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Steinberg v. Hermitage Ins. Co.
N.Y.A.D. 2 Dept., 2006.

Supreme Court, Appellate Division, Second Department,
New York.

Thelma STEINBERG, et al., appellants,

v.

HERMITAGE INSURANCE CO., respondent.

Feb. 21, 2006.

Background: Judgment creditors of apartment building owner brought action to recover amount of judgment against owner's liability insurer. The Supreme Court, Queens County, [Hart](#), J., granted insurer's motion for summary judgment dismissing complaint and denied judgment creditors' cross-motion for summary judgment. Judgment creditors appealed.

Holdings: The Supreme Court, Appellate Division, held that:

(1) owner's failure to provide insurer with notice of accident until 57 days after becoming aware of incident precluded coverage under policy, which required owner to provide notice of accident or loss as soon as practicable;

(2) owner's alleged good-faith belief that it was not liable for accident did not excuse owner's failure to provide insurer with timely notice of accident;


(3) insurer's letter disclaiming coverage was issued within reasonable time;

(4) insurer did not have to cite claimant's failure to provide direct notice of claim in its disclaimer letter issued to insured; and

(5) judgment creditors could not rely on statute providing injured party with independent right to provide insurance carrier with written notice of accident.

Affirmed.

West Headnotes

[\[1\] Insurance 217](#)  [3155](#)

[217 Insurance](#)

[217XXVII](#) Claims and Settlement Practices

[217XXVII\(B\)](#) Claim Procedures


[217XXVII\(B\)2](#) Notice and Proof of Loss

[217k3152](#) Timeliness

[217k3155](#) k. "As Soon as Practic-

able". [Most Cited Cases](#)

When insurance policy requires insured to provide insurer with notice of an accident or loss as soon as practicable, such notice must be provided within a reasonable time in view of all of the facts and circumstances.

[\[2\] Insurance 217](#)  [3147](#)

[217 Insurance](#)

[217XXVII](#) Claims and Settlement Practices


[217XXVII\(B\)](#) Claim Procedures

[217XXVII\(B\)2](#) Notice and Proof of Loss

[217k3143](#) Necessity

[217k3147](#) k. Compliance as Condi-

tion Precedent. [Most Cited Cases](#)

Insurance 217  **3167**

[217 Insurance](#)

[217XXVII](#) Claims and Settlement Practices

[217XXVII\(B\)](#) Claim Procedures

[217XXVII\(B\)2](#) Notice and Proof of Loss

[217k3166](#) Effect of Noncompliance with

Requirements

[217k3167](#) k. In General. [Most Cited](#)

[Cases](#)

Providing insurer with timely notice of a potential claim is a condition precedent to coverage, and therefore, absent a valid excuse, failure to satisfy the notice requirement vitiates insurance policy.

[\[3\] Insurance 217](#)  [3155](#)

[217 Insurance](#)

[217XXVII](#) Claims and Settlement Practices

[217XXVII\(B\)](#) Claim Procedures


[217XXVII\(B\)2](#) Notice and Proof of Loss

[217k3152](#) Timeliness

[217k3155](#) k. "As Soon as Practic-

able". [Most Cited Cases](#)

Failure of apartment building owner to provide its liability insurer with notice of accident in which tenant tripped and fell on apartment building's front steps until 57 days after owner became aware of incident precluded coverage under policy, which required owner to provide notice of accident or loss as soon as practicable, given absence of valid excuse for owner's delay.

[4] Insurance 217  **3160(3)**

217 Insurance

217XXVII Claims and Settlement Practices

217XXVII(B) Claim Procedures

217XXVII(B)2 Notice and Proof of Loss


217k3157 Excuses for Delay or Failure

217k3160 Beliefs or Knowledge

217k3160(3) k. As to Liability.

Most Cited Cases

Apartment building owner's alleged good-faith belief that it was not liable for tenant's injuries from accident in which she tripped and fell on building's front steps was belied by evidence showing that owner, upon making reasonable investigation, should have realized that there was reasonable possibility of liability, and therefore alleged belief did not excuse owner's failure to provide insurer with timely notice of accident, as required by policy.

