

**Supreme Court of the State of New York
Appellate Division: Second Judicial Department**

D36810
O/kmb

_____AD3d_____

Argued - November 16, 2012

WILLIAM F. MASTRO, J.P.
PLUMMER E. LOTT
SHERI S. ROMAN
JEFFREY A. COHEN, JJ.

2011-08376

DECISION & ORDER

Juan Sierra, plaintiff, v 4401 Sunset Park, LLC, et al.,
defendants third-party plaintiffs-respondents;
LM Interiors Contracting, LLC, third-party defendant-
respondent, Scottsdale Insurance Company, third-party
defendant-appellant (and a second third-party action).

(Index No. 32786/08)

Goldberg Segalla, LLP, Albany, N.Y. (Matthew S. Lerner of counsel), for third-party
defendant-appellant.

Margaret G. Klein & Associates, New York, N.Y. (Brill & Associates, P.C. [Corey
Reichardt], of counsel), for defendants third-party plaintiffs-respondents.

Smith Mazure Director Wilkins Young & Yagerman, P.C., New York, N.Y. (Joel M.
Simon of counsel), for third-party defendant-respondent.

In an action to recover damages for personal injuries, and a third-party action, inter alia, for a judgment declaring that the third-party defendant Scottsdale Insurance Company is obligated to defend and indemnify the defendants third-party plaintiffs in the main action, the third-party defendant Scottsdale Insurance Company appeals, as limited by its notice of appeal and brief, from so much of an order of the Supreme Court, Kings County (Lewis, J.), dated June 23, 2011, as granted that branch of the motion of the defendants third-party plaintiffs which was for summary judgment declaring that it is obligated to defend and indemnify the defendants third-party plaintiffs in the main action, denied its cross motion, among other things, for summary judgment declaring that it is not obligated to defend and indemnify the defendants third-party plaintiffs in the main action, and denied its separate motion, among other things, for summary judgment declaring that it is not obligated to defend and indemnify the third-party defendant LM Interiors Contracting, LLC, for

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claims arising out of the main action.

ORDERED that the appeal from so much of the order as denied the separate motion of the third-party defendant Scottsdale Insurance Company, among other things, for summary judgment declaring that it is not obligated to defend and indemnify the third-party defendant LM Interiors Contracting, LLC, for claims arising out of the main action is dismissed as withdrawn pursuant to a letter dated May 10, 2012; and it is further,

ORDERED that the order is affirmed insofar as reviewed, and the matter is remitted to the Supreme Court, Kings County, for the entry of a judgment, inter alia, declaring that the third-party defendant Scottsdale Insurance Company is obligated to defend and indemnify the defendants third-party plaintiffs in the main action; and it is further,

ORDERED that one bill of costs is awarded to the defendants third-party plaintiffs.

The third-party defendant Scottsdale Insurance Company (hereinafter Scottsdale) issued a certificate of insurance to the defendants third-party plaintiffs, 4401 Sunset Park, LLC (hereinafter 4401), and Sierra Realty Company (hereinafter Sierra Realty), in accordance with a construction agreement in connection with a project in which several apartments in the subject building were to be renovated. On August 18, 2008, the plaintiff in the main action, Juan Sierra, allegedly was injured while working in the subject building.

On January 6, 2009, the primary insurer of 4401 and Sierra Realty, Greater New York Insurance Company (hereinafter GNY), wrote to Scottsdale, tendering a claim for the defense and indemnification of the underlying action on behalf of 4401 and Sierra Realty. On February 2, 2009, Scottsdale responded with a letter to GNY disclaiming coverage and rejecting the tender, on the grounds that the GNY letter constituted late notice of the accident and did not comply with terms of the Scottsdale policy. Scottsdale did not send this letter to 4401 or Sierra Realty. Sierra Realty and 4401 moved, inter alia, for summary judgment declaring that Scottsdale was obligated to defend and indemnify them in the main action. Scottsdale cross-moved, inter alia, for summary judgment declaring that it was not obligated to defend and indemnify 4401 and Sierra Realty in the main action.

Where a primary insurer, in this case GNY, tenders a claim for a defense and indemnification to an insurer, in this case Scottsdale, which issued a certificate of insurance to the parties, indicating that they are additional insureds, that insurer must comply with the disclaimer requirements of Insurance Law § 3420(d)(2) by providing written notice of disclaimer of coverage to the additional insureds. The fact that the tendering insurer provided untimely notice of the accident “does not excuse the insurer’s unreasonable delay in disclaiming coverage” (233 E. 17th St., LLC v L.G.B. Dev., Inc., 78 AD3d 930, 932; see *Admiral Ins. Co. v State Farm Fire & Cas. Co.*, 86 AD3d 486, 488; *J.T. Magen v Hartford Fire Ins. Co.*, 64 AD3d 266, 269; *Bovis Lend Lease LMB, Inc. v Royal Surplus Lines Ins. Co.*, 27 AD3d 84, 87-88; *AIU Ins. Co. v Investors Ins. Co.*, 17 AD3d 259, 260). The failure of Scottsdale to provide written notice of disclaimer to 4401 and Sierra Realty rendered the disclaimer of coverage ineffective against them (see *Maughn v RLI Ins. Co.*, 68 AD3d 1067, 1068). Under the circumstances of this case, GNY was not the real party in interest, such that

the notice of disclaimer to GNY would be rendered effective as against 4401 and Sierra Realty (*cf. Cincinnati Ins. Cos. v Sirius Am. Ins. Co.*, 51 AD3d 1365; *Excelsior Ins. Co. v Antretter Contr. Corp.*, 262 AD2d 124).

Scottsdale's remaining contention has been rendered academic in light of our determination.

Since the third-party action is, in part, a declaratory judgment action, we remit the matter to the Supreme Court, Kings County, for the entry of a judgment, inter alia, declaring that Scottsdale is obligated to defend and indemnify 4401 and Sierra Realty in the main action (*see Lanza v Wagner*, 11 NY2d 317, 334, *appeal dismissed* 371 US 74, *cert denied* 371 US 901).

MASTRO, J.P., LOTT, ROMAN and COHEN, JJ., concur.

ENTER:

A handwritten signature in black ink that reads "Aprilanne Agostino". The signature is written in a cursive, flowing style.

Aprilanne Agostino
Clerk of the Court