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At an IAS Term, Part 34 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse thereof at 360 Adams St., Brooklyn, New York on the 8th day of August, 2017.

P R E S E N T:

HON. LARA J. GENOVESI,
J.S.C.

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GEORGE DRITSANOS,

Plaintiff,

Index No.: 507466/2016

DECISION & ORDER

-against-

MT. HAWLEY INSURANCE COMPANY,

Defendant.

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Recitation, as required by CPLR §2219(a), of the papers considered in the review of this motion:

| | Papers Numbered |
|---|---|
| Notice of Motion/Cross Motion/Order to Show Cause and Affidavits (Affirmations) Annexed | 1, 2A - 2B |
| Opposing/Reply Affidavits (Affirmations) | 5 |
| Other Papers: Memorandum of Law, Statement of Material Facts | 3, 4 |

***Introduction***

Plaintiff, George Dritsanos, moves by notice of motion, sequence number one: (1) pursuant to CPLR § 3212 for an order and judgment on the first cause of action for $75,850.00, with interest from December 12, 2014; and (2) pursuant to CPLR § 3001 and common law principals of equity, for a declaratory judgment on the second cause of action, directing and declaring that defendant is required to extend coverage to defend

and indemnify the insured pursuant to CGL policy number MPB0503355 for the July 18, 2008 loss. Defendant Mt. Hawley Insurance Company, cross-moves pursuant to CPLR § 3212 for an order granting summary judgment and pursuant to CPLR § 3001 for an order declaring that Mt. Hawley's disclaimer of coverage is valid.

***Background and Procedural History***

Plaintiff sustained personal injuries on July 18, 2008, when he was allegedly attacked by Early Robinson, Jr. and stabbed approximately four times in the stomach. The attack occurred at club "Level", which was owned and operated by Ambela Corp., at an event hosted by WQHT, otherwise known and doing business as "Hot 97 Radio". Plaintiff commenced an action for personal injuries against Robinson, Ambela Corp. and Hot 97 Radio by filing a Summons and Verified Complaint on December 9, 2008, index number 32900/2008, for negligent security at the event which allowed plaintiff to be attacked. Litigation ensued and a judgment was entered against Robinson (the alleged assailant) and Ambela Corp. (the owner of Club Level) on December 12, 2014, in favor of plaintiff in the amount of $75,800.00 for past and future pain and suffering.[1]

Ambela was insured under a contract of commercial general liability insurance underwritten by defendant Mt. Hawley Insurance Co. (Mt. Hawley) for the period of May

[1] Plaintiff's motion to confirm the arbitration award in the amount of $75,000.00 was granted by the Hon. Donald Kurtz on September 3, 2014. Although a search of the court file reveals no answer by Ambela Corp., plaintiff's motion to confirm was served on counsel for Ambela Corp. The Kings County Clerk was directed to enter judgment against defendants in the amount of $75,000.00, together with interest, costs and attorney's fees. Thereafter a judgment was entered on December 12, 2014. This Court notes that the judgment states that an inquest was held pursuant to CPLR §3215 upon the default of defendants (*see* Notice of Motion [1], Exhibit B).

29, 2008 to December 11, 2008 and designated under policy number MPB0503366 (*see* Plaintiff's Affirmation in Support [1] at ¶ 9; *see also* Statement of Material Facts in Support [4] at ¶ 8). The policy "includes limited bodily injury liability arising out of assault or battery subject to a $500,000 per-occurrence sublimit" (Affidavit of Sheila O'Callaghan [2C] at ¶ 2; *see also* Exhibit H, Policy Declaration, PGL 423 (06/06)).

Section IV of the Commercial General Liability Coverage Form, entitled "Commercial General Liability Conditions", provides:

> 2. Duties In The Event Of Occurrence, Offense, Claim Or Suit
>
> a. You must see to it that we are notified as soon as practicable of an "occurrence" or an offense which may result in a claim. To the extent possible, notice should include:
>
> (1) How, when and where the "occurrence" or offense took place;
>
> (2) the names and addresses of any injured persons and witnesses; and
>
> (3) The nature and location of any injury or damage arising out of the "occurrence" or offense.
>
> b. If a claim is made or "suit" brought against any insured, you must:
>
> (1) Immediately record the specifics of the claim or "suit" and the date received; and
>
> (2) notify us as soon as practicable.
>
> You must see to it that we receive notice of the claim or "suit" as soon as practicable.

(Affidavit of Sheila O'Callaghan [2C], Exhibit H, Commercial General Liability Coverage Form, p 11 of 17).

Plaintiff maintains that Ambela submitted a claim to Mt. Hawley, designated as claim number 00236065 (*see* Notice of Motion [1] at ¶ 9). However, it is unclear when the claim was submitted. Based on the documents provided to this Court, plaintiff served the Summons and Complaint, as well as two Supplemental Summons and Amended Verified Complaints on Ambela.[2] Ambela never served an answer. On April 8, 2009, plaintiff's counsel sent a letter to Ambela, which stated,

> As you are aware, your corporation was served with a Summons and Verified Complaint on February 17, 1009 [*sic*]. Service was complete on February 20, 2009. Copies of the [January 28, 2009] Summons, Verified Complaint and [February 17, 2009] affidavit of service are enclosed.
>
> Your last date to answer was March 9. [*sic*] 2009. No extension of time to answer has ever been requested nor has any answer been served on your behalf.
>
> You are now very seriously in default answering.
>
> If this office does not **ACTUALLY RECEIVE** an answer on your behalf, **WHETHER BY MAIL, FAX OR PERSONAL DELIVERY, NO LATER THAN April 29, 2009,** a motion for judgment by default will be made and, **ONCE SERVED, WILL NOT BE WITHDRAWN UNDER ANY CIRCUMSTANCES – NOT EVEN THE RECIEPT OF AN ANSWER THEREAFTER. A DEFAULT JUDGMENT MAY BE ENFORCEABLE AGAINST YOUR PERSONAL ASSETS, YOU ARE URGED TO SEE TO IT THAT YOUR INSURANCE COMPANY FULLY PROTECTS YOUR RIGHTS!**

[2] A search of the court file indicates that plaintiff's Summons and Verified Complaint in the underlying action was filed on December 9, 2008, and served on Ambela on December 24, 2008 pursuant to CPLR § 306 on the Secretary of State. Thereafter, a Supplemental Summons and Amended Verified Complaint was filed on January 28, 2009, and served on Ambela on February 17, 2009, in the same manner. Another Supplemental Summons and Amended Verified Complaint was filed on May 14, 2009, and served on Ambela on June 9, 2009. This Court notes that a "Second Supplemental Summons and Second Amended Verified Complaint" was filed on October 15, 2010, and was served on Early Robinson by service on a person of suitable age and discretion on November 19, 2010.

(Affidavit of Sheila O'Callaghan [2C], Exhibit I, April 8, 2009 letter to Ambela).

On June 22, 2009, Max J. Pollack, a broker on behalf of Ambela, sent a letter to Mt. Hawley and Ambela.[3] This letter provides,

> On **07/08/2008** at about 12:30pm four individuals about 30yrs old left the premises. There had been no confrontation at any time between them prior to there [*sic*] leaving. About one hour later, one of the individuals returned to the premises alone and was told by a patron in the premises that he was bleeding. At that time the manager summoned an ambulance which arrived at the premises, patched him up and removed him to be taken to the hospital. At no time was he injured on the premises. This must have incurred after he left the premises or incurred outside of same. We never received prior notice of this occurring until we received [the] enclosed summons on **06/08/2009.** if [*sic*] you need any additional information please contact the owner Nick Drosson…"

(Affidavit of Sheila O'Callaghan [2C], Exhibit I, June 22, 2009 letter from Pollack). This correspondence included "*inter alia,* copies of the January 28, 2009 amended complaint in Dritsanos and an affidavit of service thereof upon Ambela" (Affidavit of Sheila O'Callaghan [2C] at ¶ 3; *see also* Exhibit I). It is not clear to this Court who provided Mr. Pollack with the summons and complaint on June 8, 2009.

