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NEW YORK

Late Notice

Court Grants Summary Judgment in Favor of Insurer Based on Policyholder's Unexcused Delay in Providing Notice

Freeway Company, LLC v. Technology Insurance Company, 2015 N.Y. Misc. LEXIS 1439, 2015 NY Slip Op 30662 (U)

The Supreme Court of New York, New York County granted an insurer's motion for summary judgment and denied the policyholder's competing summary judgment motion in a declaratory judgment action filed by the policyholder against its insurer seeking a declaration that the insurer had a duty to defend and indemnify the policyholder in an underlying case pursuant to the policyholder's Commercial General Liability Insurance Policy ("CGL").

In the underlying case, an employee of a non-party was installing cameras and cables at the premises owned by the insured, when he fell from a ladder on March 30, 2009. The insured's superintendent, testified that he witnessed the accident, that the employee landed on both of his feet and continued working, and that he did not receive medical attention at the premises. He further testified that after the accident, the employee was unable to drive his van, that he complained about his feet to his colleagues, and that he did not return to work the next day, but instead had gone to the hospital. Additionally, the managing member of the insured, testified during that he was made aware of the accident almost immediately, but he did not inform the CGL insurer because he believed that the employee's employer maintained liability insurance, and that insured had nothing to do with the accident.

The employee filed the underlying action against the insured on May 30, 2010, and served the insured with the Summons and Complaint on June 3, 2010, by service on the New York Secretary of State. However, the law firm that was listed as Freeway's agent for service had changed addresses, and the insured had not notified the Secretary of State of the change, and so was not notified of the underlying action until January 25, 2011. The insured subsequently notified its insurer of the underlying action.

Shortly thereafter, the insurer denied coverage based on the insured's failure to provide timely notice. The insured then filed this declaratory judgment action. The insured argued that insurer had no reasonable basis do deny coverage because prior to receiving the summons and complaint in the underlying action, the insured had no reasonable belief that it could be held liable; that insurer's unintentional failure to update the notification agent's address with the Secretary of State provided and good-faith basis to excuse the insured's late notice of the claim; and that the insurer was not prejudiced by the delay in notice to the insurer. In its competing motion, the insurer asserted that it was entitled to disclaim coverage based upon the insurer's breach of the notice provision of the CGL Policy, and that the insurer need not show prejudice; that the insured had no legally viable excuse for the breach of the notice provision because the insured had an obligation to ensure the correct address on file with the Secretary of State for its agent designated for service; and that the insured could not excuse its late notice based upon a good faith belief in non-liability because the insured did not conduct any investigation into the extent of the employee's injuries upon learning of the accident.

In finding for the insurer, the Court reiterated the "well-settled [principle] that an insurer is not obligated to pay for the loss of its insured in the absence of timely notice in accordance with the terms of the policy." The Court held that the insured had failed to meet its burden of showing the reasonableness of its belief in non-liability, given all the circumstances, so as to excuse its late notice; specifically, the Court found that the insured conducted no independent investigation after the accident, and accordingly, "could not have had a good faith belief in non-liability without conducting a more thorough inquiry into the matter."

Finally, the Court noted that the insured was mistaken in their contention that an insurer must demonstrate prejudice resulting from the untimely notice. The CGL Policy at issue predated the effective date of the amendments to *Insurance Law §3420(a)(5)* which now require such a showing. Because the Policy predated the amendments, the insurer was not required to demonstrate prejudice as a result of the late notice, and the disclaimer of coverage was proper.

[Please Scroll Down for a Copy of the Full Decision]

[**1] **FREEWAY COMPANY, LLC, Plaintiff, -against- TECHNOLOGY INSURANCE COMPANY, INC. and TURAN UMER, Defendants. INDEX NO. 107203/11**

107203/11

SUPREME COURT OF NEW YORK, NEW YORK COUNTY

2015 N.Y. Misc. LEXIS 1439; 2015 NY Slip Op 30662(U)

April 27, 2015, Decided
April 28, 2015, Filed

NOTICE: THIS OPINION IS UNCORRECTED AND WILL NOT BE PUBLISHED IN THE PRINTED OFFICIAL REPORTS.

JUDGES: [*1] PRESENT: HON. PAUL WOOTEN, J.S.C.

OPINION BY: PAUL WOOTEN

OPINION

This action was commenced by plaintiff Freeway Company, LLC (Freeway) against defendants Technology Insurance Company, Inc. (Technology) and Turan Umer (Umer) seeking a declaration that Technology, as its insurer pursuant to a Commercial General Liability Insurance Policy, has a duty to defendant and indemnify Freeway in an underlying case pending in the New York State Supreme Court, Bronx County entitled *Turan Umer v Freeway Company, LLC*, under Index Number 304325/2010 (underlying action).

