

<b>Mountain Val. Indem. Co. v Cohen</b>
2020 NY Slip Op 32644(U)
August 14, 2020
Supreme Court, New York County
Docket Number: 157931/2018
Judge: Gerald Lebovits
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

PRESENT: HON. GERALD LEBOVITS PART IAS MOTION 7EFM

*Justice*

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INDEX NO. 157931/2018

MOUNTAIN VALLEY INDEMNITY COMPANY,

MOTION SEQ. NO. 001

Plaintiff,

- v -

**DECISION + ORDER ON  
MOTION**

ABRAHAM COHEN and VICTORIA MAKMUDOVA,

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40

were read on this motion for SUMMARY JUDGMENT.

*Law Office of James J. Croteau*, Parsippany, NJ (Natasha Millman of counsel), for plaintiff.  
*Pollack, Pollack, Isaac & DeCicco, LLP*, New York, NY (Brian J. Isaac of counsel), for defendant Abraham Cohen.

Gerald Lebovits, J.:

This is an insurance-coverage action. Plaintiff, Mountain Valley Indemnity Company, is seeking a declaratory judgment that it has no duty to defend or indemnify defendant Abraham Cohen in an underlying personal-injury action in Supreme Court, Kings County. MVIC now moves under CPLR 3212 for summary judgment on its declaratory-judgment claim.

**BACKGROUND**

MVIC issued a personal-liability insurance policy to Cohen, covering the premises located at 3731 Nautilus Avenue in Brooklyn from July 2, 2015, to July 2, 2016. The insurance policy covers sums that the insured becomes legally obligated to pay as damages because of bodily injury caused by an occurrence under the policy. The policy also contains a provision requiring the insured to provide MVIC with notice of a loss as soon as practicable, and to forward promptly copies of related legal papers to MVIC.

In May 2016, defendant Victoria Makmudova slipped and fell at the premises. She sued Cohen for personal injuries in Supreme Court, Kings County. (*See Makmudova v Cohen*, Index No. 521869/2016.) Cohen defaulted in the *Makmudova* action. In March 2017, Makmudova moved for default judgment, which was granted in June 2017. The court then conducted an inquest; following the inquest, the court granted Makmudova a default judgment of \$812,468 in December 2017. Cohen became aware of this judgment in January 2018.

In March 2018, Cohen prepared an affidavit seeking to vacate the default judgment on the ground that he had not received any papers in the action prior to entry of the judgment; and Cohen filed a motion based on that affidavit in April 2018. Cohen did not, however, inform MVIC of the judgment. On May 16, 2018, the motion to vacate was denied. On May 18, 2018, Cohen, now represented by counsel, telephoned MVIC to notify it of the loss and seek coverage under the policy.

MVIC then initiated an investigation into the loss. On May 29, 2018, MVIC again spoke with Cohen over the telephone and confirmed that he resided at the premises and had no other residences. On June 6, 2018, MVIC disclaimed coverage for the claim based on Cohen's failure to notify MVIC promptly of the loss.

In August 2018, MVIC brought this action, seeking a declaratory judgment that it is not required either to defend or to indemnify Cohen in the underlying personal-injury action, in light of Cohen's failure to notify MVIC of the loss. MVIC now moves for summary judgment on this claim under CPLR 3212. The motion is granted.

## DISCUSSION

A party moving for summary judgment under CPLR 3212 must make a prima facie showing of the entitlement to judgment as a matter of law, offering sufficient evidence to eliminate any material issues of fact. (*Santiago v. Filstein*, 35 AD3d 184, 185-186 [1st Dept 2006].) If such a showing is made, the opponent of the motion must then "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact." (*Mazurek v. Metropolitan Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006]). Mere conclusions or unsubstantiated allegations are not sufficient. (*Corcoran Group, Inc v. Morris*, 107 AD2d 622, 624 [1st Dept 1985], *affd* 64 NY2d 1034).

MVIC argues that it is entitled to summary judgment because Cohen failed to provide it timely notice of Makmudova's injury. This court agrees.

Cohen's insurance policy required that he provide MVIC with written notice of an occurrence "as soon as practical." In that scenario, an insured must provide the insurer notice within a "reasonable time," given the facts and circumstances of the case. (*24 Fifth Owners, Inc. v Sirius Am. Ins. Co.*, 124 AD3d 551, 551 [1st Dept 2015].) Here, at a minimum it is undisputed that Cohen was aware of the underlying occurrence by January 2018, when he learned of the default judgment entered against him. Yet he did not notify MVIC of the occurrence until the court denied his motion to vacate in May 2018, four months later. Given this four-month delay, Cohen's notice to MVIC was late as a matter of law. (*See Neighborhood Partnership Hous. Dev. Fund Co., Inc. v Everest Natl. Ins. Co.*, 152 AD3d 420, 420-421 [1st Dept 2017].)

To be sure, untimely notice to the insurer "shall not invalidate any claim by the insured" under the policy "unless the failure to provide timely notice has prejudiced the insurer." (Insurance Law § 3420 [a] [5].) An irrebuttable presumption of prejudice arises if, "prior to notice, the insured's liability has been determined by a court of competent jurisdiction.

(*Id.* § 3420 [c] [2] [B].) Here, though, Cohen did not provide notice to MVIC until after entry of a default judgment against him. That default judgment, which has not been vacated despite repeated efforts by Cohen, constituted a determination of his liability for purposes of § 3420 (c) (2) (B). MVIC has therefore established as a matter of law that it was prejudiced. (See *Villavicencio v. Erie Ins. Co.*, 172 AD3d 1276, 1278 [2d Dept 2019]; *Greenberg v Utica First Ins. Co.*, 2020 NY Slip Op 50491 [U], at \*4 [Sup Ct, NY County 2020].)

Cohen contends that even if his notice to MVIC was late, fact issues exist about whether MVIC failed to disclaim coverage timely after receiving that notice. This court is not persuaded.

Timeliness of a disclaimer is measured from the time when the insurer first learns of the ground for disclaimer of liability or denial of coverage (*GPH Partners v. American Home Assn.*, 87 AD3d 843 [1st Dept. 2011].) MVIC received notice from Cohen by telephone on May 18, 2018, and disclaimed on June 6, 2018, 19 days later. Cohen asserts, in essence, that his initial statements to MVIC in the May 18th telephone call made the ground for disclaimer so clear that there likely was no need for MVIC to conduct a further investigation, rendering summary judgment for MVIC inappropriate. But this court does not see why MVIC should have been obliged merely to go on what Cohen said in that initial call without any further double-checking.<sup>1</sup> And it is undisputed that MVIC had completed its investigation within 11 days of the initial call, and prepared and sent out the disclaimer within eight days of completing the investigation. In these circumstances, MVIC's disclaimer was timely as a matter of law. (See *Tower Ins. Co. of N.Y. v Khan*, 93 AD3d 618, 619 [1st Dept 2012] [disclaimer held timely as a matter of law where "it came 17 days after [the insurer] had obtained and confirmed all the facts warranting the disclaimer of coverage"].) The First Department's decision in *AIU Ins. Co. v Veras*, relied upon by Cohen, is distinguishable: in that case, the insurer had not only completed its investigation but also prepared a disclaimer letter within two weeks of notice, and then spent another 15 days investigating other, additional grounds for disclaimer. (See 94 AD3d 642, 643.) Not so here.

Finally, Cohen argues that under CPLR 3212 (f), MVIC's summary-judgment motion is premature because further discovery is required. But a party seeking to rely upon CPLR 3212 (f) to defeat a summary-judgment motion must provide a basis beyond "mere hope or conjecture" to believe that further discovery would uncover evidence supporting its claims in opposition. (*Voluto Venture, LLC v Jenkins & Gilchrist Parker Chapin LLP*, 44 AD3d 557, 557 [1st Dept 2007].) Cohen's protestations notwithstanding, he has not met that burden here.

Accordingly, it is hereby

ORDERED that MVIC's motion under CPLR 3212 for summary judgment in its favor is granted; and it is further

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<sup>1</sup> Cohen's argument on this point also sits oddly with his contention that fact issues remain about whether his notice to MVIC was untimely in the first place.

ORDERED, AJUDGED, AND DECREED that MVIC has no duty to defend or indemnify Cohen in the underlying personal-injury action, entitled *Makmudova v Cohen*, Index No. 521869/2016 (Sup. Ct., Kings County).

  
**HON. GERALD LEBOVITZ**  
J.S.C.

8/14/2020  
DATE

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE