[* 1]

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

PRESENT: HON. EILEEN A. RAKOWER Justice

PART 15

Index Number : 109826/2007
TOWER INS. CO. OF NY
VS.
CLASSON HEIGHTS LLC
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT

INDEX NO. 109826/07

MOTION DATE

MOTION SEQ. NO. 001

MOTION CAL. NO.

this motion to/for

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1,2,3,4
Answering Affidavits — Exhibits	5,6
Replying Affidavits	7

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING 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 141B).

Dated: 5/3/10

HON. EILEEN A. RAKOWER J.S.C.

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

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: PART 15

----------X

TOWER INSURANCE COMPANY OF NEW YORK,

Plaintiff,

Index No.
109826/07

CLASSON HEIGHTS LLC, RENAISSANCE REALTY GROUP LLC & ELIZABETH GONZALEZ,

Seq. No.: 001

Defendants.

----------X

HON. EILEEN A. RAKOWER, J.S.C.

Plaintiff, Tower Insurance Company of New York ("Tower"), brings this action seeking an order declaring that it has no duty to defend and/or indemnify defendants Classon Heights, LLC, and Renaissance Realty Corp. ("Renaissance") (collectively "Classon") in the underlying action commenced in Kings County titled *Elizabeth Gonzalez v. Classon Heights, LLC, et al*, bearing Index Number 18718/07. Tower now moves for summary judgment on the complaint seeking a declaratory judgment that Tower has no duty to defend or indemnify Classon and an order declaring that Elizabeth Gonzalez, plaintiff in the underlying action, failed to provide Tower with timely notice of the accident and claim. Classon opposes and cross-moves to compel discovery. Ms. Gonzalez does not submit papers.

The underlying action was commenced on May 24, 2007, after Ms. Gonzalez alleges that she was caused to fall to the ground as the result of/or in connection with construction work occurring on the sidewalk in front of her apartment building located at 519 Lincoln Place in the County of Kings State of New York, on October

30, 2006. Classon is alleged to have owned, managed, maintained and/or controlled the subject premises and the sidewalk adjacent thereto. Classon is also alleged to have conducted, supervised and/or contracted to have construction work conducted on its sidewalk. On March 26, 2007 Classon notified Tower of Ms. Gonzalez' impending claim against it. Tower disclaimed coverage by letter dated April 25, 2007, asserting that it was not obligated to cover Classon because it was not notified "as soon as practicable" after the accident. Tower commenced the instant action against Classon and Ms. Gonzalez on or about July 17, 2007 alleging that:

> Defendants were aware of the underlying accident/occurrence on or about October 30, 2006, the very day that it allegedly occurred
>
> Despite being aware of the accident/occurrence on October 30, 2006, defendants, in violation of the Tower Policy's notice conditions, inexplicably delayed notifying Tower until March 26, 2007

Classon filed a counterclaim, alleging that Tower is obligated to defend and/or indemnify it in the underlying action.

Tower, in support of its motion submits: a copy of the Classon policy; a copy of a fax sent to Tower from Classon, advising it of the Gonzalez action, dated March 26, 2007; a copy of Tower's disclaimer, dated April 25, 2007; a copy of the pleadings; and the affidavit of David W. Hertweck, with transcribed statements of Luis Espinal, porter for the subject building and Moses "Moishe" Saurymper, Classon's bulding manager, annexed thereto.

Section IV-Commercial General Liability Conditions of the Tower policy states, in relevant part:

> 2. Duties In The Event Of Occurrence, Offense, Claim Or Suit
>
> a. You must see to it that we are notified as soon as practicable of an "occurrence" or an offense which may result in a claim. To the extent possible , notice should include:
>
> (1) How, when and where the "occurrence" or offense took place;

> (2) The names and addresses of any injured persons and witnesses; and
> (3) The nature and location of any injury or damage arising out of the "occurrence" or offense.

