SHORT FORM ORDER **INDEX NO. 033665/2007**

SUPREME COURT - STATE OF NEW YORK
DCM-J - SUFFOLK COUNTY

PRESENT:
Hon. Paul J. Baisley, Jr.

COURDUFF'S OAKWOOD ROAD GARDENS & LANDSCAPING COMPANY, INC.

Plaintiff(s),

-against-

MERCHANTS MUTUAL INSURANCE COMPANY

Defendant(s).

ORIG. RETURN DATE: August 12, 2008
FINAL RETURN DATE: September 26, 2008
MTN. SEQ. #: 001-MD
CROSS MTN. SEQ. #. 002-MD

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Upon the following papers numbered 1 to 37 read on this motion and cross motion for summary judgment: Notice of Motion and supporting papers 1 - 12: Notice of Cross Motion and Supporting papers 13 - 31; Affidavit in Opposition 32 - 37; it is,

ORDERED that the motion (001) by the plaintiff for summary judgment is denied; and it is further

ORDERED that the cross motion (002) by the defendant for summary judgment is denied; and it is further

ORDERED that the parties are directed to appear for a preliminary conference pursuant to 22 NYCRR 202.8(f) on September 7, 2010 at the Supreme Court, DCM Part, Room A362, One Court Street, Riverhead, New York at 10:00 a.m.

This is an action by the plaintiff for a judgment declaring that a disclaimer by its insurance company of coverage in a related action (*Molion v Courduff's Oakwood Road Gardens & Landscape Co., Inc.*, USDC, EDNY, CIV 07-01168) was improper and that the defendant/insurer is obligated to defend and indemnify the plaintiff/insured in the related action. The following facts are not disputed[1]:

[1] The source for these facts is almost entirely found in the deposition of Robert Bemiss, president of Courduff's Oakwood Road Gardens & Landscaping Company, Inc. in the underlying federal action. The transcript of that deposition was not submitted by Bemiss on Courduff's motion but by Merchants Mut. Ins. Co. in support of its cross motion.

The plaintiff is a retail garden center and landscape contracting company. Early on the morning of September 1, 2005, the plaintiff was expecting a delivery of stones from one of its suppliers, Wicki Wholesale Stone, Inc. (hereinafter Wicki). The delivery was by way of a dump truck driven by Gerard Molion (hereinafter Molion) who was an employee of Wicki's. When the truck arrived, Robert Bemiss (hereinafter Bemiss) - the president and principal shareholder of the plaintiff corporation - was the only person on the plaintiff's premises.

The stones consisted of loose "colonial boulders" and a pallet, resting on top of the boulders, of "river rounds." As Molion, who had never been to the plaintiff's before, started to dump the boulders, they became jammed due to the shifting of the pallet of stones and its becoming wedged among the boulders. Bemiss then drove his skid steer over to the truck. A "skid steer" is a small piece of riding equipment which, at the time in question, was fitted with a forklift attachment for the moving of pallets.

Bemiss attempted to left the pallet to free up the boulders. In doing this, he realized that the pallet was heavier than he expected and directed Molion to stand on the rear of the skid steer to provide a counterweight. With Molion presumably on the rear - Bemiss never actually observed Molion getting on or where exactly he was standing - Bemiss moved the pallet off the truck and started to lower it to the ground. As soon as Bemiss pressed the foot pedal to lower the load, which came down faster than he had anticipated, he heard Molion scream. According to Bemiss, Molion's toe had gotten pinched by a cross bar on the rear of the skid steer.

An ambulance was called to take Molion to the hospital; Bemiss followed in his own vehicle. Molion was released later that day and Bemiss stayed with him the whole time at the hospital.

Bemiss prepared no incident or accident report at any time.

Within about two or three days after the accident, Bemiss received a call from Wicki's workers' compensation insurance carrier with whom he discussed the details of the accident. Based upon the discussions with the workers' compensation person, Bemiss says he assumed that the matter would be entirely covered by workers' compensation. Accordingly, Bemiss says he saw no need to report the accident to his insurance company.

On March 23, 2007, Bemiss says he became aware for the first time that Molion was bringing a claim against Bemiss' corporation, Courduff's Oakwood Road Gardens & Landscaping Company, Inc. (hereinafter Courduff's), when he received a copy of the summons and complaint in the underlying federal action. This was a little over one and a half years after the accident. At that time, Bemiss promptly took steps to notify his insurer, the defendant herein, Merchants Mutual Insurance Company (hereinafter Merchants).

