**Allstate Insurance Company v Marcone**

2003 NY Slip Op 30151(U)

August 4, 2003

Supreme Court, Suffolk County

Docket Number: 0005977/1998

Judge: Robert W. Doyle

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Index No. **98-5977**

SUPREME COURT-STATE OF NEW YORK

TRIAL SPECIAL TERM, PART 5 SUFFOLK COUNTY

PRESENT:

Hon. ROBERT W. DOYLE
Justice of the Supreme Court

MOTION DATE: **9-19-02**
MOT. Seq. **#003 – SJ** – MG
**#004X – SJ** – MD
**#005X** – SJ – **MD**
CASEDISP

**X**

ALLSTATE INSURANCE COMPANY,

Plaintiff,

-against-

MICHAEL A. MARCONE, NELDA MARCONE, ELENA DUKE BENEDICT, EDWARD E. BENEDICT, DUKE & BENEDICT, INC., FRANK'S SPORT SHOP, INC., FRANK'S SPORT SHOP, KERRI IOSSA, as Administratrix of the Estate of GIUSEPPE IOSSA, and KERRY IOSSA, Individually,

Defendants.

**X**

PLAINTIFFS' ATTY:
SWEETBAUM & SWEETBAUM
3000 Marcus Avenue, Suite 3W6
Lake Success, New York **11042**

DEFENDANTS' ATTYS:
THOMAS J. TROETTI, ESQ.
**45** Knollwood Road
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CHRISTOPHER MAHER, ESQ.
**317** Madison Avenue, Suite **814**
New York, New York **10017**

NELDA MARCONE
Defendant Served/No Appearance
**2913** Dewitt Place
Bronx, New York 10469

Upon the following papers numbered 1 to 5 read on these motions for summary judgment: Notice of **Motion/~~Order to Show Cause~~** and supporting papers 1 ; Notice of Cross Motion and supporting papers 2 & 3 ; Answering Affidavits and supporting papers 4 ; Replying Affidavits and supporting papers 5 ; Other __ ; (and after hearing counsel in support and opposed to the motion); it is,

***ORDERED*** that this motion by plaintiff Allstate Insurance Company for summary judgment for the relief demanded in the complaint and these cross motions by defendants Michael Marcone and Nelda Marcone and defendant Kerri Iossa as Administrator of the Estate of Giuseppe Iossa and individually each of which also seek summary judgment are considered by the Court and are decided as follows:

This is a declaratory judgment action commenced by plaintiff seeking a determination that it is not obligated to defend or indemnify Michael Marcone in connection with a wrongful death action commenced against him in Supreme Court, Bronx County. The underlying lawsuit is based upon the death of Giuseppe Iossa on December 3,1995. At that time, defendant Marcone and the decedent were hunting deer in Putnam County, New York. The decedent was assigned the task of "pushing" the deer out of the woods and toward the area where defendant and his uncle were hunting. Defendant Marcone contends that when he heard a sound in the woods and saw a deer heading toward him, he fired a shot from his rifle. He heard a moaning sound coming from a distance away and soon discovered that his friend Giuseppe Iossa had been shot in the chest. Iossa died a short time later.

A wrongful death action was commenced by the decedent's widow as the Administratrix of his estate in Supreme Court, Bronx County against various parties including the defendant herein. Defendant Marcone, who was 38 years old at the time of the shooting, resided with his mother at the family residence at 2913 DeWitt Place, Bronx, New York. Plaintiff Allstate had in force at the time of the accident a standard homeowners policy of liability insurance with coverage up to $50,000.00 issued to Luigi Marcone and Nelda Marcone, the parents of defendant Michael Marcone, and a personal umbrella policy with $1,000,000.00 in coverage.

By letter dated January 22, 1998, Allstate disclaimed coverage for the accident in question based upon the failure of the insured to promptly notify Allstate of the occurrence. In addition, Allstate disclaimed coverage upon the ground that the intentional act of the insured in causing injury to a third party was not within the coverage afforded by the policy in question. At the time that it notified its insured of the disclaimer, it also notified them of its intentions to commence a declaratory judgment action to determine the validity of its disclaimer.

In support of its motion for summary judgment, plaintiff contends that the notification of the incident by its insured on January 2,1998, over two years after its occurrence, was in violation of the terms of the policy and vitiated the coverage that would otherwise have been available. It also notified its insured that the policy of insurance did not include coverage for the intentional acts of the insured and disclaimed coverage on this basis as well.

In opposition to the motion and in support of the cross motions, defendants Michael Marcone and Nelda Marcone and defendant Kerri Iossa each raise a number of issues.

Defendants Marcone contend that they did not consider that an insurance policy of his parents would cover a hunting accident that occurred some 50 miles away from his mother's residence. Further, defendant Michael Marcone argues that he was never aware of the terms and conditions of the policy. According to defendant Marcone, his mother, the holder of the policy, was an immigrant and was unable to read, write or speak English. Defendant Marcone asserts that he first learned of a potential claim against him when he received the complaint in the underlying wrongful death action

in late November 1997. Although letters were apparently sent to defendant in June 1996 and January 1997 from the attorneys representing the estate of the deceased, defendants deny receipt of them. Defendants point out that because of the inability of his mother to read or write English, she would often discard mail sent to her husband who had been deceased since 1982. Defendants note that the letters were addressed to the previously deceased Luigi Marcone. According to defendants, it was not until the service upon them of the summons and complaint and his consultation with an attorney did they realize that a claim was been asserted against them. Counsel thereafter promptly forwarded the summons and complaint to plaintiff Allstate.

According to defendants, the question of the whether the notification was prompt and in accordance with the terms of the policy is to be determined from all of the circumstances surrounding the incident and that, in this instance, the notification was in accordance with the policy provisions.

In opposition to the cross motion and in further support of its motion, plaintiff raises several issues. It notes that the letters sent to defendant Marcone at his home address were not returned by the post office as undeliverable and were, therefore, presumptively received by them. It argues that the fact that Nelda Marcone might have discarded the letters because of her inability to understand English should not compromise plaintiff's rights under the policy. Plaintiff contends that in light of the apparent receipt of these letters at the Marcone residence, there was an obligation on their part to take appropriate action. Indeed, plaintiff points out that the letters themselves advise defendants to forward the letter to their homeowner's insurance company.

Plaintiff also notes that subsequent to the shooting but prior to the receipt of the summons and complaint in the underlying action, defendant Michael Marcone was involved in a hearing before the New York State Department of Environmental Conservation regarding his hunting license. The hearing arose as a result of the shooting incident in question and resulted in the suspension of his hunting license. Although defendant did not appear at the hearing, he did hire counsel to represent in connection therewith. According to plaintiff, if defendant was sophisticated enough to engage counsel to represent him at the administrative hearing about his hunting license, he should also be aware that a shooting accident involving the death of an individual requires notification of an potential insurer of the incident.

It is a well-established principle that absent a valid excuse, noncompliance with the provisions of an insurance policy requiring timely written notice of an accident vitiates the contract. (Deso v. London & Lancashire Indem. Co., 3 NY2d 127, 129; Security Mut. Ins. Co. v. Acker-Fitzsimons Corp., 31 NY2d 436,440; Rushing v. Commercial Cas. Ins. Co., 251 NY 302,304-305.) It is also well settled that where an insurance policy, such as the one at bar, requires an insured to provide prompt notice of an occurrence, such notice must be provided within a reasonable time in view of all of the facts and circumstances of the case (see, Deso v. London & Lancashire Indem. Co. of America, 3 NY2d 127,164 NYS2d 689,143 NE2d 889). The giving of required notice is a condition precedent to coverage under the policy (Deso v. London & Lancashire Tndem. Co. of America, supra). When the

insured has delayed giving the required notice, the insured bears the burden of demonstrating the reasonableness of the delay (see, White v. City of New York, 81 NY2d 955,598 NYS2d 759,615 NE2d 216). In the case at bar, defendant was well aware that his actions resulted in the death of an individual. Given the seriousness of the incident, no ordinary prudent person could have reasonably believed himself to be immune from potential civil liability (see, Winstead v. Uniondale Union Free School Dist., 201 AD2d 721,608 NYS2d 487; Allstate Ins. Co. v. Grant, 185 AD2d 911,587 NYS2d 382; Greater N.Y. Ins. Co. v. Farrauto, 158 AD2d 514, 551 NYS2d 277; Peerless Ins. Co. v. Nationwide Ins. Co., 12 AD2d 602,208 NYS2d 469; Zurich Gen. Acc. & Liability Ins. Co. v. Harbil Restaurant, 7 AD2d 433,184 NYS2d 51; cf., Merchants Mut. Ins. Co. v. Hoffman, 86 AD2d 779,448 NYS2d 68, aff'd 56 NY2d 799,452 NYS2d 398,437 NE2d 1155;).

Further, defendant has failed to meet his burden of proving that he was justifiably ignorant of the insurance coverage available to him under his parents' homeowner's policy. It is true that a justifiable lack of knowledge of insurance coverage may excuse a delay in reporting an occurrence (see, Mighty Midgets v. Centennial Ins. Co., 47 NY2d 12,416 NYS2d 559,389 NE2d 1080; Jarka Corp. v. American Fid. & Cas. Co., 19 AD2d 141,241 NYS2d 546, aff'd 14 NY2d 714,250 NYS2d 61, 199 NE2d 161; Padavan v. Clemente, 43 AD2d 729,350 NYS2d 694). However, in order to prevail on this theory, the insured person must prove not only that he or she was ignorant of the available coverage, but also that he or she made reasonably diligent efforts to ascertain whether coverage existed (see, Matter of Allstate Ins. Co. [Frank], 57 AD2d 950,394 NYS2d 902, rev'd on other grounds 44 NY2d 897,407 NYS2d 696,379 NE2d 222; Aetna Cas. & Sur. Co. v. Pennsylvania Mfrs. Assn. Ins. Co., 57 AD2d 982,394 NYS2d 330). Defendant Marcone has not established that he made reasonably diligent efforts to ascertain whether coverage existed. In fact, he has not established that he made any efforts to determine whether insurance coverage existed. The fact that his mother had limited knowledge of the English language and was unfamiliar with the legal ramifications of the notices sent to her home does not constitute a valid reason for the lack of notice (see, Virtuoso v. Aetna Cas. and Sur. Co., 134 AD 2d 252,520 NYS 2d 439).

