

**Atlantic Mut. Ins. Co. v Travelers Prop.  
Cas. Ins. Co.**

2007 NY Slip Op 30023(U)

March 6, 2007

Supreme Court, New York County

Docket Number: 0600427

Judge: Paul G. Feinman

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

HON. PAUL G. FEINFEINMAN

PRESENT:

Justice

PART 52

Atlantic Mutual Insurance Company, et al.

- v -

Travelers Property Casualty Insurance Company, et al

INDEX NO. 600427/06  
MOTION DATE 10-4-06  
MOTION SEQ. NO. 001  
MOTION CAL. NO. 3

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

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits

Replying Affidavits

all attached

2 Cross-Motion: [X] Yes [ ] No

Upon the foregoing papers, it is ordered that this motion & cross motions are all denied for the reasons set forth in the annexed decision & order.

FILED  
MAR 12 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

Dated:

3/6/07

[Signature]

J.S.C.

Check one: [ ] FINAL DISPOSITION [X] NON-FINAL DISPOSITION

Check if appropriate: [ ] DO NOT POST

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

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: CIVIL TERM: PART 52

-----X  
ATLANTIC MUTUAL INSURANCE COMPANY,  
ISE 555 BROADWAY, LLE and SCHOLASTIC  
INC.,

Plaintiffs,  
against

Index Number 600427/2006  
Submission Date Oct. 4, 2006  
Mot. Seq. No. 001  
Cal. No. 3

TRAVELERS PROPERTY CASUALTY INSURANCE  
COMPANY and BENETTON, USA  
CORPORATION,

Defendants.

**DECISION AND ORDER**

-----X  
**For the Plaintiffs:**

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Papers considered in review of this motion and cross-motions for summary judgment:

**Papers**

Notice of Motion and Affidavits Annexed  
Affirmation in Opposition (Benetton)  
Notice of Cross-Motion and Affirmation (Benetton)  
Notice of Cross-Motion (Travelers), Memo of Law  
Affirmation in Opposition to Travelers (Plaintiffs)  
Reply Affidavit, Reply Memo of Law (Travelers)  
Affirmation in Opposition to Benetton (Plaintiffs)

Numbered

1  
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4, 5  
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**FILED**  
MAR 12 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

**PAUL GEORGE FEINMAN, J.:**

This is a declaratory judgment action arising out of an insurance coverage dispute relating to a pending personal injury lawsuit. The plaintiffs in this action move for summary judgment brought pursuant to CPLR 3212. Travelers Indemnity Company of Connecticut<sup>1</sup> and Benetton USA each cross-move for summary judgment in its favor. For the reasons set forth below, the

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<sup>1</sup>Travelers is incorrectly identified in the caption, according to defendant's counsel (Traveler's Notice of Cross-Motion, Aff. of James M. Strauss, July 25, 2006).

motion and cross motions are all denied.

#### The Underlying Personal Injury Action

On June 11, 2003, Annunziata Latella tripped and fell on a sloped exit ramp outside the Benetton store located at 555 Broadway, New York, New York. She suffered a fractured right ankle (Not. of Mot. Ex. A, Bill of Partic. ¶ 14). At the time of her accident, the owner of the entire premises was plaintiff ISE 555 Broadway, LLC, which had leased the premises to co-plaintiff Scholastic Inc. (Not. of Mot. Ex. B [partial lease]). Scholastic had thereafter sublet part of the building to defendant Benetton USA pursuant to a lease agreement dated December 18, 2000 (Not. of Mot. Ex. C).

In July 2003, Latella commenced a personal injury action by filing a summons and verified complaint against the City of New York, ISE, and Scholastic.<sup>2</sup> In April 2004, ISE and Scholastic commenced a third-party action against Benetton and JLS Industries, Inc., Benetton's general contractor who allegedly constructed the ramp (Travelers Not. of Cross-Mot. Ex. E, Third-Party Compl.; (Not. of Mot. Dickoff Aff. ¶ 10). A second third-party action was subsequently commenced.

#### The Declaratory Judgment Action

Plaintiffs ISE and Scholastic, and their general liability insurer, Atlantic Mutual Insurance Company, commenced this action in February 2006 against Benetton and its insurer, Travelers for declaratory relief and indemnification based upon the terms of the lease agreement between

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<sup>2</sup>*Annunziata Latella v The City of New York, ISE 555 Broadway, LLC. and Scholastic Inc.*, Supreme Court, New York County (Index No. 112368/2003). Although plaintiffs in this action apparently believe that JLS Industries is a direct defendant (see, e.g., Not. of Mot. Dickoff Aff. ¶ 9), the court records reflect only that JLS Industries is a third-party defendant.

Scholastic and Benetton (Travelers Not. of Cross-Mot. Ex. A, Summons and Compl.). They rely on the language of the lease agreement as the basis of their action. Pursuant to Section 8.02 (A) of the lease, Benetton agreed to obtain and keep in force during the term of its lease,

. . . for the benefit of Tenant [Benetton] and naming Landlord [ Scholastic], the managing agent of the Building (if any), Overlandlord [ISE] and any Future Overlandlord as additional insureds, the following coverages: (i) commercial general liability insurance (including . . . bodily injury, personal injury. . . in a combined single limit amount of not less than \$10,000,000, against all claims, demands or actions with respect to . . . injury . . . arising from or related to any act or omission of Tenant . . .

(Not. of Mot. Ex. C, Lease Agreement between Scholastic and Benetton, Dec. 18, 2000, p. 20, §18.02[A]). In addition, Section 8.02 ( C) of the lease stated that the landlord and overlandlord were to be named as additional insureds in the various policies to be acquired by Benetton as described in the lease agreement, and that

All such policies of insurance shall be: (ii) written on an ‘occurrence’ basis, (ii) written as primary policy coverage and not contributing with or in excess of any coverage which Landlord, . . . Overlandlord or any Future Overlandlord may carry.

(Not. of Mot. Ex. C, Lease Agreement between Scholastic and Benetton, Dec. 18, 2000, p. 21, § 18.02[C]).

On the date of Latella’s accident, Benetton was covered under a policy of comprehensive general liability insurance issued by co-defendant Travelers Indemnity Company (Not. of Mot. Ex. E). Section D of the policy endorsement entitled “XTEND ENDORSEMENT-NEW YORK,” modified and broadened the insurance policy provided under the commercial general liability coverage to provide the policy covered those “insureds” “with whom you have agreed in a written contract, executed prior to loss, to name as an additional insured, but only with respect

to liability arising out of the ownership, maintenance or use of that part of any premises leased to you,” subject to certain limitations, none of which are here pertinent (Not. of Mot. Ex. D, Travelers Commercial Insurance Policy for Benetton USA, Endorsement CGF2 04 09 99, p. 2 of 5). Section D also provides that the insurance provided to the additional insureds is excess coverage “*unless you have agreed in a written contract for this insurance to apply on a primary or contributory basis.*” (Not. of Mot. Ex. D; Travelers Commercial Insurance Policy for Benetton USA, Endorsement CG F2 04 09 99, p. 2 of 5, emphasis added).

By letter dated April 16, 2004, the attorney representing ISE and Scholastic notified Travelers of Latella’s claim and requested indemnification pursuant to the Benetton policy (Travelers Not. of Cross-Mot. Ex. G, Letter of Apr. 16, 2004). On May 21, 2004, a representative from Travelers’ claims department wrote to deny the request (Travelers Not. of Cross-Mot. Ex. H, Letter of May 21, 2004). Travelers’ denial was made primarily on the ground that it had not been timely notified of the occurrence nor provided with all of the notices and legal documents, in and violation of the insurance agreement. In addition, Travelers reserved its rights as to whether ISE qualified as an additional insured, and noted that under its excess liability policy, it was not liable to pay for damages in excess of the “minimum retained limit” until the insureds’ liability was established by court decision or by settlement agreement.

In February 2006, plaintiffs commenced the instant action (Travelers Not. of Cross-Mot. Ex. A, Summons). Their complaint contains three causes of action. The first seeks a declaration both that Travelers is required to defend and indemnify ISE and Scholastic up to the limits of the policy of insurance issued and that the coverage is primary to any other coverage that the plaintiffs have available (Travelers Not. of Cross-Mot. Ex. A. Compl. ¶¶ 24, 25). They also seek

to have Travelers pay for the reasonable cost of defending them in the suit brought by Latella (Travelers Not. of Cross-Mot. Ex. A. Compl. ¶ 26). The second cause of action alleges that Benetton breached its agreement to procure insurance that names ISE and Scholastic as additional insureds, and seeks a declaration that Benetton is required to defend and indemnify ISE and Scholastic up to the limits of the policy of insurance which its insurance coverage would have provided (Travelers Not. of Cross-Mot. Ex. A. Compl. ¶¶ 28-31). The third cause of action seeks a declaration that Benetton is required to defend and indemnify ISE and Scholastic pursuant to the lease agreement for any liability imposed and all costs, expenses, and attorneys' fees incurred in the defense of the claim brought by Latella (Travelers Not. of Cross-Mot. Ex. A. Compl. ¶¶ 32-35).

Travelers served its Answer on May 4, 2006 (Travelers Not. of Cross-Mot. Ex. B). Its Answer contains five affirmative defenses: failure to state a cause of action; no contractual obligation; laches, waiver and estoppel; failure to provide timely notice pursuant to the contract; and that any liability is co-primary or excess. Benetton's Answer was served on about April 27, 2006 (Not. of Mot., Goldman Aff. ¶ 3).<sup>3</sup> It contains six affirmative defenses: prior action pending; failure to comply with a condition precedent; proper denial as occurrence not within policy coverage; failure to mitigate; CPLR 1601; and untimely notice.

#### Plaintiffs' Summary Judgment Motion

Plaintiffs move for summary judgment as to the first cause of action, seeking a declaration that Travelers is required to defend and indemnify ISE and Scholastic up to the limits

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<sup>3</sup>A copy of Benetton's Answer is contained as part of the papers in front of Exhibit A of plaintiff's motion for summary judgment.

of the policy of insurance issued and that the coverage is primary to any other coverage that the plaintiffs have, as well as that Travelers will reimburse plaintiffs Atlantic Mutual, ISE, and Scholastic for the costs, expenses and attorneys' fees thus far expended in the defense of the claim brought by Latella. They argue that the motion should be granted based on the "undisputed documentary evidence" consisting of the lease agreement between Scholastic as landlord and Benetton as tenant which required Benetton to obtain insurance covering ISE and Scholastic as additional insureds, and the insurance policy procured by Benetton from Travelers which contains an endorsement providing coverage to ISE and Scholastic as additional insureds (Not. of Mot. Goldman Aff. ¶¶ 4-5).

In support of their argument that the comprehensive liability insurance policy issued by Travelers to Benetton affords primary and non-contributing coverage to ISE and Scholastic as additional insureds, they rely on *Pecker Iron Works of New York v Traveler's Ins. Co.*, 99 NY2d 391 (2003), which they argue is "dispositive of the issues raised by this motion." (Not. of Mot. Goldman Aff. ¶ 19). In *Pecker Iron Works*, the Court of Appeals examined the obligations of two liability insurance carriers covering the same risk, and focused on whether the coverage extended primary or only excess coverage to "additional insureds." The Court held that in insurance contracts, an additional insured enjoys the same protections as the named insured (99 NY2d at 393, citation omitted). Thus, when Pecker Iron Works, the contractor, engaged the subcontractor and in writing provided that the subcontractor would name the contractor as an additional insured, it was understood that the subcontractor's carrier, not the contractor's, would provide the primary coverage on the risk. As the subcontractor's insurer agreed to provide primary insurance to any party with whom it had contracted in writing, the insurance provision

was satisfied when the subcontractor agreed to provide such insurance to its contractor (*Pecker Iron Works*, 99 NY2d at 393-394). Plaintiffs argue that here, similarly, Benetton agreed in writing to name ISE and Scholastic as additional insureds under its policy issued by Travelers, that the coverage was primary coverage, and that Benetton's rather than Scholastic's or ISE's coverage should provide primary coverage in the Latella matter.

Travelers does not dispute plaintiffs' argument or their reliance on *Pecker Iron Works*. Travelers therefore concedes that plaintiffs ISE and Scholastic are within their rights to seek defense costs and possible indemnification from Travelers (*see, Kuehne & Nagel, Inc. v F.W. Baiden*, 36 NY2d 539 [1975] [where a party fails to deny a material allegation, that allegation is thereby deemed admitted]; *Lave v Shepard*, 48 Misc 2d 478 [Sup. Ct. NY County 1965], *aff'd* 25 AD2d 498 [1<sup>st</sup> Dept], *lv denied* 17 NY2d 420 [1966] [if a key fact appears in the movant's papers to which the opposing party makes no reference, it is deemed admitted]).

#### Travelers' Opposition and Cross-Motion for Summary Judgment

Travelers opposes plaintiffs' motion and cross-moves for summary judgment and dismissal of the complaint on the ground that although ISE and Scholastic were aware of the Latella claim by August 2003, they only notified Travelers in April 2004, and that this delay in notifying it failed to comply with the terms of the policy requiring an insured to notify the insurer of any possible claim "as soon as practicable." It points to Section IV of its policy which requires the insured to notify Travelers of an "occurrence," "as soon as practicable" whenever an insured or additional insured is advised of an occurrence, claim, or lawsuit which may result in a claim being made under the policy, as well as that each insured must independently comply with the various obligations and duties imposed under the policy (Travelers Not. of Cross-Mot. Ex. F,

Travelers Comm. Ins. Policy, at SPT 0024, SPT 0025).

It is well-established that a condition precedent to an insurer's providing coverage is timely notice of the accident or claim, and an insurer need not show prejudice to rely on the defense of late notice (*Unigard Sec. Ins. Co. v North River Ins. Co.*, 79 NY2d 576, 581 [1992]; *see also, Great Canal Realty Corp. v. Seneca Ins. Co.*, 5 NY3d 742 [2005]; *Security Mut. Ins. Co. of N.Y. v Acker-Fitzsimmons Corp.*, 31 NY2d 436, 440 [1972]). Where an insured does not offer a reasonable excuse for the delay and there are no mitigating factors, the issue of whether an insured has complied with the policy's provisions may be resolved as a matter of law (*Power Auth. of the State of N.Y. v Westinghouse Elec. Corp.*, 117 AD2d 336, 339-340 [1<sup>st</sup> Dept. 1986]; *see also, US Pack Network Corp. v Travelers Prop. Cas.*, 23 AD3d 299, 300 [1<sup>st</sup> Dept. 2005]).

Travelers argues that a nine-month delay, without any excuse, is in direct violation of the policy's notice requirement and inexcusable as a matter of law, citing among others, *Deso v London & Lancashie Indem. Co.*, 3 NY2d 127, 130 (1957) (51-day delay untimely); *DiGuglielmo v Travelers Prop. Cas.*, 6 AD3d 344, 345 (1<sup>st</sup> Dept. 2004), *lv denied* 3 NY3d 608 (2004) (seven-month delay after receipt of notice of legal claim deemed untimely); *American Mfgs. Mut. Ins. Co. v CMA Enterpr., Ltd.*, 246 AD2d 373 (nine-month delay untimely); *Heydt Contracting Corp. v American Home Assur. Co.*, 146 AD2d 497 (1<sup>st</sup> Dept. 1989), *lv denied* 74 NY2d 651 (1989) (four-month delay untimely). Travelers argues that summary judgment and dismissal of the complaint as against it is therefore appropriate.

Although plaintiffs have offered no excuse for their late notice, they argue in opposition to Travelers' motion that Travelers failed to timely deny their demand for a defense in abrogation of Insurance Law § 3420(d), which states that an insurer shall disclaim liability or deny coverage

by giving written notice “as soon as is reasonably possible of such disclaimer of liability or denial of coverage.” This statutory provision is so central to insurance law that it has been held that an insurer’s failure to provide notice as soon as is reasonably possible will preclude effective disclaimer, even where, as in the instant matter, the insured’s own notice of the incident to its insurer is untimely (*Hartford Ins. Co. v County of Nassau*, 46 NY2d 1028, 1028 [1979]). Thus, where a policyholder did not give its insurer notice of the occurrence until more than five months after its occurrence when the insurer was served with the summons and complaint in the personal injury action, the court held nonetheless against the insurer because its sole reason for the denial of the claim, its untimeliness, was apparent on its face, and the 30-day delay in disclaiming was held to be unreasonable as a matter of law (*West 16<sup>th</sup> Street Tenants Corp. v Public Serv. Mut. Ins. Co.*, 290 AD2d 278 [1<sup>st</sup> Dept. 2002], *lv denied* 98 NY2d 605 [2002]; *see also*, *2833 Third Ave. Realty Assoc. v Marcus*, 12 AD3d 329 [1<sup>st</sup> Dept. 2004] [although plaintiffs failed to timely notify or to forward summons and complaint, insurer required to defend as it waited 37 days to disclaim]; *Matter of Allstate Ins. Co. v Cruz*, 30 AD3d 511, 512 [2d Dept. 2006] [an insurer’s failure to give written notice of a disclaimer of coverage as soon as is reasonably possible will preclude effective disclaimer or denial, “even where the insured and injured party have failed to provide the insurer with timely notice of the claim in the first instance.”]).

The question of whether a notice of disclaimer has been sent “as soon as is reasonably possible” is normally a question of fact and depends on the particular circumstances of each case (*Hartford Ins. Co. v County of Nassau*, 46 NY2d at 1030). Once an insurer has sufficient knowledge of the facts entitling it to disclaim, or knows that it will disclaim, it must notify the policyholder in writing as soon as is reasonably possible of its decision (*First Financial Ins. Co.*

*v Jetco Contracting Co.*, 1 NY3d 64, 69 [2003]). An insurer who delays in providing written notice of disclaimer bears the burden of justifying the delay (*Jetco Contracting Co.*, at 69). Thus, in *Jetco Contracting*, although the insurer only learned of the accident at issue more than seven months after it occurred and advised the policyholder that it reserved its right to deny coverage based on late notice approximately one week after receiving notice, its decision to wait 48 more days to deny coverage based on late notice was held to be unsatisfactory and the equivalent of an unexcused 48-day delay, and unreasonable as a matter of law. The Court did not find reasonable the insurer's argument that the delay was excusable because it was investigating other sources of insurance for the contractor.

Here, the parties dispute the length of time it took Travelers to respond to plaintiffs' demand. Plaintiffs contend that their letter requesting indemnification, dated April 16, 2004, was sent both by certified mail and by facsimile, according to the letter itself, and that Travelers did not reply until May 21, 2004, that is to say, 35 days later, a delay that they argue is unreasonable as a matter of law. However, plaintiffs offer no proof either in the form of a first-person affidavit or a facsimile cover sheet, to establish that the letter was sent by facsimile on April 16, 2004. Notably, the exhibit of the letter contained in Travelers' motion papers is date stamped as "received" on April 23, 2004. Travelers argues in opposition that it disclaimed in 28 days, a delay that could be found reasonable as a matter of law, and proffers the affidavit of Patricia DiConsiglio, the claims specialist who wrote the May 21, 2004 denial letter (Reply Aff. of James M. Strauss Ex. A, DiConsiglio Aff.).<sup>4</sup> DiConsiglio avers that the Travelers claims file in this

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<sup>4</sup>The May 21, 2004 letter from Travelers' claims specialist contained a rather obvious typographical error on the third page, which Travelers has clarified through an affidavit by the

matter contains no facsimile letter but only the copy sent by certified mail and that it was received on May 23, 2004 (Reply Aff. of James M. Strauss Ex. A, DiConsiglio Aff. ¶¶ 3, 5).

There is no bright line rule setting forth the number of days an insurer is allowed to have to evaluate a claim without excuse before issuing a denial or disclaimer. It has been held that where the ground for disclaimer was evident from the face of the late notice, a delay of 37 days was unreasonable (*2833 Third Ave. Realty Assoc. v Marcus*, 12 AD3d 329). Similarly, a delay of 34 days has been held unreasonable for the same reason (*Matter of Allstate Ins. Co. v Swinton*, 27 AD3d 462 [2d Dept. 2006]). Travelers points to *City of New York v Welsbach Elec. Corp. and Ins. Co. of No. Amer.*, 2006 NY Slip Op 50705U, \*4, 11 Misc.3d 1085A, 819 NYS2d 847 (Sup. Ct., NY County 2006 [Lehner, J.], where the Court stated that if the insurer “had served its answer within the 30 days allowed by statute, there is no question that a disclaimer defense asserted therein would be timely under Insurance Law § 3420(d).” Travelers concedes this is at best a guideline and notes that its research found no decisions holding a denial letter issued less than 30 days after the request for coverage to be unreasonable as a matter of law (Travelers Reply Memo of Law p. 4).

Here, although Travelers’ cross-motion to dismiss the complaint based on late notice must be denied, plaintiffs’ motion for summary judgment and a declaration that Travelers must defend and indemnify them in the underlying *Latella* action must also be denied without prejudice. There is a material disputed issue of fact raised by the papers as to the number of days

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specialist who explains that the date on page three of the May 21, 2004 letter concerning when Travelers first had notice of the *Latella* injury was “April 16, 2004” rather than “April 16, 2003” (Reply Aff. of James M. Strauss Ex. A, DiConsiglio Aff. ¶ 5).

between receipt of the claim and issuance of the disclaimer. Plaintiffs' letter of April 16, 2004 presents evidence that it was faxed to Travelers on that date, but Travelers has raised a question of fact concerning the date it received the letter, and it cannot be found as a matter of law that Travelers' denial of plaintiffs' demand was unreasonably delayed (*see Travelers Ins. Co. v Volmar Constr. Co.*, 300 AD2d 40, 42 [1<sup>st</sup> Dept. 2002] [reasonableness of delay in giving notice is ordinarily question of fact for trial]). To the extent that Travelers appears to argue that ISE should have given separate notice and should be treated distinctly from Scholastic and that the complaint as concerns ISE should be dismissed, it has been held that where the parties are "not adverse" to each other, notice by one can constitute notice for both (*see, New York Tel. Co. v Travelers Cas. & Sur. Co.*, 280 AD2d 268 [1<sup>st</sup> Dept. 2001] [notice by insured and additional insured]). ISE and Scholastic are represented by the same attorney and have not made cross-claims against each other, and therefore at the time their demand for defense and indemnification was made, they were united in interest.

#### Benetton's Opposition and Cross-Motion for Summary Judgment

Benetton opposes plaintiffs' motion and cross-moves for summary judgment and dismissal of the complaint as against it. As concerns plaintiffs' motion, Benetton argues that it in actuality seeks declaratory relief as concerns Travelers, and that Benetton has complied with its obligation, as conceded by counsel, to procure the required insurance policy and coverage (Benetton Aff. in Opp. ¶¶ 3-6). It further argues that the issue between Travelers and plaintiffs is one of notice and does not concern Benetton's obligation to procure insurance.

The gravamen of Benetton's cross-motion is that in the underlying action, there has been no finding that Benetton was negligent, or that plaintiffs were free of negligence, and that

therefore it has no duty to indemnify plaintiffs, citing *Correia v Professional Data Mgmt.*, 259 AD2d 60 [1<sup>st</sup> Dept. 1999]. Benetton points out that the lease states, in Section 11.03, that Benetton “agree[d] (except if and to the extent that the same shall be caused by the negligence or willful misconduct of landlord or persons within the landlord’s control....) to indemnify, protect, defend and safe harmless, landlord and landlord’s partners.....” (Not. of Mot. Ex. C, Lease, p. 33). Benetton argues that Latella has not shown that Benetton had any responsibility, and that plaintiffs were free of negligence (Benetton Not. of Cross-Mot. Schmidt Aff. 6-8).

Benetton’s cross-motion is denied. Benetton has not made a prima facie showing that it was free from negligence in the underlying action. Benetton makes no showing whatsoever concerning this issue, and relies solely on the affirmation of its attorney and on the documentary evidence proffered by the other parties. Failure to make a prima facie showing of entitlement to judgment as a matter of law will result in the denial of the motion, regardless of the adequacy of the opposition papers (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

Accordingly, it is

ORDERED that the plaintiffs’ motion for summary judgment and declaratory relief as to the first cause of action of the complaint is denied; and it is further

ORDERED that the defendants’ cross-motions for summary judgment and dismissal of the complaint are both denied.

This constitutes the decision and order of the court.

Dated: March 6, 2007  
New York, New York



FILED  
MAR 12 2007  
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