[* 1]

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

PRESENT: HON. CAROL EDMEAD PART 35

Index Number : 113017/2008

TOWER EXTERIOR SOLUTIONS INC

VS

AMERICAN EMPIRE GROUP SURPLUS

Sequence Number : 001

DISMISS ACTION

INDEX NO. 113017/08

MOTION DATE 4/20/09

MOTION SEQ. NO. ____

MOTION CAL. NO. ____

The following papers, numbered 1 to ____ were read on this motion to ____

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

In accordance with the accompanying Memorandum Decision, it is hereby

ORDERED that the motion by defendant American Empire Surplus Lines Insurance Company (sued herein as American Empire Group Surplus Lines Insurance Company) pursuant to CPLR §3211(a)(7) to dismiss the Complaint of the plaintiff, Tower Exterior Solutions Inc. for failure to state a cause of action, is granted, in its entirety. And it is further

ORDERED that plaintiff serve a copy of this order with notice of entry upon all parties within 20 days of entry.

ORDERED that the Clerk may enter judgment accordingly.

This constitutes the decision and order of the Court.

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

Dated: 4/29/09

J.S.C.

HON. CAROL EDMEAD

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 35

----------X

TOWER EXTERIOR SOLUTIONS INC., Index No. 113017/08

Plaintiff,

-against-

AMERICAN EMPIRE GROUP SURPLUS LINES INSURANCE COMPANY, AMERICA INTERNATIONAL INSURANCE COMPANY as Subrogee of ARTHUR BRANDT,

Defendants.

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HON. CAROL EDMEAD, J.S.C.

MEMORANDUM DECISION

In this insurance coverage action, defendant American Empire Surplus Lines Insurance Company (sued herein as American Empire Group Surplus Lines Insurance Company) ("Empire") moves pursuant to CPLR §3211(a)(7) to dismiss the Complaint of the plaintiff, Tower Exterior Solutions Inc. ("Tower" or "plaintiff") for failure to state a cause of action.

Factual Background[1]

Arthur Brandt ("Brandt") retained Tower to install waterproofing to his building located at 150 East 74th Street, New York, New York (the "building"). On April 22, 2006, during a rainstorm, water leaked from the roof causing damage to the premises. The leak was allegedly due to Tower's failure to keep the building watertight while performing work on the roof.

Brandt gave notice of the loss to his property carrier, defendant America International

[1] The factual background is taken from the Complaint and submissions in the record.

Insurance Company ("American International"),[2] and American International paid $243,939.08 to Brandt for the damages.

On June 12, 2006, American International sent its first certified letter to Tower, advising Tower of damage it caused to Brandt's building and requesting that Tower "report this claim directly to your insurance company as soon as possible." Having received no response, American International sent another letter on July 26, 2006, which was followed by a final letter on August 29, 2006 requesting that Tower notify its insurance carrier.

After having received no response to these letter, on or about October 16, 2006, American International, as subrogee of Arthur Brandt, commenced an action against Tower to recover the sums it paid to Brandt to repair the property damage to the building (the "underlying action").

On October 24, 2006, American International sent its insured, Brandt, a letter requesting that if he had "any information regarding whether Tower . . . has insurance, it would be appreciated if you could provide that information."

On or about November 3, 2006, American Insurance served Tower with the summons and complaint through the Secretary of State. An additional copy of the pleadings was sent directly to Tower, to the attention of Tower's President.

On November 14, 2006, Tower sent the summons along with a letter to Professional Risk Planners, third-party administrators of Empire advising of Brandt's claim against them. Tower, was insured by Empire under a Commercial General Liability insurance policy, which was in effect on April 22, 2006. Tower's letter referred to the June 12, 2006, letter from "the claimant's

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[2] American International Insurance Company is incorrectly named as *America* International Insurance Company.

insurance company [American International] that a claim was filed against Tower," and that the June 12, 2006 letter noted that the leak was due to heavy rainfall.

On November 27, 2006, American International sent Tower a letter including the summons and complaint and advised that in the event Tower failed to respond, American International would take a default against it.

On November 30, 2006, Empire contacted counsel for American International.

On or about December 8, 2006, pursuant to the request of Empire, American International sent a letter to Empire providing defendant with proof of the damage.

On December 11, 2006 Empire sent a letter to Tower, declining defense and indemnification in the underlying action brought by American International. Empire stated:

> Tower was on notice of the alleged loss at or about the date which it occurred, April 22, 2006. Furthermore, American International issued correspondence to Tower on June 12, 2006 specifically claiming that Tower was responsible for the water damage and requesting that Tower place its insurance carrier on notice. Despite that knowledge, Tower failed to report the matter to American Empire until November 22, 2006, following the institution of suit. Under the circumstances, American Empire is denying coverage based upon untimely notice of an occurrence and/or claim.

