SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

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BKR REALTY CORP.,

Index No. 650015/2015

Plaintiff,

-against-

DECISION/ORDER

ASPEN SPECIALTY INSURANCE COMPANY,

Defendants.

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HON. CYNTHIA KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for :_____

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	1
Affidavits in Opposition.....	2
Replying Affidavits.....	3
Exhibits.....	4

Plaintiff commenced the instant action seeking a judgment declaring that it is entitled to defense and indemnification from defendant in an underlying personal injury action. Both parties now move for summary judgment. For the reasons set forth below, defendant Aspen Specialty Insurance Company ("Aspen") is entitled to summary judgment dismissing this action.

The relevant facts are as follows. On or about January 5, 2015, plaintiff commenced this action seeking a declaration that defendant is obligated to defend and indemnify it in connection with an underlying personal injury action. In the underlying action, it is claimed that Nikolaos Korfiatis ("Korfiatis") sustained personal injuries as a result of a fall within a construction site located at 411 West 39th Street, New York, New York (the "Building") that occurred on June 5,

2009. At the time of the accident, Korfiatis was on site to take measurements for Bayside Refrigeration, when he fell and was caused to be taken away by an ambulance.

Plaintiff in this action, BKR Realty Corp. ("BKR"), is the owner of the Building. On the day of the accident, no one from BKR was present at the Building. However, according to the affidavit of James Meskouris ("James"), secretary/treasurer of BKR, he arrived at the Building shortly after the accident. At this time, he was told by either a police officer or firefighter at the scene that somebody had fallen at the site. Thereafter, James called Jason Lee, the president of the general contractor on the job, who could not provide any further information. Thus, according to James, the only information he had at the time of the accident was that somebody had fallen at the site and that somebody had been transported from the scene by ambulance. James further attests that "in an abundance of caution," he then notified his brother Chris Meskouris ("Chris"), the president of BKR, to contact BKR's insurance carrier to report the incident. He was later told by his brother that he had contacted BKR's broker and reported the accident. According to James, "[w]henever anything had occurred that we thought needed to be reported to our carrier, we would notify [our broker] and he would make the formal notification to [sic] applicable carrier."

Sometime between the accident and the filing of the this lawsuit, James attests that he was informed that the person who fell on the site was the brother of BKR's long term employee Panagiotis Korfiatis ("Panagiotis"). James attests that during the time he found this out and the commencement of this action, he spoke on a number of occasions with Panagiotis asking about his brother and was never told on any occasion that plaintiff thought the accident was caused in

any manner by BKR or that plaintiff intended to sue BKR. James further attests that Panagiotis had worked for BKR for many years and was a trusted employee.

On or about August 31, 2010, nearly 19 months after the accident, BKR first provided notice of the accident to defendant Aspen. Thereafter, defendant Aspen disclaimed coverage on the ground of untimely notice. This declaratory judgment action followed.

On a motion for summary judgment, the movant bears the burden of presenting sufficient evidence to demonstrate the absence of any material issues of fact. *See Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986). Summary judgment should not be granted where there is any doubt as to the existence of a material issue of fact. *See Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980). Once the movant establishes a *prima facie* right to judgment as a matter of law, the burden shifts to the party opposing the motion to "produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim." *Id.*

"For years the rule in New York has been that where a contract of primary insurance requires notice 'as soon as practicable' after an occurrence, the absence of timely notice of an occurrence is a failure to comply with a condition precedent which, as a matter of law, vitiates the contract." *Argo Corp. v. Greater New York Mut. Ins. Co.*, 4 N.Y.3d 332, 339 (2005). Ultimately, the burden is on the insured to prove, under all the circumstances, the reasonableness of any delay in the giving of notice. *Paramount Ins. Co. v. Rosedale Gardens*, 239 A.D.2d 235, 240 (1st Dept 2002). Additionally, while the issue of reasonableness is usually left for the trier of fact, where there is no valid excuse or mitigating factor, the issue of the reasonableness of an insured's belief that a claim will not be made, is one for the court rather

than the trier of fact. *SSBSS Realty Corp. v. Public Serv. Mut. Ins. Co.*, 253 A.D.2d 583, 584 (1st Dept 1998).

In the present case, Aspen's motion for summary judgment is granted as plaintiff's notice of the claim is untimely as a matter of law and defendant has failed to offer any valid excuse or mitigating factor to raise an issue of fact as to whether its delay in giving notice was reasonable. BKR does not dispute that its notice, 19 months after the accident, was untimely. Rather, BKR contends that its delay in providing notice was reasonable as it had a good faith belief that no claim would be filed. BKR bases this good faith belief on the fact that: (1) on the day of the accident, James was only informed that someone had fallen at the site and was taken away by ambulance but did not know any other specifics; (2) the general contractor could give no further information; and (3) James had spoken with plaintiff's brother, a BKR trusted employee, on several occasions after the accident and he was never told by this employee that his brother thought that BKR was at fault or that he was going to sue them. Contrary to BKR's contention, these facts cannot support its contention that its delay in providing notice was reasonable. To the contrary, since BKR admitted that it knew on the day of the accident that someone had fallen at the Building and had been taken away by ambulance to a hospital, its purported belief that no claim could possibly be filed by the injured person because the injured person's brother never indicated that a claim would be filed is unreasonable as a matter of law. Indeed, any alleged good faith belief that a claim would not be filed is completely belied by the fact that James admits that he instructed his brother to notify BKR's insurance broker as "[w]henever anything had occurred that we thought needed to be reported to our carrier, we would notify [our broker] and he would make the formal notification to applicable carrier." Thus, BKR's notice to its

broker establishes that BKR did in fact think it needed to report the accident to its insurer, yet failed to do so. Simply put, under the circumstances present here, there is no basis for a good-faith belief in BKR's non-liability to support a finding that BKR's delay in providing notice was reasonable.

Accordingly, plaintiff's motion is denied and defendant's motion is granted. It is hereby ORDERED that this action is dismissed and the Clerk is directed to enter judgment accordingly. This constitutes the decision and order of the court.

Dated: 8/7/15

Enter: _____ J.S.C.

CYNTHIA S. KERN
J.S.C.