Mt. Hawley disclaimed coverage against Ambela by letter dated July 1, 2009, based upon the failure to provide "immediate notice" of the occurrence, claim and suit.

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[3] Counsel for defendant refers to Mr. Pollack as a broker on behalf of Ambela. Additionally, in Director O'Callaghan's affidavit, she refers to Mr. Pollack as a "broker on behalf of Ambela" (Affidavit of Sheila O'Callaghan [2C] at ¶ 3). However, plaintiff refers to Mr. Pollack as defendant's broker (*see* Affirmation in Further Support of Motion and In Opposition to Cross-Motion [5] at ¶ 11 ["provided to Defendant by its broker, Max J. Pollack & Sons"]). There is no indicia herein that Mr. Pollack is an agent for Mt. Hawley. In his letter, Mr. Pollack seemingly refers to Ambela when he states, "[w]e never received prior notice of this occurring until we received [the] enclosed summons on **06/08/2009**. if [*sic*] you need any additional information please contact the owner Nick Drosson…" (*id.* at Exhibit I).

According to Sheila O'Callaghan, Claims Director for Mt. Hawley, Mt. Hawley first received notice of the occurrence and the claim on June 24, 2009, when they received the June 22, 2009 letter from Robert Pollack (*see* Affidavit of Sheila O'Callaghan [2C] at ¶¶ 3, 6). Director O'Callaghan further stated that Mt. Hawley never received any written notice directly from plaintiff.

As of May 5, 2016, defendant failed to satisfy the $75,800.00 judgment to plaintiff. Accordingly, on May 6, 2016, plaintiff commenced this direct action against Mt. Hawley by electronically filing a summons and complaint. Issue was joined with the service of an answer on or about June 8, 2016.

***Plaintiff's Contentions***

Plaintiff moves by notice of motion, sequence number one, for summary judgment and declaratory judgment, which states that defendant must enforce the prior judgment of its insured, Ambela. Plaintiff contends that the Insurance Law requires that notice be given "as soon as practicable" and what constitutes a reasonable amount of time is a question of law. Plaintiff avers that, as a matter of law, the mere passage of time does not constitute untimely notice (Notice of Motion [1] at ¶ 26). Plaintiff further contends that the injured party has an independent right to provide notice and cannot be bound by the insured's lack of notice, for what is reasonable for the insured may not be reasonable for the injured party. Plaintiff maintains that plaintiff notified Mt. Hawley of the occurrence by letter from his counsel dated April 8, 2009, which is referenced in defendant's disclaimer letter. Plaintiff further maintains that independent notice was given to Mt.

Hawley through the Supplemental Summons and Amended Verified Complaint when a copy was forwarded to Mt. Hawley on June 22, 2009 by Ambela's broker. Plaintiff contends that this notice was given as soon as practicable because the injured person does not have the same access to insurance information as the insured does, and therefore, should not be held to the same standard.

***Defendant's Contentions***

Defendant, Mt. Hawley, cross-moves, sequence number two, for summary judgment and declaratory judgment which states that Mt. Hawley need not enforce the judgment against its insured, because timely notice of the occurrence was not given. Mt. Hawley maintains that it is uncontested that the insured Ambela was immediately aware of the incident which occurred on July 18, 2008. Mt. Hawley avers that as this is an action pursuant to Insurance Law 3420, plaintiff herein "steps into the shoes" of the insured with respect to the claim. Mt. Hawley contends that notice of the incident wasn't received from Ambela until June 24, 2009, and this 11-month delay in notice is untimely as a matter of law (*see* Memorandum of Law [3] at p 7). It further states that Ambela provided untimely notice of the suit and that Ambela had a duty to "perform a reasonable investigation to determine whether the accident might result in a claim against the insured" (*id.* at p 9).

