

<b>Faicco v Mr. Lucky's Pub Inc.</b>
2012 NY Slip Op 33820(U)
December 6, 2012
Supreme Court, Suffolk County
Docket Number: 09-50503
Judge: Daniel Martin
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**ORIGINAL**

SHORT FORM ORDER

INDEX No. 09-50503  
CAL No. 11-02241OT

SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 9 - SUFFOLK COUNTY

**PRESENT:**

Hon. DANIEL MARTIN  
Justice of the Supreme Court

MOTION DATE 7-16-12 (#003)  
MOTION DATE 7-25-12 (#004)  
ADJ. DATE 9-11-12  
Mot. Seq. # 003 - MD  
# 004 - MG

-----X  
REENA MARIO FAICCO,  
  
Plaintiff,

PALERMO, PALERMO & TUOHY, P.C.  
Attorney for Plaintiff  
1300 Veterans Memorial Highway  
Hauppauge, New York 11788

- against -

MR. LUCKY'S PUB INC., d/b/a MR. LUCKY'S  
PUB and CHERYL KIJIK,  
  
Defendants.

THE LAW OFFICES OF VLADIMIR &  
ASSOCIATES, PLLC  
Attorney for Defendants/Third-Party Plaintiffs  
2137 Deer Park Avenue  
Deer Park, New York 11729

-----X  
MR. LUCKY'S PUB INC., d/b/a MR. LUCKY'S  
PUB and CHERYL KIJIK,  
  
Third-Party Plaintiffs,

NICOLETTI GONSON SPINNER & OWEN LLP  
Attorney for Third-Party Defendant  
555 Fifth Avenue, 8th Floor  
New York, New York 10017

- against -

PENN-STAR INSURANCE COMPANY,  
  
Third-Party Defendant.  
-----X

Upon the following papers numbered 1 to 78 read on this motion summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 22; 23 - 46; Notice of Cross Motion and supporting papers    ; Answering Affidavits and supporting papers 47 - 52; 53 - 74; Replying Affidavits and supporting papers 75 - 76; Other memoranda of law, 77; 78; (and after hearing counsel in support and opposed to the motion) it is,

**ORDERED** that the motion (#003) by plaintiff Reena Marie Faicco and the motion (#004) by third-party defendant Penn-Star Insurance Company are consolidated for the purposes of this determination; and it is

**ORDERED** that the motion (#003) by plaintiff pursuant to CPLR 3215 for a default judgment against defendants Mr. Lucky's Pub, Inc. and Cheryl Kijik is denied, as moot; and it is

**ORDERED** that the motion (#004) by third-party defendant for summary judgment dismissing the third-party complaint against it is granted; and it is further

**DECLARED** that third-party defendant Penn-Star Insurance Company has no duty to defend or indemnify third-party plaintiff with respect to the underlying claim.

On June 23, 2009, plaintiff Reena Marie Faicco allegedly was injured when she slipped and fell on premises owned by defendants/third party-plaintiffs Mr. Lucky's Pub Inc., d/b/a Mr. Lucky's Pub, and Cheryl Kijik (hereinafter the Pub defendants). Plaintiff commenced this action in December 2009 to recover damages for personal injuries allegedly sustained on the subject premises. Although the Pub defendants were insured by third-party defendant Penn-Star Insurance Company, it declined coverage under the policy, stating that the Pub defendants did not report the occurrence as soon as practicable. Thereafter, the Pub defendants brought a third-party action against Penn-Star Insurance Company (hereinafter Penn-Star) for a judgment declaring that it has a duty to defend and indemnify them in the underlying action.

Penn-Star moves for summary judgment dismissing the third-party complaint on the ground that there is no coverage under the policy, as the Pub defendants failed to cooperate under the terms of the policy. Penn-Star also moves for a default judgment pursuant to CPLR 3215(a) against the Pub defendants. In support of its motion, Penn-Star submits, among other things, copies of the pleadings, the liability insurance policy it issued to the Pub defendants, and the Pub defendants' application for the liability insurance. It also submits copies of reports prepared by C.I.A Adjusters & Investigators and excerpts of deposition testimony of Gregory Amato, Patricia Eubanks, Nina Manojlovich

The Pub defendants oppose the branch of Penn-Star's motion for summary judgment, arguing that an issue of fact exists as to whether they had notice of the occurrence before receiving the summons and complaint, and that the language in the insurance policy is vague in defining "occurrence." The Pub defendants also oppose the branch of Penn-Star's motion for a default judgment, arguing that it is moot as the parties have entered a stipulation withdrawing this branch of the motion. In opposition, the Pub defendants submit copies of the stipulation and the affidavits of Gregory Amato and Cheryl Kijik. Amato's affidavit states that two days after the accident, Patty Eubanks, a bar maid at the pub, informed him that plaintiff slipped and fell behind the pub. It states that Eubanks told him that plaintiff fell in the parking lot which is shared with a 7-Eleven store next door. It also states that Eubanks informed him plaintiff was not seriously injured and that he was never informed that the plaintiff sought medical attention. The affidavit further states that Eubanks told him plaintiff was a regular customer before and after the accident.

