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

PRESENT: HON. PAUL G. FEINMAN Justice

PART 52

Taylor, J

INDEX NO. 113110/06

MOTION DATE

- v -

MOTION SEQ. NO. 01

Chubb + Son

MOTION CAL. NO. 13

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

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1,2
Answering Affidavits — Exhibits	3,4
Replying Affidavits	5,6
Sur Replies	7, 8, 9

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, It is ordered that this motion

FILED

JUL 24 2007

NEW YORK
COUNTY CLERK'S OFFICE

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION/ORDER

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

Dated: 7/19/07

PGF

J.S.C.

Check one: ☐ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 52
----------X
GEORGE TAYLOR and HWISOOK TAYLOR,
Plaintiffs,

against

CHUBB & SON, INC. d/b/a VIGILANT INSURANCE COMPANY,
Defendant.
----------X

Index Number 113110/2006
Mot. Seq. No. 001
Cal. No. 13

DECISION AND ORDER

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Papers considered in review of this motion to dismiss:

Papers	Numbered
Notice of Motion and Affidavits Annexed	1,2
Answering Affidavits, Memo of Law	3,4
Replying Affirmation, Memo of Law	5,6
Sur-reply Memo of Law	7
Sur-reply Affirmation, Memo of Law	8, 9

PAUL G. FEINMAN, J.:

In this declaratory judgment action, defendant insurance company moves to dismiss the complaint based on documentary evidence and failure to state a cause of action pursuant to CPLR 3211(a)(1) and 3211(a)(7). For the reasons which follow, the motion is granted.

Background

Plaintiffs are owners of real property located on 38th Street in New York County. Defendant is an insurance company which issued a homeowner's policy to plaintiffs commencing in 2002. Plaintiffs are seeking a declaration that defendant must provide coverage for damage sustained by their home and allegedly caused by an irrigation system on an adjoining

property.

In 2005, plaintiffs commenced an action against their next door neighbors seeking damages "incurred due to the . . . negligent installation and operation of the irrigation system and the trespass and infiltration of water into the Taylor property." (Am. Compl. ¶ 16). The action, *George Taylor and Hwisook Taylor v Raja Flores, Kathry Quadracci-Flores, Elizabeth E. Quadracci, and Quad Graphics, Inc.* (Index No. 109568/2005), was tried before this court in February 2007. No verdict has been rendered by the court as the parties have not yet submitted their proposed findings fact and final memoranda of law.

Defendant moves to dismiss this declaratory action arguing that the claims are explicitly excluded by the insurance contract and that plaintiffs failed to timely notify it of their potential claim. According to the complaint, in about 2001, plaintiffs' next door neighbors installed an irrigation system along the westerly side of plaintiffs' property, and operated the system on a "continual or daily basis" from about March through November of each year thereafter (Am. Compl. ¶¶ 11-12). Plaintiffs allege that the system's operation caused water to "penetrate into" and "physically invade" plaintiffs' property, resulting in damage to the interior walls, floors, and masonry, pooling of water, destabilization of the soil at the building's foundation, "severe damage" to the foundation and exterior and interior walls along the west side of the property, and "extensive water damage" (Am. Compl. ¶ 14).

Also submitted on this motion are portions of the plaintiff Hwisook Taylor's trial testimony in the *Taylor v Flores* action. According to Mrs. Taylor, she noticed "wet walls" in 2002, after which she hired an engineer to inspect her home (Def. Sur-reply Aff., Ex. A [Trial

Test. of H. Taylor, 2/15/07 [hereinafter "Taylor Test. I"], 4-5]).[1] She herself was "not knowledgeable in these matters, but wanted to know why the wall was wet (Taylor Test. 6). The engineer apparently recommended that she buy a dehumidifier (Taylor Test. I, 7). Another individual who looked at her basement during the same period told her, "it's a basement," and also suggested a dehumidifier (Def. Sur-reply, Aff. Ex. B [Trial Test. of H. Taylor, 2/16/07 [hereinafter "Taylor Test. II"], 82-83, 86,90). Mrs. Taylor was given the impression that dampness and wet walls, "one time or two times" was in the nature of a basement (Taylor Test. II, 90).

In the summer of 2003, Mrs. Taylor's sister moved into the home and upon her return from vacation in early September 2003, she smelled dampness and found standing water in the basement (Def. Sur-reply Aff., Ex. C [Trial Test. of Koh], 6-7). Her sister notified her, and Mrs. Taylor called the same engineer and asked him reinspect the home, and she contacted a construction engineer as well (Taylor Test. I, 9, 19, 21).[2] The engineer told her that the neighbors' watering system was the problem (Taylor Test. I, 23). The construction engineer notified Mrs. Taylor, who was in Zurich, that there was a problem (Taylor Test. II, 52). Both the inspector and engineer wrote reports which Mrs. Taylor sent to her next door neighbors in November 2003 (Taylor Test. II, 56). In April 2004, she wrote to her neighbors, from Zurich, to ask for help in resolving the issue before the planting season (Taylor Test. II, 60). In June 2004,

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[1]When asked whether the basement floor had standing water in 2002, Mrs. Taylor stated "no." (Def. Sur-reply Aff., Ex. B [Trial Test. of H. Taylor, 2/16/07], 110).

[2]According to Mrs. Taylor, as of April 2003, she was in New York only some of the time and living primarily in Zurich, Switzerland; her husband, plaintiff George Taylor, was also living in Zurich (Taylor Test. II, 95). She relied on her sister to inform her of the conditions of the house (Taylor Test. II, 96).

still in Zurich, Mrs. Taylor was notified by her sister that the floor was wet again (Taylor Test. II, 68). Sometime that summer, she was informed in an e-mail from her neighbors that their sprinkler system was "capped" as a "short term solution" to the problem (Taylor Test. II, 71, 73). Mrs. Taylor remained in Zurich in July 2004 and did not know that status of her basement other than the fact that her sister did not call to report further leakage (Taylor Test. II, 72, 73).

Although it is not entirely clear when plaintiffs notified defendant, their insurer, of a potential claim, defendant insurance company hired a construction inspector in October 2004 to inspect plaintiffs' home and report on the cause and origin of the water infiltration "which caused extensive damages to interior walls." (Aff. in Opp. Ex. 3 [Parisi Report, Nov. 2, 2004]). The report, dated November 2, 2004, states that (1) plaintiffs told the inspector that water damage was first noted in July 2003, (2) upon their return home from vacation in September 2003 plaintiffs found the basement flooded and the west wall saturated with water, (3) they contacted the next door neighbors who ultimately turned off the front part of the sprinkler system but not the rear part, and (4) they stripped the front portion of the basement down to the studding to allow for drying and observation. The inspector observed that "excessive amounts of moisture" were "migrating through this west wall," "extensive" deterioration had weakened the floor and could result in partial collapse of the first floor and that "this deterioration most likely has occurred over a long period of time and is not necessarily related to this particular loss." (Parisi Report 2-3). The presence of moisture in the first floor walls "directly compare[d] with the planters on the outside area of courtyard [next door], indicating possible leakage and/or water migration due to the construction of these planters." (Parisi Report 3). The design and construction of the neighbors' courtyard "would [have] require[d] extensive waterproofing to the

foundation wall" (Parisi Report 4). The report concluded that "to a reasonable degree of engineering certainty," the cause of the water infiltration into plaintiffs' home was the "direct result of subterraneous water problems on the [neighbors'] property to the east," and that the "cause for the water infiltration is most likely due to improper waterproofing of the courtyard area during construction." (Parisi Report 5).

Plaintiffs notified their neighbors in about December 2004 of their claim (Am. Compl. ¶ 18). The neighbors' insurer, also Chubb & Son, Inc., hired an engineer to investigate both plaintiffs' and the neighbors' property, and by letter dated July 20, 2005, Chubb & Son, Inc., as the claims manager for affiliate Great Northern Insurance Company, notified plaintiffs' counsel that the engineer had issued a report which concluded that "irrigation water seepage is not the cause of the structural deterioration," and "that the cause of the structural deterioration is the lack of waterproofing in the basement and first floor walls [of plaintiff's property] causing infiltration of rainfall and groundwater into the structure for over 100 years." (Aff. in Opp. Ex. 4, Hall letter to Su, July 20, 2005). The May 18, 2005 engineer's report, prepared by Thornton-Tomasetti Engineers, indicated that the neighbors' basement, as well as the basement of a neighbor on the other side of the plaintiffs' neighbors, both have had water infiltration problems; the non-immediate neighbor had installed a sump pit and pump, while plaintiffs' neighbors have floor drains to collect water after attempts to waterproof the basement from the inside were unsuccessful (Aff. in Opp. Ex. 4, Thornton-Tomasetti Report 2). The report further described the geology of that area to include a flow of ground water with the ability to "built up approximately two to three feet above basement levels during heavy rains causing water to infiltrate in basement spaces," with "the amount of infiltration depending on the integrity of the foundation structures

and waterproofing membranes." (Thornton-Tomasetti Report 3). The Thornton-Tomasetti engineer opined that the four-year-old sprinkler system "may have exacerbated" the condition of plaintiffs' basement wall, but that the sprinkler' system's "effect is minimal compared to the rainfall activity and its water infiltration for over 100 years."[3] (Thornton-Tomasetti Report 3, 4). Because the conclusion of the report is that the "main cause of the problem is lack of waterproofing in the basement and first floor walls of" plaintiffs' building, the neighbors' policyholder indicated that it would not voluntarily pay on their policyholders' behalf (Aff. in Opp. Ex. 4 [letter from Hall, examiner of Chubb & So, Inc. to Su]).

Plaintiffs commenced this declaratory action in *September 2006* (Pl. Sur-reply 2). Defendants contend that plaintiffs should have notified it when they first learned of the moisture in the basement and the pooling of water and have breached their contract by failing to notify the insurer in a timely fashion of their claim, and that plaintiffs' insurance policy contains two exclusions which preclude coverage of the claim. The policy in effect in *2002* (when water was first discovered in the basement), and the policy in effect in *2004* (when the Parisi report reported structural damage and concluded that excess water from the neighbors' sprinkler system was causing the damage), both contain exclusions for "ground water" and "negligent [or faulty] planning, construction and maintenance." In addition both policies set forth in identical language the insured's duty after a loss (or an occurrence) to notify the insurer "as soon as possible" and to bring an action within two years after a loss.[4]

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[3]Plaintiffs' building was presumed to have been built "probably... before the turn of the [twentieth] century." (Thornton-Tomasetti Report 1).

[4] The 2002 policy states that if the insured has a loss, "You must notify us or your agent of your loss as soon as possible" (Reply Aff. Ex. A, 2002 Policy , at Y-4), and the 2004 policy

In opposition, plaintiffs argue that they only learned of the nature and extent of damage and the reason for the problem in late *2004*, after defendant's inspector visited their home and issued his report, and had timely notified defendant of the potential problem beforehand. They argue that the policy exclusions do not apply, as the meaning of "ground water" does not encompass water from an irrigation system, and that it is the faulty *operation* of the sprinkler system which caused the damage, an exception to the exclusion. They also argue that defendant failed to timely disclaim coverage.

Legal Analysis

In determining a motion pursuant to CPLR 3211(a), the Court must "accept the facts as alleged in the complaint as true, accord plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]; *accord, Campaign for Fiscal Equity, Inc. v State of N.Y.*, 86 NY2d 307, 318 [1995]). In order for a defendant to prevail in a motion to dismiss, he or she must convince the court that nothing the plaintiff can reasonably be expected to prove would establish a valid claim (Siegel, New York Practice, § 265 [3d ed.]).

Compliance with an insurance policy's notice provision is considered a condition precedent to coverage of the claim (*White v City of New York*, 81 NY2d 955, 615 [1993]). An insurer is not obligated to pay for the loss of its insured in the absence of timely notice in

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states, "You must notify us or your agent as soon as possible." (Not. of Mot. Ex. B, 2004 Policy at Y-3). Both policies state that the insured agrees "not to bring legal action against us unless you have first complied with all conditions of ths policy. Except for vehicle coverage, you also agree to bring any action against us within two years after a loss occurs." (Reply Aff. Ex. A, 2002 Policy, at Y-5; Not. of Mot. Ex. B, 2004 Policy, at Y-5).

accordance with the terms of the policy (*DiGuglielmo v Travelers Prop. Cas.*, 6 AD3d 344, 345 [1st Dept. 2004]). The requirement to give notice "as soon as practicable" is commonly used in insurance policies and has a long history of judicial interpretation and application; it presumes elasticity and a case-by-case inquiry as to whether the timeliness of the notice was reasonable, taking all of the circumstances into account (*Metropolitan Prop. & Cas. Ins. Co. v Mancuso*, 93 NY2d 487, 494 [1999], citing *Mighty Midgets, Inc. v Centennial Ins. Co.* 47 NY2d 12 [1979]; *see also Security Mut. Ins. Co. v Acker-Fitzsimmons Corp.*, 31 NY2d 436 [1972]; *Matter of State Farm Mut. Auto. Ins. Co. v Adams*, 259 AD2d 551 [2d Dept. 1999]). The crucial issue is not the simple length of time it took to notify the insurer but the reason for the timing (*Mighty Midgets*, 47 NY2d at 19). Thus, a lack of knowledge that a loss has occurred can excuse or explain the delay in giving notice to the insurer, although the insured bears the burden of showing the reasonableness of such excuse (*White v City of New York*, 81 NY2d 955, 957 [1993]). Where the claimant offers mitigating circumstances such as absence from the State or lack of knowledge of the occurrence or its seriousness, the reasonableness of the delay in notification is a question for the trier of fact (*Deso v London & Lancashire Indem. Co.*, 3 NY2d 127, 129-130 [1957]).

Here, plaintiffs proffer two arguments to excuse the delay in making their claim. First, that they had extensive periods of absence from their home, particularly in 2003-2004, and second that they did not know until late 2004 either the extent of damage to their home or that the neighbors' failure to waterproof the courtyard was the cause of their problems. However, it is clear from the submitted excerpts of trial testimony that although Mrs. Taylor was not knowledgeable in these matters and was led to understand that basements are subject to periodic

wetness, by *Fall 2003* plaintiffs had been informed by their own inspectors that the dampness and water were coming from the next door irrigation system, and after learning that fact, months were spent trying to resolve the problem with their neighbors. Plaintiffs were largely absent from their home and relied on reports from Mrs. Taylor's sister concerning water in the basement. The *one year delay* from the time plaintiffs learned the source of their problem in the *Fall 2003*, and that it was likely to be ongoing in nature, until they gave notice of a potential claim to their insurer in *Fall 2004*, cannot be found reasonable. This is particularly true given the long period of time that elapsed from the first appearances of excess moisture in *July 2002*, until the time plaintiffs notified the insurer. Thus, defendant's motion to dismiss the complaint on the ground of untimeliness must be granted, and the question of whether the defendant timely disclaimed coverage is academic. Furthermore, because the action is untimely, the court need not analyze the policy exclusions. It is therefore

ORDERED that defendant's motion to dismiss is granted and the complaint is dismissed with costs and disbursements to defendant as taxed by the Clerk of the Court; and it is further

ORDERED that the clerk of the court is to enter judgment accordingly.

This constitutes the decision and order of the court.

Dated: July 19, 2007
New York, New York

J.S.C.