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Short Form Order

SUPREME COURT - STATE OF NEW YORK

I.A.S. PART 7 - SUFFOLK COUNTY

PRESENT:

WILLIAM B. REBOLINI
Justice

Holiday Organization, Inc., Willow Creek Development Corp., The Hamlet at Willow Creek, LLC and Sirius America Insurance Company,

Plaintiffs,

-against-

State Farm Fire & Casualty Company, Thomas Kaelber and Kuhn Brothers Construction, Inc. and Liny Homebuilders Corp.,

Defendants.

Index No.: 45065/2008

Motion Sequence No.: 002; MD
Motion Date: 6/21/10
Submitted: 8/4/10

Motion Sequence No.: 003; XMD
Motion Date: 7/7/10
Submitted: 8/4/10

Attorneys/Parties [See Rider Annexed]

Upon the following papers numbered 1 to 37 read on this motion for summary judgment and cross motion for summary judgment and to compel: Notice of Motion and supporting papers, 1 - 23; Notice of Cross Motion and supporting papers, 24 - 29; Replying Affidavits and supporting papers, 31 - 36; Memorandum of Law, 37.

The plaintiffs, Holiday Organization, Inc., Willow Creek Development Corp. and The Hamlet at Willow Creek, LLC (collectively, Holiday) are owners and developers of real property located at 97 Hamlet Drive, Mount Sinai, New York. This is an action in which Holiday seeks a declaratory judgment against the defendant State Farm Fire & Casualty Company (State Farm) requiring it to defend and indemnify Holiday in an underlying action in this Court entitled, *Kaelber v The Holiday Organization* (Supreme Court Suffolk County index number 20181/2006). The plaintiff Sirius America Insurance Company (Sirius) has been defending Holiday in the underlying action pursuant to a liability policy issued to Holiday and in effect at the time of the underlying plaintiff's alleged injury.

The underlying action arises out of a construction accident that allegedly occurred on March 17, 2005, when Thomas Kaelber (Kaelber) was in the course of his employment with the defendant

Liny Homebuilders Corp. (Liny). Prior to March, 2005, Holiday contracted with the defendant Kuhn Brothers Construction, Inc. (Kuhn) to perform carpentry work at its development project at the subject premises. Unbeknownst to Holiday, Kuhn orally contracted with Liny to perform certain work at Holiday's construction project. In November, 2006, Holiday was served with the summons and complaint in the underlying action. The suit did not name Kuhn and described the location of the accident as "real property on County Road 83, Suffolk County." Holiday's development project at 97 Hamlet Drive is located on County Road 83. In addition, the plaintiff in the underlying action named a second, unrelated developer which had a separate project in development on County Road 83.

Holiday asserts that, upon receipt of the underlying summons and complaint, it investigated the matter to determine if the accident happened on its property and what connection, if any, the underlying plaintiff had to its development project. It is claimed that it was not until March 28, 2007 that it became aware that Kuhn had sub-contracted with Liny, the underlying plaintiff's employer, and that it immediately tendered the defense and indemnification in the matter to Kuhn and State Farm. On May 3, 2007, State Farm disclaimed coverage in the matter based on Holiday's alleged failure to give it timely notice of the claim and to provide copies of the underlying action legal papers.

Holiday now moves for summary judgment on the grounds that it is named as an additional insured on a contractors policy issued to Kuhn by State Farm, bearing policy number 92-ES-7985-4, effective March 15, 2005 to March 15, 2006. In support of its motion, Holiday submits, *inter alia*, the pleadings, the pleadings in the underlying action including Kaelber's bill of particulars, a copy of Kuhn's policy with State Farm, affidavits in support and State Farm's disclaimer letters.

Holiday submits the affidavit of its chief financial officer, Joseph Chase, who swears that Holiday was not aware that an accident had occurred before it was served in November, 2006, and that a search of the corporate records and conversations with its employees revealed that no one was aware of who Liny and Kaelber were or their connection to the development project. Chase indicates that the matter was handed over to Sirius which retained an attorney to defend the matter.

In her affidavit, Patricia A. O'Connor, the attorney handling this action for Holiday, swears that she spoke with her client and attempted to determine whether the accident occurred on Holiday property or at the second, unrelated development project. She indicates that she spoke with the attorney for Kaelber, who initially was unable to shed any light on the location of the accident and on the alleged presence of Liny on the Holiday project site. She states that on March 28, 2007 she obtained medical records which revealed that Kaelber worked for a Matt "Safe (sic)" at the time of the accident. She then contacted Holiday's project foreman who indicated that a Matt Saif worked for Kuhn or a sub-contractor of Kuhn. She further states that, because this was the first notice Holiday had of Kuhn's potential connection to the incident, she immediately tendered the defense and indemnification in the matter to State Farm via Kuhn.

The proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issue of fact (see, Alvarez v. Prospect Hospital, 68 NY2d 320 [1986]; Winegrad v. New York Univ. Med. Ctr., 64 NY2d 851 [1985]). If such initial burden is met, the burden then shifts to the party opposing the motion which must produce evidentiary proof in admissible form sufficient to require a trial of the material issues of fact (see, Rebecchi v. Whitmore, 172 AD2d 600 [2nd Dept., 1991]; Roth v. Barreto, 289 AD2d 557 [2nd Dept., 2001]; O'Neill v. Fishkill, 134 AD2d 487 [2nd Dept., 1987]). Furthermore, the parties' competing interests must be viewed "in a light most favorable to the party opposing the motion" (Marine Midland Bank, N.A. v. Dino & Artie's Automatic Transmission Co., 168 AD2d 610 [2nd Dept., 1990]).

A review of the State Farm policy reveals that it contains Endorsement number FE-6232.2 which includes the following relevant language:

> Section II
> General Conditions
>
> The following paragraphs are added to item a. under Duties in the Event of Occurrence, Claim or Suit:
>
> Notice given by or on behalf of you or written notice by or on behalf of any claimant to any of our agents in New York State, which adequately identifies you, will be the same as notice to us.
>
> Failure to give any notice required to be given by this policy within the time prescribed will not invalidate any claim made by the insured or by any other claimant if it is shown not to have been reasonably possible to give such notice within the prescribed time and that notice was given as soon as was reasonably possible.

Where, as here, an insurance policy requires an insured to provide notice of any accidental loss within a reasonable time, what is reasonable is determined in light of all the circumstances (see, Deso v. London & Lancashire Indem. Co. of Am., 3 NY2d 127 [1957]; Paul Developers v. Maryland Cas. Ins. Co., 28 AD3d 443 [2nd Dept., 2006]). The duty to give the insurer notice arises "when, from the information available relative to the accident, the insured could glean a reasonable possibility of the policy's involvement" (Figueroa v. Utica Natl. Ins. Group, 16 AD3d 616 [2nd Dept., 2005], *lv denied* 5 NY3d 709 [2005]; Paramount Ins. Co. v. Rosedale Gardens, 293 AD2d 235 [1st Dept., 2002]). Providing the required notice is a condition precedent to coverage; hence, absent a valid excuse, failure to satisfy the notice requirement vitiates the policy, even if no prejudice is shown (see, Argo Corp. v. Greater N.Y. Mut. Ins. Co., 4 NY3d 332 [2005]; Security Mut. Ins. Co. of N.Y. v Acker-Fitzsimmons Corp., 31 NY2d 436 [1972]). Further, what is reasonable is ordinarily left for determination at trial, and only where there is no excuse for the delay the issue of timeliness of notice to an insurer may be disposed of as a matter of law (see, Power Auth. of State

of N.Y. v. Westinghouse Elec. Corp., 117 AD2d 336 [1st Dept., 1986]; Hartford Acc. & Indem. Co. v. CNA Ins. Companies, 99 AD2d 310 [1st Dept., 1984]).

As to Holiday's motion, the Court finds an issue of fact, sufficient to defeat summary judgment, whether the plaintiff reasonably and diligently investigated the issues regarding coverage in the underlying action and when it was "reasonably possible" to give notice in accordance with the terms of the State Farm policy. The question of whether an excuse is a reasonable one is ordinarily a question of fact (see, Argentina v. Otsego Mut. Fire Ins. Co., 86 NY2d 748 [1995]; Witriol v. Travelers Ins. Group, 251 AD2d 497 [2nd Dept., 1998]).

However, Holiday contends that, even if the notice was late, State Farm failed to disclaim in a timely manner. Insurance Law § 3420(d) requires written notice of a disclaimer to be given "as soon as is reasonably possible" after the insurer learns of the grounds for disclaiming liability (see, First Fin. Ins. Co. v Jetco Contr. Corp., 1 NY3d 64 [2003]; Lancer Ins. Co. v T.F.D. Bus Co., 18 AD3d 445 [2d Dept 2005]). The insurer bears the burden of justifying any delay (see, First Fin. Ins. Co. v Jetco Contr. Corp., 1 NY3d 64 [2003]). An investigation into issues affecting an insurer's decision whether to disclaim coverage obviously may excuse delay in notifying the policyholder of a disclaimer (see, First Fin. Ins. Co. v Jetco Contr. Corp., 1 NY3d 64 [2003]). An insurer is not required to disclaim on timeliness grounds before conducting a prompt, reasonable investigation into other possible grounds for disclaimer; in fact, a "reasonable investigation is preferable to piecemeal disclaimers" (DiGuglielmo v Travelers Prop. Cas. Co., 6 AD3d 344, 346 [1st Dept 2004] *quoting* 2540 Assoc. v Assicurazioni Generali, 271 AD2d 282 [1st Dept 2000]; see, Ace Packing Co. v Campbell Solberg Assoc., 41 AD3d 12 [1st Dept 2007]; Public Service Mutual Ins. Co. v Harlen Housing Assoc., 7 AD3d 421 [1st Dept 2004]; Farmbrew Realty Corp. v Tower Ins. Co., 289 AD2d 284 [2d Dept 2001]).

In this case, Holiday relies upon its letter to Kuhn dated March 28, 2007 as proof of notice to State Farm of the underlying occurrence. It has not submitted any evidence regarding the documents included in its letter. In addition, despite the claims of its attorney that she checked to insure that Kuhn forwarded the letter, there is no evidence as to when Kuhn contacted State Farm and what documentation was included with that communication. Furthermore, State Farm asserts that it did not receive documentation indicating that it had grounds to disclaim liability until April 18, 2007 and that its disclaimer was issued only 21 days later, on May 3, 2007. Under the circumstances, the Court cannot find that the brief delay in order to conduct an investigation was unreasonable as a matter of law (see, Farmbrew Realty Corp. v. Tower Ins. Co., 289 AD2d 284 [2nd Dept., 2001]; Structure Tone v. Burgess Steel Products, 249 AD2d 144 [1st Dept., 1998]).

The issues regarding whether State Farm has any duty to defend and indemnify Holiday, and whether its disclaimer was reasonably timely remain unresolved. In the absence of a finding that State Farm is obligated to defend and indemnify Holiday, the Court finds that the controversy regarding whether State Farm or Sirius has primary or excess coverage in the underlying action is not ripe. A "justiciable controversy" must involve a present, rather than hypothetical, contingent or remote, prejudice to the plaintiff (see, American Ins. Assn. v. Chu, 64 NY2d 379 [1985], *cert denied*

474 US 803). " The dispute must be real, definite, substantial, and sufficiently matured so as to be ripe for judicial determination" (Ashley Bldrs. Corp. v. Town of Brookhaven, 39 AD3d 442 [2nd Dept., 2007]; Waterways Dev. Corp. v. LaValle, 28 AD3d 539 [2nd Dept., 2006]). The Court declines to issue a contingent order declaring that State Farm is obligated to reimburse Sirius for its defense costs based upon a future judicial determination of State Farm's obligations in the underlying action. Accordingly, the plaintiffs' motion for summary judgment is denied.

State Farm cross-moves for summary judgment dismissing the complaint and declaring that it is not obligated to defend or indemnify the plaintiffs in the underlying action or, alternatively, for an order compelling the plaintiffs to respond to its interrogatories. By letter dated May 3, 2007 State Farm disclaimed coverage in the underlying action due to Holiday's alleged failure to 1) promptly notify it of the incident that resulted in the claim, and 2) immediately forward every notice, demand, summons or other process. Regarding the issue of notice, the Court finds that there are issues of fact, as set forth above, which preclude the grant of summary judgment herein. State Farms asserts that Holiday's tender letter to Kuhn on March 28, 2007 was not proper notice and, thus, it never received notice of Holiday's claim. However, State Farm does not dispute that Holiday sent notice to Kuhn on that date and it has not submitted any evidence as to when Kuhn transmitted that tender letter to it and what, if any, additional information or documentation was included therein. In addition, the Court finds that State Farm has failed to establish its entitlement to summary judgment on the issue of Holiday's failure to give notice of suit and to forward legal documents to it.

