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

Charles Edward Ramos 53

Index Number : 601562/2005

WELLS FARGO BANK, N.A.

vs

ZURICH AMERICAN INSURANCE

Sequence Number : 014

PRECLUDE

PART _____

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

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	
Answering Affidavits — Exhibits	
Replying Affidavits	

FILED
FEB 28 2007
COUNTY CLERK'S OFFICE
NEW YORK

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion is disposed of as reflected in the Court's transcript. A party to this matter may request that this Court "So Order" the transcript by submitting a copy of the Court Stenographer's record, together with an errata sheet correcting all errors in the record, to the Clerk of Part 53. If all parties consent to the proposed corrections or agree that no corrections are required, a stipulation to that effect shall accompany said errata sheet or transcript. In the absence of consent, the requesting party shall notice the record for settlement pursuant to CPLR Rule 5525(c).

If an order is required to effectuate this Court's ruling, any party may submit a proposed order to Part 53 (not the Commercial Division Clerk's office) together with a copy of the transcript. In the event the ruling requires the entry of a judgment or other action by the clerks, the submission of a proposed order or judgment is mandatory and shall be in form acceptable to the Judgment Clerk or other appropriate clerk.

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

Dated: 2/21/07

CHARLES E. RAMOS J.S.C.

J.S.C.

Check one: ☑ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION

----------X

WELLS FARGO BANK, N.A., f/k/a Wells Fargo Bank Minnesota, N.A., successor by Merger to and f/k/a Norwest Bank Minnesota, National Association, as Trustee for the registered holders of DLJ Commercial Mortgage Corp., Commercial Mortgage Pass-Through Certificates, Series 1998-CF2,

Plaintiff,

- against -

ZURICH AMERICAN INSURANCE COMPANY, successor to Kemper Environmental, Ltd. and LUMBERMENS MUTUAL CASUALTY COMPANY,

Defendants.

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Index No. 601562/05

Charles Edward Ramos, J.S.C.:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter was tried before the Court without a jury on September 7, December 4, 5, 6, 7, 18 and 19, 2006. To the extent any of the Findings of Fact constitute Conclusions of Law or the application of law to fact, they are incorporated herein as Conclusions of Law. Similarly, to the extent any of the following Conclusions of Law constitute Findings of Fact, they are deemed incorporated as Findings of Fact. Outstanding motions 14 through 19 are incorporated and herein determined.

The Parties

Plaintiff WELLS FARGO BANK, N.A., f/k/a Wells Fargo Bank Minnesota, N.A., successor by merger to and f/k/a Norwest Bank Minnesota, National Association, as Trustee for the registered holders of DLJ Commercial Mortgage Corp., Commercial Mortgage Pass-Through Certificates, Series 1998-CF2 ("Wells Fargo" or the

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"Trust") is a REMIC trust. Transcript of trial ("TR"), p. 69.

ORIX Capital Markets, LLC ("ORIX") is the special servicer for Wells Fargo. See Ex. 8, Power of Attorney; (TR. pp. 70-71).

Defendant Lumbermens Mutual Casualty Company ("LMC") is an insurance company also known by the trade name Kemper. (TR. p. 82).

Background

The underlying transaction involves an $8.7 million loan issued by LMC's insured to Run-In Foods and Solomon Partners to finance the purchase of 16 gas stations, which had a total contract sales price of $7.8 million. (TR. pp. 68, 73-74).

The lender in the Mortgage Loan transaction was Column Financial, Inc. ("Column"). See Ex. 417-420, Loan Agreement, Note, Mortgage and Security Agreement, respectively.

The Mortgage Loan and the related loan documents were assigned by Column to Wells Fargo. (Ex. 7, Omnibus Assignment; TR. p. 68, Ex. 235: Policy; See also Ex. 407).

The Policy

In connection with the Mortgage Loan, an insurance policy (the "Policy") entitled "Creditor Reimbursement for Environmental Damages Insurance Policy" was obtained by Wells Fargo's predecessor. LMC issued the policy covering the period of April 20, 1998 to April 20, 2008. (Ex. 235).

This policy was to insure the value of the collateral against losses resulting from pollution conditions not reflected in the value of the collateral at the time the loan was placed.

Wells Fargo seeks damages for pollution conditions at eight properties: Scotchman 401, Scotchman 402, Scotchman 403, Scotchman 406, Dixie Boy 4, Dixie Boy 7 and Gas World 8.

The coverage involved in this action is Coverage F.

Coverage F of the Policy reads as follows:

> Coverage F - COLLATERAL VALUE LOSS REIMBURSEMENT
>
> To pay on behalf of the INSURE. for COLLATERAL VALUE LOSS incurred by the INSURED on a COVERED LOAN subject to the Retention Amount and Limit of Liability stated in Items IV and V of the Declarations.

[Ex. 235 (capitalization in original)].

Article II.E of the Policy sets the limits of coverage by defining Collateral Value Loss as follows:

> E. COLLATERAL VALUE LOSS means the lesser of:
>
> 1. all amounts due and owing to an INSURED on a COVERED LOAN; or
>
> 2. the FAIR MARKET VALUE at the time of the COVERED LOAN closing for the COVERED LOCATION subject to the DEFAULT; or
>
> 3. estimated ENVIRONMENTAL CLEAN UP COSTS at the COVERED LOCATION subject to the DEFAULT as reasonably agreed upon between the Company and the INSURED.

[Ex. 235, Policy (capitalization in original)].

Motion *In Limine*

Prior to trial LMC presented a motion *in limine* to exclude estimated clean up costs that were not discovered during the policy period (which began in April of 1998). (TR. p. 9). In context, that motion was a virtual motion for summary judgment. Nevertheless, the issues raised in that motion that went to the heart of this case were properly presented. This Court's

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decision on the record barred "recovery for costs related to pre-existing contamination that were known at the time the policy was incepted." This reasoning for said holding is hereby stated as follows.

The Policy defines an ENVIRONMENTAL INCIDENT as "either a CLAIM made against the insured, during the POLICY PERIOD, as a result of POLLUTION CONDITIONS, or the INSURED's discovery during the POLICY PERIOD of POLLUTION CONDITIONS." (Ex. 235, p. 3). The Policy also provides that "All CLAIMS, CONTRACT DAMAGES, ENVIRONMENTAL CLEAN UP COSTS or LEGAL DEFENSE EXPENSE which involve the same or related POLLUTION CONDITIONS shall be considered a single ENVIRONMENTAL INCIDENT." (Ex. 235, p. 6 Subsection VII, paragraph C).

At the time of the application for insurance, the insured represented that it was aware of pre-existing pollution conditions which were specifically referenced as pollution conditions in the Baseline Environmental Report. (Ex. AL). As these existing conditions were known to all parties, this Court finds that these conditions were reflected in the value placed on the collateral at the time insurance was placed. These pre-existing conditions represented the known extent of environmental pollution damage and could not be the basis for a claim. However, if the known pollution conditions created additional damage during the coverage period, that would constitute a covered loss, even if the loss was merely a worsening of a known condition. Thus the value of the collateral would be insured

against loss.

The condition in the policy that notice be given is satisfied by the insured giving a "Notice of an Environmental Incident." (Ex. 235). The LMC Policy defines an Environmental Incident, in pertinent part, as the Insured's discovery, during the Policy Period of Pollution Conditions. (Ex. 235). There is no requirement in the policy that an Environmental Incident take place during the policy period. Rather, the requirement is that *notice* be given during the policy period concerning an Environmental Incident "to which this Policy applies." Therefore, in the event that an oil spill occurred prior to the policy period, discovery of a pollution condition during the policy period and timely notice thereof, would trigger coverage.[1]

Pre-existing known conditions that were disclosed to Lumbermens before the issuance of the Policy which cause a loss to the value of the collateral during the policy period are also covered by the Policy, provided timely notice is given. It could be stated that any change in the insured's knowledge of pollution conditions that occurred during the policy period was covered. All that is required is that the change in condition (the worsening of pollution damage and the consequent loss in collateral value) be discovered and timely notice given, during the policy period. (Ex. 235).

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[1] The requirement of timely notice effectively restricts coverage to newly discovered conditions, regardless of when the spill occurred.

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The application for the Policy includes references to an Environmental Baseline Report. (TR. p. 74; Ex. 349, Policy Application and Ex. AL, Baseline Report). This is the document that defines what was known about the properties at the time coverage was placed. The Baseline Report refers to existing environmental conditions on the properties covered by the Mortgage (the "Mortgaged Properties") by type of pollutant and location of contamination. (Ex. AL, Baseline Report).

Therefore, the environmental conditions set forth in the Baseline Report disclosed to Lumbermens prior to the inception of the Policy are also covered by the Policy. [Ex. 235, Policy; Article IV.7 (coverage for disclosed pre-existing conditions), Ex. 349, Policy Application and Ex. AL, Baseline Report].

However, pre-existing contamination (loss) that was known by the insured at the time the policy was placed cannot constitute a covered loss, only its worsening is covered. In the first instance, under the terms of the policy, only a loss that is discovered during the policy period is covered, which eliminates all disclosed pollution conditions, except the further worsening of a known condition, during the policy period. In addition, this is a contract of insurance, not a contract to repair or restore. The plaintiff cannot recover under an insurance contact for a past loss. To the extent that the plaintiff seeks recovery for pre-existing conditions (losses) already known, the claim is barred.

Plaintiff's Expert Witness

Wells Fargo's selective production of relevant documents prohibited its expert from providing unbiased and reliable testimony. (See Trial Transcripts collectively dated December 4-7, 2006 and December 18-19, 2006).

On March 22, 2006, Wells Fargo gave a one page spreadsheet prepared by T.C. Consulting to its environmental expert Scott Starr to assist him in developing environmental clean up costs for the seven properties involved in this litigation. (Ex. IF).

The aforesaid spreadsheet was withheld from LMC until after trial began and was only disclosed on or about October 23, 2006. *Id.* On the trial date of Wednesday December 6, 2006, when asked if there were any other documents produced by T.C, Wells Fargo's counsel, Chintin Amin, stated in open Court that no other T.C. documents existed besides the aforementioned one page spreadsheet. *Id.*

LMC then demonstrated that these T.C. documents, which were requested during discovery (in paragraphs 5, 13 and 14 of LMC's Interrogatories to Wells Fargo), were not the only documents that existed. On Monday December 11, 2006 Wells Fargo produced at trial nearly 100 pages of documents produced by T.C. (Ex. IJ).

These T.C. documents show that Mr. Amin's earlier statement that no other T.C. documents existed was a misrepresentation. Mr. Amin himself was the recipient of virtually every document produced by T.C. *Id.*

Additionally, the T.C. documents show that T.C. was an integral part of Wells Fargo's assessment of the environmental

conditions in this litigation as T.C. made the decision to retain LFR Levine-Fricke, Inc. (LFR) to produce all of Wells Fargo's environmental opinions and reports. *Id.*

Moreover, T.C. was critical of LFR's Phase 1 remediation estimates because, *inter alia*, T.C. stated LFR's estimates were "based on limited information" only and characterized the LFR's estimates as "[r]ough cost range based on data presented in LFR ESA.". *Id.* These T.C. documents undermined the numbers upon which Wells Fargo's claim was based.

Wells Fargo gave its expert, Scott Starr, only one T.C. document, the aforementioned spreadsheet, that presented estimated costs to remediate the seven sites that are the subject of this litigation. (Ex. IF). Wells Fargo's counsel admitted that he did not send the remaining relevant T.C. documents that undermined its position to the expert. Wells Fargo gave Starr this one document for the express purpose of assisting him in developing estimated costs for the initial expert report. *Id.* This Court finds that Starr relied on this document because he produced a document that parroted the T.C. Documents numbers to the penny.

Wells Fargo's belated claim that the T.C. Documents are privileged is rejected. Wells Fargo failed to identify any of the T.C. documents on the privilege log it provided to LMC. Privileged or not, this Court finds that Wells Fargo had an obligation to give its expert all of the T.C. documents as a predicate for his testimony. Wells Fargo's act of culling

through its files and selecting which documents to produce to its expert and to LMC render the expert's testimony worthless and violated the most fundamental standards for disclosure.

In addition, Scott Starr changed his testimony during trial from what he had testified to under oath on deposition. At his deposition, Starr testified that he was not aware of any contamination for Scotchman 401, 402, 403 and Dixie Boy 4 that was unrelated to what appeared in the Baseline Report. (Ex. HQ1).

> Q. Now, as to those, let's just go on those four sites. I'm looking at the Mitch chart. That is Petrol Mart 101, 102, 103, and Petrol Mart 107. As to those four sites, your report should be modified to state that there may or may not have been other releases that took place, correct, as to those four sites?
> A. Correct.
> Q. You're not aware of any releases that are referred to in your report, correct? You can't pinpoint any of the releases?
> A. Correct.
> Q. Other than appear in the baseline report?
> A. Correct.
> Q. And that the contamination, at least the pre-April 1998, relates to the original problems that appear in the baseline report, just say the word related; correct?
> A. Yes.
> Ex. HQ1, p. 222:3-22.[2]

At trial, Starr testified in a manner contradictory to his deposition by claiming that the contamination existed at the sites was unrelated to contamination shown in the Baseline Report. This would characterize the contamination as new or at

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[2] Scotchman 401 is also known as Petrol Mart 101, Scotchman 402 is also known as Petrol Mart 102, Scotchman 403 is also known as Petrol Mart 103, and Dixie Boy 4 is also known as Petrol Mart 107. Additionally, Scotchman 406 is also known as Petrol Mart 106.

least newly discovered.

This Court finds that LMC could not have expected that Wells Fargo would present contradictory testimony. As such, this Court refused to accept Starr's contradictory testimony at trial.

Notwithstanding the foregoing, this Court makes the following findings regarding each site.

Scotchman 401

The Court finds Starr's testimony at trial regarding Scotchman 401 troublesome because it contradicted his testimony given under oath on deposition. (TR. p. 552). During trial Starr attempted to testify that Scotchman 401 had contamination unrelated to what was listed in the Baseline Report. (TR. p. 539). He claimed that the property was contaminated by chlorinated solvents that were not listed in the Baseline Report. (TR. p. 539).

However, at his deposition Starr testified that the only contamination at Scotchman 401 he was aware of related to the contamination reported in the Baseline Report (p. 560). (Ex. HQ1, p. 222: 3-22). This Court will not permit Wells Fargo to take a position contrary to the position it took during deposition. (TR. p. 554).

This Court also finds that Wells Fargo could not have discovered pollution conditions during the policy period for Scotchman 401 because it failed to show any existing contamination at Scotchman 401 that was unknown at policy inception. (TR. p. 554). Starr admitted that the only incident

that occurred prior to the policy is reported in the Baseline Report and that he is aware of no other spills or discharges in his reports. (Ex. HQ1, p. 130).

Furthermore, Starr admitted that the entirety of the contamination at Scotchman 401 relates to what was documented in the Baseline Report. (*Id* at p. 148).

Scotchman 402

The Baseline Report shows contamination for Scotchman 402 at well number 4. Thus, pollution was known at this site at the time of the initial sale. Wells Fargo's attempt to show that other contamination at Scotchman 402 occurred or was discovered during the policy period was speculative in nature and therefore does not warrant this Court finding a covered loss. All that is known, regarding Scotchman 402's contamination, is that in 2001 a contaminated area was found near the southeastern corner of the pumps. (TR. pp. 511-512). Wells Fargo failed to produce evidence that any contamination at Scotchman 402 was caused by any particular spill (before or after the policy period). (TR. pp. 511-512).

Starr testified that he did not have documentation that there was a post 1998 release and did not know if the release causing contamination occurred prior to 1998. (TR. p. 507). Starr admitted that the only releases that he was aware of occurred prior to the policy that are reported in the Baseline Report. (Ex. HQ1, pp.158-59).

Moreover, he admitted that the pre-policy contamination at

Scotchman 402 was related to what appears in the Baseline Report. (Ex. HQ1, p. 222). Thus, as Starr admits that no releases occurred after the policy was placed, all pre-policy contamination appears in the Baseline Report and that the entirety of the contamination at Scotchman 402 appears in the Baseline Report. (*Id* at pp. 158-59 and 222).

An alleged subsequent discovery of a gasoline spill that originally occurred on September 17, 1992 was outside the policy period and coverage because any reasonable due diligence would have uncovered a public document such as Exhibit 302, which reported the discharge of September 17, 1992. (TR. pp. 440-441); (Ex. 302). The record discloses no way of knowing which of any discharges (within or without the policy period) caused contamination at Scotchman 402. (TR. p. 511).

Therefore, any assertion as to the causation of contamination at Scotchman 402 is speculative. (TR. p. 512).

In addition, at the time of Scotchman 402's liquidation sale to satisfy the loan, Wells Fargo was not aware of any contamination occurring or discovered within the policy period. (TR. p. 485). This Court therefore finds that except for information known to all of the parties from the placing of the collateral, Wells Fargo has not demonstrated that the buyer, seller or receiver of the property knew of any contamination at the time Scotchman 402 was liquidated, thereby eliminating any possibility that the sales price was diminished by any environmental conditions. (TR. p. 484). This precludes any

finding of loss to the collateral value since Scotchman 402 was sold without an adjustment for any additional pollution conditions.

Thus, this Court finds that Wells Fargo did not discover covered pollution conditions during the policy period at Scotchman 402 or suffer a loss to its collateral value. (TR. p. 484).

Scotchman 403

Starr testified on his deposition that all of the contamination at Scotchman 403 related to contamination in the Baseline Report. (TR. p. 560). Again, Wells Fargo may not surprise the defendant by taking a position contrary to the position it took during deposition. (TR. p. 554).

In addition, Wells Fargo could not have discovered pollution conditions during the policy period for Scotchman 403 because all of the contamination at the site was attributable to the pre 1998 releases, (TR. p. 560) Starr admitted that he was not aware of any releases occurring after the policy was placed and further admitted that all pre-policy contamination relates to what appears in the Baseline Report. (Ex. HQ1, pp. 212, 213, 227 and 222).

Dixie Boy 4

Wells Fargo made an offer of proof that its expert "would testify that based upon further evaluation of the site, the preexisting contamination that he made a cost estimate for was adequately described in the Baseline Report." (TR. p. 561,

13:17).

The Court accepted this offer of proof and finds that the pre-existing contamination at Dixie Boy 4 was adequately represented in the Baseline Report. (TR. p. 561).

Wells Fargo alleged that before the liquidation sale of Dixie Boy 4, a damaged dispenser caused elevated concentration of contaminants to appear after the liquidation sale date. (TR. p. 562). Dixie Boy 4 was sold in liquidation on either June 26, 2005 or June 29, 2005. (TR. pp. 562, 567). However, Wells Fargo did not become aware of any environmental contamination until either April or May of 2006, well after the sale. (TR. pp. 568-569).

Therefore, Wells Fargo could not have been aware of any claim associated with the alleged spill during the policy period. (TR. pp. 570-571, 574-575). Absent circumstances not present here, Wells Fargo's insurable interest for this site terminated on the day the property was sold in liquidation. (TR. pp. 571, 574-575).

The Court also finds that the information in Exhibits 261 and 263 used to support Wells Fargo's claim is inadmissible because it is speculation based on a hearsay statement. (TR. pp. 583, 585, 586).

The Court finds that Wells Fargo could not have discovered pollution conditions during the policy period because Wells Fargo failed to prove that any contamination occurred or was discovered during the policy period.

Notice

In addition to the forgoing, this Court finds that Wells Fargo failed to reasonably provide prompt notice for Scotchman 401, Scotchman 402, Scotchman 403, Scotchman 406, Dixie Boy 4 and Dixie Boy 7.

The Notice provisions in the policy at issue provides as follows:

> NOTICE means written notice by the INSURED to the COMPANY, during the POLICY PERIOD or REPORTING PERIOD stated in Item III of the declarations, which is reasonably sufficient to inform the Company of an ENVIRONMENTAL INCIDENT. (Ex. 235, definition Q of Section II of the Policy).
>
> The Policy further provides that:
>
> In the event of an Environmental Incident, immediate written Notice including particulars sufficient to identify the Insured and also reasonably obtainable information with respect to time, place and circumstances thereof, and the names and addresses of the injured and of available witnesses, shall be given by or for the Insured to the Company.

(Ex. 235, p. 6, subsection VIII.A.).

Coverage for further contamination from a known condition requires notice during the policy period of an environmental incident. Wells Fargo claimed it provided proper notice, pursuant to the policy, to LMC with its letter dated August 22, 2002. (Ex. BI).

However, the August 22, 2002 letter did not provide LMC with information related to the date, place, and circumstances surrounding plaintiff's discovery of pollution. *Id.*

Additionally, the August 22, 2002 letter does not provide notice of an Environmental Incident, as required by the LMC

policy. *Id.* Instead, the letter advised LMC that there "might" be pollution. (Ex. BI).

Although Wells Fargo advised LMC that there was merely a possibility that the properties were contaminated in 2002, Wells Fargo was in fact aware of the pollution conditions that existed at that time. *Id.* Wells Fargo failed to disclose this information to LMC.

At or about the date of the 2002 letter, Wells Fargo had discussions with the Florida DEP and Redemption Environmental, an environmental consultant, and knew the sites had documented releases and were in various phases of site assessment or remediation. (Ex. GY). Wells Fargo circulated an internal spreadsheet detailing the discharge dates, location and estimated costs to clean up each contaminated site. (Ex. BT). Wells Fargo, however, never provided this spreadsheet to LMC.

After receiving Wells Fargo's August 22, 2002 letter, LMC advised plaintiff that it had failed to provide notice and requested information from plaintiff, without which LMC could not move forward with its coverage investigation. (Ex. BJ).

On March 12, 2003, LMC again asked for information concerning environmental contamination in its reservation of rights letter. (Ex. BP). LMC stated it could not move forward with its coverage investigation until it received information regarding pollution conditions and advised Wells Fargo that its Notice was insufficient because it did not provide specific details concerning the alleged release. *Id.*

Finally, on September 29, 2004, two years after it was aware of the pollution conditions at the sites, Wells Fargo provided LMC with a two-page letter, which enclosed newly prepared environmental reports. (Ex. CU).

Wells Fargo's letter making a claim under the Policy did not comply with the notice requirement of Article II.Q. (Ex. 235, Policy and Ex. 372, August 26, 2002 letter from ORIX).

Plaintiff's representative Adam Diamond testified that, in 2002, Wells Fargo understood that Worsley Companies was identified as a potentially responsible party as of 2002. (TR. p. 215). He further testified that in 2002, Wells Fargo understood that six of the eight sites were eligible for state funding through the Florida Department of Environmental Protection. (TR. p. 215). A detailed spreadsheet, dated August 2002, contained information concerning the dates, location and estimated clean up costs for each contaminated site. (TR. p. 324, 327). This spreadsheet was prepared at the direction of the plaintiff and was distributed internally among employees of the plaintiff. (TR. p. 318). Therefore, Wells Fargo had knowledge of environmental pollution conditions at Scotchman 401, Scotchman 402, Scotchman 403, Scotchman 406, Dixie Boy 4 and Dixie Boy 7 as of August 2002. (TR. pp. 323, 327).

This spreadsheet, however, was not provided to LMC. (TR. pp. 324, 327). Wells Fargo's representative was unable to offer any explanation as to why the information contained in this August report was not provided to LMC. (TR. p. 279).

On September 9, 2002, shortly after receiving plaintiff's August 22, letter, LMC advised plaintiff that it had failed to provide notice of an environmental incident and requested information from plaintiff, without which LMC could not move forward with its coverage investigation. (TRJ). (TR. p. 176-177).

On March 12, 2003, LMC issued a comprehensive reservation of rights letter and reiterated its request for information, again stating that it could not move forward with its coverage investigation without the information it had requested. (TRP) (TR. p. 178-180). However, LMC was not provided notice of an environmental condition at any of the locations involved in this litigation until September 29, 2004, when it received correspondence from ORIX including Phase I reports. (TR. p. 269). (Ex. 236-241 and 243).

The insured's failure to give notice, despite the fact that it had information sufficient to provide notice, for two years fails the notice requirements as it was required. (TR. p. 749).

Wells Fargo also failed to provide reasonably prompt notice for Gas World 8. On October 6, 2003, a letter was faxed to Jeff Slahor, an employee of the plaintiff, which stated that Gas World 8 had an environmental problem in the form of a release from transition sumps. (TR. p. 732); (Ex. HC). Thus, Wells Fargo knew of the existence of environmental contamination at Gas World 8 as of October 6, 2003. (TR. p. 731); (Ex. HC).

However, LMC was not provided notice of an environmental

condition at Gas World 8 until September 29, 2004, when it received a letter from ORIX. (TR. p, 694-696).

The notice requirement in an insurance policy is a condition precedent to coverage and the failure to give notice in a timely manner relieves the insurer of liability. *Argo Corp. v Greater New York Mutual Ins. Co.*, 4 NY3d 332 (2005); *American Home Assurance Co. v International Insurance Co.*, 90 NY2d 433, 661 (1997). In environmental contamination cases, the requirement of reasonably prompt notice is heightened by the fact that environmental contaminations are easier to clean when addressed early. (TR. p. 421-2). The reason that New York requires notice to be given the carrier is to allow the carrier to step in and mitigate. (TR. p. 747). The right of the insurer to receive such notice has been found to be so fundamental that no showing of prejudice is required for an insurer to be able to disclaim liability. See, e.g., *Argo Corp. v Greater New York Mutual Ins. Co.*, supra; *Security Mutual Ins. Co. v Acker-Fitzsimons Corp.* supra; and *Power Auth. v Westinghouse Elec. Corp.*, 502 NYS2d 420 (1st Dep't 1986).

The duty to provide notice arises when a person objectively could or should have known of the possibility of a claim falling within the coverage at issue. (TR. p. 418). *Ogden Corp. v Travelers Indemnity Co.*, 424 F2d 39, 43 (2d Cir 1991) and *Olin Corp. v Insurance Co. of North America*, 743 F Supp 1044, 1045 (SDNY, 1990). Moreover, the contract provides that notice requires the insured to provide specifics of date, time, place

and circumstance of loss. In this case the insured possessed information of a potential claim as early as August 2002 for six properties, Scotchman 401, Scotchman 402, Scotchman 403, Scotchman 406, Dixie Boy 4 and Dixie Boy 7, and as early as October 6, 2003 for the remaining property, Gas World 8. Wells Fargo did not provide notice of environmental incidents occurring on the property until September 23, 2004. Thus, Wells Fargo delayed for nearly two years to provide notice for six properties, Scotchman 401, Scotchman 402, Scotchman 403, Scotchman 406, Dixie Boy 4 and Dixie Boy 7, and delayed for over one year in providing notice for Gas World 8. Wells Fargo is not entitled to damages on any of the seven properties involved in this litigation because Wells Fargo had the information to put its insurance carrier on notice, but unreasonably delayed for nearly two years in six cases and over one year in one case. *Republic New York Corp. v American Home Assurance Co.*, 125 AD2d 247, (1st Dep't 1986) (unexcused 45 day delay in providing notice invalidated coverage); *Pandora Industries, Inc. v St. Paul Surplus Lines Insurance Co.*, 188 AD2d 277, (1st Dep't 1992) (unexcused 31 day delay invalidated coverage); *Power Authority v Westinghouse Electric Corp.*, 117 AD2d 336, (1st Dep't 1986) (unexcused 53 day delay invalidated coverage); *SSBSS Realty Corp. v Public Service Mutual Ins. Co.*, 253 AD2d 583, (1st Dep't 1998) (91 day delay justified late notice disclaimer); *Heydt Contracting Corp. v American Home Ins. Co.*, 146 AD2d 497, 536 (1st Dep't 1989) (unexcused four month delay unreasonable as a

matter of law); *Lukralle V Durso Supermarkets, Inc.*, 238 AD2d 318, (2d Dep't 1997) (four month delay late as a matter of law).

Other Motions *in limine*

At the commencement of the first day of trial on September 7, 2006, Wells Fargo presented a motion *in limine* to exclude evidence of alternative sources of recovery. Specifically, collateral sources of payment from the State of Florida as well as from the prior owners of the property that were obligated to make certain payments to clean up the property. On September 7, 2006, LMC also brought a motion *in limine* to bar Wells Fargo from presenting evidence on estimated clean up costs as a result of plaintiff's failure to comply with LMC's notice to produce for deposition a person most knowledgeable to testify as to damages. (TR. pp. 36:15-26, 37:1-14 and 43:6-26).

All motions *in limine* are decided in this trial decision.

Collateral Value Loss

The Policy defines "collateral value loss" under paragraph E as the lesser of : (1) all amounts due and owing to an insured on a covered loan; or (2) the fair market value at the time of the covered loan closing for the covered location subject to the default; or (3) estimated environmental clean up costs at the covered location subject to the default as reasonably agreed upon between the Company and the insured. (Ex. 235, p. 2). This definition is further modified by endorsement 5 which eliminates the term "default" under E(2).

This is a loss reimbursement policy under which a known

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condition would affect the value of the collateral at time of loan. (TR. p. 517). As pollution conditions were known at the time the property became collateral, they affected the value of collateral at the time of the initial sale. (TR. p. 518). Thus conditions known to the parties at policy inception are not recoverable because they would have diminished the value of the collateral from the outset and would not have constitute a loss. (TR. p. 518).

Wells Fargo chose not to submit testimony from a property appraiser who would testify to the value of the properties with and without contamination. (TR. p. 425). This Court offered to adjourn trial for Wells Fargo to submit such testimony from an appraiser. (TR. pp. 424-5). However, Wells Fargo never accepted the Court's offer and decided not to offer any expert testimony from an appraiser that would indicate how a buyer would consider the diminishment in value of any of the properties. (*See generally*, TR. p. 425).

Wells Fargo also failed to introduce any admissible evidence of fair market value. Wells Fargo attempted to introduce appraisal reports from 1998 into evidence as business records as an exception to hearsay. (TR. p. 329). LMC's objection to the appraisal reports was sustained on foundational and hearsay grounds. (TR. p. 331).

The evidence offered to support the fair market value measure of damages, the Hopkins's appraisal report, was inadmissible hearsay evidence. (TR. pp. 333-4). The business

record exception to hearsay did not apply to these appraisals because the appraisals were merely a person's opinion as to the value of certain properties. New York CPLR 4518 provides:

> "[a]ny writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence or event, shall be admissible in evidence in proof of that act, transaction, occurrence or event, if the judge finds that it was made in the regular course of any business and that it was the regular course of such business to make it, at the time of the act, transaction, occurrence or event, or within a reasonable time thereafter.
>
> (CPLR 4518).

New York's business record exception to hearsay comes from the shop-book rule and is designed to permit incidental testimonial use of records which are made and kept primarily for non-testimonial purposes, and do not serve as substitutes for testimony. *People v Crant*, 42 Misc 2d 350 (1964). A witness's opinion is not admissible under the business record exception. *Auer v Bienstock*, 104 AD2d 350 2nd Dep't). *Hornbrook v Peak Resorts, Inc.* 754 NYS2d 132 (Sup Ct Tomkins Cty 2002).

In addition, as the appraisals were not done at or around the time that the properties were initially sold or the policy was placed because they were not done "at the time of the act, transaction, occurrence or event, or within a reasonable time thereafter." (CPLR 4518). The appraisals fail to satisfy the business record exception because the appraisals were not prepared contemporaneously to the initial sale of the properties.

The requirements for CPLR 4518 as follows "...first, that the record be made in the regular course of business --

essentially, that it reflect a routine, regularly conducted business activity, and that it be needed and relied on in the performance of functions of the business; second, that it be the regular course of such business to make the record (a double requirement of regularity) -- essentially, that the record be made pursuant to established procedures for the routine, habitual, systematic making of such a record; and third, that the record be made at or about the time of the event being recorded -- essentially, that recollection be fairly accurate and the habit or routine of making the entries assured." *People v Kennedy*, 503 NE2d 501 (1986).

As Wells Fargo failed to produce any evidence on the Fair Market Value of the properties, they failed to meet their burden of proof as to one of the measure of damages. Wells Fargo's entitlement to damages is limited to the lesser of the three measure of damages (Fair Market Value, Estimated Environmental Clean-up Costs and Amount due and Owing Under the Loan), therefore, Wells Fargo is not entitled to damages because it failed to produce any evidence of the Fair Market Value measure of damages. (TR. pp. 29:4-26).

Wells Fargo's claims for damages at Scotchman 401, Scotchman 402, Scotchman 403 and Dixie Boy 4 are dismissed because it failed to introduce any evidence that the value of the collateral was diminished at the time of liquidation sale. (TR. p. 489). This supported by the fact that Wells Fargo did not know of any covered pollution conditions for Scotchman 401, Scotchman 402,

Scotchman 403 and Dixie Boy 4 at the time of the property sale and that Wells Fargo has not introduced evidence indicating that the buyer was aware of any pollution conditions occurring or discovered within policy period.

Moreover, Wells Fargo is not entitled to damages for these four sites, Scotchman, 401, Scotchman 402, Scotchman 403 and Dixie Boy 4, because Wells Fargo failed to prove that any environmental conditions occurred during the policy for any of the sites.

Sanction

This Court found that Wells Fargo should be sanctioned by striking the testimony and reports of Wells Fargo's environmental expert, Scott Starr when it chose to withhold documents from its expert and LMC that were both probative and detrimental to its case. (TR. p. 718). When a party wilfully fails to disclose information which the Court finds should have been disclosed, the Court may prohibit the disobedient party from producing in evidence designated things or items of testimony. (CPLR 3126). The nature and degree of the penalty imposed on a motion pursuant to CPLR 3126 is a matter of the Court's discretion. *Hill v Oberoi*, 13 AD3d 1095, (NY App Div 2004). Where a party is deliberately evasive, or engages in a misleading and uncooperative course of conduct or a determined strategy of delay, the party has acted willfully. *Forman v Jamesway Corporation*, 175 AD2d 514, 515, (App Div 1991); *See Nabozny*, 267 AD2d at 625. Once the moving party has met its initial burden of

establishing willful, contumacious or bad faith conduct on the part of the non-moving party, the burden shifts to the non-moving party to offer a reasonable excuse. *Hill*, 13 AD3d at 1096.

In the instant case, the Court found that Wells Fargo acted wilfully in choosing to withhold the T.C. documents from its expert and from LMC. The T.C. documents were clearly requested in LMC's Interrogatories. Wells Fargo chose to give its expert a one page spreadsheet from these documents, but withheld numerous documents that cast doubt on the estimated remedial costs reported by LFR. Starr's reliance on this spreadsheet is clear as the first draft of his report parrots the cost figures from the spreadsheet he was given. Thus, Wells Fargo's selective suppression of documents harmful to its case is clear. Such a selective production of documents is harmful to the expert because it prohibits him from providing unbiased and reliable testimony and it is extremely prejudicial to LMC because it proscribes LMC from effectively defending its case.

Moreover, Wells Fargo's counsel was less then candid in his statements regarding the existence of the T.C. documents during trial despite the fact that the attorney making said misrepresentation was the recipient of many of these documents. As Wells Fargo withheld the documents and misled the Court as to the existence of said documents, Wells Fargo's behavior requires the sanction of barring its expert's testimony.

Conclusion

This Court finds that defendant LMC is not liable to Wells

Fargo for damages under its sole breach of contract claim because Wells Fargo (1) failed to provide reasonably prompt notice of pollution conditions for every of the sites (2) failed to introduce evidence of the Fair Market Value for every one of the sites and (3) failed to provide anything but speculative evidence for the majority of the sites involved in this litigation.

Dated: February 21, 2007

J.S.C.

CHARLES E. RAMOS J.S.C.

Counsel are hereby directed to obtain an accurate copy of this Court's opinion from the record room and not to rely on decisions obtained from the internet which have been altered in the scanning process