Mt. Hawley maintains that because plaintiff stands in the shoes of the insured, he bears the burden of providing an excuse for late notice and he failed to meet that burden. Mt. Hawley further avers that plaintiff cannot prove that he satisfied the direct notice

provision of Insurance Law § 3420(a)(3). The letter dated April 8, 2009, was sent by plaintiff's counsel to Ambela Corp; not to Mt. Hawley. It was only provided to Mt. Hawley by the broker on June 24, 2009 when it was attached to the June 22, 2009 letter (*see* Affidavit of Sheila Callaghan [2C], Exhibit I). Mt. Hawley argues that "[w]here an injured party such as [plaintiff] Dritsanos has not actually exercised his right to provide independent notice under the statute, the insurer's disclaimer of coverage on the basis of the insured's late notice is effective against the injured party as well" (Memorandum of Law [3] at p 12).

***Discussion***

"[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 demonstrate absence of any material issues of fact" (*Stonehill Capital Mgmt., LLC v. Bank of the W.,* 28 N.Y.3d 439, 68 N.E.3d 683 [2016], citing *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 501 N.E.2d 572 [1986]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Chiara v. Town of New Castle*, 126 A.D.3d 111, 2 N.Y.S.3d 132 [2 Dept., 2015], citing *Vega v. Restani Const. Corp.,* 18 N.Y.3d 499, 965 N.E.2d 240 [2012]). "A defendant moving for summary judgment dismissing a complaint cannot satisfy its initial burden merely by pointing to gaps in the plaintiff's case" (*Jiann Hwa Fang v. Metropolitan Transp. Auth.,* 148 A.D.3d 791, 48 N.Y.S.3d 758 [2 Dept., 2017], quoting *Lorenzo v. 7201 Owners Corp.,* 133 A.D.3d 641, 20 N.Y.S.3d 123 [2 Dept., 2015]).

"Summary judgment is a drastic remedy that deprives a litigant of his or her day in court, and it 'should only be employed when there is no doubt as to the absence of triable issues' of material fact" (*Bonaventura v. Galpin,* 119 A.D.3d 625, 988 N.Y.S.2d 866 [2 Dept., 2014], citing *Andre v. Pomeroy,* 35 N.Y.2d 361, 320 N.E.2d 853 [1974]). "In determining a motion for summary judgment, the evidence must be viewed in the light most favorable to the nonmoving party" (*Boulos v. Lerner-Harrington,* 124 A.D.3d 709, 2 N.Y.S.3d 526 [2 Dept., 2015], citing *Pearson v. Dix McBride, LLC,* 3 A.D.3d 895, 883 N.Y.S.3d 53 [2 Dept., 2009]). "It is not the function of a court deciding a summary judgment motion to make credibility determinations or findings of fact, but rather to identify material triable issues of fact" (*Vega v. Restani Const. Corp.,* 18 N.Y.3d 499, *supra,* citing *Sillman v. Twentieth Century–Fox Film Corp.,* 3 N.Y.2d 395, 144 N.E.2d 387 [1957] ["Issue-finding, rather than issue-determination, is the key to the procedure"]). "However, bald, conclusory assertions or speculation and [a] shadowy semblance of an issue are insufficient to defeat summary judgment, as are merely conclusory claims (*Stonehill Capital Mgmt., LLC v. Bank of the W.,* 28 N.Y.3d 439, 68 N.E.3d 683 [2016] [internal quotations and citations omitted]).

Once a moving party has made a prima facie showing of its entitlement to summary judgment, the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*see Fairlane Fin. Corp. v. Longspaugh,* 144 A.D.3d 858, 41

N.Y.S.3d 284, citing *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, *supra; see also Hoover v. New Holland N. Am., Inc.*, 23 N.Y.3d 41, 11 N.E.3d 693 [2014]).

