

Tower Ins. Co. of N.Y. v NHT Owners LLC
2010 NY Slip Op 31479(U)
June 11, 2010
Sup Ct, NY County
Docket Number: 113336/08
Judge: Marcy S. Friedman
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: MARCY S. FRIEDMAN

PART 57

Justice

Index Number : 113336/2008

TOWER INSURANCE

VS.

NHT OWNERS LLC

SEQUENCE NUMBER : 002

SUMMARY JUDGMENT

INDEX NO. 113336/08

MOTION DATE _____

MOTION SEQ. NO. 002

MOTION CAL. NO. _____

this motion is for summary judgment

PAPERS NUMBERED	
1,2	
3,4	
5	

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Memor of Law M1-M2

Upon the foregoing papers, it is ordered that this motion is

DECIDED IN ACCORDANCE WITH ACCOMPANYING DECISION/ORDER.

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Dated: 6-11-10



MARCY S. FRIEDMAN S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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 57

PRESENT: Hon. Marcy S. Friedman, JSC

_____ x
TOWER INSURANCE COMPANY OF NEW
YORK

Index No.:113336/08

Plaintiff,

- against -

DECISION/ORDER

NHT OWNERS LLC, MALLORY
MANAGEMENT CORP., and ROBERT RICCIO

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk
and notice of entry cannot be served hereon. To
obtain entry, counsel or authorized representative must
appear in person at the Judgment Clerk's Desk (Room
1415).

_____ x
In this declaratory judgment action, plaintiff Tower Insurance Company of New York (“Tower”) seeks a judgment declaring that it has no duty to defend or indemnify defendants NHT Owners, LLC (“NHT”) and Mallory Management Corp. (“Mallory”) in a lawsuit entitled Riccio v NHT Owners, LLC, et al., (Supreme Court, Kings County, Index No. 32163/04 [“underlying action”]). Tower moves for summary judgment granting the requested declaration on the ground that defendants’ notice of occurrence was untimely. Tower’s motion also seeks summary judgment dismissing NHT’s and Mallory’s counterclaim for breach of the duty of good faith and fair dealing. NHT and Mallory cross-move for summary judgment granting judgment on their counterclaim and dismissing the complaint on the ground that the notice of disclaimer was untimely.

The relevant facts are as follows: Tower issued a Commercial Lines Policy (“Policy”) to defendants for the period from December 31, 2003 through December 31, 2004. (Aff. of Lowell Aptman [Tower VP of liability claims], Ex. A.) The underlying accident occurred on August 30,

2004, when defendant Robert Riccio allegedly fell from a ladder in an elevator at defendants' premises. Defendants do not dispute that they had knowledge of the accident on the date that it occurred. (See Aff. of Simon Rothkrug in Supp. of Cross-Motion, ¶ 11[c].) Defendants were served with a summons and complaint in the underlying action on October 18, 2004. (*Id.*, ¶ 11[f].) On November 1, 2004, NHT notified its insurance agent, Tri-Northern Group, of the accident and the complaint. On the same date, Tri-Northern notified Jersey Link, Inc. ("Jersey Link"), an entity listed as the "Producer" on the Tower Policy. (Tower's Motion, Exs. A, B.) It is undisputed that Jersey Link notified Tower of the occurrence and the complaint on November 4, 2004.¹ By letter dated December 2, 2004, Tower disclaimed coverage on the ground that defendants failed to notify Tower of the occurrence as soon as practicable in breach of Section IV, Paragraph 2, of the Policy. (*Id.*, Ex. D.)

In its disclaimer letter, Tower agreed to represent defendants in the underlying action pending a determination of the propriety of its disclaimer in a declaratory judgment action. While Tower originally filed a declaratory judgment action against defendants in 2005, it decided not to prosecute that action because of the possibility that the underlying action would be dismissed. It continued to hold off pursuing the declaratory judgment action pending decision on its motion for summary judgment in the underlying action, including the subsequent appeal of the trial court's partial denial of its motion. (Aff. of Joseph Wiener, ¶¶ 28-38.) Not until 2008, when the appellate court affirmed the trial court's denial, did Tower then decide to commence a new declaratory judgment action against defendants, as its time to move for a judgment by

¹While Tower claims that it first received notice of the claim on November 4, 2004, defendants contend that Jersey Link is an authorized agent of Tower and thus the notice given to Jersey Link on November 1, 2004 effectuated notice on Tower.

default had expired. (Id., ¶ 39.)

