

**RDZ & Co., LLC v Harleysville Ins. Co.**

2011 NY Slip Op 30224(U)

January 19, 2011

Sup Ct, Nassau County

Docket Number: 3007/10

Judge: Anthony L. Parga

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SHORT FORM ORDER

SUPREME COURT-NEW YORK STATE-NASSAU COUNTY  
PRESENT:

HON. ANTHONY L. PARGA  
JUSTICE

-----X PART 8  
RDZ & COMPANY, LLC and DAVID NOUVINI  
d/b/a RDZ & COMPANY, LLC,

Plaintiffs,

INDEX NO. 3007/10

-against-

MOTION DATE: 11/24/10  
SEQUENCE NO. 02,03,04

HARLEYSVILLE INSURANCE COMPANY,  
PATRICIA BERGER, HERBERT BERGER, and  
CVS PHARMACY, INC.,

Defendants.

-----X	
Notice of Motion, Affs. & Exs(Seq. 02).....	<u>1</u>
Notice of Cross-Motion, Affs. & Exs(Seq. 03).....	<u>2</u>
Affirmation in Opposition to Cross-Motion(Seq. 03).....	<u>3</u>
Notice of Cross-Motion, Affs. & Exs(Seq. 04).....	<u>4</u>
Affirmation in Opposition to Cross-Motion(Seq. 04).....	<u>5</u>

Upon the foregoing papers, it is ordered that the motion by defendant Harleysville Insurance Company, LLC, for summary judgment, pursuant to CPLR §3212, and a declaration that Harleysville has no duty to either defend or indemnify plaintiffs is denied.

It is further ordered that the cross-motion by plaintiffs, RDZ & COMPANY, LLC and DAVID NOUVINI d/b/a RDZ & COMPANY, LLC (hereinafter "RDZ"), for summary judgment, pursuant to CPLR §3212, and a declaration that Harleysville Insurance Company (hereinafter "Harleysville") is obligated to defend and/or indemnify its insured, RDZ & COMPANY, LLC, in the underlying personal injury action, and for defense costs is granted.

It is further ordered that the cross-motion by defendants, PATRICIA BERGER and

HERBERT BERGER, for an order granting summary judgment to plaintiffs, pursuant to CPLR §3212, is denied as procedurally improper.

The following facts are taken from pleadings and submitted papers and do not constitute findings of fact by this Court.

This is an action brought by plaintiffs for a declaration that the denial of coverage issued by defendant Harleysville was invalid against both plaintiffs and defendants Patricia Berger and Herbert Berger, and that Harleysville is obligated to defendant and/or indemnify its insured, RDZ & COMPANY, LLC, in the underlying personal injury action up to the limits of its policy, and for costs.

Harleysville issued a Deluxe Business Owner's Policy to plaintiff David Nouvini d/b/a RDZ & Company, Inc., for the period of April 1, 2008 to April 1, 2009. The policy number was BO1J7189 and its business liability coverage limits were \$1,000,000 per occurrence and \$2,000,000 general aggregate. Said coverage included liability for bodily injury for occurrences which take place in the "coverage territory."

On August 22, 2008, Patricia Berger was injured in the parking lot in front of the CVS store located at 20 Ocean Avenue and 22-24 Broadway, in Massapequa, New York. Patricia Berger brought a lawsuit alleging that she was injured in said parking lot when she was caused to lose her "balance and fall as a result of uneven, dangerous, defective, hazardous and unsafe conditions, and in particular the sunken grate/drain" located in the parking lot. Her complaint alleges, *inter alia*, that RDZ and CVS were negligent in their ownership, management, maintenance, service, repair, operation, and control of the parking lot.

Defendant Harleysville moves for summary judgment, arguing that it properly, and timely, disclaimed coverage due to plaintiff's late notice of the claim, and should be granted

summary judgment. Defendant Harleysville argues that it first received notice of the accident when it received an Accord Notice of Occurrence/Claim on June 1, 2009 (which annexed the summons to the underlying action). Harleysville claims that on June 4, 2009, its insured, plaintiff David Nouvini, was questioned about this occurrence and told Harleysville that he had received a letter from Berger's attorney "a few months" ago and that he ignored it because he did not believe that the claim had merit. Accordingly, on July 9, 2009, thirty-eight days later, after engaging in an "investigation" of Mr. Nouvini's late notice, Harleysville issued a denial of coverage to plaintiffs based upon late notice of the claim.

