[* 1]

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

PRESENT: Hon. MICHAEL D. STALLMAN PART 7
Justice

DOLP 1133 PROPERTIES LLC,

Plaintiff,

- v -

TWIN CITY FIRE INSURANCE COMPANY,

Defendant.

INDEX NO. 100479/2008

MOTION DATE 6/13/08

MOTION SEQ. NO. 001

MOTION CAL. NO. 43

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)

The following papers, numbered 1 to 5 were read on this motion and cross motion for summary

	PAPERS NUMBERED
Notice of Motion— Affidavits — Exhibits	1-3
Notice of Cross Motion — Answering Affidavits — Exhibits	4-5
Repl Mem. of Law	

Cross-Motion: X Yes ☐ No

Upon the foregoing papers, it is ordered that this motion and cross motion for summary judgment are decided in accordance with the annexed memorandum decision, order, and judgment.

NYS SUPREME COURT
RECEIVED
AUG 26 2008
IAS MOTION
SUPPORT OFFICE

Dated: 8/20/08
New York, New York

J.S.C.

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

Check one: ☐ FINAL DISPOSITION X NON-FINAL DISPOSITION
Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

MDAT

HON. MICHAEL D. STALLMAN

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: I.A.S. PART 7

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DOLP 1133 PROPERTIES LLC,

Index No. 100479/08

Plaintiff,

Decision, Order, and Judgment

- against -

TWIN CITY FIRE INSURANCE COMPANY,

Defendant.

----------X

HON. MICHAEL D. STALLMAN, J.:

In this action for a declaratory judgment concerning an insurance company's obligation to cover its insured for a loss, plaintiff Dolp 1133 Properties LLC (Dolp) moves, and defendant Twin City Fire Insurance Company (Twin City)[1] cross-moves, for summary judgment.

I. Background

Dolp is the owner of premises located at 1133 Avenue of the Americas, New York, New York (the premises). Non-party Cowan Liebowitz & Latman P.C. (Cowan) leases offices located on the 35th and 36th floors of the premises. Cowan is covered under a commercial general liability policy issued by Twin City, in which Dolp is named as an additional insured.

On February 28, 2005, Maria Cepulo (Cepulo), a cleaning matron for the building who was employed by Dolp, allegedly sustained

[1] Twin City is apparently associated with Hartford Casualty Insurance Company. Although the parties and documents sometimes refer to Hartford, instead of Twin City, this Court will use the name of Twin City.

injuries when she hit her head on a door allegedly located on the 35th floor offices occupied by Cowan. In her complaint, Cepulo describes the door as "mechanical." Aff. of Louise Baccari, Ex. O, ¶ 28.

A Supervisor Accident Investigation Report was generated on the day of the incident, which described the nature of the accident as having occurred when Cepulo was vacuuming, and failed to notice a half-opened kitchen door, which she accidentally struck with the side of her face when she turned her head. *Id.*, Ex. C. An Employer's Report of the accident, dated March 9, 2005, repeats the same facts. *Id.*, Ex. D. Neither report uses the term "mechanical" door.

Cepulo continued to work until March 4, 2005, when she went on workers' compensation leave. She returned to work on July 14, 2005. On October 14, 2005, Cepulo fainted while on the job, an occurrance she attributed to the February 28, 2005 incident. She returned to workers' compensation leave at that time.

Dolp did not report either Cepulo's February 2005 accident, or the October 2005 incident, to Twin City because:

> Dolp did not believe that there would be any liability associated with the incidents, or that Maria Cepulo would even assert a liability claim against it or anyone else, because she went on workers' comp after the first incident, returned to work without complaint, was going on workers' comp again after the second incident, and was expected to return to work without complaint as she did before.

Plaintiff's Memorandum of Law, at 3.

On December 29, 2005, Dolp received a letter from Michael Myerson (Meyerson), dated December 14, 2005, informing Dolp that he had been retained by Cepulo as her attorney to pursue a claim in negligence against Dolp for the injuries she had incurred on February 28, 2005. Aff. of Baccari, Ex. J. Meyerson also informed Cowan of the pending claim, in a similar letter, dated December 14, 2005. *Id.*, Ex. K. Cowan passed along Meyerson's letter to Twin City on January 4, 2006.

Dolp reported Cepulo's claim to its own liability insurer, Liberty Mutual, on January 5, 2006. Liberty Mutual tendered the defense and indemnification of Cepulo's claim to Twin City, and also to Cowan, in a letter dated January 5, 2006.

Apparently, Twin City wrote to Meyerson for more information regarding the claim, but never received an answer. Dolp claims that Twin City never contacted Dolp or Liberty Mutual concerning Cepulo's claim.

By letter dated April 14, 2006, Twin City disclaimed coverage to Dolp (Disclaimer Letter), citing Dolp's alleged failure to report the underlying incident "as soon as practicable" under the terms of Cowan's insurance policy. Aff. of Jean E. Taylor, Ex. G. The Disclaimer Letter also stated that Twin City "[has] no knowledge of or proof that the injury occurred as alleged," and that "[b]ased on the information provided, and [Dolp's] delay in notifying either [Cowan] or [Twin City] of this incident, we must

advise that coverage will not be afforded to [Dolp]." *Id.*

Twin City's second basis for disclaiming against Dolp, aside from the claim of late notice, is its belief that the accident did not occur in the offices occupied by Cowan, based on an investigation it conducted which allegedly revealed that there are no "mechanical" doors in Cowan's premises, at least in the area of the kitchen and pantry where Cepulo claims to have sustained her initial injury.

Dolp's motion is based on its position that Twin City's Disclaimer Letter is without effect for two reasons: (1) Dolp's tender was timely; and (2) Twin City's disclaimer was itself late, relieving Dolp of the consequences of its own tardiness, if any.

Twin City's defense to coverage is (1) that Dolp's notice of the incident was untimely made, making disclaimer on that ground proper; and (2) that Twin City's Disclaimer Letter was not based merely on the untimeliness of Dolp's notice, but was also based on the investigation Twin City made into the incident, an investigation which allegedly proved that the incident did not occur on Cowan's premises at all, never triggering the terms of the policy. Twin City claims that the time it took to conduct this investigation was reasonable, so that it cannot be accused of late notice of disclaimer.

II. Discussion

"'[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact.'" *Ayotte v Gervasio*, 81 NY2d 1062, 1062 (1993), quoting *Alvarez v Prospect Hospital*, 68 NY2d 320, 324 (1986); *see also Winegrad v New York University Medical Center*, 64 NY2d 851 (1985); *Kesselman v Lever House Restaurant*, 29 AD3d 302, 303 (1st Dept 2006). Upon the presentation of a prima facie case by the movant, the burden then shifts to the motion's opponent to offer evidentiary facts sufficient to raise a triable issue of fact. *See Alvarez v Prospect Hospital*, 68 NY2d 320, *supra*; *Kesselman*, 29 AD3d 302, *supra*.

The Twin City policy requires that its insured give notice of an occurrance "as soon as practicable." Such language gives rise to a condition precedent to coverage. *See Great Canal Realty Corp. v Seneca Insurance Company, Inc.*, 5 NY3d 742 (2005). Where an insurance policy contains this language, "such notice must be accorded the carrier within a reasonable period of time." *Id.* at 743; *see also Sorbara Construction Corporation v AIU Insurance Company*, 41 AD3d 245 (1st Dept 2007).

The insured's duty to give notice "'arises when, from the information available relative to the accident, [the] insured could glean a reasonable possibility of the policy's involvement

[citation omitted].'" *Tower Insurance Company of New York v Lin Hsin Long Company*, 50 AD3d 305, ___ (1st Dept 2008). Where the insured might be able to "envision liability," that party has a duty to inquire as to potential liability. *York Speciality Food, Inc. v Tower Insurance Company of New York*, 47 AD3d 589 (1st Dept 2008). "Absent a valid excuse, a failure to satisfy the notice requirement vitiates the policy (*Security Mutual Insurance Company of New York v Acker-Fitzsimons Corp.*, 31 NY2d 436, 440 [1972]), and the insurer need not show that it has been prejudiced by the delay. *See Argo Corporation v Greater New York Mutual Insurance Co.*, 4 NY3d 332 (2005).[2]

The parties argue vigorously the question of whether Dolp's notice to Twin City was timely, based on the length of time between Cepulo's accident and Liberty Mutual's tender to Twin City on Dolp's behalf. Dolp argues that it had the right to rely on the workers' compensation proceedings as proof that no action would be forthcoming. Nevertheless, whether Dolp's notice of the incident was timely or not is irrelevant, if it can show that Twin City's disclaimer was itself untimely.

It is well settled that "[i]n order to effectively disclaim liability or deny coverage" under a liability policy, an insurer

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[2] This rule will be completely superseded by legislation which will go into effect in January 2009. This new legislation provides that the insurer will bear the burden to prove that it has been prejudiced by its insured's late notice of claim. However, this new rule has no effect on the present litigation.

must "'give written notice as soon as is reasonably possible of such disclaimer of liability or denial of coverage.'" *Hartford Insurance Company v County of Nassau*, 46 NY2d 1028, 1029 (1979), quoting New York Insurance Law § 167 (8), precursor to section 3420 (d). The insurer's failure to do so "precludes effective disclaimer, even though the policyholder's own notice of the incident to its insurer is untimely." *First Financial Insurance Company v Jetco Contracting Corp.*, 1 NY3d 64, 67 (2003), citing *Hartford Insurance Company v County of Nassau*, 46 NY2d at 1029; *see also Matter of Firemen's Fund Insurance Company of Newark v Hopkins*, 88 NY2d 836, 837 (1996)(insurer must give notice of a disclaimer on the grounds of the insured's late notice "as soon as reasonably possible", and its failure to do so "'precludes effective disclaimer [citation omitted]'").

Twin City took nearly three months to disclaim coverage on the basis of late notice, although that ground was immediately obvious and available to it. Much shorter periods of time have been found to be unreasonable as a matter of law. *See West 16th Street Tenants Corporation v Public Service Mutual Insurance Company*, 290 AD2d 278 (1st Dept 2002)(delay of 30 days unreasonable). Therefore, whether or not Dolp could have given notice of the accident to Twin City earlier than it did, Twin City's attempt to disclaim on the basis of late notice is unavailing.

Twin City next argues that it could not have given earlier notice to Dolp of its alleged second ground for disclaimer (the alleged lack of evidence that the accident occurred on Cowan's premises), because an investigation into that issue was necessary, and necessarily took time, and that it conducted that investigation as expeditiously as possible.

The only reference the Disclaimer Letter makes to a belief that coverage might not be available is a line in the letter which reads, in context:

> We have reviewed the information provided by [Liberty Mutual] to [Dolp] about the alleged incident and their request that [Cowan] provide you with defense and indemnification for an incident *they have no knowledge of or proof that the injury occurred as alleged*. ... Based on the information provided, and their delay in notifying either Cowan or [Twin City] of this incident, we must advise that coverage will not be afforded to [Dolp] under either of the referenced liability policies for Ms. Cepulo's injuries [emphasis added].

Disclaimer Letter, at unnumbered page 1.

The Disclaimer Letter goes on to say that

> [w]ithout addressing the likelihood or validity of the allegations being made by Ms. Cepulo, at no time since the alleged incident occurred, to what is said to be an injury to [its] own employee, did [Dolp] ever inform [Cowan] that Ms. Cepulo had been injured allegedly by automatic doors within the demised premises. [Dolp], or someone on [its] behalf, had an obligation to give notice to [Twin City] of an "occurrance" which may result in a claim as soon as practicable.

Id. at unnumbered page 2.

Twin City claims that

> [i]t is the policy of [Twin City] not to respond to a tender before conducting a thorough investigation to determine if the insured's premises were in fact involved. If they are not, then there is no coverage for the incident at all. If it is established that the insured's premises are involved, then it would be determined if the notice of the incident was timely.

Aff. of Taylor, at 7. Thus, Twin City claims that, (1) it had the right to investigate the accident before sending a coverage letter to Dolp; and (2) if the accident did not occur on Cowan's premises, coverage under the policy was never triggered, and it has no duty to defend and indemnify Dolp.

Despite Twin City's explanation of the nature of its disclaimer, a careful reading of the Disclaimer Letter reveals no specific disclaimer based on a lack of coverage. Twin City's "policy" only permits it, unilaterally, to make a finding of late notice upon a resolution, to its own satisfaction, of the coverage issue. This policy subverts the insured's right to timely disclaimer.

Even if the Disclaimer Letter specifically stated that an investigation would be held into the coverage issue as of right, Twin City's right to disclaim on that ground evaporates in light of established law which provides that "an insurer's duty to defend [its insured] is exceedingly broad and an insurer will be called upon to provide a defense whenever the allegations of the complaint suggest ... a reasonable possibility of coverage [internal

quotation marks and citation omitted.." *BP Air Conditioning Corporation v One Beacon Insurance Group*, 8 NY3d 708, 714 (2007); *see also Automobile Insurance Company of Hartford v Cook*, 7 NY3d 131, 137 (2006); *Agoado Realty Corporation v United International Insurance Company*, 95 NY2d 141 (2000). "An insurer must defend whenever the four corners of the complaint suggest - or the insurer has an actual knowledge of the facts establishing - a reasonable possibility of coverage." *Continental Casualty Company v Rapid-American Corporation*, 80 NY2d 640, 648 (1993); *see also Frontier Insulation Contractors, Inc. v Merchants Mutual Insurance Company*, 91 NY2d 169 (1997). If the complaint contains allegations or facts "'which bring the claim even potentially within the protection purchased ...'" (*BP Air Conditioning Corporation v One Beacon Insurance Group*, 8 NY3d at 714), the insurer must defend. Only if the interpretation of the complaint's allegations present "a factual predicate for the claim" falls "wholly within a policy exclusion" is the insurer relieved of the duty to defend. *Global Construction Compnay, LLC v Essex Insurance Company*, 52 AD3d 655, 655 (2d Dept 2008).

Twin City's obligation to defend Dolp was triggered by the allegations contained in the four corners of the complaint, which alleged that Cepulo was injured by a door in Cowan's premises. Thus, Twin City's duty to defend was triggered upon receipt of the complaint, because the allegations alleged fell within its policy.

policy. Its right to disclaim could not be based on a unilateral company policy allowing it to take time to further investigate the facts underlying the alleged incident. As a result, Twin City's disclaimer was without merit and untimely, and its duty to defend Dolp was established, regardless of the timeliness of Dolp's notice, and regardless of the fact that Twin City might ultimately prevail in proving that it need not indemnify Dolp. That issue is one which awaits the conclusion of the underlying action. *See Cordial Greens County Club, Inc. v Aetna Casualty and Surety Company*, 41 NY2d 996 (1977).

On this cross motion, Twin City has not established, as a matter of law, that the policy provides no coverage for the claims in the underlying action. Twin City concluded that the policy did not cover Cepulo's accident because Liberty Mutual allegedly informed Twin City that Cepulo was injured by an "automatic door," but Twin City found no "automatic door" in Cowan's offices. Aff. of Taylor ¶¶ 17, 20. Accident reports indicate that the door which allegedly struck Cepulo was a kitchen door, located on the "35th floor - corridor and kitchen entrance." Affirm. of Rosemary Cinquemani, Ex 4. Thus, the question is not whether the door that allegedly struck Cepulo was "automatic" or "mechanical"; the issue is whether the kitchen door in question is located on Cowan's premises. Here, Twin City has not met its prima facie burden that the kitchen door was not located on Cowan's premises.

Conclusion

As a result of the foregoing, it is

ORDERED that the motion by plaintiff Dolp 1133 Properties LLC for a declaration that it is entitled to a defense and indemnification from defendant in the underlying action *Cepulo v 1133 Building Corp*, Index No. 107590/07, is granted in part; and it is further

ADJUDGED and DECLARED that defendant Twin City Fire Insurance Company is required to provide a defense to Dolp in the underlying action; and it is further

ORDERED that so much of the complaint that seeks indemnification from defendant for costs arising from the underlying action is severed and shall continue; and it is further

ORDERED that defendant's cross motion for summary judgment is denied.

Dated: **August 20, 2008**
New York, New York

ENTER:

J.S.C.

HON. MICHAEL D. STALLMAN

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