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

PRESENT: Hon. Doris Ling-Cohan Justice

PART 36

Index Number : 104188/2005
SENECA INSURANCE
vs
LAVEAUX, ISAAC
Sequence Number : 001
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

notion to/for summary judgment

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

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, It is ordered that this motion by defendants/third-party plaintiff Isaac Laveaux + Bernard Laundromat's motion for summary judgment is consolidated for disposition with motion seq. 002 + decided in accordance with the attached memorandum decision.

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

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).

Dated: 7/14/08

DORIS LING-COHAN J.S.C.

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 36

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SENECA INSURANCE COMPANY,

Plaintiff,

-against-

Index № 104188/05

ISAAC LAVEAUX, BERNARD LAUNDROMAT, CORP., JOSE ALBERTO, and ERIKA ALBERTO,

Motion Seq.: 001/002

Defendants.

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ISAAC LAVEAUX and BERNARD LAUNDROMAT, CORP.,

Third-Party Plaintiffs,

-against-

S&M KLEIN COMPANY, INC.,

Third-Party Defendant.

----------X

DORIS LING-COHAN, J.:

Under motion sequence 001, third-party plaintiffs Isaac Laveaux and his company, Bernard Laundromat, Corp. (collectively, Laveaux and Laundromat), seek summary judgment on their declaratory judgment claim that third-party defendant S&M Klein Company, Inc.'s (S&M Klein) failure to provide plaintiff Seneca Insurance Company (Seneca) with timely notification of the November 23, 2004 construction-related accident involving the above-named co-defendant, Jose Alberto (Alberto), which occurred at Laveaux's Laundromat, was the proximate cause of the denial of coverage by Seneca . As a result of the purported late notice, Seneca denied coverage to its insureds, Laveaux and Laundromat, with respect to a personal injury/labor law action commenced by Jose and Erika Alberto (Albertos) in Supreme Court, Bronx County, under index number 6874/05, in which Laveaux was named as a defendant. Laveaux and Laundromat further

seek attorneys fees for defending the underlying personal injury action, as well as prosecuting the within third-party declaratory judgment action.

Under motion sequence 002, Seneca moves, pursuant to CPLR 3212, for an order granting summary judgment against Laveaux and Laundromat and the Albertos on the issue of late notice in reporting the accident, resulting in the proper denial of coverage. Both motions (sequence numbers 001 and 002) are consolidated for disposition.

It is undisputed that Laveaux and Laundromat obtained a Seneca business owners' comprehensive liability policy (BOP), number 500 8132 (the Policy), through S&M Klein, a licensed insurance agent authorized to obtain insurance policies in the state of New York. It is also undisputed that the Policy, which ran from February 2, 2004 through February 2, 2005, was in effect on the date of the accident and covered the type of accident and injury sustained by Alberto. On or about November 24, 2004, Laveaux went to S&M Klein's office and informed S&M Klein's claims manager Dorothy Petrizzo (Petrizzo) that an accident had occurred the previous day at the Laundromat construction site, but he was unable to supply details of the incident until mid-December 2004. S&M Klein notified Seneca of the accident, approximately, 90 days later.

Although the parties are litigating notification and coverage issues, the following facts are not in dispute: (1) pursuant to both Petrizzo's handwritten and typewritten notes, between December 9, 2004 and December 13, 2004, S&M Klein was provided with information, both orally and in the form of documents and letters, including a letter from Alberto's attorney, Donald H. Hazelton, Esq. (Hazelton), that Alberto was injured while doing construction/repair work at the Laundromat; (2) Laveaux reported Alberto's accident to his workers' compensation carrier and informed Petrizzo that he had done so; and (3) on February 23, 2005, Laveaux brought a

