Public Serv. Mut. Ins. Co. v Tower Ins. Co. of N.Y.
2012 NY Slip Op 33484(U)
June 29, 2012
Sup Ct, Bronx County
Docket Number: 305267/2010
Judge: Lucindo Suarez
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FILED Jul 12 2012 Bronx County Clerk

NEW YORK SUPREME COURT - COUNTY OF BRONX

Mot. Seq. 02

PART 19

Case Disposed ❑
Settle Order ❑
Schedule Appearance ❑

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX:
---X

PUBLIC SERVICE MUTUAL INS. CO., et ano

- against -

TOWER INS. CO. OF NEW YORK, et ano
---X

Index №. **305267/2010**

Hon. **LUCINDO SUAREZ**,

Justice.

The following papers numbered 1 to **8** read on this motion, **REARGUE**,
Noticed on **April 27, 2012** and duly submitted as No. **35** on the Motion Calendar of **May 10, 2012**

	PAPERS NUMBERED	
Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed	1, 2, 3	
Notice of Cross-Motion - Order to Show Cause - Exhibits and Affidavits Annexed	5, 6	
Replying Affidavit and Exhibits	7	
____________ Affidavits and Exhibits		
Pleadings - Exhibit		
Stipulation(s) - Referee's Report - Minutes		
Filed Papers		
Memoranda of Law	4, 8	

Upon the foregoing papers, the motion of defendant Tower Insurance Company of New York and the cross-motion of plaintiffs, both seeking reargument of the decision and order of the undersigned dated December 21, 2011 denying their respective applications for summary judgment, are disposed of in accordance with the annexed decision and order.

Dated: **06/29/2012**

Hon. ______________________
LUCINDO SUAREZ, J.S.C.

FILED Jul 12 2012 Bronx County Clerk

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: I.A.S. PART 19
---X
PUBLIC SERVICE MUTUAL INSURANCE COMPANY and 100-120 HUGH GRANT CIRCLE REALTY, LLC,

Plaintiffs,

DECISION AND ORDER

Index No. 305267/2010

- against -

TOWER INSURANCE COMPANY OF NEW YORK and AHMED ALHAJAJI d/b/a THREE STAR CONVENIENCE STORE (pertaining to an underlying action entitled Julio Rosado and Rosalia Rosado v. 100-120 Hugh Grant Circle Realty, LLC, Blue Star Convenience & Donut, Shareef Moflehi, individually and d/b/a Blue Star Convenience & Donut, Three Star Convenience Store, Ahmed Alhajaji, individually and d/b/a Three Star Convenience Store),

Defendants.
---X

PRESENT: Hon. Lucindo Suarez

Upon the notice of motion dated March 19, 2012 of defendant Tower Insurance Company of New York and the affirmation, exhibits and memorandum of law submitted in support thereof; plaintiff's notice of cross-motion dated March 28, 2012 and the affirmation submitted in support thereof; defendant's affirmation in reply dated May 8, 2012 and the memorandum of law submitted therewith; and due deliberation; the court finds:

Defendant Tower Insurance Company of New York ("Tower") moves to reargue the decision and order of the undersigned dated December 21, 2011 which denied its cross-motion seeking summary judgment and a declaration that it had no duty to defend and indemnify plaintiff landlord 100-120 Hugh Grant Circle Realty, LLC ("Realty") in an underlying personal injury lawsuit alleging an August 20, 2008 accident in front of the property Realty leased to defendant Three Star Convenience Store ("Three Star"). Realty was insured by plaintiff Public Service Mutual

Insurance Company ("PSM") and was also a named additional insured under Three Star's policy issued by Tower. By letter dated November 24, 2008, PSM tendered the claim to Three Star and demanded indemnity of Realty because PSM's investigation found that the accident was due to Three Star's failure to properly maintain the area in front of the store in accordance with the lease. By letter dated January 13, 2009, Tower rejected PSM's tender and disclaimed coverage of Realty because, *inter alia*, Realty did not notify Tower of the accident until December 1, 2008.

The prior order found that Tower had failed to establish that it disclaimed as soon as reasonably possible under Insurance Law § 3420(d)(2) and that it therefore had not met its *prima facie* burden on the cross-motion for summary judgment. Plaintiffs' summary judgment motion was likewise denied. The ground for Tower's present motion is that in allegedly finding that Realty failed to establish that it gave Tower notice of the accident as soon as practicable as required by the Tower policy, and then finding that Tower had failed to establish that its rejection of PSM's tender was made as soon as reasonably possible under Insurance Law § 3420(d)(2), the court overlooked relevant caselaw holding that the timeliness of the disclaimer is not an issue where the tender is made by another insurer.

Contrary to Tower's argument, PSM's claims were not the only claims to be addressed on summary judgment. Realty was a "real party in interest" because the underlying personal injury action was still pending at the time of the summary judgment motion and cross-motion. *See Bovis Lend Lease LMB, Inc. v. Royal Surplus Lines Ins. Co.*, Sup Ct, N.Y. County, Feb. 24, 2004, Shafer, J., index No. 106637/03 ("*Bovis I*"), *mod* 27 A.D.3d 84, 806 N.Y.S.2d 53 (1st Dep't 2005) ("*Bovis II*"). Thus as to Realty, Tower was still obligated not to unreasonably delay in disclaiming even if the notice of the claim was untimely. *See 233 E. 17th St., LLC v. L.G.B. Dev., Inc.*, 78 A.D.3d 930, 913 N.Y.S.2d 110 (2d Dep't 2010).

Despite Tower's protestations, PSM's November 24, 2008 tender letter, addressed to Three Star and copied to Tower, served as notice of the occurrence on behalf of Realty so as to require Tower's timely disclaimer. *See e.g. 25 Ave. C New Realty, LLC v. Alea N. Am. Ins. Co.*, 2012 N.Y. App. Div. LEXIS 4599 (1st Dep't June 12, 2012); *Industry City Mgmt. v. Atlantic Mut. Ins. Co.*, 64 A.D.3d 433, 882 N.Y.S.2d 121 (1st Dep't 2009); *JT Magen v. Hartford Fire Ins. Co.*, 64 A.D.3d 266, 879 N.Y.S.2d 100 (1st Dep't 2009), *leave dismissed*, 13 N.Y.3d 889, 921 N.E.2d 602, 893 N.Y.S.2d 835 (2009). Accordingly, the failure to demonstrate timely disclaimer mandated denial of summary judgment as to Realty's claims. Because Tower is correct that Insurance Law § 3420(d)(2), requiring timely disclaimer, is inapplicable to <u>claims between insurers</u>, *see Bovis II, supra*, the court grants reargument. However, because that principle impacts the prior decision only with respect to PSM's claims against Tower for costs, fees and disbursements related to the defense of Realty, reargument is granted solely as to those claims.

To succeed on its motion with respect to PSM's claims, Tower was obligated to demonstrate that the basis of its disclaimer, Realty's untimely notice, was valid. *See id.*; *Hunter Roberts Constr. Group, LLC v. Arch Ins. Co.*, 75 A.D.3d 404, 408-9, 904 N.Y.S.2d 52, 57 (1st Dep't 2010); Mulcahy and Cosgrove, *N.Y. Ins. 3420(d) does not Apply to Tenders Between Insurers*, NYLJ, Apr. 18, 2006, at 1, col 4. Tower bore the initial burden on its motion for summary judgment to "make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact." *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 501 N.E.2d 572, 508 N.Y.S.2d 923 (1986). PSM's Senior Liability Examiner averred that he learned of the underlying plaintiff's claim on October 7, 2008, forty-eight days after the accident. Tower presented no admissible evidence that Realty, a purportedly out-of-possession landlord, or PSM, on Realty's behalf, could, should or did have notice of the occurrence at any time prior.

Accordingly, it is the separate forty-eight day period from PSM's October 7, 2008 notification of the occurrence to its November 24, 2008 tender to Tower that is relevant,[1] because "[t]he 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." *Paramount Ins. Co. v. Rosedale Gardens, Inc.*, 293 A.D.2d 235, 239-40, 743 N.Y.S.2d 59, 62 (1st Dep't 2002).

