National Cas. Co. v American Home Assur. Co.
2011 NY Slip Op 32998(U)
November 3, 2011
Supreme Court, New York County
Docket Number: 105494/06
Judge: Joan M. Kenney
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: JOAN M. KENNEY J.S.C. Justice

PART 8

Index Number : 105494/2006

NATIONAL CASUALTY

vs.

AMERICAN HOME ASSURANCE

SEQUENCE NUMBER : 003

SUMMARY JUDGMENT

INDEX NO. 105494/06

MOTION DATE 8/2/11

MOTION SEQ. NO. 003

MOTION CAL. NO.

n this motion to/for summary judgment

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1-21
Answering Affidavits — Exhibits X Motion	22-37
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Reply in support of x motion	41

Cross-Motion: ☑ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

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

MOTION IS DECIDED IN ACCORDANCE WITH THE ATTACHED MEMORANDUM DECISION

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Dated: November 3, 2011

JOAN M. KENNEY J.S.C.

J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 8

---X

NATIONAL CASUALTY COMPANY, individually and as assignee of 212 West Kingsbridge Ltd. and Howard Buck,

Plaintiff,

-against-

AMERICAN HOME ASSURANCE COMPANY and CHUBB INDEMNITY INSURANCE COMPANY,

Defendants.

---X

DECISION & ORDER
Index No. 105494/2006

UNFILED JUDGMENT
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Joan M. Kenney, J.:

In this declaratory judgment action, defendant Chubb Indemnity Insurance Company (Chubb), moves, pursuant to CPLR 3212, dismissing the complaint.

Plaintiff National Casualty Company (National Casualty), individually and as assignee of 212 West Kingsbridge Ltd. (West Kingsbridge) and Howard Buck (Buck) (both, the assignors), cross-moves, pursuant to CPLR 3212 (b) and Insurance Law § 3420 (d) (2), for an order granting summary judgment on its claim asserted against Chubb, and dismissing Chubb's affirmative defenses, primarily on the ground that Chubb's disclaimer of coverage was untimely.

FACTUAL & PROCEDURAL BACKGROUND

This action arises out of Chubb's refusal to defend and indemnify West Kingsbridge and Buck in a lead-based paint poisoning action captioned, *Dominguez v 212 West Kingsbridge Ltd. & Howard Buck* (Sup Ct, Bronx County, index No. 017400/2001) (the *Dominguez* action). The date of loss for insurance purposes is November 3, 1993, the date that Andrew Dominguez, an infant and one of the *Dominguez* action plaintiffs, was diagnosed with elevated lead blood levels. By letter dated July 29, 1994, Andrew Dominguez' attorneys advised the assignors of the lead-based paint poisoning claim,

and that, beginning on January 22, 1992, Andrew Dominguez had resided in the assignors' apartment building.

By letter dated October 9, 1998, Chubb denied coverage, primarily on the ground that it did not receive notice of the *Dominguez* action or the underlying claim until August 28, 1998, more than four years after the assignors received notice of the claim. Subsequently, Chubb refused to accept National Casualty's tender of the assignors' defense, citing the same grounds.

In the complaint, National Casualty seeks a judgment declaring that Chubb breached its contractual obligation to defend and indemnify the assignors with respect to the *Dominguez* action and underlying claim, and seeks pro rata contribution from Chubb for sums paid in the defense and settlement of that action.

The following carriers and insurance policies issued to the assignors are relevant to the action at bar:

National Casualty issued a commercial general liability policy to the assignors covering the period from December 20, 1991 through December 20, 1992 (the National Casualty policy). The National Casualty policy provided for liability limits of $1 million per occurrence and $1 million in aggregate, with a self-insured retention of $10,000 per occurrence.

Defendant American Home Assurance Company (American Home) issued a commercial general liability policy to the assignors covering the period from November 5, 1992 to December 20, 1993 (the American Home policy). The American Home policy provided for liability limits of $5 million per occurrence and $5 million in aggregate, with a self-insured retention of $10,000 per occurrence. National Casualty has settled its claim against American Home.