copy of the Albertos' Bronx County pleadings to S&M Klein, at which time, Petrizzo promptly mailed it, along with an "Acord" notice of claim form, to Seneca, which was received by Seneca on February 24, 2005; (4) on March 10, 2005, Seneca sent a reservation of rights letter to the insureds and commenced an investigation of the claim; (5) by letter, dated March 15, 2005 (March-disclaimer), coverage attorney Michael Milner, Esq. (Milner) informed Laveaux that, due to late notice, Seneca was disclaiming coverage, and refusing to defend or indemnify Laveaux and Laundromat with respect to the allegations in the Alberto lawsuit; (6) by letter, dated May 21, 2005 (May-notification), Hazelton sought to notify Seneca of the subject accident and lawsuit; and (7) by letter, dated July 19, 2005 (July-disclaimer), Seneca, by its coverage attorney Milner, informed the Albertos and Hazelton that Seneca would not provide coverage because it had already been disclaimed via the March-disclaimer, and because Hazelton/Alberto's attempt to provide notice was superfluous to that which had been previously received and denied.

Prior to serving the instant motions, the parties engaged in discovery, exchanging documents and taking depositions. S&M Klein produced its claims manager, Petrizzo, for an examination before trial. In response to questions posed, Petrizzo testified to the attempts made by Laveaux to comply with the condition precedent to coverage by providing prompt notification of Alberto's accident to his liability carrier through his insurance broker, S&M Klein, and she acknowledged that she was the individual at S&M Klein handling Laveaux's claim. Furthermore, Petrizzo testified that by mid-December 2004, she had received a letter from Hazelton regarding Alberto's accident for injuries arising out of the construction-related accident. When asked what she did thereafter, Petrizzo stated that she either "flipped through," "didn't bother looking at," or understood these letters and documents to be "for record purposes" which the insured's attorney wanted him to "drop off" and for which Laveaux "wanted a receipt" (Petrizzo Deposition, at 50 -

53). According to Petrizzo, while she initially understood Alberto's accident to be a Workers' Compensation matter, she acknowledged that, by December 12, 2004, she had received sufficient information to report the incident to the liability carrier, yet she made no attempt to either notify Seneca on Laveaux and Laundromat's behalf prior to February 2005, or to advise Laveaux to notify Seneca directly (Petrizzo Deposition, at 42, 47, 70, and 90). Accordingly, Laveaux and Laundromat seek summary judgment declaring that S&M Klein failed to provide Seneca with timely notification of Alberto's accident, resulting in Seneca's denial of coverage.

In this motion, S&M Klein takes the position that, because it was an authorized agent for Seneca, Laveaux and Laundromat's prompt notification of the accident to S&M Klein constituted timely notification to Seneca, rendering the motion by Laveaux and Laundromat moot. S&M Klein acknowledges that it was responsible for notifying Seneca on Laveaux and Laundromat's behalf, and aside from asserting its status as an authorized agent, S&M Klein offers no other opposition to this motion.

According to S&M Klein, Seneca had, at all relevant times, led it to believe that it had apparent authority to act on its behalf, and therefore, Laveaux's prompt and timely notice of Alberto's accident to S&M Klein constituted prompt and timely notice to Seneca. S&M Klein submits the sworn affidavit (sworn to on September 19, 2007) of its company president, Steven J. Klein (Klein), who states, in relevant part, that based upon his position as president of S&M Klein for the last 10 years and as an employee of S&M Klein for the last 20 plus years:

> 2. I am familiar with the procedures employed by S&M Klein with the various insurers with whom we have relationship, including with Seneca . . .
> 3. Seneca has conferred authority to S&M Klein to act, including but not limited to the following: S&M Klein is permitted to issue Certificates of Insurance on policies issued by Seneca without obtaining the authority of Seneca; S&M Klein is authorized to accept premiums on behalf of policies issued to Seneca insureds;

> S&M Klein is authorized to make change requests on Seneca policies; S&M Klein is authorized to deliver Seneca insurance policies; S&M Klein is identified as the producer on Seneca insurance policies; and S&M Klein reconciles commission reports sent by Seneca;
> 4. Based upon the fact that Seneca has conferred apparent authority to act on its behalf in connection with Seneca policies of insurance to Seneca policyholders, notice to S&M Klein on the loss of Seneca insureds Isaac Laveaux and Bernard Laundromat should be deemed notice to Seneca Insurance Company.

