

39 W. 29th St. Owners v Lig Ins.

2011 NY Slip Op 31911(U)

July 11, 2011

Supreme Court, New York County

Docket Number: 104815/2008

Judge: Doris Ling-Cohan

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

PRESENT: Hon. Doris Ling-Cohan
Justice

PART 36

Index Number : 104815/2008
39 WEST 29TH STREET OWNERS
VS.
LIG INSURANCE
SEQUENCE NUMBER : 002
SUMMARY JUDGMENT

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

this motion to/for Summary judgment

PAPERS NUMBERED

1, 2

3

4

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____ (memo)

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion for summary judgment
by plaintiff is denied in accordance with the
attached memorandum decision.

(consolidated for disposition with motion
sequence # 003)

FILED

JUL 13 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 7/13/11

[Signature]

HON. DORIS LING-COHAN 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: IAS PART 36

-----X

39 WEST 29TH STREET OWNERS CORP. and
SCARLET & KIM CO., LLC,

Plaintiffs,

Index No.: 104815/08
DECISION/ORDER

-against-

Motion seq. #: 002 & 003

LIG INSURANCE CO., LTD, UNITED STATES
BRANCH, AMERICAN INTERNATIONAL
COMPANIES, ILLINOIS NATIONAL INSURANCE
COMPANY, INTERNATIONAL UNDERWRITING
AGENCY, INC., KARS JEWELRY, INC., LEVITAN
DESIGN ASSOCIATES INCORPORATED and
LEONARD LEVITAN,

Defendants.

FILED

JUL 13 2011

-----X

DORIS LING-COHAN, J.S.C.:

NEW YORK
COUNTY CLERK'S OFFICE

In this action for declaratory relief on an insurance policy, plaintiffs request partial summary judgment on the complaint (motion sequence number 002), while defendant LIG Insurance Co., LTD., moves separately for summary judgment to dismiss the complaint (motion sequence number 003). For the following reasons, plaintiffs' motion is denied, and defendant's cross motion is granted.

BACKGROUND

Plaintiff 39 West 29th Street Owners Corp. (39 Owners Corp.), a New York corporation, is the owner of a commercial-use cooperative building (the building) located at 39 West 29th Street in the County, City and State of New York. See Notice of Motion (motion sequence number 002), Exhibit 1 (complaint), ¶ 1. Plaintiff Scarlet & Kim Co., LLC (S&K), a New York limited liability corporation, is the building's managing agent. *Id.*, ¶¶ 2-3.

On or about January 20, 2007, S&K contracted through a broker with defendant LIG Insurance Co., Ltd., United States Branch (LIG) to obtain a \$1,000,000.00 general commercial liability insurance policy (the LIG policy) for 39 Owners Corp. *Id.*; Kim Affidavit, ¶¶ 5-7; Exhibit 10.¹ The “commercial general liability coverage form” of the LIG policy provides, in pertinent part, as follows:

Section I - Coverages

- 1. Insuring Agreement.
 - a. We will pay those sums that the insured becomes legally obligated to pay as damages because of ... “property damage” to which this insurance applies. We will have the right and duty to defend the insured against any “suit” seeking those damages. ...
- 2. Exclusions. This insurance does not apply to:
 - a. Expected or Intended Injury. “Bodily injury” or “property damage” expected or intended from the standpoint of the insured. ...
 - b. Contractual Liability. “Bodily injury” or “property damage” for which the insured is obligated to pay damages by reason of the assumption of liability in a contract or agreement. This exclusion does not apply to liability for damages:
 - (1) That the insured would have in the absence of the contract or agreement; or
 - (2) Assumed in a contract or agreement that is an “insured contract,” provided the “bodily injury” or “property damage” occurs subsequent to the execution of the contract or agreement. ...

Section II - Who Is An Insured

- 2. Each of the following is also an insured:
 - b. Any person (other than your “employee” or “volunteer worker”), or any organization while acting as your real estate

¹ S&K had also obtained an \$8,000,000.00 excess liability coverage policy for 39 Owners Corp. from defendants American International Group, Inc. i/s/h/a American International Companies and Illinois National Insurance Company through their brokers, International Underwriting Agency, Inc. *Id.*; Kim Affidavit, ¶¶ 8-10. However, as will be discussed, plaintiffs eventually stipulated to discontinue this action as against those defendants. *Id.*; Exhibits 5,6,7.

manager.

