[* 1]

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

PRESENT: TOWB

PART 15

Justice

Index Number : 116389/2008

GEORGE CAMPBELL PAINTING

VS.

NATIONAL UNION FIRE INSURANCE CO.

SEQUENCE NUMBER : # 001

SUMMARY JUDGMENT

INDEX NO. 116389-08

MOTION DATE 4.24.09

MOTION SEQ. NO. #001

MOTION CAL. NO.

were read on this motion to/for

	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

IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

UNFILED JUDGMENT

This Judgment has not been entered by the County Clerk and notice of entry cannot be given. To obtain entry, counsel must appear in Part [illegible] Room 141B).

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

Dated: 5/7/09

WALTER B. TOLUB J.S.C.

Check one: ☐ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

[* 2]

SUPREME COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK: PART 15
----------x

GEORGE CAMPBELL PAINTING and TRIBOROUGH BRIDGE AND TUNNEL AUTHORITY,

Plaintiffs,

Index No.: 116389/08

-against-

DECISION

NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA.

Defendant.

----------x

TOLUB, J.

BACKGROUND

Motion sequence numbered 001 and 002 are consolidated for disposition.

In Motion sequence number 001, plaintiffs George Campbell Painting (Campbell) and Triborough Bridge and Tunnel Authority (TBTA) move, pursuant to CPLR 3212 and 2215, for summary judgment declaring that Campbell and TBTA qualify as additional insureds under defendant National Union Fire Insurance Company of Pittsburgh, Pa. (National Union) policy; that National Union's disclaimer based on late notices violates Insurance Law § 3420 (d); that National Union is estopped from denying coverage to Campbell and TBTA; that National Union breached the terms and conditions of its policy by denying coverage to Campbell and

TBTA; and that National Union be order to pay $999,950.00 as its pro rata share of the excess layer settlement in the underlying personal injury action. National Union has cross-moved, pursuant to CPLR 3212, for summary judgment to dismiss the complaint.

In motion sequence number 002, National Union seeks to have the court permit it to serve a reply brief in support of its crossmotion.

Campbell and TBTA were previously named as defendants in a personal injury action entitled *James Conklin v Triborough Bridge and Tunnel Authority and Campbell Painting v Safespan Platform Systems, Inc.*, Index No.: 228535/03, filed in the Supreme Court, Bronx County. On August 11, 2003, James Conklin (Conklin) was allegedly injured at a job site. On or about December 23, 2003, Conklin instituted the underlying personal injury lawsuit. Pursuant to a contract between Safespan and Campbell, Safespan agreed to acquire general commercial liability insurance, naming Campbell and TBTA as additional insureds. Gulf issued the policy to Safespan, with a limitation of liability of $1 million per occurrence. Additionally, Safespan was also insured on an excess basis with National Union.

Campbell and TBTA tendered their defense and indemnity in the underlying action to James Conklin's employer, subcontractor Safespan Platform Systems, Inc. (Safespan). Safespan's primary insurer, Gulf Insurance Company, now Travelers (Gulf), accepted

Campbell's and TBTA's tender as additional insureds, and appointed counsel to defend them in the underlying action. Campbell and TBTA also tendered their indemnity claims to National Union. However, seven months after receiving its tender from Campbell and TBTA, National Union disclaimed coverage to Campbell and TBTA, asserting that their notice of claim was late.

Campbell was insured as the named insured under a policy issued by Westchester Fire Insurance Company, and TBTA is insured as the named insured under a policy issued by First Mutual Transportation Assurance Company (First Mutual).

By letter dated November 16, 2005, defense counsel for Campbell and TBTA tendered notice of the Conklin action to National Union, seeking insurance coverage under the National Union policy. By letter dated December 23, 2005, National Union acknowledged receipt of the letter notifying it of the claim, and reserved its rights based on the fact that the complaint in the underlying personal injury action did not allege any specific negligence as to its insured, and that the notice of claim was untimely, having been submitted approximately two years after the incident in question. On May 17, 2006, seven months after receiving the notice of claim, National Union denied coverage based on the late notice of claim.

Campbell and TBTA subsequently settled the underlying personal injury action for the total amount of $5.5 million.

National Union refused to contribute toward this settlement, and, accordingly, as part of the settlement agreement it was agreed that payment of $1 million of the total settlement amount would be deferred until July 1, 2009, with Campbell and TBTA expressly reserving their rights to commence the instant action.

Campbell and TBTA assert that the limits of the primary coverage have been reached, and that the amount that they are seeking represents National Union's pro rata share of the excess coverage to which they are entitled. National Union maintains that it does not have to contribute to the settlement because Campbell's and TBTA's late notice of claim relieves it of liability, or, alternatively, that the policy issued by First Mutual is primary insurance coverage which must first be exhausted before National Union's excess insurance obligation is triggered.

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).

National Union rightly asserts that a delay in alerting it to a claim "as soon as practicable," as required under the policy, constitutes a failure of a condition precedent to National Union's obligations, and thereby, generally, 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, National Union was not notified of the occurrence until almost 27 months after the accident took place, and almost two years 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 OF Appeals 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]."

After receiving the late notice, National Union wrote to plaintiff's counsel, advising counsel that it was reserving its rights with respect to indemnifying plaintiffs, indicating in its letter that the notice "did not allege any specific negligence as to [its] insured that would give rise to coverage," and the tender of notice was approximately two years late. Approximately seven months later, National Union disclaimed coverage, based on an untimely notice.

A reservation of rights letter does not constitute a disclaimer of coverage, nor does it negate an insurer's obligation to provide a timely rejection. *New York Central Mutual Fire Ins. Co. v Hildreth,* 40 AD3d 602 (2d Dept 2007). A delay of six 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 found 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, National Union's assertion that it does not have to indemnify plaintiffs because of their late notice of claim is vitiated by its own unreasonably late disclaimer.[1]

Furthermore, the court finds that National Union's argument that the provisions of Insurance Law § 3420 (d) do not apply to insurers of excess coverage is without merit. Not only does National Union fail to provide direct judicial or statutory support for this contention, but its logic flies in the face of

---

[1] National Union also asserts that it was entitled to delay disclaiming coverage because it had to investigate the underlying complaint. However, in its denial letter, National Union only denied coverage based on a late notice of claim, which was evident when the notice of claim was originally sent, and not disputed by Campbell and TBTA. Since the basis for the denial was evident from the original notice, there was no need for an investigation. *Pav-Lak Industries, Inc. v Arch Insurance Company*, 56 AD3d 287 (1st Dept 2008).

the underlying purpose of Insurance Law § 3420 (d), which is to allow insureds to obtain expeditious resolution to liability claims. *First Financial Ins. Co. v Jetco Contracting Corp.*, 1 NY3d 64, *supra*.

In its alternative argument appearing in the crossmotion, National Union asserts that, pursuant to the policy in effect between TBTA and First Mutual, First Mutual is to provide first party coverage, which must be exhausted before any excess coverage can be reached. *Kajima Construction Services, Inc. v CATI, Inc.*, 302 AD2d 228 (1st Dept 2003). To support this contention, National Union has submitted a copy of what its attorney affirms is the First Mutual policy in question.

In their opposition to National Union's crossmotion, Campbell and TBTA argue that the First Mutual policy provided in the crossmotion papers cannot be considered because it is not properly authenticated, only being introduced by affirmation by National Union's counsel. CPLR 3212 (b). It is this argument that National Union seeks to refute in its reply papers, the issue presented by motion sequence number 002. The court notes that the original motion had previously been submitted to a referee, who ruled that if National Union filed a crossmotion, Campbell and TBTA would be allowed to submit opposition papers, but National Union would be precluded from submitting a reply.

It is within the discretion of the court to accept reply

papers to a crossmotion. *See generally Murphy v Huntington Hospital*, 246 AD2d 519 (2d Dept 1998). In the instant matter, the papers are before the court, and so no delay would be occasioned by the court's consideration of National Union's arguments. Therefore, the court grants National Union's motion to accept its reply to Campbell's and TBTA's opposition to its crossmotion.

National Union's reply indicates that the First Mutual policy it submitted with its papers was provided to it by TBTA's own counsel, thereby rendering it admissible evidence. However, in the papers submitted in opposition to the crossmotion, Campbell and TBTA have supplied an affidavit of Laureen Coyne, the Director of Risk & Insurance Management for the Metropolitan Transportation Authority, of which TBTA is an affiliate, who affirms that the policy submitted with the crossmotion is not a true and correct copy of the policy in question.

Generally, when conflicting affidavits are submitted in support or opposition to a motion for summary judgment, summary judgment is precluded if the essence of the affidavits goes to a material question of fact. *Sagittarius Broadcasting Corporation v Evergreen Media Corporation*, 226 AD2d 261 (1st Dept 1996). However, regardless of the authenticity of the insurance policy provided, National Union's reading of the policy is flawed.

The gravamen of the conflict concerns the interpretation of contract clauses, which is a matter of law within the court's province (*Ruttenberg v Davidge Data Systems Corp.*, 215 AD2d 191 [1st Dept 1995]), and the court will assume, arguendo, that the policy submitted is a true and correct copy.

National Union's argument is based on two clauses in the First Mutual policy, paragraphs 13 (1) and (2). These clauses state:

> "(1) If the named insured *purchases* other insurance protecting it against a loss falling within terms and conditions of this policy, ie, acts or omissions of third parties (not professional liability) then this insurance shall first respond, and such other insurance shall be considered excess insurance, and the underwriter shall not seek contribution therefrom [emphasis added].
> (2) If other insurance protecting the named insured insurance exists, then such insurance as is afforded by this policy shall be excess insurance over such insurance and in no circumstances shall contribute thereto."

A contract should be construed so as to give full meaning and effect to all of its provisions. *Trump-Equitable Fifth Ave. Co. v H.R.H. Construction Corp.*, 106 AD2d 242, *affd* 66 NY2d 779 (1985). The logical reading of these two provisions indicates that the First Mutual policy provides primary coverage *only* when the named insured, TBTA, *purchases* other insurance. In the instant matter, TBTA did not purchase any other insurance; rather, it was named as an additional insured under other policies acquired by other parties, thereby triggering paragraph

13 (2), in which First Mutual coverage is excess when other insurance exists but was not purchased by TBTA. Consequently, even accepting the First Mutual policy as a true and correct copy, First Mutual is not obligated to provide primary coverage in the underlying personal injury action. Therefore, National Union is obligated to pay its pro rata share of the Conklin settlement as excess coverage since all primary coverage has been exhausted.

Based on the foregoing, it is hereby

ORDERED that plaintiffs' motion, motion sequence numbered 001, is granted in its entirety; and it is further

ADJUDGED and DECLARED that defendant National Union Fire Insurance Company of Pittsburgh, Pa. is to pay $999,950.00 as its pro rata share of the excess layer settlement to James Conklin in the underlying personal injury action entitled *James Conklin v Triborough Bridge and Tunnel Authority and Campbell Painting v Safespan Platform Systems, Inc.*, Index No.: 28535/03, Supreme Court, Bronx County, no later than July 1, 2009; and it is further

ORDERED that defendant's motion, motion sequence numbered 002, is granted, permitting defendant to submit a reply brief to

its crossmotion; and it is further

ORDERED that defendant's crossmotion, motion sequence numbered 001, seeking to dismiss the complaint is denied.

This constitutes the decision, order and Judgment of the Court.

Dated: 4/16

ENTER:

Walter B. Tolub, J.S.C.