

Tower Ins. Co. of N.Y. v 2165 Pac. St., LLC
2013 NY Slip Op 31373(U)
June 20, 2013
Supreme Court, New York County
Docket Number: 101776/11
Judge: Donna M. Mills
Republished from New York State Unified Court System's E-Courts Service. Search E-Courts (http://www.nycourts.gov/ecourts) for any additional information on this case.
This opinion is uncorrected and not selected for official publication.

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

PRESENT : DONNA M. MILLS
Justice

PART 58

TOWER INSURANCE COMPANY OF NEW YORK,

INDEX No. 101776/11

Plaintiff,

MOTION DATE _____

-v-

MOTION SEQ. NO. 002

2165 PACIFIC STREET, LLC, et al.,

MOTION CAL No. _____

Defendants.

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

PAPERS NUMBERED

Notice of Motion/Order to Show Cause-Affidavits- Exhibits.... 1, 2

Answering Affidavits- Exhibits _____

FILED 4

Replying Affidavits _____

JUN 27 2013 5

CROSS-MOTION: _____ YES NO

NEW YORK
COUNTY CLERK'S OFFICE

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

DECIDED IN ACCORDANCE WITH THE ATTACHED ORDER.

Dated: 6/20/13

Donna M. Mills

J.S.C.

Check one: FINAL DISPOSITION

DONNA M. MILLS, J.S.C.
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 -

2165 PACIFIC STREET, LLC, SOPHIA GREEN MCKENZIE, DEVON L. MCKENZIE and ROBIN PARKINSON,

Defendants.

INDEX NO.
101776/11

DECISION/ORDER

FILED

DONNA M. MILLS, J.:

JUN 27 2013

Tower Insurance Company of New York ("Tower") brings this motion pursuant to CPLR §3212 for summary judgment against defendants 2165 Pacific Street, LLC ("2165 Pacific"), Sophia Green McKenzie, Devon L. McKenzie and Robin Parkinson ("Parkinson") declaring that it has no duty to defend or indemnify 2165 Pacific or the McKenzies in a personal injury suit entitled Robin Parkinson v 2165 Pacific Street, LLC, Sophia Green McKenzie and Devon L. McKenzie, currently pending in the Supreme Court of the State of New York, County of Kings, under Index No.: 19983/2010 ("the underlying action").

NEW YORK COUNTY CLERK'S OFFICE

BACKGROUND

This declaratory judgment action arises from an incident in which Parkinson sustained injuries due to an alleged presence of toxic mold, fungi and bacteria in her apartment located at 2165 Pacific Street, Apt. 3R, in Brooklyn, New York from June 2008 to present. 2165 Pacific owns the premises which is insured by Tower.

On December 19, 2008, Sophia McKenzie received an attorney representation letter from counsel for Parkinson. The attorney representation letter states:

Please be advised that this firm represents Ms. Robin Parkinson for all claims against you, Sophia Green McKenzie for personal injuries and/or damages sustained as a result of mold, fungus and

other environmental hazards at 2165 Pacific Street, Apt. 3R, City of Brooklyn, State of New York as a result of your negligence. Kindly forward this letter to your insurance carrier or other authorized representative in order that we might discuss this matter with a view towards an amicable resolution.

On or about August 11, 2010, the McKenzies and 2165 Pacific were served with the underlying Summons and Compliant in the underlying action. The underlying complaint alleges that between August 25, 1993 and October 20, 2005, while Parkinson was a tenant on the premises owned by the insureds, toxic mold, fungus and bacteria accumulated in her bathroom ceiling causing the ceiling to collapse.

On September 15, 2010, Sophia McKenzie on behalf of 2165 Pacific, for the first time, through her broker, Insurance Resource of NY Agency, Inc., provided notice to Tower of the Parkinson's claim by providing a copy of the complaint in the underlying action. On September 20, 2010, Tower acknowledged the claim and assigned the claim to Liability Examiner, William Greene. Tower then assigned Daniel J. Hannon & Associates, Inc. to investigate the claim and Maria Rodriguez ("Rodriguez") was assigned to the investigation.

On September 29, 2010, Rodriguez interviewed Sophia McKenzie, who advised that she received a letter dated December 19, 2008 from Parkinson's attorney regarding her complaints, but chose not to forward the letter to Tower because she believed the mold issue was resolved and the letter was retaliatory.

