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

PRESENT: HON. CAROL EDMEAD Justice

PART 35

Lancer Insurance

- v -

STA Parking

INDEX NO. 401599/09

MOTION DATE 2/16/10

MOTION SEQ. NO. 01

MOTION CAL. NO.

The following papers, numbered 1 to ____ 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

In accordance with the accompanying Memorandum Decision, it is hereby

ORDERED that the branch of plaintiff's motion pursuant to CPLR §3215 for default judgment against defendants Danielle Court Condominiums, Golden Vale Construction Corp., Hawk Consulting Services, Inc., Liberty Mutual Insurance Company a/s/o Donna Spensieri, Fireman's Insurance Company of Washington, D.C. a/s/o Danielle Court Condominiums, Interstate Indemnity Company a/s/o East 77 Owners Co., LLC, and Fireman's Fund Insurance Company a/s/o London Management, is granted on default, and damages against said defendants shall be assessed at the time of the trial of the action or disposition of the action against the remaining defendant; and it is further

ORDERED that the branch of the cross-motion by STA Parking Corp. for summary judgment dismissing plaintiff's claims as barred under the doctrines of waiver, estoppel and ratification, is denied; and it is further

ORDERED that the branch of the cross-motion by STA Parking Corp. for summary judgment awarding STA Parking Corp. its defense costs and compelling plaintiff to defend STA Parking Corp. in the subject underlying actions, is granted; and it is further

ORDERED that the branch of the cross-motion by STA Parking Corp. for summary judgment compelling plaintiff to indemnify STA Parking Corp. in subject underlying actions is denied; and it is further

ORDERED that plaintiff serve a copy of this order with notice of entry upon all parties within 20 days of entry.

Dated: 3/23/10

The Clerk may enter judgment accordingly.

This constitutes the Decision and Order of this Court.

J.S.C.

HON. CAROL EDMEAD

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

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 35

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LANCER INSURANCE COMPANY,

Plaintiff,

-against-

Index No. 401599/09
Sequence No. 001

STA PARKING CORP., 430 OWNERS CORP., EAST 77 OWNERS CO., LLC, DANIELLE COURT CONDOMINIUMS, KING SHA GROUP, INC., GOLDEN VALE CONSTRUCTION CORP., CERTIFIED TESTING LABORATORIES, INC., HAWK CONSULTING SERVICES, INC., LIBERTY MUTUAL INSURANCE COMPANY a/s/o DONNA SPENSIERI, FIREMAN'S INSURANCE COMPANY OF WASHINGTON, D.C., a/s/o DANIELLE COURT CONDOMINIUMS, ALLSTATE INSURANCE COMPANY a/s/o SUSAN LUCINA, ONEBEACON INSURANCE COMPANY a/s/o MICHAEL CORRALES, INTERSTATE INDEMNITY COMPANY a/s/o EAST 77 OWNERS CO., LLC, AND FIREMAN'S FUND INSURANCE COMPANY a/s/o LONDON MANAGEMENT,

Defendants.

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HON. CAROL R. EDMEAD, J.S.C.

MEMORANDUM DECISION

In this insurance declaratory judgment action, plaintiff Lancer Insurance Company ("plaintiff") moves for a default judgment against all defendants except STA Parking Corp. ("STA"), 430 Owners Corp. ("430 Owners"), East 77 Owners Co., LLC ("East 77"), King Sha Group, Inc. ("King Sha"), and Allstate Insurance Company a/s/o Susan Lucina for failure to appear or answer in this action.[1]

In response, STA cross moves for summary judgment dismissing plaintiff's claims as barred under the doctrines of waiver, estoppel and ratification, and for an order awarding STA its defense costs and compelling plaintiff to defend and indemnify STA in several pending actions.

[1] Plaintiff's motion as against OneBeacon was withdrawn pursuant to stipulation.

Factual Background

The action arises from property damage claims made by the insurers, property owners and residents of three buildings located at: 430 East 77th Street ("430"), owned by 430 Owners; 435 East 76th Street ("435"), owned by Danielle Court Condominiums ("Danielle Court"); and 436 East 77th Street ("436"), owned by East 77. The claims resulted from construction work being performed at an adjacent parking garage located at 434 East 77th Street (the "Garage"), owned by STA.[2]

The three neighboring buildings claimed damages resulting from the underpinning work and notified the New York City Department of Buildings (the "DOB"), which then issued stop-work orders. Work at the Garage was halted from December 27, 2004 through February 15, 2005, and resumed in March of 2005. Following complaints by a neighboring property, the DOB issued another stop-work order for failing to properly underpin 430. DOB mandated that a remedial underpinning project be completed before the work could recommence.

Plaintiff issued a certain Garage Non-Dealer's Liability Policy of insurance to STA, effective February 14, 2005 through February 14, 2006 (the "Policy"). The Policy provided coverage for claims and lawsuits for "property damage" arising from covered accidents only if, *inter alia*, prior to the Policy period, no insured knew that the property damage had occurred. If the insured knew, prior to the policy period, that the property damage occurred, then any

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[2] In October 2004, STA commenced a construction project to expand the Garage by creating a subbasement six feet below the existing basement (the "Project"). STA engaged King Sha as a general contractor to underpin the Garage and the abutting buildings. Golden Vale was a subcontractor and defendant Certified Testing Laboratories, Inc. ("CTL") was the controlled inspector. King Sha denies the claim that it was engaged to underpin the parking garage and the abutting buildings, and contends that the scope of its work and the parties responsible for protecting adjacent properties are issues not before the court at this time.

continuation, change or resumption of such property damage during or after the Policy period will be deemed to have been known prior to the Policy period. Under the Policy, "property damage" will be deemed to have been known to have occurred at the earliest time when any insured: (1) reports the "property damage" to plaintiff or any other insurer; (2) receives a demand or claim for damages because of the "property damage"; or (3) becomes aware that "property damage" has occurred or has begun to occur. Additionally, the Policy provided that plaintiff will not provide coverage for any insured "who has made fraudulent statements or engaged in fraudulent conduct in connection with any" damage for which coverage is sought under this policy." In its application for insurance, STA represented that it was not aware of any liability or claims against STA for the three years prior to the Policy.

Thereafter, STA submitted claims to plaintiff for coverage for property damage at 430, 435 and 436. On May 29, 2005 plaintiff denied coverage of the 430 and 436 claims, since STA "was put on notice [of these claims on] February 4, 2005" before the Policy became effective. The May 29, 2005 denial letter was silent as to 435.

