Short Form Order

NEW YORK SUPREME COURT -QUEENS COUNTY

PRESENT: ORIN R. KITZES **PART 17**
Justice

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COLONY INSURANCE COMPANY,
Plaintiff,

Index No.: 5758/07
Motion Date: 6/6/07
Motion Cal. No.: 31

-against-

JAMES KING d/b/a EAST END POOL & HOT TUB, INC. and NICOLE CORRADO,
Defendants.

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The following papers numbered 1 to 10 read on this motion by defendant Nicole Corrado for an order pursuant to CPLR § 3211 (a)(1) & (7), dismissing plaintiff's complaint and an order imposing sanctions against plaintiff for bringing a frivolous action.

	PAPERS NUMBERED
Notice of Motion-Affidavit-Exhibits.....	1-4
Affirmation in Opposition.....	5-7
Reply Affirmation.....	8-10

Upon the foregoing papers it is ordered that the motion by defendant Nicole Corrado for an order dismissing the plaintiff's verified complaint for declaratory judgment, pursuant to CPLR § 3211 (a)(1) & (7), on the grounds that the documentary evidence establishes a defense, and on the grounds that the complaint fails to state a cause of action; and for an order imposing sanctions against the plaintiff for bringing a frivolous action, attorneys fees and costs, is decided as follows:

According to defendant Corrado, the underlying claim that is the subject of this action arose from an incident involving Corrado and defendant James King d/b/a East End Pool King (hereinafter, "King"), which was insured by plaintiff Colony. Sometime in the early spring of 2005, Corrado entered into a contract with defendant King to have the vinyl liner changed in her in-ground swimming pool at her residence, 41 Stevens Lane, Westhampton Beach, New York. Thereafter, on or about May 29, 2005, King emptied the in-ground swimming pool at Corrado's residence in preparation for changing the pool liner. However, King apparently failed to account

for or remove the high ground water in the area of Ms. Corrado 's pool. As a result, once the pool water was emptied, the ground water infiltrated into the area of the pool, causing the pool to collapse.

On October 14, 2005, Corrado brought an action against King for negligence and breach of contract relating to the collapse of the swimming pool. King retained its own attorney and, on or about December 15, 2005 interposed an answer to Corrado's complaint. On December 21, 2005, Corrado served her demands upon King's attorney including a demand for insurance information. King did not respond to this demand for insurance information. In a February 8, 2006, preliminary conference order, King was to provide its insurance information on or before March 10, 2006. King failed to provide the information and on May 8, 2006, Corrado's attorney wrote a letter to King's attorney again demanding the insurance information. King failed to provide the information and on July 7, 2006, Corrado moved to strike King's answer for failure to provide that information. On August 24, 2006 King's attorney finally furnished Corrado's counsel with King's insurance information naming Colony as King's insurer for the period covering the pool collapse. On September 22, 2006, Corrado's attorney wrote to Colony Insurance Company to advise them of Corrado's claim and interest as an injured party under King's insurance policy. That letter specifically referenced the date of Ms. Corrado's loss.

On October 27, 2006, Colony's representative, Rachael White, issued a Reservation of Rights letter to King, King' s personal attorney and King's insurance broker. No copy of the Reservation of Rights letter was sent to Corrado or her counsel at that time. In her letter, Ms. White mentions several specific policy grounds upon which Colony was seeking to reserve its rights. The Reservation of Rights letter does not mention that Colony is reserving its rights as to late notice of claim or for lack of cooperation with Colony. Thereafter, in apparent contradiction to its Reservation of Rights, Colony appointed the firm of Faust, Goetz, Schenker & Blee to defend King in the Corrado action. Subsequently, on February 15, 2007, Colony's coverage counsel, Wilson Elser, Edelman, Moskowitz and Dicker issued a letter disclaiming coverage on the basis that King failed to provide Colony with notice of the claim and failed to cooperate with the defense of the action. On or about March 21, 2007 Colony served Corrado with the instant complaint seeking a declaratory judgment that Colony does not have to defend or indemnify King in the Corrado action on the basis that King provided late notice of the claim to Colony and failed to cooperate with the defense of the action.

