

<b>Mountain Valley Indem. Co. v VIP Towing Corp.</b>
2012 NY Slip Op 31496(U)
May 29, 2012
Supreme Court, New York County
Docket Number: 111178/2010
Judge: Joan M. Kenney
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# SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

**PRESENT:** JOAN M. KENNEY  
J.S.C.  
Justice

**PART** 8

Index Number : 111178/2010  
MOUNTAIN VALLEY INDEMNITY CO.  
vs.  
VIP TOWING CORP.  
SEQUENCE NUMBER : 004  
DEFAULT JUDGMENT

INDEX NO. 111178/10  
MOTION DATE 2/14/12  
MOTION SEQ. NO. 004

The following papers, numbered 1 to 20, were read on this motion to/for default judgment

Notice of Motion/Order to Show Cause — Affidavits — Exhibits Memorandum | No(s). 1-17

Answering Affidavits — Exhibits (2) | No(s). 18, 19

Replying Affidavits \_\_\_\_\_ | No(s). 20

Upon the foregoing papers, it is ordered that this motion is

## MOTION IS DECIDED IN ACCORDANCE WITH THE ATTACHED MEMORANDUM DECISION

## FILED

JUN 06 2012

NEW YORK  
COUNTY CLERK'S OFFICE

Dated: May 31, 2012

 J.S.C.  
**JOAN M. KENNEY**  
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

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

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 8

-----x

MOUNTAIN VALLEY INDEMNITY COMPANY,  
Plaintiff,

DECISION & ORDER

Index No.: 111178/10

-against-

**FILED**

VIP TOWING CORP., VIP AUTO BODY,  
INC., DAVID S. ORTIZ and GREGORIO  
SANCHEZ MENDOZA,

JUN 06 2012

Defendants.

NEW YORK  
COUNTY CLERK'S OFFICE

-----x

JOAN M. KENNEY, J.:

Plaintiff moves, pursuant to CPLR 3212, for summary judgment  
dismissing the complaint with prejudice.<sup>1</sup>

**BACKGROUND**

This action seeks a declaratory judgment on plaintiff's duty  
to defend and/or indemnify VIP Towing Corp., VIP Auto Body, Inc.,  
(together, VIP), David S. Ortiz (Ortiz) and Gregorio Sanchez  
Mendoza (Mendoza) in the underlying action entitled *Gregorio  
Sanchez Mendoza v VIP Towing Corp., VIP Auto Body, Inc. and David  
S. Ortiz*, index number 13745/10, now pending in Supreme Court,  
Queens County. Ortiz has failed to appear or otherwise interpose  
an answer, and this court granted a default judgment against Ortiz.  
Motion, Ex. C.

Plaintiff insured VIP from November 12, 2008 to November 12,

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<sup>1</sup>This is how the notice of motion is framed; however, the  
court concludes from all of the arguments that plaintiff is  
seeking a declaration that it has no duty to defend or indemnify  
defendants in the underlying personal injury action.

2009 under policy number G31-0031956-02. Motion, Ex. L. On June 11, 2010, plaintiff received notice of the underlying lawsuit. Motion, Ex. M. The incident that allegedly gave rise to the underlying lawsuit occurred on July 31, 2009.

According to the complaint in the underlying lawsuit, which was filed on or about May 19, 2010, Mendoza claims to have been harmed when Ortiz, an employee of VIP Auto Body, Inc., assaulted him and committed a battery on him while he was at VIP Auto Body, Inc.'s place of business. *Id.* Specifically, Mendoza alleges that Ortiz verbally insulted him and then proceeded to push, punch and knock him unconscious. *Id.*

Paul Keane (Keane), the VIP Auto Body, Inc. representative, was deposed in this matter and testified that he learned of the incident the evening of July 31, 2009 when he received a call from Mary Palazzo, the dispatcher on duty, and was aware that Ortiz was arrested that same day. Keane EBT at 23-24. Keane stated that he let Ortiz go on the advice of his personal lawyers who told him that the insurer would not want Ortiz to be working at the premises. *Id.* at 29-30.

Pursuant to the terms of the insurance policy, VIP were required to give plaintiff notice as soon as possible after the insured becomes aware of any accident, claim, suit, offense or loss that may be covered under the policy. Motion, Ex. L. Plaintiff was not notified of the incident until June 11, 2010, eleven months

after the occurrence and 23 days after the complaint in the underlying action was filed. On July 8, 2010, plaintiff denied coverage based on an untimely notice of claim.

It is plaintiff's position that it is not obligated to defend and/or indemnify VIP because of a late notice of claim and VIP's failure to provide a reasonable excuse for their delay.

In opposition to the instant motion, VIP assert that, whereas Ortiz was in their employ on a part-time basis, he was not working for them on the day of the occurrence. Therefore, VIP argue that they did not reasonably believe that they would be held liable for Ortiz' actions on their premises, and the reasonableness of this belief is a question of fact for the jury.

In his opposition to the instant motion, Mendoza concurs with VIP's reasoning for the delay in notification.

In reply, plaintiff contends that VIP were aware of the incident on the day of its occurrence, and that VIP's opposition is legally insufficient because it consists only of the attorney's affirmation as to what VIP believed and is not supported by an affidavit of anyone from VIP to confirm this conclusion. Further, plaintiff points to Keane's deposition, in which he averred that he let Ortiz go after the incident on the advice of his lawyers who told him that the insurer would not want Ortiz to remain working on the premises. Therefore, plaintiff contends that defendants are feigning an issue to attempt to avoid summary judgment.

### DISCUSSION

"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 eliminate any material issues of fact from the case [internal quotation marks and citation omitted]." *Santiago v Filstein*, 35 AD3d 184, 185-186 (1<sup>st</sup> Dept 2006). The burden then shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact." *Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 (1<sup>st</sup> Dept 2006); see *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied. See *Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 (1978).

Plaintiff's motion is granted.

"[T]he rule in New York has been that where a contract of primary insurance requires notice 'as soon as practicable' after an occurrence, the absence of timely notice of an occurrence is a failure to comply with a condition precedent, which, as a matter of law, vitiates the contract. No showing of prejudice is required. Strict compliance with the contract protects the carrier against fraud or collusion; gives the carrier an opportunity to investigate claims while evidence is fresh; allows the carrier to make an early estimate of potential exposure and establish adequate reserves and gives the carrier an opportunity to exercise early control of claims, which aids settlement [internal citations omitted]."

*The Argo Corporation v Greater New York Mutual Insurance Company*, 4 NY3d 332, 339 (2005); *Spentrev Realty Corp. v United National Specialty Insurance Company*, 90 AD3d 636 (2d Dept 2011).

In the case at bar, plaintiff only received notice of the occurrence 11 months after the incident and 23 days after the underlying action was commenced. Delays in notification of an occurrence for 10, 22, 31, 45, 51 and 53 days have all been found to be untimely as a matter of law (*Pandora Indus., Inc. v St. Paul Surplus Lines Insurance Co.*, 188 AD2d 277 [1<sup>st</sup> Dept 1992]; *Republic New York Corp. v American Home Assurance Company*, 125 AD2d 247 [1<sup>st</sup> Dept 1986];; *Power Authority of New York v Westinghouse Electric Corp.*, 117 AD2d 336 [1<sup>st</sup> Dept 1986]; *Hartford Accident & Indemnity Company v CNA Insurance Companies*, 99 AD2d 310 [1<sup>st</sup> Dept 1984]), and defendants do not argue that their notification was timely. Rather, VIP contend that the delay in notification was due to their reasonable belief that they would not held liable by Mendoza, thereby excusing the delay.

Whereas the existence of a good faith belief and the reasonableness of that belief is ordinarily a question for the trier of fact (*Argentina v Otsego Mutual Fire Insurance Company*, 86 NY2d 748 [1995]; 426-428 West 46<sup>th</sup> St. Owners, Inc. v Greater New York Mutual Insurance Company, 55 AD3d 480 [1<sup>st</sup> Dept 2008]), evidence of such good faith belief has not been provided in admissible form by VIP.

"[W]here a reasonable person could envision liability, that person has a duty to make some inquiry." *White v City of New York*, 81 NY2d 955, 958 (1993). In the instant case, Mendoza was taken to

the hospital after being attacked on VIP's premises by a VIP employee, that employee was arrested at the time of the occurrence, and Keane's lawyer advised him to let Ortiz go because of potential problems with the insurer. Under these circumstances, it would be reasonable for VIP to notify plaintiff.

Even if it were assumed that, at the time of the attack, VIP could reasonably believe that they would not be held liable, once the underlying lawsuit was filed naming VIP as defendants, there could be no question of VIP's potential liability. Yet, even after the suit was filed, VIP waited 23 days to submit a notice of claim, which, as discussed above, still constitutes an untimely notification.

Moreover, the opposition argument is supported only by an attorney affirmation, not by the affidavit of anyone from VIP who would have personal knowledge of VIP's state of mind. To defeat a motion for summary judgment, it is insufficient merely to raise feigned issues of fact. *Heath v Liberato*, 82 AD3d 841 (2d Dept 2011).

Based on the foregoing, it is hereby

ORDERED that plaintiff's motion for summary judgment seeking a declaration that it is not obligated to defend or indemnify VIP Towing Corp. or VIP Auto Body, Inc. in the underlying personal injury action entitled *Gregorio Sanchez Mendoza v VIP Towing Corp., VIP Auto Body, Inc. and David S. Ortiz*, index number 13745/10, now

pending in Supreme Court, Queens County is granted; and it is further


ORDERED that plaintiff submit Order no later than June 29, 2012.

Dated: May 29, 2012

**FILED**

ENTER:

JUN 06 2012

  
NEW YORK  
COUNTY CLERK'S OFFICE  
Joan M. Kenney, J.S.C.