NEW YORK SUPREME COURT - COUNTY OF BRONX
PART 32

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

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CHINTAN TRIVEDI,

Index No. **34424/2020E**

Plaintiff,

Hon. **FIDEL E. GOMEZ**
Justice

- against -

GREATER NEW YORK INSURANCE COMPANY, CHERYL KEELING, PROMENADE WEST CONDOMINIUM,

Defendants.

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The following papers numbered 1 to 3, read on these motions, noticed on 12/11/2021, and duly submitted as no. 3 on the Motion Calendar of 2/17/2022.

	PAPERS NUMBERED	
Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed	1	
Answering Affidavit and Exhibits	3	
Replying Affidavit and Exhibits		
Notice of Cross-Motion - Affidavits and Exhibits	2	
Pleadings - Exhibit		
Stipulation(s) - Referee's Report - Minutes		
Filed Papers-Order of Reference		
Memorandum of Law		

Plaintiff Chintan Trivedi's motion, and Defendant Greater New York Insurance Company's cross-motion, are decided in accordance with the Decision and Order annexed hereto.

Dated: 4/5/2022

Hon.
FIDEL E. GOMEZ, A.J.S.C.

1. CHECK ONE..... ☐ CASE DISPOSED X NON-FINAL DISPOSITION

2. MOTION IS..... X GRANTED (motion) X DENIED (cross-motion) ☐ GRANTED IN PART ☐ OTHER

3. CHECK IF APPROPRIATE.....

☐ SETTLE ORDER ☐ SUBMIT ORDER ☐ DO NOT POST
☐ FIDUCIARY APPOINTMENT ☐ REFEREE APPOINTMENT
☐ NEXT APPEARANCE DATE: _____

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

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CHINTAN TRIVEDI,

Plaintiff,

DECISION AND ORDER

- against -

Index No. **34424/2020E**

GREATER NEW YORK INSURANCE COMPANY,[1] CHERYL KEELING, PROMENADE WEST CONDOMINIUM,

Defendants.

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Plaintiff Chintan Trivedi ("Plaintiff") moves for summary judgment against Defendant Greater New York Insurance Company ("Defendant"), seeking, *inter alia*, a declaration that Defendant must defend and indemnify him in two actions: *Keeling v Salvo, et al*, Bronx County Supreme Court Index No. 302945/2016E (the "Keeling action") and *Wesco Ins. Co. v Salvo, et al*, New York County Supreme Court Index No. 652442/2020 (the "Wesco action").[2] Defendant opposes, and cross-moves for summary judgment, seeking: (1) a declaration that Plaintiff's notice to Defendant of the Keeling action was late and that it prejudiced Defendant; (2) a declaration that it has no duty to defend or indemnify Plaintiff in the Keeling action; and (3) a dismissal of the complaint as to Defendant.

For the reasons which follow, Plaintiff's motion is granted. Defendant's cross-motion is denied.[3]

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[1] Defendant asserts that its proper name is "Greater New York Mutual Insurance Company" (Affirmation of Jonathan Messier, Esq., ¶ 1).

[2] Plaintiff did not make any arguments in support of its motion for a declaration that Defendant must defend and indemnify Plaintiff in the Wesco action. Plaintiff's motion is completely directed towards the defense and indemnification of the Keeling action.

[3] The Court notes that Defendant filed a memorandum of law in further support of its cross-motion on February 16, 2022. This memorandum has not been considered, as no sur-replies were permitted by the Court's (McShan, J.) Order dated November 17, 2021, which set a briefing schedule.

BACKGROUND:

On December 1, 2020, Plaintiff commenced the instant action against Defendants by filing a summons and verified complaint, alleging causes of action for a declaratory judgment and a money judgment. The complaint is verified by Plaintiff.

The complaint alleges that Plaintiff is a real estate broker whose company, RE/MAX in the City and ITC Management, Inc. ("Remax"), was hired by Defendant Promenade West Condominium ("Promenade") to manage Promenade's real estate, by contract dated January 1, 2015 (Compl. ¶ 1). Plaintiff alleges that in 2015, Defendant was hired to provide insurance coverage, including general liability, for Promenade's Board of Directors (the "Board"), officers, and for Plaintiff and his company, as agents of Promenade, under policy number 1131M35641 (Compl. ¶ 2).

