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

WALTER B. TOLUB

PART 15

Index Number : 604424/2004

ACE PACKING

VS

CAMPBELL SOLBERG ASSOCIATES

Sequence Number : 002

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

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

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

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the accompanying memorandum decision.

FILED
AUG 15 2006
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 8/7/06

WALTER B. TOLUB J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

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ACE PACKING CO., INC.,

Plaintiff,

INDEX NO.: 604424/2004
Motion Seq. 002

- against -

CAMPBELL SOLBERG ASSOCIATES, INC., DAVID J. LOUIE, INC. and UTICA FIRST INSURANCE COMPANY,

Defendants.

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WALTER B. TOLUB, J.

By this action, plaintiff Ace Packing Co., Inc (Ace) moves for summary judgment against defendant Utica First Insurance Company (Utica), and defendant Campbell Solberg Associates, Inc. (Campbell). Plaintiff additionally seeks an order from this court requiring defendants to pay plaintiff's attorneys' fees in the defense of the action pending in Supreme Court, Kings County, captioned, Frankie Daniels v Ace Packing Co., Inc., Index No. 10803/04 (hereinafter, "the underlying action").[1] Defendant Utica cross-moves for summary judgment on the claims and cross claims brought against them and for a declaration pursuant to CPLR 3001 that it has no duty to defend or indemnify plaintiff in the underlying action. Defendant Campbell also cross-moves for summary judgment, and for issuance of a declaration obligating defendant Utica to defend and indemnify plaintiff with respect to the underlying action. Lastly, defendant David J.

[1] For purposes of this motion, the court's reference to the underlying action refers to the summons and complaint originally filed in Kings County which was subsequently transferred to this court. Specifically, on or about July 21, 2005, the underlying action was transferred and is now entitled Frankie Daniels v Ace Packing Co., Index No. 402416/05, Sup Ct, NY County, J. Tolub.

Louie, Inc. ("Louie") cross moves for summary judgment on the basis of a lack of contractual privity as between Louie and plaintiff.

Background

Plaintiff is a meat wholesaler. In 2001, plaintiff purchased a comprehensive commercial liability insurance policy for the period of September 2, 2001 through September 2, 2002. The policy, brokered by defendant Campbell, was issued by defendant Utica. Defendant David J. Louie, Inc. ("Louie") is Utica's agent.

This litigation arises in connection with an incident which occurred in 2001. As alleged in the underlying action, Frankie Daniels, a truck driver, was injured on December 19, 2001 when he sustained injuries while unloading his truck. Mr. Daniels' injuries, were allegedly caused by a forklift owned by Plaintiff. A witness to the incident and forklift operator for Ace, Sam Jovic, claims that another forklift operator inadvertently knocked Mr. Daniels from his truck, but neither the police nor an ambulance were called to assist Mr. Daniels. Rather, approximately 20 minutes after the incident, Mr. Daniels returned to his truck and drove off.

At some point thereafter, Mr. Jovic learned that Mr. Daniels had to be relieved from driving later that day, although it is unclear from the record how Mr. Jovic became aware of this information, whether he told anyone else employed by plaintiff of this information, or whether plaintiff had knowledge of the incident. The record also reflects that Michael Nelson, vice president of Ace, claims that he did not report the incident to Ace's insurance agent at the time it occurred because Mr. Daniels did not require any medical attention and drove away under his own volition. There is no indication in the record as to whether or not Mr. Nelson had any knowledge of Mr. Daniels' need for relief from work on the day in question.

One year later, on December 26, 2002, Mr. Daniels, through his counsel, served Ace with a notice requesting information regarding Ace's insurance. A follow-up letter was sent to Ace on January 24, 2003. In each instance, Ace transmitted the letters to defendant Campbell instructing it to forward the letters to defendant Utica.

On April 2, 2004, Mr. Daniels commenced the underlying action against Ace for personal injuries. In response, Ace forwarded the summons and complaint to defendant Campbell. Defendant Campbell then forwarded the pleading, as well as the December 2002 and January 2003 letters, to defendant Louie on June 4, 2004. Defendant Louie thereupon forwarded these documents to defendant Utica. It is not clear from the record whether defendant Campbell had, in fact, sent the December 2002 and January 2003 letters to either defendants Louie or Utica, at any time prior to June 4, 2004, since the employee who handled the account is no longer employed at defendant Campbell, and that individual's deposition has not yet been conducted.[2]

On July 15, 2004, 38 days later, defendant Utica notified Ace that it was denying coverage. In its disclaimer, Utica stated that the denial was based on Ace's untimely notification of the claim of loss. Specifically, the letter states:

> Our investigation revealed that [Ace] was put on notice of this claim on December 26, 2002 and again on January 24, 2003. Since we did not receive notice until June 7, 2004, the eighteen month delay in notifying the Company is considered late notice and a violation of the referenced policy condition requiring prompt notice to the Company. As such, the policy will not provide [Ace] with coverage for the claim of Frankie Daniels arising out of his December 19, 2001 accident. Since the policy's defense obligation is conditioned upon coverage being provided under the policy, it will not provide [Ace] with a defense for this, or any, lawsuit filed in connection with this accident.

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[2] Most of the depositions in this matter have yet to be conducted.

The Present Action

The instant action was commenced by plaintiff on December 30, 2004, seeking judgment as to defendant Campbell for its alleged negligence and breach of contract in failing to timely forward notice of the underlying action to defendant Utica, as well as a declaratory judgment as against Utica for its untimely disclaimer. Additionally, Ace seeks indemnity and attorneys' fees in the underlying action from all defendants. Notwithstanding the fact that this action was commenced in 2004, it appears that little, if any, discovery, has been completed.

By its summary judgment motion, Ace asserts that Utica's 38-day delay in notifying Ace that coverage would be denied is unreasonable as a matter of law, and, as such, Utica must be compelled to defend and indemnify Ace in the underlying action. Ace further contends that if the notification to Utica is determined to be untimely, then the untimeliness was solely the result of Campbell's failure to provide timely notice of Mr. Daniels' claim to Utica, and, as such, Campbell is liable for all defense costs incurred by Ace in defending the underlying action.

Defendant Utica counters that summary judgment is not warranted against it because: (1) Ace breached the notification provisions of the insurance policy; (2) Utica timely disclaimed coverage after conducting an investigation of the claims; and (3) Ace's motion is premature, presents questions of fact, and is defective because it is not based on an affidavit of a person with knowledge. Defendant Campbell, in turn and joining in Ace's argument, asserts that Utica failed to give timely notice of the disclaimer; and, if the court were to find that Utica's disclaimer was timely, then Ace was responsible for any late notice since it failed to notify Utica of the accident when it occurred in December 2001. Campbell also asserts that plaintiff's motion is unsupported by any admissible evidence and is premature.

Both Utica and Campbell contend that plaintiff failed to file an affidavit of an individual with personal knowledge of the facts in this case. While it is well settled that an affidavit in a summary judgment motion should indicate that it is being made by one having personal knowledge of the facts and that an affidavit of an attorney is of no probative value in moving for summary judgment (Marinelli v Shifrin, 260 AD2d 227 [1st Dept 1999]), this defect can be obviated by the inclusion of other evidentiary proof in admissible form, such as documentary evidence (see Alvarez v Prospect Hosp., 68 NY2d 320 [1986]; Olan v Farrell Lines Inc., 64 NY2d 1092, 1093 [1985]; see also Lewis v Safety Disposal Sys. of Pennsylvania, Inc., 12 AD3d 324 [1st Dept 2004] ["an attorney's affirmation may serve as a vehicle to introduce documentary evidence in support of a motion for summary judgment"]). Since plaintiff's counsel's affidavit in support of its summary judgment motion merely reiterates what can be deciphered from the documents attached to the affidavit, and plaintiff subsequently filed the affidavit of Mr. Nelson, the court rejects defendants' argument that plaintiff's motion for summary judgment is defective.

Defendant Louie argues that its cross motion for summary judgment should be granted in its favor since there is no privity of contract between Louie and Ace, and Louie was, at all times herein, acting as Utica's agent.

Discussion

As with any motions for summary judgment, success is naturally predicated upon whether the proponent of the motion has made a "prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact" (Wolff v New York City Trans. Auth., 21 AD3d 956 [2d Dept 2005], quoting Winegrad v New York University Med. Ctr., 64 NY2d 851, 853 [1985] [internal quotations omitted]). The party

opposing the motion must then come forward with sufficient evidence to create an issue of fact for the consideration of the jury (Pinto v Pinto, 308 AD2d 571 [2d Dept 2003]). The role of this court is to find the issues, and not resolve them (Sillman v. Twentieth Century Fox Film Corp., 3 NY2d 395 [1957]; Winegrad v. New York University Medical Center, 64 NY2d 851, 853 [1985]. See also, Barr, Altman, Lipshie and Gerstman; *New York Civil Practice Before Trial*, [James Publishing 2005] §37:91-92).

In the instant motion, it is obvious to this court that Ace promptly submitted the December 2002 and January 2004 notices to its insurance broker, Campbell. However, such a submission alone does not establish that sufficient notice was given to Utica (see Matter of First Cent. Ins. Co. v Malave, 3 AD3d 494 [2d Dept 2004] [notice provided to insured's insurance broker was not notice to the insurer], citing Security Mut. Ins. Co. of New York v Acker-Fitzsimons Corp., 31 NY2d 436, 442 n 3 [1972]; Serravillo v Sterling Ins. Co., 261 AD2d 384, 385 [2d Dept 1999] [other citation omitted]). However, irrespective of whether Ace gave timely notice to Utica, Utica failed to timely provide notice of its disclaimer of coverage for the underlying lawsuit (see Matter of New York Cent. Mut. Fire Ins. Co. v Aguirre, — NY3d —, 2006 WL 1593955, 2006 NY Slip Op 04749 [June 13, 2006], quoting First Fin. Ins. Co. v Jetco Contr. Co., 1 NY3d 64, 67 [2003]; see also Matter of Worcester Ins. Co. v Bettenhauser, 95 NY2d 185, 188 [2000] [an insurer's failure to comply with Insurance Law § 3420 (d) precludes it from denying coverage based upon a policy exclusion]; Matter of Allstate Ins. Co. v Cruz, — AD3d —, 817 NY2d 129 [2d Dept 2006]; Milbank Hous. Dev. Fund v Royal Indem. Co., 17 AD3d 280 [1st Dept 2005] ["although insured may have failed to provide timely notice of occurrence as required by policy, liability insurer's delay of more than 60 days in disclaiming

coverage for underlying personal injury action was unreasonable]; Matter of Nationwide Mut. Ins. Co. v Steiner, 199 AD2d 507 [2d Dept 1993] [an insurer must give timely notice of disclaimer to its insured even where the insurer has not in the first instance received timely notice of the accident]; Matter of Aetna Casualty & Surety Co. v Rodriguez, 115 AD2d 418 [1st Dept 1985]).

Defendant Utica argues that the timing of its disclaimer notice was reasonable, since it investigated whether or not the underlying lawsuit was covered in light of the untimeliness of Ace's notice (see New York Cent. Mut. Fire Ins. Co. v Majid, 5 AD3d 447 [2d Dept 2004]; 2540 Assocs. v Assicurazioni Generali, S.p.A., 271 AD2d 282 [1st Dept 2000]; Norfolk & Dedham Mut. Fire Ins. Co. v Petrizzi, 121 AD2d 276 [1st Dept 1986]). In most cases, the timeliness of an insurer's notice of disclaimer "will be a question of fact, dependent on all of the circumstances of a case that make it reasonable, or unreasonable, for an insurer to investigate coverage" (First Fin. Ins. Co., 1 NY3d at 70). However, where the grounds for a disclaimer were "readily apparent before the onset of the delay", from the documents submitted to defendant (Matter of New York Cent. Mut. Fire Ins. Co. v Aguirre, 2006, WL 1593955, 2006 NY Slip Op 04749; see also First Fin. Ins. Co., 1 NY3d 64), the defendant has no need to conduct an investigation, and, therefore, any delay in disclaiming coverage is unreasonable as a matter of law (see 2833 Third Ave. Realty Assocs. v Marcus, 12 AD3d 329 [1st Dept 2004] [37-day delay was unreasonable where grounds for disclaimer was evident from the face of the late notice claim]; Squires v Robert Marini Bldrs., Inc., 293 AD2d 808 [3d Dept 2002] [42-day delay unreasonable; investigation superfluous]; West 16th Street Tenants Corp. v Public Service Mut. Ins. Co., 290 AD2d 278, 279 [1st Dept 2002] [30-day delay unreasonable]; Faas v New York Cent. Mut. Fire Ins. Co., 281 AD2d 586

[2d Dept 2001] [42-day delay unreasonable]; Matter of Colonial Penn Ins. Co. v Pevzner, 266 AD2d 391 [2d Dept 1999] [41-day delay unreasonable]).

In the instant action, Utica's disclaimer letter states that its basis for denying coverage to Ace was due solely to the purported untimeliness of Ace's notice to Utica of the claim in the underlying action, which was apparent from the documents already in Utica's possession. As such, there was no need for Utica to conduct an investigation into the underlying claims, such as interviewing Mr. Jovic as part of its investigation (see First Fin. Ins. Co., 1 NY3d at 69; Milbank Housing Fund v Royal Indemnity Co., 17 AD3d at 280-281; 288 Third Avenue Realty Assoc. v Marcus, 12 AD3d 329; West 16th St. Tenants Corp. v Public Serv. Mut. Ins. Co., 290 AD2d 278). Based on the foregoing, Utica's 38-day postponement in providing notice of its disclaimer of coverage is unreasonable as a matter of law, and the portion of plaintiff's motion seeking a declaration that defendant Utica is required to defend and indemnify it for its attorneys' fees in connection with the underlying action is therefore granted.

With respect to the portion of plaintiff's motion seeking summary judgment against defendant Campbell, this court finds plaintiff's motion premature. Here, plaintiff asserts that Campbell was negligent in timely notifying Utica of Ace's claim. In furtherance of this claim, plaintiff argues that it notified Campbell of the claim against it in December 2002 and January 2003. Plaintiff thus claims that Campbell was obligated to inform Utica, and ensure that Utica had notice of the claim. In opposition, Campbell claims that Ace had notice of the claim on or about December 19, 2001, more than one year before plaintiff first notified Campbell of the accident, and therefore plaintiff should be liable for its own actions. Ace further asserts that it was not required to notify defendants because it had a good faith belief that it would not be liable

for any of Mr. Daniels' injuries (see Great Canal Realty Corp. v Seneca Ins. Co., 5 NY3d 742, 743 [2005]; Merchants Mut. Ins. Co. v Hoffman, 56 NY2d 799 [1982]). Specifically, Ace claims that it did not suspect that a claim would be brought because, on the day in question, Mr. Daniels did not require medical attention and drove away shortly after the accident. Given the amount of triable issues of fact with respect to the issue of when notice was required to be given, and, whether said notice was timely, this court must deny the portion of plaintiff's motion seeking summary judgment against defendant Campbell as premature.

Also premature is Ace's contention that Campbell is liable for all costs incurred by Ace in defending the underlying action (Martini v Lafayette Studio Corp., 273 AD2d 112 [1st Dept 2000]). Most recently, the First Department held that an insured's action brought against its insurance broker for breach of contract and negligence claims as a result of "failing to timely forward notice of the subject claims to the insureds' carrier" was properly permitted (see Layandier v Landmark Ins. Co., 26 AD3d 264 [1st Dept 2006]). Although Ace promptly forwarded the notices to Campbell, it is not clear how Campbell handled receipt of those notices, since the person responsible for handling the claim, Leila Bankston, is no longer employed by Campbell. Campbell asserts that Ms. Bankston's deposition is necessary. This court agrees. Since discovery is necessary on the issues of the exact date of plaintiff's knowledge of the claim, and whether Ms. Bankston forwarded the December 2002 and January 2003 letters contemporaneously upon receipt, plaintiff's motion for summary judgment as against Campbell and Campbell's cross motion in the alternative are premature, and therefore denied with leave to renew after discovery, if so warranted.

Lastly, the court turns to Louie's cross motion for summary judgment. Louie asserts that

under New York law, a broker will only owe a duty to an entity seeking coverage under an insurance policy if privity existed between them relative to that policy (Utica First Ins. Co. v Floyd Holding, Inc., 294 AD2d 351 [2d Dept 2002], citing Sinclair's Deli, Inc. v Associated Mut. Ins. Co., 196 AD2d 644 [2d Dept 1993]). Louie contends that there is no privity between it and Ace. While Ace asserts in the complaint that "[t]hrough the services of Campbell, [Louie], Ace and Utica entered [sic] a contract whereby Ace paid premiums and Utica issued a policy of insurance to Ace" (Complaint, ¶ 28), and Ace's insurance policy with Utica lists Louie as its agent (see Commercial Package Policy, Policy No: CPP 1184409 01 dated 10/23/01), Ace submits no opposition to Louie's cross motion. As such, the court grants Louie's cross motion in its entirety. Accordingly, it is

ORDERED that the summary judgment motion brought by plaintiff Ace Packing Company, Inc., is granted to the extent that the court holds that defendant Utica First Insurance Co.'s disclaimer of coverage was untimely and Utica is obligated to defend and indemnify Ace, the defendant in the underlying action captioned, Frankie Daniels v. Ace Packing Co., Inc., Index No. 402416/2005, and the remaining portions of the summary judgment motion brought by plaintiff are denied; and it is further

ORDERED that the cross-motion made by defendant Campbell Solberg Associates, Inc. is granted solely with respect to the timeliness of the disclaimer made by defendant Utica First Insurance Co., and the remaining portions of the summary judgment motion brought by defendant Campbell are denied; and it is further

ORDERED that the cross-motion made by defendant Utica First Insurance Co. is denied as premature with leave to renew; and it is further

ADJUDGED and DECLARED that defendant Utica First Insurance Co. has a duty to defend and indemnify Ace in the underlying action; and it is further

ORDERED that the cross-motion brought by defendant David J. Louie, Inc. seeking summary judgment is granted and the complaint as well as any cross claims are hereby severed and dismissed as against defendant David J. Louie, Inc., and the Clerk is directed to enter judgment in favor of said defendant, with costs and disbursements as taxed by the Clerk; and it is further

ORDERED that the remainder of the action shall continue.

Counsel for the parties are directed to appear for the already scheduled Status Conference in this matter. Said conference is presently scheduled for October 6, 2006, at 11:00 a.m. in IA Part 15, Room 335, 60 Centre Street, New York, New York.

This constitutes the Decision and Order of the court.

Dated: August 7, 2006

ENTER:

Hon. Walter B. Tolub, J.S.C.