

**Morrisania Towers Hous. Co. LP v Lexington Ins.
Co.**

2012 NY Slip Op 30935(U)

April 3, 2012

Sup Ct, New York County

Docket Number: 116364/10

Judge: Manuel J. Mendez

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

PRESENT: MANUEL J. MENDEZ
Justice

PART 13

**MORRISANIA TOWERS HOUSING COMPANY LIMITED
PARTNERSHIP, NHPMN MANAGEMENT, LLC, AND
LIBERTY MUTUAL INSURANCE COMPANY,**
Plaintiff

INDEX NO. 116364/10

MOTION DATE 02-29-2012

- v -

LEXINGTON INSURANCE COMPANY,

Defendant.

MOTION SEQ. NO. 002

MOTION CAL. NO. _____

The following papers, numbered 1 to 10 were read on this motion to dismiss and for summary judgment.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — 1-10 FILED JUDGMENT	1, 2-3, 4-5, 6
Answering Affidavits — Exhibits 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).	7-8, 9
Replying Affidavits _____	10

Cross-Motion: Yes No

Upon a reading of the foregoing cited papers, it is ordered and adjudged that defendant's motion to dismiss on the grounds that a defense is founded upon documentary evidence and the complaint fails to state a cause of action is denied, plaintiffs' cross-motion for summary judgment is granted.

Plaintiffs bring this action for a determination of rights with respect to the Lexington policy and for a declaratory judgment that once coverage under the Arch policy covering the plaintiffs Morrisania and NHPMN is exhausted, Lexington is required to provide a defense and indemnity to them for the claims alleged in a consolidated action pending in Supreme Court County of Bronx under Index number 17848/05. Plaintiffs also seek judgment declaring that coverage under the Liberty Mutual Policy is excess over the coverage afforded by the Lexington policy.

Relevant Facts(Insurance coverage)

Morrisania Towers Housing Company (hereinafter "Morrisania") is the owner of premises located at 280-300 East 161st. Street Bronx, New York(hereinafter the "premises") NHPMN Management Company (hereinafter "NHPMN") is Morrisania's Managing Agent. McRoberts Protective Agency Inc., (hereinafter "McRoberts") is a security agency. On August 1, 2004 Morrisania, through its agent NHPMN entered into an agreement with McRoberts for McRoberts to provide security services at the premises. The agreement commenced on August 1, 2004 and was to end on July 31, 2005. As part of the agreement McRoberts was to carry and maintain insurance coverage and "to hold owner harmless from any and all liability or damage or claims for damage for personal injury, including death, as well as property damages which

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

may arise from the negligent acts of [McRoberts]." [See Foley Affidavit Exhibit C].

McRoberts obtained a policy of insurance from Arch Insurance Company (No. BSPKG00454) covering the period October 5, 2004 through October 5, 2005, with a General Aggregate limit of \$5, 000, 000 dollars and a per occurrence limit of \$1,000, 000. It also obtained an Excess coverage policy through Lexington Insurance Company (No. 1155109) covering the period December 1, 2004 through October 5, 2005, with an aggregate limit of \$2,000,000 per occurrence. The Lexington policy lists the Arch policy as the underlying policy. Morrisania and NHPMN are covered under an excess policy of insurance issued by Liberty Mutual (No. EBI-661-004162-103) with an General Aggregate limit of \$14,166,666 and a bodily injury/property damage limit of \$1,000,000[see Foley Affidavit Exhibit A, B and E].

The Lexington Policy, lists the Arch policy as the Underlying Insurance and provides coverage for the loss which the Insured is obligated to pay by reason of exhaustion of all applicable underlying limits. This policy contains a notice provision requiring the Insured to immediately notify Lexington in writing of any occurrence which may reasonably be expected to result in a claim under the policy. The named Insured is required to give immediate written notice of any claim which is reasonably likely to involve the policy.

The Liberty Mutual Policy provides coverage in excess of a \$500,000 self-insured amount and "in excess of other valid and collectible insurance, whether primary, excess, contingent or on any other basis, except any such insurance purchased by the insured specifically to apply in excess of this insurance. If the Insured has ' other insurance', greater than or equal to [\$500,000] then all amounts payable or retained under such 'other insurance', but not less than [\$500,000]." The Liberty Mutual Policy "will not contribute with any other insurance". [see Foley Affidavit Exhibit E pg. 13, 14, 20 and 21].

