

Tower Ins. Co. of N.Y. v Lowe

2011 NY Slip Op 32677(U)

October 11, 2011

Sup Ct, NY County

Docket Number: 103495/09

Judge: Saliann Scarpulla

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

PRESENT: Saliann Scarpulla
Justice

PART 19

Index Number : 103495/2009
TOWER INSURANCE CO OF NEW YORK
VS.
LOWE, CYRIL
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT

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

this motion to/for _____

PAPERS NUMBERED

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion *is determined in accordance with the accompanying decision/order.*

FILED

OCT 14 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 10/14/11

Saliann Scarpulla
SALIANN SCARPULLA, s.c.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG. SETTLE ORDER/ JUDG.

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

SUPREME COURT OF THE-STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 19

----- X
TOWER INSURANCE COMPANY OF NEW YORK

Plaintiff,

-against-

Index No. 103495/09
Subm. Date: 6/15/2011
Motion Seq. 001

CYRIL LOWE, DENISE SNELL, individually and as
administratrix of the Estate of LESLIE SNELL and
NEW YORK CITY HEALTH AND HOSPITALS
CORPORATION,

DECISION AND ORDER

Defendant.

----- X

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For Defendant New York City Health and Hospitals Corporation:
Bartless, McDonough, Bastone, Monaghan, LLP
81 Main Street
White Plains, NY 10601

Papers considered in review of the motion and cross- motions:

Notice of Motion.....	1
Notice of Snell's Cross-Motion.....	2
Notice of NYCHHC's Cross-Motion.....	3
Tower's Reply.....	4
Snell's Reply.....	5

FILED

OCT 14 2011

**NEW YORK
COUNTY CLERK'S OFFICE**

HON. SALIANN SCARPULLA, J.:

In this declaratory judgment action, plaintiff Tower Insurance Company of New York ("Tower") moves for summary judgment on its complaint against defendants Cyril Lowe ("Lowe"), Denise Snell ("Snell") and New York City Health and Hospitals Corporation ("NYCHHC") or, in the alternative, for a default judgment against Lowe. Snell cross-moves for summary judgment dismissing the complaint insofar as asserted

against her and NYCHHC cross-moves for summary judgment dismissing the complaint insofar as asserted against it.

On April 7, 2007, Leslie Snell was injured at Lowe's home. He subsequently died on September 6, 2007 at Coler Goldwater Specialty Hospital and Nursing Facility, which is owned, operated and controlled by NYCHCC. In or about December 2008, his daughter Snell commenced a wrongful death action, *Denise Snell v. New York City Health and Hospitals Corporation, "John Does 1-25" and Cyril Lowe*, 117341/08 ("the underlying action").

Lowe had a homeowners insurance policy issued by Tower, which required that Lowe notify Tower of any potential claims "as soon as is practical." According to Tower, it received notice of the incident on March 25, 2008 when Lowe called in the claim to Tower's automated call-in center. On March 26, 2008, Tower attempted to contact Lowe and Snell to obtain further information and voicemail messages were left for both of them.

In a statement executed April 7, 2008, Lowe indicated that Snell told him, once while the decedent was in the hospital and again, right after he passed away, that her father did not want to file a lawsuit, and that is why Lowe did not notify Tower of the incident right after it happened. Tower received Lowe's written statement on April 9, 2008. Tower sent a letter to Lowe on April 15, 2008 disclaiming coverage due to late notice. According to Tower's vice-president of liability-claims Lowell Aptman ("Aptman"), Tower received a copy of the summons and complaint in the underlying

action on January 20, 2009. On January 24, 2009, Tower sent another letter, reiterating that it disclaimed coverage to both Lowe and Snell.

Tower commenced this action on March 13, 2009 seeking a declaratory judgment that it has no obligation to defend Lowe, Snell or NYCHHC in the underlying action. Lowe has not appeared in this action.

Tower now moves for summary judgment on its complaint, arguing that there is no insurance coverage for Lowe or the other defendants because they failed to provide timely notice of the occurrence to Tower. In the alternative, Tower moves for a default judgment against Lowe due to his failure to appear in the action.