Section IV - Commercial General Liability Conditions

- 2. Duties In The Event Of Occurrence, Offense, Claim Or Suit
 - a. You must see to it that we are notified as soon as practicable of an "occurrence" or an offense which may result in a claim. To the extent possible, such notice should include:
 - (1) How, when and where the "occurrence" or offense took place;
 - (2) The names and addresses of any injured persons and witnesses; and
 - (3) The nature and location of any injury or damage arising out of the "occurrence" or offense.
 - b. If a claim is made or a "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.
 - c. You and any other involved insured must:
 - (1) Immediately send us copies of any demands, notices, summonses or legal papers received in connection with the claim or "suit;"
 - (2) Authorize us to obtain records and other information;
 - (3) Cooperate with us in the investigation or settlement of the claim or defense against the "suit;" and
 - (4) Assist us, upon our request, in the enforcement of any right against any person or organization which may be liable to the insured because of injury or damage to which this insurance may also apply.

Section V - Definitions

- 13. "Occurrence" means an accident, including continuous or repeated exposure to substantially the same general harmful conditions.
- ***
- 17. "Property damage" means: ...
 - b. loss of use of tangible property that is not physically injured. All such loss of use shall be deemed to occur at the time of the "occurrence" that caused it.

18. "Suit" means a civil proceeding in which damages because of ... "property damage" ... to which this insurance applies are alleged. ...

Id.; Exhibit 10.

Defendant Levitan Design Associates Incorporated (LDI), a New York corporation whose president and owner was and is defendant Leonard Levitan (Levitan), has been the tenant of record of the building's eighth-floor unit since November 1981. *Id.*; Exhibit 9 (Kars complaint), ¶¶ 5-6. On October 7, 2004, Levitan, on behalf of LDI, and defendant Kars Jewelry, Inc. (Kars), another New York corporation, executed a sublease (the Kars sublease) for a portion of the building's eighth-floor commercial unit. *Id.*; Friedman Affirmation, ¶ 12; Exhibit 9-A. The Kars sublease runs from November 1, 2004 through October 31, 2014, and neither 39 Owners Corp., nor S&K, was a party or signatory thereto. *Id.*; Exhibit 9-A.

During the course of its tenancy, Kars became concerned by what it viewed as lax security practices at the building. LIG presents copies of correspondence between Levitan and Kars president, Richard Korwin (Korwin), regarding these building security issues. *See* Notice of Motion (motion sequence number 003), Exhibits C, D, G, I. LIG particularly notes that, in a letter dated August 29, 2005, Korwin specifically informs Levitan that "should we suffer any security failures into the premises which result in our financial loss ... we will seek damages from our landlord and building owners for being complicit in the reckless and indifferent operation [of the building] by the superintendent and other building employees." *Id.*; Exhibit D. LIG also presents a copy of a letter, dated September 8, 2005, that Levitan sent to S&K to notify it of his and Kars's concerns about building security. *Id.*; Exhibit E. In addition, LIG presents a transcript of Levitan's deposition testimony wherein he alleges to have been making complaints

to S&K's owner, Hee Jung Kim (Kim), about building security for "a long time." *Id.*; Exhibit H, at 100-101. Finally, LIG presents a copy of a letter, dated October 13, 2005, from Levitan to Korwin, that alleges that the building's co-op board had met to address security concerns, and had, among other things, reassigned the building's superintendent and other employees to provide more coverage of the building's passenger and freight elevators. *Id.*; Exhibit I. Kim denies ever having received any written complaints about building security apart from the September 8, 2005 letter, and states that, in response to that letter, she had authorized the installation of a locked gate between the building's first and second floors. *See* Notice of Motion (motion sequence number 002), Kim Affidavit, ¶¶ 45-46.