Four actions were commenced arising from the alleged damage to 430 (the "430 claims").[3] Thus, STA submitted further documentation to plaintiff, and by letter dated April 13, 2006, plaintiff withdrew its disclaimer of the 430 claims, but reserved its rights to disclaim coverage (1) "in the event that it is discovered that the alleged damages . . . took place prior to

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[3] *RLI Ins. Co. and Alea North American Ins. Co. v. King Sha Group, Inc., Certified Testing Laboratories, Inc., Golden Vale Construction Corp. and S.T.A. Parking Corp.* (the "RLI action"); *430 Owners Corp. v. King Sha Group, Inc., Certified Testing Laboratories, Inc., Golden Vale Construction Corp. and S.T.A. Parking Corp.*; *Allstate Ins. Co. a/s/o Susan Lucina v. King Sha Group, Inc., Golden Vale Construction Corp., Certified Testing Laboratories, Inc., S.T.A. Parking Corp. and Hawk Consulting Services, Inc.* (Index No. 104842/07); and *Liberty Mutual Insurance Company a/s/o Donna Spensieri v. King Sha Group, Inc., Certified Testing Laboratories, Inc., Golden Vale Construction Corp. and S.T.A. Parking Corp.* (Index No. 604264/06) (the "Liberty Mutual action").

the inception" of the Policy, and (2) based on the fraud condition in the Policy "while it continue[d] to investigate this matter and the representations made to [plaintiff] when the policy was applied for and in the presentation of this claim." Plaintiff then made four payments to STA indemnifying it for the costs of the remedial work STA was compelled to conduct.[4]

In September 2006, STA received a notice of claim from 436, and furnished plaintiff with this claim. By letter dated November 3, 2006, plaintiff again denied coverage of the 436 claim, and reiterated that this claim occurred prior to the Policy period.

In December 2006, plaintiff issued a notice of non-renewal to STA, effective February 14, 2007, due to STA's "adverse loss experience."

On March 7, 2007, an action was commenced against STA for property damage at 435 (the "435 claim"). By letter dated June 19, 2007, plaintiff disclaimed coverage of this claim, on the basis that such action alleged that the damage to the property took place on December 15, 2004, "two months prior to the inception of the Lancer policy." STA then requested that plaintiff reconsider its denial.

In October 2007, two actions were commenced for property damage at 436 (the "436 claims"),[5] and STA sent copies of the summonses to plaintiff.

STA later submitted documentation to plaintiff, claiming that the 435 and 436 claims occurred at the same time as the 430 claims and, therefore, were within the Policy period.

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[4] The first payment was made September 15, 2006. The final payment was made January 2, 2007.

[5] *East 77 Owners Co., LLC v. King Sha Group, Inc., S.T.A. Parking Corp., Golden Vale Construction Corp., Hawk Consulting Services, Inc. and Certified Testing Laboratories, Inc.* (Index No. 603340/07) and *Interstate Indemnity Company a/s/o East 77 Owners Co., LLC v. King Sha Group, Inc., S.T.A. Parking Corp., Golden Vale Construction Corp., Hawk Consulting Services, Inc. and Certified Testing Laboratories, Inc.* (Index No. 114015/07) (the "Interstate action").

According to STA, in January 2008, plaintiff informed STA that it would no longer defend the 430 claims; plaintiff ceased paying STA's legal fees, but did not withdraw coverage of the 430 claims. Thus, in March 2008, STA requested clarification from plaintiff as to plaintiff's coverage position on the 430 claims and requested that plaintiff reconsider its denial as to the 435 and 436 claims.

This action for declaratory judgment ensued.[6]

In this action, plaintiff seeks a judgment declaring that (1) the Policy does not provide coverage to STA for the claims and lawsuits brought by the insurers, property owners and residents of 430, 435, and 436, arising from the construction project at the Garage; (2) it was not and is not obligated to defend and indemnify STA with respect to these claims and lawsuits, and is entitled to reimbursements of the costs, expenses and attorneys fees paid in connection therewith; and (3) it was not obligated to reimburse STA for remediation expenses and is entitled to recoup those expenses.

In support of summary judgment, STA argues that plaintiff's true claim is one for rescission. STA contends that plaintiff cannot avoid coverage of the claims by crafting its papers as an action for declaratory judgment. Although rescission is not mentioned in its papers, since the basis of plaintiff's claim to a refund is an alleged misrepresentation in the application, the only remedy available to plaintiff would be a rescission of the Policy. As a consequence of plaintiff's course of conduct of over three years, *to wit*: its defense of STA, having evidence of the alleged fraud and ample opportunity to investigate, its indemnification of STA of more than

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[6] STA commenced a similar action against plaintiff seeking coverage under the Policy. Both actions were consolidated for trial by stipulation and order dated March 20, 2009. In both actions, plaintiff seeks a determination of coverage, and a refund from STA of the defense and indemnification costs it incurred on the 430 claims.

$80,000, its acceptance of a renewal premium, its issuance of a non-renewal notice with no reference of the alleged fraud, its issuance of two subsequent disclaimer letters with no reference to the alleged fraud and its retention of STA's premium, plaintiff is barred from rescinding the Policy due to waiver, estoppel and ratification.

The failure to give prompt notice of whether the insurer intends, upon gaining information of an alleged misrepresentation, to continue performance under the policy will result in the waiver and estoppel of the insurer's potential rescission claim. Similarly, a finding of ratification will defeat a misrepresentation claim where the party seeking to avoid the contract does not take prompt action after discovery of the alleged false statement. Moreover, where an insurer accepts premiums after learning of an event allowing for cancellation of the policy, the insurer has waived the right to cancel or rescind. If plaintiff believed a fraud had been committed, it should have never accepted STA's second payment, never withdrawn the disclaimer, and cancelled the Policy. Similarly, where an insurer who is aware of the insured's material misrepresentations elects to send a notice of non-renewal stating coverage will remain effective through the end of the policy, but will not be renewed, the insurer is estopped from seeking rescission. Finally, the insurer's failure to refund the premiums paid by the insured before seeking rescission results in a waiver of the right to rescind, and here, plaintiff has not refunded the premiums to STA.

STA contends that the sole basis for plaintiff's denial of coverage was that the claims occurred prior to the Policy period, and the complaint in the 436 claims alleged the date of the occurrence to be in or about March 2005 within the Policy period, and STA has provided proof that all of the underlying claims occurred during the covered period.

