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

PRESENT: Hon. Arthur F. Engoron PART 37
Justice

CASTLEPOINT INSURANCE COMPANY,

Plaintiff,

- v -

ANLOVI CORPORATION, et al.,

Defendants.

INDEX NO. 103187/10
MOTION DATE 3/25/13
MOTION SEQ. NO. 003

The following papers, numbered 1 to 4, were read on this motion by plaintiff for summary judgment

	PAPERS NUMBERED
Moving Papers	1
Opposition Papers	2 + 3
Reply Papers	4

Upon the foregoing papers, the instant motion is granted.

Basic Factual Background

Defendant Anlovi Corporation owns the building at and known as 1275 Edward L. Grant Highway, Bronx, New York. Since before the time here in issue, Defendant Franklin Oleh, Sr., and his two infant children, Franklin Oleh, Jr., and Joshua Oleh, have resided in the building. At the times here in issue, Michel (or "Michkel") Davis was the building manager, and, at least for part of this time, Richard Taylor was the building superintendent.

In or about February 2008, plaintiff Castlepoint Insurance Company issued a commercial general liability insurance policy to Anlovi covering the building. The policy has a standard notice provision (Moving Aff. at 3) requiring notice "as soon as practicable" and allowing for notice "on behalf of the [injured] person." Davis apparently was the only Anlovi employee who knew that Castlepoint was the building's insurer. During this time period, Anthony Viaer was in failing health; he died on July 15, 2009. Thus, Davis was essentially running the building's affairs.

In October 2008, Joshua Oleh was allegedly burned by hot water while he was bathing. On January 24, 2009, Franklin Oleh, Jr., was allegedly burned in the same manner. That same day, Franklin Oleh, Sr., telephoned Taylor and notified him of that day's incident (and perhaps of Joshua's earlier incident as well). Taylor told Davis, but neither Davis nor Anlovi nor any of its employees notified Castlepoint.

Within a few days of the January burn, the Olehs retained attorney Elliot Fuld. By letter dated January 27, 2009 (Moving Exh. K), sent by regular and certified mail to "Anlovi Corporation," "Michkel Davis," "Anthony Vaier," and Darryl Collins (another building employee)

Check one: ☑ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION
Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

(collectively, "the addressees") at the address listed on the City Department of Building's website as being Anlovi's (1656 University Avenue, Bronx, NY 10453), Fuld imparted the basics of the January burn claim and asked the addressees to "forward this letter to your liability carrier so that an amicable resolution of this matter can be reached." On or about February 23, 2009, on behalf of Franklin Oleh, Sr., as parent and natural guardian, Fuld sued Anlovi in Supreme Court, Bronx County (Index No. 350130/09), based on the burns. Fuld served process on Anlovi via the Secretary of State, which on March 10, 2009 attempted by mail to notify Anlovi.

By letter dated April 7, 2009 (Moving Exh. K) Fuld notified the addressees that he had commenced suit, had not yet received an answer "from you or your liability insurance carrier," and would be forced to move for a default judgment. By notice of motion dated April 17, 2009, the Olehs moved for a default judgment against Anlovi. By letter of the same date (Moving Exh. K), Fuld notified the addressees of the default judgment motion. By letter dated June 9, 2009 (Moving Exh. K) Fuld forwarded a copy of a May 19, 2009 decision addressing the motion for a default judgment; noted that he still had not received an answer "from you or your liability insurance carrier"; and notified the addressees that unless plaintiff heard from them, he would be forced to move (again) for a default judgment.

All of the certified letters were returned as undeliverable; for reasons that are not clear, the subject mail simply did not get through to Davis. He did, however, receive notice, on August 28, 2009, of an Order to Show cause seeking to attach Anlovi's bank account. The Order to Show Cause somehow led to Fuld's learning, on or shortly before October 2, 2009, that Castlepoint had insured Anlovi. On that date Fuld notified Castlepoint of the claims. Castlepoint investigated the claims and on November 9, 2009, disclaimed coverage, alleging late notice.

On or about March 11, 2010 plaintiff commenced the instant action for a declaration that plaintiff is not obligated to defend and/or indemnify Anlovi in the underlying action because Anlovi failed to give plaintiff timely notice of the claim(s).

Discovery is complete, and plaintiff now moves for summary judgment.

Basic Statement of the Law

Generally speaking, and certainly here, an insurer is entitled to notice of a claim "as soon as practicable." The general "rule of thumb" is that notice by the insured within a month or so will be considered timely. Beyond that, notice by an insured is problematic, and more than three or four months would generally be considered untenable. As plaintiff notes, prompt notice "protects the carrier against fraud or collusion; gives the carrier an opportunity to investigate claims while evidence is fresh; allows the carrier to make an early estimate of potential exposure and establish adequate reserves and gives the carrier an opportunity to exercise early control of claims, which aids settlement." Argo Corp. v Greater New York Mut. Ins. Co., 4 NY3d 332, 339 (2005) (citations omitted). As plaintiff also notes, an insurer may disclaim due to late notice

even in the absence of prejudice. Id.; Security Mut. Ins. Co. of New York v Acker-Fitzsimons Corp., 31 NY2d 436, 440 (1972).

Pursuant to Insurance Law § 3420(a)(3) and the policy at issue here, the injured party (as distinct from the insured) may notify the insurer of the claim but must have "acted diligently in attempting to ascertain the identity of the insurer and, thereafter, expeditiously notified the insurer," Tower Ins. Co. of New York v Lin Hsin Long Co., 50 AD3d 305, 308 (1st Dept 2008). "[T]he injured party's reasonable time within which to give notice is measured from when he or she obtained sufficient information to enable him or her to provide notice or from when, through the exercise of due diligence, the injured party should or could have obtained such information. McCabe v St. Paul Fire and Mar. Ins. Co., 25 Misc3d 726, 737 (Sup Ct, Erie County 2009) (emphasis added) (citing Tower).

Here, the issue is whether the Olehs "acted diligently in attempting to ascertain the identity of the insurer." Whether or not they did "is governed not by mere passage of time but by the means available for such notice." Appel v Allstate Ins. Co., 20 AD3d 367 (1st Dept 2005) (finding question of injured party's diligence was issue of fact); see also, Allstate Ins. Co. v Marcone, 29 AD3d 715, 717 (2nd Dept 2006) (diligence is "ordinarily" question of fact); Lauritano v American Fid. Fire Ins. Co., 3 AD2d 564, 568 (1st Dept 1957) ("The passage of time does not itself make delay unreasonable. Promptness is relative and measured by circumstance.").

Tower is worth quoting at length because it is particularly instructive as to whether Fuld and the Olehs can be found, as a matter of law, to have , or not have, "acted diligently" in ascertaining plaintiff as Anlovi's insurer.

> [N]o triable issue of fact exists regarding the adequacy of the efforts of [the injured party's] counsel to ascertain the identity of plaintiff and notify it of the accident. An injured party ... has an independent right to notify an insurance carrier of an accident (see Insurance Law § 3420 [a] [3]). However, "the injured party is required, in order to rely upon that provision, to demonstrate that he or she acted diligently in attempting to ascertain the identity of the insurer, and thereafter expeditiously notified the insurer" (Steinberg v Hermitage Ins. Co., 26 AD3d 426, 428 [2006]; see also Lauritano v American Fid. Fire Ins. Co., 3 AD2d 564, 568 [1957], affd 4 NY2d 1028 [1958] ["When the injured party has pursued his [or her] rights with as much diligence as was reasonably possible the statute shifts the risk of the insured's delay to the compensated risk-taker who can initially accept or reject those for whom it will bear such risks" (internal quotation marks omitted)]). Stated differently, "where the injured person proceeds diligently in ascertaining coverage and in giving notice, he [or she] is not vicariously charged with any delay by the assured" (Jenkins v Burgos, 99 AD2d 217, 221 [1984]; see National Grange Mut. Ins. Co. v Diaz, 111 AD2d 700, 701 [1985]).

* * *

> With regard to the issue of reasonable diligence, shortly after the accident, [the injured party's] counsel made inquiries with both the Westchester County Department of Health and the [State Liquor Authority], seeking the name and address of the licensee of the premises where the accident occurred; no request for information regarding the insurer of the licensee was requested from these agencies or anyone else. The plain language of the requests shows that [the injured party's] counsel was seeking to ascertain the identity of the licensee of the premises, not the licensee's insurer, and thus these requests do not evince reasonable diligence by [the injured party's] counsel in seeking to identify plaintiff. For the same reasons, the mere request for a copy of the police report regarding the accident generated by the New Rochelle Police Department does not evince reasonable diligence.
>
> Even more importantly, however, [the injured party's] counsel's letter to the insured simply "suggest[ed]" that the insured forward the letter to its insurance carrier. Counsel's subsequent letter stated only that "a prompt response from [the insured's] insurance company would be appreciated." Neither letter is sufficient to raise a triable issue of fact regarding whether [the injured party] exercised reasonable diligence. Indeed, the undisputed fact that [the injured party's] counsel never even requested from the insured the name of its insurance carrier (nor undertook additional efforts to identify the carrier) compels the conclusion that [the injured party] did not exercise reasonable diligence.
>
> In sum, Supreme Court erred in denying plaintiff's motion because no triable issue of fact exists regarding whether the insured or the injured party provided timely notice of the accident to plaintiff.

