the Decision and Order of the Court.

Dated: March 8, 2010

**FILED**  
MAR 15 2010  
NEW YORK  
COUNTY CLERK'S OFFICE

ENTER:

  
\_\_\_\_\_  
**EMILY JANE GOODMAN**