[5] Insurance 217  **3110(2)**


217 Insurance

217XXVI Estoppel and Waiver of Insurer's Defenses

217k3105 Claims Process and Settlement

217k3110 Denial or Disclaimer of Liability on Policy

217k3110(2) k. Failure, Delay, or Inadequacy. **Most Cited Cases**

Insurance 217  **3191(9)**

217 Insurance

217XXVII Claims and Settlement Practices

217XXVII(B) Claim Procedures

217XXVII(B)2 Notice and Proof of Loss

217k3187 Insurer's Waiver or Estoppel

217k3191 Implied Waiver or Estoppel


pel

217k3191(8) Failure to Object or to State Grounds of Objection

217k3191(9) k. In General;

Delay. **Most Cited Cases**

Letter in which liability insurer disclaimed coverage for accident in which tenant tripped and fell on front steps of apartment building owned by insured, which was issued less than one month after insurer received notice of such incident, was issued within reasonable time.

[6] Insurance 217  **3191(9)**

217 Insurance

217XXVII Claims and Settlement Practices

217XXVII(B) Claim Procedures

217XXVII(B)2 Notice and Proof of Loss

217k3187 Insurer's Waiver or Estoppel

217k3191 Implied Waiver or Estoppel

pel

217k3191(8) Failure to Object or to State Grounds of Objection

217k3191(9) k. In General;

Delay. **Most Cited Cases**

Liability insurer that disclaimed coverage for accident due to lack of timely notice of claim did not have to cite claimant's failure to provide direct notice of claim in disclaimer letter issued to insured when claimant's attorney did not directly notify insurer of accident until after insured had done so.

[7] Insurance 217  **3150**

217 Insurance

217XXVII Claims and Settlement Practices


217XXVII(B) Claim Procedures

217XXVII(B)2 Notice and Proof of Loss

217k3148 Persons Giving Notice or

Proof

217k3150 k. Persons Injured by Insured. **Most Cited Cases**

Insurance 217  **3191(9)**

217 Insurance

217XXVII Claims and Settlement Practices

217XXVII(B) Claim Procedures

217XXVII(B)2 Notice and Proof of Loss

217k3187 Insurer's Waiver or Estoppel

[217k3191](#) Implied Waiver or Estoppel

[217k3191\(8\)](#) Failure to Object or to State Grounds of Objection

[217k3191\(9\)](#) k. In General; Delay. [Most Cited Cases](#)

When insured is the first to notify insurance carrier of a claim, even if that notice is untimely, any subsequent information provided by injured party is superfluous for notice purposes, and need not be addressed in notice of disclaimer issued by insurer.

[\[8\] Insurance 217](#) [3150](#)

[217](#) Insurance

[217XXVII](#) Claims and Settlement Practices

[217XXVII\(B\)](#) Claim Procedures

[217XXVII\(B\)2](#) Notice and Proof of Loss

[217k3148](#) Persons Giving Notice or Proof

[217k3150](#) k. Persons Injured by Insured. [Most Cited Cases](#)

Although statute provides injured party with an independent right to provide an insurance carrier with written notice of an accident, injured party is required to demonstrate that he or she acted diligently in attempting to ascertain the identity of carrier and thereafter expeditiously notified carrier. [McKinney's Insurance Law § 3420\(a\)\(3\)](#).

[\[9\] Insurance 217](#) [3150](#)

[217](#) Insurance

[217XXVII](#) Claims and Settlement Practices

[217XXVII\(B\)](#) Claim Procedures

[217XXVII\(B\)2](#) Notice and Proof of Loss

[217k3148](#) Persons Giving Notice or Proof

[217k3150](#) k. Persons Injured by Insured. [Most Cited Cases](#)

Judgment creditors' failure to provide any explanation for five-month delay in notifying judgment debtor's liability insurer of accident underlying judgment precluded judgment creditors from showing that they acted diligently in ascertaining insurer's identity and notifying insurer of accident, as required to rely on statute providing injured party with independent right to provide insurance carrier with written notice of ac-

cident. [McKinney's Insurance Law § 3420\(a\)\(3\)](#).

Schindel, Farman & Lipsius, LLP, New York, N.Y. ([Ira S. Lipsius](#) of counsel), for appellants.

Gold, Stewart, Kravatz & Stone, LLP, Westbury, N.Y. ([Jeffrey B. Gold](#) of counsel), for respondent.

[A. GAIL PRUDENTI](#), P.J., [THOMAS A. ADAMS](#), [ROBERT A. SPOLZINO](#), and [JOSEPH COVELLO](#), JJ.

***426** In an action to recover the amount of a judgment obtained against the defendant's insured, the plaintiffs appeal from an order of the Supreme Court, Queens County (Hart, J.), dated October 14, 2003, which granted the defendant's motion for summary judgment dismissing the complaint and denied their cross motion for summary judgment.

ORDERED that the order is affirmed, with costs.

On October 14, 1996, the plaintiffs' decedent (hereinafter the claimant) was injured when she tripped and fell on the front steps of the apartment building in which she lived. By letter dated November 19, 1997, the claimant's attorney notified the defendant's insured, which owned the building, of the claimant's ***427** injuries, and suggested that the insured forward the letter to its insurance carrier "so that [its] rights may be protected." The insured did not do so, purportedly because it believed that it had no potential liability for the claimant's alleged injuries.

The claimant's attorney commenced an action against the insured shortly thereafter. The defendant received a copy of the summons and complaint in the action from its agent on January 20, 1998. By letter dated February 17, 1998, a copy of which was provided to the claimant's attorney, the defendant disclaimed coverage on the ground of late notice. The claimant's attorney****571** did not provide notice of the occurrence to the defendant directly until August 13, 1998, after he had obtained a default judgment against the insured on July 24, 1998.

[\[1\]\[2\]\[3\]](#) Where an insurance policy, such as the one in this case, requires an insured to provide notice of an accident or loss as soon as practicable, such notice

must be provided within a reasonable time in view of all of the facts and circumstances (see Merchants Mut. Ins. Co. v. Hoffman, 56 N.Y.2d 799, 801-802, 452 N.Y.S.2d 398, 437 N.E.2d 1155; Travelers Indem. Co. v. Worthy, 281 A.D.2d 411, 721 N.Y.S.2d 400). “Providing an insurer with timely notice of a potential claim is a condition precedent, and thus ‘[a]bsent a valid excuse, a failure to satisfy the notice requirement vitiates the policy’ ” (Sayed v. Macari, 296 A.D.2d 396, 397, 744 N.Y.S.2d 509, quoting Security Mut. Ins. Co. of N.Y. v. Acker-Fitzsimons Corp., 31 N.Y.2d 436, 440, 340 N.Y.S.2d 902, 293 N.E.2d 76; see Argo Corp. v. Greater N.Y. Mut. Ins. Co., 4 N.Y.3d 332, 339, 794 N.Y.S.2d 704, 827 N.E.2d 762).

[4] The defendant established, prima facie, its entitlement to judgment as a matter of law by demonstrating that the insured did not provide it with notice of the occurrence for 57 days after it had become aware of the incident that gave rise to the claim (see Deso v. London & Lancashire Indem. Co. of Am., 3 N.Y.2d 127, 130, 164 N.Y.S.2d 689, 143 N.E.2d 889; Rushing v. Commercial Cas. Ins. Co., 251 N.Y. 302, 304, 167 N.E. 450; Safer v. Government Empls. Ins. Co., 254 A.D.2d 344, 345, 678 N.Y.S.2d 667). The plaintiffs' opposition to the motion neither controverted the relevant facts asserted by the defendant nor offered a valid excuse for the delay, as it was required to do in order to avoid summary judgment dismissing the complaint (see Fischer v. Centurion Ins. Co., 9 A.D.3d 381, 382, 780 N.Y.S.2d 612; Viggiano v. Encompass Ins. Co. Fireman's Ins. Co. of Newark, N.J., 6 A.D.3d 695, 696, 775 N.Y.S.2d 533). The plaintiffs' claim that the delay was justified by the insured's “good faith belief” that it was not liable for the claimant's injuries is belied by evidence establishing that upon a reasonable investigation the insured should have realized that there was a reasonable possibility of liability (see *428C.C.R. Realty of Dutchess v. New York Cent. Mut. Fire Ins. Co., 1 A.D.3d 304, 305, 766 N.Y.S.2d 856; Sayed v. Macari, *supra* at 397, 744 N.Y.S.2d 509; Paramount Ins. Co. v. Rosedale Gardens, 293 A.D.2d 235, 240-242, 743 N.Y.S.2d 59).

[5][6][7] Further, the defendant's disclaimer letter was, as a matter of law, issued within a reasonable

time (see New York Cent. Mut. Fire Ins. Co. v. Majid, 5 A.D.3d 447, 773 N.Y.S.2d 429; Farmbrew Realty Corp. v. Tower Ins. Co., 289 A.D.2d 284, 734 N.Y.S.2d 592; State Farm Mut. Auto. Ins. Co. v. Daniels, 269 A.D.2d 860, 703 N.Y.S.2d 796) and the plaintiffs' argument that the defendant's disclaimer was insufficient 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 A.D.2d 460, 462, 740 N.Y.S.2d 109; see Rochester v. Quincy Mut. Fire Ins. Co., 10 A.D.3d 417, 418, 781 N.Y.S.2d 139; Massachusetts Bay Ins. Co. v. Flood, 128 A.D.2d 683, 684, 513 N.Y.S.2d 182). Here, the claimant's attorney did not directly notify the defendant of the accident until after the insured had done so. Thus, the defendant was not required to cite the claimant's failure to provide direct notice in the disclaimer letter it had already issued to the insured ****572** (see Travelers Indem. Co. v. Worthy, *supra* at 412, 721 N.Y.S.2d 400; Agway Ins. v. Alvarez, 258 A.D.2d 487, 488, 684 N.Y.S.2d 635).

[8][9] While Insurance Law § 3420(a)(3) provides an injured party with an independent right to provide an insurance carrier with written notice of an accident, the injured party is required, in order to rely upon that provision, to demonstrate that he or she acted diligently in attempting to ascertain the identity of the insurer, and thereafter expeditiously notified the insurer (see General Acc. Ins. Group v. Cirucci, 46 N.Y.2d 862, 863-864, 414 N.Y.S.2d 512, 387 N.E.2d 223; American Home Assur. Co. v. State Farm Mut. Auto. Ins. Co., 277 A.D.2d 409, 410, 717 N.Y.S.2d 224; Serravillo v. Sterling Ins. Co., 261 A.D.2d 384, 385, 689 N.Y.S.2d 521; Eveready Ins. Co. v. Chavis, 150 A.D.2d 332, 333, 540 N.Y.S.2d 860). The plaintiffs' failure to provide any explanation for the five-month delay in notifying the defendant of the incident precludes any such showing here (see Trepel v. Asian Pac. Express Corp., 16 A.D.3d 405, 406, 791 N.Y.S.2d 161; Ringel v. Blue Ridge Ins. Co., *supra* at 461-462, 740 N.Y.S.2d 109; American Home Assur. Co. v. State Farm Mut. Auto. Ins. Co., *supra* at 410,

[717 N.Y.S.2d 224](#)).

The plaintiffs' remaining contentions are without merit.

N.Y.A.D. 2 Dept.,2006.

Steinberg v. Hermitage Ins. Co.

26 A.D.3d 426, 809 N.Y.S.2d 569, 2006 N.Y. Slip

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