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

PRESENT: DEBRA A. JAMES *Justice* **PART 59**

CIAMPA ESTATES, LLC, CIAMPA MANAGEMENT, CORP., and EVEREST NATIONAL INSURANCE COMPANY,

Plaintiffs,

- v -

TOWER INSURANCE COMPANY OF NEW YORK, BELLAROSE CONSTRUCTION CORP., and SANITA CONSTRUCTION CORP.,

Defendants.

Index No.: 116424/07

Motion Date: 10/20/09

Motion Seq. No.: 03

Motion Cal. No.: 25

The following papers, numbered 1 to 3 were read on this motion for summary judgment.

	PAPERS NUMBERED
Notice of Motion/Order to Show Cause -Affidavits -Exhibits	1
Notice of Cross Motion/Answering Affidavits - Exhibits	2
Replying Affidavits - Exhibits	3

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers,

In this declaratory judgment action arising out of a construction accident, the court shall grant the cross-motion of defendant Tower Insurance Company dismissing the complaint against it and declaring that defendant insurer has no duty to defend or indemnify plaintiffs for the subject occurrence on the grounds of lack of coverage and failure to comply with a condition precedent for additional insured coverage.

The court grants the cross-motion for summary judgment

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

Check One: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

dismissing the claim of plaintiff Ciampa Management Corp. (Management) against Tower because Management had no contractual relationship with the defendants nor was listed as an insured on Tower's policy and therefore cannot qualify for coverage as a named or additional insured under Tower's policy.

However, contrary to Tower's arguments, Ciampa Estates, LLC (Estates), qualifies as an additional insured under the policy. The Additional Insured endorsement to the Sanita/Bellarose policy issued by Tower states in pertinent part that additional insured coverage is "only with respect to acts or omissions of the named insured, his agents, servants, and employees for which the Additional Insured may be held liable." Defendants do not dispute that Estates was named as an additional inured under the policy but argue that Estates is not entitled to coverage because the underlying occurrence is outside the risks defined in the policy. Tower's argument lacks merit.

As argued by plaintiffs, AIU Ins. Co. v American Motorists Ins. Co. (292 AD2d 277, 278 [1st Dept 2002]), stands for the proposition that where an employee of a subcontractor brings an action against the general contractor and owner of the premises for personal injuries arising out of work performed by the subcontractor, the general contractor and owner are entitled to a defense pursuant to the terms of an additional insured endorsement. As stated by that Court in another action

> An insurer's duty to defend is broader than the duty to indemnify and arises where the allegations of the complaint against the insured fall within the scope of the risks undertaken by the insurer. The underlying complaint, which alleges bodily injury sustained by the primary insured's employee when he fell down a stairway, clearly falls within the general scope of the policy's coverage for bodily injury arising out of the primary insured's work for the additional insureds. Whether the underlying plaintiff's injuries come within the policy's exclusion for injuries caused by the additional insureds' negligence is a question that must await a determination of liability in the underlying action, since the underlying complaint sets forth claims pursuant to, for example, Labor Law § 240 (1), under which each of the additional insureds could be held liable despite no showing of any negligence on their part contributing to the allegedly defective stairway.

Pavarini Const. Co., Inc. v Liberty Mut. Ins. Co., 270 AD2d 98, 99 (1st Dept 2000) (citations and internal quotations omitted).

Furthermore there is no dispute that in cases concerning policy language such as that presented here the additional insurance coverage is primary. See BP Air Conditioning Corp. v One Beacon Ins. Group, 33 AD3d 116, 123 (1st Dept 2006), affd 8 NY3d 708 (2007); Pecker Iron Works of New York, Inc. v Traveler's Ins. Co., 99 NY2d 391, 393 (2003).

The evidence submitted on the motions demonstrates that the claims against plaintiffs in the underlying action arose out of work being performed by defendants' employee pursuant to the contract between Estates and Sanita/Bellarose. Thus the duty to defend would be triggered under the policy. However, the duty to indemnify would have to await a determination of the liability of the parties' in the underlying action. Because the court holds that Estates is an additional insured under the Tower insurance

policy the court shall also deny plaintiffs' motion to the extent that it seeks summary judgment for breach of contract against Bellarose and Sanita.

However, while Estates qualifies as an additional insured pursuant to the policy issued by Tower, the court agrees with defendants that Estates failed to comply with the condition precedent of prompt notice of claim under the policy and therefore Estates is not entitled to the protection of the policy.

The accident in the underlying action occurred on February 17, 2006, and plaintiffs concede that they were acting as owner and general contractor on the project at the time. The underlying suit was commenced on May 17, 2006 and Estates was served via the Secretary of State on July 18, 2006. By letter dated June 6, 2006, plaintiffs notified Tower of their claim stating that "Ciampa Management Corp." was "Our Insured" and that "Ciampa Management Corp." was an "additional insured" under the Tower policy. There was no mention of Estates in the June 6, 2006, letter. By further letter dated August 2, 2006, plaintiffs revised their original tender to state that "Ciampa Management Corp., [and] Ciampa Estates, LLC" were "Our Insured." By letter dated August 17, 2006, Tower disclaimed coverage on the grounds of late notice and lack of coverage.

"The law is clear that an insured's obligation to provide timely notice is not excused on the basis that the insurer has received notice of the underlying occurrence from an independent source. . . [T]he notice requirement in this insurance policy applies equally to both primary and additional insureds, and notice provided by one insured in accordance with the policy terms will not be imputed to another insured." Travelers Ins. Co. v Volmar Const. Co., Inc., 300 AD2d 40, 43-44 (1st Dept 2002) (citations omitted).

In opposition to Tower's arguments, Estates asserts that defendants' disclaimer was untimely and therefore ineffective since it was not sent until almost two months after Tower received notice of Management's claim. The fact that the Ciampa entities may be related does not mean that they stand in the same position with respect to notice under the policy where only Estates was the additional insured under the policy. Estates' argument that knowledge from the notice provided by Management ought to be imputed to Tower fails because the courts have held only in dicta that prior notice may be applicable to another where the parties were co-insureds. Structure Tone, Inc. v Burgess Steel Products Corp., 249 AD2d 144 (1st Dept 1998), Delco Steel Fabricants, Inc. v. American Home Assur. Co., 40 AD2d 647 (1st Dept 1972), and Motor Vehicle Accident Indemnification Corp. v. U.S. Liability Insurance Company, 33 AD2d 902 (1st Dept 1970).

Since Management was neither a named nor additional insured under the Tower policies, the argument that the initial notice was provided by one of two claimants who are similarly situated is unpersuasive. The agreed facts demonstrate that defendants were not notified of Estates' claim to coverage under the Tower policy prior to the August 2, 2006 letter.

Plaintiffs' citation to JT Magen v Hartford Fire Ins. Co. (64 AD3d 266, 269 [1st 2009], lv dismissed 13 NY3d 889 [2009]) is misplaced as the court there also stated that "an insurance carrier's duty to timely disclaim is not triggered until an insured satisfies a notice of claim provision in an insurance contract, because that provision is a condition precedent to coverage, and absent a valid excuse, the failure to satisfy the notice requirement vitiates the policy". The court held that, therefore, the timely disclaimer provisions of Insurance Law 3420 (d) are operative as to insureds when their insurers provide notice on behalf of the insureds. The critical distinction is that in JT Magen the notification provided on behalf of the additional insureds named the additional insureds, unlike the June 6, 2006, letter at issue here which did not name or otherwise purport to provide notice on behalf of Estates.

Therefore, Tower's disclaimer of August 17, 2006, was timely as a matter of law pursuant to Insurance Law 3420 as measured from the notice date of August 2, 2006. See Public Service Mut.

Ins. Co. v Harlen Housing Associates, 7 AD3d 421, 423 (1st Dept 2004) (disclaimer timely where issued only 27 days after grounds for disclaimer became known).

Accordingly, it is

ORDERED that plaintiffs' motion for summary judgment is DENIED; and it is further

ORDERED, ADJUDGED and DECLARED that defendant TOWER INSURANCE COMPANY of NEW YORK's cross-motion for summary judgment is GRANTED, and Tower has no obligation to defend or indemnify plaintiffs and all other claims by and against defendant TOWER INSURANCE COMPANY of NEW YORK are DISMISSED, and the action against defendant TOWER INSURANCE COMPANY of NEW YORK is severed, and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that plaintiffs' sixth cause of action against the remaining defendants and any counterclaims with respect thereto shall continue.

This is the decision and order of the court.

Dated: February 16, 2010

ENTER:

J.S.C.

DEBRA A. JAMES

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be given based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).