Tower asserts that the statements made by both Mr. Espinal and Mr. Saurymper show that Classon had notice of the accident on the date of its occurrence. Mr. Espinal states that "after [the accident] happened I called the office and told them what happened." Mr. Saurymper states "I first became aware of this accident on 10/30/06 while I was on my way to the building . . . I got a call from Luis Espinal who told me that Ms. Gonzalez [redacted] somehow fell out of her wheelchair . . ."

Classon, in opposition, argues that the motion should be denied because it is "predicated solely upon unsworn, redacted statements by two of The Classon Parties' employees, which were written by Tower's investigator." Further, Classon asserts that it has substantive defenses to Tower's allegations, including: "a good faith belief of non-liability . . . and a lack of prejudice to Tower from the alleged late notice." In any event, Classon asserts, the motion should be denied because there is outstanding discovery. Classon claims that Tower has failed to respond to its demand for a bill of particulars and a D&I. Finally, Classon argues that Tower should be estopped from denying coverage because it had assumed control of the Classon's defense in the underlying action and did nothing to prosecute that action for three years, and that Tower "presumably caused an irretrievable change in its position. Indeed the deadline for filing the note of issue in the underlying action has passed."

The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law. That party must produce sufficient evidence in admissible form to eliminate any material issue of fact from the case. Where the proponent makes such a showing, the burden shifts to the party opposing the motion to demonstrate by admissible evidence that a factual issue remains requiring the trier of fact to determine the issue. The affirmation of counsel alone is not sufficient to satisfy this requirement. (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]). In addition, bald, conclusory allegations, even if believable, are not enough. *(Ehrlich v. American Moninger Greenhouse Mfg. Corp.*, 26 N.Y.2d 255 [1970]). (*Edison Stone Corp. v. 42nd Street Development Corp.*,145 A.D.2d 249, 251-252 [1st Dept. 1989]).

Initially, the statements made by Espinal and Saurymper, material to the dispute here, are corroborated by the sworn affidavit of Mr. Saurymper, which is submitted by Classon. Such affidavit constitutes evidence in admissible form. Thus, the statements may be considered as they are not the sole pieces of evidence relied upon by the Court in making its determination. (see *Wertheimer v. New York Property Ins. Underwriting Ass'n*, 85 AD2d 540[1st Dept. 1981]).

"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)(internal citations omitted)(where the court found that a nine month delay in reporting a slip and fall accident on the insured's premises was unreasonable as a matter of law where employees of the insured witnessed the victim being taken away in an ambulance and the building manager was informed of the accident on the date of its occurrence). "The duty to give notice arises when, from the information available relative to the accident, an insured could glean a reasonable possibility of the policy's involvement . . . the insured bears the burden of proving, under all the circumstances, the reasonableness of any delay in the giving of notice." (*Paramount Insurance Company v. Rosedale Gardens, Inc.*, 293 AD2d 235, 239-240[1st Dept. 2002])(where the court held that notice given eight months after an accident on stairs in insured's building was unreasonable in light of the fact that the building superintendent knew that victim was taken away in an ambulance and that he conveyed that information to the building manager the next day). "It has generally been held that a failure to give notice may be excused when an insured, acting as a reasonable and prudent person, believes that he is not liable for the accident." (*Id.* at 239).

It is undisputed that Classon failed to notify Tower of the Gonzalez accident until nearly five months after it occurred. Classon defends the delay by asserting that it had a good faith belief that the accident would not result in liability. In his statement to the investigator, Mr. Espinal states:

> The ambulance arrived and I think the police did as well Ms. Gonzalez was taken to the hospital . . . after this happened I called the office and told them what happened . . .

In his statement to the investigator, Mr. Saurymper states:

> I first became aware of this incident on 10/30/06 while I was on my way to the building . . . I got a call from Luis Espinal who told me that Ms. Gonzalez somehow fell out of her wheelchair. He said that she did not appear injured but an ambulance came and took her to the hospital.

In his sworn affidavit, Mr. Saurymper states:

> I learned of the alleged accident when I received a call from Luis Espinal that day . . . I went to the Classon building either the day of the alleged incident or the following day to discuss the matter with Mr. Espinal. He advised me that Ms. Gonzalez did not appear to be injured; that an ambulance was called solely for precautionary reasons . . .

Here, as in *Tower* and *Paramount*, the Classon employee statements, coupled with Mr. Saurymper's sworn affidavit, establish that Mr. Espinal witnessed Ms. Gonzalez fall on the premises, saw her being taken away in an ambulance and conveyed that information to Mr. Saurymper on the day that the accident occurred. The fact that Mr. Espinal saw Ms. Gonzalez taken away in an ambulance "is a significant factor in determining the reasonableness of any delay in giving notice."(*Paramount* at 241). Indeed, in such a case, "no prudent person could have reasonably believed himself to be immune from potential civil liability under the circumstances." (*Zatrima v. PSM Ins. Companies*, 208 AD2d 529,530[2nd Dept. 1994]). "Moreover, knowledge of an occurrence obtained by an agent charged with the duty to report such matters is imputed to the principal."(*Paramount* at 240). Mr. Saurymper states in his affidavit that, among other things, he is responsible to "communicate with the owners if a major issue arises."

CPLR 3212(f) permits the court to deny a summary judgment motion as premature if it appears "from affidavits submitted in opposition to the motion that facts essential to justify opposition may exist but cannot then be stated. " However, "the mere hope of plaintiffs that they might be able to uncover some evidence during the discovery process is insufficient to deny summary judgment." (*Pow v. Black*, 182 AD2d 484, 485[1st Dept. 1992])(internal quotes and citations omitted). Although Classon points generally to Tower's failure to respond to its demands for discovery, it fails to state what discovery is outstanding, or how the exchange of that discovery would have strengthened its opposition.

Nor are there any issues of fact regarding whether Tower is estopped from denying coverage to Classon because it represented Classon in the underlying accident. Indeed, in a letter sent from Tower to Classon, dated June 7, 2007, Tower is clear that it is defending Classon pending resolution of the instant motion:

> We will defend you in this lawsuit, through assigned counsel, *subject to resolution of a declaratory-judgment action that we will commence against you to confirm the propriety of our disclaimer.* If the court confirms that we have no duty to defend or indemnify you, then counsel will be asked to withdraw and you will be obligated to obtain your own defense counsel. (emphasis added).

Ms. Gonzalez does not oppose the motion. Where the movants have established a prima facie showing of entitlement to summary judgment, the motion, unopposed on the merits, shall be granted. (*See, Access Capital v. DeCicco*, 302 AD2d 48, 53-54 [1st Dept. 2002]). Further, "the factual allegations of the moving papers, uncontradicted by plaintiff, are sufficient to entitle defendants to judgment dismissing the complaint as a matter of law." (*Tortorello v. Carlin*, 260 A.D.2d 201[1st Dept. 1999]). Finally, the cross-motion to compel discovery is denied as moot.

Wherefore, it is hereby

ORDERED that the motion is granted and the Clerk of the Court is directed to enter judgment in favor of plaintiff and against defendants Classon Heights, LLC, Renaissance Realty Corp., and Elizabeth Gonzalez; and it is further;

ADJUDGED and DECLARED that plaintiff has no duty to defend or indemnify defendants Classon Heights, LLC and Renaissance Realty Corp. for a bodily injury action commenced against them by Elizabeth Gonzalez, pending in the Supreme Court, Kings County, bearing Index No. 18718/07; and it is further

ADJUDGED and DECLARED that Elizabeth Gonzalez has failed to provide plaintiff with timely notice of her accident which occurred on October 30, 2006; and it is further

ORDERED that the cross-motion is denied as moot.

DATED: May 3, 2010

EILEEN A. RAKOWER, J.S.C.