[* 1]

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

PRESENT: HON. CAROL EDMEAD PART 35

Index Number : 113167/2007

TEN'S CABARET

VS.

AMERICAN SAFETY INSURANCE

SEQUENCE NUMBER : 001

DISMISS

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

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

In accordance with the accompanying Memorandum Decision, it is hereby

ORDERED that the motion by defendants, American Safety Insurance Services Inc. ("ASIS") and Apex Insurance Managers, Inc., ("APEX") (collectively "defendants") for summary judgment dismissing the complaint of plaintiffs Ten's Cabaret, Inc. ("Ten's Cabaret") and L.F. Gramercy Property Co., LLC ("LF Gramercy") is granted, and the action as asserted against ASIS and APEX is severed and dismissed, and the Clerk of the Court is directed to enter judgment accordingly; and it is further

ORDERED that the branches of plaintiffs' cross-motion for an order (a) granting plaintiffs, pursuant to CPLR 3025(b), leave to amend their complaint to add American Safety Indemnity Company as a party defendant and assert claims against it; (b) granting defendant twenty (20) days to answer or otherwise respond to Second Amended Complaint; and (c) amending the caption to reflect the additional defendant, is granted, and the Clerk of this Court shall amend the caption as follows:

Dated: _____

_____ 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

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

----------X

TEN'S CABARET, INC.,

Plaintiff,

-against-

AMERICAN SAFETY INDEMNITY COMPANY,

Defendants.

----------X

Index No. 113008/08

And it is further

ORDERED that the branch of plaintiffs' cross-motion for an order resolving in plaintiff's favor the factual allegation made by plaintiffs in paragraph 7 of the Complaint that defendants are the issuers of the policy as asserted and admitted under oath in defendants' response to plaintiffs' Interrogatory No. 10, is denied; and it is further

ORDERED that the parties shall appear for a status confer

ORDERED that Ten's Cabaret 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.

HON. CAROL EDMEAD

Dated 8/27/09 ENTER: _____, J.S.C.

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

TEN'S CABARET, INC. and LF GRAMERCY PROPERTY CO., LLC,

Index No. 113167/07

DECISION/ORDER

Plaintiffs,

-against-

AMERICAN SAFETY INSURANCE SERVICES INC. and APEX INSURANCE MANAGERS, INC.,

Defendants.

----------X

MEMORANDUM DECISION

In this a declaratory judgment action, defendants, American Safety Insurance Services Inc. ("ASIS") and Apex Insurance Managers, Inc., ("APEX") (collectively "defendants") move for summary judgment dismissing the complaint of plaintiffs Ten's Cabaret, Inc. ("Ten's Cabaret") and L.F. Gramercy Property Co., LLC ("LF Gramercy") (collectively "plaintiffs").

In response, plaintiffs cross move for an order (a) granting plaintiffs, pursuant to CPLR 3025(b), leave to amend their complaint to add American Safety Indemnity Company as a party defendant and assert claims against it; (b) granting defendant twenty (20) days to answer or otherwise respond to Second Amended Complaint; and (c) amending the caption to reflect the additional defendant; and (d) resolving in plaintiff's favor the factual allegation made by plaintiffs in paragraph 7 of the Complaint that defendants are the issuers of the policy as asserted and admitted under oath in defendants' response to plaintiffs' Interrogatory No. 10.

Factual Background

Plaintiffs seek a declaration that they are entitled to defense and indemnification for any settlement or judgment entered against Ten's Cabaret and/or LF Gramercy in the pending underlying tort action, entitled *Nicole Westra v Ten's Cabaret, Inc., d/b/a Rock Candy and LF Gramercy Property Co.* (the "Westra Action") pursuant to an insurance policy issued by non-party American Safety Indemnity Company through APEX of Chicago, Illinois ("American Indemnity") to Ten's Cabaret (number 10AP-PK-00043233) (the "Policy"). In the Westra Action, it is alleged that on April 12, 2005, Nicole Westra ("Ms. Westra") fell and suffered injuries as she was walking down a set of steps while a guest at the night club then known as Rock Candy[1] which was located on East 21st Street, New York, New York.

The Policy designated defendant APEX as the third party claims administrator for American Indemnity and that APEX was to be notified of any "occurrence" or "suit" "immediately in writing." Defendant ASIS is the program manager for American Indemnity.

When ASIS received the Acord Notice of Occurrence/Claim form in January 25, 2007, by letter dated February 28, 2007, ASIS notified Ten's Cabaret that (1) Ten's Cabaret breached its obligations under the Policy by failing to timely notify American Indemnity of the underlying occurrence and the commencement of the Westra Action, and (2) American Indemnity had been prejudiced by the delay in reporting the "occurrence" and the "claim" in that the delay denied American Indemnity the opportunity to investigate Ms. Westra's allegations. As such, American

[1] Rock Candy was a night club operated by Ten's Cabaret that shared the first floor of 35 East 21st Street with the gentlemen's club known as 'Ten's Cabaret".

Indemnity declined defense and indemnification to Ten's Cabaret or LF Gramercy.[2]

Motion

Defendants initially point out that under the terms of the Policy, Illinois law is to be applied to all matters concerning the Policy. New York courts enforce contractual choice of law clauses, provided the law chosen has a reasonable relationship to the agreement and does not violate a fundamental policy of New York State. APEX, the administrator for this Policy, has its principal place of business in Chicago, Illinois. Thus, the need to have consistency in the law being applied to issues that arise concerning American Indemnity policies makes the application of Illinois law here a logical step toward that goal. Summary judgment is warranted under the application of Illinois law to the facts of this case, per the insurance contract, and the same result must obtain whether New York or Illinois law is applied.

Ten's Cabaret breached its obligations under the Policy to provide notice "in writing immediately," thus vitiating coverage for the Westra Action by failing to notify APEX, American Indemnity or ASIS of the "occurrence" involving Ms. Westra, including the "how, when and where" of the occurrence, and the nature and location of any injury or damage. Ten's Cabaret did not notify APEX, American Safety Indemnity Company or ASIS of the occurrence until January

---

[2] By letter dated March 20, 2007, Ten's Cabaret responded that Ten's Cabaret had no knowledge of the April 12, 2005 incident, and further, that Ten's Cabaret did not have knowledge of the Westra Complaint until it was notified of same by co-defendant LF Gramercy on January 25, 2007. Finally, Ten's Cabaret asserted that American Indemnity had not been prejudiced. By tender letter dated April 12,2007, American Indemnity reaffirmed its prior denial, noting, *inter alia,* that "the Certificates of Service of the Summons and Complaint filed with the court by Westra demonstrate that Ten's was served with the Summons and Complaint in September of 2006. . . Ten's did not inform ASIC of . . . the Westra action until four months later, on January 25, 2007. The first Certificate of Service indicates that service was affected on the Secretary of State, as Ten's designated representative for service of process under Section 306 of the General Business Law, on September 16, 2006. The second Certificate of Service indicates that service on Ten's was made on a Ms. Russo at 35 East 21st Street, New York, New York, on September 26, 2006. Both the service of the Summons and Complaint on the Secretary of State and the subsequent personal service on Ten's commenced Ten's obligation to forward the suit papers to ASIC. This declaratory judgment action ensued.

25, 2007, by an Acord Notice of Occurrence/Claim form, twenty-one months after the occurrence. Clearly, Ten's Cabaret knew of Ms. Westra's accident on the evening it occurred, yet never notified APEX, American Indemnity, or ASIS of the occurrence. Therefore, any attempt by the present management of Ten's Cabaret to seek benefits of the Policy written for Ten's Cabaret when it was owned by Paul Coppa must fail, as Mr. Coppa failed to immediately notify APEX, American Indemnity or ASIS of Ms. Westra's accident and of the Summons and Complaint immediately upon receipt of same in September 2006. Plaintiffs' attempt to excuse performance of Policy conditions precedent to coverage because of the change in ownership and/or its explanation that it had no knowledge of the Westra Action is insufficient.

Ms. Westra's deposition testimony belies Ten's Cabaret's contention that it had no knowledge of the accident on the date of the incident. Ms. Westra testified that a manager, bouncer and waitress knew of her accident immediately after it occurred. Ms. Westra was given a bag of ice for her foot and sat with the bag of ice on her foot for approximately ten minutes during which time she was given an accident report to fill out. The accident report was taken from Ms. Westra. She was told that the copier system was not functioning and that a copy of the report would be faxed to her. Ms. Westra never received a copy of the accident report. Ms. Westra also testified that she was asked if the club should call an ambulance for her. She declined the offer because she wanted to go to a hospital affiliated with her primary care physician. Finally, Ms. Westra testified that the bouncer carried her out of the club to a cab because she could not walk.

Christopher Reda, who testified on behalf of Ten's Cabaret, stated that at the time of the accident, Ten's Cabaret was owned by Paul Coppa. Mr. Reda purchased the assets of Ten's

Cabaret from Mr. Coppa in June 2006 and none of the employees of Ten's Cabaret at the time of the underlying accident were retained as employees after he purchased the business in June 2006. Mr. Reda was the owner of Ten's Cabaret at the time the Summons and Complaint were served in September 2006. Mr. Reda testified that Ann Marie Russo was hired by Ten's Cabaret as a receptionist and began working in the office on September 13, 2006. The office for Ten's Cabaret is located at 35 East 21st Street, New York, New York. Both the nightclub and the offices of Ten's Cabaret occupied the 35 East 21st Street premises at the time of Ms. Westra's accident in April 2005; at the time the Summons and Complaint were personally served upon Ten's Cabaret in September 2006; and East 21st Street was the address on file with the Secretary of State to which process was to be forwarded.

Ten's Cabaret also breached its obligations under the Policy by failing to notify APEX, American Indemnity, or ASIS of the Westra Action until four months after a copy of the Summons and Complaint were personally served upon Ms. Russo, and after a copy of the Summons and Complaint were served upon the Secretary of State in accordance with Business Corporation Law§306. Ten's Cabaret admits that it did not immediately notify APEX, American Indemnity, or ASIS of either the occurrence or the suit, claiming that current management, Christopher Reda, did not know of the April 12, 2005 incident until notified of same by LF Gramercy. However, current management cannot escape the fact that the prior owner never notified APEX, American Indemnity or ASIS of Ms. Westra's accident "in writing immediately."

Defendants also argue that ASIS and APEX are entitled to summary dismissal of the Complaint because neither ASIS nor APEX issued the Policy, and thus, neither has a duty to defend or indemnify the plaintiffs. The Policy was issued by non-party American Indemnity, and

neither Ten's Cabaret nor LF Gramercy has made any effort to amend the Complaint to name American Indemnity as a party, even though the denial of coverage was issued on behalf of American Indemnity, and a copy of the Policy was provided to plaintiffs in May 2008.

Further, the Policy provides that the rights and duties under the Policy "may not be transferred without our written consent, except in the case of death of an individual Named Insured." APEX, American Indemnity and ASIS were not notified of the June 2006 change in ownership of Ten's Cabaret in writing or otherwise.

Moreover, LF Gramercy is not entitled to a defense or indemnity because LF Gramercy does not meet the Policy definition of "insured" and is not listed as an "Additional Insured" on the Additional Insured endorsement. Even assuming that LF Gramercy is an Additional Insured under the Policy, dismissal of LF Gramercy's claim is still warranted, since LF Gramercy never advised APEX, American Indemnity or ASIS of the "occurrence" or the "suit" in contravention of its independent duty as an Additional Insured to provide notice of the "occurrence" and notice of the "suit." LF Gramercy has never notified APEX of the suit, let alone notice of the occurrence, relying instead on the late notice by Ten's Cabaret.

