

York Specialty Food, Inc. v Tower Ins. Co. of N.Y.

2006 NY Slip Op 30675(U)

November 8, 2006

Supreme Court, New York County

Docket Number: 100414/04

Judge: Judith J. Gische

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

HON. JUDITH J. GISCHE

PRESENT:

PART 10

Index Number : 100414/2004

YORK SPECIALTY FOODS

vs

TOWER INSURANCE

Sequence Number : 006

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits -- Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

*motion (s) and cross-motion(s)
decided in accordance with
the annexed decision/order
of even date.*

FILED
NOV 16 2006
NEW YORK
COUNTY CLERK'S OFFICE

Dated: NW 8, 2006

JG

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST 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 10

-----X
YORK SPECIALTY FOOD, INC. d/b/a
OSCAR'S ON YORK,

Plaintiff,

-against-

Decision/Order

Index No.: 100414/04
Seq. No. : 006

Present:
Hon. Judith J. Gische
J.S.C.

TOWER INSURANCE COMPANY OF NEW
YORK, STEVEN ZAGORIA, L&M AGENCY
and A PLUS COVERAGE, INC.,

Defendants.
-----X

Recitation, as required by CPLR 2219 [a], of the papers considered in the review of this (these) motion(s):

Papers	Numbered
Defs Tower & A Plus motion [sj] w/JSW affirm in support, exhs	1
Pltf's affirm in opp (FAC) w/HST affid in opp, exhs	2
Def Zagoria affirm in opp (RJB)	3
Defs Tower & A Plus reply affirm in further support (JSW) w/exhs	3

-----X
Upon the foregoing papers, the decision and order of the court is as follows:

This is an action for a declaratory judgment that plaintiff is entitled to defense by defendant Tower Insurance Company of New York ("Tower") in a personal injury action pending in Supreme Court, New York County (the "Zagoria" action). The court has before it Tower and A Plus Coverage, Inc.'s motion for summary judgment. The timeliness of these motions was previously addressed in this court's decision/order dated July 14, 2006.

Background

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NOV 16 2006
NEW YORK COUNTY CLERK'S OFFICE

York Specialty Food Inc. operates a restaurant called "Oscar's on York," where defendant Steven Zagoria ("Mr. Zagoria") allegedly tripped and fell one evening while exiting the establishment. He has sued plaintiff for damages arising from personal injuries he claims to have sustained, including a fracture.

Tower contends that plaintiff submitted a late notice of claim, a condition precedent to coverage, and therefore it was within its contractual right to disclaim coverage of the claim that plaintiff ultimately submitted to it on October 8, 2003, almost eight (8) months after Mr. Zagoria's accident on February 16, 2003. Argo Corporation v. Greater New York Mutual Insurance Company, 4 NY3d 332 (2005).

Although Tower has appointed an attorney to represent York in the underlying personal injury action, plaintiff has brought this action for declaratory judgment seeking this court's decision as to whether, as it claims, it timely notified Tower of an occurrence at its restaurant. Many of the facts are not in dispute, but the disagreement is over whether, as plaintiff claims, its notice was not "unreasonably" late, and whether it has a valid excuse for why, if it was late, such lateness should be excused. Steinberg v. Hermitage Insurance Co., 26 AD3d 426 (2nd dept 2006).

The time line of the events preceding the commencement of the Zagoria action are germane to the dispute before the court. They are as follows.

The accident occurred on February 16, 2003. The bartender (Bruce Barnes) called for an ambulance and patrons helped bring Mr. Zagoria inside where he waited for the ambulance's arrival. The accident was also witnessed by a waitress employed at Oscar's (Karen Valint). Mr. Zagoria has testified he fell at the entrance/exit of the restaurant, and that someone called an ambulance. He admits he did not tell anyone

he thought he was injured, although in pain. None of the ambulance attendants talked to anyone in the restaurant, but took Mr. Zagoria to the ambulance where he was triaged.

Mr. Tuck, York's principal, testified at his deposition that he first learned there had been an accident outside the restaurant 3 or 4 days after it happened. The information came from Mr. Joyce, the dining room manager who did not offer him many details about the accident. English is not Mr. Tuck's native tongue, and Mr. Joyce communicated the event to Mr. Tuck in English.

Mr. Tuck testified that it would have been the responsibility of either of his managers, Mr. Joyce or Mary Beth, to report the accident to the insurance company. Neither of them did. When Mr. Tuck received a letter from Mr. Zagoria's lawyer dated September 3, 2003 stating he had a claim, Mr. Tuck immediately (that day) contacted his insurance representative, Mr. Lam of L&M Agency, a named defendant.

Mr. Lam testified at his EBT (and documentary evidence shows) that he did not complete the necessary paperwork for the Zagoria claim (the "general liability loss notice" or "ACCORD") until two weeks later, on September 18, 2003. He testified that in the meantime he was trying to "find" Mary Beth, the restaurant manager, to get certain information for the claim. Thereafter, Mr. Lam faxed the notice to defendant A Plus Coverage Inc., the insurance adjuster, on October 8, 2003. He could not recall whether he also mailed a copy. A Plus, in turn, sent the claim to Tower that same day. The Zagoria action was commenced (filed) on October 10, 2003. An investigator went to Oscar's on November 3rd to speak to Ms. Valint and the bartender. Tower disclaimed coverage on November 21, 2003.

