Square v Port Auth. of N.Y. & N.J.
2016 NY Slip Op 32001(U)
September 15, 2016
Supreme Court, Bronx County
Docket Number: 309839/09
Judge: Barry Salman
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX
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SALIMOU SQUARE AND MELINDA SQUARE,

Plaintiff(s),

DECISION AND ORDER

Index No: 309839/09

- against -

PORT AUTHORITY OF NEW YORK AND NEW JERSEY AND GREYHOUND LINES, INC.,

Defendant(s).
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PORT AUTHORITY OF NEW YORK AND NEW JERSEY,

Third=Party Plaintiff(s), Index No: 42061/12

- against -

METROPOLITAN TRANSPORTATION AUTHORITY, INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA AND ASPEN INSURANCE COMPANY,

Third-Party Defendant(s).
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In this action for negligence in the maintenance of a premises, third-party defendant INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA (ICSP) moves seeking summary judgment and dismissal of the third-party complaint against it. Specifically, ICSP claims that insofar as defendant/third-party defendant PORT AUTHORITY OF NEW YORK AND NEW JERSEY (PANYNJ) failed to provide notice of the claim made against it by plaintiffs in the first-party action, ICSP

is not required to provide coverage to PANYNJ under the relevant insurance policy. PANYNJ opposes the instant motion, asserting, *inter alia*, that it provided ICSP with notice of the relevant claim as soon as it confirmed that the events giving rise to the first-party action involved work being performed by third-party defendant METROPOLITAN TRANSPORTATION AUTHORITY (the MTA); such work triggering coverage under ICSP's policy.

For the reasons that follow hereinafter, ICSP's motion is granted.

The complaint, filed December 4, 2009, alleges the following: On March 2, 2009, plaintiff SALIMOU SQUARE (Square) slipped on ice at a bus terminal within premises located 625 8th Avenue, New York, NY (625). Plaintiffs allege that 625 was owned, operated, and maintained by PANYNJ and that the bus terminal was maintained and operated by defendant GREYHOUND LINES, INC. (Greyhound), for whom Square was employed as a bus driver. Plaintiffs allege that the accident was caused by the negligence of the defendants in failing to maintain the premises in a reasonably safe condition. Plaintiff MELINDA SQUARE, Square's wife asserts a derivative loss of consortium claim.

The third-party complaint alleges several causes of action. As against ICSP, PANYNJ asserts a cause of action for indemnification and insurance coverage. Specifically, ICSP alleges that in 2008 PANYNJ entered into an agreement with the MTA whereby

the MTA was given access to 625 for purposes of performing work therein to extend the Number 7 Train Line. In connection with the foregoing agreement, MTA was also granted temporary easements giving it access to the bus terminals within 625. Pursuant to the foregoing agreements, the MTA was required to indemnify PANYNJ for any claims made against PANYNJ arising from the MTA's work. Moreover, the MTA and its contractors were required to procure liability insurance naming PANYNJ as an additional insured. ICSP issued a the foregoing liability insurance policy and as required by the foregoing agreements, named PANYNJ as an additional insured. Because the accident alleged falls within the ambit of the indemnification clauses in the foregoing agreements, PANYNJ sought coverage from ICSP. However, despite the foregoing, ICSP has refused to defend, indemnify or insure PANYNJ thereby breaching the forgoing agreements.

ICSP's motion is granted insofar as ut establishes that PANYNJ failed to ptovide it with notice of plaintiffs' claim as soon as practicable.

The proponent of a motion for summary judgment carries the initial burden of tendering sufficient admissible evidence to demonstrate the absence of a material issue of fact as a matter of law (*Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Thus, a defendant seeking summary judgment must establish prima facie

entitlement to such relief as a matter of law by affirmatively demonstrating, with evidence, the merits of the claim or defense, and not merely by pointing to gaps in plaintiff's proof (*Mondello v DiStefano*, 16 AD3d 637, 638 [2d Dept 2005]; *Peskin v New York City Transit Authority*, 304 AD2d 634, 634 [2d Dept 2003]). There is no requirement that the proof be submitted by affidavit, but rather that all evidence proffered be in admissible form (*Muniz v Bacchus*, 282 AD2d 387, 388 [1st Dept 2001], *revd on other grounds Ortiz v City of New York*, 67 AD3d 21, 25 [1st Dept 2009]).

Once movant meets his initial burden on summary judgment, the burden shifts to the opponent who must then produce sufficient evidence, generally also in admissible form, to establish the existence of a triable issue of fact (*Zuckerman* at 562).

Notice provisions in insurance policies are designed to protect the insurer (*Security Mutual Insurance Company of New York v Acker-Fitzsimons Corp.*, 31 NY2d 436, 440 [1972]). By giving notice as soon as practicable, the insurer is protected against fraud or collusion, is given the an opportunity to investigate the claims while the evidence is still fresh, can estimate potential exposure, establish adequate reserves, and control its claims to aid in settlement (*Argo Corporation v Greater New York Mutual Insurance Company*, 4 NY3d 332, 339 [2005]). Thus, notice is a condition precedent to an insurer's liability under an insurance policy (*Security Mutual Insurance Company of New York* at 440; *Deso*

v. London & Lancashire Indemnity Company of America, 3 NY2d 127, 129 [1957]). Absent a valid excuse for failure to satisfy the notice requirement, the insurer can vitiate its policy and need not provide coverage (*Security Mutual Insurance Company of New York* at 440; *Deso* at 129). Significantly, in vitiating a policy for lack of timely notice, an insurer need not demonstrate prejudice (*Briggs Ave. LLC v Ins. Corp. of Hannover*, 11 NY3d 377, 382 [2008]; *Security Mutual Insurance Company of New York* at 440).

A provision mandating that the insured give the insurer timely notice of a loss, accident or claim "as soon as practicable," means that the insured must tender notice within a reasonable time under all circumstances (*Security Mutual Insurance Company of New York* at 441; *Deso* at 129). Specifically,

> [i]t is well settled that the phrase 'as soon as practicable' is an elastic one, not to be defined in a vacuum. By no means does it connote an ironbound requirement that notice be 'immediate' or even 'prompt', relative as even those concepts often are;'soon', a term close to each of these in common parlance, is expressly qualified in the policy here by the word 'practicable'

(*Mighty Midgets, Inc. v. Centennial Insurance Company*, 47 NY2d 12, 19 [1979]). Furthermore,

> there is no inflexible test of reasonableness. As with most questions whose answers are heavily dependent on the factual contexts in which they arise, rules of general application are hard to come by

(*id.* at 19-20).

Nevertheless, in *Mighty Midgets, Inc.*, the court determined that a seven and one half month delay between an accident covered by the policy and the time when the insurer was notified was did not warrant vitiation of the policy because the insured timely notified its insurance broker as soon as it became aware of the accident (*id.* at 20). While the insurance company was not notified until seven months thereafter, the court held that such delay was not the fault of the insured because it immediately notified the broker and relied on the broker's representation that the accident fell within one policy rather than another (*id.* at 20-21). Thus, the court found that under the foregoing circumstances, the seven month delay in notifying the insurer was reasonable (*id.* at 20-21).

Generally, the reasonableness of a delay in providing notice of a claim to an insurance company is a question of fact for a jury (*Deso* at 129). This is particularly true when reasons for the delay are proffered (*id.*) However, when the insured fails to proffer any excuse or mitigating circumstances for the delay, the court can make a determination as to whether the notice conditions have been met as a matter of law (*id.* at 130 [Court held that petitioner's 51 day delay in notifying his insurance company about an accident when his policy called for notification as soon as practicable, was inexcusable as a matter of law. Court found that petitioner knew that an accident had occurred and that an injury had resulted therefrom, but nevertheless waited 51 days after

acquiring such knowledge to notify his insurance company.]; *see Boutin v Aetna Casualty & Surety Company*, 264 AD2d 434, 425-436 [2d Dept 1999] [Court granted insurer's motion for summary judgment finding that the insured's 10 month delay in notifying the insurer of a lawsuit was not as soon as practicable and, thus, unreasonable as a matter of law. Specifically, insured was served with the summons and complaint with respect to a lawsuit for an accident on their property and nevertheless waited 10 months before notifying the insurer.]; *Peerless Insurance Company v Nationwide Insurance Company*, 12 AD2d 602, 602 [1st Dept 1960] [Court held that a four to five month delay in notifying an insured of a claim was unreasonable and not as soon as practicable when the insured was notified of the severity of the injury underlying the claim.]).