CPLR § 3001 provides that "[a] party who has brought a claim for personal injury or wrongful death against another party may maintain a declaratory judgment action directly against the insurer of such other party, as provided in paragraph six of subsection (a) of section three thousand four hundred twenty of the insurance law". Insurance Law §3420(a)(6) provides that,

> if the insurer disclaims liability or denies coverage based upon the failure to provide timely notice, then the injured person or other claimant may maintain an action directly against such insurer, in which the sole question is the insurer's disclaimer or denial based on the failure to provide timely notice, unless within sixty days following such disclaimer or denial, the insured or the insurer: (A) initiates an action to declare the rights of the parties under the insurance policy; and (B) names the injured person or other claimant as a party to the action.

"Insurance Law § 3420(a)(2) provides that if certain conditions are met, an injured party may commence an action to recover an unsatisfied judgment from the insurance carrier for a tortfeasor that becomes a judgment debtor. To recover an unsatisfied judgment pursuant to Insurance Law § 3420(a)(2), the plaintiff must show, inter alia, that he or she acted reasonably "diligently in attempting to ascertain the identity of the insurer [for the tortfeasor], and thereafter expeditiously notified the insurer" of the claim" (*Golebiewski v. Nat'l Union Fire Ins. Co. of Pittsburgh, P.A.*, 101 A.D.3d 1074, 958 N.Y.S.2d 161 [2 Dept., 2012], quoting *Steinberg v. Hermitage Ins. Co.*, 26 A.D.3d 426, 809 N.Y.S.2d 569 [2 Dept., 2006]). "While Insurance Law § 3420(a)(3) provides an injured party with an

independent right to provide an insurance carrier with written notice of an accident, 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 A.D.3d 426, 809 N.Y.S.2d 569 [2 Dept., 2006]).

> "[W]hile an insured's failure to provide notice may justify a disclaimer vis-à-vis the insurer and the insured, it does not serve to cut off the right of an injured claimant to make a claim as against the insurer" (*Becker v. Colonial Coop. Ins. Co.*, 24 A.D.3d 702, 704, 806 N.Y.S.2d 720). As such, the injured person " 'is not to be charged vicariously with the insured's delay' " (*id.* at 704, 806 N.Y.S.2d 720, quoting *Lauritano v. American Fid. Fire Ins. Co.*, 3 A.D.2d 564, 568, 162 N.Y.S.2d 553, *affd.* 4 N.Y.2d 1028, 177 N.Y.S.2d 530, 152 N.E.2d 546). "However, where an injured party fails to exercise the independent right to notify the insurer of the occurrence, a disclaimer issued to an insured for failure to satisfy the notice requirement of the policy will be effective as against the injured party as well" (*Maldonado v. C.L.–M.I. Props., Inc.*, 39 A.D.3d 822, 823, 835 N.Y.S.2d 335; *see Viggiano v. Encompass Ins. Company/Fireman's Ins. Co. of Newark, N.J.*, 6 A.D.3d 695, 775 N.Y.S.2d 533; *see also Tower Ins. Co. of N.Y. v. Alvarado*, 84 A.D.3d 1354, 1355, 923 N.Y.S.2d 717; *Sputnik Rest. Corp. v. United Natl. Ins. Co.*, 62 A.D.3d 689, 690, 878 N.Y.S.2d 428).

(*Konig v. Hermitage Ins. Co.*, 93 A.D.3d 643, 940 N.Y.S.2d 116 [2 Dept., 2012])

In the instant case, the incident occurred on July 18, 2008. Ambela's insurance broker provided notice of the incident to its insurer by letter dated June 22, 2009, approximately 11 months later. Thereafter, defendant Mt. Hawley, disclaimed liability and denied coverage to its insured, Ambela. Mt. Hawley sent a letter to Ambela on July 1, 2009, which stated that "it will neither defend nor indemnify Ambela in this matter"

because Ambela failed to provide notice of the occurrence and the lawsuit "as soon as practicable", in violation of Section IV of its Commercial General Liability Conditions (Affidavit of Sheila O'Callaghan [2C], Exhibit L). As a result, plaintiff commenced a direct action against the insurer pursuant to Insurance Law § 3420(a)(6). This action was commenced on May 6, 2016. This is eight years after the incident occurred on July 18, 2008; seven years after the underling action was commenced on December 9, 2008; and two years after the default judgment was granted on September 3, 2014.

