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

PRESENT: SALIANN SCARPULLA Justice PART 19

Index Number : 600341/2010
FC BRUCKER ASSOCIATES, L.P.
vs.
FIREMAN'S FUND INSURANCE CO.
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause -- Affidavits -- Exhibits ... FILED

Answering Affidavits -- Exhibits _____

Replying Affidavits _____ MAY 26 2011

NEW YORK
COUNTY CLERK'S OFFICE

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

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

This constitutes the decision and order of the Court

Dated: May 24, 2011

Saliann Scarpulla
SALIANN SCARPULLA J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

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

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

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

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FC BRUCKNER ASSOCIATES, L.P., and
FIRST NEW YORK MANAGEMENT, INC.,

Plaintiffs,

-against-

FIREMAN'S FUND INSURANCE CO.,
and GAB ROBIN'S NORTH AMERICA, INC.

Defendants.

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Index Number 600341/10
Submission Date 2/16/2010
Mot. Seq. No. 001

DECISION & ORDER

Appearances:

For Plaintiffs :
Herzfeld & Rubin, P.C.
By David B. Hamm, Esq.
125 Broad Street
New York, New York 10004
212-471-8500

For Defendant FFIC:
Rivkin Radler LLP
By David Guadagnoli, Esq.
926 RXR Plaza
Uniondale, New York 11556-0111
516-357-3000

For Defendant GAB:
Ropers, Majewski, Kohn & Bentley
17 State Street, Ste 2400
New York, NY 10004
212-668-5927

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
Notice of Cross-Mot. and Affirm. in Supp.	3
Memorandum in Supp. of Cross-Mot.	4
Affirm. in Oppos. to Cross-Mot. and in Supp. of Mot.	5
Reply in Supp. of Cross-Mot. and in Opp. To Mot.	6

HON SALIANN SCARPULLA, J.:

This is an action for declaratory judgment on defendant Fireman's Fund Insurance Co.'s ("FFIC") disclaimer of obligation to provide insurance coverage under its excess policy in a personal injury action brought against plaintiffs FC Bruckner Associates, L.P.

("FC Bruckner") and First New York Management, Inc. ("First NY") by non-party Lorraine Sullivan.[1]

FFIC issued an excess liability insurance policy to Forest City Enterprises, Inc. ("Forest City"), an Ohio-based company, as first named insured for the period from November 1, 1996 to November 1, 1997.[2] FC Bruckner is a New York limited partnership, and Forest City's wholly-owned subsidiary. FC Bruckner owns the shopping mall at 845 White Plains Road in the Bronx County, where the underlying personal injury allegedly occurred on December 3, 1996. First NY, another wholly-owned subsidiary of Forest City, was FC Bruckner's property manager. Defendant GAB Robins North America, Inc. ("GAB") was at that time Forest City's third-party claims adjuster and insurance representative. FFIC's excess policy to Forest City has liability limits of twenty million dollars, excess of one million, which includes two-hundred-and-fifty thousand in self-insured retention and a seven-hundred-and-fifty thousand dollar primary policy issued by National Union Fire Insurance Co. of Pittsburgh ("National Union").

The *Sullivan* action was commenced on April 16, 1997, and National Union immediately assumed the defense and assigned the firm of Lester Schwab Katz & Dwyer to represent FC Bruckner and First NY. Thereafter, the *Sullivan* action was litigated for

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[1]*Lorraine Sullivan v FC Bruckner Plaza Associates, et al.*, New York Supreme Court, Bronx County, Index No. 14817/1997 (hereinafter "the *Sullivan* action").

[2]While neither party has submitted an executed copy of the insurance policy at issue, neither party challenges the applicability and binding nature of the provisions in the uncertified policy provided with these motions.

the next several years without FFIC having notice of it. Then, after receiving certain information from its attorneys in October, 2002, FC Bruckner determined that it should give notice of the *Sullivan* action to FFIC.

FC Bruckner and FFIC disagree over the date FFIC received notice. FC Bruckner insists that it gave notice on January 31, 2003, while FFIC argues that the January 31, 2003 notice went to non-party Interstate Insurance Group, allegedly a reinsurer of FFIC, which forwarded the notice to FFIC on June 10, 2003. By letter, dated December 23, 2003, FFIC disclaimed coverage with respect to the *Sullivan* action, citing Forest City's six-year delay in notifying FFIC of the underlying claims and challenging FC Buckner's designation as additional insured under the policy.

