

**Abetta Boiler & Welding Serv., Inc. v American
Intl. Specialty Lines Ins. Co.**

2009 NY Slip Op 30283(U)

January 30, 2009

Supreme Court, New York County

Docket Number: 600660/06

Judge: Marcy S. Friedman

Republished from New York State Unified Court
System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for
any additional information on this case.

This opinion is uncorrected and not selected for official
publication.

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

PRESENT: Hon. Marcy S. Friedman
Justice

PART 57

Index Number : 600660/2006
ABETTA BOILER & WELDING
vs
SPECIALTY LINES INSURANCE
Sequence Number : 007
DISMISS

INDEX NO. 600660/06
MOTION DATE _____
MOTION SEQ. NO. 007
MOTION CAL. NO. _____

American
is motion to/for summary judgment

and cross-motion
Notice of Motion/ ~~Order to Show Cause~~ ~~Affidavits~~ ~~Exhibits~~ ...
Answering Affidavits — Exhibits _____
Replying Affidavits _____

PAPERS NUMBERED
1, 2
3-5
M1-M9

Cross-Motion: Yes No *Memos of Law*

Upon the foregoing papers, it is ordered that this motion and cross-motion are

**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION/ORDER** *filed under Seq # 007*

1415
This judgment shall be entered by the County Clerk, and notice of entry cannot be served ~~in~~ *in* person. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 1415).

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

Dated: 1-30-09



Hon. Marcy S. Friedman *J.S.C.*

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK – PART 57

PRESENT: Hon. Marcy S. Friedman, JSC

_____ x
ABETTA BOILER & WELDING SERVICE, INC.,

Plaintiff,

Index No.: 600660/06

- against -

AMERICAN INTERNATIONAL SPECIALTY
LINES INSURANCE COMPANY, AIG TECHNICAL
SERVICES, INC., THE AMERISC CORP.
INSURANCE AND FINANCIAL SERVICES,
FRANK ABATELLO, individually, and PROGRAM
BROKERAGE CORP.,

DECISION/ORDER

Defendants.

NOTICE: This document is filed with the County Clerk of New York County and is deemed to have been served by the County Clerk on all parties of record unless otherwise indicated by the County Clerk. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 1419).

_____ x

In this declaratory judgment action, plaintiff Abetta Boiler & Welding Service, Inc. (“Abetta”) seeks a judgment declaring that defendant American International Specialty Lines Insurance Company (“AISLIC”), plaintiff’s excess insurer, is obligated to defend and indemnify plaintiff in a personal injury action and a wrongful death action against it. Plaintiff cross-moves for summary judgment for the declaratory relief it sought against AISLIC in the amended complaint and, in the alternative, for summary judgment declaring that defendants The Amerisc Corp. Insurance and Financial Services (“Amerisc”) and Program Brokerage Corp. (“Program”), plaintiff’s retail broker and wholesale broker, respectively, are obligated, in the event AISLIC’s disclaimer is upheld, to indemnify Abetta in the underlying action for any amount for which Abetta is found liable above Abetta’s primary coverage. Defendant AISLIC moves for summary

judgment dismissing plaintiff's amended complaint and opposes any cross-claims against it by Amerisc and Program. Defendant Amerisc moves for summary judgment dismissing the amended complaint and cross-claims against it. Defendant Program moves for summary judgment dismissing the amended complaint and Amerisc's cross-claims against it.¹

The following facts are relevant to the determination of these motions and are undisputed unless otherwise stated: The underlying actions arose out of an accident that occurred on June 10, 2002 at a business operated by non-party New Mak Noodle Company. The accident involved a cabbage-drying machine that caused injuries to several, and the death of one, of New Mak Noodle's employees. Plaintiff was hired by New Mak Noodle to repair the machine on or about August 6, 2001, approximately ten months prior to the date of the accident. The injured employees subsequently commenced the underlying actions against Abetta for its alleged negligence in welding the device. (Aff. of Nancy Silver In Support of P.'s Cross-Motion ["P.'s Cross-Motion"], ¶¶ 17-19.)

