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

PRESENT: JUSTICE SHIRLEY WERNER KORNREICH PART 54

Justice

Index Number : 100529/2005

JUDLAU CONTRACTING

INDEX NO.

VS

WESTCHESTER FIRE INSURANCE

MOTION DATE 12/18/08

Sequence Number : 004

MOTION SEQ. NO.

COUNSEL FEES, EXPENSES

MOTION CAL. NO.

is motion to/for

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1-2
Answering Affidavits — Exhibits	3-4
Replying Affidavits	5-6

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANC
WITH ACCOMPANYING MEMORANDU
DECISION AND ORDER.

FILED
JUL 28 2009
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 7/21/09

J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

JUSTICE SHIRLEY WERNER KORNREI

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

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JUDLAU CONTRACTING, INC.,

Index No.: 100529/2005

Plaintiff,

-against-

DECISION and ORDER

WESTCHESTER FIRE INSURANCE COMPANY,

Defendant.

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SHIRLEY WERNER KORNREICH, J.

In this declaratory judgment action, plaintiff Judlau Contracting, Inc. (Judlau), moves for summary judgment, pursuant to CPLR 3212, declaring that defendant Westchester Fire Insurance Company (Westchester) has a duty to defend and indemnify Judlau in an underlying property damage action entitled *Bloomingdales v. The New York City Transit Auth.*, Sup. Ct. N.Y. Co. Index No. 100214/03. Westchester opposes and cross-moves for summary judgment dismissing the complaint.

The facts are undisputed. In the complaint in the underlying action, Bloomingdales alleged that on February 18 and 19, 2002, it discovered that its store basement was flooding because its storm drainpipe had been cut. The drainpipe connected to the New York City sewer system. The underlying suit sought damages for the cost of replacing the drainpipe.

In 1999, the Transit Authority had undertaken a project to rehabilitate an electrical power station on 57th Street between Lexington and Third Avenues. Part of the work involved excavation on Third Avenue between 59th and 60th Streets, outside Bloomingdales' store at 1000 Third Avenue. M-Track Enterprises, Inc. (M-Track), was the Transit Authority's contractor.

Mass Electric Construction (Mass Electric) and Judlau were M-Track's subcontractors. Westchester's insured, Janus Industries, Inc. (Janus), was Judlau's subcontractor.

Judlau entered into a subcontract with Janus on October 1, 1998. In the subcontract, Janus agreed to obtain general liability insurance, in the amount of $500,000, protecting Judlau against liability arising out of Janus' work. The subcontract stipulated that the insurance was required to be primary, with any other insurance obtained by Judlau to be excess "and not called upon to contribute" with the coverage Janus obtained.

In accordance with the subcontract, Janus obtained insurance from Westchester. The parties agree that Judlau is an additional insured under the policy. The policy provides coverage for property damage caused by an occurrence during the policy period, August 13, 2001 through August 13, 2002. Property damage is defined as 'physical injury to tangible property" and is "deemed to occur at the time of the physical injury that caused it." An occurrence is defined as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." Westchester is required to defend any suit for property damage to which the insurance applies "even if the allegations of the 'suit' are groundless, false or fraudulent."

The policy excludes contractual liability, except where it is assumed in an "insured contract," executed before the property damage occurs, for which there is coverage for property damage and defense costs. An insured contract is one pertaining to the insured's business, in which the insured assumes tort liability to pay for property damage to a third person "that would be imposed by law in the absence of any contract...." The subcontract between Judlau and Janus falls within the definition of an "insured contract" because it pertains to Janus' business, Janus assumed liability for property damage relating to its work, which would have existed at common

law, in the absence of a contract.

With respect to notice, the policy provides that the named insureds must provide notice as soon as practicable of a suit or an occurrence that may result in a claim. The notice provision states that "You" must give notice and the policy defines "you" as the named insured shown in the declarations and any other person or organization qualifying as a named insured. Further, it defines "insured" as any person or organization qualifying as such under Section II, - Who Is An Insured." Judlau is not named in the declarations and is not an insured under Section II.

With regard to who must give and receive notice, the policy provides that:

> Notice given by or on behalf of the insured or written notice by or on behalf of the injured claimant to any agent of ours [Westchester] in New York State, with particulars sufficient to identify the insured, shall be considered notice to us.

In addition, the policy provides that the named insured and any other involved insured must "immediately" send copies of demands, summonses, or legal papers in connection with a claim or suit.

The record establishes that Westchester first received notice from Janus some time before July 8, 2002, prior to the time that the underlying action was commenced. Bloomingdales served a notice of claim on the Transit Authority on April 19, 2002. On July 8, 2002, Westchester's Senior Claims Representative, Bruce Alles, on behalf of its insured, Janus, wrote a letter to the Transit Authority stating that Westchester would defend and indemnify the Transit Authority pursuant to the terms of a subcontract between M-Track and Janus. The letter recited that it was responding to a June 28, 2002 letter from the Transit Authority to Mass Electric, that had been forwarded to M-Track, who had tendered it to Janus. Mr. Alles sent a copy of the letter to Judlau. There is no evidence in the record as to exactly when Janus or Westchester received the

June 28, 2002 letter.

In a second letter to the Transit Authority, dated January 15, 2003, Mr. Alles acknowledged receipt, on January 14, 2003, of the summons and complaint in the underlying action. He characterized his prior letter as "a conditional agreement to defend/indemnify" the Transit Authority and refused to accept tender of its defense. Westchester's grounds for refusal in January 2003 were that: 1) the work was done in 1999 and 2) there was no evidence that Janus was responsible for cutting the drainpipe.

Two third-party actions were brought in the underlying action. On or about October 28, 2003, the Transit Authority impleaded M-Track. M-Track impleaded Judlau by a second third-party summons dated April 29, 2004. Neither the record nor the County Clerk's file contains an affidavit of service of the second third-party summons and complaint on Judlau. The second third-party complaint alleged that the damage occurred on February 18 and 19, 2002.

Westchester's attorney avers that on June 30, 2004, Bloomingdales contacted Westchester concerning settlement. Haddad Affirmation, dated October 22, 2008, ¶ 13. He does not state whether the contact was written or oral. On August 3, 2004, Judlau notified Westchester, the same day that it served its answer to the second third-party complaint. Westchester's disclaimer, on January 31, 2005, was the service of its answer to Judlau's complaint in this action, almost six months after Judlau gave notice. Judlau does not allege any prejudice due to the six-month interval.

Subsequently, on or about November 8, 2004, Judlau filed a third third-party summons and complaint against Janus. According to the County Clerk's file, of which the court takes judicial notice, service was effected on Janus by delivery to the Secretary of State on November

29, 2004. Westchester has been defending Janus in the underlying action.

It was determined in the underlying action that the pipe was cut in 1999. On August 7, 2006, this court (Hon. Robert Lippman, J.) dismissed the underlying complaint on the ground that it was barred by the statute of limitations, based upon a finding that the drainpipe was cut in September 1999. On the same day, Justice Lippman granted Westchester's motion to dismiss this action, on the ground that it was academic due to the dismissal of the underlying complaint.

In 2007, the First Department reversed the dismissal of the complaint in this action. *Judlau Contr., Inc. v. Westchester Fire Ins. Co.*, 46 A.D.3d 482 (1st Dep't 2007). It ruled: 1) that Judlau's claim for defense costs was not academic due to the dismissal of the underlying complaint and 2) that Westchester had not proven that the property damage occurred in 1999, outside the coverage dates of the policy.

In the underlying action, the causes of action for trespass and nuisance were reinstated by the Appellate Division, First Department, on May 15, 2008 and the Court of Appeals affirmed on June 11, 2009.[1] Both Appellate Courts confirmed that the pipe was cut in 1999.

Judlau's moving papers asserted that Westchester was required to defend it in the underlying action because, pursuant to the allegations of the second third-party complaint, the covered occurrence took place in February 2002, during the policy period. In addition, Judlau posited that Westchester failed to issue a disclaimer and, therefore, eliminated the issue of whether Judlau gave timely notice to Westchester.

