

Cohen Bros. Realty Corp. v RLI Ins. Co.

2016 NY Slip Op 31493(U)

August 3, 2016

Supreme Court, New York County

Docket Number: 652037/2011

Judge: Robert D. Kalish

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 29

-----X
Cohen Brothers Realty Corp.,

Plaintiff,

Index Number:

-against-

652037/2011

RLI Insurance Company, American Guarantee &
Liability Insurance Company and
Lockton Insurance Brokers, LLC,

Defendants.

-----X
Robert D. Kalish, J.:

The Plaintiff's motion for summary judgment pursuant to CPLR §3212 seeking a declaratory judgment is hereby granted and the Defendant's cross-motion for summary judgment is hereby denied as follows:

Underlying Allegations

In the underlying action, the Plaintiff Cohen Brothers Realty Corp. ("Cohen Brothers") alleges in sum and substance that they are entitled to coverage under an insurance policy from the Defendant RLI Insurance Company ("RLI"). The Plaintiff alleges in sum and substance that it is the exclusive managing agent for the property located at 622 Third Avenue, and that on October 3, 2008, David Vasquez was injured (and subsequently died) while working at said location. The Plaintiff alleges that at the time of the incident, the Plaintiff had a general liability policy (the "Policy") issued by RLI, which listed 622 Third Avenue as a "covered location". Plaintiff alleges that at the time of the incident, Lockton Insurance Brokers, LLC ("Lockton") was the Plaintiff's insurance broker.

The Plaintiff alleges that on the day of the incident, Plaintiff's vice-president Madeline C. Marcus called Lockton to apprise it of the incident. The Plaintiff further alleges that during said call, Lockton's vice-president/account executive Elizabeth Walsh advised Marcus that the incident was a Workers' Compensation matter and that the Policy was inapplicable. Plaintiff further alleges that during said phone call, Marcus was told by Walsh that the Plaintiff should file the claim under its Workers' Compensation policy and that Plaintiff should not file a claim on its own behalf for the incident. Plaintiff further alleges that a week later, on or about October 10, 2008, Marcus sent Walsh an email referencing said incident. Plaintiff alleges that Lockton would reiterate this position by letter dated May 5, 2009 (after the Plaintiff had become aware of the Vasquez estate's action and had informed RLI of the incident) from one of Lockton's senior vice-presidents. Plaintiff alleges that Lockton did not notify RLI of the incident and that based upon the Lockton's advice, Plaintiff did not directly notify RLI of the incident either.

Plaintiff alleges that on or about March 5, 2009, it became aware that Vasquez's estate was beginning an action against the Plaintiff stemming from the incident. Plaintiff alleges that it immediately notified RLI, and that RLI initially appointed an attorney to defend the Plaintiff in said action. However, RLI subsequently denied coverage and declined to defend the Plaintiff on the basis that the Plaintiff had failed to notify RLI of the incident "as soon as possible" as required under the Policy. Plaintiff alleges that the lawsuit commenced by the Vasquez's estate remains pending against the Plaintiff and that RLI has refused to defend or indemnify the Plaintiff with respect to said lawsuit in breach of the Policy.¹

¹ The Parties have since indicated to the Court that the Vasquez estate's action has been settled in the sum of \$2.5 million for the Vasquez estate.

The Plaintiff claims five causes of action against the Defendants:

- Plaintiff's first cause of action against Lockton for negligent misrepresentation based upon Lockton's alleged advice to the Plaintiff that Vasquez's accident did not fall under the Policy;
- Plaintiff's second cause of action against Lockton for negligence based upon Lockton's alleged advice to Plaintiff that Vasquez's accident did not fall under the Policy;
- Plaintiff's third cause of action against RLI for breach of contract based upon RLI disclaiming any duty to defend or indemnify Plaintiff in connection with the underlying incident;
- Plaintiff's fourth cause of action against American Guarantee & Liability Insurance Company for breach of contract based upon American Guarantee & Liability Insurance Company disclaiming any duty to defend or indemnify Plaintiff in connection with the underlying incident; and
- Plaintiff fifth cause of action seeking a declaratory judgment from th Court indicating that it is entitled to coverage from RLI and American Guarantee & Liability Insurance Company under the Policy as to the underlying incident.

Pursuant to a motion to dismiss made by Lockton, the Plaintiff's action against Lockton was dismissed without prejudice by a decision made on the record on December 14, 2011.

The Plaintiff now moves for summary judgment declaring that RLI is required to pay all of the defense costs and fully indemnify the Plaintiff for any damages incurred in connection with the action brought by Vasquez's estate, together with attorney's fees. The Defendant RLI also cross-moves for summary judgement dismissing the Plaintiff's third and fifth causes of action as against RLI.

Parties' Contentions

The Plaintiff presents two argument in support of its motion for summary judgment seeking a declaratory judgment. The Plaintiff's first argument is that RLI never issued a letter to the Plaintiff timely declining coverage. Specifically, the Plaintiff argues that it only received a letter dated April 1, 2009 from the nonparty Mt. Hawley Insurance Company ("Mt. Hawley") purportedly denying coverage on the dual grounds of late notice and that the Vasquez estate's claim sounded in Workers'

Compensation, which was excluded under the Policy. The Plaintiff argues that it did not receive any such denial of coverage letter from RLI. The Plaintiff argues that Mt. Hawley, though apparently a subsidiary for RLI, is a separate company, and as such said letter does not constitute a denial of coverage from RLI.

