SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

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LONGWOOD CENTRAL SCHOOL DISTRICT and NEW YORK SCHOOLS INSURANCE FOUNDATION as attorney-in-fact for NEW YORK SCHOOLS INSURANCE RECIPROCAL,

Plaintiffs,

-against-

COMMERCE AND INDUSTRY INSURANCE COMPANY, BURLINGTON INSURANCE COMPANY, MORE CONTRACTING & CONSULTING, INC., TKI CITAK CORP., and MARION BOGACZ,

Defendants.

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MICHELE M. WOODARD
J.S.C.
TRIAL/IAS Part 11
Index No.: 23402/09
Motion Seq. Nos.: 01, 02, 04 & 05

AMENDED
DECISION AND ORDER

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In motion sequence number one, defendant More Contracting & Consulting, Inc. moves for an order pursuant to CPLR §3025(b)(c) allowing it to amend its Answer to add a cross-claim for declaratory relief against the defendant Burlington Insurance Company requiring it to defend and indemnify it and Longwood Central School District in the action entitled *Marian Bogacz v Longwood Central School District and More Contracting & Consulting, Inc.*

In motion sequence number two, defendant TK Citak Corp. moves for an order pursuant to CPLR §3212 granting it summary judgment declaring that Burlington Insurance Company is obligated to defend and indemnify it in the third party action *More Contracting & Consulting, Corp., Inc. v T.K. Citak Inc.* as well as to reimburse it for all costs and expenses including attorneys' fees incurred by it in defending that action (sequence no. 2) is granted as provided herein.

In motion sequence number four, defendant More Contracting & Consulting, Inc. moves for an order pursuant to CPLR §3212 declaring that Burlington Insurance Company is obligated to indemnify TK Citak Corp. with respect to its third-party claim in the action entitled *More Contracting & Consulting, Corp., Inc. v T.K. Citak Inc.*

In motion sequence number five, defendant Burlington Insurance Company cross-moves for an order pursuant to CPLR §3212 dismissing all claims against it.

The facts pertinent to the determination of this motion are as follows:

On or about July 22, 2009, Marion Bogacz commenced an action pursuant to Labor Law §§ 200, 240(1), 241(6) against Longwood Central School District (the "School District") and More Contracting & Consulting, Inc. ("More Contracting") seeking to recover damages for personal injuries he allegedly sustained while working for TK Citak, he fell from a defective ladder while working at the School District's high school construction site on September 9, 2008. More Contracting had been acting as the

general contractor at the construction site and Bogacz had been working for one of More Contracting's subcontractors, TK Citak Corp.

The School District, its insurer New York Schools Insurance Reciprocal, as well as its attorney-in-fact New York Schools Insurance Foundation, commenced this declaratory judgment action on or about November 11, 2009, against More Contracting and its insurer Commerce and Industry Insurance Company ("Commerce") as well as TK Citak and its insurer Burlington Insurance Company ("Burlington") seeking, *inter alia*, a declaration that Commerce and Burlington are obligated to provide it insurance coverage with respect to Bogacz's action. In this action, the School District has alleged that its contract with More Contracting required More Contracting to provide commercial general liability insurance naming it as an additional primary insured and that TK Citak's contract with More Contracting provided likewise. The School District alleges that the defendant insurers have in fact issued policies which insured it and name it as an additional insured but nevertheless have refused to defend and/or indemnify it in the Bogacz action despite proper notice. The School District maintains that its agreement with More Contracting and More Contracting's agreement with TK Citak contractually provided for indemnification of the School District. TK Citak has cross-claimed against Burlington in this action seeking insurance coverage in the Bogacz action and third-party actions.

More Contracting brought a third-party action against TK Citak on or about December 28, 2009 seeking common law and contractual indemnification and contribution, as well as defense in the Bogacz action. It also sought to recover for breach of contract based upon TK Citak's failure to procure commercial general liability insurance for it and the School District. The School District brought a second third-party action against TK Citak on or about September 29, 2010 seeking the same relief.

