Tower Ins. Co. of N.Y. v Commissary Direct, Inc.
2019 NY Slip Op 31392(U)
May 13, 2019
Supreme Court, New York County
Docket Number: 160359/16
Judge: Robert R. Reed
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 43

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TOWER INSURANCE COMPANY OF NEW YORK,

Plaintiff,

-against-

Index No. 160359/16

COMMISSARY DIRECT, INC., K.E.D. FOOD SERVICE CORP., NGK REALTY INC., KURT EGGERT, LISA EGGERT, and DINA GONIAS f/k/a DINA TASKOS, d/b/a KED FOOD SERVICE,

Defendants. Mot. Seq. Nos. 001 & 002

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Kennedys CMK (*Max W. Gershweir* of counsel), New York City, for plaintiff Tower Insurance Company of New York.

Berson & Budashewitz, LLP (*Jeffrey A. Berson* of counsel), New York City, for defendant Commissary Direct, Inc.

Haworth Rossman & Gerstman, LLC (*Barry Gerstman* of counsel), New York City, for defendant NGK Realty, Inc.

Ras Associates, PLLC (*Luis F. Ras* of counsel), Purchase, for defendants Kurt and Lisa Eggert.

ROBERT R. REED, J.:

Motion sequence numbers 001 and 002 are consolidated for disposition.

In this insurance coverage dispute, plaintiff Tower Insurance Company of New York (Tower) moves, pursuant to CPLR 3124, to compel defendant NGK Realty, Inc. (NGK), Kurt Eggert (Eggert), and Lisa Eggert (together, the Eggerts) to comply with all of its prior discovery demands and notices (motion sequence number 001).

Tower also moves, pursuant to CPLR 3212, for summary judgment declaring that it is not obligated to defend or indemnify defendants Commissary Direct, Inc. (Commissary) and NGK in an action captioned *Eggert v NGK Realty, Inc.*, Index No. 702233/14 (Sup Ct, Queens County) (hereinafter, the underlying action) (motion sequence number 002).

NGK cross-moves, pursuant to CPLR 3212, for summary judgment declaring that Tower must defend, indemnify, and hold harmless NGK for all claims asserted against it and any verdict, judgment or settlement in the underlying action on a primary and non-contributory basis. NGK also seeks an order declaring that: (1) Tower must reimburse NGK and/or its insurer for attorneys' fees and costs associated with the instant action; and (2) Tower must reimburse NGK for the settlement and its defense costs in the underlying action.

The Eggerts cross-move, pursuant to CPLR 3212, for summary judgment dismissing Tower's amended complaint, as well as any cross claims or counterclaims, as against them.

BACKGROUND

The Underlying Action

In the underlying action, the Eggerts allege that, on March 10, 2014, Eggert was injured when he fell from a height, while performing repair work at the premises located at 150 Denton Avenue, Lynbrook, New York (NY St Cts Electronic Filing [NYSCEF] Doc No. 48, verified complaint ¶ 17). The Eggerts initially sued NGK and defendant K.E.D. Food Service Corp. (K.E.D.) on April 3, 2014, but later added Commissary as a direct defendant on May 7, 2014 (NYSCEF Doc No. 51, amended verified complaint). The Eggerts allege, among other things, that NGK was the owner of the premises, and that Commissary was the lessee of the premises (*id.*, ¶¶ 5, 14). The Eggerts allege that defendants were negligent and violated Labor Law §§ 240, 241 (6) and 200 (*id.*, ¶¶ 32, 35).

On February 6, 2015, the Eggerts served a notice to produce and combined demands on Commissary, in which they requested, among other things, the following:

> "a) all primary insurance agreements and policies of liability insurance; and
> "b) all agreements providing for a self-insured retention; and
> "c) all excess and umbrella insurance agreements and policies of liability insurance . . ."

(NYSCEF Doc No. 55 at 5). A compliance conference order dated February 9, 2015 directed Commissary to respond to the Eggerts' notice to produce and combined demands within 30 days (NYSCEF Doc No. 56 at 3). The compliance conference order also provided that "parties aggrieved by failures to disclose must move promptly for relief or [shall] be deemed to have waived the outstanding items" (*id.*).