The Plaintiff's second argument for summary judgment is that Plaintiff's "delay" in notifying RLI of the underlying incident "as soon as practicable" was due to the Plaintiff's good faith reasonable belief that the Vasquez estate's sole remedy was under Workers' Compensation, and that the incident did not fall within the scope of the Policy. Specifically, the Plaintiff argues that Marcus unequivocally testified she immediately notified Lockton (the Plaintiff's insurance broker) and spoke to Walsh on the date of the incident. The Plaintiff further argues that Walsh admitted at her deposition that she did not think the accident gave rise to an "insurable event". The Plaintiff further argues that after speaking with Walsh, Marcus immediately contacted the Plaintiff's Workers' Compensation broker. The Plaintiff further argues that it did not become aware that the Vasquez estate was pursuing an action until it received an Order to Show Cause on March 5, 2009, and that it immediately notified RLI on the same day Plaintiff received the Order to Show Cause.

The Plaintiff further argues that although RLI denied coverage in connection with the incident, Plaintiff's Workers' Compensation carrier, the New York State Insurance Fund ("SIF"), agreed to cover the Plaintiff's defense in the action brought by the Vasquez estate, and SIF also paid Workers' Compensation benefits to the Vasquez estate. The Plaintiff further argues that in the disclaimer letter dated April 1, 2009, RLI disclaimed coverage in part due to timeliness, but also because Vasquez was an "employee" and that the incident fell under Workers' Compensation. As such, the Plaintiff argues that it was not the only one to believe that Vasquez's estate's sole remedy was in Workers' Compensation. Therefore, the Plaintiff argues that it had a good faith reasonable belief that the underlying incident was

not covered under the Policy, and that the Plaintiff informed RLI of the incident as soon as it came to believe otherwise upon receipt of the order to show cause.

In opposition to the Plaintiff's motion and in support of its own cross-motion for summary judgment, the Defendant RLI argues that its disclaimer of coverage was valid as a matter of law. RLI argues that it did not receive its first notice of the accident from the Plaintiff until March 5, 2009, over five months after the incident, and as such lawfully disclaimed coverage based upon the Plaintiff's lack of timely notice. RLI further argues that the Plaintiff's underlying action is not a genuine insurance coverage dispute, but rather a professional negligence case that the Plaintiff has against the Defendant Lockton based upon the alleged advice that Lockton gave the Plaintiff. Specifically, RLI argues that the Defendant Lockton misadvised the Plaintiff that the underlying incident did not fall under the Policy and that it was Lockton who, upon being notified of the incident by the Plaintiff, failed to forward notice to RLI. RLI argues in sum and substance that, due to Lockton's incorrect advice to Cohen Brothers and failure to notify RLI of the underlying incident, Lockton is directly responsible for any damages incurred by the Plaintiff due to lack of coverage, not RLI.

RLI further argues that the Plaintiff's purported belief that the underlying incident only implicated Workers Compensation was unreasonable as a matter of law. Specifically, RLI argues that Vasquez was an employee of 622 Third Avenue Company ("622 Third"), which owned the building where the accident occurred, and that Cohen Brothers was the managing agent for said building. RLI indicates that both Cohen Brothers and 622 Third were named as insured parties under the Policy. RLI argues in sum and substance that since Vasquez was an employee of 622 Third and not Cohen Brothers at the time of the accident, Cohen Brothers knew or should have known that there was a possibility that they would be subject to a suit under the Labor Law as to the incident. Therefore, RLI argues that Cohen Brothers could not have "reasonably believed" that Vasquez's sole remedy was in Workers

Compensation as to the accident or that the incident did not fall within the scope of the Policy. RLI further argues that the fact that Cohen Brothers contacted Lockton immediately after the accident supports RLI's position that Cohen Brothers recognized the incident fell within the scope of the Policy, and that Cohen Brothers contacted Lockton so that Lockton could make RLI aware of the incident, which Lockton failed to do.

RLI further argues that the Plaintiff cannot recover its defense costs as to the Vasquez estate's action since the Plaintiff chose to retain its own counsel in said action instead of accepting counsel selected by SIF. RLI argues that notwithstanding RLI's disclaimer, SIF agreed to defend the Plaintiff in the Vasquez estate's action, and that instead of accepting counsel selected by SIF, the Plaintiff chose to retain its own defense attorneys. RLI further argues that SIF agreed to contribute the hourly rate it would have paid for the attorneys SIF had intended to retain towards the Plaintiff's defense. RLI indicates that the Vasquez estate's action was settled for 2.5 million, 1 million of which was paid by the Plaintiff and 1.5 million of which was paid by the Plaintiff's excess insurer. RLI argues in sum and substance that since the Plaintiff rejected SIF's recommended attorney in defending against the Vasquez estate's action and instead accepted the cash value of said defense from SIF, the Plaintiff cannot now recover from RLI the defense costs in excess of what SIF already provided to the Plaintiff.

In reply, the Plaintiff reiterates its arguments that it had a good faith reasonable belief that the Vasquez estate's sole remedy was under Workers' Compensation, based upon the mistaken advice the Plaintiff received from Lockton. The Plaintiff further reiterates its argument that RLI failed to notify the Plaintiff that it would be disclaiming coverage. The Plaintiff further argues that it is not barred from seeking defense costs from RLI. Specifically, the Plaintiff argues that it is only where an insurer assumes the defense and indemnification of an insured when there is no obligation to do so that the insurer becomes a volunteer with no right to recover monies it paid on behalf of the insured. The

Plaintiff argues that in the instant case it was the Plaintiff (as the insured) not RLI (as the insurer) who retained its own counsel, and as such the Plaintiff is not subject to the "volunteer payment doctrine".