Plaintiff moves herein by motion sequence number one, to declare Mt. Hawley's disclaimer invalid. Mt. Hawley cross moves by motion sequence number two, to declare the disclaimer valid. Ambela's failure to provide timely notice may justify defendant's disclaimer against it, but does not serve to cut off plaintiff's right to make a claim (*see Konig v. Hermitage Ins. Co.*, 93 A.D.3d 643, *supra*). Therefore, the relevant inquiry here is whether plaintiff properly exercised his independent right under Insurance Law § 3420(a)(3) to notify Mt. Hawley "as soon as practicable".

It is clear that "in determining the reasonableness of an injured party's notice, the notice required is measured less rigidly than that required of the insured [ ]" (*Mt. Hawley Ins. Co. v. Seville Elecs. Trading Corp.*, 139 A.D.3d 921, 33 N.Y.S.3d 314 [2 Dept., 2016], *leave to appeal denied*, 29 N.Y.3d 902 [2017], quoting *Malik v. Charter Oak Fire Ins. Co.*, 60 A.D.3d 1013, 877 N.Y.S.2d 114 [2 Dept., 2009]). "The injured person's rights must be judged by the prospects for giving notice that were afforded him [or her], not by those available to the insured" (*Glanz v. New York Marine & Gen. Ins. Co.*, 150

A.D.3d 704, 54 N.Y.S.3d 50 [2 Dept., 2017], quoting *Lauritano v. American Fid. Fire Ins. Co.*, 3 A.D.2d 564, 162 N.Y.S.2d 553 [1 Dept., 1957], *affd.* 4 N.Y.2d 1028, 177 N.Y.S.2d 530 [1958]). "What is reasonably possible for the insured may not be reasonably possible for the person he [or she] has injured. The passage of time does not of itself make delay unreasonable" (*id.* at 52). However, these rules are applicable when determining the reasonableness of plaintiff's notice. They do not apply in circumstances where plaintiff failed entirely to provide independent notice.

Plaintiff argues that he exercised his right to provide independent notice. First, plaintiff maintains that "by Defendant's own admission, Plaintiff notified Defendant of the occurrence on April 8, 2009" (Notice of Motion [1], at ¶ 25). One letter dated April 8, 2009, was provided to this Court. This is a letter from plaintiff's counsel to Ambela indicating that they are in default in the underlying personal injury action (*see* Affidavit of Sheila O'Callaghan [2C], Exhibit I). The letter does not indicate that a copy was provided to Mt. Hawley. Although Mt. Hawley referenced the April 8th letter in its disclaimer letter, Mt. Hawley merely reiterates that the April 8th letter was sent by plaintiff's counsel to Ambela. Director O'Callaghan states that Mt. Hawley received enclosures with Mr. Pollack's June 24, 2009 notice letter (*see* Affidavit of Sheila O'Callaghan [2C] at ¶ 3). These enclosures appear to include a copy of plaintiff's April 8th letter (*see id.* at Exhibit I). There is no indicia that plaintiff ever sent this letter directly to Mt. Hawley. Based on the foregoing, plaintiff's letter dated April 8, 2009, does not constitute independent notice to the insurer (*see generally, Konig v. Hermitage*

*Ins. Co.,* 93 A.D.3d 643, *supra* [where "the insured's insurance agent faxed a copy of the plaintiff's default judgment motion" to the insurer"]).

