Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE DENIS J. BUTLER IA Part 12
Justice

x

TOWER INSURANCE COMPANY OF NEW YORK

- against -

NEW WOK HING TRADING, INC., et al.

x

Index Number 28203 2008

Motion Date March 30, 2010

Motion Cal. Number 29

Motion Seq. No. 1

The following papers numbered 1 to 13 read on this motion by plaintiff Tower Insurance Company of New York for an order granting a default judgment against New Wok Hing Trading, Inc., and Qi Chao Lin pursuant to CPLR 3215(a), and for an order granting summary judgment declaring that it has no duty to defend and indemnify defendants New Wok Hing Trading, Inc., and Qi Chao Lin in the underlying action entitled *Zeng-Fei Jiang and Xiu-Mei Dong v New Wok Hing Trading, Inc. and Qi Chao Lin*, Index No. 23284/07.

	Papers Numbered
Notice of Motion-Affidavit-Exhibits (A-H).....	1-4
Supporting Affirmation-Exhibits (A-D).....	5-7
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Upon the foregoing papers the motion is determined as follows:

Plaintiff Tower Insurance Company of New York (Tower) issued a commercial general liability policy to the insured New Wok Hing Trading Inc. (New Wok), a grocery distributor, that was to provide coverage for the insured's premises from March 1, 2007

through March 1, 2008. The insured's premises are located at 126 Gardner Avenue, Brooklyn, New York. The policy also provided coverage to the insured's executive officers and directors, with respect to their duties in that capacity, and thus included Qi Chao Lin, the sole officer and principal of New Wok. The policy contains a provision requiring the insured, "as soon as practicable," to provide notice to Tower of an "occurrence" that may result in a claim. It also provides that notice of a "suit" brought against any insured be given to the insurer "as soon as practicable."

On June 6, 2007, Zeng-Fei Jiang, sustained a crush injury to his left hand, which resulted in the amputation of his middle finger to the middle joint, as well as other injuries to his fingers and hand, while unloading goods he had delivered to the premises. Mr. Lin was on the premises at the time of the accident, and was immediately aware of Mr. Jiang's injury, as he heard Mr. Jiang scream, saw his bloody hand, knew that someone had called 911, and that the police arrived, and witnessed Mr. Jiang's removal from the premises by an ambulance. Neither New Wok or Mr. Lin reported this accident to their insurer, Tower.

Mr. Jiang and his wife Xiu-Mei Dong retained counsel to represent them in the accident five days later on June 11, 2007. Sometime after being retained, an investigator was hired who visited the 90th Precinct, and obtained a copy of the 911 calls, and determined that only one call had been made from the subject premises reporting the accident, and that the caller spoke Spanish. The investigator called the number on file with 911, and spoke to someone who told him that he spoke Chinese. The investigator in a report dated August 5, 2009, requested that someone from counsel's office call that phone number and speak to the person in Chinese. Counsel also conducted a title search to determine the name of the property owner, and searches were made online regarding the property owner, and New Wok.

On September 17, 2007 an action was commenced in this court to recover damages for personal injuries and loss of consortium, entitled *Zeng-Fei Jiang and Xiu-Mei Dong v Qi Chao Lin and New Wok Trading Inc.*, Index Number 23284/2007. Mr. Lin was served with process in that action on September 20, 2007 and New Wok was served with process on September 21, 2007. Neither Mr. Lin nor New Wok responded to the pleadings, and counsel for Jiang and Dong sent letters by certified and regular mail to New Wok and Lin on November 13, 2007, stating that if counsel did not hear from these defendants, default proceedings would be commenced. Although the certified letter addressed to New Wok was returned as "unclaimed," the letter sent by regular mail was not returned. As regards the letters sent to Mr. Lin, the return receipt card was signed by Lin and none of these letters were returned to the sender.

On November 15, 2007, New Wok and Lin provided their first notice to Tower of Jiang's accident, by a fax from Eastern Brokerage Inc., an insurance broker, who attached

a copy of the summons and complaint in the action commenced by Jiang and Dong. Tower conducted an investigation through Northern Intelligence Agency Inc., whose investigator visited the premises, and interviewed Mr. Lin. Northern Intelligence Agency reported its findings to Tower on November 28, 2007.