Generally, if the reason for the delay is a good faith belief that an accident is not covered by an insurance policy, belated notice to an insured is inexcusable as a matter of law(*Pandora Indus., Inc. v St. Paul Surplus Lines Ins. Co.*, 188 AD2d 277, 277 [1st Dept 1992]). However, when the insured is covered as an additional insured by a policy issued to a third-party, the time prior to learning that a third-party insurance policy is implicated is excusable and the time within to which to notify the appropriate insurer is measured from the point when the insured learns of he is afforded coverage by a third-party's policy (*Greaves v Pub. Serv. Mut. Ins. Co.*, 4 AD2d 609, 614 [1st Dept 1957], *affd*, 5 NY2d 120

[1959] ["The evidence clearly indicates that appellant had every reason to believe that he was being protected by his own employer's insurance company, Liberty Mutual. When in July he received a summons and complaint in the action against him by Watson, Greaves immediately turned them over to his employer, Bigelow. However, Bigelow's carrier refused to defend him. Up to that time he had no knowledge of his coverage under the Davis policy. Within a day or two after he learned or was advised of the coverage, he gave prompt notice to Public. The question then is whether such notice met the requirement of the policy that notice be given as soon as practicable. We think it did."]).

When the insured fails to notify the insurer on grounds that it lacked specific knowledge of an accident and resulting injuries but a reasonable person would have made a further inquiry; such inquiry leading to timely notice, any delay is untimely as a matter of law (*Great Canal Realty Corp. v Seneca Ins. Co., Inc.*, 5 NY3d 742, 744 [2005]; *Tower Ins. Co. of New York v Jaison John Realty Corp.*, 60 AD3d 418, 419 [1st Dept 2009]).

In support of the instant motion, ICSP submits[1] the notice of

[1] To the extent that ICSP's sole basis for summary judgment is the timeliness of the notice provided to it by PANYNJ, the Court shall only discuss evidence relevant to this issue. Thus, the Court shall not endeavor to discuss the relevant agreements between PANYNJ and the MTA nor ICSP's policy since whether the MTA was required to indemnify PANYNJ, procure liability insurance for such purposes and whether plaintiffs' accident falls within the ambit of ICSP's policy are not contested issues.

claim served upon PANYNJ on August 27, 2009, wherein plaintiffs claim that on March 2, 2009, Square slipped and fell on ice within 625 due to PANYNJ's negligence in the maintenance of its premises.

ICSP submits a letter dated March 6, 2012, wherein PANYNJ apprises ICSP that it received plaintiffs' notice of claim on August 27, 2009 and their complaint on January 7, 2010. Within the letter, PANYNJ seeks coverage from ICSP pursuant to the indemnification agreement between PANYNJ and the MTA.

ICSP submits a letter dated March 26, 2012, wherein it denies PANYNJ's claim for coverage. Among the many reasons for which ICSP denied coverage to PANYNJ, the first, was PANYJ's failure to timely notify ICSP of Square's accident, claim, and suit. Significantly, ICSP states that PANYNJ had notice of plaintiffs' claim as early as March 27, 2009, when plaintiffs served the notice of claim upon PANYNJ. Further, ICSP alleges that PANYNJ had notice of the suit as early as December 4, 2009, when plaintiffs filed their summons and complaint. Lastly, insofar as PANYNJ claimed that it first learned that Square's accident implicated the work then being performed by the MTA and which in turn implicated ICSP's insurance policy on March 8, 2011, ICSC asserted that PANYNJ's more than a year's delay in notifying ICSP was unreasonable.

Based on the foregoing, ICSP establishes prima facie entitlement to summary judgment with respect to PANYNJ's claims seeking insurance coverage. As noted above, absent a valid excuse

for failure to satisfy the notice requirement, an insurer can vitiate its policy and need not afford any coverage to the insured (*Security Mutual Insurance Company of New York* at 440; *Deso* at 129). Moreover, while generally, the reasonableness of a delay in providing notice to an insurance company is a question for a jury (*Deso* at 129),when the insured fails to proffer any excuse or mitigating circumstances for the delay in notifying the insurer, the court can make a determination as to whether the notice conditions have been met as a matter of law (*id.* at 130; *Boutin* at 425-436; *Peerless Insurance Company* at 602).

Here, based on ICSP's evidence, PANYNJ's failure to notify ICSP of the instant accident until March 6, 2012 - approximately two years after it received plaintiff's notice of claim is unreasonable as a matter of law. To be sure, PANYNJ's reason for failing to notify ICSP of plaintiffs' accident upon receipt of the notice of claim is that it was unaware that the accident arose from the MTA's work such that PANYNJ had no reason to believe that the policy issued by ICSP was implicated. However, when an insured fails to notify the insurer on grounds that it lacked specific knowledge of the accident and injuries sustained but a reasonable person would have made a further inquiry; such inquiry leading to timely notice any delay is unreasonable as a matter of law (*Great Canal Realty Corp.* at 744 ; *Tower Ins. Co. of New York* at 419). Accordingly, had PANYNJ investigated the plaintiffs' accident upon

receipt of the notice of claim - a reasonable course of action inasmuch as it occurred on its premises - it would have learned of the MTA's purported involvement, that ICSP's policy was implicated, and, thus, would have notified ICSP of the claim months sooner. Accordingly, the delay asserted was a created by PANYNJ's unreasonable failure to timely investigate. Thus, the delay in notifying ICSP was unreasonable as a matter of law.

Additionally, even if the Court adopts PANYNJ's contention that the time to notify ICSP should be measured from March 8, 2011 when it discovered that the MTA's work purportedly caused plaintiffs' accident, summary judgment in ICSP's favor would be warranted nonetheless. It is true that when, as here, the insured is covered as an additional insured by a policy issued to a third-party (the MTA), the time prior to learning that a third-party insurance policy is implicated is generally excusable and the time within to which to notify the appropriate insured is measured from the point that the insured learns that coverage is afforded by a third-party's policy (*Greaves* at 614). Here, however, while PANYNJ alleges that it was apprised of the MTA's involvement on March 8, 2011 it nevertheless waited another year before notifying ICSP. Since no explanation for the delay is offered, this delay is also unreasonable as a matter of law (*Deso* at 130; *Boutin* at 425-436; *Peerless Insurance Company* at 602).

Nothing submitted by PANYNJ raises an issue of fact sufficient

to preclude summary judgment.

PANYNJ submits Evan L. Burak's (Burak) deposition testimony wherein he testified, in pertinent part, as follows: On March 2, 2009, while employed by Greyhound as a District Manager, he was informed that Square had been involved in an accident in the bus terminal within 625 near the dispatch booth. Burack was so informed by Rachel Harris (Harris), Acting City Manager with Greyhound, who indicated that Square slipped on ice which formed from a puddle of water. The water, according to Harris, emanated from a hose which was being used by people performing construction within 625. Harris further testified that she apprised PANYNJ of Square's accident that same day.

PANYNJ also submits Karl Lunan's (Lunan) deposition testimony wherein he testified, in pertinent part, as follows: On March 8, 2011, by virtue of Burak's deposition testimony, PANYNJ learned that Square's accident involved other potentially liable parties. As a result, PANYNJ initiated an investigation and by August 2011, had determined that the MTA was performing work at the location of Square's accident, that ICSP was the MTA's insurance carrier, and that PANYNJ was entitled to make a claim ICSP.

PANYNJ's evidence fails to raise an issue of fact sufficient to preclude summary judgment. Significantly, neither Burak nor Lunan's testimony indicates why upon learning about Square's accident on March 27, 2009, when the notice of claim was served

upon PANYNJ, no action to investigate the claim was immediately undertaken, which action would have been taken by a reasonable person and would have yielded information about the MTA's involvement sooner than March 8, 2011, when Burak testified and March 6, 2012, when ICSP was notified. Accordingly, PANYNJ fails to raise an issue of fact as to its failure to provide notice to ICSP as soon as practicable for this reason alone.

Similarly, even if the failure to notify ICSP prior to March 8, 2011 - the date of Burak's deposition - is excusable, PANYNJ fails to establish that it gave notice to ICSP as soon as practicable thereafter. Crediting Lunan's deposition testimony, by August 2011, PANYNJ was aware that the MTA's work caused the instant accident and that, thus, the policy issued by ICSP was implicated. Nevertheless, notice was not given to PANYNJ until eight months thereafter. To the extent that PANYNJ's excuse for the belated notification is its investigation, such assertion is impermissibly made by counsel and is nonetheless belied by Lunan's testimony. It is hereby

ORDERED that the third-party complaint and any cross-claims be dismissed as against ICSP. It is further

ORDERED that ICSP serve a copy of this Order with Notice of Entry upon all parties within thirty days (30) hereof.

This constitutes this Court's decision and Order.

Dated : September 15, 2016
Bronx, New York

BARRY SALMAN, J.S.C.