In addition, S&M Klein submits copies of the Policy and related documentation, as well as copies of unrelated insurance documents produced by Seneca, including policy declaration sheets, policy changes, renewal, reinstatement, and cancellation notices and various other forms and statements, in which Seneca lists S&M Klein as "agent." These submissions provide "some evidence of action on the insurer's part, or facts from which a general authority to represent the insurer may be inferred" (U.S. Underwriters Ins. Co. v Manhattan Demolition Co., Inc., 250 AD2d 600 [2nd Dept 1998] [internal quotation marks and citations omitted]).

However, upon an examination of all the submissions on this issue, it is unclear as to whether S&M Klein was an authorized agent for Seneca. Attached to Seneca's reply affirmation are copies of legal documents from an unrelated, prior action, JPB Carpeting, Inc. v Seneca Insurance Company, Inc., under New York County index no. 603070/04, in which the third-party defendant in that action, S&M Klein, took a contradictory position regarding its relationship with Seneca when the very same issue was in dispute. The submissions include the sworn affidavit of Klein (sworn to on December 20, 2005) in which he stated, in relevant part:

> 4. I understand that JPB Carpeting, Inc. has alleged in its cross-motion for summary judgment that S&M Klein is an agent of Seneca. This statement could be no further from the truth. I have reviewed all relevant records and files in the possession of S&M Klein and have found no agreement between S&M Klein and Seneca which grants us authority to act as agent of Seneca in any way whatsoever. I also based this conclusion on my own personal knowledge of S&M Klein's business operations and my years of employment there.

> 5. To the best of my knowledge, Seneca does not use any agents to sell its policies. It only uses brokers, and that is the nature of the relationship between Seneca and S&M Klein.

(Reply Affirmation, Exhibit 1). The balance of Seneca's exhibits emanating from the JPB Carpeting action, which includes the sworn affidavit of Seneca vice president, Keith McCarthy, confirms that S&M Klein

> is a broker of Seneca policies, and that relationship does not confer upon them any authority to act as Seneca's agent. Seneca enters into agency relationships rarely and only through written agency agreements. There is no agency agreement between [S&M Klein] and Seneca and no such relationship exists now or in the past.

(Reply Affirmation, Exhibit 2, § 5).

The existence of contradictory sworn affidavits from the same individual on this material point, without further explanation, raises questions of this affiant's veracity and raises a factual issue as to whether or not S&M Klein is an agent or a broker for Seneca.

Turning to the summary judgment aspects of the motions, while it is acknowledged by Seneca that the Policy provides liability coverage for the type of injuries contained in Alberto's complaint, it is argued by Seneca that the insured failed to meet the condition precedent to liability coverage by failing to provide Seneca with notice of the subject incident "as soon as practicable."

The Policy provides, in relevant part, on page 21, section 3:

> Insured's Duties in the Event of Occurrence, Claim or Suit:
>
> (a) In the event of an occurrence, the insured shall give to the Company or its authorized agents, as soon as practicable, written notice containing:
> (1) particulars sufficient to identify the insured;
> (2) reasonably obtainable information with respect to the time, place and circumstances; and
> (3) names and addresses of the injured and of available witnesses.
> (b) if claim is made or suit is brought against the insured, the insured shall immediately forward to the Company every demand, notice, summons or other

process received by him or his representative.

The instant controversy, as to whether notice was given "as soon as practicable," has often been a central issue in insurance-related disputes in the New York courts. Litigants have long disputed what is meant by this phrase, as well as how to apply it to the facts of their cases. With no clear definition, the Court of Appeals in Mighty Midgets v Centennial Ins. Co., (47 NY2d 12, 19 [1979]) determined

> that the phrase 'as soon as practicable' is an elastic one, not to be defined in a vacuum. By no means does it connote an ironbound requirement that notice be "immediate" or even "prompt" . . . [T]he provision that notice be given 'as soon as practicable" call[s] for a determination of what was within a reasonable time in light of the facts and circumstances of the case at hand.

