

C

Supreme Court, Appellate Division, Second Department, New York.
SAULT, INC., appellant,
v.
HERMITAGE INSURANCE COMPANY, respondent.

Dec. 5, 2005.

Background: Insured brought action against insurer seeking declaration that insurer was obligated to defend and indemnify insured in underlying personal injury action. The Supreme Court, Rockland County, [O'Rourke, J.](#), granted summary judgment in favor of insurer. Insured appealed.


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

(1) insured's belief of nonliability did not provide valid excuse for over one-year delay in providing insurer notice of incident, and

(2) assault and battery exclusion in insurance policy precluded coverage.

Affirmed.

West Headnotes


[1] Insurance  **3160(3)**

[217k3160\(3\) Most Cited Cases](#)

[1] Insurance  **3167**

[217k3167 Most Cited Cases](#)

Insured's belief of nonliability for former employee's attack on guest did not provide valid excuse for over one-year delay in providing insurer notice of incident, and thus delay was unreasonable and vitiated coverage.

[2] Insurance  **2278(5)**

[217k2278\(5\) Most Cited Cases](#)

Assault and battery exclusion in insurance policy precluded coverage for insured hotel operator's liability for former employee's attack of guest.

****661** [Donald J. Feerick, Jr.](#), New City, N.Y., for appellant.

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

[ROBERT W. SCHMIDT, J.P.](#), [BARRY A. COZIER, REINALDO E. RIVERA](#), and [STEVEN W. FISHER, JJ.](#)

428** In an action for a judgment declaring that the defendant is obligated to defend and indemnify the plaintiff in an underlying personal injury action entitled *Todd v. Miele* in the Supreme Court, Rockland County, under Index No. 3828/01, the plaintiff appeals from an order of the Supreme Court, Rockland County (O'Rourke, J.), dated December 1, 2003, which denied its motion for summary judgment and *662** granted the defendant's cross motion for summary judgment dismissing the complaint.

ORDERED that the order is affirmed, with costs, and the matter is remitted to the Supreme Court, Rockland County for the entry of a judgment declaring that the defendant is not obligated to defend and indemnify the plaintiff in the underlying personal injury action entitled *Todd v. Miele* in the Supreme Court, Rockland County, under Index No. 3828/01.

The plaintiff owned a hotel where a guest was attacked by an alleged former employee and tenant of the hotel. In a criminal proceeding, the attacker was found not guilty by reason of mental disease or defect. The plaintiff sought a defense and ***429** indemnification in the action by the guest against it, and the defendant insurer declined on the grounds that the plaintiff did not provide it with notice as soon as practicable, and that the policy contained an assault and battery exclusion. The plaintiff commenced this declaratory judgment action against the insurer, which, in turn, successfully moved for summary judgment. This appeal ensued.

[1] The insurer established its entitlement to judgment as a matter of law by establishing that the plaintiff failed to provide timely notification of the incident, as it did not receive notice until more than one year after the incident occurred (see [Travelers Indem. Co. v. Worthy](#), 281 A.D.2d 411, 721 N.Y.S.2d

400. The plaintiff's contention in response, that it had a good faith belief of nonliability, was insufficient to raise a triable issue of fact as to the timeliness of the notice (see Metropolitan N.Y. Coordinating Council on Jewish Poverty v. National Union Ins. Co. of Pittsburgh, Pa., 222 A.D.2d 420, 634 N.Y.S.2d 730; Security Mut. Ins. Co. of N.Y. v. Acker-Fitzsimons Corp., 31 N.Y.2d 436, 441, 340 N.Y.S.2d 902, 293 N.E.2d 76).

[2] The insurer was also entitled to summary judgment on the ground that the assault and battery exclusion applied (see Mount Vernon Fire Ins. Co. v. Creative Hous., 88 N.Y.2d 347, 350, 645 N.Y.S.2d 433, 668 N.E.2d 404).

Since this is a declaratory judgment action, we remit the matter to the Supreme Court, Rockland County, for the entry of a judgment declaring that the defendant is not obligated to defend and indemnify the plaintiff in the underlying personal injury action entitled *Todd v. Miele* in the Supreme Court, Rockland County, under Index No. 3828/01 (see Lanza v. Wagner, 11 N.Y.2d 317, 334, 229 N.Y.S.2d 380, 183 N.E.2d 670, *appeal dismissed* 371 U.S. 74, 83 S.Ct. 177, 9 L.Ed.2d 163, *cert. denied* 371 U.S. 901, 83 S.Ct. 205, 9 L.Ed.2d 164).

24 A.D.3d 428, 805 N.Y.S.2d 661, 2005 N.Y. Slip Op. 09288

END OF DOCUMENT