IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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GREGORY O'CONNOR, d/b/a
VISION ENTERPRISES,

OPINION AND ORDER

Plaintiff,

01-C-0604-C

v.

CINDY GERKE & ASSOCIATES, INC.,
REALTORS,

Defendant,

and

INTEGRITY MUTUAL INSURANCE COMPANY,

Defendant-Intervenor.

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In this civil action for monetary relief, plaintiff Gregory O'Connor, d/b/a Vision Enterprises, is suing defendant Cindy Gerke & Associates, Inc., Realtors, for copyright infringement, breach of contract and conversion relating to video production services provided by plaintiff. Integrity Mutual Insurance Company intervened in the suit with the court's permission, pursuant to Fed. R. Civ. P. 24(a). Jurisdiction is present under 28 U.S.C. §§ 1331, 1338 and 1367.

This case is before the court on defendant-intervenor's motion for summary judgment. Defendant-intervenor contends that it has no duty to defend or indemnify defendant because defendant did not provide timely notice of a possible insurance claim. In the alternative, defendant-intervenor moves for partial summary judgment as to plaintiff's breach of contract and conversion claims, arguing that there is no coverage for these claims in the policies. (It is undisputed that plaintiff's claim of copyright infringement is covered by the policies.) I conclude that, although both timeliness of notice and prejudice to the insurer are questions of fact, no reasonable jury could find from the evidence defendant has adduced that defendant did not receive notice of an injury in October 1999 or that defendant-intervenor was not prejudiced by defendant's delay of over two years in advising it of plaintiff's claim. Defendant's breach of its policy obligations relieves defendant-intervenor of any liability under the policy. Therefore, it is not necessary to reach defendant-intervenor's alternative motion for partial summary judgment on coverage issues.

Some comments are in order before I set out the undisputed facts. First, defendant-intervenor and plaintiff failed to cite any evidence in support of their factual propositions, in violation of this court's "Procedures to be Followed on Motions for Summary Judgment." The procedures state that "[t]he court will not consider any factual propositions contained in the proposed findings of fact not supported properly and sufficiently by admissible evidence." In this case, I was able to decide defendant-intervenor's motions by relying

entirely on the insurance policies and two letters, all of which are undisputed and in the record. The parties would be well-advised to pay more careful attention to the court's procedures in the future.

From defendant's proposed findings of fact and the record, and for the sole purpose of deciding defendant-intervenor's motions for summary judgment, I find that no genuine issue exists with respect to the following material facts.

UNDISPUTED FACTS

Plaintiff Gregory O'Connor, d/b/a Vision Enterprises, is in the business of video productions for advertising purposes and is located in Davenport, Iowa. Defendant Cindy Gerke & Associates, Inc., Realtors, is in the business of listing and selling real estate. It is a Wisconsin corporation with its principal place of business in La Crosse, Wisconsin.

On May 22, 1998, plaintiff and defendant agreed that plaintiff would produce a television show for defendant entitled, "Cindy Gerke Showcase of Homes." Plaintiff registered his rights to the work and obtained a Certificate of Copyright Registration.

Defendant-intervenor issued defendant three annual businessowners and umbrella (excess liability) insurance policies effective September 21, 1998, through September 21, 2001. All three businessowners policies contain identical language relating to insured's "Duties in The Event Of Occurrence, Claim Or Suit":

6a. 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 and witnesses; and
(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.

The relevant coverage language in the umbrella policies is virtually identical to the language in the businessowner's policies.

On or about October 14, 1999, defendant received a letter from plaintiff's attorney, Bruce O'Connor, written on behalf of his client. O'Connor reminded defendant of their May 22, 1998 agreement that plaintiff would produce a weekly television show for defendant and went on to state that plaintiff had produced the show, that plaintiff owned the copyright to the show and that the production of the show involved "the disclosure of certain confidential information and trade secrets to your company, which your company was under a duty of confidentiality and contractually bound not to disclose."