At the time of STA's letter withdrawing its disclaimer of the 430 claims, no other actions had been commenced, so plaintiff's denial of the 436 claims was not addressed by STA. Moreover, based upon plaintiff's coverage of the 430 claims, it was STA's expectation that plaintiff would cover other claims for damages arising out of the same construction work during the same period. While plaintiff defended STA, STA was involved in litigation in both Federal and State Court consisting of several mediations, extensive discovery, multiple court conferences, motion practice and trial preparation. Plaintiff's representative appeared at several of the mediation conferences. Additionally, in about September 2006, plaintiff commenced a separate action on STA's behalf seeking a coverage determination against the other potentially culpable parties and their carriers. Plaintiff paid for all costs associated with this other action. STA did not request that plaintiff commence this action. And, the first time plaintiff issued a disclaimer for the 435 Claim was in its letter dated June 19, 2007.

In any event, plaintiff has an unequivocal duty to defend STA. An insurer's duty to defend is broader than its duty to indemnify. If an insurance company has knowledge of unpleaded facts which indicate that a claim may potentially be covered, the insurance company must defend, even if the claim appears on the face of the complaint to fall outside of coverage. If the insurer has knowledge of unpleaded facts which suggest that the claim may prove outside the policy's coverage, it nevertheless must defend the claim if the pleadings allege a potentially covered claim.

Although the complaint in the Interstate subrogation action arising out of the same alleged damages alleges an earlier date, STA counsel submitted proof that the alleged occurrence at 436 took place after the inception of the Policy. The evidence submitted by STA demonstrated

that the 436 occurrences happened at the same time as the occurrences underlying the 430 claims.

STA also submitted supplemental evidence to plaintiff in response to plaintiff's disclaimer of the 435 claims indicating that the alleged occurrence at 435 took place after the inception of the Policy. Even though the 435 claims are now settled, based on the proof submitted by STA, plaintiff should have also defended the 435 claims.

As to the 430 claims, plaintiff's unexplained refusal to continue to defend STA on such claims is indefensible. At the time plaintiff ceased paying defense costs in January 2008, several of the 430 actions were still pending. Plaintiff never tendered back STA's premium. Even assuming that, a valid rescission claim existed, caselaw dictates that plaintiff could not unilaterally elect to rescind the Policy and was required to fulfill its obligations until a Court determined otherwise.

STA incurred unreimbursed legal costs in the defense of the 430, 435 and 436 claims, and the costs for the 436 claims continue to mount. These expenses should be reimbursed by plaintiff. Additionally, plaintiff should be compelled to defend STA on the 436 claims going forward. Further, by commencing this action for reimbursement of its defense and remediation costs paid to STA, and for a determination of coverage on the 435 and 436 claim, plaintiff placed STA in a defensive posture, and thus STA must be reimbursed for the costs of this action.[7]

Plaintiff opposes STA's cross-motion, arguing that summary judgment is premature and

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[7] Interstate, East 77, CTL and King Sha do not oppose STA's cross-motion. Interstate and East 77 aver that the complaint does not include a direct cause of action against them, and that they have been named as parties out of procedural necessity. Thus, the defendants argue, should this court grant summary judgment dismissing plaintiff's complaint, plaintiff's complaint must also be dismissed as to these defendants. CTL denies any underlying allegations of negligence giving rights to the insurance coverage matter, and along with King Sha, contends that the scope of their work and the parties responsible for protecting adjacent properties are disputed allegations not properly before the Court at this time.

should be denied pursuant to CPLR 3212(f), as discovery is incomplete. The deposition of Michael Zacharias ("Zacharias"), on behalf of STA is necessary to address STA's conduct regarding claims that resulted from the project prior to the preparation of STA's policy application, representations made in STA's Policy application, and what Zacharias knew prior to the preparation of the application. STA has refused to proceed with depositions until directed to do so by this Court. Further, plaintiff subpoenaed the non-party broker through which the Policy was obtained for a deposition and documents pertaining to the Garage.

Despite STA's representation in its application that it was unaware of any claims against it, claims had been made by the insurers, property owners and residents of 430, 435, and 436, as a result of STA's work in the weeks and months prior to the submission of the application for the Policy and the property damage occurred before the effective date of coverage of the Policy.

STA's cross-motion should be denied also because its arguments are inapplicable to the instant action. A review of the complaint, as well as the Answer with Counterclaims in STA's action, demonstrates that STA's argument that plaintiff is seeking to rescind the Policy is just wrong; no claim for recision has ever been made by plaintiff. Plaintiff clearly seeks a declaration that there is no coverage for the subject claims resulting from the subject construction project and that it is not obligated to provide coverage for these claims. Plaintiff has never sought to rescind the Policy, nor void it for misrepresentation. STA also disregards the fact that a policy cannot be rescinded retroactively, even if an insured made misrepresentations in procuring it. Vehicle and Traffic Law §313 "supplants an insurance carrier's common-law right to cancel a contract of insurance retroactively on the grounds of fraud or misrepresentation, and mandates that the cancellation of a contract pursuant to its provisions may only be effected prospectively."

Plaintiff recognized that the Policy could not be rescinded and did not wish to burden this Court with frivolous pleadings. Thus, the basis of STA's cross-motion is inapplicable and inapposite to the instant action.

Further, the claims at issue in the underlying actions are not covered under the Policy based upon the application of the "known loss" doctrine: an insured may not obtain insurance to cover a loss that is known before the policy takes effect. The "known loss" doctrine "essentially reforms the contract to exclude the known loss, apparently under the assumption that no reasonable insurer would assume such a 'risk.'" It is necessary to consider "whether, at the time the insured bought the policy (or the policy incepted), the loss was known." Insurance cannot be purchased for "damage that has been fraudulently concealed from the insurer prior to the purchase of the insurance policy." Here, the damages claimed in the underlying actions and claims resulted from the construction work before the inception of the Policy, and were known to STA at least one and a half months before it applied for the Policy. Based on a letter from STA to "CBS Coverage Group," dated December, 22, 2004, STA was aware of the claims of damage to the 435 as of this date. On January 20, 2005, STA prepared a General Liability Notice of Occurrence/Claim, which stated that 435 was claiming damage to its building due to STA's construction project. Further, on January 20, 2005, CBS Coverage Group advised STA that it did not find "any in force" primary liability coverage at that time. Finally, on February 4, 2005, the same day STA applied for insurance with plaintiff, correspondence was sent to STA from 430 Owners advising that STA's construction project caused damage to 430. STA was also aware that it did not have an insurance policy in place at the time these claims were made, and then scrambled to obtain insurance coverage, in order to improperly submit them to plaintiff for

coverage. Therefore, there is no coverage for this "known loss."

