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

PRESENT: BARBARA JAFFE J.S.C. PART 5
Justice

Index Number : 603572/2009
BANDOW CO., INC.
VS.
BURLINGTON INS. CO.
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT
Sol # 8

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

FILED
JUN 16 2010
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 6/10/10
JUN 16 2010

BARBARA JAFFE J.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 5

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BANDOW CO., INC.,

Plaintiff,

-against-

THE BURLINGTON INSURANCE COMPANY also known as "TBIC" and doing business as IFG COMPANIES,

Defendant.

----------x

Index No. 603572/09

Motion Date: 4/23/10
Motion Seq. No.: 001
Argued: 5/4/10

DECISION AND ORDER

BARBARA JAFFE, JSC:

For plaintiff:
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For defendant:
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By notice of motion dated February 10, 2009, defendant moves pursuant to CPLR 3212 for an order summarily dismissing the complaint against it, including plaintiff's claim pursuant to General Business Law (GBL) § 349, and declaring that it has no duty to defend or indemnify plaintiff in an underlying personal injury action. Plaintiff opposes the motion except to the extent of consenting to the dismissal of the GBL claim.

I. BACKGROUND

In or around August 2007, defendant issued a commercial general liability (CGL) insurance policy to plaintiff, effective from August 8, 2007 to August 8, 2008. (Affidavit of Nancy Palmisano, dated Feb. 10, 2010 [Palmisano Affid.], Exh. A). Pursuant to section four of the policy's CGL conditions, plaintiff was required to notify defendant "as soon as practicable of

an 'occurrence' or an offense which may result in a claim" and if a claim or lawsuit is made against plaintiff, and to immediately send defendant copies of any legal papers. (*Id.*, Exh. A-1).

On December 18, 2007, one Hampson Sisler sustained injuries as a result of a trip and fall on a sidewalk on which plaintiff had performed repair work. (*Id.*, Exh. C). Sisler retained a lawyer who, in an attempt to resolve any claim arising from the accident, advised plaintiff by letter dated January 30, 2008 that Sisler may have a claim against it and asked that plaintiff forward a copy of the instant letter to its insurance carrier. (*Id.*, Exh. C). Having received no response, Sisler's lawyer tried again, by letter dated March 5, 2008. (*Id.*, Exh. D).

Soon thereafter, plaintiff forwarded the March 5 letter to its attorney. (*Id.*). By letter to Sisler's lawyer, dated March 17, 2008, plaintiff denied liability for the accident. (*Id.*, Exh. E).

On or about July 7, 2008, Sisler commenced the underlying action against plaintiff and others. (*Id.*, Exh. B). By facsimile transmission dated August 14, 2008, plaintiff's broker sent defendant a notice of claim for Sisler's accident. (*Id.*, Exh. F). Attached to it was the March 5 letter. (*Id.*).

By letter dated August 20, 2008, defendant acknowledged receipt of plaintiff's claim (*id.*, Exh. G), and by letter dated August 29, 2008, denied coverage, claiming that the notice was untimely (*id.*, Exh. H).

On or about November 17, 2009, plaintiff commenced the instant action against defendant, seeking a judgment declaring that defendant has a duty to defendant and indemnify it in the underlying action. (*Id.*, Exh. B). On or about January 13, 2010, defendant served its answer. (*Id.*, Exh. I). In plaintiff's response to defendant's discovery demands, dated February 2, 2010, plaintiff admitted that the first notice it received of Sisler's accident was the March 5 letter,

that on March 13, 2008 it forwarded the letter to its attorney, and that on August 8, 2008 it forwarded it to its broker. (*Id.*, Exh. K). It conceded that although it received the January letter, it did not know when. (*Id.*).

II. CONTENTIONS

Relying on the January and March letters to plaintiff and plaintiff's admissions, defendant contends that plaintiff's notice of the underlying action was untimely and that it thus has no duty to defend or indemnify plaintiff. (Memorandum of Law in Support, dated Feb. 11, 2010).

Plaintiff argues that as defendant is a resident of North Carolina, that state's law governs, and that North Carolina, like New York, requires that an insurer establish prejudice resulting from the insured's late notice before it may disclaim coverage. (Plaintiff's Memorandum of Law, dated Apr. 9, 2010). While it concedes notice of Sisler's accident in the March 5 letter, plaintiff maintains that because the letter contains no indication of any defect or fault, it believed, in good faith, that it was not liable for the accident and that its delay was thereby justified. (*Id.*, Affidavit of Thomas Vignola, dated Apr. 9, 2010).

In reply, defendant denies that North Carolina law or that New York's "no prejudice" rule applies to plaintiff's policy, and that, under the circumstances, plaintiff's alleged good-faith belief that it was not liable is reasonable as a matter of law. (Reply Affirmation, dated Apr. 22, 2010).

III. ANALYSIS

It is well-settled that when an insurance policy requires an insured to provide "notice of a claim or 'suit' as soon as practicable," the notice must be provided "within a reasonable time in view of all the facts and circumstances." (*Security Mut. Ins. Co. of New York v Acker-Fitzsimons*

Corp., 31 NY2d 436, 440-441 [1972]; *Pile Foundation Constr. Co., Inc. v Investors Ins. Co. of Am.*, 2 AD3d 611 [2d Dept 2003]). Notice is a condition precedent to coverage and absent a valid excuse, "a failure to satisfy the notice requirement vitiates the [insurance] policy." (*Security Mut. Ins. Co. of New York*, 31 NY2d at 440).

While an insured's untimely notice may be excused by a good-faith belief in non-liability for an accident, the insured has the burden of demonstrating the reasonableness of its belief. (*Great Canal Realty Corp. v Seneca Ins. Co., Inc.*, 5 NY3d 742 [2005]). "At issue is not whether the insured believes he will ultimately be found liable for the injury, but whether he has a reasonable basis for a belief that no claim will be asserted against him." (*SSBSS Realty Corp. v Pub. Serv. Mut. Ins. Co.*, 253 AD2d 583, 584 [1st Dept 1998]).

Although the existence of a good-faith belief of non-liability and whether that belief is reasonable are generally questions reserved for trial, summary judgment may be granted in favor of the insurer if, "construing all inferences in favor of the [ ] insured, [the insurer] establishes as a matter of law that the [insured's] belief . . . that the plaintiffs in the underlying action would not assert claims against it was unreasonable or in bad faith." (*Genova v Regal Marine Indus., Inc.*, 309 AD2d 733, 734 [2d Dept 2003]; *see also Reg-Tru Equities, Inc. v Valley Forge Ins. Co.*, 44 AD3d 570 [1st Dept 2007], *lv denied* 10 NY3d 701 [2008] [granting insurer summary judgment as insured failed to raise triable issue as to whether its belief that it was not liable for accident was reasonable]; *SSBSS Realty Corp.*, 253 AD2d at 585 [where there is no excuse or mitigating factor, issue of reasonableness is legal question to be resolved by court]).

While an insurer may not disclaim coverage based on untimely notice if it was not prejudiced thereby (Insurance Law § 3420[5]), section five became effective on January 17, 2009

and applies only to policies issued or delivered on or after that date. (*Briggs Ave., LLC v Ins. Corp. of Hannover*, 11 NY3d 377 [2008] [reaffirming that insurer may disclaim coverage based on late notice regardless of prejudice as amendment to Insurance Law § 3420 not yet effective]). As the policy here was issued in 2007, long before the amendment's effective date, defendant need not demonstrate that it was prejudiced by plaintiff's untimely notice in order to disclaim coverage based on untimeliness. (*See Ponok Realty Corp. v United Ntl. Specialty Ins. Co.*, 69 AD3d 596 [2d Dept 2010]; *Bd. of Mgrs. of the 1235 Park Condo. v Clermont Specialty Mgrs., Ltd.*, 68 AD3d 496 [1st Dept 2009] [no merit to insured's argument that showing of prejudice required as policy issued in 2003]).

Moreover, as plaintiff's principal place of business is New York, New York insurance law applies. (*See Zurich Ins. Co. v Shearson Lehman Hutton, Inc.*, 84 NY2d 309, 318 [1994] [New York law applied as insured had principal place of business in New York, and it was where insurance contract was negotiated and issued and claims were handled]; *Liberty Surplus Ins. Corp. v Ntl. Union Fire Ins. Co. of Pittsburgh, PA*, 67 AD3d 420 [1st Dept 2009] [governing law based on insured's principal place of business]).

As it is undisputed that the notice was untimely, it must be determined whether plaintiff's excuse for the delay was reasonable. Sisler's lawyer not only advised plaintiff of the accident but asked that plaintiff notify its insurance carrier of the accident, thereby signaling Sisler's intention to assert a claim against plaintiff absent any pre-action settlement. And in forwarding the letter to its attorney, plaintiff signaled its awareness of Sisler's intention. Plaintiff's belief that the claim lacked merit is irrelevant. (*See Avery & Avery, P.C. v Am. Ins. Co.*, 51 AD3d 695 [2d Dept 2008][issue was not whether plaintiff reasonably believed that any claim brought by underlying

plaintiff had no merit, but whether plaintiff reasonably believed that no claim would be asserted against it]). Consequently, plaintiff's asserted belief that Sisler would not assert a claim against it is without basis and unreasonable as a matter of law (*See eg Donovan v Empire Ins. Group*, 49 AD3d 589 [2d Dept 2008] [plaintiff's belief in nonliability after receiving letter from underlying plaintiff's attorneys, notifying plaintiff of potential claim against it, was unreasonable]; *DiGuglielmo v Travelers Prop. Cas.*, 6 AD3d 344 [1st Dept 2004], *lv denied* 3 NY3d 608 [belief of nonliability unreasonable as matter of law as plaintiff received letter from underlying plaintiff's law firm advising him to contact his insurance carrier with respect to underlying accident]; *Paul Developers, LLC v Maryland Cas. Ins. Co.*, 28 AD3d 443 [2d Dept 2006] [plaintiff's eight-month delay in notifying defendant of claim after receiving claim letter from underlying plaintiff's attorneys was unreasonable]). And absent a reasonable excuse for plaintiff's delay in notifying defendant of Sisler's claim, defendant properly disclaimed coverage.

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that defendant's motion for summary judgment seeking a declaration that it is not obliged to provide a defense to, and provide coverage for, the plaintiff in the action of Hampson Sisler vs. The City of New York, et al., Index No. 109396/08, New York County, is granted; it is further

ADJUDGED and DECLARED, that defendant herein is not obliged to provide a defense to, and provide coverage for, the plaintiff in the said action pending in New York County; it is further

ADJUDGED, that the defendant shall recover from the plaintiff costs and disbursements

as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED, that the Clerk is directed to enter judgment accordingly.

This constitutes the decision and order of the court.

Barbara Jaffe, JSC

DATED: June 10, 2010
New York, New York

BARBARA JAFFE
J.S.C.

JUN 10 2010

FILED
JUN 16 2010
NEW YORK
COUNTY CLERK'S OFFICE