Plaintiff Faicco also opposes Penn-Star's motion, arguing that the Pub defendants complied with the requirements of the insurance policy by reporting the occurrence as soon as practicable. In opposition, Faicco submits, among other things, a copy of the pleadings, transcripts of the parties'

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deposition testimony, and a copy of the Pub defendants' application for liability insurance.

At his examination before trial, Amato, the manager of Mr. Lucky's Pub, testified that he learned of the accident the day after it occurred. He testified that "Patty," who was the only employee working at the pub the night of the accident, informed him plaintiff had sprained her ankle. He further testified that he learned a few days later that Patty called for an ambulance to take plaintiff to the hospital.

At her examination before trial, Patricia Eubanks, who was working as a bartender on the night of the accident, testified that she called an ambulance after learning that plaintiff slipped and fell outside of the pub. She testified that she did not inform Mr. Amato about the accident until a day or two later, because she did not think plaintiff's injury was serious. She further testified that Mr. Amato already knew that "911" had been called the night of the subject accident.

A party claiming insurance coverage bears the burden of proving entitlement to such coverage, and an insurer bears the burden of proving an exclusion in the policy applies to defeat coverage (*see Consolidated Edison Co. of N.Y. v Allstate Ins. Co.*, 98 NY2d 208, 746 NYS2d 622 [2002]; *Rhodes v Liberty Mut. Ins. Co.*, 67 AD3d 881, 892 NYS2d 403 [2d Dept 2009]). Where an insurance policy requires the insured to give prompt notice of an occurrence, the notice must be given within a reasonable time in view of all the circumstances (*see Hanson v Turner Constr. Co.*, 70 AD3d 641, 897 NYS2d 116 [2d Dept 2010]; *Eagle Ins. Co. v Zuckerman*, 301 AD2d 493, 753 NYS2d 128 [2d Dept 2003]). Absent a reasonable excuse for the delay in providing a notice, the failure to comply with the notice provision vitiates coverage (*see Great Canal Realty Corp. v Seneca Ins. Co., Inc.*, 5 NY3d 742, 800 NYS2d 521 [2005]; *Sputnik Restaurant Corp. v United Natl. Ins. Co.*, 62 AD3d 689, 878 NYS2d 428 [2d Dept 2009]; *Avery & Avery, P.C. v American Ins. Co.*, 51 AD3d 695, 858 NYS2d 319 [2d Dept]), whether or not the insurer is prejudiced by the delay (*see Briggs Ave. LLC v Insurance Corp. of Hannover*, 11 NY3d 377, 870 NYS2d 841 [2008]; *Argo Corp. v Greater N.Y. Mut. Ins. Co.*, 4 NY3d 332, 794 NYS2d 704 [2005]).

Penn-Star established its prima facie entitlement to judgment as a matter of law by demonstrating that it did not receive notice of the accident until January 13, 2010, more than six months after it occurred (*see Balbert v 302 96<sup>th</sup> St. Owners Corp.*, 77 AD3d 779, 909 NYS2d 535 [2d Dept 2010]; *120 Whitehall Realty Assoc., LLC v Hermitage Ins. Co.*, 40 AD3d 719, 835 NYS2d 715 [2d Dept 2007]; *Felix v Pinewood Bldrs.*, 30 AD3d 459, 818 NYS2d 119 [2d Dept 2006]). The Pub defendants, in opposition, failed to raise a triable issue of fact as to an excuse or mitigating factor justifying their delay. To the contrary, the record reveals that the accident involved a patron who slipped and fell on the Pub defendants' premises and had to be removed from the premises in an ambulance. Moreover, the bartender employed by the Pub defendants knew about the accident on the day it occurred, and the manager of the Pub learned about the accident a day or two later (*see Lobosco v Best Buy, Inc.*, 80 AD3d 728, 915 NYS2d 305 [2d Dept 2011]; *Tower Ins. Co. of N.Y. v Lin Hsin Long Co.*, 50 AD3d 305, 855 NYS2d 75 [1st Dept 2008]; *Rondale Bldg. Corp. v Nationwide Prop. & Cas. Ins. Co.*, 1 AD3d 584, 769 NYS2d 46 [2d Dept 2003]). While Amato's affidavit states he did not know that where the accident occurred or that plaintiff sought medical attention, his affidavit appears to be an attempt to raise a feigned issue of fact in order to avoid the consequences of dismissal (*see Tejada v Jonas*, 17 AD3d 448, 792 NYS2d 605 [2d Dept 2005]; *Parisi Enter. Inc. Profit Sharing Trust v Settimo*, 198 AD2d

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272, 603 NYS2d 571 [2d Dept 1993]). Accordingly, the motion by Penn-Star for summary judgment dismissing the third-party complaint is granted.

As to plaintiff's motion pursuant to CPLR 3215 for a default judgment against the Pub defendants, it has been withdrawn according to correspondence from plaintiff's counsel dated August 20, 2012. Thus, this motion is denied, as moot.

Dated DECEMBER 6, 2012.

*Amiel Martin*  
J.S.C.

           FINAL DISPOSITION      X   NON-FINAL DISPOSITION