Old Lyme Insurance Company of Rhode Island (Old Lyme) issued a comprehensive general

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liability insurance policy to the assignors covering the period from December 20, 1991 through December 20, 1993, including one renewal term (the Old Lyme policy). The Old Lyme policy provided for a $10,000 liability limit.

Chubb issued a commercial general liability insurance policy to HM Agency, Inc. covering the assignors during the period from December 20, 1993 through December 20, 1994 (the Chubb 1994 policy), which was renewed for one year, from December 20, 1994 through December 20, 1995 (the Chubb 1995 renewal policy). Both policies provided for liability limits of $250,000 per occurrence and $500,000 in aggregate, with a $25,000 deductible.

Chubb also issued a lead-based paint liability insurance policy to HM Agency, Inc. covering the assignors during the period from December 20, 1994 through December 20, 1995 (Chubb lead-based paint policy), and having liability limits of $250,000 per claim and $250,000 in aggregate, with a $25,000 deductible per claim. The Chubb lead-based paint policy is a claims-made policy.

ARGUMENTS

Chubb now seeks summary judgment on the grounds that the evidentiary record conclusively demonstrates that it did not receive timely notice of the *Dominguez* action or the underlying claim, in breach of the Chubb 1994, 1995 renewal, and lead-based paint policies' notice of claim provisions, and that, in any event, no coverage exists under the 1995 renewal and lead-based paint policies.

In opposition to the motion and in support of the cross motion, National Casualty contends that Chubb is estopped pursuant to Insurance Law § 3420 (d) (2) from disclaiming coverage on the grounds of late notice or any other condition or exclusion set forth in the three Chubb policies because Chubb did not disclaim coverage until, at minimum, 43 days after receipt of the notice of claim.

DISCUSSION

A carrier's obligation to cover its insured's loss is conditional upon the insured's timely notice to the carrier of the incident in accordance with the terms of the policy (*Power Auth. of State of N.Y. v Westinghouse Elec. Corp.*, 117 AD2d 336, 339 [1st Dept 1986]). "Absent a valid excuse, a failure to satisfy the notice requirement vitiates the policy," and the insurer need not show prejudice before it can assert a defense based on failure to timely notify (*Security Mut. Ins. Co. of N.Y. v Acker-Fitzsimons Corp.*, 31 NY2d 436, 440 [1972]).

The Chubb 1994 and 1995 renewal policies require the assignors to notify Chubb in writing of an occurrence which may result in a claim and of any claim received by them "as soon as practicable" (Chubb 1994 Policy & 1995 Renewal Policy, Liability Loss Provisions [a]). The Chubb lead-based paint policy requires the assignors to give Chubb "immediate written notice of the claim or suit" (Chubb Lead-Based Paint Policy, Duties in the Event of a Claim or Suit, [A]).

"[W]here an insurance policy requires that notice of an occurrence be given promptly, notice must be given within a reasonable time under the facts and circumstances of each case" (*Kim v Maher*, 226 AD2d 350, 350 [2d Dept 1996]). "Although what is reasonable is ordinarily left for determination at trial, where there is no excuse for the delay and mitigating considerations are absent, the issue may be disposed of as a matter of law in advance of trial" (*Power Auth. of State of N.Y. v Westinghouse Elec. Co.*, 117 AD2d at 339-340). The insured bears the burden of establishing that its delay in notifying the insurer of the claim was not unreasonable (*RMD Produce Corp. v Hartford Cas. Ins. Co.*, 37 AD3d 328, 331 [1st Dept], *lv denied* 8 NY3d 816 [2007]).

The documentary record now before the court includes the following relevant contemporaneous correspondence and documentation regarding the assignors' notice of claim and

Chubb's notice of disclaimer:

By letter dated July 29, 1994, the attorneys representing Andrew Dominguez, an infant, and his mother, Rebecca Munoz, advised West Kingsbridge that Andrew Dominguez had suffered personal injury as the result of lead-based paint poisoning while residing in an apartment owned by the assignors since 1992.

By letter dated August 4, 1994, West Kingsbridge forwarded the July 29, 1994 letter to Kaye Insurance Associates, LP (Kaye), with instructions to forward that letter to the appropriate insurance carriers. A handwritten note on the August 4, 1994 transmittal letter indicates that the diagnosis was made on November 3, 1993.

By letters dated October 17 and 18, 1994, Claims Administration Corporation (CAC) advised the assignors, Kaye, American Home, and National Casualty of the Dominguez claim, that CAC was the claims administrator for Old Lyme, and offered a defense for the Dominguez claim, subject to a reservation of rights.

On April 27, 1995, the City of New York issued an order to abate the lead-based paint nuisance to the assignors, and the condition was allegedly rectified within a few months.

On December 16, 1996, Andrew Dominguez and Rebecca Munoz commenced the *Dominguez* action against the assignors, and effected service on them in January 1997.

By letter dated August 19, 1998, CAC notified CGS Coverage, Inc. (CGS), the assignors, and Kaye, of the *Dominguez* action. CGS was the producer for the Chubb 1994, 1995 renewal, and lead-based paint policies.

On August 27, 1998, Chubb received notification from CGS of the *Dominguez* action, and a copy of the complaint. Chubb represents that this is the first notification that it received from any

source of the *Dominguez* action and the claims underlying it.

By letter dated August 28, 1998, Chubb advised the assignors that it was attempting to locate the relevant policies in order to make a coverage determination, and would investigate the claim, without waiving its rights under the policy provisions.

By letter dated October 9, 1998, Chubb advised the assignors and the *Dominguez* action attorneys that it disclaimed coverage under all three Chubb policies. Chubb disclaimed coverage under the Chubb 1995 renewal policy on a variety of grounds, including failure to provide timely notice of claim, the location of the loss location is not a designated premises, and a lead-based paint coverage exclusion. Chubb also disclaimed coverage under the Chubb 1994 policy on the ground of failure to provide timely notice, and advised that, because it had been unable to locate a copy of the 1994 policy, it reserved its right to amend and supplement the disclaimer letter. Last, Chubb disclaimed coverage under the lead-based paint liability policy on the grounds of failure to provide timely notice of claim, and the absence of a claim being made for lead-based paint exposure during the policy term.

By letter dated August 4, 1999, Chubb advised the assignors and the *Dominguez* action attorneys that it disclaimed coverage under the Chubb 1994 policy on the ground of late notice of claim. Chubb also advised that, unlike the Chubb 1995 renewal policy, the Chubb 1994 policy does not contain a lead-based paint exclusion provision, but does designate the location where the loss occurred as a covered premises.

Subsequently, the *Dominguez* action plaintiffs voluntarily discontinued the action without prejudice. They recommenced the action on June 6, 2001.

By letter dated October 24, 2001, Chubb advised the assignors and the *Dominguez* action

plaintiffs of the discontinuance and recommencement, and of Chubb's continued disclaimer of coverage under all three Chubb policies on the grounds of late notice of claim, and reserved its rights under those policies to disclaim on additional grounds.

The assignors' more than four-year delay in notifying Chubb constitutes breaches of the Chubb 1994, 1995 renewal, and lead-based paint policies, as a matter of law. Absent an excuse or mitigating circumstances, relatively short delays have been held to constitute a breach of a prompt notice of claim provision as a matter of law (*see e.g. Deso v London & Lancashire Indem. Co. of Am.*, 3 NY2d 127, 130 [1957] [51 days]; *Haas Tobacco Co. v American Fid. Co.*, 226 NY 343, 346-347 [1919] [10 days]; *Tower Ins. of N.Y. v Amsterdam Apts. LLC*, 82 AD3d 465, 466 [1st Dept 2011] [76 days]; *Kogan v North St. Community*, LLC, 81 AD3d 429, 431 [1st Dept 2011] [four months]; *Power Auth. of State of N.Y. v Westinghouse Elec. Corp.*, 117 AD2d at 342 [53 days]). The undisputed evidence conclusively demonstrates that, no later than July 29, 1994, the assignors were advised that a lead-based painting poisoning claim had been made against them, and that the individual who sustained injury had been a resident in the assignors' building beginning January 22, 1992. This evidence also demonstrates that the assignors immediately notified their insurance broker, Kaye, who immediately notified CAC, who immediately notified American Home, Old Lyme, and National Casualty. CAC notified CGS by letter dated August 19, 1998. Even assuming, without deciding, for purposes of this motion that CGS is Chubb's agent, that notification occurred more than four years after the assignors became aware of the claim and the policy years in which it arose. The record is devoid of any excuse or explanation for the delay.

National Casualty has failed to raise a triable issue regarding whether Chubb may have received the notice of claim as early as May 26, 1998. That date is mentioned once in the October

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9, 1998 letter as the date that Chubb first received the notice of claim. However, the reference is clearly a typographical error. Absolutely nothing in the record supports a finding that May 26, 1998 is the correct date. The October 9, 1998 letter also refers to August 27, 1998 as the date that Chubb first received the notice of claim. Moreover, the undisputed record conclusively demonstrates that Chubb did not create a file until August 27, 1998, and that no mention of the *Dominguez* action or the underlying claim exists in Chubb's records until August 27, 1998.

However, despite the untimeliness of the assignors' notice of claim, coverage may still exist, if Chubb's disclaimers were themselves untimely, and if coverage is otherwise available. By statute, an insurer wishing to disclaim liability or deny coverage for personal injury must do so by giving "written notice as soon as is reasonably possible of such disclaimer of liability or denial of coverage to the insured and the injured person or any other claimant" (Ins. Law § 3420 [d] [2]). An insurer will be estopped from denying coverage, if the insurer fails to give the insured timely notice of disclaimer (*Generali-U.S. Branch v Rothschild*, 295 AD2d 236, 237 [1st Dept 2002]).

Contrary to National Casualty's contention, the statute is applicable here, inasmuch as Chubb's disclaimer letters were addressed to the assignors, with copies to the *Dominguez* action attorneys, and were not addressed to National Casualty and its tender of the assignors' defense, and given that National Casualty commenced this action in its capacity as its insureds' assignee (*see Bovis Lend Lease LMB, Inc. v Royal Surplus Lines Ins. Co.*, 27 AD3d 84, 87-88 [1st Dept 2005] [holding that Ins. Law § 3420 (d) (2) does not apply to a carrier intending to disclaim liability against another carrier who covers the same insured]).

Chubb's 43-day delay in issuing the notice of disclaimer is not reasonable. "[T]imeliness of an insurer's disclaimer is measured from the point in time when the insurer first learns of the grounds

for disclaimer of liability or denial of coverage" (*First Fin. Ins. Co. v Jetco Contr. Corp.*, 1 NY3d 64, 68-69 [2003]). Disclaimers issued more than 30 days from the date that the carrier became aware of the grounds for disclaimer have been held to be untimely, as a matter of law (*see e.g. Sirius Am. Ins. Co. v Vigo Constr. Corp.*, 48 AD3d 450, 452 [2d Dept 2008] [34 days]; *West 16th St. Tenants Corp. v Public Serv. Mut. Ins. Co.*, 290 AD2d 278, 279 [1st Dept], *lv denied* 98 NY2d 605 [2002] [30 days]; *Matter of Colonial Penn Ins. Co. v Pevzner*, 266 AD2d 391, 391 [2d Dept 1999] [41 days]).

CGS received the notice of claim on August 19, 1998 and immediately forwarded it to Chubb, which sent the assignors a reservation-of-rights letter dated August 28, 1998. The Chubb adjuster noted on August 31, 1998 that he "reviewed complaint and other materials. Insured was served on 1/17/97 and only recently tendered complaint. I believe we should have a valid late notice defense. Will await recipt [sic] of policies and disclaimer is likely. Nevertheless, I will still conduct investigation" (Chubb Internal Electronic Claims System, P. Amirata, Aug. 31, 1998). Thus, the record conclusively demonstrates that, no later than August 31, 1998, Chubb had received a copy of the *Dominguez* action complaint, and was well aware from the face of that complaint that grounds for a disclaimer based on late notice existed, yet failed to issue the disclaimer letter until October 9, 1998, more than five weeks later.

Contrary to Chubb's contention, the assignors' failure to provide notice after Chubb had sent the relevant policies to its dead-storage facility does not constitute a mitigating excuse for its 43-day delay. While a carrier is not required to disclaim coverage before conducting a prompt reasonable investigation into all possible grounds for disclaimer (*see DiGuglielmo v Travelers Prop. Cas.*, 6 AD3d 344, 346 [1st Dept], *lv denied* 3 NY3d 608 [2004]), a carrier must disclaim promptly "where the basis for the disclaimer was or should have been readily apparent before the onset of the delay"

(*Bovis Lend Lease LMB, Inc. v Royal Surplus Lines Ins. Co.*, 27 AD3d at 88). Where, as here, the carrier's delay in timely completing its investigation was caused by internal factors within its control, that delay may be held unreasonable, as a matter of law (*see e.g. id.*, at 86, 89 [10 weeks' delay caused by resignation of claims adjuster held unreasonable]). The proffered excuse is not reasonable given that Chubb issued the disclaimer prior to locating the 1994 policy, and located a copy of that policy within two days after its adjuster requested that a copy be found (*see* Chubb Internal Electronic Claims System, G. Homestead, Dec. 2, 1998).

For these reasons, Chubb's disclaimer letter was not timely issued, in breach of the notice of disclaimer terms of each of the three Chubb policies.

Next, Chubb contends that its late disclaimer cannot constitute a waiver of its right to disclaim under the Chubb 1995 renewal policy because no coverage is available under that policy's scope of coverage. That policy expressly excludes coverage for lead-based paint poisoning, and removes the premises where the loss occurred from the list of designated locations.

In opposition, National Casualty contends that the undisputed evidence demonstrates that neither the lead-based paint exclusion nor the provision deleting the subject premises from coverage effected a modification of the Chubb 1995 renewal policy because neither is signed by an authorized Chubb representative.

Disclaimer "is unnecessary when a claim falls outside the scope of the policy's coverage portion. Under those circumstances, the insurance policy does not contemplate coverage in the first instance, and requiring payment of a claim upon failure to timely disclaim would create coverage where it never existed" (*Matter of Worcester Ins. Co. v Bettenhauser*, 95 NY2d 185, 188 [2000]).

The Chubb 1994 policy does not specifically exclude lead-based paint claims from the scope of coverage, and lists the building where Andrew Dominguez resided on the designated premises endorsement as within the ambit of the policy; therefore, coverage is available under that policy. However, the Chubb 1995 renewal policy amends the 1994 policy terms to extend the coverage period by one year, to exclude coverage for lead-based paint claims and to delete the subject building from the designated locations endorsement (*see* Chubb 1995 Renewal Policy, Commercial Ins. Coverage Amendments).

These amendments are enforceable. While the Chubb 1995 renewal policy includes a merger provision requiring all amendments to be signed by a Chubb authorized representative, that provision does not eviscerate the lead-based paint exclusion and the designated locations endorsement. Both these provisions are part of the Chubb 1995 renewal policy from the date of its inception, and, therefore, do not constitute an amendment of the renewal policy's terms.

In any event, and assuming that these provisions do constitute modifications of the Chubb 1994 or 1995 renewal policy, the assignors' failure to object to the changes, and the purchase by the assignors of the Chubb lead-based paint policy covering the subject premises during 1995 amply demonstrate their acquiescence to, and ratification of, the changes.

For these reasons, the Chubb 1995 renewal policy does not cover the *Dominguez* action or underlying claim.

Similarly, the *Dominguez* action or underlying claim never fell within the scope of the Chubb lead-based paint policy. Therefore, Chubb's failure to timely disclaim coverage under that policy cannot, and does not, create coverage (*see Markevics v Liberty Mut. Ins. Co.*, 97 NY2d 646, 648 [2001] ["A disclaimer is unnecessary when a claim does not fall within the coverage terms of an

insurance policy"]).

The Chubb lead-based paint policy is a claims-made policy that does not cover pre-existing claims. "An insurance contract is to be interpreted by the same general rules that govern the construction of any written contract and enforced in accordance with the intent of the parties as expressed in the language employed in the policy" (*Throgs Neck Bagels, Inc. v GA Ins. Co. of N.Y.*, 241 AD2d 66, 69 [1st Dept 1998]). The policy provides, in relevant part, that "this policy provides claims made liability insurance only for bodily injury. Except as otherwise provided, such coverage applies only to claims first made against the insured during the policy period" (Chubb Lead-Based Paint Policy, at 1 [capitalization and emphasis omitted]). The policy also provides, in relevant part, that the insurance applies to claims for bodily injury arising out of lead-based paint exposure "first made against the insured during the policy period and reported to us during the policy period or within 30 days after the end of the policy period" (*id.*, Bodily Injury Liability Coverage, at 3 [emphasis omitted]).

Here, the Dominguez demand letter dated July 29, 1994 conclusively demonstrates that the claim existed prior to the inception of the lead-based paint liability policy's term on December 20, 1994. Therefore, the claim falls outside the scope of coverage. Accordingly, it is

ORDERED that the motion is granted to the extent that partial summary judgment in favor of defendant Chubb Custom Insurance Company, sued herein as Chubb Indemnity Insurance Company (Chubb), is granted; and it is further

ADJUDGED AND DECLARED that Chubb is required by the Chubb 1994 policy to indemnify plaintiff for its losses sustained in *Dominguez v 212 West Kingsbridge Ltd. & Howard Buck* (Sup Ct, Bronx County, index No. 017400/2001) and underlying claim, and that Chubb is not

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required by the Chubb 1995 renewal policy and Chubb lead-based paint policy to indemnify plaintiff for those losses; and it is further

ORDERED that the branches of the claims for recovery under the Chubb 1995 renewal policy and the Chubb lead-based paint policy are dismissed; and it is further

ORDERED that the motion is denied in all other respects; and it is further

ORDERED that the cross motion is granted to the extent that partial summary judgment in favor of plaintiff National Casualty Company, individually and as assignee of 212 West Kingsbridge Ltd. and Howard Buck is granted; and it is further

ADJUDGED AND DECLARED that Chubb is required by the Chubb 1994 policy to indemnify plaintiff for its losses sustained in *Dominguez v 212 West Kingsbridge Ltd. & Howard Buck* (Sup Ct, Bronx County, index No. 017400/2001) and underlying claim, and that Chubb is not required by the Chubb 1995 renewal policy and Chubb lead-based paint policy to indemnify plaintiff for those losses, and it is further

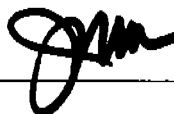
ORDERED that the branches of Chubb's affirmative defenses relating to the Chubb 1994 policy are dismissed; and it is further

ORDERED that the cross motion is denied in all other respects; and it is further

ORDERED that all remaining claims are hereby severed and continued; and it is further

ORDERED that the parties proceed to mediation, forthwith.

Dated: November 3, 2011

ENTER: 

J.S.C.

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