Counsel for Harleysville argues that a "reservation of rights" letter was sent to plaintiffs on June 19, 2009, pending its investigation, but no proof of the purported certified mailing is submitted, the letter is undated, and the affidavit of Joanne Daley, a litigation specialist employed by Harleysville, specifically states that said "reservation of rights" letter was mailed on July 19, 2009, after the date of the denial. Furthermore, the reservation of rights letter purports to reserve all of Harleysville's rights under the policy, without a specification that it is reserving its right to deny coverage for "late notice" pending its investigation. The letter merely states that "any action taken by the Harleysville in the investigation of this incident and/or defense of claims made as a result of this incident is not to be construed as a waiver of any of the terms and conditions of the policy."

The Court of Appeals has held that letters which merely reserve the carrier's rights to disclaim coverage have no relevance to the question of whether the insurer has timely sent a notice of disclaimer of liability or denial of coverage. (*Hartford Ins. Co. v. County of Nassau*, 46 N.Y.2d 1028 (2d Dept. 1979)). Such letter cannot serve as a notice of disclaimer of liability or denial of coverage and is only relevant in the event that the insured should claim that the insurer

had waived its right to disclaim by conducting a defense. (*Id.*)

Defendant Harleysville submits an unsigned copy of an investigator's report, dated June 30, 2009, which notes that David Nouvini told the investigator that "he knew nothing about the accident until he received the letter of litigation from the attorney." Later in the report, the investigator notes that Mr. Nouvini told him that he received the litigation letter from the attorney on June 1, 2009 and immediately forwarded it to his broker. The investigator's report notes that "[t]he letter from the attorney representing the claimant is also attached," however the report annexed to Harleysville's motion, and submitted to the court, notably fails to contain same.

According to the affidavit of Harleysville's employee, Joanne Daley, after Harleysville received the investigator's report, "Harleysville spoke with Geber's [sic] attorney's office [on July 7, 2009] and confirmed that a letter of representation had been mailed to plaintiffs on or about November 17, 2008." Harleysville only undertook to contact Berger's counsel regarding the date of the letter sent to plaintiffs on July 7, 2009, thirty-six days after its receipt of notice of the claim. Upon confirmation of the date of claimants' counsels' letter, however, Harleysville disclaimed coverage on July 9, 2009. Harleysville offers no proof that its investigation ascertained the exact, or even the approximate, date that plaintiffs received the letter of representation.

Defendant Harleysville argues that is entitled to summary judgment, as absent a valid excuse, that the failure to satisfy a notice requirement of a commercial general liability policy, which is a condition precedent to coverage, vitiates the policy. Harleysville further argues that since its policy was issued on April 1, 2008, it is not affected by the amendment to Insurance Law §3420, which requires a showing of prejudice, since the amendment became effective on

January 17, 2009 and only applies to policies of insurance issued after that date.

In opposition, and in support of its cross-motion for summary judgment, plaintiffs argue that Harleysville failed to timely disclaim coverage, as it waited thirty-eight days (until July 9, 2009) before disclaiming coverage, despite knowing from its conversation with David Nouvini on June 4, 2009, three days after its receipt of notice, that Mr. Nouvini had learned of the occurrence at issue “a few months” prior. Plaintiffs argue that, accordingly, plaintiff was in possession of all of the information it needed upon which to base its disclaimer as of June 4, 2009. Plaintiff’s also argue that Harleysville’s disclaimer is deficient because it fails to precisely state the length of plaintiffs’ alleged delay in notifying Harleysville, claiming only that RDZ delayed “a few months.”

In support of their argument, plaintiffs submit an affidavit executed by David Nouvini, in which Mr. Nouvini attests that he did not tell the investigator that he first received a letter from the claimants’ attorney on June 1, 2009. He attests that he told the investigator that he first received the summons and complaint for the Bergers’ action on June 1, 2009. Mr. Nouvini claims that he told the investigator the same thing he told the Harleysville representative, namely that he did not advise Harleysville of his receipt of the initial claim letter from the Bergers’ attorney until after he was served with the summons and complaint on June 1, 2009. Mr. Nouvini’s affidavit is silent regarding the specific or approximate date of his receipt of the letter of representation from the Bergers’ attorney.

The lack of timeliness of a disclaimer renders academic any consideration of the validity of the grounds asserted therein, including the staleness of notice furnished by the insured or by the injured party. (*Shell v. Fireman’s Fund Insurance Co.*, 17 A.D.3d 444, 793 N.Y.S.2d 110 (2d Dept. 2005; *see also*, *Croningshield v. Nationwide Mut. Ins. Co.*, 255 A.D.3d 813, 680

N.Y.S.2d 302 (3d Dept. 1998); *State Farm Mut. Ins. Co. V. Clift*, 249 A.D.2d 800, 671 N.Y.S.2d 843 (3d Dept. 1998)). Accordingly, this Court shall first address the timeliness of Harleysville's disclaimer.

To disclaim coverage for bodily injuries, an insurer must give written notice of the disclaimer of liability or denial of coverage "as soon as reasonably possible" to the insured and the injured person or any other claimant. (N.Y. Ins. Law 3420(d)). This is true even when the insured fails to provide timely notice of the claim. (*Nationwide Mut. Ins. Co. v. Steiner*, 199 A.D.2d 507 (2d Dept. 1993)). In the instant action, the insured, David Nouvini, cooperated with Harleysville from its first contact with him. Two days after notice was sent to Harleysville, Mr. Nouvini admitted to a Harleysville representative that he had received a letter from claimants' counsel "a few months" prior. Harleysville then undertook an "investigation" of the claim, which consisted only of sending an investigator to again speak with Mr. Nouvini to obtain the same information obtained during the telephone conversation of June 4, 2009, and of making a phone call to claimants' counsel to ascertain the date that the letter of representation was sent to plaintiffs. Harleysville offers no explanation as to why the investigative call to claimant's counsel was not made until July 7, 2009 or why an investigator was needed to obtain information already garnered through its representative's documented conversation with the insured.

The timeliness of an insurer's disclaimer is measured from the point in time when the insurer first learns of the grounds for the disclaimer of liability or denial of coverage. (*Matter of Allcity Ins. Co. (Jiminez)*, 78 N.Y.2d 1054 581 N.E.2d 342 (Ct. of App. 1991)). The reasonableness of any delay must be judged from the point in time when the insurer is possessed of sufficient facts upon which to base a denial or disclaimer. (*Matter of State Farm Ins. Co. (Merrill)*, 192 A.D.2d 824, 596 N.Y.S.2d 554 (3d Dept. 1993)). In the instant matter,

Harleysville possessed sufficient facts upon which to base its denial after its conversation with Mr. Nouvini on June 4, 2009. As plaintiffs' delay in notifying Harleysville of the occurrence giving rise to the claim (the sole ground on which Harleysville disclaimed coverage) was obvious from its first contact with the plaintiff on June 4, 2009, Harleysville had no need to conduct an investigation before determining whether to disclaim. (See, *West 16<sup>th</sup> Street Tenants Corp. v. Public Service Mut. Ins. Co.*, 290 A.D.2d 278, 736 N.Y.S.2d 34 (1<sup>st</sup> Dept. 2002); *McGinnis v. Mandracchia*, 291 A.D.2d 484, 739 N.Y.S.2d 160 (2d Dept. 2002); *Wasserheit v. N.Y. Cent. Mut. Fire Ins. Co.*, 271 A.D.2d 439, 705 N.Y.S.2d 638 (2d Dept. 2000); *2833 Third Ave. Readly Associates v. Marcus*, 12 A.D.3d 329, 784 N.Y.S.2d 863 (1<sup>st</sup> Dept. 2004)).

