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

PRESENT : DONNA M. MILLS **PART** 58
Justice

TOWER INSURANCE COMPANY OF NEW YORK,

Plaintiffs,

-v-

T&S FOOD MARKET CORP., et al.,
Defendants.

INDEX NO. 106210/10

MOTION DATE _____

MOTION SEQ. NO. 001

MOTION CAL NO. _____

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

	PAPERS NUMBERED
Notice of Motion/Order to Show Cause-Affidavits– Exhibits....	1 + 1A
Answering Affidavits– Exhibits	2
Replying Affidavits	

CROSS-MOTION: _____ YES ✓ NO

Upon the foregoing papers, it is ordered that this motion is:

DECIDED IN ACCORDANCE WITH ATTACHED MEMORANDUM DECISION.

Dated: 12/1/11

J.S.C.

DONNA M. MILLS, J.S.C.

Check one: ✓ FINAL DISPOSITION ___ NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 58

TOWER INSURANCE COMPANY OF NEW YORK,

Plaintiff,

- against -

T&S FOOD MARKET CORP., GERTRUDE WIESEL, ALL NATURAL FOOD CORP., and HAROS REALTY CORP.,

Defendants.

INDEX NO. 106210/10

DECISION/ORDER

DONNA M. MILLS, J.:

This declaratory judgment action arises from an incident on October 23, 2007, in which Gertrude Wiesel allegedly tripped and fell over a hose that lay across the sidewalk adjacent to the premises at 1911 Avenue M, Brooklyn, New York ("the Premises") and sustained bodily injuries.

Thereafter, Ms. Wiesel commenced a personal injury suit entitled Gertrude Wiesel v Friends Exhaust Systems, Inc. et al., pending in the Supreme Court of the Sate of New York, County of Kings ("the underlying action").

Plaintiff, Tower Insurance Company of New York ("Tower") now submits this motion for summary judgment seeking a declaration that it is not obligated to defend or indemnify T&S Food Market Corp. ("T&S") on the grounds that it failed to provide timely notice of the claim in violation of the policy terms.

BACKGROUND

Tower issued a commercial general liability insurance policy to T&S for the subject premises. The Tower policy conditions coverage under the general liability part on receipt of prompt notice of an occurrence or offense that may give rise to a claim. Policy form CG 00 01 10 01, at Section IV - Commercial General Liability Conditions, at paragraph 2., states in relevant part:

2. Duties in the event of 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 person and witnesses; and

(3) The nature and location of any injury or damage arising out of the "occurrence" or offense.

"Occurrence" is defined in Section V - Definitions as follows:

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

According to the allegations in the underlying action, Gertrude Wiesel sustained personal injuries when she tripped and fell over a hose laying across the sidewalk adjacent to the insured T&S's premises. Ms. Wiesel alleges that T&S and others were negligent in the ownership, maintenance, control and/or supervision of the wires and/or hoses that lay across the aforementioned sidewalk. Tower alleges that T&S forfeited its right to coverage under the policy by waiting seven months before reporting the incident to Tower, in violation of the policy condition that insured give notice of a claim "as soon as practicable." On May 21, 2008 , approximately seven months after the occurrence took place, Tower received first notice of the incident by receipt of a facsimile from Sergey Yefremov, vice-president of T&S, forwarding a copy of the underlying summons and complaint.

On June 4, 2008, Tower, through its claims examiner, Juanita Britton, discussed the facts of the claim with Yefremov. Additionally, Yefremov gave a sworn statement to Accurate Infoservices, Inc., who was retained by Tower to investigate the claim. According to Yefremov's statement:

I saw when the woman f[a]ll. . . I was on the sidewalk. . . I was the only who

witnessed the f[a]ll . .. . She tripped on the hoses and fell forward on her hands. . . there was no sign of injury and I helped her up. She walked away without asking for an ambulance. About an hour later she came back and asked for my name. At that time she told me that she had injured her arm and had seen a doctor. After she left I went out and took pictures of the hoses and the cones. After not hearing anything from the woman, I thought she was not going to make a claim, and did not think it was necessary to report it to my broker.

Wiesel's deposition testimony in the underlying action confirms much of Yefremov's statements to Tower;

Q: And on that occasion you actually went into the Gormand store, correct?

A: First I spoke to [Yefremov] outside and he took me into the store.