Defendant Corrado now moves to dismiss the complaint, claiming that the complaint fails to set forth a cause of action and there is documentary evidence that establishes the following: Corrado gave timely and proper notice of her claim as provided in the Insurance Law. Colony's disclaimer on the grounds of late notice was untimely. Plaintiff opposes this motion claiming that the motion is untimely and deficient, and the complaint sets forth a cause of action. Plaintiff has not refuted the factual recitation presented by defendant Corrado.

The branch of the motion seeking dismissal pursuant to CPLR 3211(a)(7) is denied. "It is well-settled that on a motion to dismiss a complaint for failure to state a cause of action pursuant to CPLR 3211(a)(7), the pleading is to be liberally construed, accepting all the facts alleged in the complaint to be true and according the plaintiff the benefit of every possible favorable inference. (Jacobs v Macy's East, Inc., 262 AD2d 607, 608; Leon v Martinez, 84 NY2d 83.) The court does not determine the merits of a cause of action on a CPLR 3211(a)(7) motion (see, Stukuls v State of New York, 42 NY2d 272; Jacobs v Macy's East Inc., supra), and the court will not examine affidavits submitted on a CPLR 3211(a)(7) motion for the purpose of determining whether there is evidentiary support for the pleading. (See, Rovello v Orofino Realty Co., Inc., 40 NY2d 633.) The plaintiff may submit affidavits and evidentiary material on a CPLR 3211(a)(7) motion for the limited purpose of correcting defects in the complaint. (See, Rovello v Orofino Realty Co., Inc., supra; Kenneth R. v Roman Catholic Diocese of Brooklyn, 229 AD2d 159.) In determining a motion brought pursuant to CPLR 3211(a)(7), the court "must afford the complaint a liberal construction, accept as true the allegations contained therein, accord the plaintiff the benefit of every favorable inference and determine only whether the facts alleged fit within any cognizable legal theory ." (1455 Washington Ave. Assocs. v Rose & Kiernan, supra, 770-771; Esposito-Hilder v SFX Broadcasting Inc., 236 AD2d 186.) Based on this standard, the complaint sets forth a cause of action for a declaratory judgment. The complaint clearly sets forth allegations that the defendants failed to cooperate in the defense of the action and failed to give timely notice of the underlying claim.

The branch of the motion seeking dismissal pursuant to CPLR 3211(a)(1) is granted. CPLR 3211 (a) (1) provides that "(a) Motion to dismiss cause of action. A party may move for judgment dismissing one or more causes of action asserted against him on the ground that: 1. a defense is founded on documentary evidence . . . " In order to prevail on a CPLR 3211(a)(1)

motion, the documentary evidence submitted "must be such that it resolves all the factual issues as a matter of law and conclusively and definitively disposes of the plaintiff's claim . . . " (Fernandez v Cigna Property and Casualty Insurance Company, 188 AD2d 700, 702; Vanderminden v Vanderminden, 226 AD2d 1037; Bronxville Knolls, Inc. v Webster Town Center Partnership, 221 AD2d 248.)

Initially, contrary to plaintiff's claim, there is no requirement that a party moving for relief under CPLR 3211 provide a copy of the pleadings along with the motion. Also contrary to plaintiff's claim, the motion was untimely. Defendant Corrado was served with the complaint on March 23, 2007, by "nail and mail" substituted service pursuant to CPLR 308(2). Under that section, service is only completed ten days after filing of the affidavit of service with the county clerk. If Colony filed the summons and complaint the same day that Corrado was served, then ten days later would be April 2, 2007. Since the time to answer or respond expires thirty days after the completion of service, Corrado had until May 2, 2007, to answer or respond and concomitantly file the instant CPLR 3211 motion. As such, the defendant's 3211 motion was timely served on April 25, 2007, which was before the expiration date. In any event, even if the Court were to adopt Colony's calculations, the motion was made two days late. Colony has not indicated any undue prejudice in having to respond to a motion only two days late. Accordingly, it is well within this court's interest of justice jurisdiction to extend Corrado's time to make the instant motion and to give it full consideration.

The law is well settled that, where an insurer disclaims coverage on specified grounds, it cannot later assert additional grounds for disclaimer. In the present case, because Colony failed to reserve its right or disclaim on the basis of late notice or lack of cooperation in its October 27, 2006 letter, Colony's subsequent attempt to disclaim based on late notice and lack of cooperation is null and void. *See*: General Accident Insurance Group v. Cirucci, 46 N.Y.2d 862 (1979) Further, Corrado, as the injured party provided Colony with written notice of the claim, thus, Colony was required to cite the insured party's failure to notify it as a ground for disclaiming, in its October letter. *See*, Insurance Law § 3420 [a] [3]; Eveready Ins. Co. v Chavis, supra. Since Colony was fully aware of its insured's failure to give notice, its failure to mention this as a ground for disclaiming in its reservation of rights letter acts as a waiver of its disclaimer for late notice.

Moreover, Corrado's notice of her claim to Colony was timely and proper. The notice provisions of the insurance policies involved in this case must be construed as requiring the insureds to give notice "within a reasonable time under all the circumstances" Deso v London & Lancashire Indem. Co. of America, 3 N.Y.2d 127, 129. *See* Insurance Law § 3420[a][4]. In the absence of a valid excuse, "a failure to satisfy the notice requirement vitiates the policy." Security Mut. Ins. Co. of N.Y. v Acker-Fitzsimons Corp., 31 N.Y.2d 436, 440. A party injured by an insured individual has an independent interest in the protection afforded by the insured's liability coverage. Allstate Ins. Co. v. Marcone, 29 A.D.3d 715 (2d Dept 2006) Accordingly, when the insured has failed to give proper notice, the injured party, by giving notice himself or herself, can preserve his or her rights to proceed directly against the insurer. *Id*. *See* Insurance Law § 3420[a][3]). Notice given by an injured party is not held to the same standards, in terms of time, as govern notice by the insured, since what is reasonably possible for the insured may not be reasonably practical for the injured person. Rather, when dealing with notice by the injured party, the test is one of reasonableness, measured by the diligence exercised by the injured party in light of the prospects afforded to him under the circumstances. *Id*. Eveready Ins. Co. v Chavis, 150 AD2d 332 (2d Dept 1989.)

Under the circumstances of the instant case, Corrado provided timely notice of her claim to Colony. It is clear from the facts set forth above that Corrado actively sought the insurance carrier from defendant King, but such efforts were met with his dilatory actions. When Corrado was finally provided the carrier's name, she promptly contacted it and gave notice of the claims against its insured. Based upon what appeared reasonable at the time, not by hindsight, it cannot be determined as a matter of law that Corrado was required to undertake more aggressive means of ascertaining defendant King's insurance coverage and notifying it about the allegations of negligent work on her pool. Corrado's attorney repeatedly attempted to obtain information about King's insurance carrier from King's attorney. In fact, the recalcitrance by King's attorney led to a preclusion order by the Court based on failure to provide discovery. As such, Corrado's diligence and persistence in locating Colony for the purpose of providing notice to it of the claim against its insured was reasonable and timely. *See*, Allstate Ins. Co. v. Marcone, 29 A.D.3d 715 (2d Dept 2006) Accordingly, Corrado has provided documentary evidence that disposes of all of the issues in Colony's declaratory judgment action and Corrado's motion to dismiss the action,

pursuant to CPLR 3211 [a] [1]), is granted. Agway Ins. v. Alvarez, 258 A.D.2d 487 (2d Dept 1999.)

The branch of the motion seeking an order imposing sanctions against plaintiff for bringing a frivolous action is denied. The Court finds insufficient basis to impose sanctions given the issues raised in the instant motion.

Dated: June 11, 2007 **.....**

ORIN R. KITZES, J.S.C.