There are instances where the courts have upheld an insurer's denial of coverage on the basis of late notification where the insured notified the liability carrier only 51 days after the occurrence (Deso v London & Lancashire Indem. Co. of Am., 3 NY2d 127 [1957]), or even merely 45 days after the occurrence (Republic N.Y. Corp. v American Home Assur. Co., 125 AD2d 247 [1st Dept 1986]). On the other hand, there are instances where a delay of nearly one year (Kelly v Nationwide Mut. Ins. Co., 174 AD2d 481 [1st Dept 1991]), or even 27 months (Medina v State Farm Mut. Auto. Ins. Co., 303 AD2d 987 [4th Dept 2003]) was deemed reasonable, and coverage for the underlying accident could not be withheld by the insurer. Ultimately, the courts' determinations rest on the facts and circumstances of the individual cases.

To this end, Seneca asserts that sufficient facts for notification purposes were known to both its insured, and to S&M Klein, as far back as December 12, 2004. Therefore, the notification which was provided on February 23, 2005, was not, according to Seneca, "as soon as practicable," entitling Seneca to disclaim coverage on that basis. It is apparent from the

deposition transcripts on submission, including the partial transcripts, that to Petrizzo's surprise and consternation, Seneca disclaimed coverage to its insured when the delay was, in her estimation, minimal, consisting of some 60 days from date S&M Klein had received the packet of information (December 12, 2004), and only one day from the date it received a copy of the summons and complaint (February 23, 2005). It is also apparent from a review of the deposition of John Mrakovcic (Mrakovcic), the Seneca underwriter who was assigned to the claim, that Seneca's counsel (Milner) blocked efforts by opposing counsel to understand how the decision was made. Nevertheless, Mrakovcic testified that "to a large extent, severity of the accident determines . . . is a criteria in the late report of a claim" (Mrakovcic Deposition, at 20); and that it was coverage counsel (Milner) who made the ultimate decision to deny coverage (id. at 9 - 10).

As a result, the record does not contain sufficient proof regarding the reasonableness of Seneca's coverage denial for the court to review. However, accepting Seneca's claim as to the propriety of its denial (Deso v London & Lancashire Indem. Co. of Am., 3 NY2d 127, supra), this determination, by itself, does not resolve the coverage issue for all purposes.

In opposition to Seneca's motion for summary judgment, both S&M Klein and the Albertos argue that Seneca is precluded from denying coverage where, as here, notice was provided directly to Seneca by counsel for the injured party. It is undisputed that, by sending the May-notification, Hazelton sought to place Seneca on notice of its insured's involvement with the Alberto personal injury claim, and it is undisputed that, under both Insurance Law § 3420 (a) (3) and New York case law, the failure of an insured to provide adequate notice to an insurer does not effect the "independent right [accorded the injured party] to give notice and to recover thereafter [and] he is not to be charged vicariously with the insured's delay" (Lauritano v

American Fid. Fire Ins. Co., 3 AD2d 564, 568 [1st Dept 1957], affd 4 NY2d 1028 [1958]).

Seneca acknowledges receipt of the injured party's notice but contends that it was both unreasonably late and superfluous. Specifically, through its July-notification, Milner, on behalf of Seneca, referenced the March-disclaimer in which Seneca stated its intent to deny coverage to Leveaux and Laundromat and to the Albertos based on late notice. While Seneca's March-disclaimer may be effective as against its insureds, it is not effective as against the Albertos.

