STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

BARRY D. GOLDBERG,

Plaintiff,

-against-

DECISION and ORDER
INDEX NO. 39-12
RJI NO. 01-12-108280

ENCOMPASS INSURANCE COMPANY OF AMERICA, PAUL VINCENT and WENDY VINCENT,

Defendants.

Supreme Court Albany County All Purpose Term, December 14, 2012
Assigned to Justice Joseph C. Teresi

APPEARANCES:
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TERESI, J.:

On March 31, 2008 Paul Vincent (hereinafter "Vincent") was injured while working on a construction site (hereinafter "the site") owned by Barry Goldberg (hereinafter "Goldberg"). Vincent commenced a Labor Law personal injury action against Goldberg, among others, to recover his resulting damages.[1]

[1] The action is entitled Vincent, Et. Al. v Goldberg, Et. Al., Index No. 869-11, Supreme Court Albany County, which is hereinafter referred to as Vincent v Goldberg.

Goldberg has now commenced this declaratory judgment action against his insurer, Encompass Insurance Company of America (hereinafter "Encompass"). He seeks a judgment declaring that Encompass is obligated to defend and indemnify him in the Vincent v Goldberg action. Issue was joined by Encompass and discovery is ongoing. Encompass now moves for summary judgment. It seeks a declaration that it is not obligated to defend or indemnify Goldberg in the Vincent v Goldberg action because of Goldberg's untimely notice and because Victor's injury did not occur at an insured location. Goldberg opposes the motion. Although material issues of fact remain on Encompass' "untimely notice" defense, because it demonstrated its entitlement to judgment as a matter of law on the "insured location" issue, and no issue of fact was raised, Encompass' motion is granted.

Considering the "untimely notice" issue first, it is well established that "[w]here 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." (Great Canal Realty Corp. v. Seneca Ins. Co., Inc., 5 NY3d 742, 743 [2005]). "[T]he 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... [and no] showing of prejudice is required." (Argo Corp. v. Greater New York Mut. Ins. Co., 4 NY3d 332, 339 [2005], Sorbara Const. Corp. v. AIU Ins. Co., 11 NY3d 805 [2008]; Waldron v New York Cent. Mut. Fire Ins. Co., 88 AD3d 1053, 1054 [3d Dept 2011][although Insurance Law §3420[a][5] was amended to now require a "prejudice" showing, because the policy herein was issued prior to such amendment's effective date (January 19, 2009) prejudice need not be established]).

Here, by demonstrating that Goldberg's notice was untimely as a matter of law,

Encompass met its initial burden on this summary judgment motion. (Tower Ins. Co. of New York v Classon Hgts., LLC, 82 AD3d 632 [1st Dept 2011]). It is uncontested that the policy at issue required Goldberg to notify Encompass of Vincent's injury "as soon as is practical." Although Goldberg admittedly knew of Vincent's injury soon after its occurrence, he did not notify Encompass of Vincent's injury for two plus years. Such delay "is untimely as a matter of law." (Lobosco v Best Buy, Inc., 80 AD3d 728, 732 [2d Dept 2011][four month delay was unreasonable]; Tower Ins. Co. of New York v Classon Hgts., LLC, supra [five month delay was unreasonable]; Great Canal Realty Corp. v. Seneca Ins. Co., Inc., supra [four month delay was unreasonable]; Bauerschmidt & Sons, Inc. v Nova Cas. Co., 69 AD3d 668 [2d Dept 2010][four month delay was unreasonable]; St. James Mechanical, Inc. v Royal & Sunalliance, 44 AD3d 1030 [2d Dept 2007][two year delay was unreasonable]; Rosier v Stoeckeler, __AD3d__ [3d Dept 2012][approximate two year delay was unreasonable as a matter of law]).

Encompass' showing shifts the burden to Goldberg to demonstrate "a reasonable excuse for [his] delay in providing notice." (N. Country Ins. Co. v Jandreau, 50 AD3d 1429, 1430 [3d Dept 2008]; Canal Realty Corp. v. Seneca Ins. Co., Inc., supra; Courduff's Oakwood Rd. Gardens & Landscaping Co., Inc. v Merchants Mut. Ins. Co., 84 AD3d 717 [2d Dept 2011]).

As relied on by Goldberg, "an insured's good-faith belief in nonliability, when reasonable under the circumstances, may excuse a delay in notifying the insurer." (Preferred Mut. Ins. Co. v New York Fire-Shield, Inc., 63 AD3d 1249 [3d Dept 2009] quoting Spa Steel Prods. Co. v Royal Ins., 282 AD2d 864 [3d Dept 2001]). As the Third Department has uniformly held when addressing the issue, "reasonableness is generally a question of fact for a jury." (Intl. Contractors Corp. v Illinois Union Ins. Co., 79 AD3d 1428, 1431 [3d Dept 2010]; Nationwide Mut. Fire Ins.