Under these and all the circumstances of this case, it is clear that defendant Marcone failed to demonstrate a reasonable excuse for his delay in notifying the plaintiff of the underlying incident. Accordingly, the cross motion by defendants Michael A. Marcone & Nelda Marcone must be denied.

There is also the cross motion by defendant Estate of Giuseppe Iossa which seeks summary judgment. Although the Court has found that the notice provided by its insured was untimely pursuant to the terms of the policy, Insurance Law section 3420 (a) provides that the failure of an insured to give notice "shall not invalidate any claim ... if it shall be shown not to have been reasonably possible to give such notice within the prescribed time and that notice was given as soon as was reasonably possible."

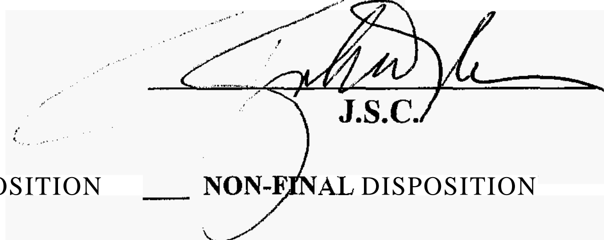
Insurance Law § 167(1)(c) affords the injured party an independent right to give notice of an accident, thereby satisfying the notice requirement of the policy (Jenkins v. Burgos, 99 AD2d 217,

221). If the injured person proceeds diligently to ascertain the existence of coverage and to give the required notice to the insurer, he will not be charged with any delay on the part of the assured. In evaluating the timeliness of such notice, it is well established that notice by the injured party is not to be measured by the same standard as notice by the insured, since "[w]hat is reasonably possible for the insured may not be reasonably possible for the person he has injured." (Lauritano v. American Fid. Fire Ins. Co., 3 AD2d 564, 568, affd 4 NY2d 1028.) "The sufficiency of notice by an injured person is governed not by mere passage of time but by the means available for such notice" (National Grange Mut. Ins. Co. v. Diaz, 111 AD2d 700,701,490 NYS2d 516; see also, Jenkins v. Burgos, supra, 99 AD2d at 221, 472 NYS2d 373). It must be shown that the injured person acted diligently in attempting to ascertain the existence of insurance coverage and, thereafter, expeditiously pursued his claim. (See, Matter of Lloyd [MVAIC], 23 NY2d 478,482.) The injured party has the burden of proving that he or his counsel acted diligently in attempting to ascertain the identity of the insurer and, thereafter, expeditiously notified the insurer (see, Rushing v. Commercial Cas. Ins. Co., 251 *NY* 302,167 NE 450; National Grange Mut. Ins. Co. v. Diaz, supra; Allstate Ins. Co. v. Manger, 30 Misc2d 326,328,213 NYS2d 901).

Here, the Court concludes that defendant Estate has not met its burden of establishing that it acted diligently to ascertain the identity of the insurer. As acknowledged by the Estate, the only actions taken by it in attempting to ascertain the existence of coverage was the mailing of two letters to Michael Marcone seeking the identity of any insurance carrier that might provide coverage for this incident. The address was found through a search of the telephone directories for Manhattan and the Bronx. That search resulted in four individuals with the last name of Marcone and a letter was sent to Michael Marcone at each of these addresses. One of those addresses was the residence of Michael Marcone. The letters were sent on June 20,1996 and January 8,1997. The Estate did not aggressively press the search for the necessary information and did not follow up its letters with telephone calls, personal visits, or other inquiries (see, Lauritano v. American Fidelity Fire Ins. Co., 3 AD2d 564,162 NYS2d 553). Moreover, although the second letter was sent on January 8,1997, the wrongful death action was not commenced until November **25,1997,** almost **11** months later. It is unclear why so much time elapsed before the commencement of the wrongful death action since it was the act of commencing the action that prompted the insured to notify his insurer.

Accordingly, the Court finds that the Estate did not act diligently in ascertaining the identity of Michael Marcone's insurer and that the disclaimer of coverage was effective as against it. Therefore, the motion by plaintiff for summary judgment is granted and the cross motions by defendants Marcone and the Estate of Giuseppe Iossa for summary judgment are denied. Plaintiff is entitled to a declaration that it is not required to indemnify defendants Marcone nor pay any judgment against them with respect to the events surrounding the death of Giuseppe Iossa on December 3,1995.

Dated: August 4,2003



**J.S.C.**

__X__ FINAL DISPOSITION ____ **NON-FINAL** DISPOSITION