FC Bruckner now moves for summary judgment, arguing that its duty to give timely notice of the underlying action did not arise until after FC Bruckner learned of facts indicating that its primary insurance would be insufficient and that the "excess layer" would be reached. Neil G. Cawsey, Director of Litigation and Claims Management for Forest City, states in an affidavit submitted herein that when the *Sullivan* action was commenced in 1997, the pleadings indicated only that litigation entailed a run-of-the-mill slip-and-fall with unspecified back injuries, not a type of a case that could reach the one-million-dollar primary insurance limit. Specifically, in her May 6, 1998 bill of particulars, Sullivan lists as claimed injuries primarily disc herniation, radiculopathy, loss of normal lumbar curvature, disc bulges, severe back pain and muscle spasms. At the

time, FC Bruckner's attorneys determined that none of these medical conditions would command recovery in excess of one million.

It was not until October 4, 2002 that Mr. Cawsey received a memorandum from his insurance broker and a report from Lester Schwab Katz & Dwyer, which provided an upward adjustment on the assessment of potential damages exposure, surpassing the primary insurance limits. The attorney's report reflected the service of two amended bills of particulars, dated April 26 and July 25, 2002, which for the first time alleged numerous surgeries resulting from the underlying accident: gastric bypass surgery, several repairs of gastric perforation, laparascopic gastric bypass, gastrotomy tube placement, lumbar fusion L4-L5 with insertion of hardware and facetectomy at L4-L5 and L3-L4.

FC Bruckner argues that it was the amended bill of particulars and the insurance broker's and defense counsel's subsequent letters that alerted FC Bruckner that the *Sullivan* litigation could reach the excess layer. FC Bruckner concludes that the January 31, 2003 notice was reasonably timely under these circumstances. In the alternative, FC Bruckner argues that FFIC's disclaimer is precluded by New York Insurance Law § 3420(d).

FFIC cross-moves for summary judgment, arguing that (1) FC Bruckner is not an insured under its policy, and (2) Ohio law governs FFIC's policy, because Forest City has its principal place of business in Ohio and because the excess insurance policy contains only Ohio mandatory endorsements. Under Ohio law, FFIC is presumed as unfairly

prejudiced by the delay, because it lost opportunities to investigate the alleged facts in the underlying action. Specifically, FFIC argues that because of FC Bruckner's six-year delay, FFIC has lost an opportunity to locate and depose Julio Gonzalez, a former Pergament employee, who witnessed the underlying accident, but who was no longer reachable at the phone number and the address he provided in 1998. Further, FFIC argues that the defense of late disclaimer under section 3420(d) is inapplicable here because FFIC excess policy was delivered or issued for delivery in the State of Ohio, not in New York.

In the alternative, FFIC argues that were the Court to find section 3420(d) applicable, the time it took to process FC Bruckner's claims, from June 10, 2003 to December 23, 2003, was not unreasonable under the circumstances. FFIC's last argument is that the Court should deny FC Bruckner's motion as premature under CPLR 3212(f), because discovery is not complete.

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).

Initially, the Court must determine whether FC Bruckner qualifies as insured under the FFIC's excess policy. FC Bruckner is not a named insured because its name does not expressly appear anywhere in the policy. However, the excess policy also extends to entities and persons who fall under the definition of "additional insured," as defined in relevant parts of Section II. Most relevant is Section II(C)(2), which extends excess coverage to Forest City's wholly owned subsidiaries. Here, because FFIC does not dispute that FC Bruckner is a wholly-owned subsidiary of Forest City, FC Bruckner is necessarily covered as an additional insured.

As FC Bruckner is an additional insured under an insurance policy issued to Forest City, an Ohio-based company, the Court must next determine whether the law of Ohio or New York governs the issue of notice under the insurance policy. Because the policy itself does not contain a choice of law provision, the Court is required to make this determination in accordance with New York's choice-of-law principles. *See Certain Underwriters at Lloyd's, London v Foster Wheeler Corp.*, 36 A.D.3d 17, 20 (1st Dep't 2006).

In the context of insurance undertakings, the inquiry revolves around the principal physical location of the insured risk, unless "'. . . with respect to the particular issue, some other state has a more significant relationship . . .to the transaction and the parties.'" *Id.* at 22-23 (citations omitted); *see also Zurich Ins. Co. v Shearson Lehman Hutton, Inc.*, 84 N.Y.2d 309, 317 (1994). When an insurance policy covers risks in multiple states, the Court must engage in a more fact intensive "grouping of contacts" analysis. *See Underwriters at Lloyd's, London*, 36 A.D.3d at 23.

