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SCANNED ON 10/1/2010

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

PRESENT: [illegible] PART 8

Index Number : 107180/2008
NATARRY MANAGEMENT
VS
QBE SPECIALTY INSURANCE
Sequence Number : 002
SUMMARY JUDGMENT

INDEX NO. 107180/08
MOTION DATE 9/2/10
MOTION SEQ. NO. 002
MOTION CAL. NO. _____

The following papers, numbered 1 to 52 were read on this motion to/for summary judgment

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...Memo of Law	1-35
Answering Affidavits — Exhibits	36-44
Replying Affidavits	45-52

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

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 141B).

[illegible]

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

Dated: September 29, 2010

[illegible] J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☒ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/JUDG. ☐ SETTLE ORDER /JUDG.

SUPREME COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK: PART 8

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NATARRY MANAGEMENT CORP., ALDO PROPERTIES III, LLC and 100 FIRST AVENUE ALDO ASSOCIATES LLC,

Plaintiff,

-against-

QBE SPECIALTY INSURANCE, LTD., ANTHONI NIWELT and JOLANDA NIWELT,

Defendant.

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DECISION, ORDER & JUDGMENT
Index No.: 107180/08
Motion Seq.: 002 & 003

JOAN M. KENNEY, J.:

Recitation, as required by CPLR 2219(a), of the papers considered in review of these motions for summary judgment.

Papers	**Numbered**
Notice of Motion (002), Affidavits, Exhibits and Memo of Law	1-35
Opposition Papers, Affirmation with Exhibits	36-44
Reply Affirmation with Exhibits	45-52
Notice of Motion (003) with Affirmation and Exhibits	53-61
Affirmation in Opposition	62
Reply Affirmation	63

Motion sequence numbers 002 and 003 are consolidated for disposition.

In motion sequence number 002, defendant, QBE Specialty Insurance, Ltd. (QBE) moves, pursuant to CPLR 3212, for summary judgment as against all plaintiffs.

In motion sequence number 003, plaintiffs move, pursuant to CPLR 3212, for summary judgment as against QBE, seeking a declaration that QBE is obligated to defend and indemnify them in an underlying personal injury action, plus reimburse reasonable attorney's fees.

BACKGROUND

This is an action seeking a declaration that QBE is obligated to defend and indemnify plaintiffs in connection with an action for the recovery of damages for bodily injury brought against the City of New York and plaintiffs in this action by Anthoni Niwelt (Anthoni) and Jolanda Niwelt (together, the Niwelts) in Supreme Court, New York County, under index number 107070/2006. The underlying personal injury action was settled on June 16, 2009, for $90,000.00.

QBE issued plaintiff Natarry Management Corp. (Natarry) and "Delorenzo Properties et al." a general commercial liability policy for bodily injury caused by an occurrence taking place in the coverage territory. Plaintiff 100 First Avenue Aldo Associates LLC (100 First Avenue) was not a named insured under the policy.

According to the policy provisions, the property located at 100 First Avenue, New York, New York, was listed as the covered premises. Motion, Ex. 1. However, according to an endorsement to the policy, plaintiff Aldo Properties III, LLC (Aldo III) and non-party BMC Management, Inc. were added as insureds under the policy. Motion, Ex. 2.

According to the allegations of the complaint in the underlying personal injury action, Anthoni, a passerby, sustained bodily injuries when he tripped and fell on an allegedly defective sidewalk in front of the covered premises on May 7, 2005. At the

time of the occurrence, Aldo III owned a 25% interest in the covered premises, and plaintiff 100 First Avenue owned a 75% interest in the covered premises, and the premises were managed by either BMC Management or BMO Management. The premises consists of eight residential units, plus two ground-floor commercial units. Motion, Ex. 4.

Pursuant to the lease between the landlord and the commercial tenant, the responsibility for the maintenance of the sidewalk was shifted from the landlord to the commercial tenant. Article 61 of that lease states:

> "Tenant shall not use the sidewwalk for any retail purpose of serving of food or otherwise conduct business thereon and shall not permit any window service arrangement. Tenant shall be fully responsible for care and maintenance of sidewalk."

Motion, Ex. 5.

That lease was executed on October 23, 1991, between New Apple Properties, Inc., as lessor, and Zelzislaw Czerny as tenant, and was to continue for 15 years. The premises were acquired by 100 First Avenue on June 24, 1997. Motion, Ex. 4.