Tower, in a letter dated December 3, 2007, disclaimed coverage to New Wok and Lin on the grounds that they had failed to notify Tower of the occurrence or the lawsuit, as soon as practicable, as required under the insurance policy. The disclaimer letter set forth the exact provisions of the policy which pertain to bodily injury, who is an insured, and the insured's duties in the event of an occurrence, offense or suit. Tower stated in its letter that its insureds were "aware of the 'occurrence' at time it took place on June 6, 2007, and an ambulance was called to the scene and transported Zeng-Fei Jiang from the premises. Also, the subject lawsuit was served on you on September 20, 2007. However, we were not notified of the 'occurrence,' claim, or suit until November 19, 2007. Accordingly, you breached the policy conditions set forth by failing to notify us of the 'occurrence,' claim and/or suit as soon as practicable and/or failing to immediately forward the suit papers to us."

Tower also disclaimed as to Jiang and Dong, stating that "[b]y copy of this letter to plaintiff's counsel, we are disclaiming directly to plaintiffs as they also failed to comply with the policy conditions set forth above by failing to notify us of the 'occurrence,' claim or suit as soon as practicable and/or failing to immediately the suit papers to us."

Tower stated that it would commence a declaratory judgment action in order to confirm that it has no duty to defend and indemnify New Wok and Lin, and that pending a determination of the proposed action, it would assign counsel to represent them in the action commenced by Jiang and Dong.

Tower, in a letter dated November 21, 2007 and addressed to counsel for Jiang and Dong, requested an extension of the time in which to respond to the underlying complaint through December 21, 2007. Counsel for Jiang and Dong, in a letter dated December 6, 2007, requested that Tower provide written notification of the limits of its insurance policy. In a letter dated January 24, 2008, Tower's claims examiner requested that counsel for Jiang and Dong provide certain information pertaining to the accident. An answer was served in the underlying action and the parties therein were deposed. All discovery has been completed in the underlying action and the parties therein are scheduled to appear in the Trial Scheduling Part on June 14, 2010.

Tower commenced the within action for declaratory judgment on November 20, 2008. Mr. Lin was personally served with process on November 28, 2008 and New Wok was served pursuant to BCL 306 on December 15, 2008. Tower's counsel sent letters to Mr. Lin

and to New Wok on February 18, 2009 and July 10, 2009 regarding their failure to respond to the pleadings in this action. Defendants Qi Chao Lin and New Wok have failed to serve an answer or otherwise move or appear in this action. Defendants Zeng-Fei Jiang and Xiu-Mei Dong have served an answer and have interposed as affirmatives defenses that Tower's disclaimer of coverage was untimely, and that these defendants timely notified the co-defendants of their claim.

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 (*Great Canal Realty Corp. v Seneca Ins. Co.*, 5 NY3d 742, 743, [2005]), and the insured's failure to provide timely notice of an occurrence vitiates the contract as a matter of law (*see Argo Corp. v Greater N.Y. Mut. Ins. Co.*, 4 NY3d 332, 339 [2005]). "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" (*Paramount Ins. Co. v Rosedale Gardens*, 293 AD2d 235, 239-240 [2002]). "[W]here there is no excuse or mitigating factor, the issue [of reasonableness] poses a legal question for the court, rather than an issue for the trier of fact" (*SSBSS Realty Corp. v Public Serv. Mut. Ins. Co.*, 253 AD2d 583, 584 [1998], quoting *Hartford Acc. & Indem. Co. v CNA Ins. Cos.*, 99 AD2d 310, 313 [1984]; *see also Tower Ins. Co. of N.Y. v Lin Hsin Long Co.*, 50 AD3d 305 [2008]).

Here, plaintiff has established as a matter of law that the insureds failed to give plaintiff notice of the accident within a reasonable period of time. The accident involved a delivery person who was injured on the insureds' premises and had to be removed from the premises on a stretcher and placed in an ambulance. Moreover, the insureds, through its sole officer or manager Mr. Lin, knew about the accident on the day it occurred. Thus, although the duty to give notice arose on the day of the accident, the insured did not give plaintiff notice until almost five months after it occurred -- an unreasonable delay as a matter of law (*see Tower Ins. Co. of N.Y. v Miles*, __ AD3d __, 2010 NY Slip Op 4635, 2010 N.Y. App. Div. LEXIS 4554 [2010]; *Tower Ins. Co. of N.Y. v Lin Hsin Long Co.*, *supra*; *DiGuglielmo v Travelers Prop. Cas.*, 6 AD3d 344, 346 [2004], *lv denied* 3 NY3d 608 [2004]; *Paramount Ins. Co. v Rosedale Gardens, supra* at 238, 241). In addition, the insureds additional delay of nearly two months in notifying the insurer of the lawsuit is unreasonable, as a matter of law (*Viles Contracting Corp v Hartford Fire Ins. Co.*, 271 AD2d 349 [2000]; *Safer v Government Employees Ins Co.*, 254 AD2d 344 [1998]; *Luberman's Mut. Cas. Co. v Material Damages Adjustment Corp.*, 248 AD2d 444 [1998]). Therefore, that branch of plaintiff's motion which seeks a default judgment as to defendants Qi Chao Lin and New Wok Trading Co., is granted.