Co. v Maitland, 79 AD3d 1348 [3d Dept 2010]; U.S. Underwriters Ins. Co. v Carson, 49 AD3d 1061 [3d Dept 2008];Klersy Bldg. Corp. v Harleysville Worcester Ins. Co., 36 AD3d 1117 [3d Dept 2007]; Morehouse v Lagas, 274 AD2d 791 [3d Dept 2000]; Preferred Mut. Ins. Co. v New York Fire-Shield, Inc., supra; N. Country Ins. Co. v Jandreau, supra).

On this record, Goldberg raised a triable issue of fact relative to the reasonableness of his belief in non-liability. Goldberg admits that he and a business partner, Craig Dennis (hereinafter "Dennis"), were constructing a home for its resale. Goldberg supplied the land, i.e. the site, and capital while Dennis acted as the general contractor. Goldberg, being in the retail furniture business nearly his entire adult life, was unaware of his Labor Law liability (which is being asserted in Vincent v Goldberg). Instead, he relied on Dennis who was in control of the work at the construction site and the site itself. Dennis informed Goldberg of Vincent's injury and that Vincent was "not supposed to be on the jobsite." Dennis also told Goldberg that the accident was due to Vincent's own carelessness. Dennis' control of the work and site, along with Vincent's own carelessness and unauthorized access to the site caused Goldberg to believe that he would not be liable for Vincent's injuries. The reasonableness of such belief raises a triable question of fact for a jury. (Id.)

Accordingly, because a triable issues of fact remains, this portion of Encompass' motion for summary judgment is denied.

Turning to Encompass' "insured location" claim, it demonstrated its entitlement to judgment as a matter of law.

"When confronted with an insurance coverage dispute,[c]ourts must determine the rights and obligations of parties under an insurance contract based on the policy's specific language."

(City of Elmira v Selective Ins. Co. of New York, 83 AD3d 1262, 1263 [3d Dept 2011], quoting Pepper v Allstate Ins. Co., 20 AD3d 633 [3d Dept 2005]). "Unambiguous provisions must be given their plain and ordinary meaning." (State Farm Mut. Auto. Ins. Co. v Glinbizzi, 9 AD3d 756, 757 [3d Dept 2004]).

Here, Encompass submitted the insurance policy it issued to Goldberg and highlighted its specific provisions relative to the locations covered. By the plain language of such policy, Encompass established that Goldberg was insured against personal injury claims, in pertinent part, at his "residence" or on "land owned by... [Goldberg] on which a one or two family dwelling is being built as a residence for [Goldberg]." Encompass established that the site was neither. It was not Goldberg's residence, nor was it being built as a residence for him. As Goldberg has readily admitted, the site was a business venture where his "plan was to sell the house and split the profit" with Dennis. Upon the foregoing showing, Encompasss demonstrated its entitlement to judgment as a matter of law.

With the burden shifted, Goldberg failed to raise a triable issue of fact. In his opposition papers Goldberg proffers no facts or legal arguments controverting Encompass' "insured location" showing. Nor has he attempted to demonstrate an ambiguity in the relevant provisions of the insurance policy.

Accordingly, because no issue of fact has been raised, Encompass' summary judgment motion based upon its "insured location" defense is granted, and it is hereby:

ORDERED, ADJUDGED, DECLARED AND DECREED that Encompass is not obligated to defend or indemnify Goldberg with respect to an action pending in the Supreme Court of the State of New York, County of Albany, captioned Vincent, Et. Al. v Goldberg, Et.

Al. (Index No. 869-11).

This Decision and Order is being returned to the attorneys for Encompass. A copy of this Decision and Order and all other original papers submitted on this motion are being delivered to the Albany County Clerk for filing. The signing of this Decision and Order shall not constitute entry or filing under CPLR §2220. Counsel is not relieved from the applicable provision of that section respecting filing, entry and notice of entry.

So Ordered.

Dated: December 9, 2012
Albany, New York

JOSEPH C. TERESI, J.S.C.

PAPERS CONSIDERED:

1. Notice of Motion, dated October 19, 2012, Affirmation of Rosa Feeney, dated October 19, 2012, with attached Exhibits A-L.
2. Affidavit of Barry Goldberg, dated November 7, 2012.
3. Affirmation of Rosa Feeney, dated December 4, 2012.