Q: And this Gormand the store that your identified earlier as 1911 Avenue M, if you know?

A: Yes.

* * *

Q: And you said Sergey was sitting outside the store?

A: Correct.

Q: And why don't you tell me the sum and substance of your conversation with Sergey as you guys were outside there?

A: I told Sergey that I was in pain. I asked for his name and I asked him to take me into the store to speak with the owner.

Q: Okay, and then you indicated that he did bring you into the store, correct?

A: Correct

Q: Did you speak with an owner?

A: I spoke with a woman behind the cash register. I'm not sure if she was an

owner.

* * *

Q: Can you tell me the sum and substance of the conversation you had with the woman behind the cash register?

A: I told her that I fell and hurt myself.

Q: Okay. Did she say anything to you?

A: She gave me a business card.

Tower disclaimed coverage by letter dated June 16, 2008, alleging that T&S failed to give timely notice of the claim. Tower alleged that T&S was aware of the occurrence giving rise to the underlying action on about October 23, 2007, yet failed to notify Tower until May 21, 2008.

APPLICABLE LAW & DISCUSSION

CPLR § 3212(b) requires that for a court to grant summary judgment, the court must determine if the movant's papers justify holding, as a matter of law, "that the cause of action or defense has no merit." It is well settled that the remedy of summary judgment, although a drastic one, is appropriate where a thorough examination of the merits clearly demonstrates the absence of any triable issues of fact (Vamattam v Thomas, 205 AD2d 615 [2nd Dept 1994]). It is incumbent upon the moving party to make a prima facie showing based on sufficient evidence to warrant the court to find movant's entitlement to judgment as a matter of law (CPLR § 3212 [b]). Once this showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (Zuckerman v City of New York, 49 NY2d 557, 562 [1980]). Summary judgment should be denied when, based upon the evidence presented, there is any significant doubt as to the existence of a triable issue of fact (Rotuba Extruders v Ceppos, 46 NY2d 223 [1978]). When there is no genuine issue to be resolved at trial,

the case should be summarily decided (Andre v Pomeroy, 35 NY2d 361, 364 [1974]).

The record shows that T&S should have reasonably anticipated that a claim would be asserted. Yefremov saw Wiesel fall in front of his premises; Wiesel came back an hour later to request insurance information and received a business card from the purported owner after claiming that she had just come from seeing a doctor, and was in pain as a result of the fall. The witnessing of the fall by Yefremov and the statements of Wiesel made immediately after the accident and the statements made an hour later when she returned, should have reasonably alerted the insured that a claim was possible.

The insured claims that it reasonably believed in its non-liability with respect to the alleged incident, because it was not involved in any activities at the loss location and were not responsible for any alleged injury, and therefore had no awareness of any liability with respect to Wiesel's accident. However, the relevant legal standard is "not whether the insured believes he will ultimately be found liable for the injury, but whether he has a reasonable basis for a belief that no clam will be asserted against him" (SSBSS Realty Corp. v Public Serv. Mut. Ins. Co., 253 AD2d 583, 584 [1st Dept 1998]).

This Court agrees with Tower that notice of the occurrence was untimely as a matter of law. Tower established that its insured, T&S, failed to report the incident for nearly seven months. In response, T&S failed to demonstrate that a reasonably prudent person, upon learning of the incident, would have a good faith, objective basis for believing that litigation would not be commenced (see Ferreira v Mereda Realty Corp., 61 AD3d 463 [1st Dept 2009]). Having failed to do so, the insured is entitled to summary judgment in its favor declaring that it had no duty to defend or indemnify T&S.

Accordingly, it is

ORDERED that the motion of plaintiff for summary judgment on its first cause of action seeking a declaration that it is not obliged to provide a defense to, and provide coverage for, the defendant T&S Food Market Corp., in the action of Gertrude Wiesel v

Friends Exhaust Systems, Inc., et al., Index No. 13711/08, Kings County, is granted; and it is further

ADJUDGED and DECLARED that plaintiff herein is not obliged to provide a defense to, and provide coverage for, the defendant T&S Food Market Corp. in the said action pending in Kings County.

ORDERED that the branch of plaintiff's motion for a default judgment against the other defendants in this action is rendered moot.

Dated: 12/1/11

ENTER:

J.S.C.

DONNA M. MILLS, J.S.C.

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).**