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

PART 7

Index Number : 117987/2006

CUBS 42ND LLC

vs.

CENTURY-MAXIM CONSTRUCTION

SEQUENCE NUMBER : 003

SUMMARY JUDGMENT

INDEX NO.

MOTION DATE 3/19/09

MOTION SEQ. NO.

MOTION CAL. NO. 19

The following papers, numbered 1 to 5 were read on this motion to/for SJ

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

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion is determined by the annexed memorandum Decision, Order and Judgment.

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).

HON. MICHAEL D. STALLMAN

Dated: 5/5/09

J.S.C.

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

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☒ REFERENCE

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

----------X

CUBS 42nd LLC, JD CARLISLE DEVELOPMENT CORP. and M.D. CARLISLE CONSTRUCTION CORP.,

Plaintiffs,

- against -

CENTURY-MAXIM CONSTRUCTION CORP. and VIRGINIA SURETY COMPANY, INC.,

Defendants.

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Index No.: 117987/06

DECISION, ORDER AND JUDGMENT

HON. MICHAEL D. STALLMAN, J.:

Plaintiffs move, pursuant to CPLR 3212, for summary judgment declaring that defendant Virginia Surety Company, Inc. (Virginia) is obligated to defend and indemnify plaintiffs in the underlying personal injury action entitled *Joseph Aceto v Cubs 42nd LLC, JD Carlisle Development Corp., M.D. Carlisle Construction Corp. and Century Maxim Construction Corp.*, bearing Index Number 13442/06, filed in Supreme Court, Bronx County. Plaintiffs further seek reimbursement for the legal fees they have expended in defending the underlying action to date.

BACKGROUND

Cubs 42nd LLC (Cubs) entered into a contract with Century-Maxim Construction Corp. (Century) to perform certain construction work at a site owned by Cubs. Pursuant to this contract, Century was to acquire commercial general liability insurance, having Cubs, JD Carlisle Development Corp. (JD) (the general contractor) and M.D. Carlisle Construction Corp. (MD) (the construction manager) named as an additional insureds.

Cubs and MD were insured by Illinois Union Insurance Company (Illinois), and JD was an additional insured under the Illinois commercial general liability policy.

On or about August 4, 2005, the plaintiff in the underlying action, Joseph Aceto, an employee of a non-party subcontractor, was allegedly injured as the result of a construction site accident, wherein a shovel filled with concrete fell from the third floor of the site building, striking him on the head. Allegedly, Century performed the concrete work at the site, the shovel belonged to Century, and the shovel was dropped by a Century worker.

In March, 2006, the underlying personal injury action was filed. On June 5, 2005, counsel for plaintiffs in the instant action wrote to Virginia indicating their intent to seek defense and indemnification pursuant to the commercial general liability policy it had with Century. A second letter was written in the same vein on July 7, 2006. Plaintiffs received no response from Virginia until Virginia filed its answer to the instant lawsuit on January 19, 2007, in which it denied liability based on a late notice of claim. It is noted that plaintiffs have been defended in the underlying lawsuit under the terms of the Illinois policy.

Both the Virginia and Illinois policies contain identical provisions with respect to providing primary and excess insurance coverage.

Plaintiffs assert that Virginia's untimely denial of coverage precludes it, pursuant to Insurance Law § 3420 (d), from avoiding its obligation to defend and indemnify them based on a late notice of claim. Virginia opposes the instant motion on the grounds that Insurance Law § 3420 (d), which mandates prompt notification of denial, is inapplicable to the instant situation, because that section does not apply to co-insurers' seeking contribution, which, it maintains, is the true issue in the case.

DISCUSSION

"The 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 eliminate any material issues of fact from the case [internal quotation marks and citation omitted]." *Santiago v Filstein*, 35 AD3d 184, 185-186 (1st Dept 2006). The burden then shifts to the motion's opponent to "present facts in admissible form sufficient to raise a genuine, triable issue of fact." *Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 (1st Dept 2006); *see Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied. *See Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 (1978).

