SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 61

TOWER INSURANCE COMPANY OF NEW YORK,

Plaintiff,

-against-

BOODHAN SOOKDEO, RAYMOND MAHABEER and JANET MAHABEER,

Defendants.

DECISION AND ORDER

Index No. 116332/09

Singh, J.:

Plaintiff Tower Insurance Company of New York (Tower) moves pursuant to CPLR 3212 for an order granting it summary judgment and a declaration that it has no obligation to defend or indemnify defendant Boodhan Sookdeo (Sookdeo) in connection with the claims and lawsuit of defendants Raymond Mahabeer (Mahabeer) and Janet Mahabeer (Ms. Mahabeer) (collectively, the Mahabeers) in the underlying personal injury action *Raymond Mahabeer and Janet Mahabeer v Boodhan Sookdeo a/k/a Boodhan Sookdan*, Index No.18037/09, pending in the Supreme Court of the State of New York, Queens County (the Underlying Action).

In the Underlying Action, the Mahabeers seek damages for personal injuries Mahabeer allegedly suffered on December 14, 2008, when he fell down a four-step exterior stairway at a two-family residential building located at 149-37 122nd Place, South Ozone Park, New York (the Premises). Following his fall, Mahabeer was transported to a hospital by ambulance and eventually underwent surgery. Mahabeer states that, as a

result of the accident, he sustained serious permanent injuries to his right ankle, leg and lower body. Sookdeo owns the Premises, and the Mahabeers live there as the second-floor tenants. Mahabeer alleges that Sookdeo is liable for his injuries due to his negligent maintenance and repair of the stairway, including improper lighting and the absence of handrails.

Tower seeks a judgment declaring that it has no duty to defend or indemnify Sookdeo in the Underlying Action under the homeowner's policy that it issued to Sookdeo for the Premises for the period January 15, 2008 to January 15, 2009 (the Policy). Tower argues that it is entitled to summary judgment on two grounds, the first of which is that neither Sookdeo nor the Mahabeers notified Tower as soon as possible of the occurrence, thus breaching the Policy's prompt-notice requirement. The Policy states, in Section II - Conditions, that the insured will, in case of an accident or occurrence, give written notice to Tower "as soon as is practical."

The second ground upon which Tower contends that it is entitled to summary judgment is that the incident did not occur at an "insured location." The Policy defines "insured location," in relevant part, as the "residence premises" which is itself defined, in part, as "a two family dwelling where you reside in at least one of the family units and which is shown as the 'residence premises' in the Declarations." According to Tower, although the Premises is shown as the 'residence premises' in the Policy, the other aspect of the definition of 'residence premises' is not satisfied, because Sookdeo did not reside

at the Premises, but rather resided at the house next door to the Premises, which he also owns.

The Policy provides coverage, subject to certain exclusions, for liability due to bodily injury caused by an "occurrence" to which the coverage applies. One exclusion set forth at paragraph 1 (e) of the exclusions to Section II, is for bodily injury "[a]rising out of a premises:

(1) [o]wned by an 'insured';

(2) [r]ented to an 'insured'; or

(3) [r]ented to others by an 'insured';

that is not an 'insured location.'"

Sookdeo was served with process in the Underlying Action on or about July 6, 2009. Tower first learned of the incident on August 4, 2009, when it received an email that included a copy of the summons and complaint in the Underlying Action. Tower explains that it sent an investigator on August 18, 2009, who learned that Sookdeo did not reside at the Premises, but rather at the house next door, at 149-41 122nd Place, South Ozone Park, New York. In his August 18, 2009 written statement given to Tower's investigator, Sookdeo asserted that he was in Florida on the date of the accident, and that he first heard about it one week later, from his nephew's wife, who also lived in the house next door to the Premises.

According to his August 18, 2009 written statement, Sookdeo did not inform his insurance broker because, between December 2008 and July 2009, he had casual

conversations with Mahabeer and knew that he was injured, but they never really talked about the accident. In the August 18, 2009 statement, Sookdeo also wrote that he "never lived" at the Premises, that the house next door to the Premises is his "primary residence," and that the Premises is an investment property.

By a September 2, 2009 letter, Tower informed Sookdeo that it was disclaiming coverage of the matter because the claim was not covered under the Policy. The disclaimer letter explained that, because Sookdeo did not reside at the Premises, it did not qualify as an "insured location," and, therefore, the Policy did not provide coverage for claims for injuries arising out of the Premises. The letter explained that coverage was also denied due to Sookdeo's failure to notify Tower of the occurrence as soon as practical, as required under the Policy. Tower assigned counsel to defend Sookdeo in the Underlying Action, subject to the resolution of the instant declaratory judgment action. Tower also disclaimed coverage directly to the Mahabeers because they did not comply with the Policy by failing to notify Tower of the occurrence and claim as soon as practicable.

