

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 36

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84 DRIVE HOMES, INC.,

Plaintiff,

Index No. 100684/07

- against -

Motion Seq. No.: 003

ADMIRAL INDEMNITY COMPANY and
METROPOLITAN PACIFIC PROPERTIES, INC.,

Defendant

HON. DORIS LING-COHAN, J.:

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk
and notice of entry cannot be served based hereon. To
obtain entry, counsel or authorized representative must
appear in person at the Judgment Clerk's Desk (Room
141B).

Before this court are the following motions: (1) Defendant

Admiral Indemnity Company's ("Admiral") motion for summary judgment declaring that it is not obligated to defend or indemnify plaintiff, 84 Drive Homes, Inc. ("84 Drive"), in an underlying personal injury action entitled *Wislocki v 84 Drive Homes, Inc.*, Sup Ct, Queens County, Index No. 8346/04 (the "*Wislocki* action"), and that its disclaimer of coverage was timely; (2) 84 Drive's cross motion for summary judgment declaring that Admiral is obligated to defend and indemnify it in the *Wislocki* action; and (3) Defendant Metropolitan Pacific Properties, Inc. ("Metropolitan") cross-motion for summary judgment declaring that Admiral is obligated to defend and indemnify it in the *Wislocki* action.¹

¹ The Court notes that with the court's permission and after the issuance of several orders, the parties stipulated to the restoration of Admiral's motion and 84 Drive's cross-motion for summary judgment; supplemental papers were submitted and the above motion/cross-motions are consolidated for disposition herein (under sequence number 003).

BACKGROUND

84 Drive is the owner of a cooperative apartment building located at 140-17 84th Drive, Briarwood, New York (the "subject premises"). Metropolitan was the managing agent for the subject premises, pursuant to a written agreement, dated December 1, 2003, and in effect from December 1, 2003 to November 30, 2005.

The plaintiff in the *Wislocki* action, a tenant at the subject premises, sought to recover damages from 84 Drive and Metropolitan for personal injuries he allegedly sustained on March 7, 2005, when he tripped and fell while walking on the subject premises. The Complaint in the *Wislocki* action alleged that the plaintiff was caused to trip and fall as a result of a dangerous, hazardous, and unsafe condition on the subject premises.

84 Drive procured from Admiral commercial general liability insurance policy No. 21-2-3616-31-05 insuring the subject premises and the real estate manager for the period April 21, 2004 to April 21, 2005 (Admiral Policy, Cross Mot, Exh A). Section I of the Admiral policy states, in part:

We [Admiral] will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies. We will have the right and duty to defend the insured against any "suit" seeking those damages. However, we will have no duty to defend the insured against any "suit" seeking damages for "bodily injury" or "property damage" to which the insurance does not apply. We may, at our discretion,

investigate any "occurrence" and settle any claim or "suit" that may result

(*id.*). In addition, § IV(2)(a) states, in part, that 84 Drive "must see to it that [Admiral is] notified as soon as practicable of an 'occurrence' or an offense which may result in a claim"

(*id.*). An "occurrence" is defined in § V of the policy to include "an accident" (*id.*).

As stated, the plaintiff in the *Wislocki* action allegedly sustained personal injuries when he tripped and fell while walking on the subject premises on March 7, 2005. Neil Nandkisure, the vice president of the cooperative board of the subject premises, and Ricardo Sifonte, the superintendent of the subject premises learned of the accident the very day it occurred but did not notify Admiral.

On March 6, 2006, counsel for the plaintiff in the *Wislocki* action sent a letter, *inter alia*, informing 84 Drive of the plaintiff's intent to pursue a claim for personal injuries arising out of the March 7, 2005 incident. On March 14, 2006, 84 Drive forwarded the letter to its insurance broker and agent, which, in turn, forwarded it to Admiral. It is undisputed that Admiral had no knowledge of the alleged incident before March 2006.

Thereafter, Admiral undertook an investigation of the alleged incident. The investigation included interviews with Neil Nandkisure, the vice president of the cooperative board of the subject premises, and Richardo Sifonte, the superintendent of

the subject premises. The interviews confirmed that Mr. Nandkisure and Mr. Sifonte had known of the accident since the day it occurred, but that they did not notify Admiral (see Nandkisure Affid, Not of Cross Mot; Sifonte Affid, *id.*). Mr. Sifonte further stated that he immediately reported the incident to Arthur Baxter, Metropolitan's senior property manager responsible for management services for the subject premises (Sifonte Affid, *supra*). However, Metropolitan submits an affidavit from Arthur Baxter essentially denying that he spoke with Mr. Sifonte, in March 2005, regarding the alleged incident (see Baxter Affid, Affid in Opp, Exh B).

A written statement of Mr. Nandkisure's interview was forwarded it to him for his approval and signature. Mr. Nandkisure signed the written statement and returned it to Admiral's investigator on April 21, 2006.

By letter, dated May 3, 2006, Admiral disclaimed coverage for the loss, asserting that 84 Drive breached the policy's notice provision by failing to provide timely notice of the claim. This declaratory judgment action ensued.

84 Drive essentially seeks defense and indemnification from Admiral and Metropolitan in the *Wislocki* action. The Complaint alleges causes of action against Admiral for a judgment declaring that Admiral is obligated to defend and indemnify 84 Drive in the *Wislocki* action (first and second causes of action); breach of contract (third cause of action); and violation of Insurance Law

§ 3420[d]) (fourth cause of action); as well as causes of action against Metropolitan for breach of contract (fifth cause of action) and negligence (sixth cause of action).

Admiral and Metropolitan answered separately, denying the allegations in the Complaint. Defendants also asserted numerous affirmative defenses, including that 84 Drive breached the policy provision requiring timely notice of the occurrence, and that Admiral's disclaimer of coverage for the loss was timely.

Admiral moved for summary judgment declaring that it is not obligated to defend or indemnify 84 Drive in the *Wislocki* action, and that its disclaimer of coverage was timely. 84 Drive opposed the motion and cross-moved for summary judgment declaring that Admiral is obligated to defend and indemnify it in the *Wislocki* action. Metropolitan also cross-moved for summary judgment declaring that Admiral is obligated to defend and indemnify it in the *Wislocki* action

DISCUSSION

It is well settled that the 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 the absence of any material issues of fact (see *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Once this showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form

sufficient to establish the existence of material issues of fact which require a trial of the action (*Zuckerman v City of New York, supra*). Mere conclusions, expressions of hope, or unsubstantiated allegations or assertions are insufficient to defeat summary judgment (*id.*).

The parties do not dispute that 84 Drive failed to provide timely notice of the occurrence that led to the *Wislocki* action, as required by the policy. Notice provisions in insurance policies afford the insurer an opportunity to protect itself, and the giving of the required notice is a condition precedent to the insurer's liability (*Security Mut. Ins. Co. of N.Y. v Acker-Fitzsimons Corp.*, 31 NY2d 436, 440 [1972]). Delay in providing notice to the insurer is a sufficient basis for disclaimer (*2540 Assocs., Inc. v Assicurazioni Generali, S.p.A.*, 271 AD2d 282, 284 [1st Dept 2000]).

At issue, however, is whether Admiral's notice of disclaimer of coverage for the loss alleged in the *Wislocki* action was timely as a matter of law. 84 Drive argues that Admiral's notice of disclaimer of coverage, based upon a breach of the policy's notice provision, was untimely as a matter of law since the basis for disclaimer was readily apparent as early as March 2006, following the interviews with Mr. Nandkisure and Mr. Sifonte.

However, Admiral insists that its notice of disclaimer of coverage for the loss was timely, and that any purported delay in disclaiming coverage was attributable to its reasonable and prompt

investigation. Admiral also asserts that any actual delay resulted from the failure of Mr. Nandkisure to promptly return his signed statement.

Insurance Law § 3420 (d) provides, in pertinent part:

If under a liability policy delivered or issued for delivery in this state, an insurer shall disclaim liability or deny coverage for death or bodily injury arising out of a motor vehicle accident or any other type of accident occurring within this state, it shall give written notice as soon as is reasonably possible of such disclaimer of liability or denial of coverage to the insured and the injured person or any other claimant.

The statute clearly mandates that an insurer must as soon as is reasonably possible give written notice of disclaimer of liability or denial of coverage for death or bodily injury under a liability policy to the insured (*Bovis Lease Lend LMB, Inc. v Royal Surplus Lines Ins. Co.*, 27 AD3d 84, 87-88 [1st Dept 2005]). "[T]imeliness of an insurer's disclaimer is measured from the point in time when the insurer first learns of the grounds for disclaimer of liability or denial of coverage" (*Matter of Allcity Ins. Co. [Jimenez]*, 78 NY2d 1054, 1056 [1991]). Furthermore, where the basis for the disclaimer was or should have been readily apparent before the onset of the delay, any explanation by the insurer for its delay will be insufficient as a matter of law, and where the basis was not readily apparent, an unsatisfactory explanation will render the delay unreasonable as a matter of law (*First Fin. Ins. Co. v Jetco Contr. Corp.*, 1 NY3d 64, 70 [2003]).

Here, as stated, Admiral first received notice of the alleged incident in March 2006. Specifically, the letter, dated March 6, 2006, and forwarded to Admiral around March 14, 2006, essentially lists the name of the injured party, as well as the date and place of the accident, and states that the injured party intends to pursue a claim for personal injuries arising out of the accident. A review of the letter reveals no readily apparent basis for disclaimer on timeliness grounds.

In any event, an insurer is not required to disclaim on timeliness grounds before conducting a prompt, reasonable investigation into other possible grounds for disclaimer, in fact, a reasonable investigation is preferable to piecemeal disclaimers (*see 2540 Assocs., Inc. v Assicurazioni Generali, S.p.A., supra*). Here, an interview with Mr. Nandkisure on March 24, 2006, as part of Admiral's investigation, confirmed that 84 Drive learned of the accident the very day it occurred. The basis for the disclaimer should have been readily apparent at that time. As such, Admiral's explanation that the delay was caused by Mr. Nandkisure's failure to promptly return his signed, written statement is insufficient as a matter of law (*see First Fin. Ins. Co. v Jetco Contr. Corp., supra*). Thus, defendant Admiral Indemnity Company is obligated to defend and indemnify its insured 84 Drive and Metropolitan in the underlying personal injury action *Wislocki v 84 Drive Homes, Inc.*, Sup Ct, Queens County, Index No. 8346/06.

Based upon the above, it is

ORDERED that the motion for summary judgment by Admiral is denied; and it is further

ORDERED that the cross motions for summary judgment by plaintiff 84 Drive and Metropolitan are granted; and it is further

ADJUDGED and DECLARED that Defendant Admiral Indemnity Company is obligated to defend and indemnify its insured 84 Drive and Metropolitan in the underlying personal injury action entitled *Wislocki v 84 Drive Homes, Inc.*, Sup Ct, Queens County, Index No. 8346/06²; and it is further

ORDERED that within 30 days of entry of this order, plaintiff shall serve a copy upon all parties with notice of entry.

Dated: April B, 2009


Hon. Doris Ling-Cohan, J.S.C.

J:\Summary Judgment\84DRIVEHOMES(002)036.wpd

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² While this court has been informed that the underlying personal injury action was dismissed by order dated July 22, 2008 (entered September 24, 2008) by Hon. Peter J. Kelly, as against 84 Drive and Metropolitan, Admiral Indemnity remains obligated to reimburse 84 Drive and Metropolitan for costs/attorneys fees. (See Exh. B, Soroka Reply Affirmation dated September 26, 2008).