In its effort to foreclose all avenues to coverage with respect to the Alberto action, Seneca disclaimed against the injured parties on the ground of "late notice" prior to Seneca's receipt of an Insurance Law § 3420 (a) (3) notice from the Albertos. By including an anticipatory disclaimer of coverage against the Albertos in its March-disclaimer, Seneca attempted to circumvent the statutory right provided by this statute. In as much as "[t]he purpose of [Insurance Law § 3420] was to protect the insured, the injured person, and any other interested party who has a real stake in the outcome, from being prejudiced by a belated denial of coverage" (Excelsior Ins. Co. v Antretter Contr. Corp., 262 AD2d 124, 127 [1st Dept 1999]), the Legislature could not have intended to enact a statute which could so readily be rendered ineffective by this type of preemptive strike. In fact, New York courts have consistently held that in order for a disclaimer letter to be effective against an injured party, the notice of disclaimer must specifically advise the claimant that his or her notice of claim was untimely (Matter of State Farm Mut. Auto. Ins. Co. v Cooper, 303 AD2d 414 [2nd Dept 2003]). Having not received an Insurance Law § 3420 notice from Alberto prior to Hazelton's May-notification, Seneca's purported disclaimer of March 15, 2005 in anticipation of such notice is ineffective against the injured party.

With respect to Seneca's contention that the injured party's notice was both late and

superfluous, it is well settled that where, as here, the liability carrier already received notice from its insured, the question is whether such notice was timely based on the injured party's "'exercise [of] due diligence in ascertaining the identity of [the] insurance company or in notifying [it] of the accident'" (Appel v Allstate Ins. Co., 20 AD3d 367, 369 [1st Dept 2005] [citation omitted]), or as stated by the court in Massachusetts Bay Ins. Co. v Flood, (128 AD2d 683, 684 [2nd Dept], appeal denied 70 NY2d 612 [1987]), "the only issue with respect to the injured party [is] whether the efforts of the injured party to facilitate the providing of proper notice were sufficient in light of the opportunities to do so afforded it under the circumstances" (see also Ringel v Blue Ridge Ins. Co., 293 AD2d 460, 462 [2nd Dept 2002]).

To this end, Seneca asserts that, because the May-notification was received by Seneca almost three months after notice of the accident was given by Laveaux and Laundromat through S&M Klein, the May-notification was superfluous and a nullity, entitling Seneca to disclaim coverage to the Albertos (Massachusetts Bay Ins. Co. v Flood, 128 AD2d 683, supra).

In response, both S&M Klein and the Albertos maintain that Seneca's July-disclaimer is ineffective because it was not timely. They argue that, in order for the July-disclaimer to be effective against an injured party or parties, the insurer must give written notice of disclaimer "as soon as is reasonably possible" after it learns of the accident, or the grounds for disclaimer of liability or denial of coverage (Insurance Law § 3420 [d]; First Fin. Ins. Co. v Jetco Contr. Corp., 1 NY3d 64, 68 - 69 [2003]; Hartford Ins. Co. v County of Nassau, 46 NY2d 1028, 1029 [1979]). They point out that since the July-disclaimer references the grounds set forth in the March-disclaimer, these grounds for denying coverage were known to Seneca/Milner at least as far back as March 15, 2005, and it cannot be said that Seneca/Milner's delay, of approximately 59 days

between the time it received the injured parties' notice and the time it issued a responsive written notice of disclaimer, was "as soon as [was] reasonably possible" (Insurance Law § 3420 [d]). Moreover, S&M Klein and the Albertos assert that it is hypocritical for Seneca to claim noncompliance with the requirement that notice be given "as soon as practicable" as the sole ground for disclaiming coverage to the injured party when it then failed to provide the injured party with a written disclaimer of coverage on a timely basis (First Fin. Ins. Co. v Jetco Contr. Corp., 1 NY3d 64; supra; Hartford Ins. Co. v County of Nassau, 46 NY2d 1028, supra).

Upon review of the evidentiary proof on this issue, Seneca has failed to "establish [its] cause of action or defense sufficiently to warrant the court as a matter of law in directing judgment in [its] favor" (Zuckerman v City of New York, 49 NY2d 557, 562 [1980] [interior quotation marks and citation omitted]).

However, under CPLR 3212 (b), the court may sua sponte search the record to grant summary judgment to any deserving non-moving party with respect to an issue that is the subject of the motion before the Court (Dunham v Hilco Constr. Co., 89 NY2d 425 [1996]). With respect to the injured parties' notification and the insurer's disclaimer, pursuant to Insurance Law §§ 3420 (a) (3) and 3420 (d), upon examination of the record, the evidence is sufficient to warrant this court, as a matter of law, to grant summary judgment against Seneca, and to find that the July-disclaimer, which specifically responds to the injured parties' May-notification, is untimely (First Financial Ins. Co. v Jetco Contr. Corp, 1 NY3d at 67 - 68; Hartford Ins. Co. v County of Nassau, 46 NY3d at 1029).

It is evident that this is not a matter where the insureds procrastinated in attempting to fulfill their obligation to notify the insurer of the underlying accident, or where an injured party

did not make his intent to sue for damages known for many months or even years after an underlying accident. Laveaux reported the incident to S&M Klein the day after Alberto's accident and proceeded to provide additional information and documentation to S&M Klein in an expeditious manner, requesting receipts for the documents provided, and requesting that notification be provided to Seneca (Laveaux Deposition, at 33, 36, 41, 50, 53, and 54), and Hazelton promptly informed Laveaux of his clients' intention to take legal action with respect to Alberto's accident. To deny coverage to the injured party under these particular circumstances would both undermine and thwart the purpose for which the liability insurance was obtained.

Accordingly, for the reasons set forth above, it is

ORDERED that the motion by Isaac Laveaux and Bernard Laundromat, Corp. for a judicial declaration that S&M Klein Company, Inc. failed to provide Seneca Insurance Company with timely notification of the November 23, 2004 accident involving Jose Alberto is denied as moot; and it is further

ORDERED that the motion by Seneca Insurance Company for an order, pursuant to CPLR 3212, granting summary judgment against Isaac Laveaux and Bernard Laundromat, Corp. and Jose Alberto and Erika Alberto on the issue of late notice in reporting the accident resulting in the proper denial of coverage, is denied as moot; and it is further

ADJUDGED and DECLARED that Seneca Insurance Company is obligated to provide coverage, under the terms of BOP 500 8132, with respect to the claims of Jose Alberto and Erika Alberto, under Bronx County index number 6874/05; it is further

ORDERED that with respect to the issue of legal fees/costs, should defendants Laveaux and Laundromat seek such fees, within 45 days of entry of this decision, order and judgment,

defendants Laveaux and Laundromat are directed to submit an accounting of the fees/costs incurred, and Seneca is directed to review and, should Seneca agree with such fees/costs, satisfy such defense fees/costs incurred by defendants Laveaux and Laundromat, within 45 days from receipt of the accounting[1], or provide specific reasons for its disagreement within such time (such objections shall be specifically directed to each item billed, with detailed reasons for the objection). If the parties are unable to agree on the amount of the defense fees/costs owed to defendants Laveaux and Laundromat, then within 90 days from entry of this order, either side may file the within order with the Clerk of the Judicial Support Office to arrange a calendar date for a reference to a Special Referee, and such issue is referred to a Special Referee, or another person designated by the parties to serve as referee, to hear and report with recommendation, except that, in the event of and upon the filing of a stipulation of the parties, as permitted by CPLR 4317, the Special Referee, or another person designated by the parties to serve as referee, shall determine this issue. [2]; failure to comply shall be deemed a waiver or default on this claim, as appropriate. and it is further

ORDERED that within 30 days of entry of this order, defendants Isaac Laveaux and Bernard Laundromat, shall serve a copy upon all parties with notice of entry.

Dated: July 14, 2008

Hon. Doris Ling-Cohan, J.S.C.

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[1] Settlement of such costs shall be filed with the Clerk of this court and a Copy provided to the Part Clerk (with a copy of this decision, order and judgment).