NYCHCC cross-moves for summary judgment and, alternatively, to dismiss on the grounds that Tower has not stated a cause of action against it. NYCHCC argues the action insofar as asserted against it must be dismissed because it is not a party to the policy between Tower and Lowe, and therefore, there is no privity of contract between Tower and NYCHCC. NYCHCC further argues that there are questions of fact as to whether Lowe had a good-faith belief that he would not be sued, which would be a valid excuse for late notice. In opposition, Tower argues that NYCHCC is a party to this action because its rights and interests could be affected if Tower is granted the relief it seeks. Tower also contends that there is no evidence that Lowe had a good-faith belief of non-liability.

Snell cross-moves for summary judgment, first arguing that Tower failed to timely disclaim coverage. She maintains that in early March 2008, Lowe identified Tower as his insurance carrier. Snell's counsel sent a letter to Tower, notifying it of the claim to be

pursued on behalf of decedent's estate. By letter dated April 9, 2008, Tower acknowledged receipt of that letter and requested various documents, including medical records, photographs, and accident reports, and asked about Snell's theory of liability. Snell maintains that although Tower knew of the claim in early March, it only allegedly sent out its first disclaimer letter in mid-April. Further, Tower has submitted no proof of mailing of that disclaimer letter.

Snell also argues that the prompt notice language under which Tower purports to disclaim is too unclear to be the basis for a disclaimer, and in any event, notice was timely provided to Tower.

Discussion

A movant seeking summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, offering sufficient evidence to eliminate any material issues of fact. *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 (1985). Once a showing has been made, the burden shifts to the opposing party who must then demonstrate the existence of a triable issue of fact. *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986); *Zuckerman v. City of New York*, 49 N.Y.2d 557 (1980).

For insurance policies issued before 2008, notice of a claim is a condition precedent to coverage, and absent a valid excuse, a failure to provide requisite notice vitiates the insurance policy notwithstanding the absence of prejudice to the insurer.¹

¹ In 2008, the New York State Legislature amended Insurance Law §3420 such that they added subsection (a)(5) which reads:

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

Great Canal Realty Corp. v. Seneca Insurance Co., 5 N.Y.3d 742 (2005); *Security Mutual Insurance Company of New York v. Acker-Fitzsimmons Corporation*, 31 N.Y.2d 436, 440-441 (1972). Where a policy of liability insurance requires that notice of an occurrence be given as soon as practicable, notice must be provided "within a reasonable time in view" of all the facts and circumstances. *Mighty Midgets, Inc. v. Centennial Ins. Co.*, 47 N.Y.2d 12, 19 (1979); *Travelers Ins. Co. v. Volmar Constr. Co.*, 300 A.D.2d 40 (1st Dept. 2002). The timing requirement is "ordinarily left for determination at trial but 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 of New York v. Westinghouse Electric Corp.*, 117 A.D.2d 336, 339-40 (1st Dept. 1986).

Tower maintains that it is entitled to summary judgment on its complaint because it was not provided with timely notice of the claim. As Lowe has not appeared in opposition to Tower's motion, the court grants Tower's motion for summary judgment on its complaint asserted against Lowe, on default. Nevertheless, Tower may still be found obligated to provide coverage in the underlying action. It is well settled that a party injured by an insured individual has an independent interest in the protection afforded by the insured's liability coverage. *Allstate Ins. Co. v. Marcone*, 29 A.D.3d 715 (2nd Dept. 2006); *Jenkins v. Burgos*, 99 A.D.2d 217 (1st Dept. 1984); *Lauritano v. American Fidelity*

prejudiced the insurer, except as provided in paragraph four of this subsection. With respect to a claims-made policy, however, the policy may provide that the claim shall be made during the policy period, any renewal thereof, or any extended reporting period, except as provided in paragraph four of this subsection. As used in this paragraph, the terms "claims-made policy" and "extended reporting period" shall have their respective meanings as provided in a regulation promulgated by the superintendent.

Fire Ins. Co., 3 A.D.2d 564 (1st Dept. 1957) *aff'd* 4 N.Y.2d 1028 (1958). An injured person has an independent right to give notice to an insurer, and is not to be charged vicariously with any delay by the insured. See *Sputnik Rest. Corp. v. United Natl. Ins. Co.*, 62 A.D.3d 689 (2nd Dept. 2009). Where an injured party fails to exercise the independent right to notify an insurer of the occurrence, a disclaimer issued to an insured for failure to satisfy the notice requirement of the policy will be effective as against the injured party as well. See *Maldonado v. C.L.-M.I. Props., Inc.*, 39 A.D.3d 822 (2nd Dept. 2007); *Becker v. Colonial Coop. Ins. Co.*, 24 A.D.3d 702 (2nd Dept. 2005).

