

**Neighborhood Partnership Hous. Dev. Fund Co., Inc.  
v Certain Underwriters & Underwriting Syndicates  
at Lloyds of London Subscribing to Policy No.  
CL180160- 06**

2009 NY Slip Op 32604(U)

November 3, 2009

Supreme Court, New York County

Docket Number: 100165/08

Judge: Emily Jane Goodman

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

PRESENT: **EMILY JANE GOODMAN**

PART 17

Index Number : 100165/2008

**NEIGHBORHOOD PARTNERSHIP HOUSING**

VS.

**CERTAIN UNDERWRITERS**

SEQUENCE NUMBER : # 001

SUMMARY JUDGMENT

*Justice*

INDEX NO. 100165-08

MOTION DATE

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 per*

*attached*

**FILED**

NOV 09 2009

NEW YORK  
COUNTY CLERK'S OFFICE

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

Dated: 11/3/09

*[Signature]*  
**EMILY JANE GOODMAN** 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: IAS PART 17

-----X

NEIGHBORHOOD PARTNERSHIP HOUSING  
DEVELOPMENT FUND COMPANY, INC., DELIGHT  
CONSTRUCTION CORP. and MT. HAWLEY  
INSURANCE CO.,

Plaintiffs,

Index No. 100165/08

-against-

CERTAIN UNDERWRITERS AND UNDERWRITING  
SYNDICATES AT LLOYDS OF LONDON  
SUBSCRIBING TO POLICY NO. CL180160-06 and  
DELIGHT CONTRACTING CORP. and MOHAMMED  
ASLAM,

Defendants.

-----X

EMILY JANE GOODMAN, J.:

In this action seeking a declaratory judgment, defendant Certain Underwriters and Underwriting Syndicates at Lloyds of London Subscribing to Policy No. CL180160-06 (Underwriters) moves, pursuant to CPLR 3212, for summary judgment declaring that Underwriters has no obligation to defend or indemnify plaintiffs Neighborhood Partnership Housing Development Fund Company, Inc. (Neighborhood) and Delight Construction Corp. (Delight Construction) in the underlying personal injury action, entitled *Aslam, Mohammed v Neighborhood Partnership Housing Development Fund Company, Inc. and Delight Construction Corp.* (Sup Ct, Kings County, index No. 039880/07) (the *Aslam* action).

FACTS

**FILED**  
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NEW YORK  
COUNTY CLERK'S OFFICE

The accident giving rise to the underlying action occurred on September 12, 2006. Mohammad Aslam (Aslam) allegedly sustained injuries when he fell from scaffolding while working at a construction site located at 267 West 144<sup>th</sup> Street, New York, New York. Aslam was an employee of defendant Delight Contracting Corp. (DCC) (a different company from Delight Construction). Delight Construction notified its insurer, plaintiff Mt. Hawley Insurance Co. (Mt. Hawley) of the Aslam loss on October 30, 2006. Mt. Hawley tendered the claim to DCC's broker, Bay Park Brokerage, Inc. (Bay Park), on November 6, 2006, via facsimile, for defense and indemnification of Delight Construction by Underwriters. By letter dated May 11, 2007, Underwriters avers that it disclaimed coverage for the Aslam claim to its insured, DCC. DCC did not respond to Underwriters' May 2007 disclaimer.

Aslam commenced the underlying action against Delight Construction and Neighborhood on October 26, 2007. Mt. Hawley forwarded the litigation papers to Bay Park, DCC's broker, on November 6, 2007, requesting defense and indemnification on behalf of its insured, Delight Construction, and, for the first time, on behalf of Neighborhood. Mt. Hawley described Neighborhood as the owner of the construction site. The contract for the project, however, designated West 146<sup>th</sup> Street Cluster, LLC as the owner. Neighborhood was not designated as the owner, nor was it a party to the construction contract. Underwriters

disclaimed coverage under its policy to Delight Construction by letter dated November 15, 2007, based on the Exclusion of Injury to Employees Endorsement.

On January 28, 2008, Neighborhood, Delight Construction and Mt. Hawley commenced this declaratory judgment action, alleging that DCC procured liability insurance with Underwriters which lists Delight Construction and Neighborhood as additional insureds. Underwriters answered the complaint, in which it asserts that plaintiffs were not additional insureds on the date of the loss, the policy excludes injury to employees of DCC, plaintiffs breached the notice provisions of the policy, as well as defenses based on the policy's contractual liability exclusion and contractual liability limitation.

#### DISCUSSION

Defendants contend that the policy at issue<sup>1</sup> does not provide coverage to Neighborhood at all, and that coverage was extended to Delight Construction effective September 15, 2006, three days after the underlying injury occurred. Therefore, Underwriters is not responsible for any defense or indemnity with respect to the *Aslam* action.

Plaintiffs, who submit only an attorney's affirmation and memorandum of law, but no affidavits, assert that this motion for

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<sup>1</sup> Defendants assert, without contradiction, that the policy issued by Underwriters is Policy No. ML010235, not CL180160-06, as stated in the caption of this action.

summary judgment is premature because defendants did not answer plaintiffs' prior counsel's discovery requests, dated April 8, 2008. Plaintiffs contend that, without a certified copy of the insurance policy, and the underwriting file, they cannot ascertain whether additional endorsements may have been added to the policy, which could provide coverage to plaintiffs.

Plaintiffs further assert that there is ambiguity as to whether the additional insured status of plaintiffs was intended to be effective on the date that the certificate of insurance was issued or throughout the entire policy, which was in effect from February 2, 2006 to February 2, 2007. Plaintiffs maintain that Underwriters never responded to the initial tender of November 6, 2006 until after the second letter approximately a year later. Plaintiffs argue that the letter disclaiming coverage was untimely, and, therefore, Underwriters waived any right to raise any exclusionary language in their policy to deny coverage.

In their reply papers, defendants initially object to plaintiffs' late submission of its opposition papers. They then assert that they did respond to plaintiffs' discovery demands, and include another copy of the claim file and underwriting file, as well as a certified copy of the policy.

Defendants have submitted evidence that on September 15, 2006, three days after Aslam's accident, Bay Park faxed an application to Underwriters' agent, requesting an Additional

Insured Endorsement to the policy for Delight Construction, and that such additional insured coverage was effective September 15, 2006. The Certificate of Insurance reflects the same addition to the coverage, effective September 15, 2006. The file does not refer to Neighborhood at all. Thus, defendants have made a prima facie showing that plaintiffs were not insured by Underwriters at the time of the loss.

Plaintiffs' argument, that the policy is ambiguous as to whether plaintiffs are named as additional insureds, is not compelling. There is nothing ambiguous in the policy or the endorsement. The insurance certificate and the policy endorsement both state that coverage, with respect to Delight Construction, is effective September 15, 2006. The application for that coverage was transmitted by facsimile on September 15, 2006. Thus, all the evidence submitted indicates that the coverage was not in effect on September 12, 2006, when the accident occurred. *Travelers Insurance Company v Utica Mutual Insurance Company* (27 AD3d 456 [2d Dept 2006]), on which plaintiffs rely, is not to the contrary. In that case, there was an ambiguity because the insurance certificate was dated two days after the accident, whereas the effective date of the policy was before the accident. Here, there is no such discrepancy. While the policy was dated prior to the accident, Delight Construction's coverage is stated clearly as being effective

September 15, 2006. Similarly, the other cases relied on by plaintiffs contained genuine ambiguities, unlike this situation. See *City of New York v General Star Indem. Co.*, 45 AD3d 430 (1<sup>st</sup> Dept 2007); *Natural Stone Indus., Inc. v Utica Natl. Assur. Co.*, 29 AD3d 758 (2d Dept 2006).

Consequently, plaintiffs have failed to raise a genuine ambiguity, or factual issue, to counter defendants' showing that plaintiffs were not covered by the policy at the time of Aslam's injury. They have presented nothing to indicate that Neighborhood was ever covered, and the evidence demonstrates that Delight Construction was not covered until after the time of the accident.

Plaintiffs argue that defendants must, nonetheless, cover the claim because the disclaimer was untimely.

It is well settled that an insurer must disclaim coverage in a timely manner. Insurance Law § 3420 (d). However, the failure to disclaim does not result in a plaintiff obtaining coverage where the claim falls outside the scope of the policy's coverage and there was no insurance in effect. *Matter of Worcester Ins. Co. v Bettenhauser*, 95 NY2d 185, 188 (2000); *Zappone v Home Ins. Co.*, 55 NY2d 131, 137-138 (1982). Here, the policy never provided coverage for the claim. Therefore, defendants' failure to disclaim in a timely manner does not create coverage where none existed, and plaintiffs' argument is rejected.

In view of this conclusion, it is unnecessary for the court to address defendants' other bases for declining coverage.

CONCLUSION

Accordingly, it is hereby

ORDERED that defendants' motion for summary judgment is granted; and it is further

ORDERED that defendants submit a proposed Judgment on notice.

This constitutes the Decision and Order of the Court.

Dated: November 3, 2009

ENTER:



J.S.C.

**EMILY JANE GOODMAN**

**FILED**  
NOV 09 2009  
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