By letter dated September 10, 2002 from the underlying personal injury plaintiffs' attorneys, Abetta first received notice of the accident and the "claim for personal injuries" arising out of Abetta's alleged negligence. This letter advised Abetta to notify its insurance carrier. (Ex. A to P.'s Cross-Motion.) On September 12, 2002, Abetta faxed a copy of the letter to its retail insurance broker, Amerisc. (Ex. G to Aff. Of Jordan Sklar In Support Of Amerisc's Motion ["Amerisc's Motion"].) On the same date, Amerisc forwarded the letter and a "General Liability

¹Program's motion also seeks summary judgment declaring that AISLIC improperly disclaimed coverage. As Program did not allege a cross-claim against AISLIC, the court will not address this branch of its motion for declaratory relief. However, the court will consider the effectiveness of AISLIC's disclaimer, as the issue is squarely raised in Abetta's complaint and motion.

Notice of Occurrence/Claim” form, also known as an “Acord form,” dated September 12, 2002, to Program, the wholesale insurance broker from which Amerisc had procured Abetta’s liability insurance policy. (Id., Ex. II.)² Program, in turn, forwarded the notice and Acord form to Ward North America (“Ward”), claims administrator for First Specialty Insurance Company, Abetta’s primary insurance carrier. (Aff. Of Matthew Bryant In Support Of Program’s Motion [“Program’s Motion”], ¶ 12.)³

On or about October 4, 2002, the underlying plaintiffs, with the exception of the deceased employee’s estate, filed a summons and complaint in a personal injury action entitled Ocampo v Abetta Boiler & Welding Serv., Inc. (Supreme Court, New York County, Index No. 121850/02). The complaint alleged without detail that the plaintiffs had sustained “severe and permanent injuries,” and sought \$40,000,000 in damages. On or about March 14, 2003, the deceased employee’s estate filed a wrongful death action entitled Aparicio v Abetta Boiler and Welding Serv., Inc. (Supreme Court, Queens County, Index No. 104777/03).

By facsimile dated November 25, 2002, Abetta sent a copy of the complaint in the personal injury action and its verified answer to Ward. (Ex. Y to AISLIC’s Motion.) Amerisc acknowledges that it first learned that the underlying accident had resulted in a fatality in December 2002. (Amerisc’s Motion, ¶ 8.) Amerisc further asserts that at that time, Ward, not Abetta, sent Amerisc a copy of the complaint in the personal injury action. (Id.; Dep. of Mary

²The Acord form is a form used within the insurance industry to provide notice of occurrences, losses, and claims. (See Amerisc’s Motion, ¶ 6)

³The First Specialty primary policy has liability limits of \$1,000,000 per occurrence, whereas the AISLIC excess policy provides \$2,000,000 in coverage per occurrence in excess of the insured’s retained limit.

Riznyk [Amerisc claims manager] at 61.) As noted above, however, Amerisc does not dispute that Abetta had previously sent it the September 10, 2002 notice of claim from the attorneys for plaintiffs in the personal injury action.

There is no evidence in the record that Abetta sent a copy of the complaint in the wrongful death action to Amerisc or that Abetta otherwise contacted Amerisc about the commencement of the wrongful death action.

After receipt of the complaint in the personal injury action, Amerisc prepared an umbrella (i.e., excess) Acord form, dated December 9, 2002, which noted: "Apparently several parties were hurt, one is possibly a fatality, Very little info available, copy of primary Accord file is attached, no litigation has ever been received byin [sic]." (Ex. C to P.'s Cross-Motion.) Amerisc faxed the form to Program which received it on December 9 at its Rhode Island office. (See Program's Motion, ¶¶ 14-15.) Program forwarded the fax to its New York office, which had brokered the AISLIC policy, and confirmed receipt by internal memorandum on December 13, 2002. (Id.) However, Program did not forward the umbrella Acord form to AISLIC. (See id.)

It is undisputed that AISLIC received notice of the underlying accident for the first time on September 18, 2003, from a representative of Amerisc. (AISLIC's Motion, ¶ 53.) Mary Riznyk, a claims manager with Amerisc, testified that, on that date, she received a telephone call from the primary adjuster informing her that there was a chance that the claim would be higher than the primary policy limits, and inquiring about the identity of the umbrella adjuster. She further testified that she telephoned Program for that information and was advised that Program had no record of receipt of the umbrella Acord. She then faxed the report of the claim to AISLIC

on September 18. (See Riznyk Dep. at 39-42, 54.) By letter dated October 10, 2003, AISLIC notified plaintiff that it was disclaiming coverage for failure to satisfy the notice conditions of the AISLIC policy.

The standards for summary judgment are well settled. The movant must tender evidence, by proof in admissible form, to establish the cause of action “sufficiently to warrant the court as a matter of law in directing judgment.” (CPLR 3212[b]; Zuckerman v City of New York, 49 NY2d 557, 562 [1980].) “Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers.” (Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 [1985].) Once such proof has been offered, to defeat summary judgment “the opposing party must ‘show facts sufficient to require a trial of any issue of fact’ (CPLR 3212, subd. [b]).” (Zuckerman, 49 NY2d at 562.)

It is plaintiff’s contention, as well as that of Amerisc and Program, that AISLIC improperly disclaimed liability coverage because the delay in giving AISLIC notice of the claim was reasonable under the circumstances. Plaintiff argues that it reasonably relied on Amerisc and/or Program to give notice to the excess carrier. Plaintiff further asserts that if AISLIC is not found obligated to provide coverage then both Amerisc and Program are liable to defend and indemnify plaintiff because of their notification omissions. In opposing plaintiff’s motion and in support of its own motion, AISLIC contends that plaintiff’s delay in giving notice was unreasonable as a matter of law. Program contends that it was Amerisc’s responsibility to notify AISLIC of any claims against plaintiff and that, in any event, it owed no duty to Abetta to give notice of claims to the carrier. In contrast, Amerisc alleges that Program was responsible for notifying AISLIC.

AISLICS's Liability

The policy at issue required the insured to give notice "as soon as practicable of an Occurrence which may result in a claim under the policy." (Policy Provision VI[F][1] [Att. Of Iris Hall, Ex. B].) It is well settled that prompt notice is a condition precedent to coverage by excess carriers, and that such insurers need not demonstrate prejudice in order to disclaim coverage in the event of non-compliance with prompt notice provisions in their policies. (Sorbara Constr. Corp. v AIU Ins. Co., 11 NY3d 805 [2008]; American Home Assur. Co. v International Ins. Co., 90 NY2d 433 [1997].)⁴ "Absent a valid excuse, a failure to satisfy the notice requirement vitiates the policy." (Security Mut. Ins. Co. v Acker-Fitzsimons Corp., 31 NY2d 436 , 440 [1972]. Accord Argo Corp. v Greater New York Mut. Ins. Co., 4 NY3d 332, 339 [2005].)

Abetta contends that AISLIC's disclaimer was not justifiable because Abetta notified Amerisc as soon as Abetta received notice of the claim from plaintiffs in the underlying action, and because Amerisc and/or Program were obligated to give notice to AISLIC. Abetta fails, however, to cite authority in support of its position that a mistake in reporting a claim to the carrier by an insured's retail or wholesale broker constitutes a reasonable excuse for failing to give notice to the carrier as soon as practicable. On the contrary, it is well settled that "a broker is normally the agent of the insured and notice to the ordinary insurance broker is not notice to the liability carrier." (Security Mut. Ins. Co., 31 NY2d at 442.) Notwithstanding the common

⁴The court notes that §3420(a) of the New York Insurance Law was recently amended to provide that a failure to give notice within the prescribed time will not invalidate any claim made by the insured, unless the failure to provide timely notice has prejudiced the insurer. However, the new law is prospective and will only apply to policies issued after the effective date on January 17, 2009.

practice for insureds to notify their brokers, an insured who notifies its insurance broker of a claim rather than its carrier does so at its own peril, as “the policy requirement that the notice must be provided to the carrier trumps any informal arrangement or practice” between the insured and its broker. (Gershow Recycling Corp. v Transcontinental Ins. Co., 22 AD3d 460, 462 [2nd Dept 2005].) Thus, an error by the insured’s broker in initially notifying the wrong carrier does not excuse the delay in notifying the proper carrier. (See Martini v Lafayette Studios Corp., 273 AD2d 112 [1st Dept 2002]; Blue Ridge Ins. Co. v Biegelman, 36 AD3d 736 [2d Dept 2007].) Contrary to Program’s contention, this is not a case in which the insurer may be precluded from disclaiming for late notice based on the broker’s delay in giving notice, as Amerisc, the broker here, was not also the agent for the insurer. (Compare Mighty Midgets, Inc. v Centennial Ins. Co., 47 NY2d 12, 20 [1979].)

It is undisputed that AISLIC was not notified of the claim of plaintiffs in the underlying action until September 2003, approximately one year after Abetta initially received notice of the claim in September 2002. This delay was unreasonable as a matter of law. (See e.g. Goodwin Bowler Assoc. v Eastern Mut. Ins. Co., 259 AD2d 381 [1st Dept 1999] [two months unreasonable as a matter of law]; Power Auth. of State of New York v Westinghouse Elec. Corp., 117 AD2d 336 [1st Dept 1986] [53 days unreasonable as a matter of law].)

Plaintiff also appears to argue that it had a reasonable belief of nonliability in the underlying action which excuses the delay in giving notice. “There may be circumstances, such as lack of knowledge that an accident has occurred or a reasonable belief in nonliability, that will excuse or explain delay in giving notice, but the insured has the burden of showing the reasonableness of such excuse.” (White v City of New York, 81 NY2d 955, 957 [1993], citing

Security Mut. Ins. Co., 31 NY2d at 441.) Moreover, “where a reasonable person could envision liability, that person has a duty to make some inquiry.” (White, 81 NY2d at 958.) Where notice to an excess carrier is in issue, “the focus is on when the insured reasonably should have known that the claim against it would likely exhaust its primary insurance coverage and trigger its excess coverage, and whether any delay between acquiring that knowledge and giving notice to the excess carrier was reasonable under the circumstances.” (Morris Park Contr. Corp. v National Union Fire Ins. Co., 33 AD3d 763, 765 [2nd Dept 2006].)

According to Abetta, at the time it attempted to repair the crack in the cabbage-drying machine, it advised the owner that the welding it performed would not hold. (P.’s Cross-Motion, ¶ 18.) Abetta further alleges that it had no subsequent contact with New Mak Noodle after the attempted repair, and the underlying accident did not occur until ten months later. (Id., ¶¶ 19-21.) However, at no point does Abetta claim it investigated the accident or conducted any inquiry into its potential liability. The September 10, 2002 initial notice of the accident advised Abetta to notify its insurance carrier. (Id., Ex. A.) As stated above, the injured plaintiffs filed the underlying complaint on October 4, 2002. Although the complaint contained a \$40,000,000 ad damnum clause with no description of the injuries, Riznyk testified that Abetta notified employees of Amerisc that the underlying accident resulted in a fatality at a renewal meeting on December 6, 2002 (see Riznyk Dep. at 25, 33), and Abetta does not deny this. While an ad damnum clause itself might not be sufficient to require the giving of notice to an excess carrier (see Morris Park, 33 AD3d at 765), Abetta was aware not only that the underlying plaintiffs were seeking \$40,000,000 in damages but that the accident had resulted in a death of one of the employees. Given Abetta’s knowledge of the seriousness of the injuries nine months prior to the

date AISLIC was first given notice, it was highly imprudent for Abetta not to undertake any investigation to determine whether its excess coverage might be implicated. Plaintiff's protracted delay in notifying AISLIC of the occurrence and lawsuit was therefore unreasonable as a matter of law. (Compare Long Is. Lighting Co. v Allianz Underwriters Ins. Co., 24 AD3d 172, 173 [1st Dept 2005], appeal dismissed 6 NY3d 844 [2006] [untimely notice found as a matter of law where there was "no evidence that the timing of [the insured's] notice was the result of a deliberate determination" that there was a reasonable possibility that the excess policies would not be reached] with Morris Park Contr. Corp. v National Union Fire Ins. Co., 33 AD3d 763, supra [triable issue of fact as to timeliness of insured's notice to excess insurer found where insured was actively engaged in an investigation as to its potential liability].)

Program and Amerisc join plaintiff in arguing that the late notice should be excused because plaintiff could reasonably have believed it would not be liable for the underlying accident. For example, Program states, "Abetta had no reason to think that it was liable for the accident." (Program's Memo. In Support at 24.) Similarly, Amerisc argues that there is a question of fact as to "whether there was a reasonable belief whether Abetta would be liable for the underlying loss." (Aff. Of Jordan Sklar In Opp. To Motions And Cross-Motion ["Amerisc's Opp."], ¶ 24.) These arguments must fail as it is well settled that the issue is "not whether the insured believes he will ultimately be found liable for the injury, but whether he has a reasonable basis for a belief that no claim will be asserted against him." (SSBSS Realty Corp. v Public Service Mut. Ins. Co., 253 AD2d 583, 584 [1st Dept 1998].) For the reasons stated above, plaintiff's belief in nonliability was unreasonable as a matter of law given its failure to undertake any investigation as to whether the excess policy would be reached.

[11]

The court has considered the remaining arguments in opposition to AISLIC's motion and finds them to be without merit. The court accordingly holds that AISLIC is entitled to judgment declaring that its disclaimer is valid.

Liability of Amerisc and Program to Plaintiff

Plaintiff argues that Amerisc and Program both owed it a duty to give prompt notification of the claim to AISLIC. "Exceptional and particularized situations may arise in which insurance agents, through their conduct or by express or implied contract with customers and clients, may assume or acquire duties in addition to those fixed at common law." (Murphy v Kuhn, 90 NY2d 266, 272 [1997].) Such an additional duty may arise where an insurance broker encourages an insured to rely on it to take care of the insured's insurance needs (see Lynch v McQueen, 309 AD2d 790 [2nd Dept 2003]) or where there is a course of dealing over a period of time which would have put objectively reasonable insurance agents on notice that their advice was being relied on. (See Murphy, 90 NY2d at 272.)

Abetta submits testimony that it relied on Amerisc to process its insurance claims. Carolyn Felix, one of its employees who handled insurance claims, testified that Abetta referred "any claims or questions" to Amerisc and Amerisc would "advise us accordingly." (Felix Dep. at 11.) She further testified: "As soon as we receive notice of any claim, it's immediately faxed, when the Amerisc was our broker, to them, to Mary Riznyk, because she's the claims person there. Once we do that we follow-up by a phone call to make sure it was received and normally she would handle everything from there." (Id. at 14.) With respect to the September 10, 2002 letter in particular, Felix testified that she called Riznyk to confirm receipt of her fax of the letter and Riznyk responded "I'll take it from there, if I need anything, I'll ask you for it." (Id. at 64;

20-21.)

In opposition, Amerisc does not contend or even suggest that Amerisc did not take on the duty of giving notice of claims received from Abetta. Nor does Riznyk deny, either in her deposition or her affidavit in opposition, that she told plaintiff's employee, Felix, to rely on her for this purpose. Rather, Riznyk's testimony confirms this course of dealing: "Again, if I receive it from the insured, I forward it to the wholesale broker or the carrier." (Riznyk Dep. at 28.) That Amerisc undertook the obligation to forward Abetta's claims is confirmed by the facts, discussed above, that Amerisc prepared both the primary and umbrella Acord forms and sent them to Program.

Amerisc's position is thus not that it did not assume the duty to Abetta to give notice of insurance claims of which it was notified by Abetta. Rather, Amerisc argues that it discharged this duty by giving the notice to Program and, in the alternative, that it had no duty to give notice of the wrongful death action because Abetta did not notify it of that action.

In support of its contention that it reasonably relied on Program, Amerisc cites Riznyk's repeated testimony that she forwarded the notices to Program with the understanding that Program would forward the notices to the carrier. Riznyk testified, for example, that she sent the Acord form to Program with the expectation that Program would notify the umbrella carrier, AISLIC, because "[t]hat is the standard in the industry that I know of." (Riznyk Dep. at 62-63.) She also testified that "I report all my claims that are written through wholesale brokers exclusively to the wholesale broker." (*Id.* at 93.)

Amerisc cites no authority that its reliance on Program is a defense to Abetta's claims against it. On the contrary, where a broker assumes duties to an insured, it must perform those

duties with reasonable care. (See e.g. Stevens v Hickey-Finn & Co., 261 AD2d 300 [1st Dept 1999]; Lynch, 309 AD2d at 792.) Thus, an insurance broker, as the insured's agent, owes it a duty to notify the proper insurance company after the insured puts the broker on notice of a claim. (See Martini v Lafayette Studios Corp., 273 AD2d 112, supra; Commissioners of the State Ins. Fund v Sherry & Sons, Inc., 2002 NY SlipOp 40433[U], 2002 WL 31107888 [Sup Ct New York County 2002], appeal withdrawn 303 AD2d 1057 [1st Dept 2003].) As between Abetta and Amerisc, Amerisc is therefore liable for failure to notify the proper insurer, AISLIC, of the claims of which it undertook to give notice on Abetta's behalf.

Amerisc does not dispute that Abetta notified it in September 2002 of the claim of the personal injury plaintiffs, and the record establishes as a matter of law that Amerisc undertook to give both the primary and excess insurers notice of the occurrence resulting in such plaintiffs' injuries as well as notice of their claim. These undertakings are evidenced by Amerisc's preparation and transmittal to Program of the September 12, 2002 Acord form for the primary insurer and the December 9, 2002 Acord form for the excess insurer, the latter of which noted that several parties were injured, one possibly a fatality. Riznyk also claims that in December 2002, after she received a copy of the summons and complaint in the personal injury plaintiffs' action from Ward, the primary insurer's claims administrator, she faxed it to Program. (Riznyk Aff., ¶ 6.) While Program denies receipt of these pleadings, this evidence establishes as a matter of law that Amerisc also undertook to give notice of the lawsuit brought by the personal injury plaintiffs.

The court accordingly concludes that plaintiff is entitled to summary judgment against Amerisc determining that Amerisc is liable to Abetta for all damages caused by its failure to give

the notices regarding the personal injury plaintiffs to AISLIC, including the costs of indemnity equivalent to what AISLIC would have provided if timely notified. (See Martini, 273 AD2d at 114.)

Summary judgment is not, however, proper on this record with respect to the wrongful death claim. Amerisc argues that it cannot be held liable for failure to notify AISLIC of the wrongful death claim because Abetta never notified it that a death had occurred as a result of the accident, and never sent it a copy of the summons and complaint in the wrongful death action. (See Amerisc Motion, ¶¶ 17-18.)

While Riznyk now submits an affidavit stating that Abetta never advised Amerisc of a death (Riznyk Aff. In Support, ¶ 14), this statement is directly contradicted by Riznyk's deposition testimony that Abetta first informed employees of her office of the death at a policy renewal meeting on December 6, 2002. (Riznyk Dep. at 25, 33.) Riznyk's inconsistent statement in the affidavit "tailored for" the summary judgment motion cannot serve to raise a triable issue of fact as to whether Abetta gave Amerisc notice of the fatality. (See Naposki v Au Bar, 271 AD2d 371 [1st Dept 2000]; Wright v South Nassau Communities Hosp., 254 AD2d 277 [2d Dept 1998].) Moreover, Riznyk's deposition testimony is confirmed by her transmittal to Program of the December 9, 2002 umbrella Acord form which referred to the possible fatality. The record thus establishes as a matter of law that as of December 2002, Amerisc not only knew of the fatality but undertook to give notice to the excess carrier of the occurrence of the fatality.

In contrast, Amerisc demonstrates as a matter of law that Abetta never gave it notice of the commencement of the wrongful death action. Abetta does not deny that it never sent the papers in that action to Amerisc, and does not submit any evidence that Amerisc otherwise

received notice of the commencement of the action. Instead, Abetta relies on Ward's December 10, 2002 fax to Riznyk (Ex. D to P.'s Cross-Motion) which transmitted the complaint in the personal injury action and noted that the estate of the deceased claimant was represented by a different law firm which has "not filed suit since an administrator has not yet been named." Abetta argues that this document put Amerisc "on notice" that a second lawsuit would soon be commenced. (See P.'s Cross-Motion, ¶ 49.)

The Ward document is insufficient, and the record otherwise lacks evidence, to demonstrate as a matter of law either that Amerisc undertook to follow up on the wrongful death action or that Abetta ceased to have the obligation to notify Amerisc when it received the summons and complaint in that action. The parties also have not addressed the legal impact of failure to give AISLIC notice of the wrongful death suit under these circumstances in which AISLIC also was not given notice of the fatality or of the wrongful death claim. The branch of the parties' motions for summary judgment on Abetta's claim against Amerisc for indemnification in the wrongful death action will accordingly be denied.

Turning to Abetta's claim against Program, the court finds that the evidence establishes as a matter of law that Program did not breach any direct duty owed to Abetta. Plaintiff does not submit any evidence or, indeed, even contend that Program encouraged plaintiff to rely on it or agreed to undertake specific acts for plaintiff, such as handling plaintiff's claims. (See Murphy, 90 NY2d at 272; Lynch, 309 AD2d at 791.) Rather, plaintiff claims that Amerisc made these assurances and that it was Amerisc which retained Program to procure umbrella coverage for plaintiff. (P.'s Cross-Motion, ¶ 23.) Thus, plaintiff fails to raise a triable issue of fact to withstand Program's motion for summary judgment on plaintiff's claim against it.

Liability as Between Amerisc and Program

Amerisc asserts cross-claims against Program for contribution and for Program's alleged negligence in not notifying AISLIC of plaintiff's potential claim under its excess policy.

Program asserts a cross-claim against Amerisc for any loss due to Amerisc's negligence.

Contrary to Program's contention, the fact that it had no direct duty to Abetta to give notice of claim to Abetta's insurer is not a bar to liability. (See Ruddy v Lexington Ins. Co., 40 AD3d 733 [2d Dept 2007].) As between a retail broker and a wholesale broker, a right to contribution may arise where there is no direct duty from the wholesale broker to the insured, but where there has been a "breach of a duty running from the contributor [wholesale broker] to the defendant [retail broker] who has been held liable" to the insured. (Id. at 734.)

Here, Amerisc makes a prima facie showing that Program had a duty to exercise due care in handling the notice of claim which Amerisc gave to Program on Abetta's behalf. Amerisc cites the testimony of Riznyk, discussed above, that she sent the Acord notices to Program with the expectation that Program would forward them to the carriers. Program takes the position that it did not handle claims and did not agree to forward notice to carriers. (Program Motion, ¶ 15.) However, Program does not dispute that it forwarded the September 12, 2002 Acord form to Abetta's primary carrier. While Program asserts that this transmittal was in error (Program Motion, ¶ 12), Program does not contend that it ever notified Amerisc that it had sent the form to the carrier in error. The parties' course of dealing on the Abetta matter thus supports Amerisc's position that it also reasonably relied on Program to forward the December 10, 2002 Acord form to the excess carrier.

More importantly, although disputing that it had a duty to notify the carrier, Program

acknowledges that, at a minimum, it was required to return a notice of claim sent to it by a broker, with instructions to the broker to file the notice with the carrier directly. Program produced testimony to this effect about its claims handling procedures from two vice-presidents Robert Meade of the New York office which brokered the policy, and Tina Barthel of the Woodbury, Long Island office to which the Abetta umbrella policy was transferred in mid to late 2002. Barthel testified that if any office of Program had received a claim implicating Abetta's excess policy, it would not have given notice to the excess carrier. (See Barthel Dep. at 140-142.) Rather, Barthel stated that the practice and procedure if a notice of claim was received was to send the claim "back to the retail broker" and give the broker "the phone and fax number for the carrier on the policy to send it directly." (Id. at 42-45.) Barthel's testimony was consistent with Meade's testimony that it was Program's policy "if we receive a Notice of Claim that we should return it," and instruct the sender that "you must send it to your carrier." (Meade Dep. at 20, 26-29.) While Meade repeatedly testified that a notice of claim should be returned to the broker, he also acknowledged that Program would either refer the notice back to the retail broker for handling or refer it to the carrier, as appropriate, and that these were the only two options if a notice of claim was received. (See id. at 46-47, 62-63.)

As noted above, Program concedes that it did not forward the Acord form to AISLIC. Significantly also, Program does not dispute that it did not return the umbrella Acord form to Amerisc. Barthel confirmed that there was no record that Program returned the excess notice received from Amerisc in December 2002. (Barthel Dep. at 144. See also Meade Dep. at 62-63.)

In claiming that it notified Amerisc to report claims directly to the carrier, Program relies solely on a "Renewal Binding Fax" to Abetta (Ex. 11 to Program Motion), confirming binding of

Abetta's renewal excess policy effective December 7, 2002, and stating: "Reporting of Claims: Directly to AIG Insurance Company." This notice by its terms applied to the renewal policy, not the prior policy which is at issue in this action. Even assuming arguendo that it was applicable to claims reporting under the prior policy, the undisputed fact remains that Program did not return the umbrella Acord form to Amerisc with instructions to file it directly with AISLIC.

Given the critical importance of the Acord form as a notice document, and the undisputed evidence on this record, the court finds as a matter of law that Program not only violated its own practice and procedure but also breached a duty to Amerisc to exercise due care in handling the form. The branch of Program's motion for summary judgment dismissing Amerisc's cross-claim against it for contribution must therefore be denied.

Program does, however, raise a triable issue of fact as to whether Amerisc was also negligent in the manner in which it transmitted the Acord form to Program for purposes of having Program forward notice to Abetta's excess insurer. Riznyk testified that after reporting an insured's claim to a wholesale broker, she would "do follow-up." (Riznyk Dep. at 28.) Yet, she testified that she did not receive an acknowledgment from Program of receipt of the umbrella Acord form and did not have a conversation with anyone at Program at the time she sent the Acord. (Id. at 20-22.) Indeed, her log book indicates that she did not communicate with Program between the time she sent the umbrella Acord in December 2002 and September 2003, when she first contacted Program after she was advised by the primary carrier that the excess policy might be reached. (See Riznyk Dep. at 31-41.)

On this record, a triable issue of fact exists as to whether Amerisc was negligent and, if so, the extent to which Program and Amerisc each contributed to the failure to give notice of the

personal injury plaintiffs' claim to AISLIC.⁵ In so holding, the court notes that while Amerisc would be barred from seeking indemnification for its own negligence (see Bleecker St. Health & Beauty Aids, Inc. v Granite State Ins. Co., 38 AD3d 231 [1st Dept 2007]), it may properly seek contribution from Program as a joint tortfeasor. (See Ruddy v Lexington Ins. Co., 40 AD3d 733, supra.) The record accordingly presents an apportionment issue for the jury.

It is accordingly hereby ORDERED that defendant AISLIC's motion for summary judgment is granted to the extent of dismissing the complaint and all cross-claims against it; and it is further

ORDERED ADJUDGED and DECREED that AISLIC is not obligated to defend or indemnify plaintiff Abetta in the underlying personal injury action entitled Ocampo v Abetta Boiler & Welding Serv., Inc. (Supreme Court, New York County, Index No. 121850/02) or in the underlying wrongful death action entitled Aparicio v Abetta Boiler and Welding Serv., Inc. (Supreme Court, Queens County, Index No. 104777/03); and it is further

ORDERED that plaintiff Abetta's cross-motion for summary judgment is granted to the extent that it is ORDERED, ADJUDGED and DECREED that defendant Amerisc is obligated to indemnify Abetta in the aforesaid underlying personal injury action for any amount for which Abetta is found liable above Abetta's primary coverage; and plaintiff Abetta's cross-motion is otherwise denied; and it is further

ORDERED that defendant Amerisc's motion for summary judgment dismissing the complaint and cross-claims against it is denied; and it is further

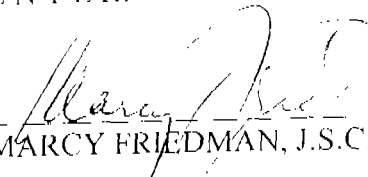
⁵As summary judgment was denied above as to Abetta's claim against Amerisc for indemnification in the wrongful death action, the court does not reach claims between Amerisc and Program regarding that action.

ORDERED that defendant Program's motion for summary judgment is granted to the extent of dismissing the complaint against it, and is otherwise denied.

This constitutes the decision, order and judgment of the court.

Dated: New York, New York
January 30, 2009

ENTER:



MARCY FRIEDMAN, J.S.C.

~~THIS DOCUMENT IS UNCLASSIFIED~~
~~DATE 11/19/2013 BY 60322 UCBAW/STP~~
into judgment and is not to be 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 1413).