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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: JANE A. LEBEDEFF Justice

PART 8

National Abatement Corp.

- v -

National Union Fire Insurance Co

INDEX NO. 603886/02 ~~[illegible]~~

MOTION DATE 12/15/04

MOTION SEQ. NO. 003

MOTION CAL. NO. 79

The following papers, numbered 1 to _____ were read on this motion to/for disc

	PAPERS NUMBERED
Notice of Motion/ ~~Order to Show Cause~~ — Affidavits — Exhibits ...	1-5
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers, it is ordered that this ~~motion~~

MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION.

FILED
APR 22 2005
COUNTY CLERK'S OFFICE
NEW YORK

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: APR 13 2005

J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: I.A.S. PART 8
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NATIONAL ABATEMENT CORP. and NAC ENVIRONMENTAL SERVICES, CORP.,

Plaintiffs,

-against-

Index No. 603886/02
Mot. Seq. No. 003

NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA,

Defendant.

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DIANE A. LEBEDEFF, J.:

In this declaratory judgment action, plaintiffs National Abatement Corp. and NAC Environmental Services, Corp. (together, "NAC"), assert a right to coverage as additional insureds under a policy issued by defendant National Union Fire Insurance Company of Pittsburgh, PA ("National Union"), to a now-defunct subcontractor, American Standard Environmental Corp. ("ASE"). Defendant moves to dismiss, and plaintiffs cross-move for summary judgment, declaring their rights, and directing reimbursement for all defense and indemnity costs incurred in the underlying Labor Law action. Alternatively, plaintiffs seek leave to amend the complaint to assert a direct cause of action under Insurance Law § 3420 (a)(2), to recover the amount of a default judgment obtained against ASE in the underlying action (exhibit J).

Factual Background

The underlying action arises out of injuries suffered by a worker, Andrez Andrusziewicz, who fell from a scaffold during an asbestos abatement removal project performed by ASE at 125 Broadway, New York, New York, between March 16 and April 1, 1997. The accident occurred on March 25, 1997. ASE had submitted a bid for the job to NAC on March 4, 1997 (motion, exhibit I), and a written subcontract was executed by NAC and ASE on or about May 6, 1997 (motion, exhibit J). NAC's vice president avers that the terms of the written subcontract were agreed to before ASE's work commenced, and that the work was performed in accordance with those terms (Caputo aff., para. 3).

At the time the work was performed, ASE was the named insured on a policy issued by National Union (the "Policy"). The Policy contains an additional insured endorsement extending coverage to "Project Owners, Property Managers, and Project/General Managers where required by written contract" (motion, exhibit N).

Andrusziewicz commenced an action against the property owner, NY Broad Holdings, Inc. ("NY Broad"), and the general contractor, Fast Track Construction ("Fast Track"). On July 26, 1999, Fast Track impleaded NAC, and in December of 1999, NAC impleaded ASE, which apparently had gone out of business by that time. In March of 2000, NAC moved for entry of a default judgment against ASE, and forwarded a copy of its motion to National Union, with a letter advising it that the motion would be withdrawn if an appearance were entered on behalf of ASE. NAC was thereafter granted default judgment on its indemnification claim against ASE.

Andrusziewicz was granted partial summary judgment against NY Broad, and NY Broad was granted summary judgment against Fast Track. Thereafter, plaintiff settled his claim against NY Broad for $400,000, to be funded 50% each by Fast Track and NAC (cross-motion, exhibit A). By letter dated February 22, 2001, NAC advised National Union of the settlement, and on March 5, 2001, it commenced a coverage action against American International Insurance Co. It subsequently commenced the instant action against Commerce & Industry Insurance Co., and the parties stipulated to substitute National Union as the correct defendant in 2004 (motion, exhibits F, G).

Pursuant to a decision dated May 6, 2002, in the underlying action the trial court determined that Fast Track was entitled to common law indemnification from NAC, because Fast Track did not direct, control or supervise ASE, and NAC had control over the asbestos abatement work performed by ASE and provided the scaffold from which plaintiff fell (*id.*).

NAC has entered judgment against ASE in the amount of $244,551, and represents that it will seek to have its judgment supplemented to include the amount it is required to reimburse Fast Track.

Legal Discussion

The motion and cross-motion raise a plethora of legal and factual issues, which are complicated by a preliminary choice of law question. In support of its motion, defendant argues (1) plaintiffs are not entitled to additional insured coverage under the terms of the Policy because there was no written contract requiring coverage in effect between ASE and NAC at the time of the accident, and (2) plaintiffs breached the Policy's notice condition

by failing to request coverage until after they settled the underlying action, thereby prejudicing the insurer. Alternatively, if additional insurance coverage is found, it argues the National Union Policy would provide coinsurance with NAC's insurer, Zurich, since the policies' "other insurance" clauses cancel each other out.

In opposition, plaintiffs argue (1) that they are entitled to additional insured status because the terms of the written contract, executed between ASE and NAC after the accident, had been agreed to before ASE commenced work, and (2) under New York law, National Union is precluded from disclaiming on late notice grounds because of its unjustified delay in disclaiming (Insurance Law § 3420), and, if Pennsylvania law applies, National Union has not established it was prejudiced by late notice, because plaintiffs forwarded the default papers to National Union, providing it with an opportunity to avoid prejudice by investigating and appearing in the action. As to the alternative point, plaintiffs argue that ASE's agreement to name NAC as an additional insured signified that ASE's carrier would provide NAC with primary coverage on the risk.

With respect to plaintiffs' cross-motion, defendant argues that the New York direct action statute is inapplicable because the Policy was issued and delivered in Pennsylvania. Plaintiffs contend that New York law applies and assert in reply that Pennsylvania has a substantively identical direct action statute.

Choice of Law

Since the law of the relevant states – New York and Pennsylvania – differs with respect to late notice, and since plaintiffs seek to rely on a New York statute applicable by its own terms only to liability policies "delivered or issued for delivery" in the state of New

York (NY Insurance Law § 3420 [a], [d]), that issue must be addressed first.

The Policy was issued to ASE, listing its principal place of business in Pennsylvania, by a Pennsylvania insurance company. The contract between ASE and NAC was not contemplated at the time the Policy was issued, and NAC is not expressly listed as an additional insured on the Policy. Plaintiffs argue that the insured risk was located in New York, where ASE apparently had an office and where ASE's worker was injured (see motion, exhibit I). Plaintiffs also argue that events related to issuance of the policy occurred in Georgia and Alabama.

The focus of the choice of law inquiry in insurance cases is the "principal location of the insured risk ... unless with respect to the particular issue, some other state has a more significant relationship" to the transaction and the parties (*Zurich Ins. Co. v. Shearson Lehman Hutton, Inc.*, 84 N.Y.2d 309, 318 [1994]). The instant case is analogous to *Marino v. New York Telephone Co.*, 944 F.2d 109, 112 (2d Cir. 1991), in which the Second Circuit, applying New York choice of law analysis, held that the NY Insurance Law, by its own terms, did not apply to a policy issued by a New Hampshire corporation, through an insurance agent in New Hampshire, to a New Hampshire corporation, where the one-year policy was not "specific" to the building contract or work done in New York, but covered the insured's general operations (*see also Steadfast Ins. Co. v. Sentinel Real Estate Corp.*, 283 A.D.2d 44, 50 [1st Dept. 2001], in action involving assault in Nevada, New York law would be applied to insurance issues, because insured was a New York corporation with nationwide operations, and policy was negotiated and "presumably" delivered in New York). In this case, where the additional insured was not expressly named in the one-year

Policy covering ASE's general operations, the principal locus of the insured risk should be deemed to be Pennsylvania, the state of ASE's principal place of business listed on the Policy and the state of incorporation of the insurer.

Plaintiffs' contention that National Union should be estopped from arguing that Pennsylvania law applies because it previously acquiesced in application of New York law has little force. No prior decision turning on the choice of law issue has been issued, and National Union appropriately raised the issue when the differences in the states' law became significant.

Accordingly, the New York Insurance Law does not apply to the Policy, and Pennsylvania law will be applied when there is a conflict between New York and Pennsylvania law.

Additional Insured Coverage

The ASE Policy provides additional insured coverage to "Project Owners, Property Managers, and Project/General Managers where required by written contract" (motion, exhibit N).[1] Both New York and Pennsylvania law recognize that a signature is not necessarily required for an effective written contract, so long as the parties perform in conformity with the terms of a written agreement, such as a purchase order (*see Brown Bros. Elect. Contr. v. Beam Constr. Corp.*, 41 N.Y.2d 397, 399-400 [1977], unsigned contract may be enforceable, provided there is objective evidence establishing that the

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[1] National Union initially urged that NAC was not a project or general manager, but does not press the point in reply, apparently conceding that NAC was project manager with respect to the asbestos aspects of the project.

parties intended to be bound; *Hartman v. Baker*, 766 A.2d 347 [Pa.Super. 2000], parties' conduct evidenced formation of contract in accordance with terms of unsigned written memorandum). Applying this general contract principle, a New York court has held that coverage under a similar additional insured provision was triggered when the parties performed pursuant to the terms of an unsigned written purchase order (*Brooklyn Hosp. Center v. One Beacon Ins.*, 5 Misc.3d 1029 [A], 2004 WL 2913774 [Sup. Ct. N.Y. Co. Freedman, J.]; *cf.*, *Powerhouse Sheet Metal Co., Inc. v. Hanover Ins. Co.*, 288 A.D.2d 164 [1st Dept. 2001], under terms of policy, insurer's duty to defend depended on existence of oral or written indemnification agreement between employer and contractor at time of accident). No Pennsylvania case has been cited in which the exact issue of insurance coverage was presented.

In the somewhat similar context of the Worker's Compensation law, New York law allows a direct suit against an employer based on an unsigned written indemnification agreement existing prior to the accident (*Flores v. Lower East Side Service Center, Inc.*, 2005 WL 708381 [Ct. App. March 29, 2005]), whereas, under Pennsylvania law, a signed written agreement appears to be required (*see Pendrak v. Keystone Shipping Co.*, 300 Pa.Super. 393, 396-397, 446 A.2d 912, 913-914 [Pa.Super. 1982], contract signed several hours prior to injury not valid under the Act, since it was not signed prior to the date of the injury; *see also Fulgham v. Daniel J. Keating Co.*, 285 F.Supp.2d 525, 535 [D.N.J.], applying Pennsylvania law, held contract signed nearly a month after the injury could not be applied retroactively where there is no mention of retroactive application in the contract itself). National Union also argues with some force, referring to the public policy against

permitting insurance of a known risk, that a contractor and subcontractor should not be able to trigger coverage by signing or entering into an agreement after an accident has occurred.

It is not necessary to predict how Pennsylvania courts would decide the legal issue presented, since there is an issue of fact as to whether a written agreement requiring ASE to obtain coverage existed prior to the accident (*see Powerhouse Sheet Metal Co., Inc. v. Hanover Ins. Co., supra*, existence of agreement was issue of fact). The evidence submitted by plaintiffs demonstrates the existence of an agreement as to terms prior to the accident, and the execution of a written contract over a month after the project was completed, but does not establish that an agreement had been reduced to writing or exchanged between the parties prior to the accident, as required by the Policy. If there was no written agreement – signed or unsigned – in effect prior to the accident, then coverage would not be available under either New York or Pennsylvania law. Accordingly, neither party has established entitlement to judgment on the issue of additional insured coverage.

Late Notice-Late Disclaimer Contentions

Under Pennsylvania law, in order to defeat coverage by relying upon the notice provision in its contract, the insurer is required to prove "(1) that the notice provision was in fact breached, and (2) that the breach resulted in prejudice to its position" (*Strickler v. Huffine*, 421 Pa.Super. 463, 618 A.2d 430 [1992], *app. denied*, 517 Pa. 607, 536 A.2d 1332 [1987]). In the leading Pennsylvania case, *Brakeman v. Potomac Ins. Co.*, 472 Pa.

66, 371 A.2d 193 (1977), the Pennsylvania Supreme Court explained:

> "Where the insurance company's interests have not been harmed by a late notice, even in the absence of extenuating circumstances to excuse the tardiness, the reason behind the notice condition in the policy is lacking, and it follows neither logic nor fairness to relieve the insurance company of its obligations under the policy in such a situation (*id.* at 75, 371 A.2d at 197)."

A showing of actual prejudice is also required of an insurer seeking to rely on a notice of settlement clause (*see Nationwide Mut. Ins. Co. v. Lehman*, 743 A.2d 933, 941 [Pa.Super. 1999], "where the insured settles with a tortfeasor without the insurer's consent and does not prejudice the insurer's interests, the purpose of the consent to settle clause is lacking"). The burden of proving prejudice is on the insurer (*Brakeman v. Potomac Ins. Co., supra*, 472 Pa. at 76, 371 A.2d at 198).

Generally, prejudice as a matter of law may be found to exist when a case has been litigated to the point of settlement, or when a default has been entered against the insured, before the insurer is notified of the action (*see Metal Bank of America, Inc. v. Insurance Co. of North America*, 360 Pa.Super. 350, 359, 520 A.2d 493, 497 [Pa.Super. 1987], insurers who received notice two years after suit was brought, when it was at the point of settlement, were prejudiced by loss of opportunity to investigate the facts and participate in the defense of the action; *Flagg v. Puleio*, 189 Pa.Super. 329, 150 A.2d 400 [1959], insurer prejudiced where it did not receive information of a lawsuit against its insured until a default judgment had been taken against him). On the other hand, plaintiffs' contention that its forwarding of the default motion and asking National Union to appear provided notice has persuasive force in the context of the policy reasons underlying the notice requirement (*see Strickler v. Huffine, supra*, where insurer admitted it would have denied

coverage and refused to participate in defense if it had received papers timely, claimant met burden of showing that insurer suffered no prejudice from late notice; *Cadwallader v. New Amsterdam Casualty Co.*, 396 Pa. 582, 589, 152 A.2d 484, 488 [1959], where a claim is potentially within the scope of an insurance policy, the insurer who refuses to defend at the outset does so at its own peril). The circumstances in which prejudice will be found as a matter of law under Pennsylvania law are not clearly settled, and the issue is often considered a question of fact (*Rohm and Haas Co. v. Continental Cas. Co.*, 566 Pa. 464, 781 A.2d 1172 [2001], whether excess insurers were prejudiced by notice given 24 years after occurrence was issue of fact under circumstances; *see Hyde Athletic Industries, Inc. v. Continental Cas. Co.*, 969 F.Supp. 289, 300 [E.D. Pa. 1997]). Here, neither prejudice nor lack of prejudice is sufficiently established to warrant judgment.

As to the purported lateness of National Union's disclaimer, "absent an applicable and appropriate statute, New York common law should be applied" (*Marino v. New York Telephone Co., supra*, 944 F.2d at 114). "Under the common-law rule, delay in giving notice of disclaimer of coverage, even if unreasonable, will not estop the insurer to disclaim unless the insured has suffered prejudice from the delay" (*Fairmont Funding v. Utica Mut. Ins. Co.*, 264 A.D.2d 581, 581-582 [1st Dept. 1999]). Plaintiffs do not assert any prejudice resulted from any delay in National Union's disclaimer.

Accordingly, National Union is not precluded by late disclaimer from asserting late notice as an affirmative defense, but the questions of whether the notice provision of the Policy was breached, and whether National Union was prejudiced thereby, are issues of fact that cannot be resolved in favor of either party.

NAC's Motion to Amend

NAC may not assert a direct claim against National Union to collect its judgment against ASE under NY Insurance Law § 3420 (a)(2), since it has not shown that the policy was issued or delivered in New York State (*see American Continental Properties, Inc. v. National Union Fire Ins. Co. Of Pittsburgh*, 200 A.D.2d 443 [1st Dept. 1994]). However, NAC asserts that Pennsylvania has an analogous direct action statute (40 P.S. § 117), permitting the injured person who has an unsatisfied judgment in an action against an insolvent or bankrupt insured, to maintain an action against the insurer "under the terms of the policy, for the amount of the judgment in the said action, not exceeding the amount of the policy."

National Union further argues that a direct claim cannot be asserted under either the New York or the Pennsylvania statute, because the Policy does not provide coverage for NAC's indemnification claim against ASE. The Policy excludes coverage for "'[b]odily injury' or 'property damage' for which the insured is obligated to pay damage by reason of the assumption of liability in a contract or agreement," unless liability is "[a]ssumed in a contract or agreement that is an 'insured contract'" (exhibit N, Sec. I – Coverage, (2) Exclusions). The Policy defines an "insured contract" as an agreement to assume "the tort liability of another" provided "the contract or agreement is made prior to the 'bodily injury or property damage'" (*id.*, section V).

The issue of whether an "insured contract" was in existence prior to the date of the accident is, as discussed above, an issue of fact.

Since leave to amend will be liberally granted absent a showing that the proposed claim is palpably insufficient, NAC's motion is granted to the extent that it may assert a claim under the Pennsylvania direct action statute.

In light of the resolution reached herein, the alternate issue of whether the Policy would provide co-insurance with NAC's policy, or primary coverage, need not be reached.

Conclusion

National Union's motion to dismiss is denied, the branch of plaintiffs' cross-motion seeking summary judgment declaring their rights is denied, and the branch of the cross-motion seeking leave to amend is granted to the extent that plaintiffs may assert a direct cause of action under the Pennsylvania direct action statute, and is otherwise denied.

The parties are directed to appear for a status conference in Part 8 (Room 540) on May 23, 2005, at 9:45 a.m.

This decision constitutes the order of the court.

Dated: April 13, 2005

J.S.C.