At an IAS Term, Part 43 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 17th day of December, 2014

PRESENT:

HON. MARK PARTNOW,

Justice.

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LAZAR GLANZ,

Plaintiff,

- against -

Index No. 506757/13

NEW YORK MARINE AND GENERAL INSURANCE COMPANY,

Defendant.

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The following papers read on this motion:

	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	7-8; 22-23; 31; 37; 45
Opposing Affidavits (Affirmations)	59
Reply Affidavits (Affirmations)	53; 75
Affidavit (Affirmation)	
Other Papers	

Upon the foregoing papers, motion sequence numbers 1 and 2 are consolidated for disposition. Plaintiff Lazar Glanz moves for an order: (1) pursuant to CPLR 3212 and Insurance Law § 3420(a)(2) and (b)(1), entering a judgment in his favor against defendant New York Marine and General Insurance Company (the Insurer). Defendant moves for an order, pursuant to CPLR 3212, awarding it summary judgment dismissing the complaint.

Facts and Procedural Background

Plaintiff allegedly sustained serious personal injuries arising from a trip and fall in front of premises owned by 92 – 94 Penn, LLC (Penn) on September 5, 2009; plaintiff alleges that the sidewalk was broken and defective. At the time of the accident, Penn was insured by defendant.

By letters dated December 14, 2009 and June 1, 2010, plaintiff's counsel wrote to Penn to advise it that plaintiff had been injured. On October 25, 2010, plaintiff commenced an action against Penn seeking damages for the injuries that he allegedly sustained (Sup Ct, Kings County, Index No. 26490/10) (the Personal Injury Action). Penn was served with the summons and complaint through the New York Secretary of State. Additional letters were mailed to Penn on December 15, 2010 and on February 9, 2011. When Penn did not answer or appear in the action, plaintiff was granted a default judgment by the Honorable Ellen M. Spodek on October 17, 2011 (the Default Judgment). An inquest to determine the amount of damages suffered was scheduled for February 6, 2012.

On November 14, 2011, Allsure Insurance Brokerage, Penn's insurance broker, sent the Insurer an "Accord" form and attached the note of issue, the Default Judgment and an affidavit of service regarding service of same in the Personal Injury Action. The Insurer acknowledged Penn's Notice of Loss by letter dated November 17, 2011. After conducting an investigation, the Insurer disclaimed coverage by letter to Penn dated December 15, 2011, sent by its representative, Pro Site Specialty Insurance (the Disclaimer). The Disclaimer

stated, in relevant part, that:

> "[The Insurer's] first notice of this matter was on November 14, 2011.
>
> "We are obliged to inform you that the lengthy lapse in time between your notice of the claim and/or lawsuit and the date it was first reported to us, is a violation of the contractual obligations as outlined in your policy of insurance."

A copy of the Disclaimer was sent to plaintiff's counsel.

By letter dated December 20, 2011 to the Insurer's claims administrator, four days after learning the identity of Penn's insurance carrier, plaintiff's counsel acknowledged receipt of the Disclaimer, advised the Insurer that an inquest was scheduled for February 6, 2012 and offered to vacate the default judgment. As is relevant here in, that letter states:

> "As you may know, plaintiff has obtained a judgment against 92 – 94 Penn, LLC, and an inquest is scheduled for February 6, 2012. Plaintiff is willing to vacate the judgment provided you interpose an Answer immediately (waiving all personal jurisdiction defenses).
>
> "Additionally, if you do not interpose an Answer on behalf of 92 – 94 Penn, LLC within 20 days, we will proceed with the inquest, and then bring an action against [the Insurer] pursuant to Insurance Law § 3420(a)(2) for the amount of the judgment."

The Insurer never responded to this letter.

Plaintiff proceeded to inquest on March 12, 2013 and was awarded damages in the amount of $250,000. On May 2, 2013, the judgment was entered with the County Clerk in favor of plaintiff and against Penn in the amount of $285,822.50. On June 28, 2013, a copy

of the judgment with notice of entry was served upon the Insurer, Penn and Penn's attorney by certified mail, return receipt requested. On July 2, 2013, the Insurer acknowledged receipt of the judgment with notice of entry and advised plaintiff's counsel that it had previously issued the Disclaimer on December 15, 2011. The certified mail sent to Penn was returned as unclaimed and on August 2, 2013, an additional copy of the judgment with notice of entry was served upon Penn by regular mail.

Thereafter, on October 31, 2013, plaintiff commenced the instant action against the Insurer pursuant to Insurance Law § 3420(a)(2) and (b)(1) to recover the judgment. On January 12, 2014, the Insurer interposed an answer. The instant motions followed.

Plaintiff's Contentions

In support of his motion, plaintiff argues that pursuant to Insurance Law § 3420, an injured plaintiff who obtains a judgment for damages against an insured party may bring a direct action against that insured party's insurance company to recover the judgment. Plaintiff further avers that his motion must be granted and the Insurer's motion must be denied because the Insurer did not disclaim against him, based upon his failure to provide it with timely notice of the occurrence. More specifically, plaintiff argues that although plaintiff provided notice of his claim to the Insurer on December 20, 2011, within four days of learning that defendant insured plaintiff, the Insurer's only disclaimer as against plaintiff was made in the answer to the complaint in the instant action, which was interposed over three years later, on January 12, 2014. Plaintiff alleges that this disclaimer is untimely

as a matter of law.

Plaintiff thus contends that he satisfied the statutory prerequisites to commence the instant action and that the Disclaimer was not valid or effective against him, so that the Insurer is responsible to pay the judgment. In this regard, plaintiff argues that if an injured party provides notice of a claim to an insurance company, for the disclaimer to be effective, the insurance company must specifically tell the injured party why it is disclaiming coverage. If an insurance company bases its disclaimer of coverage only on its insured's failure to notify it of the claim and does not specifically cite the injured party's failure to give timely notice, as is the case herein, the disclaimer will not be effective against the injured party. In such cases, the insurer will be estopped from raising the defense that the injured party provided late notice as a ground for disclaiming coverage and the insurer will be required to provide coverage and pay any judgment that the plaintiff obtained against the insured.

The Insurer's Contentions

In opposition to plaintiff's motion and in support of its cross motion, the Insurer argues that plaintiff herein failed to exercise his independent right to provide the Insurer with notice of his accident and lawsuit. In so arguing, the Insurer notes that it first received notice of the subject claim on November 14, 2011, two years after the underlying accident occurred and after the Default Judgment had been issued against Penn in the Personal Injury Action. The Insurer thus asserts that it is undisputed that Penn breached its obligation to give it prompt notice of the claim. The Insurer alleges that thereafter, it issued a timely disclaimer

to its insured, which it contends is binding upon plaintiff, since plaintiff failed to provide independent, timely notice and has similarly failed to establish that it made a diligent attempt to provide notice of the claim. Stated succinctly, the Insurer claims that where, as here, the insured is the first to notify the insurer of a claim, any subsequent information provided by the injured party is superfluous for notice purposes and need not be addressed, since the injured party is bound by the disclaimer issued to the insured.

The Law

As is relevant herein:

> "Insurance Law § 3420(a)(2)[1] provides that if certain

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[1] Insurance Law § 3420(a)(2), which pertains to the standard provisions of liability insurance policies and the rights of an injured person, states, in pertinent part, that:

> "No policy or contract insuring against liability for injury to person . . . shall be issued or delivered in this state, unless it contains in substance the following provisions or provisions that are equally or more favorable to the insured and to judgment creditors so far as such provisions relate to judgment creditors:
>
> "A provision that in case judgment against the insured or the insured's personal representative in an action brought to recover damages for injury sustained or loss or damage occasioned during the life of the policy or contract shall remain unsatisfied at the expiration of thirty days from the serving of notice of entry of judgment upon the attorney for the insured, or upon the insured, and upon the insurer, then an action may . . . be maintained against the insurer under the terms of the policy or contract for the amount of such judgment not exceeding the amount of the applicable limit of coverage under such policy or contract."

> conditions are met, an injured party may commence an action to recover an unsatisfied judgment from the insurance carrier for a tortfeasor that becomes a judgment debtor. To recover an unsatisfied judgment pursuant to Insurance Law § 3420(a)(2), the plaintiff must show, inter alia, that he or she acted reasonably 'diligently in attempting to ascertain the identity of the insurer [for the tortfeasor], and thereafter expeditiously notified the insurer' of the claim (*Steinberg v Hermitage Ins. Co.*, 26 AD3d 426, 428 [2006]; *see Tower Ins. Co. of N.Y. v Lin Hsin Long Co.*, 50 AD3d 305, 308 [2008])."