Sookdeo maintains that his valid excuse for failing to notify Tower earlier is that he had a good faith belief in non-liability. In his affidavit, Sookdeo states that he was in Florida on the date of the accident. He claims that his nephew's wife witnessed the fall and that she stated that Mahabeer was noticeably drunk at the time of his fall and was seen arguing with his wife after the fall. Sookdeo said that he knew that Mahabeer drank excessive amounts of alcohol on a regular basis. Sookdeo states that he, therefore, had no

good faith reason to believe Mahabeer would make a claim against him. Sookdeo states that, in March or April 2009, Ms. Mahabeer told him that Mahabeer was drunk when he fell, and that they would not be pursuing a suit against him. According to Sookdeo, in July 2009, Mahabeer told him for the first time that he was going to bring a claim against Sookdeo, after which Sookdeo promptly notified his insurance broker, who notified Tower on August 4, 2009.

The Mahabeers argue that Sookdeo's notification to Tower, which took place within a matter of months after the accident, was timely under the facts and circumstances involved. They explain that shortly after the accident, Mahabeer was brought to Jamaica Hospital, where he stayed for more than a month, much of the time in the intensive care unit. He then spent several additional months recovering at home, in a severely weakened physical state.

Mahabeer explains that his main concern at that time, and during the months of recovery at home afterwards, was his physical health, not whether his accident merited a possible personal injury lawsuit. He states that in June 2009, while he was still recovering at home, but improving, he decided to retain an attorney to represent him related to the December 2008 accident. A claim letter was sent to Sookdeo on June 26, 2009, followed by a summons and complaint on July 6, 2009.

At issue is whether Sookdeo provided Tower with written notice of the accident "as soon as is practical," as is required under the Policy. "Where a policy of liability insurance requires that notice of an occurrence be given 'as soon as practicable,' such

notice must be accorded the carrier within a reasonable period of time." *Great Canal Realty Corp. v Seneca Ins. Co., Inc.*, 5 NY3d 742, 743 (2005). "[T]he 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 N.Y. Mut. Ins. Co.*, 4 NY3d 332, 339 (2005). The insurer need not establish that it was prejudiced by the untimely notice. *Id.*[1] There are, however, certain factors that may serve to excuse an insured's failure to provide timely notice, including his or her good-faith belief in non-liability, if reasonable under all of the circumstances. *Great Canal Realty Corp. v Seneca Ins. Co., Inc.*, 5 NY3d at 743.

The court finds that neither Sookdeo nor the Mahabeers timely notified Tower of the occurrence, and that Tower is, therefore, entitled to disclaim coverage of the accident under the terms of the Policy. Sookdeo's assertion that Mahabeer often drank excessively, and that his niece reported to him that Mahabeer was drunk when he fell, are not adequate to create a good faith belief in non-liability. Her opinion that Mahabeer was drunk may or may not have been accurate, but even if he was, that would not automatically indicate that such intoxication was the sole factor that contributed to his accident.

Sookdeo does not allege that he otherwise sought to investigate the circumstances of the accident. *Security Mut. Ins. Co. of N.Y. v Acker-Fitzsimons Corp.*, 31 NY2d 436,

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[1]Insurance Law § 3420, which was amended to require an insurer to show prejudice in many cases before disclaiming coverage based on late notice, applies to insurance policies issued after January 17, 2009 and, thus, is inapplicable in the instant case.

441 (1972) (holding that extent to which insured sought to know circumstances of accident may be relevant in determining whether insured's belief in non-liability was reasonable). In his affidavit, Sookdeo states that, a week after the accident, he learned about the accident, as well as Mahabeer's removal by ambulance shortly thereafter. The fact that the injured person is taken to the hospital by an ambulance is a "significant factor in determining the reasonableness of any delay in giving notice." *Paramount Ins. Co. v Rosedale Gardens*, 293 AD2d 235, 241 (1st Dept 2002).

In determining whether Sookdeo had a good-faith belief in non-liability, the question "is not whether [he] 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." *SSBSS Realty Corp. v Public Serv. Mut. Ins. Co.*, 253 AD2d 583, 584 (1st Dept 1998). "Ordinarily, the question of whether the insured had a good faith belief in nonliability, and whether that belief was reasonable, presents an issue of fact and not one of law. It is only when the facts are undisputed and not subject to conflicting inferences that the issue can be decided as a matter of law." *St. James Mech., Inc. v Royal & Sunalliance*, 44 AD3d 1030, 1031-32 (2d Dept 2007) (citations omitted).

