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

PRESENT: JAMIE R. SCLOMON PART 55

Justice

Index Number : 105179/2006

TOWER INSURANCE CO OF NEW YORK

VS.

RITE WAY CORP.

SEQUENCE NUMBER : 001

SUMMARY JUDGMENT

INDEX NO.

MOTION DATE 1/11/10

MOTION SEQ. NO.

MOTION CAL. NO.

n this motion to/for

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1-7
Answering Affidavits — Exhibits	8-10/ 11-12
Replying Affidavits	13-16

Cross-Motion: [X] Yes [ ] No

Upon the foregoing papers, It is ordered that this motion is decided + adjudged decided in accordance with the annexed memorandum decision, order and declaratory judgment.

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: 6/23/10

JAMIE R. SCLOMON J.S.C.

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

Check one: [Y] FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST [ ] REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 55
----------X

TOWER INSURANCE COMPANY OF NEW YORK,

Plaintiff,

-against-

RITE WAY CORP., JERRY J. GUREWITZ and MICHAEL LAGANA,

Defendants,

----------X

Index No. 105179/2006
DECISION, ORDER and DECLARATORY JUDGMENT

SOLOMON, J.:

In this action, Tower Insurance Company of New York (Tower) seeks a declaration that it has no duty to indemnify or defend defendants Rite Way Corp (Rite Way) and Jerry J. Gurewitz (Gurewitz) in a personal injury lawsuit titled *Lagana v. Rite Way* Corp., et al., pending in the Supreme Court, Kings County, bearing index number 29789/2005 (the Underlying Action).

Tower moves for summary judgment in its favor against Gurewitz and Rite Way, and for default judgment against defendant Michael Lagana (Lagana), who is the plaintiff in the Underlying Action. Lagana cross-moves to dismiss the action against him on the ground that Tower abandoned it.

FACTS

Lagana is an electrician who was employed as a handyman by Gurewitz, the owner of the Rite Way grocery store located at 2269 86th Street, in Brooklyn (the Store). Tower insured Rite

Way under a commercial liability policy (see Policy, number CPP2215954, attached to the Affidavit of Lowell Aptman, dated September 23, 2009, [Aptman Affidavit], Ex. A).

In the Underlying Action, Lagana alleges that on April 17, 2003, he fell from a ladder while performing work at the Store, and suffered injuries. An attorney for Lagana sent a letter dated May 13, 2004 to Gurewitz, at the Rite Way address, advising that he was retained to represent Lagana in connection with the accident of April 17, 2003. Rite Way did not give notice to Tower of the accident until July 7, 2004 (Notice of Claim, Aptman Affidavit, Ex. B). On July 28, 2004, Tower disclaimed coverage by a letter that stated:

> [W]e have reviewed this matter and have determined that it is not covered under your policy . . . . Accordingly, we hereby disclaim coverage of this matter and will not defend or indemnify you with respect thereto . . . .

(First Disclaimer, Aptman Affidavit, Ex. C).

The reason cited for the disclaimer is Rite Way's failure to timely provide notice in accordance with the Policy.[1]

In Tower's investigation of the incident, made on receipt of the letter from Lagana's lawyer, Gurewitz informed the

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[1] The Policy provides the following:

> "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."

(Tower Commercial Policy, attached to Aptman Affidavit 1, Ex A, at Section 4, ¶ 2).

investigator that he knew Lagana had fallen the day of the accident, but did not report the incident to Tower because he did not think Lagana was going to bring a law suit against him (Statement, attached to affidavit of Michael Fraggetta, Ex. A). The investigator quotes Gurewitz stating that Lagana wanted to go to the hospital because his ankle was hurting, and that Lagana called a friend to take him there (*Id.*).

