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

PRESENT : DONNA M. MILLS **PART** 58

Justice

TOWER INSURANCE COMPANY OF NEW YORK,

Plaintiff,

-against-

SHAPTOM REALTY CORP. also known as SHAPTON REALTY CORP. and MARIA FERNANDEZ,

Defendants.

INDEX NO. 115759/10

MOTION DATE

MOTION SEQ. NO. 001

MOTION CAL NO.

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

	PAPERS NUMBERED
Notice of Motion/Order to Show Cause-Affidavits– Exhibits....	1-3
Answering Affidavits– Exhibits	
Replying Affidavits	4-6

CROSS-MOTION: ✓ YES _____ NO

Upon the foregoing papers, it is ordered that this motion is:

DECIDED IN ACCORDANCE WITH ATTACHED MEMORANDUM DECISION.

Dated: 10/25/12

J.S.C.

DONNA M. MILLS, J.S.C.

Check one: _____ FINAL DISPOSITION ✓ NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 58

TOWER INSURANCE COMPANY OF NEW YORK,

Plaintiff,

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SHAPTOM REALTY CORP. also known as SHAPTON REALTY CORP. and MARIA FERNANDEZ,

Defendants.

INDEX NUMBER 115759/2010
Mot. Seq. 001
DECISION & ORDER

DONNA MILLS, J.:

In this action for a declaratory judgment concerning liability insurance coverage, 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 Shaptom Realty Corp. also known as Shapton Realty Corp. (Shaptom) in *Fernandez v Shaptom Realty Corp.*, Bronx County index No. 305241/2009 (the Fernandez Action), a pending personal injury action. Tower also moves for the entry of a default judgment against defendant Maria Fernandez (Fernandez). Shaptom opposes and cross-moves for summary judgment in its favor, pursuant to CPLR 3212, dismissing the complaint in its entirety. Fernandez also opposes and cross-moves to dismiss the complaint, pursuant to CPLR 3215 (c), for failure to take a default within one year, or for failure to state a legally cognizable cause of action. In the alternative, Fernandez requests an extension of time to answer the complaint.

Background

Fernandez allegedly was injured, on July 11, 2007, when she slipped and fell on a staircase at the entrance of 1230 Fulton Avenue, Bronx County (the Building), a 16-unit residential building, owned by Shaptom, where she was a tenant. She commenced the Fernandez Action on or about June 29, 2009.

Tower issued Shaptom a commercial general liability policy for the Building, bearing the number CPP2216968, effective December 10, 2006 to December 10, 2007 (the Policy). Thomas Affirm., Ex. E. On July 28, 2009, Tower disclaimed coverage in the Fernandez Action on the ground of late notice. *Id.*, Ex. J. It commenced the instant action on December 6, 2010, requesting a declaratory judgment that it has no duty to defend or indemnify anyone in the Fernandez Action.

Discussion

Tower's Motion

Under CPLR 3212 (b), a summary judgment "motion shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party." "The proponent of a motion for summary judgment [pursuant to CPLR 3212] 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). Where a party fails to meet its prima facie burden, its summary judgment motion shall be denied regardless of the sufficiency of the opposing papers. *Matter of Siegel*, 90 AD3d 937, 940 (2d Dept 2011), citing *Winegrad*, 64 NY2d at 853.

Section IV (2) (a) of the Policy provides 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." An

occurrence means an accident, per Section V (13). Tower claims that Shaptom failed to comply with this provision as understood by New York law, because Tower first received notice of the occurrence on July 6, 2009, in a Loss Report sent to it by facsimile transmission. This notice, sent by an entity called Jersey Link LLC, included a General Liability Notice of Occurrence/Claim, dated July 2, 2009, and a copy of the Fernandez Action complaint. Thomas Affirm., Ex. F. Tower's disclaimer notice, dated July 28, 2009, states:

> "Our investigation reveals that you were notified of the 'occurrence' and of the claim against you on or about July 11, 2007[, the date of the accident]. However, you did not notify us of the 'occurrence' and/or claim until July 2, 2009. Accordingly, you breached the policy conditions set forth above by failing to notify us of the 'occurrence' as soon as practicable."

Thomas Affirm., Ex. J.