In opposition to this motion, plaintiffs have submitted a judgment of possession based on a non-payment proceeding issued against Zelzislaw Czerny, entered January 11, 2005, four months prior to the date of the occurrence. Opp., Ex. F.

On July 8, 2005, the Niwelts' attorney sent correspondence to Aldo III's registered agent apprising it of the occurrence.

Motion, Ex. 6. On August 17, 2005, the Niwelt's counsel sent a second letter to Aldo III's registered agent. Motion, Ex. 7. The address appearing on these letters was "417 Fifth Avenue"; the correct address for the registered agent is: 404 Fifth Avenue. A third letter was sent on August 30, 2005, again to the incorrect address. Motion, Ex. 8.

On December 21, 2005, the Niwelts' counsel sent a fourth letter to Aldo III's registered agent, again sent to 417 Fifth Avenue. Motion, Ex. 9.

On February 16, 2006, Harry Hirsch (Hirsch), the managing agent for the covered premises, sent a letter to Natarry's insurance broker on 100 First Avenue letterhead, enclosing a copy of the four claim letters, and requesting the broker to make sure that "our interests are protected." Motion, Ex. 10.

On February 23, 2006, QBE's wholesale broker, Kerwick & Curran (K&C), received notice of Anthoni's incident from Natarry's insurance broker. Motion, Ex. 11. QBE maintains that this was the first time that it was made aware of the occurrence.

On February 23, 2006, K&C sent a copy of the notice of claim form and claim letters to Rockville Risk Management Associates (Rockville), QBE's claims administrator. Motion, Ex. 12.

After conducting an investigation, on March 28, 2006, Rockville denied coverage to Natarry based on a late notice of claim. Motion, Ex. 13. This disclaimer was disputed by Natarry's

insurance broker on April 10, 2006, who stated that Natarry was in no way affiliated with Aldo III's registered agent, that the correspondence sent by the Niwelts' counsel was incorrectly addressed, and that the first time that Natarry received knowledge of the incident was in February, 2006. Motion, Ex. 14. Thereafter, on May 4, 2006, QBE wrote back reiterating its declination of coverage. Motion, Ex. 15.

The Niwelts' counsel stated that the first two letters that they sent to Aldo III's registered agent were returned to them by the post office for having an incorrect address, that they never received a response to the third letter that they sent, and they made no mention of the fourth letter. Motion, Ex. 16.

The underlying personal injury action was commenced on or about June 8, 2006, and Hirsch sent a copy of the pleadings with a cover letter to Natarry's insurance broker stating that Natarry never managed the premises. Motion, Ex. 18.

The attorney for plaintiffs in the instant action notified QBE of the underlying personal injury action on July 8, 2006, demanding defense and indemnification. Motion, Ex. 19. QBE responded on July 28, 2006, disclaiming coverage, and enclosed a copy of its notice of disclaimer. Motion, Exs. 20 & 21. The instant declaratory action was commenced on or about May 20, 2008. Motion, Ex. 24.

On June 16, 2008, a settlement agreement was reached in the

underlying personal injury action, pursuant to which the Niwelts, in consideration of $90,000.00, issued a general release to Aldo III, 100 First Avenue and Natarry. The $90,000.00 was paid to the Niwelts by Aldo 57 Management, LLC, an entity that is not a named party in the underlying action and, allegedly, has no affiliation with plaintiffs and is not a named insured under the policy that is the subject of this litigation.

Hirsch, 100 First Avenue's managing agent, was deposed on November 6, 2009. In his examination before trial (EBT), Hirsch stated that BMC Management and/or BMO Management managed 100 First Avenue's property for several years. Hirsch EBT, at 11-13. Hirsch further stated that he uses Natarry for payroll purposes, as a payroll management company. *Id.* at 13. Hirsch said that he is the sole shareholder and officer of Natarry and BMO, but only manages property for 100 First Avenue and Aldo III, pursuant to an oral contract. *Id.* at 18-20. In addition, Hirsch averred that there were commercial tenants in the premises on the date of the occurrence (*id.* at 26-28), and that the first time that he became aware of the accident was in February of 2006, when he received the letters discussed above, at which time he was not an agent for 100 First Avenue or Aldo III. *Id.* at 40-41.

Steven Schwartz, an accountant for 100 First Avenue and Aldo III was deposed on behalf of Aldo III, and said that BMC Management had the responsibility for taking care of anything inside or

outside of the premises. Schwartz EBT, at 16.

QBE contends that it is not obligated to provide defense and indemnification coverage to plaintiffs because of a late notice of claim. QBE also asserts that 100 First Avenue is not entitled to coverage because is it neither a named insured nor an additional insured under the policy, and that plaintiffs did not suffer any damages since, pursuant to the lease, the commercial tenants were responsible for maintaining the sidewalk. Moreover, according to QBE, an entity other than plaintiffs actually paid the Niwelts' settlement amount.

In opposition, plaintiffs do not dispute the facts as presented above, but argue that QBE did receive a timely notice of claim as soon as it was practicably possible to do so.

In plaintiffs' motion, motion sequence number 003, plaintiffs assert the same arguments appearing in their opposition to QBE's motion, maintaining that they did provide a timely notice of claim, that QBE's disclaimer of coverage for defense and indemnification costs in the underlying personal injury action was untimely and unreasonable, that 100 First Avenue, as a part-owner of the premises, was inadvertently indicated on the policy as Delorenzo Properties, and that they did suffer actual damages because the entity that issued the check to the Niwelts handles disbursements for all of the plaintiffs. Moreover, plaintiffs assert that, at the time of the accident, there were no commercial tenants on the

premises. QBE's opposition parrots the arguments of its main motion.

DISCUSSION

"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 issues of fact from the case [internal quotation marks and citation omitted]." *Santiago v Filstein*, 35 AD3d 184, 185-186 (1st Dept 2006). The burden then shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact." *Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 (1st Dept 2006); *see Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied. *See Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 (1978).

"[I]t is well established that the party claiming insurance coverage bears the burden of proving entitlement, and, as we have recently held, a party that is not named an insured or an additional insured on the face of the policy is not entitled to coverage." *Tribeca Broadway Associates, LLC v Mount Vernon Fire Insurance Co.*, 5 AD3d 198, 200 (1st Dept 2004). Since 100 First Avenue was not named as an insured or as an additional insured on the face of the policy, at first blush it would appear that it is not entitled to coverage. *Sixty Sutton Corp. v Illinois Union*

Insurance Co., 34 AD3d 386 (1st Dept 2006); *Moleon v Kreisler Borg Florman General Construction Company, Inc.*, 304 AD2d 337 (1st Dept 2003).

However, plaintiffs have provided the affidavits of Hirsch and Schwartz, each of whom avers that there is no entity entitled Delorenzo Properties, that the entity that was supposed to be named on the insurance policy was 100 First Avenue, and that the error was made by QBE.

"The court's function on a motion for summary judgment is merely to determine if any triable issues exist, not to determine the merits of any such issues, or to assess credibility [internal citations omitted]." *Meridian Management Corp. v Cristi Cleaning Service Corp.*, 70 AD3d 508, 510-511 (1st Dept 2010). In the case at bar, the face of the insurance policy contradicts the affidavits of Hirsch and Schwartz, raising issues of fact and credibility which the court cannot determine on summary judgment motions. Therefore, the court cannot grant either motion for summary judgment as it relates to the rights of 100 First Avenue. Furthermore, as discussed below, even if 100 First Avenue were deemed to be an insured or an additional insured under the policy, they would not be entitled to coverage because of an untimely notice of claim.

QBE's motion for summary judgment with respect to Aldo III is granted, and plaintiffs' motion for summary judgment as it relates

to Aldo III is denied.

> "We have long held, and recently reaffirmed, that an insurer that does not receive timely notice in accordance with a policy provision may disclaim coverage, whether it is prejudiced by the delay or not. While this rule produces harsh results in some cases, it also, by encouraging prompt notice, enables insurers to investigate claims promptly and thus to deter or detect claims that are ill-founded or fraudulent [citations omitted]."

Briggs Avenue LLC v Insurance Corporation of Hannover, 11 NY3d 377, 381-382 (2008).

The accident occurred on May 5, 2005, and, without addressing the merits of the argument, plaintiffs assert that QBE received notice of the claim on February 23, 2006, eight and a half months after the occurrence. Plaintiffs' eight-and-half- month delay in notifying QBE of the occurrence constitutes a late notice of claim as a matter of law. *Pandora Industries, Inc. v St. Paul Surplus Lines Insurance Co.*, 188 AD2d 277 (1st Dept 1992)(31-day delay invalidated coverage); *Republic New York Corp. v American Home Assurance Co.*, 125 AD2d 247 (1st Dept 1986)(45-day delay invalidated coverage); *Power Authority of State of New York v Westinghouse Electric Corp.*, 117 AD2d 336 (1st Dept 1986)(53-day delay invalidated coverage); *Hartford Accident & Indemnity Co. v CNA Insurance Co.*, 99 AD2d 310 (1st Dept 1984)(51-, 22- and 10-day delays found to be unreasonably late as a matter of law).

QBE rightly asserts that a delay in alerting it to a claim "as soon as practicable," as required under the policy, constitutes a

failure of a condition precedent to QBE's obligations, and thereby, generally, would vitiate the contract of insurance. *Briggs Avenue LLC v Insurance Corporation of Hannover*, 11 NY3d 377 *supra*; *Argo Corporation v Greater New York Mutual Insurance Company*, 4 NY3d 332 (2005). In the instant matter, QBE was not notified of the occurrence until almost eight and a half months after the accident took place. This delay in notification constitutes an untimely notice.

However, pursuant to Insurance Law § 3420 (d) (2),

> "If under a liability policy issued or delivered in this state, an insurer shall disclaim liability or deny coverage for death or bodily injury arising out of a motor vehicle accident or any other type of accident occurring within this state, it shall give written notice as soon as is reasonably possible of such disclaimer of liability or denial of coverage to the insured and the insured person or any other claimant.

As stated by the Court in *First Financial Insurance Company v Jetco Contracting Corp.* (1 NY3d 64, 68-69 [2003]),

> "timeliness of an insurer's disclaimer is measured from the point in time when the insurer first learns of the grounds for disclaimer of liability or denial of coverage. Moreover, an insurer's explanation is insufficient as a matter of law where the basis for denying coverage was or should have been readily apparent before the onset of the delay [internal quotation marks and citations omitted]."

After receiving the late notice on February 23, 2006, from K&C, QBE, through Rockville, investigated the claim, and on March 23, 2006, disclaimed coverage based on a late notice of claim. Therefore, the issue is raised as to whether a delay of 33 days in

disclaiming coverage vitiates the late notice of claim.

In *New York Central Mutual Fire Ins. Co. v Hildreth* (40 AD3d 602 [2d Dept 2007]), a delay of 48 days in disclaiming coverage based on a late notice of claim, which was evident on the face of the notice of claim, was held to be unreasonable as a matter of law. *Matter of Firemen's Fund Insurance Company of Newark v Hopkins*, 88 NY2d 836 (1996) (unexplained delay of two months is unreasonable as a matter of law); *2833 Third Avenue Realty Associates v Marcus*, 12 AD3d 329 (1st Dept 2004) (37 day delay is unreasonable as a matter of law); *New York City Housing Authority v Underwriters at Lloyd's, London*, 61 AD3d 726 (2d Dept 2009)(three-month delay unreasonable).

Courts have consistently held that an insurer's delay in disclaiming coverage precludes it from asserting any defense, including a late notice of claim. *Matter of Firemen's Fund Insurance Company of Newark v Hopkins*, 88 NY2d 836, *supra*; *New York City Housing Authority v Underwriters at Lloyd's, London*, 61 AD3d 726, *supra*; *Quest Builders Group, Inc. v Deco Interior Construction, Inc.*, 56 AD3d 744 (2d Dept 2008). Therefore, QBE's assertion that it does not have to defend or indemnify plaintiffs because of plaintiffs' late notice of claim is negated by its own unreasonably late disclaimer. *See Estee Lauder Inc. v OneBeacon Insurance Group, LLC*, 62 AD3d 33, 35 (1st Dept 2009).

However, the question remains as to which plaintiff provided

QBE with the notice of claim.

QBE maintains that only Natarry notified it of the occurrence when Hirsch, Natarry's admitted agent, wrote to K&C. According to the evidence presented, Hirsch, as managing agent for the premises, sent copies of the claim letters that he received in February of 2006 to Natarry's insurance broker, who then forwarded the correspondence on to QBE's claims administrator. According to QBE, the first time Aldo III (and, arguably, 100 First Avenue) notified it of the claim was on July 8, 2006, one month after the underlying personal injury action was filed and 13 months after the accident itself, and QBE disclaimed coverage based on a late notice of claim on July 28, 2008, 20 days later, which is not an untimely disclaimer as a matter of law.