Tower then commenced this declaratory judgment action. In its first cause of action, Tower claims that Empire must defend and indemnify Tower in connection with the underlying action. Tower alleges that after it was served with a summons and complaint on November 3, 2006, it sent a letter to Empire's third-party administrators on November 14, 2006, advising of Brandt's claim against it. Tower alleges that it performed all the conditions precedent required under the Empire Policy, including timely notifying American International about the claim.

In its second cause of action, Tower claims that under New York Insurance Law ("Ins. Law") §3420(a)(3), American International, as a subrogee of Brandt, the injured party and

claimant had a separate and independent right to provide notice to Empire. On or about November 30, 2006, American International first became aware that Empire was the insurance company for Tower and put Empire on notice of the claim. Based on this notice, Empire has a duty to defend, indemnify and pay the costs of the defense of claims and potential claims that American International as a subrogee Brandt has asserted against Tower.

Empire's Motion

Empire argues that Tower violated the notice provisions of the Empire Policy. An insurer is not obligated to provide coverage in the absence of timely notice of an occurrence in accordance with the terms of the policy. Tower concedes that it was notified on June 12, 2006 by "the claimant's insurance company that a claim was filed against Tower." In addition, the June 12, 2006 correspondence sent by American International requested that Tower "report this claim directly to [Tower's] insurance company as soon as possible." Nevertheless, Empire did not receive notice of this occurrence or claim until November 22, 2006. Tower's five month delay in providing notice to Empire violated Section IV(2)(a) and (b) of the Empire Policy. Further, there is no excuse for the delay and mitigating considerations are absent.

In addition, Tower's second cause of action is inherently improper. Under Ins. Law §3420(a)(3), "A provision that notice given by or on behalf of the insured, or written notice by or on behalf of the injured person or any other claimant...shall be deemed notice to the insurer." Any reliance by Tower on American International's December 8, 2006 letter of proof of damages is improper. Not only does this December 8, 2006 letter postdate Tower's notice to Empire, the letter does not seek to provide notice to or request coverage from Empire, but merely provides proof of American International's damages. In sum, American International's December 8, 2006

correspondence to Empire does not cure the untimely notice or otherwise allow Tower to receive coverage under the Empire Policy.

Tower's Opposition

Timely notice of the claim was provided to Empire by the injured party, American International. By sending its December 8, 2006 letter, American International placed Empire on notice of its insured, Tower's, involvement with the Brandt property damage claim. Under both Ins. Law §3420(a)(3) and caselaw, 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 the injured party is not to be charged vicariously with the insured's delay.

The only issue 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 under the circumstances. "The sufficiency of notice by an injured party is governed not by mere passage of time but by the means available for such notice." American International exercised reasonable diligence in attempting to ascertain the identity of Tower's Insurance. Shortly after becoming aware of the identity of Empire, American International provided them with notice of the property damage. Since American International asserted its own right to provide notice, instead of relying on the insured to do so, its rights are not derivative of the insured's. American International has timely exercised its independent right to notify Tower's insurance carrier, Empire, of the accident.

In contrast to the one Federal and two Second Department cases cited by Empire, the First Department holds that, where the insured fails to give proper notice, the injured party can give notice, thereby preserving its right to proceed directly against the insurer.

Additionally, in order for Empire's disclaimer letter to be effective against American

International, the injured party, the notice of disclaimer must specifically advise that the notice of claim was untimely and here, American International never received a response from Empire to its December 8, 2006 claim letter. Nor has a copy of Empire's denial letter been forwarded to American International. It was only through counsel for Tower that American International became aware that Empire had disclaimed coverage for Tower. Thus, having not sent a denial letter to the injured party, American International, Empire's purported disclaimer of December 11, 2006 is totally ineffective against American International. And, since the notice of the claim was provided directly by the injured party, the disclaimer must address with specificity the grounds for disclaiming coverage applicable to both the injured party as well as the insured.

Further, Empire has a duty to defend and indemnify its insured Tower. Tower had a reasonable belief of its nonliability regarding any property damage claimed by Brandt. In addition, Tower sent the Summons and Complaint to Empire shortly after it was served upon them, and the delay from the June 12, 2006 letter to the time that they sent the Summons and Complaint on or about November 14, 2006, was not unreasonable. Besides, the duty of an insurer to defend is broader than its duty to indemnify and arises whenever the allegations contained in the complaint against the insured, liberally construed, potentially fall within the scope of the risks which the insurer has undertaken.

American International's Opposition

The late notice of the insured cannot be attributed to the injured third party. American International's letter dated December 8, 2006 is not superfluous, and notice given by an injured third party is judged by a different standard than notice given by the insured. The test for the injured party or its agent is whether the party or his attorney acted diligently in ascertaining the

identity of the insurer.

