MEMORANDUM

SUPREME COURT: QUEENS COUNTY
IA PART 19

TULLY CONSTRUCTION CO., INC.,

Plaintiff,

- against -

TIG INSURANCE CO., et al.,

Defendants.

INDEX NO.: 28468/2004

BY: SATTERFIELD, J.

DATED: May 1, 2007

Motion
Cal. Number: 35

Defendant Marsh USA INC. has moved for (1) an order granting summary judgment dismissing the complaint; (2) awarding it summary judgment on its counterclaim against Tully Construction Co., Inc., and (3) dismissing the cross claims of co-defendant Allied North America Insurance Brokerage Corp. (Allied). Co-defendant Allied cross-moves for an order granting summary judgment dismissing the complaint and all cross claims against it.

On November 27, 2000, David Jones and Debra Rubenstein were killed when the car they were in, driven by Mr. Jones, crashed into a construction vehicle owned by Tully Construction Co, Inc. (Tully) and parked at a construction site in Staten Island. Tully was insured under a primary general liability insurance policy issued by Zurich American Company (Zurich) for the period of March 20, 2000 through April 1, 2001, and was also insured under a commercial umbrella liability policy issued by TIG Insurance Co. (TIG) for the same policy

period. The TIG policy had a limit of $50,000,000.00 in excess of the Zurich policy.

Marsh USA Inc. (Marsh) was Tully's insurance broker from October 1999 until May or June 2002, when Tully changed brokers and retained Allied as its broker of record. In December 2000, Tully notified Zurich of the Rubenstein/Jones accident. On May 9, 2001, Tully allegedly wrote to Marsh and requested that it inform TIG of the claim. TIG, however, did not receive any notice of the accident until June 2004, and disclaimed coverage in a letter dated August 5, 2004.

In April and June 2002, the decedents' estates filed wrongful death actions in the Supreme Court, Kings County, seeking millions of dollars in damages from Tully. (Roberta Rubenstein, as Administratrix of Debra Rubenstein, deceased and Roberta Rubenstein, Individually v. Tully Construction Co. Inc., and Louise Jones as Administrator of David Jones, deceased [Index No. 15025/02] and Louise Jones, as Administratrix of the Estate of David Jones, deceased and Louise Jones, Individually v Tully Construction Co. Inc. [Index No. 23132/02].) The Rubenstein action was settled on September 24, 2004 for the sum of $1,500,000.00, to be funded as follows: $50,000.00 from Jones' insurer; $998,000.00 from Tully's policy with Zurich; and $452,000.00 from Tully. The Jones action was settled on October 8, 2004, for the sum of $500,000.00 to be funded as follows: $250,000.00 from the TIG policy and $250,000.00 from Marsh USA Inc. On June 16, 2005, Tully, TIG and Marsh entered into an

agreement to fund the settlement of these actions, subject to a reallocation and judicial resolution of the rights of the respective parties. The total amount paid by Tully, Marsh and TIG was $992,000.00. Allied was not advised of the settlement and was not asked to contribute to the settlement.

Tully Construction Co. Inc. commenced the within action on December 22, 2004. This Court, in a memorandum decision dated May 16, 2006 and a judgment dated July 27, 2006, declared the rights of Tully and TIG under the excess policy, and determined that the notice provided by Tully to TIG in June 2004, approximately three years and seven months after the accident, was unreasonable as a matter of law, and that TIG's disclaimer was timely under the circumstances. This Court denied Tully's motion for summary judgment, and granted TIG's motion for summary judgment dismissing the complaint, and granted TIG's motion for summary judgment on its counterclaims to recover the $250,000.00 it advanced for the settlement of the underlying action and to recover $75,000.00 in attorney's fees, pursuant to the parties' agreement. An appeal has been filed and the court, pursuant to a so-ordered stipulation dated January 31, 2007, severed Tully's causes of action against TIG, and all counterclaims asserted by TIG. TIG's name has been removed from the caption pursuant to an order dated March 5, 2007.

Tully's claims against Marsh for breach of contract and negligence are predicated upon the assertion that Marsh was its long

term insurance broker and consultant and had agreed to provide complete insurance services to Tully, including providing notice of claims and lawsuits to its excess insurer. Tully asserts that Marsh represented that it would place TIG on notice of the underlying claim, that Marsh was instructed to notify TIG in a letter dated May 9, 2001 and failed to do so, and that TIG's failure to receive timely notice of the Jones/Rubenstein accident was due to Marsh's inaction.

Tully does not rely upon a written brokerage agreement with Marsh. Peter Tully, the president of Tully, states in his affidavit that at the time he engaged Marsh's services it was agreed that the broker would notify both primary and excess carriers of accidents and claims. He further states that it was Marsh's responsibility, as Tully's broker, to put the excess carrier on notice of the accident and subsequent lawsuits. Plaintiff asserts that it believed that Marsh had in fact notified TIG of the accident and claims, and that Marsh's agreement to notify TIG is confirmed in Tully's letter dated May 9, 2001. In this letter, Gerard Simons, on behalf of Tully, and addressed to Joseph Pizzi at Marsh, states that Tully had received a fax from Zurich and further stated the following:

> As per our conversations on the above date Marsh will put the access (sic) carrier on notice as a precaution. The relevant carrier is TIG under policy #GLO3495534. As this was a parked piece

> of equipment we see no liability on our part at this time. However since this is a double fatality we agree with your advice to put them on notice. Please make the necessary notifications.

The letter was sent to Marsh at 1166 Avenue of the Americas, by regular mail, and Tully has submitted evidence of its mailing practices.

Gerard Simons, Tully's Director of Safety, was responsible for its insurance matters from 1991 until July 2001, when he retired. He testified that it was Tully's practice to immediately notify the carrier or the broker of any occurrences or claims; that Tully created a file for each incident; and that after litigation had commenced and a complaint had been received he would notify the excess carrier if a claim exceeded the value of the liability policy. He stated that upon learning of the Jones/Rubenstein fatal accident from the police, he telephoned the broker Marsh, and the primary carrier Zurich, and informed them of the accident. He stated that he responded to the December 12, 2000 letter from counsel regarding the Jones/Rubenstein claims on December 19, 2000 and "cc'd" Mr. Munson at Marsh, as well as Zurich. Mr. Simons stated that his letter of May 9, 2001 to Mr. Pizzi was written at the urging of the primary carrier Zurich, and that prior to this date he never requested that Marsh put TIG on notice of

the accident. The May 9, 2001 letter contains the notation "cc:Bill Ryan, TCC."

William Ryan, Tully's Director of Safety since April 2001, testified at his deposition that he replaced Simons shortly before his retirement, and that he dealt with insurance matters on behalf of Tully, and was the liaison to Marsh. He stated that he would correspond with Bill Dean, Marsh's claims representative, and that he would also speak with either John Munson or Joseph Pizzi, about claims and other related insurance issues. Mr. Ryan testified that Tully would report claims directly to the primary carrier, that he would on occasion seek guidance from the broker, and that if excess coverage was needed he would ask the broker to notify the excess carrier, as he didn't know how to handle excess claims. Mr. Ryan stated that the Jones/Rubenstein accident was his first claim involving an excess carrier. He stated that he assumed that Marsh had placed TIG on notice, based upon Simons' letter of May 9, 2001, as well as a conversation he had with Mr. Dean, a Marsh claims representative, during a claims review meeting in the Summer 2001, and conversations with John Munson in September 2001 and later when Munson was with Allied. Mr. Ryan stated that his first contact with TIG was in June 2004, and that prior to this time he did not have any knowledge of any effort by Tully to have Marsh put TIG on notice of the filing of the Rubenstein and Jones lawsuits, and that he did not have any knowledge of any effort by Tully to provide notice to TIG. He stated,

however, that Zurich had recommended to Tully that it put the excess carrier on notice of the accident, and in reviewing the file he had assumed that TIG had been on notice. He also stated that he was more familiar with Allied than Marsh, and that it was Tully's understanding that Allied was not planning to notify TIG, and that Allied expected Tully to notify TIG.

Joseph Pizzi, a Marsh employee, testified at his deposition that Bill Dean was the claims representative who handled the Tully account and that it was Dean's job to put an excess carrier on notice of a claim involving Tully. He stated that during a claim review with Mr. Dean, he recommended that notice be provided to the excess carrier, but that first this recommendation would have to be made to Mr. Simons, who would then have to consult with Mr. Tully. He stated that if Mr. Tully agreed with this recommendation, either Mr. Simons or Mr. Tully would then contact Mr. Dean. He stated that he did not have any personal knowledge as to whether a lawsuit was filed as a result of the accident, or whether the excess carrier was ever put on notice of the accident. Mr. Dean died in the September 11, 2001 attack on the World Trade Center and the records maintained in his office were destroyed.

John Munson was Marsh's account executive for the Tully account. Mr. Munson left Marsh on April 24, 2002, and commenced his current employment, as president of Project Technologies, an affiliate of Allied, on April 28, 2002. Tully, at Munson's request, agreed to

move its account to Allied. Mr. Munson testified that it was the normal process for Marsh's claims department to notify primary and excess carriers of an accident, that Bill Dean was responsible for handling Tully's claims, and that he and Dean discussed the severity of the Jones/Rubenstein accident. He stated that Gerard Simons told him about the Jones/Rubenstein accident, shortly after it occurred. Mr. Munson stated that Marsh would give notice to excess carriers if the case was "severe" or if it had a notification for a demand beyond the primary carrier's limits. Mr. Munson stated that the Jones/Rubenstein accident was severe as it involved a double fatality, but that he did not believe there was a basis for a claim against Tully. Mr. Munson further stated that he did not handle or report claims, had no role in reporting claims to insurers, did not participate in claims meetings with Tully, did not know which carriers had been notified of the accident, and that he did not request that anyone at Marsh provide notice of the Jones/Rubenstein accident or lawsuits to the excess carrier. However, he stated that he believed that Mr. Dean had notified all of the carriers involved with Tully "to the severity of the case," as it was the responsibility of the broker to give notice of a severe case to the excess carrier.

Robert Booher, a managing director of Marsh, states in an affidavit that he was the head of the claims department from 1996 to 2003. He states that Mr. Munson's testimony regarding the practices and procedures of Marsh's claims department are incorrect,

and that it has always been the practice and procedure of the claims department not to report a claim to any insurer unless the client requests that Marsh do so. He further states that Marsh's claims department does not provide any post-termination services to any client, except by written agreement.

Defendant Marsh now seeks summary judgment dismissing the fourth cause of action for breach of contract, the fifth cause of action for negligence, and the eighth cause of action for attorney's fees based upon the parties' June 16, 2005 agreement. Marsh further seeks summary judgment against Tully on its counterclaim to recover the sum of $250,000.00 it paid Tully to fund the settlement of the underlying actions and the dismissal of Allied's cross claims for contribution and indemnification. Marsh asserts that as the plaintiff never requested that it notify the excess carrier of the Jones/Rubenstein accident, it had no duty to give such notice to TIG. It is asserted that even if plaintiff requested that Marsh notify the excess carrier on May 9, 2001, such notice would be untimely as a matter of law, and plaintiff's failure to notify the excess carrier was a supervening cause for the TIG disclaimer. Finally, it is asserted that plaintiff caused its own damages by settling the underlying actions during trial for an amount in excess of the primary limits.

Marsh's request to dismiss the fifth cause of action for negligence on the grounds that it is barred by the statute of

limitations, is denied. The applicable statute of limitations for negligence is three years. (CPLR § 214[4]; see Chase Scientific Research Inc. v NIA Group Inc., 96 NY2d 20 [2001].) The statute begins to run when the cause of action accrues. The cause of action accrues "... when all of the facts necessary to the cause of action have occurred so that the party would be entitled to obtain relief in court (citations omitted)." (Aetna Life & Casualty Co. v Nelson, 67 NY2d 169, 175 [1986]; Kronos, Inc. v AVX Corp., 81 NY2d 90 [1993].) Defendant Marsh claims that the date of accrual is May 9, 2001, the date of Tully's letter to Marsh requesting that it place TIG on notice of the accident. Plaintiff claims that the date of accrual is August 5, 2004, the date TIG disclaimed coverage.

It is well settled that negligence claims against insurance brokers for failure to procure adequate insurance coverage accrue when the broker fails to procure the insurance and not when the wrong is discovered. (See Mauro v Niemann Agency, Inc., 303 AD2d 468, 468 [2003]; Morse Diesel Int'l v CNA Ins. Cos., 272 AD2d 455 [2000]). Since a plaintiff under those circumstances lacks proper insurance coverage, damages arise at the time the broker breached his or her duty, and a disclaimer of coverage is unnecessary. However, where as here, the broker has procured coverage, but allegedly failed to notify an insurer of an occurrence or claim, the insured's claim accrues not at the time of the alleged breach of duty but, subsequently, at the time of injury, when the plaintiff suffers a loss or when the

insurance company disclaims. (Lavandier v Landmark Ins. Co., 26 AD3d 264 [2006]; Cunningham v Ins. Co. of N. Am., 2006 US Dist LEXIS 62229, 12-15 [2006].) Here, as plaintiff did not suffer a loss until the excess insurer disclaimed on August 5, 2004, its claim against Marsh for negligence based upon a failure to notify the excess carrier, is timely.

It is well settled that an insurance broker is an agent of its insured. (See Bohlinger v Zanger, 306 NY 228 [1954].) As its agent, a broker is charged with notifying the proper insurance company after it is put on notice of a claim by its insured. (See Martini v Lafayette Studios Corp., 273 AD2d 112 [2000].) An insured has a right to look to the expertise of its broker with respect to insurance matters. (See Baseball Office of the Comm'r v Marsh & McLennan, 295 AD2d 73, 82-83 [2002].) Tully does not allege in its complaint that Marsh was required to report the accident to the excess carrier as soon as it was informed of the accident. Tully's present reliance on Mr. Munson's testimony in support of the claim that it was Marsh's practice to put the excess carrier on notice, without a request from the insured, is misplaced. Mr. Munson was not employed in the claims department, did not handle Tully's claims, did not participate in claims meetings with Tully, did not know which carriers had been notified of the accident, and did not request that any one at Marsh report the claim to the excess carrier. Mr. Munson thus failed to establish that he had personal knowledge of Marsh's practices

regarding the reporting of claims to excess carriers, and in particular, it practices as regards to Tully. However, Mr. Simons' letter of May 9, 2001 which directed Marsh to report the accident to TIG, supports Marsh's contention that it did not have the authority to report the accident to the excess carrier without Tully's knowledge and consent. There is no evidence that Tully instructed Marsh to notify TIG earlier than May 9, 2001.

Plaintiff, however, cannot establish that but for Marsh's failure to provided notice to TIG on or after May 9, 2001, the excess carrier would not have disclaimed coverage. "Excess insurers have most of the rights and obligations of primary insurers. They have the right to investigate claims and to participate in settlement negotiations, and they have even been held to be entitled to make their own settlement determinations .... Accordingly, all of the salient factors point to the conclusion that excess carriers have the same vital interest in prompt notice as do primary insurers and that the Security Mut. (Security Mut. Ins. Co. v Acker-Fitzsimons Corp., 31 NY2d 346 [1972]) rule should be applicable." (American Home Assur. Co. v International Ins. Co., 90 NY2d 433, 442-443 [1997].) Where, as here, the excess insurance policy requires that notice of an occurrence be given promptly, notice must be given within a reasonable time in view of all of the circumstances. Courts have found even relatively short periods of unexcused delay in giving notice to be unreasonable as a matter of law. (See Deso v London & Lancashire

Indem. Co. of Am., 3 NY2d 127 [1957] [51 days]; Natural Stone Indus., Inc. v Utica Natl. Assur. Co., ___ AD3d ___ 2007 NY App Div LEXIS 4002, [2007] [6 months]; Steinberg v Hermitage Ins. Co., 26 AD3d 426 [2006] [57 days]; Doe Fund, Inc. v Royal Indem. Company, 34 AD3d 399, 399-400 [2006] [8 months];US Pack Network Corp. v Travelers Prop. Cas Co., 23 AD3d 299 [2005] [6 months]; Heydt Contr. Corp. v American Home Assur. Co., 146 AD2d 497 [1989], lv dismissed 74 NY2d 651 [1989] [131 days].) Absent a valid excuse for a delay in furnishing notice, failure to satisfy the notice requirement vitiates coverage. (See Great Canal Realty Corp. v Seneca Ins. Co., 5 NY3d 742 [2005].) Contrary to plaintiff's assertion, the insurer need not establish that it was prejudiced by the late notice, save in certain situations not applicable here. (See Argo Corp. v Greater N.Y. Mut. Ins. Co., 4 NY3d 332 [2005]; American Home Assur. Co. v International Ins. Co., supra; Blue Ridge Ins. Co. v Biegelman, 36 AD3d 736 [2007].) Since Tully did not direct Marsh to notify the excess insurer until May 9, 2001, some 5 1/2 half months after it was aware of the accident, such notice was untimely as a matter of law (Schoenig v North Sea Ins. Co., 28 AD3d 462, 463 [2006]; Modern Cont. Constr. Co., Inc. v Giarola, 27 AD3d 431 [2006]; Steinberg v Hermitage Ins. Co., 26 AD3d 426 [2006]), and there is no reason to believe that TIG would not have disclaimed coverage at that time. This Court therefore finds that as plaintiff cannot establish that its damages were caused by Marsh's failure to timely notify the excess carrier of

the accident, it cannot maintain its claims against Marsh for breach of contract or negligence.

The Court further finds that the evidence presented is insufficient to establish that Tully had an agreement with Allied which required the broker to notify excess carriers of incidents or claims, or that Tully ever requested that Allied provide such notice. Allied became Tully's broker of record on May 24, 2002. In support of its claims against Allied, Tully does not rely upon a written brokerage agreement with Allied. Rather, Peter Tully states in his affidavit that when he moved the account to Allied, Mr. Munson assured him that he would receive the same services that he had at Marsh. Mr. Munson testified that when he left Marsh he became the president of Project Technologies, a company owned by Allied. He also testified that he was not familiar with Allied's general practices regarding the handling of claims. There is no evidence that Tully negotiated the same agreement with Allied that it had with Marsh. Nor is there any evidence that Mr. Munson was an employee or agent of Allied, with the authority to bind Allied. Mr. Tully's reliance upon statements made to him by Mr. Munson, as an inducement to move his account to Allied, is insufficient to establish that a contract exists between Allied and Tully which required Allied to inform the excess carrier of the Jones/Rubenstein accident and claims. Furthermore, there is no evidence that Tully provided Allied with its insurance policies, including the TIG policy, or that it ever requested that Allied place

TIG on notice of the Jones/Rubenstein claims. Regarding the Jones/Rubenstein claims, Martin Metzner, Allied's Senior General Liability Client Representative, in a letter addressed to Tully and stamped "received October 11, 2002," stated in pertinent part that "As Allied was not your broker of record for this loss we do not have the information needed to place your excess liability carrier on notice. If you have not done so already, please make sure the proper excess carrier is on notice of this claim. You should direct them to contact Mr. McLoughlin at Zurich directly for the claim information .... I would appreciate being advised of the excess carriers information as well." The evidence presented thus establishes that Allied did not know who Tully's excess carrier was, and that it expected Tully to notify the excess carrier. Under these circumstances Tully is unable to establish its claims against Allied for breach of contract or negligence.

In view of the foregoing, Marsh's motion for summary judgment dismissing the complaint is granted, and its request for summary judgment on its counterclaim against Tully to recover the $250,000.00 it advanced to Tully to fund Tully's settlement of the Jones/Rubenstein accident is granted. Marsh's request to dismiss Allied's cross claims for indemnification and contribution is granted. Allied's cross motion to dismiss the complaint and Marsh's cross claims for indemnification and contribution is granted.

Settle order on Notice.

J.S.C.