Consolidated Edison Co. of N.Y., Inc. v American Home Assur. Co.
2006 NY Slip Op 30625(U)
July 18, 2006
Supreme Court, New York County
Docket Number: 600527/01
Judge: Herman Cahn
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SCANNED ON 7/25/2006

[* 1]

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

PRESENT: HERMAN CAHN
Justice

PART 49

Con Edison
Plaintiff

- v -

American Home Insurance
Defendant.

INDEX NO. 600527/01

MOTION DATE 1/23/06

MOTION SEQ. NO. 044

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

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

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION IN MOTION SEQUENCE ....•

FILED
JUL 24 2006
COUNTY CLERK'S OFFICE
NEW YORK

July 18, 2006

[signature] J.S.C.

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 49
---X
CONSOLIDATED EDISON COMPANY OF
NEW YORK, INC.,

Plaintiff,

-against-

Index No. 600527/01

AMERICAN HOME ASSURANCE COMPANY, ALLSTATE INSURANCE COMPANY, AMERICAN REINSURANCE COMPANY, CENTURY INDEMNITY COMPANY, CERTAIN UNDERWRITERS OF LLOYD'S LONDON AND LONDON MARKET INSURANCE COMPANIES, CONTINENTAL CASUALTY COMPANY, DAIRYLAND INSURANCE COMPANY, EMPLOYERS INSURANCE OF WAUSAU, FIREMEN'S FUND INSURANCE COMPANY, HOME INSURANCE COMPANY, INSURANCE COMPANY OF NORTH AMERICA, INTERNATIONAL INSURANCE COMPANY, NATIONAL CASUALTY COMPANY, NEW ENGLAND INSURANCE COMPANY, PROTECTIVE NATIONAL INSURANCE COMPANY OF OMAHA, ST. PAUL FIRE & MARINE INSURANCE COMPANY, TIG INSURANCE COMPANY, TWIN CITY FIRE INSURANCE COMPANY, ZURICH AMERICAN INSURANCE COMPANY, and ZURICH INSURANCE COMPANY,

Defendants.

FILED
JUL 24 2006
COUNTY CLERK'S OFFICE
NEW YORK

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HERMAN CAHN, J.

In this declaratory judgment action, defendant Continental Casualty Company (Continental)[1] moves, pursuant to CPLR 3212, for partial summary judgment declaring that it has no duty to defend and indemnify plaintiff Consolidated Edison Company of New York (Con Ed)

[1]Initially, this motion was made on behalf of other defendants as well, but the other defendants have entered into settlement agreements with plaintiff, which are awaiting finalization. These defendants have not renoticed the motion, nor requested a ruling. Only Continental remains as an active defendant.

regarding environmental damage claims at the Astoria and Pelham Manor sites, because of failure to provide timely notice, as required by the subject policies.

Background:

The Insurance Policies:

Con Edison seeks coverage for both claims under three policies issued by Continental. The first policy, number RD 9972783, was in effect for the term June 2, 1961 to June 2, 1964; it provided $500,000 in coverage excess of Con Edison's $500,000 self-insured retention (SIR). The second policy, number RD 9433293, was in effect for the term June 4, 1964 to July 2, 1967; it provided the same coverage as the first policy. The third policy, number UMB 008-45-87-70, was in effect for the term April 28, 1983 to June 28, 1986; it provided $250,000 coverage as part of a $2.5 million layer of coverage in excess of Con Edison's $500,000 SIR.

Each of the policies required the insured to provide the carrier with notice of an occurrence "as soon as practicable." Continental policy numbers RD 9972783 and RD 9433293, in Condition 3, specifically provide as follows:

> Whenever the Insured has information from which the Insured may reasonably conclude that an occurrence covered hereunder involved injuries or damages which, in the event that the Insured should be held liable, is likely to involve this policy notice shall be sent to the Company as soon as practicable, provided however that failure to notify the Company of any occurrence which at the time of its happening did not appear to involve this policy, but which at a later date would appear to give rise the claims hereunder, shall not prejudice such claims.