Also worth quoting at length, because of certain similarities to the instant case, but also because it directed summary judgment in favor of the injured party, is McCabe v St. Paul Fire & Mar. Ins. Co., 25 Misc3d 726, 737-739 (Sup Ct, Erie County 2009) (Patrick H. NeMoyer, J.):

> It is well established that when an insured fails to give an insurer timely notice of an occurrence, the injured party has the independent right to provide such notice, thereby preserving the injured party's right to proceed directly against the insurer on the basis of any eventual unsatisfied judgment against the insured (see Insurance Law § 3420 [a] [3]; Lauritano v American Fid. Fire Ins. Co., 3 AD2d 564, 567-568 [1st Dept 1957], affd 4 NY2d 1028 [1958]; Allstate Ins. Co. v Marcone, 29 AD3d 715, 717 [2d Dept 2006]; Potter v North Country Ins. Co., 8 AD3d 1002 [4th Dept 2004]; Wraight, 234 AD2d at 917). By the combined effect of Insurance Law § 3420 (a) (3) and (4), notice given on behalf of the injured

person is tantamount to notice given on behalf of the insured, and any delay by the former in giving notice within the time prescribed in the policy "shall not invalidate any claim made by the insured . . . or any other claimant if it shall be shown not to have been reasonably possible to give such notice within the prescribed time and [further shown] that notice was given as soon as was reasonably possible." (Insurance Law § 3420 [a] [4].) Notice given by an injured party "is not to be judged by the same standards, in terms of time, as govern notice by the insured, since what is reasonably possible for the insured may not be reasonably practical for the injured person" (Jenkins v Burgos, 99 AD2d 217, 221 [1st Dept 1984]; see Allstate Ins. Co., 29 AD3d at 717). Thus, the injured party's reasonable time within which to give notice is measured from when he or she obtained sufficient information to enable him or her to provide notice or from when, through the exercise of due diligence, the injured party should or could have obtained such information (see generally Tower Ins. Co. of N.Y. v Lin Hsin Long Co., 50 AD3d 305, 308-309 [1st Dept 2008]; American Home Assur. Co. v State Farm Mut. Auto. Ins. Co., 277 AD2d 409, 410 [2d Dept 2000]; see also GA Ins. Co. of N.Y. v Simmes, 270 AD2d 664, 666-667 [3d Dept 2000] [issue is "(e)xactly when (the injured party's) attorney became aware that plaintiff was (the tortfeasor's) insurer or—with more diligence—should have known of plaintiff's status"]; Jenkins v Burgos, 99 AD2d 217, 221 [1984] ["where the injured person proceeds diligently in ascertaining coverage and in giving notice, he is not vicariously charged with any delay by the (in)sured"]; Allstate Ins. Co. v Moon, 89 AD2d 804, 805 [4th Dept 1982] [issue is whether injured party gave notice "as soon as reasonably possible in light of the circumstances after insurance coverage was known or should have been known" (emphasis added)]). The injured party has the burden of proving that he or she, or counsel, acted diligently in attempting to ascertain the identity of the insurer and thereafter expeditiously notified the insurer (see American Home Assur. Co., 277 AD2d at 410).

Here, as a matter of law, plaintiffs acted diligently in an attempt to garner the relevant insurance information from Fretz [i.e., the insured]. Thus, as a matter of law, plaintiffs did not unduly or unreasonably delay in reporting the claim to St. Paul (see American Continental Props. v National Union Fire Ins. Co. of Pittsburgh, 200 AD2d 443, 446 [1st Dept 1994]). Plaintiffs reported the making of the claim to St. Paul on June 22, 2007, the very day on which they were informed of St. Paul's identity as Fretz' malpractice insurer. The period of delay to be examined with reference to plaintiffs' asserted diligent efforts is the period from March 15, 2007, the end of the 60-day extension period, until June 22, 2007, when notice was given to St. Paul. During that period alone, more particularly on March 26, April 9, April 24, and May 8, 2007, plaintiffs' then-attorney Doyle sent four certified letters to Fretz, repeatedly emphasizing the importance of notice being given immediately to his malpractice insurance carrier and pleading with

