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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: DORIS LING-COHAN J.S.C. Justice

PART 36

Hermitage Ins. Co.
-v-
Sabina Zaidman et al.

INDEX NO. 101244/20

MOTION DATE

MOTION SEQ. NO. 001

The following papers, numbered 1 to ____, were read on this motion to/for ∠ cross-motion for Summary Judgment ∠ cross-motion to extend time

Notice of Motion/Order to Show Cause — Affidavits — Exhibits ____ | No(s). 1-4 5

Answering Affidavits — Exhibits ____ | No(s). 8

Replying Affidavits ____ | No(s). 9, 10

X Motions 4, 5, 6, 7

Upon the foregoing papers, it is ordered that this motion is ~~X~~ and cross-motion for summary judgment ∠ cross-motion for time to file a late answer are decided in accordance with the attached memorandum decision.

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).

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 4/2/12

DORIS LING-COHAN, J.S.C.

1. CHECK ONE: ..... ☑ CASE DISPOSED ☐ NON-FINAL DISPOSITION

2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER

3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER

☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

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

HERMITAGE INSURANCE COMPANY,
Plaintiff,

-against-

SABINA ZAIDMAN, DCD MARKETING, LTD. and GRACE ZAIDMAN,
Defendants.

INDEX NUMBER 101241/2011
Motion Sequence 001
JUDGMENT & ORDER

DORIS LING-COHAN, J.:

Plaintiff Hermitage Insurance Company (Hermitage) moves, pursuant to CPLR 3212, for summary judgment in its favor on the complaint, declaring that it has no obligation to defend or indemnify defendant Sabina Zaidman (Sabina), and for a default judgment as against defendant DCD Marketing, LTD. (DCD), pursuant to CPLR 3215 (a). Defendant Grace Zaidman (Grace), Sabina's daughter, opposes and cross-moves for summary judgment declaring that Hermitage is obligated to defend and indemnify Sabina. Sabina opposes Hermitage's motion and supports Grace's cross motion. DCD opposes Hermitage's motion and cross-moves for leave to extend its time to appear and answer the complaint, pursuant to CPLR 3012 (d).

Factual Background

On February 12, 2007, Grace allegedly was injured when she tripped and fell down steps at 1235 East 69th Street, Brooklyn, New York (the Premises), owned by Sabina and Theodor Zaidman (Theodor), Grace's parents. On September 27, 2007, Grace commenced an action, *Grace Saidman v Sabina Zaidman and DCD Marketing, LTD.*, Kings County Index No. 36154/2007 (the underlying action), alleging that she slipped on newspaper flyers left on the steps of the Premises by DCD. Ex. A attached to Thomas Support Affirm. On June 9, 2008, a

default judgment was issued against Sabina, because she failed to answer the complaint. Ex. C attached to Davidovic Opp. Affirm.

On October 19, 2007, Hermitage, which insured the Premises, allegedly disclaimed coverage of Grace's claim. Ex. H attached to Thomas Support Affirm. However, on December 1, 2010, over three (3) years after later, Hermitage (under the name of Tower Group Companies, its new owner), sent a letter which, while reiterating its disclaimer, indicated that it would defend Theodor and Sabina in the underlying action, "subject to resolution of a declaratory judgment action that we will commence against you to confirm the propriety of our disclaimer." Ex. D attached to Davidovic Opp. Affirm. Hermitage commenced the instant action on February 1, 2011, requesting a declaratory judgment that it has no duty to defend or indemnify any of the defendants for claims made in the underlying action, on the ground of late notice. On March 16, 2011, Sabina, represented by counsel retained by Hermitage, moved to vacate the default judgment against her.

Legal Standards

"The proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law." *Dallas-Stephenson v Waisman*, 39 AD3d 303, 306 (1st Dept 2007), citing *Winegrad v New York Univ. Med. Center*, 64 NY2d 851, 853 (1985). Upon proffer of evidence establishing a prima facie case by the movant, "the party opposing a motion for summary judgment bears the burden of 'produc[ing] evidentiary proof in admissible form sufficient to require a trial of material questions of fact.'" *People v Grasso*, 50 AD3d 535, 545 (1st Dept 2008), quoting *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). Although summary judgment is considered to be a drastic remedy, it should be granted where there are no disputed material issues of fact. *Andre v.*

Pomeroy, 35 NY2d 361 (1974).

"When a defendant has failed to appear, plead or proceed to trial of an action reached and called for trial, or when the court orders a dismissal for any other neglect to proceed, the plaintiff may seek a default judgment against him." CPLR 3215 (a). However, CPLR 3012 (d) permits the court to "extend the time to appear or plead, or compel the acceptance of a pleading untimely served, upon such terms as may be just and upon a showing of reasonable excuse for delay or default." "It is within the court's power to grant such an extension where it is established . . . that the delay in service was not willful or lengthy and that it did not cause any prejudice to the parties." *A & J Concrete Corp. v Arker*, 54 NY2d 870, 872 (1981). Further, CPLR 2005, expressly permits a court to excuse a delay or default, based upon a claim of "law office failure".

Discussion

At the time of the incident, the Premises were insured by Hermitage under policy number HCP/523538-06 (the Policy). Ex. E attached to Thomas Support Affirm. Hermitage claims that it first received notice of the incident on October 1, 2007, by a "General Liability Notice of Occurrence/Claim," dated September 28, 2007, from an insurance broker. Ex. F attached to Thomas Support Affirm. This notice was accompanied by a letter from Grace's attorney to Theodor and Sabina, dated September 7, 2007, concerning Grace's "personal injuries as a result of the negligent operation, maintenance and control of your premises." *Id.*

In a letter dated October 19, 2007 to Sabina[1] and Theodor, Hermitage denied coverage of Grace's accident based upon the seven-and-a-half month interval in providing notice. Ex. H

[1]Hermitage misidentifies her as Sabrina at various places.

attached to Thomas Support Affirm. It is not disputed that such October 19, 2007 letter was sent to Sabina and Theodor's, at, 11 Gaylord Drive, Brooklyn, NY 11234, which was not the mailing address listed on the policy; as of *March 7, 2007*, the mailing address listed on the policy for Sabina and Theodor's address was 9301 Ditmas Avenue, Brooklyn, NY 11236. Exh. A attached to Doris Affirmation in Opposition to Hermitage Motion and in Support of Grace Zaidman Cross-Motion.

In the October 19, 2007 letter denying coverage, Hermitage relied specifically on Section IV – Commercial General Liability Obligations of the Policy, which requires that the insured "see to it that we [Hermitage] are notified as soon as practicable of an 'occurrence' or an offense which may result in a claim." Similarly, if a formal claim is made or a law suit brought against the insured, the insured must "[n]otify us as soon as practicable." The Policy goes on to ask for the reporting of details of the occurrence, such as, location, nature of the incident, names and addresses of injured persons and witnesses. *Id.*

Timeliness of Notice to Hermitage

"The requirement that an insured notify its liability carrier of a potential claim 'as soon as practicable' operates as a condition precedent to coverage." *White v City of New York*, 81 NY2d 955, 957 (1993). Further, "the insured bears the burden of proving, under all the circumstances, the reasonableness of any delay in the giving of notice." *Paramount Ins. Co. v Rosedale Gardens, Inc.*, 293 AD2d 235, 240 (1st Dept 2002). Hermitage argues that an unexcused delay of short duration may be a breach of the insurance contract as a matter of law, citing, among others, *Deso v London & Lancashire Indem. Co. of Am.* (3 NY2d 127 [1957]) (51 days); *Power Authority of the State of New York v Westinghouse Electric Corp.* (117 AD2d 336 [1st Dept 1986]) (53 days).

Sabina's opposition does not challenge the seven-and-a-half month interval between the occurrence and its being reported to Hermitage. She acknowledges that she learned of her daughter's accident soon after it occurred[2] and visited her in the hospital daily.

> "However, I had no reason to believe that my daughter might make a claim or sue me as a result of her fall. The facts, as I understood them at the time of the accident and presently, seem clear to me that I did nothing wrong, and my relationship to Grace did not lead me to believe that she would bring a lawsuit claiming that I did. In fact, Grace never mentioned the possibility of making a claim or suing me during the following months as I was helping to care for her."

Sabina Aff., ¶ 6, Ex. B attached to Doris Opp. Affirm. Sabina further elaborates as to her assertion that she "did nothing wrong", indicating that, "[t]he concrete steps had been replaced a few years before the accident, and were in good condition at the time of the occurrence as were the handrails along both sides". *Id.* at ¶5. Sabina maintains that she "did not place the newspaper/marketing bundle on the steps [and that she] did not live at [the premises where the accident occurred] and "was not aware that the newspaper marketing bundle had been placed on the steps". *Id.*

Sabina states that she first learned of Grace's intentions to sue when she received a letter from Grace's lawyer, dated September 7, 2007. *Id.*, ¶ 7. Sabina relies upon *Argentina v Otsego Mut. Fire Ins. Co.* (86 NY2d 748, 751 [1995]), where the Court of Appeals held that "the close familial relationship between the insureds and the accident victim was of such a nature as to support a finding that the insureds reasonably believed that they would have been apprised if the injured party had been contemplating a lawsuit," in support of her argument that she proceeded in good faith in the aftermath of the incident. While the insured in *Argentina* waited 171 days to

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[2]Hermitage submits an unsworn, hand-written statement, signed by Theodor, dated October 12, 2007, which states that "I first learned that my daughter was injured on February 13, 2007." Ex. G attached to Thomas Support Affirm. In conjunction with this document, Charlie Dimino, an investigator for First Judicial Claim Service, submits an affidavit asserting that he met with Theodor on October 12, 2007, discussed the incident with him, transcribed Theodor's statement and had him sign a copy, as attached.

give notice of the occurrence, the Court focused on "the peculiar circumstances of this case" (*id.*) in accepting "the insureds' 'good-faith belief' that the injured party would not seek to hold them liable" (*id.* at 750).

"[T]he insured bears the burden of establishing the reasonableness of the proffered excuse." *Great Canal Realty Corp. v Seneca Ins. Co.*, 5 NY3d 742, 744 (2005). Typically, such a good-faith belief does not rest solely in the mind of the beholder. *Paramount*, 293 AD2d at 239 ("the courts have not turned over to the insured, or its agents, the exclusive responsibility for determinating when an accident is likely to give rise to a liability claim"); *see also Tower Ins. Co. of N.Y. v Classon Hgts., LLC*, 82 AD3d 632, 635 (1st Dept 2011) ("Since the insureds admitted that their building manager knew on October 30, 2006 that Gonzalez had fallen on the premises and had been taken by ambulance to a hospital, their purported belief that no claim could possibly be filed by Gonzalez because she was not injured was unreasonable"); *Heydt Contracting Corp. v American Home Assurance Co.*, 146 AD2d 497, 499 (1st Dept 1989) ("The fact that a particular occurrence may not in the end result in a ripened claim does not relieve the insured from advising the carrier of that event, and plaintiff's policy with defendant dictates that timely written notice be provided whenever a claim 'may' arise"). Yet, these latter cases lack the intimate familial connection found in *Argentina*. In *Paramount*, an employee of the building's managing agent delayed acting on his knowledge of an occurrence; in *Classon Hgts.*, it was the building manager; in *Heydt*, it was a contractor on a construction project. Thus, in the instant action, arguably, it was reasonable for Sabina, focusing on her daughter's recovery, not to speculate about unexpressed legal considerations, and to hold a good-faith belief that she would not face liability for the accident, providing a reasonable basis for her delay in notifying Hermitage. *See Argentina*, 86 NY2d at 750.

Timeliness of Hermitage's Disclaimer

Regardless of whether it has been established that Sabina had a reasonable excuse for her delay in notifying Hermitage, Sabina and Grace also contend that insurance coverage is warranted, since, as a matter of law, Hermitage failed to timely disclaim coverage as required by Insurance Law § 3420 (d) (2). As detailed below, this court agrees.

Insurance Law §3420 (d) (2) provides that:

> "[i]f under a liability policy issued or delivered 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."

Grace's counsel notes that the purported disclaimer notice bears the certified mail tracking number 7006 3450 0002 4119 6505. *See* Ex H attached to Thomas Support Affirm. He submits the results of a search of the United States Postal Service's (USPS) tracking web site for this number reporting "no record for this item." Ex. G attached to Davidovic Opp. Affirm. Additionally, Grace's counsel argues that the October 19, 2007 disclaimer was sent to the wrong address in that it was not sent to the most recent mailing address indicated in the policy. While Hermitage claims the October 19, 2007 disclaimer was sent to Theodor and Sabina at 11 Gaylord Drive, Brooklyn, NY 11234, it is undisputed that as of March 7, 2007, the mailing address which was listed on the policy was 9301 Ditmas Avenue, Brooklyn, NY 11236, as evidenced by an endorsement included in the copy of the policy attached to Hermitage's motion.[3]

In addition, Sabina's counsel asserts that the October 19, 2007 disclaimer sent by Hermitage to the Zaidmans, was in fact sent to the wrong address in that it was sent to "11

[3] It is noted that, neither of these addresses is the address of the subject Premises.

Gaylord Drive, Brooklyn, New York", and that no such address exists.[4] ¶28, Doris Affirm. Sabina's counsel argues that there can be no presumption of receipt if a letter is sent to a wrong address. Sabina's counsel also asserts that, six months prior to the alleged mailing of the October 19, 2007 disclaimer, the policy's was amended to provide the mailing address for Sabina and Theodor as, 9301 Ditmas Avenue, Brooklyn, New York, and the disclaimer was not sent to such address.

Hermitage does not dispute that the October 19, 2007 disclaimer was not sent to the current mailing address listed on the policy.

Under the within circumstances, Hermitage has not met its burden of establishing timely notice of disclaimer, pursuant to Insurance Law § 3420 (d) (2). *See Leher McGovern Bovis v. Public Service Mut. Ins. Co.*, 260 AD2d 388, *leave dismissed* 94 NY2d 944 (2000). *It is undisputed* that Hermitage addressed its notice of disclaimer (the October 19, 2007 letter), to 11 Gaylord Drive, Brooklyn, NY 11234, which was not the current address listed on the policy. It is also not disputed that, as of March 7, 2007, Sabina and Theodor's mailing address as listed in the policy was, 9301 Ditmas Avenue, Brooklyn NY 11236. Thus, the statutory notice was not effected. *See Elacqua v Physicians' Reciprocal Insurers* (21 AD3d 702, 706 [(3d Dept 2005]) ("The failure to satisfy that statute's [Insurance Law § 3420 (d)] requirements precludes an insurer from denying coverage based on a policy exclusion"); *cf. Badio v. Liberty Mutual Fire Ins., Co.*, 12 AD3d 229 (1st Dept 2004)("an insurer may effectively cancel its policy by mailing a notice of cancellation to the address shown on the policy"(emphasis supplied)); *18th Ave. Rlty Corp. v. Aetna Casualty and Surety Co.*, 240 AD2d 287 (1st Dept 1997)("[t]he insurer *satisfied*

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[4] Counsel indicates that the proper address for "Gaylord Drive" is "Gaylord Drive, North" and that "Gaylord Drive" does not exist.

its burden of proving a proper mailing...sent...[to the] addresses as they appeared on the declaration page of the policy..."). Where a notice is mailed to an address which does not conform to the information contained in the parties' contract, such notice is without effect. *See 1626 Second Ave., LLC v. Notte Restaurant Corp.*, 21 Misc 3d 1143(A), 2008 NY Slip Op 52490(U)(Civ Court, New York County 2008). Moreover, Hermitage's (second) notice of disclaimer dated December 1, 2010, sent almost three (3) years after receiving notice from Sabina of the subject occurrence, in which it reiterated its denial of coverage, is insufficient to constitute a timely notice of disclaimer, as a matter of law. *Firemen's Fund Ins. Co. of Newark v. Hopkins*, 88 NY2d 836 (1996); *Hartford Insurance Co. v. County of Nassau,* 46 NY2d 1028 (1979); *Allcity Ins. Co. v. 601 Crown St. Rlty. Corp.*, 264 AD2d 315 (1st Dept 1999).

Thus, as Hermitage failed to establish that it provided Sabina with a timely notice of disclaimer, as required by Insurance Law §3420 (d) (2), Hermitage's motion for summary judgment is denied and Grace's motion for summary judgment is granted. The court notes that, no factual issues with respect to Hermitage's failure to send a timely notice of disclaimer have been raised by any party, since it is undisputed that the October 19, 2007 notice of disclaimer was not sent to the current mailing address listed on the policy. As such, Hermitage's motion for a declaration that it has no obligation to defend or indemnify Sabina in the underlying action is denied, while Grace's cross motion for a declaration that Hermitage has an obligation to defend or indemnify Sabina is granted.

Default Judgment as to DCD Marketing, Ltd./Extend time to Answer

The remaining issues pertain to Hermitage's motion for a default judgment as to DCD, which DCD has opposed, as well as DCD's cross-motion for an extension of time to appear and answer Hermitage's complaint, pursuant to CPLR 3012 (d) . However, since the within decision

has determined the issue of insurance coverage as a matter of law, the case as against defendant DCD is deemed moot.[5] The court notes that the pleadings fail to contain any specific relief asserted as against defendant DCD.[6]

Accordingly it is,

ORDERED that Hermitage Insurance Company's motion for summary judgment, seeking a declaration that it is not obliged to provide a defense to and indemnify the defendant Sabina Zaidman in the personal injury action of *Grace Zaidman v Sabina Zaidman and DCD*

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[5] A copy of the summons and complaint in the instant action was served on DCD, through the Secretary of State, on February 25, 2011, pursuant to Business Corporation Law § 306 (b) (1). Ex. I attached to Thomas Support Affirm. After no answer was received or appearance entered by DCD, Hermitage sent a letter to DCD, on June 15, 2011, notifying it of its default. Ex. J attached to Thomas Support Affirm. The letter contained an additional copy of the summons and complaint. Ex. K attached to Thomas Support Affirm. Because DCD has not served an answer, asked for an extension of time to answer, nor made an appearance, as of the date Hermitage filed the instant motion, Hermitage moved for the entry of a default judgment against DCD, pursuant to CPLR 3215 (f).

DCD did in fact serve an answer on July 5, 2011 (Ex. B attached to DCD cross motion), but Hermitage rejected it as it untimely (Ex. C attached to DCD cross motion). DCD contends that "faulty office practice rather than any willful neglect or dilatory tactics" accounted for the approximately four-and-a-half month delay in answering. Absent prejudice to Hermitage, this delay may be excused. *See Elkman v Southgate Owners Corp.*, 243 AD2d 356 (1st Dept 1997) (four months delay); *Mufalli v Ford Motor Co.*, 105 AD2d 642 (1st Dept 1984) (three-and-a-half months delay). While "a showing of a potential meritorious defense is not an essential component of a motion to serve a late answer (CPLR 3012 [d]) where, as here, no default order or judgment has been entered" (*Jones v 414 Equities LLC*, 57 AD3d 65, 81 [1st Dept 2008]), DCD has nonetheless provided one. DCD states that it has never been an insured under the Policy, and DCD is not seeking that Hermitage defend or indemnify it for a claim made in the underlying action (Index Number 36154/20080), thus, there can be no declaratory relief regarding DCD under the terms of the Policy. Based upon the above, DCD's cross motion for leave to extend its time to answer would have been granted, and Hermitage's motion for a default judgment against DCD denied, had the within relief not be determined to be moot.

[6] The only relief requested in the complaint is that: "this [c]ourt issue a judgment declaring that [Hermitage] had not duty to defend or indemnify defendants for claims being made in the action Grace Zaidman v. Sabina Zaidman and DCD Marketing, pending in the Supreme Court of the State of New York, County of Kings, under Index Number 36154/2007...". Exh. B, Thomas Affirm in Support.

Marketing, LTD., Kings County Index No. 36154/2007, is denied; and it is further

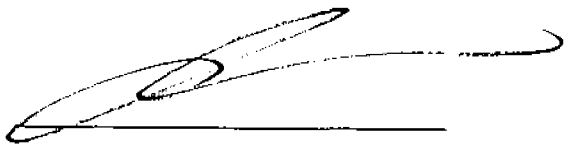
ORDERED that defendant Grace Zaidman's cross motion for summary judgment, seeking a declaration that Hermitage Insurance Company is obliged to provide a defense to and indemnify the defendant Sabina Zaidman in the said action pending in Kings County, is granted; and it is further

ADJUDGED and DECLARED that Hermitage Insurance Company is obliged to provide a defense to and indemnify the defendant Sabina Zaidman in the said action pending in Kings County; and it is further

ORDERED that defendant DCD Marketing LTD.'s cross motion for leave to an extension of time to answer the complaint is deemed moot; and it is further

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

DATED: **April 2, 2012**



Doris Ling-Cohan, J.S.C.

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UNFILED JUDGMENT
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