Merchants, by letter dated March 29, 2007 sent to Bemiss (on behalf of Courduff's), disclaimed any coverage whatsoever for the Molion claim. This disclaimer was solely based upon Courduff's failure to "provide timely notice of this loss as required by the provisions of the [applicable] policy."

Courduff's then brought the instant action for a declaratory judgment declaring that Merchants' disclaimer was null and void, that Merchants must reimburse Courduff's for the cost of the defense in the federal action and must indemnify Courduff's for any damages awarded in the federal action.

Merchants does not deny that if notice, in its view, had been "timely" that it would have had to defend and indemnify in the underlying federal action. As for Courduff's, Courduff's does not claim that the pertinent notice provision is inapplicable - it merely contends that under these circumstances it did, in fact, provide notice "as soon as practicable."

Courduff's now brings this motion for summary judgment (001) and Merchants cross-moves for summary judgment (002).

On a motion for summary judgment, the moving party has the burden of making a prima facie showing of entitlement to summary judgment as a matter of law and must offer sufficient evidence to show the absence of material issues of fact (*Winegrad v New York University Medical Center*, 64 NY2d 851, 487 NYS2d 316 [1985]; *Zuckerman v City of New York,* 49 NY2d 557, 427 NYS2d 595 [1980]). If the moving party fails in meeting this burden, the motion must be denied regardless of the sufficiency of the opposition papers (*see Smalls v AJI Industries, Inc.,* 10 NY3d 733, 853 NYS2d 526 [2008]). If, however, this burden is satisfied, then the burden shifts to the opposing party to establish the existence of material issues of fact requiring a trial (*see Zuckerman v City of New York, supra*).

In support of Courduff's motion for summary judgment (001), Courduff submits, inter alia, copies of the pleadings, the applicable insurance policy, the letter of disclaimer and an affidavit from Bemiss.

In the Bemiss affidavit, he acknowledges the obligation under the policy for Courduff's to notify Merchants "as soon as practicable of an 'occurrence' . . . which may result in a claim." Bemiss also admits he knew of the occurrence on the day it happened. In describing the accident, however, Bemiss does not mention that he had any part in its occurrence. Bemiss, instead, merely states that Molion was injured while delivering a shipment of stones and unloading a pallet of stones. From this description, it cannot be ascertained whether Molion was injured as the sole result of his own actions or, at least, without the participation of anyone from Courduff's.

Bemiss goes on to state that he was contacted by "Workers' Compensation" and was under the impression that the matter was being handled entirely by workers' compensation. In addition, Bemiss says that this understanding was reinforced by the fact that in all his conversations after the accident with principals from Wicki, he was never given any indication that any claim would be made against Courduff's.

According to Bemiss, as stated in his supporting affidavit:

> "Based upon my conversation with Mr. Molion, Al from Wicki Wholesale Stone, and most importantly, Ms. Morrison [the representative from the workers' compensation insurance carrier], I believed that Mr. Mollion's injury and medical care was [sic] being addressed either through his employer, Wicki Wholesale Stone, or its Workers Compensation carrier. Accordingly, I did not report this incident to Merchants Mutual Insurance Company when Mr. Molion was injured" (¶ 9).

As a general rule, if an insurance policy requires prompt notice, the insured must comply with said provision in order to receive coverage. Failure to comply with such a provision vitiates the policy unless there is a reasonable excuse or a mitigating factor (*see Barkan v New York Schools Ins. Reciprocal,* 65 AD3d 1061, 1065, 886 NYS2d 414 [2d Dept 2009]; *Paul Developers, LLC v Md. Cas. Ins. Co.,* 28 AD3d 443, 816 NYS2d 75 [2d Dept 2006]).

Whether a belief that the injured party would not bring a lawsuit is reasonable depends on the particular circumstances of each case and is usually a question of fact for the fact finder (*see Argentina v Otsego Mut. Fire Ins. Co.,* 86 NY2d 748, 631 NYS2d 125 [1995]; *see also Big Man Bros., Ins. v QRE Ins. Corp.,* 73 AD3d 1110, ___ NYS2d ___ [2d Dept 2010]; *Ponak Realty Corp. v United Natl. Specialty Ins. Co.,* 69 AD3d 596, 893 NYS2d 125 [2d Dept 2010]; *C.C.R. Realty of Dutchess, Inc. v N.Y. Cent. Mut. Fire Ins. Co.,* 1 AD3d 304, 766 NYS2d 856 [2d Dept 2003]).