Further, as there is no coverage for such claims, plaintiff has no duty to defend STA for the 430, 435 and 436 claims. The duty to defend is not triggered when there is no possible factual or legal basis upon which the insurer might eventually be held to be obligated to indemnify the claimant under any provision of the insurance policy. Plaintiff is not obligated to provide coverage because the claims resulting from the subject construction project were "known losses." Just as there is no coverage for "known losses," there can be no duty to defend.

Further, STA conceded that the 435 and 436 claims predated the Policy. Although the complaint for the 436 claims alleges that the damage occurred in March, 2005, the complaint in the Interstate action alleges that the damage occurred on January 5, 2005, one month before STA even applied for insurance. In addition, the alleged damage to 435 occurred on December 15, 2004, two months before the Policy was issued. Thus, there is no duty to defend STA with respect to the 435 and 436 claims. Finally, with respect to the 430 claims, plaintiff provided a defense to STA up to the time that the only remaining claims were STA's cross-claims. It was not until STA refused to honor its agreement to reimburse plaintiff for a percentage of the money plaintiff in remediation expenses that plaintiff commenced this action. Plaintiff was never obligated to continue to pay for the attorneys fees incurred in the prosecution of STA's claims.

Plaintiff further argues that it is not responsible for STA's costs in defending the instant action. This action has been joined for trial with the action by STA against plaintiff, which was commenced by STA before plaintiff's action was commenced. STA is not in a defensive posture, and that STA chose to cross-move in the instant action is irrelevant; STA is not truly defending claims brought by plaintiff, but is affirmatively prosecuting its action against plaintiff.

Plaintiff is not responsible for attorneys fees where STA commenced the action. As STA cannot establish that plaintiff is obligated to provide coverage for the claims, STA is not entitled to legal fees for the defense of the instant action.

In reply, STA maintains that plaintiff's claims fail, whether based on rescission or the known loss doctrine. The "known loss" doctrine is narrowly applied and bars coverage for a known risk, even if the risk was known by the insured to be high at the time the policy was issued. Here, plaintiff provided no evidence that STA had knowledge of the 436 claims before the Policy was issued. With respect to the 430 and 435 claims, plaintiff's reliance on the known loss doctrine is erroneously based upon on two alleged notices received by STA prior to the inception of the Policy. Yet these alleged notices did not constitute known losses and were at best known risks, and New York does not recognize a "known risk" theory as a basis for an insurer to deny its obligations under a policy. Zacharias attests that based upon STA's knowledge at the time which was derived from its engineer and the DOB's findings, these claims had no validity. STA's engineer and the DOB both agreed that the alleged damage to 430 was preexisting and not caused by STA's construction activities (the "cracking on 430 . . . was pre-existing and no due to our work."). They also agreed that the alleged damage to 435 was a result of its own defective construction ("The City inspector . . . verified that the underpinning was done incorrectly on their building [435] at the time of reconstruction/alteration of 435. . . .").

Plaintiff also did not state that it was relying on the known loss doctrine as an affirmative defense in reply to STA's Counterclaims or in plaintiff's Answer to STA's complaint. Even assuming that the known loss doctrine could be applied, plaintiff is still barred from disclaiming coverage by reason of waiver, estoppel and ratification. Further, plaintiff's claim that the

$84,365.88 payments to STA were based upon a reliance that they would be refunded is wholly unsupported by the record. While it is true that STA included plaintiff's payments in STA's demand and engaged in discussions with plaintiff immediately prior to the settlement with CTL of STA's claims, STA did this in good faith and not out of any obligation to plaintiff. New York law prohibits the very conduct plaintiff is attempting to rely upon as a defense. Under the make whole doctrine, an insurer cannot recover payments it made to its insured until the insured has been made whole for its loss. The indemnification payments made by plaintiff to STA were unconditional. Since plaintiff was paying to defend STA, STA in good faith offered to include the indemnification payments in STA's demand in the RLI action and that if those monies were recovered, STA would return them to plaintiff. It was always STA's intention to recover damages for its own losses first before giving any recovery to plaintiff as was its right under the make whole doctrine.

By engaging in this conduct, plaintiff has also breached the Policy. Plaintiff has all but acknowledged that the only reason it stopped paying defense costs on the 430 claims was because STA would not reimburse plaintiff's indemnification payments. There is no obligation in the Policy that STA reimburse plaintiff its indemnification costs, and plaintiff cannot look to its own insured for these payments. Its sole remedy would be to commence a subrogation action against the other defendants. The action plaintiff commenced on STA's behalf was the proper forum for plaintiff to seek the monies for which it has now wrongfully sued STA.

Further, plaintiff's refusal to continue to defend STA on the 430 claims was not adequately addressed. At the time plaintiff ceased paying defense costs in January 2008, several of the 430 actions were still pending: the 430 Owners's action continued until September 10,

2008 when it was settled; the Liberty Mutual action continued until January 13, 2009. Notwithstanding notice to plaintiff that these claims were unresolved, plaintiff breached the Policy in refusing to defend STA.

Even assuming more discovery is necessary, STA is entitled to a defense on the pending 436 claims until the issues herein are fully determined. The duty to defend is a separate obligation from the duty to indemnify and East 77's complaint clearly alleges the date of the occurrence to be in or about March 2005, within the Policy period. Plaintiff is obligated to defend STA under the Policy while the other issues are litigated. While the Interstate complaint referenced an earlier occurrence date, plaintiff was provided evidence that the alleged occurrence at 436 (encompassing the claims in both complaints) took place after the inception of the Policy. Moreover, plaintiff's "known loss" argument is not applicable to the 436 claims. There is no evidence that STA had notice of the 436 claims prior to the inception of the Policy. Plaintiff's claim that one of the complaints referenced an occurrence date that predated the Policy is unavailing, based upon the documentation furnished by STA.

Furthermore, by seeking a refund of the monies it has paid in the defense and indemnification of STA, plaintiff has clearly placed STA in a defensive posture, thereby entitling STA to an award of its legal fees. And, whether STA had coverage prior to the Policy is irrelevant.

Discussion

Where a defendant is the proponent for summary judgment, it must establish that the "cause of action . . . has no merit" (CPLR § 3212[b]), sufficient to warrant the court as a matter of law to direct judgment in its favor (*Bush v St. Claire's Hosp.*, 82 NY2d 738, 739 [1993];

Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 [1985]; *Wright v National Amusements, Inc.*, 2003 NY Slip Op 51390 [U] [Sup Ct New York County, 2003]). Thus, such defendant must make a *prima facie* showing of entitlement to judgment as a matter of law, by advancing sufficient "evidentiary proof in admissible form" to demonstrate the absence of any material issues of fact (*Winegrad v New York Univ. Med. Ctr., supra*; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Silverman v Perlbinder*, 307 AD2d 230, 762 NYS2d 386 [1st Dept 2003]; *Thomas v Holzberg*, 300 AD2d 10, 11, 751 NYS2d 433, 434 [1st Dept 2002]).

To defeat a motion for summary judgment, the opposing party must show facts sufficient to require a trial of any issue of fact (CPLR §3212[b]). Thus, where the proponent of the motion makes a *prima facie* showing of entitlement to summary judgment, the burden shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action, or to tender an acceptable excuse for his or her failure to do so (*Vermette v Kenworth Truck Co.*, 68 NY2d 714, 717 [1986]; *Zuckerman, supra* at 560, 562; *Forrest v Jewish Guild for the Blind*, 309 AD2d 546, 765 NYS2d 326 [1st Dept 2003]).

Dismissal of the Complaint

STA's claim that plaintiff's complaint is one for rescission, lacks merit.

The Court recognizes that the acceptance of premiums after learning of an alleged fraud allowing for cancellation of the policy constitutes a waiver and estoppel against an insurer's right to rescind the policy (*see Security Mut. Life Ins. Co. of New York v Rodriguez*, 65 AD3d 1, 880 NYS2d 619 [1st Dept 2009]). Plaintiff also undertook the defense of STA for almost two years after acknowledging notice of the alleged earlier claims, commenced a separate action on STA's behalf, indemnified STA in the amount of $84,365.88, and issued a non-renewal notice instead of

cancelling the Policy and failed to tender a refund of STA's premium. Thus, assuming plaintiff sought rescission of the Policy, plaintiff would be barred from so rescinding.

However, the relief plaintiff seeks here is one commonly sought by insurers, and that is a declaration that it is not obligated to indemnify or defend STA for the underlying claims. Contrary to STA's contention, the alleged misrepresentation of STA in the Policy application is not the sole basis of plaintiff's claim to a refund. In its complaint, as well as it Answer with Counterclaims in STA's action for coverage, plaintiff asserts that the Policy provides coverage for property damage only if the property damage occurred during the Policy period and the insured did not know, prior to the Policy period, that such property damage occurred. Plaintiff also alleged that as to any insured who had made fraudulent statements or engaged in fraudulent conduct in connection with the property damage claims, the "property damage" claimed by the insurers, property owners, and residents of the subject buildings "occurred before the effective date of coverage of the policy" (¶46) and STA represented that it was unaware of any liability claims against it for three years prior to the Policy. That plaintiff seeks recoupment of the costs it expended to defend STA and to pay STA's remediation costs, does not render the complaint one for recision or any less than an action for declaratory relief (*see Trustees of Princeton University v National Union Fire Ins. Co. of Pittsburgh, Pa.*, 15 Misc 3d 1118, 839 NYS2d 437 [Sup Ct New York County 2007] (stating, in an action for declaratory relief and reimbursement of costs, that where coverage is disputed, insurers are required to advance defense expenses subject to recoupment in the event it is ultimately determined the Policy does not cover the claim)). Moreover, neither plaintiff's complaint, nor any of its denial letters, referenced rescission, or sought to rescind the Policy (*see e.g., Reliance Ins. Co. v National Grange Mut. Ins. Co.*, 225

AD2d 1046, 639 NYS2d 615 [4th Dept 1996] (holding that where defendant in its disclaimer letter and answer did not assert that the policy was void because of fraud, mistake or its agent's lack of authority, nor did it commence an action to rescind or reform the policy based on those grounds, grant of summary judgment on those grounds was improper). Thus, STA's argument that the Complaint is barred by the doctrines of waiver, estoppel and ratification, premised upon the notion the Complaint seeks rescission of the Policy, is improper.

Even if the Court found that the complaint alleged a rescission claim, and that plaintiff was barred from raising such a claim, STA would not be entitled to dismissal of the complaint since the remaining issue raised in the complaint is whether plaintiff is entitled to declaratory relief concerning issues of coverage. "[W]here the issue is the existence or nonexistence of coverage (*e.g.*, the insuring clause and exclusions), the doctrine of waiver is simply inapplicable" (*Albert J. Schiff Assoc. v Flack*, 51 NY2d 692, 698, 435 NYS2d 972 [1980]). Defenses relating to the issue of the coverage and noncoverage are not waivable (*Taft v Equitable Life Assur. Soc. of U.S.*, 173 AD2d 267, 569 NYS2d 660 [1st Dept 1991]). Nor can insurance coverage "be created by equitable estoppel where no policy of insurance exists (*Taft citing Van Buren v Employers Ins. of Wausau*, 98 AD2d 774, 469 NYS2d 488 and *Powers Chemco, Inc. v Federal Insurance Co.*, 122 AD2d 203, 504 NYS2d 738).[8] Thus, STA's claim that plaintiff's denial of coverage based on the "known loss" defense is barred by waiver, estoppel, and ratification, also lacks merit. Therefore, summary dismissal of the Complaint based on the doctrines of waiver, estoppel and ratification, is denied.

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[8] The case cited by STA for the proposition that ratification will defeat a claim of misrepresentation, *S.E.C. v Credit Bancorp, Ltd.* (147 F Supp 2d 238 [SDNY 2001]) is inapplicable, since unlike the complain herein, *S.E.C.* involved a claim for rescission.

Turning to STA's claim that plaintiff is obligated to indemnify STA under the Policy, such determination rests upon whether the underlying claims are covered under the Policy.