Tower satisfied its initial burden by offering proof of Realty's delay, whether forty-eight or the total ninety-six days, "because an unexcused delay of that length is untimely as a matter of law." *Tower Ins. Co. of N.Y. v. Classon Hgts., LLC*, 82 A.D.3d 632, 634, 920 N.Y.S.2d 58, 61 (1st Dep't 2011) (emphasis added); *see Young Israel Co-Op City v. Guideone Mut. Ins. Co.*, 52 A.D.3d 245, 859 N.Y.S.2d 171 (1st Dep't 2008) (forty days); *National Grange Mut. Ins. Co. v. Malone*, 15 N.Y.2d 1025, 207 N.E.2d 864, 260 N.Y.S.2d 177 (1965) (eighty-two days); *Abitante v. Home Indem. Co.*, 240 A.D. 553, 270 N.Y.S. 641 (1st Dep't 1934) (forty-nine days). Tower was not required to demonstrate prejudice emanating from the delay. *See e.g. Argo Corp v. Greater N.Y. Mut. Ins. Co.*, 4 N.Y.3d 332, 827 N.E.2d 762, 794 N.Y.S.2d 704 (2005).

The burden therefore shifted to plaintiffs to demonstrate that the delay in notifying Tower was reasonable, *see Heydt Contr. Corp. v. American Home Assur. Co.*, 146 A.D.2d 497, 498, 536 N.Y.S.2d 770, 772 (1st Dep't 1989), *appeal dismissed*, 74 N.Y.2d 651, 540 N.E.2d 715, 542 N.Y.S.2d 520 (1989), because "when a policy of liability insurance requires notice of an occurrence be given as soon as practicable, such notice must be provided within a reasonable period of time, and the failure to give such notice relieves the insurer of its obligations under the contract,"

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[1] Tower's argument regarding the length of plaintiffs' delay appears to have stemmed partly from its assertion on page 12 of its memorandum of law, repeated in its witness's affidavit, that "Tower only received first notice from HGC Realty via PSM's letter on December 17, 2009." Tower's January 13, 2009 disclaimer letter itself stated that Tower received notice from Realty on December 1, 2008. *See George Campbell Painting v. National Union Fire Ins. Co.*, 92 A.D.3d 104, 937 N.Y.S.2d 164 (1st Dep't 2012).

Hermany Farms, Inc. v. Seneca Ins. Co., 76 A.D.3d 889, 890, 907 N.Y.S.2d 490, 491-92 (1st Dep't 2010) (citations omitted). While an unexcused delay may present a question for the court as a matter of law, "[w]here an excuse or explanation is offered for delay in furnishing notice, the reasonableness of the delay and the sufficiency of the excuse are matters to be determined at trial." *Hartford Accident & Indem. Co. v. CNA Ins. Cos.*, 99 A.D.2d 310, 472 N.Y.S.2d 342 (1st Dep't 1984).

It is undisputed that Realty itself failed to directly notify Tower. However, it was appropriate for plaintiffs to rely on PSM's explanation of its investigation in establishing the excuse for Realty's delay. *See e.g. 25 Ave. C New Realty, LLC, supra.* PSM's Senior Liability Examiner described his efforts from the October 7, 2008 claim notification to the November 24, 2008 tender to Tower as follows:

> I conducted an investigation to determine liability in the underlying case, what the terms of the Lease were, whether or not the personal injury case was a covered occurrence under the PSM policy and what the terms of the Tower policy were. We needed to determine whether or not the underlying claim was a covered occurrence under the Tower policy, and whether the Tower policy had the same co-insurance terms that the PSM policy had. I also needed to determine whether or [*sic*] PSM's insured, HGC Realty, had anything to do with the accident.

"Even where the basis for disclaimer is not readily apparent, the insurer has a duty to promptly and diligently investigate the claim." *GPH Partners, LLC v. American Home Assur. Co.*, 87 A.D.3d 843, 929 N.Y.S.2d 131 (1st Dep't 2011). However, "the moment from which the timeliness of an insurer's disclaimer is measured is the date on which it first receives information that would disqualify the claim, not the date on which it receives the insured's notice of claim." *2540 Assocs. v. Assicurazioni Generali, S.P.A.*, 271 A.D.2d 282, 283-84, 707 N.Y.S.2d 59, 61 (1st Dep't 2000). A <u>wholly unexcused</u> 48-day delay in disclaiming would be unreasonable as a matter of law. *See First Fin. Ins. Co. v. Jetco Contr. Corp.*, 1 N.Y.3d 64, 801 N.E.2d 835, 769 N.Y.S.2d 459

(2003).

