ZL v Zurich Am. Ins. Co.
2020 NY Slip Op 32437(U)
July 6, 2020
Supreme Court, Kings County
Docket Number: 514786/2018
Judge: Richard Velasquez

At an IAS Term, Part 66 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 6TH day of July, 2020

PRESENT:
HON. RICHARD VELASQUEZ,
Justice.

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ZL, an infant, by his natural mother and natural guardian, CHANA LEW and CHANA LEW, individually,

Plaintiff(s),

- against -

Index No. 514786/2018

ZURICH AMERICAN INSURANCE COMPANY AND EDUCATIONAL INSTITUTE OHLEI TORAH OF BROOKLYN, INC.

Defendant(s).

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The following e-filed papers read herein:	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	15, 18, 35-38
Opposing Affidavits (Affirmations)	77, 62
Reply Affidavits (Affirmations)	78, 80

After having heard oral argument on May 14, 2020, and upon review of the foregoing papers, defendant Zurich American Insurance Company (ZAIC) moves for an order, pursuant to CPLR 3212, granting summary judgment dismissing the complaint of plaintiffs ZL, an infant by his mother and natural guardian, Chana Lew and Chana Lew, individually. (MS#1). Plaintiffs cross-move for an order, pursuant to CPLR 3212,

granting summary judgment in their favor against ZAIC and amending the caption to substitute the name Schneur Zalman Lew (Zalman), who has reached the age of 18 years, in place of infant plaintiff "ZL." (MS#2).

Background

In this action, plaintiffs seek a judgment declaring that ZAIC is obligated under an insurance policy to defend and indemnify defendant Educational Institute Oholei Torah of Brooklyn, Inc. (EIOT) in a personal injury action brought by plaintiffs and to satisfy default judgments entered in favor of plaintiffs against EIOT in the personal injury action. On November 21, 2007, Zalman, then six years of age, was injured as he fell from a slide at a playground on EIOT's property. An accident report, prepared by EIOT on the day of the accident, notes that Zalman suffered a "fracture on right arm (halfway between wrist & elbow) fracture caused laceration & slight muscle protrusion." Plaintiffs thereafter commenced an action against EIOT on December 28, 2007 (2007 action). On February 1, 2008, EIOT was served with the summons and complaint in the 2007 action. On February 13, 2008, EIOT notified ZAIC of the subject accident and the 2007 action. By facsimile dated February 15, 2008, EIOT transmitted to ZAIC a copy of the November 21, 2007 accident report. By letter dated February 22, 2008, ZAIC notified EIOT that it was denying coverage for the subject accident and the 2007 action because EIOT's notice was deemed late under the terms of the policy. ZAIC also notified plaintiffs' counsel of the disclaimer on February 22, 2008. No further activity was taken in the 2007 action, nor was any challenge mounted to the disclaimer prior to the instant declaratory judgment action.

On March 1, 2017, plaintiffs filed a second personal injury action against EIOT (2017 action) based on the November 21, 2007 accident. In an email dated October 26, 2017, plaintiffs' counsel notified ZAIC of the 2017 action, advised that EIOT had not responded to the complaint, and requested that ZAIC interpose an answer to avoid a default. On November 7, 2017, plaintiffs' counsel moved for a default judgment against EIOT due to its failure to appear. The motion for a default judgment was granted, and following an inquest held on April 26, 2018, default judgments were entered against EIOT in favor of Zalman in the amount of $750,000 and in favor of his mother, Chana Lew (Chana) in the amount of $25,000.

On July 19, 2018, plaintiffs commenced the instant action seeking satisfaction of the default judgments entered against EIOT under the EIOT's policy with ZAIC. In the complaint, plaintiffs state that on October 26, 2017, a copy of the summons and complaint in the 2017 action was forwarded to ZAIC, which responded on November 1, 2017 by sending a copy of the disclaimer letter dated February 22, 2008. ZAIC seeks summary judgment dismissing the complaint on the ground that it properly disclaimed coverage for the subject accident due to late notice. Plaintiffs seek summary judgment in their favor on the ground that ZAIC did not send a timely notice disclaiming coverage to plaintiffs; that the February 22, 2008 letter disclaimed coverage only to EIOT.

Discussion

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 (*Alvarez v Prospect Hosp.*, 68

NY2d 320, 324 [1986]). The "[f]ailure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Once this showing has been made, the burden shifts to the party opposing the motion to lay bare its proof and present evidentiary facts sufficient to raise a genuine triable issue of fact (*see Zuckerman v City of New York,* 49 NY2d 557 [1980]; *Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065 [1979]).

The subject policy requires that the insured "must see to it that [ZAIC is] notified as soon as practicable of an 'occurrence' or an offense *which may result in a claim*" (emphasis added). Compliance with an insurance policy notice provision is a condition precedent to coverage, and the failure to comply vitiates the policy (*see White v City of New York*, 81 NY2d 955, 957 [1993]; *Security Mut. Ins. Co. of N.Y. v Acker-Fitzsimons Corp.*, 31 NY2d 436, 440 [1972]; *Quality Invs., Ltd. v Lloyd's London, England*, 11 AD3d 443 [2d Dept 2004]; *Yarar v Children's Museum of Manhattan*, 4 AD3d 420, 421 [2d Dept 2004]). It is noted that the subject insurance policy was issued and provided coverage prior to an amendment to Insurance Law § 3420 that requires an insurer to show prejudice in order to disclaim coverage based on untimely notice. Therefore, ZAIC is not required to show that it was prejudiced by an untimely notice (*see Briggs Ave. LLC v. Insurance Corp. of Hannover*, 11 NY3d 377, 382 [2008]).

ZAIC's Motion

As noted by plaintiffs, ZAIC's motion for summary judgment is not supported by an affidavit from one with personal knowledge of the facts, but rather by its attorney who

does not profess such knowledge. For the first time in reply, ZAIC submits the affidavit of claims manager Jonathan Flynn, who handled plaintiffs' claim after ZAIC received notice of the 2007 action. Although a party moving for summary judgement cannot meet its prima facie burden by submitting evidence for the first time in reply (*see Arriola v City of New York*, 128 AD3d 747, 749 [2d Dept 2015]; *Poole v MCPJF, Inc.*, 127 AD3d 949, 950 [2d Dept 2015]; *Tingling v C.I.N.H.R. Inc.*, 74 AD3d 954 [2d Dept 2010]), and generally, evidence submitted for the first time in reply papers should be disregarded by the court (*see e.g. Adler v Suffolk County Water Auth.*, 306 AD2d 229, 230 [2d Dept 2003]), exceptions to the rule arise when the evidence submitted is in response to allegations raised for the first time in the opposition papers (*see David v Chong Sun Lee*, 106 AD3d 1044, 1045 [2d Dept 2013]; *Conte v Frelen Assoc., LLC*, 51 AD3d 620, 621 [2d Dept 2008]; *Ryan Mgt. Corp. v Cataffo*, 262 AD2d 628 [2d Dept 1999]), and/or when the other party is given an opportunity to respond to the reply papers (*see Pennachio v Costco Wholesale Corp.*, 119 AD3d 662 [2d Dept 2014]; *Zernitsky v Shurka*, 94 AD3d 875, 876 [2d Dept 2012]). Because plaintiffs were afforded the opportunity to respond to Flynn's affidavit and did in fact address the merits of the affidavit in reply papers (NYSCEF Doc No. 80), this court may accept the Flynn affidavit as proof in support of ZAIC's motion for summary judgment.

In his affidavit, Flynn confirms that he was assigned to handle the subject claim on February 14, 2008 and, on the same day, called EIOT and plaintiffs' counsel in an attempt to obtain information regarding the claim. Flynn further avers that he sent a letter to EIOT on February 15, 2008 acknowledging receipt of the February 13, 2008

notice regarding the claim and requesting additional information regarding the incident, including any internal incident reports. Flynn states that a February 15, 2008 facsimile was sent to his attention by EIOT, along with the accident report prepared by EIOT on November 21, 2007, and after receiving the facsimile he called EIOT and confirmed that they had notice of the incident on November 21, 2007. Flynn states that on February 20, 2008, he received a call from Rabbi Rosenfeld, who identified himself as the Director of Education at EIOT and explained his understanding of the November 21, 2007 accident. Flynn asserts that based on his investigation, he recommended to his manager that a disclaimer be issued based on late notice, with which his manager agreed.

Based on the undisputed fact that ZAIC had notice of the accident on the day of its occurrence (November 21, 2007) but did not notify ZAIC until it forwarded the 2007 action to ZAIC on February 13, 2008 (over two months later), ZAIC has established as a matter of law that EIOT and/or plaintiffs failed to comply with the policy's timely notice provision, thereby precluding any obligation of coverage for the subject accident.

In opposition to ZAIC's motion for summary judgment, EIOT contends that its delay in making a claim was based upon a good faith belief that it did not face liability until the 2007 action was commenced by plaintiffs and EIOT was served with process on February 1, 2008. EIOT submits the affirmation of Devorah Baumgarten, an employee of EIOT responsible for reporting any claims to her superiors which she believed should be forwarded to the insurance companies and for reporting any such claims to the insurance companies. Baumgarten affirms that on or about November 21,

2007, she was made aware of Zalman's accident and understood that the cause of the injury was not the result of any negligence on the part of EIOT, but arose from Zalman climbing up the wrong way of a slide as other children were properly sliding down. Baumgarten states that the administration immediately contacted the parents as well as obtained medical assistance for Zalman and, over the next few days, "out of an abundance of caution," she called Chana to ask her whether she intended to file a claim with EIOT's insurer and offered the school's assistance in filing a claim. Baumgarten avers Chana was advised that if she intended to file a claim, Baumgarten would contact EIOT's insurer and put them in contact with her. Baumgarten states that over the following weeks, Baumgarten contacted Chana on multiple occasions to ask her intentions and offered her assistance. Baumgarten maintains that as the result of repeated conversations with Chana, she "understood that [Chana] did not intend to file a claim." Baumgarten states that the first notice of a claim being asserted was the receipt of the 2007 lawsuit, on February 1, 2008, whereupon she immediately notified EIOT's insurance agent.

In a separate affirmation, Chana states that in mid-December 2007 she consulted with an attorney about the possibility of bringing a lawsuit, but never advised the school that she may bring an action. Chana asserts that she was advised by EIOT to bring Zalman's medical bills to the school and that they would be "taken care of." Chana states that she was "never told that an insurance company might pay these bills." Chana maintains that ZAIC never told her or any member of her family that they failed to give timely notice and they had no reason to believe that the school would not

give timely notice to ZAIC. Chana maintains that because ZAIC had denied coverage and the school had failed to answer the complaint, she decided not to pursue a claim at that time as Zalman was still a student at the school and other boys from her family were attending the school as well.

The insured has the burden of demonstrating a reasonable excuse for the delay in providing notice (*see White*, 81 NY2d at 957; *Security Mut. Ins. Co. of N.Y.*, 31 NY2d at 441). "[A] good-faith belief of nonliability may excuse or explain a seeming failure to give timely notice. But the insured's belief must be reasonable under all the circumstances, and it may be relevant on the issue of reasonableness, whether and to what extent, the insured has inquired into the circumstances of the accident or occurrence" (*Security Mut. Ins. Co. of N.Y.*, 31 NY2d at 441 [citations omitted]). When the facts of an occurrence are such that an insured acting in good faith would not reasonably believe that liability will result, notice of the occurrence is given "as soon as possible" if given promptly after the insured receives notice that a claim will in fact be made (*D'Aloia v Travelers Ins. Co.*, 85 NY2d 825, 826 [1995]). Ordinarily, the question of whether the insured had a good-faith belief in nonliability, and whether that belief was reasonable, presents an issue of fact and not one of law (*see Genova v Regal Mar. Indus.*, 309 AD2d 733 [2d Dept 2003). "Nevertheless, the issue of whether an insured's excuse for the delay is reasonable 'may be determined as a matter of law where the evidence, construing all inferences in favor of the insured, establishes that the belief was unreasonable or in bad faith'" (*Tower Ins. Co. of N.Y. v Alvarado*, 84 AD3d 1354,

1355 [2d Dept 2011], quoting *McGovern-Barbash Assoc., LLC v Everest Natl. Ins. Co.*, 79 AD3d 981, 983 [2d Dept 2010]).

Based on EIOT's own proof, the court finds as a matter of law that EIOT's belief of nonliability was unreasonable under the circumstances. In her affirmation, Baumgarten averred that following the accident, whereby Zalman received injuries that required emergency medical attention, she contacted Chana inquiring as to whether she intended to file a claim over several occasions. There is no admissible proof offered that Chana affirmatively represented to EIOT that an action would not ensue. Baumgarten's inquiries to Chana regarding a potential claim clearly demonstrates a belief on her part that a claim "may result" from the accident, thus requiring notification to ZAIC of the occurrence "as soon as practicable" pursuant to the terms of the policy. Further, any belief of nonliability based on Zalman's behavior on the slide is not reasonable as liability may be premised on negligent supervision.

Despite the proper disclaimer of coverage with respect to EIOT, "Insurance Law § 3420 (a) (2) expressly permits an injured party to recover any unsatisfied judgment against an insured, directly from the insurer" (*Becker v Colonial Coop. Ins. Co.*, 24 AD3d 702, 704 [2d Dept 2005]). Insurance Law § 3420 (a) (3) gives the injured party an independent right to give notice of the accident and to satisfy the notice requirement of the policy. "If the injured person proceeds diligently to ascertain the existence of coverage and to give the required notice to the insurer, he [or she] will not be charged with any delay on the part of the assured" (*National Grange Mut. Ins. Co. v Diaz*, 111 AD2d 700, 701 [1st Dept 1985]). "Where the insured has failed to give proper notice,

the injured party can itself give notice, thereby preserving its rights to proceed directly against the insurer. 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.*, 251 AD2d 216, 220 [1st Dept1998]; *see Lauritano v American Fid. Fire Ins. Co.*, 3 AD2d 564 [1st Dept 1957], *affd* 4 NY2d 1028 1958]). "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 v New York Mar. & Gen. Ins. Co.*, 150 AD3d 704, 705 [2d Dept 2017]). The sufficiency of notice by an injured person is governed not by mere passage of time but by the means available for such notice" (*National Grange Mut. Ins. Co.*, 111 AD2d at701; *see Jenkins v Burgos*, 99 AD2d 217, 221 [1st Dept 1984]). Ordinarily, the reasonableness of any delay and the sufficiency of the excuse offered is a matter for trial. However, absent an excuse or mitigating circumstances, the issue poses a legal question for the court (*see Deso v London & Lancashire Indem. Co.*, 3 NY2d 127, 129-130 [1957]; *Jenkins*, 99AD2d at 220; *see also First State Ins. Co. v J & S United Amusement Corp.*, 67 NY2d 1044, 1046 [1986]).

Here, there is no indication that Chana made any diligent effort to ascertain EIOT's insurance information and/or was unable to ascertain the carrier's identity until after the action was instituted (*cf. Malik v Charter Oak Fire Ins. Co.*, 60 AD3d 1013, 1015 [2d Dept 2009]). Further, Chana offers no basis (i.e. conversations with Baumgarten or other EIOT employees) for her belief that timely notice of the accident

was provided to ZAIC by EIOT. Plaintiffs' actions in hiring an attorney and commencing an action against EIOT in 2007 are insufficient to show that plaintiffs made diligent efforts to ascertain the identity of EIOT's insurer (*see Dritsanos v Mt. Hawley Ins. Co.*, 180 AD3d 753, 755 [2d Dept 2020]). Notably, although plaintiffs were aware as early as February 2008 that ZAIC provided coverage to EIOT, plaintiffs did not notify ZAIC of the 2017 action for over seven months from its commencement.

Plaintiffs' Cross Motion

Turning to plaintiffs' cross motion for summary judgment, their argument that ZAIC's disclaimer was ineffective against them is without merit. "[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 [2d Dept 2002]; *see Rochester v Quincy Mut. Fire Ins. Co.*, 10 AD3d 417, 418 [2d Dept 2004]; *Massachusetts Bay Ins. Co. v Flood*, 128 AD2d 683, 684 [2d Dept 1987]). Here, it is not in dispute that ZAIC first received notice of the claim from EIOT on February 12, 2008. While ZAIC may have subsequently contacted plaintiff's counsel, which contact may constitute "notice" of the claim from plaintiff (*see Cirone v Tower Ins. Co. of N.Y.*, 39 AD3d 435, 436 [1st Dept 2007]), such notice did not occur until after the insured, EIOT, had notified ZAIC. Thus, ZAIC was not required to cite plaintiffs' failure to provide timely notice in its disclaimer letter of February 22, 2008. The court finds unavailing plaintiffs' argument that EIOT's act of forwarding of the

summons and complaint in the 2007 action to ZAIC constitutes notice on behalf of plaintiffs (*see Dritsanos*, 180 AD3d at 755).

Accordingly, ZAIC's motion for summary judgment is granted. (MS#1). Plaintiff's cross-motion for summary judgment and to amend the caption is denied, and the complaint is hereby dismissed. (MS#2).

This constitutes the Decision/Order of the Court.

Date: JULY 6, 2020

RICHARD VELASQUEZ, J.S.C.

So Ordered
Hon. Richard Velasquez

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