

**Castlepoint Ins. Co. v Fried**

2013 NY Slip Op 31814(U)

August 6, 2013

Sup Ct, New York County

Docket Number: 101240/11

Judge: Donna M. Mills

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

PRESENT : DONNA M. MILLS  
*Justice*

PART 58

CASTLEPOINT INSURANCE COMPANY,

INDEX No. 101240/11

Plaintiff,

MOTION DATE \_\_\_\_\_

-v-

MOTION SEQ. No. 002,003

PHILIP FRIED, INDIVIDUALLY AND AS EXECUTOR  
OF THE ESTATE OF JOSEF FRIED, MADISON SB  
LLC, ROOPA BHUSRI and AMAR BHUSRI,

**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).**

Defendants.

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

PAPERS NUMBERED

Notice of Motion/Order to Show Cause-Affidavits- Exhibits...	<u>1, 2, 6</u>
Answering Affidavits- Exhibits _____	<u>3, 7, 8</u>
Replying Affidavits _____	<u>4, 5</u>
CROSS-MOTION: _____ YES <input checked="" type="checkbox"/> NO	

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

DECIDED IN ACCORDANCE WITH ATTACHED MEMORANDUM DECISION.

Dated: 8/6/13

*Donna M. Mills*  
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

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CASTLEPOINT INSURANCE COMPANY,

INDEX NO.  
101240/11

Plaintiff,

- against -

PHILLIP FRIED, INDIVIDUALLY AND AS  
EXECUTOR OF THE ESTATE OF JOSEF  
FRIED, MADISON SB LLC, ROOPA BHUSRI  
and AMAR BHUSRI,

Defendants.

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DONNA M. MILLS, J.:

DECISION/ORDER  
UNFILED JUDGMENT

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and notice of entry cannot be served hereon. To  
obtain entry, counsel or authorized representative must  
appear in person at the Judgment Clerk's Desk (Room  
141B).

Motion sequence numbers 002 and 003 are consolidated for decision.

This declaratory judgment action arises from an alleged water and sewage leak between March 25, 2008 and February 11, 2009 at the property owned by Josef Fried ("Fried"), located at 83 Avenue D, New York New York ("the Premises"), causing flooding and property damage in the basement of the adjoining property owned by defendants Madison SB LLC ("Madison") located at 77 Avenue D, New York, New York.

A property damage suit was commenced as a result of the leak, entitled Madison SB LLC, Roopa Bhusri and Amar Bhusri v Josef Fried, currently pending in the Supreme Court of the State of New York, County of Kings, under Index No. 20821/09 ("the underlying action"). According to the underlying complaint, Roopa and Amar Bhusri ("the Bhusris") are officers of Madison.

Plaintiff CastlePoint Insurance Company of New York ("CastlePoint"), now moves for summary judgment against all defendants seeking a declaration that it is not obligated to defend or indemnify the Estate of Josef Fried (the "Estate"), on the grounds that Fried failed to provide timely notice of the claim in violation of the policy terms. Defendants

Madison and the Bhusris oppose the motion, and move to strike CastlePoint's complaint, or in the alternative, to compel CastlePoint to comply with outstanding discovery. The Estate also opposes CastlePoint's motion for summary judgment.

#### BACKGROUND

It is undisputed that CastlePoint issued a commercial lines policy to Josef Fried for the Premises bearing policy number CPG70059-08 effective March 21, 2008 to March 21, 2009 ("the policy"). The CastlePoint policy conditioned coverage under the general liability part on receipt of prompt notice of an occurrence or offense that may give rise to a claim.

According to the allegations in the underlying action, the Madison Building sustained property damage as a result of the water and sewage leak and flooding in the adjoining basement of the Premises. Madison and the Bhusri's allege that the insured, Fried, was negligent in the maintenance, control and repair of the plumbing or internal sewer system at the Premises.

Notice of the claim was allegedly first received by CastlePoint on October 5, 2009, seven months after the occurrence started upon receipt of a copy of the underlying summons and complaint forwarded by the insured's broker, A.B.M. Brokerage Corp. to CastlePoint. On or about October 16, 2009, Terrier Claims Services was retained by CastlePoint to investigate the alleged water leak that occurred between March 25, 2008 and February 11, 2009. After speaking with Fried, the investigator concluded that Fried was aware of the accident on March 25, 2008. The investigation further revealed that violation notices were issued to Fried by the New York City Department of Buildings related to the Madison claim, as far back as October 15, 2008. Based upon this investigation, CastlePoint, by letter dated November 4, 2009, disclaimed coverage to the insured based

on grounds including, but not limited to, late notice.

#### 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 [1<sup>st</sup> 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 CastlePoint policy, the insured claiming coverage had a duty to provide notice of an “occurrence” to CastlePoint “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 accident, 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). In support of summary judgment by CastlePoint for a declaratory judgment that it has no duty to defend or indemnify the Estate in the underlying action, it contends that Fried had notice of the accident on the date it occurred as evidenced by his deposition testimony and the deposition testimony of Roopa Bhusri, one of the owners of the Madison Building. Fried admitted in his deposition to knowledge of the leak and flooding on the day in question. Moreover, according to Bhursi, she notified Fried of the flooding the same day after its

occurrence. Bhursi also indicated in her deposition that the Department of Environmental Protection also spoke to Fried shortly after the flood. Here, by admission, Fried was not only aware of the water leak and flooding in the Madison Building shortly after its occurrence, but was aware of the governmental interaction relative to the leaks.