In support of its cross-motion and in opposition, Westchester asserts: 1) that Judlau's

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[1] *Bloomingdales, Inc. v. New York City Tr. Auth.*, 52 A.D.3d 120 (1st Dep't 2008), *affd.*, 2009 NY Slip Op 4743, 2009 N.Y. LEXIS 1846 (N.Y. Court of Appeals, June 11, 2009)(n.o.r.).

notice to Westchester was untimely; 2) that Judlau has failed to produce the policy it procured from Gerling Global Insurance Company (Gerling) that may yield coinsurance; 3) that there is no coverage under the Westchester policy because the pipe was cut in 1999; 4) that Westchester needs depositions of Judlau's risk manager regarding the late notice defense and Gerling's adjuster concerning whether there is coinsurance; 5) that Insurance Law 3420(d), vitiating late notice if there is a late disclaimer, does not apply to property damage claims and 6) that service of Westchester's answer to the complaint in this action was its disclaimer.

In reply, Judlau submitted the July 8, 2002 Alles' letter as proof of timely notice and repeated that Westchester's failure to disclaim excused Judlau's allegedly late notice. With respect to discovery, Judlau asserted that the depositions are irrelevant because the Westchester policy is primary and Judlau has proof of notice on July 8, 2002.

Westchester's reply on its cross-motion posited that: 1) even if a policy is triggered by the allegations of a complaint, untimely notice is still a defense; 2) even if a policy is triggered for defense, there may not be coverage for indemnity; 3) there can be more than one primary policy and where there is more than one, defense costs can be shared depending on the other insurance clauses in the policies; and 4) an additional insured cannot rely on notice given by the primary insured.

Discussion

Under Westchester's policy, the insured named in the declarations, Janus, and any other person or organization qualifying as a named insured, had the duty to notify as soon as practicable of a suit or an occurrence that might result in a claim. However, "even if the insurance policy were construed as specifying that only the named insured ... was required to

provide notices of occurrences, demands and suits, ... the duty to give reasonable notice is implied in all insurance contracts ... and is applicable to an additional insured." *Structure Tone v. Burgess Steel Prods. Corp.*, 249 A.D.2d 144, 145 (1st Dep't 1998); *City of N.Y. v. Welsbach Electric Corp.*, 49 A.D.3d 322 (1st Dep't 2008); *Travelers Ins. Co. v. Volmar Constr. Co.*, 300 A.D.2d 40 (1st Dep't 2002); *23-08-18 Jackson Realty Assoc. v. Nationwide Mutual Ins. Co.*, 53 A.D.3d 541 (2nd Dep't 2008). An insured may rely on notice from another party only if the parties are united in interest in the lawsuit, but not if they are adverse in the underlying suit. *23-08-18 Jackson Realty Assoc. v. Nationwide Mutual Ins. Co.*, *supra*, 53 A.D.3d at 543.

Notice is a condition precedent to coverage. *Travelers Ins. Co. v. Volmar Constr. Co.*, *supra*, 300 A.D.2d at 42. A short delay in providing notice is unreasonable as a matter of law absent a reasonable excuse or a good faith belief that the insured is not liable. *Id.* at 43. Failure to give proper notice vitiates the duty to defend. *American Mfrs. Mut. Ins. Co. v. CMA Enters.*, 246 A.D.2d 373 (1st Dep't 1998); *Lewis v. Nationwide Ins.*, 202 A.D.2d 816 (3rd Dept. 1994). The insured has the burden of proving notice. *426-428 West 46th St. Owners Corp. v. Greater N.Y. Mutual Ins. Co.*, 16 Misc.3d 1114A, *aff'd.*, 55 A.D.3d 480 (1st Dep't 2008).