Plaintiff further argues that he provided Mt. Hawley with independent notice by virtue of its Supplemental Summons and Amended Verified Complaint. However, plaintiff concedes that he never directly provided this summons and complaint to Mt. Hawley. "It is the Plaintiff's position that it does not matter how the independent notice… was delivered to Defendant. What is important is that Defendant received written independent notice of the claim from the Plaintiff in a timely fashion…" (Affirmation in Further Support of Motion and In Opposition to Cross-Motion [5] at ¶ 9). Plaintiff contends that Mt. Hawley "splits hairs as to what constitutes actually providing notice" in its argument that a copy of this summons and complaint was never provided directly from plaintiff to Mt. Hawley (*id.* at ¶ 12). Rather, it was provided when a copy was forwarded to Mt. Hawley on June 22, 2009 by Ambela's insurance broker.

In support of this argument, plaintiff attempts to distinguish the case law provided by Mt. Hawley.[4] Although counsel is correct that these cases do not specify how an injured party's notice must be delivered to the insurer, he fails to provide any authority to support his proposition that plaintiff's summons and complaint can constitute

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[4] *See generally, Mt. Hawley Ins. Co. v. Abraham Little Neck Dev. Grp., Inc.,* 825 F.Supp.2d 34 [EDNY, 2011] [where the United States District Court did not determine the sufficiency of plaintiff's independent notice because plaintiff failed to address this issue in its Rule 56.1 statement, summary judgment submissions or the complaint]; *Mt. Hawley Ins. Co. v. Seville Electronics Trading Corp,* 139 A.D.3d 921, *supra* [where the injured party failed to raise a triable issue of fact as to whether they acted diligently in attempting to ascertain the identity of the insurer and provided notice expeditiously thereafter]; *Trepel v. Asian Pacific Exp. Corp.,* 16 A.D.3d 405, 791 N.Y.S.2d 161 [2 Dept., 2005] [where the injured party failed to provide any explanation of the delay in ascertaining the identity of the insurer].

independent notice by the injured person, when it is not provided by plaintiff or a representative of plaintiff.

Plaintiff states that Insurance Law § 3420(a)(3), provides that "written notice by or on behalf of the injured person… with particulars sufficient to identify the **insured**, shall be deemed notice to the insurer". Max Pollack, provided a notice letter to Mt. Hawley on June 22, 2009, along with copies of the April 8th letter and plaintiff's supplemental summons and amended complaint. As stated above, Pollack appears to be Ambela's broker. There is no indicia that he is an agent for Mt. Hawley. By providing a copy of the summons and complaint, Pollack, as representative of Ambela, provided notice on behalf of the insured, Ambela. There is no reason to believe that Pollack provided notice on behalf of plaintiff, the injured person. As an initial matter, this letter does not indicate that a copy was forwarded to plaintiff or his counsel. Furthermore, the letter refutes plaintiff's claim that he was even injured on the premises (*see* Affidavit of Sheila O'Callaghan [2C], Exhibit I). It is implausible that Pollack would provide notice on plaintiff's behalf while simultaneously refuting plaintiff's cause of action. Based on the foregoing, there is no evidence that Pollack acted as a representative of plaintiff when he provided notice to Mt. Hawley and forwarded a copy of plaintiff's summons and complaint. Plaintiff failed to meet his burden and demonstrate that he provided independent notice of the claim and preserved his right to direct action. Accordingly, plaintiff's motion for summary judgment and declaratory judgment is denied.

Mt. Hawley cross moves to declare the disclaimer valid. "[W]here an injured party fails to exercise the independent right to notify the insurer of the occurrence, a disclaimer issued to an insured for failure to satisfy the notice requirement of the policy will be effective as against the injured party as well" (*Konig v. Hermitage Ins. Co.*, 93 A.D.3d 643, *supra,* quoting *Maldonado v. C.L.–M.I. Props., Inc.,* 39 A.D.3d 822, *supra*). Here, as the Appellate Division, Second Department stated in *Konig v. Hermitage,* where there is no evidence that the plaintiff independently notified Mt. Hawley of the accident or underlying action, the viability of plaintiff's direct action against Mt. Hawley hinges upon the validity of Mt. Hawley's disclaimer to the insured, Ambela, "based upon the insured's alleged failure to give timely notice of the occurrence and/or of the underlying action (93 A.D.3d 643, *supra*).

Here, Mt. Hawley met their burden and demonstrated that Ambela failed to provide notice of the occurrence as soon as practicable. Mt. Hawley provided the affidavit of Director O'Callaghan who stated that Mt. Hawley never received direct notice of the incident or the lawsuit from plaintiff. Director O'Callaghan further states that Mt. Hawley first received notice from Ambela's insurance broker on June 24, 2009, nearly one year after the incident. Mt. Hawley confirmed with the New York State Department of State that service of the Supplemental Summons and Amended Verified Complaint was effected on the Secretary of State on February 17, 2009. A copy was forwarded to Ambela but returned by the Post Office as "attempted unknown / not known" (Affidavit of Sheila O'Callaghan [2C], Exhibits J & K). Ambela's failure to

keep its address current with the Secretary of State demonstrates that Ambela failed to provide notice as soon as practicable (*see Briggs Ave. LLC v. Insurance Corp. of Hannover,* 11 N.Y.3d 377, 870 N.Y.S.2d 841 [2008]*; see also AH Property, LLC v. New Hampshire Ins. Co.,* 95 A.D.3d 1243, 945 N.Y.S.2d 391 [2 Dept., 2012]). This Court notes that the instant policy was issued for the period of May 29, 2008 through December 11, 2008, and therefore, defendant is not required to demonstrate prejudice to meet their burden.[5]

In opposition, plaintiff failed to raise a triable issue of fact. "Since the insured claimed to lack knowledge of the underlying action, it was the plaintiff's burden to demonstrate that the insured actually lacked knowledge of the underlying action" (*Konig v. Hermitage Ins. Co.,* 93 A.D.3d 643, *supra,* citing *White v. City of New York,* 81 N.Y.2d 955, 598 N.Y.S.2d 759 [1993]). Here Pollack stated in his letter that "we" lacked knowledge of the occurrence until "we" received the summons and complaint on June 8, 2009 (Affidavit of Sheila O'Callaghan [2C], Exhibit I). However, plaintiff set forth no arguments and provided no proof to verify this contention. Mr. Pollack further alleged in his letter that plaintiff was injured off the premises. However, plaintiff failed to set forth any argument or provide any proof that Ambela had a good faith belief of nonliability (*see Integrated Const. Servs., Inc. v. Scottsdale Ins. Co.,* 123 A.D.3d 770, 999 N.Y.S.2d

[5] "[T]he amendment to Insurance Law § 3420, which became effective for policies issued on or after January 17, 2009, and which allows an insurer to disclaim coverage only upon a showing of prejudice to it, is not applicable. Thus, the common-law rule that an insurer may disclaim coverage for untimely notice, even without prejudice, applies" (*AH Prop., LLC v. New Hampshire Ins. Co.,* 95 A.D.3d 1243, 945 N.Y.S.2d 391 [2 Dept., 2012], citing *Briggs Ave. LLC v. Insurance Corp. of Hannover,* 11 N.Y.3d 377, 870 N.Y.S.2d 841 [2008]; *see also Ramlochan v. Scottsdale Ins. Co.,* 150 A.D.3d 1166, *supra*).

92 [2 Dept., 2014], quoting *Sec. Mut. Ins. Co. of New York v. Acker-Fitzsimons Corp.*, 31 N.Y.2d 436, 293 N.E.2d 76 [1972]). Accordingly, plaintiff failed to raise a triable issue of fact.

***Conclusion***

Plaintiff's motion for summary judgment and declaratory judgment to declare the disclaimer invalid is denied and Mt. Hawley's cross-motion to declare the disclaimer valid is granted.

The foregoing constitutes the decision and order of this Court.

ENTER:

Hon. Lara J. Genovesi
J.S.C.

Lara J. Genovesi
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