In its sur-reply, the Defendant RLI reiterates the argument presented in its cross-motion and opposition to the Plaintiff's motion for summary judgment. Specifically, the Defendant argues that the Plaintiff's argument relies upon the case of Tesler v Paramount Ins Co (220 AD2d 334 (NY App Div 1st Dept 1995)). However, the Defendant argues that "it is impossible that Tesler remains good decisional law". The Defendant RLI argues in sum and substance that the Plaintiff's purported belief that the Vasquez incident fell solely within the scope of Workers' Compensation and not under the Policy was unreasonable regardless of the fact that Lockton specifically advised the Plaintiff to this effect.

Oral Argument

On May 16, 2016, the Plaintiff and RLI appeared before this Court for oral argument and reiterated the arguments presented in their submitted papers.

The Plaintiff reiterated its argument that it reasonably and in good faith relied upon Lockton's advice that the Vasquez incident did not fall with the Policy. Plaintiff further emphasized that as soon as it became aware that Vasquez's estate was pursuing an action as to the incident, Plaintiff immediately notified RLI. The Plaintiff further argued that RLI did not properly disclaim coverage as the Plaintiff received a disclaimer of coverage letter from Mt. Hawley and not directly from RLI.

At oral argument, the Plaintiff referred to the case of Tesler v Paramount Ins Co (220 AD2d 334 (NY App Div 1st Dept 1995)), which the Plaintiff argued stood for the principle that an insured party's reliance upon the mistaken advice of its insurance agent as to coverage constituted a reasonable good faith reason for the insured party's delay in informing an insurer of a specific incident.

In opposition, RLI reiterated its argument that it lawfully disclaimed coverage based upon the Plaintiff's failure to timely notify RLI of the incident. RLI argued that even though the Plaintiff's delay in notifying RLI was based upon Plaintiff's reliance upon the Lockton's incorrect advice (acting as Plaintiff's insurance broker), this has no effect upon RLI's ability to lawfully disclaim coverage for untimely notice. RLI further argued that issuing the disclaimer letter through Mt. Hawley did not rise to the level of a defect. RLI further argued that Tesler v Paramount Ins Co (220 AD2d 334 (NY App Div 1st Dept 1995)) was no longer "good law" and that instead the Court should follow the First Department's decision in National Union Fire Ins Co of Pittsburgh, PA v Great Am E&S Ins Co, (86 A.D.3d 425 (NY App. Div. 1st Dept 2011)), which RLI argued in sum and substance "overruled" Tesler.

RLI further argued that the Plaintiff "did not have the right" to obtain its own counsel instead of accepting the attorneys suggested by SIF. RLI argued in sum and substance that since the Plaintiff obtained its own counsel, that charged higher rates than the attorneys proposed by SIF, the Plaintiff could not now recover the difference in rates from RLI. RLI further argued that had it not disclaimed, the obligation for the Plaintiff's defense in the Vasquez estate's action would have been shared by RLI and SIF, and that RLI and SIF would have each paid 50% of the defense. RLI further argued in sum and substance that had it not disclaimed coverage, it could have refused to allow the Plaintiff to choose its own lawyers as opposed to attorneys picked by RLI.

The Court notes that neither of the Parties alleges that there are any "issues of fact" to be determined at trial in opposition to the other Party's motion for summary judgment. Each party argues in sum and substance that it is entitled to summary judgment as a matter of law, and that the other Party's motion for summary judgment should be denied accordingly.

Analysis

Summary Judgment and Declaratory Judgement Standard

It is well established that “[t]he proponent of summary judgment must establish its defense or cause of action sufficiently to warrant a court’s directing judgment in its favor as a matter of law” (Ryan v Trustees of Columbia Univ. in the City of N.Y., Inc., 96 AD3d 551, 553 (NY App Div 1st Dept 2012) [internal quotation marks and citation omitted]). “Thus, the movant bears the burden to dispel any question of fact that would preclude summary judgment” (id.). “Once this showing has been made, the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution” (Giuffrida v Citibank Corp., 100 NY2d 72, 81 (NY 2003)). “On a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party” (Vega v Restani Constr. Corp., 18 NY3d 499, 503 (2012) (internal quotation marks and citation omitted)). If there is any doubt as to the existence of a triable issue of fact, summary judgment must be denied (Rotuba Extruders v Ceppos, 46 NY2d 223, 231 (1978); Grossman v Amalgamated Hous. Corp., 298 AD2d 224, 226 (NY App Div 1st Dept 2002)). In deciding the motion, the Court must draw all reasonable inferences in favor of the nonmoving party and deny summary judgment if there is any doubt as to the existence of a material issue of fact (See Branham v Loews Orpheum Cinemas, Inc., 8 NY3d 931 (NY 2007); Dauman Displays, Inc. v Masturzo, 168 AD2d 204, 205 (NY App Div 1st Dept 1990), lv dismissed 77 NY2d 939 (NY 1991)). “Where different conclusions can reasonably be drawn from the evidence, the motion should be denied” (Sommer v Federal Signal Corp., 79 N.Y.2d 540, 555 (NY 1992)).

Further, pursuant to CPLR § 3001 - Declaratory judgment:

The supreme court may render a declaratory judgment having the effect of a final judgment as to the rights and other legal relations of the parties to a justiciable controversy whether or not further relief is or could be claimed. If the court declines to render such a judgment it shall state its grounds...

