

Late Notice

In Paramount Insurance Company -v- Rosedale Gardens, Inc., (New York Law Journal, May 3, 2002) the First Department addressed the validity of an insured's defense to a disclaimer by its carrier for late notice, namely those situations where an insured is excused from giving notice when it has a reasonable belief it is not liable for an accident.

The underlying claim involves an incident which occurred on May 16, 1999 at a building owned by Rosedale Gardens Inc. ("Rosedale") and managed by Arco Gold Management Co., Inc. ("Arco"). On that date, Jose Escobar, a resident of the building slipped and fell down a third-floor stairway, allegedly as a result of the presence of sunflower seeds on the stairs. As a result of the fall, Mr. Escobar was taken to a hospital via ambulance where he was diagnosed with an ankle fracture, admitted, and kept for six days. On the same day as the accident, Mrs. Escobar phoned Rosedale's emergency number and reported the accident. Thereafter, Mrs. Escobar spoke with Rosedale's superintendent about the accident and that her husband was hospitalized. She also showed the superintendent the staircase, although by that time there were no sunflower seeds there, nor did Mrs. Escobar mention that that is what caused her husband to fall.

On the day following the incident, the superintendent told Arco's site manager about the incident. Specifically, he said that Mr. Escobar had fallen and was taken by ambulance to a hospital. Arco's site manager testified that in the event of an accident, he would conduct an investigation and determine whether the insurance broker should be notified. In this case, notice was not given because after he spoke with the superintendent and examined the staircase, he "didn't see or hear any further substantiation of anything having occurred." Additionally, one year earlier, the Escobars had made unsubstantiated complaints that their child had been the

victim of lead poisoning. Thus, he felt he had reasons to doubt the validity of the Escobar's claims.

Seven months later, the Escobar's commenced an action against Rosedale. The process was ultimately turned over to Rosedale's insurer, Paramount, who received their first notice of the claim on January 3, 2000. By letter dated February 1, 2000, Paramount disclaimed coverage and three days later commenced a declaratory judgment action. After discovery, Paramount moved for summary judgment, arguing that the seven-and-one-half month delay in notifying it of the accident constituted untimely notice as a matter of law. In opposition, Rosedale argued that it reasonably believed liability did not exist and/or the Escobars would not bring suit and as such, there were issues of fact precluding summary judgment.

The court begins by stating the general principle that an insured's obligation to give notice "as soon as practicable" of an occurrence that may result in a claim is measured by the yardstick of reasonableness. Implicit in the court's decision's is that under ordinary circumstances, a delay of seven-and-one-half months is unreasonable. Nevertheless, the court notes that it has generally been held that a failure to give notice may be excused when an insured, acting as a reasonable and prudent person, believes that he is not liable for the incident. The duty to give notice arises when, from the information available relative to the accident, an insured could glean a reasonable possibility of the policy's involvement. Additionally, the burden is on the insured to prove the reasonableness of the delay.

After stating the general principles, the court went on to examine the facts of the instant case, and found that Rosedale's delay was unreasonable. The court noted that both reasons given for the failure to report the incident were insufficient. That the condition complained of as the cause of the fall, i.e. the presence of sunflower seeds on the staircase, a highly transient

condition, was not present at the time the stairway was inspected, one day after the incident, was hardly surprising and of little or no significance in any assessment of the likelihood of a claim being made. The other factor, that the Escobars had a year earlier asserted an allegedly meritless claim of lead poisoning, which was never pursued, should have had the opposite effect.

Additionally, the court pointed out that none of the extenuating circumstances that have led courts to conclude that the insured acted reasonably were present. These situations included cases in which there was a close familial relationship between the accident victim and the insured, where there was a lack of knowledge of permanent injury, or where the accident victim refuses the insured's offer to pay all medical expenses.

On a final note, the court stated that while an insurer need not show prejudice to sustain a coverage disclaimer on the basis of late notice, Paramount would be able to show prejudice. This was based on Mr. Escobar's testimony that he only hired an attorney after he failed to hear from any representative of Rosedale. Thus, the delay impacted on Paramount's ability to investigate and dispose of the claim at an early stage.

Building Manager Liability

A recent First Department case may broaden a building manager's potential liability and also allow some plaintiffs to get around the Workers Compensation Law. In order to understand the potential ramifications of the case, Tushaj -v- 322 Elm Management Associates, Inc., 2002 N.Y. Slip. Op. 02747 (April 4, 2002), it is necessary to examine the precedent it claims to rely upon, the Court of Appeals decision in Palka -v- Servicemaster Management Services Corporation, 83 N.Y.2d 579 (1994).

In Palka, the plaintiff, a nurse employed by Ellis Hospital in Schenectady, was injured

during the course of her employment when a wall-mounted fan fell on her. The plaintiff brought suit against Servicemaster, which had a contract with the hospital to develop and implement a maintenance program for the hospital premises. As a threshold issue, the Court had to determine whether the contract in question required Servicemaster to inspect and repair the fans in the hospital. The Court found that it did and went on to address the central issue in the case, i.e. whether the plaintiff had a valid claim against Servicemaster based upon Servicemaster's negligent or failed performance of its contractual duties. In other words, did Servicemaster owe a duty to the plaintiff.

Clearly, the hospital, as a party to the contract, was owed a duty by Servicemaster. Servicemaster argued that since the plaintiff was not in privity of contract, Servicemaster could not be liable for her injuries. In fact, the Court observed that generally, parties outside of a contract are not permitted to sue for tort damages arising out of negligently performed or omitted contractual duties. However, the Court found that when a party contracts to inspect and repair, its duty extends to noncontracting individuals reasonably within the zone and contemplation of the intended services. The Court cautioned that an extra-contractual duty is not open-ended and limitless, stating that the "nexus for a tort relationship between the defendant's contractual obligation and the injured noncontracting plaintiff's reliance and injury must be direct and demonstrable, not incidental or merely collateral. Because the plaintiff's safety was well within the scope of the defendant's contractual obligations to the hospital, the jury's verdict in favor of the plaintiff was upheld. Also of significance to the Court was the fact that the contract in question was "comprehensive and exclusive" as it required Servicemaster to train, manage, supervise and direct all support services employed in the performance of daily maintenance duties. With this background in mind we can now examine Tushaj.

Mr. Tushaj was the superintendent of a co-op who was injured as a result from a fall from a makeshift scaffold in the basement of the building when a defective board in the scaffold gave way under him as he was investigating a pipe leak. The building was owned by the third party defendant, Corlear Garden Housing Co., Inc. (“Corlear”), which was also the plaintiff’s employer. Corlear had a contract with defendant Elm Management Associates, Inc. (“Elm”) to manage the day to day operation of the building. Essentially, Elm had to make periodic inspections and keep the building in good repair. Elm also had full authority to make all repairs costing under \$500. It was undisputed that it would have cost \$12 to replace the defective board and that Elm had notice of the defective board, but took no action to repair it.

At the conclusion of the trial, the jury found Elm 40% responsible and Corlear 60% responsible. The defendant moved to set aside the verdict arguing that it could not be liable to the noncontracting party for its failure to fulfill a contractual obligation because it did not have “complete and exclusive control” over the management of the premises because it was limited to making repairs costing less than \$500. Relying on Gardner -v- 1111 Corporation, 286 A.D.2d 110, *aff’d* 1 N.Y.2d 758, the court held that since Elm’s spending authority was limited, it could not be liable in negligence to the plaintiff for its “mere nonfeasance.”

In reversing the lower court, the Appellate Division noted that it was guided by Palka and not by Gardner. The court felt that the lower court’s reliance on the distinction made in Gardner between “nonfeasance” and “misfeasance” was misguided in light of Palka. The court held that like the plaintiff in Palka, plaintiff Tushaj was among those limited individuals whose safety came within the scope of defendant’s contractual obligations and the risk of his being injured as a result of defendant’s failure to fulfill those obligations was foreseeable. As such, the verdict was reinstated.

While it claims to be merely following Palka, it seems clear that the First Department has extended Palka's reach. The Court of Appeals stated very clearly that for a noncontracting party to be able to recover, the contract at issue must be "comprehensive and exclusive". As the building owner would be responsible for any repairs over \$500, the contract in Tushaj was not exclusive. As such, it appears that this decision paves the way for more suits, despite the fact that Palka made clear that not all contractual breaches give rise to a tort duty. Without this decision, a plaintiff in a similar situation would have to prove misfeasance, as required Gardner, or be limited to the provisions of the Workers Compensation Law. Overall, it appears the decision may be bad news for building managers.

Summary Judgment Practice

Over the past two issues we have discussed several cases involving the effect of a liability summary judgment motion on the serious injury threshold. These cases, three from Richmond county and one from Queens county, all reached essentially different results. In Zecca -v- Riccardelli, ___ A.D.2d ___ (2d. Dep't April 29, 2002), the Second Department resolved the split in the lower court's holding that a liability only summary judgment motion does not also decide the serious injury question.

The Court acknowledges it had never decided the issue presented directly, although it was guided by its decision in Perez -v- State of New York, 627 N.Y.S.2d 421 (2d Dep't 1995). In Perez, the Supreme Court dismissed a case during the liability phase of a bifurcated trial based upon the fact that the plaintiff had failed to establish a serious injury. The Court reversed that decision, holding that the liability phase of a trial is not the proper place to adjudicate issues regarding the severity of injuries and that such issues should be left to the damages phase of the trial.

The Court then goes on to discuss the First Department's decision in Maldonado -v- DePalo, 715 N.Y.S. 2d (1st Dep't 2000) which held that the granting of summary judgment on liability necessarily includes a finding that the plaintiff sustained a serious injury. The Maldonado decision was the basis for the lower court's holding in Zecca. The Second Department disagreed with Maldonado, reasoning that the ruling was inconsistent with the No-Fault law as well as with basic summary judgment principles, and will have the practical effect of increasing motion practice.

The Court goes on to elaborate on why it feels Maldonado is incorrect. Interestingly, the lower court cases which distinguished Maldonado, emphasized the fact that trials in the First Department were unified, as opposed to the Second Department, where trials are bifurcated. In Zecca, the court did not even mention this distinction, choosing instead to focus first on the fact that the Maldonado decision could frustrate the purpose of the No-Fault Law. The Court stated, “[b]y holding that the issue of serious injury is “necessarily resolved in favor of the plaintiff even when no evidence of such injury is presented, the courts may be authorizing recovery for minor injuries, which is contrary to the purpose of the No-Fault Law. The Court went on to state it is the judge's job to determine whether the plaintiff has submitted proof of a serious injury. By allowing a plaintiff to recover for minor injuries merely because a defendant does not oppose a summary judgment motion on the issue of liability, the court is abdicating its duty.

The Court also mentions a practical reason for its decision, i.e. the potential proliferation of unnecessary motion practice. For example, in a typical hit in the rear case, where there is really no defense, a defendant would, under Maldonado, be forced to cross move on the issue of serious injury, even where that issue was not raised in the main motion. The Court points out correctly that such a situation creates a burden on the defendant to demonstrate a *prima facie*

entitlement often without disclosure and at great expense. Further, while defendants might often concede liability in such cases, they would have no choice but to oppose such motions, delaying the case, and further burdening the court system.

The Zecca decision is sound, well-reasoned decision, based both upon the No-Fault Law and practical considerations. It appears beyond dispute that Maldonado would allow for recovery in cases which might not meet the threshold, merely because a defendant does not oppose a liability summary judgment motion. That result is clearly contrary to the No Fault Law. Despite the fact that the First and Second Department differ in the manner in which they conduct trials, there is no reason for a difference in the way summary judgment motions. Given the sharp split between the Departments, it is hoped the Court of Appeals will ultimately step in to resolve the issue.