Underlying Action

The underlying action concerns a 2005 shooting of Raymond Alberto Carreras by Sonia Meekins and Bakim Meekins, that occurred at the property owned by Morrisania, managed by NHPMN and for which McRoberts provided security. Carreras was shot, while in front of his mother, and rendered a paraplegic. Carreras and his mother Yolanda Lopez brought suit in Supreme Court Bronx County under index No. 17848/05 against Morrisania, McRoberts, Sonia Meekins and Bakim Meekins on June 20, 2005. On May 5, 2008 Carreras and Lopez brought suit in Supreme Court Bronx County under index No. 303699/08 against NHPMN. The actions were consolidated under index number 17848/05.

On August 2, 2006, Wilson Elser, defense counsel for Morrisania sent a letter to defense counsel for McRoberts regarding the Agreement of August 1, 2004 and tendering the defense and indemnification of the action on behalf of Morrisania to McRoberts. On August 25, 2006 Carol Meriam, Esq., of Brownyard Claims Management, Inc., responded to Wilson Elser's letter, denying negligence on the part of McRoberts and disclaiming coverage based on late notice. [see Cross motion Exhibit D and E].

On November 2, 2006 Wilson Elser replied to Ms. Meriam objecting to the denial of tender on numerous grounds, requesting confirmation of coverage and copies of the policy of insurance and declaration page. As to the late notice claim Wilson Elser pointed out that McRoberts is a named defendant and that Cross-claims were asserted against it in October 2005 as such they were to have placed Brownyard Claims Management on Notice. Finally Wilson Elser argued that it was giving notice of the claim as per the policy "as soon as practicable." By letter dated November 22, 2006, Ms. Meriam responded reiterating her previous denials of coverage. None of the letters from Ms. Meriam identified McRobert's insurance carrier. [see Cross motion Exhibits G, H, I and J].

Preliminary conference orders were issued, ordering McRoberts to provide the name of their insurance carrier. It was not until January 23, 2007 that Morrisania learned that Arch Insurance had issued a liability policy to cover McRoberts. McRoberts provided the name of the wrong excess carrier and it wasn't until June of 2009 when counsel for Morrisania and NHPMN learned that Lexington Insurance could be the excess carrier. On June 3, 2009 counsel for Morrisania and NHPMN wrote to Lexington notifying it of the claims and requesting that it confirm receipt of notice of the actions and that it will be providing coverage. Lexington responded with a request for additional information. On July 16, 2009 counsel for Morrisania and NHPMN provided the information requested, reiterated the request for confirmation and their position on coverage. Receiving no answer from Lexington, again on July 2, 2010 counsel for Morrisania and NHPMN wrote to Lexington providing it with a policy number, period of coverage and a copy of the declarations page. Counsel also requested confirmation that Lexington would be providing coverage for this matter. On July 30, 2010 Lexington wrote to Morrisania and NHPMN's counsel disclaiming coverage [see Cross motion Exhibits B, C, F, L, M, N, O, P, Q, R, S, T, U and V].

Plaintiffs commenced this declaratory judgment action. Defendant now moves to dismiss and plaintiffs cross move for summary judgment. Defendant claims that it is not obligated to provide coverage because notice was untimely. Plaintiff claims that notice was timely, as it was made as soon as they learned Lexington was the carrier and the disclaimer of coverage was untimely, as it was made over one year after receiving notice of claim.

LAW

Notice:

Insurance Law § 3420 (d)(2) requires an insurer under a liability policy delivered or issued for delivery in this state to disclaim liability or deny coverage for death or bodily injury arising out of a motor vehicle accident or any other type of accident occurring within this state, to give written notice as soon as reasonably possible of such disclaimer of liability or of coverage to the insured and the injured person or any other claimant. Timeliness 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 (Ewing v. Moore, 9 A.D. 3d 484, 781 N.Y.S. 2d 51 [1st Dept. 2004]).