Virginia asserts that a delay in alerting it to a potential claim "as soon as practicable," as required under the policy, constitutes a failure of a condition precedent to Virginia's obligations. Generally, a failure of such condition precedent would vitiate the contract of insurance. *Briggs Avenue LLC v Insurance Corporation of Hannover,* 11 NY3d 377 (2008); *Argo Corporation v Greater New York Mutual Insurance Company,* 4 NY3d 332 (2005). In the instant matter, Virginia was not notified of the occurrence until June 5, 2006, almost one year after the accident took place, and over two months after the underlying personal injury action was filed. This delay in notification, without any explanation forthcoming for such delay, would constitute an untimely notice.

However, pursuant to Insurance Law § 3420 (d),

> "If under a liability policy delivered or issued for delivery in this state, an insurer shall disclaim coverage for death or bodily injury arising out of a motor vehicle accident of any other type of accident occurring within this state, 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 insured

person or any other claimant.

As stated by the court in *First Financial Insurance Company v Jetco Contracting Corp.* (1 NY3d 64, 68-69 [2003]),

> "timeliness of an insurer's disclaimer is measured from the point in time when the insurer first learns of the grounds for disclaimer or liability or denial of coverage. Moreover, an insurer's explanation is insufficient as a matter of law where the basis for denying coverage was or should have been readily apparent before the onset of the delay [internal quotation marks and citations omitted]."

Virginia only indicated that it was disclaiming coverage because of untimely notification in its answer to the instant action on January 19, 2007, approximately seven months after it received notification of a claim. A delay of seven months in disclaiming coverage based on a late notice of claim, which is evident on the face of the notice of claim, is unreasonable as a matter of law. *Id.* (48 day delay is unreasonable as a matter of law); *Matter of Firemen's Fund Insurance Company of Newark v Hopkins,* 88 NY2d 836 (1996) (unexplained delay of two months is unreasonable as a matter of law); *2833 Third Avenue Realty Associates v Marcus,* 12 AD3d 329 (1st Dept 2004) (37 day delay is unreasonable as a matter of law); *New York City Housing Authority v Underwriters at Lloyd's, London,* 2009 NY Slip Op 2977, 2009 NY App Div LEXIS 2886 (2d Dept 2009) (three month delay unreasonable).

Courts have consistently held that an insurer's delay in disclaiming coverage precludes it from asserting any defense, including a late notice of claim. *Matter of Firemen's Fund Insurance Company of Newark v Hopkins,* 88 NY2d 836, *supra*; *New York City Housing Authority v Underwriter's at Lloyd's, London,* 2009 NY Slip Op 2977, 2009 NY App Div LEXIS 2886, *supra*; *Quest Builders*

Group, Inc. V Deco Interior Construction, Inc., 56 AD3d 744 (2d Dept 2008). Therefore, Virginia's assertion that it does not have to defend or indemnify plaintiffs because of their late notice of claim is vitiated by its own unreasonably late disclaimer.

In opposition, Virginia additionally argues that the provisions of Insurance Law 3420 (d) are inapplicable to a request for contribution between co-insurers (*Tops Markets, Inc. v Maryland Casualty*, 267 AD2d 999 [4th Dept 1999]), which, Virginia maintains, is the actual thrust of this motion, despite the fact that Illinois is not a party to the proceedings.

In *Bovis Lend Lease LMB, Inc. v Royal Surplus Lines Insurance Company* (27 AD3d 84 [1st Dept 2005]), a case strikingly similar to the case at bar, the court held that the insurer's delayed disclaimer of liability based on the insured's late notice of claim is ineffective as against the insured, but is effective with respect to a co-insurer. In that case, the court determined that the insurer was obligated to defend the insured, but that the obligation commenced only on the date of its actual notice of claim, thereby precluding the co-insurer, who had been defending the action, from receiving any contribution up to that point. This court believes that such conclusion is a reasonable application of Insurance Law § 3420 (d).

In the case at bar, plaintiffs are entitled to have Virginia defend them in the underlying personal injury action. As a general rule,

> "[a] duty to defend is triggered by the allegations contained in the underlying complaint. The inquiry is whether the allegations fall within the risk of loss undertaken by the insured [and it is immaterial] that the complaint against the insured asserts additional claims which fall outside the policy's general coverage or within its exclusory provisions. ... Furthermore, an insurer may be required to defend under the contract even though it may not be

> required to pay once the litigation has run its course.
> ...
> [A]n additional insured is a recognized term in insurance contracts, ... [and that] the well-understood meaning of the term is an entity enjoying the same protection as the named insured [internal quotation marks and citations omitted]."

BP Air Conditioning Corp. v One Beacon Insurance Group, 8 NY3d 708, 714-715 (2007).

The complaint in the underlying personal injury action alleges that Joseph Aceto suffered bodily injury at the job site covered by the insurance policy in question, caused by the negligence of Century. As such, Virginia has a duty to defend plaintiffs as additional insureds under the commercial general liability policy Century has with Virginia, but plaintiffs may seek reimbursement only for defense expenses incurred after June 5, 2006.

However, at this point, plaintiffs' request that Virginia be found responsible to indemnify them in the underlying personal injury action is deemed premature.

"[W]hile the duty to defend is clear, issues of fact as to liability in the underlying personal injury action render premature the conclusion that the insurers have a duty to indemnify [plaintiffs]." *Chunn v New York City Housing Authority,* 55 AD3d 437, 438 (1st Dept 2008). Therefore "we decline to pass on the question of defendant['s] duty to indemnify at this early juncture, which predates any ultimate determination of the insurers' liability." *Frontier Insulation Contractors, Inc. v Merchants Mutual Insurance Company,* 91 NY2d 169, 178 (1997).

Finally, because both commercial general liability insurance policies contain identical provisions regarding primary and excess coverage, they cancel each other out and are each considered responsible for primary coverage. *Osorio v Kenart Realty, Inc.*, 48 AD3d 650 (2d Dept 2008).

CONCLUSION

Based on the foregoing, it is hereby

ORDERED that the portion of plaintiffs' motion seeking a declaration that Virginia Surety Company, Inc. has a duty to defend them in the underlying personal injury action is severed and granted to the extent that it is

ADJUDGED and DECLARED that Virginia Surety Company, Inc. has a duty to defend plaintiffs in the underlying personal injury action entitled *Joseph Aceto v Cubs 42nd LLC, JD Carlisle Development Corp., M.D. Carlisle Construction Corp., and Century Maxim Construction Corp.*, Index No.: 13442/06, pending in the Supreme Court, Bronx County, from June 5, 2006; and it is further

ORDERED that the portion of plaintiffs' motion seeking a declaration that Virginia Surety Company, Inc. has a duty to indemnify them in the aforesaid underlying personal injury action is denied as premature; and it is further

ORDERED that the issue of the amount of reimbursement of legal fees to which plaintiffs are entitled is severed and referred to a Special Referee to hear and determine (or upon stipulation of the parties, another person to act as a referee to hear and determine); and it is further

ORDERED that this motion is held in abeyance pending the determination of the Special Referee or the designated referee; and it is further

ORDERED that counsel for the party seeking the reference or, absent such party, counsel for plaintiff shall, within 30 days from the date of this order, serve a copy of this order with notice of entry, together with a completed Information Sheet, upon the Special Referee Clerk in the Motion Support Office in Rm. 119 at 60 Centre Street, who is directed to place this matter on the calendar

of the Special Referee's Part (Part 50 R) for the earliest convenient date.

Dated: May 5, 2009
New York, New York

ENTER:

Michael D. Stallman, J.S.C.

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).