Under the "known loss" defense, "an insured may not obtain insurance to cover a loss that is known before the policy takes effect" (*National Union Fire Ins. Co. of Pittsburgh, PA. v Stroh Companies*, Inc., 265 F3d 97 [2d Cir 2001] *citing Stonewall Ins. Co. v Asbestos Claims Mgt. Corp.*, 73 F3d 1178, 1214-1215 [2d Cir1995] (describing the "known loss" doctrine under New York law, stating that "insurance cannot be validly purchased" for known losses), modified on other grounds, 85 F3d 49 [2d Cir 1996]; *see also Henry Modell & Co. v Gen. Ins. Co. of Trieste & Venice*, 193 AD2d 412, 412-13, 597 NYS2d 75, 76 [1st Dept 1993] (holding that no insurance coverage exists when, *inter alia*, "the damages claimed occurred prior to the inception of the policy and were fully known to the plaintiff . . . before the commencement of coverage") (citing N.Y. Ins. Law § 1101(a) as authority for known loss doctrine)).[9]

Yet, this defense is distinctly found in the Policy language itself. The Policy, the insurance applied to "property damage" only if the "accident" occurred in the coverage territory and during the policy period (Form CA 00 05 10 01 Section II(A)(1)(b)(1) and (2). The Policy applied to "property damage" only if

> *Prior to the policy period, no "insured"* listed under Who Is An Insured and no "employee" authorized by you to give or receive notice of an "accident" or claim, *knew*

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[9] The "known loss" defense is a variation on the fortuity doctrine. As stated by the Second Circuit in *National Union Fire Insurance Co. of Pittsburgh, Pa. v The Stroh Companies, Inc.* (265 F 3d 97 [2d Cir 2001]), the fortuity doctrine holds that "insurance is not available for losses that the policyholder knows of, planned, intended, or is aware are substantially certain to occur." (*Id.* at 106). New York has codified a narrower version of the doctrine (*Id.* at 106). As codified, New York Insurance Law § 1101(a) provides that an "'Insurance contract' means any agreement . . . whereby one party, the "insurer", is obligated to confer benefit of pecuniary value upon another party, the "insured" or "beneficiary" dependent upon the happening of a fortuitous event in which the insured or beneficiary has, or is expected to have at the time of such happening, a material interest which will be adversely affected by the happening of such event.

that the "bodily injury" or "property damage" had occurred, in whole or in part. If such a listed "insured" or authorized "employee" knew, prior to the policy period, that the "bodily injury" or "property damage" occurred, then any continuation, change or resumption of such "bodily injury" or "property damage" during or after the policy period will be deemed to have been known prior to the policy period.
(Form CA 00 0510 01 Section II(A)(1)(b)(3) (Emphasis added).

The Policy provided that coverage for

. . . "*property damage" which occurs during the policy period and was not, prior to the policy period, known to have occurred by any "insured"* listed under Who Is An Insured or any "employee" authorized by you to give or receive notice of an "accident" or claim, includes any continuation, change or resumption of that "bodily injury" or "property damage" after the end of the policy period.
(Form CA 00 05 10 01 Section II(A)(1)(c) (Emphasis added).

The Policy also provided that

. . . *"property damage" will be deemed to have been known to have occurred at the earliest time* when any "insured" listed under Who Is An Insured or any "employee" authorized by you to give or receive notice of an "accident" or claim: (1) *Reports all, or any part, of the "bodily injury" or "property damage" to us or any other insurer*; (2) Receives a written or verbal demand or claim for damages because of the "bodily injury" or "property damage"; or (3) *Becomes aware by any other means that "bodily injury" or "property damage" has occurred or has begun to occur.*
(Form CA 00 05 10 01 Section II(A)(1)(d) (Emphasis added).

Clearly, coverage under the Policy does not apply where the insured is deemed to have known about the "property damage" prior to the Policy period, and an insured is deemed to have known that the "property damage" occurred if, *inter alia*, the insured reports the "property damage" to plaintiff or any other insurer or became aware that the "property damage" has occurred or has begun to occur, whichever occurs first in time. The record contains sufficient evidence to give rise to an inference that the alleged "property damage" claimed by the insurers, property owners and residents of 430 Owners, Danielle Court and East 77 occurred before the effective date of coverage of the policy of insurance issued by plaintiff to defendant STA.

As to 435, a General Liability Notice of Occurrence/Claim form was prepared on January 20, 2005, one month before the STA applied for insurance with STA, indicating that "Danielle Court Condominium is claiming that due to ongoing construction of insd premises their building [435] has sustained damage. . . . *We are reporting as matter of record at this time.*" (Emphasis added). This Claim form indicates that the claim was "reported" by "M. Zacharias" of STA. Zacharias had previously prepared a letter on December 22, 2004 advising its broker, CBS Coverage Group, that 435 is "trying to blame us for damage to its building. Our engineers and architects have advised us that all of the Condo's problems were cause[d] by it[s] failure to underpin its building and out building in accordance with the NYC Building Code." The veracity of these documents is undisputed.

As to 430, plaintiff's May 29, 2005 denial letter indicated that STA had notice of this "loss" as of February 2, 2005. The DOB issued a stop-work order to STA on December 27, 2004. In this stop-work order, STA was alleged to have failed to safeguard property "affected by construction operations." It was noted that "construction at this [Garage] location is affecting property. Cracks developed at 430 East 77 [430] on the east walls from the cellar to the 7th floor apartments. . . ." Since the DOB stop-work order put STA on notice of the alleged property damage to 430, such damage arguably was known to STA as of December 27, 2004, prior to the inception of the Policy. Further, by letter dated February 4, 2005, addressed to STA c/o Michael Zacharias, indicating that the "work [at your premises] has caused substantial damages to the premises at 430 East 77th Street [430], and *has continued despite the issuance of a stop work order issued by the [DOB]* . . . ." Both the DOB stop work order and this letter from 430, issued to STA, predate the effective date of the Policy. Interestingly, STA's application for the Policy

was signed by the broker, CBS Coverage Group, Inc. on February 4, 2005; yet a fax cover sheet from Zacharias/STA to the broker, dated February 3, 2005 indicated that "per your request" STA did not have any liability or other claims for the last three years.

A deposition of Zacharias is necessary to explore what knowledge STA had, if any, of the property damage to 430 and 435 in light of these documents. Therefore, as the record supports plaintiff's known loss defense to coverage, STA's motion to dismiss plaintiff's indemnification claims as to the claims and losses pertaining to 435 and 430 is denied.

As to 436, plaintiff's May 29, 2005 denial letter indicated that STA had notice of this "loss" as of February 2, 2005. However, other than plaintiff's statement that "Three of the neighboring buildings, . . . East 77 claimed damages resulting from the underpinning work and notified the [DOB]" and that stop-work orders were issued, there is no indication in any of the stop work orders that STA was notified of any damage to East 77th's 436 building. The only record attributable to STA's "notice" of loss with regard to 436 that predates the Policy period, is CTL's memo report to the Borough Commissioner, dated January 25, 2005. This record merely indicates that a plan to "complete underpinning of other areas adjacent to . . . 436 East 77th st." Though scant, such record raises an issue as to whether STA was on notice of any damage to 436 prior to the Policy period, which can be explored at the deposition of Zacharias.

The Policy further provided that

> we [Lancer] do not provide coverage for any insured ("insured") who has made fraudulent statements or engaged in fraudulent conduct in connection with any loss ("loss") or damage for which coverage is sought under this policy. However, with respect to insurance provided under the COMMERCIAL AUTOMOBILE COVERAGE PART, we will provide coverage to such "insured" for damages sustained by any person who has not made fraudulent statements or engaged in fraudulent conduct *if such damages are otherwise covered under the policy.*

(p. 1 of 1. Form IL 01 83 04 98.)

The record indicates that when STA applied for insurance from plaintiff, STA specifically represented that it was not aware of any liability or claims against STA for the three years preceding the Policy. Despite this representation, the record supports an inference that claims were made against STA arising from the project at the Garage prior to the submission of the application for the Policy. Assuming it is determined that the property damages in the underlying claims are covered under the Policy, plaintiff may pursue its declaratory judgment action on the ground that this fraud exclusion applies.

Contrary to STA's contention, the known loss doctrine applies to the facts of this case, and the case *National Union Fire Ins. (supra)* and *City of Johnstown, NY v Bankers Standard Ins.* (877 F2d 1146 [2d Cir 1989]) and *Wal-Mart Stores, Inc. v U.S. Fidelity and Guaranty Co.* (2005 WL 5525687), are factually distinguishable. The record indicates that the alleged "property damage" in the underlying actions does not constitute a known "risk" but were allegedly actual damages suffered by the properties in question.

Duty to Defend

It is well settled that the duty to defend is broader than the duty to indemnify (*Federal Ins. Co. v Kozlowski*, 18 AD3d 33, 792 NYS2d 397 [1st Dept 2005] *citing Fitzpatrick v American Honda Motor Co.*, 78 NY2d 61, 65, 571 NYS2d 672 [1991]). The duty to defend arises whenever the underlying complaint alleges facts that fall within the scope of coverage (*Federal Ins. Co. v Kozlowski citing Seaboard Sur. Co. v Gillette Co.*, 64 NY2d 304, 310, 486 NYS2d 873 [1984]). "[T]he same allegations that trigger a duty to defend trigger an obligation to pay defense costs" (*Federal Ins. Co. v Kozlowski citing Travelers Prop. Cas. Corp. v Winterthur Intl.*, 2002

U.S. Dist. LEXIS 11342, *17, 2002 WL 1391920, *6 [SDNY]). Both "an insurer's duty to defend and to pay defense costs under liability insurance policies must be construed broadly in favor of the policyholder," (*Federal Ins. Co. citing Admiral Ins. Co. v Weitz & Luxenberg, P.C.*, 2002 U.S. Dist. LEXIS 20306, *9, 2002 WL 3140950, *3 [SDNY]) and any doubts about coverage are resolved in the insured's favor (*Federal Ins. Co. v Tyco Intern. Ltd.*, 2 Misc 3d 1006, 784 NYS2d 920 [Sup Ct New York County 2004] *citing Volney Residence, Inc. A. Mut. Ins. Co.*, 195 A.D.2d 434, 434, 600 NYS2d 707 [1st Dept 1993]). The ultimate validity of the underlying complaint's allegations is irrelevant (*Federal Ins. Co. v Tyco Intern. Ltd., supra*). "The existence of the duty is dependent upon whether sufficient facts are stated so as to invoke coverage under the policy" (*Federal Ins. Co. v Kozlowski, supra citing American Home Assur. Co. v Port Auth. of NY & N.J.*, 66 AD2d 269, 278, 412 NYS2d 605 [1979]). The question as to the obligation of the insured to defend "'is not whether the injured party can maintain a cause of action against the insured, but whether he can state facts which bring the injury within the coverage. If he states such facts the policy requires the insurer to defend irrespective of the insured's ultimate liability" (*International Paper Co. v Continental Cas. Co.*, 35 NY2d 322, 361 NYS2d 873 [1974]).

"[T]he insurer has no duty if, as a matter of law, the allegations in the complaint could not give rise to any obligation to indemnify, or the allegations fall within a policy exclusion" (*Federal Ins. Co. v Tyco Intern. Ltd.*, 2 Misc 3d 1006, 784 NYS2d 920 [Sup Ct New York County 2004] citing *Allstate Ins. Co. v Zuk*, 78 NY2d 41, 45, 571 NYS2d 429 [1991]). An insurer can only invoke a policy exclusion to avoid coverage if it can show that "the allegations in the complaint cast that pleading solely and entirely within the policy exclusions" and further,

that the allegations, *in toto*, are subject to no other interpretation (*Federal Ins. Co. v Tyco Intern. Ltd.*, *supra citing Intl. Paper Co. v Continental Cas. Co.*, 35 NY2d 322, 32 [1974]; *International Paper Co.*, 35 NY2d at 335)). If the complaint's allegations give rise to a duty to defend, the insurer cannot use extrinsic facts to show otherwise (*Federal Ins. Co. v Tyco Intern. Ltd.*, *supra citing Fitzpatrick*, 78 NY2d at 65 [stating "Even where there exist extrinsic facts suggesting that the claim may ultimately prove meritless or outside the policy's coverage, the insurer cannot avoid its commitment to provide a defense]; *Petr-All Petroleum Corp. v Fireman's Ins. Co. of Newark*, 188 AD2d 139, 142, 593 NYS2d 693 [4th Dept 1993]). Thus, a liability insurer has a duty to defend its insured in a pending lawsuit if the pleadings allege a covered occurrence, even though facts outside the four corners of those pleadings indicate that the claim may be meritless or not covered (*Fitzpatrick*, 78 NY2d at 63-65) (imposing duty to defend where the complaint on its face did not state a covered claim but the underlying facts made known to the insurer by its insured unquestionably involved a covered event)).

Plaintiff's general contention that it has no duty to defend STA in the underlying actions because there is no duty to indemnify STA under the Policy for "known losses" is insufficient, since the duty to defend arises when the action is brought and is unaffected by the outcome of the action (*Federal Ins. Co. v Tyco Intern. Ltd.*, *supra citing Lapierre, Litchfield & Partners v Continental Cas. Co.*, 59 Misc 2d 20, 22, 297 NYS2d 976 [Sup Ct New York County], *judgm. modified on other grounds*, 32 AD2d 370 [1st Dept 1969]; *Natl. Union Fire Ins. Co. of Pitt. v City of Oswego*, 295 AD2d 905, 905, 744 NYS2d 266 [4th Dept 2002]; *see also A. Mut. Ins. Co. v Terk Techs. Corp.*, 309 AD2d 22, 33, 763 NYS2d 56 [1st Dept 2003] (Andrias, J., concurring)).

Specifically, as to the 436 claims, East 77's complaint expressly alleges the date of the

occurrence to be in March 2005. Since the complaint's allegations give rise to a duty to defend, and the insurer cannot use extrinsic facts to show otherwise (*see Federal Ins. Co. v Tyco Intern. Ltd., supra*), plaintiff has a duty to defend STA as to this complaint. Further, although the Interstate (subrogation) complaint, which arises out of the same alleged damages in the East 77 complaint, alleges that the property damage occurred on a date prior the Policy period, STA submitted to plaintiff sufficient evidence indicating that the alleged occurrence at 436 took place after the inception of the Policy. Where the complaint on its face does not state a covered claim, but the underlying facts made known to the insurer by its insured unquestionably involved a covered event, defense of such claim may be required of the insurer (*see Fitzpatrick v American Honda Motor Co., Inc.*, 78 NY2d at 65) (requiring the insurer to provide a defense where, notwithstanding the complaint allegations, underlying facts made known to the insurer create a "reasonable possibility that the insured may be held liable for some act or omission covered by the policy"; insurer cannot ignore the facts made known to it by its insured and rely instead on the complaint alone to assess its duty to defend)).

As to the 435 claim, although the underlying complaint alleges that the property damage occurred prior to the Policy inception, the record indicates that STA submitted supplemental evidence to plaintiff in response to plaintiff's disclaimer of this claims indicating that the alleged occurrence at 435 took place after the inception of the Policy. Consequently, plaintiff's argument that it has no duty to defend this claim because there is no coverage for the underlying claim, is insufficient; the ultimate outcome of plaintiff's indemnification or coverage of these claims is irrelevant (*see Federal Ins. Co. v Tyco Intern. Ltd., supra*; *International Paper Co., supra*).

The same holds true as to the 430 claims. Therefore, STA established that plaintiff is

required to provide a defense to STA of the 430 claims and is entitled to reimbursement of costs expended in defense of such claims. However, plaintiff was never obligated to continue to pay for the attorneys fees incurred in the prosecution of STA's cross-claims. Where an insurer provides a defense for an insured, hiring separate counsel to pursue an insured's affirmative cross claims is the insured's responsibility (*National City Bank v New York Central Mut. Fire Ins. Co.*, 6 AD3d 1116, 775 NYS2d 679 [4th Dept 2004] *citing Goldberg v American Home Assur. Co.*, 80 AD2d 409, 412, 439 NYS2d 2; *Johnson v General Mut. Ins. Co.*, 24 NY2d 42 [1969] (insured was not entitled to recover expenses in prosecuting cross claim, in declaratory judgment action, against insurer)). Thus, plaintiff has no duty to pay legal fees incurred by STA in STA's pursuit of its cross claims.

Finally, by commencing this action for reimbursement of its defense and remediation costs paid to STA, and for a determination of coverage on the 435 and 436 claims, plaintiff placed STA in a defensive posture, and thus STA must be reimbursed for the costs of this action.

Although an award of costs and attorney fees "may not be had in an affirmative action brought by an [insured] to settle its rights," such an award is appropriate where the insured "has been cast in a defensive posture by the legal steps an insurer takes in an effort to free itself from its policy obligations" *(GRE Ins. Group v GMA Accessories, Inc.*, 180 Misc 2d 927, 691 NYS2d 244 [Sup Ct New York County 1998] *citing Mighty Midgets v Centennial Ins. Co.*, 47 NY2d 12, 21, 416 NYS2d 559 [1979]). Since plaintiff brought this declaratory judgment action seeking to free itself from its policy obligations, STA is therefore also entitled to recover its reasonable costs and attorney fees incurred in defending claims for which it is successful in this action thus far (*see GRE Ins. Group, supra*). Plaintiff's contention that this action is now joined with an

action brought by STA does not obviate its duty to provide a defense and pay defense costs for STA's defense of plaintiff's claim herein.

Conclusion

Based on the foregoing, it is hereby

ORDERED that the branch of plaintiff's motion pursuant to CPLR §3215 for default judgment against defendants Danielle Court Condominiums, Golden Vale Construction Corp., Hawk Consulting Services, Inc., Liberty Mutual Insurance Company a/s/o Donna Spensieri, Fireman's Insurance Company of Washington, D.C. a/s/o Danielle Court Condominiums, Interstate Indemnity Company a/s/o East 77 Owners Co., LLC, and Fireman's Fund Insurance Company a/s/o London Management, is granted on default, and damages against said defendants shall be assessed at the time of the trial of the action or disposition of the action against the remaining defendant; and it is further

ORDERED that the branch of the cross-motion by STA Parking Corp. for summary judgment dismissing plaintiff's claims as barred under the doctrines of waiver, estoppel and ratification, is denied; and it is further

ORDERED that the branch of the cross-motion by STA Parking Corp. for summary judgment awarding STA Parking Corp. its defense costs and compelling plaintiff to defend STA Parking Corp. in the subject underlying actions, is granted; and it is further

ORDERED that the branch of the cross-motion by STA Parking Corp. for summary judgment compelling plaintiff to indemnify STA Parking Corp. in subject underlying actions is denied; and it is further

ORDERED that plaintiff serve a copy of this order with notice of entry upon all parties

within 20 days of entry.

The Clerk may enter judgment accordingly.

This constitutes the Decision and Order of this Court.

Dated: March 22, 2010

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

HON. CAROL EDMEAD