The standards for summary judgment are well settled. The movant must tender evidence, by proof in admissible form, to establish the cause of action “sufficiently to warrant the court as a matter of law in directing judgment.” (CPLR 3212[b]; Zuckerman v City of New York, 49 NY2d 557, 562 [1980].) “Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers.” (Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 [1985].) Once such proof has been offered, to defeat summary judgment “the opposing party must ‘show facts sufficient to require a trial of any issue of fact’ (CPLR 3212, subd. [b]).” (Zuckerman, 49 NY2d at 562.) Furthermore, summary judgment may not be avoided based on a claimed need for discovery unless some evidentiary basis is offered to show that discovery may lead to relevant evidence. (Bailey v New York City Transit Auth., 270 AD2d 156, 157 [1st Dept 2000].)

Insurance Law § 3420(d) provides that where a liability insurer disclaims liability for an accident occurring in this State, “it shall give written notice as soon as is reasonably possible of such disclaimer of liability or denial of coverage to the insured and the injured person or any other claimant.” It is settled that “timeliness of an insurer’s disclaimer is measured from the point in time when the insurer first learns of the grounds for disclaimer of liability or denial of coverage. Moreover, an insurer’s explanation [for its delay] is insufficient as a matter of law where the basis for denying coverage was or should have been readily apparent before the onset of the delay.” (First Fin. Ins. Co. v Jetco Contr. Corp., 1 NY3d 64, 68-69 [2003] [internal quotation marks and citations omitted].)

Here, the basis for the disclaimer, defendants’ delay in notifying Tower of the occurrence, became readily apparent on, or shortly after, the date that Tower received notice of the

occurrence and of the summons and complaint in the underlying action. In particular, both the notice of occurrence and the accompanying complaint clearly state that the accident occurred at defendants' premises and set forth the date on which the accident occurred, which was two months prior to the date on which Tower received notice. While Tower does not dispute that it received the notice at least as of November 4, 2004, it claims that it did not have the information on which to disclaim until November 8, 2004, when it received a fax from defendant Mallory which showed that defendants were aware of the accident the day that it occurred. (Tower's Motion, Ex. C.) Even assuming that Tower needed this information to determine whether to disclaim, Tower fails to provide a sufficient explanation for its delay in disclaiming coverage from November 8 on, and makes no showing in support of its assertion that it had a "need to conduct an investigation before determining whether to disclaim." (See West 16th St. Tenants Corp. v Public Serv. Mut. Ins. Co., 290 AD2d 278, 279 [1st Dept 2002], lv denied 98 NY2d 605.) Thus, its delay in not disclaiming coverage until December 2, 2004 was unreasonable. (See e.g. Milbank Hous. Dev. Fund v Royal Indem. Co., 17 AD3d 280 [1st Dept 2005] [60 day delay in disclaiming coverage based on untimely notice of the occurrence held unreasonable as a matter of law]; 2833 Third Ave. Realty Assocs. v Marcus, 13 AD3d 329 [1st Dept 2004] [37 days held unreasonable where grounds for disclaimer were evident from the face of the late notice of claim]; West 16th St. Tenants Corp., 290 AD2d 278, supra [30 day delay in disclaiming on late notice ground held unreasonable as a matter of law]. Compare Wausau Bus. Ins. Co. v 3280 Broadway Realty Co. LLC, 47 AD3d 549 [1st Dept 2008] [24 day delay held reasonable where plaintiff misrepresented when he first learned of accident and failed to disclose such knowledge for two years].)

The counterclaim alleging that Tower acted in bad faith and breached the duties of good faith and fair dealing by commencing this action is not maintainable on the facts as alleged by defendants.

Accordingly, it is hereby ORDERED that the summary judgment motion of Tower Insurance Company of New York for a declaratory judgment is denied; and it is further

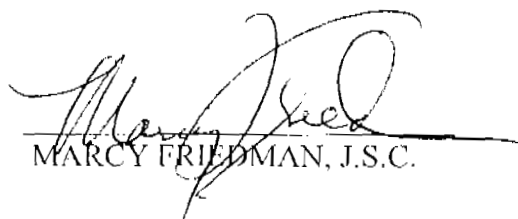
ORDERED, ADJUDGED, and DECLARED that Tower Insurance Company of New York is obligated to defend and indemnify defendants NHT Owners, LLC and Mallory Management Corp. in the underlying action against them entitled Riccio v NHT Owners, LLC, et al., (Supreme Court, Kings County, Index No. 32163/04); and it is further

ORDERED that the branch of Tower Insurance Company of New York's motion to dismiss the counterclaim of defendants NHT Owners, LLC and Mallory Management Corp. is granted; and it is further

ORDERED that the cross-motion for summary judgment of defendants NHT Owners, LLC and Mallory Management Corp. is granted to the extent of dismissing the complaint.

This constitutes the decision, order, and judgment of the court.

Dated: New York, New York
June 11, 2010


MARCY FRIEDMAN, J.S.C.

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 1419).