The complaint alleges that in 2016,[4] Defendant Cheryl Keeling ("Ms. Keeling"), a unit owner at the Promenade, sued Plaintiff, his company, and Silvana Salvo ("Ms. Salvo"), a member of the Board, in the Keeling action, alleging claims for defamation[5] for stating that she owed money to Promenade (Compl. ¶ 1, 3). Plaintiff alleges that the only claim left against him in the Keeling action is the defamation claim (Compl. ¶ 11-12).[6]

The complaint alleges that since 2016, AmTrust North America/WESCO Insurance Company ("Wesco") provided defense and indemnity to Plaintiff in the Keeling action, with some reservation (Compl. ¶ 16, 20). Plaintiff alleges that he is entitled to defense and immunity under Wesco's and Defendant's insurance policies as an additional insured (Compl. ¶ 18).

The complaint alleges that after all claims except the defamation claim were dismissed in the Keeling action, Wesco commenced the Wesco action, seeking a judgment declaring that it need

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[4] A copy of the Keeling complaint Plaintiff filed with his motion indicates that the Keeling complaint was filed on or around August 29, 2016.

[5] The complaint asserts that the claim being asserted is for libel and slander. The Keeling complaint denotes the cause of action as one for defamation.

[6] On or around July 9, 2019, the Court (Tuitt, J.) in the Keeling action dismissed the cause of action for defamation against Remax, and the causes of action for tortious interference with prospective economic advantage. The only two causes of action which survived are the causes of action for defamation against Ms. Salvo and against Plaintiff (Plaintiff's Exhibit 13).

not defend or indemnify Plaintiff or Ms. Salvo in the Keeling action (Compl. ¶ 33).[7] Plaintiff alleges that it tendered the defense of the Wesco action to both Wesco and Defendant (Compl. ¶ 35-36).

On its first cause of action, Plaintiff seeks a judgment declaring that Defendant and Promenade must provide defense and indemnity to Plaintiff in the Wesco and Keeling actions (Compl. ¶ 47). On its second cause of action, Plaintiff seeks a money judgment (Compl. ¶ 50).

On or around December 15, 2020, Ms. Salvo commenced an action entitled *Salvo v Greater New York Mut. Ins. Co.*, New York County Supreme Court Index No. 657025/2020 (the "Salvo action"), seeking, *inter alia*, a judgment declaring that Defendant must provide her with a defense and indemnification in the Keeling action. On or around April 14, 2021, Ms. Salvo moved for summary judgment seeking, *inter alia*, a declaratory judgment ordering Defendant to provide her with a defense and indemnification in the Keeling action. Defendant cross-moved for summary judgment, seeking, *inter alia*, a declaration that Ms. Salvo's notice to Defendant of the Keeling action was late and that it prejudiced Defendant. Defendant also sought a declaration that it has no duty to defend or indemnify Ms. Salvo in the Keeling action. On September 23, 2021, the Court (Bluth, J.) granted Ms. Salvo's motion, declaring that Defendant must provide Ms. Salvo with defense and indemnification in the Keeling action, and denied Defendant's cross-motion for summary judgment.

On or around June 29, 2021, Wesco moved for summary judgment in the Wesco action, seeking a declaration that it does not have the duty to defend or indemnify Ms. Salvo or Plaintiff in the Keeling action. Plaintiff cross-moved for summary judgment to stay and/or deny Wesco's motion pursuant to CPLR 3212(f). On October 8, 2021, the Court (Love, J.) denied Wesco's motion for summary judgment, and granted Plaintiff's cross-motion for summary judgment pursuant to CPLR 3212(f),[8] reasoning that:

> On 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). Here it is clear to the court that as [sic] this juncture questions of facts remain related to the full circumstances of this matter and the possible role of various insurance carriers and

[7] Court records indicate that WESCO filed its summons and complaint with the Court on June 12, 2020. An affidavit of service filed in that action states that Plaintiff was served with the summons and complaint on July 15, 2020, pursuant to CPLR 308(2).

[8] The decision and order states that Plaintiff's cross-motion is granted pursuant to CPLR § 3215(f). Presumably, the Court meant to indicate CPLR 3212(f).

> how same may intertwin [sic] within the underlying litigation itself. Until further discovery is completed related to same a question of fact remains to this court.

On November 17, 2021, Plaintiff filed the instant motion for summary judgment. On January 17, 2022, Defendant filed the instant cross-motion for summary judgment. On February 17, 2022, the motions were marked fully submitted.

