

SHORT FORM ORDER

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE PETER J. KELLY**
Justice

IAS PART 16

PONOK REALTY CORP.,

INDEX NO. 22929/05

Plaintiff,

MOTION

DATE APRIL 8, 2008

- against -

MOTION

UNITED NATIONAL SPECIALTY INSURANCE
COMPANY,

CAL. NO. 17

Defendant.

MOT. SEQ.

NUMBER 1

The following papers numbered 1 to 9 read on this motion by the defendant United Specialty Insurance Company for an order granting summary judgment dismissing the complaint and declaring that it has no duty to defend and indemnify plaintiff Ponok Realty Corp., in the underlying action.

	<u>PAPERS NUMBERED</u>
Notice of Motion-Affirmation-Exhibits (A-K).....	1 - 4
Opposing Affirmation-Affidavit-Exhibit (A).....	5 - 7
Replying Affirmation.....	8 - 9

Upon the foregoing papers defendant's motion is determined as follows:

Ponok Realty Corp. (Ponok) is the owner of a commercial building located at 27-06 42nd Road, Long Island City, New York. On June 23, 1988, Ponok entered into a lease agreement with Omega Shell Ltd. (Omega) whereby it leased said premises to Omega for a period of four years, expiring on July 1, 1998. The parties to the lease thereafter extended the lease agreement until June 30, 2001, and pursuant to an amendment dated May 18, 2001, extended and renewed the lease for another three years beginning July 1, 2001 and terminating June 30, 2004.

It is undisputed that United National Speciality Insurance Company (United National) issued a general commercial liability policy to Ponok for the subject premises for the period of October 3, 2003 to October 3, 2004.

RO Gallery Image Makers, Inc. (RO Gallery) is the owner of artwork that was stored in the leased premises. In the underlying action entitled RO Gallery Image Makers v Ponok Realty Corp., and Antretter Roofing Company

(Index No. 19583/2003), the original complaint, dated August 7, 2003, alleges that RO Gallery occupied the subject premises which was used as a warehouse for artwork, and that on June 15, 2002 and July 22, 2002, water leaked from the roof of the subject building, causing irreparable damage and spoilage to its artwork. It is alleged that the roof was negligently repaired prior to June 15, 2002. Ponok served an answer dated December 3, 2003, in which it interposed three affirmative defenses and a cross claim. In June 2004, RO Gallery moved for leave to amend its complaint in order to assert a claim for damage to artworks stored at the premises due to a water leak that occurred on February 5, 2004. A review of the file in the underlying action reveals that the court, in an order dated August 17, 2004, granted RO Gallery's motion stating that "plaintiff may serve and file its amended complaint within 30 days of service of a copy of this Order together with notice of entry." A copy of the order with notice of entry and an affidavit of service was filed on August 26, 2004 and the amended complaint dated August 30, 2004 was filed on September 1, 2004.

The documentary evidence submitted herein establishes that Ponok first notified United National of the February 5, 2004 alleged property damage in April 5, 2005 by an "Accord General Liability Notice of Occurrence/Claim" form. On April 8, 2005, United disclaimed coverage on the grounds that it did not receive timely notice of the claim. The disclaimer letter set forth the following policy provision:

"Section IV-Commercial General Liability Conditions

2. 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 or witnesses;

(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.

You must see to it that we receive written notice of the claim or "suit" as soon as practicable.

c. You and any other involved insured must:

(1) Immediately send us copies of any demands, notices, summons or legal papers received in connection with the claim or "suit";

(2) Authorize us to obtain records and other information;

(3) Cooperate with us in the investigation or settlement of the claim or defense against the "suit" and;

(4) Assist us, upon our request, in the enforcement of any right against any person or organization which may be liable to the insured because of injury or damage to which this insurance may also apply.

d. No insured will, except at that insured's own cost, voluntarily make a payment, assume any obligation, or incur any expense, other than for first aid, without our consent"

The letter further states that "[t]he policy defines an "occurrence" as follows:

"Occurrence means an accident, including continuous or repeated exposure to substantially the same general harmful conditions."

United National stated that from the information obtained, it had been determined that Ponok was first aware of RO Gallery's water damage loss on February 5, 2004 when Robert Rogal, the owner of RO Gallery, telephoned Thomas Konop, the President of Ponok, personally, and informed him that water was leaking inside the building and damaging his stored artwork. The insurer stated as follows:

"However, at no time prior to April 5, 2005 was any notification of this 02/05/04 water damage claim, sustained by your tenant, RO Gallery, provided to United National by Ponok Realty. By failing to give notice of this claim until you received notice that the Court had given leave to the claimant to amend his 2002 loss claims to now assert an addition loss claim for this 02/05/04 loss, you have breached the above notice provision, a condition of your policy.