"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); *Travelers Ins. Co. v Volmar Constr. Co.*, 300 AD2d 40, 42 (1st Dept 2002) ("absent a valid excuse, the failure to satisfy the notice requirement vitiates the policy"). Unexcused delays of far shorter duration than the almost two years alleged here have been held to be a breach of the insurance contract as a matter of law. *See Deso v London & Lancashire Indem. Co. of Am.*, 3 NY2d 127 (1957) (51 days); *Juvenex Ltd. v Burlington Ins. Co.*, 63 AD3d 554, 554 (1st Dept 2009) ("Plaintiff's delay of two months in giving defendant notice of the claim was unreasonable as a matter of law"); *Young Israel Co-Op City v Guideone Mut. Ins. Co.*, 52 AD3d 245 (1st Dept 2008) (40 days); *Power Auth. of State of N.Y. v Westinghouse Elec. Corp.*, 117 AD2d 336 (1st Dept 1986) (53 days).

Fernandez was deposed on December 14, 2010 in her personal injury action. She stated that the barking, growling and threatening of a dog belonging to another tenant contributed to the incident. Thomas Affirm., Ex. I (Fernandez Transcript) at 21-34. She knew the dog's owner as Raphael, an occupant of apartment 15 on the third floor. *Id.* at 21-22. She said that she fell when the dog jumped at her, and placed his paws on her. *Id.* at 35. She claimed that this dog

had growled at her before, causing her to "complain to the super. I called the office and would speak to the secretary." *Id.* at 30. Fernandez testified that the same dog attacked the building manager, whom she called Ice,[1] a couple of months earlier. *Id.* at 24. She had also heard that the dog tried to bite Jose, the young son of Carteria Ortega, a tenant on her floor, and Inez Polosio, another tenant on the second floor. *Id.* at 26-29. She said that Raphael had three dogs, but she did not know of any other animals in the Building. *Id.* at 23.

Fernandez said that the super's son, Prospero Pimentel, was in the immediate vicinity at the time of the accident, but she was unable to say that he witnessed it. *Id.* at 17. However, she testified that the super's son "helped me stand up" after she fell. *Id.* at 37. She then went to her apartment without seeking medical attention. She said that the super, Levi Pimentel (Pimentel), who lived in the Building, was in the hospital at the time of the incident, but that his son informed him of the accident, according to what Pimentel told her when he eventually visited her. *Id.* at 31.

Fernandez testified that her boyfriend, who lived with her, "called [the secretary at the office] on the following day [after the incident] and mentioned the incident about the dog, but super had already reported." She said that she was present when her "boyfriend called the building on the next day." *Id.* at 58. That same day she also went to the emergency room of Bronx-Lebanon hospital, because her right foot "was black and it was swollen." *Id.* at 44. An X-ray showed a fracture in her foot, and she returned home the same day with a cast on her foot. *Id.* at 45-46. She later had surgery on her foot.

Tower submits a hand-written statement assertedly from Pimentel, the original in Spanish with an English translation and a Certificate of Accuracy of the translation. Thomas Affirm., Exs. G, H. Pimentel's statement is unsworn and not notarized. At the bottom of each of the two pages, there is a mark or stylized signature, although not identified as such. The Certificate of Accuracy, from Ventura Translations, Inc., is signed, sworn and notarized.

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[1]This is probably Isidor Jovicevic (Jovicevic), a property manager employed by Shaptom.

Tower claims that Pimentel's statement was secured by Israel Marrero (Marrero), an investigator with Daniel J. Hannon & Associates, Inc. (DJH), a firm retained by Tower to investigate the Fernandez accident. Marrero is no longer employed by DJH, and Tower submits an affidavit by John Mooney, a DJH manager, who says that he supervised Marrero in this matter. Mooney Aff., ¶ 3. Mooney states that Marrero met Pimentel on July 15, 2009, and "obtained a written statement that is signed and initialed by Pimentel." *Id.*, ¶ 5.

About half of Pimentel's statement is redacted, a significant amount considering the simple story he seems to be telling. He admittedly was away from the Building at the time of the accident, and he states, in translation, that the "first time that I knew about Maria Fernandez' accident, who lives in apartment 10, was when my son, Prospero Pimentel, told me that the lady, Maria Fernandez had an accident in front of the building." *Id.*, Ex. H. He continues, without offering any time frame, that the "lady called me on the telephone and her husband came to my apartment." *Id.* Finally, "I don't remember when I saw the lady but she had a cast on her leg and she had a crutch and afterwards a cane."