In motion sequence 002, Freeway moves for summary judgment on its complaint on the basis that Technology has no basis to deny insurance coverage in the underlying action, and that Freeway had a good faith basis for late reporting of this claim to Technology. In motion sequence 003, Technology moves for summary judgment and a declaration that it has no duty to defend and indemnify Freeway in regards to the underlying action or accident due to [**2] Freeway's breach of conditions contained in the insurance policy issued to Freeway by Technology.

BACKGROUND

On March 30, 2009, Umer fell from a ladder while installing cameras and cables at the premises located at 546-552 [*2] Isham Street, New York, New York, which was owned by Freeway. At the time of his accident, Umer was employed by non-party Webster Lock & Hardware Co. (Webster). Prior to March 30, 2009, Technology issued a $1,000,000.00 commercial general liability policy to Freeway, number TTP 1002949-01, for the coverage period April 1, 2008 to April 1, 2009. It is undisputed that the policy was in effect at the time of Umer's accident.

Mr. Felix Oquendo (Oquendo), Freeway's building superintendent testified that he witnessed the accident (Oquendo EBT, p. 12 lines 17-18). Oquendo testified that Umer was not given medical attention at the site and after he lost his balance, Umer landed on both his feet and continued to work (*id.*, p. 18 lines 15-21). He further stated that later on, Umer was unable to drive his van and complained to his colleague that his feet hurt, and Umer did not return to work the next day (*id.* p. 19 lines 9-25, p. 20 lines 15-20). Oquendo was told the next day by Webster employees that Umer had gone to the hospital, but he did not find out what happened to Oquendo until a year later when he was informed that Umer had been injured and had an operation on his foot (*id.* p. 21, p. 23). At such time, Oquendo did [*3] not call Webster to find out more information about the injury (*id.* p. 23 lines 20-22), nor did he perform any kind of investigation or take pictures (*id.* p. 26 lines 12-19).

Lawrence Geisinger (Geisinger), the managing member of Freeway, testified that he was made aware of

the "sprained ankle" accident that day or one day thereafter by Oquendo (*see* Geisinger EBT p. 30 line 3-p. 31 line 17). However, Geisinger did not inform his insurer Technology of the accident because he believed Webster "would maintain liability insurance [**3] and would be responsible for all injuries to its own employees and other persons" on the premises, that Freeway had nothing to do with the accident, and Umer was the cause of the accident (Geisinger Affidavit, ¶ ¶ 16-19). Moreover, Geisinger states in his affidavit that he was unaware of the significance of the [Labor Law] statute at the time of the accident involving Umer based upon his contract with Webster and his understanding that this was not a construction accident (*id.* ¶ 22).

On May 30, 2010, Umer filed the underlying action alleging that Freeway was served with the summons and complaint on June 3, 2010, by service on the New York State Secretary of State. The law firm Rand [*4] Rosenzweig Smith Radley Gordon & Burnstein c/o Mark Nessoff was listed as Freeway's agent for service with the Secretary of State. However, Mr. Nessoff had changed his address since first registering the Secretary of State and did not update the Secretary of the State. This caused a delay in Mr. Nessoff receiving the summons and complaint in the underlying action. Thus, on January 25, 2011, Mr. Nessoff first notified Geisinger of the underling action (see Geisinger Affidavit ¶¶ 7-12). On January 26, 2011, Freeway notified Technology of the underlying action via its insurance broker.

On February 24, 2011, Technology denied coverage[1] on the ground that Freeway had failed to provide timely notice of the accident pursuant to the terms of the insurance contract. Specifically, Technology claimed that it did not receive notice of Umer's accident until January 26, 2011, which was more than two years after the occurrence and two months after a default judgment was entered against Freeway in the underlying action.[2] In support of its disclaimer, Technology referred to the language of its policy which states "Section IV, 2. Duties In The Event Of Occurrence, Offense, Claim or Suit, (a) You must see [*5] to it that we are notified as soon [**4] as practicable of an "occurrence" or an offense which *may* result in a claim [emphasis added] (*see* Freeway Notice of Motion, exhibit G).

1 *Insurance Law § 3420(d)*, requires that an insurer issue a written disclaimer of coverage for death or bodily injuries arising out of accidents "as soon as is reasonably possible" (*Continental Cas. Co. v Stradford, 11 NY3d 443, 449, 900 N.E.2d 144, 871 N.Y.S.2d 607 [2008])*.

2 The default judgment entered against Freeway in the underlying action was subsequently vacated by stipulation.

Freeway subsequently contested Technology's denial of coverage, but Technology in a letter dated May 17, 2011 reiterated its disclaimer. After the parties conducted depositions and completed discovery, on March 1, 2013, the plaintiff filed his Notice of Issue and Certificate of Readiness. Now before the Court are the aforementioned motions for summary judgment by Freeway and Technology.

It is Freeway's contention that there is no basis for Technology to deny insurance coverage herein. Freeway first asserts, that prior to receiving the summons and complaint in the underlying action, it had a reasonable belief that it could not be held liable to the injured plaintiff under the Workers Compensation Law, that the accident was caused by Umer, and his injury [*6] was minimal, and thus there was no reason to initially notify Technology about the accident (see Goldberg Affirmation ¶ 53). Second, Freeway asserts that its unintentional omission to update the notification agent's address with the Secretary of State provides a good faith basis to excuse the late reporting of Freeway's claim for coverage. Lastly, Freeway asserts that Technology has not suffered any prejudice by eight month delay and cannot refuse insurance coverage pursuant to *Insurance Law § 3420(a)(5)*, which became effective on January 17, 2009, and requires the insurance carrier to show prejudice by the insured's late notice.

In support of its motion, Technology asserts that it is entitled to disclaim coverage based upon Freeway's breach of the notice provision contained within the insurance policy. Specifically, Technology maintains that the policy requires timely notice to Technology about two separate and independent events - an occurrence or claim and timely tender of lawsuit papers. Freeway's failure to provide timely notice of the occurrence on March 30, 2009 and its failure to timely tender lawsuit papers, particularly without any legally viable excuse for said breaches, entitles Technology to summary [*7] judgment declaring it has no obligation to provide [**5] coverage to Freeway for the Umer accident or underlying action in connection therewith. Technology contends that Freeway cannot excuse its untimely notice by claiming it had a good faith belief in non-liability because a property owner has an obligation to conduct an investigation when an accident occurs on its premises, and by his own admission, Geisinger failed to conduct any investigation to determine the extent of Umer's injuries upon learning of the accident. Moreover, Freeway cannot excuse its failure to timely tender the lawsuit papers because it had an obligation to ensure that the address on file with the Secretary of State for its agent designated for service was updated, and are charged with said omission even if the error is made by its attorney. As to showing prejudice, Technology asserts that under the common law it does

not have to do so before disclaiming coverage, and that the amendment to the Insurance Law which requires a showing of prejudice only applies to policies issued after January 17, 2009. Lastly, Technology maintains that its disclaimer of coverage on February 24, 2011 was timely, specifically since it [*8] did not receive Oquendo or Geisinger's statements, which were taken on February 10, 2011 until February 23, 2011.

STANDARD

Summary judgment is a drastic remedy that should be granted only if no triable issues of fact exist and the movant is entitled to judgment as a matter of law (*see Alvarez v Prospect Hosp., 68 NY2d 320, 324, 501 N.E.2d 572, 508 N.Y.S.2d 923 [1986]*; *Andre v Pomeroy, 35 NY2d 361, 364, 320 N.E.2d 853, 362 N.Y.S.2d 131 [1974]*; *Meridian Management Corp. v Cristi Cleaning Svc. Corp., 70 AD3d 508, 510, 894 N.Y.S.2d 422 [1st Dept 2010]*, quoting *Winegrad v NY Univ. Medical Cntr., 64 NY2d 851, 853, 476 N.E.2d 642, 487 N.Y.S.2d 316 [1985])*. The party moving for summary judgment must make a prima facie case showing of entitlement to judgment as a matter of law, tendering sufficient evidence in admissible form demonstrating the absence of material issues of fact (*see Ostrov v Rozbruch, 91 AD3d 147, 152, 936 N.Y.S.2d 31 [1st Dept 2012]*, citing *Alvarez, 68 NY2d 320, 324, 501 N.E.2d 572, 508 N.Y.S.2d 923 [1986]*; *see also Scafe v Schindler El. Corp., 111 AD3d 556, 556, 975 N.Y.S.2d 399 [1st Dept 2013]*; *Cole v Homes for the Homeless Inst., Inc., 93 AD3d 593, 594, 940 N.Y.S.2d 642 [1st Dept 2012]*; *CPLR 3212[b]*). "Once [**6] this requirement is met, 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, 936 N.Y.S.2d 31 [1st Dept 2012]*; *Giuffrida v Citibank Corp., 100 NY2d 72, 81, 790 N.E.2d 772, 760 N.Y.S.2d 397 [2003]*; *Zuckerman v City of NY, 49 NY2d 557, 562, 404 N.E.2d 718, 427 N.Y.S.2d 595 [1980])*. A failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Smalls v AJI Indus., Inc., 10 NY3d 733, 735, 883 N.E.2d 350, 853 N.Y.S.2d 526 [2008])*.

