Sumner Bldrs. Corp. v Rutgers Cas. Ins. Co.
2010 NY Slip Op 32756(U)
September 30, 2010
Sup Ct, NY County
Docket Number: 602730/2008
Judge: Paul G. Feinman
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SCANNED ON 10/5/2010
[* 1]

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

PRESENT: HON. PAUL G. FEINMAN PART 12

Index Number : 602730/2008

SUMNER BUILDERS CORP.

VS

RUTGERS CASUALTY INS. CO.

Sequence Number : 001

SUMMARY JUDGMENT

INDEX NO. 602730/08E

MOTION DATE

MOTION SEQ. NO. 001

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

MOTION AND CROSS MOTION(S) ARE DECIDED IN ACCORDANCE WITH ANNEXED DECISION AND ORDER.

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 E-File certificate requesting Entry of Judgment with a copy of the order and/or judgment attached.

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

Dated: September 30, 2010

Paul G. Feinman, J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 12

---X

SUMNER BUILDERS CORPORATION, P&C BUILDING, INC., and PREMIER DRYWALL, INC.,
Plaintiffs,

Index Number 602730/2008E
Mot. Seq. No. 001

against

RUTGERS CASUALTY INSURANCE COMPANY,
Defendant.

DECISION AND ORDER

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Papers considered in review of this motion and cross motion seeking summary judgment:

Papers	Efiling Document Number[1]
Notice of Motion and Affidavits Annexed	2, 4, 5, 6, 7
Exhibits[2]	7-1
Notice of Cross Motion, Affidavits, Exhibits	8
Affidavit & Affirmation in Opp. & in Support	10, 11
Memorandum of Law in Support	9
Replying Affirmation, Exhibits	12
Sur-Reply	13
Sur-Reply	14
Sur-Reply	15

PAUL G. FEINMAN, J.:

The motion and cross motion are consolidated for purposes of decision.

Plaintiffs move pursuant to CPLR 3212 for summary judgment and a declaration that

[1]References to document numbers throughout this decision refer to the assigned number in the Supreme Court efiling system.

[2]This document, which consists of Exhibits A - V to the Notice of Motion, was not scanned or uploaded into the NYSCEF. Counsel for plaintiffs is directed to upload these exhibits to create a full electronic record with the County Clerk.

defendant insurance company be compelled to defend and indemnify them in an underlying action commenced in Supreme Court, Richmond County.[3] Defendant cross-moves for summary judgment and dismissal of the complaint in its entirety or, in the alternative, that both motions be denied and plaintiffs directed to comply with outstanding discovery demands. For the reasons which follow, the motion is granted in part and otherwise denied, and the cross motion is denied.

Background

This action seeks a declaration that defendant Rutgers Casualty Insurance Company, whose insured is plaintiff Premier Drywall, Inc., must defend and indemnify it and the other plaintiffs in an underlying personal injury action. The underlying claim was brought by non-party Jerry Della Ragione, who was injured on April 9, 2007, while at a two-family home under construction on Staten Island, New York (Mot. Ex. A [Complaint] ¶¶ 12-13). Della Ragione commenced a personal injury action in November 2007 in Supreme Court, Richmond County against Sumner Builders, the owner of the two-family home, P&C Building, the contractor; and Premier Drywall, the subcontractor (Mot. Ex. N). Della Ragione's complaint alleges that he was injured during the course of his employment at a construction site owned and operated by plaintiffs in this action. He was injured when the stairs in the house came away from the wall as he started to walk down them, causing him to fall (Mot. Ex. I [Della Ragione's EBT p. 33-34]). His verified complaint claims violations of Labor Law sections 200, 240, and 241 (6).

Plaintiffs Sumner Builders Corporation and P&C Building, Inc., are both corporations

[3]The underlying action is entitled *Jerry Della Ragione and Joanne Della Ragione v Sumner Builders Corp., P&C Building, Inc., and Premier Drywall, Inc.*, Index No. 104520/2007 (Sup. Ct., Richmond County).

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owned by Rudolph Pillarella, with Sumner Builders owning the Staten Island property and P&C Building acting as general contractor under a written agreement (Mot. Ex. C. [R. Pillarella EBT 15, 21, 25, 27]). In March 20, 2007, the two plaintiffs entered into an agreement, partially written, with co-plaintiff Premier Drywall, Inc., whose president is Craig Carter, to perform sheetrocking (Mot. Ex. A [Complaint] ¶ 8). The written portion of that agreement pertained to insurance and indemnification (Mot. Ex. D). Premier Drywall agreed to purchase commercial general liability insurance and an umbrella liability policy naming Sumner Builders and P&C Building as additional insureds on a primary basis, and to provide certificates of insurance to Sumner Builders (Mot. Ex. D [Contract § 2.1]). Premier Drywall also agreed to indemnify and hold harmless Sumner Builders and P&C Building to the fullest extent permitted by law, from claims including attorney's fees arising out of or resulting from performance of its work.

Premier Drywall had previously procured a general liability policy from defendant Rutgers Casualty Insurance Company, and this policy was in effect from May 30, 2006 to May 30, 2007 (Mot. Ex. A. [Complaint ¶¶ 9, 10]). According to the complaint, Sumner Builders and P&C Building were added as additional insureds under the policy (Mot Ex. A [Complaint ¶ 11]). No documentary evidence is provided to establish this claim.

As concerns the underlying personal injury claim, Rudolph Pillarella testified that he himself built the stairs and installed them (Mot. Ex. C [R. Pillarella EBT 40). Carter, testifying for Premier Drywall, testified that the stairs had to be temporarily removed to put sheetrock behind them, and he then reinstalled them in the same manner as they were originally installed (Mot. Ex. E [Carter EBT 28-29, 32]). According to the deposition testimony of another witness, the stairs were apparently nailed into the sheetrock, which proved not strong enough to hold them

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(Mot. Ex. H [P. Romeo EBT 22-23]).

Defendant Rutgers Casualty was notified of the occurrence by letter dated May 22, 2007, from Mt. Hawley Insurance Co., the general liability insurer of P&C Building (Mot. Ex. J). The notice included a copy of the contract between "Sumner Builders (aka P&C Building Corp.)" and Premier Drywall (Mot. Ex. F). The Mt. Hawley letter indicated that the matter concerned Rutgers' insured, Premier Drywall, that the injured party was named "Jerry Romeo," the date of loss was April 9, 2007, provided the address of the Staten Island property, and set forth a description of the findings of Mt. Hawley's investigation which were that Rutgers' insured had removed a staircase to sheetrock behind it, failed to reattach it securely, and when "Romeo" was on the staircase, it detached from the wall and caused him to fall (Mot. Ex. J). It demanded that Rutgers investigate, defend, and indemnify P&C Building and all additional insureds (*Id.*).

By letter dated June 6, 2007, William J. Plucinski of Rutgers Casualty, acknowledged receipt of Mt. Hawley's letter but "respectfully den[ied]" the request "at this time" to defend and indemnify P&C Building. (Mot. Ex. K; Cross Mot. Ex. Q [Doc. 8: 556]). Plucinski's letter indicated that the demand to indemnify and defend "is at best premature," as there is "no evidence . . .to suggest that work being performed by [Premier Drywall], caused, or contributed, to the happening of this accident." It further stated that the removal of the staircase in order to sheetrock "is simply not supported by any evidence," but added that any evidence that the work by Premier Drywall caused or contributed to the accident should be forwarded to Rutgers. It concluded with a request that Rutgers be informed of "what Mr. Romeo was doing on the job site. Was he the home owner, the employee, etc...." (*Id.*).

Also on June 6, 2007, Plucinski wrote on behalf of Rutgers to Premier Drywall,

indicating that Rutgers acknowledged "receipt of a First Notice of Occurrence/Claim form submitted on [Premier Drywall's] behalf" concerning the April 9, 2007, claim by "Jerry Romeo." (Cross Mot. Ex. Q [Doc. 8: 557]).[4] Plucinski's letter asked Premier Drywall to complete an attached accident report, and include the "reason the claimant, Jerry Romeo, was at the job site." (*Id.*). There is no copy of a completed accident report by Premier Drywall submitted with the papers.

Rutgers received a second letter from Mt. Hawley dated October 12, 2007, which indicates that the April 9, 2007 incident concerned Jerry Della Ragione, and enclosed a "letter of representation" from Ragione's attorney (Mot. Ex. L). This "letter of representation," dated July 26, 2007, is addressed to both P&C Building and Sumner Builders. It states that Ragione "was a subcontractor performing work at the [Staten Island] location when he was involved in an accident," and asks P&C Building and Sumner Builders to notify any and all insurance brokers and carriers who should defend and indemnify them (*Id.*). The Mt. Hawley letter did not explicitly indicate that "Jerry Romeo" was actually "Jerry Della Ragione," nor offer an explanation for the misidentification.

Less than three weeks later, on October 31, 2007, William Plucinski issued a "notice of disclaimer" on behalf of Rutgers to Premier Drywall, with copies to Della Ragione's attorney, Mt. Hawley Insurance, P&C Building, and Buckingham Badler Insurance Co. (Mot. Ex. M).[5]

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[4]According to the Rutgers' letter, notice of the incident was submitted on behalf of Premier Drywall by Arthur Sulcov Agency, Abraham Schmuttter, of New York City (Cross Mot. Ex. Q [Doc. 8: 557]).

[5]Buckingham Badler is the agent for Premier Drywall, according to the Rutgers Insurance policy (Mot. Ex. V, summary page).

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Plucinski's letter indicated that the October 12, 2007 letter from Mt. Hawley "was our first knowledge/notice of this matter"' that its inquiry showed that Della Ragione sustained injury "while in the course of his employment," and that injuries to employees and employees of contractors are excluded from coverage under Premier Drywall's insurance policy. (*Id.*) The disclaimer also noted the policy requirement that Premier Drywall notify Rutgers of an occurrence as soon as practicable, and concluded that as Jerry Della Ragione's April 9, 2007 injury was only reported a half year later by letter dated October 12, 2007, this notification was untimely.

After Della Ragione commenced his personal injury litigation in Richmond County Supreme Court, the attorney for Sumner Builders and P&C Building sought by letter dated February 26, 2008, to reverse Rutgers' decision (Mot. Ex. O). Two arguments were specifically made, and are also made in the instant motion. One is that Rutgers was untimely in its disclaimer, as it had been notified of the occurrence on May 22, 2007, but only issued its disclaimer of coverage on October 31, 2007 (*Id.*). The other is that, despite the allegations in Della Ragione's verified complaint which, as suggested by plaintiffs, was possibly crafted so that his injuries would "come under the purview of the Labor Law," he was not in fact an employee of plaintiffs when he was injured (*Id.* p. 2). As proof, the letter included an affidavit by Rudolph Pillarella dated February 12, 2008, which states in relevant part that when injured, Jerry Della Ragione was not employed either by his companies or any other company performing work at the premises. Plaintiffs' attorney argues that, with evidence that there was no employment relationship, Rutgers' obligation to defend and indemnify the "additional insureds" was triggered by the allegations in the complaint that Rutgers' insured, Premier Drywall, negligently performed

work which caused injury to Della Ragione (*Id.* p. 2).