Judlau failed to give timely notice. There is no proof that it gave notice prior to August 3, 2004 and it offers no excuse for the delay. It knew of the suit on or about July 8, 2002. In *Structure Tone v. Burgess Steel Prods. Corp.*, *supra*; *City of N.Y. v. Welsbach Electric Corp.*,*supra*; *Travelers Ins. Co. v. Volmar Constr. Co.*, *supra*; and *23-08-18 Jackson Realty Assoc. v. Nationwide Mutual Ins. Co.*, *supra.*, the courts did not construe a policy provision that notice "given by or on behalf of the insured or written notice by or on behalf of the injured claimant to any agent of [the insurer], with particulars sufficient to identify the insured, shall be

considered notice...." However, those cases held that even where the policy does not expressly provide that an additional insured must give notice, it has an implied, independent obligation to do so. Judlau impleaded Janus and, therefore, they were not united in interest.

There was also an obligation under the policy for "any other involved insured" to give "immediate" notice of a summons or other legal papers. The affidavit of service of the second third-party summons on Judlau is not in the record and, therefore, Judlau has not proved that it immediately forwarded the suit papers to Westchester.[2] However, the First Department has held that the requirement to forward suit papers is considered lack of cooperation by the insured, rather than lack of notice, and that the insurer must demonstrate attempts to secure cooperation and deliberate obstruction by the insured in order to disclaim on this ground. *City of N.Y. v. Continental Cas. Co.*, 27 A.D.3d 28 (1st Dep't 2005). It is unclear from that decision whether the policy construed was the same as the one before this court. The First Department decision stated that in the policy it was considering, the requirement of forwarding suit papers was under the heading of duties of cooperation. In the policy before this court, forwarding suit papers is under the list of duties in the event of an occurrence, offense, claim or suit, albeit in a separate subsection, (c)(1), from the requirement of notice in the event of an occurrence that might result in a claim, which is subsection (a). Subsection (c)(3) involves cooperation. This court need not rule on whether forwarding suit papers was a separate condition precedent, as the failure to provide notice in 2002 is a sufficient basis to uphold Westchester's disclaimer. Further, it is

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[2] Although the court was able to obtain the affidavit of service from the attorney for M-Track, after a telephone conference with the parties and several e-mails, the attorney for Judlau declined to stipulate to supplement the record with the affidavit of service or other relevant documents, which apparently exist.

Judlau's burden in the face of Westchester's cross-motion to come forward with proof of timely notice, which it failed to do.

The disclaimer by Westchester was timely. The requirement of a prompt disclaimer, pursuant to Insurance Law 3420(d), applies only to actions for personal injury, not property damage claims. *Fairmont Funding v. Utica Mutual Ins. Co.*, 264 A.D.2d 581 (1st Dep't 1999); *State Farm Ins. v. O'Brien*, 242 A.D.2d 381 (2nd Dep't 1997). Even where the insurer's delay in disclaiming is unreasonable, an insured must demonstrate prejudice to invalidate an untimely disclaimer in a property damage case. *Id.; see also, Smith v. General Accident Ins. Co.*, 295 A.D.2d 738 (2nd Dep't 2002). A disclaimer based upon untimely notice may be asserted by an affirmative defense in an answer to a declaratory judgment complaint. *American Mfrs. Mut. Ins. Co. v. CMA Enters., supra*. Here, Westchester disclaimed almost six months after notice, but there is no prejudice claimed by Judlau. Therefore, the disclaimer was timely.

In light of the determination that Judlau failed to provide timely notice and that Westchester's disclaimer was timely, it is unnecessary to rule on the remaining contentions of the parties or Westchester's requests for disclosure. Accordingly, it is

ORDERED that the motion of Judlau Contracting, Inc., for summary judgment declaring that defendant Westchester Fire Insurance Company has a duty to defend and indemnify Judlau in an underlying property damage action entitled *Bloomingdales v. The New York City Transit Auth.*, Sup. Ct. N.Y. Co. Index No. 100214/03, is denied; and it is further

ORDERED that the cross-motion of Westchester Fire Insurance Company to dismiss the complaint is granted and the balance of the cross-motion is denied as moot; and it is further

ORDERED that the Clerk is directed to enter judgment dismissing the complaint with

prejudice.

Dated: July 21, 2009

ENTER: