

**Fook Cheung Lung Realty Corp. v Yang Tze River
Realty Corp.**

2010 NY Slip Op 30986(U)

April 21, 2010

Supreme Court, New York County

Docket Number: 106519/06

Judge: Joan A. Madden

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

PRESENT: MADDEN
Justice

PART 11

FOOK CHEUNG LUNG REALTY CORP.

INDEX NO.

106519/06

MOTION DATE

- v -
YANG TZE RIVER REALTY CORP.,
ET AL.

MOTION SEQ. NO.

02

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 is determined in accordance with the annexed decision, order and declaratory judgment.

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 1419).

Dated: April 21, 2010

[Signature]
HON. JOAN A. MADDEN ^{J.S.C.}

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 11

-----X
FOOK CHEUNG LUNG REALTY CORP.,

Plaintiff,

INDEX NO. 106519/06

-against-

YANG TZE RIVER REALTY CORP., YAM SANG
KWAI, SUN SUN CONSTRUCTION, INC.,
STANLEY LAU, MICHAEL CHIANG, ANDY SIU,
DANNY WU, CAPITAL ONE CONSTRUCTION
INCORPORATED, CORPORATIONS XYZ
NOS. 1-10, and JOHN DOES NOS. 1-10,

Defendants.

UNFILED DOCUMENT
This judgment has not been entered by the County Clerk
and notice of entry cannot be served based hereon. To
obtain entry, counsel or authorized representative must
appear in person at the Judgment Clerk's Desk (Room
1418).

JOAN A. MADDEN, J.:

In this action for property damages, second third-party defendants/third-third party plaintiffs J&A Concrete Corp. and J&A Concrete Pumping Corp. move for an order pursuant to CPLR 3212, granting them summary judgment on their claims against third-third party defendant QBE Insurance Corporation ("QBE"), declaring that QBE is obligated to defend and indemnify them in this action. QBE opposes the motion, and none of the other parties has responded to it.

BACKGROUND

On May 11, 2006, plaintiff Fook Cheung Lung Realty Corp. (FCL Realty) commenced this action seeking \$5 million in damages, alleging that its building located at 146 Forsythe Street in Manhattan was damaged as result of defendants' construction activities at 38-40 Delancey Street, which is owned by defendant Yang Tze Realty Corp. (YT Realty). The complaint did not name J&A as a defendant. The complaint alleges starting in September 2004, "plaintiff's

premises were severely damaged as a result of demolition, excavation, foundation and construction work carried out by Defendants on the adjoining property.” Specifically, the complaint alleges that defendants’ work “caused the land and foundations of Plaintiff’s premises to become undermined and unstable; causing Plaintiff’s land to partially collapse and to fall; caused cracking, splitting, breakage and other severe damage to the foundation of Plaintiff’s premises; caused cracking, splitting, breaking, separation, rotation tilting, warping, loosening and other severe damage to the exterior walls of the building on Plaintiff’s Premises; caused and allowed penetration and seepage of water through the walls of Plaintiff’s Premises; caused cracking, buckling, splitting, breakage, separation, shifting, warping and other severe damage to interior walls, floors, ceilings, windows, doorways, stairways and other portions of the interior of Plaintiff’s Premises.”

In or about January 2008, defendant Sun Sun Construction commenced a second third-party action naming as third-party defendants J&A Concrete Corp., J&A Concrete Pumping Corp., QBE Specialty Insurance Cop., QBE Investments (North America, Inc), QBE Management, Int and QBE Holdings, Inc. The second third-party complaint asserts claims for negligence, contribution, common law and contractual indemnification, failure to procure insurance, and a declaration as to insurance coverage. In or about March 2009, J&A commenced a third third-party action against QBE Insurance for a declaratory judgment as to insurance coverage.

J&A Concrete and J&A Concrete Pumping (collectively “J&A”) are now moving for summary judgment declaring that QBE is obligated to defend and indemnify J&A in the third-party action action. In support of the motion, J&A contends that: 1) QBE improperly disclaimed

coverage based in J&A's alleged untimely notice; and 2) QBE's disclaimer of coverage as to J&A was untimely. As determined below, the first contention is meritorious; the second is not.

QBE'S DISCLAIMER FOR UNTIMELY NOTICE

By letter dated February 14, 2008, QBE advised J&A that it was disclaiming coverage on grounds of untimely notice. Specifically, the letter provided as follows: "Please be advised that QBE has determined that it owes no duty to defend or indemnify J&A Concrete Corp. or J&A Concrete Pumping Corp. in the above action, based upon a failure to provide notice of the occurrence and claim as soon as practicable." The letter stated that "QBE's first notice of the occurrence, claim or suit from which this action arises was on May 29, 2007. The Complaint in the primary action indicates that damages were caused on or before December 2005; yet no notice was provided to QBE or its authorized agents. Based on this information, the foregoing condition of the policy has not been satisfied."

Where as here, a policy of liability insurance requires that the insured provide notice of an occurrence "as soon as practicable," such notice must be given within a reasonable time under all the circumstances. See Great Canal Realty Corp. v. Seneca Insurance Co., Inc., 5 NY3d 742, 743 (2005); York Speciality Food, Inc. v. Tower Insurance Co., 47 AD3d 589, 590 (1st Dept 2008); Lukralle v. Durso Supermarkets, Inc., 238 AD2d 318 (1st Dept 1997). This requirement is considered a condition precedent to the insurer's obligation to defend or indemnify the insured, and a failure to comply with this requirement vitiates the insurance contract as a matter of law, even without a showing of prejudice. See Argo Corp. v. Greater New York Mutual Insurance Co., 4 NY3d 332, 339 (2005); York Speciality Food, Inc. v. Tower Insurance Co., *supra* at 589. Under certain circumstances, a delay in giving timely notice may be excused, such as where the

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insured can show that it lacked knowledge or had a good faith belief in nonliability. See White by White v. City of New York, 81 NY2d 955 (1993); Security Mutual Insurance Co. v. Acker-Fitzsimons Corp., 31 NY2d 436 (1972); St. James Mechanical, Inc. v. Royal & Sunalliance, 44 AD3d 1030 (2nd Dept 2007); Public Service Mutual Insurance Co. v. Holander, 228 AD2d 283 (1st Dept), lv app den 88 NY2d 816 (1996).

Applying the foregoing standard, the court concludes that J&A provided notice to QBE within a reasonable time under all the circumstances. The uncontradicted evidence in the record establishes that plaintiff's principal How Luan Lee and his son Bill Lee, first observed damage to their building in September 2004, and on December 27, 2004, they filed a complaint with the Department of Buildings ("DOB") that the building was shaking and vibrating during excavation, when piles were being driven into the ground next door. The DOB conducted an inspection on December 29, 2004, and determined that no violation was warranted because there was "no shaking or vibrating" at the time of the inspection.

J&A submits an affidavit from its Vice President Antonio Martins, stating that J&A Concrete Corp. entered into an oral agreement with defendant Pier Tech, Inc., for J&A Concrete Corp. to pour the concrete foundation for the new construction, which involved the erection of various wooden forms into which the concrete is poured. Martins states that the agreement did not call for J&A to perform any excavation or demolition work at the site. He states that J&A Concrete Corp.'s first date of work at the site was February 16, 2005, and before that date "demolition of the prior building had been completed and removed from the site, piles had been driven, and the excavation by others was in process." Martins also states that "[w]e had no knowledge of alleged events and damage on an adjacent property that took place before our

arrival at the site." He states that "on or about May 20, 2007, J&A received a letter from Pier's attorney, dated May 17, 2007" and "[u]pon receipt of that letter, it was immediately forwarded to our commercial general liability carrier, the third third party defendant, QBE."

The record includes a copy a letter from the law firm of Gallagher, Walker , Bianco & Plastaras, dated May 17, 2007, advising J&A that "[w]e have been informed that your company was a subcontractor at a construction projects located at 38-40 Declancey Street." The letter states an action was commenced on behalf of the owner of 146 Forsythe Street, "alleging that as a result of ongoing work at the 38-40 Delancey Street project, structural damage was caused to the building at 146 Forsythe Street. . . . Based on the allegations of plaintiff's complaint, the alleged damage may have arisen out of J&A's operations at the construction projects at 38-40 Delancey Street. Enclosed is a copy of the complaint." The letter states that under J&A's "agreement" to perform work as the site, J&A "is required to defend and indemnify the owner, general contractor and Pier Tech for the claim," and "to the extent J&A has insurance coverage which may cover this claim, we request that you immediately forward this letter to said insurance carriers along with the request for defense and indemnity."

The record also includes a copy of a form entitled "Accord General Liability Notice of Occurrence/Claim," dated May 29, 2007, by which J&A informed QBE of the "occurrence." The form lists the date of the occurrence as "12/1/2004," the location of the occurrence as "146 Forsythe Street, NY, NY" and the "description" of the occurrence as: "Exact Details unknown. Insured [J&A Concrete Corp.]" received a letter of representation from Gallagher, Walker, Bianco, et al for physical damages to a building located 146 Forsythe Street, NY NY."

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Under the circumstances presented, J&A provided QBE with notice of the occurrence as soon practicable after it first learned of the potential claim from Pier's attorney in May 2007, and immediately notified QBE, and QBE responded with a reservations of rights letter dated June 4, 2008. The record neither shows or suggests that J&A knew or should have known about the damage to plaintiff's property at any earlier time. It is not disputed that J&A Concrete Corp. did not commence any work at the construction site until February 16, 2005, and by that time, Mr. Lee and his son had already identified the damage to the building and complained to the DOB. Presumably, since J&A was hired to pour the concrete for foundation for the new building, by the time J&A arrived at the site, the prior building was already demolished, the ground was excavated, and the piles had been driven into the ground.

In opposition, QBE submits letters from Mr. Lee to the general contractor, defendant Sun Sun Construction, regarding ongoing issues as to damage to his building. While those letters were written in March, June and September 2005, they do not demonstrate that J&A had or should have had knowledge of those issues at that time. QBE also relies on DOB complaints and violations from 2005, which at best show that the problems with the construction work were ongoing. QBE further submits that on June 12, 2007, a QBE investigator had a telephone conversation with a representative of J&A, who states that he was "aware of the accident" and "[t]here were apparently two foremen on the job." The instant action, however, does not involve an "accident," but an ongoing series of events which took place over a number of months. Finally, QBE's argument that discovery has not been completed is not persuasive, in view of the record before the court.

Based on the foregoing, J&A has established a circumstances providing a reasonable

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excuse for the delay in notifying QBE of the occurrence, based on J&A's lack of knowledge of the damage to plaintiff's property. See Security Mutual Insurance Co. v. Acker-Fitzsimons Corp., supra.

TIMELINESS OF QBE'S DISCLAIMER

J&A also argues that QBE untimely disclaimed coverage, as it acknowledged receipt of the claim in June 2007, but did not disclaim coverage until more than eight months later, in February 2008.

For the purposes of the instant motion, the court will assume that QBE's disclaimer was untimely. However, since this action does not involve a claim for death or bodily injury, the notice of disclaimer provisions set forth in Insurance Law §3410(d) are not applicable, and any unexplained failure on the part of QBE to promptly disclaim on the ground of untimely notification does not automatically estop QBE from relying on such disclaimer. See Topliffe v. U.S. Art Co., Inc., 40 AD3d 967 (2nd Dept 2007); Only Natural, Inc. v. Realm National Insurance Co., 37 AD2d 436 (2nd Dept 2007); Scappatura v. Allstate Insurance Co., 6 AD3d 692 (2nd Dept 2004); Vecchiarelli v. Continental Insurance Co., 277 AD2d 992 (4th Dept 2000); Fairmont Funding Ltd v. Utica Mutual Insurance Co., 264 AD2d 581 (1st Dept 1999). Rather, under the applicable common law principles, an insurer's delay in giving notice of disclaimer, even if unreasonable, will not estop the insurer from disclaiming unless the insured has suffered prejudice from the delay. See Topliffe v. U.S. Art Co., Inc., supra; Only Natural, Inc. v. Realm National Insurance Co., supra; Scappatura v. Allstate Insurance Co., supra; Vecchiarelli v. Continental Insurance Co., supra; Fairmont Funding Ltd v. Utica Mutual Insurance Co., supra. In

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order to show prejudice, the insured must demonstrate reliance and a change of position resulting from the delay. See Chester v. Mutual Life Insurance Co., 290 AD2d 317 (1st Dept 2002). Mere speculation as to prejudice is insufficient to estop an insurer. See Topliffe v. U.S. Art Co. Inc., supra.

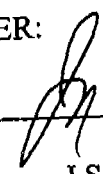
Here, J&A fails to address the need to make the requisite prima facie showing of prejudice resulting from the delay. J&A relies on inapplicable case law involving actions for personal injuries governed by Insurance Law § 3420(d). See First Financial Insurance Co. v. Jetco Contractors Corp., 1 NY3d 64 (2001); Fireman's Fund Insurance Co. of Newark v. Hopkins, 88 NY2d 836 (1996); Hartford Insurance Co. v. County of Nassau, 46 NY2d 1028 (1979); Gregorio v. J.M. Dennis Construction Co. Corp., 21 AD3d 1056 (2nd Dept 2005); Bovis Lend Lease LMB, Inc. v. Royal Surplus Lines Insurance Co., 27 AD3d 84 (1st Dept 2005); Campos v. Sarro, 309 AD2d 888 (2nd Dept 2003); West 16th Street Tenants Corp. v. Public Service Mutual Insurance Co., 290 AD2d 278 (1st Dept), lv app den 98 NY2d 605 (2002). Those cases are not controlling in the instant action since it involves only claims for property damage. See Only Natural, Inc. v. Realm National Insurance Co., supra; Fairmont Funding Ltd v. Utica Mutual Insurance Co., supra. Consequently, under the applicable common law, in the absence of a showing of prejudice, QBE is not estopped from disclaiming coverage based on untimely notice.

Accordingly, it is

ORDERED that the motion by J&A Concrete Corp. and J&A Concrete Pumping Corp. for summary judgment, is granted for the reasons stated above; and it is further

ORDERED, ADJUDGED AND DECLARED that QBE Insurance Corporation is obligated to defend and indemnify J&A Concrete Corp. and J&A Concrete Pumping Corp. in the instant action.

DATED: April 21, 2010

ENTER:


J.S.C.

HON. JOAN A. MADDEN
J.S.C.

UNFILED JUDGMENT
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