Bruce O'Connor advised defendant that plaintiff had become aware that defendant and "a yet undisclosed party" had produced a television program "substantially similar to the

program in which [plaintiff] owns the copyright" and that the production entailed the use of plaintiff's trade secrets and confidential information, "in breach of the duty of confidentiality." He stated, "We are thus forced to make demands for compensation for the injuries inflicted on our client, as discussed below." O'Connor then asked for production costs for a show produced for Memorial Day weekend that never aired ($1,700); production costs for two shows that aired on June 20 and June 27 ($5,000); and copyright damages estimated to be approximately $110,000. He stated that plaintiff was reserving compensation for defendant's breach of its confidentiality and nondisclosure obligations and misappropriation of plaintiff's trade secrets and was seeking an end to defendant's infringement of copyright and misuse of plaintiff's trade secrets and confidential information. The letter closed with a paragraph suggesting that the parties work out a resolution of the matter so as to avoid litigation and asking defendant to respond in writing no later than October 22, 1999.

Defendant wrote back on October 21, 1999, stating that it was running a real estate television show using a different format from that used by plaintiff, that it owed no money for the Memorial Day weekend program because it was plaintiff's fault that the program never aired, that it owed no money for the June 20 and June 27 programs because they were shown after the parties' contract had expired and after defendant had told plaintiff verbally and in writing that the show was terminated. Defendant advised plaintiff that no money

was due plaintiff for sales resulting from the show because defendant had no information that the shows had led to any sales. Defendant ended by saying that plaintiff's requests were unfounded and that its legal advisers had suggested that defendant should take action against plaintiff "for not fulfilling the contracts as agreed to by them."

Defendant heard nothing more from plaintiff until approximately two years later when plaintiff served defendant with a copy of its complaint and request for waiver of service. On January 10, 2002, defendant sent a letter dated January 8, 2002, to its insurance agent notifying defendant-intervenor of plaintiff's lawsuit.

OPINION

The initial and determinative question is whether defendant's notice to defendant-intervenor was untimely and, if so, whether the untimeliness was prejudicial to defendant-intervenor so as to relieve defendant-intervenor of its duty to defend or indemnify defendant. In Wisconsin, "the insurer's right to receive timely notice . . . is a condition precedent to the insurer's contractual duties to defend and indemnify." U.S. Fire Ins. Co. v. Green Bay Packaging, Inc., 66 F. Supp. 2d 987, 1000 (E.D. Wis. 1999) (citing Gerrard Realty Corp. v. American States Ins. Co., 89 Wis. 2d 130, 140, 277 N.W.2d 863 (1979)). (Although the case between the primary parties is based on federal copyright law, the insurer's duty to defend its insured is a state law question. Colton v. Swain, 527 F.2d 296,

300 (7th Cir. 1975) (state law governs interpretation of insurance policy issued by insurer in third-party action when policy formed within state, insured resides within state and incident giving rise to action took place in state, despite fact that primary suit is founded on federal question jurisdiction).) The timeliness of the notice is measured from the time the insured knew or should have known of the need to give notice. Wisconsin courts have held that the insured's duty to report arises when "'he [or she] has reasonable grounds to believe that he [or she] is a participant in an accident'" or occurrence. Neff v. Pierzina, 245 Wis. 2d 285, 300, 629 N.W.2d 177, 184 (2001) (citing Kolbeck v. Rural Mutual Ins. Co., 70 Wis. 2d 655, 659, 235 N.W.2d 466 (1975)). When the duty to report has been established, the insured must provide notice within "a reasonable time." RTE Corp. v. Maryland Casualty Co., 74 Wis. 2d 614, 627, 247 N.W.2d 171, 178 (1976) (finding that policy terms such as "immediately," promptly" and "as soon as practicable" all require notice in "a reasonable time") (citing 5A Appleman, Insurance Law and Practice, §§ 3501-3503; Annot., 18 A.L.R. 2d 443, 448 (1951)). The timeliness of defendant's notice depends on what was reasonable under the circumstances. Id.