Continental policy UMB 008-45-87-70, in Condition VI (B) (1), reads as follows:

> Upon the happening of an occurrence that appears likely to involve liability on the part of the company, written notice shall be given by or on behalf of the insured to the company as soon as practicable after

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> notice of occurrence is received by Consolidated Edison Company of New York, Inc.
>
> The insured shall give notice with full particulars, of any claim made on account of such occurrence. If thereafter suit or other proceeding is instituted against the insured to enforce such claim, the insured shall upon request, forward to the company every demand, notice, summons or other process or true copies thereof, received by the insured or the insured's representative together with a summary of factual data with respect to such claim, suit or other proceeding.
>
> Failure to notify the company shall not prejudice the insured's right hereunder, if the insured in exercise of reasonable judgment, shall be of the opinion that liability appears unlikely to exceed the underlying limits in any one occurrence.

The Astoria Site:

The Astoria site consists of 400 acres located along the northwest border of Queens County. At the time of the notice and to date, Con Ed is the owner of the site, which was partially utilized by it and the New York Power Authority (NYPA). The site has been employed in various utility operations for more than a century. From 1899 to 1961, the site included a manufactured gas plant (MGP). It also contains two electrical generating facilities (the Astoria Generating Station and the NYPA Polletti Plant), a gas turbine facility, two waste water treatment facilities (the Central Waste Water Treatment Facility and the Waste Water Treatment Facility), and a hazardous waste storage facility for the management of polychlorinated biphenyls (PCBs).

Over the years, the electric and gas generation operations have resulted in by-products, such as MGP wastes and PCBs, that appear to have entered the subsurface of the Astoria site. Con Ed was aware of the oil contamination as early as September 1977, but did not know the

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scope of the problem, its potential cost, or whether the regulatory authorities were going to require a clean-up. In 1980, New York State Department of Environmental Conservation (DEC) directed Con Ed to conduct a survey to determine if oil contamination in the East River was emanating from the Astoria site. Upon inspection, no oil sheen was noted. DEC directed that further groundwater analysis be undertaken and that a boom be put in place to contain any oil discharge. No further regulatory action was taken as a result of the survey.

In 1984 and again in 1986, the DEC requested information regarding former MGP plants. Con Ed responded to the inquiries providing information on the Astoria and Pelham Manor sites, as well as several others. No action by the DEC was undertaken as a follow-up to its inquiries. Thereafter, Con Ed began an internal analysis of the issue of environmental problems at its MGP sites and their potential regulatory impact. Several industry organizations, such as the New York Power Pool (NYPP) and the Electric Power Research Institute (EPRI), of which Con Ed is a member, also addressed potential environmental issues involving MGP operations and their waste by-products.

In 1988, Con Ed observed that a pitch-type substance had seeped to the surface of the Astoria site and conducted sampling to determine the nature of the substance. An analysis of the samples revealed that the substance was coal tar, a by-product of MGP operations. Con Ed determined that the coal tar was not a threat to human health or an environmental concern. Meanwhile, two employees were checked out to determine if they had been exposed to any deleterious effects from the seepage at the Astoria Pipe Yard. The tests confirmed that the exposure was below the danger levels set forth by the Occupational Safety and Health Administration (OSHA). Con Ed devised a procedure to excavate and dispose of coal tar as it

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surfaced at the Astoria site.

In 1989, Con Ed employee Lawrence Scerbo, concerned about the seepage observed at Astoria Pipe Yard, wrote President George H.W. Bush complaining about the environmental conditions of the site. The matter was referred to the Environmental Protection Agency (EPA). EPA indicated that it had been planning to conduct a study to determine the corrective action needed at that site, because Con Ed was treating hazardous waste under an interim permit. As a consequence, a Resource Conservation and Recovery Act (RCRA) facility assessment would be scheduled as soon as possible.

In 1989, the EPA, through its consultant, A.T. Kearney Inc. (Kearney), conducted a visual inspection of the Astoria Site, as part of the RCRA facility assessment. This inspection resulted in the identification of a "total of eighty-three (83) Solid Waste Management Units (SWMUs) and two Areas of Concern (AOCs) located within six (6) general operating areas" of the Astoria site, including the Astoria Transformer Shop PCB Waste Areas and the MGP area. OSHA also considered the report and concluded that 72 of the SWMUs and one of the AOCs required no further investigation. It did not conclude that any of the AOCs and SWMUs required remediation.

Kearney recommended that three SWMUs undergo a full RCRA Facility Investigation, including the Pipe Yard where the coal tar seeps were observed, and that six of the SWMUs and one AOC, including the North Storage Yard, should be sampled further. This latter area was to be checked for PCBs.

Meanwhile, DEC notified Con Ed that, in conjunction with the issuance of a hazardous waste storage permit, it would require that Con Ed conduct a RCRA facility investigation at the

Astoria site. Thereafter, EPA turned over supervision of the investigation of the Astoria site to DEC.

At that point, Con Ed entered into negotiations with DEC over which areas of the Astoria site would need to be investigated under the terms of hazardous waste permit to be issued by DEC.

In 1991, DEC issued a formal position paper on its approach to MGP sites, like Astoria and Pelham Manor. The goal of the policy was to collect information on all MGP sites in New York and to assess their investigation status so as to evaluate whether or not to place the particular site on the Registry of Hazardous Waste Sites. The policy indicated that "it is anticipated that most coal gasification sites will meet listing criteria and will be added to the body of the Registry once more." See Pelham Affidavit Exhibit 17, New York State DEC Memorandum dated March 5, 1991.

As a result of the DEC policy statement, Con Ed was requested to provide further information on its former MGP operations including dates of operation, and current site use. Con Ed responded by providing information on both the Astoria and Pelham Manor sites, among others. At about this time, the Public Service Commission (PSC), which sets rates for utilities, became interested in Con Ed's MGP sites and requested a copy of the submission made to DEC.

On June 5, 1992, the DEC filed a complaint against Con Ed. See Astoria Affidavit, Exhibit 21, DEC Index No. R2-1023-88-06). The complaint alleges repeated discharges of hazardous waste without proper permits at multiple sites, including Astoria. The Astoria site accounted for 31 claims out of a total of 319. The complaint sought the imposition of $20 million civil penalties, as well as comprehensive environmental audits, and remedial, restorative

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and preventive measures, as necessary. The parties agree that the civil penalty would not be covered by the insurance policies, but that the expense of the comprehensive audit and other actions are the subject of this lawsuit.

In February 1993, Con Ed put out a request for proposals to environmental consultants for the purpose of bidding on an RCRA Facility Investigation of the Astoria Site. The proposal called for the consultant to comment on corrective action conditions, prepare RCRA Facility Investigation work plans for those areas requiring investigation, perform an RCRA Facility Assessment of the remaining areas of the site that were identified by the EPA, and implement corrective measures as needed. ENSR obtained the contract with a bid of approximately $830,000.

On March 12, 1993, DEC issued a draft hazardous waste storage permit for the Astoria site, which "requires the facility to institute corrective action to address any uncorrected releases." Based upon available information, DEC determined "that further investigation is required to determine if there have been releases of hazardous waste or hazardous waste constituents to the environment." Astoria Affidavit, Exhibit 14 at p.2. The draft permit Module III set forth a detailed program, pursuant to RCRA, that Con Ed was to follow in investigating the Astoria site and remediating the site, if necessary.

The PSC compiled the information it obtained from utilities around the State, and on July 12, 1993, informed Con Ed that the expected cost of remediating MGP sites statewide was expected to cost between five hundred million and two billion dollars. It recommended that each utility prepare a long-term plan for dealing with its MGP sites. The letter also suggested that the PSC was about to establish regular reporting procedures for MGPs, and solicited Con Ed's views

on the proposed new policy.

The NYPP, of which Con Ed was a member, established a separate task force to interface with the regulators, DEC and the PSC, regarding the MGP issue. Con Ed participated in the NYPP MGP Task Force. Throughout 1993 and 1994, the Task Force considered various draft proposals for generic procedures to be included in consent decrees and monitored negotiations of its members with the DEC.

In January 1994, ENSR finalized its work plan for the investigation of the North Storage Yard area of the Astoria Site. Then, in March, Con Ed filed a Form 10K for 1993 with the Securities and Exchange Commission (SEC). The Form 10K names both the Astoria and Pelham Manor sites as significant proceedings under the Superfund or similar statutes, and it specifically referenced the complaint before the DEC. The Form 10K provided as to the Astoria site that "the site investigation is expected to commence in April 1994 and to cost approximately $800,000. The extent and cost of the remediation program will depend on the results of the investigation."

On May 1, 1994, DEC issued a final permit to Con Ed for the storage of PCB hazardous waste at the Astoria facility, which included a nearly identical provision for corrective action as the previously described Module III.

On November 4, 1994, Con Ed entered into a consent order with DEC to resolve the June 1992 complaint against it, and agreed to conduct comprehensive environmental audits, by independent third parties, of its facilities, including the Astoria site, and to remediate the effects of petroleum discharges at its sites.

The Giving of Notice:

On December 28, 1994, Con Ed's Insurance Manager directed Marsh & McLennan to

provide its insurers with notice of its environmental liabilities at the Astoria and Pelham Manor sites. On January 9, 1995, Sedgwick James of New York, Inc. forwarded a letter to Continental, notifying it of Con Ed's environmental liabilities for the Pelham Manor and Astoria sites under Continental policy UMB 008-45-87-70. Then, on January 19, 1995, Marsh & McLennan fowarded a letter to Continental notifying it of Con Ed's environmental liabilities for the Astoria and Pelham Manor sites under the other two policies.

On February 24, 1995, Continental acknowledged receipt of the notice letters, requested further information about the policies and claims, specifically raised the possibility of disclaimer based upon late notice, and reserved its rights.

No disclaimer because of late notice was issued for either site, until the defense of late notice was interposed in Continental's answer to the within complaint.

The Pelham Manor Site

The Pelham Manor site is located in the Village of Pelham Manor in Westchester County. From 1896 to 1968, Con Ed, or its predecessors in interest, operated a MGP at this location. As with the Astoria plant, MGP operations produced waste by-products that entered the subsurface of the site and present an environmental liability. The Pelham Manor site is currently owned by John Hancock Insurance Company and leased to Levin Properties, LP (Levin). The site currently is occupied by a commercial shopping center.

As with the Astoria site, Con Ed responded to DEC inquiries in the mid-eighties regarding the Pelham Manor site. No regulatory action resulted from Con Ed's responses.

In the late eighties, Levin, in contemplation of erecting a building on the site, took borings to facilitate determining the best method of construction. The borings showed residues

of what was later to be determined to be waste products of MGP operations in the soil and groundwater at the site. The Village of Pelham Manor, based upon these findings, informed Levin that it had to satisfy the DEC environmental requirements before the Village would permit any construction to proceed. As a result, Levin commenced negotiations with DEC over the proposed remedial solutions for the subsurface condition at the site.

On December 13, 1993, Levin first notified Con Ed of the problems encountered at the Pelham Manor site, and requested a meeting to discuss the proposed remedial solution that Levin wished to present to the DEC. In April 1994, Mark Chertok, counsel for Levin, and Garrett Austin, in-house counsel for Con Ed, engaged in settlement discussions. On April 18, 1994, Chertok forwarded a proposed cooperation agreement. He represented that Levin had expended $310,000 in consultant fees related to the Pelham Manor site, and that it was expected to spend between $145,000 and $220,000 to implement the remediation plan. The proposed cooperation agreement provided that Con Ed would pay 90% of the remediation cost through the first $2 million and 100% of the remediation costs thereafter. Other documents support that Con Ed and Levin both expected that the costs of remediation would be less than $400,000.

Con Ed continued to negotiate with Levin throughout 1994, with subsequent drafts of the cooperation agreement continuing the 90-10% formula for allocation of remedial costs. A Cooperation Agreement was finally executed by Con Ed and Levin on February 1, 1995, which contained the same 90-10% allocation of shared costs on the first $2 million.

<u>Continental's Contentions</u>:

Continental contends that as to both the Astoria site and the Pelham Manor site the notification in January 1995 constituted late notice. In both instances, Contintental maintains

that well prior to that date, Con Ed was aware of third-party claims or regulatory action that necessitated expenditures in excess of the SIR.

With respect to the Astoria site, Continental argues that Con Ed was long aware of the problems with MGP residues at the site, and that the permit process required for its waste disposal operations mandated investigation of the site and remediation, if any was found necessary. The Astoria site was also the subject of a civil complaint by DEC in June 1992 that sought civil penalties and the auditing and remediation of problems found at the site. Continental points to the 1993 Form 10K filed in March 1994, which reported that the cost for a consultant, at Astoria to assist in meeting the DEC requirements for obtaining a permit and to conduct the required investigation would be approximately $800,000, and that the actual contract with ENSR was for a cost $830,000. That alone exceeded the SIR of $500,000. Continental further notes that the consent decree entered into on the civil complaint in November 1994 provided for audits and possible remediation, if necessary, so that the $830,000 figure was the starting point for Con Ed's expenses at this site.

With respect to the Pelham Manor site, Continental points to the proposed draft cooperation agreements, which, long before notice was given, created the 90-10% formula for allocating remediation costs up to $2 million as the basis for triggering notice.

Continental maintains that the calculation of the potential costs should not be reduced by allocation over the 50 years worth of insurance coverage and that there is no basis for a waiver of the defense or the need to demonstrate prejudice.

Plaintiff's Contentions:

Con Ed argues that under the policies, notice is not required until an underlying claim

exceeds the SIR of $500,000, and that it did not reasonably believe that the Astoria and Pelham Manor claims would trigger the notice requirement, because with allocation of damages over the 50- year period of coverage, neither site would reach the $500,000 SIR. Con Ed also claims that Continental waived its late notice defense by not raising it promptly when it had the facts to support it, and that Continental failed to show that it was prejudiced by any late notice. In addition, even if there was no allocation as to the Pelham Manor claim, Con Ed argues that prior to giving notice, it reasonably believed that the total costs for Pelham Manor would only be $400,000, not enough to implicate application of the Continental policies.

The Law:

Under the subject policies, notice to the insurer is required when Con Ed has knowledge from which it may reasonably conclude that a covered occurrence is likely to involve the policy or liability of the carrier. The duty to provide notice is a condition precedent to bringing suit. White by White v City of New York, 81 NY2d 955 (1993). The failure to comply with the condition precedent, absent a valid excuse, will vitiate the coverage. Security Mut. Ins. Co. of New York v Acker-Fitzsimons Corp., 31 NY2d 436 (1972). An insurer need not show prejudice to obtain such relief. Great Canal Realty Corp. v Seneca Ins. Co., 5 NY3d 742 (2005); Long Island Lighting Co. v Allianz Underwriters Ins. Co., 24 AD3d 172 (1st Dept 2005), lv dismissed 6 NY3d 844 (2006).

The policies require notice "as soon as practicable" (see quoted policy infra). The cases have defined "as soon as practicable" to mean notice within a reasonable time under the circumstances. Heydt v Contracting Corp. v American Home Assur. Co., 146 AD2d 497 (1st Dept), appeal dismissed 74 NY2d 651 (1989). The burden of demonstrating that the delay in

providing notice was reasonable falls on the insured. Argentina v Otsego Mut. Fire Ins. Co., 86 NY2d 748 (1995). A good faith belief that the excess policies would not be reached can serve as a reasonable excuse or explanation for what appears to be a failure of timely notice. Loblaw, Inc. v Employers' Liability Assur. Corp., 85 AD2d 880 (4th Dept 1981), affd 57 NY2d 872 (1982). Here, the language of the policies themselves incorporate this concept.

Thus, to determine whether notice was required at an earlier time than actually given, it is necessary to examine what Con Ed knew about the Astoria and Pelham Manor sites at critical times. With respect to the Astoria site, the sightings of seepage and the early reports to EPA, DEC and OSHA are not sufficiently conclusive to warrant notice being given. At no point during the 1980s and early 1990s, is there a claim made with damages attached in excess of the $500,000 SIR that in any way implicates the policy.

However, the picture begins to change in June 1992, with the DEC complaint and the charges against the Astoria plant. Couple this with the DEC requirement of RCRA investigation to obtain waste disposal permits for the Astoria plant, and the hiring of a consultant for a fee in excess of the SIR in April 1994, all of which indicate that notice might then be required. Further, Con Ed, by its filing of the Form 10K in March 1994, clearly demonstrates that it then had knowledge that the Continental excess policies will be impacted by the Astoria claim. The notice for the Astoria site first given in January 1995, is untimely.

Allocation will not be applied retrospectively when there is no evidence that Con Ed conducted such analysis when it was determining whether to give notice. Long Island Lighting Co. v Allianz, 24 AD3d 172, supra. Nor is there a basis for waiver. Long Island Lighting Co. v Allianz Underwriters Ins. Co., Sup Ct NY County, December 30, 2003, Gammerman, J., Index

No. 604715/97, affd 24 AD3d 172 (1st Dept 2005).[2] The underlying claim here does not involve death or personal injury, so that the provisions of Insurance Law § 3420 (d) do not apply to create a statutory waiver based upon the mere passage of time. Worcester Ins. Co. v Bettenhauser, 95 NY2d 185 (2000); Merchants Mut. Ins. Co. v Allcity Ins. Co., 245 AD2d 590 (3d Dept 1997).

Con Ed's waiver argument must be viewed as a common-law waiver claim that once Con Ed provided further documentation of its claim, Continental was required to disclaim promptly. Under the common law, waiver is a voluntary and intentional relinquishment of a known right. Albert J. Schiff Assoc. Inc. v Flack, 51 NY2d 692 (1980). Con Ed has the burden of establishing that there was "a clear manifestation of intent" by Continental to abandon its right to assert the notice defense. Gilbert Frank Corp. v Federal Ins. Co., 70 NY2d 966 (1988). The reservation of rights contained in the letters acknowledging receipt of the notice and indicating that there may be a late notice defense effectively negates an intent to relinquish the right to such defense, since the letters do not specifically disclaim coverage for any other reason. Allstate Ins. Co. v Gross, 27 NY2d 263 (1970). Further, there is no basis for estoppel, since Con Ed has not alleged any prejudice from Continental's failure to disclaim prior to filing its answer in this action. Fairmont Funding, Ltd. v Utica Mut. Ins. Co., 264 AD2d 581 (1st Dept 1999).

With respect to Pelham Manor, Con Ed has raised an issue of fact as to whether it reasonably believed that the excess policy would not be reached. While the Cooperation Agreement in its many drafts provides for cost sharing up to $2 million, Con Ed has presented

[2] In the Supreme Court opinion the same waiver argument, as here, was raised by the insured and rejected by the trial court. The Appellate Division affirmed the lower court's conclusions, but did not specifically address the issue of waiver. By its affirmance sub silencio, it implicitly approved the lower court's decision on waiver.

documentation that at the earlier stages when it was negotiating with Levin, both Levin and Con Ed did not anticipate that the remedial costs for Pelham Manor would be more than $400,000. In addition, even the estimates cited by defendant, bring that number up to $530,000, which figure must be discounted by the 10% that the parties always contemplated that Levin would assume, bringing the number below the SIR.

Thus, the issue of whether there was late notice, as to the Pelham Manor site, is one of fact which can not be resolved on this motion.

The notice defense is valid as to the Astoria site, and a declaration that Continental is not obligated to defend or indemnify for environmental damage at the Astoria site, under any of the three cited policies can be made. Partial summary judgment on the first and second causes of action for the declaration sought and dismissing the third cause of action for breach of the contract of insurance for not paying the Astoria claim will be granted. Summary judgment regarding the Pelham Manor site is not warranted, because there is a triable issue of fact regarding what Con Ed reasonably believed the claim would cost, and therefore whether the notice was late as to this site.

Accordingly, it is

ORDERED that the motion for summary judgment is granted in part as to the Astoria site and denied in part as to the Pelham Manor site; and it is further

ORDERED AND ADJUDGED that on the first and second causes of action, it is declared that Continental has no obligation under the insurance policies issued to Con Ed to defend and indemnify Con Ed on the environmental claims regarding the Astoria site; and it is further

ORDERED that on the third cause of action, summary judgment dismissing the claim as

to the Astoria site is granted; and it is further

ORDERED that the motion is denied as to the Pelham Manor site; and it is further

ORDERED that the claims as to the Pelham Manor site are hereby severed and the Clerk of the Court is directed to enter judgment accordingly; and it is further

ORDERED that the claims as to the Pelham Manor site shall continue.

Dated: July 18, 2006

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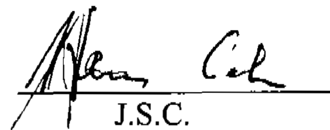

J.S.C.

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