Cross-Motion and Opposition

An insured's failure to give timely notice to insurer may be excused by proof that insured either lacked knowledge of occurrence or had reasonable belief in nonliability, and defendants have not introduced any evidence that Ten's Cabaret had notice of the occurrence and/or claim prior to January 2007. There is no accident report, ambulance and or police report on record to suggest that Ms. Westra's injury occurred at Ten's Cabaret on the date in question. A question of fact remains as to whether an "occurrence," as defined by the Policy, took place, thereby

obligating plaintiffs to notify defendants. Also, Ms. Westra alleges to have had a conversation with someone she "perceived to be a manager" with no indication or proof of this individual's identity. More importantly, Westra admits that, even if this man was an employee of the club (much less a manager), the only thing she told anyone who was possibly employed by Ten's Cabaret was that she was fine, which she said repeatedly. Westra never obtained the name of the waitress (or other witness), nor did she suggest that, even if the copier was supposedly broken, someone could make another handwritten form for her - or make a copy in the fax machine. Westra then testified that she allegedly filled out an accident report but was refused a copy. However, the evidence indicates that Westra never filled out any report. Ten's Cabaret asserts and Westra admits that this was an insignificant event - a patron who was, by her own admission, embarrassed, but not hurt. She never asked for any contact information nor does she have any evidence of any effort to contact Ten's Cabaret until her lawsuit. She never came back to the club during the day in the days following the incident to confirm her purported incident. In fact, Westra cannot even confirm that she was at Ten's Cabaret that night. There is no witness to confirm she was at Ten's Cabaret (as opposed to some other nightclub) that night. She has no receipt that she was there that night. This accident took place before Mr. Reda became the principal owner of Ten's Cabaret and although he was not privy to the policies of Ten's Cabaret, he is certain that the staff would not have had Westra fill out any written report. According to Mr. Reda, once he purchased Ten's Cabaret in 2006 after Westra's alleged accident, he established procedures and written reports which had to be completed in various different situations, and recalls that, in the course of training the managers and staff in these procedures, the concept of filling out any reports was foreign to them and clearly had not been followed when

Westra was supposedly injured. Thus, there was no "notice" of this incident, much less notice of an incident of sufficient gravity so as to mandate reporting it to the insurance company.

Further, Ten's Cabaret never received a copy of the Westra Complaint, as alleged in the affidavit of service or the summons and complaint supposedly served on the Secretary of State. As such, it was not aware of the Westra Action. Ms. Russo was Ten's Cabaret daytime receptionist, who dealt with tradespeople and employees to get the club ready for its nighttime business hours. Ms. Russo's normal working hours were from noon to 6:00 p.m. and she did not work nights. Thus, service of process on her at 1:00 in the morning was impossible. If service had been effectuated properly, or completed at all, Ten's Cabaret would have promptly turned over notice of the claim to its insurance company. It is completely absurd that Ten's Cabaret received a summons in this action and knowingly sat on it until January 2007. Ten's Cabaret's attorneys learned of the Westra Action for the first time and requested that a copy of the Complaint in January 2007 during a conversation with LF Gramercy's insurance carrier regarding the Westra Complaint. Both defendants failed to conclusively prove or disprove whether plaintiffs complied with the Policy regarding notification of a claim and an occurrence.

Even if Ten's Cabaret had constructive notice of an occurrence (which it does not concede to having), Ten's Cabaret had a good faith belief that it would not be liable for an accident or injury, so as to excuse a delay in notifying its insurance carrier of an occurrence or a potential claim, based on Ms. Westra's failure to 1) demand immediate medical attention, 2) demand transportation to the nearest hospital facility, or 3) follow up request for the alleged accident report.

Further, in response to plaintiffs' First Set of Interrogatories,[3] defendants produced the Policy in response to plaintiffs' request that defendants "Identify and produce copies of any and all policies of insurance issued by defendants to plaintiff Ten's Cabaret including, but not limited to assigned policy number 10AP-PK-00043233," but never mentioned that any insurance policy they were producing was actually issued by a different company. Thus, contrary to defendants' current position, defendants admitted that they issued the Policy, as alleged in the Complaint. And, ASIS, as the program manager for American Indemnity, was under a duty to close the details regarding this matter to their principal. Defendants have never disclosed the existence of American Indemnity let alone contended that it was a necessary party to the litigation. As such, defendants' contradictory position should not be countenanced in light of their bad faith in disclosing this information during the discovery phase of the instant action. However, in case the Court gives any weight to defendants' new allegation that it never issued the Policy, Ten's Cabaret seeks leave to amend the Complaint to mitigate the prejudice it suffered through defendants' perjurious disclosure. Defendants did not suffer any prejudice in receiving notice of the occurrence and lawsuit in January 2007. Specifically, upon learning of the lawsuit Ten's Cabaret requested an extension of time to interpose a responsive pleading. Ten's Cabaret was not in default; in fact, it was it no better or worse position than when the Complaint was allegedly served. Ten's Cabaret could have made a motion to dismiss the Complaint on the grounds that service was improper, it chose not to do so and expend funds needlessly in view of the fact that Westra would simply re-serve; further, since there was no threat of the statute of limitations expiring in this action, it was simply impractical to seek that relief. Otherwise, Ten's Cabaret will have to commence a separate plenary proceeding for such

[3] Upon request by the Court for a copy of such Interrogatories and Responses thereto, the parties advised the Court that a First Notice of Discovery and Inspection and not Interrogatories were served by Ten's Cabaret, and that defendants served a Response to Plaintiffs' First Notice for Discovery and Inspection.

relief and, because it is based on a common set of facts, move to consolidate that new action with this action. Such a course of action would be an absurd waste of the courts and clients' resources. Here, defendants knew that American Indemnity issued the Policy. Ten's Cabaret has not added any new facts in the Amended Complaint of which defendants are unaware, and certainly no facts which were in existence on the date that the Complaint was served. Ten's Cabaret has tailored the causes of action to include American Indemnity based on what was alleged in defendants moving papers. As such, defendants have not prejudiced as a result.