Whether defendant's notice was timely is essentially a question of fact for the factfinder. Neff, 245 Wis. 2d at 300. However, this question may be decided as a matter of law if the court concludes that "there is no material issue of fact as to when notice was given, and when under the policy the duty to give it arose." RTE Corp., 74 Wis. 2d at 629,

247 N.W.2d at 179.

In some cases it can be difficult to determine when a duty arose to give notice. See, e.g., Sheafor v. Standard Accident Ins. Co., 166 Wis. 498, 166 N.W. 4 (1918) (although accident had occurred that might have been covered under plaintiff's policy, court held that plaintiff's duty to give notice did not arise until he was told by doctor that he might lose an eye as result of accident; this constituted *injury* under terms of policy). See also Lopardo v. Fleming Companies, Inc., 97 F.3d 921 (7th Cir. 1996) (court refrains from deciding exactly when insureds had notice of possible claim sufficient to trigger their duty to notify liability insurers, concluding that, at latest, they had notice when they were sued for damages in counterclaim filed in declaratory judgment action; fact that damages were not available in such a suit irrelevant because counterclaim was "occurrence" within meaning of insurance policy); Neff, 245 Wis. 2d at 304, 629 N.W.2d at 186 (insured gave persons ride in homemade elevator that broke, injuring all passengers; state supreme court upheld circuit court's finding that insured "should have known 'that he might have some trouble' as a result of the accident"). Whatever complexities other cases might present, in this case, it is a simple matter to determine when defendant had a duty to give notice. Its duty arose as soon as it received plaintiff's October 1999 letter, stating plaintiff's claim in writing and demanding damages. At the moment defendant received that letter, it had notice of an "occurrence" and potential injury. It knew that a claim had been made against it. That

nothing more happened for two years is irrelevant. "The duty to notify is triggered by an occurrence, not by the insured's unilateral determination that a potentially successful suit for damages is underway." Lopardo, 97 F.3d at 927. Defendant cannot argue that it did not know that plaintiff's letter constituted notice of an "occurrence." Not only is this argument unavailable to it given the plain language of the letter but the insurance policies did not limit themselves by requiring notice only at the time of an "occurrence" or "injury." They included an additional requirement: that the insured give it notice of "claims made" or "suits brought," thereby making it explicit that defendant's duty arose in either instance. Even if defendant did not believe there had been an "occurrence," it can hardly contend that it did not know that a claim had been made against it.

Plaintiff and defendant argue that defendant did not have a duty to provide notice when defendant received the October 14 letter from plaintiff's attorney because the letter did not provide reasonable grounds for defendant to believe plaintiff had a possible claim against it that would be covered by the policies.. This argument flies in the face of reality. The letter demanded damages and threatened litigation. It could not have been more explicit. Whether it was a claim that would be followed up by litigation is not the question; it represented a claim and therefore, triggered defendant's duty to give notice. Plaintiff and defendant argue that plaintiff's failure to make any response to its October 21, 1999 letter until two years later is further evidence that no claim existed until the lawsuit was filed.

Again, it is irrelevant what happened or failed to happen after defendant received notice of a claim. Defendant's duty arose with receipt of the letter; it did not vanish afterwards.

Wisconsin law does not allow insureds to speculate about their ultimate liability once they have been apprised of an occurrence or injury. RTE, 74 Wis. 2d at 622-23, 247 N.W.2d at 175-76. In RTE, the insured tried to argue that it was justified in withholding notice to its insured because it believed that its loss would be covered by the insurer of the company that damaged the transformers RTE had ordered. RTE relied on Illinois law to the effect that an insured would not be held to a failure to give notice of an accident if a jury could find that a reasonably prudent person in the insured's position would have believed he was not liable for the accident. The supreme court was not persuaded by the argument. It held that RTE knew of the occurrence as soon as it knew of the damages to its transformers. As to the Illinois rule, it said only that it "has not been recognized in Wisconsin." Id. at 623 n.3; 247 N.W.2d 176 n.3.

I conclude that no reasonable jury could find that plaintiff's October 14, 1999 letter did not constitute notice to defendant of a claim or occurrence giving rise to a duty to notify defendant-intervenor of an occurrence or injury covered by the policy. That is not the end of the matter, but nearly so, because defendant does not argue that anything prevented it from giving defendant-intervenor notice of the claim earlier than 2001.

Under Wis. Stat. § 631.81(1), untimely notice does not invalidate a claim in and of

itself unless the insurer was prejudiced by the untimely notice. However, if the notice is not given within one year after the time required by the policy, which is the situation in this case,"there is a rebuttable presumption of prejudice and the burden of proof shifts to the [insured] to prove that the insurer was not prejudiced by the untimely notice." Gerrard Realty Co. v. American States Ins. Co., 89 Wis. 2d 130, 146-47, 277 N.W.2d 863, 872 (1979). The insured must prove the lack of prejudice by the preponderance of the evidence. See Neff, 245 Wis. 2d at 302, 629 N.W.2d at 186 ("'insured must produce sufficient evidence to satisfy the factfinder by a preponderance of the evidence that no prejudice has been suffered by the insurer as a result of the failure to give notice'") (quoting Ranes v. American Family Mutual Ins. Co., 212 Wis. 2d 626, 635-36, 569 N.W.2d at 359 (Ct. App. 1997), aff'd, 219 Wis. 2d 49, 580 N.W.2d 197 (1998)).

Defendant has not offered any evidence that defendant-intervenor was not prejudiced by the two-year delay in receiving notice of plaintiff's claim. It offers argument only, contending that defendant-intervenor was not prejudiced in its ability to investigate, evaluate or present an effective defense because it hired counsel as soon as it received notice from defendant and counsel has been actively involved in defending the suit ever since. Defendant concedes that defendant-intervenor might have been able to settle the case before the lawsuit began and might have been able to cut off some or all of the damages by terminating the new television show (although defendant argues that doing so would have

exposed defendant to breach of contract damages by the cable company airing the new show). It places reliance on the fact that no evidence has been lost because the evidence consists primarily of the videotapes and they still exist. Defendant adds that even if it had notified defendant-intervenor when it received the October 14 letter, the insurer might have simply opened a file and instructed defendant to notify it if plaintiff ever started a lawsuit. None of this argument or speculation constitutes real evidence that defendant-intervenor was not prejudiced by defendant's delay in giving notice. Indeed, by conceding that defendant-intervenor had no opportunity to settle the case before litigation began, defendant has admitted prejudice. See Neff, 245 Wis. 2d at 304, 629 N.W.2d at 186 (loss of opportunity to attempt pre-suit settlement is prejudicial to insurer). As the state supreme court has explained, id. at 305, 629 N.W.2d at 187, "[a]n insurer has the right to limit its liability by the terms of its contract. Two ways to limit liability are to permit the insurer to determine its coverage responsibility promptly, and to enable its adjusters to pay without suit."

Defendant has not discharged its burden of showing by the preponderance of the evidence that defendant-intervenor was not prejudiced by the more than two-year delay in receiving notification of plaintiff's claims. I conclude, therefore, that defendant-intervenor is entitled to summary judgment, relieving it of any obligations it had to defendant under the insurance policy. This disposition makes it unnecessary to decide whether the policy

provided coverage for any of plaintiff's claims.

ORDER

IT IS ORDERED that the motion of defendant-intervenor Integrity Mutual Insurance Company for summary judgment is GRANTED as to the timeliness of the notice provided to defendant-intervenor by defendant Cindy Gerke & Associates, Inc., Realtors, and defendant-intervenor is relieved of its obligation to defend or indemnify defendant in this lawsuit.

Entered this 16th day of July, 2002.

BY THE COURT:

BARBARA B. CRABB
District Judge