Contrary to the assertions of defendants Jiang and Dong, plaintiff's request for summary judgment is not premature. Tower's investigation of the June 6, 2007 accident is not at issue here, and Jiang and Dong have failed to establish the existence of any facts, presently unavailable, which would warrant the denial of summary judgment pursuant to CPLR 3212(f). The evidence establishes that Tower, upon receipt of the summons and complaint, promptly investigated the incident and determined that its insureds were aware of the accident immediately after it occurred on June 6, 2007, and timely disclaimed against its own insureds and the injured party on December 3, 2007. Counsel for Jiang and Dong received the disclaimer letter on December 6, 2007, the same date he wrote to Tower advising of the claim and its representation.

An injured party has an independent right to notify an insurance carrier of an accident (*see* Insurance Law § 3420[a][3]). However, "the injured party is required, in order to rely upon that provision, to demonstrate that he or she acted diligently in attempting to ascertain the identity of the insurer, and thereafter expeditiously notified the insurer" (*Steinberg v Hermitage Ins. Co.*, 26 AD3d 426, 428 [2006]; *see also Lauritano v American Fid. Fire Ins. Co.*, 3 AD2d 564, 568 [1957], *affd* 4 NY2d 1028 [1958]). Stated differently, "where the injured person proceeds diligently in ascertaining coverage and in giving notice, he [or she] is not vicariously charged with any delay by the assured" (*Jenkins v Burgos*, 99 AD2d 217, 221 [1984]; *see National Grange Mut. Ins. Co. v Diaz*, 111 AD2d 700, 701 [1985]). In determining the reasonableness of such notice, the notice required is measured less rigidly than that required of the insured and the sufficiency thereof is governed not by the mere passage of time but by the means available therefor (*Appel v Allstate Ins. Co.*, 20 AD3d 367, 368-369 [2005]).

The evidence further establishes as a matter of law that Jiang and Dong did not exercise reasonable diligence in attempting to ascertain the identity of plaintiff and notify it of the accident. With respect to the issue of reasonable diligence, counsel was retained within five days after the accident, and thereafter obtained the 911 information, an EMS report, a title search in order to determine the identity of the property owner and conducted online searches to obtain information pertaining to New Wok and Mr. Lin. However, counsel did not seek any information regarding the insurer of the premises from either the property owner or the occupant of the premises, New Wok. Thus, neither the investigator's report, nor the various online searches evince reasonable diligence by Jiang and Dong's counsel in seeking to identify plaintiff. Rather than ascertaining the identity of New Wok and Lin's insurer, counsel for Jiang and Dong merely relied on the actions of the insureds broker, who forwarded the pleadings to Tower. This is insufficient under Insurance Law § 3420(a)(3) (*see Tower Ins. Co. of N.Y. v Jaison John Realty Corp.*, 60 AD3d 418 [2009]; *Tower Ins. Co. of N.Y. v Lin Hsin Long Co., supra*).

With respect to the issue of notice, neither Mr. Jiang and Ms. Dong, nor their counsel, independently notify Tower of the June 6, 2007 accident. Rather, the belated notice received by plaintiff insurer was supplied by the insureds when their broker forwarded to Tower the summons and complaint in the underlying action. Therefore, as neither Jiang nor Dong asserted their own right to provide notice, but rather relied on the insured to do so, their rights are derivative of the insured's (*see Tower Ins. Co. of N.Y. v Lin Hsin Long Co., supra*; *Mount Vernon Fire Ins. Co. v Harris*, 193 F Supp 2d 674, 679 [2002]). Jiang and Dong thus are bound by the insureds's failure to give timely notice, and any subsequent information provided by the injured party is superfluous as regards notice. Under these circumstances, Tower was not required to provide the injured party with an additional notice of disclaimer (*see Massachusetts Bay Insurance Co. v Flood*, 128 AD2d 683 [1987]; *see also Agway Ins. Co. v Alvarez*, 258 AD2d 487 [1999]).

In view of the foregoing, plaintiff's motion for a default judgment against defendants New Wok Trading Inc. and Qi Chao Lin is granted. That branch of plaintiff's motion which seeks summary judgment is granted, and it is the declaration of the court that Tower Insurance Company of New York does not have a duty to defend and indemnify New Wok Trading Inc. and Qi Chao Lin in the underlying action.

Dated: June 8, 2010

J.S.C.