Given that Mahabeer fell on property owned by Sookdeo, that he was taken away by ambulance to the hospital, and that Sookdeo made no attempt to investigate the circumstances of the fall, after hearing his daughter-in-law's opinion that Mahabeer was drunk, this court finds that Sookdeo's belief in non-liability was not reasonable. Thus, he does not offer a reasonable excuse for his delay in reporting the accident to Tower, such

that his notice to Tower was not given "as soon as practical." Tower is therefore entitled to disclaim coverage. (*See, for example, St. Nicholas Cathedral of Russian Orthodox Church in North America v. Travelers Property Casualty Ins. Co.*, 45 A.D.3d 411 (1st Dept. 2007) (holding that insured failed to establish reasonableness of its belief that no claim would be asserted against it and hence of its seven-month delay in providing notice to insurer); *see also Tower Insurance Company of New York v. Miles*, 74 A.D.3d 410 (1st Dept. 2010) (holding that five-month delay was not reasonable).

The Mahabeers also did not timely inform Tower of the accident. In the aftermath of the accident, they did not make any effort to find out who Sookdeo's liability insurer was, or to notify such insurer of the accident. The Mahabeers did not give any notice to Tower. Rather, the belated notice was given to Tower by Sookdeo's broker after Sookdeo was sued in the Underlying Action. *See Tower Ins. Co. of N.Y. v Lin Hsin Long Co.*, 50 AD3d 305 (1st Dept 2008).

Although this court has found that Tower was entitled to disclaim coverage based on the late notice it received about the accident, it will also address whether Sookdeo "resided" at the Premises, such that the Premises is an "insured location." Sookdeo contends that the Policy is ambiguous and does not accurately define "resides." Sookdeo argues that, as the party seeking summary judgment, Tower must show that Sookdeo did not reside in the Premises. Defendants cite a case, which held that a similar policy written by Tower did not define "resides," but also did not "preclude an insured from

utilizing multiple residences." *Neary v Tower Ins.*, 29 Misc 3d 1205 (A) *3, 2010 NY Slip Op 51700 (U) (Sup Ct, Kings County 2010).

Sookdeo asserts that, at the time the policy was rewritten with Tower in January 2008, he was living at the Premises in the first floor apartment with his daughter and her two children. He maintains that he was staying and living at this residence until approximately June of 2008. According to Sookdeo, for the rest of 2008 he also stayed a good portion of his time at his property next door. He explains that he regularly inspected, maintained, and visited both of the properties on a daily basis and continues to do so through the present time. Sookdeo asserts that the Policy does not define what qualifies as "resides" for the purposes of attaching coverage and that it does not preclude him from utilizing multiple residences. He contends that he had two residences in 2008.

Tower contends that Sookdeo does not establish that he resided at the Premises. It points out that, while Sookdeo effectively disavowed, in his affidavit and deposition testimony, his statement to Tower's investigator that he "never lived" at the Premises, he admitted that he did not live there when the subject accident occurred, and has not done so since June 2008, six months before the accident. Tower states that Sookdeo admitted that he was in Florida at the time of the accident, and that he otherwise resided in the house next door, where, he admitted at his deposition, he has lived since 1980.

"The standard for determining residency for insurance coverage requires something more than temporary or physical presence and . . . at least some degree of permanence and intention to remain. A person can have more than one residence for

insurance coverage purposes. A resident is one who lives in the household with a certain degree of permanency and intention to remain." *Matter of Allstate Ins. Co. v Rapp*, 7 AD3d 302, 303 (1st Dept 2004) (internal citations omitted).

Sookdeo asserts that he lived on the first floor of the Premises with his daughter and her family in early 2008, and that he stayed there into June of 2008. He does not allege, however, that at the time of the accident he still resided there. Rather, according to his deposition testimony, as of the date of the accident, the first floor of the Premises was rented out to a tenant unrelated to Sookdeo, who still lived there as of the April 13, 2010 date of the deposition. Thus, his daughter and her family must have moved out of the first floor of the Premises at some point between June 2008, and the date of the accident. The second floor of the Premises was rented out, throughout the period in question, to the Mahabeers. According to his deposition testimony, the basement of the Premises was also rented out at the time of the accident to a tenant unrelated to Sookdeo, who continued to live there as of the date of Sookdeo's deposition. Thus, it is undisputed that, as of the date of the accident, Sookdeo did not reside at the Premises.