The Estate, as a party claiming coverage under the CastlePoint policy, bears the burden of establishing its compliance with the timely notice condition (see Security Mut. Ins. Co. v Acker-Fitzsimons Corp., 31 NY2d 436, 440 [1972]). In opposition to CastlePoint's motion for summary judgment, the Estate relies on the sworn testimony and written statements of decedent Fried, wherein he claimed that he believed the Laundromat in his building, and not him, was responsible for the subject water leak. Fried also maintained that he first became aware of the claim about water leaking to the building when he received the underlying summons and complaint. The Estate also argues that when Fried was first notified of the occurrence, he had a reasonable belief in nonliability.

As previously noted, an insured must comply with the notice provisions of an insurance policy as a condition precedent to coverage by timely informing the insurer of a potential claim or occurrence ( see, American Home Assur. Co. v. International Ins. Co., 90 N.Y.2d 433, 442–443, 661 N.Y.S.2d 584, 684 N.E.2d 14; Reynolds Metal Co. v. Aetna Cas. & Sur. Co., 259 A.D.2d 195, 199, 696 N.Y.S.2d 563; Marinello v. Dryden Mut. Ins. Co., 237 A.D.2d 795, 796, 655 N.Y.S.2d 156). However, “an insured's good-faith belief in nonliability, when reasonable under the circumstances, may excuse a delay in notifying the insurer” ( Hudson City School Dist. v. Utica Mut. Ins. Co., 241 A.D.2d 641, 642, 659 N.Y.S.2d 948). While the insured bears the burden of proving an excuse for the delay (see, *id.*, at 642, 659 N.Y.S.2d 948), the focus of such an inquiry is its reasonableness

under the circumstances, not whether the insured should have anticipated the possibility of a lawsuit ( see, Vradenburg v. Prudential Prop. & Cas. Ins. Co., 212 A.D.2d 913, 915, 622 N.Y.S.2d 623; Briggs v. Nationwide Mut. Ins. Co., 176 A.D.2d 1113, 575 N.Y.S.2d 413).

This Court finds that, the Estate's explained delay in providing CastlePoint with notice of the underlying action when Fried was initially made aware of it, was not reasonable. Fried's claims of nonliability are unreasonable given the utter lack of investigation on his part, as to the cause of the water damage. For a sophisticated owner of property to rely on his tenant to resolve the damage caused to the adjoining property was not reasonable. For Fried to have waited until he received the summons and complaint in the underlying action, which was at least seven months after the occurrence requires this Court to find that the notice given to CastlePoint was untimely. It is undisputed that Fried was aware of the occurrence immediately after it occurred and his failure to inquire as to potential liability demonstrates that his belief of nonliability was not reasonable under the circumstances 815 N.Y.S.2d 513 [2006] ). Therefore, CastlePoint is entitled to summary judgment declaring that it does not have a duty to defend and indemnify the Estate in the underlying action.

The Estate argues, however, that the disclaimer it received from CastlePoint was not timely. The law is clear, that "[w]hen an insurer fails to give written notice as soon as is reasonably possible of such disclaimer of liability, it is precluded from disclaiming coverage based upon late notice, even where the insured has in the first instance failed to provide the insurer with timely notice of the accident" (Hunter Roberts Constr. Group,



LLC v Arch Ins. Co., 75 AD3d 404, 408-409 [2010]). Although the timeliness of such a disclaimer generally presents a question of fact, where the basis for the disclaimer was, or should have been, readily apparent before the onset of the delay, any explanation by the insurer for its delay will be insufficient as a matter of law (see First Fin. Ins. Co. v Jetco Contr. Corp., 1 NY3d 64, 69 [2003]).

Applying the aforementioned legal authority, it is clear that upon receipt of the underlying summons and complaint on October 5, 2009, CastlePoint was then legally obligated to give written notice to the insured as soon as reasonably possible of such disclaimer of liability or denial of coverage. “The timeliness of an insurer’s disclaimer is measured from the point in time when the insurer first learns of the grounds for disclaimer of liability or denial of coverage” (Matter of Allcity Ins. Co. [Jiminez], 78 NY2d 1054, 1056 [1991]). In light of the fact that the basis of the disclaimer, late notice, was not readily apparent when Fried first notified CastlePoint, under the circumstances of this case it was not unreasonable for CastlePoint to conduct an investigation and then send a disclaimer letter 30 days later. As such, this Court finds that the disclaimer letter was issued within a reasonable time as a matter of law (see State Farm Mut. Auto. Ins. Co. v Daniels, 269 AD2d 860 [2000]).

The Estate’s remaining contentions either are without merit, or need not be addressed in light of this Court’s determination.

Accordingly, it is

ORDERED that plaintiff’s motion for summary judgment, seeking a declaration that it is not obliged to provide a defense to, and provide coverage for, the defendant

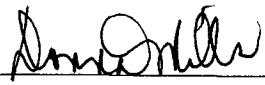
the Estate of Fried in the action of Madison SB LLC, Roopa Bhusri and Amar Bhusri v Josef Fried, Index No. 20821/09, Kings County, is granted; and it is further

ADJUDGED and DECLARED that plaintiff herein is not obliged to provide a defense to, and provide coverage for, the defendant Josef Fried in the said action pending in Kings County, and it is further

ORDERED that defendant Estate's motion is denied in its entirety.

Dated: 8/6/13

ENTER:



J.S.C.

**DONNA M. MILLS. J.S.C.**

**UNFILED JUDGMENT**

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