DISCUSSION:

Plaintiff moves for summary judgment, seeking a declaration that Defendant must defend and indemnify him in the Keeling and Wesco actions. In support of his motion, Plaintiff submitted, *inter alia*, his affidavit; the pleadings; the Defendant's policy for the period commencing on February 22, 2015, and expiring on February 22, 2016 (the "GNY policy"); the letter dated October 14, 2016 from Wesco[9]; a page of the Condominium By-Laws; the Property Management Agreement dated January 1, 2015, between Promenade and ITC Management, Inc. (the "Property Management Agreement"); the Decision and Order dated July 9, 2019 in the Keeling action; the Decision and Order dated September 23, 2021 in the Salvo action; and the Decision and Order dated October 8, 2021 in the Wesco action.

CPLR § 3212(b) provides, in relevant part, that:

> A motion for summary judgment shall be supported by affidavit, by a copy of the pleadings and by other available proof, such as depositions and written admissions. The affidavit shall be by a person having knowledge of the facts; it shall recite all the material facts; and it shall show that there is no defense to the cause of action or that the cause of action or defense has no merit. . . . The motion shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any

[9] The October 14, 2016 letter from Wesco notified Plaintiff and the other defendants in the Keeling action that portions of or all of the defense may not be covered under its policy. Wesco states that: "we hereby disclaim coverage under the Commercial General Liability part of the policy of any injuries or damages occurring or offenses committed outside the effective dates of the policy as well as for any injuries or damages you intended, expected or knowingly caused and will not indemnify you with respect thereto." (Plaintiff's Exhibit 8, p. 1-2). However, Wesco also states that: "Without waiver of this position, we have assigned White & McSpedon, 875 6th Ave., Suite 800, New York, NY 10001, telephone number (212) 947-2637, to defend Silvina Salvo, Chintan Trivedi and ITC Realty Company in this matter." (Plaintiff's Exhibit 8, p. 15). It also states that: "This letter does not constitute a waiver of any policy provisions or defenses available to us." (Plaintiff's Exhibit 8, p. 15).

> party. Except as provided in subdivision (c) of this rule the motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact.

The proponent of a motion for summary judgment carries the initial burden of tendering sufficient admissible evidence to demonstrate the absence of a material issue of fact as a matter of law (*Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). "Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers" (*Alvarez* at 324). Once movant meets his initial burden on summary judgment, the burden shifts to the opponent who must then produce sufficient evidence, generally also in admissible form, to establish the existence of a triable issue of fact (*Zuckerman* at 562).

Collateral Estoppel:

Plaintiff argues that collateral estoppel should apply to the issues raised in this motion. He argues that he is entitled to a judgment declaring that Defendant must defend and indemnify him in the Keeling action, just as the Court held in the Salvo action. Plaintiff argues that both cases involve the same facts. Specifically, he argues that the claims against Ms. Salvo and him are identical, the policy of insurance is identical, the facts involving the notice of claim are identical, and Defendant's defense and affirmative defenses are identical. Plaintiff also argues that the claim against Defendant in this action is the same claim that Ms. Salvo brought against Defendant in the Salvo action. Plaintiff further argues that Defendant should be collaterally estopped from opposing this motion, as it already had a full and fair opportunity to litigate and defend these issues.

In opposition, Defendant argues that collateral estoppel should not apply here, because Plaintiff was not a party to the Salvo action. Defendant argues that there is no determination that Defendant owes Plaintiff coverage. Defendant also argues that there are two conflicting decisions regarding whether coverage exists for Ms. Salvo. Specifically, Defendant argues that the decision in the Salvo action and the decision in the Wesco action are in conflict. Defendant argues that the decision in the Wesco action, which denied Wesco's motion for summary judgment seeking a declaration that it is not obligated to defend and indemnify Plaintiff in the Keeling action, was decided on the same issues presented here.