The evidence submitted by Tower in support of its motion establishes that the incident occurred on April 7, 2007, Tower received notice of the incident on March 25, 2008 and notice of the underlying lawsuit on January 20, 2009, and sent two letters disclaiming coverage, one on April 15, 2008 and one on January 24, 2009. Snell claims that she was only able to obtain her father's autopsy report in January 2008, and at that time, decided to pursue a claim and tried to find out the identity of Lowe's insurance carrier. Lowe would only divulge the information in March 2008. According to Snell, she informed Tower of the claim immediately after learning that Tower was Lowe's insurance carrier in March 2008.

Tower maintains that it was objectively unreasonable for Snell to wait until March 2008 or even January 2008 to pursue her claim and to provide it with notice of the incident. In determining the reasonableness of an injured party's notice, the notice required is measured less rigidly than that required of the insureds. See *Appel v. Allstate Ins. Co.*, 20 A.D.3d 367 (1st Dept. 2005). The sufficiency of notice by an injured party is

governed not by mere passage of time but by the means available for such notice. *Becker v. Colonial Coop. Ins. Co.*, 24 A.D.3d 702 (2nd Dept. 2005). The court finds that an issue of fact exists as to whether Snell acted diligently in investigating the claim and in ascertaining Tower's identity as the insurer and in notifying it of the accident. *See generally Appel v. Allstate Ins. Co.*, 20 A.D.3d 367 (1st Dept. 2005); *National Grange Mut. Ins. Co. v. Diaz*, 111 A.D.2d 700 (1st Dept. 1985). As such, Snell's cross motion for summary judgment dismissing the complaint insofar as asserted against her and Tower's motion for summary judgment on its complaint asserted against Snell are both denied.²

However, NYCHHC's cross motion for summary judgment dismissing the complaint insofar as asserted against it is granted. In the underlying action, Snell alleged a claim against NYCHHC for negligent failure to use reasonable care and skill in treating her father. The claim asserted against NYCHHC is not related to Lowe's insurance policy with Tower or Tower's disclaimer of coverage. Because there is no privity, or material relationship, between Tower and NYCHHC, Tower's claim asserted against NYCHHC can not be maintained. *See generally Int'l Flavors & Fragrances, Inc. v. Royal Ins. Co. of Am.*, 6 Misc. 3d 1024A (Sup. Ct., N.Y. Co. 2003).

In accordance with the foregoing, it is hereby

ORDERED that plaintiff Tower Insurance Company's motion for summary judgment against all defendants is granted only to the extent that plaintiff is granted

² The court notes that Snell's argument that Tower failed to timely disclaim is without merit. In his affidavit, Aptman averred that two disclaimer letters were sent out, one on April 15, 2008 and one on January 24, 2009. Snell fails to submit any evidence to the contrary. Therefore, Tower's disclaimer was timely as a matter of law.

summary judgment on its complaint, on default, against defendant Cyril Lowe; and it is further

ORDERED that defendant New York City Health & Hospitals Corporation's cross-motion for summary judgment dismissing the complaint insofar as asserted against is granted and the complaint insofar as asserted against it is dismissed; and it is further

ORDERED that defendant Denise Snell, individually and as administratrix of the Estate of Leslie Snell's cross-motion for summary judgment dismissing the complaint insofar as asserted against her is denied, and the claims insofar as asserted against defendant Denise Snell, individually and as administratrix of the Estate of Leslie Snell, are severed and shall continue; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment accordingly.

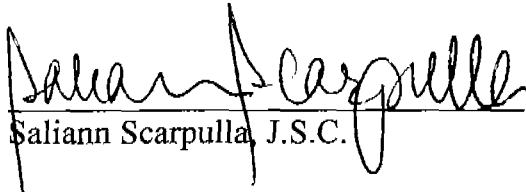
This constitutes the decision and the order of the Court.

FILED

Dated: New York, New York
October 8, 2011

OCT 14 2011

ENTER: NEW YORK
COUNTY CLERK'S OFFICE


Saliann Scarpulla, J.S.C.