When the insured has failed to give proper notice, the injured party, by giving notice himself or herself can preserve his or her right to proceed directly against the insurer. American International first became aware that Empire was the insurance company for Tower and put Empire on notice of its claim on November 30, 2006, when Empire's counsel contacted American International after American International sent its default letter to Tower. It was only through the attorneys for Tower that American International became aware that Empire had disclaimed coverage. After sending its December 8, 2006 letter to Empire of proof of damage, American International has never received any correspondence from Empire. American International notified Tower of its intent to hold Tower liable for the damage to Brandt's building from June 2006 through August 2006, and sued Tower for such damages when Tower failed to respond to American International's letters. American International was notified by Empire in November 2006 for the first time, and did not mention late notice or disclaimed coverage at that time. Empire never sent American International a disclaimer letter.

American International is not unmindful of the fact that should plaintiff's action be dismissed it will be unable to proceed against Empire until after a judgment has been obtained. Even the changes to CPLR 3001 which take effect January 19, 2009, will not allow a third party whose injury is to property rather than person start a declaratory action prior to obtaining a judgment. However, it should be noted that there are also changes to Ins. Law §3420 which take effect January 19, 2009. Said changes will not permit an insurer to merely declare a notice to be late without bearing the burden of proving that it was prejudiced by that lateness. This change will apply to property damage claims as well as personal injury or death.

Thus, as it cannot be held, as a matter of law, that the notice by American International was late, the motion to dismiss the action should be denied.

Reply

American International's December 8, 2006 letter to Empire, which post-dates Tower's untimely notice, does not constitute notice of the claim, does not cure the untimely notice provided to Empire, or otherwise allow Tower to receive coverage under the Empire Policy. Further, the cases cited by Tower and American International are distinguishable in that the insured did not provide notice to its insurer, prompting the injured party to provide notice.

Additionally, Empire was not obligated to provide American International with a copy of its disclaimer letter. Ins. Law §3420(d) states that: "If...an insurer shall disclaim liability or deny coverage for death or bodily injury...it shall give written notice as soon as is reasonably possible of such disclaimer of liability or denial of coverage to the insured and the injured person . . . ." Here, American International's underlying claim does not involve death or bodily injury.

Further, American International did not act diligently in ascertaining the identity of Tower's liability insurer, and did not act expeditiously to notify Empire. American International's December 8, 2006 letter does not seek to provide notice to nor request coverage from Empire, or constitute notice of claim or a request for coverage, but merely provides proof of American International's damages. None of the correspondence issued by American International to Tower requested that Tower identify its insurer. In addition, American International does not allege or identify any additional efforts it undertook to identify Empire.

Moreover, Tower failed to meet its burden to demonstrate that it had a reasonable basis in non-liability. The issue is not whether the insured believes that it will ultimately be found liable,

but whether the insured has a reasonable basis for a belief that no claim will be asserted against it. Tower cannot reasonably contend that it had no reasonable basis to believe that a claim would be asserted against it when it received correspondence from American International discussing its claim against Tower on three separate occasions.

Finally, the amendment to Ins. Law §3420(d) that took effect on January 19, 2009 bears no consequence upon this matter. A reading of Chapter 388, amending Ins. Law §3420, indicates that the law shall only apply to policies issued or delivered in New York on or after January 19, 2009. As such, American International's argument that the changes to Ins. Law § 3420 will somehow effect this matter are without merit.

Analysis

In determining a motion to dismiss for failure to state a cause of action pursuant to CPLR §3211[a] [7], the Court's role is ordinarily limited to determining whether the complaint states a cause of action (*Frank v DaimlerChrysler Corp.*, 292 AD2d 118, 741 NYS2d 9 [1st Dept 2002]). On a motion to dismiss made pursuant to CPLR § 3211, the court must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit into any cognizable legal theory" (*Leon v Martinez*, 84 NY2d 83, 87-88, 614 NYS2d 972, 638 NE2d 511 [1994]). However, in those circumstances where the bare legal conclusions and factual allegations are "flatly contradicted by documentary evidence," they are not presumed to be true or accorded every favorable inference (*Biondi v Beekman Hill House Apt. Corp.*, 257 AD2d 76, 81, 692 NYS2d 304 [1st Dept 1999], *affd* 94 NY2d 659, 709 NYS2d 861, 731 NE2d 577 [2000]; *Kliebert v McKoan*, 228 AD2d 232, 643 NYS2d 114 [1st Dept], *lv denied* 89 NY2d 802, 653 NYS2d 279,

675 NE2d 1232 [1996], and the criterion becomes "whether the proponent of the pleading has a cause of action, not whether he has stated one" (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275, 401 NYS2d 182 [1977]; *see also Leon v Martinez*, 84 NY2d 83, 88, 614 NYS2d 972 [1994]; *Ark Bryant Park Corp. v Bryant Park Restoration Corp.*, 285 AD2d 143, 150, 730 NYS2d 48 [1st Dept 2001]). Where the parties have submitted evidentiary material, including affidavits, the pertinent issue is whether claimant has a cause of action, not whether one has been stated in the complaint (*see Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]; *R.H. Sanbar Projects, Inc. v Gruzen Partnership*, 148 AD2d 316, 538 NYS.2d 532 [1st Dept 1989]).