It is undisputed that under plaintiff's policy with Tower, it is obligated to notify

Tower:

"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 and witnesses; and
- (3) The nature and location of any injury or damages arising out of the "occurrence" or "offense"

Discussion

On a motion for summary judgment, the moving party has to prove its *prima facie* case such that it would be entitled to judgment in its favor, without the need for a trial. CPLR § 3212; Winegrad v. NYU Medical Center, 64 NY2d 851 (1985); Zuckerman v. City of New York, 49 NY2d 557, 562 (1980).

The purpose of filing a timely notice of claim with an insurance company is to give the insurance carrier an opportunity to investigate claims while fresh, make an early estimate of its potential exposure, and establish ample reserves. Argo Corporation v. Greater New York Mutual Insurance Company, 4 NY3d 332 (2005). Allowing a case to proceed to the entry of a default judgment against the property owner before notifying the insurance carrier is an extreme example of what constitutes late notice. Argo Corporation v. Greater New York Mutual Insurance Company, supra. However, even delays of as few as fifty (51) one days may support an appropriate disclaimer. Deso v. London & Lancashire Indem Co. of America, 3 NY2d 127 (1957).

The parties' dispute is fundamentally over whether plaintiff's belief, that Mr. Zagoria's fall on February 16, 2003 was not an occurrence that had to be reported, was reasonable, and therefore an excuse for an unintended late reporting of this

occurrence. There is also the closely related factual dispute over whether the manner in which Mr. Zagoria's accident occurred should have immediately suggested the possibility of a claim against the restaurant. See: Urban Resource Institute, Inc. v. Nationwide Mut. Ins. Co., 191 A.D.2d 261 (1st Dept 1993).

Plaintiff has offered a number of excuses for why it did not contact its insurance company sooner. For example, it did not know Mr. Zagoria's identity because he did not provide anyone at Oscar's with his personal information, such as his name and telephone. Although people saw Mr. Zagoria after he fell, there was no obvious defect visibly apparent at the door, and therefore no reason to believe the restaurant was responsible for his accident. By his own account, Mr. Zagoria had ordered two cocktails while at the restaurant.

After Mr. Tuck received the letter from Mr. Zagoria's lawyer, he immediately contacted his insurance representative, Mr. Lam. Compare: Argo Corporation v. Greater New York Mutual Insurance Company, *supra* (late notice of claim and late notice of lawsuit). There was, however, a two week delay in Mr. Lam filing the claim with Tower. Since the timeliness of notice is raised by Tower as a defense, it remains to be decided what role, if any, this two week delay played in Tower's disclaimer.

Since plaintiff has presented excuses or mitigating circumstances that frame factual disputes, it is for the trier of fact to decide (among other things) whether it notified Tower of an occurrence "as soon as practicable," and whether it had a reasonable basis for believing no claim would be asserted against it. SSBSS Realty Corp. v. Public Service Mutual Insurance Co., 253 AD2d 583 (1st dept 1998). Therefore, this branch of defendants' motion for summary judgment is denied.

The second branch of defendants' motion is for summary judgment dismissing the claims against A Plus, the insurance adjuster, because no separate claims are asserted against this defendant, and A Plus acted as a disclosed agent for Tower, its principal. In opposition plaintiff states that A Plus may be found liable for its own torts, apart from any liability within the scope of its agency, therefore A Plus should not be dismissed from the case.

Defendants have proved that L&M faxed the notice of claim to A Plus on October 8, 2003, and A Plus faxed it the same day to Tower. Thus, any issue about delay in processing the claim does not involve A Plus, and it should be dismissed from this case. Defendant's motion, for summary judgment severing and dismissing the claims against A Plus is granted. The Clerk shall enter judgment in favor of defendant A Plus Coverage, Inc., against plaintiff, dismissing the claims and complaint against it.

Finally, defendant urges the court to reject Mr. Zagoria's late submission on this motion. Mr. Zagoria acknowledges they are late and they add little of substance to these motions. Given the result achieved by the plaintiff in this action, Mr. Zagoria's papers in support are cumulative and they have not been considered.

Since the note of issue has been filed, and this case is ready to be tried, plaintiff shall serve a copy of this decision/order on the Trial Support Office so that this case may be scheduled and assigned for trial.

Conclusion

It is hereby

Ordered that defendants' motion for summary judgment dismissing this case is

denied as there are factual disputes that have to be tried; and it is further

Ordered that defendants' motion for summary judgment dismissing the claims and complaint against A Plus Coverage, Inc., is granted; and it is further

Ordered that the Clerk shall enter judgment in favor of defendant A Plus Coverage, Inc., against plaintiff, dismissing the claims and complaint against it; and it is further


Ordered that plaintiff shall serve a copy of this decision/order on the Trial Support Office so that this case may be scheduled and assigned for trial.

Ordered that any relief not expressly addressed has nonetheless been considered and is hereby denied.

This shall constitute the decision and order of the Court.

Dated: New York, New York
November 8, 2006

So Ordered:



Hon. Judith J. Gische, J.S.C.

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