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

PRESENT: Hon. Doris Ling-Cohan PART 36

Index Number : 113469/2010
HERMITAGE INS. CO.
vs.
ADAMO, JOSEPH L.
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits (memo)	1, 2
Answering Affidavits — Exhibits	3, 4
Replying Affidavits (memos)	5, 7
Interim Order	6

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion for summary judgment by plaintiff is granted in accordance with the attached memorandum decision.

[redacted]

Dated: 7-12-2012

J.S.C.
JUSTICE DORIS LING-COHAN

Check one: ☑ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

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

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

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HERMITAGE INSURANCE COMPANY,

Plaintiff,

Index No.: 113469/10
DECISION/ORDER

-against-

Motion Seq. No. 001

JOSEPH L. ADAMO, ADRIANNE ADAMO, JOSEPH L. ADAMO, D.C. as tenant of METRO CHIROPRACTIC, P.C. and ANNA TSIMIS,

Defendants.

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HON. DORIS LING-COHAN, J.S.C.:

In this declaratory judgment action, plaintiff moves for summary judgment on the complaint (motion sequence number 001). For the following reasons, plaintiff's motion is granted.

BACKGROUND

This action was commenced by the plaintiff insurer, Hermitage Insurance Company (Hermitage), with respect to a related personal injury/negligence action, which was commenced by defendant Anna Tsimis (Tsimis), in the Supreme Court of the State of New York, County of Suffolk, captioned *Tsimis v Adamo*, bearing Index Number 24589/10 (the underlying action). *See* Notice of Motion, Kotlyarsky Affirmation, Exhibit A. Defendants in this action, Joseph L. Adamo, Adrianne Adamo and Joseph L. Adamo, D.C. as tenant of Metro Chiropractic, P.C. (collectively, the Adamo defendants), are the defendants in the underlying action. *Id.*

The Adamo defendants own a commercial building and the appurtenant parking lot located at 4671 Express Drive North in Ronkonkoma, New York, where they operate Metro Chiropractic, P.C. *See* Notice of Motion, Kotlyarsky Affirmation, ¶ 3. Defendant Joseph Adamo is a chiropractor. The gravamen of the underlying action is that, on December 13, 2008, Tsimis

claims to have slipped and fallen on snow in the parking lot that the Adamo defendants had allegedly negligently failed to remove. *Id.* at ¶ 10.

Prior to the Tsimis accident, the Adamo defendants had obtained a commercial general liability insurance policy from Hermitage, which was in effect from October 1, 2008 through October 1, 2009 (the Hermitage policy). *Id.*, ¶ 6. The relevant portions of the Hermitage policy provide as follows:

> Commercial General Liability Coverage Form
>
> ***
>
> Section IV - Commercial General Liability Conditions
>
> ***
>
> 2 Duties In the Event Of An Occurrence, Offense, Claim Or Suit
>
> a. You must see to it that we are notified as soon as practicable of an "occurrence" or an offense which may result in a claim. To the extent possible, notice should include:
>
> (1) How, when and where the "occurrence" or offense took place;
>
> (2) the names and addresses of any injured persons or witnesses; and
>
> (3) the name and location of any injury or damage arising out of the "occurrence" or offense.
>
> b. If a claim is made or "suit" is brought against any insured, you must:
>
> (1) Immediately record the specifics of the claim or "suit" and the date received; and
>
> (2) Notify us as soon as practicable.
>
> You must see to it that we receive written notice of the claim or "suit" as soon as practicable.
>
> c. You and any other involved insured must:
>
> (1) Immediately send us copies of any demands, notices, summonses or legal papers received in connection with

the claim or "suit;"

(2) Authorize us to obtain records and other information;

(3) Cooperate with us in the investigation or settlement of the claim or defense against the "suit;" and

(4) Assist us, upon our request, in the enforcement of any right against any person or organization which may be liable to the insured because of injury or damage to which this insurance may also apply.

d. No insured will, except at the insured's own cost, voluntarily make a payment, assume any obligation, or incur any expense, other than for first aid, without our consent.

Section V - Definitions

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3. "Bodily injury" means bodily injury, sickness or disease sustained by a person, including death resulting from any of these at any time.