Defendants' Reply

Defendants point out that the courts in the New York cases cited by plaintiffs ultimately held that notice was not given within a reasonable time. According to the Purchase and Sale Agreement, Paul Coppa sold one-hundred percent (100%) of the ownership interest of Ten's Cabaret to Mr. Reda in April 2006, five months prior to service of the Summons and Complaint. Therefore, Mr. Reda was in charge and running the operations of Ten's Cabaret when the Summons and Complaint were served. Plaintiffs fail to mention that when Mr. Reda purchased the business the employees of the club were terminated. Thus, the new employees had to be trained in the new procedures regarding documenting incidents at the club.

Even assuming that personal service was ineffective, Ten's Cabaret offers nothing more than a meek protest that it did not receive the Summons and Complaint from the Secretary of State. The address for Ten's Cabaret was and remains 35 East 21st Street, New York, New York. The suggestion that the Secretary of State was derelict in its duty to forward the Summons and Complaint to Ten's Cabaret is implausible. The four month delay in notifying APEX, American Indemnity and ASIS of the suit was unreasonable as a matter of law.

Ten's Cabaret fails to offer any excuse as to why APEX, American Indemnity or ASIS were never notified of the change in ownership of Ten's Cabaret, which was included in the Policy to avoid the situation presented here.

Regardless of whether plaintiffs cross-motion to amend is granted, APEX and ASIS are entitled to summary judgment dismissing the Complaint as neither issued Policy 10AP-PK-00043233. The denial of coverage was issued on behalf of American Indemnity and a copy of the Policy, which clearly indicates that the Policy was issued by American Indemnity, was provided to plaintiffs in May 2008. Thus, neither ASIS nor APEX has a duty to defend or indemnify the plaintiffs.

Plaintiffs' Reply

Plaintiff argues that Illinois law does not apply to resolve the parties' dispute. New York's public policy is designed to protect our domiciliaries from the inequities of foreign laws that might advantage the domiciliaries of those foreign states vis-a-vis New York. Moreover, under particular circumstances, a choice-of-law provision contained in a group insurance policy will not be the determining factor in concluding whether to enforce a choice of law provision; specifically, if the precise issue in no way involved the operation of the insurance contract terms courts may give no effect to a choice of law provision. The terms of the insurance contract should be construed in accordance with the laws of the State of New York because all of the plaintiffs are present in New York, conduct business in New York, the incident which is the subject of the underlying action occurred in New York and the underlying action for which they presently seek coverage is in New York County, Supreme Court. Further, the mere fact that APEX is based out of Illinois is not a valid reason to enforce the onerous choice of law provision against the plaintiffs. Presumably, defendants' decision to engage in the interstate sale of insurance policies implies that the terms of insurance policies will be in accordance

with the prevailing insurance law of each state to ensure that the citizens of each particular state are properly safeguarded. Defendants have not cited a single compelling reason to apply Illinois law. There is no prejudice to defendants who have retained New York attorneys who are clearly well versed in New York law. As such, New York has the greatest interest in adjudicating this litigation.

Further, defendants' conclusions that it has been prejudiced lack merit. And, the evidence forwarded by defendants in favor of the theory that Ten's Cabaret had notice of the action by introducing portions of Ms. Westra's deposition, lack merit. Ms. Westra's deposition does not prove or conclude that Ten's Cabaret had notice of her alleged accident. In fact the testimony cited above fails to pass even the simplest test of reliability. For example, Ms. Westra was unable to provide the name(s) or description(s) of the individuals above. Ms. Westra testimony fails to prove that the individuals alleged to have assisted were (a) employees of Ten's Cabaret or (b) ever really assisted her as she describes. More importantly, Ms. Westra's assertion that there was an accident report is belied by the fact that she never returned to Ten's Cabaret to reclaim the alleged accident report she claims was filled out that evening.

Further, the failure to properly assign does not warrant summary judgment. The particular provision is devoid of any mention, express or implied, of what triggers a termination of policy rights based on insured's failure to comply with the subject paragraph. There is no mention that a default would be cause for automatic termination without notice.

Analysis

Choice of Law

At the outset, the Court finds that the Policy unequivocally provides that the laws of Illinois shall govern. Where parties have agreed on the law that will govern their contract, it is the policy of the courts

of this [New York] State to enforce that choice of law, provided that (a) the law of the State selected has a "reasonable relation[ship]" to the agreement and (b) the law chosen does not violate a fundamental public policy of New York (*Finucane v Interior Const. Corp.*, 264 AD2d 618, 695 NYS2d 322 [1st Dept 1999] [internal citations omitted]).

The Policy provides that:

> "[t]his policy, and all disputes relating to the parties' obligations under this policy shall be interpreted, construed, governed by and enforced in accordance with the laws of the State of Illinois."
> (Section IV - Conditions, Paragraph 16).

APEX, the administrator for the Policy, has its principal place of business in Chicago, Illinois and there is a need for APEX to have consistency in the law being applied to issues that arise concerning the Policy. Therefore, the law of Illinois bears a "reasonable relationship" to the Policy.