"Collateral estoppel precludes a party from relitigating in a subsequent action or proceeding an issue raised in a prior action or proceeding and decided against that party or those

in privity" (*Buechel v Bain*, 97 NY2d 295, 303 [2001]), "whether or not the tribunals or causes of action are the same" (*Ryan v New York Telephone Co.*, 62 NY2d 494, 500 [1984]). "Two requirements must be met before collateral estoppel can be invoked. There must be an identity of issue which has necessarily been decided in the prior action and is decisive of the present action, and there must have been a full and fair opportunity to contest the decision now said to be controlling. The litigant seeking the benefit of collateral estoppel must demonstrate that the decisive issue was necessarily decided in the prior action against a party, or one in privity with a party. The party to be precluded from relitigating the issue bears the burden of demonstrating the absence of a full and fair opportunity to contest the prior determinations" (*Buechel* at 303-304; *Blanc-Kousassi v Carrington*, 144 AD3d 470, 471 [1st Dept 2016]; *Hughes v Farrey*, 30 AD3d 244, 247 [1st Dept 2006]; *Coleman v J.P. Morgan Chase Bank, N.A.*, 190 AD3d 931, 932 [2d Dept 2021]; *Lennon v 56th and Park (NY) Owner, LLC*, 199 AD3d 64, 69 [2d Dept 2021]). However, the doctrine of collateral estoppel is flexible, and "the enumeration of these elements is intended merely as a framework, not a substitute, for case-by-case analysis of the facts and realities. 'In the end, the fundamental inquiry is whether relitigation should be permitted in a particular case in light of . . . fairness to the parties, conservation of the resources of the court and the litigants, and the societal interests in consistent and accurate results. No rigid rules are possible, because even these factors may vary in relative importance depending on the nature of the proceedings" (*Buechel* at 304; *In re Hofmann*, 287 AD2d 119, 123 [1st Dept 2001]). "[C]laim preclusion never arises between codefendants in a prior action unless they represented adverse interests in the prior action as to a claim that was in fact litigated between them" (*Rojas v Romanoff*, 186 AD3d 103, 110 [1st Dept 2020]).

"A determination whether the first action or proceeding genuinely provided a full and fair opportunity requires consideration of 'the realities of the [prior] litigation,' including the context and other circumstances which * * * may have had the practical effect of discouraging or deterring a party from fully litigating the determination which is now asserted against him. Among the specific factors to be considered are the nature of the forum and the importance of the claim in the prior litigation, the incentive and initiative to litigate and the actual extent of litigation, the competence and expertise of counsel, the availability of new evidence, the differences in the applicable law and the foreseeability of future litigation" (*Ryan* at 501).

Collateral estoppel may only be asserted against a party to the first lawsuit, or one in privity with a party (*Rojas v Romanoff*, 186 AD3d 103, 108 [1st Dept 2020]). "In general, 'a nonparty to

a prior litigation may be collaterally estopped by a determination in that litigation by having a relationship with a party to the prior litigation such that his own rights or obligations in the subsequent proceeding are conditioned in one way or another on, or derivative of, the rights of the party to the prior litigation'. . . . 'the term privity does not have a technical and well-defined meaning" (*Juan C. v Cortines*, 89 NY2d 659, 667 [1997]; *Avilon Automotive Group v Leontiev*, 168 AD3d 78, 86 [1st Dept 2019]). "In the context of collateral estoppel, privity does not have a single well-defined meaning. Rather, privity is 'an amorphous concept not easy of application' . . . and 'includes those who are successors to a property interest, those who control an action although not formal parties to it, those whose interests are represented by a party to the action, and [those who are] coparties to a prior action'. In addressing privity, courts must carefully analyze whether the party sought to be bound and the party against whom the litigated issue was decided have a relationship that would justify preclusion, and whether preclusion, with its severe consequences, would be fair under the particular circumstances. Doubts should be resolved against imposing preclusion to ensure that the party to be bound can be considered to have had a full and fair opportunity to litigate." (*Buechel* at 304-305; *Juan C.* at 667-668).

Coverage Under the GNY Policy:

Here, collateral estoppel is not applicable to the issue of whether Plaintiff is covered under the GNY policy. The underlying facts regarding Plaintiff's coverage under the GNY policy are not identical to the facts regarding Ms. Salvo's coverage. To be sure, Ms. Salvo and Plaintiff each have distinct relationships with Promenade. As such, the Court considers Plaintiff's arguments regarding coverage independently of the decision in the Salvo action.

Plaintiff argues that the defamation claim asserted against him in the Keeling action is covered under the GNY policy, under the section entitled "Coverage B Personal and Advertising Injury Liability" on page 6 in the Commercial General Liability section of the GNY policy (Plaintiff's Exhibit 7, p. 156). Plaintiff asserts that "personal and advertising injury" is defined as including "oral or written publication, in any manner, of material that slanders or libels a person or organization or disparages a person's or organization's goods, products or services" (Plaintiff's Exhibit 7, p. 164).

Plaintiff argues that he is an insured under the GNY policy, because the policy includes executive officers and directors of a corporation as insureds (Plaintiff's Exhibit 7, p. 159), and he, at all times, acted as an executive officer appointed by Promenade, as Promenade contracted with

Plaintiff to manage the condominium. Thus, Plaintiff argues that he qualifies as an executive officer, board member, and real estate managing agent (Affidavit of Chintan Trivedi, ¶ 1) (Plaintiff's Exhibit 7, p. 163).[10]

Plaintiff argues that it is undisputed that his alleged defamatory statements were made in the context of his condominium duties, and that he was sued in connection with his duties as an executive officer (Plaintiff's Exhibit 9, Section Three – "Duties of the Agent": "In managing the above-described property, agent shall: 1) Bill and collect common charges and other charges . . ."; Plaintiff's Exhibit 4, ¶ 4 – "Plaintiff [sic] published and continues to publish that plaintiff owes $83,000 in common charges as a result of failing to pay common charges, assessments, water, or other billed amounts since 2008. The first publication was June 2015, the most recent June 2016").

Here, Plaintiff has demonstrated that he is a covered insured under the GNY policy, that the allegedly defamatory statements he made occurred during the policy period (Plaintiff's Statement of Material Facts, ¶ 18; Defendant's Counter-Statement of Material Facts, p. 7), and that the GNY policy covers the claim being alleged against him in the Keeling action. Defendant denies that Plaintiff is an insured under the GNY policy in its Counter-Statement of Material Facts, asserting that: "[Plaintiff's] statement does not contain a citation to the record that in any way refers to or establishes Trivedi is an insured under the GNY policy but rather refers to the reservation of rights letter written by AmTrust North America (a non-party to this action)" (Defendant's Counter-Statement of Material Facts, p. 7). It is true that Plaintiff's Statement of Material Facts refers to the October 14, 2016 letter in support of its statement that Plaintiff is an insured under the GNY policy (Plaintiff's Statement of Material Facts, ¶ 19). However, Plaintiff made a prima facie showing in his motion papers by his submissions, which include the pleadings and excerpts from the GNY policy. In opposition and cross-motion, Defendant did not make any arguments or provide any affidavits addressing these issues. As such, this conclusory denial is not sufficient to raise an issue of fact (*See Grullon v City of New York*, 297 AD2d 261, 263-264 [1st Dept 2002] ["Mere conclusory assertions, devoid of evidentiary facts, are insufficient [to defeat a well-supported summary judgment motion"]; *JP Morgan Chase Bank v Gamut-Mitchell, Inc.*, 27 AD3d 622, 622 [2d Dept 2006]).

[10] The policy defines "executive officer" as "a person holding any of the officer positions created by your charter, constitution, by-laws or any other similar governing document".

Prejudice to Defendant:

Plaintiff argues that the issue of whether Defendant has been prejudiced by late notice of the Keeling action has already been decided against Defendant in the Salvo action, and that collateral estoppel should apply.

Plaintiff also argues that even if collateral estoppel does not apply, the Court should find that Defendant has not been prejudiced. Citing N.Y. Ins. Law § 3420(a)(5), as well as the terms of the GNY policy, which includes the language required by § 3420(a)(5) (Plaintiff's Exhibit 7, p. 171), Plaintiff argues that Defendant has the burden to demonstrate that it has been prejudiced by Plaintiff's failure to timely provide notice of the Keeling action. Citing N.Y. Ins. Law § 3420(c)(2)(c), Plaintiff argues that Defendant must demonstrate that the failure to provide timely notice materially impaired its ability to investigate or defend the claim. Plaintiff further argues that an insurer must show prejudice as a prerequisite to disclaimer of coverage based on late notice. Plaintiff argues that Defendant cannot show any prejudice, because it may easily assume the defense of the Keeling action, as the Keeling action is a defamation case, "not one in which physical evidence has disappeared or degraded or where witnesses have died or moved" (Plaintiff's Memorandum of Law, p. 12).

