SHORT FORM ORDER

INDEX # 24062-03
RETURN DATE: 7-13-06
MOT. SEQ. # 002 & 003

SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART XXIV - SUFFOLK COUNTY

PRESENT:
Hon. PETER FOX COHALAN

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LLP REALTY CORP., LLP MANUFACTURING CO., INC. and WATER SPORTS CO.,

Plaintiffs,

-against-

NATIONWIDE INSURANCE CO., BEST TEMP MECHANICAL CORP., MICHAEL FLORIO and CHRISTINE M. FLORIO,

Defendants.
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CALENDAR DATE: November 1, 2006
MNEMONIC: MD; XMD

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Upon the following papers numbered 1 to 37 read on this motion and cross motion for summary judgment ; Notice of Motion/Order to Show Cause and supporting papers 1-12 ; Notice of Cross-Motion and supporting papers 13-17 ; Answering Affidavits and supporting papers 18-31 ; Replying Affidavits and supporting papers 32-37 ; Other ; and after hearing counsel in support of and opposed to the motion it is,

ORDERED that this motion and cross-motion by the defendants, Nationwide Insurance Co. (hereinafter Nationwide) and Best Temp Mechanical Corp. (hereinafter Best Temp), for summary judgment and dismissal of the plaintiffs' complaint as against them in this declaratory judgment action seeking insurance coverage pursuant to CPLR §3212 is hereby denied in its entirety as there are readily identifiable issues of fact present and discovery has not been completed.

This lawsuit arises out of a construction accident occurring on July 6, 2001 involving an employee of Best Temp, Michael Florio (hereinafter Florio), who was doing construction work at the plaintiffs' premises and sustained a broken arm. Florio brought a Labor Law action against the plaintiffs as owners/tenants of the premises where the accident took place located at 130 Commerce Drive in Hauppauge, Suffolk County on Long Island, New York. The plaintiffs (through and by their insurance company, Travelers) thereafter commenced this declaratory action against the defendants, Nationwide and Best Temp, claiming that they are owed a "defense, indemnification and reimbursement" in the underlying action by Florio because Best Temp "was obligated to purchase commercial general liability coverage covering claims for bodily injuries" by its employees arising from the construction

work at the plaintiffs' premises. The plaintiffs claim that Best Temp failed to purchase such insurance protection for the plaintiffs or add them as named insureds under its policy of insurance with Nationwide. The defendants deny the claims and state the contract for the construction work required the plaintiffs to carry all necessary insurance except workers compensation insurance which the defendant Best Temp carried. This declaratory judgment lawsuit thereafter ensued.

The defendants Nationwide and Best Temp now move for summary judgment and dismissal of the plaintiffs' action pursuant to CPLR §3212 arguing that the purchase agreement between Best Temp and the plaintiff, Water Sports Co. (hereinafter Water Sports), dated June 7, 2001, carried a notation at the bottom of the agreement that "Owner to carry fire, tornado, and other necessary insurance. Our workers are fully covered by Worker's Compensation insurance." Therefore, Best Temp argues that it was under no obligation to obtain liability insurance for Water Sports or its various other entities nor to add Water Sports or the other plaintiffs as additional insureds. The defendants also claim that the other two plaintiffs, LLP Realty Corp. (hereinafter Realty) and LLP Manufacturing Co., Inc. (hereinafter LLP) as owners and tenants of the property were not involved as contractual partners and are therefore owed no duty of liability insurance coverage. Additionally, Nationwide also disclaims coverage because of late notice arguing that the accident occurred on July 6, 2001, Travelers, the plaintiffs' insurance company, was notified in August 2001 and was served in March 2002 with the Florio summons and complaint, yet Nationwide was not notified of any claim until December 30, 2002 and it then immediately disclaimed coverage on January 2, 2003.

The plaintiffs, in opposition to the motion and cross-motion, point out that Best Temp indicated that the plaintiffs would be additional insureds and the plaintiffs provide a certificate issued by Nationwide to LLP Distributors as additional insureds of Best Temp and also provide from Bagatta Associates Inc., Best Temp's insurance broker, a certificate of insurance with the additional insureds listed as LLP Distributors ETAL (sic) (all entities owned by the same principal Harry Benanti) suggesting other LLP companies not limited to LLP Distributors were to be included. The plaintiffs argue that the question of what entities are to be listed as additional insureds raises significant issues of fact which warrant denial of summary disposition to the moving defendants. The plaintiffs additionally state that discovery has not been completed. Depositions of the defendants are still outstanding and could shed light on the apparent discrepancies and the language used in the documents, contract and insurance forms for the additional insureds. There are also document demands with regard to correspondence between the defendants and the broker, Bagatta Associates Inc., which are still outstanding and subject to a court order.

For the following reasons, the defendants' motion and cross-motion, respectively, for summary judgment and dismissal of the plaintiff's action pursuant to CPLR §3212 seeking a declaratory judgment of insurance coverage are hereby denied with defendant Nationwide being granted leave to renew after discovery has been completed.

The function of the court on a motion for summary judgment is issue finding not issue determination. It is a most drastic remedy which should not be granted where there is any doubt as to the existence of a triable issue or where the issue is even arguable. ***Elzer v. Nassau County***, 111 AD2d 212, 489 NYS2d 246 (2nd Dept. 1985); ***Steven v. Parker***, 99 AD2d 649, 472 NYS2d 225 (2nd Dept. 1984); ***Gaeta v. New York News, Inc.***, 95 AD2d 325, 466 NYS2d 321 (1st Dept. 1983). As the New York Court of Appeals noted in ***Sillman v. Twentieth Century Fox***, 3 NY2d 395, 404 (1957):

> "To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (***DiMenna & Sons v. City of New York***, 301 NY 118.). This drastic remedy should not be granted where there is any doubt as to the existence of such issues (***Braun v. Carey***, 280 App. Div. 1019), or where the issue is `arguable' (***Barnett v. Jacobs***, 255 NY 520, 522); `issue finding, rather than issue determination is the key to the procedure' (***Esteve v. Avad***, 271 App. Div. 725, 727)."

It is the function of the court on a motion for summary judgment to consider all the facts in a light most favorable to the party opposing the motion, ***Thomas v. Drake***, 145 AD2d 687, 535 NYS2d 229 (3rd Dept. 1988) and to determine whether there are any material and triable issues of fact presented. The key is issue finding, not issue determination, and the court should not attempt to determine questions of credibility. ***S.J. Capelin Assoc., v. Globe***, 34 NY2d 338, 357 NYS2d 478 (1974).

Here, in the case at bar, and after looking at the evidentiary material presented in the light most favorable to the parties opposing the motion for summary judgment as required, [***Robinson v. Strong Memorial Hospital***, 98 AD2d 976, 470 NYS2d 239 (4th Dept. 1983)], the Court finds readily identifiable issues of fact with regard to the motion and cross-motion by the defendants for summary disposition. The defendants move and cross-move on a number of grounds, the first being the plaintiffs were not parties to the agreement between Best Temp and Water Sports nor was Best Temp required to list them as additional insureds. A review of the original agreement for the air conditioning installation between Best Temp and Water Sports has the notation "ATTN: Harry Benanti" and does provide at the bottom of the agreement "Owner to carry fire, tornado, and other necessary insurance. Our workers are fully covered by Worker's Compensation insurance." However, while the Court accepts the general proposition that a certificate of insurance is not proof of insurance, the certificate of insurance from the broker, Bagatta Associates, Inc., states additional insureds are LLP Distributors and within Nationwide's own records it carries under policy number 66PR 579-659-3001L for Best Temp, a notation for additional insured LLP Distributors at 130 Commerce Drive, Hauppauge, NY. The reference within Nationwide's policy to an entity, LLP Distributors, (not listed in the agreement for the air conditioning work) raises issues of fact referable as to what is this entity

and under what circumstances was it listed as the additional insured and why.

Fact issues are readily apparent about the additional insureds because LLP Distributors was not a signatory to the work order, and was not listed as an entity with Best Temp, yet Nationwide added it as an additional insured. This lends credence to the deposition testimony of Harry Benanti, plaintiffs' principal, that the additional insureds were to be all of his entities under the LLP label at 130 Commerce Drive in Hauppauge and this substantiates the use of *et al.* in the certificate of insurance provided by Bagatta Associates, Inc.. Without any discovery provided by the defendants, the plaintiffs' claim that there are numerous questions of fact on the issue of the additional insureds, who was to be covered, why LLP Distributors was listed and why et.al. in the certificate holder was used under additional insureds. Also, is Water Sports just another name for the various entities under the LLP label? All of these companies are owned and operated by the same man, Harry Benanti, from one location at 130 Commerce Drive in Hauppauge where the air conditioning work was done by Best Temp.

More troubling, is the issue of late notice which may constitute a complete defense to Nationwide's requirement to provide coverage and sustain its disclaimer of coverage. The standard in New York is very clear that an insured is required to give prompt notice of a potential claim as soon as practicable and prompt notice operates as a condition precedent to any requirement of coverage. ***White v. City of New York***, 81 NY2d 955, 598 NYS2d 759 (1993); As noted in ***Paul Developers LLC. v. Maryland Cas. Ins. Co.***, 28 AD3d 443, 816 NYS2d 75 (2nd Dept. 2006), wherein the Court stated:

> " 'Where an insurance policy requires that notice of an occurrence be given promptly, notice must be given within a reasonable time in view of all the facts and circumstances' (***Eagle Ins. Co. v. Zuckerman***, 301 AD2d 493, 495; see ***Merchants Mut. Ins. Co. v. Hoffman***, 56 NY2d 799, 801-802). 'Providing an insurer with timely notice of a potential claim is a condition precedent, and thus "[a]bsent a valid excuse, a failure to satisfy the notice requirement vitiates the policy" ' (***Sayed v. Macari***, 296 AD2d 396, 397, quoting ***Security Mut. Ins. Co. Of N.Y. v Acker-Fitzsimons Corp.***, 31 NY2d 436, 440). ' "Where there is no excuse or mitigating factor, the issue [of reasonableness] poses a legal question for the court," rather than an issue for the trier of fact' (***SSBSS Realty Corp. v Public Ser. Mut. Ins. Co.***, 252 AD2d 583, 584 quoting ***Hartford Acc. & Indem. Co. v CNA Ins. Co.***, 99 AD2d 310, 313)."

While the plaintiffs correctly argue that there may be a unity of interest and

timely proper notice by Best Temp, as a direct insured, to Nationwide (since the plaintiffs and Best Temp's interests may not be adverse), [***Ambrosio v. Newburgh Enlarged City School District***, 5 AD3d 410, 774 NYS2d 153 (2nd Dept. 2004); ***National Union v. Insurance Company of North America***, 188 AD2d 259, 590 NYS2d 463 (1st Dept. 1992)], there is no evidence of such timely notice. It is recognized that without discovery by deposition testimony and the presentation of the records of the defendants, the plaintiffs are left without any means to test the claim by Nationwide that it did not receive timely notice. This, all the more, provides reason to deny Nationwide's motion pending the completion of discovery and the addressing of the issue of notice.

Nationwide's disclaimer may be valid if it received no notice of any impending claim until Travelers' letter, dated December 30, 2002, even though Travelers was allegedly placed on notice in August 2001 about the Florio accident and received the summons and complaint in March 2002, some nine months before notifying Nationwide of a prospective claim. Here, again, the plaintiffs need for discovery as to Nationwide raises additional issues of fact. When was Nationwide on notice of the accident and did its insured, Best Temp, notify it of the Florio accident, and, if so, when? Since the defendants have not abided by the Court ordered discovery, dated April 6, 2005, which involved the depositions of Best Temp and Nationwide employees and the production of documents, the plaintiffs are unable to respond to the denials of Nationwide on the issue of notice. See, ***Jones v. Town of Delaware***, 251 AD2d 876, 674 NYS2d 499 (3rd Dept. 1998). While a motion for summary judgment automatically stays disclosure under the provisions of CPLR §3214 (b), the failure of the defendants to allow the Court ordered discovery to proceed to conclusion has raised the very issues of fact heretofore identified above

It is well established that where facts essential to justify opposition to a motion for summary judgment are exclusively within the knowledge of the party making the motion and the opposing party did not have reasonable opportunity for disclosure prior to the motion for summary judgment, the motion should be denied. ***Stevens v. Grody***, 297 AD2d 372, 746 NYS2d 510 (2nd Dept. 2002); ***Urcan v. Cocarelli***, 234 AD2nd 537, 651 NYS2d 611 (2nd Dept. 1996); ***Campbell v. City of New York***, 220 AD2d 476, 631 NYS2d 932 (2nd Dept. 1995); ***Baron v. Incorporated Village of Freeport***, 143 AD2d 792, 533 NYS2d 143 (2nd Dept. 1988). There has been no disclosure in this case at all by any of the defendants and no depositions of the defendants' employees to explain the issues of notice and the discrepancies within the documents on the additional insureds.

The Court has on many occasions cautioned litigants against the rush to dispositive motions where discovery has not been completed as it wastes judicial time and resources which are better utilized when a complete record is presented to the Court. The Courts in New York have made clear that successive motions for summary judgment should be discouraged in the absence of newly discovered evidence. ***Ralston Purina Company v. Arthur G. McKee & Company***, 174 AD2d 1060, 572 NYS2d 125 (4th Dept. 1991). Here, in the case at bar, further discovery is warranted and after the completion of discovery, if timely

notice can not be established, then Nationwide's disclaimer should prevail. This may require another motion for summary judgment and re-litigation of the very issues now before the Court. This could have been avoided by the completion of discovery. See, ***Baron v. Charles Azzue, Inc.***, 240 AD2d 447, 658 NYS2d 135 (2nd Dept. 1997). However, pending discovery, the motion is premature. Therefore, defendant Nationwide's second application for summary judgment, after the completion of discovery, would not violate the general proscription against making successive motions for summary judgment pursuant to CPLR §3212, especially if it is based on new information obtained during the disclosure process and has been invited by the Court. See, ***Broer v. Smith***, 240 AD2d 528, 658 NYS2d 447 (2nd Dept. 1997).

Summary judgment, being such a drastic remedy so as to deprive a litigant of his day in court, should only be employed when there is no doubt as to the absence of triable issues. ***VanNoy v. Corinth Central School District***, 111 AD2d 592, 489 NYS2d 658 (3rd Dept. 1985).

According, Nationwide and Best Temp's motion and cross-motion for summary judgment pursuant to CPLR §3212 are hereby denied and the parties are directed to proceed to and complete discovery and abide by this Court's discovery order dated April 6, 2005.

The foregoing constitutes the decision of the Court.

Dated: June 22, 2007

J.S.C.