A review of the State Farm policy reveals that it contains Contractors Policy number FP-6100 which includes the following relevant language:

> Section II
> General Conditions
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> 3. Duties in the Event of Occurrence, Claim or Suit.
> c. You and any other involved insured must:
> (1) Immediately send us copies of any demands, notices, summonses, or legal papers received in connection with the claim or suit;

An insured's duty to give notice of suit and to forward suit papers is governed by the same rules which apply to its duty to give prompt notice of claim. This includes the provision that failure to give any notice as required pursuant to the policy within the time prescribed therein does not invalidate any claim if such notice is given as soon as reasonably possible (see, Ins. Law §3420[a][4]; Holubetz v. National Fire Ins. Co., 13 AD2d 228 [3rd Dept., 1961]; Lauritano v. American Fidelity Fire Ins. Co., 3 AD2d 564 [1st Dept., 1957], *affd,* 4 NY2d 1028 [1958]). Here, the record reveals that Holiday has not forwarded the required notice of suit but it is silent with regard to whether Kuhn delivered the summons and complaint in the underlying action to State Farm. If Kuhn's interests were not adverse to those of Holiday at the time the summons and

complaint were forwarded said notice would suffice to defeat State Farm's affirmative defense of late notice (see, Ambrosio v. Newburgh Enlarged City School Dist., 5 AD3d 410 [2nd Dept., 2004]; New York Tel. Co. v. Travelers Cas. & Sur. Co. of Am., 280 AD2d 268 [1st Dept., 2001]). In addition, there is an issue of fact as to whether the underlying plaintiff provided notice of suit to State Farm. Pursuant to the Insurance Law, an injured person or any other claimant may provide sufficient notice to an insurer (see, Ins. Law §3420[a][3]). State Farm has not established its entitlement to summary judgment herein and the failure to make such *prima facie* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (see, Alvarez v. Prospect Hosp., 68 NY2d 320 [1986]; Winegrad v. New York Univ. Med. Ctr., 64 NY2d 851 [1985]).

The branch of State Farm's cross motion which is for an order compelling the plaintiffs to provide responses to its first set of interrogatories is denied. 22 NYCRR §202.7[c] of the Uniform Rules for the Trial Courts, states that a motion relating to disclosure must be supported by an affirmation that counsel "has conferred with counsel for the opposing party in a good faith effort to resolve the issues raised by the motion." In addition, the affirmation of good-faith effort "shall indicate the time, place, and nature of the consultation and the issues discussed and any resolutions, or shall indicate good cause why no such conferral with counsel for opposing parties was held" (Uniform Rules for the Trial Courts [22 NYCRR] §202.7 [c]). Here, State Farm has not supported its cross motion with an affirmation of good faith. Therefore, summary denial of this branch of State Farm's motion is required (see, Barnes v. NYNEX, Inc., 274 AD2d 368 [2nd Dept., 2000]; Matos v. Mira Realty Mgt. Corp., 240 AD2d 214 [1st Dept., 1997]; Vasquez v. G.A.P.L.W. Realty, 236 AD2d 311 [1st Dept., 1997]).

Based on the foregoing, it is

ORDERED that this motion by the plaintiffs for an order pursuant to CPLR §3212 granting summary judgment declaring that 1) the defendant State Farm Fire & Casualty Company is obligated to defend and indemnify them in a certain underlying action, and 2) the defendant State Farm Fire & Casualty Company is obligated to reimburse the plaintiff Sirius America Insurance Company for all defense costs and expenses in defending the underlying action, is denied; and it is further

ORDERED that this cross motion by defendant State Farm Fire & Casualty Company for an order granting summary judgment dismissing the complaint and declaring that it is not obligated to defend or indemnify the plaintiffs in the underlying action or, alternatively, for an order compelling the plaintiffs to respond to its interrogatories, is denied.

Dated: September 10, 2010

William B. Rebolini

HON. WILLIAM B. REBOLINI, J.S.C.

_____ **FINAL DISPOSITION** ___X___ **NON-FINAL DISPOSITION**

RIDER

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Clerk of the Court