Here, however, PSM has asserted that its need to investigate the claim excuses the delay. PSM's tender thus should not be deemed untimely as a matter of law, and its explanation presents a question as to whether its investigation was conducted "promptly, diligently and in good faith." *City of New York v. Welsbach Elec. Corp.*, 49 A.D.3d 322, 323, 852 N.Y.S.2d 134, 136 (1st Dep't 2008). "There is no objective standard against which the time it takes an insurer to issue its disclaimer can be measured. It is a fact-sensitive inquiry that is based upon all of the surrounding circumstances and focuses on the period between when the insurer first learned of the grounds for the disclaimer and finally served its written notice disclaiming coverage on the insured." *Those Certain Underwriters at Lloyds, London v. Gray*, 49 A.D.3d 1, 4, 856 N.Y.S.2d 1, 3 (1st Dep't 2007). Therefore, contrary to the prior holding, PSM's affidavit did in fact raise a question as to whether "plaintiff's investigator used his best efforts to diligently perform this investigation and complete it within a reasonable period of time after receiving the assignment." *Id.*, 49 A.D.3d at 6, 856 N.Y.S.2d at 4 (1st Dep't 2007) (47-day investigation). Accordingly, in response to Tower's *prima facie* showing, plaintiffs raised questions of fact regarding the timeliness of the notice to Tower and therefore raised questions of fact as to the validity of Tower's disclaimer, requiring denial of the cross-motion.

Plaintiffs cross-move to reargue the same order denying their motion for summary judgment. Plaintiffs served a copy of the December 21, 2011 order with written notice of its entry on February 14, 2012 and served their notice of cross-motion more than thirty-five days later, on April 2, 2012. The cross-motion is therefore denied as untimely. *See* CPLR 2221(d)(3); *Servais v. Silk Nail Corp.*, 2012 N.Y. App. Div. LEXIS 4733 (1st Dep't June 14, 2012); *Bramble v. State of New York*, 54 A.D.3d 1138, 864 N.Y.S.2d 223 (3d Dep't 2008); *Selletti v. Liotti*, 45 A.D.3d 668, 845 N.Y.S.2d

816 (2d Dep't 2007); *Perez v. Davis*, 8 A.D.3d 1086, 778 N.Y.S.2d 382 (4th Dep't 2004). Plaintiffs are still bound by CPLR 2221(d)(3) regardless of whether they were the unsuccessful parties on their prior motion or the prevailing parties on defendant's prior cross-motion. *See* Siegel, NY Prac § 254, at 450 (5th ed). "Unlike a summary judgment motion, CPLR 2221(d)(3) does not confer discretion upon the courts with respect to belated motions or cross motions for leave to reargue," and no party appealed the prior order. *Dekenipp v. Rockefeller Center, Inc.*, 2008 N.Y. Misc. LEXIS 10328, at **13 (Sup Ct N.Y. County Oct. 8, 2008), *affirmed*, 60 A.D.3d 550, 876 N.Y.S.2d 364 (1st Dep't 2009).

Accordingly, it is

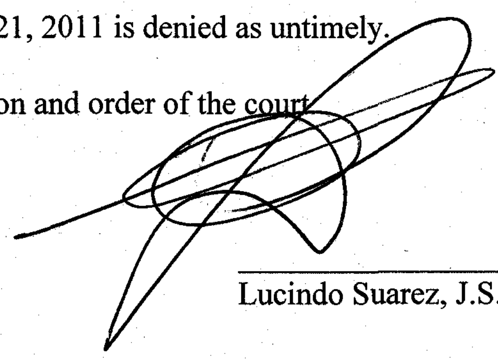
ORDERED, that the motion of defendant Tower Insurance Company of New York for reargument of the decision and order of the undersigned dated December 21, 2011 denying its motion for summary judgment is granted solely to the extent of granting reargument on its motion for summary judgment as to the claims of plaintiff Public Service Mutual Insurance Company for reimbursement of costs in defending 100-120 Hugh Grant Circle Realty, LLC; and it is further

ORDERED, that upon reargument, the court adheres to its December 21, 2011 decision denying summary judgment to defendant Tower Insurance Company of New York; and it is further

ORDERED, that the cross-motion of plaintiffs for reargument of the decision and order of the undersigned dated December 21, 2011 is denied as untimely.

This constitutes the decision and order of the court.

Dated: June 29, 2012



Lucindo Suarez, J.S.C.