Further, the law of Illinois as to an insured's duty to provide timely notice of an occurrence or claim pursuant to the provisions of an insurance policy does not violate a fundamental public policy of New York. Pursuant to the Policy, Ten's Cabaret was obligated to notify APEX "in writing immediately" of the occurrence. It is undisputed that under Illinois law, "immediately" has been interpreted to require notice "within a reasonable time" (*IMC Global v Continental Ins. Co.*, 378 Ill App3d 797 [1st Dist 2007] ["If claim is made or suit is brought against the insured, the insured shall immediately forward to the company every demand, notice, summons or other process received by him or his representative"]; *Zurich Insurance Co. v Walsh Construction Co. of Illinois*, 352 Ill App3d 504, 512 [1st Dist. 2004] [With respect to the notice of the four lawsuits, "Immediate" in this context "has been uniformly interpreted to mean within a reasonable time, taking into consideration all the facts and circumstances.]; *United States Fidelity & Guaranty Co. v Maren Engineering Corp.*, 82 Ill App3d 894,

898 [1st Dist 1980] ["the time within which notice is required is determined by a standard of reasonableness, based upon the facts and circumstances of a particular case"]). Illinois law in this regard does not conflict with or violate the standards under New York law concerning the timeliness of notice provided by insureds *(see e.g., Sorbara Const. Corp. v AIU Ins. Co.*, 41 AD3d 245, 838 NYS2d 531 [1st Dept 2007] ["Where a liability insurance policy requires notice of an occurrence to the carrier as soon as practicable, such notice must be given within a reasonable period of time, and the insured's noncompliance in this respect constitutes failure of a condition precedent]). Therefore, the choice of Illinois law in the Policy is enforceable, and applies to the issues at hand (*see also Reliance Nat. Ins. Co. (UK) Ltd. v Sapiens Intern. Corp., N.V.*, 243 AD2d 406, 665 NYS2d 253 [1st Dept 1997] ["The law of the Netherlands Antilles, applicable by reason of a choice-of-law provision, does not differ from the law of this forum"]).

Notice of Occurrence, Claim, or Suit

Turning to the merits, under Illinois law, a "motion for summary judgment will be granted if the pleadings, depositions, admissions and affidavits on file reveal that there is no genuine issue as to any material fact and that the movant is entitled to a judgment or decree as a matter of law (*Farmers Auto. Ins. Ass'n v Hamilton*, 64 Ill2d 138 [1976] *citing* Ill. Rev. Stat.1975, ch. 110, par. 57(3); *Carruthers v. B. C. Christopher & Co.*, 57 Ill2d 376).

Pursuant to Section IV of the Policy, in the event of "occurrence", "offense", "claim" or "suit," the insured must follow the following provisions:

> a. You must see to it that we are notified in writing, immediately, of an "occurrence", "offense" or any other circumstances which may result in a "claim". To the extent possible, notice should include:
> (1) How, when, and where the "occurrence", "offense" or other circumstances took place;
> * * *

(4) The nature and location of any injury or damage arising out of the "occurrence", "offense" or other circumstances.

The Policy defines "occurrence" as "an accident including the continuous or repeated exposure to substantially the same general harmful conditions." (Section V, Definitions, 27).

Under IV (b) of the Policy, "If a 'claim' is made or 'suit' is brought against any insured, you must: (2) Notify us immediately. . . . You must see to it that we receive written notice of the "claim" or "suit" immediately."

It is uncontested that defendants did not receive notice of Ms. Westra's April 12, 2005 accident until 14 months thereafter on or about January 25, 2007.

However, under Illinois law, "the time within which notice is required is determined by a standard of reasonableness, based upon the facts and circumstances of a particular case" (*United States Fidelity & Guaranty Co. v Maren Engineering Corp.*, 82 Ill App3d 894, *supra* ["the issue in a case involving late notice is not whether the insurer has been prejudiced, but rather, whether reasonable notice has been given"]). Under Illinois law, "a provision calling for an insured to provide notice "immediately" requires notification within a reasonable time" (*Zurich Ins. Co. v Walsh Constr. Co. of Illinois*, 352 Ill App3d 504, 512 [1st Dist 2004]). Illinois courts apply four factors to determine the reasonableness of notice when determining whether an insured complied with a policy condition that the insured give "immediate notice" of the occurrence or suit: "(1) the language of the policy itself; (2) whether the insured can be considered sophisticated in the instant area of commerce and insurance; (3) *when the insured became aware of the occurrence*; and (4) the diligence of the insured in determining the availability of coverage after it learns of the occurrence" *(Board of Educ. of Tp. High School Dist. No. 211, Cook County v TIG Ins. Co.,* 378 Ill App3d 191 [1st Dist 2007] *citing Ankus v Government*

Employees Ins. Co., 285 Ill App3d 819, 825 [1996] [emphasis added]). "Two other factors commonly cited are whether the insurer was prejudiced by the delayed notice and when the insurer had actual notice of the occurrence" although neither of these factors is dispositive.[4] Further, the lack of prejudice to the insurer will not excuse a lack of timely notice (*Country Mutual Ins. Co. v Livorsi Marine, Inc.*, 222 Ill2d 303, 317 [2006]). The insurer's actual notice does not excuse the insured from its responsibility to give reasonable notice to the insurer; thus, the actual notice received by the insurer must have been communicated within a reasonable time (*Board of Educ. of Tp. High School Dist. No. 211, Cook County v TIG Ins. Co. citing Illinois Valley Minerals Corp. v Royal-Globe Insurance Co.*, 70 Ill App3d 296, 301 [1979]).

