

**Stelsim, Inc. v Kensington Ins. Co.**

2011 NY Slip Op 30285(U)

January 20, 2011

Sup Ct, NY County

Docket Number: 110391/10

Judge: Joan M. Kenney

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

PRESENT:

PART 8

Index Number : 110391/2010

STELSIM, INC.

vs

KENSINGTON INSURANCE

Sequence Number : 001

DISMISS ACTION

INDEX NO. 110391

MOTION DATE

MOTION SEQ. NO.

MOTION CAL. NO.

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

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits

Replying Affidavits

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

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

Dated: 1/23/11

HON. JOAN M. KENNEY

JOAN M. KENNEY J.S.C.

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: IAS Part 8

-----X  
STELSIM, INC.,

Plaintiff.

- against -

KENSINGTON INSURANCE COMPANIES.

Defendant.  
-----X

**DECISION AND ORDER**

Index:110391/10

Cal.: 1/01/10

Mot. Seq. No.: 001

**KENNEY, JOAN M., J.**

Recitation, as required by CPLR 2219(a), of the papers considered in review of this motion to dismiss the complaint:

**Papers**

Notice of Motion, Affirmation, Affidavit & Exhibits  
Attorney's Affirmation in Opposition & Exhibit  
Reply Affirmation.

**Numbered**

1-10  
11-12  
13

**Appearances**

Ahmuty, Demers & McManus  
Attorneys for Defendant  
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Jeffrey Miller & Associates, P.C.  
Attorneys for Plaintiff  
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New York, New York 10004

In this declaratory judgment action, defendant Kensington Insurance Companies interposes a pre-answer motion to dismiss, pursuant to CPLR 3211(a)(1).

**FACTUAL AND PROCEDURAL BACKGROUND**

This action arises out of defendant's disclaimer of insurance coverage for a claim by plaintiff, Stelsim, Inc. (Stelsim) to defend and indemnify plaintiff in an underlying personal injury action entitled *Geraldine Monson v City of New York, New York City Department of Transportation, Stelsim, Inc., and Fins, Furs "N" Feathers of Brooklyn, Ltd.*, Index No. 20950/2008, Kings County, New York (underlying action). It is undisputed that plaintiff procured a commercial property and general liability insurance policy from defendant (the insurance policy). The insurance policy is undated, but it is undisputed that the policy period ran from 10/25/2006 to 10/25/2007.

The underlying action was commenced on or about May 19, 2009. Pursuant to an affidavit of service in the underlying action, Stelsim was served with the pleadings in the underlying action by service upon the New York Secretary of State pursuant to Business Corporation Law § 306. At the time of the commencement of the underlying action, Stelsim's address was "250 96<sup>th</sup> Street, Brooklyn, New York 11209". It is undisputed that Stelsim should have listed its address as "33

Sherwood Drive, Monroe Township, New Jersey 08831". Stelsim never changed its address with the New York Secretary of State.

The insurance policy's notice provision states in pertinent part:

"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 . . ." (*see* Section IV - Commercial General Liability Conditions of the insurance policy).

Stelsim alleges that it first received notification of the underlying action in February 2010 by "their tenant" (affirmation of Doron Leiby, Esq. attached to opp papers, ¶ 6). Stelsim further alleges that they notified Kensington on or about March 1, 2010 of the underlying action by fax to defendant's claim department. Defendant, however, asserts that they were notified of the underlying action in March 29, 2010 by fax (*see* Ex. "G" attached notice of motion).

By letter dated April 9, 2010, Kensington disclaimed coverage for Stelsim claim because Stelsim did not provide notice of the underlying action as soon as practicable pursuant to the insurance policy (*see* Section IV - Commercial General Liability Conditions of the insurance policy; Ex. "H" to notice of motion papers).

### ARGUMENTS

Defendant contends that action must be dismissed because Stelsim failed to provide defendant with timely notice of the existence of the underlying action, as required by the parties insurance policy provision (Section IV). Defendant further argues that its disclaimer of the insurance coverage on grounds of untimely notice was proper and therefore the instant declaratory action is without merit.

Plaintiff contends that the motion to dismiss should be denied because: 1) the policy's notice provision with respect to timeliness is ambiguous; and 2) defendant has failed to demonstrate any prejudice by the purported untimely notice as required by Insurance Law § 3420 (a) (5).

### DISCUSSION

On a motion to dismiss based upon documentary evidence, pursuant to CPLR § 3211[a][1], “a party may move for judgment dismissing one or more causes of action asserted against him on the ground that a defense is founded upon documentary evidence”. A dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law (*see Leon v Martinez*, 84 NY2d 83, 88 [1994]).

The plain language of the insurance policy requires that Stelsim notify defendant of *inter alia* a “suit” “as soon as practicable” (*see* Section IV - Commercial General Liability Conditions of the insurance policy). Stelsim does not deny the allegation that it failed to update its new address with the Secretary of State as the designated agent of service of process. Due to this “oversight”, Stelsim claims that it did not receive actual notice of the lawsuit until its tenant informed them of the lawsuit in February 2010, nine months after commencement of the underlying suit. Here, the plaintiff does not provide a reasonable excuse for failing to notify the Secretary of State of its changed address. Additionally, as the insured bears the burden of proffering a reasonable excuse for failing to give timely notice, and plaintiff in this case offers none, this Court concludes that Stelsim failed to timely notify defendant pursuant to the terms of the insurance policy (*see 2130 Williamsbridge Corp. v Interstate Indem. Comp.*, 55 AD3d 371, 372 [1st Dept 2008]).

Stelsim further argues that the terms of the insurance policy regarding timely notice are ambiguous. The Court of Appeals, however, has construed the exact phrase “as soon as practicable” as a “condition precedent” which, in the event of non-compliance by the insured, vitiates the contract as a matter of law (*see Great Canal Realty Corp. v Seneca Ins. Comp., Inc.*, 5 NY3d 742, 743 [2005]). This Court finds that the notice provision with respect the timely notice is not ambiguous in this case.

Additionally, this Court is not persuaded by Stelsim’s contention that recently enacted New York Insurance Law Section 3420 (a) (5) requires defendant to demonstrate prejudice by the insured’s lack of timely notice. NYLI § 3240 (a) (5) expressly applies to policies issued or delivered on or after January 17, 2009 (Insurance Law § 3420, as added by L 1984, ch 367, § 1, as amended L 2008, ch 388, § 8). It is undisputed that the Kensington policy was issued or delivered before January 17, 2009. Section 3420 (a) (d) of New York Insurance Law, therefore, is not applicable in

this case.


Accordingly, it is

ORDERED that defendant Kensington Insurance Companies' motion to dismiss is granted;  
and it is further

ORDERED that the Clerk of the Court shall enter judgment in favor of defendant Kensington Insurance Companies and against plaintiff Stelsim, Inc., dismissing the complaint.

Dated: January 20, 2011

E N T E R

  
\_\_\_\_\_  
Hon. Joan M. Kenney  
J.S.C.