After the close of discovery, the Eggerts moved for partial summary judgment as to liability under Labor Law § 240 (1) as against NGK and Commissary (NYSCEF Doc No. 57). NGK cross-moved for summary judgment dismissing the complaint and all cross claims against it, and for summary judgment on its cross claim for common-law indemnification against Commissary (NYSCEF Doc No. 58).

By decision and order dated September 1, 2016, Justice Frederick D. R. Sampson, as relevant here, granted the Eggerts' motion for partial summary judgment on the issue of liability under Labor Law § 240 (1) as against NGK and Commissary (NYSCEF Doc No. 63 at 5). In addition, Justice Sampson denied NGK's cross motion for summary judgment on its cross claim for common-law indemnification on the ground that there were triable issues of fact as to whether Commissary was negligent (*id.* at 6).

On November 9, 2016, NGK settled with the Eggerts for the amount of $900,000 (NYSCEF Doc No. 85, Gerstman affirmation in support, ¶ 10).

Tower's Policy

Tower issued a commercial lines policy (policy no. CPC 7039711 00) to Commissary, which was effective from January 21, 2014 through January 21, 2015 (NYSCEF Doc No. 77, Aptman aff, exhibit 1).

The policy provides that Tower "will pay those sums that the insured becomes legally obligated to pay as damages because of 'bodily injury' . . . to which this insurance applies" that are caused by an "occurrence," which the policy defines as an "accident" (*id.*, form CG 00 01 10 01, § 1, ¶¶ 1.a., b.).

An endorsement to the policy states that "WHO IS INSURED (Section II) is amended to include as an insured the person or organization shown in the Schedule but only with respect to liability arising out of the ownership, maintenance or use of that part of the premises leased to you [Commissary]" (*id.*, form CG9 20 02 09 06).

The policy conditions coverage on compliance with the following condition:

> "**Duties In The Event of Occurrence, Offense, Claim Or Suit**
> a. You must see to it that we are notified as soon as practicable of an 'occurrence' or an offense which may result in a claim. To the extent possible, notice should include:
> (1) How, when and where the 'occurrence' or offense took place;
> (2) The names and addresses of any injured persons and witnesses; and
> (3) The nature and location of any injury or damage arising out of the 'occurrence' or offense.
> b. If a claim is made or 'suit' is brought against any insured, you must:
> (1) Immediately record the specifics of the claim or 'suit' and the date received; and
> (2) Notify us as soon as practicable.
> c. You and any other involved insured must:
> (1) Immediately send us copies of any demands, notices, summonses or legal papers received in connection with the claim or 'suit' . . ."

(*id.*, form CG 00 01 10 01, § IV, ¶ 2).

The policy also enables injured persons and other claimants to satisfy these conditions:

> "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 agent of ours in New York State, with particulars sufficient to identify the insured, shall be considered notice to us"

(*id.*, form CG 01 63 07 11, § 1, ¶ C [e]).

Defendants' Notice to Tower

Tower submits an affidavit from Lowell Aptman (Aptman), the vice president of claims for AmTrust America, Inc. (AmTrust), Tower's claims administrator, which is based upon his review of records maintained in the ordinary course of AmTrust's business (NYSCEF Doc No. 76, Aptman aff, ¶ 1). According to Aptman, on November 29, 2016, AmTrust received a telephone call from an attorney inquiring whether Tower wanted to retain him to defend Commissary at the upcoming trial in the underlying action, which was then scheduled for December 5, 2016 (*id.*, ¶ 5). On the same day, email correspondence between Commissary's counsel and its insurance agents was forwarded to AmTrust (*id.*, ¶ 6).

The Eggerts contacted AmTrust once they became aware of the policy on December 2, 2016, and issued a subpoena for the policy on December 5, 2016 (NYSCEF Doc No. 114, Eggerts' answers to Tower's interrogatories, ¶ 2).

Thereafter, on December 8, 2016, Tower disclaimed coverage to Commissary and NGK, based on their failure to promptly notify Tower of the occurrence, claim or suit (NYSCEF Doc No. 80 at 2, 4). However, in that letter, Tower agreed to defend Commissary until the resolution of a declaratory judgment action (*id.* at 3).

