SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEPHEN A. BUCARIA

Justice

TRIAL/IAS, PART 15
NASSAU COUNTY

GEICO EMPLOYEES INSURANCE COMPANY,

Plaintiff,

INDEX No. 002937/98

-against-

MOTION DATE: May 2, 2001
Motion Sequence # 001, 002, 003

LILLIAN TAN, PROBOL PATEL and WILLIAM MCCASKILL, an infant by his mother and natural guardian VIVIANE DEMARD,

Defendants.

The following papers read on this motion:

Notice of Motion..... X
Cross-Motion..... XX
Affirmation in Opposition..... X
Reply Affirmation..... X
Memorandum of Law..... X

Motion by defendant Lillian Tan and cross-motion by defendant William McCaskill for an order pursuant to CPLR 3212 granting them summary judgment declaring that plaintiff GEICO Employees Insurance Company ("GEICO") is obligated to defend and indemnify Lillian Tan in an action entitled **William McCaskill, an infant by his mother and natural guardian, Vivianne Demard v Lillian Tan and Probol Patel** (Supreme Court, Queens Co., Index No. 023489/97) and other related relief are **denied.**

Cross-motion by plaintiff GEICO for an order pursuant to CPLR 3212 granting it summary judgment declaring that it is not obligated to defend and/or indemnify

defendants Lillian Tan and Probol Patel in said action is **granted** only to the extent provided herein.

This is an action to determine whether there is insurance coverage available to defendants Tan and Patel in the action **William McCaskill, an infant by his mother and natural guardian, Vivianne Demard v Lillian Tan and Probol Patel** (Supreme Court, Queens Co., Index No. 023489/97). In that action, the plaintiffs seek to recover for personal injuries allegedly sustained by the infant plaintiff as a result of lead poisoning which is alleged to have occurred at premises owned by defendants Tan and Patel.

The GEICO policy provides that the insured must give written notice of an accident or occurrence as soon as is practical setting forth the identity of the policy and insured; reasonably available information on the time, place and circumstances of the accident or occurrence; and, names and addresses of any claimant and witnesses. An occurrence is defined as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions, which results, during the policy period, in bodily injury or property damage".

The defendants Tan and Patel had rented an apartment in their building to Vivianne Demard, the mother of the affected child, in February, 1997. Defendant Tan, a licensed real estate broker, provided Mrs. Demard with a form she had received at her realty office, Century 21 Amiable Realty Group. It was entitled Rental Disclosure for 1978 Housing Rental and Leases – Disclosure of Information – Lead-Based Paint and/or Lead-Based Paint Hazards. The Rental Disclosure form stated:

> LEAD WARNING STATEMENT
>
> Housing built before 1978 may contain lead-based paint. Lead from paint, paint chips and dust can pose health hazards if not managed properly. Lead exposure is especially harmful to young children and pregnant women. Before renting pre-1978 housing, lessors must disclose the presence of known lead-based paint hazards in the dwelling. Lessees must also receive a federally approved pamphlet on lead poisoning prevention. (Emphasis added).

The form indicated that Tan had no knowledge of lead-based paint and/or lead-based paint hazards in the apartment and that she had no reports or records pertaining to these things either.

As the real estate broker, defendant Tan also gave Mrs. Demard a copy of a government publication put out by the United States Environmental Protection Agency, the United States Consumer Product Safety Commission and the United States Development of Housing and Urban Development, entitled "Protect Your Family From Lead in Your Home." Tan had been provided with this booklet by her employer Century 21 Amiable Realty Group real estate agency and was required to distribute it to potential tenants as well as home buyers. That publication states:

> FACT: Lead exposure can harm young children and babies even before they are born.
>
> FACT: Even children that seem healthy can have high levels of lead in their bodies.
>
> Babies and young children often put their hands and other objects in their mouths. These objects can have lead dust on them.
>
> Children's growing bodies absorb more lead.
>
> Children's brains and nervous systems are more sensitive to the damaging effects of lead.
>
> If not detected early, children with high levels of lead in their bodies can suffer from:
>
> Damage to the brain and nervous system
>
> Behavior and learning problems (such as hyperactivity)
>
> Slowed growth
>
> Hearing problems
>
> Headaches

A simple blood test can detect high levels of lead. Blood tests are important for:

Children who are 6 months to 1 year old (6 months if you live in an older home with cracking or peeling paint).

Family members that you think might have high levels of lead.

Lead-based paint may also be a hazard when found on surfaces that children can chew or that get a lot of wear-and-tear. These areas include:

Windows and window sills.

Doors and door frames.

Stairs, railings, and banisters.

Porches and fences.

About two months after renting the apartment to Mrs. Demard, on or about April 24, 1997, defendant Tan received an Order to Abate Nuisance from the New York City Department of Health Lead Poisoning Prevention Program. It specifically identified William McCaskill as a child who resides or spends a significant amount of time in the apartment who was under 18 years of age and had a blood-lead level of 20 micrograms per deciliter or higher. It further informed her that an inspection of the apartment on April 17, 1997 revealed lead-based paint which is peeling, and/or located on one or more window fraction surfaces or on another surface that it determined to be a lead hazard because of its condition, location or accessibility to children. Said lead paint hazard was specifically found to present a danger to the life and health of William McCaskill. The Notice set forth in detail the locations of lead-paint violations, nine in all, and directed defendant Tan to remove, correct and/or otherwise abate those conditions. The Notice was re-sent to Tan on June 11, 1997 in view of defendant Tan's failure to comply.

Furthermore, on or about August 12, 1997, defendant Tan was served with an affidavit executed by Mrs. Demard in connection with her pending eviction proceeding wherein Mrs. Demard specifically defended her rent nonpayment as follows: "There are conditions in the apartment which need repair, or services which have not been provided. The Landlord raised the rent because I had a sitter and refused to do repairs which caused my son to be lead poisoned (emphasis added)".

Not until September, 1997, when Mrs. Demard commenced the action on behalf of her son against defendants Tan and Patel, was plaintiff GEICO notified of the underlying occurrence. Although plaintiff GEICO had issued a policy to Tan covering said premises, coverage was denied by GEICO on the ground that it was not provided timely notice of the claim as required by the policy.

"Compliance with a notice of occurrence provision in an insurance policy is a condition precedent to an insurer's liability under the policy *(see, Mount Vernon Fire Ins. Co. v East Side Renaissance Assocs.*, 893 F Supp 242, 247; *see also, White v City of New York*, 81 NY2d 955, 957; *Commercial Union Ins. Co. v International Flavors & Fragrances*, 822 F2d 267)". **(Kaliandasani v Otsego Mutual Fire Insurance Company**, 256 AD2d 310, 311). "Whether an insured's required to give notice to an insurer of an 'occurrence' depends on the particular facts and circumstances underlying the occurrence." **(Mount Vernon Fire Ins. Co. v East Side Renaissance Assocs.**, 893 FSupp 242, 247). "There may be circumstances, such as lack of knowledge that an accident has occurred or a reasonable belief in nonliability, that will excuse or explain delay in giving notice, but the insured has the burden of showing the reasonableness of such excuse." **(Public Service Mutual Insurance Company v Hollander**, 228 AD2d 283, 285, lv to app den, 88 NY2d 816, citing **Security Mut. Ins.**, 31 NY2d 441; **White v City of New York**, 81 NY2d 955, 957). "Generally, questions of the insured's good faith and reasonableness in believing that he or she would not be sued and in delaying notification to the insurer are issues to be resolved by the trier of fact *(see, Winstead v Uniondale Union Free School Dist.*, 170 AD2d 500; *AMRO Carting Corp. v Allcity Ins. Co.*, 170 AD2d 394)". **(E.T. Nutrition Incorporated v Central Mutual Insurance Company**, 201 AD2d 451, 452; see also, **Kreger Truck Renting Company, Inc. v American Guarantee & Liability Insurance Company**, 213 AD2d 453, 454).

Tan received two Orders to Abate Nuisance. Both informed her not only that a child's blood lead levels elevated, but that a child's life and health were endangered due to a lead-paint condition in the apartment, as well. The child was specifically identified as William McCaskill, who Tan knew was Mrs. Demard's son. At her examination before trial, Tan admitted that from the forms, she understood that William McCaskill has been poisoned by a lead condition at the premises. The Abatement Orders also told Tan that she was subject to civil and criminal prosecution and penalties if she failed to comply with them. At her examination before trial, Tan admitted that Demard had described her son as having a health care problem and the building's boiler man had asked her if there was something wrong with the child. In addition, as a result of the enactment of Local Law One by the City of New York in 1996, in her capacity as a real estate broker, Tan had been educated by her employer of the need to have clients sign lead disclosure forms and to provide them with the lead-paint pamphlet before she rented the apartment. Tan had read, distributed and executed these forms routinely in her employment. Under these

circumstances, a question of fact exists as to whether defendant Tan acted reasonably in failing to notify GEICO of the Orders to Abate Nuisance. (**Kalinadasani v Otsego Mutual Fire Insurance Company, supra**; **Seals by Seals v Powell**, 236 AD2d 700; see also, **Public Service Mutual Insurance Company v Hollander, supra**; compare, **Scharf v Generali–U.S. Branch**, 259 AD2d 349; **Public Service Mutual Insurance Company v AYFAS Realty Corp.**, 234 AD2d 226, lv to app den, 90 NY2d 844; **Mount Vernon Fire Insurance Company v East Side Renaissance Associates, supra**; **Mount Vernon Fire Insurance Company v Chong**, 1998 WL 178847).

Defendants Tan and McCaskill and plaintiff GEICO's motions for summary judgment vis-a-vis one another are accordingly **denied**.

As for defendant Patel, plaintiff GEICO's motion for summary judgment declaring that it is not obliged to defend and/or indemnify him in **William McCaskill, an infant by his mother and natural guardian, Vivianne Demard v Lillian Tan and Probol Patel** (Supreme Court, Queens Co., Index No. 023489/97) is **granted**, without opposition. He was not a named insured.

Dated JUN 1 8 2001

Stephen L. Bucaria
J.S.C.

ENTERED

JUN 20 2001

NASSAU COUNTY
COUNTY CLERK'S OFFICE