Rutgers refused to withdraw its disclaimer. Its February 29, 2008 letter by William Plucinski set forth some of the same arguments as made in its cross motion (Mot. Ex. P). The letter noted that Mt. Hawley did not explicitly state that "Jerry Romeo" and "Jerry Della Ragione" were the same person, and that there was no way for Rutgers to know, "if indeed they are." Plucinski's letter also noted that Rutgers had asked for evidence that Premier Drywall's work had contributed to the accident and had not received any additional information. It further noted that Della Ragione's verified complaint had not been amended to state that he was *not* injured in the course of his employment, and for these reasons concluded that Rudolph Pillarella's affidavit stating that Della Ragione was not employed by any of the plaintiffs when he was injured, was "insufficient" to establish that coverage had been triggered. (*Id.*)

Plaintiffs commenced the instant declaratory action by filing their summons and complaint on September 22, 2008 and serving defendant thereafter (Mot. Ex. A). They allege that Premier Drywall was a named insured on the Rutgers policy which was in effect on the date of April 9, 2007. They allege that Sumner Builders and P&C Building are additional insureds under the policy. They allege that Rutgers was timely notified of the occurrence and suit, and was timely requested to defend and indemnify Premier Drywall, but has in bad faith refused to defend or indemnify, causing Premier Drywall to incur costs and attorney's fees. The complaint seeks declarations that Rutgers must defend and indemnify Premier Drywall and reimburse it for attorney's fees (first cause of action); Rutgers must defend and indemnify Sumner Builders and P&C Building and reimburse them for the defense in the underlying action (second cause of action); and Rutgers must defend and indemnify the plaintiffs and is required to reimburse them

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for the defense cost of the underlying action (third cause of action).

Rutgers interposed its answer on about December 13, 2008, and included 28 affirmative defenses (Mot. Ex. B).

Plaintiffs' attorney wrote to Rutgers' attorney on December 18, 2008, in an attempt to settle the matter (Mot. Ex. U). The letter included new documents acquired in the underlying personal injury action, in particular a copy of the print-out of Della Ragione's "Intake Sheet" at the hospital where it notes that he stated he was "unemployed" (Mot. Ex. R), and Della Ragione's discovery responses that both provided an authorization for employment records but also indicated that an authorization for records from his Workers' Compensation carrier was "not applicable" (Mot. Ex. S). Also included was Della Ragione's verified supplemental amended bill of particulars, dated November 17, 2008, which states that he was not working for "the defendant" at the time of the occurrence and was not injured in the course of his employment (Mot. Ex. T). Plaintiffs' attorney refers to the statement in Rutgers' disclaimer letter that if Della Ragione amended his complaint, then the issue of coverage could "be revisited," and concludes by asserting that Rutgers received timely notice of the occurrence and that "any error" in the last name of the injured individual was "inadvertent and inconsequential" (Mot. Ex. U [Letter of 12/13/2008, at 3]).[6]

Depositions were conducted beginning in February 2009 in the underlying personal injury action.

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[6] Della Ragione's May 22, 2008, bill of particulars, did not respond to the question his employment status (Mot. Ex. Q). His amended bill of particulars indicated that he was employed by R&B Wood Concepts, Inc., a new business of which he was the principal, and which had not yet generated weekly earnings (Mot. Ex. T).

Rudolph Pillarella testified as president of Sumner Builders (Mot. Ex. C [hereinafter R. Pillarella EBT]). He was in Florida on vacation at the time of the accident (R. Pillarella EBT 29). He had seen that the sheetrocking had been done under the stairs before he left (R. Pillarella EBT 59). While in Florida, he was in daily telephone contact with his brother Scott Pillarella (R. Pillarella EBT 30-31). At one point, he asked his brother to check on certain construction work that had taken place in the new home's bathroom (R. Pillarella EBT 31). His brother went to the construction site on April 9, 2007 (R. Pillarella EBT 31-32). They spoke by telephone after the accident, and his brother told him that Scott's friends Pete [Romeo] and Jerry [Della Ragione], had come along with him for the ride and that Jerry had been injured in the house (R. Pillarella EBT 31, 33, 34). According to Rudolph Pillarella, Jerry Della Ragione was not performing any job that day nor working as a subcontractor (R. Pillarella EBT 62). Rudolph Pillarella did not inform Premier Drywall about the accident, but Craig Carter subsequently called after receiving a notice concerning the claim from his insurance company which had been informed by Pillarella's insurance company (R. Pillarella EBT 69).

Scott Pillarella testified as a witness to the accident (Mot. Ex. G [hereinafter S. Pillarella EBT]). Scott Pillarella, the co-owner with his brother of an autobody shop, was not involved with Sumner Builders (S. Pillarella EBT 8, 29). However, his brother telephoned him on April 9, 2007, to ask if he could check on the jacuzzi before the tiler arrived (S. Pillarella EBT 12-13). As he was getting into his car to drive over, he saw Pete Romeo who said he would take a ride with him, and then Jerry Della Ragione appeared and they suggested he drive over with them (S. Pillarella EBT 14). After the accident Scott Pillarella called his brother in Florida to tell him that Jerry Della Ragione had fallen and hurt his ankle and that the stairs had come off (S. Pillarella

EBT 32). He was not aware that Jerry Della Ragione was doing anything at the site other than accompanying the others to see the house (S. Pillarella EBT 29).

Jerry Della Ragione testified that he was self-employed as a cabinet maker at the time of the accident (Mot. Ex. I [hereinafter Della Ragione EBT], 10). His business, R&D Wood Concepts, was then about a year old (Della Ragione EBT 10-11). He learned the trade from Pete Romeo, his brother-in-law, who was retiring from the profession (Della Ragione EBT 14, 16, 17). Della Ragione had been working at the shop for about eight months, making boxes (Della Ragione EBT 17-18). He did not yet have customers, but Pete Romeo was introducing him to his customers (Della Ragione EBT 75). On the day of the accident, Jerry had been working around the shop (Della Ragione EBT 17). That afternoon, he was asked if he wanted to tag along when Scott Pillarella stopped by to ask Pete Romeo to accompany him to the construction site (Della Ragione EBT 19-20). Jerry had previously been to the house under construction "to go over some measurements with Rudy of cabinets" (Della Ragione EBT 26: 16-18). Pillarella "wanted to just go over a layout that I was making for cabinets" (Della Ragione EBT 27: 101-12). On the day of the accident, Della Ragione explained he "just went to stop in and see how things were going" (Della Ragione EBT 28: 18-19). He was not there to do any work (Della Ragione EBT 67).

Craig Carter testified as president on behalf of Premier Drywall (Mot. Ex. E [hereinafter Carter EBT], 8). He testified that his work at the construction project was completed by April 9, 2007 (Carter EBT 11). He had last been on the premises about a week prior to that date (Carter EBT 12). He only learned of Della Ragione's accident in October 2007 when his insurer sent a disclaimer that it was not covering the accident (Carter EBT 42-43). When he asked Rudolph

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Pillarella about this, he was told that Sumner's insurance company had indicated there was no need to tell Premier Drywall about the claim because there was no lawsuit yet (Carter EBT 43, 44).

Plaintiffs provide affidavits by Rudolph Pillarella, Craig Carter, and Grace O'Connor from Mt. Hawley Insurance Co. Pillarella's affidavit of June 30, 2009, explains that when he was told of the accident while on vacation in Florida, he assumed that since Pete Romeo had accompanied Scott Pillarella to the house, the person injured was Pete's brother, Jerry Romeo, which was what he told his insurance company; he did not learn that the injured person was Jerry Della Ragione until receiving the July 2007 letter of representation from Della Ragione's lawyer (Doc. 4). Carter's affidavit of April 27, 2009, reiterates that he "first became aware" that Della Ragione had been injured on April 9, 2007, when he received the October 31, 2007 disclaimer letter from Rutgers (Doc. 5). The June 29, 2009, affidavit by O'Connor, claims examiner for Mt. Hawley Insurance, states that on about April 19, 2007, the company was notified by its insured, Sumner Builders and P&C Building, of an accident at the construction site, that when she contacted Rudolph Pillarella, he told her the injured person was "Jerry Romeo"; the company undertook an initial investigation and after determining the insurer and coverage at issue, she wrote to Rutgers seeking its defense on behalf of plaintiffs (Doc. 6). When her office received the letter of representation identifying the claimant as Jerry Della Ragione, she forwarded the letter to Rutgers. (*Id.*)

Defendant Rutgers provides an affidavit dated September 17, 2009, by William Plucinski, its assistant-vice president of Corporate Claims who handled the claim (Doc. 10). Plucinski acknowledges receipt of a notice of claim regarding Jerry Romeo, received about May 22, 2007,

43 days after the alleged incident. Plucinski states that Premier Drywall never provided Rutgers with copies of any contracts executed with other entities regarding the work site where Della Ragione was injured, and never requested that any other entity or person be named as an additional insured under the policy issued by Rutgers, or requested a Certificate of Insurance from Rutgers, and Rutgers never charged or received premiums for additional insureds nor issued a Certificate of Insurance in connection with the Premier Drywall policy. The affidavit also states, inexplicably contrary to the documentary evidence, that Premier Drywall never notified Rutgers of the accident. It further states that Premier Drywall's policy's Blanket Additional Insured endorsement extends coverage only to Premier Drywall's "ongoing operations," and that under the facts as alleged, Premier Drywall's work had ceased prior to the date of the accident, meaning that neither Sumner Builders nor P&C Building qualified as additional insureds to be covered for Premier Drywall's work. He also states that plaintiffs have never provided legally sufficient evidence to convince the insurer to alter its opinion regarding coverage.

Plaintiffs move for summary judgment and a declaration that defendant Rutgers must defend and indemnify plaintiffs in the underlying personal injury action. Defendant cross-moves for summary judgment on the basis that it had no duty or obligation to defend or indemnify plaintiffs in the underlying action. Alternatively, it seeks an order directing plaintiffs to provide outstanding discovery previously demanded.

Pertinent Contractual Provisions

The policy issued by Rutgers to Premier Drywall, in force on April 9, 2007, was a commercial general liability policy covering personal injury liability as well as other types of liability (Doc. 8: 128 *et seq.*). Two particular sections, quoted in the October 31, 2007

disclaimer letter by Rutgers, are relevant.[7]

First is the "Exclusion of Injury to Employees, Contractors and Employees of Contractors," form RCG 00 06 (Doc. 8: 167). It provides that insurance coverage does not apply to bodily injury of any employee of any insured arising out of, or in the course of, employment by any insured or performing duties related to the conduct of the insured's business. Insurance also does not apply to any obligation of any insured to indemnify or contribute with another because of damages arising out of such bodily injury.

Second is Section IV of the "Commercial General Liability Coverage Form," which sets forth the insured's duties in the event of an occurrence or claim (Doc. 8:139).[8] Subsection (2) (a) provides that the insured

> must see to it that [Rutgers is] ... notified as soon as practicable of an "occurrence" or an offense which may result in a claim. To the extent possible notice should include:(1) How, when and where the "occurrence" took place; (2) The names and addresses of any injured persons and witnesses; and (3) The nature and location of any injury or damage arising out of the 'occurrence' or offense.

An "occurrence" is defined on page 13 under section V [13], in relevant part, as "an accident."[9]

Under subsection (2) (b), if a claim is made or a suit is brought, the insured must

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[7]As noted below, two other sections are quoted and relied upon by the parties in support of their positions, but the Court cannot find either section in the copies of the policy submitted by defendant or by plaintiffs (Doc. 8: 128 *et seq.*; Mot. Ex.V).

[8]The document uploaded into the Supreme Court's efiling system as Exhibit F is incomplete in that the even-numbered pages of the "Commercial General Liability Coverage Form" (form CG 00 01 10 01), were not scanned. The paper courtesy copy contains all pages - copied front-to-back. Defendant is directed to separately upload the entire exhibit into the Court's system, clearly indicating that it pertains to Motion Sequence 001, Exhibit F, of the Cross Motion).