The April 1, 2009 disclaimer letter from Mt. Hawley did not constitute a violation of Insurance Law 3420(d)(2)

Upon review of the submitted papers, including the deposition testimonies and having conducted oral argument, the Court finds that the disclaimer letter dated April 1, 2009 ostensibly from the Mt. Hawley constituted a valid notice disclaimer by the Defendant RLI pursuant to Insurance Law 3420(d)(2). The Court recognizes that said disclaimer letter indicates that it is from the Mt. Hawley and not RLI. However, Edward McGrath, an assistant vice president for RLI testified at his deposition that printing the April 1, 2009 letter on Mt. Hawley letterhead was a mistake on his part. Further, it is clear from the substance of the letter that it refers to the action brought by the Vasquez estate against the Plaintiff.

The Court further notes that at no point in the submitted papers nor at oral argument did the Plaintiff ever indicate that it was in any way prejudiced by said letter. Neither did the Plaintiff ever indicate in its submitted papers nor at oral argument that it was unaware that said letter represented a disclaimer of coverage by RLI. In point of fact, everything in the Plaintiff's submitted papers and arguments presented at oral argument confirm that the Plaintiff fully understood that the April 1, 2009 letter was a disclaimer of coverage by RLI. As there is no indication by the Plaintiff that it at any point failed to recognize that the April 1, 2009 letter was a disclaimer letter by RLI as to the Vasquez estates' action, the Court finds that the Plaintiff was in no way prejudiced by the fact that the April 1, 2009 disclaimer letter was written on Mt. Hawley letterhead (See Miller v Allstate Indem. Co., 132 AD3d 1306 (NY App Div 4th Dept 2015)).

As such, the Court finds that the April 1, 2009 did constitute a denial of coverage by RLI and will determine the remainder of the motion and cross-motion accordingly.

The Plaintiff is entitled to a declaratory judgment holding that RLI is required to fully indemnify the Plaintiff for any damages in connection with the action brought by Vasquez's estate, as Plaintiff has established that it reasonably and in good faith relied upon Lockton's advice that the incident did not fall within the Policy.

“Where a policy of insurance requires that the insured give the insurer notice ‘as soon as practicable,’ notice must be afforded within a ‘reasonable time under the circumstances’. The notice requirement is a condition precedent to coverage and so, failure to provide such notice vitiates the contract of insurance. At the time that the Vasquez incident occurred in the underlying action, there was no need to show that the insurer suffered any prejudice as a result of tardy notice (Castlepoint Ins Co v Mike's Pipe Yard & Bldg Supply Corp, 2010 NY Slip Op 31870(U) (NY Sup Ct Cnty 2010) affd 101 AD3d 504 (NY App Div 1st Dept 2012) citing Travelers Ins Co v Volmar Constr Co, 300 AD2d 40 (NY App Div. 1st Dept 2002); Great Canal Realty Corp v Seneca Ins Co, 5 NY3d 742 (NY 2005); Ocean Partners, LLC v North River Ins Co, 25 AD3d 514 (NY App Div 1st Dept 2006); Argo Corp v Greater NY Mut Ins Co, 4 NY3d 332 (NY 2005); Security Mut Ins Co v. Acker-Fitzsimons Corp, 31 NY2d 436 (NY 1972). “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’. ‘[W]here there is no excuse or mitigating factor, the issue [of reasonableness] poses a legal question for the court,’ rather than an issue for the trier of fact” (Tower Ins Co of NY v Lin Hsin Long Co, 50 AD3d 305, 307 (NY App Div 1st Dept 2008) citing Paramount Ins Co v Rosedale Gardens, Inc, 293 AD2d 235 (NY App Div 1st Dept 2002); SSBSS Realty Corp v Public Serv Mut Ins Co, 253 AD2d 583 (NY App Div 1st Dept 1998); see also Security Mut Ins Co v Acker-Fitzsimons Corp, 31 NY2d 436 (NY 1972); Haas Tobacco Co v American Fidelity Co, 226 NY 343 (NY 1919); Woolverton v Fidelity & Casualty Co, 190 NY 41 (NY 1907)).²

² The Court notes that currently pursuant to Insurance Law § 3420 (a) (5) an insurer may not deny coverage based on untimely notice “unless the failure to provide timely notice has prejudiced the insurer” (See Slocum v Progressive Northwestern Ins. Co., 32 NYS3d 524 (NY App. Div. 4th Dept 2016). However, the effective date of Insurance Law § 3420 (a) (5) was January 2009 and the underlying incident occurred

“While the reasonableness of an insured’s belief in nonliability is ordinarily a matter for the fact finder, where the facts are undisputed and not subject to conflicting inferences, the issue can be decided as a matter of law.” (Castlepoint Ins Co v Mike's Pipe Yard & Bldg. Supply Corp., 2010 NY Slip Op 31870(U) (NY Sup Ct NY Cnty July 19, 2010) affd 101 AD3d 504 (NY App Div 1st Dept 2012) citing Argentina v Otsego Mut Fire Ins Co, 86 NY2d 748 (NY 1995); Phoenix Builders, Inc. v Sirius America Insurance Company, 2008 NY Slip Op 32535(U) (NY Sup Ct 2008)). The Court notes that in the instant motion and cross-motion, both Parties argue that the issue of the “reasonableness” or “unreasonableness” of Cohen Brothers’ belief that it did not have to inform RLI of the incident until Cohen Brothers became aware that the Vasquez estate was pursuing an action against Cohen Brothers can be decided as a matter of law.

