

Global Liberty Ins. Co. of N.Y. v. McCrae, 14835/12, NYLJ 1202723935383, at *1 (Sup., NA, Decided April 14, 2015).

1

The defendants, Nyack Mews Condominiums Association and Light Year Property Management Corporation, (hereinafter referred to as "Nyack"), move for an order declaring, pursuant to CPLR §3001, that plaintiff has a duty to defend and indemnify the defendants, Miguel O. Loria and Gladys Estevez, (hereinafter referred to as "Loria" and "Estevez"), in connection with the underlying lawsuit. The plaintiff moves for an order pursuant to CPLR §3215, entering a judgment of default against the defendants, Michael McCrae, Tamara Alberda, A & P Taxi, L.L.C., Miguel O. Loria and Gladys M. Estevez, and a declaration that the plaintiff, Global Northeastern Insurance Company, is not obligated to provide coverage to the defendants, Estevez and Loria, in connection with the action pending in the Supreme Court of the State of New York, County of Rockland entitled Nyack Mews Condominiums Association and Light Year Property Management Corporation v. A&P Taxi, L.L.C., Miguel O. Loria, Index Number 032588/2012, (hereinafter referred to as the "underlying action"), or defend Estevez and Loria in connection with the underlying actions. The plaintiff submits opposition to Nyack's motion. Nyack submits opposition to the plaintiff's motion. Nyack submits a reply affirmation. The plaintiff submits a reply affirmation.

*2

Nyack seeks an order declaring that the plaintiff has a duty to defend and indemnify Loria and Estevez in the underlying action, as well as Nyack's third-party action thereto. The plaintiff, Michael McCrae, (hereinafter referred to as "McCrae"), initiated the underlying action by way of Summons and Complaint dated May 14, 2012 to recover for personal injuries sustained on August 9, 2011 when McCrae allegedly slipped and fell at the premises owned, operated and maintained by the defendants, and then was struck by a motor vehicle. The plaintiff provides that the defendants, Estevez and Loria, were insured at the time of loss under a commercial policy of insurance issued by the plaintiff. Nyack appeared as a defendant in the underlying action and brought a third-party action against A&P Taxi and Loria for contribution and indemnification, by way of third-party Summons and Complaint dated August 29, 2012.

The plaintiff submits that it is not obligated to defend, indemnify or afford coverage to Estevez and Loria based on their failure to timely notify the plaintiff of the motor vehicle accident as soon as reasonably practical.

"With respect to policies issued after January 17, 2009, an insurer cannot disclaim coverage on the basis of untimely notice unless the insurer was prejudiced by the late notice." (*Atlantic Casualty Insurance Company v. Value Waterproofing, Inc.*, 918 F. Supp2d 243, citing New York Insurance Law §3420(c)(2)(A)). The insurer has the burden of proving it was prejudiced by the late notice, whereby "[a]n insurer is prejudiced if the failure to timely provide notice 'materially impairs the ability of the insurer to investigate or defend the claim.'" (*Id.*, citing NY Ins. Law §3420(c)(2)(c)). In *Atlantic Casualty Insurance Company*, *supra*, the roof collapsed, and the subject property was demolished, prior to the insurer obtaining any notice of the claim, and as so, "there was no meaningful investigatory steps that remained available to it [the insurer] that it failed to take," and there was no existence of a litigation for the opportunity for discovery to remove the prejudice to the insurer. (*Id.*) "Here, where the best physical evidence was available to only one side but not the other because of an unreasonable failure to provide notice, prejudice had been shown." (*Id.*)

In *Castillo v. Prince Plaza*, 43 Misc3d 335, the Court held that in the absence of finding that the insurer had in fact been prejudiced by the delay in receiving the notice, the Court denied the insurer's motion seeking an order dismissing the action on the grounds that the insurer had no duty to defend or indemnify the defendant/third-party plaintiff because of late notice.

Here, the plaintiff insurer claims that it was prejudiced by the insured's failure to promptly notice the plaintiff of the incident. The plaintiff's claims examiner, Marc Isaacs, avers that if he were aware of the facts of the incident, as it was a "very questionable accident", that plaintiff would have conducted a detailed investigation of the accident, including a scene investigation, an attempt to speak to any witnesses, and would have looked for film footage. The plaintiff provides that it was notified about the loss on or about August 29, 2012, after receiving a phone call from another insurance carrier concerning an uninsured claim by plaintiff McCrae, and as so, in receiving notice approximately one year after the incident occurred, was severely prejudiced. However, Nyack has shown that plaintiff's investigation into the matter consisted of approximately three phone calls made on August 29, 2012 prior to ultimately deciding to disclaim, approximately 23 minutes after plaintiff's initial investigation. The plaintiff's claims manager, Stacy Jurado, testified that the following efforts consisted of plaintiff's investigation into the claim on August 29, 2012, to wit: a phone call to plaintiff from GEICO regarding an uninsured claim by McCrae; plaintiff's call to Estevez with a notation that the phone number was not in service and attempt to obtain another phone number; and plaintiff's contact with Loria who stated that he was driving the subject motor vehicle at the time of the accident, picked up a fare, drove to a parking lot where he believed the passenger tried to attack him, that the attacker

*3

fell to the ground and Loria left the scene. Thereafter, that same day, at approximately 12:37 p.m., denial letters were created and ultimately issued the next day on the basis of late notice and failure to cooperate.

As previously provided, in order to disclaim coverage on the basis of untimely notice, the insurer has the burden of proving it was prejudiced by the failure to provide timely notice. (NY Ins. Law §3420(c)(2)(c)). Here, plaintiff cannot establish it has been prejudiced as plaintiff has not conducted any meaningful investigation, despite the matter being in litigation, and despite the apparent police report filed by Loria, albeit there were conflicting accounts as to what occurred and issues as to whether the vehicle made contact with the plaintiff, McCrae. While plaintiff's own claims examiner, Marc Isaacs, avers that a detailed investigation would be conducted, an attempt to speak to a witness or obtain film footage would be made, no such effort was made with respect to the instant claim. Unlike Atlantic Casualty Insurance Co., *supra*, here the insurer has not demonstrated that the best physical evidence was demolished, that there were no meaningful investigatory steps available, or that key evidence was available to one side and not the other, and later destroyed. In the matter *sub judice*, the plaintiff has not shown that it has taken any opportunity to avail itself to the discovery in the underlying action, attempted to speak to any witnesses or parties to the underlying action, follow up on the police report, or that plaintiff had taken any meaningful steps in its investigation prior to disclaiming.

Additionally, Nyack has demonstrated that plaintiff failed to provide all claimants with requisite notice of its disclaimer as it failed to provide Nyack with any notice whatsoever of its disclaimer. (NY Ins. Law §3420; *George Campbell Painting v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA*, 92 AD3d 104; *Allstate Ins. Co. v. Ferrone*, 232 AD2d 479).

In light of the foregoing, this Court need not address Nyack's remaining contentions, and it is hereby

ORDERED that plaintiff's motion is denied, and it is hereby further

ORDERED that Nyack's motion is granted, and it is hereby further

ORDERED that Nyack is hereby directed to Settle Order on Notice. A copy of this order with notice of entry shall accompany the proposed order.

ENTER:

Dated: April 14, 2015