Royal Indemnity Co. v Salomon Smith Barney, Inc.
2005 NY Slip Op 30302(U)
July 27, 2005
Supreme Court, New York County
Docket Number: 125889/99
Judge: Shirley Werner Kornreich
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SCANNED ON 8/10/2005
[* 1]

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

PRESENT: **Kornreich, Shirley Werner, J.** PART 54
Justice

Royal Indemnity Co., Royal Insurance Co. of America and Westchester Fire Insurance Co.,

Plaintiffs

-against-

Salomon Smith Barney, Inc., as the successor in interest to Smith Barney, Inc., Salomon Smith Barney Holdings, Inc., Citigroup Inc., as the successor in interest to Travelers Group, Inc., as the successor in interest to The Travelers Inc., as the successor in interest to Primerica Corp.,

Defendants.

INDEX NO. 99/125889
MOTION DATE 4/28/05
MOTION SEQ. NO. 12
MOTION CAL. NO.

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

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

The following papers, numbered 1 to 9 were read on this motion for Discovery

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits...	1,2,5,8,9
Answering Affidavits — Exhibits	3,4,7
Replying Affidavits	6,9

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed Decision, Order and Judgment.

Dated: July 27, 2005

SHIRLEY WERNER KORNREICH
J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION
Check if appropriate: ☒ DO NOT POST

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

---X

ROYAL INDEMNITY CO., ROYAL
INSURANCE CO. OF AMERICA and
WESTCHESTER FIRE INSURANCE CO.,

Plaintiffs,

Index No.: 125889/99

**DECISION,
ORDER and
JUDGMENT**

-against-

SALOMON SMITH BARNEY, INC., as the
successor in interest to Smith Barney, Inc.,
SALOMON SMITH BARNEY HOLDINGS, INC.,
CITIGROUP INC., as the successor in interest
to Travelers Group, Inc., as the successor in interest
to The Travelers Inc., as the successor in interest
to Primerica Corp.,

Defendants.

---X

KORNREICH, SHIRLEY WERNER, J.:

This is a declaratory judgment action brought by excess insurers in connection with two underlying actions against defendants commenced by several of defendants' employees, alleging various gender-based employment claims. Plaintiffs Royal Indemnity Co. and Royal Insurance Company of America (collectively, "Royal")[1] issued commercial umbrella liability insurance policies to defendants and/or their predecessors (collectively, "SSB"),[2] providing coverage for

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[1]Westchester Fire Insurance Co. has withdrawn its claims against defendants.

[2]Smith Barney, Inc. is allegedly the predecessor in interest of defendant Salomon Smith Barney, Inc., a wholly-owned subsidiary of defendant Salomon Smith Barney Holdings, Inc., which in turn is a wholly-owned subsidiary of defendant Citigroup, Inc. Citigroup, Inc. is allegedly the successor in interest to Travelers Group, Inc., the successor in interest to The Travelers, Inc., the successor in interest to Primerica. For the sake of simplicity, the Court will

damages in excess of $2 million. Royal seeks a judgment declaring that it is not obligated to provide SSB with coverage for liability in connection with the underlying actions. SSB has asserted counterclaims for breach of contractual duty to indemnify, waiver of defense to coverage, estoppel, and failure to reserve rights to disclaim coverage.[3]

I. Summary Judgment Motion

Royal now moves for: (1) summary judgment on its first cause of action (breach of contractual duty to provide timely notice); (2) an order declaring that it is not obligated to provide coverage to SSB in connection with the underlying actions; and (3) dismissal of SSB's first through fourth counterclaims. Royal submits the affirmation of its attorney and the affidavit of Edwin Smith, together with a voluminous set of documentary exhibits in connection with the underlying actions, the policies in question, and the instant action. SSB opposes, submitting its attorney's affirmation, together with similarly extensive documentary evidence.

II. Factual Background

A. The Underlying Actions

On May 20, 1996, three SSB employees from the Garden City, New York office of SSB filed an action against SSB and certain of its officers and directors, styled *Martens v. Smith Barney, Inc.*[4] The three *Martens* plaintiffs, all women, alleged various causes of action for *inter alia,* sexual harassment, discrimination and retaliation, based on a company-wide "pattern and

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refer to this entire agglomeration of entities as "SSB." *See* Leonard Aff., Ex. 18, n.2.

[3]SSB asserted a fifth counterclaim, alleging that this action was instituted in bad faith, which was dismissed by the First Department in an opinion reversing the court below. *See* Royal Indem. Co. v. Salomon Smith Barney, Inc., 308 A.D.2d 349, 350 (1st Dept. 2003).

[4]The *Martens* action, No. 1:96-CV-03779-JGK, was filed in the United States District Court for the Southern District of New York.

practice of discriminatory conduct." *See* Affirmation of J. Leonard, Exhibit 4, p. 3 (hereinafter, the "Martens Complaint").

The *Martens* action arose from the experience of Pamela K. Martens, who was hired in 1985 as a trainee in the Garden City branch of SSB. In October of 1994, Martens, then a Financial Consultant, wrote a letter to SSB's then Chairman and CEO Jamie Dimon, alleging sexual harassment, discrimination and other inappropriate conduct by Nicholas Cuneo, the branch office manager. Leonard Aff., Ex. 32. Among the allegations in Ms. Marten's letter were that Cuneo: "holds women, particularly professional women, in low regard"; "runs the branch as if it is 'A Whorehouse and White Men's Club'"; "regularly and loudly engages in verbal and non-verbal vulgarity"; "is racially intolerant and engages in ethnic slurs"; and "manages by harassment and intimidation." *Id.*

SSB's Associate General Counsel, Eugene Clark, investigated Ms. Martens' complaints, resulting in an internal report dated December 13, 1994. *Id.* The investigation consisted primarily of interviews with SSB staff at the Garden City office.[5] *Id.* The report concluded that Mr. Cuneo:

> demonstrated an insensitivity towards women and racial minorities. As a manager of a business unit, his insensitivities may translate into unlawful discriminatory practices. With regard to women, it could be asserted that he encourages, participates in and tolerates a sexually hostile environment. In addition, with regard to women at the sales level and minorities at all levels, it could be asserted that his hiring practices have an exclusionary effect.

Id.

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[5]Two female former "FC's" (Financial Consultants), declined to participate in the interviews. Leonard Aff., Ex. 32. One of them, Lorraine Parker, sent a letter to Mr. Dimon "in which she reiterates many of the concerns raised by Martens." *Id.* Mr. Clark's office also received letters from "various employees in support of Cuneo." *Id.*

The Clark report recommended that

> management take steps to assure that the employment practices in Garden City are lawful. Indeed, such steps should be promptly taken given the fact that there exists evidence that concerns have been previously brought to management's attention and that the response to such was inadequate to assure compliance with lawful employment practices.

Id.

In the aftermath of the Clark report, SSB "concluded that [Cuneo] had fallen short of the high standards which Smith Barney expects of its managers. In January 1995, [Cuneo] was disciplined and placed on leave of absence. Shortly after, he retired." Leonard Aff., Ex. 31.

The *Martens* plaintiffs sought relief "on behalf of themselves and all others similarly situated." The Martens Complaint asserted "Class Allegations" with respect to the following: (1) numerosity of the class; (2) commonality of questions of law and fact; (3) typicality of the named plaintiffs on behalf of the class; (4) fairness to the represented class members; and (5) predominance of common class questions over individual issues.[6] *Id.* at 24. An Amended Complaint was filed in July, 1996, adding one plaintiff. A Second Amended Complaint was filed on October 23, 1996, adding 20 additional plaintiffs, who had, between them, worked at "17 branch offices in 11 states." Leonard Aff. at para. 8. The allegations in the Martens Complaint described conduct at "SSB and its predecessors encompassing a period of 15 years." *Id.*

[6]In its Memorandum of Law, SSB states that the Martens Complaint "was not styled as a class action and had none of the mandatory class action allegations." This statement is inaccurate. *See Lewis Tree Serv. v. Lucent Techs., Inc.*, 211 F.R.D. 228, 230 (S.D.N.Y. 2002) ("Before certifying a class, the Court must determine that the party seeking certification has satisfied the four prerequisites of Rule 23(a): numerosity, commonality, typicality, and adequacy of representation.").

On October 28, 1996, a second putative class action was commenced against SSB by 6 employees of its California offices, in the United States District Court for the Northern District of California. The plaintiffs in *Alvarez v. Smith Barney, Inc., et al.*, C-96-3919, asserted claims similar to those of the *Martens* plaintiffs.[7] The *Martens* and *Alvarez* plaintiffs were represented by the same attorneys, Linda Friedman and Mary Stowell of the firm Leng Stowell Friedman & Vernon in Chicago, Illinois. One attorney offering her services to SSB in connection with the *Martens* matter described Ms. Friedman as "a formidable opponent who uses all available means to achieve her end." *Id.*, Ex. 33. An attorney at a different insurance company who had dealt with Ms. Stowell described her as "very knowledgeable in the employment area" and told of a "routine discrimination claim" against the company that was transformed by Ms. Stowell into a publicity item, causing the insurance company to lose a public finance contract and settle for an apparently much larger sum than initially anticipated. *Id.,* Ex. 33. SSB hired the firm of Paul, Weiss, Rifkind, Wharton & Garrison ("Paul Weiss") to defend the class actions.

Royal suggests that Paul Weiss engaged in settlement discussions with plaintiffs' counsel in the summer of 1996, citing the affidavit of its coverage counsel, Edwin Smith (*see infra* Part I.D.). SSB disputes this. The record shows that, as of December 13, 1996, substantive discussions were ongoing between Jay Hines, SSB's Paul Weiss attorney, and plaintiffs' counsel. *See* Leonard Aff., Ex. 37. In an email of that date, addressed by Mr. Hines to the "Smith Barney

[7]A memorandum dated April 4, 1997 from SSB's attorney Mark Belkin stated that 15 of the 24 plaintiffs named in the underlying actions had made complaints of discrimination or harassment prior to the commencement of the class actions. After investigation, SSB took disciplinary action in connection with 13 of these 15 complaints. Leonard Aff., Ex. 7.

Team," Hines described a lengthy conversation he had just had with plaintiffs' attorney Linda Friedman. *Id.* According to Hines, most of the conversation with Friedman could not be characterized as "good news." *Id.* Hines reported that Friedman had stated that the plaintiffs in the two actions now totaled approximately 100, and she was "getting two or three calls a day" from potential claimants. *Id.* In a file memo dated December 19, 1996, Hines stated that during the call with Friedman on December 13, another Paul Weiss attorney, Mark Belnick, had indicated to Friedman that "as we had said last fall, [SSB] was interested in dicussing a settlement" and that a "class settlement was more attractive than one involving only the individual plaintiffs." *Id.*, Ex. 38. Whatever the commencement date of the settlement discussions, it is agreed that the discussions led to a settlement demand by plaintiffs of $400 million on January 20, 1997. SSB contends that, prior to this demand, it "did not receive any inkling of the magnitude of plaintiffs' settlement demands... ." Reynolds Aff. at para. 8.

B. The Royal Policies

SSB sought coverage under 4 annual umbrella liability policies issued by Royal beginning on April 1, 1993. Each policy provides up to $15 million of coverage in excess of $2 million of coverage provided by SSB's primary policy. Timely notice of occurrence was required by each of the policies as follows. The 1993 policy provided that:

> [w]henever it appears that an occurrence covered hereunder is likely to involve the Company [Royal], written notice shall be sent to the Company as soon as practicable. Such notice shall contain particulars sufficient to identify the Insured and also reasonably obtainable information respecting the time, place and circumstances of the Occurrence.

Leonard Aff., Ex. 11 at ROY01230. The notice provisions in the 1994 and 1995 policies are substantially similar to the 1993 policy. The 1996 policy provides: "[y]ou must see to it that we

are notified as soon as practicable of an 'Occurrence' or offense which may result in a claim or 'Suit.'" *Id.*, Ex. 13 at ROY02426.

C. SSB's Notice

On May 21, 1996, SSB's general liability insurance broker, Walter Pidhajecky, sent a facsimile to the Assistant Director for the Insurance and Risk Management Department for SSB, attaching a newspaper article discussing the *Martens* action. Leonard Aff. at para. 14. On the same day, SSB notified its predecessor, Shearson Lehman Brothers ("Lehman"), of the *Martens* action. The next day, May 22, 1996, SSB directed its broker for Director's and Officer's ("D&O") insurance to notify all of its D&O carriers (primary and excess) of the *Martens* action.[8] *Id.* at para. 15. On June 5, 1996, SSB notified its primary insurers[9] of the *Martens* action. *Id.* at para. 17. Approximately 10 months later, on April 3, 1997, SSB notified its excess insurers, including Royal, of the *Martens* action. *Id.* at para. 19.

D. Settlement Meetings

Royal's coverage counsel, Edwin L. Smith, attended settlement discussions at SSB in June and August 1997. Leonard Aff. at para. 20. In his affidavit, Smith avers that at the June 26, 1997 meeting, SSB's in-house counsel, Gene Clark, described a "settlement overture" made by SSB to the *Martens* plaintiffs in the summer of 1996, which was rejected "because the

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[8]According to SSB, no import should be ascribed to the fact that it notified "all of the layers" of its D&O insurance, because the D&O policies, unlike the Royal policies, were "claims made policies," meaning that notice was required in the same year as the occurrence. Affirmation of T. Reynolds, n. 5. Royal counters that SSB has not provided any evidence that it "had any practice of automatically providing simultaneous notice to all D&O insurers... ." Leonard Reply Aff., para. 26 (emphasis in original).

[9]One of SSB's primary insurance carriers, Travelers Indemnity Company of Illinois ("Travelers") was a corporate sibling of SSB. Leonard Aff., Ex. 18, p. 2 n.2.

plaintiffs only wanted money." Affidavit of E. Smith, para. 3. Smith further avers that Clark stated at the meeting that the "potential class" of plaintiffs in the *Martens* and *Alvarez* actions "would be the largest class ever certified" and that the "risks were considered to be enormous." *Id.* at para. 5. SSB states that Mr. Clark, at his deposition, "disputed" these and other statements attributed to him by Mr. Smith. Memorandum of Law of Defendants, p. 8, citing Reynolds Aff. at para. 21 (citing EBT of G. Clark, p. 325). In the cited portion of Mr. Clark's deposition, he did not directly dispute Mr. Smith's claims; Clark testified that his first recollection of settlement discussions was at the mediations (which occurred in July of 1997). Clark further testified that the possibility of class certification presented "substantial risk"[10] to both SSB and the *Martens* and *Alvarez* plaintiffs. EBT of G. Clark, p. 325.

SSB and the class plaintiffs signed a Memorandum of Understanding ("MOU") on August 15, 1997. Leonard Aff. at para. 21. A formal Stipulation of Settlement was executed on November 18, 1997. *Id.* at 22. The Stipulation did not establish specific monetary settlement terms; rather, it set forth a Dispute Resolution Process ("DRP") by which individual claims would be determined. *Id.* According to SSB, "Royal showed no interest in participating in the negotiating and structuring of the [DRP], such as attending the mediation sessions regarding the DRP, or in otherwise protecting its rights. Although Mr. Smith reviewed the MOU several

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[10]A May 9, 1997 Paul Weiss memorandum to SSB in-house attorneys, addressed to Clark, *et al.*, stated that the strategy to defeat class certification would be to challenge the commonality, typicality and adequacy allegations under the "rigorous analysis" required by *General Telephone Co. v. Falcon,* 457 U.S. 147 (1982). Reynolds Aff., Ex. 6. The 52-page memo sets forth "numerous" grounds upon which such challenge would be made. Reynolds Aff., para. 27. "Unfortunately," the memo observed, "the case law applying Rule 23 in the employment discrimination [sic] is strikingly inconsistent. ...the inconsistency of the case law leaves the question of class certification open to widely disparate resolutions on the same facts." *Id.*

months before it was signed, Royal offered no comments." Reynolds Aff. at para. 22.

A class of 1920 members elected to participate in the DRP. Leonard Aff. at para. 23. As of October 18, 2004, all but 35 DRP claims had been resolved, in the aggregate amount of $91 million. *Id.*, Ex. 23 (October 18, 2004 letter from Citigroup, Inc. to International Insurance Company). As of the same date, SSB had expended approximately $33 million to defend the *Martens* matter, bringing its total cost to $124 million. *Id.*

E. SSB's Prior Experience with Sexual Harassment and Discrimination Claims

It is undisputed that *SSB* is a national securities brokerage firm which employed, during the relevant time periods, approximately 25,000 to 30,000 people, of whom 11,000 were Financial Consultants.[11] However, the parties dispute the nature and extent of SSB's experience with regard to liability for sexual harassment and discrimination claims in the years leading up to the *Martens* and *Alvarez* actions. According to Royal, statistical employment records obtained by plaintiffs' attorneys in those actions revealed that SSB "had already either resolved or was currently confronting hundreds of similar claims from SSB offices throughout the country," with an average payout per claim exceeding $80,000. Leonard Aff. at paras. 40-43 (emphasis in original). The referenced documents appear to indicate that for sexual harassment and sexual discrimination matters "opened from January 1993 through April 1997," SSB had paid out

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[11]SSB acquired Shearson Lehman ("Shearson") in July 1993. Royal suggests that the acquisition "vastly" increased SSB's loss exposure with regard to employment law claims. Leonard Aff. at para. 28. SSB disputes this, citing to the memorandum of SSB's Director of Insurance & Risk Management, Kevin Christel regarding the acquisition, which refers to Shearson's "adverse loss experience for Personal Injury (PI), particularly Wrongful Termination," and predicts "big exposure for [SSB] during the next 12 months." Leonard Aff., Ex. 27. SSB points out that there is no evidence that the anticipated increased exposure was connected to any gender-related employment claims, and that the 12-month period referred to would have concluded "fully two years" prior to the commencement of the *Martens* action.

$4,105,785.48 and $3,934,275.01, respectively. *Id.*, Ex. 30.

SSB contends that Royal overstates SSB's previous experience with liability for sexual harassment and discrimination claims by employees. According to SSB, "in the several year period prior to the *Martens* action, SSB's average payment to women asserting gender harassment or gender discrimination claims was only $28,500 per claim. More importantly, the majority of claims brought ended in no payment being made by SSB." Reynolds Aff. at para. 6 (emphasis in original). However, SSB does not dispute the aggregate figures reported in the referenced documents, which indicate an average annual payout for the two types of claims combined, for the approximately four-year period reported, of approximately $2 million per year.[12]

SSB also disputes Royal's characterization of its past experience as tending to suggest potentially "enormous" liability for SSB in the *Martens* and *Alvarez* actions. SSB cites its internal analysis of potential liability in those actions, conducted by Mr. Clark. Clark testified that he thought that any gender-related issues raised by the actions were "anecdotal, but not pervasive or pattern practice"; and that "historically there [had] not been substantial numbers of [gender-based] claims filed." EBT of G. Clark at 294, 317.

SSB does not dispute that in preparation for a meeting to be held on January 17, 1994, its general liability insurance broker, Mr. Pidhajecky, delivered a memorandum to Kevin Christel, SSB's Director of Corporate Risk Management, referring to a recent restriction in insurance coverage as a result of an "explosion in Employment Practices Liability suits during the past few

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[12]The Court arrives at this conclusion by adding the two aggregate payout amounts together and dividing by 4. As expressed in numbers: the sum of $4,105,785.48 and $3,934,275.01 is $8,040,060.49; dividing by 4, the result is $2,010,015.13.

years." Leonard Aff., Ex. 24. Nor does SSB dispute that in April 1994, Mr. Christel forwarded to the Corporate Treasurer, Jerry Fadden, a list of examples of recent awards and settlements in employment-related lawsuits, including class actions, which demonstrated awards ranging from $1 million to $157 million. *Id.*, Ex. 25. Of the 21 awards or settlements listed, all but 6 were $10 million or greater. *Id.* The largest of these was a settlement payment of $157 million in a class action brought by State Farm Insurance employees alleging "sex discrimination in its hiring practices." *Id.* The State Farm settlement reflected an average payout of $193,000 per plaintiff. *Id.*

III. Conclusions of Law

A. Summary Judgment

In order to prevail on a motion for summary judgment, the movant must establish its cause of action or defense sufficiently to warrant the court as a matter of law in directing judgment in its favor, and do so by tender of evidentiary proof in admissible form. *Zuckerman v. City of N.Y.*, 49 N.Y.2d 557 (1980). If the movant makes out a prima facie case, the opponent must come forward and "lay bare his proofs" of any alleged triable issues of fact. *See In re Dissolution of Rencor Controls, Inc.*, 263 A.D.2d 845 (3rd Dept. 1999) citing *Hanson v. Ontario Milk Producers Coop., Inc.*, 58 Misc.2d 138 (Sup. Ct. Oswego Co. 1968) (Aronson, J.); *Bank of New York v. Spitzer*, 43 A.D.2d 105 (1st Dept. 1973). The parties agree that the Royal policies required reasonably timely notice of an occurrence. *See Security Mut. Ins. Co. v. Acker-Fitzsimons Corp.*, 31 N.Y.2d 436 (1972). Royal argues that it is entitled to summary judgment because SSB's notice was untimely as a matter of law. SSB counters that the reasonableness of its notice presents a question of fact to be determined at trial. For the reasons

that follow, the Court agrees with Royal.

B. Reasonableness Standard for Timely Notice

In *Security Mutual,* The Court of Appeals set forth the law of New York with regard to an insured's obligation to provide notice of an occurrence:

> Notice provisions in insurance policies afford the insurer an opportunity to protect itself, and the giving of the required notice is a condition to the insurer's liability. Absent a valid excuse, a failure to satisfy the notice requirement vitiates the policy, and the insurer need not show prejudice before it can assert the defense of noncompliance.[13]
>
> There may be circumstances, such as lack of knowledge that an accident has occurred, that will explain or excuse delay in giving notice and show it to be reasonable. But the insured has the burden of proof thereon. Moreover, he must exercise reasonable care and diligence to keep himself informed of accidents out of which claims for damages may arise.
>
> Then, too, a good-faith belief of nonliability may excuse or explain a seeming failure to give timely notice. But the insured's belief must be reasonable under all the circumstances, and it may be relevant on the issue of reasonableness, whether and to what extent, the insured has inquired into the circumstances of the accident or occurrence.

Security Mutual, 31 N.Y.2d at 441 (citations, internal quotation marks omitted).

"The obligation to give notice 'as soon as practicable' of an occurrence that may result in

[13]Despite some doubts engendered by the First Department's decision in *Great Canal Realty Corp. v. Seneca Ins. Co.,* 13 A.D.3d 227, 230 (1st Dept. 2004), longstanding New York precedent remains valid: an insurer is not required to show prejudice in order to vitiate a policy for untimely notice. *See Great Canal Realty Corp. v. Seneca Ins. Co.,* 2005 N.Y. LEXIS 1257, 1-2 (2005) ("the carrier need not show prejudice before disclaiming based on the insured's failure to timely notify it of an occurrence").

a claim is measured by the yardstick of reasonableness." *Paramount Ins. Co. v. Rosedale Gardens, Inc.*, 293 A.D.2d 235, 239-240 (1st Dept. 2002) citing *875 Forest Ave. Corp. v Aetna Cas. & Sur. Co.*, 37 A.D.2d 11, 12 (1st Dept. 1971), *affd* 30 N.Y.2d 726 (1972). In case of a policy requiring notice as soon as practicable, "[t]he 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." *Paramount,* 293 A.D.2d at 239-240 (citations omitted). Where a policy "requires notice to the insurer when it *'appears likely'* that a claim will or may involve a policy," the obligation to give notice "'does not require a probability--much less a certainty--that the policy at issue will be involved.'" *Paramount,* 293 A.D.2d at 240 citing *Christiania General Ins. Corp. v. Great American Ins. Co.*, 979 F.2d 268, 276 (2d Cir. 1992) (emphasis added). In such case, all that is required is a "'reasonable possibility'" of the policy's involvement, "'even though there are some factors that suggest the opposite.'" *Id.* "The insured bears the burden of proving, under all the circumstances, the reasonableness of any delay in the giving of notice." *Paramount Ins. Co. v. Rosedale Gardens, Inc.*, 293 A.D.2d at 240 citing *Argentina v. Otsego Mut. Fire Ins. Co.*, 86 N.Y.2d 748, 749-750 (1995).

Here, the 1993, 1994 and 1995 policies issued by Royal required written notice "[w]henever it appears that an occurrence covered hereunder is likely to involve the Company." The 1996 policy requires notice of an occurrence as soon as "practicable." Thus, all of the Royal policies required prompt notice if and when SSB became aware of a "reasonable possibility" of the policies' involvement. *See Paramount,* 293 A.D.2d at 239-240. The record shows that at several different junctures, SSB should reasonably have detected a possibility that its liability in the *Martens* and *Alvarez* actions would exceed $2 million. One such juncture was the service of

the *Martens* complaint. Others included: (1) service of the second amended complaint in *Martens* (which named 20 new plaintiffs from 17 branch offices in 11 states) in July, 1996; (2) service of the *Alvarez* complaint on October 28, 1996; (3) commencement of settlement discussions, either in the "summer" of 1996, or at the latest, by December 13, 1996 (when plaintiffs' counsel indicated the aggregate number of name plaintiffs had reached approximately 100); and (4) plaintiffs' $400 million demand on January 27, 1997. Despite this series of events, SSB did not provide notice until April 3, 1997. Construing the record in the light most favorable to SSB, the Court concludes that its notice to Royal was untimely as a matter of law, regardless of which of the aforementioned trigger dates are used. *See Quality Investors, Ltd. v. Lloyd's London, Eng.*, 11 A.D.3d 443 (2nd Dept. 2004) (where plaintiffs' insurance policy required notice immediately of 'any happening likely to give rise to a claim,' defendant made out prima facie case of untimely notice by showing that plaintiffs' delay was between 3 and 11 months).

Upon receipt of the Martens Complaint, in May 1996, SSB knew, from its Garden City investigation, that Ms. Marten's allegations were not spurious. To the contrary, Mr. Clark's report stated that Mr. Cuneo encouraged, participated in and tolerated a "sexually hostile environment," and referred to the problem that previous reports of his conduct had not been expeditiously handled. From its own experience, and information it had with regard to other class actions involving gender-based employment claims, SSB knew that the potential liability in such an action could be well in excess of $2 million. Nor does the Court agree with SSB that the *Martens* action was not styled as a class action because it only named 3 plaintiffs; as discussed above, the first Martens Complaint made class allegations and described a company-wide pattern of conduct. The seriousness of the *Martens* and *Alvarez* actions, from their inception, was made

more apparent by the formidable reputation of the plaintiffs' attorneys. Against this backdrop, SSB's claim that initially it had *no* reason "to believe *Martens* would implicate its excess insurance policies," strains credulity.

Similarly, upon receipt of the second amended complaint in *Martens,* SSB could not reasonably have believed that its liability in the class actions *could not possibly* exceed $2 million. At that point, it was clear that the *Martens* action would implicate conduct in SSB offices nationwide, and thus, would need to be assessed in comparison with other gender-based employment class actions against national corporate entities. On December 13, 1996, SSB again should have concluded, that its obligation to provide notice to Royal had been triggered, when plaintiffs' counsel informed SSB's attorney that the number of plaintiffs was 100 and counting. Indeed, even assuming *arguendo,* that SSB had no inkling of the size of the plaintiffs' demand until January 27, 1997, SSB's notice, over two months later, would have been unreasonably tardy, because SSB offers no explanation or excuse. *See Travelers Ins. Co. v. Volmar Constr. Co.,* 300 A.D.2d 40, 43 (1st Dept. 2002) (insureds' "relatively short" unexplained delays in notice to insurer found unreasonable as matter of law; citing cases of delays found unreasonable as matter of law: *Deso v. London & Lancashire Ind. Co.*, 3 N.Y.2d 127, 130 [51days]; *Rushing v. Commercial Cas. Ins. Co.,* 251 N.Y. 302, 304 [22 days]; *Haas Tobacco Co. v American Fid. Co.,* 226 NY 343, 345 [10 days])); *Viles Contr. Corp. v. Hartford Fire Ins. Co.*, 271 A.D.2d 349 (1st Dept. 2000) (unexplained delay of almost two months held unreasonable as matter of law).

SSB argues that its delay in providing notice (prior to receipt of the $400 million demand from plaintiffs) is explained by its then good faith belief that its liability in the class actions could not exceed $2 million, and that the reasonableness of that belief presents a triable issue of fact.

The Court disagrees. While "[t]he reasonableness of an insured party's belief of nonliability is generally a question of fact," *(Generali-U.S. Branch v. Rothschild,* 295 A.D.2d 236, 238 (1st Dept. 2002) (citations omitted)), a court may find that the insured's "purported good faith belief in non-liability" is unreasonable as a matter of law. *See Brownstone Partners/AF & F, LLC v. A. Aleem Constr.,* __ A.D.3d __ (1st Dept. 2005) (finding unreasonable as matter of law plaintiffs' proferred excuse that they "relied upon the subcontractor's assurances that the subcontractor would bear responsibility for injuries caused by the reckless conduct of its employees"); *DiGuglielmo v. Travelers Prop. Cas.,* 6 A.D.3d 344, 346 (1st Dept. 2004) *appeal denied* 3 N.Y.3d 608 (2004) (plaintiff's purported belief in non-liability found unreasonable as matter of law where plaintiff store owner fatally shot individual in store parking lot and was advised by decedent's family's attorney to contact his insurer with respect to injuries alleged as result of decedent's death); *compare Zurich-American Ins. Group,* 300 A.D.2d 176, 178 (1st Dept. 2002) (finding "sufficient indicia of reasonableness in connection with [plaintiff's] delay" where plaintiff garment manufacturer was aware of defects in its products for several years and believed them to be caused by manufacturing errors [which would not be covered] but later discovered evidence of vandalism, which, arguably, was covered); *Generali-U.S. Branch v. Rothschild,* 295 A.D.2d 236, 238 (1st Dept. 2002) (landlord-insured had good faith belief in non-liability, and, thus, fact question was raised as to timeliness of notice, where landlord re-painted in response to claimed lead paint problem, and heard no further complaints for years). As discussed above, SSB's purported belief in non-liability was unreasonable. The reasonable possibility that the *Martens* and *Alvarez* actions would generate liability in excess of $2 million–and possibly *well* in excess of that amount–should have been detected at various points, ranging from 11 months, to

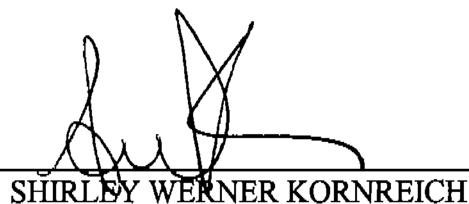
just over 2 months, from SSB's notice to Royal. Indeed, SSB's notice to its other insurers promptly after receipt of the Martens Complaint is evidence that SSB believed it might be liable, and tends to contradict its purported belief in non-liability. *See* Travelers, 300 A.D.2d at 43 (insured's notice to one insurer contradicted its defense of belief in non-liability) (citation omitted). Thus, the Court concludes that SSB's notice to Royal was unreasonably untimely as a matter of law.

Finally, SSB's argument that a "recent change to New York Law" requires a showing that Royal was prejudiced by the delay, is without merit. *See Great Canal Realty Corp. v. Seneca Ins. Co.,* 2005 N.Y. LEXIS 1257, 1-2 (2005). Accordingly, it is

ORDERED that plaintiffs' motion for summary judgment is granted; and it is further

ORDERED that plaintiffs' first, second, third and fourth counterclaims are dismissed; and it is further

ADJUDGED and DECLARED that plaintiffs Royal Indemnity Co. and Royal Insurance Company of America are not obligated to provide defense and/or indemnification to defendants for liability as a result of claims brought against defendants in *Martens v. Smith Barney, Inc., et al.,* No. 1:96-CV-03779-JGK (S.D.N.Y.), and *Alvarez v. Smith Barney, Inc., et al.,* C-96-3919 (N.D.Ca.).



Date: July 27, 2005
New York, New York

SHIRLEY WERNER KORNREICH