In Tesler v Paramount Ins Co (220 AD2d 334 (NY App Div 1st Dept 1995)), the First Department held that an insured party demonstrated a good-faith reasonable belief in their nonliability, where said belief was based upon the specific incorrect advise of their insurance agent (see also Castlepoint Ins Co v Mike's Pipe Yard & Bldg Supply Corp., 2010 NY Slip Op 31870(U) (NY Sup Ct Cnty 2010) affd 101 AD3d 504 (NY App Div 1st Dept 2012); European Bldrs. & Contrs. Corp v Arch Specialty Ins Co, 2014 NY Slip Op 31695(U) (NY Sup Ct NY Cnty 2014). As such, the insured party had a reasonable excuse for not informing the insurer of the underlying incident within the time frame of the notification provision in the insurance policy (Tesler v Paramount Ins Co, 220 AD2d 334 (NY App Div 1st Dept 1995) citing Mighty Midgets, Inc v Centennial Ins Co, 47 NY2d 12 (NY 1979); 875 Forest Ave Corp v Aetna Cas & Sur Co., 37 AD2d 11 (NY App Div 1st Dept 1971) affm 30 NY2d 726 (NY 1972)).

prior to said effective date. The Court notes that neither of the Parties argue that the current Insurance Law § 3420 (a) (5) is applicable to the underlying action, and that the Plaintiff does not argue in its moving papers that RLI is required to show prejudice in order to deny coverage under the Policy.

In the instant action, there is no dispute that Cohen Brothers was immediately aware of the October 3, 2008 incident, but did not inform RLI of said incident until approximately six months later in March of 2009. As such, there is no dispute that Cohen Brothers did not timely notify RLI of the incident as required under the Policy.

Further, in the instant motion Cohen Brothers is not arguing that notifying Lockton of the underlying incident was the equivalent of notifying RLI of the underlying incident. Said argument is not before this Court, and said argument would not be supported by the case law (See Strauss Painting, Inc. v Mt. Hawley Ins. Co., 24 NY3d 578 (NY 2014)). There is no dispute that Lockton both failed to notify RLI of the underlying incident on behalf of Cohen Brothers and that Lockton also advised Cohen Brothers that the underlying incident fell solely within Workers' Compensation. The Plaintiff's argument in support of the instant motion is that it had a reasonable good faith belief that the underlying incident fell solely within Workers' Compensation based upon Lockton's incorrect advice not that notice to Lockton constituted notice to RLI. The Plaintiff further argues that based upon that reasonable good faith belief, the Plaintiff failed to notify RLI of the incident until the Plaintiff became aware that Vasquez's estate was pursuing an action against the Plaintiff outside of Workers' Compensation. As such, the Plaintiff's argument for summary judgment hinges upon the undisputed fact that Lockton incorrectly advised the Plaintiff as to the Plaintiff's potential liability for the underlying incident, not the undisputed fact that Lockton failed to notify RLI of the underlying incident.

Upon review of the submitted papers and having conducted oral argument, this Court finds that the instant action is directly analogous to Tesler v Paramount Ins Co. in that Cohen Brothers had a "reasonable good faith belief" of non-liability based upon Lockton's incorrect advice, which excused Cohen Brothers delay in reporting the incident to RLI.

Specifically, in the instant action the RLI does not dispute that the Plaintiff immediately contacted Lockton on the date of the incident. Nor does RLI dispute that Lockton both mistakenly informed the Plaintiff that Vasquez's sole remedy was under Workers' Compensation. Neither does RLI dispute that the Plaintiff later sent an email to Lockton as to the incident, or that the Plaintiff was again informed by Lockton that the incident did not fall within the Policy the Plaintiff had with RLI. Said allegations are also supported by the depositions taken of Madeline Marcus for the Plaintiff and Elizabeth Walsh for Lockton. Further, there is no dispute that upon receiving notice that the Vasquez estate was pursuing an action (via the Order to Show Cause on March 5, 2009), the Plaintiff immediately notified RLI. RLI's submitted papers and arguments presented at oral argument acknowledge that Lockton failed to notify RLI of the incident (in its capacity as the Plaintiff's insurance broker) and that the Plaintiff's failure to timely notify RLI of the incident was due to Lockton's incorrect advice to the Plaintiff that the Vasquez estate's sole recovery was in Workers' Compensation. There is nothing to indicate that Cohen Brothers had any motive for not complying with the timely notice provision of the Policy, or that Cohen Brothers did not stand ready to timely provide any information to RLI in any form that was required under the Policy, had Cohen Brothers not been mistakenly advised by Lockton that the incident was solely a Workers' Compensation matter and did not fall within the Policy (See Mighty Midgets, Inc. v Centennial Ins. Co., 47 NY2d 12, 20 (NY 1979))

Based upon said undisputed facts, this Court finds that the Plaintiff's delay in notifying RLI of the incident was based upon the Plaintiff's reasonable and good faith reliance upon Lockton's incorrect advice that the Vasquez estate's sole recovery was in Workers' Compensation. Further, as soon as the Plaintiff became aware the Vasquez estate was pursuing an action against the Plaintiff, the Plaintiff immediately informed RLI of the underlying incident and related action. As such, the Plaintiff has established prima facie that it did not violate the notice provision of the Policy, and as such was entitled

to coverage by RLI for the incident (See Tesler v Paramount Ins Co 220 AD2d 334 (NY App Div 1st Dept 1995)).