There is no coverage under United National Specialty's policy for the claim of RO Gallery. Accordingly, please accept this letter as United National's denial of any claim or potential claim under United National Specialty's policy, both for the reasons stated herein and for any such other reasons, which may be presently known or become known. United National Specialty Insurance specifically reserves all of its rights and does not

waive any terms or conditions of the policy. It is suggested that you immediately engage personal counsel, at your own cost, to defend your interest in this matter without delay."

Ponok commenced the within action against United National on October 21, 2005 and asserts five causes of action for breach of contract, breach of the covenant of good faith and fair dealing, breach of fiduciary duty, and for a declaration that the insurer has a duty to defend and indemnify it in the underlying action. Ponok alleges in its complaint that RO Gallery commenced the underlying action in August 2003 by serving the Secretary of State, who failed to send the summons and complaint to Ponok's current address. Ponok, therefore, alleges that it did not have actual knowledge of the 2003 action at the time it was filed. The complaint further alleges that Ponok's insurance broker received notice of the 2002 claim from Robert Rogal and that the broker so notified Hermitage Insurance Company (Hermitage), who had issued a general commercial liability policy covering the subject premises for the period of September 30, 2001 to September 30, 2002. Hermitage selected counsel to represent Ponok in the underlying action, as regards the 2002 property damage claims. It is alleged that Ponok's counsel did not receive a copy of the amended complaint, but that in January 2005, Ponok's counsel informed Thomas Konop of the February 2004 claim. It is further alleged that in March 2005, plaintiff's counsel first discovered that the amended complaint had been filed with the court, and informed Hermitage of this claim. Hermitage is providing a defense to the February 2004 claim but not indemnification as said claim is not within the policy's period of coverage. Ponok alleges in its complaint that two days after its counsel informed it of the existence of the February 2004 claim, it provided notice of this claim to United National, and that it wrongfully denied coverage for the February 2004 claim. United National has served an answer and interposed an affirmative defense.

It is well settled that where, as here, an insurance policy requires that notice of an occurrence be given "as soon as practicable," notice must be given within a reasonable time under the facts and circumstances of each case, and the requirement operates as a condition precedent to coverage (See White v City of New York, 81 NY2d 955, 957 [1993]; Unigard Sec. Ins. Co. v North Riv. Ins. Co., 79 NY2d 576, 581 [1992]; Security Mut. Ins. Co. of N.Y. v Acker-Fitzsimons Corp., 31 NY2d 436, 440 [1972]). However, circumstances may exist that will excuse or explain the insured's delay in giving notice, such as a reasonable belief in non-liability, but the insured has the burden of demonstrating the reasonableness of the excuse (See White v City of New York, supra at 957; Security Mut. Ins. Co. v Acker-Fitzsimons Corp., supra at 441). The questions of whether there existed a good faith belief that the injured party would not seek to hold the insured liable and whether that belief was reasonable are questions of fact for the fact finder (See Argentina v Otsego Mut. Fire Ins. Co., 86 NY2d 748, 750 [1995]).

Summary judgment on this issue may be granted in favor of the insurance company only if, construing all inferences in favor of the

insured, the evidence establishes as a matter of law that the belief of the insured that the plaintiff in the underlying action would not assert claims against it was unreasonable or in bad faith (See Genova v Regal Marine Indus., 309 AD2d 733, 734 [2003]; SSBSS Realty Corp. v Public Serv. Mut. Ins. Co., 253 AD2d 583, 584 [1998]). The insured has the burden of showing the reasonableness of such excuse, given all the circumstances (Security Mut. Ins. Co. v Acker-Fitzsimons Corp., supra at 441; White v City of New York, supra at 957). At issue is not whether the insured believes it will ultimately be found liable for the injury, but whether it has a reasonable basis for a belief that no claim will be asserted against it (See AMRO Carting Corp. v Allcity Ins. Co., 170 AD2d 394 [1991]; See White v City of New York, supra at 958; Security Mut. Ins. Co. v Acker-Fitzsimons Corp., supra 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 (SSBSS Realty Corp. v Public Serv. Mut. Ins. Co., 253 AD2d 583, 584 [1998], quoting Hartford Acc. & Indem. Co. v CNA Ins. Cos., 99 AD2d 310, 313 [1984]).

Thomas Konop became the President of Ponok in 2002, and prior to that was its Director. He is also a shareholder of Ponok and an attorney admitted to practice in New York. At his deposition in the underlying action, Mr. Konop testified that the subject premises were rented to Omega for use as a warehouse, and that Ponok accepted rent checks from RO Gallery. He stated that he personally knows Robert Rogal, who he identified as the President of Omega and a representative of RO Gallery.

Mr. Konop testified that he first met Mr. Rogal in November 2002, at the subject premises, at which time Mr. Rogal claimed that cartons containing lithographs had been damaged by water that had leaked into the building. He stated that he checked the roof with Mr. Antretter, a roofer, and that there was an old rust colored stain on the ceiling near a heating vent, and that some repairs were made to the roof. He stated that the artwork Mr. Rogal showed him did not appear to have suffered any damage. Mr. Konop stated that in 2003, a new coating was placed on the roof, and the old air-conditioning unit on the roof was removed by an entity known as Maspeth Roofing. He further stated that he asked Mr. Rogal to inspect the roof work, and that Mr. Rogal looked at the roof and discussed the work performed with Maspeth Roofing. No other roof work was performed after Mr. Rogal left the premises on June 30, 2004. Mr. Konop stated that in February 2004, a drain pipe became frozen and caused water to enter the warehouse. He stated that said drain pipe froze because Mr. Rogal failed to live up to his obligation under the lease to keep the pipes from freezing. Said drain pipe was repaired in February 2004.

Mr. Konop stated that he first became aware of the underlying action in January 2005, when he was so notified by the attorney representing Ponok in that action. He stated that after he became president of Ponok in November 2002, either his brother George or Mr. Rogal informed him of a 2002 claim filed with Ponok's insurer by the tenant concerning damage caused by a leaking roof, which the insurer had denied.

Mr. Rogal testified, at a deposition in the underlying action, that he is an art dealer, and the sole shareholder of Omega. He stated that RO Gallery is a fine art company, that he is its president, and that he and his wife are its only shareholders. He stated that Omega leased the subject premises from Ponok and that RO Gallery stored its artwork at these premises. There was no written sub-lease or storage agreement between Omega and RO Gallery.

Mr. Rogal stated that in 1987, he notified Mr. Konop of a water leak in the building, but did not recall if any merchandise stored in the premises was damaged. He stated between 1987 and 2000, he notified the landlord several times that water had leaked into the building from the roof. He stated that sometime in 2000, following a heavy rain, there appeared to be a leak in the building, as there was water on the left and right side of the interior of the building, and oil paintings, sculptures and prints had been damaged. Mr. Rogal was unable to recall the specific number of pieces that he claimed were damaged at that time, but stated that they were examined by an art restorer and could not be restored. He stated that he made a written complaint to George Konop, the then president of Ponok.

Mr. Rogal stated that on two occasions in 2002, there were water leaks in the building that he believed came from the roof. He identified damaged prints, lithograph plates, silk screen prints, and etchings by different artists that are listed in the bill of particulars in the underlying action. He stated that the landlord was contacted, and that the landlord's insurer inspected the damaged artwork. Mr. Rogal stated that in the winter 2004, water again leaked into the warehouse from the roof drain pipe, as well as from the back wall and front heaters, and that prints, paintings, lithographs, silk screen works, and a tapestry were damaged. He stated that he telephoned Tom Konop and that Mr. Konop called the roofer.

Construing all inferences in favor of the insured, the evidence presented establishes, as a matter of law, that Mr. Konop's alleged belief in Ponok's non-liability was unreasonable (See Genova v Regal Mar. Indus., supra at 734,) and a prudent insured "should have realized that there was a reasonable possibility of the subject policy's involvement" (C.C.R Realty of Dutchess v New York Cent. Mut. Fire Ins. Co., 1 AD3d 304, 305 [2003]; 120 Whitehall Realty Assoc., LLC v Hermitage Ins. Co., 40 AD3d 719 [2007]). Mr. Konop was aware of the February 5, 2004 incident on the same day, at which time he inspected the premises and arranged for the repair of the broken drain pipe. Furthermore, Ponok and Thomas Konop had previously received other complaints of water leaks from Mr. Rogal, and were aware of the fact that RO Gallery had made a claim in 2002 against Ponok's prior insurer for property damage allegedly caused by a water leaks.

Moreover, at the time of the February 5, 2004 incident, the underlying action had already been commenced. Although Ponok and Mr. Konop assert that they were not personally aware of the underlying action at its commencement on August 12, 2003, this is of no moment. Ponok acknowledges

that the summons and complaint in the underlying action were served on the Secretary of State, and it is the corporation's obligation to keep a current address on file with the Secretary of State (BCL § 306[b]). Contrary to Mr. Konop's suggestions, Ponok must have been aware of the underlying action prior to the February 5, 2004 incident, as an answer dated December 3, 2003 had been served on its behalf in that action. It is noted that Ponok, in the underlying action, did not move to dismiss on jurisdictional grounds and did not preserve the defense of lack of personal jurisdiction in its answer. Ponok, therefore, should have realized that there was a possibility that RO Gallery would make a claim regarding the February 5, 2004 incident, whether or not Ponok could possibly be liable for the alleged damage to the artworks. Ponok's failure to notify United National of the February 5, 2004 incident until April 5, 2005, a year and two months later, and some three months after it was aware of the amendment of the underlying complaint, was without legal justification and vitiates the insurance contract.

Accordingly, defendant's motion for summary judgment dismissing the complaint is granted, and it is the declaration of the court that United National does not have a duty to defend and indemnify Ponok in the underlying action.

Dated: JUNE 27, 2008

Peter J. Kelly, J.S.C.