More Contracting seeks leave to amend its Answer in this action to add a cross-claim against

Burlington Insurance Company seeking declaratory relief regarding insurance coverage for both it and the School District in the Bogacz action. Similar claims have been advanced by the School District, Commerce and TK Citak Corp., therefore no prejudice would result. Leave is accordingly ***granted***. *See, Wronka v GEM Community Mangement*, 49 AD3d 869 (2d Dept 2008); *Bolanowski v Trustees of Columbia University in City of New York*, 21 AD3d 340 (2d Dept 2005).

Bogacz's accident occurred on September 9, 2008 while Burlington's policy covering TK Citak was in effect. Bogacz filed a notice of claim with the School District on or about December 4, 2008. The School District notified Burlington via letter dated December 15, 2008 of the incident thereby informing Burlington that TK Citak was the named insured on the subject policy and that Bogacz's claim arose from injuries he sustained when he fell off a ladder while performing construction work at the School District's high school.

Via letter dated December 24, 2008, Burlington wrote TK Citak acknowledging receipt of the claim on behalf of the School District. It noted that the claim emanated from Bogacz's accident at a construction site at the school. Burlington noted that it was investigating the claim and that it reserved its rights and noted that it could disclaim coverage if it determined that TK Citak failed to comply with the policy's notice provision. Burlington's records reflect that it intended to retain an investigator to perform a "3420 investigation" on December 23, 2008 and on December 24, 2008, did so by retaining R.M.G. Investigations, Inc. By letter dated December 29, 2008, Burlington disclaimed coverage to the School District on the grounds that it was not an additional insured on TK Citak's policy. It also noted that its insured's role, i.e., TK Citak's, in the underlying event was unclear and that there was no indication that it had any responsibility with respect to Bogacz's accident. Burlington also noted that only certain work classifications by TK Citak were covered under the policy – "carpentry," "masonry" and "residential

roofing" as well as that it did not receive notice until over 90 days after Bogacz's accident. Burlington maintained that it was not obligated to defend or indemnify the School District for those reasons. On January 6, 2009, R.M.G's investigator met with a School District representative as a result of which R.M.G. advised Burlington, *inter alia*, via letter dated January 14, 2009 that Bogacz, who it "suspected" was TK Citak's employee, had fallen off a ladder while working at the high school. Via letter dated February 2, 2009, R.M.G. reported to Burlington following its meeting with TK Citak's principle that the underlying claim was in fact by TK Citak's employee Marion Bogacz for injuries he sustained while working at the School District's construction site. R.M.G. advised that Mr. Citak of TK Citak had not reported the incident because he thought Workers' Compensation would handle the matter. By letter dated March 6, 2009, 32 days later, Burlington denied the claim on two grounds: Late Notice and "Employee Bodily Injury Exclusion."

By letter dated December 14, 2009, More Contracting & Consulting, Inc. requested, *inter alia*, a defense and if necessary indemnification by Burlington in the Bogacz action. By letter dated January 8, 2010, Burlington denied coverage to More Contracting on the ground that it was not an additional insured on the policy via the certificate or endorsement. Burlington noted that its certificate was issued by a broker, not an agent of Burlington and it provided that:

> "This certificate is issued as a matter of information only and confers no rights upon the certificate holder. This certificate does not amend, extend or alter the coverage afforded by the policies below."

It noted that the certificate was subject to all the terms, exclusions and conditions of the policy. Policy exclusions were cited as well.

Burlington's policy provided:

> If we defend an insured against a "suit" and an indemnitee of the insured is also

named as a party to the "suit", we will defend that indemnitee if all of the following conditions are met:

a. The "suit" against the indemnitee seeks damages for which the insured has assumed the liability of the indemnitee in a contract or agreement that is an "insured contract;"

b. This insurance applied to such liability assumed by the insured;

c. The obligation to defend, or the cost of the defense of, that indemnitee, has also been assumed by the insured in the same "insured contract;"

d. The allegations in the "suit" and the information we know about the "occurrence" are such that no conflict appears to exist between the interests of the insured and the interests of the indemnitee;

e. The indemnitee and the insured ask us to conduct and control the defense of that indemnitee against such "suit" and agree that we can assign the same counsel to defend the insured and the indemnitee; and

f. The indemnitee:

(1) Agrees in writing to:

a) Cooperate with us in the investigation, settlement or defense of the "suit;"

b) Immediately send us copies of any demands, notices, summons or legal papers received in connection with the "suit;"

c) Notify any other insurer whose coverage is available to the indemnitee; and

d) Cooperate with us with respect to coordinating other applicable insurance available to the indemnitee; and

(2) Provides us with written authorization to:

a) Obtain records and other information related to the "suit;" and

b) Conduct and control the defense of the indemnitee in such "suit."

Burlington's policy with TK Citak provided that it does not apply to:

> Contractual Liability
>
> Bodily injury" or "property damage" for which the insured is obligated to pay damages by reason of the assumption of liability in a contract or agreement.

However, it further provided: **"This exclusion does not apply to liability for damages:"**

> **(2) Assumed in a contract or agreement that is an 'insured contract', provided the 'bodily injury' or 'property damage' occurs subsequent to the execution of the contract or agreement."** Solely for the purposes of liability assumed in an "insured contract", reasonable attorney fees and necessary litigation expenses incurred by or for a party other than an insured are deemed to be damages because of "bodily injury" or "property damage, provided:
>
> > (a) Liability to such party for, or for the cost of, that party's defense has also been assumed in the same "insured contract."

The insurance agreement also provided that it did not apply to "Employer's Liability" for " 'Bodily injury' to (1) An 'employee' of the insured arising out of and in the course of: (a) employment by the insured." The policy provides that that exclusion applies: (1) Whether the insured may be liable as an employer or in any other capacity; and (2) To any obligation to share damage with or repay someone else who must pay damages because of the injury." Again, the policy provided that this exclusion **"does not apply to liability as assumed by the insured under an 'insured contract.' "** However, the endorsement provides:

> Under Exclusion e. Employer's Liability of 2. Exclusions, COVERAGE A BODILY INJURY AND PROPERTY DAMAGE LIABILITY, SECTION 1 – COVERAGES, the paragraph "This exclusion does not apply to liability assumed by the insured under an 'insured contract.' " **is deleted.**

The deletion is under the Employer's Liability exemption to the exclusion, not the Contractual Liability portion. An insured contract is defined by the policy as:

> "That part of any other contract or agreement pertaining to your business (including an indemnification of a municipality in connection with work performed for a municipality) under which you assume the tort liability of another party to pay for "bodily injury" or "property damage" to a third person or organization. Tort liability means a liability that would be imposed by law in the absence of any contract or agreement."

"On a motion for summary judgment pursuant to CPLR §3212, the proponent must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact." *Sheppard-Mobley v King*, 10 AD3d 70, 74 (2d Dept 2004), *aff'd. as mod.*, 4 NY3d 627 (2005), *citing Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 (1986); *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985). "Failure to make such *prima facie* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers." *Sheppard-Mobley v King, supra*, at p. 74; *Alvarez v Prospect Hosp., supra; Winegrad v New York Univ. Med. Ctr., supra.* Once the movant's burden is met, the burden shifts to the opposing party to establish the existence of a material issue of fact. *Alvarez v Prospect Hosp., supra*, at p. 324. The evidence presented by the opponents of summary judgment must be accepted as true and they must be given the benefit of every reasonable inference. *See, Demishick v Community Housing Management Corp.*, 34 AD3d 518, 521 (2d Dept 2006), citing *Secof v Greens Condominium*, 158 AD2d 591 (2d Dept 1990).

Pursuant to Insurance Law § 3420(a), an insurer has an obligation to timely disclaim a claim or deny coverage once it becomes aware of the grounds therefor. *Halloway v State Farm Ins. Companies*, 23 AD3d 617 (2d Dept 2005), *lv den.*, 6 NY3d 708 (2006). This is so even if the insured has failed to provide the insurer with timely notice. *Allstate Ins. Co. v Cruz*, 30 AD3d 511 (2d Dept 2006). "The failure of an insured to timely notify the insurer of a claim does not excuse the insurer's failure to timely disclaim coverage." *Schulman v Indian Harbor Ins. Co.*, 40 AD3d 957 (2d Dept 2007). "This is particularly true where, as here, the

. . . ground for disclaiming was predicated upon the insured's failure to notify its carrier of the accident, and the ground for disclaiming liability was readily apparent to the carrier when it received notice of the accident." *Kramer v Interboro Mutual Indem. Ins. Co.*, 176 AD2d 308 (2d Dept 1991), *app den.*, 79 NY2d 756 (1992). And while a delay may be justified by investigatory efforts, a delay in denying a claim premised upon investigative efforts fails when there was no need for the investigation. *New York City Housing Authority v Underwriters at Lloyd's, London*, 61 AD3d 726 (2d Dept 2009).

An insurer will also be barred from disclaiming based upon a policy exclusion where it has unreasonable delayed in doing so. *Markevics v Liberty Mut. Ins. Co.*, 97 NY2d 646, 649 (2001); *City of New York v St. Paul Fire and Marine Ins. Co.*, 21 AD3d 978 (2d Dept 2008). "A failure by the insurer to give notice as soon as is reasonably possible after it learns of the accident or of grounds for disclaimer of liability or denial of coverage precludes effective disclaimer or denial." *Hartford Ins. Co. v County of Nassau*, 46 NY2d 1028, 1029 (1979). *rearg den.*, 47 NY2d 951 (1979). "The moment from which the timeliness of an insurer's disclaimer is measured is the date on which it first receives information that would disqualify the claim." *2540 Associates, Inc. v Assicurazioni Generali, S.p.A.*, 271 AD2d 282, 283 (1st Dept 2000); *see also, First Financial Ins. Co. v Jetco Contracting Corp.*, 1 NY3d 64, 69 (2003). This includes when the carrier has "sufficient facts" upon which to base a denial *(Mount Vernon Fire Ins. Co. v Gatesington Equities, Inc.*, 204 AD2d 419, 420 [2d Dept 2004]) as well as when a carrier has a "strong suspicion" that a policy exclusion may apply which would result in a denial of coverage *(North Country Ins. Co. v Tucker*, 273 AD2d 683, 684 [3rd Dept 2000]).

That the notice came from an additional insured does not dispense with or prolong Burlington's obligations to timely disclaim. In *Quest Builders Group, Inc. v Deco Interior Constr., Inc.* (56 AD3d 744 [2d Dept 2008]) notice of a claim and suit was provided to Burlington Insurance not by its insured Deco

Interior Construction, Inc., but by the additional insured general contractor Quest Builders Group. Inc. and its insurer Scottsdale Insurance Company. While the Supreme Court found that Burlington's disclaimer was untimely, it found that the duty to disclaim as soon as is reasonably possible under Insurance Law § 3420(d) was not triggered because the notice was from a co-insurer. In reversing, the Second Department held that "the plaintiffs demonstrated a *prima facie* entitlement to judgment as a matter of law with evidence that Burlington's delay in issuing a disclaimer of coverage was unreasonable as a matter of law, and that, consequently, Burlington was precluded from disclaiming coverage based on a late notice of claim or a policy exclusion (citations omitted)". *Quest Builders Group, Inc. v Deco Interior Cosntr., Inc., supra.* Accordingly, the notice that was provided by the School District will not alter the result. Furthermore, since Burlington wrote to both the School District and TK Citak following its receipt of the School District's notice on December 15, 2008, any notice by TK Citak at that point would have been superfluous. *Massachusetts Bay Ins. Co. v Flood*, 128 AD2d 683 (2d Dept 1987), *app den.*, 70 NY2d 612 (1987). Burlington waived the notice requirement by TK Citak.

The court notes that the School District and More Contracting maintain that they are entitled to coverage under the policy as written: Their status as "additional insured." is not determinative.

Burlington clearly became aware that the claim was late when it was originally received albeit from the School District on December 15, 2008. It also was put on notice that it was the result of bodily injuries to its insured's employee no later than February 2, 2009. Accordingly, the disclaimer on grounds of lateness was known by Burlington immediately upon receipt of the claim and both grounds, *i.e.*, lateness and Employee Bodily Injury Exclusion, were clearly known by Burlington for over 30 days before coverage was denied. Therefore, the disclaimer fails for untimeliness. *See, Sirius America Ins. Co. v Vigo Const. Corp.*, 48 AD3d 450 (2d Dept 2008); *Bovis Lend Lease LMB, Inc. v Royal Surplus*

Co. v Vigo Const. Corp., 48 AD3d 450 (2d Dept 2008); *Bovis Lend Lease LMB, Inc. v Royal Surplus Lines Ins. Co.*, 27 AD3d 841 (1st Dept 2005); *2833 Third Ave. Realty Associates v Marcus*, 12 AD3d 329 (1st Dept 2004); *West 16th Street Tenants Corp. v Public Serv. Mut. Ins. Co.*, 290 AD2d 278 (1st Dept 2002), *lv den.*, 98 NY2d 605 (2002).

In any event, even if Burlington's denial of coverage was not untimely, coverage exists under the policy. Contractual terms are ambiguous if they are subject to more than one interpretation. *Telerep, LLC v U.S. Intern. Media, LLC*, 74 AD3d 401, 402 (1st Dept 2010), citing *Chimart Associates v Paul*, 66 NY2d 570, 573 (1986). Ambiguity must be construed liberally in favor of the insured and strictly against the insurer especially if the insurer's proffered interpretation results in a lack of coverage. *Handelsman v Sea Ins. Co.*, 85 NY2d 96 (1994), *rearg den.*, 85 NY2d 924 (1995); *Ace Wire & Cable Co. v Aetna Cas. & Sur. Co.*, 60 NY2d 390 (1983); *Breed v Insurance Co. of North America*, 46 NY2d 351 (1978), *rearg den.*, 46 NY2d 940 (1979). When an insurer seeks an interpretation resulting in a denial of coverage, it bears a heavy burden of proving that its interpretation is the only reasonable one. *Moneta Dev. Corp. v General Ins. Co. of Trieste and Venice*, 212 AD2d 428 (1st Dept 1995); *Sacks v Hartford Ins. Co.*, 68 AD2d 48 (2d Dept 1979).

Burlington's policy with TK Citak includes coverage for bodily injury assumed in an "insured contract." The deleted exception to the exclusion for liability assumed in an "insured contract" is in the employer's liability provision, not the contractual liability provision, which applies here. Under the rule of *inclusio unius, exclusio alterius*, the presumption is that Burlington intentionally decided not to exclude the exemption coverage for an insured contracts within the contractual exclusion, as it purposely failed to use that term there.

In conclusion, the defendant More Contracting's motion pursuant to CPLR §3025(b) allowing it

The defendants' TK Citak Corp.'s and More Contracting's motions for summary judgment are ***granted*** and it is hereby

ORDERED, that the defendant Burlington Insurance Company is obligated to defend and indemnify TK Citak Corp. and More Contracting, Inc. as well as the School District in *Bogacz v Longwood Central School District and More Contracting & Consulting, Inc.* and the third-party action *More Contracting & Consulting Corp., Inc. v TK Citak, Inc.*

The defendant Burlington Insurance Company's motion for summary judgment dismissing all claims against it is ***denied***.

This constitutes the Decision and Order of the Court.

DATED: October 21, 2011
Mineola, N.Y. 11501

ENTER:

HON. MICHELE M. WOODARD
J.S.C.
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