It is undisputed that the Empire Policy provides, in pertinent part, as follows:

> SECTION IV - COMMERCIAL GENERAL LIABILITY CONDITIONS
>
> * * *
>
> 2. Duties In The Event of Occurrence, Offense, Claim or Suit
>
> a. You must see to it that we are notified as soon as practicable of an "occurrence" or an offense which may result in a claim. . . .
>
> b. If a claim is made 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 use as soon as practicable. You must see to it that we receive written notice of the claim or "suit" as soon as practicable.
>
> c. You and any other involved insured must:
>
> (1) Immediately send us copies of any demands, notices, summonses or legal papers received in connection with the claim or "suit"; . . . .

It is well settled that where a policy of insurance, such as the Empire Policy herein, requires that the insured give the insurer notice "as soon as practicable," notice must be afforded within a "reasonable time under the circumstances" (*see Travelers Ins. Co. v Volmar Constr. Co.*, 300 AD2d 40, 42 [1st Dept 2002]). The notice requirement is a condition precedent to coverage and so, failure to provide such notice, absent a showing of legal justification, vitiates the contract of insurance (*Great Canal Realty Corp. v Seneca Ins. Co.*, 5 NY3d 742 [2005]; *Matter of Allcity*

Ins. Co. [*Jimenez*], 78 NY2d 1054, 1055 [1991]; *Ocean Partners, LLC v North River Ins. Co.*, 25 AD3d 514, 515 [1st Dept 2006] ["[p]laintiff's [insured's] failure to provide notice of its claim until 28 months after the fire constituted an unreasonable delay and a failure to satisfy a condition precedent to coverage under the policy"]).

The obligation to give notice "as soon as practicable" of an occurrence that may result in a claim is measured by the yardstick of reasonableness (*Brooks v Zurich-American Ins. Group*, 300 AD2d 176, 753 NYS2d 454 [1st Dept 2002]). It has generally been held that a failure to give notice may be excused when an insured, acting as a reasonable and prudent person, believes that he is not liable for the accident (*Paramount Ins. Co. v Rosedale Gardens, Inc.*, 293 AD2d 235, 743 NYS2d 59 [1st Dept 2002]). The duty to give notice arises when, from the information available relative to the accident, an insured could glean a reasonable possibility of the policy's involvement (*Paramount Ins. Co. v Rosedale Gardens, Inc., supra, citing Security Mut. Ins. Co. v Acker-Fitzsimons Corp.*, 31 NY2d 436, 441-443 [1972]). The insured bears the burden of proving, under all the circumstances, the reasonableness of any delay in the giving of notice (*Paramount Ins. Co. v Rosedale Gardens, Inc., supra, citing Argentina v Otsego Mut. Fire Ins. Co.*, 86 NY2d 748, 749-750 [1995]).

It has been held that "there may be circumstances that excuse a failure to give timely notice, such as where the insured has a good faith belief of nonliability, provided that belief is reasonable [internal quotation marks and citation omitted]" (*Great Canal Realty Corp. v Seneca Ins. Co.*, 5 NY3d 742 [2005]); *Security Mut. Ins. Co. of New York v Acker-Fitzsimons Corp.*, 31 NY2d 436 [1972]). However, relevant on the issue of reasonableness, is consideration of whether and to what extent, the insured has inquired into the circumstances of the accident or

occurrence (*Great Canal Realty Corp. v Seneca Ins. Co., supra citing White v City of New York*, 81 NY2d 955, 958 [1993] [stating that, "where a reasonable person could envision liability, that person has a duty to make some inquiry"]).

As to the insured, Tower failed to demonstrate that it had no reasonable basis to believe that a claim would be asserted against it. The record establishes that Tower received correspondence from American International of American International's claim against Tower as early as July 12, 2006, and further notices of same on July 26, 2006 and August 29, 2006. Such correspondence indicated that (1) Tower "contracted with Mr. Brandt to conduct certain work on the roof" of his building; (2) "[rain]water was allowed to enter through the unfinished portion of the base fashing which caused water to enter into the building causing damage," (3) it was American International's "claim that your company [Tower] failed to take steps in not keeping the building water tight during the construction stages of this project" and (4) if Tower "had insurance on the date of loss, please report this claim directly to your insurance company as soon as possible." These notices to Tower could not be any clearer that its policy with Empire was implicated. Thus, Tower's duty to provide notice to Empire under the Empire Policy arose as of the date of the July 12, 2006 letter from American International. However, Tower did not provide notice to Empire until five months later on November 14, 2006. And, there is no indication that Tower, upon receipt of this notice on July 12, 2006 or thereafter, attempted to investigate or inquire into the circumstances of American International's claim so as to form a basis for any belief that the Empire Policy would not be implicated. Therefore, Tower's five-month delay in providing notice to Empire of American International's claim is unreasonable under any view of the facts, and untimely, as a matter of law (*see Deso v London & Lancashire*

Ind. Co. of America, 3 NY2d 127 [1957] [51 days]; *Power Auth. of the State of N.Y. v Westinghouse Elec. Corp.*, 117 AD2d 336 [1st Dept 1986][53 days]; see also, [notice given five months after the accident untimely] *citing Travelers Ins. Co. v Volmar Const. Co., Inc.*, 300 AD2d 40, 752 NYS2d 286 [1st Dept 2002]).

Therefore, Tower's first cause of action seeking a declaration that Empire defend and indemnify Tower in connection with the underlying action based on its claim that it performed all the conditions precedent required under the Empire Policy, including timely notifying American International about the claim, is dismissed.

As to the notice given by American International, Ins. Law §3420(a)(3) states:

> A provision that notice given by or on behalf of the insured, or written notice by or on behalf of the injured person or any other claimant. . . shall be deemed notice to the insurer.

Ordinarily, an insured cannot rely on the fact that an independent source notified its insurer to satisfy its obligation to provide timely notice under an insurance policy (*see Travelers Ins. Co. v Volmar Const. Co.*, 300 AD2d 40, 752 NYS2d 286 [1st Dept 2002] [rejecting claim by insureds/plaintiffs attempting to rely on the fact that insurer received notice of the occurrence from independent sources, such as its other insured, Volmar, and another subcontractor]). An insured's obligation to provide timely notice is not excused on the basis that the insurer received notice of the underlying occurrence from an independent source (*Travelers Ins. Co. v Volmar Const. Co., supra, citing American Mfrs. Mutual Ins. Co. v CMA Enters.*, 246 AD2d 373, 667 NYS2d 724 [1st Dept 1998]; *Heydt Contr. Corp. v American Home Assurance Co.*, 146 AD2d 497, 499, 536 NYS2d 770 [1st Dept 1989]).

However, it cannot be said that American International's letter of December 8, 2006 is

insufficient to cure the notice condition precedent to American International obtaining indemnification coverage under the Empire Policy. Whether *an injured party's* notice to an insurer pursuant to Ins. Law § 3420(a)(3) may satisfy the "notice as soon as practicable" condition precedent to indemnification coverage is illustrated in several cases cited by the parties.

In *Lauritano v American Fid. Fire Ins. Co.* (3 AD2d 564, 162 NYS2d 553 [1st Dept 1957]) the injured plaintiff obtained a default judgment against Joseph Forzano and S. S. D. Trucking Corp. When the judgment remained uncollected, plaintiff sued directly their automobile liability insurers. On appeal, the First Department noted that S. S. D. gave no notice of the accident to its insurers. Plaintiff, "unaware and unadvised of the fact that the vehicle had been rented to S. S. D., did not himself notify S. S. D.'s insurers of the accident and of his claim until June 12, 1953," 13 months after the accident. The trial court held the delay to be excessive and dismissed the complaint.

> At one time, the liability insurance policy was regarded as the concern only of the insured and his insurer, as exclusive parties to the contract. Any act or omission by the insured which would have released his insurer from liability would inevitably have precluded recovery by those whose claims against the insurer were wholly derivative. However, the Legislature, recognizing that an injured party, while not privy to the insurance contract, had a genuine interest in it and should be enabled to invoke its protection, enacted section 109 of the Insurance Law, forerunner of the present section 167, to create, as its heading indicates, an independent right of the injured person to proceed directly against the liability insurer (L. 1917, ch. 524). Successive amendments have profoundly altered what was once commonly accepted--that the liability policy existed solely for the protection of the insured.
>
> Today the injured party is no longer wholly dependent upon the diligence and conscientiousness of the person who caused him injury. The statute having granted the injured person an independent right to give notice and to recover thereafter, he is not to be charged vicariously with the insured's delay. When the injured party has pursued his rights with as much diligence "as was reasonably possible" the statute shifts the risk of the insured's delay to the compensated risk-taker who can initially accept or reject those for whom it will bear such risks.

The First Department found that based on the facts available to the injured plaintiff, his notice given to S. S. D.'s liability insurers was given as soon as it was reasonably possible for him to do so. Thus, the dismissal against the insurers was reversed and judgment entered for the plaintiff.

In *Ringel v Blue Ridge Ins. Co.*, (293 AD2d 460, 740 NYS2d 109 [2d Dept 2002]), an action was commenced against defendant Blue Ridge Insurance's insured for negligence in March 1997. Approximately two months thereafter, the insured's insurance broker notified Blue Ridge of the action, and in June 1997, Blue Ridge requested and was granted a 30-day extension of time to answer the Complaint. Blue Ridge then disclaimed coverage on the ground that its insured failed to provide timely notice of the accident. A default judgment was entered against the insured. Thus, the injured plaintiffs sought a declaration that Blue Ridge was required to defend its insured in the underlying personal injury action and to afford insurance coverage for the accident. The Court held that the insured's notice via the broker was untimely. In defense of Blue Ridge's motion for summary dismissal, the plaintiffs' argued "that they cannot be bound by [the insured'] failure to give timely notice because they had independently notified Blue Ridge when they stipulated to extend Blue Ridge's time to answer. However, the Court held that because the plaintiffs did not exercise due diligence in ascertaining the identity of tortfeasor's insurance company or in notifying tortfeasor's insurer of the accident, the injured plaintiffs' subsequent notice was also untimely. Thus, the insurer had no duty to defend or indemnify tortfeasor in underlying action.

United States Liability Ins. Co. v Winchester Fine Arts Servs., Inc. (337 FSupp 2d 435 [SDNY 2004]) involved an action by an excess insurer, "U.S. Liability," against its insured

"Winchester," its insured's primary carrier, Utica National Insurance Group ("Utica"), and injured claimants involved in an accident with plaintiff's insured, for a declaration that U.S. Liability was not required to provide excess indemnification coverage in connection with the claimant's underlying personal injury action.

On April 9, 2001, a Winchester's employee was involved a motor vehicle accident with the claimants. Winchester was then insured under a primary policy with Utica and under an excess policy with U.S. Liability (the "Excess Policy"), which required notice of an occurrence or claim by Winchester as soon as practicable.

On April 17, 2001 and January 29, 2002, the Claimants notified Utica of the accident and inquired as to whether Winchester carried excess liability insurance. The Claimants sued Winchester for personal injuries, and again requested that Utica provide information regarding excess insurance coverage, and provided Utica with the Complaint of their action. Utica did not respond. On two separate occasions during discovery, the Claimants requested excess coverage information from Winchester's trial counsel. Winchester's trial counsel never mentioned that Winchester had an excess policy.

On February 28, 2003, Winchester's defense counsel informed Utica that he was in the process of preparing an affidavit from Winchester's President to attest that there was no applicable excess insurance policy carried by Winchester. By letter dated March 5, 2003, Winchester's general corporate counsel ("Winchester's corporate counsel"), however, informed U.S. Liability of the state court action and provided the Complaint.

On April 1, 2003, Winchester informed the Claimants of the Excess Policy.

U.S. Liability then received the Claimants' pleadings from Winchester's corporate

counsel on April 2, 2003, and two weeks thereafter, sent a letter to Winchester and the Claimants' counsel disclaiming coverage for Winchester's failure to comply with the notice provision of the Excess Policy. This notice further stated that the Claimants failed to cure Winchester's untimely notice because the Claimants were not the first to notify plaintiff of the state court action.

In determining whether U.S. Liability, or Winchester and the Claimants, were entitled to summary judgment on their respective claims, the Court first concluded that Winchester failed to provide timely notice of the state court action to plaintiff under the terms of the Excess Policy. The Court also found that "it was unreasonable as a matter of law for Winchester to not have notified U.S. Liability [plaintiff] of the state court action well before March 5, 2003."

The Court then "turn[ed] to the Claimants' argument that they cured Winchester's untimely notice"; more specifically, whether "[a]ccording to the Claimants, they cured any untimely notice by Winchester by informing U.S. Liability [plaintiff] of the state court action pursuant to New York Insurance Law § 3420(a)(3)" which grants an injured party an independent right to notify the insurer of a potential claim" and deems such notice as "notice to the insurer."

The court acknowledged such notice from an injured party must be made "as soon as...reasonably possible" once the injured party learns of the insurance. The Claimants invoked § 3420(a)(3) "to overcome Winchester's untimely notice, and as such, proffer[ed] their diligent efforts to discover the existence of [the] Excess Policy as a mitigating circumstance to excuse Winchester's delay in providing notice" to plaintiff. The Claimants asserted that they timely notified plaintiff of their claim on May 20, 2003 after receiving plaintiff's disclaimer letter on April 21, 2003. Plaintiff retorted that the Claimants did not cure Winchester's untimely notice because the Claimants were not the first to notify plaintiff of the state court action. In this regard,

the court noted :

> Although there is no statutory requirement that the injured party's notice must occur prior to any notice by the insured, several courts applying § 3420(a)(3) have so held. Ringel v. Blue Ridge Ins. Co., 293 A.D.2d 460, 740 N.Y.S.2d 109, 111 (2d Dep't 2002) (stating that "where the insured is the first to notify the carrier, even if that notice is untimely, any subsequent information provided by the injured party is superfluous for notice purposes"); Massachusetts Bay Ins. Co. v. Flood, 128 A.D.2d 683, 513 N.Y.S.2d 182, 183 (2d Dep't 1987) (noting that where the insured had already notified the insurer, the injured party's subsequent notice was "superfluous"); Mount Vernon Fire Ins. Co. v. Orange Intercept, Ltd., No. CV-92-1986, 1992 WL 368085, at *3 (E.D.N.Y. Nov. 19, 1992) (stating that "once the insured gives late notice to the insurer an injured party cannot give timely notice under section 3420(a)(4) because 'any subsequent information provided by the injured party [is] ..., for notice purposes, superfluous ....' ") (citation omitted).

