STATE OF NEW YORK
SUPREME COURT COUNTY OF GREENE

PROGRESSIVE NORTHEASTERN INSURANCE COMPANY,

Plaintiff,

-against-

DECISION and ORDER
INDEX NO. 09-1589
RJI NO. 19-10-4833

WILLIAM E. FITZMAURICE,

Defendant.

Supreme Court Greene County All Purpose Term, April 16, 2010
Assigned to Justice Joseph C. Teresi

APPEARANCES:
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TERESI, J.:

On June 29, 2008, Defendant and his wife were boating on the Hudson River, when Defendant's wife was injured by one of the boat's gates. Defendant and his wife commenced a personal injury action against the boat manufacturer[1], with the boat manufacturer asserting a counterclaim against Defendant. On June 8, 2009, Defendant sought defense and

[1] The action is entitled Lisa A. Fitzmaurice, Et. Al. v. Smoker Craft, Inc. d/b/a Sylvan, Index No. 09-172, Supreme Court Greene County, which is hereinafter referred to as Fitzmaurice v. Sylvan.

indemnification for such counterclaim from Plaintiff, the insurer of his boat. Plaintiff disclaimed coverage, citing Defendant's failure to timely notify it of the occurrence.[2]

Thereafter, Plaintiff commenced this declaratory judgment action against Defendant seeking a judgment declaring that it is "not obligated to defend or indemnify" Defendant in the Fitzmaurice v. Sylvan action. Issue was joined by Defendant and discovery is ongoing. Plaintiff now moves for summary judgment, which Defendant opposes. Although Plaintiff demonstrated its entitlement to summary judgment, because Defendant raised a triable issue of fact, Plaintiff's motion is denied.

"Summary judgment is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue." (Napierski v. Finn, 229 AD2d 869, 870 [3d Dept. 1996]). "[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law." (Smalls v. AJI Industries, Inc., 10 NY3d 733 [2008] quoting Alvarez v. Prospect Hospital, 68 NY2d 320 [1986]). If the movant establishes their right to judgment as a matter of law, the burden then shifts to the opponent of the motion to establish by admissible proof, the existence of genuine issues of fact. (Zuckerman v. City of New York, 49 NY2d 557 [1980]).

"Where a policy of liability insurance 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." (Great Canal Realty Corp. v. Seneca Ins. Co., Inc., 5 NY3d 742, 743 [2005]). "[T]the absence of timely notice of an occurrence is a failure to comply with a condition precedent

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[2] The above set forth facts were alleged in the Complaint, not denied in the Answer and, as such, are deemed admitted in this action. (CPLR §3018[a]).

which, as a matter of law, vitiates the contract... [and n]o showing of prejudice is required." (Argo Corp. v. Greater New York Mut. Ins. Co., 4 NY3d 332, 339 [2005], Sorbara Const. Corp. v. AIU Ins. Co., 11 NY3d 805 [2008]). However, "an insured's good-faith belief in nonliability, when reasonable under the circumstances, may excuse a delay in notifying the insurer." (Preferred Mut. Ins. Co. v. New York Fire-Shield, Inc., 63 AD3d 1249 [3d Dept. 2009] quoting Spa Steel Prods. Co. v. Royal Ins., 282 A.D.2d 864, 865, 722 N.Y.S.2d 827 [2001]). "Significantly, the question of reasonableness is generally a question of fact for a jury." (U.S. Underwriters Ins. Co. v. Carson, 49 AD3d 1061 [3d Dept. 2008], Preferred Mut. Ins. Co., supra, Klersy Bldg. Corp. v. Harleysville Worcester Ins. Co., 36 AD3d 1117 [3d Dept. 2007]).

Here, the insurance policy at issue required Defendant to notify Plaintiff of his wife's occurrence "within twenty-four (24) hours, or as soon as practical" even if he was "not at fault." It is undisputed, however, that Defendant did not notify Plaintiff of the occurrence until almost one year had past. Defendant's delay in notifying Plaintiff of this occurrence for almost one year is unreasonable as a matter of law. (Canal Realty Corp. v. Seneca Ins. Co., Inc., 5 NY3d 742, 743 [2005] reversing Great Canal Realty Corp. v. Seneca Ins. Co., Inc., 13 AD3d 227 [1st Dept. 2004][four month delay was unreasonable], Bauerschmidt & Sons, Inc. v. Nova Cas. Co., 69 AD3d 668 [2d Dept. 2010][four month delay was unreasonable]). As such, Plaintiff demonstrated its prima facie entitlement to judgment, thereby shifting the burden of proof onto Defendant.

In opposition, Defendant raised a triable issue of fact relative to"the reasonableness of [his] proffered excuse" for the delay. (Great Canal Realty Corp., supra at 744). "[T]he focus of [this] inquiry is its reasonableness under the circumstances, not whether the insured should have

anticipated the possibility of a lawsuit." (U.S. Underwriters Ins. Co., supra, Spa Steel Prods. Co., supra). Defendant submits a sworn affidavit alleging that his wife's injury, while it occurred on a boat that he owned and was operating, was not caused by his operation. He alleges that the gate was closed prior to his wife's injury and had no prior notice of its dangerously sharp condition or its propensity to open. He alleges that the faulty gate, sprung open by a passing boat's waves, caused her injury. Defendant set forth his belief of nonliability for his wife's claims, prior to the counterclaim brought in Fitzmaurice v. Sylvan, which belief was confirmed by his attorneys. Because "[o]rdinarily the question of whether the insured had a good faith belief in nonliability, and whether that belief was reasonable, presents an issue of fact and not one of law" (Bauerschmidt & Sons, Inc., supra at 669) and the "conflicting inferences" arising from the facts herein (St. James Mechanical, Inc. v. Royal & Sunalliance, 44 AD3d 1030 [2d Dept. 2007]), Defendant sufficiently demonstrated the existence of an issue of fact, requiring denial of Plaintiff's motion.

Accordingly, Plaintiff's motion for summary judgment is denied.

This Decision and Order is being returned to the attorneys for the Defendant. A copy of this Decision and Order and all other original papers submitted on this motion are being delivered to the Greene County Clerk for filing. The signing of this Decision and Order shall not constitute entry or filing under CPLR §2220. Counsel is not relieved from the applicable provision of that section respecting filing, entry and notice of entry.

So Ordered.

Dated: June 4, 2010
Albany, New York

JOSEPH C. TERESI, J.S.C.

PAPERS CONSIDERED:

1. Notice of Motion, dated March 30, 2010, Affidavit of Jeffrey Hurd, dated March 30, 2010, with attached Exhibits A-I.
2. Affidavit of William Fitzmaurice, dated April 1, 2010, Affirmation of Ralph Lewis, dated April 1, 2010.
3. Affidavit of Judith Aumand, dated April 8, 2010.