[* 1]

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

PRESENT: GISCHE Justice

PART 10

Tower Dvs. Company of NY

-v-

DYBA REALTY Corp

INDEX NO. 100270/11

MOTION DATE

MOTION SEQ. NO. 3

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1, 2
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

~~[illegible]~~

2/8/12 stay continued pending decision

MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION order & judgment

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).

Dated: 2/15/12

JUDITH J. GISCHE, J.S.C. J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 10

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Tower Insurance Company of New York,

Plaintiff (s),

-against-

DYBO Realty Corp. and Cary Peck,

Defendant (s).

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DECISION/ ORDER AND JUDGMENT
Index No.: 100470/11
Seq. No.: 003

PRESENT:
Hon. Judith J. Gische
J.S.C.

Recitation, as required by CPLR § 2219 [a] of the papers considered in the review of this (these) motion(s):

Papers	Numbered
DYBO OSC (RR) w/RAS, exhs	1
Tower opp w/JSW affirm	2
DYBO further support w/RAS, exh	3
Peck opp w/LBS affirm	4
Order, Gische J., 2/9/12	5

Upon the foregoing papers, the decision and order of the court is as follows:

GISCHE J.:

Tower Insurance Company of New York's ("Tower") brought a prior motion for a declaratory judgment and defendant DYBO Realty Corp. ("DYBO") brought a prior motion for leave to amend its answer and reverse summary judgment. Those motions were decided in accordance with the court's prior decision, order and judgment dated December 21, 2011 ("prior order"). DYBO now seeks reargument of the motions underlying the court's grant of declaratory judgment, on the basis that the court overlooked an Appellate Division decision DYBO contends is directly on point. DYBO's

motion for a stay pending the court's decision on this reargument motion was granted, over the opposition by Cary Peck ("Peck"), plaintiff in the underling personal injury action pending in Supreme Court, Kings County (Cary Peck v. DYBO Realty Corp., Supreme Court, Kings Co. Index No. 34687/08) ("personal injury action"). Peck is also a nominal defendant in this action. Tower Insurance Company of New York ("Tower") does not oppose a stay of the Kings County action, but argues that the "new" law cited by DYBO does not command a change in the court's prior order. The court has stayed Peck from proceeding with the trial in Kings County, pending its decision on this motion (Order, Gische J., 1/18/2012 extended 2/8/2012).

A motion for leave to reargue pursuant to CPLR § 2221 is addressed to the court's discretion (Foley v. Roche, 68 A.D.2d 558 [1st Dept. 1979]). It may be granted only upon a showing that the court overlooked or misapprehended the facts or the law or for some reason mistakenly arrived at its earlier decision (William P. Pahl Equipment Corp. v. Kassis, 182 A.D.2d 22 [1st Dept 1992]).

The decision that DYBO now relies on, Tower Ins. Co. of New York v. NHT Owners LLC, 90 A.D.3d 532 [1st Dept. 2011]) ("Tower v. NHT") was released on December 20, 2011, one day before this court's prior order. Since then, another decision was issued by the Appellate Division, First Department (George Campbell Painting v. National Union Fire Ins. Co. of Pittsburgh, PA, —AD3d—, 2012 WL 118461, 2012 N.Y. Slip Op. 00254 [1st Dept. Jan 17, 2012]) ("George Campbell"), further addressing issues about timely disclaimers by insurers based upon late notice. Given the similarities of the issues in this case and the recently issued decisions by the First Department, the court grants reargument. The facts of this case are set forth in the

court's prior order and will not be repeated herein, unless necessary.

Background

Peck claims she fell and was injured on the sidewalk immediately abutting the building owned by DYBO, located at 936 St. Marks Avenue, Brooklyn, New York, 11213 ("building"). Anne Boyd ("Boyd") is one of the principals of DYBO, a domestic corporation. Boyd does not reside at the building which is a multiple dwelling.

On the underlying motion, Tower established that although the accident is alleged to have occurred on August 28, 2008, Tower was not notified of the incident until June 10, 2009. Tower disclaimed coverage on July 10, 2009. This court found that the 30-day delay in notifying DYBO of its disclaimer was not unreasonable because Tower had to assign the claim to an investigator and wait for the investigator's report before deciding what to do. In making its decision, the court examined the requirements of Insurance Law § 3420 [d] which provides that "an insurer shall disclaim liability or deny coverage for death or bodily injury...as soon as is reasonably possible..." as well as the applicable case law, and compared the requirements to the actions taken by Tower after it received the ACORD on June 10, 2009. First Tower assigned the claim to an examiner (June 11th), then the examiner assigned the claim to an outside investigator (June 12th). The investigator met with Boyd on June 16th and he gave the claims examiner a verbal report on June 25th. Tower disclaimed coverage July 10, 2009.

On the underlying motion, DYBO argued that Tower could have immediately disclaimed coverage when it received the ACORD, because all the necessary facts were known at that time: 1) the date of the accident (August 28, 2008) and 2) a letter

from Peck's lawyer, notifying DYBO's principal to notify her insurance company and 3) the RJI for the underlying personal injury action. The court noted, however, that although older cases in the First Department had found a delay of as few as 30 days in disclaiming coverage based on late notice was unreasonable as a matter of law (West 16th Street Tenants Corp. v. Public Service Mutual Insurance Co., 290 AD2d 278 [1st Dept 2002] app den 98 NY2d 605 [2002]), more recently the Appellate Division, First Department had found it was "draconian" to expect an insurer to immediately disclaim coverage because an insurer should be able to investigate a claim by, among other things, conducting interviews about the circumstance surrounding the incident (Ace Packing Co., Inc v. Campbell Soberg Assoc., 41 AD3d 12 [1st Dept 2007]). In particular, the Appellate Division noted that the "disclaim now and investigate later" practice advocated by many insureds who are late in notifying their insurance providers erodes an insurer's right to a reasonable investigation into other possible grounds for disclaimer (Admiral Ins. Co. v. State Farm Fire, 86 A.D.3d 486, 490 [1st Dept 2011] citing Ace Packing Co., Inc. v. Campbell Solberg Assoc., Inc., 41 A.D.3d 12, 15–16, 835 N.Y.S.2d 32 [2007]).

The decision in the 2011 decision in Admiral Insurance Co. v. State Farm Fire, supra ("Admiral Insurance"), however, draws upon the so-called "DiGuglielmo" rule, established by the Appellate Division, First Department in the case of DiGuglielmo v. Travelers Prop. Cas., 6 AD3d 344 [1st Dept 2004] lv den 3 NY3d 608 [2004]). The DiGuglielmo rule, however, was expressly overruled by the recent 2012 decision in George Campbell. Thus, even if, as Tower argues, the decision in Tower v. NHT, is not a change in the law, the more recent decision in George Campbell is an unmistakable

shift in the law of the First Department, clearly setting forth the law: an insurer may – and must– disclaim "as soon as reasonably possible" based solely on the receipt of information from its insured, if it is readily apparent that the insured's notice is late (George Campbell Painting v. National Union Fire Ins. Co. of Pittsburgh, PA, —AD3d—, 2012 WL 118461, 2012 N.Y. Slip Op. 00254 at 3 [1st Dept. Jan 17, 2012])

Examining the fax Tower received on June 10, 2009, it is apparent that DYBO's notice was late. The fax included: 1) the liability ACORD from the insurance broker, 2) a copy of the letter Peck's lawyer's sent on February 27, 2009 notifying DYBO that it had DYBO through the Secretary of State, but DYBO had not answered the complaint and with further instructions that DYBO notify its insurance carrier so as to avoid entry of a default judgment against it, 2) the RJI in the personal injury action and 3) a specific notation by the insurance broker itself that this was the "first notification of this incident" highlighting the date of the claim as "8/28/08." Tower did not, however, notify DYBO that it was disclaiming coverage based upon late notice until July 10, 2009, 30 days later and the disclaimer was solely on the basis of late notice.

Applying the legal principles of George Campbell (and to a lesser extent, Tower v. NHT), Tower should not have delayed in issuing a disclaimer based on late notice because all the facts necessary to disclaim coverage on that basis were obvious from the notice materials it received on June 10, 2009. By deciding George Campbell as it has, the Appellate Division has underscored that an expedited disclaimer by an insurer is required. Therefore, DYBO's motion to reargue is granted. Upon reargument, the court modifies its prior order granting Tower's motion for summary judgment, declaring that it has no obligation to provide DYBO with a defense in the personal injury action

and instead declares that there is an obligation to provide DYBO with a defense in the personal injury action.