On or about April 29, 2007, Kars's portion of the premises at the building was burglarized, and a quantity of Kars's gold and jewelry was stolen. *See* Notice of Motion (motion sequence number 003), Silver Affirmation, ¶ 17. LIG presents copies of the deposition testimony of Levitan, who states that he immediately notified Kim of the burglary, and the deposition testimony of 39 Owners Corp.'s board president, Gisue Hariri (Hariri), who states that the police notified her about the burglary shortly after it had happened. *Id.*, ¶¶ 19-22; Exhibits H, at 153, J, at 26-39. LIG states that neither Kim, nor Hariri, made any attempt to notify it of the occurrence of the burglary at that time. *Id.*, ¶ 21. Kim testified that she "had heard in passing that a burglary may have happened but there was no reason to think that this meant anything for the building," and that "nobody reported it at that time - Kars Jewelry, no, nobody - nobody reported to me about it so I didn't know." *Id.* ¶ 20; Exhibit F, at 51. Hariri states that: "I ... asked the police officers whether I should be concerned about the safety in the [b]uilding as a result of the [a]lleged [b]urglary," and that "one of the police officers responded that I should not worry

because the [a]lleged [b]urglary was ‘an inside job.’” *See* Notice of Motion (motion sequence number 002), Hariri Affidavit, ¶¶ 11-12. Hariri further testified that it was Kim who was responsible for notifying insurance companies as to losses and claims. Notice of Motion (motion sequence number 003), Exh. J, at 67, lines 12-15.

On February 20, 2008, Kars commenced an action in this court, bearing Index No. 600515/08 (the Kars action), that named Levitan, LDI, 39 Owners Corp. and S&K as defendants. *See* Notice of Motion (motion sequence number 002), Exhibit 9. The complaint in the Kars action sets forth one cause of action for negligence, and three causes of action for breach of contract. *Id.* Kim states that she received a copy of the complaint in the Kars action on March 3, 2008, and immediately forwarded it to 39 Owners Corp.’s insurance broker, who forwarded it to LIG. *Id.*; Kim Affidavit, ¶ 12. Kim presents copies of dated mailing receipts to support her claim. *Id.*; Exhibit 11. LIG admits having received plaintiffs’ notice of the Kars action, but notes that plaintiffs served this notice eight months after the burglary that gave rise to said action. *See* Notice of Motion (motion sequence number 003), Silver Affirmation, ¶ 24. Kim next presents a copy of a letter, dated February 15, 2008, in which LIG reserved its rights to disclaim coverage of 39 Owners Corp. and S&K with respect to the Kars action (the LIG reservation). *See* Notice of Motion (motion sequence number 002), Exhibit 12. Finally, Kim presents a copy of a letter, dated March 11, 2008, in which LIG disclaimed coverage of 39 Owners Corp. and S&K with respect to the Kars action (the LIG disclaimer). *Id.*; Exhibit 13. The LIG disclaimer states that coverage was not warranted because: 1) the allegations in Kars’ complaint do not constitute an “occurrence,” as defined by the LIG policy; first, because they sound in breach of contract rather than in tort; and second, because Kars had claimed that 39 Owners Corp. and S&K

engaged in “foreseeable and intentional conduct;” 2) S&K submitted a late notice of claim; 3) it was subject to the “intentional acts exclusion;” 4) it was subject to the “contract damages exclusion;” 5) it would fall afoul of “applicable law and public policy considerations;” 6) Kars complaint seeks certain classes of “damages” (i.e., legal fees, court costs, expenses and interest) that are not covered by the LIG policy; 7) S&K is not an “insured” under the LIG policy; 8) other insurance exists which would afford primary coverage; and 9) Kars’ claims fall outside the LIG policy’s effective period of between January 15, 2007 and January 15, 2008. *Id.*; Exhibit 13.

As a result of the foregoing, plaintiffs commenced this action on April 1, 2008 by filing a complaint that sets forth causes of action for: 1) declaratory relief; 2) contractual indemnification (against International Underwriting Agency, Inc. [International Underwriting]); and 3) costs and disbursements. *Id.*; Exhibit 1. LIG filed an answer on May 23, 2008 that included 24 affirmative defenses and two cross claims against International Underwriting. *Id.*; Exhibit 2. American International Group, Inc. i/s/h/a American International Companies [AIG] and Illinois National Insurance Company [Illinois National] filed a joint answer on June 6, 2008, and International Underwriting filed an answer on June 27, 2008. *Id.*; Exhibits 3, 4. Plaintiffs executed stipulations to discontinue this action as against AIG, Illinois National and International Underwriting on February 2, 2008, September 2, 2009 and December 18, 2009, respectively. *Id.*; Exhibits 5, 6, 7. Plaintiffs now move for summary judgment on their first cause of action for a declaratory judgment (motion sequence number 002). LIG moves separately for summary judgment to dismiss the complaint (motion sequence number 003).

DISCUSSION

When seeking summary judgment, the moving party bears the burden of proving, by

competent, admissible evidence, that no material and triable issues of fact exist. *See e.g. Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 (1985); *Sokolow, Dunaud, Mercadier & Carreras LLP v Lacher*, 299 AD2d 64 (1st Dept 2002). Once this showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial of the action. *See e.g. Zuckerman v City of New York*, 49 NY2d 557 (1980); *Pemberton v New York City Tr. Auth.*, 304 AD2d 340 (1st Dept 2003). Further, it is well settled that ““on a motion for summary judgment, the construction of an unambiguous contract is a question of law for the court to pass on, and ... circumstances extrinsic to the agreement or varying interpretations of the contract provisions will not be considered, where ... the intention of the parties can be gathered from the instrument itself.”” *Maysek & Moran, Inc. v S.G. Warburg & Co.*, 284 AD2d 203, 204 (1st Dept 2001), quoting *Lake Constr. & Dev. Corp. v City of New York*, 211 AD2d 514, 515 (1st Dept 1995). Here, for the reasons discussed below, plaintiffs’ motion for summary judgment is denied and LIG’s motion for summary judgment is granted.

Plaintiffs’ motion seeks summary judgment on their first cause of action for a declaratory judgment. Pursuant to New York law, declaratory judgment is a discretionary remedy which may be granted “as to the rights and other legal relations of the parties to a justiciable controversy whether or not further relief is or could be claimed.” CPLR 3001; *see e.g. Jenkins v State of N.Y. Div. of Hous. and Community Renewal*, 264 AD2d 681 (1st Dept 1999). Here, plaintiffs specifically request a:

declaration of the respective rights and duties of the plaintiffs and the defendants ... with respect to one [another] under and by virtue of said contracts of insurance and the claim asserted by [Kars] ... be made and that [LIG] indemnify plaintiffs

for any loss, settlement or judgment up to One Million (\$1,000,000.00) [d]ollars. *See* Notice of Motion (motion sequence number 002), Exhibit 1, at 7-8. Plaintiffs argue that the LIG policy obligates LIG to provide plaintiffs with a defense and indemnification in the Kars action. *See* Plaintiffs' Memorandum of Law, at 12-14, 14-15. However, as will be discussed below, the court cannot reach these arguments without first disposing of the issue of whether plaintiffs complied with the LIG policy's notice requirements and are, therefore, entitled to coverage.

Plaintiffs' additional argument (and the bulk of LIG's motion) is directed to the question of whether or not plaintiffs were excused from their admitted failure to promptly notify LIG about Kars' burglary - an act that Section V, subparagraph 13 of the LIG policy clearly defines as an "occurrence."² Plaintiffs assert that both Hariri and Kim had a "reasonable, good faith belief ... in non-liability [that] excuse[d] the[ir] delay in notification to [LIG] of the alleged burglary." *See* Plaintiffs' Memorandum of Law, at 15-19. With respect to Hariri, plaintiffs argue that she was entitled to rely on the police officer's statement not to worry about building security, because the burglary was "an inside job." *Id.* at 18. With respect to Kim, plaintiffs argue that she did not receive any notification of the burglary, apart from a passing conversation with Levitan. *Id.* With respect to both Hariri and Kim, plaintiffs argue that they reasonably believed that Kim's authorizing of the placement of a locked door between the building's first and second floors and her reassignment of the building's personnel was sufficient to address the security concerns that Levitan had raised on behalf of LDI and Kars in his September 8, 2005 letter. *Id.*

² The parties do not dispute that plaintiffs did serve LIG with timely notice of the commencement of the Kars action.

Plaintiffs also argue that Hariri and Kim were entitled to rely on the facts that Kars did not communicate any further complaints to them (either personally or through Levitan) after they received the September 8, 2005 letter, and that Kars did not contact them to request either repairs or changes to building security after the burglary occurred. *Id.* Plaintiffs conclude that the foregoing gave rise to a “reasonable, good faith belief” on their parts that the subject burglary was not an “occurrence” that might give rise to liability on their part, and about which they were obligated to notify LIG by the terms of the LIG policy. *Id.*

In both its opposition papers and its own motion, LIG takes the opposite position - i.e., that Section IV, subparagraph 2 of the LIG policy’s “commercial general liability coverage form” required plaintiffs to: 1) notify LIG “as soon as practicable” about the happening of an “occurrence;” and 2) notify LIG “immediately” about the commencement of a “suit.” *See* Memorandum of Law in Opposition to Plaintiffs’ Motion, at 6-10. LIG argues that plaintiffs’ violated the former duty by failing to provide it with any notice of the burglary at the time it was committed. *Id.* LIG also argues that the eight-month delay that lapsed between the Kars burglary and plaintiffs’ service of a copy of the Kars complaint rendered that second notice “late,” as a matter of law, and justified LIG’s decision to disclaim coverage. *Id.* LIG finally argues that plaintiffs’ allegations do not disclose the existence of a “reasonable, good faith belief” on their parts that the subject burglary was not an “occurrence” that might give rise to liability on their part. *Id.* Plaintiffs’ reply papers contest this point. *See* Plaintiffs’ Reply Memorandum of Law, at 5-9.

The Court of Appeals has held that when a policy of liability insurance requires that notice of an occurrence be given “as soon as practicable,” such notice must be provided within a

reasonable period of time; failure to satisfy the notice requirement vitiates the contract. *Sorbara Const. Corp. v. AIU Ins. Co.*, 11 NY3d 805, 806 (2008); *Great Canal Realty Corp. v. Seneca Ins. Co., Inc.*, 5 NY3d 742, 743 (2005). However, a reasonable good-faith belief of non-liability, may excuse the failure to give timely notice. *Great Canal Realty Corp. v. Seneca Ins. Co., Inc.*, 5 NY3d at 743; *Security Mut. Ins. Co. of N.Y. v. Acker-Fitzsimons Corp.*, 31 NY2d 436, 441 (1972). In such instance, “the insured’s belief must be reasonable under all the circumstances, [e.g.,] it may be relevant on the issue of reasonableness, whether and to what extent, the insured has inquired into the circumstances of the accident or occurrence.” *Great Canal Realty Corp.*, 5 NY3d at 744, quoting *Security Mut. Ins. Co.*, 31 NY2d at 441. Additionally, the insured bears the burden of establishing the reasonableness of the excuse. *Great Canal Realty Corp.*, 5 NY3d at 744; *Argentina v. Otsego Mut. Fire Ins. Co.*, 86 NY2d 748, 750 (1995). While ordinarily, questions of reasonableness are reserved for the trier of fact, summary judgment in favor of the insurer may be appropriate if, viewing all facts in favor of the insured, the evidence establishes that the insured “has failed to raise a triable issue of fact as to whether its delay in giving notice was [reasonable].” *Great Canal Realty Corp.*, 5 NY3d at 744; *see also Tower Ins. Co. of N.Y. v. Lin Hsin Long Co.*, 50 AD3d 305, 307 (1st Dept 2008) (citations omitted); *SSBSS Rlty. Corp. v. Public Service Mut. Ins. Co.*, 253 AD2d 583 (1st Dept 1998).

Here, as previously discussed, plaintiffs have identified several reasons why they believed that it was not necessary to notify LIG about the burglary of Kars’s premises. LIG responds that, as a matter of law, none of these reasons affords grounds for a “reasonable, good faith belief” that no notice was required, because: 1) plaintiffs were aware that Kars would assert a claim against them; 2) plaintiffs never took any action to ascertain their potential liability to Kars; and

3) plaintiffs' "assumption that other parties might bear liability for the occurrence does not relieve them of their obligations under the [p]olicy." *See* Memorandum of Law in Opposition to Plaintiffs' Motion, at 10-15.

LIG asserts that "plaintiffs had actual notice that a claim would be made," because they "had written notice that [Kars] would hold them responsible for any loss or injury that it sustained as a result of the building's inadequate security." *Id.* at 12. LIG cites the dictum of the Appellate Division, First Department, in *SSBSS Realty Corp. v Public Serv. Mut. Ins. Co.* (253 AD2d 583, 584 [1st Dept 1998]), which granted summary judgment in favor of the insurance company, stating that the "issue is not whether the insured believes he will ultimately be found liable for the injury, but whether he has a reasonable basis for a belief that no claim will be asserted against him." LIG also refers to Korwin's August 29, 2005 letter to Levitan as evidence that plaintiffs had notice that Kars intended to file a claim against them in the event that lax building security ever led to Kars suffering a financial loss. *See* Memorandum of Law in Opposition to Plaintiffs' Motion, at 10. However, as plaintiffs point out, Kim responded to that letter by authorizing the placement of a locked door between the building's first and second floors, and by reassigning the building's personnel, and Kars never communicated any subsequent security concerns to plaintiffs. *See* Plaintiffs' Memorandum of Law, at 18. Under these circumstances, it cannot be said to be unreasonable, as a matter of law, for Kim to presume that she had adequately addressed Kars's security concerns. Indeed, it would be unreasonable to treat Kars's August 29, 2005 letter as placing plaintiffs on permanent notice, as LIG argues, especially in view of the fact that Korwin addressed that letter to Levitan and *not* to plaintiffs. Therefore, the court rejects LIG's first argument.

LIG also argues that plaintiffs could not rely on their purported “good faith belief in non-liability” because they never investigated their potential liability to Kars. *See* Memorandum of Law in Opposition to Plaintiffs’ Motion, at 12. LIG cites the decisions of the Appellate Division, First Department, in *All Am. Flooring, Ltd. v Sirius Am. Ins. Co.* (57 AD3d 402 [1st Dept 2008]) and *York Speciality Food, Inc. v Tower Ins. Co. of N.Y.* (47 AD3d 589 [1st Dept 2008]) to support its argument. In both of those cases, the First Department in holding, as a matter of law, that the insurance companies had no duty to defend or indemnify the plaintiff, determined that the insured should have made some inquiry as to the physical condition of the injured party. LIG argues that plaintiffs, similarly, should have made some inquiry as to Kars’s status after the burglary. *See* Memorandum of Law in Opposition to Plaintiffs’ Motion, at 14.

Plaintiffs, however, assert that they were not required to make such an inquiry. *See* Plaintiffs’ Reply Memorandum of Law, at 6-9. In support, plaintiffs rely upon the decision by the Appellate Division, Second Department, in *Tri-State Consumer Ins. Co. v Yaskin* (304 AD2d 560, 561 [2d Dept 2003]), that held that a plaintiff insured could reasonably rely on the statements of a police officer “to form a good-faith belief in his non liability.” The Second Department found that the officer’s statements were properly offered not for their “truth,” but to establish the plaintiff’s “state of mind.” Plaintiffs argue that Hariri was similarly entitled to rely on the statement of the police officer who investigated the Kars burglary, that it involved an “inside job,” that would not result in liability to the building. *See* Plaintiffs’ Reply Memorandum of Law, at 6-9.

In their reply papers, LIG cites the decision by the Appellate Division, First Department, in *Tower Ins. Co. of N.Y. v Christopher Ct. Hous. Co.* (71 AD3d 500 [1st Dept 2010]), where the

insured landlord was held *not* to have been reasonable, as a matter of law, to rely solely on the statements of police officers regarding a mugging that took place on the premises. *See* LIG's Memorandum of Law in Further Support of its Motion for Summary Judgment (motion sequence number 003), at 5-13. The First Department in *Tower* held that, subsequent to the conversation, the landlord *should have* inquired as to whether a police report had been filed, and then examined it to learn the important details of the incident.

While there is discord in the First and Second Departments on the issue of whether a property owner may reasonably rely on a police officer's statements to form a "state of mind" without further inquiry, as this court sits in the First Judicial District, it must adhere to the finding by the First Department in *Tower Ins. Co.* that further inquiry is required as to the circumstances surrounding the subject incident. Further, it has been held that an insured's "assumption that other parties would bear ultimate responsibility for its property loss is insufficient, as a matter of law, to excuse" untimely notice. *Heydt Contracting Corp. v. American Home Assur. Co.*, 146 AD2d 497, 499 (1st Dept 1989). Furthermore, where the contract requires insured to notify insurer in the event an occurrence "may give rise to a claim," as in the instant case, "the fact that a particular occurrence may not in the end result in a ripened claim does not relieve the insured from advising the carrier of that event" in a timely fashion. *Id.* Additionally, the First Department held, in *Paramount Ins. Co. v. Rosedale Gardens, Inc.*, (293 AD2d 235, 240 [1st Dept 2002]), that the phrase "'may result in a claim' should not be interpreted in a way that the insurer is compelled to relinquish its rights to prompt notice and all benefits that accrue therefrom... by placing undue emphasis on the liability assessments of one not trained or even knowledgeable in such matters," i.e., the insured.

Therefore, the court accepts LIG's argument that it was unreasonable, as a matter of law, for plaintiffs to rely solely on the police officer statements made to Hariri, to form a belief that the Kars burglary would not result in any liability to the building. The court notes that, significantly, while plaintiffs argue that the police officer's statements made to Hariri were sufficient to provide plaintiffs with the necessary reasonable good faith belief, Hariri testified that it was Kim, as managing agent, and not Hariri, who was responsible for notifying the applicable insurance company as to losses and claims; Hariri denies discussing with Kim the burglary or the information they had each obtained with respect thereto. Notice of Motion (motion sequence number 003), Exh. J, at 67, lines 12-15. Thus, there is no evidence that Kim, the managing agent who was responsible for determining whether to notify the insurance company, ever had information from the police (through Hariri) that it was an "inside job", and could not have reasonably relied on such information in deciding not to notify the insurance company. Thus, it is clear that plaintiffs had a duty to make a further inquiry into the matter, especially in light of Hariri's testimony that she did not have the responsibility of providing notice as to potential claims to the applicable insurance companies. Based upon the within circumstances, the court must conclude that LIG was correct to disclaim plaintiffs' request for coverage under the LIG policy. It is undisputed that plaintiffs were aware of the subject burglary soon after its occurrence and failed to inquire further as to any of the details with respect thereto. Accordingly, the court denies plaintiffs' motion for summary judgment awarding them a declaration that they *are* entitled to said coverage, and grants so much of LIG's motion as seeks summary judgment to

dismiss plaintiffs' cause of action for such declaratory relief.³

The balance of LIG's motion seeks summary judgment dismissing the remaining causes of action in the complaint. The court need not reach LIG's request to dismiss plaintiffs' second cause of action for contractual indemnification against International Underwriting, since the parties' December 18, 2009 stipulation specified that all claims and cross claims against International Underwriting were withdrawn and discontinued. See Notice of Motion (motion sequence number 002), Exhibit 7. Thus, LIG's current request to dismiss plaintiffs' second cause of action is moot.

With respect to plaintiffs' third cause of action for costs and disbursements, it is clear that this claim is entirely dependent on plaintiffs' prevailing on their request for declaratory relief. However, because the court has denied plaintiffs' request for declaratory relief, the dependent cause of action cannot stand. Accordingly, the court grants so much of LIG's cross motion as seeks summary judgment dismissing plaintiffs' third cause of action.

DECISION

ACCORDINGLY, for the foregoing reasons, it is hereby

ORDERED that the motion, pursuant to CPLR 3212, of plaintiffs 39 West 29th Street Owners Corp. and Scarlet & Kim Co., LLC (motion sequence number 002) is denied; and it is further


³ The court need not reach plaintiffs' arguments that the terms of the LIG policy obligate LIG to provide them with a defense and indemnity in the Kars action. The court also need not reach LIG's third dismissal argument, that plaintiffs' "assumption that other parties might bear responsibility for the occurrence does not relieve them of their obligations under the policy." The court notes that, in any case, this argument appears to merely restate LIG's earlier argument that plaintiffs were not excused from the LIG policy's notice requirements.

ORDERED that the motion, pursuant to CPLR 3212, of defendant LIG Insurance Co., Ltd, United States Branch (motion sequence number 003) is granted and the complaint is dismissed with costs and disbursements to defendant as taxed by the Clerk of the Court; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that within 30 days of entry of this order, LIG shall serve a copy upon plaintiffs with notice of entry.

Dated: New York, New York
July 11, 2011



Doris Ling-Cohan, J.S.C.

J:\Summary Judgment\39west29thstvligeta. lane.wpd

FILED

JUL 13 2011

**NEW YORK
COUNTY CLERK'S OFFICE**