On January 13, 2017, NGK's counsel notified Tower's counsel of the accident and underlying action (NYSCEF Doc No. 65).

PROCEDURAL HISTORY

In this declaratory judgment action, Tower seeks, among other things, declarations that: (1) it is not obligated to defend or indemnify Commissary or NGK in the underlying action (NYSCEF Doc No. 68, amended complaint, first, third causes of action); and (2) it is not obligated to defend or indemnify K.E.D. and defendant Dina Gonias in connection with the

underlying action and another action, *Eggert v K.E.D. Food Serv. Corp.*, Index No. 703045/17 (Sup Ct, Queens County) (*id.*, second cause of action).

NGK asserted a counterclaim for a declaration that Tower is obligated to defend and indemnify it on a primary and non-contributory basis in the underlying action (NYSCEF Doc No. 70, NGK's answer, counterclaim).

In their answer, the Eggerts asserted a counterclaim for a declaration that Tower is obligated to indemnify them for any judgment obtained against its insureds in the underlying action (NYSCEF Doc No. 73, Eggerts' answer, counterclaim).

DISCUSSION

I. Tower's Motion to Compel (Motion Sequence Number 001)

Tower moves to compel NGK and the Eggerts to comply with all of its prior discovery demands and notices (*see* CPLR 3124). In support of its motion, Tower argues that defendants failed to respond to its first set of interrogatories and notice of discovery and inspection dated July 14, 2017. NGK and the Eggerts assert, in opposition, that they have responded to all of these demands. Tower has not submitted a reply. Accordingly, Tower's motion to compel is denied as moot.

II. Tower's Motion for Summary Judgment (Motion Sequence Number 002)

Tower also moves for summary judgment, arguing that none of the defendants complied with the policy's notice conditions. Specifically, Tower asserts that Commissary and NGK did not notify it of the accident and underlying action until over two years after the Eggerts commenced the underlying action. Moreover, Tower maintains that the Eggerts failed to timely exercise their rights to satisfy the policy's notice conditions.

In addition, Tower argues that it has been prejudiced by defendants' delay in providing notice. According to Tower, prejudice is irrebuttably presumed under Insurance Law § 3420 (c) (2) (B) because Commissary and NGK did not notify it of the accident or suit until after their liability had already been determined. Tower points out that, when defendants notified it of the accident and suit, Justice Sampson had already granted the Eggerts' motion for partial summary judgment as to liability under Labor Law § 240 (1) at the time, and the action was about to proceed to trial on the Eggerts' damages and NGK's common-law indemnification claim. Even if prejudice is not irrebuttably presumed, Tower argues, the court should find that the delay prejudiced Tower. In this regard, Tower maintains that Commissary and NGK bear the burden of proving that the delay did not prejudice Tower because the delay exceeded two years, pursuant to Insurance Law § 3420 (c) (2) (A). Additionally, Tower asserts that timely notice would have precluded NGK's common-law indemnification under the anti-subrogation rule. Furthermore, Tower argues that the delay potentially impacted the outcome of the underlying action, since Tower was deprived of the ability to assert a sole proximate cause defense, negotiate a settlement, and file an appeal.

Commissary argues, in opposition to Tower's motion, that Tower has not been prejudiced by the delay. As argued by Commissary, Tower has been able to obtain necessary discovery in order to defend against the damages trial, and the outcome would not have been any different had Tower opposed the Eggerts' motion for summary judgment. However, at oral argument, Commissary's counsel appeared to concede that Tower has been prejudiced by his client's delay (oral argument tr at 22).

In opposition to Tower's motion, and in support of its cross motion, NGK argues that its delay is excusable because it was ignorant of Tower's insurance coverage. NGK points out that

all parties repeatedly requested Commissary's insurance information through discovery demands and correspondence. NGK asserts that it reasonably relied upon Commissary's failure to disclose the existence of its insurance coverage – although the February 9, 2015 compliance conference order directed Commissary to respond to the Eggerts' combined demands within 30 days (including those portions requesting insurance coverage), Commissary's prior counsel in the underlying action repeatedly characterized Commissary as uninsured. NGK maintains that, as soon as it learned of Commissary's insurance coverage, it promptly notified Tower. Moreover, according to NGK, Tower has not been prejudiced, because Commissary's liability to NGK on NGK's common-law indemnification claim has not been finally determined by any court decision or binding arbitration.

The Eggerts argue, in response to Tower's motion and in support of their own cross motion, that they separately notified Tower of the accident and underlying action as soon as they became aware of the policy in December 2016. According to the Eggerts, they pursued their rights with as much diligence as was reasonably possible under the circumstances. The Eggerts contend that they reasonably relied upon Commissary's counsel's representations that his client was uninsured.

"It is well settled that 'the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact'" (*Pullman v Silverman*, 28 NY3d 1060, 1062 [2016], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). "Once such a prima facie showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to raise material issues of fact which require a trial of the action" (*Cabrera v Rodriguez*, 72 AD3d 553, 553-554 [1st Dept 2010]). "[M]ere

conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

"Where a policy of liability insurance requires that notice of an occurrence be given 'as soon as practicable,' such notice must be accorded the carrier within a reasonable period of time" (*Great Canal Realty Corp. v Seneca Ins. Co., Inc.*, 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 AD2d 235, 239-240 [1st Dept 2002]). "The insured's failure to satisfy the notice requirement constitutes 'a failure to comply with a condition precedent which, as a matter of law, vitiates the contract'" (*Great Canal Realty Corp.*, 5 NY3d at 743, quoting *Argo Corp. v Greater N.Y. Mut. Ins. Co.*, 4 NY3d 332, 339 [2005]).

However, there are circumstances "that will explain or excuse delay in giving notice and show it to be reasonable" (*Security Mut. Ins. Co. of N.Y. v Acker-Fitzsimons Corp.*, 31 NY2d 436, 441 [1972]), including "where the insured does not know about the accident or has a good faith belief in nonliability" (*St. James Mech., Inc. v Royal & Sunalliance*, 44 AD3d 1030, 1031 [2d Dept 2007]), and where the insured has a "justifiable lack of knowledge of insurance coverage" (*Winstead v Uniondale Union Free School Dist.*, 201 AD2d 721, 723 [2d Dept 1994]). The insured has the burden of proving the reasonableness of the excuse (*see Security Mut. Ins. Co. of N.Y.*, 31 NY2d at 441). "'[W]here there is no excuse or mitigating factor, the issue [of reasonableness] poses a legal question for the court,' rather than an issue for the trier of fact" (*Tower Ins. Co. of N.Y. v Lin Hsin Long Co.*, 50 AD3d 305, 307 [1st Dept 2008] [internal quotation marks and citation omitted]).

Courts have held unexcused delays of about a month or two months to be unreasonable as a matter of law (*see e.g. Deso v London & Lancashire Indem. Co. of Am.*, 3 NY2d 127, 130 [1957] [51 days]; *Tower Ins. of N.Y. v Amsterdam Apts., LLC*, 82 AD3d 465, 466 [1st Dept 2011] [76 days]; *Young Israel Co-Op City v Guideone Mut. Ins. Co.*, 52 AD3d 245, 246 [1st Dept 2008] [40 days]; *Pandora Indus. v St. Paul Surplus Lines Ins. Co.*, 188 AD2d 277, 277 [1st Dept 1992] [31 days]).

"Insurance Law § 3420 (a) (2) expressly permits an injured party to recover any unsatisfied judgment against an insured, directly from the insurer" (*Glanz v New York Mar. & Gen. Ins. Co.*, 150 AD3d 704, 705 [2d Dept 2017], quoting *Becker v Colonial Coop. Ins. Co.*, 24 AD3d 702, 704 [2d Dept 2005]). However, "Insurance Law § 3420 (a) (3) requires the injured party to demonstrate that he or she acted diligently in attempting to ascertain the identity of the insurer, and thereafter expeditiously notified the insurer" (*Glanz*, 150 AD3d at 705).

Under Insurance Law § 3420 (a) (5), which applies to policies issued on or after January 17, 2009, "[f]ailure to give any notice required to be given by such policy within the time prescribed therein shall not invalidate any claim by the insured, injured person or any other claimant, *unless the failure to provide timely notice has prejudiced the insurer*" (emphasis supplied) (*see Freeway Co., LLC v Technology Ins. Co., Inc.*, 138 AD3d 623, 624 [1st Dept 2016]).

A. Whether Defendants' Delay In Notifying Tower Was Reasonable

The court must first determine whether Commissary and NGK notified Tower of the accident and underlying action "as soon as practicable." In addition, the court must consider whether the Eggerts were diligent in attempting to ascertain Tower's identity, and thereafter promptly notified Tower.

1. Commissary

Here, it is undisputed that Commissary, the named insured, did not notify Tower of the underlying accident (and Eggert's accident) until November 29, 2016 (NYSCEF Doc No. 76, Aptman aff, ¶¶ 5, 6), a delay of over two years from when the underlying action was commenced on April 3, 2014. Thus, Tower has demonstrated that Commissary breached the policy's provision to provide notice "as soon as practicable."

Commissary offers no excuse for its delay in providing notice to Tower. Accordingly, the court finds that Commissary's delay was unreasonable as a matter of law (*see Tower Ins. Co. of N.Y.*, 50 AD3d at 307).

2. NGK

It is well established that "the notice requirement in this insurance policy applies equally to both primary and additional insureds" (*Travelers Ins. Co. v Volmar Constr. Co.*, 300 AD2d 40, 44 [1st Dept 2002]). "The fact that an insurer may have received notice of the claim from the primary insured, or from some other source, does not excuse an additional insured's failure to provide notice" (*City of New York v St. Paul Fire and Marine Ins. Co.*, 21 AD3d 978, 981 [2d Dept 2005])

In this case, NGK failed to notify Tower of the accident and underlying action until January 13, 2017 (NYSCEF Doc No. 65). This constitutes a delay of more than two years from when the Eggerts commenced the underlying action.

NGK argues that its delay should be excused because it was justifiably ignorant of Tower's insurance coverage. "'[A] justifiable lack of knowledge of insurance coverage may excuse a delay in reporting an occurrence'" (*Daimler Chrysler Ins. Co. v Keller*, 164 AD3d 1209, 1210-1211 [2d Dept 2018], quoting *Winstead*, 201 AD2d at 723). "However, in order to

prevail on this theory, the insured . . . must prove not only that [it] was ignorant of the available coverage, but also that [it] made reasonably diligent efforts to ascertain whether coverage existed" (*Rockland Exposition, Inc. v Marshall & Sterling Enters., Inc.*, 138 AD3d 1095, 1098 [2d Dept 2016] [internal quotation marks and citation omitted]).

Although NGK asserts that "all parties repeatedly requested Commissary's insurance information," it has not provided any evidence that it made *any* effort to ascertain whether coverage existed. Rather, NGK relies on the Eggerts' discovery demands requesting Commissary's insurance information in the underlying action. Therefore, the court finds that NGK's delay was inexcusable as a matter of law (*see id.* [insured did not have a justifiable lack of knowledge of insurance coverage where it did not make any effort to inquire as to possibility of insurance coverage in connection with the underlying action for 52 days after underlying action was brought against it]; *Allstate Ins. Co. v Marcone*, 2003 NY Slip Op 30151[U], 2003 WL 25757022 [Sup Ct, Suffolk County 2003], *revd on other grounds* 29 AD3d 715 [2d Dept 2016], *lv dismissed* 7 NY3d 841 [2016] [insured did not have justifiable lack of knowledge of insurance coverage where he failed to establish that "he made any efforts to determine whether insurance coverage existed"]).

NGK relies on *Cicero v Great Am. Ins. Co.* (53 AD3d 460, 460-461 [1st Dept 2008]), in which the First Department held that an injured party, not an insured like NGK, acted diligently in ascertaining the identity of an owner's insurer. In the underlying action involved in *Cicero*, the owner did not disclose the existence of the excess policy until the eve of trial, despite the fact that the preliminary conference order directed that the owner respond to the plaintiffs' combined demands, and disclose "the existence and contents of *any* insurance agreement as described in CPLR § 3101 (f)" (*id.* at 460 [emphasis in original]). The Court reasoned that:

> "[w]hile, ordinarily, whether plaintiffs acted diligently in ascertaining the identity of [the owner's] insurer or insurers would present an issue of fact, under these circumstances, where [the owner] affirmatively misled plaintiffs as to even the existence, let alone the identity, of its excess insurer and failed to cooperate with its primary insurer . . . in the latter's attempts to ascertain whether there was any excess coverage, plaintiffs' efforts were sufficient and the notice given by them shortly after they learned of the excess coverage . . . was timely as to them"

(*id.* at 460-461; *see also Golebiewski v National Union Fire Ins. Co. of Pittsburgh, Pa.*, 101 AD3d 1074, 1077 [2d Dept 2012] [injured plaintiffs were "reasonably diligent in ascertaining the identity of the excess carrier and in providing notice to that carrier of this claim and of the underlying action" where they notified the insurer on the same day that they learned of the existence of the excess policy, and the excess policy had not been disclosed despite the fact that the preliminary conference order required it to be disclosed]).

The First Department subsequently cited *Cicero* in *Chunn v New York City Hous. Auth.* (55 AD3d 437, 438 [1st Dept 2008]). In *Chunn*, the Court held that an additional insured's delay in notifying an insurer was excusable, where "any delay in notice was due to misleading statements by the NCC claims department concealing the existence of the OCP policy" (*id.*). Here, in contrast, NGK has failed to meet its burden that "any delay in notice was *due to* misleading statements" by Commissary's counsel in the underlying action (*id.* [emphasis added]). Since NGK has not established that it made any effort to ascertain whether coverage existed, NGK has failed to show that there are circumstances that "explain or excuse delay in giving notice and show it to be reasonable" (*Security Mut. Ins. Co. of N.Y.*, 31 NY2d at 441).

3. The Eggerts

The Eggerts assert, in their responses to interrogatories, that they independently notified AmTrust on December 2, 2016 (NYSCEF Doc No. 114). "Having been statutorily granted an independent right to give notice and recover directly from the insurer, the injured party or other

claimant is not to be charged vicariously with the insured's delay" (*Aetna Cas. & Sur. Co. v National Union Fire Ins. Co. of Pittsburgh, Pa.*, 251 AD2d 216, 220 [1st Dept 1998]).

"In determining the reasonableness of an injured party's notice, the notice required is measured less rigidly than that required of the insureds" (*Appel v Allstate Ins. Co.*, 20 AD3d 367, 368 [1st Dept 2005]). "The injured person's rights must be judged by the prospects for giving notice that were afforded him [or her], not by those available to the insured" (*Lauritano v American Fid. Fire Ins. Co.*, 3 AD2d 564, 568 [1st Dept 1957], *affd* 4 NY2d 1028 [1958]). "What is reasonably possible for the insured may not be reasonably possible for the person he [or she] has injured. The passage of time does not of itself make delay unreasonable" (*id.*).

"However, the injured party still has the burden of proving that he or she or counsel acted diligently in attempting to ascertain the identity of the insurer and thereafter to expeditiously notify the insurer" (*Spentrev Realty Corp. v United Nat. Specialty Ins. Co.*, 90 AD3d 636, 637 [2d Dept 2011]; *see also Steinberg v Hermitage Ins. Co.*, 26 AD3d 426, 428 [2d Dept 2006] [unexplained five-month delay untimely as matter of law]; *Ringel v Blue Ridge Ins. Co.*, 293 AD2d 460, 461-462 [2d Dept 2002] [five-month delay untimely as a matter of law because "because the plaintiffs did not exercise due diligence in ascertaining the identity of [the insured's] insurance company or in notifying (the insurer) of the accident"]; *American Home Assur. Co. v State Farm Mut. Auto. Ins. Co.*, 277 AD2d 409, 410 [2d Dept 2000] [seven-month delay not excused by delay in appointing personal representative of decedent's estate]).

Tower contends, and the Eggerts do not dispute, that the first time that the Eggerts requested Commissary's insurance information was on February 6, 2015 (NYSCEF Doc No. 55), about nine months after the Eggerts added Commissary as a direct defendant in the underlying

action (NYSCEF Doc No. 51, amended verified complaint). Thus, Tower has made a prima facie showing of entitlement to judgment as a matter of law.

The Eggerts offer no evidence as to when Commissary's counsel first represented that his client was uninsured. The Eggerts also do not provide an explanation for why they were unable to request Commissary's insurance before February 6, 2015. Thus, the Eggerts have failed to demonstrate that they exercised due diligence in attempting to ascertain Tower's identity and thereafter promptly notified Tower (*see Tower Ins. Co. of N.Y.*, 50 AD3d at 309 [injured plaintiff's counsel's requests for identity of licensee and police report "do not evince reasonable diligence by (injured plaintiff's) counsel in seeking to identify (licensee's insurer)"]; *Trepel v Asian Pac. Express Corp.*, 16 AD3d 405, 406 [2d Dept 2005] [injured "plaintiff failed to provide any explanation for the five-month delay in ascertaining the (insurer's) identity"]; *Eveready Ins. Co. v Chavis*, 150 AD2d 332, 334 [2d Dept 1989] [injured person did not exercise due diligence where "counsel did not attempt to ascertain the name of (defendant's) insurer until approximately four months after receipt of the police report containing the insurance code"]; *cf. Allstate Ins. Co.*, 29 AD3d at 718 [finding issues of fact as to whether widow was reasonably diligent where widow's attorney requested information about insured from the police and mailed letters to every individual listed in the Manhattan and Bronx telephone directories who shared his surname]).

Denneny v Lizzie's Buggies (306 AD2d 89 [1st Dept 2003]), a case relied upon by the Eggerts, is distinguishable. There, the Court found that there were issues of fact as to whether injured plaintiff was diligent in attempting to identify and notify a bar's insurer, where the plaintiff made multiple efforts over the course of a year to determine the identity of the bar's insurer, and searched relevant public records and filings in connection with the bar's corporate

existence, "especially in view of the misleading conduct engaged in by" the bar's principal owner (*id.*). The Eggerts have not identified any similar efforts to identify Tower's identity and notify Tower that would establish their reasonable diligence.

Therefore, Tower has established that the Eggerts were not reasonably diligent in ascertaining Tower's identity. The Eggerts have failed to raise an issue of fact.

B. Whether Tower Has Been Prejudiced By the Delay in Notice

Having determined that defendants unreasonably delayed in notifying Tower, the court must consider whether the delay has prejudiced Tower.

Insurance Law § 3420 provides that "[t]he insured's rights shall not be deemed prejudiced unless the failure to provide notice materially impairs the ability of the insurer to defend or investigate the claim" (Insurance Law § 3420 [c] [2] [C]).

> "In any action in which an insurer alleges that it was prejudiced as a result of a failure to provide timely notice, the burden of proof shall be on: (i) the insurer to prove that it has been prejudiced, if the notice was provided within two years of the time required under the policy; or (ii) the insured, injured person or other claimant to prove that the insurer has not been prejudiced, if the notice was provided more than two years after the time required under the policy"

(Insurance Law § 3420 [c] [2] [A]).

The statute further provides that "an irrebuttable presumption of prejudice shall apply if, prior to notice, the insured's liability has been determined by a court of competent jurisdiction or by binding arbitration; or if the insured has resolved the claim or suit by settlement or other compromise" (Insurance Law § 3420 [c] [2] [B]).

"It is fundamental that a court, in interpreting a statute, should attempt to effectuate the intent of the Legislature and where the statutory language is clear and unambiguous, the court should construe it so as to give effect to the plain meaning of the words used" (*Patrolmen's Benevolent Assn. of City of N.Y. v City of New York*, 41 NY2d 205, 208 [1976] [citations

omitted]; *see also Majewski v. Broadalbin–Perth Cent. School Dist.*, 91 NY2d 577, 583 [1998] ["the clearest indicator of legislative intent is the statutory text, the starting point in any case of interpretation must always be the language itself"]). Yet, the legislative history of an enactment may also be relevant and "is not to be ignored, even if words be clear" (*Riley v County of Broome*, 95 NY2d 455, 463 [2000], quoting McKinney's Cons Laws of NY, Book 1, Statutes § 124, at 252).

Moreover, as a "general guidepost," courts must "strictly construe a statute when it is in derogation of the common law" (*Fumarelli v Marsam Dev.*, 92 NY2d 298, 306 [1998]). "It is axiomatic concerning legislative enactments in derogation of common law, and especially those creating liability where none previously existed, that they are deemed to abrogate the common law only to the extent required by the clear import of the statutory language" (*Blue Cross & Blue Shield of N.J., Inc. v Philip Morris USA Inc.*, 3 NY3d 200, 206 [2004] [internal quotation marks and citation omitted]).

By requiring insurers to demonstrate prejudice in order to disclaim for late notice, Insurance Law § 3420 (a) (5) abrogated the common-law "no prejudice" rule (*see Conergics Corp. v Dearborn Mid-W. Conveyor Co.*, 144 AD3d 516, 523 [1st Dept 2016]).

Thus, Insurance Law § 3420 (c) (2) (B), which provides that "an irrebuttable presumption of prejudice shall apply, if prior to notice, the insured's liability has been determined by a court of competent jurisdiction," must be construed narrowly. Applying a strict construction to this statutory language, the provision applies where, prior to notice, the insured's liability has been determined in any respect. This interpretation is supported by the intent of the statute, which is to prevent insurers from disclaiming coverage for inconsequential technicalities (*see Hernandez*

Castillo v Prince Plaza, LLC, 142 AD3d 1127, 1129 [2d Dept 2016], citing Bill Jacket, L 2008, ch 388).

On September 1, 2016, Justice Sampson granted the Eggerts' motion for partial summary judgment on the issue of liability under Labor Law § 240 (1) as against Commissary and NGK. Commissary's liability had already been determined when it notified Tower of the accident and underlying action, i.e., on November 29, 2016 (NYSCEF Doc No. 76, Aptman aff, ¶¶ 5, 6). In addition, NGK did not notify Tower until its counsel sent a letter to Tower on January 13, 2017 (NYSCEF Doc No. 65), after the Eggerts' motion for partial summary judgment had already been granted. Therefore, the irrebuttable presumption of prejudice applies here (*see Matter of Sportsfield Specialties, Inc. v Twin City Fire Ins. Co.*, 45 Misc 3d 1201[A], 2012 NY Slip Op 52509[U], *11 [Sup Ct, Delaware County 2012]).

In light of the above, Tower has demonstrated that defendants' notice was untimely. Moreover, Tower has demonstrated that it has been prejudiced by the delay. Accordingly, Tower is entitled to a declaration that it is not obligated to defend or indemnify Commissary and NGK in the underlying action.

For these reasons, NGK's cross motion seeking a declaration that Tower must defend and indemnify it on a primary and non-contributory basis must be denied.

Since Tower is entitled to the declarations sought here, the Eggerts' cross motion seeking dismissal of the complaint and all cross claims and counterclaims against them must also be denied.

CONCLUSION

Accordingly, it is

ORDERED that the motion (sequence number 001) of plaintiff Tower Insurance Company of New York to compel is denied; and it is further

ORDERED that the motion (sequence number 002) of plaintiff Tower Insurance Company of New York for summary judgment on the first and third causes of action seeking declarations that it is not obligated to defend or indemnify defendants Commissary Direct, Inc. or NGK Realty Inc. in the action captioned *Eggert v NGK Realty, Inc.*, Index No. 702233/14 (Sup Ct, Queens County) is granted; and it is further

ADJUDGED and DECLARED that plaintiff Tower Insurance Company of New York is not obligated to defend or indemnify defendants Commissary Direct, Inc. or NGK Realty Inc. in the action captioned *Eggert v NGK Realty, Inc.*, Index No. 702233/14 (Sup Ct, Queens County); and it is further

ORDERED that the cross motion of defendant NGK Realty Inc. for summary judgment is denied; and it is further

ORDERED that the cross motion of defendants Kurt and Lisa Eggert for summary judgment is denied; and it is further

ORDERED that the balance of the action is severed and continued.

Dated: 5/13/19

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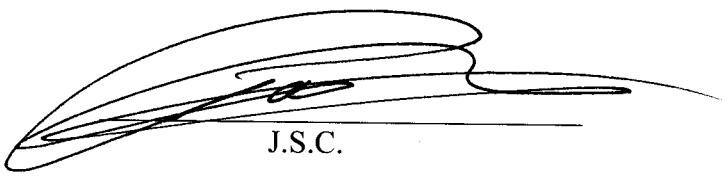

J.S.C.