

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE ALLAN B. WEISS IA Part 2
Justice

x
NUSSBAUM REALTY CORPORATION,
NUSSBAUM REALTY COMPANY, L.L.C., and
NUSSBAUM ASSOCIATES COMPANY, LLC,

Plaintiffs,

- against -

MT. HAWLEY INSURANCE COMPANY,

Defendant.

_____ x

Index
Number 29387 2007

Motion
Date June 24, 2009

Motion
Cal. Number 20

Motion Seq. No. 1

The following papers numbered 1 to 8 read on this motion by defendant for summary judgment dismissing the complaint and declaring that it is not obligated to defend or indemnify plaintiffs or any other person in connection with the action entitled *Deutsch v Nussbaum Realty Corp.*, (Supreme Court, New York County, Index No. 109847/2007) (the *Deutsche* action).

	<u>Papers Numbered</u>
Notice of Motion - Affidavits - Exhibits.....	1-4
Answering Affidavits - Exhibits.....	5-8

Upon the foregoing papers it is ordered that the motion is determined as follows:

Plaintiffs Nussbaum Realty Corp., Nussbaum Realty Company, LLC, and Nussbaum Associates Company, L.L.C. commenced this action seeking, inter alia, a declaration that defendant has a duty to defend and indemnify them and Dunwell Elevator Electrical

Industries, Inc. (Dunwell), in the *Deutsche* action. According to plaintiffs, defendant is obligated to defend and indemnify them and Dunwell under a commercial general liability policy issued by defendant to Nussbaum Realty Corp. on the grounds that plaintiffs Nussbaum Realty Corp., Nussbaum Realty Company, L.L.C., and Nussbaum Associates Company, LLC were named insureds under the policy and that Dunwell was an additional insured under the policy.

In the *Deutsche* action, it is alleged that Herta Deutsche sustained personal injuries when she tripped and fell on January 21, 2007, due to a misleveled elevator at the premises known as 495 West 186th Street, New York, New York. The summons and complaint in the action *Deutsche* action were filed July 18, 2007.

Defendant served an answer denying material allegations of the complaint, and asserting various affirmative defenses.

It is well established 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,” ([Alvarez v Prospect Hosp.](#), 68 NY2d 320, 324 [1986]; [Zuckerman v City of New York](#), 49 NY2d 557 [1980]).

Defendant argues that it owes no duty to defend or indemnify plaintiffs relative to the *Deutsche* action. In support of its motion, defendant offers its attorney’s affirmation, and a copy of the pleadings in this action, the original summons and complaint and the amended summons and amended complaint in the *Deutsch* action, the insurance policy, various correspondence, an investigation report, a maintenance contract between Dunwell and Nussbaum Associates Co., and a certificate of insurance dated July 30, 2007.

Plaintiffs oppose the motion and contend that the motion papers were inadequate under CPLR 3212 because they included an affirmation of an attorney without personal knowledge of the facts.

At the outset, the court rejects plaintiffs’ challenge to the adequacy of the motion papers, as the notice of motion is accompanied not only by an attorney’s affirmation, but also by relevant documentary evidence (*see* [Olan v Farrell Lines](#), 64 N.Y.2d 1092 [1985]).

It is well established that the party claiming insurance coverage bears the burden of proving entitlement, and a party that is not named an insured or an additional insured on the face of the policy is not entitled to coverage (*see* [Tribeca Broadway Assoc., LLC v Mount Vernon Fire Ins. Co.](#), 5 AD3d 198, 200-201 [2004]; [Moleon v Kreisler Borg Florman Gen. Constr. Co.](#), 304 AD2d 337 [2003]).

The Declarations page of the subject policy lists Nussbaum Realty Corp. as the named insured. The policy includes an endorsement (no. CGL-340[02/99]), entitled “NAMED INSURED AND LOCATION SUPPLEMENTARY SCHEDULE,” amending the Declarations page, to include “the following as Named Insureds...:

NAMED INSUREDS

...

Nussbaum Realty Corp.

...

Estate of Herbert Nussbaum & Trust of Jacob Nussbaum dba
Nussbaum Realty Co.

Estate of Herbert Nussbaum & Trust of Jacob Nussbaum dba
Nussbaum Associates Co.

Richard Nussbaum and Eric Nussbaum as Individuals & their capacity
of Managing Agents

....”

Section II of the Commercial General Liability Coverage Form (no. CG 0001[12/04]) portion of the policy also includes definitions of “an insured” based upon the “designation[s]” used in the Declarations page, including the designation of a “limited liability company” (Section II [1][c]) or “an organization other than a partnership, joint venture or limited liability company” (Section II [1][d]).

Another endorsement to the policy (no. CG-2018[11/85]) entitled “ADDITIONAL INSURED-MORTGAGEE, ASSIGNEE, OR RECEIVER” states, among other things, that an insured includes: “the person(s) or organizations shown in the Schedule but only with respect to their liability as mortgagee, assignee, or receiver and arising out of the ownership, maintenance, or use of the premises by you and shown in the Schedule...” The Schedule, in relevant part, provides: “Name of Person or Organization: All where required by written contract.”

Plaintiffs Nussbaum Realty Company, L.L.C. and Nussbaum Associates Company, LLC are not listed among those entities named as insureds under the policy. The reference in the endorsement (no. CGL-340[02/99]) to the Estate of Herbert Nussbaum & Trust of

Jacob Nussbaum “dba” Nussbaum Realty Co. or Nussbaum Associates Co. does not establish that Nussbaum Realty Co., LLC and Nussbaum Associates Company, LLC, were intended to be covered as insureds. A limited liability company is an “unincorporated organization of one or more persons having limited liability for the contractual obligations and other liabilities of the business” (Limited Liability Company Law § 102[m]), and must use the words “Limited Liability Company” or the abbreviation “L.L.C.” or “LLC” in its name (Limited Liability Company § 204[a]). The use of the format “dba” with the abbreviation “Co.” and not “L.L.C.” or “LLC” in the endorsement indicates a trade name employed by the Estate of Herbert Nussbaum and the Trust of Jacob Nussbaum, and as such, has no separate jural existence (*see Provosty v Lydia E. Hall Hosp.*, 91 AD2d 658 [1982], *affd* 59 NY2d 812 [1983]). Thus, contrary to the argument of plaintiffs, Nussbaum Realty Company, L.L.C. and Nussbaum Associates Company, LLC do not qualify as insureds pursuant to Section II of the Commercial General Liability Coverage Form (no. CG 0001[12/04]), because “Nussbaum Realty Co.” and “Nussbaum Associates Co.” were not designated in the Declarations page as limited liability companies, or organizations other than a partnership, joint venture or limited liability company.

In addition, Nussbaum Realty Company, L.L.C. and Nussbaum Associates Company, LLC, are not specifically named as additional insureds and no evidence exists that they qualified to be additional insureds under endorsement no. CG-2018(11/85). Therefore, because there is no proof that plaintiffs Nussbaum Realty Company, L.L.C. and Nussbaum Associates Company, LLC are insureds or additional insureds under the policy, they are not entitled to coverage under it (*see Zappone v Home Ins. Co.*, 55 NY2d 131, 137-138 [1982]). The court also finds that to the extent defendant disclaimed coverage with respect to Nussbaum Realty Company, L.L.C. and Nussbaum Associates Company, LLC, it was not required to do so as the claim does not fall within the coverage terms of the insurance policy (*see Markevics v Liberty Mut. Ins. Co.*, 97 NY2d 646, 648 [2001]; *Zappone v Home Ins. Co.*, 55 NY2d 131, [1982]; *Tribeca Broadway Assoc., LLC v Mount Vernon Fire Ins. Co.*, 5 AD3d 198, 200-201 [2004], *supra*).

Nussbaum Realty Corp., on the other hand, is a named insured under the policy, and therefore, is entitled to bring a declaratory judgment action against defendant concerning the extent of coverage, the duty to defend, or other issues arising from the insurance contract (*see Lang v Hanover Ins. Co.*, 3 NY3d 350 [2004]). Defendant, however, argues that plaintiff Nussbaum Realty Corp. failed to provide it with timely notice of the occurrence in accordance with the policy conditions, and therefore, breached the contract. Defendant contends that it did not receive notice of the occurrence until it received notice of the resulting claim by virtue of a facsimile transmission from Hilb Rogal & Hobbs of New York, LLC dated June 21, 2007, a period of 151 days after the accident date of January 21, 2007.

It is well established that when a policy of insurance requires that notice of an occurrence be given “as soon as practicable,” the requirement operates as a condition precedent to coverage, and the failure to give such notice vitiates the contract (*see Argo Corp. v Greater N.Y. Mut. Ins. Co.*, 4 NY3d 332, 339 [2005]; *Security Mut. Ins. Co. of N.Y. v Acker-Fitzsimons Corp.*, 31 NY2d 436, 441 [1972]). The policy conditions herein require the insured to notify the company “as soon as practicable” of any occurrence which may result in a claim and of any suit brought against the insured. Such a notice, therefore, must be provided within a reasonable time in view of all of the facts and circumstances (*see Merchants Mut. Ins. Co. v Hoffman*, 56 NY2d 799, 801-802 [1982]; *see also Steinberg v Hermitage Insurance Co.*, 26 AD3d 426 [2006]; *Travelers Indemnity Co. v Worthy*, 281 AD2d 411 [2001]).

The courts have recognized that there may be circumstances where the insured’s failure to give timely notice is excusable, such as where the insured does not know about the accident or has a good-faith belief in nonliability (*see Security Mut. Ins. Co. v Acker-Fitzsimons Corp.*, 31 NY2d at 441). The burden of establishing a reasonable excuse for the delay in giving notice rests upon the insured (*see Argentina v Otsego Mutual Fire Ins. Co.*, 86 NY2d 748 [1995]; *Pile Found. Constr. Co., v Investors Ins. Co. of Am.*, 2 AD3d 611, 613 [2003]; *1700 Assoc. v Public Serv. Mut. Ins. Co.*, 256 AD2d 456 [1998]).

Plaintiff Nussbaum Realty Corp. asserts defendant received timely notification of the occurrence and *Deutsche* lawsuit. It offers an affidavit of Richard Nussbaum, the president of Nussbaum Realty Corp., and the managing member of Nussbaum Realty Company, L.L.C. and Nussbaum Associates Company, LLC, indicating that he first learned of the incident when he received the June 19, 2007 letter from Deutsche’s attorney. Plaintiff Nussbaum Realty Corp. argues that as evidenced by the June 21, 2007 letter, defendant was aware of the incident and *Deutsche* lawsuit two days after Richard Nussbaum learned of it.

Defendant asserts that Roberto Vargas is a superintendent employed by Nussbaum Realty Corp., and that according to its investigator’s report, Vargas learned of the incident one day after it occurred, and in turn reported it to Richard Nussbaum on the same day (January 22, 2007). Defendant also asserts the knowledge of the incident by Roberto Vargas and Richard Nussbaum may be imputed to Nussbaum Realty Corp. (*see e.g. Smalls v Reliable Auto Serv.*, 205 AD2d 523, 524 [1994]). The alleged statements made by Vargas to the investigator, however, constitute inadmissible hearsay. Thus, a triable issue of fact as to whether plaintiff Nussbaum Realty Corp. gave defendant timely notice of the occurrence and suit (*see Sobers v Lopresti*, 283 AD2d 633 [2001]).

To the extent plaintiff Nussbaum Realty Corp. has been dropped from the *Deutsche* action as a party defendant, defendant has no duty to indemnify Nussbaum Realty Corp. therein. Nevertheless, in addition to imposing a duty upon the insurer to indemnify, the

policy imposes a duty upon the insurer to defend the insured against any suit seeking damages because of bodily injury or property damage to which the insurance applies (*see* Section I [1][a] of the Commercial General Liability Coverage Form [no. CG 0001[12/04]]). Thus, in the event it is ultimately determined that plaintiff Nussbaum Realty Corp. complied with the condition precedents requiring timely notification of occurrence and suit, defendant may be held liable for those reasonable fees and expenses, if any, necessarily incurred by Nussbaum Realty Corp. in its defense in the *Deutsche* action.

To the extent plaintiff Nussbaum Realty Corp. seeks to declare that defendant has a duty to defend and indemnify Dunwell in the *Deutsch* action, Dunwell is not a named party herein. “There is no dispute that parties to an insurance contract--the issuer, a named insured or a person claiming to be an insured under the policy--may bring a declaratory judgment action against each other when an actual controversy develops concerning the extent of coverage, the duty to defend, or other issues arising from the insurance contract” ([*Lang v Hanover Ins. Co.*, 3 NY3d 350, 353 \[2004\]](#), *supra*). This court, however, is unaware of any legal authority which allows a named insured to bring suit against an insurer with respect to coverage issues regarding an alleged additional insured in the absence of joinder of that additional insured. Certainly, any declaration issued herein regarding the rights of Dunwell vis-a-vis the policy would have no preclusion consequences for Dunwell as a nonparty. Inasmuch as Dunwell is not a party, the court cannot make any determination as to whether it is an additional insured party, and the request by defendant for a declaratory judgment relative to Dunwell is denied.

Accordingly, the motion by defendant is granted only to the extent of granting summary judgment declaring that defendant is not obligated to defend or indemnify plaintiffs Nussbaum Realty Company, L.L.C. and Nussbaum Associates Company, LLC in connection with the *Deutsche* action, and has no duty to indemnify plaintiff Nussbaum Realty Corp. in relation to the *Deutsche* action, insofar as Nussbaum Realty Corp. has been dropped as named defendant therein.

Dated: 9/8/09

J.S.C.