

**Tower Ins. Co. of N.Y. v Williams**

2011 NY Slip Op 32378(U)

August 22, 2011

Sup Ct, NY County

Docket Number: 113669/10

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**

**TOWER INSURANCE COMPANY OF NEW YORK,**

**Plaintiff,**

**INDEX NO. 113669/10**

**-against-**

**MOTION SEQ. NO. 001**

**JOHN CLARENCE WILLIAMS, MATHILDA  
BRATHWAITE, NISBETT GIRARD, INC.,  
BREANNA NICHOLSON, an infant by her mother  
and natural guardian SHOUNDEL BECKLES and  
SHOUNDEL BECKLES, individually,**

**Defendants.**

**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 - 8 were considered on this motion for summary judgment:

<u>PAPERS</u>	<u>NUMBERED</u>
Notice of Motion/Order to Show Cause, — Affidavits — Exhibits _____	<u>1, 2, 3, 4</u>
Answering Affidavits — Exhibits _____	<u>5, 6, 7</u>
Replying Affidavits _____ (memo of law)	<u>8</u>
Cross-Motion: [ ] Yes [ X ] No	_____

Upon the foregoing papers, it is ordered that plaintiff's motion for summary judgment is granted as set forth below.

BACKGROUND

This is an action for a declaratory judgment that plaintiff has no duty to defend or indemnify defendants in an underlying personal injury action, pending in the New York State Supreme Court, Kings County, under Index No. 30907/09 (Underlying Action), commenced by defendant Breanna Nicholson (Nicholson), an infant by her mother and natural guardian Shoundel Beckles (Beckles), and Beckles individually. In July 2009, Beckles and Nicholson were tenants living in apartment 1E (Subject Apartment) located at 275 Martense Street, Brooklyn, New York (Building), owned by defendant Nisbett Girard, Inc. (NGI). NGI is owned by defendants John Clarence Williams (Williams) and Mathilda Brathwaite (Brathwaite).

Plaintiff Tower Insurance Co. of New York (Tower) issued a commercial lines insurance policy, number CPP2416694 (Tower Policy), to Williams and Brathwaite (collectively the Insureds) for the policy period September 18, 2008 to September 18, 2009, covering the Building.

On July 15, 2009, Nicholson was injured when a portion of glass, from the bathroom door, fell on her in the Subject Apartment. Nicholson was taken to the hospital for treatment for her injuries that same day. Williams learned of Nicholson's injury when he was contacted by the tenants in apartment 4E of the Building, Andrea Reed (Reed) and her husband, on the day of Nicholson's injury. Williams contacted the superintendent of the Building, Tony Anatole (Anatole) to arrange for Beckles and Nicholson's bathroom door to be repaired. Williams went to the apartment the following day to fix the bathroom door and saw a bandage on Nicholson's calf. In December 2009, Nicholson and Beckles commenced the Underlying Action against NGI, Williams, and Brathwaite.

Approximately five months after Nicholson's accident, Tower received a General Liability Notice of Occurrence/Claim form from the Insureds seeking defense and indemnification pursuant to the Tower Policy. Tower was not informed of Douglas's accident or the Underlying Action until receiving the claim form. Thereafter, Tower commenced this action, seeking a declaratory judgment that Tower has no duty to defend or indemnify defendants in the Underlying Action. Tower now moves for summary judgment for a declaration against Williams, Brathwaite, and NGI.

#### DISCUSSION

Tower states that Williams learned of Nicholson's accident on the date of its occurrence. Tower argues that the Insureds failed to provide timely notice of claim since they waited five months from the date of Williams learning of the accident to notify Tower. In support of the motion, Tower relies on Williams' signed statement dated January 5, 2010 given to Tower's investigator, David Hertweck, in which Williams acknowledges that he first learned Nicholson was injured and was taken to the hospital on the day of the accident when another tenant, Reed, contacted him. Williams further acknowledges

that Anatole heard the commotion and was also there. Additionally, Tower argues that NGI is not entitled to a defense or indemnification from Tower, as NGI is not a named insured on the Tower Policy and is not an additional insured.

Defendants Williams, Brathwaite, and NGI oppose Tower's motion collectively. Defendants state that they did not receive notice of the Underlying Action until on or about December 18, 2009. Defendants contend that Williams contacted his insurance broker/insurance company, Bellido Insurance Brokerage (Bellido), immediately to notify them of the suit and to forward all documents in compliance with the notice provision of the Tower Policy. Defendants further contend that Williams was informed that Nicholson's injuries were due to a temper tantrum thrown by Nicholson and through no fault or negligence of defendants. As such, defendants argue, they had no reason to believe that they would be blamed for any negligence. Defendants further argue that there was nothing that would lead them to believe that Nicholson's injury may result in a claim, as the injury was a result of her own intentional act and thus, the Tower Policy did not require notification until defendants received notice of the Underlying Action. Defendants contend that any delay in notifying Tower was reasonable and excusable.

The Tower Policy, at form CG 00 01 10 01, page 10, Section IV states, in relevant part, that the insureds "must see to it that [Tower is] notified as soon as practicable of an 'occurrence' or an offense which may result in a claim." It is well established that when, as here, "a contract of primary insurance requires notice 'as soon as practicable' after an occurrence, the absence of timely notice of an occurrence is a failure to comply with a condition precedent which, as a matter of law, vitiates the contract." *Argo Corp v Greater New York Mut. Ins. Co.*, 4 NY3d 332, 339 (2005). Moreover, "[n]o showing of prejudice is required."<sup>1</sup> *Id* at 339. The rule, which requires "[s]trict compliance with the contract

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<sup>1</sup> The Court notes that Insurance Law § 3420(a)(5), which provides, in pertinent part, "[a] provision that failure to give any notice required to be given by such policy within the time prescribed therein shall not invalidate any claim made by the insured, injured person or any other claimant, unless the failure to provide timely notice has prejudiced the insurer", became effective January 17, 2009 and did not apply to insurance policies obtained prior to the effective date and thus does not apply to the

protects the carrier against fraud or collusion; gives the carrier an opportunity to investigate claims while evidence is fresh; allows the carrier to make an early estimate of potential exposure and establish adequate reserves and gives the carrier an opportunity to exercise early control of claims, which aids settlement.” *Id* at 339 (internal citations omitted).

The Tower Policy’s condition precedent that an insured must notify Tower of an occurrence “as soon as practicable” is defined by the standard of reasonableness “in light of the facts and circumstances of the case at hand”. *Mighty Midgets, Inc. v Centennial Ins. Co.*, 47 NY2d 12, 19 (1979). One of the factors in determining whether an insured’s delay in notifying the insurer is reasonable, is whether the insured has a good faith belief that it is not liable to the injured party. In this case, the Insureds assert that they delayed in notifying the broker of the accident, as they had a good faith belief that they would not be liable to Nicholson and Beckles. Williams states that sometime after the accident, Reed informed him that Nicholson got angry, kicked the door causing the glass to break and cut her leg.

It has been held that “[t]he duty to give notice arises when, from the information available relative to the accident, an insured could glean a reasonable possibility of the policy’s involvement.” *Paramount Ins. Co. v Rosedale Gardens, Inc.*, 293 AD2d 235, 239-240 (1st Dept 2002). “Although what is reasonable is ordinarily left for determination at trial, where there is no excuse for the delay and mitigating considerations are absent, the issue may be disposed of as a matter of law in advance of trial.” *Power Authority v Westinghouse Elec. Corp.*, 117 AD2d 336, 339-340 (1st Dept 1986). In addition, “[a] reasonable belief in non-liability may excuse an insured’s failure to give timely notice, but the insured has the burden of showing the reasonableness of such excuse, given all the circumstances.” *SSBSS Realty Corp. v Public Serv. Mut. Ins. Co.*, 253 AD2d 583, 584 (1st Dept 1998). Moreover, 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.” *Id* at 584.

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Tower Policy at issue in this action.

Williams argues that Beckles never told him about Nicholson's accident. Williams further argues that he later discovered the accident was a result of Nicholson's own intentional acts and, thus, Williams did not know of the potential claim until he received the summons and complaint. However, defendants did not take reasonable steps in further inquiring into a potential claim, as they should have done after Nicholson was taken to the hospital. Williams states that he attempted to investigate, the day after Nicholson's accident, by asking Beckles what happened but she did not tell him. "Where a reasonable person could envision liability, that person has a duty to make some inquiry as to potential liability." *York Speciality Food, Inc. v Tower Ins. Co. of New York*, 47 AD3d 589, 590 (1<sup>st</sup> Dept 2008). It was unreasonable for the defendants not to make a further inquiry, especially in light of the fact that Nicholson was taken to the hospital and that Williams admitted he later learned from Reed that Beckles was going to sue him. Thus, defendants have failed to show that they had a reasonable basis for believing no claim would be filed against them.

