[* 1]

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

PRESENT: HON. CAROL EDMEAD PART 35

Justice

Castlepoint

INDEX NO. 113048/09

MOTION DATE 6/23/10

- v -

MOTION SEQ. NO. 001

Mike's Pipe Yard

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for

FILED
JUL 22 2010
COUNTY CLERK'S OFFICE
NEW YORK

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

In accordance with the accompanying Memorandum Decision, it is hereby

ORDERED that the motion by CastlePoint Insurance Company for summary judgment declaring that it has no obligation to defend or indemnify defendant Mike's Pipe Yard and Building Supply Corp. in the personal injury action entitled *Damon Haindl v Mike's Pipe Yard and Building Supply Corp.* is denied; and it is further

ORDERED that CastlePoint Insurance Company serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: 7/19/10

HON. CAROL EDMEAD J.S.C.

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

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/JUDG. ☐ SETTLE ORDER /JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

----------X

CASTLEPOINT INSURANCE COMPANY,

Index No: 113048/09

Plaintiff,

-against-

MIKE'S PIPE YARD AND BUILDING SUPPLY CORP., and DAMON HAINDL,

Defendants.

----------X

HON. CAROL R. EDMEAD, J.S.C.

MEMORANDUM DECISION

In this insurance declaratory judgment action, CastlePoint Insurance Company ("plaintiff") moves for summary judgment declaring that it has no obligation to defend or indemnify defendant Mike's Pipe Yard and Building Supply Corp. ("defendant" or "Mike's") in the personal injury action entitled *Damon Haindl v Mike's Pipe Yard and Building Supply Corp.* (the "underlying action").

Factual Background

On or about February 11, 2009, defendant Damon Haindl ("Haindl") commenced the underlying personal injury suit against defendant, a plumbing supply distributor, for personal injuries he allegedly sustained on November 14, 2008, when he fell through a scaffold while working at defendant's premises. Haindl alleges that defendant negligently failed to maintain the building in a reasonably safe condition.

Prior to the underlying accident, plaintiff issued an insurance policy to defendant, effective from June 28, 2008 through June 28, 2009 (the "Policy"). The Policy's general liability coverage part covers "those sums that the insured becomes legally obligated to pay as damages

because of "bodily injury" caused by an "occurrence," which is defined in pertinent part as an "accident." A condition precedent to the coverage under the general-liability-coverage part is defendant's compliance with the following notice condition:

> 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. To the extent possible, notice should include:
> (1) How, when and where the "occurrence" or offense took place;
> (2) The names and addresses of any injured persons and witnesses; and
> (3) The nature and location of any injury or damage arising out of the "occurrence" or offense.
> b. If a claim is made or "suit" is brought against any insured, you must:
> (1) Immediately record the specifics of the claim or "suit" and the date received; and
> (2) Notify us as soon as practicable.
>
> You must see to it that we receive written notice of the claim or "suit" as soon as practicable.

After receiving notice of the claim on March 11, 2009, plaintiff disclaimed coverage by letter dated April 10, 2009, claiming, *inter alia*, that defendant was aware of the "occurrence" on the date it took place and failed to provide prompt notice to plaintiff of same as required by the Policy.

Plaintiff then commenced this action for a declaration that defendant is not entitled to insurance coverage under the Policy in the underlying action.

In support of summary judgment, plaintiff argues that it is not obligated to defend or indemnify defendant because defendant breached the Policy's notice-of-occurrence requirement by waiting nearly four months before notifying plaintiff of the accident, despite being aware of the incident when it occurred. In support, plaintiff submits the affidavit of James Dermit ("Dermit"), the assistant vice-president for home office claims for plaintiff. Dermit attests that

on March 11, 2009, nearly four months after the incident, plaintiff received the Summons and Verified Complaint and General Liability Notice of Occurrence/Claim from IGM Brokerage Corp. ("IGM"). No notice was ever received by plaintiff's claims administrator, TowerGroup Companies ("Tower"), directly from the claimants. According to plaintiff, upon receiving notice, plaintiff initiated an investigation.[1] On March 24, 2009, plaintiff's investigator interviewed defendant's manager, Daniel Rainford ("Daniel"), who discussed how he personally observed Haindl injured on the ground on the day of the accident. Daniel also confirmed that he was advised by another employee named Shiek that Haindl's injuries arose out of his use of a scaffold while working at defendant's premises. On April 1, 2009, plaintiff's investigator interviewed defendant's owner, Milton Rainford ("Milton"), who confirmed that he was made aware of Haindl's accident immediately after its occurrence. Milton also visited Haindl at the hospital the day after the accident. Plaintiff contends that Milton reported Haindl's incident to his insurance company after her received the Summons and Complaint in the underlying action.

Plaintiff contends that the Policy's requirement of defendant to provide notice "as soon as practicable" of any occurrence that "may result in a claim" is a condition precedent to coverage under the Policy. Plaintiff argues that an insured's unjustified failure to notify its insurance carrier of an occurrence that could result in a claim within a month is untimely as a matter of law. Absent a valid excuse, a failure to satisfy the notice requirement vitiates the policy, and the insurer need not show prejudice before it can assert the defense of noncompliance. A recent amendment to Insurance Law § 3420 now requires a showing of an insurer's prejudice when

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[1] Plaintiff relies on the affidavit of Oscare Alzate, an investigator employed by H.P. Investigations & Technical Advisor, which was retained by plaintiff to investigate Haindl's allegations. Alzate's affidavit is accompanied by his notes of his interviews with Daniel and Milton.

faced with the issue of late notice. However, this statute applies only to insurance policies issued after January 17, 2009, and is not retroactive in its application. As such, no showing of prejudice is required relative to plaintiff's coverage position.

And, while a delay can be excused if the insured can show that it reasonably believed that it would not be sued, the circumstances here defeat any such claim. Both Daniel and Milton, by their own admissions were aware of the occurrence involving Haindl immediately after it happened on November 14, 2008, and even arranged for medical attention for Haindl's injuries. A belief that an incident would not result in a lawsuit is insufficient to raise a triable issue of fact with respect to an insurer's late-notice defense. It cannot be reasonably argued that the owners of a building supply and contracting company who have been in the business for an excess of thirty-five years would think that a fall from a scaffold where apparent injuries were sustained did not necessitate reporting the incident to their liability insurer. Accordingly, by failing to notify plaintiff of this occurrence involving Haindl as soon as practicable, defendant breached the policy as a matter of law, thus entitling plaintiff to a judgment declaring that it has no duty to defend or indemnify defendant in the underlying action.

In opposition, defendant argues that caselaw holds that an insurance broker is the agent of the insured. As such, "as its agent, a broker is charged with notifying the proper insurance company after it is put on notice of a claim by its insured." Milton attests that "upon learning of Mr. Haindl's injury, we immediately notified IGM our insurance broker" and assisted defendant Haindl with his Workers' Compensation claim. By immediately informing his insurance broker of the occurrence, Milton in effect notified plaintiff as soon as practicable. Milton was entitled to entrust his agent to take the steps necessary to ensure that plaintiff would be put on notice.

Inasmuch as Milton notified IGM as soon as practicable and charged it, as his agent, with the responsibility of putting the proper carrier (*i.e.*, plaintiff) on notice, he proffered notice to plaintiff as soon as practicable. Allowing plaintiff to disclaim coverage due to a delay on the part of IGM, who was notified by Milton immediately after the occurrence, would be a patently unfair result with respect to the insured and injured parties. A question of fact exists as to whether plaintiff received notice as soon as practicable and thus, this Court cannot grant plaintiff's motion for summary judgment.

Further, if the Court finds that plaintiff did not receive notice as soon as practicable, Milton's good faith and objective belief in non-liability excuses the untimely notice. Milton, the insured, explains that because he had timely notified his insurance broker IGM and assisted Haindl with his Worker's Compensation claim, he did not believe that defendant could have been liable for the injury. Courts have repeatedly looked to reliance by the insured on a Workers' Compensation remedy as a factor in excusing delays in notice to liability carriers. Due to the understandable belief on the part of Milton that because Haindl was paid by Gunner Group Inc., a separate entity, and was only specifically and intermittently employed by defendant, that defendant could not have been liable, plaintiff was not directly informed by Milton. Instead, Milton informed IGM, who would be better able to determine which carriers needed to be put on notice. Milton also explains that Haindl is his nephew, which is an additional factor the Court can consider to determine whether Milton had a good faith and objective belief that immediately informing plaintiff of the occurrence was not necessary. Under the circumstances, defendant raised triable issues of fact as to whether its delay in giving notice was reasonably founded upon a good-faith belief of nonliability.

Defendant further argues that this Court, in exercising its discretion, should take note that the recent amendment in July 2008 now imposes a burden of proof such that if notice is given within two years of the time required, there is a presumption that the insurer has not been prejudiced and the burden will be upon the insurer to demonstrate prejudice. Although the Policy narrowly missed the deadline for the new law to take effect, here, plaintiff would not have been able to disclaim coverage based on prejudice caused by late notice. As plaintiff states, it performed an investigation on March 16 which included interviews of all relevant personnel from defendant as well as an investigation of the subject scaffold which they maintain in their possession. Thus, plaintiff was in no way prejudiced by the notice received. One rationale for the amendment was to avoid frivolous motion practice associated with insurers attempting to disclaim coverage given any slight opportunity to do so based on late notice and nothing else. To allow plaintiff to disclaim its obligations under the Policy would be, at minimum, an inequitable result with respect to both Milton and Haindl.

In reply, plaintiff argues that neither Milton's affidavit nor Haindl's opposition dispute that first notice to plaintiff of the incident involving Haindl was provided on March 11, 2009, nearly four months after the incident occurred, when its broker, IGM forwarded a copy of the pleadings to plaintiff. It is undisputed that such a delay is untimely as a matter of law and that plaintiff thereafter timely disclaimed coverage to defendant for the underlying claims.

Plaintiff argues that defendant's alleged belief in non-liability is simply untrue and contrary to undisputed facts and in any event fails to raise a legally recognized "reasonable excuse" for the four-month delay.

Likewise, notice to defendant's broker is not notice to plaintiff.

An insurer's burden to establish prejudice as a result of a delay is inapplicable to the case at bar. By his own admission, Milton owns defendant and Gunner Group, both located at the same premises. At the time of the accident, Haindl was an employee of defendant, but paid by Gunner. As Milton well knew, in these circumstances, it is frequently not clear whether the injured worker will be deemed to be an employee of one or both for purposes of Worker's Compensation insurance. According to plaintiff, it also remains undisputed that defendant was almost immediately aware of the underlying accident, knew Haindl sustained injuries requiring hospitalization and knew Haindl retained an attorney for the purpose of filing suit. In fact, by letter dated December 24, 2008, just over a month after the incident giving rise to the Haindl claim, Gunner put its liability carrier, Scottsdale Insurance Company, on notice of Haindl's accident advising it: "...one of our employees sustained an injury while on the job. We have filed a claim with our Workers Compensation carrier...." If Milton's company Gunner put its Workers' Compensation and liability carrier on notice of the accident, it was aware of the potential for a liability claim to be made against one or the other of the two companies. The notice itself indicates that it was provided "for informational purposes only...no liability claim has been filed." Plaintiff argues that Milton's representation that defendant, as one of Haindl's "employers," did not believe it could be liable beyond Worker's Compensation exposure, while at the same time his other company, Gunner, also representing itself as Haindl's employer and which apparently also put its Workers' Compensation carrier on notice, gave notice to its liability carrier a month after Haindl's accident, is disingenuous. Thus, argues plaintiff, Milton's statements of a belief in non-liability of defendant lacks merit and should be rejected.

Plaintiff argues that in any event, caselaw holds that an insured's failure to give timely

notice when faced with injuries sustained by an employee at a construction site under the belief that the employee's exclusive remedy is under the Workers Compensation Law to be unreasonable as a matter of law. The cases cited by defendant are not controlling; Milton admits that defendant was aware not only of Haindl's retention of an attorney, but of his intention to file a claim. Likewise, Gunner, who was also an "employer" of Haindl put both its liability carrier and Worker's Compensation carrier on notice of the claim. Thus, it was unreasonable for Milton to believe that Gunner would not be shielded by the exclusivity of Worker's compensation but that defendant would. Furthermore, as a seasoned business owner and general contractor, defendant is likely well-versed in the labor law and the potential liability arising from a worker's fall from a scaffold.

Plaintiff also adds that notice to the insured's broker is not notice to plaintiff. IGM is defendant's broker, and typically an insurance broker is the agent of the insured. Absent evidence of action on the insurer's part, or facts from which general authority to represent the insurer may be inferred, no agency relationship can be established between the insured's broker and the insurer. Thus, notice to the insured's broker does not constitute notice to the insurer. Defendant's notice to IGM was independent of and did not satisfy the Policy's requirement of notice to plaintiff. And, plaintiff is not required to establish prejudice for late notice. The Policy was issued in 2008, prior to the effective date of the new legislation.

Discussion

To obtain summary judgment, the movant must establish its cause of action or defense sufficiently to warrant the court as a matter of law in directing judgment in its favor (CPLR § 3212 [b]). This standard requires that the proponent of a motion for summary judgment make a

prima facie showing of entitlement to judgment as a matter of law, by advancing sufficient "evidentiary proof in admissible form" to demonstrate the absence of any material issues of fact (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Silverman v Perlbinder*, 307 AD2d 230, 762 NYS2d 386 [1st Dept 2003]; *Thomas v Holzberg*, 300 AD2d 10, 11, 751 NYS2d 433, 434 [1st Dept 2002]). Thus, the motion must be supported "by affidavit [from a person having knowledge of the facts], by a copy of the pleadings and by other available proof, such as depositions" (CPLR § 3212 [b]).

Alternatively, to defeat a motion for summary judgment, the opposing party must show facts sufficient to require a trial of any issue of fact (CPLR §3212 [b]). Thus, where the proponent of the motion makes a *prima facie* showing of entitlement to summary judgment, the burden shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action, or to tender an acceptable excuse for his or her failure to do so (*Vermette v Kenworth Truck Co.*, 68 NY2d 714, 717 [1986]; *Zuckerman v City of New York, supra*, 49 NY2d at 560, 562; *Forrest v Jewish Guild for the Blind*, 309 AD2d 546, 765 NYS2d 326 [1st Dept 2003]). Like the proponent of the motion, the party opposing the motion must set forth evidentiary proof in admissible form in support of his or her claim that material triable issues of fact exist (*Zuckerman, supra* at 562).

Where a policy of insurance requires that the insured give the insurer notice "as soon as practicable," notice must be afforded within a "reasonable time under the circumstances" (*Travelers Ins. Co. v Volmar Constr. Co.*, 300 AD2d 40, 42 [1st Dept 2002]). The notice requirement is a condition precedent to coverage and so, failure to provide such notice vitiates the contract of insurance (*Great Canal Realty Corp. v Seneca Ins. Co.*, 5 NY3d 742 [2005];

Ocean Partners, LLC v North River Ins. Co., 25 AD3d 514, 515 [1st Dept 2006]). There is no need to show that the insurer suffered any prejudice as a result of tardy notice (*Id.*; *see also Argo Corp. v Greater New York Mutual Ins. Co.*, 4 NY3d 332 [2005]; *Security Mutual Ins. Co. of New York v Acker-Fitzsimons Corp.*, 31 NY2d 436 [1972]).

There is not a large window of opportunity for an insured to serve a notice of a claim upon its insurer, as relatively short periods of time have been found to be untimely as a matter of law (*Heydt Contracting Corp. v American Home Assurance Co.*, 146 AD2d 497 [1st Dept 1989][four months]; *Brownstone Partners/A F & F, LLC v A. Aleem Constr., Inc.*, 18 AD3d 204 [1st Dept 2005] [five months]). 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 (*see, Security Mut. Ins. Co. v Acker-Fitzsimons Corp.*, 31 NY2d at 441-443; *Haas Tobacco Co. v American Fid. Co.*, 226 NY 343, 346-347; *Woolverton v Fidelity & Cas. Co.*, 190 NY 41, 48).

It is uncontested that defendant's owner, Milton was aware of Heindl's fall through a scaffold at defendant's premises and resulting injuries on the day the accident occurred on November 14, 2008, and that the Policy requires, as a condition of coverage, that Milton notify plaintiff "as soon as practicable" of the occurrence which may result in a claim. Not only was Milton aware of Haindl's accident and injuries on the date the accident occurred, Milton also visited Haindl at the hospital the day after the accident. The Court notes that by letter dated December 24, 2008, just over a month after Haindl's accident, Gunner, owned also by Milton, notified its liability carrier, Scottsdale Insurance Company, of Haindl's accident, advising that "...one of our employees sustained an injury while on the job. We have filed a claim with our

visited Haindl at the hospital the day after the accident. The Court notes that by letter dated December 24, 2008, just over a month after Haindl's accident, Gunner, owned also by Milton, notified its liability carrier, Scottsdale Insurance Company, of Haindl's accident, advising that "...one of our employees sustained an injury while on the job. We have filed a claim with our Workers Compensation carrier...." The record clearly establishes that on November 14, 2008, defendant was aware of an occurrence which may result in a claim.

Plaintiff's contention that Milton's immediate notification to its broker IGM was sufficient to proffer notice as soon as practicable to plaintiff, lacks merit. An insurance broker is an agent of the insured and as its agent, a broker is charged with notifying the proper insurance company after it is put on notice of a claim by its insured (*Commissioners of State Ins. Fund ex rel. A.J. McNulty & Co., Inc. v Sherry & Sons, Inc.*, 2002 WL 31107888 [Sup Court, New York County 2002]; *Ribacoff v Chubb Group of Ins. Companies*, 2 AD3d 153, 770 NYS2d 1 [1st Dept 2003] *citing* Insurance Law § 2101[c] and *Bohlinger v Zanger*, 306 NY228, 231; *West 64th Street, LLC v Axis U.S. Ins.*, 2008 WL 219157 [Sup Court, New York County 2008] (stating "[i]n general, an insurance broker is considered the agent of the insured, not the insurance company")). However, notwithstanding a broker's duty to insured to notify the insurer of a claim under a policy, the insured's notice to an ordinary insurance broker is not notice to the insurer (*Gabriel v Attigliato*, 60 Misc 2d 536, 303 NYS2d 399 [Sup Ct, Rockland County 1968]; *see also 130 Williamsbridge Corp. v Interstate Indem. Co.*, 55 AD3d 371, 866 NYS2d 105 [1st Dept 2008] (That the insured in such circumstances was unaware that notice provided to its broker was insufficient is no excuse)).

However, "a broker will be held to have acted as the insurer's agent where there is some

evidence of 'action on the insurer's part, or facts from which a general authority to represent the insurer may be inferred'" (*Temple Const. Corp. v Sirius Am. Ins. Co.*, 40 AD3d 1109, 837 NYS2d 689 [2d Dept 2007] *citing Rendeiro v State-Wide Ins. Co.*, 8 AD3d 253, 253, 777 NYS2d 323 [2d Dept 2004], *quoting Bennion v Allstate Ins. Co.*, 284 AD2d 924, 925, 727 NYS2d 222 [4th Dept 2001]). Here, there is no evidence from which it may be inferred that defendant's broker IGM acted as the agent for plaintiff or that IGM otherwise had the authority to bind IGM. Therefore, even assuming the truth of defendant's contention that it notified IGM immediately after the incident, such notice does not constitute notice to the plaintiff under the circumstances. Plaintiff failed to raise an issue of fact as to whether plaintiff received notice as soon as practicable.

Notwithstanding defendant's failure to notify plaintiff of the underlying incident as soon as practicable, it has been held that "there may be circumstances that excuse a failure to give timely notice, such as where the insured has a good faith belief of nonliability, provided that belief is reasonable [internal quotation marks and citation omitted]" *(Great Canal Realty Corp. v Seneca Ins., Inc.*, 5 NY3d 742 (2005). However, relevant on the issue of reasonableness, is consideration of whether and to what extent, the insured has inquired into the circumstances of the accident or occurrence (*Id. citing White v City of New York*, 81 NY2d 955, 958 [1993] [stating that, "where a reasonable person could envision liability, that person has a duty to make some inquiry"]). Absent a showing of legal justification, the failure to comply with the notice condition vitiates coverage (*Matter of Allcity Ins. Co. [Jimenez]*, 78 NY2d 1054, 1055 [1991]). It also bears noting that the insured bears the burden of proving, under all the circumstances, the reasonableness of any delay in the giving of notice (*see, Argentina v Otsego Mut. Fire Ins. Co.,*

86 NY2d 748, 749-750).

While the reasonableness of an insured's belief in nonliability is ordinarily a matter for the fact finder (*Argentina v Otsego Mut. Fire Ins. Co.*, 86 NY2d 748, 631 NYS2d 125 [1995] ("The existence of such a 'good-faith belief', as well as the question of whether the belief was reasonable, are ordinarily questions of fact for the fact finder), where the facts are undisputed and not subject to conflicting inferences, the issue can be decided as a matter of law (*Phoenix Builders, Inc. v Sirius Am. Ins. Co.*, 2008 WL 4360439 [Sup Court, New York County 2008]). Here, an issue of fact exists as to the reasonableness of defendant's belief of non-liability based on the exclusive remedy of Worker's Compensation.

In *Sabre v Rutland Plywood Corp.* (93 AD2d 903, 461 NYS2d 596 [3d Dept 1983]), the Court held that notice of the accident given by Tupper Lake to its liability carrier on June 11, 1980 was timely, where the third-party action for indemnification and/or contribution was not commenced against Tupper Lake until June 3, 1980, almost three years after the accident. Although Tupper Lake knew about the accident at the time of its happening, the Court held that it was not unreasonable for it to assume that a third-party suit could not be brought against it when an employee was involved whose injury was covered by its Workers' Compensation policy, pursuant to which prompt notice had been given to its compensation carrier (*see also Tesler v Paramount Ins. Co.*, 220 AD2d 334, 633 NYS2d 119 [1st Dept 1995] (holding that plaintiffs demonstrated a good-faith and reasonable belief in their nonliability under the Workers' Compensation Law, their insurance agent having advised them to that effect, and there otherwise having been no indication that a liability claim would be brought against them)).

Macro Enterprises, Ltd. v QBE Ins. Corp., 43 AD3d 728, 841 NYS2d 447 [1st Dept

2007]) cited by plaintiff, does not warrant a different result. In *Macro*, the Court simply held that plaintiff's failure to notify defendant for more than two years of the underlying occurrence, in which plaintiff's employee was injured in a construction site accident, constituted noncompliance with the condition precedent to coverage and vitiated the contract of insurance. Citing to *Tesler v Paramount Ins. Co.* (220 AD2d 334 [1995]) in comparison, the First Department continued, "Plaintiff's claimed belief of nonliability, on the basis that its injured employee's exclusive remedy was under the Workers' Compensation Law, was not reasonable under the circumstances." However, the decision is silent as to the circumstances under which the insured's belief was held unreasonable. A review of the parties' appellate briefs indicates that plaintiff/subcontractor argued that its late notice should be excused because it had no reason to believe that the matter was beyond that of a Workers' Compensation claim and not excluded from defendant's general liability policy. In response, the defendant/insurer argued that Workers' Compensation was not the plainitff/subcontractor's exclusive exposure when its employee was injured, as the indemnity contract plaintiff had with the general contractor not only exposed the plaintiff/subcontractor to a greater liability, but also demonstrated its awareness of such potential liability; the mistaken belief that plainitff/subcontractor would not be subject to a claim was arguably belied by its own construction contract, which extends its own liability exposure to include and to protect the general contractor.

Here, there is no indication that defendant had a contractual obligation to purchase liability insurance in addition to Workers' Compensation coverage, to cover the type of loss occasioned herein (*see Eastern Baby Stores, Inc. v Central Mut. Ins. Co.*, 337 Fed. Appx. 10 [2d Cir 2009] (rejecting third-party defendant/insured's claim that it reasonably believed that its

workers' compensation policy would cover any liability; third-party defendant/insured failed to come forward with any evidence of that reason and its lease with third-party plaintiff required that it purchase liability insurance to indemnify third party plaintiff for claims such as Guariglia's, who was injured in insured's store); *Phoenix Builders, Inc., supra* (reliance on workers' compensation held insufficient, as plaintiff "knew or should have known of a potential claim at the time of the accident in July 2004, in light of its obligations under the construction contract to indemnify the owner and procure general liability insurance")). The absence of the contractual obligation to procure liability insurance, coupled with the fact that Haindl is the nephew of defendant's owner, it cannot be said that defendant's belief of nonliability was unreasonable as a matter of law, under the circumstances (*see Argentina* at 751 (stating that "the close familial relationship between the insureds and the accident victim was of such a nature as to support a finding that the insureds reasonably believed that they would have been apprised if the injured party had been contemplating a lawsuit")). Notwithstanding the contention that Milton allegedly owns Gunner and Gunner, who was also an "employer" of Haindl, put both its liability carrier and Worker's Compensation carrier on notice of the claim, the reasonableness of defendant's reliance on Worker's Compensation as to nonliability of defendant cannot be determined as a matter of law under the circumstances.

Conclusion

Based on the foregoing, it is hereby

ORDERED that the motion by CastlePoint Insurance Company for summary judgment declaring that it has no obligation to defend or indemnify defendant Mike's Pipe Yard and Building Supply Corp. in the personal injury action entitled *Damon Haindl v Mike's Pipe Yard*

and Building Supply Corp. is denied; and it is further

ORDERED that CastlePoint Insurance Company serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: July 19, 2010

Hon. Carol Robinson Edmead, J.S.C.

HON. CAROL EDMEAD

FILED
JUL 22 2010
NEW YORK
COUNTY CLERK'S OFFICE