> Fretz to reveal the name of such carrier so that plaintiffs could exercise their independent right to give such notice. Those letters were in addition to an unspecified number of telephone calls made for the same purpose. In each instance, the mentally incapacitated Fretz failed to respond to the letter or telephone call. Doyle was reduced to asking this court for an order compelling Fretz to disclose the identity of his carrier, and only then were plaintiffs made aware of that identity. Those various attempts by Doyle were a follow-up to his earliest certified letter of March 2, 2007, in which Doyle likewise sought to have Fretz provide him with the identity of his carrier and place that carrier on notice of the malpractice claim. That plaintiffs first undertook and were thwarted in those efforts to discover the identity of the insurer before March 15, 2007, at a time when it would have been possible for them to comply with the requirements of the policy, demonstrates their due diligence as a matter of law.

Obviously, the instant case resembles Tower (in which the court granted summary judgment for the insurer) more than it resembles McCabe (in which the court granted summary judgment for the injured party). However, the case of which this Court is aware that the instant case most resembles is Spentrev Realty Corp. v United Natl. Specialty Ins. Co., 28 Misc 3d 1211(A) (Sup Ct, Kings County 2010) (Martin Schneier, J.), 90 AD3d 636 (2d Dept 2011) ("pertinent inquiry is whether [the injured party] pursued his [sic] rights with 'as much diligence as was reasonably possible'"), which only needs quoting at short length.

> In the case at bar, Martinez [i.e. the injured party] did not make any attempt to independently ascertain the identity of the insurer. In fact, Martinez's pre-action letter to Spentrev only requested that Spentrev notify its insurer. It did not request Spentrev to notify Martinez of the identity of the insurer. Martinez's diligent pursuit of his personal injury action, while laudable, does not, as demonstrated by [Eveready Ins. Co. v Chavis, 150 AD2d 332 (2d Dept 1989)], satisfy the due diligence requirement for independent notice pursuant to Insurance Law § 3420. Thus, Martinez has failed to raise a triable issue of fact regarding the validity of United's disclaimer.

Application of the Law to the Facts

Fuld's January 27, 2009 letter, like the letters in Tower and Spentrev, simply asked the insured to notify the insurer of the claim, without asking for the identity of the insurer. His April 7 letter noted that he had not received an answer to the lawsuit from the insured or the insurer, again without asking for the identity of the latter. The April 17 letter does not even mention an insurer or insurance. The June 9 letter mentions Anlovi's "liability insurance carrier" but again fails even to ask for its identity.

These letters, stretching over a five-month period, demonstrate that Fuld hoped that insurance existed, and suggest that he hoped that someday, somehow, insurance would compensate his

clients for their injuries. They also demonstrate that by the spring, or certainly by the summer, of 2009, Fuld must have known that Anlovi was not going to respond to the lawsuit, or disclose, voluntarily or involuntarily, the identity of its insurer. What they do not demonstrate is any "diligence" in attempting to ascertain the identity of Anlovi's insurer; indeed, they do not demonstrate any independent effort at all to ascertain the insurer's identity.

In Tower, plaintiff's counsel contacted a state (SLA) and a municipal (DOH) agency seeking to learn the identity of the licensee of the subject premises, but failed to ask for the identity of the licensee's insurer. Here, plaintiff's counsel states (Affirm. ¶ 3(o)) that he "checked with the NYC Department of Buildings, the NYC Division of Housing and Community Renewal and the Department of State and they confirmed no database or index [exists that] would reveal the identity of a liability carrier [of] a residential building." Notably, he fails to indicate when he "checked"; for all that appears, he may have checked in response to the instant motion. There is no indication that he even directed his clients to ask around the building to see if anyone else, perhaps as the result of some prior injury and/or lawsuit, knew the insurer's identity. There is no indication that he attempted to obtain any insurance information from Taylor, or from any of Taylor's contacts (such as Davis). In sum, from late January at least through until in or about late September (when he seems to have discovered Castlepoint's identity fortuitously), an eight-month period, he did nothing. Some effort might create an issue of fact; no effort presents an issue of law.

Conclusion

As Anlovi never notified Castlepoint of the underlying claims, and as the Olehs did not act diligently in notifying Castlepoint of same, plaintiff's motion for summary judgment is granted, and the clerk is hereby directed to enter judgment in favor of plaintiff and against defendant declaring that plaintiff is not obligated to defend and/or indemnify Anlovi in the underlying litigation (Oleh v Anlovi, Supreme Court, Bronx County, Index No. 350130/09).

Dated: April 16, 2013

Arthur F. Engoron, *J.S.C.*