SHORT FORM ORDER INDEX NO.16050-2009

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART XIII SUFFOLK COUNTY

PRESENT:
HON. MELVYN TANENBAUM
Justice

MOTION #001 **Mot D**
R/D: 07/31/09
S/D: 10/08/09

MCGOVERN-BARBASH ASSOCIATES, LLC, BARBASH ASSOCIATES, INC. and THE VILLAGES WEST AT HUNTINGTON, ETC.,

Plaintiffs,

-against-

EVEREST NATIONAL INSURANCE, COMPANY PEERLESS INSURANCE COMPANY and EXCELSIOR INSURANCE COMPANY,

Defendants.

PLTF'S/PET'S ATTY:
REILLY, LIKE & TENETY
179 Little East Neck Road North
Babylon, NY 11702

DEFT'S/RESP'S ATTY:
CARROLL McNULTY & KULL, LLC
570 Lexington Ave., 10th Floor
New York, NY 10022

Upon the following papers numbered 1 to 11 read on this motion for an order pursuant to CPLR Section 3211(a)(1)&(7) & CPLR Section 3211(c) Notice of Motion/Order to Show Cause and supporting papers 1-9; Notice of Cross Motion and supporting papers __Answering Affidavits and supporting papers 10-11 Replying Affidavits and supporting papers ___ Other _____; ~~(and after hearing counsel in support and opposed to the motion)~~ it is,

ORDERED that this motion by defendant EVEREST NATIONAL INSURANCE COMPANY ("EVEREST") for an order pursuant to CPLR Section 3211(a)(1)&(7) and 3211(d) dismissing plaintiff's complaint based upon documentary evidence and for failure to state a valid cause of action or, in the alternative, converting this motion to one for summary judgment and granting summary judgment dismissing plaintiffs complaint is determined as follows:

On August 22, 2007 John Wehrheim ("Wehrheim") was injured while working at a construction project on commercial premises owned by the plaintiffs. By letter dated September 11, 2007 counsel for "Wehrheim" advised plaintiff "MCGOVERN-BARBASH ASSOCIATES" ("MBA") that the law firm had been retained to represent the injured worker for a personal injuries claim arising out of the August 22nd accident. On November 16, 2007 "Wehrheim" commenced a personal injury action against the plaintiffs alleging his injuries were caused by the owners negligence and violations of Labor Law Sections 200, 240(1) and 241(6).

Defendant "EVEREST" issued a liability policy to plaintiffs insuring the premises where "Wehrheim" was injured.By letter dated December 6, 2007 plaintiff "VILLAGES WEST" forwarded a copy of "Wehrheim's" summons and complaint to its insurance agency. On December 10, 2007

the agency notified the insurance carrier's agent of "Wehrheim's" personal injury action. On January 2, 2008 defendant "EVEREST" disclaimed coverage based upon plaintiff "MCGOVERN's" late notice. Plaintiffs action seeks a judgment declaring that the insurer "EVEREST" is obligated to provide a defense and indemnify plaintiffs in the underlying personal injury action.

Defendant "EVEREST's" motion seeks an order dismissing plaintiff's complaint claiming that no viable claim is asserted against the insurer. In support defendant submits an attorney's affirmation together with documentary evidence in the form of the underlying insurance policy and copies of letters exchanged between the parties and claim that plaintiff's complaint must be dismissed since plaintiffs failed to timely notify the insurer of the underlying claim in accordance with the policy requirements. Defendant claims that the almost four month delay in notifying the insurer of the personal injury action violated the policy terms which requires that notice of claim be provided "as soon as practicable". Defendant asserts that the insurer is not required to show prejudice as a result of a late notice, since the 2009 legislation which requires that an insurer prove material prejudice exempts policies issued prior to its enactment. Defendant asserts that "EVEREST" issued the policy in 2007. Defendant also claims that the insurer made a timely disclaimer of coverage and therefore plaintiff's declaratory judgment action must be dismissed.

In opposition plaintiffs submit an affidavit from the controller of defendant "VILLAGES WEST" and claim that significant issues of fact exist concerning: 1) whether plaintiffs provided the insurance carrier timely notice of the claim, and 2) whether there is a reasonable excuse for the delay in serving the notice sufficient to require a plenary trial. Plaintiffs claim that the policy requirement of notice "as soon as practicable" is subject to a reasonable interpretation on a case by case basis and requires that a jury determine the essential facts leading to service of the notice. Plaintiffs assert that the evidence reveals that the carrier obtained sufficient information of the incident and has not been prejudiced in its ability to defend against the injured parties claims. Plaintiffs also claim that as owners, they reasonably believed that the contractor's liability policy would provide coverage for the worker's injuries and therefore their failure to immediately notify "EVEREST" of the injury was reasonable under the circumstances. It is plaintiffs position that the issue of whether notice was timely provided where plaintiffs reasonably believed another insurer would provide liability coverage is a question of fact for a jury.

To succeed on a motion pursuant to CPLR Section 3211(a)(1), the documentary evidence upon which defendant's motion is predicated must be such that it resolves all the factual issues as a matter of law and conclusively and definitively disposes of the plaintiffs claims (Siddiqui v. Nationwide, 255 AD2d 30, 687 NYS2d 457 (3rd Dept., 1999); Fernandez v. Cigna, 188 AD2d 700, 590 NYS2d 925 (3rd Dept., 1992)).

The issue before the Court on a motion to dismiss for failure to state a cause of action is not whether the cause of action can be proved, but whether one has been stated (Stakuls v. State of New York, 42 NY2d 272, 397 NYS2d 740 (1977)). A pleading does not state a cause of action when it

fails to allege wrongdoing by a defendant upon which relief can be granted (Hex Building Corp.v. Lepeck Construction, 104 AD2d 231, 482 NYS2d 510 (2nd Dept., 1984)). The Court must accept the facts alleged as true and determine whether they fit any cognizable legal theory (CPLR Section 3211(a)(7); Marone v. Marone, 50 NY2d 481, 429 NYS2d 592 (1980); Klondike Gold Inc. v. Richmond Associates, 103 AD2d 821, 478 NYS2d 55 (2nd Dept., 1984)).

An insurer's obligation to cover its insured's loss is not triggered unless the insured gives timely notice of loss in accordance with the terms of the insurance contract. (Security Mutual Insurance Company v. Acker-Fitzsimons Corp., 31 NY2d 436 (1972)). Without timely notice, an insurer may be deprived of the opportunity to investigate the claim and is rendered vulnerable to fraud. Late notification may also prevent the insurer from providing a sufficient reserve fund. For these reasons the right of an insurer to receive notice has been held to be so fundamental that the insurer need show no prejudice to be able to disclaim liability on this basis (Allstate Insurance Company v. Furman, 84 AD2d 29 (2nd Dept., 1981)).

Defendant's policy required that its insured provide notice of claim "as soon as practicable". Such a provision has been uniformly interpreted to require that notice be given within a reasonable time under all the circumstances (Metropolitan Property and Casualty Insurance Company v. Mancuso, 93 NY2d 487, 693 NYS2d 81 (1999); Sorbara Construction Corp.v. AIU Insurance Company, 41 AD3d 245, 838 NYS2d 531 (1st Dept., 2007)). The Court of Appeals in Mighty Midgets, Inc. v. Centennial Insurance Company, 47 NY2d 12, 19 (1979) explained:

> "It is well settled that the phrase "as soon as practicable" is an elastic one, not to be defined in a vacuum. By no means does it connote an ironbound requirement that notice be "immediate" or even "prompt", relative as even those concepts often are; "soon", a term close to each of these in common parlance, is expressly qualified in the policy by the word "practicable. Nor was compliance with the insurance policy's temporal requirement to be measured simply by how long it was before written notification came forth. More crucial was the reason it took the time it did. So, the provision that notice be given "as soon as practicable" called for a determination of what was within a reasonable time in light of the facts and circumstances of the case at hand."

A review of the complaint in the light most favorable to the plaintiffs shows that sufficient claims are set forth to support a valid declaratory judgment action against the defendant. Moreover even were the Court to convert this motion to one for summary judgment pursuant to CPLR Section 3211 (c), based upon the evidence submitted by the parties substantial issues of fact exist concerning

whether adequate timely notice was given to the insurer under the circumstances sufficient to require a plenary trial. Defendant's motion for an order dismissing plaintiffs complaint must therefore be denied. Accordingly it is

ORDERED that defendant's motion for an order pursuant to CPLR Section 3211(a)(1)&(7) is denied.

Dated: January 28, 2010

MELVYN TANENBAUM

J.S.C.