Courts have interpreted this provision as requiring the insurer to give prompt notice and not delay the issuance of a disclaimer that the insurer knows to be valid until it completes its investigation of other possible grounds for disclaimer. As such

the failure of the insurer to give written notice of disclaimer or denial of coverage for a personal injury claim as soon as reasonably possible, after first learning of the accident or the grounds for disclaimer of liability or denial of coverage, precludes the effectiveness of the disclaimer or denial. Any uncertainty as to the existence of coverage is irrelevant to an insurer's ability to issue a timely disclaimer based on an insured's breach of a condition precedent to coverage, such as a late notice of claim, that is known to the insurer (*George Campbell Painting v. National Union Fire Insurance Company of Pittsburgh, PA*, 92 A.D. 3d 104, 937 N.Y.S. 2d 164 [1st. Dept. 2012]).

Courts have found a four month delay in disclaiming insurance coverage on the ground that an additional insured failed to notify the insurer "as soon as practicable" of the accident to be unreasonable as a matter of law, absent an explanation why anything beyond a cursory investigation was necessary to determine whether the additional insured had timely notified it of the claim(*Hunter Roberts Construction Group, LLC., v. Arch Insurance Company*, 75 A.D. 3d 404, 904 N.Y.S. 2d 52 [1st. Dept. 2010]). An unsatisfactory explanation for the delay will render the notice of disclaimer or denial of coverage unreasonable as a matter of law (*Moore v. Ewing*, 9 A.D. 3d 484, 781 N.Y.S. 2d 51, *Supra*,) insurer's unexplained delay in notice of disclaimer 45 days after it had information about the claim unreasonable as a matter of law; *Worcester Insurance Company v. Bettenhauser*, 95 N.Y.2d 185, 734 N.E. 2d 745, 712 N.Y.S. 2d 433 [2000], failure to deny coverage for more than one year unreasonable; *Agoado Realty Corp, v. United International Insurance Company*, 260 A.D. 2d 112, 699 N.Y.S. 2d 335 [1st. Dept. 1999], unexplained delay of approximately one year disclaimer of coverage for a wrongful death suit arising out of a tenant's murder unreasonable as a matter of law, regardless of whether the insured was prejudiced).

Strict scrutiny of facts supporting an insurer's noncooperation defense to coverage is required to protect innocent injured parties from suffering the consequences of lack of coverage (*Hunter Roberts Construction Group, LLC, v. Arch Insurance Company*, 75 A.D. 3d 404, 904 N.Y.S. 2d 52, *Supra*).

Plaintiffs in the underlying action, innocent injured parties, who sustained serious physical injuries rendering Carreras paraplegic as a result of the gunshot wounds would suffer the consequences of McRoberts neglect in providing timely insurance information or filing a prompt notice of claim with its carrier. In any event, Lexington waited for over a year from the time it was first notified of the claim by Morrisania and NHPMN's counsel before disclaiming coverage. This over one year delay is unreasonable as a matter of law and untimely.

Priority:

Arch Insurance company policy BSPKG00454 is the primary and underlying policy listed in Lexington's excess coverage policy. The question to be answered is which must be exhausted first as between Liberty Mutual policy No. EBI-661-004162-103 and Lexington policy No. 1155109 or do they contribute ratably.

An insurance policy is a contract between the insurer and the insured and the extent of coverage is controlled by the relevant policy terms, including a given policy's priority vis-a-vis other policies. It is the policy provisions that control priority of coverage (*Bovis Lend Lease LMB, Inc., v. Great American Insurance Company*, 53 A.D.

3d 140, 855 N.Y.S. 2d 459 [1st. Dept. 2008]). An insurance policy which purports to be excess coverage but contemplates contribution with other excess policies or does not by the language used negate that possibility must contribute ratably with a similar policy, but must be exhausted before a policy which expressly negates contribution with other carriers or otherwise manifests that it is intended to be excess over other excess policies (15 Couch on Insurance § 220:42; Vassar College v. Diamond State Insurance Company, 84 A.D. 3d 942, 923 N.Y.S. 2d 124 [2nd. Dept. 2011]). An excess policy that provides the final tier of coverage cannot be invoked prior to the exhaustion of all primary and excess policies (Tishman Construction Corp., v. Great American Ins., Co, 53 A.D. 3d 416, 861 N.Y.S. 2d 38 [1st. Dept. 2008]).

The Lexington policy lists the Arch insurance policy as the underlying policy and is excess insurance to the Arch Insurance policy. Lexington has obligated itself to pay "on behalf of the Insured that portion of the loss which the Insured will become legally obligated to pay as compensatory damages...by reason of exhaustion of all applicable underlying limits..." Under the SELF-INSURED RETENTION Lexington's policy states " in the event of exhaustion of the aggregate limits of liability of the underlying insurance policy as stated in section II of the declarations, this policy will continue in force as underlying insurance subject to the insured's retention of an amount equal to that stated in the declarations as self insured retention." No other relevant language is included in the copy of the policy annexed to defendant's papers [see Foley Affidavit Exhibit B].

Liberty Mutual has obligated itself to pay amounts in excess of the self-insured amount.(See policy Section VI 4.a). The policy further states " Any other insurance available to the insured shall be deemed to satisfy the insured's responsibility for damages within the 'self insured amount' to the extent such "other insurance" actually pays for damages within the 'self insured amount'. ... this policy will not contribute with any other insurance." (Policy Section VI 4.d). The policy defines "Other insurance" to mean any other valid and collectible insurance, whether primary, excess, contingent or on any other basis, except any such insurance purchased by the insured specifically to apply in excess of this insurance."

The Lexington policy becomes the underlying policy after exhaustion of the applicable underlying limit of \$1,000,000 of the Arch Insurance policy. Once the \$2,000,000 limit of the Lexington policy is exhausted, since the Liberty Mutual policy is in excess of "any other insurance policy" then the Liberty Mutual policy is obligated to pay.

In order to prevail on a motion for summary judgment, the proponent must make a prima facie showing of entitlement to judgment as a matter of law, through admissible evidence, eliminating all material issues of fact.(Klein V. City of New York, 89 NY2d 833; Ayotte V. Gervasio, 81 NY2d 1062, Alvarez v. Prospect Hospital, 68 NY2d 320). Once the moving party has satisfied these standards, the burden shifts to the opponent to rebut that prima facie showing, by producing contrary evidence, in admissible form, sufficient to require a trial of material factual issues(Kaufman V. Silver, 90 NY2d 204; Amatulli V. Delhi Constr. Corp., 77 NY2d 525; Iselin & Co. V. Mann Judd Landau, 71 NY2d 420). In determining the motion, the court must construe the evidence in the light most favorable to the non-moving party(SSBS Realty Corp. V. Public Service Mut. Ins. Co., 253 AD2d

583; Martin V. Briggs, 235 192).

Plaintiffs have made a prima facie showing of entitlement to judgment as a matter of law, eliminating all material issues of fact. It is now incumbent upon the defendant to raise a factual issue, this defendant has failed to do.

Accordingly , it is ORDERED that defendant's motion to dismiss on documentary evidence and for the complaint's failure to state a cause of action is denied, and it is further

ORDERED, that plaintiffs' cross motion for summary judgment is granted, and it is further

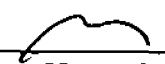
ORDERED, ADJUDGED and DECLARED, that defendant LEXINGTON INSURANCE COMPANY, is required to defend and indemnify MORRISANIA and NHPMN for the claims alleged in the consolidated action pending in Supreme Court Bronx County under index number 17848/05 entitled RAYMOND ALBERT CARRERAS AND YOLANDA LOPEZ, plaintiffs - against - MORRISANIA TOWERS HOUSING COMPANY LIMITED PARTNERSHIP, MCROBERTS PROTECTIVE AGENCY, INC., SONIA MEEKINS, BAKIM MEEKINS AND NHPMN MANAGEMENT, LLC., -defendants-, and it is further ,

ORDERED, ADJUDGED and DECLARED that coverage under the LIBERTY MUTUAL POLICY is excess over the coverage afforded by Lexington under the LEXINGTON POLICY.

This constitutes the decision, order and judgment of this court.

ENTER: MANUEL J. MENDEZ
J.S.C.

Dated: April 3, 2012 _____


Manuel J. Mendez
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE

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 418).