[9]This page is one of those missing from the uploaded documents identified as E-filed Document 8. It can be found in plaintiffs' motion, in hard copy, as part of exhibit V.

> (1) immediately record the specifics of the claim or "suit" and the date received; and (2) Notify us as soon as practicable. You must see to it that we receive written notice of the claim or "suit" as soon as practicable.

Under subsection 2 (c), the insured "and any other involved insured" must send Rutgers copies of any legal papers or other notices received in connection with the litigation (Id).[10]

Legal Analysis

Summary judgment is proper when there are no issues of triable fact (*Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]). Issue finding rather than issue determination is its function (*Sillman v Twentieth Century Fox Film Corp.*, 3 NY2d 395 [1957]). The evidence will be construed in the light most favorable to the one moved against (*Corvino v Mount Pleasant Centr. Sch. Dist.*, 305 AD2d 364, 364 [2d Dept 2003]; *Bielat v Montrose*, 272 AD2d 251, 251 [1st Dept. 2000]). Where there is any doubt as to the existence of a triable issue of fact, summary judgment should be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]; *Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226 [1st Dept. 2002]).

To prevail on a summary judgment motion, the moving party must produce evidentiary proof in admissible form sufficient to warrant the direction of summary judgment in its favor. (*GTF Mtkg, Inc. v Colonial Aluminum Sales, Inc.*, 66 NY2d 965, 967 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Where this burden is met, it

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[10]Plaintiffs additionally quote subsection (2) (e) of the Policy's notice provisions (see Calabria Reply Aff. at 5), which defendant identifies as subsection (2) (c) and as appearing on page 7 of 14 of the Policy (Rutgers Reply Aff. ¶ 14), but which cannot be found on that or any other page of the Policy (Doc. 8: 137, 139). The parties' arguments as to the import of this section concerning notices by additional insureds is therefore not addressed.

is then the opposing party's burdenn to submit proof in admissible form sufficient to create a question of fact requiring a trial (*Kosson v Algaze*, 84 NY2d 1019 [1995]; *Zuckerman v City of New York*, 49 NY2d 557, 563 [1980]). Bare conclusory allegations are insufficient to defeat a motion for summary judgment (*See, Thanasoulis v National Assn. for the Specialty Foods Trade, Inc.*, 226 AD2d 227 [1st Dept 1996]; *Lee v Weinstein*, 116 AD2d 700 [2d Dept], *lv denied* 68 NY2d 601 [1986]). It is insufficient to offer suspicions, surmises, accusations, or unsubstantiated allegations (*Zuckerman v City of New York, supra*, at 557).

A declaratory judgment is a discretionary remedy (*Bareham v City of Rochester*, 246 NY 140, 143 [1927]; *Castro Convertible Corp. v Gordon Prop.*, 28 Misc. 2d 5, 7 [Sup. Ct. Nassau County 1961]). CPLR 3001 provides that the Court may render a declaratory judgment having the effect of a final judgment as to the rights and other legal relations of the parties (*see, Nationwide Mut. Ins. Co. v Dennis*, 14 AD2d 188 [3d Dept.], *lv denied* 10 NY2d 708 [1961]). Where the facts are undisputed and pure questions of law are present, a declaratory judgment is appropriate (*Dun & Bradstreet v City of N.Y.*, 276 NY 198, 207 [1937]).

A person or entity claiming to be an insured under an insurance policy may bring a declaratory judgment action against an insurer when an actual controversy develops concerning the extent of coverage, the duty to defend, or other issues arising from the insurance contract (*Lang v Hanover Ins. Co.*, 3 NY3d 350, 353 [2004]). Therefore here, as the plaintiffs are known collectively under their contract with Premier Drywall as "Sumner Builders (aka P&C Building)," they are entitled to bring this declaratory action and, for purposes of this litigation, will be considered one entity rather than two separate entities. Thus, the notices written by Mt. Hawley on behalf of P&C Building to Rutgers are understood to pertain to both P&C Building

and Sumner Builders, which indeed is how the author of Mt. Hawley's letters, Grace O'Connor, characterized the two in her affidavit of June 29, 2009 (Doc. 6).

An insurer's duty to defend its insured is based on the contractual agreement between it and its insured (*Fitzpatrick v American Honda Motor Co. Inc.*, 78 NY2d 61, 68 [1991]). It is well settled that insurance policies are to be liberally construed in favor of the insured (*Vinocur's Inc. v CNA Ins. Co.*, 132 AD2d 543 [2d Dept. 1987], *app denied* 71 Y2d 803 [1988]). An insurer's obligation to furnish a defense is weighty, and broader than its duty to pay (*International Paper Co. v Continental Cas. Co.*, 35 NY2d 322, 326 [1974]). The duty is only triggered when the insured has complied with the policy's notice provision (*see Paramount Ins. Co. v Rosedale Gardens, Inc.*, 293 AD2d 235, 239 [1st Dept. 2002]).

Where a policy of liability insurance requires that notice of an occurrence by given "as soon as practicable," then the notice must be provided within a reasonable period of time (*Great Canal Realty Corp. v Seneca Ins. Co., Inc.*, 5 NY3d 742, 743 [2005]). An insured has an independent duty to notify its insurer of the claim even where others with an interest in coverage have also notified the insurer (*Travelers Ins. Co. v Volmar Constr. Co.*, 300 AD2d 40, 44 [1st Dept. 2002]; *American Mfgrs. Mut. Ins. Co. v CMA Enters.*, 246 AD2d 373 [1st Dept. 1998]). The insured has the burden of proof of showing that its notice was sufficient under the policy and is charged with exercising reasonable diligence in keeping informed of accidents out of which claims may arise (*Security Mut. Ins. Co. of N.Y. v Acker-Fitzsimons Corp.*, 31 NY2d 436, 440 [1972]). There are circumstances, such as lack of knowledge that an accident occurred, or a belief of nonliability, that may excuse a delay in giving notice (*Id.*). The reasonableness of any delay in providing notice, and the sufficiency of the excuse are matters to be determined at trial

(*Travelers Ins. Co. v Volmar Constr. Co., Inc.*, 300 AD2d at 42). Where no excuse or mitigating factor is presented, the issue is a legal one, and courts often find relatively short periods of time to be unreasonable as a matter of law (*Travelers Inc. Co. v Volmar*, at 43 [citations omitted]).