RLI's argument in opposition to Plaintiff's motion for summary judgment and in support of its cross-motion for summary judgment is that the Plaintiff's reliance upon the incorrect advice of its insurance agent is not a sufficient basis for concluding that the Plaintiff had a good-faith reasonable belief of nonliability to justify failing to timely notify RLI of the incident. RLI acknowledged in both its submitted papers and at oral argument that its position on this issue is directly counter to the First Department's determination in Tesler, and RLI specifically argues that Tesler is no longer "good law" given the cases that have been decided since. However, none of the cases cited by RLI in its submitted papers either directly support RLI's argument nor do they overturn Tesler.

Specifically, although RLI cites to multiple cases that stand for the position that an insured's notice to an insurance broker does not constitute notice to the insured, not one of said cases cited by RLI specifically addresses Tesler nor the situation where an insured's untimely notice to an insurer was based upon the incorrect advice of an insurance agent:

- Strauss Painting, Inc. v Mt. Hawley Ins. Co., 24 NY3d 578 (NY 2014) [Stands for the position that a policyholder's timely notice to a broker does not constitute the notice contemplated by the insurance policy. However, Strauss does not address the issue of an insured's untimely notice to an insurer based upon the incorrect advice of an insurance agent that the underlying incident did not fall within the policy, nor did it make any reference to Tesler];
- Martin Assocs., Inc. v Illinois Natl. Ins. Co., 137 AD3d 503 (NY App Div 1st Dept 2016) [Stands for the position that a policyholder's timely notice to a broker does not constitute the notice contemplated by the insurance policy. However Martin Assocs. does not address the issue of an insured's untimely notice to an insurer based upon the incorrect advice of an insurance agent that the underlying incident did not fall within the policy nor does it make any reference to Tesler];
- Juvenex Ltd. v Burlington Ins. Co., 63 A.D.3d 554 (NY App Div 1st Dept 2009) [Holding that an insured's delay of two months in giving notice of the claim was unreasonable as a matter of law. However Juvenex Ltd. does not address the issue of an insured's untimely notice to an insurer based upon the incorrect advice of an insurance agent that the underlying incident did not fall within the policy nor does it make any reference to Tesler];

- 2130 Williamsbridge Corp. v. Interstate Indem. Co., 55 AD3d 371 (NY App Div 1st Dept 2008) [Holding that an insured bears the burden of establishing the reasonableness of the proffered excuse for failing to timely notify an insurer of a covered incident and that being unaware that notice provided to its broker was insufficient is no excuse. However, 2130 Williamsbridge Corp. does not address the issue of an insured's untimely notice to an insurer based upon the incorrect advice of an insurance agent that the underlying incident did not fall within the policy nor does it make any reference to Tesler];
- Tower Ins. Co. of N. Y. v. Mike's Pipe Yard & Bldg. Supply Corp., 35 AD3d 275 (NY App Div 1st Dept 2006) [Holding that notice to a broker cannot be treated as notice to the insurer since the broker is deemed to be the agent of the insured and not the carrier. However, Tower Ins. Co. of N. Y. does not address the issue of an insured's untimely notice to an insurer based upon the incorrect advice of an insurance agent that the underlying incident did not fall within the policy nor does it make any reference to Tesler];
- Rosier v Stoeckeler, 101 AD3d 1310 (NY App Div 3d Dept 2012) [Holding that notice of a claim or a potential claim provided by an insured only to the insured's broker, and not to the carrier or its agent, generally is not considered sufficient notice to the carrier. However, Rosier does not address the issue of an insured's untimely notice to an insurer based upon the incorrect advice of an insurance agent that the underlying incident did not fall within the policy nor does it make any reference to Tesler];
- Blue Ridge Ins. Co. v. Biegelman, 36 A.D.3d 736, 737 (NY App Div. 2d Dept 2007) [Holding that where an insurance policy requires that notice of an occurrence be given promptly, notice must be given within a reasonable time in view of all of the circumstances and that absent a valid excuse for a delay in furnishing notice, failure to satisfy the notice requirement vitiates coverage. However, Blue Ridge Ins. Co. does not address the issue of an insured's untimely notice to an insurer based upon the incorrect advice of an insurance agent that the underlying incident did not fall within the policy nor does it make any reference to Tesler];
- Gershow Recycling Corp. v. Transcontinental Ins. Co., 22 AD3d 460 (NY App Div 2d Dept 2005) [Holding that notice to an insurance broker cannot be treated as notice to an insurer since the broker is deemed to be the agent of the insured and not the carrier. However, Gershow Recycling Corp. does not address the issue of an insured's untimely notice to an insurer based upon the incorrect advice of an insurance agent that the underlying incident did not fall within the policy nor does it make any reference to Tesler]

Similarly, although RLI also cites to multiple cases where an insured did not have a reasonable good faith belief in nonliability in the context of a potential Labor Law claim to justify its failure to give timely notice to its insurer, most of the cases cited by RLI on this point fail to either challenge the First Department's determination in Tesler nor indicated that they addressed a situation where an insured's untimely notice to an insurer was based upon the incorrect advice of an insurance agent:

