

Tower Ins. Co. of N.Y. v JAAP Constr., Inc.
2010 NY Slip Op 33302(U)
November 24, 2010
Supreme Court, New York County
Docket Number: 105007/09
Judge: Judith J. Gische
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. JUDITH J. GISCHE
J.S.C. Justice

PART 10

Index Number : 105007/2009
TOWER INSURANCE COMPANY
vs.
JAAP CONSTRUCTION, INC.
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. 001
MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

Answering Affidavits — Exhibits _____
Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion **UNFILED JUDGMENT**
This judgment has not been entered by the County Clerk and notice of entry cannot be given hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

motion (s) and cross-motion(s)
decided in accordance with
the annexed decision/order
of even date.

Dated: 11/24/10

J. GISCHE
HON. JUDITH J. GISCHE 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 10

-----X
TOWER INSURANCE COMPANY OF
NEW YORK

Plaintiff,

-against-

JAAP CONSTRUCTION, INC. and
LUDGARDO RODRIGUEZ,,

Defendants.
-----X

Decision/Order

Index No.: 105007/09
Seq. No. : 001

PRESENT:

Hon. Judith J. Gische
J.S.C.

JAAP CONSTRUCTION, INC.,

Third-Party Plaintiff,

-against-

Y&Y BROKERAGE, INC., IGOR GROBOSKY
and YURIY RUNUNOU,

Third-Party Defendants.
-----X

Third-Party Index No.:
590484/09

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).

Recitation, as required by CPLR 2219 [a], of the papers considered in the review of this
(these) motion(s):

Papers	Numbered
Tower's n/m [SJ] w/LCF affirm, LA and MS affids, exhs	1,2,3
3PDef's opp w/ DSW affirm, GG affid, exhs	4
JAAP's opp w/TML affirm, JP affid	5
Rodriguez's opp w/JAR affirm, exh	6
Tower's reply	7

-----X

Upon the foregoing papers, the decision and order of the court is as follows:

Plaintiff, Tower Insurance Company of New York ("Tower") moves for summary
judgment, seeking a declaration that it does not have a duty to defend or indemnify

defendant, JAAP Construction, Inc. ("JAAP"), its insured, in connection with a separate personal injury action pending in the Supreme Court, Kings County ("the personal injury action") (*Rodriguez v. JAAP Construction Inc.*, Index No. 500069/08). On May 19, 2009, JAAP commenced a third party action against Y&Y, Igor Grodsky ("Grodsky") and Yuriy Ruvinou ("Rovinou") (collectively "third-party defendants") for contribution and/or indemnification. Defendants and third-party defendants oppose the instant motion.

Issue has been joined between the parties to this motion and the filing of the note of issue has not yet occurred. Thus, this motion is appropriately before the court for consideration at this time. CPLR § 3212(a); *Myung Chun v. North American Mortgage Co.*, 285 A.D.2d 42 (1st Dept. 2001).

Background/Arguments

Defendant, Ludgardo Rodriguez ("Rodriguez"), alleges that on January 29, 2008, he was injured as a result of a work related accident. At the time, he was employed by JAAP and was working at 2729 West 16th Street, Brooklyn, NY (the "Premises"). Rodriguez alleges that non-party, Anatoliy Puschkar ("Mr. Puschkar"), President of JAAP, was aware of the accident on the date that it occurred, and Julia Puschkar ("Mrs. Puschkar"), also President of JAAP, transported Rodriguez to the hospital.

On September 4, 2008, Rodriguez commenced an action against JAAP based on negligence and violations of New York's labor law. Tower claims that it was not notified of Rodriguez's accident until October 24, 2008, when Y&Y Brokerage, Inc. (Y&Y), JAAP's insurance broker, provided Tower with a "General Liability Notice of Occurrence/Claim" ("Notice of Claim"). The Notice of Claim is signed by Mrs. Pushkar,

and states that the claim had not been previously reported. Thereafter, Tower conducted an investigation and obtained a statement of Mr. Puschkar, dated October 2008 (the "Statement"). The Statement is annexed to Tower's motion papers in redacted form. On November 7, 2008, Tower disclaimed coverage based on JAAP's failure to timely notify it of the occurrence and claim.

Tower alleges that although there may have been an accident at the Premises on January 29, 2008, none of the defendants timely notified Tower of an "occurrence," as they are required to do under the terms of the insurance policy (the "Policy") in effect at that time. The Policy states that the insured must notify Tower "as soon as practicable of an 'occurrence' or an offense which may result in a claim." The Policy further states that "notice by or on behalf of the injured person or any other claimant, to any agent of ours in New York State . . . shall be considered to be notice to us."

JAAP argues that within a few days of the accident, Mrs. Pushkar asked third-party defendants for advice and guidance regarding the accident and she was advised by the third-party defendants that the accident was a workers' compensation matter between Rodriguez and his employer, and that the incident did not need to be reported to Tower.

The third-party defendants argue that Tower's motion is premature because discovery has not been completed. The third-party defendants argue, *inter alia*, that the redacted copy of the Statement is insufficient because it excludes relevant portions of Mr. Puschkar's text, and that they have not yet had the opportunity to depose JAAP's witnesses.

Rodriguez argues that Tower's motion is premature and there has been no

discovery. Alternatively, Rodriguez also argues that there are triable issues of fact concerning whether or not the third-party defendants told JAAP that it was under no obligation to notify Tower about the accident.

Discussion

The movant on a summary judgment motion has the initial burden of proving entitlement to summary judgment by tender of evidentiary proof in admissible form sufficient to eliminate any material issues of fact from the case. Zuckerman v City of New York, 49 N.Y.2d 557, 562 (1st Dept. 1980); Winegrad v New York Univ. Med. Ctr., 64 N.Y.2d 851 (1st Dept. 1985). Only when the proponent of the motion makes a *prima facie* showing of entitlement to summary judgment does the burden then shift to the party opposing the motion who must then demonstrate, by admissible evidence, the existence of a factual issue requiring a trial of the action. Zuckerman v. City of New York, *supra* at 562. If the proponent fails to make out its *prima facie* case for summary judgment, the motion must be denied, regardless of the sufficiency of the opposing papers. Alvarez v. Prospect Hospital, 68 N.Y.2d 320 (1986); Ayotte v. Gervasio, 81 N.Y.2d 1062 (1993). If the proponent meets its burden, then the opposition must lay bare its proof to raise real issues of fact and not just shadowy semblances.

Where the language of an insurance contract is clear and unambiguous, interpretation of that contract and construction of its provisions are questions of law that should be resolved by summary adjudication. Loblaw, Inc. v. Employers' Liability Assurance Cas. Corp., 57 N.Y.2d 872 (1982); Sheehan v. State Farm Fire and Cas.

Co., 239 A.D.2d 486 (2d Dept. 1997).

Where an insurance policy requires that notice of an occurrence be given promptly, notice must be given within a reasonable time in view of all of the circumstances. Absent a valid excuse for a delay in furnishing notice, failure to satisfy the notice requirement vitiates coverage. Great Canal Realty Corp. v Seneca Ins. Co., Inc., 5 N.Y.3d 742 (2005); Eagle Ins. Co. v Zuckerman, 301 A.D.2d 493 (2003). Although there may be circumstances that excuse a failure to give timely notice, such as where the insured has “a good-faith belief of nonliability,” the insured bears the burden of establishing the reasonableness of the proffered excuse. Security Mut. Ins. Co., 31 N.Y.2d at 441.

Here, the Policy unambiguously states that Tower must be notified “as soon as practicable of an ‘occurrence’ or an offense which may result in a claim.” It is undisputed that JAAP did not submit a Notice of Claim until October 24, 2008 and that Mrs. Pushkar checked off the portion of the form stating that a claim had not been previously reported. Plaintiff has shown that it was not notified of the occurrence until October 24, 2008, which is almost 10 months after the accident occurred. See Deso v. London & Lancashire Indem. Co. of America, 3 N.Y.2d 127 (1957) (coverage denied, 51 days found not timely); Pandora Industries, Inc. v. St. Paul Surplus Lines Ins. Co., 188 A.D.2d 277 (1st Dept. 1992) (coverage denied, 31 days found not timely). Plaintiff has, therefore, established a *prima facie* entitlement to judgment as a matter of law. Blue Ridge Ins. Co. v. Biegelman, 36 A.D.3d 736 (2d Dept. 2007).

Although JAAP contends that third-party defendants advised it to take no action regarding the accident, this is not enough to defeat Tower’s motion for summary

judgment. JAAP's reliance on the third-party defendants' advice does not excuse its untimely notice to Tower. A broker is deemed an agent of the insured and notice to a broker does not satisfy the insured's duty to notify its insurance carrier. Shaw Temple A.M.E. Zion Church v. Mount Vernon Fire Ins. Co., 199 A.D.2d 374 (2d Dept. 1993). Therefore, JAAP's notice to the third-party defendants on or about the time of the accident does not satisfy its duty to notify Tower directly. Accordingly, JAAP's late notification fails to satisfy the requirements of the Policy.

JAAP further contends that it believed the accident was a workers' compensation matter between Rodriguez and his employer. However, this does not constitute a reasonable excuse for failure to give timely notice to Tower, and plaintiff has failed to establish "a good-faith belief of nonliability." See Great Canal Realty Corp. v Seneca Ins. Co., Inc., *supra* at 743.

Defendants' and third-party defendants' argument that Tower's motion for summary judgment is premature because discovery is incomplete, is not a reason to deny Tower summary judgment. Where a party opposed to summary judgment contends that discovery is incomplete, the court may consider whether the motion is premature because the information necessary to fully oppose the motion remains under the control of the proponent of the motion. CPLR § 3212 [f]; Lewis v. Safety Disposal System of Pennsylvania, Inc., 12 A.D.3d 324 (1st Dept. 2004); Global Minerals and Metals Corp. v. Holme, 35 A.D.3d 93 (1st Dept. 2006) (*internal citations omitted*). The mere hope, however, that defendants can uncover useful evidence is an insufficient reason to postpone consideration of plaintiff's motion and defendants have failed to demonstrate how further discovery might yield material facts that would warrant the

denial of summary judgment at a later time. Seelig v. Burger King Corp., 66 A.D.3d 986 (2d Dept 2009). Therefore, this motion is not premature although brought before discovery is complete.

Accordingly, defendants have failed to raise any triable issues of fact as to whether there existed a reasonable excuse for the delay in notifying Tower. Zuckerman v. City of New York, *supra*. Tower's motion is hereby granted.

Conclusion

In accordance with the foregoing,

IT IS HEREBY

ORDERED that plaintiff, Tower Insurance Company of New York's motion for summary judgment is granted in all respects; and it is further

ORDERED ADJUDGED AND DECLARED that plaintiff, Tower Insurance Company of New York, does not have a duty to defend or indemnify defendant, JAAP Construction, Inc. ("JAAP"), in connection with a separate personal injury action pending in the Supreme Court, Kings County ("the personal injury action") (*Rodriguez v. JAAP Construction Inc.*, Index No. 500069/08); and it is further

ORDERED that the complaint in the main action (*Tower Insurance Company of New York v. JAAP Construction, Inc. and Ludgardo Rodriguez*, Index No. 105007/09) is hereby severed and dismissed; and it is further

ORDERED that the third-party action (*JAAP Construction, Inc. v. Y&Y Brokerage, Inc., Igor Grodsky and Yuriy Ruvinou*, Third-Party Index No. 590484/09) shall continue

and is hereby scheduled for a preliminary conference on **January 27, 2011 at 9:30 a.m. in Part 10, 60 Centre Street, Room 232** so that a discovery schedule can be set by the court; and it is further

ORDERED that any requested relief not expressly addressed is hereby denied; and it is further

ORDERED that this constitutes the decision and order of the court.

Dated: New York, New York
November 27, 2010

So Ordered:



HON. JUDITH J. GISCHE, J.S.C.

UNFILED JUDGEMENT
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).