Yet, "notice is not required until such facts have developed as would suggest to a person of ordinary and reasonable prudence that liability might arise" *(Star Transfer Co. v Underwriters at Lloyds of London*, 323 Ill App 90, 93 [1st Dist 1944]). A lengthy passage of time is not an absolute bar to coverage provided the insured has a justifiable excuse for the delay *(American Country Insurance Co. v. Efficient Construction Corp.*, 225 Ill App3d 177 [1st Dist 1992]).

Based on the record before the Court, an issue of fact exists as to whether Ten's Cabaret breached its obligations under the Policy to provide notice "in writing immediately," of the "occurrence" involving Ms. Westra. When describing the alleged accident, Ms. Westra testified at her deposition as follows:

Q: You also mentioned that a man who you perceived to be a manager picked you up. How soon after you fell did this person come and pick you up?
A: He was there immediately.
Q: Did he introduce himself to you?

---

[4] The recent change in Insurance Law §3420 requiring an insurer to show prejudice as a result of late notice of a claim is irrelevant, as the amendment is applicable only to policies of insurance issued after January 17, 2009.

A: *No.* He said, " . . . Are you okay? I . . . kind of was like, "Oh yeah. Yeah, I'm fine." He helped me stand up. And I also think at that point a bouncer had come down. From where I was, the bouncer was at the top of those stairs, in that lounge area.

* * * * *

Q. How do you know he was a bouncer?
A. He was a very large man with a black shirt, which, oh, kind of told me that he was a bouncer and that he definitely worked there as well.
Q. After the individual whom *you perceived to be the manager*[5] came, did you stand up?
A. He helped me stand up. "Are you okay? Are you okay? Can we get you anything? What do you need?" I said, "I think I'm okay. I think I can just walk it off." And he was like, "Do you guys want any drinks? We'll take care of you." I said, "No. No. No. We're fine."

Ms. Vestra proceeded to the bar, and returned to the VIP lounge where her friends were sitting. When she observed that her foot was swollen, she discussed with her friend the need to go to the emergency room and tell the manager:

Q: Did you tell the manager?
A: He knew that I had fallen because he helped me up. We filled out an accident report.
Q: When you say, "we filled out an accident report," were you given a piece of paper to write a report on?
A: I was given a form, an accident report form that I filled out the information while the bouncer sat with me.
Q: Did you keep a copy of that accident report?
A: I was not allowed. I was not given one. They wouldn't give it to me.
Q. At any time during this point when you were filling out your accident report, did you get the name of the manager or the person you perceived to be the manager?
A. No. I did get the name of the bouncer, but I do not remember it.
(Pp. 38-39).

Ms. Westra then explained why she did not have a copy of the accident report:

Q: After you filled out the accident report, what did you do with it?
A: They took it from me and asked me for a fax number and told me that they would fax it to me, that their copier system and things weren't up because it was opening night. But I never received a fax and I did try calling and following up and, you know, no one would get back to me.
(P. 40).

---

[5] Ms. Westra later testified that the "man who helped her originally, who I perceived to be the manager when I fell, was trying to clear out the area for VIPs to come in and sit there." (P. 36).

The record fails to establish, as a matter of law that Ten's Cabaret had knowledge of the occurrence on the date of Ms. Westra's accident. The person who assisted plaintiff at the time of her accident was someone plaintiff "perceived" to be a manager at the nightclub, and when asked if this individual identified himself, plaintiff responded, "No." It also cannot be said that the person at the top of the stairs was the "bouncer;" plaintiff could not recall his name and her basis for determining that he was a bouncer rested on the fact that he was "large" man with a mere "black shirt." Nor is there any incident report, emergency room report, or other documentation concerning this accident. Therefore, it cannot be said that Ten's Cabaret had knowledge of plaintiff's accident on April 12, 2005, as a matter of law, and defendants' motion for summary dismissal of the Complaint on the ground that Ten's Cabaret breached its duty to provide notice of the occurrence pursuant to the Policy is denied (*see National Bank of Bloomington v Winstead Excavating of Bloomington*, 94 Ill App3d 839 [4th Dist 1981] ["the trial court could have properly concluded that insured was under no duty to notify the insurer based on the information indicating that plaintiff's vehicle made no contact with the insured's vehicle, that no traffic citation was issued to insured's driver; thus, insured was not required to have foreseen the likelihood that suit would be brought on a claim that insured's driver had pulled onto the highway too abruptly in front of the plaintiff's vehicle]; *Kenworthy v Bituminous Cas. Corp.*, 28 Ill App3d 546 [4th Dist 1975] [duty to inform did not arise until fourteen months after the accident. No vehicle of the insured was damaged and there is no evidence the insured even knew about the accident, much less that the railroad might consider him liable, before April 10, 1968. Under these circumstances, there could be no duty to notify the insurer before that date]).

Further, an issue of fact exists as to whether Ten's Cabaret breached its duty to notify defendants "immediately" of the claim or suit. It is uncontested that Ten's Cabaret did not notify APEX, American

Safety Indemnity Company, or ASIS of the Westra Action until four months after a copy of the Summons and Complaint was filed and the Westra Action commenced. An insured who knows a suit against it exists but allows a considerable length of time to pass before notifying the insurer does not automatically lose coverage under the insurance policy, even one which includes the "as soon as practicable" provision (*Northern Ins. Co. of New York v City of Chicago,* 325 Ill App3d 1086 [1st Dist 2001] *citing Northbrook Property*, 313 Ill App3d at 466). This is true, however, only if the insured's delay in notifying the insurer is justifiable (*Northern Ins. Co. of New York v City of Chicago*, *citing Northbrook Property*, 313 Ill App3d at 465 [absent valid excuse, "the insured's failure to satisfy the notice requirement will generally absolve the insurer of its duties under the policy"]). To determine this, Illinois courts "evaluate several factors, including the language of the notice provision, the insured's sophistication in commerce and insurance matters, *its awareness that a suit was pending and once aware*, its diligence in ascertaining whether policy coverage is available" (*Northern Ins. Co. of New York v City of Chicago, citing Northbrook Property*, 313 Ill App3d at 466 [emphasis added]).

Although the affidavit of service indicates that Ten's Cabaret was served with the Complaint in or about September 2006, Ten's Cabaret asserts that it never received a copy of the Westra Complaint and did not learn of the Complaint until January 2007.

Mr. Reda attests that Ten's Cabaret never received a copy of the pleadings from the Secretary of State. Although, as plaintiffs point out, the First Department has recognized that "the receipt of service of the summons and complaint by the Secretary of State, as plaintiffs designated agent, constituted receipt by a representative within the meaning of the policy" provision requiring that immediately forward lawsuit papers to the insurer *(26 Warren Corp. v Aetna Cas. and Sur. Co.*, 676 NYS2d 173, 174 [lst Dept 1998]), the terms of the contract in *26 Warren Corp.* "expressly stated that 'the insured shall

immediately forward to the [insurer] every demand, notice, summons or other process received by him or his representative,' and the secretary of state was found to be 'a representative within the meaning of the policy'" (*105 Street Assocs., LLC v Greenwich Ins. Co.*, 507 F Supp 2d 377 [SDNY 2007] [distinguishing 26 Warren, on the ground that the language of the agreement was "far less explicit" in that it did not expressly describe specific circumstances that trigger the insured's duty to notify the insurer, and instead merely required that notice be provided 'as soon as practicable.'"]). Here, the Policy contains no such requirement, but simply states that "If a 'claim' is made or 'suit' is brought against any insured, "you" must: "(2) Notify us immediately . . .You must see to it that we receive written notice of the 'claim' or 'suit' immediately." Unlike *26 Warren Corp.*, on which defendants rely, notification of the claim or suit is conditioned upon the receipt of notice of such claim or suit by the insured or the insured's representative. Additionally, contrary to the affidavit of service, Mr. Reda attests that Ms. Russo was not at work at the time service was allegedly made upon her at 12:56 a.m. Thus, issues of fact exist as to when Ten's Cabaret received notice of the claim or suit.

Mr. Reda further attests that once Ten's Cabaret became aware of the Westra Action, it filed a claim for coverage with APEX. While it has been held that a six month delay in providing notice of a suit was unreasonable, such period was deemed unreasonable where the only reason offered for such delay was that the insured's representative inadvertently sent notification to the wrong insurer, because "an insured's own negligence will not excuse a lengthy delay in providing notice" (*see IMC Global v. Continental Ins. Co.*, 378 Ill App3d 797 [1st Dist 2007]). Here, the record fails to contain any indication that Ten's Cabaret's notice to APEX of Westra's Complaint and Action were the result of its own negligence.

Even assuming the delay in notice of the claim and suit resulted in any prejudice, such prejudice

is a factor and not dispositive under the circumstances. Therefore, dismissal of the Complaint on the grounds that Ten's Cabaret failed to provide notice of the occurrence and suit as required under the Policy, is denied.

LF Gramercy

However, LF Gramercy is not a named insured in the Policy. When construing the language of an insurance policy, Illinois courts give effect to "the intention of the parties as expressed by the words of the policy" (*IMC Global v Continental Ins. Co.*, 378 Ill App3d 797 [1st Dist 2007] *citing Central Illinois Light Co. v Home Ins. Co.*, 213 Ill.2d 141, 153 [2004]). An insurance policy is construed as a whole, giving effect to every provision (*Id.*). Where the language of the policy is clear and unambiguous, it must be given its plain, ordinary, and popular meaning (*Id.*). Whenever possible, the main body of the policy must be construed in conjunction with the endorsements in order to determine the meaning and effect of the insurance contract (*IMC Global v Continental Ins. Co.*, 378 Ill App3d at 807, *citing Protective Ins. Co. v Coleman*, 144 Ill App3d 682, 695 [1986]).

Section II - entitled "Who Is an Insured," provides in pertinent part:

1. If you are designated in the Declaration as:
   a. An individual, you and your spouse are insured, but only with respect to the conduct of a business of which you are the sole owner.
   b. A partnership or joint venture, you are an insured. Your members, your partners and their spouses are also insureds, but only with respect to the conduct of your business.
   c. An organization other than a partnership or joint venture, you are an insured. Your "executive officers" and directors are insureds, but only with respect to their duties as your officers or directors. Yours stockholders are also insureds, but only with respect to their liability as stockholders.

The Additional Insured Endorsement Managers or Lessors of Premises modified the Commercial General Liability Coverage Part, Section II - Who Is An Insured so as to include as an insured:

> "... the person or organization shown in the Schedule below as an Additional Insured, but only with respect to liability arising out of, resulting from or in any way connected with, in whole or in part, either directly or indirectly, the ownership, maintenance or use of mat part of the premises leased by you, when required in a written contract between you and the Additional Insured shown below.

The Schedule lists the Additional Insured as:

"Henry Hay Centaur Properties, LLC
551 Madison Avenue, 8th Floor
New York, New York 10022"
and the designated insured premises as:
"35 E. 21st Street, New York, New York 10010".

By endorsement effective June 15, 2004, the named insured was identified as Ten's Cabaret, Inc.' DBA Ten's Cabaret with a mailing address at 4990 SW 52nd Street, Suite 204, Davie, Florida 33314. By a second endorsement effective June 15,2004, "Section II - Who Is An Insured" was amended to include as an insured the person or entity shown in the schedule as an Additional Insured. Such entity was identified as "Henry Hay, Centaur Properties, LLC, 551 Madison Avenue, 8th Floor, New York, New York 10022" for the premises located at "35 East 21st Street, New York, New York 10010."

Under the plain and unambiguous terms of the Policy, LF Gramercy clearly does not fall within the definition of Insured or Additional Insured under the Policy. Therefore, branch of defendants' motion to dismiss the claim by LF Gramercy is granted, and the action as asserted by LF Gramercy is severed and dismissed, in its entirety.

In any event, LF Gramercy never advised either APEX, American Indemnity, or ASIS of the "occurrence" or the "suit." Instead LF Gramercy notified *Ten's Cabaret*; there is no indication in the record that LF Gramercy notified defendants or American Indemnity. Notice by an additional insured to the named insured does not constitute notice to the insurer, as the named insured is not an agent of the insurer (*State Auto. Mut. Ins. Co. v Kingsport Dev., LLC*, 364 Ill App3d 946 [1st Dist 2006]). Thus, LF

Gramercy is not entitled to a defense or indemnity under the Policy. Therefore, LF Gramercy is not entitled to the declaration it seeks in this action.

More importantly, neither ASIS nor APEX has a duty to defend or indemnify the plaintiffs as neither defendant is the insurer of the Policy for purposes of the coverage sought herein. Since the language of the Policy is clear and unambiguous, it must be given its plain, ordinary, and popular meaning (*see IMC Global v Continental Ins. Co.*, *supra*). The Policy clearly indicates that it was "issued by" American Indemnity. Notably, the denial of coverage issued by ASIS expressly stated that

> ASIS is the *program manager* for American Safety Indemnity Company ("ASIC"). Please accept this letter as the response *of ASIC* to the tender of the defense and indemnity of Ten's Cabaret, Inc. ("Ten's") in the action commenced by Ten's patron Nicole Westra ("Westra") against Ten's and LF Gramercy Property Co., LLC ("Gramercy"). . . ." (Emphasis added).

The denial of coverage later indicates that the Policy was "issued by ASIC [American Indemnity]."

Further, plaintiffs' reliance on defendants' statement in their Response to Plaintiffs' First Notice for Discovery and Inspection is misplaced. Although defendants produced the Policy in response to plaintiffs' request for policies issued by defendants, such production was made "Without waiving the general objections set forth above," which included, *inter alia*, that such document was not relevant to the issues of law and fact; defendants also reserved their right to challenge the relevancy and materiality of such document.

The record fails to establish, as a matter of law, that defendants are the issuers of the Policy for purposes of providing coverage thereunder. Therefore, plaintiffs' application for an order resolving in plaintiffs' favor the factual allegation made by plaintiffs in paragraph 7 of the Complaint that defendants are the issuers of the Policy as asserted and admitted under oath in defendants' response to plaintiffs'

Interrogatory No. 10, is unwarranted.

As there is no indication that either of the defendants is the insurer of the Policy at issue, neither defendant owes a duty to defend or indemnify plaintiffs, and dismissal of the Complaint as asserted against such defendants is granted.[6]

Cross-Motion

Based on the foregoing, the branch of plaintiffs' cross- motion to deem defendants' response to plaintiff's Interrogatory No. 10 an admission that defendants ASIS and APEX issued the Policy in question, is denied.

Further, defendants offer no meaningful objection to permitting plaintiffs to amend the Complaint to add American Indemnity as a defendant, except to argue that regardless of whether plaintiffs' cross-motion to amend the Complaint to name American Indemnity as a defendant is granted, APEX and ASIS are entitled to summary judgment dismissing the Complaint as neither issued the Policy. Since it cannot be said that Ten's Cabaret failed to provide proper notice of the occurrence and suit pursuant to the Policy, the application to amend the Complaint to add American Indemnity as a party defendant is granted. Further, the application to amend the caption to reflect such amendment is granted. Defendant has twenty (20) days to answer or otherwise respond to Second Amended Complaint, as requested by Ten's Cabaret.

Conclusion

Based on the foregoing, it is hereby

---

[6] The Court notes that defendants simply assert that Ten's Cabaret never advised defendants or American Indemnity of the change in ownership in accordance with Section IV of the Policy. Although it is uncontested that no such notice was given, defendants fail set forth any caselaw to support the contention that coverage under the Policy is vitiated by failure to comply with this section of the Policy. Thus, to the extent defendants seek dismissal of the Complaint on this ground, dismissal is denied.

ORDERED that the motion by defendants, American Safety Insurance Services Inc. ("ASIS") and Apex Insurance Managers, Inc., ("APEX") (collectively "defendants") for summary judgment dismissing the complaint of plaintiffs Ten's Cabaret, Inc. ("Ten's Cabaret") and L.F. Gramercy Property Co., LLC ("LF Gramercy") is granted, and the action as asserted against ASIS and APEX is severed and dismissed, and the Clerk of the Court is directed to enter judgment accordingly; and it is further

ORDERED that the branches of plaintiffs' cross-motion for an order (a) granting plaintiffs, pursuant to CPLR 3025(b), leave to amend their complaint to add American Safety Indemnity Company as a party defendant and assert claims against it; (b) granting defendant twenty (20) days to answer or otherwise respond to Second Amended Complaint; and (c) amending the caption to reflect the additional defendant, is granted, and the Clerk of this Court shall amend the caption as follows:

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

----------X

TEN'S CABARET, INC.,

Index No. 113167/07

Plaintiff,

-against-

AMERICAN SAFETY INDEMNITY COMPANY,

Defendants.

----------X

And it is further

ORDERED that the branch of plaintiffs' cross-motion for an order resolving in plaintiff's favor the factual allegation made by plaintiffs in paragraph 7 of the Complaint that defendants are the issuers of the policy as asserted and admitted under oath in defendants' response to plaintiffs' Interrogatory No. 10, is denied; and it is further

ORDERED that Ten's Cabaret 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: August 27, 2009

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

HON. CAROL EDMEAD