

**Castlepoint Ins. Co. v Borinquen Court Hous. Dev.  
Fund Corp.**

2014 NY Slip Op 31119(U)

April 21, 2014

Supreme Court, New York County

Docket Number: 650022/12

Judge: Joan A. Madden

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 11

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CASTLEPOINT INSURANCE COMPANY,

Plaintiff,

Index No. 650022/12

-against-

BORINQUEN COURT HOUSING DEVELOPMENT FUND  
CORPORATION, FOXY MANAGEMENT, LTD., and  
ZAIDA AYALA,

Defendants.

-----X  
SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 11

-----X  
CASTLEPOINT INSURANCE COMPANY,

Plaintiff,

Index No. 154901/12

-against-

FOXY MANAGEMENT LTD. and ZAIDA AYALA,

Defendants.

-----X

**Joan A. Madden, J.:**

Plaintiff Castlepoint Insurance Company ("Castlepoint") commenced these two separate declaratory judgment actions (*Castlepoint Insurance Company v Borinquen Court Housing Development Fund Corporation*, Index No. 650022/12) [Action No. 1], and *Castlepoint Insurance Company v Foxy Management Ltd.*, Index No. 154901/12) [Action No. 2]), seeking declarations that it is not obligated to defend and indemnify its insureds Borinquen Court Housing Development Fund Corporation ("Borinquen") and Foxy

Management Ltd. ("Foxy"), in two underlying actions entitled *Ayala v Borniquen [sic] Court Housing Development Fund Corporation* (Index No. 303709/10, Supreme Court, Bronx County) (the "underlying *Borinquen* action"), and *Ayala v Foxy Management Ltd.* (Index No. 303397/12, Supreme Court, Bronx County) (the "underlying *Foxy* action") (collectively, the "underlying actions"). In Action No. 1, Castlepoint moves, pursuant to CPLR 602(a), to consolidate Actions Nos. 1 and Action No. 2, and pursuant to CPLR 3212, for summary judgment declaring that it has no coverage obligation to Ayala, and no duty to defend or indemnify Foxy. In Action No. 2, defendant Foxy moves for summary judgment declaring that Castlepoint is obligated to provide it with a defense and indemnification in the underlying *Foxy* action.

The underlying actions arise out of an accident that occurred on May 19, 2009, when defendant Zaida Ayala alleges she tripped and fell on the sidewalk in front of the building located at 286 East 138<sup>th</sup> Street, Bronx, New York (the "premises"), which is owned by Borinquen and managed by Foxy. At the time of the accident, Foxy was insured by Castlepoint under a commercial lines insurance policy, with an Extension of Named Insured endorsement naming Borinquen as a named insured.

Castlepoint first received notice of the accident on June 9, 2010, when Foxy's insurance broker, NFP Property and Casualty,

forwarded a copy of the summons and complaint in the *Borinquen* action, and a general liability notice of claim/occurrence dated June 7, 2010. The *Borinquen* action did not name Foxy as a defendant; Ayala commenced the separate action against Foxy in or about April 2012.

Castlepoint assigned a claims examiner to the claim, and hired Northern Intelligence Agency, Inc. ("Northern") to conduct a investigation. On June 18, 2010, Northern's investigator, Miguel Velazquez, met with the building's superintendent, Rafael Algarin and porter, Luis Izquierdo.<sup>1</sup> During the meeting, Velasquez recorded in his own handwriting a statement given by Izquierdo. The statement was not sworn, but Izquierdo signed and dated it June 18, 2010. The statement provides that "sometime in May 2009" between 9:30 and 10:00 a.m., Izquierdo witnessed an "elderly lady" fall in front of the premises; he "went to her but did not help her to get up"; he saw an ambulance arrive and the "ambulance attendants helping her up and taking her to the ambulance"; he did not know why she fell, or the nature of her injuries.

In a letter dated July 6, 2010, addressed to *Borinquen* c/o Foxy, Castlepoint disclaimed coverage to *Borinquen* on the ground that *Borinquen* breached the policy conditions requiring

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<sup>1</sup>It is unclear whether Izquierdo was employed by Foxy or *Borinquen*.

notification of an occurrence "as soon as practicable." The letter explained that an investigation indicated that Borinquen was "aware of the subject incident when it occurred on May 19, 2009," and "[w]e were not notified of this matter until June 7, 2010." The letter also disclaimed coverage "directly to claimant," Ayala, based on her failure to comply with the policy notice provisions.

In an email dated May 11, 2012, Castlepoint received notice of the underlying *Foxy* action. By letter dated June 11, 2012, Castlepoint disclaimed coverage to *Foxy*, on the identical ground of untimely notice, based on an investigation indicating *Foxy* was aware of the incident when it occurred on May 19, 2009, but Castlepoint was not notified until June 7, 2010.

#### **Procedural History**

In October 2010, Castlepoint<sup>2</sup> commenced a declaratory action against Borinquen and Ayala (the "Prior Action"). When Castlepoint moved for default judgments, Borinquen defaulted on the motion, but Ayala appeared and raised an issue as to whether she was properly served. Castlepoint attempted to withdraw the motion as against Ayala and accept her answer, but Ayala would not agree. By notice dated January 10, 2012, Castlepoint

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<sup>2</sup>Castlepoint states that the action was commenced by "Tower," without further elaboration. The court will use the name Castlepoint.

discontinued the Prior Action as against Ayala. On January 23, 2012, the Hon. Carol Edmead issued an order granting on default Castlepoint's motion for a default judgment against Borinquen, and declaring that Castlepoint was not obligated to defend or indemnify Borinquen in the underlying *Borinquen* action. In view of that declaration, the insurance coverage issue has been finally determined against Borinquen; and Borinquen is not involved in the present motions.

On January 24, 2012, Castlepoint commenced Action No. 1 against Borinquen, Foxy and Ayala, seeking a declaratory judgment that it is not obligated to defend or indemnify those parties in the underlying actions. Since a declaratory judgment had just been granted against Borinquen on default, and Foxy was not a party to the underlying *Borinquen* action, Castlepoint discontinued Action No. 1 as against Borinquen and Foxy. Ayala is the only remaining defendant in Action No. 1.

On July 25, 2012, Castlepoint commenced Action No. 2 against Foxy and Ayala, in response to Ayala's commencement of a separate personal injury action against Foxy in 2012 (the underlying *Foxy* action). Both Foxy and Ayala appeared in Action No. 2.

Castlepoint is now moving to consolidate Actions Nos. 1 and 2, and for summary judgment in both actions, declaring that it is not obligated to defend or indemnify Foxy in the underlying *Foxy*

action. Ayala is not moving for any relief, but submits papers in support of Foxy's motion for summary judgment on the insurance coverage issue.<sup>3</sup> Ayala, however, opposes Foxy's argument that it has no liability to her in the underlying Foxy action.

### **Discussion**

#### **A. Consolidation**

Foxy does not oppose the portion of Castlepoint's motion for consolidation. While the first paragraph of the affirmation of Ayala's attorney states that Ayala opposes Castlepoint's motion for consolidation, the attorney never addresses the merits of the opposition. In any event, consolidation is appropriate.

"[I]t is well settled that there is a preference for consolidation in the interests of judicial economy where there are common questions of law and fact, unless the party opposing the motion demonstrates that consolidation will prejudice a substantial right." *Geneva Temps, Inc. v New World Communities, Inc.*, 24 AD3d 332, 334 (1st Dept 2005); *see also Badillo v 400 E. 51st St. Realty LLC*, 74 AD3d 619, 620 (1st Dept 2010) (preference for consolidation in the absence of prejudice or undue delay).

Here, it is clear that common questions of law and fact exist, and neither party has argued otherwise, much less shown or

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<sup>3</sup>As the plaintiff in the underlying actions, Ayala presumably expects to benefit from any insurance coverage provided by Castlepoint to Foxy.

set forth any substantial prejudice that would arise from consolidation. Therefore, the portion of Castlepoint's motion to consolidate the two actions, is granted.

