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

PRESENT: Hon. Saliann Scarpulla PART 19

Justice

Illinois National Ins. Co. et al

-v-

Everest National Ins. Co. et al

INDEX NO. 102302/08

MOTION DATE 9/8/10

MOTION SEQ. NO. 005

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes X No

Upon the foregoing papers, it is

~~motion~~ 1 5 ~~and cross-motion are~~ decided in accordance with accompanying memorandum decision.

This constitutes the Decision and Order of the Court.

Dated: December 13, 2010

Saliann Scarpulla J.S.C.

Check one: X FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 19

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ILLINOIS NATIONAL INSURANCE COMPANY, BROADWAY MANAGEMENT CO, INC. and HRH CONSTRUCTION, LLC,

Plaintiffs,

-against-

EVEREST NATIONAL INSURANCE CO., C&M INTERIORS f/k/a GLOBAL INTERIORS, INC., JOHN GUERRIERO and TAMMY GUERRIERO,

Defendants.

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Index Number 102302/08
Submission Date 9/8/2010
Mot. Seq. No. 005

DECISION & ORDER

Appearances:

For Plaintiffs :
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914-686-4800

For Defendant Everest National:
Carroll McNulty & Kull, LLC
By Joanna Young, Esq.
570 Lexington Avenue, 10th Floor
New York, New York 10022
212-252-0004

Papers considered in review of this motion for summary judgment:

Papers	Numbered
Notice of Mot. and Affirm. in Supp	1
Memorandum in Supp. of Summ. Judg	2
Affirm. in Oppos. to Summ. Judg	3
Reply in Supp. of Mot. for Summ. Judg	4

HON SALIANN SCARPULLA, J.:

In this declaratory judgment action, defendant Everest National Insurance Co. ("Everest") moves pursuant to CPLR 3212 for an order dismissing the complaint of plaintiffs Illinois National Insurance Company, Broadway Management Co., Inc. ("Broadway") and HRH Construction Co., Inc. ("HRH"). In their complaint, plaintiffs allege that Everest's Policy No. 6900000333-001, issued to co-defendant C&M Interiors for the period from March 16, 2006 to June 9, 2006, provides them with coverage for the

claims asserted in the personal injury action entitled "*John Guerrriero and Tamy Guerriero v Broadway Management Co., Inc. and HRH Construction LLC*" Index No. 106767/2006, filed in New York Supreme Court, New York County ("the underlying action"). Everest argues that HRH and Broadway are not entitled to indemnification and defense as additional insured under C&M Interiors' policy, because their claims did not include any document evidencing C&M Interiors' agreement to procure insurance coverage for them. Additionally, Everest argues that HRH's and Broadway's claims for coverage are barred due to late notice.

HRH argues in opposition that this motion is premature and should be denied pursuant to CPLR 3212(f), because initial discovery exchanges have not been completed and the parties have not held a preliminary conference. HRH further argues that it had entered into a written contract with a now defunct carpentry subcontractor, Global Interiors, Inc. This contract required Global Interiors, Inc. to add HRH and Broadway as additional insured under its insurance policy. HRH and Broadway allege that C&M Interiors, Inc. is a successor corporation to Global Interiors, Inc., citing the deposition testimony of plaintiff in the underlying action, John Guerriero.[1]

Also, plaintiffs dispute Everest's claim of untimely notice of the claims in the underlying action on the basis of the language of the insurance contract. Plaintiffs argue

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[1] Guerriero testified that during his employ at Global Interior, the two names, Global Interiors and C&M Interior, were used interchangeably. Both entities also shared the same mailing address of 157 Walsh Road, Yonkers, NY 10701.

that the policy expressly required only the named insured, C&M Interiors, to provide notice of claims by third parties. Specifically, plaintiffs rely on Section IV(2)(a) of the policy, which states in the relevant part that "you must see to it that we are notified as soon as practicable of an 'occurrence' or an offense which may result in a claim."

In turn, "you" is defined in the policy as "a 'Named Insured' shown in the Declarations, and any other person or organization qualifying as a Named Insured under this policy." According to plaintiffs, "any other named insureds" does not expressly include additional insureds who are mentioned in Section IV(2)(c)(2) as "other involved insureds." The language in Section IV(2)(c)(2) expressly obligates "other involved insureds" to cooperate, assist, and authorize Everest to represent them in the defense of any legal proceeding, but makes no mention of a duty to provide notice of occurrences that may result in claims.

In the alternative, plaintiffs argue that they provided timely notice by means of certified mail on July 27, 2007. Everest, however, denies receiving this initial notice, and further alleges to have received a notice of claim from plaintiffs no earlier than October 8, 2007. Hence, the parties dispute whether Everest timely disclaimed coverage by its letter, dated October 16, 2007.

Discussion

Under CPLR 3212(b), summary judgment "shall be granted if, upon all papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant

the court as a matter of law in directing judgment in favor of any party." To warrant a court's directing judgment as a matter of law, it must clearly appear that no material issue is presented for trial. *Epstein v Scally*, 99 A.D.2d 713 (1st Dep't 1984). When a party has made a prima facie showing to entitle it to summary judgment, the burden shifts to the opposing party to show by evidentiary facts that there is a material issue of fact for trial. *Indig v Finkelstein*, 23 N.Y.2d 728 (1968); *see also Vogel v Blade Contr. Inc.*, 293 A.D.2d 376, 377 (1st Dep't 2002). Conclusory allegations or denials are insufficient to either warrant or defeat summary judgment. *McGahee v Kennedy*, 48 N.Y.2d 832, 834 (1979).

