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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: DEBRA A. JAMES *Justice* **PART 59**

QBE INSURANCE CORPORATION and COOK & KRUPA, LLC,

Plaintiffs,

- v -

ILLINOIS UNION INSURANCE COMPANY, BROADTRADE PLUMBING & HEATING, INC, MAX SPECIALTY INSURANCE COMPANY, and NBT ELECTRICAL, INC,

Defendant.

Index No.: 601139/09

Motion Date: 04/19/11

Motion Seq. No.: 01

UNFILED JUDGMENT

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).

The following papers, numbered 1 to 5 were read on this motion for summary judgment.

Notice of Motion/Order to Show Cause -Affidavits -Exhibits	No(s).	1
Answering Affidavits - Exhibits	No(s).	2 - 4
Replying Affidavits - Exhibits	No(s).	5

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion is

The court shall grant the motion of defendant Illinois Union Insurance Company for summary judgment dismissing the complaint against it and declaring that it has no duty to defend or indemnify the plaintiffs with respect to the claims asserted in the underlying personal injury action (Huang v Spyglass Develop. LLC, Kings County Index No.: 31724/2008).

It is undisputed that the claim in the underlying action arose on August 12, 2008. For purposes of this motion viewing

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

1. CHECK ONE: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .. MOTION IS: ☒ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
   ☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

the facts in the light most favorable to the plaintiff/non-movants, it is further undisputed that counsel for the injured plaintiff in the underlying accident sent notice of the accident to plaintiff Cook & Krupa, LLC, by letter dated October 13, 2008. Plaintiff QBE's agent received notice via its broker on October 22, 2008. On December 2, 2008, QBE's claim administrator notified defendant Illinois Insurance that it was seeking additional insured coverage for Cook & Krupa, LLC, under a policy issued to defendant Broadtrade. On December 15, 2008, Illinois' administrator disclaimed coverage on the grounds of late notice among other grounds.

Illinois now moves for summary judgment dismissing the complaint against it and declaring it has no duty to plaintiffs. There is no dispute that the policy in question has a prompt notification of occurrence clause. Viewing the facts in the light most favorable to plaintiffs they were notified of the occurrence by October 22, 2008 and notified the movant on December 2, 2008, over 42 days later. Therefore plaintiffs' notice was late and failed to comply with the policy provisions as a matter of law. As stated by the Court

> It is unquestioned that a failure to satisfy the requirements of this clause by timely written notice vitiates the contract as to both the insured and the plaintiff recovering a judgment against him and that the term "as soon as practicable", like various similar expressions in other liability policies, requires that written notice be given within a reasonable time under all the circumstances. It is also well settled that the

> reasonableness of a delay, where mitigating circumstances such as absence from the State or lack of knowledge of the occurrence or its seriousness are offered as an excuse, is usually for the jury. On the other hand, absent an excuse or mitigating circumstances, courts have assumed the function of determining fulfillment of the condition. Thus in the Rushing case Cardozo, Ch. J., stated that as a matter of law, "In the absence of explanation or excuse, a notice of an accident withheld for twenty-two days is not the immediate notice called for by the policy." In an earlier case this court, having found no mitigating circumstances, held that a delay of 10 days was unreasonable as a matter of law.
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> Plaintiff's action is barred by the force of these latter decisions. The Appellate Division in finding that the record presented a question for the jury relied upon the case of Melcher v. Ocean Acc. & Guar. Corp. (supra). That reliance was misplaced. The Melcher case is authority for the proposition that ignorance of the fact that injury has resulted from an accident may excuse a delay in giving notice. Here it is conceded that as of May 28 the insured was fully apprised of the fact that the fall had resulted in serious injury to the plaintiff. Had notice been given shortly thereafter the reasonableness of the delay would have been properly for the jury to determine. Under those circumstances it might have been found that the insured's ignorance excused the failure to give notice at an earlier date; this in accordance with the Melcher decision. Obviously, however, once the insured was made fully aware of the seriousness of the injury and its relation to the accident, the excuse of ignorance was no longer cognizable. In the Melcher case written notice was given the insurer 3 days after plaintiff was first informed as to the injury. In the present case a period of some 51 days intervened. An unexcused delay of that length constitutes a breach of condition as a matter of law within the above-cited cases.

Deso v London & Lancashire Indem. Co. of America, 3 NY2d 127, 129 -130 (1957) (underlining supplied).

Deso is dispositive here. Plaintiffs' proffered excuse, that an investigation was required because the October 13, 2008 letter provided insufficient information to alert the movant to

the existence of a possible claim, is unsupported by the record. That letter set forth that Huang suffered "serious personal injuries" at the "premises located at 2101 Fredrick Douglass Boulevard" on August 8, 2008. The letter also requested that plaintiffs "preserve the ladder/structure/device(s) on/from which our client was injured." Therefore as a matter of law the claim letter contained sufficient information, the "who, what, when, where," to require the plaintiffs' to notify the movant that its coverage may be implicated. Further, the plaintiffs fail to provide any evidence of what information the investigative report contained that they did not possess at the time they were notified of the accident. Thus plaintiffs' proffered excuse fails to raise an issue of fact in light of the movant's prima facie showing.

Accordingly, it is

ORDERED and ADJUDGED that the motion of defendant ILLINOIS UNION INSURANCE COMPANY for summary judgment is GRANTED and the complaint and cross-claims against the movant are hereby dismissed; and it is further

ORDERED, ADJUDGED and DECLARED that defendant ILLINOIS UNION INSURANCE COMPANY has no duty to defend or indemnify plaintiffs in the underlying personal injury action Huang v Spyglass Develop. LLC, (Kings County Index No.: 31724/2008) or any claims appurtenant thereto; and it is further

ORDERED that the claims and cross-claims against defendant ILLINOIS UNION INSURANCE COMPANY are hereby severed and the Clerk shall enter judgment thereupon as directed above; and it is further

ORDERED that the remainder of this action shall continue; and it is further

ORDERED that the remaining parties are directed to attend a status conference on August 30, 2011 in IAS Part 59, Room 103, 71 Thomas Street, at 2:30 P.M.

This is the decision and order of the court.

Dated: July 1, 2011

ENTER:

DEBRA A. JAMES J.S.C.

UNFILED JUDGMENT
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).