Here, while FC Bruckner is a New York entity, it is covered under the policy only as an additional insured, not expressly named. There is also nothing in the policy to indicate that Forest City disclosed to FFIC that any part of the insured risk was located in New York, or anywhere outside of Ohio, evidenced by the fact that the policy contains only an Ohio amendatory provision. Accordingly, because both FFIC and Forest City were entities organized under Ohio law and headquartered in Ohio, and the policy was "issued for delivery" in Ohio, the insured risk is deemed located in Ohio. See *Admiral Ins. Co. Joy Contractors, Inc.*, 81 A.D.3d 521, 523 (1st Dep't 2011); *see also Underwriters at Lloyd's, London v Foster Wheeler Corp.*, 36 A.D.3d 17, 20 (1st Dep't 2006). Therefore, the FFIC policy is governed by Ohio law.[3]

Under Ohio law, timely notice of a potential claim is a condition precedent to insurance coverage. *See Goodyear Tire & Rubber Co. v Aetna Casualty & Surety Co.*,

[3]Because Ohio law governs the FFIC policy, the Court does not address the New York Insurance Law § 3420(d) argument.

95 Ohio St. 3d 512, 517 (Ohio 2002). Irrespective of whether an insurance policy requires notice "as soon as practicable" or "immediately," the notice is required "within a reasonable time in light of all surrounding facts and circumstances." *Goodyear Tire & Rubber Co.*, 95 Ohio St. 3d at 517, quoting *Ormet Primary Aluminum Corp. v Employers Ins. of Wassau*, 88 Ohio St. 3d 292, 303 (Ohio 2000). "Generally, the question of timeliness calls into play matters to be discerned by the finder of fact; however, it is also true that 'an unexcused significant delay may be unreasonable as a matter of law.'" *Id.*

Here, the parties present a genuine issue of fact as to the timeliness of the notice. FFIC argues that Forest City was first placed on notice that the excess layer may be reached when it received a copy the original complaint in the *Sullivan* action, because the complaint demanded a judgment in the amount of five-and-a-half million dollars. However, while the facial amount of judgment demanded in a pleading can serve as evidence of the timeliness baseline, it cannot alone be conclusive as a matter of law.

Cawsey's affidavit and the substantial changes in the alleged injuries contained in the amended bills of particulars raise a factual issue as to whether, when the *Sullivan* action was commenced, it was reasonable to believe that claims of disk herniation and muscle spasms would not exceed the one million dollar self retention and primary layer policy. Notice of several stomach and spinal surgeries came only in the later part of 2002, when Lester Schwab Katz & Dwyer advised Forest City to notify the excess insurer.

Further, the parties have raised an additional issue of fact as to the existence of undue prejudice to FFIC. Under Ohio law, late notice of claim is not necessarily fatal. "'Unreasonably late notice gives rise to the presumption of prejudice to the insurer, which the insured bears the burden of presenting evidence to rebut.'" *Hundsrucker v Perlman*, 2004 Ohio 4851, *P46 (Ohio Ct. App. 2004), quoting *Ferrando v Auto-Owners Mutual Ins. Co.*, 98 Ohio St.3d 186, 208 (Ohio 2002). The question of reasonableness must be reviewed in light of the purpose of notice provisions in insurance contracts, and where there is no prejudice, even an extensive, multi-year lateness will not justify disclaimer. *Id.*

Here, FC Buckner raises an issue of fact whether there was prejudice to FFIC. Andrew M. Roher, Esq. of Herzfeld & Rubin, P.C., submits an affidavit detailing his research into the legal representation services performed by Lester Schwab Katz & Dwyer. Roher opines that Lester Schwab Katz & Dwyer competently represented defendants in the underlying *Sullivan* action, and that FFIC suffered no prejudice from its lack of additional counsel representing defendants.

FFIC does not dispute that FC Bruckner's interest was competently defended prior to its receiving notice of potential excess liability. Further, even though FFIC argues that as a result of the six-year delay, FFIC could not locate a witness to the incident, there is simply no credible evidence adduced at the present stage of the litigation that any witness was carelessly overlooked in the initial stages of the defense of the underlying *Sullivan*

action. As there are issues of fact as to whether notice was untimely and whether, if so, FFIC suffered prejudice, the Court denies both motion and cross-motion for summary judgment. [4]

In accordance with the foregoing, it is

ORDERED that the motion by plaintiff FC Bruckner Associates, L.P. for summary judgment is denied; and it is further

ORDERED that the cross-motion by defendant Fireman's Fund Insurance Co. for summary judgment is denied; and it is further

ORDERED that the parties shall appear for a preliminary conference on June 29, 2011 at 2:15 p.m. in Room 279, at 80 Centre Street, New York, New York.

This constitutes the decision and order of the Court.

Date: May 24, 2011
New York, New York

Saliann Scarpulla
Saliann Scarpulla, J.S.C.

[4]Because FFIC traces the alleged prejudice to FC Bruckner's failure to give notice when the *Sullivan* action was commenced in 1997, the dispute as to the date of notice, January 31, 2003 or June 10, 2003, does not bear on the outcome of this motion.