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

PRESENT: HON. SHIRLEY WERNER KORNREICH PART 54

Index Number : 604209/2004

FIRE & CASUALTY INSURANCE

VS

SOLOMON, VICTOR

Sequence Number : 004

SUMMARY JUDGMENT

INDEX NO. 604209/04

MOTION DATE 6/21/07

MOTION SEQ. NO. 4

MOTION CAL. NO. _____

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

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1,2,3,5
Answering Affidavits — Exhibits _____	4
Replying Affidavits _____	

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION AND ORDER.

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

Dated: 8/7/07

HON. SHIRLEY WERNER KORNREICH 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: PART 54

----------X

FIRE & CASUALTY INSURANCE COMPANY OF CONNECTICUT,

Plaintiff,

-against-

VICTOR SOLOMON, ELIZABETH SOLOMON-WIGGINS, SOLAS MANAGEMENT CORP., MELBA SOLOMON, DOROTHY SOLOMON, JULIANA KELLY and JOEL PAREDES, infants under the age of 14 years, by their mother and natural guardian, MAGALY KELLY, and MAGALY KELLY, individually,

Defendants.

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Index No.: 604209/04

DECISION, ORDER and JUDGMENT

KORNREICH, SHIRLEY WERNER, J.:

This is an action brought by plaintiff Fire & Casualty Insurance Company of Connecticut ("FCICC") seeking a declaration that it is not obligated, under a commercial general liability policy, to defend or indemnify defendants Victor Solomon, Elizabeth Solomon-Wiggins, Melba Solomon, Dorothy Solomon, and Solas Management Corp. in an underlying personal injury action brought by Magaly Kelly on behalf of herself and her infant children Juliana Kelly and Joel Paredes (collectively, the "Kellys") for lead paint exposure. Plaintiff moves for summary judgment against all defendants.

I. *Background*

FCICC issued Commercial General Liability Policy POM 001363020310 (the "Policy") to Solas Management, Inc. ("Solas"), effective from December 10, 2002 to December 10, 2003. The Policy provided general liability coverage for real property including 2526 Valentine Avenue, Bronx, New York (the "Building"). Coverage existed for "'bodily injury' and 'property

damage' only if: (1) The 'bodily injury' or 'property damage' [was] caused by an 'occurrence' that [took] place in the 'coverage territory'; (2) The 'bodily injury' or 'property damage' occur[ed] during the policy period." The Policy defined "occurrence" as an accident, including continuous or repeated exposure to substantially the same general harmful conditions.

Victor Solomon, Elizabeth Solomon-Wiggins, Melba Solomon, and Dorothy Solomon (collectively, the "Solomons") purchased the Building as individuals in 1985 and retained ownership until December 1, 2003. The Solomons each owned an equal share of Solas, which managed the Building and other properties.

Magaly Kelly moved into apartment 2E of the Building as the sole tenant in July 1996. Her son Joel Paredes, born on September 17, 1998, and her daughter Juliana Kelly, born on February 12, 2001, joined her in the apartment shortly after their births. On January 11, 2000, a test revealed Joel had a blood lead level of 6. A routine test for Juliana on December 18, 2001 showed a blood lead level of 10. A blood lead level of under 10 is considered normal, 10-19 moderate, 20-44 high, and 45-69 urgent. On January 23, 2002, the Department of Health ("DOH") sent a letter to the Kellys' pediatrician ordering regular blood lead tests for Juliana Kelly every three months until her lead level fell below 10. The pediatrician conducted further tests on both children. In April 2002, Joel had a blood lead level of 21, and Juliana had a level of 20.

On April 25, 2002, the DOH inspected the Kellys' apartment and discovered lead paint. As a result, the DOH issued an order to Solas on April 30, 2002, requiring lead abatement work in the apartment. A contractor hired by Solas carried out the work, and the Kellys were relocated to apartment 5C for four to five months. When tested on June 19, 2002, Juliana had a

blood lead level of 12, and Joel had a level of 18. A further test on January 29, 2003 showed Joel had a level of 11.

On July 22, 2002, the DOH conducted a compliance inspection of apartment 2E. Pursuant to the inspection, the DOH issued a report on December 12, 2002, certifying that the abatement was complete. Defendant Magaly Kelly testified that when she moved back into apartment 2E, the conditions were "regular," and she had no problems with the condition of the paint. The Kellys continued to live in the apartment until June 15, 2005.

FCICC provided a defense for Solas after the filing of the underlying action, since the complaint did not exclude the possibility of lead exposure during the policy period. However, on December 15, 2004, FCICC filed the instant action for declaratory judgment, asserting a lack of coverage under the Policy because there was no bodily injury during the policy period.

II. *Conclusions of Law*

To prevail on a motion for summary judgment, the movant must establish a prima facie showing of entitlement to judgment as a matter of law by producing sufficient evidence to demonstrate the absence of any material issue of fact. *Giuffrida v. Citybank Corp.*, 100 N.Y.2d 72, 81 (2003). Once the movant has made a prima facie showing, the burden shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial. *Zuckerman v. New York*, 49 N.Y.2d 557, 560 (1980).

CPLR 3212(b) states that a motion for summary judgment shall be supported by personal affidavit, a copy of the pleadings and other available proof. However, a movant's burden of proof can be met by the submission of deposition testimony in lieu of personal affidavits. *See Olan v. Farrell Lines Inc.*, 64 N.Y.2d 1092 (1985); *Muniz v. Bacchus*, 282 A.D.2d 387 (1st Dept. 2001); *Wiwigac v. Snedaker*, 282 A.D.2d 801 (3rd Dept. 2001). Moreover, the civil practice rules

are to be liberally construed to secure the just, speedy and inexpensive determination of every civil judicial proceeding. CPLR 104.

Plaintiff has met its burden of proof by presenting sufficient evidence that there is no coverage under the Policy for the underlying action, since the Kellys did not suffer bodily injury during the policy period. Defendants argue that plaintiff's motion must be denied regardless of its merits because plaintiff did not submit a personal affidavit and the initial motion papers lacked a copy of the original complaint. However, plaintiff made its prima facie showing by presenting evidence including a certified copy of the Policy, defendants' own deposition testimony in the underlying action, and medical records for the Kelly children. Plaintiff also corrected any deficiency in the record by attaching the complaint and defendants' answers to its reply brief.

Since courts have applied the injury in fact test to cases of lead poisoning, coverage begins with the onset of a lead-induced injury or illness, even if undiagnosed at the time. *See U.S. Liability Ins. Co. v. Farley*, 215 A.D.2d 371 (2nd Dept. 1995); *Greater New York Mutual Ins. Co. v. Royal Ins. Co.*, 238 A.D.2d 261 (1st Dept. 1997); *Mt. Vernon Fire Ins. Co. v. Abesol Realty Corp.*, 288 F. Supp. 2d 302 (ED NY 2003); *Generali-U.S. Branch v. Caribe Realty Corp.*, 612 N.Y.S.2d 296 (Sup. Ct., NY County 1994). After the initial injury, each additional exposure to lead constitutes a new injury because it compounds the original harm. *Mt. Vernon Fire Ins. Co. v. Chong*, 1998 U.S. Dist. LEXIS 2856, *7, 1998 WL178847, *2 (ED NY Feb. 18, 1998)(citing *General Accident Ins. Co. v. Idbar Realty Corp.*, 622 N.Y.S.2d 417, 418 (Sup. Ct., Suffolk County 1994)).

It is undisputed that the Kelly children developed lead poisoning from exposure to lead paint in their apartment. However, plaintiff presents the DOH certification and defendants' own

testimony establishing that the lead in the Kellys' apartment was abated months prior to the policy period. In addition, the children's blood lead levels fell after the abatement work was ordered. The record indicates that the Kelly children were not exposed to lead in the apartment during the policy period and thus did not suffer any new compensable injury. Without injury during the policy period, there is no coverage under the Policy, entitling plaintiff to summary judgment.

Defendants have not demonstrated the existence of any questions of fact. As defendants point out, courts have found coverage or questions of fact in some cases where lead poisoning occurred before the effective period of an insurance policy. However, these cases are inapposite because they contained evidence that the source of lead still existed during the policy period. Defendants present no such evidence here. Instead, defendants allege only the possibility of exposure during the policy period based solely on the complaint in the underlying action and vague, uncertain testimony by Ms. Kelly regarding the ages of her children during the period of exposure. Defendants fail to rebut plaintiff's evidence that the abatement work was successful in removing the lead from the apartment prior to the policy period. Although defendants request further discovery, they do not show that facts essential to opposing the motion are exclusively within plaintiff's knowledge and necessary in this 2004 case.

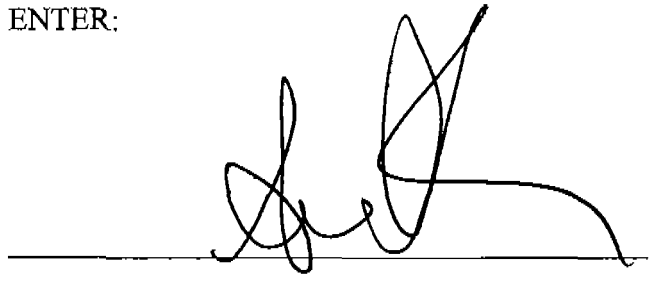
While an insurer's duty to defend is broader than its duty to indemnify, plaintiff fulfilled its duty by defending Solas after the filing of the underlying action. *30 West 15th Street Owners Corp. v. The Travelers Ins. Co.*, 165 A.D.2d 731, 786 (1st Dept. 1990). Moreover, where there is no coverage, there is no duty to defend or indemnify. *Id.* By establishing a lack of coverage under the Policy, plaintiff is relieved of any duty to defend or indemnify Solas. Accordingly, it is

ORDERED that plaintiff's motion for summary judgment against Victor Solomon, Elizabeth Solomon-Wiggins, Melba Solomon, Dorothy Solomon, Solas Management Corp., and Magaly Kelly, on behalf of herself and her infant children Juliana Kelly and Joel Paredes, is granted; and it is further

ORDERED that the Clerk shall enter judgment accordingly; and it is further

ORDERED, ADJUDGED and DECLARED that FIRE & CASUALTY INSURANCE COMPANY OF CONNECTICUT has no duty to defend or indemnify Victor Solomon, Elizabeth Solomon-Wiggins, Melba Solomon, Dorothy Solomon, or Solas Management Corp., in the action entitled Juliana Kelly, infant, et al. v. Victor Solomon, et al., Sup. Ct. Bronx Co., Index No. 7319-03.

Dated: August 7, 2007 ENTER:



J.S.C.