Here, irrespective of whether HRH and Broadway may attain the status of additional insureds under the policy issued to C & M Interiors, Everest is entitled to summary judgment on the basis of late notice. Notice of claim is a condition precedent to coverage and absent a valid excuse, a failure to provide requisite notice vitiates the insurance policy. *See Security Mut. Ins. Co. of New York v Acker-Fitzsimons Corp.*, 31 N.Y.2d 436, 440-441 (1972).[2] It is well-settled that notice must be provided "within a reasonable time in view" of all the facts and circumstances." *See Security Mut. Ins. Co. of New York v Acker-Fitzsimons Corp.*, 31 N.Y.2d 436, 440-441 (1972).

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[2]The 2008 amendments to New York Insurance Law § 3420, including the requirement of actual prejudice due to late notice in paragraph (a)(5) as a requirement of disclaimer, are not applicable to Everest's insurance policy issued in 2006.

Every insurance contract includes an implied duty of notice as a condition of coverage, even in the absence of an express notice requirement in the policy agreement. *See Structure Tone, Inc. v Burgess Steel Products Corp.*, 249 A.D.2d 144, 144 (1st Dep't 1998). The notice requirement in the policy applies equally to both primary and additional insureds, and notice provided by one insured in accordance with the policy terms will not ordinarily be imputed to another. *See 1700 Broadway Co. v Greater New York Mutual Ins. Co.*, 54 A.D.3d 593, 594 (1st Dep't 2008).

In this case, notwithstanding the issue of whether as alleged additional insureds, HRH and Broadway had an express obligation to notify Everest of the claim, HRH and Broadway each had an independent duty as alleged additional insureds to give Everest notice. *See Structure Tone, Inc.*, 249 A.D.2d at 144. By its own admission, HRH sent notice to Everest no earlier than July 27, 2007, some twelve months after the commencement of the underlying action on May 17, 2006. HRH does not offer any explanation or justification for the delay. Therefore, HRH's notice to Everest was inexcusably late, and justified disclaimer of coverage. *See 1700 Broadway Co.*, 54 A.D.3d at 594 (finding that non-excused eight-month delay in noticing a claim to the insurer supported valid disclaimer). [3]

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[3] An exception to the requirement of notice by additional insureds "might exist where two claimants are similarly situated, i.e., where their interests are not adverse to each other, in which case notice by one may also be deemed applicable to a claim by another." *1700 Broadway Co.* , 54 A.D.3d at 594 (finding that defendant landlord and tenant, who brought cross-claims against one another, had adverse interests); *see also*

HRH's argument that Everest belatedly disclaimed coverage by its letter dated October 16, 2007 is also unavailing. Everest and HRH dispute the date of HRH's initial notice. Everest insists that its records indicate that it received initial notice by letter dated October 8, 2007, and timely disclaimed by letter dated October 16, 2007.[4] HRH, however, argues that a copy of the July 27, 2007 letter it included with its opposition papers proves the July date as the time of the initial notice, rendering Everest's October 8, 2007 disclaimer untimely.

Although HRH submitted a copy of the July 27, 2007 certified letter, it omitted to include either a copy of the certified receipt or return receipt. Further, HRH has not submitted an affidavit from anyone attesting to mailing the July 27, 2007 letter, or even attesting to a practice and policy of mailing which was followed in this case. The absence of this proof, which is exclusively in HRH's possession, that HRH sent the letter on July 27, 2007, as opposed to October 8, 2007 as Everest argues, is fatal to HRH's late disclaimer argument. No less instructive is paragraph 11 of plaintiffs' response to initial

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Nat'l Union Fire Ins. Co. of Pittsburgh v Ins. Co. of North America, 188 A.D.2d 259, 261 (1st Dep't 1992) (finding that notice of claim given by an employer was also imputed to the covered employee as the two did not bring any cross-claims). However, this exception does not apply here. HRH and C&M Interiors have adverse interests, because HRH commenced a third-party action against C&M Interiors and Global Interiors in the underlying proceeding.

[4]Under Insurance Law § 3420(d)(2), an insurer is required to disclaim liability or deny coverage for any personal injury action by written notice given "as soon as is reasonably possible." There is no dispute between the parties that disclaimer issued eight days after notice of claim is in compliance with Insurance Law § 3420(d)(2).

interrogatories, dated August 18, 2008 (Exhibit I of Everest's moving papers), wherein plaintiffs themselves stated that the first time they served notice on Everest was October 8, 2007, and that Everest timely responded on October 16, 2007. Therefore, even if Broadway and HRH could somehow be construed as additional insured under the C&M Interiors policy, this notice of claim to Everest was untimely, and they failed to comply with a condition precedent to coverage under the C&M Interiors policy.

In accordance with the foregoing, it is

ORDERED that summary judgment motion by defendant Everest National Insurance Co. dismissing the complaint in its entirety is granted and the complaint is dismissed; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

This constitutes the decision and order of the Court.

Dated: December 13, 2010
New York, New York

ENTER:

Hon. Saliann Scarpulla, J.S.C.