Indeed, there have been cases where it was found that the insured had no indication of an intent to sue and once it was served with a summons and complaint, the providing of notice to the insurer at that time was found to be "as soon as practicable" and reasonable (*see e.g. Merchants Mut. Ins. Co. v Hoffman,* 56 NY2d 799, 452 NYS2d 398 [1982]; *Jordan Constr. Prods. Corp. v Travelers Indem. Co. of America,* 14 AD3d 655, 789 NYS2d 298 [2d Dept 2005]; *Sphere Drake Ins. Co. v Aspen Tree Specialists,* 234 AD2d 358, 651 NYS2d 881 [2d Dept 1996]).

In this case, based upon the incomplete description of the accident supplied by Bemiss on behalf of Courduff's, questions arise as to what part, if any, Courduff's had in the accident. Indeed, if Courduff's had no part in the accident and the accident was entirely due to actions by Molion and his operation of the Wicki truck, it would give more credence to Bemiss' and Courduff's belief that workers' compensation would be the sole participant in providing compensation for the accident. On the other hand, if Courduff's (Bemiss) had some part on the accident, then it would not be as weighted in favor of such a contention.

In addition, based upon the submissions in support of Courduff's motion for summary judgment (001), it cannot be determined whether its excuse for not giving notice to Merchants of the occurrence until Courduff's was served with the summons and complaint was reasonable under the circumstances of this case. Accordingly, Courduff's has failed to show a prima facie entitlement to summary judgment; and,thus, this failure to show whether Courduff's belief was reasonable that it would not be sued by Molion is a question of fact which requires the denial of Courduff's motion for summary judgment.

Therefore, with regard to Courduff's motion for summary judgment (001), Courduff's failure to make a showing of prima facie entitlement to summary judgment requires denial of the motion without consideration of the opposing papers.

Turning now to Merchants' cross motion for summary judgment (002), by showing that Courduff had knowledge of the accident on the day of its occurrence and failed to provide notice to Merchants of the accident until Courduff's receipt of the summons and complaint over a year and a half later, Merchants has made a prima facie showing of non-compliance with the policy's requirement that the insured provide prompt notice of an accident to the insurer "as soon as practicable."

Accordingly, the burden on the cross motion for summary judgment was shifted to Courduff's to show that there is a material issue of fact requiring a trial (*see Zuckerman v City of New York,* 49 NY2d 557, 427 NYS2d 595 [1980]).

In opposition, to the cross motion, Courduff's excuse that it believed under the circumstances of this case that it would not be sued, while insufficient to make a prima facie showing for its own summary judgment motion, is sufficient to raise a material question of fact, to wit: whether said belief had a good faith basis and was reasonable under the circumstances of this case.

If the proffered excuse was not plausible, the lack of a reasonable basis would be a question of law rather than a question of fact (*see SSBSS Realty Corp. v Public Serv. Mut. Ins. Co.,* 253 AD2d 583, 677 NYS2d 136 [1st Dept 1998]). Here, however, the excuse is plausible. Bemiss was not only in contact with the workers' compensation carrier but states in his affidavit that he was also in contact with Molion and Wicki and was never given any indication that Courduff's would be sued or that the workers' compensation claim or Wicki's own insurance coverage would not cover any and all claims arising from the incident.

Whether this belief ultimately is found to have been reasonably based on good faith is a question for the trier of fact ((*see St. James Mech., Inc. v Royal & Sun Alliance,* 44 AD3d 1030, 1032, 845 NYS2d 83 [2d Dept 2007]; *Seneca Ins. Co. v W.S. Distrib., Inc.,* 40 AD3d 1068, 1969, 838 NYS2d 99 [2d Dept 2007]; *Jordan Constr. PRODS. Corp. v Travelers Indem. Co. of America,* 14 AD3d 655, 789 NYS2d 298 [2d Dept 2005]; *United Talmudical Academy of Kiryas Joel, Inc, v Cigna Prop. & Cas. Co.,* 253 AD2d 423, 424, 676 NYS2d 445 [2d Dept 1998]). Indeed, the test will be whether an "ordinary prudent person" would have reasonably believed under the circumstances of this case to be immune from future civil liability (*see Philadelphia Indem. Ins. Co. v Genesee Valley Improvement Corp.,* 41 AD3d 44, 47, 834 NYS2d 802 [4th Dept 2007]; *Zadrima v PSM Ins. Co.,* 208 AD2d 529, 616 NYS2d 817 [2d Dept 1994], *lv denied* 85 NY2d 807, 627 NYS2d 324 [1995]).

Accordingly, Merchants' cross motion (002) for summary judgment is also denied.

This constitutes the decision and order of the court.

Dated: August 18, 2010

HON. PAUL J. BAISLEY, JR.

HON. PAUL J. BAISLEY, JR., J.S.C.