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13. "Occurrence" means an accident, including continuous or repeated exposure to substantially the same harmful conditions.

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18. "Suit" means a civil proceeding in which damages because of "bodily injury" ... to which this insurance applies are alleged.

See Notice of Motion, Aptman Affidavit, Exhibit 1.

As previously mentioned, Tsimis suffered her accident on December 13, 2008. In a written statement that Joseph Adamo prepared on August 11, 2010, with the assistance of one of Hermitage's investigators, Adamo states that while he did not witness the accident, one of his employees informed him of Tsimis's fall, right after it happened and 911 was called. *See* Notice of Motion, Indellicati Affidavit, Exhibit 1. Adamo further indicates that he went outside and

found Tsimis lying on the ground, "crying and in pain...holding her hip". *Id.* According to Adamo, Tsimis informed him that she could not move her hip and could not stand. Adamo provided Tsimis some sheets, blankets and a pillow for her to lay down on while she waited for the ambulance, which took her away. *Id.* Dr. Adamo states that, after Tsimis's accident, he continued to treat Tsimis's husband, for a year, and was informed by Tsimis' husband that Tsmis was receiving medical treatment for injuries to her back and hip, as a result of the fall. *Id.* Adamo indicates that despite learning of Tsimis' accident on the day that it occurred, he did not notify his business liability insurance carrier, non party Keep Agency - of the accident until sometime in January 2010, after he learned from Tsimis' husband that "his wife might be pursing something", which was right "before he abruptly ended his treatment" with Adamo. *Id.* Adamo forwarded Tsimis's subsequent summons and complaint to Hermitage when he received them in July of 2010. *Id.*

Hermitage asserts, and it is not disputed that, the first and only notice that it received of Tsimis's accident from the Adamo defendants was a fax, dated July 23, 2010, that included the summons and complaint in the underlying action. *See* Notice of Motion, Kotlyarsky Affirmation, ¶ 15. Hermitage notes that this notification came 19 months after the date of Tsimis's accident. *Id.* As a result, on August 18, 2010, Hermitage sent the Adamo defendants a letter disclaiming coverage with respect to the underlying action. *See* Notice of Motion, Aptman Affidavit, Exhibit 2. Thereafter, on October 8, 2010, Hermitage commenced the instant action by serving a summons and complaint that sets forth one cause of action for a declaratory judgment that it is not obligated to defend the Adamo defendants in the underlying action. *See* Notice of Motion, Kotlyarsky Affirmation, Exhibit B. In response, on December 2, 2010, the Adamo defendants filed an answer

that sets forth one counterclaim for a declaratory judgment that Hermitage is obligated to defend them. *Id.*; Exhibit D. Now before the court is Hermitage's motion for summary judgment.

DISCUSSION

When seeking summary judgment, the moving party bears the burden of proving, by competent, admissible evidence, that no material and triable issues of fact exist. *See e.g. Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 (1985); *Sokolow, Dunaud, Mercadier & Carreras v Lacher*, 299 AD2d 64 (1st Dept 2002). Once this showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial of the action. *See e.g. Zuckerman v City of New York*, 49 NY2d 557 (1980); *Pemberton v New York City Tr. Auth.*, 304 AD2d 340 (1st Dept 2003). As previously mentioned, Hermitage has asserted one claim for declaratory relief in this action.

Declaratory judgment is a discretionary remedy which may be granted "as to the rights and other legal relations of the parties to a justiciable controversy whether or not further relief is or could be claimed." CPLR 3001; *see e.g. Jenkins v State of N.Y., Div. of Hous. and Community Renewal*, 264 AD2d 681 (1st Dept 1999). Further, it is well settled that:

> "'on a motion for summary judgment, the construction of an unambiguous contract is a question of law for the court to pass on, and ... circumstances extrinsic to the agreement or varying interpretations of the contract provisions will not be considered, where ... the intention of the parties can be gathered from the instrument itself.'"

Maysek & Moran v Warburg & Co., 284 AD2d 203, 204 (1st Dept 2001), quoting *Lake Constr. & Dev. Corp. v City of New York*, 211 AD2d 514, 515 (1st Dept 1995). Here, as detailed below, Hermitage is entitled to the declaration that it seeks.

Hermitage argues that, as a matter of law, the Adamo defendants' unexcused 19-month delay in notifying it of Tsimis' accident violated the Hermitage policy's requirement (reproduced *supra*), that the Adamo defendants serve such notification "as soon as practicable," and, thereby, relieved Hermitage of its obligation to defend the Adamo defendants in Tsimis's underlying action. This court agrees.

In *Great Canal Realty Corp. v Seneca Ins. Co., Inc.* (5 NY3d 742, 743-744 [2005]), the Court of Appeals summarized the governing law as follows:

> Where a policy of liability insurance requires that notice of an occurrence be given "as soon as practicable," such notice must be accorded the carrier within a reasonable period of time. The insured's failure to satisfy the notice requirement constitutes "a failure to comply with a condition precedent which, as a matter of law, vitiates the contract." Hence, the carrier need not show prejudice before disclaiming based on the insured's failure to timely notify it of an occurrence.
>
> We have recognized that there may be circumstances that excuse a failure to give timely notice, such as where the insured has "a good-faith belief of nonliability," provided that belief is reasonable. But we have further explained that "the insured's belief must be reasonable under all the circumstances, and it may be relevant on the issue of reasonableness, whether and to what extent, the insured has inquired into the circumstances of the accident or occurrence." Additionally, the insured bears the burden of establishing the reasonableness of the proffered excuse [internal citations omitted].

As a general rule, unexcused delays of short duration have been held to be a breach of the insurance contract and a failure to comply with a condition precedent, as a matter of law. *See Deso v. London & Lancashire Indem. Co. of Am.*, 3 NY2d 127, 129 (1957) (51 day delay); *Safer v. Government Emples. Ins. Co.*, 254 AD2d 344, 345 (2nd Dept 1998) (approximately six week delay); *Power Auth. of State of N.Y. v. Westinghouse Elec. Corp.*, 117 AD2d 336, 340 (1st Dept 1986) (53 day delay).

Here, the undisputed delay in withholding notice to plaintiff of 19 months from the date of the accident, can hardly be considered "as soon as practicable", in light of that Adamo learned of the accident, moments after it occurred. *See Hedyt Contr. Corp. v. American Home Assur. Co.*, 146 AD2d 497, 497-98 (1st Dept 1989) (delay in notifying the insurer in excess of four (4) months was held to be untimely, as a matter of law, where the insured was aware of the occurrence, in such case a fire, on the day it occurred). Thus, the burden is on defendants to establish a reasonable excuse for the failure to give plaintiff insurer timely notice of the occurrence. *See White v. City of New York*, 81 NY2d 955, 957 (1993).

In determining whether an insured's alleged excuse for delaying in notifying its insurer was reasonable, the "issue is not whether the insured believes he will ultimately be found liable for the injury, but whether he has a reasonable belief that no claim will be asserted against him". *SSBSS Rlty. Corp v. Pub. Serv. Mut. Ins. Co.*, 253 AD2d 583, 584 (1st Dept 1998)(citations omitted); *see also Heydt Contr. Corp. v. Am. Home Assur. Co.*, 146 AD2d at 499 (1st Dept 1989). It has been specifically held that "the mere possibility of a claim" triggers an insured's duty to notify. *Heydt Contr. Corp. v. Am. Home Assur. Co.*, 146 AD2d at 499.

Based upon the within submissions and the undisputed facts, defendants have failed to satisfy their burden. As stated, Adamo, the building owner, became aware of Tsimis' fall, almost immediately after it occurred. Moreover, Adamo himself, went to the scene of Tsimis' fall, and found her "lying on the ground crying, and in pain...holding her hip". *See* Notice of Motion, Indellicati Affidavit, Exhibit 1. Tsimis informed Adamo that she was unable to stand and Adamo comforted her with sheets, blankets and pillows, while she waited for the ambulance to arrive.