Where notice was sufficiently given, an insurer must provide a defense to its insured where the underlying complaint, liberally construed, sets forth a claim which is ostensibly covered by its policy, "no matter how groundless, false, or baseless the suit may be" (*Tranchina v Government Empls. Ins. Co.*, 235 AD2d 471, 472 [2d Dept. 1997], citing *Ruder & Finn, Inc. v Seaboard Sur. Co.*, 52 NY2d 663 [1981]). The duty is triggered when the allegations within the four corners of the underlying complaint potentially give rise to a claim under the terms of the policy, or where the insurer has actual knowledge of facts establishing a reasonable possibility of coverage (*BP Air Conditioning Corp. v One Beacon Ins. Group*, 8 NY3d 708, 714 [2007]). The insurance carrier may be relieved of its duty to defend only if it can establish as a matter of law that there is no possible factual or legal basis on which it might eventually be obligated to indemnify its insured, or by proving that the claim falls within a policy exclusion (see, *Frontier Insulation Contrs. v Merchants Mut. Ins. Co.*, 91 NY2d 169, 175 [1997]; *Nancie D. v New York Cent. Mut. Fire Ins. Co.*, 195 Ad2d 535, 536-537 [2d Dept. 1993]). When the allegations of the complaint "allow for no interpretation that will bring the plaintiffs within the policy protections," then as a matter of law the insurer has no duty to defend the insured (*Tranchina v Government Empls. Ins. Co.*, 235 AD2d at 472, citing *Lionel Freedman, Inc. v Glens Falls Ins. Co.*, 27 NY2d 364, 368 [1971]; *see Frontier Insulation Contrs. v Merchants Mut. Ins. Co.*, *supra*, 91 NY2d at 175).

Under Insurance Law § 3420 (d) (2), an insurer wishing to deny coverage for bodily

injury must "give written notice as soon as is reasonably possible of such disclaimer of liability or denial of coverage." If an insurer disclaims and declines to defend in the underlying lawsuit, it takes the risk that if the injured party obtains a judgment against the purported insured that party will then seek payment pursuant to Insurance Law § 3420 and, having chosen not to participate in the underlying lawsuit, the insurance carrier may litigate only the validity of its disclaimer and cannot challenge the liability or damages determination underlying the judgment (*Lang v Hanover Ins. Co.*, 3 NY3d 350, 356 [2004]).

An insurer attempting to disclaim on a liability policy must show that it served a written notice of disclaimer upon the insured as soon as was reasonably possible; an unreasonable delay will defeat a disclaimer (*Hartford Ins. Co. v County of Nassau*, 46 NY2d 1028, 1030, *app. dismissed* 47 NY2d 951 [1979]). If the delay allegedly results from a need to investigate the facts underlying the proposed disclaimer, the insurer must demonstrate the necessity of conducting a thorough and diligent investigation (*see Quincy Mut. Fire Ins. Co. v Uribe*, 45 AD3d 661 [2d Dept. 2007]). The insurer bears the burden to explain the reasonableness of any delay in disclaiming coverage (*see Hartford Ins. Co., supra*, at 1029; *Moore v Ewing*, 9 AD3d 484, 488 [2d Dept. 2004]). An untimely delay will preclude the insurer from disclaiming coverage based upon late notice, even if the insured failed to provide the insurer with timely notice of the accident (*see Hartford Ins. Co. v County of Nassau, supra*, 46 NY2d at 1029; *Delphi Restoration Corp. v Sunshine Restoration Corp.*, 43 AD3d 851, *lv dismissed* 9 NY3d 1002 [2007]).

The reasonableness of any delay by the insurer is computed from the time that the insurer becomes sufficiently aware of the facts which would support a disclaimer (*see Pawley Interior*

Contr., Inc. v Harleysville Ins. Cos., 11 AD3d 595, 595 [2d Dept. 2004]). The timeliness of such a disclaimer generally presents a question of fact (*see Continental Cas. Co. v Stradford*, 11 NY3d 443, 449 [2008]). However, when the basis for the disclaimer was or should have been readily apparent, the delay will not be found justified as a matter of law, and where the basis was not readily apparent, an unsatisfactory explanation will render the delay unreasonable as a matter of law (*see Bovis Lend Lease LMB, Inc. v Royal Surplus Lines Ins. Co.*, 27 AD3d 84, 88 [1st Dept. 2005], citing *First Fin. Ins. Co. v Jetco Contr. Corp.*, 1 NY3d 64, 69 [2003]; *West 16th St. Tenants Corp. v Public Serv. Mut. Ins. Co.*, 290 AD2d 278 [1st Dept. 2002]; *see also First Financial Insurance Company v Jetco Contracting Corp.*, 1 NY3d 64, 69 [2003] [48-day delay unreasonable as a matter of law where grounds for disclaimer were based on late filing of the claim]; *West 16th Street Tenants Corp. v Public Service Mutual Ins. Co.*, 290 AD2d 278 [1st Dept.], *lv denied* 98 Y2d 605 [2002] [30-day delay "unreasonable as a matter of law" when policy exclusion was apparent on the face of the claim]; *Squires v Robert Marini Builders, Inc.*, 293 AD2d 808 [3d Dept.], *lv denied* 99 NY2d 502 [2002] [42 days unreasonable where the information necessary to immediately determine a policy exclusion was provided]; *Matter of Colonial Penn Ins. Co. v Pevzner*, 266 AD2d 391 [2d Dept. 1999] [41 days unreasonable as a matter of law when based on late notice of claim]).

As a general rule, a claim for indemnification does not accrue until payment has been made by the party seeking indemnification (*McDermott v City of N.Y.*, 50 NY2d 211, 217, *rearg denied* 50 NY2d 1059 [1980]; *Bay Ridge Air Rights v State of N.Y.*, 57 AD2d 237, 238 [3d Dept. 1977], *affd* 44 NY2d 49 [1978]). As noted by the Court of Appeals, however, parties seeking indemnification or contribution ordinarily need not await the ripening of their claims to protect

their rights to proceed against a third party (*Bay Ridge Air Rights, supra*, 44 NY2d at 54).

Applying these precedents to the facts at bar, the motion by plaintiffs seeking a declaration that Rutgers is compelled to defend and indemnify them in the underlying action brought by Jerry Della Ragione, is granted in part and otherwise denied.

Sumner Builders and P&C Building Corp., have not established entitlement to summary judgment. They have not established that they are additional insureds who would be entitled to coverage under the policy issued by Rutgers to Premier Drywall. Although it is apparent that Premier Drywall agreed in March 2007 to indemnify Sumner Builders "aka P&C Building Corp." as against all claims arising out of the performance of Premier Drywall's work, neither Sumner Builders nor P&C Building is explicitly named in Premier Drywall's insurance policy issued by Rutgers. It has been held that unless a purported insured or additional insured is named on the face of the policy, that entity is not entitled to coverage (*Tribeca Broadway Assocs., LLC v Mount Vernon Fire Ins. Co.*, 5 AD3d 198, 200 [1st Dept. 2004]; *see also Sanabria v American Home Assur. Co.*, 68 NY2d 866 [1986]). Plaintiffs argue that the policy does in fact provide for coverage to additional insureds, relying on defendant's characterization of the policy's Blanket Additional Insured Endorsement. Although defendant seems to concede that this endorsement could in theory pertain to the two plaintiffs, it argues that it does not pertain here, because that endorsement extends coverage only to "liability arising from [Premier's] *ongoing operations*," and Premier Drywall completed its work about one week before the alleged accident (Memo of Law [Doc. 9: 39], emphasis added). The problem is that this endorsement, which defendant's memorandum of law refers to as form CG 2010, does not appear to be referenced or included in the copies of the insurance policy submitted by either party, and its contents and import remain at

issue.

Sumner Builders and P&C Building also argue, without citing case law, that because Rutgers acknowledged the notices provided by Mt. Hawley, it implicitly affirmed their status as additional insureds and is now barred from claiming that it has no obligation to defend them. Their argument is not persuasive, given that insurance law is based on the law of contract which holds that where an agreement has been reduced to writing, the best evidence of what the parties intended is the contract itself and its construction, unless ambiguous, will be construed by the courts (*see International Flavors & Fragrances, Inc. v Royal Ins. Co. of Am.*, 46 AD3d 224, 233 [1st Dept. 2007]).

Their argument that Rutgers untimely disclaimed coverage also raises a question of fact. An insurer has no obligation to timely disclaim coverage where coverage does not exist (*see, Matter of Lumbermens Mut. Cas. Co. v Quintero*, 305 AD2d 684, 685 [2d Dept.], *lv denied*, 100 NY2d 515 [2003]) and as noted above, it remains unclear whether Sumner Builders or P&C Building are additional insureds.

As to Premier Drywall, defendant's insured, it is unexplained why it alleges it never knew of the accident until it received notice of disclaimer, when the evidence shows that its agent notified Rutgers and Rutgers acknowledged its claim in June 2007. Although there is sparse evidence that it complied with the policy requirements to keep Rutgers informed as to the claim and the litigation, it nevertheless is in a distinctly different position from its two co-plaintiffs, who have not sufficiently established that they are additional insureds. Nonetheless, its argument that Rutgers untimely disclaimed must be resolved at trial.

More importantly, however, is that Premier Drywall establishes that it is entitled to

summary judgment and a declaration that defendant must defend it in the underlying litigation. Although defendant disclaimed based in part on the employee exclusion, it has been held than an insurer's duty to defend may arise at a time subsequent to the commencement of the action. See *Sucrest Corp. v Fisher Governor Co.*, 83 Misc. 2d 394, 401 (Sup. Ct. NY County 1975) (holding where an insurer has knowledge of facts indicating coverage, then it is to be guided accordingly). By November 2008, when Della Ragione amended his bill of particulars to state that he was not injured on the job, there was at least presented the possibility that the insurance policy's employee exclusion does not apply. Although Rutgers understandably initially declined to offer a defense when the source of its knowledge as to Della Ragione's employment status was based on the statement of Della Ragione's attorney and the allegations in the verified compliant, after the bill of particulars was amended a year later, it became evident that Della Ragione might not in fact be employed by any of the defendants or injured while working, and that the accident should be covered by Premier Drywall's policy. Accordingly, this branch of plaintiffs' motion is granted. The remaining branches of plaintiffs' motion seeking summary judgment and a declaration that defendant is compelled to defend and indemnify them, cannot be granted.

The branch of Rutgers' cross motion for summary judgment dismissing the action based on plaintiffs' failure to timely notify it of the accident, must be denied. It may not at this juncture disclaim based on the approximate 43-day-delay between the date of the accident and the initial notification by plaintiffs of injury to "Jerry Romeo," because it should have issued a disclaimer based on untimeliness when the initial notices were provided (*see, West 16th St. Tenants Corp. v*

Public Serv. Mut. Ins. Co., *supra*, 290 AD2d 278).[11] Its argument that the first notice naming "Jerry Romeo" has no import and that therefore plaintiffs' October 12, 2007 notice of Jerry Della Ragione's accident, is untimely, is not persuasive. The insurance policy requires only that the insured give notice of an "occurrence" and "to the extent possible" that this notice provide details of how, when, and where the occurrence took place, the name and address of the injured person, and the nature of the injury. Rutgers was placed on notice of many of the details of the occurrence, after which it requested additional information, information which was provided only in October 2007.

The branch of Rutgers' cross motion seeking summary judgment and dismissal of the complaint as to Sumner Builders and P&C Building, on the ground that they are not additional insureds, cannot be granted for the reasons set forth above. There is a question of fact as to whether form CG 2010, the Blanket Additional Insured Endorsement, covers the two plaintiffs. Although defendant argues that the endorsement does not pertain under the facts in this situation, its argument cannot be assessed given that this particular portion of the policy was not provided in the papers filed with the court. Furthermore, none of the parties discusses the significance, if any, of the Rutgers policy's Additional Coverage Declarations page, which indicates that as of March 2006, there is an "Addl Insured" for which an additional premium was billed (see Doc. 8: 133).

[11]As stated previously, the evidence shows that Premier Drywall's agent provided a notice to Rutgers at some date prior to June 6, 2007, which is the date on which Rutgers acknowledged receipt of the notice. Rutgers may not, therefore, argue that Premier Drywall never itself gave notice as required under the policy.

Rutgers also seeks summary judgment and dismissal based on the policy's employee exclusion. There can be little dispute that at the time it disclaimed on October 31, 2007, Rutgers had been informed by the attorney for Della Ragione that he had been injured while on the job, clearly an exclusion under the policy. Della Ragione's complaint, verified by the plaintiff himself, filed later that fall, also indicated he was injured while on the job. Thus, based on the face of the complaint, defendant properly declined coverage. Since that time, plaintiffs have sought to prove that Della Ragione was actually not an employee working on the premises at the time of his accident, which would bring his claim under the aegis of Premier Drywall's policy. Most of the evidence provided by them has been equivocal or self-serving. Notably, Della Ragione has never amended his complaint to state that he was not working at the time of his accident, although in November 2008 he amended his bill of particulars to assert that he was not working for "the defendant" nor injured in the course of employment (Mot. Ex. T [Ver. Suppl. Amend. Bill of Part.] ¶ 4). At his deposition, he testified that he was not an employee working at the construction site on the day of his accident, but also that he would be building the cabinets for the new structure based on his conversations with Rudolph Pillarella, thus raising a question as to his status on April 9, 2007.

The well-stated rule is that an insurer must defend whenever the four corners of the complaint suggest, or the insurer has "actual knowledge of facts" that establish a reasonable possibility of coverage (*Continental Cas. Co. v. Rapid-American Corp.*, 80 NY2d 640, 648 [1993]). Defendant argues that it has never acquired "actual knowledge" concerning Della Ragione's employment status that would explicitly disprove the allegations in his verified complaint and the statement made by his attorney. However, as noted above, the duty to defend

may arise at a time subsequent to the commencement of the action (*Sucrest Corp. v Fisher Governor Co., supra*, 83 Misc. 2d at 401). Rutgers has been presented sufficient evidence to call into question Della Ragione's initial statements as to his work status. The November 2008 amendment to his bill of particulars should have caused Rutgers to reassess its decision as to Premier Drywall. In conclusion, defendant may no longer decline to defend its insured on the ground of employee exclusion (*see, BP Air Conditioning Corp. v One Beacon Ins. Group, supra*, 8 NY3d at 714).[12] Whether defendant will be required to indemnify remains to be seen. As it is not a party or a participant in the underlying tort action, the recent decision concerning Della Ragione's employment status is not conclusive with respect to its obligation to indemnify (*see, First State Ins. Co. v J & S United Agreement Corp.*, 67 NY2d 1044, 1045 [1986]).

Rutgers also seeks an order directing plaintiffs to provide all outstanding discovery in this action. As summary judgment has, for the most part been denied, this branch of Rutgers' cross motion is granted to the extent that the parties are directed to appear for a preliminary conference at which time an order scheduling the completion of discovery shall be entered. Accordingly, it is

ORDERED that plaintiffs' motion for summary judgment and declaratory relief is granted to the extent that the branch of their motion seeking a declaratory judgment with respect to the first cause of action is granted; and it is further

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[12]After final submission of this motion and cross motion, including sur-replies, plaintiffs provided a copy of a short form decision issued by the justice in Supreme Court, Richmond County, dated February 2, 2010, dismissing Della Ragione's Labor Law claims and holding that he "is found not to be an employee or contractor at the time of the accident" (Letter, 7/15/10, from Bisignano to Supreme Court). These letters were not uploaded into the NYSCEF system, nor the letter in response from defendant, and are not part of the County Clerk's record.

ADJUDGED and DECLARED that defendant Rutgers Casualty Insurance Company shall defend its insured Premier Drywall, Inc., in the underlying action entitled *Jerry Della Ragione and Joanne Della Ragione v Sumner Builders Corporation, P&C building, Inc. and Premier Drywall, Inc.*, Index Number 104520/2007, Supreme Court Richmond County; and it is further

ORDERED that the remaining branches of plaintiffs' motion seeking summary judgment and declaratory relief with respect to the second and third causes of actions is denied and those causes of action are severed and continued under this index number; and it is further

ORDERED that the cross motion of defendant for summary judgment and dismissal of the complaint is denied; and it is further

ORDERED that the parties shall appear for a preliminary conference in Supreme Court, 60 Centre Street, Part 12, room 212, on October 27, 2010 at 2:15 p.m.

This constitutes the decision and order of the court, as well as judgment on the first cause of action only.

ENTER:

J.S.C.

Dated: September 30, 2010
New York, New York

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 E-File certificate requesting Entry of Judgment with a copy of the order and/or judgment attached.