- Board of Mgrs. of the 1235 Park Condominium v. Clermont Specialty Mgrs., Ltd., 68 AD3d 496 (NY App Div 1st Dept 2009) [Holding that given the nature of the work that the worker was performing and the insured's knowledge that the worker had fallen off a ladder and been taken to the hospital by ambulance, this single phone call to the worker's employer on the day of the accident was not an adequate inquiry into the circumstances of the accident and its outcome, and, as a matter of law, could not have caused the insured to reasonably believe that there was no reasonable possibility of the policy's involvement. However, Board of Mgrs. does not address the issue of an insured's untimely notice to an insurer based upon the incorrect advice of an insurance agent that the underlying incident did not fall within the policy nor does it make any reference to Tesler]
- St. Nicholas Cathedral of the Russian Orthodox Church in N. Am. v. Travelers Prop. Cas. Ins. Co., 45 AD3d 411 (NY App. Div. 1st Dept 2007) [Holding that the evidence adduced before the Special Referee established that plaintiff was immediately aware of the accident, which occurred in front of its property while its contractor was performing work on its behalf, and that it was aware that a person was injured and was removed from the scene in an ambulance. Moreover, plaintiff discussed the accident internally and with others, and was familiar with the insurance policy's requirement to provide notice of an occurrence "as soon as practicable." Under the circumstances, plaintiff failed to establish the reasonableness of its belief that no claim would be asserted against it and hence of its seven-month delay in providing notice to Travelers. However, St. Nicholas Cathedral does not address the issue of an insured's untimely notice to an insurer based upon the incorrect advice of an insurance agent that the underlying incident did not fall within the policy nor does it make any reference to Tesler]
- Brownstone Partners/AF & F, LLC v. A. Aleem Constr., 18 AD3d 204 (NY App Div 1st Dept 2005) [Plaintiffs, the owner of and general contractor at the subject work site, indisputably knew immediately after the fact that there had been a work-related accident at the work site in which a subcontractor's employee was injured, plaintiffs did not tender their defense of the underlying, ensuing action to defendant as additional insureds under the comprehensive general liability policy until nearly five months after the accident and four months after the underlying action was commenced against them. Plaintiffs' proffered excuse for failing to notify defendant sooner of the accident, namely, that they relied upon the subcontractor's assurances that the subcontractor would bear responsibility for injuries caused by the reckless conduct of its employees, was insufficient to raise any triable issue as to whether plaintiffs had a reasonable, good-faith belief in their non-liability. However, Brownstone Partners does not address the issue of an insured's untimely notice to an insurer based upon the incorrect advice of an insurance agent that the underlying incident did not fall within the policy nor does it make any reference to Tesler]

In point of fact, only two of the cases cited by the RLI in support of its argument that Tesler is no longer "good law" even cite to Tesler, and said decisions both strongly suggest that Tesler is still "good law".

RLI argued in its submitted papers and at oral argument that National Union Fire Ins Co of Pittsburgh, PA v Great Am E&S Ins Co, (86 A.D.3d 425 (NY App. Div. 1st Dept 2011)) somehow “overturns” Tesler. Upon review of National Union Fire Ins Co of Pittsburgh, PA v Great Am E&S Ins Co, the Court finds said argument to be without merit. In National Union Fire Ins Co of Pittsburgh, PA v Great Am E&S Ins Co, the First Department specifically distinguished Tesler from the facts of the case in National, stating that Tesler was “distinguishable because, in that case, the insurance agent specifically advised the insured that there was no indication a claim could be brought against it. Here, there was no evidence that Solar was advised by any insurance agent as to nonliability.” (National Union Fire Ins Co of Pittsburgh, PA v Great Am E&S Ins Co, 86 AD3d 425, 427 (NY App Div 1st Dept 2011)). Said decision in no way “overrules” Tesler, but merely distinguishes the facts presented in Tesler from the facts presented in National. If anything, the fact that the First Department specifically distinguished Tesler from the facts of National only confirms that Tesler is still “good law”, though not applicable to the specific facts of National. Unlike National, in the underlying action there is no dispute that Lockton mistakenly advised the Plaintiff that Vasquez’s sole remedy was in Workers’ Compensation.

RLI also cites to Macro Enters. v. OBE Ins. Corp. (43 AD3d 728 (NY App Div 1st Dept 2007)), wherein the First Department found that an insured’s “claimed belief of nonliability, on the basis that its injured employee’s exclusive remedy was under the Workers’ Compensation Law, was not reasonable under the circumstances” and includes a cf. citation to Tesler. However, the Macro Enters. decision gives no indication as to those specific “circumstances” nor is there anything in said decision to indicate that the First Department had before it a situation wherein an insured’s untimely notice to an insurer was based upon the incorrect advice of an insurance agent.

Further, upon examination of the New York Supreme Court's decision in Macro Enters. v. QBE Ins. Corp. that was the subject of the appeal before the First Department, it is clear that Macro Enters. v. QBE Ins. Corp. did not involve a situation wherein an insured's untimely notice to an insurer was based upon the incorrect advice of an insurance agent.³

As such, none of the cases cited by RLI on these points specifically overturned Tesler or even addressed situations analogous to either Tesler or the underlying action. At best, the cases cited by the Defendant specifically distinguish the fact patterns before those court from the fact pattern in Tesler, which only goes to support the position that Tesler remains good law.

In the underlying action, regardless of whether or not Vasquez was the Plaintiff's employee, the fact remains that the Plaintiff immediately reported the incident to Lockton, and Lockton mistakenly advised the Plaintiff that Vasquez's sole remedy was in Workers' Compensation. Further there is nothing to indicate that Cohen Brothers had any motive for not complying with the timely notice provision of the Policy, or that Cohen Brothers did not stand ready to timely inform RLI of the incident had Cohen Brothers not been mistakenly advised by Lockton that the incident was solely a Workers' Compensation matter and did not fall within the Policy (See Mighty Midgets, Inc v Centennial Ins Co, 47 NY2d 12 (NY 1979)).