Moreover, Adamo was aware that Tsimis was taken away from the scene of her fall by ambulance. Additionally, after the accident, Adamo was informed by Tsimis' husband that Tsimis was in fact receiving medical treatment for her back and hip, as a result of her fall. Where as here, the insured is aware of an occurrence resulting in injury, requiring emergency medical attention and subsequent treatment, courts have consistently held that an insured's notification delay is not excused. *See SBSS Rlty. Corp. v. Pub. Serv. Mut. Ins. Co.*, 253 AD2d at 584; *New York Cent. Mut. Fire Ins. Co. v. Riley*, 234 AD2d 279, 279-80 (2nd Dept 1996); *Sobara Const. Corp. v. AIU Ins. Co.*, 41 AD3d 245, 246 (1st Dept 2007); *Paramount Ins. Co. v. Rosedale Gardens, Inc.*, 293 AD2d 235, 239 (1st Dept 2002).

While the Adamo defendants argue that the instant 19 month delay was excused because Adamo had a reasonable belief that Tsimis would not commence suit against him because he did not see any fractures or cuts on her body when he saw her on the ground on the day of her accident, and that Tsimis's husband never indicated that his wife was contemplating bringing suit in the year that Adamo continued to treat him after her accident, such argument is contrary to the applicable case law. As correctly argued by Hermitage, Adamo's belief that he would not be sued was not reasonable under the circumstances, as the law requires that a person make some independent inquiry or investigation in order for his belief to be deemed reasonable. *See Great Canal Rlty. Corp. v. Seneca Ins. Co.*, 5 NY3d at 743-44; *Sec. Mut. Ins. Co. Of NY v. Acker-Fitzsimmons Corp.*, 31 NY2d 436, 441-42 (1972); *York Specialty Food, Inc. v. Tower Ins. Co. of New York*, 47 AD3d 589, 590 (1st Dept 2008). It has been held that, it is the occurrence of an injury, not the commencement of a personal injury action, that triggers an insured's obligation to provide notice according to the term of the policy. *See Great Canal Rlty. Corp. v. Seneca Ins. Co.*, 5 NY3d at

743; *Rondale Bldg. Corp. v. Nationwide Prop. & Cas. Ins. Co.*, 1 AD3d 584, 585-86 (2nd Dept 2003)("a reasonable prudent insured would have concluded that there existed a strong possibility that a liability claim would be made due to the fact that the victim was removed from the scene by ambulance") .

Adamo, however, does not allege that he ever made any an inquiry of Tsimis's husband as to whether a claim was being pursued against him. *See White v. City of New York*, 81 NY2d 955, 958 (1993)(stating that "where a reasonable person could envision liability, that person has a duty to make some inquiry"). Thus, Adamo's allegation that he should be excused from notifying his insurer of Tsimis' accident which he learned of, shortly after it occurred, because Tsimis' husband never told him that any sort of claim was going to be made against him, is not supported by case law. It is noted that Adamo never spoke with Tsimis herself, to inquire as to whether in fact she was seriously injured, as a result of her fall, or as to whether she would be asserting a claim.

Thus, based upon the above, Hermitage's motion summary judgment on its claim for a declaratory judgment in its favor is granted.[1]

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[1] The court notes that while the parties were given an opportunity, by interim order, to submit case law on the issue of "whether defendant took reasonable steps in further inquiring into a potential claim under the within facts and circumstances, and in particular, whether it is reasonable for a licensed medical professional (ie defendant chiropractor) to rely on the results of his/her own investigation, in determining potential liability", defendants have not supplied any case law.

DECISION

ACCORDINGLY, for the foregoing reasons, it is hereby

ORDERED that the motion, pursuant to CPLR §3212, of plaintiff Hermitage Insurance Company is granted; and is further

ADJUDGED AND DECLARED that plaintiff Hermitage Insurance Company is not obligated to provide defendants Joseph L. Adamo, Adrianne Adamo, Joseph L. Adamo, D.C. (as tenant of Metro Chiropractic, P.C.) with a defense and indemnification in the action pending in the Supreme Court of the State of New York, County of Suffolk, captioned *Tsimis v Adamo* and bearing Index Number 24589/10 .

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).

Dated: New York, New York
July 12, 2012

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

J:\Summary Judgment\hermitagevadamo.flip.wpd