Shaptom asserts that "Tower received notice in a timely fashion, immediately after the lawsuit was commenced." Shapiro Affirm., ¶ 7. Shaptom flatly denies that anyone associated with the Building or its company learned of the incident until the commencement of the Fernandez Action on June 29, 2009. Shaptom questions the evidentiary value of the Pimentel statement for several reasons, including the method of its recording, that it is unsworn and unnotarized, the redactions, the "illegible" signature, and the translator's affidavit. Shaptom contends that Mooney's statement is "not based upon any personal knowledge," ignoring Mooney's claim that he supervised Marrero, who is no longer with DJH. *Id.*, ¶ 12. Although Shaptom does not produce anything from Pimentel, it raises doubts as the authorship of the statement, Pimentel's literacy in English and/or Spanish, and how Pimentel was identified by Marrero, if at all. From challenging the merits of Pimentel's statement, Shaptom jumps to the unreasonable conclusion that "any translation [of it is] meaningless and unreliable." *Id.*, ¶ 15. Whatever the quality of its contents, nothing suggests that the translation itself of the Pimentel

statement is unreliable. Shaptom, however, confuses the issue by quoting at great length the decision in *Reyes v Arco Wentworth Mgt. Corp.* (83 AD3d 47, 54 [2d Dept 2011]), to the effect "that the absence of a translator's affidavit, required of foreign-language witnesses, renders the witness's English-language affidavit facially defective and inadmissible." Here, there is a translator's affidavit, and it is adequate.

"The 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. Moreover, knowledge of an occurrence obtained by an agent charged with the duty to report such matters is imputed to the principal." *Paramount Ins. Co. v Rosedale Gardens*, 293 AD2d 235, 239-240 (1st Dept 2002) (citations omitted). Nothing in Pimentel's statement clearly establishes when he acquired the necessary information to inform his employer of Fernandez's accident. Fernandez testified that she wore a cast for three months after the accident, then wore a boot. Fernandez Transcript at 48. She said that she used crutches while wearing the cast and for about one more month when wearing the boot. *Id.* In April 2008 she had surgery on her foot. Afterwards, she wore one cast for about two weeks, which was replaced by another for about one month more. *Id.* at 51. She used crutches for about two-and-a-half months after the surgery, even longer than she wore a cast. *Id.*

In the absence here of a submission by Pimentel, or his son, Shaptom responds with the affidavit of Martin Shapiro, its principal and sole shareholder, in which he denies any knowledge of the incident. Shapiro[2] Affirm., Ex. G. Additionally, Martin Shapiro claims that Pimentel, in July 2009, informed him that he had no knowledge of the incident, and that Victoria Vazquez (Vazquez), "the office secretary and the only person who answers the office phones," also told him that she knew nothing of the incident "and that nobody ever called to notify the office." *Id.*, ¶ 9. Vazquez herself submits an affidavit repeating Martin Shapiro's comments, and stating that she was present and translating for him when he interviewed Pimentel in July 2009, after receipt

[2]Jason Shapiro, Shaptom's attorney.

of the summons and complaint in the Fernandez Action. Shapiro Affirm., Ex. H, ¶ 4.

On November 11, 2011, Jovicevic, a property manager employed by Martin Shapiro, testified about the Building, which he visited once or twice a week until Shaptom sold it. Shapiro Affirm., Ex. I., at 14-15. He said that tenants were not allowed to keep pets, and that he knew of no tenants owning pets in 2007 in the Building. *Id.* at 13-14. Jovicevic stated that tenant complaints regarding the Building were made either to his office or directly to the super. *Id.* at 17. He said that he never heard of the incident from any source prior to the commencement of the Fernandez Action. *Id.* at 15. He did not recognize the names of Marie Fernandez, Catiria Mendez or Ines Palacios.[3] He admitted to being only "[v]aguely" familiar with the names of the tenants in the Building in 2007. *Id.* at 12.

Under all these circumstances, the court finds that there is a material issue of triable fact regarding when Pimentel learned of Fernandez's alleged slip and fall accident, effectively putting his employer on notice of the occurrence. Accordingly, Tower's motion for summary judgment, declaring that it has no duty to defend or indemnify Shaptom in the Fernandez Action, is denied.