It is well-settled that an insured is obligated to give timely notice of a claim in accordance with the provisions of the insurance policy, and that a notice of claim filed by one insured will not be imputed to any other insureds under the same policy, nor will it discharge the insured's notification responsibilities. *1700 Broadway Co. v Greater New York Mutual Insurance Company*, 54 AD3d 593 (1st Dept 2008); *Travelers Insurance Company v Volmar Construction Company, Inc.*, 300 AD2d 40 (1st Dept 2002).

Based on the facts presented, the court concludes that Aldo III, and 100 First Avenue, if it were determined that 100 First Avenue was an insured or an additional insured under the policy,

are not entitled to defense or indemnification from QBE because of their late notice of claim. QBE does not dispute that it received a notice of claim from Natarry on February 23, 2006.

In opposition, plaintiffs contend that, because of interlocking ownership and management, Hirsch's notification should be deemed sufficient for all three plaintiffs: Natarry, Aldo III and 100 First Avenue. The court disagrees.

The complaint specifies that each plaintiff is a separate and distinct corporate entity. Although Hirsch has provided an affidavit in support of the opposition in which he claims that he is an agent for Aldo III, this affidavit contradicts his deposition testimony, and is insufficient to create a triable issue of fact. *Blackwell v Fraser,* 13 AD3d 157 (1st Dept 2004); *Rodriguez v New York City Housing Authority,* 304 AD2d 468 (1st Dept 2003). In addition, the affirmation from plaintiffs' attorney averring to the same argument is also insufficient to defeat the summary judgment motion, since the affidavit is not provided from an individual with personal knowledge of the facts. *Warrington v Ryder Truck Rental, Inc.*, 35 AD3d 455 (2d Dept 2006). Therefore, there is no evidence in legally admissible form to allow the court to conclude that Hirsch, or Natarry, is an agent legally capable of acting for the other corporate entities with respect to receiving service of process or providing notice of claims to insurers. Consequently, this argument must fail.

The last issue to be addressed by the court is whether Natarry has suffered any actual damages.

According to the commercial lease provisions, the commercial tenant was responsible for maintaining the sidewalk in front of the premises, not Natarry. QBE has provided a commercial lease that indicates that a commercial tenant was in possession of the commercial space on the date of the occurrence, and Hirsch, at his deposition, stated that he believed that there was a commercial tenant on the property on the date of the accident. In addition, QBE has included a copy of the check that was used to pay the Niwelts, pursuant to the stipulation of settlement, which was issued by a company other than plaintiffs.

In opposition, plaintiffs have provided a court order granting plaintiffs possession of the commercial leasehold, based on a non-payment proceeding, filed several months before the day of the accident. Further, plaintiffs assert that the check issued to the Niwelts was issued by a company that they use for handling disbursements. However, since the court action against the commercial tenant was a non-payment proceeding, any eviction could have been stopped by the tenant paying the arrears prior to the marshal evicting it, and no evidence of actual eviction has been included in plaintiffs' papers. Nor have plaintiffs provided any evidentiary support that the check issued to the Niwelts actually came from their funds.

The conflicting evidence raises triable issues of fact as to whether plaintiffs are either legally responsible for the Niwelts' claims or whether they did, in fact, discharge such claims. Therefore, both QBE's and plaintiffs' motions must be denied with respect to Natarry. Based on the foregoing, it is hereby

ORDERED that QBE Specialty Insurance, Ltd.'s motion for summary judgment is granted as against Aldo Properties III, LLC and 100 First Avenue Aldo Associates LLC; and it is further

ADJUDGED and DECLARED that QBE Specialty Insurance, Ltd. has no duty to defend or indemnify Aldo Properties III, Ltd. or 100 First Avenue Aldo Associates LLC in the underlying personal injury action entitled *Anthoni Niwelt and Jolanda Niwelt v City of New York, Aldo Properties III, LLC, 100 First Avenue Aldo Properties LLC and Natarry Management Corp.*, index number 107970/06, filed in the Supreme Court, New York County; and it is further

ORDERED that QBE Specialty Insurance, Ltd.'s motion for summary judgment as against Natarry Management Corp. is denied; and it is further

ORDERED that plaintiffs' motion for summary judgment is denied.

Dated: September 28, 2010

ENTER:

Joan M. Kenney, J.S.C.