Accordingly, by letter dated October 15, 2010, Tower disclaimed coverage to 2165 Pacific, Sophia McKenzie and Devon McKenzie on the ground that they failed to provide notice of the occurrence as soon as practicable as required under the Policy. It is undisputed that the Tower policy issued to 2165 Pacific conditions coverage upon notice being given "as soon as is practical" of an "occurrence" or an offense which may result in

a claim.

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]).

"Notice provisions in insurance policies afford the insurer an opportunity to protect itself" (Security Mut. Ins. Co. of N.Y. v Acker-Fitzsimons Corp., 31 NY2d 436, 440 [1972]), and "[t]he notice provision in the policy is a condition precedent to coverage and, absent a valid excuse, the failure to satisfy the notice requirement vitiates the policy" (Travelers Ins. Co. v Volmar Constr. Co., 300 AD2d 40, 42 [1st Dept 2002]). "The burden of justifying the delay by establishing a reasonable excuse is upon the insured" (Philadelphia Indem.

Ins. Co. v Genesee Val. Improvement Corp., 41 AD3d 44, 46 [2007]), and such excuses include the lack of knowledge of an accident (see Security Mut. Ins. Co. Of N.Y., 31 NY2d at 441); a good faith and reasonable basis for a belief in nonliability (see Great Canal Realty Corp. v Seneca Ins. Co., Inc., 5 NY3d 742, 743 [2005]); and a good faith and reasonable basis for a belief in noncoverage (see Strand v Pioneer Ins. Co., 270 AD2d 600, 600-601 [2000]).

As a condition precedent to coverage under the Tower policy, the insureds who are claiming coverage had a duty to provide notice of an "occurrence" to Tower "as soon as practicable." Where a liability insurance policy requires notice "as soon as practicable", notice must be given to the carrier within a reasonable period of time. (Great Canal Realty Corp. v. Seneca, 5 NY3d 742, 743 [2005]). "The duty to give notice arises when, from the information available relative to the occurrence, an insured could glean a reasonable possibility of the policy's involvement (Paramount Ins. Co. v. Rosedale Gardens, 293 A.D.2d 235, 239-240 [1st Dept.2002]).

The obligation to give notice "as soon as practicable" of an occurrence that may result in a claim is measured by the yardstick of reasonableness (875 Forest Ave. Corp. v. Aetna Cas. & Sur. Co., 37 A.D.2d 11, 12, affd 30 N.Y.2d 726). It also bears noting that the insured bears the burden of proving, under all the circumstances, the reasonableness of any delay in the giving of notice (see, Argentina v Otsego Mut. Fire Ins. Co., 86 NY2d 748, 749-750 [1995]).

In this case, 2165 Pacific's duty to notify Tower of the Parkinson claim was triggered when the attorney representation letter was served on it on December 19, 2008. 2165 Pacific failed to notify Tower of the Parkinson claim until nearly two years later in

September of 2010 when the underlying suit was filed against it.

Applying the law to the facts of this case, it is clear that Tower has satisfied its burden of proof by establishing an almost two year delay between the occurrence and Tower's receipt of a notice of claim by Parkinson's counsel (see Sputnik Restaurant Corp. v United National Insurance Co., 62 AD3d 689 [2d Dept 2010]). Thus, where the insurer has established that a protracted delay occurred, the insured must submit admissible evidence of a reasonable excuse for the delay to avoid summary judgment in the insured's favor (Ferreira v Mereda Realty Corp., 61 AD3d 463 [1st Dept 2009]).

Here, 2165 Pacific and the McKenzies failed to submit evidence of a reasonable excuse for the delay. The claim that Sophia McKenzie reasonably withheld the claim letter from Tower because she believed the mold issue had been resolved, and that the letter was sent in retaliation, is unreasonable and insufficient to avoid summary judgment.

Accordingly, it is

ORDERED that the motion by Tower Insurance Company of New York for summary judgment declaring that it has no duty to defend or indemnify defendants 2165 Pacific Street, LLC, Sophia Green McKenzie and Devon L. McKenzie, in an underlying personal injury action entitled Robin Parkinson v 2165 Pacific Street, LLC, Sophia Green McKenzie and Devon L. McKenzie, currently pending in the Supreme Court of the State of New York, County of Kings, under Index No.: 19983/2010 is granted; and it is further

ORDERED that Tower Insurance Company of New York serve a copy of this order with notice of entry upon all parties within 20 days of entry; and it is further

ORDERED that the Clerk may enter judgment accordingly.

Dated: 6/20/13

ENTER:

Donna M. Mills
J.S.C.

DONNA M. MILLS, J.S.C.

FILED

JUN 27 2013

NEW YORK
COUNTY CLERK'S OFFICE