Shaptom charges that "Tower's approximate one-month delay in disclaiming coverage was unreasonable as a matter of law." Shapiro Affirm., ¶ 27. *Matter of Firemen's Fund Ins. Co. of Newark v Hopkins*, 88 NY2d 836, 837 (1996) ("An insurer must give written notice of disclaimer on the ground of late notice as soon as is reasonably possible after it first learns of the accident or of grounds for disclaimer of liability, and failure to do so precludes effective disclaimer") (internal quotation marks and citations omitted); *Tower Ins. Co. of N.Y. v NIIT Owners LLC*, 90 AD3d 532, 533 (1st Dept 2011) (33 days is "untimely as a matter of law"); *West 16th St. Tenants Corp. v Public Serv. Mut. Ins. Co.*, 290 AD2d 278, 279 (1st Dept 2002) ("30-day delay in disclaiming coverage was therefore unreasonable as a matter of law"); *Matter of Nationwide Mut. Ins. Co. v Steiner*, 199 AD2d 507, 507 (2d Dept 1993) ("unexplained 41-day delay in disclaiming coverage was unreasonable").

[3]These are how the names appear in Jovicevic's transcript.

Tower offers two different time intervals in reply to Shaptom's assertion of an "approximate one-month delay" in disclaiming coverage. Tower disingenuously states that it "disclaimed coverage a mere four days after it became aware of the grounds for a denial of late notice." Thomas Reply Affirm., ¶ 9. That discounts the time the insurer may have waited before initiating its investigation. More credible is Tower's assertion that there was a 22-day interval from its receipt of Shaptoms's notice, on July 6, 2009, until its response on July 28, 2009. Jersey Link LLC sent the document set to Tower, by facsimile transmission, as acknowledged by Tower (Aptman Aff., ¶ 4), and each of its 12 pages contains a ribbon of print at the top showing transmission at 10:21, July 2, 2009, a Thursday, 26 days before Tower's disclaimer. However, the Independence Day holiday weekend began on Friday, July 3, 2009. The next business day was likely Monday, July 6, 2009, and it is reasonable to accept this as the day of the notice to Tower, thereby establishing a 22-day interval.

In this instance, the 22-day interval is not deficient as a matter of law, in contrast to the several cases cited by Shaptom. Such a determination cannot be based on a mere look at the calendar. *Continental Cas. Co. v Stradford*, 11 NY3d 443, 449 (2008) ("timeliness almost always presents a factual question, requiring an assessment of all relevant circumstances surrounding a particular disclaimer"). During those 22 days, Tower assigned the matter to DJH, which sent Marrero to investigate and interview Pimentel. Having pursued the matter diligently, investigating an occurrence two years in the past, and disclaiming coverage to Shaptom within 22 days, Tower acted reasonably. *First Fin. Ins. Co. v Jetco Contr. Corp.*, 1 NY3d 64, 69 (2003) ("investigation into issues affecting an insurer's decision whether to disclaim coverage obviously may excuse delay in notifying the policyholder of a disclaimer").

In conclusion, there is a triable issue of fact concerning the timeliness of Shaptom's notice of the occurrence, but Tower's disclaimer of coverage was timely. Tower's motion for summary judgment for a declaration that it has no duty to defend or indemnify Shaptom is, therefore, denied. Discussion of Tower's motion for a default judgment against Fernandez is

combined with consideration of Fernandez's cross motion for an extension of time to file an answer, below.

Shaptom's Cross Motion

In light of the decision on Tower's motion for summary judgment, Shaptom's cross motion for summary judgment in its favor is denied.

Fernandez's Cross Motion

In addition to adopting Shaptom's arguments for summary judgment dismissing the complaint, Fernandez cross-moves for dismissal of the complaint for failure to take a default within one year, pursuant to CPLR 3215 (c), or for failure to state a legally cognizable cause of action. In the alternative, Fernandez requests additional time to file an answer.

"If the plaintiff fails to take proceedings for the entry of judgment within one year after the default, the court shall not enter judgment but shall dismiss the complaint as abandoned, without costs, upon its own initiative or on motion, unless sufficient cause is shown why the complaint should not be dismissed." CPLR 3215 (c). Fernandez claims that Tower commenced the instant action on November 29, 2010, because that date was typed on the face of the summons, as prepared by Tower's counsel. Linder Affirm., Ex. A. Fernandez then builds her argument on the November 29, 2010 date, and finds that it leads to Tower's failure to comply with statute. However, Fernandez ignores the actual commencement date, the date of filing, the date the index number was obtained, "12/6/10," handwritten on the summons. The copy of the summons scanned on the Supreme Court Records On-Line Library bears the stamped filing date of "Dec 06 2010."