For purposes of this motion, the court grants all reasonable inferences in favor of the parties opposing summary judgment. *F. Garafalo Elec. Co. v New York Univ.*, 300 AD2d 186, 188 (1st Dept 2002). Thus, the court considers the contents of Sookdeo's affidavit and deposition testimony and does not give weight to his unsworn written statement of August 18, 2009, in which he wrote that he never lived at the Premises. Taking as true his assertion that he resided at the Premises during the first half of 2008, it

is nonetheless clear that, as of the date of the accident, he no longer resided there. Sookdeo does not and cannot allege that he had an intention to remain or to return to the Premises, because the basement, first floor and second floor apartments were, prior to the accident, all rented out to paying tenants who were not his family members.

Thus, at the time of the accident, the Premises was not an "insured location" under the Policy. Therefore, on this basis as well, Tower is entitled to summary judgment.

Lastly, Sookdeo argues that Tower did not give him timely notice of its disclaimer. Insurance Law § 3420 (d) provides, in part, that if an insurer disclaims liability or denies coverage for bodily injury, it shall give written notice as soon as is reasonably possible to the insured and the injured person.

Tower first learned of the incident on August 4, 2009. According to Sookdeo, Tower could have and should have disclaimed coverage that was obvious from the face of the late notice of the claim, and Tower had no need to conduct an investigation before determining whether to disclaim. Instead, according to Sookdeo, Tower delayed by hiring an investigator who took a statement from him two weeks later on August 18, 2009. Two weeks after that, on September 2, 2009, Tower mailed a letter to Sookdeo disclaiming coverage based in part on the late notification by him of the accident. Sookdeo argues that Tower's 29-day delay in disclaiming coverage was unreasonable as a matter of law under Insurance Law § 3420 (d); therefore, the disclaimer should be deemed null and void.

Tower argues that its disclaimer was timely. It contends that Sookdeo's own argument that his delay in notifying Tower was reasonably excusable underscores that Tower did not have sufficient facts from its initial notice to determine whether he had breached the notice conditions. The initial notice did not provide information by which Tower could know if Sookdeo had a reasonable excuse for his delay. For example, the initial notice did not state when Sookdeo learned of the accident or of the extent of Mahabeer's injuries, nor did it describe the severity of Mahabeer's injuries or whether he was hospitalized.

Tower argues that, even if the initial notice to Tower had sufficed to establish that Sookdeo breached the Policy's notice conditions, Tower still had the right to investigate the possibility that it may have had other coverage defenses before disclaiming coverage. Thus, according to Tower, any delay resulting from such an investigation does not preclude any of Tower's defenses. Tower explains that an insurer must investigate all possible coverage defenses before issuing a disclaimer in order to determine which defenses are valid, because any coverage defense based on a policy exclusion or a breach of a policy condition is waived to the extent that it is not included in the initial disclaimer.

Sookdeo's argument is unavailing. "An insurer is not required to disclaim on timeliness grounds before conducting a prompt, reasonable investigation into other possible grounds for disclaimer; in fact, a 'reasonable investigation is preferable to piecemeal disclaimers.'" *DiGuglielmo v Travelers Prop. Cas.*, 6 AD3d 344, 346 (1st Dept 2004) quoting *2540 Assoc. v Assicurazioni Generali*, 271 AD2d 282, 284 (1st Dept 2000).

Thus, the instant motion for summary judgment is granted. Sookdeo has not established that he resided at the Premises on the date of the accident. Therefore, as to the accident at issue, the Premises is not an "insured location" under the Policy. Sookdeo also failed to provide timely notice to Tower of the accident, so he cannot enforce the terms of the Policy in regard to coverage related to the accident. Finally, Tower's disclaimer of coverage was timely under the circumstances.

Accordingly, it is

ORDERED that the motion of plaintiff for summary judgment seeking a declaration that it is not obliged to provide a defense to, and provide coverage for, the defendant Boodhan Sookdeo in the action of *Raymond Mahabeer and Janet Mahabeer v Boodhan Sookdeo a/k/a Boodhan Sookdan*, Index No., 18037/09, Queens County, is granted; and it is further

ADJUDGED and DECLARED that plaintiff herein is not obliged to provide a defense to, and provide coverage for, the defendant Boodhan Sookdeo in the said action pending in Queens County; and it is further

ADJUDGED that plaintiff Tower Insurance Company of New York, does recover from the defendant Boodhan Sookdeo, costs and disbursements as taxed by the Clerk, and plaintiff have execution therefor.

Date: March 3, 2011

ENTER:

HON. ANIL C. SINGH
SUPREME COURT JUSTICE

Clerk