In opposition and in support of its cross-motion, Defendant argues that Plaintiff should be judicially estopped from asserting that collateral estoppel applies, and that Defendant has not been prejudiced. Defendant argues that Plaintiff avoided summary judgment against him in the Wesco action by asserting that he has been prejudiced by Wesco's negligent defense in the Keeling action, because among other reasons, no discovery was taken and a note of issue was filed, precluding the taking of further discovery. Defendant argues that since Plaintiff took this position and prevailed in the Wesco action, he cannot take a contrary position in this matter by arguing that Defendant will not be prejudiced by assuming his defense in the Keeling action.

Citing N.Y. Ins. Law § 3420(c)(2)(A), Defendant also argues that it is Plaintiff's burden to demonstrate the lack of prejudice to Defendant since the notice was not provided within 2 years of the time required under the policy. Nevertheless, Defendant argues that it has been prejudiced by the late notice of the Keeling action, because it has been deprived of the ability to contemporaneously investigate the circumstances alleged in the Keeling action and to participate in the defense in the Keeling action. Defendant argues that a note of issue has already been filed in the Keeling action, precluding further discovery. Defendant also argues that Wesco defended

the Keeling action in such a way as to only obtain dismissal of the claim that it covered, and leave the claim that it does not cover.

N.Y. Ins. Law § 3420 (a)(5) provides, in relevant part, that:

> A provision that failure to give any notice required to be given by such policy within the time prescribed therein shall not invalidate any claim made by the insured, injured person or any other claimant, unless the failure to provide timely notice has prejudiced the insurer, except as provided in paragraph four of this subsection.

N.Y. Ins. Law § 3420 (a)(4) provides that:

> A provision that failure to give any notice required to be given by such policy within the time prescribed therein shall not invalidate any claim made by the insured, an injured person or any other claimant if it shall be shown not to have been reasonably possible to give such notice within the prescribed time and that notice was given as soon as was reasonably possible thereafter.

N.Y. Ins. Law § 3420 (c)(2)(A) provides that:

> In any action in which an insurer alleges that it was prejudiced as a result of a failure to provide timely notice, the burden of proof shall be on: (i) the insurer to prove that it has been prejudiced, if the notice was provided within two years of the time required under the policy; or (ii) the insured, injured person or other claimant to prove that the insurer has not been prejudiced, if the notice was provided more than two years after the time required under the policy.

N.Y. Ins. Law § 3420 (c)(2)(C) provides that: "The insurer's rights shall not be deemed prejudiced unless the failure to timely provide notice materially impairs the ability of the insurer to investigate or defend the claim."

Here, the GNY policy complies with N.Y. Ins. Law § 3420 (a)(5) by providing that:

> Failure to give notice to us as required under this Coverage Part shall not invalidate any claim made by the insured, injured person or any other claimant, unless the failure to provide such timely notice has prejudiced us. However, no claim made by the insured, injured person or other claimant will be invalidated if it shall be shown not to have been reasonably possible to give such timely notice and that notice was given as soon as was reasonably possible thereafter (Plaintiff's Exhibit 7, p. 171).

The issue of whether Defendant has been prejudiced by the untimely notice of the Keeling action is an issue to which collateral estoppel must apply. The issues regarding which party has

the burden to demonstrate prejudice, the reasons and the sufficiency of the reasons set forth by each party to argue prejudice or the lack thereof, and whether Defendant has been prejudiced, were already raised and fully addressed and litigated in the Salvo action.

There is no distinction in the relevant facts here to those in the Salvo action. Ms. Salvo and Plaintiff are both being sued for defamation in the Keeling action. Both are covered under the GNY policy. Both were represented by Wesco in the Keeling action and are facing Wesco's withdrawal from their defense. Since Wesco represented both Ms. Salvo and Plaintiff in the Keeling action, they are both subject to the same discovery disputes and limitations in that action. Both were recipients of the October 14, 2016 letter from Wesco. Ms. Salvo and Plaintiff gave notice of the Keeling action to Defendant around the same time - Ms. Salvo on August 18, 2020, and Plaintiff a few weeks earlier - on July 30, 2020. Defendant does not argue that the facts and issues in this action are dissimilar to those of the Salvo action such that collateral estoppel should not apply.