(*Golebiewski v National Union Fire Ins. Co.*, 101 AD3d 1074, 1076 [2012]; *see generally General Accident. Ins. Group v Cirucci*, 46 NY2d 862, 863-864 [1979] [an injured third party may seek recovery from an insured's carrier despite the failure of the insured to provide timely notice of the accident]).

Thus, it is well established that:

> "Insurance Law § 3420(a)(3)[2] gives the injured party an independent right to give notice of the accident to the insurer and to satisfy the notice requirement of the policy. '[W]hile an insured's failure to provide notice may justify a disclaimer vis-à-vis the insurer and the insured, it does not serve to cut off the right of an injured claimant to make a claim as against the insurer' (*Becker v Colonial Coop. Ins. Co.*, 24 AD3d 702, 704 [2005]). As such, the injured person '"is not to be charged vicariously with the insured's delay"' (*id.* at 704, quoting *Lauritano v American Fid. Fire Ins. Co.*, 3 AD2d 564, 568 [1957], *affd* 4 NY2d 1028 [1958]). *'However, where an injured*

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[2] Insurance Law § 3420(a)(3) states that:

> "A provision that notice given by or on behalf of the insured, or written notice by or on behalf of the injured person or any other claimant, to any licensed agent of the insurer in this state, with particulars sufficient to identify the insured, shall be deemed notice to the insurer."

> *party fails to exercise the independent right to notify the insurer of the occurrence, a disclaimer issued to an insured for failure to satisfy the notice requirement of the policy will be effective as against the injured party as well' (Maldonado v C.L.-M.I. Props., Inc.*, 39 AD3d 822, 823 [2007]; *see Viggiano v Encompass Ins. Company/Fireman's Ins. Co. of Newark, N.J.*, 6 AD3d 695 [2004]; *see also Tower Ins. Co. of N.Y. v Alvarado*, 84 AD3d 1354, 1355 [2011]; *Sputnik Rest. Corp. v United Natl. Ins. Co.*, 62 AD3d 689, 690 [2009])."

(*Konig v Hermitage Ins. Co.*, 93 AD3d 643, 645 [2012] [emphasis added]).

Stated differently:

> "'[W]here the insured is the first to notify the carrier, even if that notice is untimely, any subsequent information provided by the injured party is superfluous for notice purposes and need not be addressed in the notice of disclaimer issued by the insurer'" (*Ringel v Blue Ridge Ins. Co.*, 293 AD2d 460, 462 [2002]; *see Rochester v Quincy Mut. Fire Ins. Co.*, 10 AD3d 417, 418 [2004]; *Massachusetts Bay Ins. Co. v Flood*, 128 AD2d 683, 684 [1987]). Here, the claimant's attorney did not directly notify the defendant of the accident until after the insured had done so. Thus, the defendant was not required to cite the claimant's failure to provide direct notice in the disclaimer letter it had already issued to the insured (*see Travelers Indem. Co. v Worthy*, 281 AD2d 411, 412 [2001]; *Agway Ins. v Alvarez*, 258 AD2d 487, 488 [1999])."

(*Steinberg*, 26 AD3d at 428).

Discussion

In this case, it is undisputed that the Insurer established, prima facie, its entitlement to judgment as a matter of law by demonstrating that its insured did not provide it with timely notice of the occurrence (*see generally Deso v London & Lancashire Indem. Co.*, 3 NY2d 127, 130-131 [1957]). It is also undisputed that the insured gave the Insurer notice of the

occurrence before plaintiff herein did. Thus, as was held in *Konig* and *Steinberg*, defendant Insurer was not required to cite to plaintiff's failure to provide direct notice in the Disclaimer that was already issued to the insured (*see also Lauritano*, 3 AD2d at 568-569). From this it follows that the Insurer properly denied coverage to plaintiff.

Conclusion

Plaintiff's motion for summary judgment is denied. Defendant's motion for summary judgment dismissing the complaint is granted.

The foregoing constitutes the order, decision and judgment of this court.

ENTER:

J.S.C.

HON. MARK I PARTNOW
SUPREME COURT JUSTICE