SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: DORIS LING-COHAN Justice PART 36

Index Number : 112845/2010
TOWER INSURANCE COMPANY
VS.
HIGH STYLE FLOORS, INC
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT

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

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). 1, 2, 3, 4

Answering Affidavits — Exhibits _____ | No(s). 8

Replying Affidavits Notice of Cross-Motion, Aff + Exh's _____ | No(s). 9 5, 6, 7

Upon the foregoing papers, it is ordered that this motion is and cross-motion are decided in accordance with the attached memorandum decision.

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

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: 6/22/12

DORIS LING-COHAN, J.S.C.

1. CHECK ONE: ..... ☑ CASE DISPOSED ☐ NON-FINAL DISPOSITION

2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER

3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER

☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 36

TOWER INSURANCE COMPANY OF NEW YORK,

Plaintiff,

-against-

HIGH STYLE FLOORS INC., HAGER MANAGEMENT INC., 170 N.Y. PROPERTIES, LLC and SHERLY MARIE MOISE,

Defendants,

INDEX NUMBER 112845/2010
Motion Sequence 001
JUDGMENT & ORDER

DORIS LING-COHAN, J.:

Plaintiff Tower Insurance Company of New York (Tower) moves for summary judgment, pursuant to CPLR 3212, declaring that it has no duty to defend or indemnify defendant High Style Floors Inc. (High Style) in the underlying personal injury action, *Moise v Hager Management Inc.*, Supreme Court, Kings County, Index No. 20244/2009 (the Moise Action), and for a default judgment against High Style, pursuant to CPLR 3215 (a). High Style opposes and cross-moves for summary judgment, pursuant to CPLR 3212, declaring that Tower has a duty to defend and indemnify it in the Moise Action, and for dismissal of the complaint as abandoned, pursuant to CPLR 3215 (c).

Factual Background

Sherly Marie Moise (Moise) was allegedly injured on May 13, 2009 when she slipped and fell in the lobby of 170 New York Avenue, Kings County (the Premises). Defendant Hager Management Inc. (Hager) was the manager and defendant 170 N.Y. Properties LLC (170 NY) owned the Premises, where High Style was engaged to retile the lobby floor. Moise commenced the underlying Moise Action on August 11, 2009 against Hager and 170 NY. Patel Opp. Aff., Ex

A. On October 26, 2009, Moise filed a supplemental summons and amended complaint adding High Style as a defendant. Motion, Ex. A.

Tower issued High Style a commercial general liability policy, number CPP2517804, effective May 19, 2008 through May 19, 2009 (the Policy). *Id.*, Ex. G. Tower commenced the instant action on September 30, 2010, claiming that High Style first gave it notice of Moise's accident on November 16, 2009, more than six months after the occurrence. *Id.*, Ex. B. This was allegedly a breach of the policy's condition on notice.

Discussion

It is not disputed that High Style failed to answer or appear on the complaint within the prescribed time, 30 days, pursuant to CPLR 320 (a), because service was effected on High Style via the New York Secretary of State on October 27, 2010. Now, Tower requests a default judgment against High Style, pursuant to CPLR 3215 (a) ("When a defendant has failed to appear, [or] plead . . . the plaintiff may seek a default judgment against him"). High Style, by contrast, requests dismissal of the complaint, pursuant to CPLR 3215 (c), because the instant motion for default was brought on November 28, 2011, one year and 31 days after service of the complaint. The statute requires that plaintiff "take proceedings for the entry of judgment within one year after the default," which would have been on or by November 27, 2011. *Opia v Chukwu*, 278 AD2d 394, 394 (2d Dept 2000) (Where "plaintiffs failed to move for leave to enter judgment within one year after the defendant's alleged default in appearing or answering, as required by CPLR 3215 (c) . . . the Supreme Court properly denied the plaintiffs' motion for leave to enter judgment against the defendant upon his default in appearing or answering").

November 27, 2011 was a Sunday and, according to General Construction Law § 20, it "must be excluded from the reckoning . . . [of] the last day of the period." Therefore, November

28, 2011 was the last day plaintiff may have moved for default under CPLR 3215 (a). High Style's cross motion to dismiss the complaint as abandoned, pursuant to CPLR 3215 (c), shall be denied. However, Tower's application for a default judgment against High Style, although procedurally proper, shall be denied in order to examine the substantive issues raised by Tower's summary judgment motion for a declaratory judgment and challenged by High Style's cross motion.

"The proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law." *Dallas-Stephenson v Waisman*, 39 AD3d 303, 306 (1st Dept 2007), citing *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985). Upon proffer of evidence establishing a prima facie case by the movant, "the party opposing a motion for summary judgment bears the burden of 'produc[ing] evidentiary proof in admissible form sufficient to require a trial of material questions of fact.'" *People v Grasso*, 50 AD3d 535, 545 (1st Dept 2008), quoting *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). If there is any doubt as to the existence of a triable issue of fact, summary judgment must be denied. *Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 (1978); *Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226 (1st Dept 2002).

The Policy includes an endorsement stating that Tower "will have no duty to defend the insured against any 'suit' seeking damages for 'bodily injury' or 'property damage' to which this insurance does not apply." Motion, Ex. G, CG 01 63 09 99 § A (1) (a). The issue of notice is addressed by the Policy's Commercial General Liability Coverage Form, which specifies that the insured "must see to it that we are notified as soon as practicable of an 'occurrence' or an offense which may result in a claim." *Id.*, at CG 00 01 10 01, § IV (2) (a). Notice should include requisite details, as available. Tower contends that High Style's failure to give timely notice of

the occurrence eliminated the duty to defend in the Moise Action.

Tower submits a copy of a General Liability Notice of Occurrence/Claim, dated November 16, 2009, filed by an agent on behalf of High Style concerning Moise, stating that "insured knows nothing about it." *Id.*, Ex. H. Tower claims that this was the first notice of the incident that it received, accompanied by a copy of the summons and complaint in the Moise Action. Tower engaged an investigator who obtained a signed, unsworn statement from Ezra Weiss, High Style's project manager, concerning the incident.[1] *Id.*, Ex. J. Weiss wrote that, late in the afternoon of May 13, 2009, after he had left the Building, he received a telephone call from one of his workers on the job telling him "that a woman had crossed the caution tape to use the back door and slipped on a patch that was on the floor." *Id.*, Ex. J. Weiss stated that he returned to the Building when "the ambulance had just left." *Id.*, Ex. J.

On December 16, 2009, Tower disclaimed coverage in a letter to High Style. *Id.*, Ex. I. Tower said that it would defend High Style "subject to resolution of a declaratory-judgment action that we will commence against you to confirm the propriety of our disclaimer." Tower's assigned counsel would be withdrawn if the court upheld Tower's stance.

"The requirement that an insured notify its liability carrier of a potential claim 'as soon as practicable' operates as a condition precedent to coverage." *White v City of New York*, 81 NY2d 955, 957 (1993). Further, "the insured bears the burden of proving, under all the circumstances, the reasonableness of any delay in the giving of notice." *Paramount Ins. Co. v Rosedale Gardens*, 293 AD2d 235, 240 (1st Dept 2002). Tower argues that an unexcused delay of short duration may be a breach of the insurance contract as a matter of law, citing, among others, *Deso*

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[1]In his affirmation in opposition, attached to the cross motion, Weiss identifies himself as "a religious individual, whose beliefs preclude swearing." Motion, Ex. J.

v London & Lancashire Indem. Co. of Am. (3 NY2d 127 [1957]) (51 days); *Safer v Government Emples. Ins. Co.*, 254 AD2d 344 [2nd Dept 1998]) (about six weeks); *Power Auth. of State of N.Y. v Westinghouse Elec. Corp.* (117 AD2d 336 [1st Dept 1986]) (53 days).

If there has been a delay in reporting an incident to the insurer, the insured has the "burden to establish that a reasonably prudent person, upon learning of the accident, would have a good faith, objective basis for believing that litigation would not be commenced." *Ferreira v Mereda Realty Corp.*, 61 AD3d 463, 463 (1st Dept 2009) (citation omitted). Weiss, in his affirmation in opposition to the motion, offers more detail about the incident, mostly as told to him by an employee when Weiss returned to the Premises. Weiss was informed that Moise allegedly held a garbage bag as she crossed the lobby; the High Style employee yelled at her to stop; she ignored the High Style employee; she was wearing high-heeled shoes; she did not complain of pain after the fall, but she called 911. Weiss Affirm., ¶¶ 19-20. Weiss, in this affirmation, acknowledges that Moise was gone when he arrived at the Premises, but omits any mention of her leaving by ambulance after the 911 call. *Id.* at ¶18.

On December 14, 2010, Weiss was deposed on this matter. Cross Motion, Ex. 3. His testimony is almost identical to his affirmation. An ambulance is never mentioned, but, in recounting what his employee allegedly told him, Weiss testified that, after Moise fell down, "[s]he called 911 and she stood there until 911 came." Weiss Transcript at 57. Luis Suriel, High Style's only employee on the Premises at the time of the accident, testified on August 1, 2011. Patel Opp. Affirm., Ex. K. His account about the woman wearing high heels, carrying a garbage bag, who stepped over the yellow caution tape, is consistent with Weiss's recollections. However, Suriel said that Moise "herself called the ambulance and she waited for the ambulance as she stood up." Suriel Transcript at 28. Suriel was still present when the ambulance arrived,

25 or so minutes later when Moise was removed from the Premises in a wheelchair. *Id.* at 28-29. While defendants consequently intimate that Moise suffered little, if any, harm in the incident, they ignore the implication of their own witnesses, that Moise did not simply brush herself off and continue upon her way.

In sum, while Weiss's declarations may illuminate the issues of liability and comparative negligence for Moise's accident, they offer no good faith, objective basis for believing that litigation would not be commenced. *Rondale Bldg. Corp. v Nationwide Prop. & Cas. Ins. Co.*, 1 AD3d 584, 585-586 (2d Dept 2003) ("a reasonable and prudent insured would have concluded that there existed a strong possibility that a liability claim would be made due to the fact that the victim was removed from the scene by ambulance and hospitalized for three days").

The fact that High Style did not become a defendant in the Moise Action until October 26, 2009, about three weeks before Tower received notice of the occurrence from the insurance agent, is unavailing. It is the occurrence, not the commencement of a personal injury action, that triggers an insured's obligation to provide notice according to the terms of the Policy. *Great Canal Realty Corp. v Seneca Ins. Co.*, 5 NY3d 742, 743 (2005) ("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").

For the reasons discussed above, Tower's motion for a declaratory judgment shall be granted and High Style's cross motion for a declaratory judgment in its favor is denied.

Accordingly, it is

ORDERED that the portion of Tower Insurance Company of New York's motion for summary judgment, pursuant to CPLR 3212, declaring that it has no duty to defend or indemnify defendant High Style Floors Inc. in the personal injury action, *Moise v Hager*

Management Inc., Supreme Court, Kings County, Index No. 20244/2009, is granted; and it is further

ADJUDGED and DECLARED that Tower Insurance Company of New York is not obliged to provide a defense to and indemnify the defendant High Style Floors Inc. in the said action pending in Kings County; and it is further

ORDERED that that part of Tower Insurance Company of New York's motion for a default judgment, pursuant to CPLR 3215 (a), against High Style Floors Inc., is deemed moot; and it is further

ORDERED that High Style Floor Inc.'s cross motion for summary judgment, pursuant to CPLR 3212, declaring that Tower Insurance Company of New York has a duty to defend and indemnify it in the said action pending in Kings County, and for dismissal of the complaint as abandoned, pursuant to CPLR 3215 (c), is denied.

DATED: **June 22, 2012**

Doris Ling-Cohan, J.S.C.

J:\Summary Judgment\tower Ins. High style. gotthelf insurance declaratory judgment late notice.wpd

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).