The timeliness of DYBO's own notice to Tower is not the subject of this motion, nor does the court have to decide whether it was timely. When the insurer's disclaimer is untimely, as a matter of law, the untimeliness of the insured's own notice to the insurer of an occurrence is not an available defense to coverage (First Fin. Ins. Co. v Jetco Contr. Corp., 1 N.Y.3d 64 [2003]; George Campbell v. National Union, *supra*; Tower v. NHT Owners, LLC, *supra*).

In DYBO's underlying motion, DYBO moved to amend its answer and to have the court search the record to grant it summary judgment. Tower has only opposed that portion of DYBO's motion for reargument based upon the decisions in Tower v. NHT and George Campbell. It does not address the issue of reverse summary judgment. Pursuant to CPLR 3212 [b], the court has the discretion to render summary judgment for a non-moving party on the issues raised in the motion for summary judgment (Dunham v. Hilco Const. Co., Inc., 89 N.Y.2d 425 [1996]). In any event, in a declaratory judgment action the court should declare the rights of the parties, even when the moving party does not prevail (Cannon Point North, Inc. v. City of New York, 87 A.D.3d 861 [1st Dept 2011]).

The only claims in the summons and complaint are that "DYBO failed to notify Tower of the occurrence as soon as practicable, thereby breaching the policy" and "Peck failed to notify Tower of the occurrence." The proposed amended answer raises the same counterclaims and defenses which were fully addressed by the parties on the underlying motions. Both sides have laid bare their proof and Tower specifically

addressed the defenses raised in the proposed amended answer. Under these circumstances, DYBO is entitled to summary judgment in its favor. Although Peck did not oppose the prior motion or taken any position on reargument, except to oppose a stay on her underlying personal injury action, the decision as to Peck must be, and hereby is, harmonized with the court's decision as to Tower. Consequently, on reargument, Tower's motion for summary judgment is denied. DYBO's motion for permission to amend its answer is granted as is its motion for reverse summary judgment. Plaintiff Tower Insurance Company of New York has an obligation to defend and indemnify defendant DYBO Realty Corp in the personal injury action pending in the Supreme Court, Kings Co., under Index No. 34687/08.

All stays on the underlying personal injury action in Supreme Court, Kings County are hereby vacated forthwith since Tower must provide DYBO with a defense in that action.

Conclusion

In accordance with the foregoing,

It is hereby

ORDERED that the motion by DYBO for reargument of the court's prior order of December 21, 2011 is granted; and it is further

ORDERED that upon reargument, the court denies plaintiff Tower Insurance Company of New York's motion for summary judgment against DYBO; and it is further

ORDERED that the cross motion by defendant DYBO Realty Corp. for permission amend its answer is granted as is its motion for reverse summary judgment and after searching the record; it is further

ORDERED ADJUDGED AND DECLARED that plaintiff Tower Insurance Company of New York must defend and indemnify defendant DYBO Realty Corp in the personal injury action pending in the Supreme Court, Kings Co., under Index No. 34687/08; and it is further

ORDERED that the motion by plaintiff Tower Insurance Company of New York for summary judgment against defendant Cary Peck is denied and the court's decision with respect to Peck is harmonized with the decision with respect to DYBO; and it is further

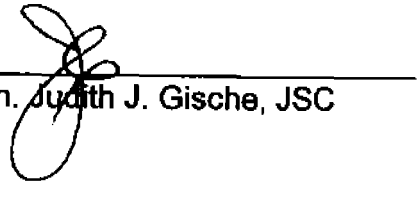
ORDERED that all stays on the underlying personal injury action in Supreme Court, Kings County are hereby vacated forthwith since Tower must provide DYBO with a defense in that action; and it is further

ORDERED that any relief any relief requested but not specifically addressed is hereby denied; and it is further

ORDERED that this constitutes the decision, order and Judgment of the court.

Dated: New York, New York
February 15, 2012

So Ordered:



Hon. Judith J. Gische, JSC

UNFILED JUDGMENT

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