The court's function on a motion for summary judgment is "issue-finding, rather than issue-determination" (*Sillman v Twentieth Century-Fox Film Corp., 3 NY2d 395, 404, 144 N.E.2d 387, 165 N.Y.S.2d 498 [1957], rearg denied 3 NY3d 941 [1957]* [internal quotation marks omitted]). "[M]ere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" to defeat summary [*9] judgment (*Zuckerman v City of New York, 49 NY2d 557, 562, 404 N.E.2d 718, 427 N.Y.S.2d 595 [1980])*. The Court views the evidence in the light most favorable to the nonmoving party, and gives the nonmoving party the benefit of all reasonable inferences that can be drawn from the evidence (*see Negri v Stop & Shop, Inc., 65 NY2d 625, 626, 480 N.E.2d 740, 491 N.Y.S.2d 151 [1985])*. If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (*Rotuba Extruders v Ceppos, 46 NY2d 223, 231, 385 N.E.2d 1068, 413 N.Y.S.2d 141 [1978]*; *Grossman v Amalgamated Hous. Corp., 298 AD2d 224, 226, 750 N.Y.S.2d 1 [1st Dept 2002]*; *CPLR 3212[b]*).

DISCUSSION

Both parties move for summary judgment asserting that the facts herein are not in dispute, and thus only questions of law need be addressed. The law is well-settled that an insurer is not obligated to pay for the loss of its insured in the absence of timely notice in accordance with the terms of the policy (*Security Mut. Ins. Co. v Acker-Fitzsimons Corp., 31 NY2d 436, 293 N.E.2d 76, 340 N.Y.S.2d 902 [1972]*; *Power Auth. of State of N.Y. v Westinghouse Elec. Corp., 117 AD2d 336, 502 N.Y.S.2d 420 [1st Dept 1986])*. "Where a liability insurance policy requires that notice of an occurrence be given [**7] 'as soon as practicable,' such notice must be accorded the carrier within a reasonable period of time" (*Tower Ins. Co. of N.Y. v Classon Hgts., LLC, 82 AD3d 632, 634, 920 N.Y.S.2d 58 [1st Dept 2011]*, quoting *Tower Ins. Co. of N.Y. v Lin Hsin Long Co., 50 AD3d 305, 855 N.Y.S.2d 75 [1st Dept 2008]*; *see Heydt Contr. Corp. v American Home Assur. Co., 146 AD2d 497, 536 N.Y.S.2d 770 [1st Dept 1989])*.

A reasonable belief in non-liability may excuse an insured's failure to give timely notice, but in an action by an insured to compel its insurance company to defend and indemnify it, the insured has the burden of showing the reasonableness of such excuse, given all the circumstances (*see Security Mut. Ins. Co. Of N.Y. v Acker-Fitzsimons Corp., 31 NY2d 436, 441, 293 N.E.2d 76, 340 N.Y.S.2d 902 [1972]*; *SSBSS Realty Corp. v Public Service Mut. Ins. Co., 253 AD2d 583, 584, 677 N.Y.S.2d 136 [1st Dept 1998])*. "At issue is not whether the insured believes he will ultimately [*10] be found liable for the injury, but whether he has a reasonable basis for a belief that no claim will be asserted against him" (*SSBSS Realty Corp., 253 AD2d at 584*; *Tower Ins. Co. of N.Y., 82 AD3d at 634*).

The Court finds that Technology has met its prima facie burden entitling it to summary judgment by offering proof of Freeway's eight-month delay in notifying Technology of the subject accident, because Freeway's unexcused delay of that length is untimely as a matter of law (*see Tower Ins. Co. of N.Y., 82 AD3d at 634*; *Turner Const. Co. v Harleysville Worcester Ins. Co., 126 AD3d*

524, 2015 NY Slip Op 02049 [1st Dept 2015]). Moreover, in doing so, the Court finds that Technology complied with *Insurance Law § 3420(d)* and disclaimed coverage in a timely manner. In opposition, Freeway fails to raise a triable issue of fact as to whether it had a reasonable, good-faith belief in its non-liability. Specifically, the established facts mandate summary judgment in favor of Technology and preclude the granting of summary judgment in Freeway's favor (see *Paramount Ins. Co. v Rosedale Gardens, 293 AD2d 235, 239-240, 743 N.Y.S.2d 59 [1st Dept 2002])*.

Pursuant to his deposition testimony, attached to the papers herein, Oquendo, witnessed Umer's accident. About thirty to forty five minutes after the accident, Oquendo saw [**8] the Umer being helped into a van, with his tools by another worker. Additionally, at that time, Umer told his colleague he could not drive because he could not step on the gas or brakes because his feet hurt. [*11] Mr. Oquendo also testified that he was aware that Umer did not return the next day, and he was told the next day by Umer's colleague that Umer had gone to the hospital, but Oquendo failed to inquire what was wrong with Umer. Additionally, it is undisputed that Oquendo conducted no independent investigation into Umer's accident nor did he take any photographs at the scene of the accident. Thus, the superintendent, whose knowledge is imputed to plaintiffs (see *Tower Ins. of N.Y. v Amsterdam Apts., LLC, 82 AD3d 465, 918 N.Y.S.2d 106 [1st Dept 2011])*, could not have had a good faith belief in non-liability without conducting a more thorough inquiry into the matter (see *310 East 74 LLC v Fireman's Fund Ins. Co., 106 AD3d 469, 964 N.Y.S.2d 512 [1st Dept 2013]*; *Tower Ins. Co. of N.Y. v Red Rose Rest., Inc., 77 AD3d 453, 908 N.Y.S.2d 681 [1st Dept 2010]*; *Anglero v George Units, LLC, 61 AD3d 564, 877 N.Y.S.2d 296 [1st Dept 2009])*.

Moreover, Geisinger's conclusion that he believed Webster maintained liability insurance and would be responsible for all injuries to its own employees on the premises, that Freeway had nothing to do with the accident, and Umer was negligent and careless in his actions and the cause of the accident, does not constitute a reasonable belief of non-liability, especially in light of the absence of any evidence that Freeway diligently sought to learn the extent of Umer's injuries (see 2 *Board of Mgrs. of the 1235 Park Condominium v Clermont Specialty Mgrs., Ltd., 68 AD3d 496, 891 N.Y.S.2d 340 [1st Dept 2009])*. The need to investigate the matter was particularly apparent since the accident involved a worker falling off [*12] a ladder while working on plaintiffs' property, thereby subjecting them to potential liability pursuant to the Labor Law (see *QBE Ins. Corp. v D. Gangi Contr. Corp., 66 AD3d 593, 594, 888 N.Y.S.2d 474 [1st Dept 2009]*; *310 East 74 LLC, 106 AD3d at 470*). Moreover, Geisinger's professed ignorance of the Labor Law statute is insufficient to establish a reasonable belief in non-liability (*see id.*).

Furthermore, contrary to Freeway's contention, Technology "was not required to [**9] demonstrate any prejudice resulting from the claimed untimely notice, as its policy predated the effective date of the amendments to *Insurance Law § 3420(a)(5)* that now requires such showing" (*310 East 74 LLC, 106 AD3d at 470*, quoting *25 Ave. C New Realty, LLC v Alea N. Am. Ins. Co., 96 AD3d 489, 491, 949 N.Y.S.2d 2 [1st Dept 2012]*; *see also Tower Ins. Co. of N.Y., 82 AD3d at 635*; *Briggs Ave. LLC v Insurance Corp. of Hannover, 11 NY3d 377, 899 N.E.2d 947, 870 N.Y.S.2d 841 [2008])*.

In light of the above, the Court need not address the parties' remaining arguments.

CONCLUSION

Accordingly, it is

ORDERED that Freeway Company LLC's summary judgment motion (motion sequence 002) against Technology Insurance Company, seeking a declaratory judgment that Technology has a duty to defend or indemnify Freeway pursuant to the Technology insurance policy in connection with an accident is denied; and it is further,

ORDERED that Technology Insurance Company's summary judgment motion (motion sequence 003) against Freeway, seeking a declaratory judgment that Technology has no duty to defend or indemnify Freeway in connection [*13] with an accident or underlying action is granted, and the complaint is hereby dismissed with costs and disbursements to Technology upon submission of an appropriate bill of costs; and it is further,

ORDERED that counsel for Technology is directed to serve a copy of this Order with Notice of Entry upon the parties and the Clerk of the Court who is directed to enter judgment accordingly.

This constitutes the Decision and Order of the Court.

Dated: 4/27/15

/s/ Paul Wooten

PAUL WOOTEN J.S.C.