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

PRESENT: HON. PAUL WOOTEN PART 7
Justice

JACQUELINE COBAN,

Plaintiff,

- against-

MANHATTAN VALLEY WEST, LLC,

Defendant.

INDEX NO. 108018/2009

MOTION DATE

MOTION SEQ. NO. 002

MOTION CAL. NO.

The following papers were read on the motions for summary judgment, pursuant to CPLR 3212.

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits

Answering Affidavits — Exhibits (Memo)

Replying Affidavits (Reply Memo)

Cross-Motion: ☐ Yes ■ No

Motion sequence number 002 in the herein action and motion sequence number 001 in a related action entitled *Manhattan Valley West LLC v RLI Insurance Company*, index No. 112284/09, are hereby consolidated for disposition.

In this action, defendant Manhattan Valley West LLC (Manhattan Valley) moves, pursuant to CPLR 3212, for an order granting summary judgment dismissing the complaint on the grounds that Manhattan Valley had neither actual nor constructive notice of the dangerous condition, and that Manhattan Valley did not create the dangerous condition.

In the related action, RLI Insurance Company (RLI Insurance) moves, pursuant to CPLR 3001 and 3212, for an order granting summary judgment dismissing the complaint and declaring that RLI Insurance is obligated neither to defend nor to indemnify Manhattan Valley in the underlying personal injury action.

BACKGROUND

In the herein action, plaintiff Jacqueline Coban (Coban) seeks to recover damages for personal injuries she suffered in a slip-and-fall while descending the exterior stairs of the premises owned by her landlord Manhattan Valley. In the related action, Manhattan Valley seeks from RLI Insurance, a defense and indemnification in the underlying personal injury action.

In support of its motion to dismiss the personal injury action, Manhattan Valley argues that there is no evidence that it had notice of, or created the dangerous ice condition at the bottom of the exterior stairs.

In opposition to the motion, Coban argues that the ice was a recurrent condition caused by the defective design of the building overhang. It is also argued that the building superintendent created the condition by regularly using hot water to clear the steps of snow and ice, regardless of the exterior temperature. Further, because Manhattan Valley was aware that water dripped from the overhang onto the landing and front steps, building staff, who were on call around the clock, routinely monitored the weather and treated the area to melt the ice.

In support of its motion for summary judgment, RLI Insurance argues that Manhattan Valley failed to give timely notice of the occurrence. RLI Insurance also argues that Manhattan Valley has failed to produce its internal documentation concerning Coban's accident.

In opposition to RLI Insurance's motion, Manhattan Valley argues that it gave timely notice to RLI Insurance and that the requested evidence is not material and can be obtained from Coban, the plaintiff in the underlying action.

SUMMARY JUDGMENT 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 [1986]; *Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). The party moving for summary judgment must make a prima facie 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 Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; CPLR 3212 [b]). The 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 [2008]). Once a prima facie showing has been made, however, "the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution" (*Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003]; *see also Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; CPLR 3212 [b]).

When deciding a summary judgment motion, the Court's role is solely to determine if any triable issues exist, not to determine the merits of any such issues (*see Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). 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 [1985]). If there is any doubt as to the existence of a triable issue, summary judgment should be denied (*see Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 [1978]).

DISCUSSION

Turning first to Manhattan Valley's motion for summary judgment, "[a] defendant who moves for summary judgment in a slip-and-fall action has the initial burden of making a prima facie demonstration that it neither created the hazardous condition, nor had actual or

constructive notice of its existence" (*Smith v Costco Wholesale Corp.*, 50 AD3d 499, 500 [1st Dept 2008]; *Rodriguez v 705-7 E. 179th St. Hous. Dev. Fund Corp.*, 79 AD3d 518, 519 [1st Dept 2010]). In order to constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to allow the defendant to discover and remedy it (*see Perez v Bronx Park South Assoc.*, 285 AD2d 402, 403 [1st Dept 2001]; *Ross v Betty G. Reader Revocable Trust*, 86 AD3d 419, 421 [1st Dept 2011]). This burden cannot be satisfied by merely pointing to gaps in the plaintiff's case (*see Nationwide Property Cas. v Nestor*, 6 AD3d 409 [2d Dept 2004]). A defendant may be charged with constructive notice of a hazardous condition if it is proven that there was a recurring condition of which the defendant had actual notice (*see Chianese v Meier*, 98 NY2d 270, 278 [2002]).