Lagana commenced the Underlying Action by filing a summons and verified complaint on September 28, 2005. Notwithstanding the First Disclaimer, Rite Way forwarded the information on the Underlying Action to Tower. Tower assigned an attorney to the matter and represented Rite Way. In conjunction with this representation, Tower sent Rite Way a letter via certified mail, return receipt requested, dated November 22, 2005 [the Second Disclaimer]. The letter stated, as relevant:

> 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.

(Second Disclaimer, attached to the Affidavit of Lowell Aptman dated December 3, 2009 [Aptman Affidavit 2], Ex. B).

Tower commenced this action for a judgment declaring that it is not obligated to indemnify Rite Way and Gurewitz from Lagana's claim for personal injuries arising from the April 17, 2003 accident, and that it is not obligated to defend Rite Way and

Gurewitz in the Underlying Action. It also seeks a declaration that Rite Way and Gurewitz are liable to Tower for the sums it has expended to defend the Underlying Action, including attorney's fees and expenses. No relief is sought against Lagana, but he was named as a defendant because he may have an interest in the coverage issues between Tower and its insureds (Verified Complaint, ¶ 13).

DISCUSSION

A. The Declaratory Judgment:

Under the circumstances presented, where Gurewitz learned that Lagana fell from a ladder on Rite Way's premises the day it happened, and that Lagana was in pain and wanted to go to the hospital, Gurewitz's belief that Lagana would not bring a law suit is not a reasonable excuse for Rite Way's failure to notify Tower of the incident (*see, SSBSS Realty Corp. v. Pub. Serv. Mut. Ins. Co.*, 253 AD2d 583 [1st Dept 1998], and *Young Israel Co-Op City v Guideone Mut. Ins. Co., 52 AD3d 245 [1st Dept 2008]*). Rite Way's unexcused delay in giving notice of more than a year is unreasonable as a matter of law (*see, SSBSS Realty Corp.*, and *Pandora Indus. v St. Paul Surplus Lines Ins. Co.*, 188 AD2d 277 [1st Dept 1992]). Therefore, Tower's disclaimer based on Rite Way's failure to give prompt notice of the incident in accordance with the Policy is valid.

Rite Way argues that it never received the Second Disclaimer and Tower has not supplied a certificate of its

mailing. It contends that Tower is equitably estopped from denying coverage on the ground that it did not reserve its right to disclaim when it began defending Rite Way in the Underlying Action, and has waived the First Disclaimer by its actions.

Tower counters that it has a common office practice to send disclaimers which is evidence that they did send the Second Disclaimer. It also argues that it is undisputed that Rite Way received the First Disclaimer, and that Tower did not waive it because there is no obligation to reaffirm a disclaimer.

The insurer has the burden of proving the validity of its timely disclaimer of insurance (see *Lehrer McGovern Bovis v. Public Service Mut. Ins. Co.*, 268 AD2d 388 [1st Dept, 2000]). An insurer is entitled to a presumption that a disclaimer notice was received when "the proof exhibits an office practice and procedure followed by the insurers in the regular course of their business, which shows that the notices of cancellation have been duly addressed and mailed" (*Nassau Ins. Co. v. Murray*, 46 NY2d 828, 829 [1978]). In order for this presumption to arise "office practice must be geared so as to ensure the likelihood that a notice of cancellation is always properly addressed and mailed" (id. at 830; see also, *Badio v. Liberty Mut. Fire Ins. Co.*, 12 AD3d 229, 229-30, 1st Dept, 2004]).

Tower submits the Affidavit of Angella Barnes, a claims administrative supervisor for Tower, who avers in detail her

personal knowledge of Tower's mailing procedure, and also notes that

> "[I]n the event that mail was undeliverable and returned to Tower, it would be given to the appropriate claims examiner, who would review it, and then route it to the file room to be placed in the file by a file clerk." (Aff. Of Angella Barnes, ¶ 6).

The file does not contain evidence of returned mail.

"[P]roof of regular office practice and procedure obviates the necessity of producing a witness with personal knowledge of the actual mailing of plaintiff's notice of cancellation" (*Badio, supra*, 12 AD3d at 230). While a signed and stamped certificate of mailing would be additional evidence of its mailing, the office's regular practices are sufficient to raise the presumption of mailing.

The burden shifts to Rite Way to rebut the presumption of receipt. Besides raising the issue of the lack of a certificate of mailing, Rite Way only contends that it never received the letter.

"In addition to a claim of no receipt, there must be a showing that routine office practice was not followed or was so careless that it would be unreasonable to assume that the notice was mailed" (*Nassau Ins., supra*, 46 NY2d at 830). Accordingly, Rite Way's contention is insufficient to rebut the presumption of mailing and it is declared that Tower properly reserved its rights, and has sufficiently disclaimed coverage.

To the extent that Tower seeks an adjudication that it is entitled to recoupment of the sum already expended in Rite Way's defense (Verified Complaint, Demand for Relief, ¶ 5, attached to Motion, Ex. C), there is no language in either disclaimer that contemplates repayment for a defense that Tower elected to offer, nor does Tower press this aspect of its claim in its motion papers. Tower disclaimed coverage, but later elected to defend Rite Way and Gurewitz. Neither disclaimer placed Rite Way on notice that it would be required to reimburse Tower for any defense provided, notwithstanding the disclaimer. Accordingly, Rite Way and Gurewitz are not required to reimburse Tower for expenses in defense of the Underlying Action.

B. Lagana's Cross Motion:

Tower moves for a default judgment against Lagana for his failure to answer or appear. Lagana cross moves to dismiss the action against him on the ground that Tower abandoned it because it did not move for default inside of one year, as required by CPLR 3215(c).

CPLR 3215(c) states that a default not entered within one year shall be dismissed as abandoned upon a motion unless sufficient cause is shown why it should not be. It is uncontested that Tower took no action with regard to Lagana for more than three years after the summons and complaint were

served. Tower's only defense to Lagana' motion is that it never intended to abandon this action. This statement, alone, does not establish sufficient cause to avoid dismissal. Moreover, the complaint does not seek any relief or a declaration as against Lagana.[2] In accordance with the foregoing, it hereby is

ORDERED, ADJUDGED and DECLARED that Tower's motion for summary judgment is granted to the following extent:

A) Defendants Rite Way Corp. And Jerry H. Gurewitz failed to give notice as soon as practicable to plaintiff Tower Insurance Company of New York of the incident involving defendant Michael Lagana on April 17, 2003 at the premises of defendant Rite Way Corp. at 2269 86th Street, Brooklyn, New York 11214, as required under the terms of the Policy issued to Rite Way Corp., which is a failure of a condition precedent to coverage under the Policy; and

B) The claims made in the Underlying Action (*Lagana v. Rite Way Corp*, Index No. 29789/2005 [Sup. Ct., Kings County]), or any related action, claim or suit arising from or relating to the same occurrence are not covered by the terms of Policy CPP2215954 issued to Rite Way, and Tower Insurance Company of New York is not obligated to

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[2] As a practical matter, however, the declaratory judgment herein will probably prevent Lagana from collecting under the Policy.

further defend or to indemnify any party in that action, but that defendants Rite Way Corp. and Jerry H. Gurewitz are not obligated to reimburse Tower for defense costs it incurred in defending the Underlying Action up to the date of entry hereof; and

C) Tower Insurance Company of New York is not obligated to pay any damages or costs which may be adjudged, awarded or otherwise arise in the Underlying Action; and it further is

ORDERED that the branch of Tower's motion seeking default judgment against Michael Lagana is denied; and it further is

ORDERED that defendant Michael Lagana's cross motion to dismiss is granted, and the complaint is severed and dismissed as against him, and the Clerk is directed to enter judgment accordingly, with costs and disbursements to Lagana as taxed.

Dated: June 23, 2010

ENTER:

J.S.C.

JANE S. SOLOMON

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).