As a matter of right, Tower filed an amended complaint on January 4, 2011, which it affixed to Fernandez's door at the Building, on February 1, 2011, with the summons, after four unsuccessful attempts at personal service. Thomas Affirm., Ex. K, Affidavit of Service. Copies of the summons and amended complaint were mailed to Fernandez the next day, according to the Affidavit of Service, which itself was filed with the County Clerk on February 14, 2011. A

courtesy copy of the summons and of the amended complaint were sent to Fernandez's counsel in the Fernandez action. *Id.*, Ex. L. Fernandez never appeared or answered in the instant action, even after Tower sent her a default notice on November 10, 2011. *Id.*, Ex. M.

Her final date to answer, appear or move was March 26, 2011. CPLR 320 (a) provides that "the appearance shall be made within thirty days after service is complete," when service is effected by alternate service. Service is complete, pursuant to CPLR 308 (4), 10 days after the filing of proof of service, which occurred on February 14, 2011. Therefore, Tower's motion to declare a default against Fernandez, filed on March 14, 2012, was timely, pursuant to CPLR 3215. Fernandez's cross motion to dismiss the complaint for failure to take a default within one year, therefore, is denied.

Fernandez contends that she had no contractual relationship with Tower, and was not required to notify it of any potential claim or lawsuit. Thus, she argues that the complaint fails to state a legally cognizable cause of action against her. Tower responds that Fernandez is a proper party to the instant action, because a judgment against Shaptom can affect her personal injury suit. Support for this position is best articulated by *U.S. Underwriters Ins. Co. v Landau* (679 F Supp 2d 330, 338 [ED NY 2010]):

> "Even if [insurer] only named the [insured] as defendants, and thus the action was purely between the two parties to the insurance contract, the result of any declaratory judgment denying coverage would practically affect the injured parties in exactly the same way as if they had been named defendants. The Court would determine the meaning of the policy and, if it found no coverage for the circumstances set forth in the injured parties' allegations, those parties would have no rights to indemnification from the insurer anyway. The tort claimants are thus 'bound' to the Court's coverage determination irrespective of their presence in the case caption."

See also Tower Ins. Co. of N.Y. v Mercos L'Inyonei Chinuch, Inc., 2010 NY Slip Op 32114(U); 2010 NY Misc LEXIS 3775 (Sup Ct, NY County July 29, 2010); *OneBeacon Ins. Co. v Freundschuh*, 2011 WL 3739427, 2011 US Dist LEXIS 94852 (WD NY Aug. 24, 2011). Tower has a legally cognizable cause of action against Fernandez, and the instant action shall not be dismissed as against her.

When a defendant has failed to appear, "the plaintiff may seek a default judgment against him." CPLR 3215 (a). However, CPLR 3102 (d) permits the court to "extend the time to appear or plead, or compel the acceptance of a pleading untimely served, upon such terms as may be just and upon a showing of reasonable excuse for delay or default." "[A] showing of a potential meritorious defense is not an essential component of a motion to serve a late answer (CPLR 3012 [d]) where, as here, no default order or judgment has been entered." *Jones v 414 Equities LLC*, 57 AD3d 65, 81 (1st Dept 2008). Yet, Fernandez requests an extension of time to answer in only one sentence, without offering any explanation or excuse for her one-and-a-half year delay. Nevertheless, her cross motion to extend her time to answer the complaint is granted. Whether an active party or not to the instant action, her testimony as a material witness should be vital to the case. Retaining her as a party also provides a greater opportunity for the other litigants to conduct discovery.

Accordingly, it is

ORDERED that plaintiff 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 Shaptom Realty Corp. also known as Shapton Realty Corp. in *Fernandez v Shaptom Realty Corp.*, Bronx County index No. 305241/2009, is denied; and it is further

ORDERED that plaintiff Tower Insurance Company of New York's motion for the entry of judgment on default against defendant Maria Fernandez is denied; and it is further

ORDERED that defendant Shaptom Realty Corp. also known as Shapton Realty Corp.'s cross motion for summary judgment in its favor, pursuant to CPLR 3212, dismissing the complaint, is denied; and it is further

ORDERED that defendant Maria Fernandez's cross motion to dismiss the complaint is denied in its entirety; and it is further

ORDERED that defendant Maria Fernandez's cross motion for an extension of time to answer the complaint is granted, and she shall serve an answer to the complaint or

otherwise respond thereto within 20 days of service of a copy of this order with notice of entry.

DATED: October 25, 2012

ENTER:

J.S.C.

DONNA M. MILLS, J.S.C.

FILED

NOV 14 2012

NEW YORK
COUNTY CLERK'S OFFICE

A preliminary conference is scheduled in Part 58, 111 Centre St, Room 574, ON February 1, 2013 at 10:00am