### **B. Ayala's Preliminary Arguments**

Ayala opposes Castlepoint's motion with three preliminary arguments: the action is barred by CPLR 3217©; Castlepoint has deliberately brought "piecemeal litigation" to "avoid its obligations under the policy"; and Castlepoint "disregarded the joinder rules established by the CPLR," by failing to name Foxy in Action No. 1. Ayala asserts "[t]he only conceivable reason for the multiplicity of lawsuits initiated by [Castlepoint] is to foster confusion and prejudice." *Id.*, ¶ 30.

CPLR 3217 (c) states:

"Effect of discontinuance. Unless otherwise stated in the notice, stipulation or order of discontinuance, the discontinuance is without prejudice, except that a discontinuance by means of notice operates as an adjudication on the merits if the party has once before discontinued by any method an action based on or including the same cause of action in a court of any state or the United States."

"The purpose of CPLR 3217(c) 'is to curb the use of the discontinuance device as a means of harassment and a source of unnecessary repetitive litigation' [citation omitted]."

*Tororello v Carlin*, 162 AD2d 291, 292 (1st Dept 1990).

Dismissal under CPLR 3217© is not warranted. Ayala fails to make a sufficient showing that Castlepoint has used the device of discontinuance to harass her. The Prior Action was

discontinued against Ayala alone when she objected that she was not properly served and would not agree to Castlepoint's withdrawing its motion for a default judgment against her. Action No. 1 was discontinued against Borniquen and Foxy, since a declaratory judgment had just been granted against Borinquen in the Prior Action, and Foxy was not a party to the underlying *Borinquen* action. Notably, Castlepoint alone cannot be faulted for bringing a "multiplicity" of actions, as Ayala is responsible for commencing the first underlying action solely against Borinquen in 2010, and not bringing the separate action naming Foxy as a defendant until two years later in 2012.

Nor has Castlepoint failed to join any necessary party to either of the remaining actions. Foxy has been properly named as a party in Action No. 2, which is now being consolidated with Action No. 1.

### **C. Summary Judgment**

Castlepoint and Foxy are each moving for summary judgment. Summary judgment is a "drastic remedy." *Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 (2012). "[T]he 'proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case.'" *Meridian Mgt. Corp. v Cristi Cleaning Serv. Corp.*, 70 AD3d 508, 510 (1st

Dept 2010), quoting *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985). Once the proponent of the motion meets this requirement, "the burden then shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of a material issue of fact that precludes summary judgment and requires a trial." *Ostrov v Rozbruch*, 91 AD3d 147, 152 (1st Dept 2012), citing *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 (1986). 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 (1978); *Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224 (1st Dept 2002).

Castlepoint disclaimed coverage of Foxy based on Foxy's failure to notify Castlepoint within a reasonable time of Foxy's knowledge of the accident. Relying on the statement Izquierdo gave to Castlepoint's investigator, Castlepoint alleges that Izquierdo, the porter for the building and "Foxy's employee," witnessed the accident on the day it occurred, May 19, 2009; as a result, Foxy had "immediate knowledge" of the occurrence, but Castlepoint was not notified until June 2010 after Borinquen received the summons and complaint in the *Borinquen* underlying action.

The Castlepoint policy requires its insureds to "see to it that we are notified as soon as practicable of an 'occurrence' or an offense which may result in a claim." Policy, Notice of

Motion, exhibit L, at Commercial General Liability Coverage Form, Section IV - Commercial General Liability Conditions, at 10 of 16. "It is well settled that compliance with an insurance policy notice provision operates as a condition precedent to coverage." *Paramount Ins. Co. v Rosedale Gardens*, 293 AD2d 235, 239 (1st Dept 2002). "Where an insurance policy mandates that notice of an occurrence be given to the insurer 'as soon as practicable,' the insured's failure to do so vitiates the insurance contract." *Tower Ins. of N.Y. v Amsterdam Apts., LLC*, 82 AD3d 465, 466 (1st Dept 2011).

Under certain circumstances, a delay in giving timely notice may be excused, such as where the insured can show that it lacked knowledge that the accident occurred, or had a reasonable, good faith belief in non-liability. See *White by White v. City of New York*, 81 NY2d 955 (1993); *SSBSS Realty Corp. V. Public Service Mutual Insurance Co.*, 253 AD2d 583 (1<sup>st</sup> Dept 1998). The insured bears the burden of showing the reasonableness of its excuse, given all the circumstances. *Rondale Bldg. Corp. v Nationwide Prop. & Cas. Ins. Co.*, 1 AD3d 584 (2d Dept 2003).

Specifically with respect to the excuse of a good faith belief in non-liability, the issue is "not whether the insured believes [it] will ultimately be found liable for the injury, but whether [it] has a reasonable basis for a belief that no claim will be asserted against [it]." *SSBSS Realty Corp. V. Public*

*Service Mutual Insurance Co.*, 253 AD2d at 584; accord *Tower Insurance Co. v. Classon Heights, LLC*, 82 AD3d 632 (1<sup>st</sup> Dept 2011). Some of the factors usually associated with a reasonable belief in non-liability, are where there was no indication of injury at the time of the accident, or no indication of a defect at the insured's premises. See *SSBSS Realty Corp. v. Public Service Mutual Insurance Co.*, 253 AD2d at 585.

Here, two excuses are offered for Foxy's delay in notifying Castlepoint of Ayala's accident. First, Foxy maintains it had a good faith belief it would not be held liable since it was merely the managing agent of the building, without exclusive control over the property, nor any ownership interest, as such had no reason to believe the occurrence could possibly result in a claim against it. Foxy asserts it had no "ability to control or avoid the accident," as the property was under the "strict control of HUD and the Board of Directors of Borinquen Court," and even Ayala did not believe Foxy was liable until she had "difficulty collecting against the property owner, Borinquen Court."

As the second excuse, Ayala maintains that neither Borinquen nor Foxy had knowledge of the occurrence before Ayala commenced the underlying action against Borinquen in 2010. Relying on the November 11, 2011 affidavit Izquierdo submitted in connection with the Prior Action, Ayala asserts that Izquierdo "had no reason to report anything to anybody," since the "woman in

question said that she was 'fine' when he spoke to her and she was able to continue walking," and he "did not help her to get medical assistance." Ayala also argues that notice to the porter Izquierdo does not constitute notice to his employer.

Even assuming without deciding that Foxy, through Izquierdo, had knowledge that a woman fell on the sidewalk in front of the premises, the events as described in Izquierdo's unsworn statement to Castlepoint's investigator sharply conflict with the events as described in his sworn affidavit.<sup>4</sup> Specifically, the statement to the investigator provides that sometime in May 2009 between 9:30 and 10:00 a.m., Izquierdo "saw 2 elderly ladies walking on the sidewalk in front of 285 E. 138<sup>th</sup> Street. They were walking and talking towards 3<sup>rd</sup> Avenue. I suddenly saw one of these ladies fall forward on the sidewalk by one of the trees. I went to her but I didn't help her to get up. I saw an ambulance come to the scene. I saw the attendants helping her up and taking her to the ambulance. The lady was Spanish."

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<sup>4</sup>As noted above, the record is unclear as to whether Izquierdo was employed by Foxy or Borinquen. In his affidavit, Izquierdo merely states "I am a porter employed at the Borinquen Court Building located at 285 East 138<sup>th</sup> Street, Bronx, New York." Izquierdo's statement as recorded by Velasquez states: "I work for Foxy Management as a porter for about 2 years. I am presently assigned to work at the Borinquen Court Building located at 285 East 138<sup>th</sup> Street, Bronx, NY 10454. This building is managed by Foxy Management and it is a senior citizen residential building."

In direct contradiction to the foregoing, Izquierdo's sworn affidavit states that he saw "two elderly women walking and observed that one of the women had fallen," he went over and "asked her if she was alright [sic]," and she "replied that she was and continued walking with her companion." His also states that "[l]ater I noticed an ambulance parked down the block from the dumpsters, however, I was not near the ambulance nor did I see anything that occurred there." Izquierdo explains that "[a]pproximately one year later I was visited by an investigator who questioned me about the incident and I responded honestly, to the best of my recollection." He states the investigator "drafted a statement in his handwriting," he "read it to me and asked me to sign, which I did. I did not read the statement myself." He objects that Castlepoint's allegation that he "assisted" Ayala in "getting emergency medical assistance immediately thereafter," is "absolutely false," and states that "[i]n fact the woman that I saw told me that she was fine and did not need any assistance; she got up and walked along."

In view of Izquierdo's conflicting statements, neither Castlepoint nor Foxy is entitled to summary judgement on the record as presented. At best, Izquierdo's affidavit and statement to the investigator raise issues of material fact as to when Foxy acquired actual knowledge of the accident, and whether Foxy had a reasonable belief of non-liability. Notably, it is not

even clear whether the woman Izquierdo saw fall, was actually Ayala, since he merely described her as "elderly" and "Spanish," and the subject premises is a "senior citizen residential building." Moreover, Izquierdo's statement does not contain any information as to whether he was aware of what, if anything, caused the woman to fall. Thus, at this point, the record is devoid of any evidence of a defect in the sidewalk, so as to provide a basis for a concern at the time of the accident with respect to Foxy's liability.

Under these circumstances, the parties should have an opportunity to address these issues and, if possible, resolve the conflicts in Izquierdo's statements by deposing him, and deposing Ayala, the investigator Velasquez, and the superintendent Algarin, along with obtaining relevant documents, including EMS or hospital records showing whether Ayala was taken from the scene of the accident by ambulance. Significantly, even though Ayala is a party to these actions, and supports Foxy's motion for summary judgment, she has not submitted an affidavit as to the events of May 19, 2009.

Thus, since the parties have not yet engaged in any discovery, summary judgment is denied as premature. . However, once discovery is complete, the parties may renew their respective motions for summary judgment, if warranted at that time.

Accordingly, it is

ORDERED that the portion of the motion by plaintiff Castlepoint Insurance Company to consolidate the actions *Castlepoint Insurance Company v Borinquen Court Housing Development Fund Corporation*, Index No. 650022/12, and *Castlepoint Insurance Company v Foxy Management Ltd*, Index No. 154901/12, is granted, and the consolidated action shall bear the following caption, under index number 650022/12:

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 11

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CASTLEPOINT INSURANCE COMPANY,

Plaintiff,

Index No. 650022/12

-against-

BORINQUEN COURT HOUSING DEVELOPMENT FUND  
CORPORATION, FOXY MANAGEMENT, and  
ZAIDA AYALA,

Defendants.

-----X  
and it is further

ORDERED that the pleadings in the actions consolidated shall stand as the pleadings in the consolidated action; and it is further

ORDERED that plaintiff shall forthwith serve a copy of this order with notice of entry on the Clerk of this Court, who shall mark the Court's records to reflect the consolidation; and it is further

ORDERED that plaintiff shall also forthwith serve a copy of this order with notice of entry on the Clerk of the Trial Support Office (Room 158) who is directed to mark the Court's records to reflect the consolidation; and it is further

ORDERED that the motion by plaintiff Castlepoint Insurance Company for summary judgment is denied; and it is further

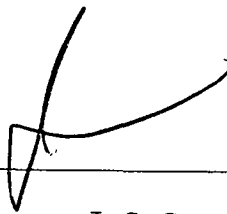
ORDERED that the motion by defendant Foxy Management Ltd. for summary judgment is denied; and it is further

ORDERED that the herein denials of summary judgment are without prejudice to renewal upon the completion of discovery; and it is further

ORDERED that the parties are directed to appear for a preliminary conference on May 29, 2014 at 11:00 a.m., in Part 11, Room 351, 60 Centre Street.

DATED: April 21, 2014

ENTER:



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J.S.C.  
**HON. JOAN A. MADDEN**  
J.S.C.