The Court also noted "that some courts have held to the contrary (See, e.g.,Walters v. Atkins, 179 AD2d 1067, 579 NYS2d 525, 527 [4th Dept 1992][stating that first notice by the insured does not extinguish the injured party's ability to cure the insured's untimeliness because the "injured party has an independent right to provide written notice to an insurer and cannot be bound by an insured's late notice"])."

The Court also distinguished *Lauritano v American Fidelity Fire Ins. Co.* (3 AD2d 564, 162 NYS2d 553 [1st Dept 1957]), which was cited for the proposition that the Claimants' notice need not be the first notice that plaintiff received provided that the notice was timely under the circumstances. The Court noted that the "injured parties in Lauritano, however, did in fact provide first notice to the insurer, and thus, that decision is materially distinguishable from the facts presented here."

The court then held that "Once an insurer has received notice from the insured, whatever notice requirements may be applicable are prima facie satisfied (subject to any challenge by the insurer). Thus, the ability of an injured party to provide notice to the insurer in lieu of the

insured under § 3420(a)(3) is moot once notice has been accomplished by the insured." Since Winchester was the first to inform plaintiff of the state court action and the Claimants were not the first to provide such notice, "the Court rejects the Claimants' and Winchester's arguments that the Claimants' notice cured Winchester's untimely notice. *Winchester* thus removed the Claimants' practical ability to cure *Winchester's* untimely notice when it notified U.S. Liability on March 5, 2003." (Emphasis added).

The Court, however, next turned to the Claimant's argument that their May 20, 2003 notice constituted timely notice of the state court action to U.S. Liability. The Court concluded that "based on the evidence in the record, such notice was untimely as a matter of law." Although the Court acknowledged that the Claimants "should not be vicariously charged with Winchester's dilatory practices," the record was clear that once the Claimants received notice of the Excess Policy on or about April 1, 2003 and waited approximately 50 days to formally provide notice to U.S. Liability. Thus, although the Claimants diligently sought information on excess coverage from Utica and Winchester's trial counsel during the period from April 2001 through March 2003, neither the Claimants nor Winchester offered "any explanation as to why the Claimants prior diligence suddenly terminated once the existence of the Excess Policy was revealed." Noting that unexplained delays, even if brief, can be unreasonable as a matter of law, the Court found that "the Claimants' unexplained 50-day delay in notifying U.S. Liability of the state court action is untimely as a matter of law." Accordingly, the Court rejected the Claimants' attempts to use their May 20, 2003 notice of the state court action to cure Winchester's untimely notice.

Finally, in *Appel v Allstate Ins. Co.* (20 AD3d 367, 799 NYS2d 467 [1st Dept 2005])

plaintiff obtained a default judgment against by Allstate's insureds, who only notified Allstate after the default judgment was entered against them on April 24, 2001. Thereafter, Allstate disclaimed coverage to its insureds and "anyone else seeking coverage under" the policy based on the insureds' failure to give prompt notice. Just over a week later, on May 29, 2002, plaintiff's attorney served a copy of the default judgment on Allstate, and then commenced this action to collect on such judgment pursuant to Insurance Law § 3420(b). Allstate sought summary judgment dismissing the complaint on the ground that since it had previously obtained a default judgment against its insureds declaring that it had no duty to defend or indemnify them due to their failure to give timely notice of plaintiff's claim, it likewise had no duty to indemnify plaintiff. Citing *Ringel* and *Massachusetts Bay Ins. Co., (supra*), the IAS court held that because Allstate is not liable to its insureds, it cannot be liable to plaintiff; that its disclaimer letter did not have to be addressed to plaintiff or explicitly name her, and was otherwise sufficient; and that it did not have to disclaim specifically based upon plaintiff's own failure to timely notify it since notice, albeit untimely, had already been given to it by its insureds. The First Department reversed. Citing *Lauritano* (*supra*), the Court reaffirmed that where the insured fails to give proper notice, the injured party can give notice herself, thereby preserving her right to proceed directly against the insurer. "Having been statutorily granted an independent right to give notice and recover directly from the insurer, the injured party or other claimant is not to be charged vicariously with the insured's delay. The Court distinguished *Ringel* and *Massachusetts Bay*, given that the notices given therein by the injured parties were untimely as a matter of law "because [they] did not exercise due diligence in ascertaining the identity of [the] insurance company or in notifying [it] of the accident" or "failed to make reasonable efforts under the

circumstances to timely bring the accident to the attention of the carrier." Since the insurer did not dispute receiving notice from its insured, "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." Since the plaintiff's attorney claimed that the first time he became aware that Allstate was the insurance carrier for the defendants in that action was approximately two days before Allstate sent him its disclaimer letter of May 21, 2002, there is, at the very least, an issue of fact as to whether plaintiff acted diligently in ascertaining Allstate's identity as the insurer and in notifying it of the accident.

Based on the above caselaw, since Insurance Law §3420 (a)(3) gives *the injured party* an independent right to give notice of an accident and to satisfy the notice requirement of a policy, *an insurer* can defeat a claim of indemnification under its policy based on untimely notice where (1) the injured party's notice was provided *subsequent to* any untimely notice provided by the insured *and* (2) the injured party's notice was, in and of itself, untimely due to a lack of diligence on its part in ascertaining the identity of and notifying the insurer (*see e.g., American Transit Ins. Co. v Sartor*, 3 NY3d 71, 77 fn. 2 [2004] ["the insured's dilatory conduct, standing alone, does not constitute an adequate basis for a disclaimer against the injured party precisely because the claimant personally may issue the required notice pursuant to section 3420 of the Insurance Law. It is only in the event of noncompliance by both the insured and the injured claimant that the insurer may validly disclaim against the injured party"]). Thus, the injured party can cure the insured's failure to provide timely notice under the policy, even where the injured party's notice was provided *subsequent to* any untimely notice provided by the insured, provided that the injured party exercised diligence in discovering the identity of and notifying the insurer.

Here, American International's written submission of the proof of the damages to Empire notice to Empire was provided *subsequent to* any untimely notice provided by the insured. Whether American International undertook reasonable steps to ascertain the identity of Tower's insured cannot be determined as a matter of law. The record discloses that in addition to urging Tower to contact its insurer on three occasions within a three-month period, American International commenced an action against Tower and asked its own insured, Brandt, in October 2006, two months later, as to whether Brandt knew the identity of Tower's insurer. It was not until November 30, 2006, that American International first learned that Empire was Tower's insured, when Empire called American International's counsel. Unlike the case, *Tower Ins. Co. of New York v Lin Hsin Long Co.* (50 AD3d 305 [1st Dept 2008]) cited by Empire wherein no efforts were undertaken to identify the insurer, American International asked Brandt to provide any information he knew regarding Tower's insurer. Since an issue of fact exists as whether American International exercised due diligence in ascertaining the identity of Empire or in notifying Empire of the accident or made reasonable efforts under the circumstances to timely bring the accident to the attention of Empire, it cannot be said that Empire has no obligation to provide indemnification coverage under the Empire Policy for American International's losses as asserted against Tower.

Notwithstanding the above, the intent of Ins. Law §3420 (a)(3) could not reasonably be to permit an insured, such as Tower, whose application for declaratory judgment to defend and indemnify is denied for untimely notice, to benefit and obtain defense and costs circuitously by relying on the diligence of the injured party. The intent of Ins. Law §3420 (a)(3) is not to resuscitate the tardy insured's stale notice, but to preserve the timely-noticed rights of the injured.

Thus, as Tower even points out, the rights that are protected and preserved by American International's alleged timely notice are the rights of the injured party. Yet, American International's right to proceed directly against the insurer is not before the Court.

Thus, given that Tower's second cause of action seeks defense and costs on Tower's behalf through American International's notice, such cause of action is also dismissed. However, this dismissal in no way compromises the right of American International to pursue its claim as an injured party directly against Empire.

Based on the foregoing, plaintiff's first cause of action, in which Tower seeks defense and indemnification based on the allegation that it performed all the conditions precedent required under the Empire Policy, including timely notifying American International about the claim, is dismissed.

Further, plaintiff's second cause of action for a declaration that Empire has a duty to defend, indemnify and pay the costs of the defense of claims and potential claims that American International as a subrogee Brandt has asserted against Tower based on the alleged notice by American International pursuant to Ins. Law §3420(a)(3) to Empire, is also dismissed.

Conclusion

It is hereby

ORDERED that the motion by defendant American Empire Surplus Lines Insurance Company (sued herein as American Empire Group Surplus Lines Insurance Company) pursuant to CPLR §3211(a)(7) to dismiss the Complaint of the plaintiff, Tower Exterior Solutions Inc. for

failure to state a cause of action, is granted, in its entirety. And it is further

ORDERED that plaintiff serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: April 27, 2009

Hon. Carol Robinson Edmead, J.S.C.

HON. CAROL EDMEAD

FILED
MAY 05 2009
COUNTY CLERK'S OFFICE
NEW YORK