Here, based on the undisputed record, and the controlling case law, the notice provided to Tower was untimely as a matter of law. *See Pandora Indus., Inc. v St. Paul Surplus Lines Ins. Co.*, 188 AD2d 277, 277 (1<sup>st</sup> Dep't 1992). The Insureds' duty to give notice arose the day of the accident, July 15, 2009, when Williams was concededly told of the accident by Reed. The record indicates, however, that the Insureds did not inform Tower of Nicholson's accident, by notifying their broker, until December 18, 2009, about five months after Williams learned about the accident.

Moreover, the Insureds' subjective belief that a claim would not be made, standing alone, is insufficient to exempt them from the notice requirement. *Paramount Ins. Co. v Rosedale Gardens, Inc.*, 293 AD2d 235, 241 (1st Dept 2002). In addition, here, there are no extenuating factors which have been associated with a reasonable belief that a plaintiff would not assert a claim. To the contrary, Williams was informed by Reed that Nicholson was injured and taken to the hospital and that Beckles intended on suing him. As stated above, since the notice provision in the Tower insurance policy is a condition

precedent to coverage, the failure to give timely notice of a claim vitiates the contract, thus relieving the insurer of both the duty to defend and to indemnify. *Argo Corp v Greater New York Mut. Ins. Co.*, 4 NY3d 332, 339 (2005).

Accordingly, as the Insureds have no reasonable explanation for the approximate five month delay between the time Williams learned of the accident and providing notice, Tower is entitled to disclaim coverage of the Insureds based upon the failure to comply with a condition precedent to coverage.

Defendants claim that Tower has a duty to defend and indemnify NGI as a partner of Williams and Brathwaite. In support of this claim, defendants state that the Tower Policy, form CG 00 01 10 01, Section II states, in relevant part: "If you are designated in the Declaration as: b. A partnership or joint venture, you are an insured. Your members, your partners, and their spouses are also insured, but only with respect to the conduct of your business." Defendants argue that there is an issue of fact as to whether NGI is a partner of the Insureds. Additionally, defendants argue that their insurance agent and Bellido are agents of Tower and knew NGI was owned by the Insureds such that the failure to name NGI on the Tower Policy is attributable to Tower.

The Court notes that the defendants have failed to provide any admissible evidence to support its arguments. In fact, the Insureds acknowledge that they are the owners of NGI, not the partners, and that Williams is the President of NGI. Defendants' conclusory statements that NGI is a partner of the Insured, and thus covered under the Tower Policy, is insufficient to raise a genuine issue of fact to defeat Tower's motion for summary judgment. The Appellate Division, First Department, has held that it is appropriate to grant summary judgment dismissing defenses that consist solely of conclusory statements. *See e.g. Manufacturers Hanover Trust Co. v Restivo*, 169 AD2d 413, 414 (1st Dept 1991).

Finally, it is undisputed that the Tower Policy itself does not list NGI as a named insured or an additional insured. It is well settled that "a party that is not named an insured or an additional insured on

the face of the policy is not entitled to coverage.” *Tribeca Broadway Assocs., LLC v Mount Vernon Fire Ins. Co.*, 5 AD3d 198, 200 (1<sup>st</sup> Dep’t 2004). As such, defendant NGI is not entitled to coverage under the Tower Policy. For the reasons stated above, Tower’s motion for summary judgment against defendant Williams, Brathwaite, and NGI is granted.

The Court notes that Nicholson and Beckles have not appeared or answered in this action, do not oppose Tower’s motion, and the issues as against them are moot.

Accordingly, it is

ORDERED that the plaintiff’s motion for summary judgment is granted against all defendants; and it is further

ORDERED, ADJUDGED and DECLARED that Tower Insurance Company of New York has no duty to defend or indemnify the within defendants in the Underlying Action; and it is further

ORDERED that the Clerk of the Court shall enter judgment accordingly; and it is further

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

Dated: 8/22/11

  
DORIS LING-COHAN, J.S.C.

Check one:  FINAL DISPOSITION     NON-FINAL DISPOSITION  
Check if Appropriate:     DO NOT POST                                     REFERENCE  
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