Manhattan Valley as the owner of the exterior staircase owed a duty of reasonable care to keep the staircase safe (*see Tagle v Jakob*, 97 NY2d 165, 168 [2001]). Manhattan Valley falls to establish its entitlement to summary judgment by demonstrating that the overhang, as designed, was reasonably safe (*see Colt v Great Atl. & Pac. Tea Co.*, 209 AD2d 294, 295 [1st Dept 1994]). Furthermore, evidence that the building superintendent may have created the condition by regularly using hot water to clear the steps of snow and ice, and that Manhattan Valley was aware that ice formed from water dripping from the overhang onto the landing and front steps, raise issues of fact as to the reasonableness of Manhattan Valley's practices, whether Manhattan Valley created the ice, or whether the ice had existed for a sufficient period of time prior to the accident to place Manhattan Valley on constructive notice. Therefore, Manhattan Valley's motion must be denied.

Turning to RLI Insurance's motion, where an insurance policy, such as the one in this case, requires an insured to provide notice of an accident or loss as soon as practicable, such

notice must be provided within a reasonable time in view of all of the facts and circumstances (*see* Insurance Law § 3420; *Great Canal Realty Corp. v Seneca Ins. Co., Inc.*, 5 NY3d 742 [2005]). In an action by an insured to compel its insurance company to defend and indemnify it, the insured has the ultimate burden of showing that there was a reasonable excuse for the delay (*see Security Mut. Ins. Co. Of N.Y. v Acker-Fitzsimons Corp.*, 31 NY2d 436 [1972]).

The general rule is that where there is evidence of an excuse or mitigating circumstance recognized by the law, whether notice has been given within a reasonable time under all the circumstances is a question for the jury (*see Argentina v Otsego Mut. Fire Ins. Co.*, 86 NY2d 748 [1995]). In addition, notice requirements are to be liberally construed in favor of the insured (*see General Elec. Capital Corp. v Royal Ins. Co. of Am.*, 205 AD2d 396 [1st Dept 1994]).

It is uncontroverted that notice was not actually given by Manhattan Valley until June 22, 2009, 4 months and 22 days after the occurrence on January 29, 2009. The excuse Manhattan Valley offers for the delay is that it was unaware of the accident until it was sued. Manhattan Valley argues that it had no reasonable basis to believe that the accident could give rise to a claim against them until they were so notified by the tenant's counsel nearly five months after the accident. Specifically, Manhattan Valley proffers that the building manager did not know on the date of the incident that the tenant had fallen on the premises and had been taken by ambulance to a hospital.

The Court finds that Manhattan Valley's purported belief that no claim could possibly be filed by the tenant was reasonable. An issue of fact exists as to whether the delay was excusable (*Savik, Murray & Aurora Constr. Mgt. Co., LLC v ITT Hartford Ins. Group*, 86 AD3d 490 [1st Dept] *appeal dismissed* 17 NY3d 901 [2011]).

In *Tower Ins. Co. of N.Y. v Classon Hgts., LLC* (82 AD3d 632 [1st Dept 2011]), the

Court held that an insured bears the burden of proving, under all the circumstances, the reasonableness of the belief of non-liability. There the insureds admitted that their building manager knew on the date of the incident that the tenant had fallen on the premises and had been taken by ambulance to a hospital, and the building manager's knowledge triggered a duty to further investigate the accident. Knowledge of an occurrence obtained by an agent charged with the duty to report such matters is imputed to the principal. The building manager stated that the porter called him to report the accident on the same day and that he then went to the subject premises to discuss the incident with the porter. Under the circumstances, the insured had a reasonable basis to believe that the accident could give rise to a claim against them.

Questions of fact exist as to whether Manhattan Valley had a reasonable, good-faith belief that its tenant Coban in the underlying personal injury action against it would not seek to hold them liable, precluding dismissal of their action against the insurer RLI Insurance (*see Jaglom v Insurance Co. of Greater N.Y.*, 13 NY3d 768 [2009]). There is a triable issue of a material fact whether notice given by Manhattan Valley promptly after the underlying lawsuit was instituted against it was given as soon as possible, and its duty to notify RLI Insurance of the incident was not triggered until its receipt of the complaint. Since the insured Manhattan Valley denies that their building manager knew that Coban had fallen on the premises and had been taken by ambulance to a hospital, and denies that Coban informed Manhattan Valley of the slip-and-fall, Manhattan Valley's purported belief that no claim would be filed by Coban, was reasonable. Manhattan Valley's failure during a January 31, 2009 telephone conversation with Coban, to conduct any inquiry into Coban's condition, does not render Manhattan Valley's excuse unreasonable as a matter of law (*see 426-428 W. 46th St. Owners, Inc. v Greater N.Y. Mut. Ins. Co.*, 23 AD3d 207 [1st Dept 2005], *lv dismissed* 7 NY3d 741 [2006]).

By letter dated July 28, 2009, RLI Insurance disclaimed coverage on the ground that the insured Manhattan Valley failed to notify it as soon as practicable of the incident. 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 [2008]). The question of whether RLI Insurance's notice of disclaimer after a 36-day period, was sent "as soon as is reasonably possible" is a question of fact, dependent on all of the circumstances (*see* Insurance Law § 3420 [d]; *First Fin. Ins. Co. v Jetco Contr. Corp.*, 1 NY3d 64, 70 [2003]; *Matter of Firemen's Fund Ins. Co. of Newark v Hopkins*, 88 NY2d 836 [1996], *rearg denied* 88 NY2d 963 [1996]; *Admiral Ins. Co. v State Farm Fire & Cas.* Co., 86 AD3d 486 [1st Dept 2011] ["the timeliness of a disclaimer is generally a question of fact"]). The insurer's sole ground for the disclaimer of coverage was the insured's delay in notifying it of the occurrence, which was readily apparent at the time of the notice of claim (*Tower Ins. Co. of N.Y. v NHT Owners LLC*, 90 AD3d 532 [1st Dept 2011]).

Finally, turning to the discovery dispute, RLI Insurance takes the position that Manhattan Valley's office manager learned of the slip-and-fall in a telephone conversation on January 31, 2009 with Coban, wherein Coban cancelled an appointment to have repairs done to her apartment because she was having surgery. It is argued that in the January 31, 2009 telephone conversation, Manhattan Valley learned that Coban's slip-and-fall occurred on Manhattan Valley's stairs, and that on January 31, 2009 Manhattan Valley should have reported the occurrence to RLI Insurance. It is also argued that Manhattan Valley's failure to produce its computer entry for the January 31, 2009 conversation with Coban warrants dismissal.

Manhattan Valley and Coban both allege that in the January 31, 2009 telephone call Coban never said that the surgery was as a result of a slip-and-fall on Manhattan Valley's

premises. The dispute regarding Manhattan Valley's office manager and her computer note or entry arose because it was discovered that the note was reviewed by the office manager witness prior to her examination. Despite due demand, the note has not been produced by Manhattan Valley. The contemporaneous note made of Coban's telephone call could indicate whether or not Coban told the office manager that her slip-and-fall occurred on Manhattan Valley's staircase. Moreover, Manhattan Valley fails to offer a clear explanation of what happened to the note.

CONCLUSION

Accordingly, it is

ORDERED that Manhattan Valley West LLC's motion for summary judgment dismissing Jacqueline Coban's complaint (motion sequence number 002), is denied, and it is further,

ORDERED that RLI Insurance Company's motion for summary judgment dismissing Manhattan Valley West LLC's complaint (motion sequence number 001 in the related action, *Manhattan Valley West LLC v RLI Insurance Company* index No. 112284/09), is denied in part, and granted only to the following extent, and it is further,

ORDERED that Manhattan Valley West LLC, within 20 days of service of a copy of this order with notice of entry, produce either the subject computer note, or an affidavit from Manhattan Valley's custodian of records, setting forth: (1) the qualifications of the affiant; (2) a description of the diligent and reasonable efforts made to locate and produce the note; (3) meaningful explanation as to why such note is not now available; (4) the identity of the persons in the authorized chain of custody, and if unknown, an explanation should be provided; (5) the identity of the last known possessor of the note, and if unknown an explanation should be provided; (6) the location where such note was kept; and (7) copies of any applicable document

retention policy (*see Roland's Elec. Inc. v USA Illumination, Inc.*, 90 AD3d 483, 485 [1st Dept 2011]); and it is further,

ORDERED that RLI Insurance Company is directed to serve a copy of this order with notice of entry upon all parties.

This constitutes the Decision and Order of the Court.

Dated: 3-20-12

Paul Wooten J.S.C.

Check one: ☐ **FINAL DISPOSITION** ■ **NON-FINAL DISPOSITION**

Check if appropriate: ☐ **DO NOT POST**