Where the insurance carrier has disclaimed coverage on the ground that its insured failed to comply with the applicable notice requirements, and the insured has offered proof that the disclaimer itself was not issued "as soon as reasonably possible," the burden is upon the insurance carrier to establish that the delay, if any, was reasonably related to its completion of a thorough and diligent investigation. (*Schulman v. Indian Harbor Ins. Co.*, 40 A.D.3d 957, 836 N.Y.S.2d 682 (2d Dept. 2007); see also, *First Fin. Ins. Co. v. Jetco Contr. Co.*, 46 N.Y.2d 1028 (Ct. of App. 1979)). In the case at hand, Harleysville has not met its burden of establishing that its delayed disclaimer was reasonably related to its completion of a thorough investigation. The investigation was unnecessary to the disclaimer of coverage, as Harleysville already had the facts necessary to issue its denial within days of its notice of the loss. Further, Harleysville offers no excuse for not contacting claimants' counsel regarding the date of its letter of representation prior to July 7, 2009.

Where an insurer fails to promptly inform an insured that its claim is denied based upon the insured's violation of a timely notice provision, the insurer's delay may be excused if it can

establish that the delay was reasonably related to its completion of a thorough and diligent investigation. (*Schulman v. Indian Harbor Ins. Co.*, 40 A.D.3d 957, 836 N.Y.S.2d 682 (2d Dept. 2007)). By contrast, courts have deemed insurers' explanations for delayed notification insufficient where the basis for denying coverage was or should have been readily apparent to the insurer even before the onset of the delay. (*New York University v. First Financial Ins. Co.*, 322 F.3d 750, 755 (C.A.2 (N.Y.) 2003).

Accordingly, Harleysville's thirty-eight day delay in disclaiming coverage in unreasonable as a matter of law. As such, plaintiffs' cross-motion for summary judgment is granted and defendant Harleysville's motion for summary judgment is denied.

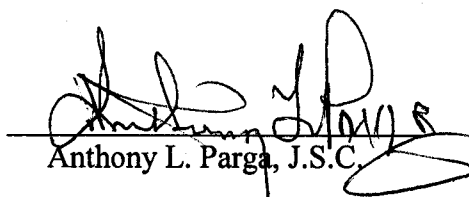
Lastly, the cross-motion brought by defendants Patricia Berger and Herbert Berger for an order granting summary judgment to plaintiffs is denied as procedurally improper. Defendants Patricia Berger and Herbert Berger argue that summary judgment should be granted to plaintiffs based upon the Bergers' timely notice of the occurrence to Harleysville. The Bergers argue that upon their notification that Harleysville was the insurance carrier for RDZ, they sent a letter to Harleysville on July 15, 2009 placing Harleysville on notice of the occurrence. Accordingly, the Bergers argue that pursuant to Insurance Law §3420, Harleysville is obligated to provide coverage and a defense to the plaintiffs. The Court of Appeals has held that Insurance Law §3420 "grants an injured party a right to sue the tortfeasor's insurer, but only under limited circumstances - the injured party must first obtain a judgment against the tortfeasor, serve the insurance company with a copy of the judgment and await payment for 30 days." (*Lang v. Hanover Ins. Co.*, 3 N.Y.3d 350, 354, 787 N.Y.S.2d 211 (2004)). As the Bergers have not obtained judgment against RDZ, and, as they have not brought suit directly against Harleysville and have not asserted a counterclaim against Harleysville in the instant action, the Bergers'

application for summary judgment is denied as procedurally improper.

Accordingly, it is ordered that defendant Harleystville's motion and defendant Bergers' cross-motion for summary judgment are denied, and plaintiffs' cross-motion for summary judgment is granted. The Court further declares that defendant Harleystville is obligated to defend and indemnify plaintiffs in the underlying personal injury action according to the limits of its policy, and to reimburse plaintiffs for their reasonable attorneys fees, costs and disbursements relating to the defense of the underlying personal injury action only.

Submit judgment on notice.

Dated: January 19, 2011

  
Anthony L. Parga, J.S.C.

cc: Gair, Gair, Conason, Steigman, Mackauf, Bloom & Rubinowitz  
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**ENTERED**  
JAN 21 2011  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE