[* 1]

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

PRESENT: EMILY JANE GOODMAN Justice PART 17

Index Number : 103794/2007

1700 BROADWAY COMPANY

vs

GREATER NEW YORK INSURANCE

Sequence Number : 001

DISMISS ACTION

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

...is motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion is decided per attached decision

...County Clerk ... To ... must ... (Room 141B).

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

Dated: 3/7/08

EMILY JANE GOODMAN J.S.C.

Check one: ☑ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 17

----------X

1700 BROADWAY, CO.,

Plaintiff,

Index No. 103794/07

-against-

GREATER NEW YORK MUTUAL INSURANCE COMPANY,

Defendant.

----------X

Emily Jane Goodman, J.:

Defendant Greater New York Mutual Insurance Company (GNY) moves for summary judgment, for a declaration that it is not required to defend or indemnify plaintiff 1700 Broadway Co. (1700) in an action entitled *Berg v Au Café, Inc.*, Index No. 108437/05, pending in the Supreme Court, New York County (the underlying action), based on the alleged failure of 1700 to give GNY timely notice of the underlying action.

I. Background

GNY issued a policy of general commercial liability insurance to non-party Au Café, Inc. (Au Café), as one of several named insureds (the Policy). 1700 was named an additional insured under the Policy.

1700 was served with the summons and complaint in the underlying action on June 23, 2005. On February 28, 2006, some eight months later, 1700 tendered its request for coverage to

GNY, providing copies of the pleadings. 1700's attorney sent a second copy of its tender on March 13, 2006.

GNY disclaimed coverage to 1700 based on late notice of the underlying action, in a letter dated March 27, 2006. In a letter dated May 23, 2006, 1700 asked GNY to reconsider its disclaimer, based on the fact that GNY had already received notice of the suit from Au Café, and so, could not claim that it had been prejudiced as a result of 1700's delay. In a letter dated July 24, 2006, GNY refused to reconsider its disclaimer.

II. Discussion

On a motion to dismiss, the court's "task is to determine whether plaintiff's pleadings state a cause of action. The motion must be denied if from the pleadings' four corners 'factual allegations are discerned which taken together manifest any cause of action cognizable at law.'" *511 West 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 151-152 (2002), quoting *Polonetsky v Better Homes Depot, Inc.*, 97 NY2d 46, 54 (2001). The complaint is to be liberally construed, the plaintiff accorded every possible inference, and the facts accepted as true. *511 West 232nd Owners Corp. v Jennifer Realty Co*, 98 NY2d 144, *supra*. "Dismissal under CPLR 3211 (a) (1) is warranted 'only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law.'" *Id.* at 152, quoting *Leon v Martinez*, 84 NY2d 83, 88

(1994); *see also Foster v Kovner*, 44 AD3d 23 (1st Dept 2007).

"[U]nambiguous provisions of an insurance policy, as with any written contract, must be afforded their plain and ordinary meaning, and that the interpretation of such provisions is a question of law for the court." *Broad Street, LLC v Gulf Insurance Company*, 37 AD3d 126, 131 (1st Dept 2006); *see also 2619 Realty, LLC v Fidelity and Guaranty Insurance Company*, 303 AD2d 299 (1st Dept 2003). However, if the provisions are ambiguous, "any doubt as to the existence of coverage must be resolved in favor of the insured and against the insurer as drafter of the agreement." *Broad Street, LLC v Gulf Insurance Company*, 37 AD3d at 131.

The Policy, as relevant, contains the following language, to apply in the:

(2) Event of Occurrence, Offense, Claim or Suit:

***

(b) If a claim or "suit" is brought against any insured, you must:

(1) Immediately record the specifics of the claim or "suit" and the date received; and

(2) Notify us as soon as is practicable.

You must see to it that we receive written notice of the claim or "suit" as soon as practicable.

(c) You and any involved insured must:

(1) Immediately send us copies of any

> demands, notices, summonses or legal papers received in connection with the claim or "suit" ... .

Notice of Motion, Ex. A.

1700 argues here, as it did in its May 23, 2006 letter asking GNY to reconsider its disclaimer, that (1) GNY received timely notice of the underlying action when Au Café sent GNY notice of the underlying action, and that (2) GNY was not prejudiced by 1700's alleged late notice of suit. GNY responds that the Policy requires each insured to give notice of suit in a timely manner; that 1700's notice was untimely; and that lack of prejudice is not relevant in instances of untimely notice. 1700 insists, and GNY concedes, that this case does not involve late notice of an occurrence, but that GNY denied coverage to 1700 based on late notice of the "suit" against 1700.

"The requirement that an insured notify its liability carrier of a potential claim 'as soon as practicable' operates as a condition precedent to coverage." *White v City of New York*, 81 NY2d 955, 957 (1993). This notice must be given to the carrier "within a reasonable period of time." *Great Canal Realty Corp. v Seneca Insurance Company, Inc.*, 5 NY3d 742, 743 (2005). Absent a valid excuse for the insured's failure to meet this condition precedent "vitiates the contract." *Id.; see also Travelers Insurance Company v Volmar Construction Co., Inc.*, 300 AD2d 40, 42 (1st Dept 2002). The insured bears the burden of proving a

reasonable excuse for its failure to provide prompt notice. *White v City of New York*, 81 NY2d 955, *supra*.

New York adheres to the "no prejudice rule" in the context of late notices of claim. *See Argo Corporation v Greater New York Mutual Insurance Company*, 4 NY3d 332, 339 (2005). This rule answers the question of "whether a primary insurer can disclaim coverage based solely upon a late notice of lawsuit or must show prejudice." *Id.* at 336. The Court of Appeals finds that late notice of suit can be a basis for a disclaimer, and that the insurer need not show that it was prejudiced by the untimeliness of the notice. *Id.* The rational for this rule is that:

> [a] liability insurer, which has a duty to indemnify and often also to defend, requires timely notice of lawsuit in order to be able to take an active, early role in the litigation process and in any settlement discussions and to set adequate reserves. Late notice of lawsuit in the liability insurance context is so likely to be prejudicial to these concerns as to justify the application of the no-prejudice rule.

Id. at 340.

In the present action, 1700 failed to provide any notification of the occurrence of suit in a timely manner, having provided GNY with the summons and complaint eight months after its service. "Even relatively short periods of time, if not justified by the insured, have been found to be unreasonable as a matter of law." *Those Certain Underwriters at Lloyds v Gray*, ___AD3d___, 2007 WL 3380450 *3 (1st Dept 2007) (less than two months). Since 1700 offers no excuse for its tardiness, its

eight-month delay in providing notice of the underlying action is unreasonable as a matter of law.

While 1700 argues that recent Court of Appeals cases have weakened or negated the no-prejudice rule, this is not the case. To the contrary, the Court of Appeals has required insurers to prove prejudice only in the context of supplementary underinsured motorist (SUM) cases, where an insurer receives timely notice of an accident or occurrence (a notice of claim), but untimely notice of the SUM action. *See Rekemeyer v State Farm Mutual Automobile Insurance Company*, 4 NY3d 468 (2005); *Matter of Brandon (Nationwide Mutual Insurance Company)*, 97 NY2d 491 (2002). In these cases, the Court reasoned that the service of a timely notice of claim serves the purpose of allowing the insurer to commence a prompt investigation; the later notice of suit is not necessary to do so. These cases do nothing to support 1700's position.

1700, lacking a reasonable excuse for failing to tender the summons and complaint to GNY in a timely fashion, argues that Au Café's service on GNY of a timely notice suffices to make its own tender valid. The general rule is that additional insureds under a policy have "an independent obligation to give timely written notice of the claim against them" and it is irrelevant whether the insurer acquires actual knowledge of the occurrence from the named insured. *American Manufacturers Mutual Insurance Company v*

CMA Enterprises, Ltd., 246 AD2d 373, 373 (1st Dept 1998).

This rule, however, does not always apply when one insured, but not the other, gives notice of suit in a timely fashion. If the parties are "united in interest," notice of the suit by one party may suffice as notice by the other. *See City of New York v Certain Underwriters at Lloyd's of London*, 294 AD2d 391 (2d Dept 2002); *New York Telephone Company v Travelers Casualty and Surety of America*, 280 AD2d 268 (1st Dept 2001). "Where two or more insureds are defendants in the same action, notice of the lawsuit provided by one insured will be deemed notice on behalf of both insureds only where the two parties are united in interest or where there is no adversity between them." *City of New York v Certain Underwriters at Lloyds*, 294 AD2d at 391; *see also National Union Fire Insurance Company of Pittsburgh, Pa. v Insurance Company of North America*, 188 AD2d 259 (1st Dept 1992)(insureds united in interest where one insured party was sued as employee of other insured party); *cf. Delco Steel Fabricators, Inc. v American Home Assurance Company*, 40 AD2d 647 (1st Dept 1972), *affd* 31 NY2d 1014 (1973))(parties not united in interest, and second tender untimely, when parties have taken an adverse position to each other).

1700 argues that it did not stand in an adverse position to Au Café at the time that Au Café tendered the summons and complaint to GNY, because, at that time, the parties had not

served cross claims against each other, although they did so later on.

The facts are thus: Au Café served GNY with a copy of the summons and complaint in July 2005, almost immediately after Au Café was served with process. 1700 served its answer in the underlying action, with cross claims against Au Café, in September 2005. Au Café served its answer in September as well, a few days after 1700. Both parties cross claimed against each other. 1700 tendered the summons and complaint to GNY in February 2006.

1700 stresses that there was, allegedly, no adversity between the insureds at the moment that GNY first received notice of the underlying action from Au Café, because there were as yet no cross claims. However, this reasoning ignores the fact that cross claims cannot be served on a co-defendant until there is service of an answer, which usually does not coincide with the commencement of an action. In the present case, there were no cross claims extant until September 2005, months after GNY first received notice of the claim from Au Café.

In *Delco Steel Fabricators, Inc. v American Home Assurance Company* (40 AD2d 647, *supra*), the additional insured waited over 15 months from commencement of the action against it to notify its carrier of the claim. The Court found that, as a result of the litigation which followed the commencement of the underlying

action, the adversity of the two insureds had been established, because a cross claim had been interposed by the additional insured in the litigation before the additional insured served its late notice of claim. Therefore, it held that the insurer was not obligated to afford coverage to the additional insureds.

Although the case *New York Telephone Company v Travelers Casualty and Surety* (280 AD2d 268, *supra*), under the facts therein, places the time of service of the summons and complaint as the point at which adversity (or the lack of same) was established, in the present case, as in most, if not all cases, adversity cannot be established until cross claims are asserted, upon the service of an answer or answers. Moreover, 1700 does not offer any explanation as to why its position suddenly became adverse to Au Café when it filed an answer, when it purportedly was not adverse to Au Café at the commencement of the action. The present situation comports more with *Delco Steel Fabricators, Inc. v American Home Assurance Company* (40 AD2d 647, *supra*), in which the tardy notice occurred many months after litigation had proceeded past the initial service of process. As in *Delco*, 1700's notice to GNY was offered many months after the parties exchanged answers containing cross claims.

As a result, this court finds that 1700 and Au Café are not united in interest, and have taken adverse positions with regard to each other. 1700's notice to GNY was untimely as a matter of

law, because the "notice provided by [Au Café] in accordance with the policy terms will not be imputed to [1700]." *Travelers Insurance Company v Volmar Construction Co.*, 300 AD2d at 44. As in *Travelers Insurance Company*, "[t]his is "especially true in circumstances such as here, where the insured that provided notice has taken a position adverse to its coinsured in the underlying litigation." *Id.* In consequence, GNY is not obligated to defend and indemnify 1700 in the underlying action.

Accordingly, it is

ORDERED that defendant Greater New York Mutual Insurance Company's (GNY) motion for summary judgment is granted; and it is

ADJUDGED and DECLARED that Greater New York Mutual Insurance Company is not required to defend or indemnify plaintiff 1700 Broadway Co. in the action entitled *Berg v Au Café, Inc.*, Index No. 108437/05, pending in the Supreme Court, New York County.

This Constitutes the Decision, Order and Judgement of the Court.

Dated: February 7, 2008

ENTER:

J.S.C.
EMILY JANE GOODMAN

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be given pursuant to CPLR 5513. In order to obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).
10