Moreover, Defendant does not dispute that it had a full and fair opportunity to litigate these issues in the Salvo action. In fact, the arguments Defendant raised in opposition and in support of its cross-motion in this action are identical to those raised in opposition and in support of its cross-motion in the Salvo action. Defendant argues in both actions that Ms. Salvo and Plaintiff each had no justifiable lack of knowledge of the GNY policy and that they did not make any diligent efforts to identify coverage, even though they were on notice by the October 14, 2016 letter that Wesco may not provide coverage in the Keeling action. Defendant argues in both actions that pursuant to N.Y. Ins. Law § 3420(c)(2)(A), Ms. Salvo and Plaintiff have the burden to demonstrate the lack of prejudice to Defendant. Defendant argues in both actions that Ms. Salvo and Plaintiff did not demonstrate the lack of prejudice to Defendant because the note of issue was filed in the Keeling action without any discovery being taken. Defendant also argues in both actions that it has been prejudiced because it has been deprived of its ability to contemporaneously investigate the circumstances alleged in the Keeling action, and to participate in the defense of the Keeling action. Finally, Defendant argues in both actions that Wesco defended the Keeling action so as to only obtain dismissal of the claim that it covered, but not of the claim that it does not cover (*See* Affirmation of Robert P. Louttit, ¶ 26-28; *see also* Affirmation of Jason A. Pozner, Esq., 29-31).

In light of the foregoing, this Court must apply collateral estoppel to the issue of whether Defendant has been prejudiced by the untimely notice of the Keeling action. Since the Salvo court determined that Defendant has not been prejudiced by untimely notice of the Keeling action, this

Court must also determine that since Defendant is estopped from relitigating that issue in this action, Defendant has not been prejudiced.

Furthermore, contrary to Defendant's arguments, Plaintiff is not judicially estopped from asserting that collateral estoppel applies in this action, and from asserting that Defendant has not been prejudiced. Although it is true that Plaintiff asserted in his affidavit in support of his cross-motion for summary judgment in the Wesco action that Wesco was negligent in his defense of the Keeling action, because, among other reasons, Wesco did not conduct discovery in the Keeling action, the decision in the Wesco action does not reference those assertions in its decision, despite citing to a portion of Plaintiff's affidavit. As such, it is not clear on this record whether the Court in the Wesco action relied on such assertions in Plaintiff's affidavit to deny Wesco's motion for summary judgment (*Kalikow 78/79 Co. v Sta te*, 174 AD2d 7, [1st Dept 1992] ["judicial estoppel may not be asserted as a defense unless it can be shown that the party against whom the estoppel is sought procured a judgment in its favor as a result of the inconsistent positions taken in the prior proceeding"]). In any case, Defendant is not a party to the Wesco action, and the Wesco action does not concern Defendant. The Wesco action only concerns Wesco's duty to defend and indemnify Ms. Salvo and Plaintiff in the Keeling action. The Wesco action did not determine the issue of whether Defendant has been prejudiced by untimely notice of the Keeling action or Defendant's duty to defend and indemnify Ms. Salvo and Plaintiff in the Keeling action.

The Court need not reach the issue of whether Plaintiff has set forth a valid excuse or a justifiable lack of knowledge of the GNY policy (N.Y. Ins. Law § 3420[a][4]), as Plaintiff has already demonstrated that Defendant has not been prejudiced. The issue of whether Plaintiff had a valid excuse or a justifiable lack of knowledge of the GNY policy, so as to excuse his failure to provide timely notice of the claim would only serve to benefit Plaintiff in case it is found that there was prejudice to Defendant in providing it with an untimely notice of the claim (*See* Audrey A. Seeley, Esq. et al, Understanding the New York Late Notice Statute, 2016 WL 6901168 [2016] ["It is noteworthy that New York Insurance Law § 3420(a)(5) also carves out further protections for policy holders with its reference to the requirements set forth in Insurance Law § 3420(a)(4). Thus, even where the insurer has been prejudiced as a result of the insured's delayed notice, such late notice will be forgiven where the insured can establish that he or she simply could not have provided timely notice under the circumstances"]).

The Court also need not reach the issue of whether Defendant must defend Plaintiff because it did not timely disclaim coverage.

Accordingly, Plaintiff's motion for summary judgment is granted. Defendant's cross-motion is denied.

It is hereby

DECLARED AND ADJUDGED that Defendant must defend and indemnify Plaintiff in the Keeling action; and it is further

ORDERED that Plaintiff serve a copy of this Decision and Order upon Defendants, with Notice of Entry, within thirty (30) days of the date hereof.

This constitutes the Decision and Order of this Court.

Dated: 4/5/2022

Hon.

FIDEL E. GOMEZ, A.J.S.C.