Accordingly, the Court finds that the Plaintiff has established RLI was required under the Policy to defend and indemnify the Plaintiff as to the action brought by Vasquez's estate. As such, the Plaintiff is entitled to a declaratory judgement holding that the Plaintiff is entitled to indemnification by RLI for any damages in connection with the action brought by Vasquez's estate.

³ The Court further notes that the same court that rendered the Supreme Court decision in Macro Enters. v. QBE Ins. Corp. specifically later reviewed the appellate briefs submitted before the First Department in Macro Enters. v. QBE Ins. Corp., which did not indicate that the insured's failure to timely notify the insurer of the incident was in any way based upon incorrect advice given by an insurance agent (See Castlepoint Ins. Co. v Mike's Pipe Yard & Bldg. Supply Corp., 2010 NY Slip Op 31870(U), 14 (NY Sup Ct NY Cnty 2010))

The Plaintiff is entitled a declaratory judgment holding that RLI is required to pay any outstanding reasonable legal fees Plaintiff incurred in defending the action brought by Vasquez's estate in excess of those legal fees already paid by SIF

Having determined that the Plaintiff was entitled to defense and indemnification by RLI in the action brought by Vasquez's estate, the Court further finds that the Plaintiff is entitled to the reasonable legal fees that it incurred in defending said action. It is clear from the terms of the Policy that RLI was required to indemnify the Plaintiff and was also responsible for the legal costs of defending the Plaintiff from the action brought by Vasquez's estate. Further, RLI's argument that the Plaintiff cannot seek legal fees given that it declined to accept any of SIF recommended counsel and instead chose its own attorneys is without merit. The "voluntary payment" doctrine referenced in the cases cited by RLI specifically refer to insurers such as RLI who assume the defense and indemnification of an insured. It does not apply to insured parties such as the Plaintiff.

In the instant action, RLI specifically chose to disclaim the Plaintiff's coverage under the Policy. Had RLI chosen to take on the Plaintiff's defense in the Vasquez estate's action, as required by the Policy, RLI would have had the opportunity to negotiate any division of fees with SIF, if not appoint its own attorneys. RLI's entire argument on this point is built upon the idea that if it had not disclaimed coverage, it would have negotiated with SIF and the Plaintiff in a manner that would have resulted in lesser legal fees than were actually incurred in the defense of the Vasquez estate's action. RLI argues in sum substance that not only should it now be treated as if it had taken on the Plaintiff's defense, but that the Court should also accept that RLI would have negotiated lesser legal fees than those incurred by the Plaintiff in actually defending against the action. Said argument is entirely without merit.

In choosing to disclaim coverage, RLI in effect voluntarily excluded itself from any aspect of the Plaintiff's defense in the Vasquez estate's action, including the selection of attorneys and the negotiation of legal fees. RLI cannot now claim that it should only be required to reimburse the Plaintiff for legal fees as if it had taken any role in the Plaintiff's defense (and the negotiation of legal fees), when RLI voluntarily chose to disclaim coverage and not participate in the Plaintiff's defense. In short, RLI cannot voluntarily choose not to participate in the Plaintiff's defense against the Vasquez estate's action and then claim that it should be treated as if it had not only participated in the said defense, but also negotiated lesser defense costs.⁴

This Court sees no reason why RLI is not independently responsible for the reasonable costs that Plaintiff incurred in defending against the Vasquez estate's action as per the Policy. Any agreement between the Plaintiff and SIF as to the division of legal fees in no way absolves RLI of its obligations under the Policy to provide for the Plaintiff's defense, and any sum SIF paid towards said defense would only be relevant as an offset to the sum owed by RLI.

Accordingly, the Plaintiff has established that it is entitled to a declaratory judgement holding that RLI is required to pay any outstanding reasonable legal fees and costs Plaintiff incurred in defending the action brought by Vasquez's estate in excess of those legal fees and cost already paid by SIF.

⁴ The Court further notes that RLI has not submitted any proof to the Court that had it actually participated in the Plaintiff's defense against the Vasquez estate's action, that RLI would have been able to obtain lesser defense costs. As such, RLI's entire argument on this point is built upon hypotheticals. First that RLI had taken on the Plaintiff's defense and second that if RLI done so, it would have incurred lesser defense costs.

Conclusion

Accordingly, and for the reasons so stated, it is hereby

ORDERED, ADJUDGED, and DECLARED that RLI is required under the Policy to indemnify the Plaintiff as to any damages within the limits of the Policy that the Plaintiff incurred in connection with the action brought by Vasquez's estate. It is further

ORDERED, ADJUDGED, and DECLARED that RLI is required to pay any outstanding reasonable attorneys fees and defense costs Plaintiff incurred in defending the action brought by Vasquez's estate in excess of those legal fees and costs already paid by SIF. It is further

ORDERED that RLI's cross-motion for summary judgment dismissing the Plaintiff's action against RLI is dismissed in its entirety. It is further

ORDERED that the Plaintiff shall file a note of issue and the underlying matter shall be placed on the calendar before a special referee to hear and report on the damages and the reasonable attorney fees and defense costs incurred by the Plaintiff in connection with the action brought by the Vasquez estate. It is further

ORDERED that any determination/calculation by the Special Referee as to the reasonable attorney fees and defense costs incurred by the Plaintiff will include within said determination the amount contributed by SIF towards the Plaintiff's defense as an offset to the amount due and owing by RLI to the Plaintiff for reasonable attorney fees and defense costs.

The foregoing constitutes the Judgment and Decision of the Court.

Dated: Aug 3, 2016

ENTER

Robert D. Kalish
 HON. ROBERT D. KALISH J.S.C.
 J.S.C.