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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

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TOWER INSURANCE COMPANY OF NEW YORK,

Plaintiff,

Index No. 106315/09

-against-

METRO PROPERTY GROUP, LLC, 2710 VALENTINE LLC, JC NEPTUNE LLC, BRUCE WITTENBERG, 718 WEST 178th ST LLC, REX MANAGEMENT CORP., MOMODOU CAMARA, as parent and natural guardian of BABOUCARR CAMARA, an infant under the age of 18 years, as parent and natural guardian of MAIMUNA CAMARA, an infant under the age of 18 years and MOMODOU CAMARA, individually,

Defendants.

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**HON. CYNTHIA KERN, J.S.C.**

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for :_____

| Papers | Numbered |
|---|---|
| Notice of Petition and Affidavits Annexed..... | 1 |
| Answering Affidavits and Cross Motion..... | 2, 3 |
| Replying Affidavits..... | 4 |
| Exhibits..... | 5 |

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Plaintiff Tower Insurance Company of New York ("Tower") commenced this declaratory judgment action seeking a declaration that it has no duty to defend or indemnify the defendants in connection with an underlying action. Plaintiff now moves for summary judgment on its complaint as against defendants Metro Property Group, LLC ("Metro Property"), 2710 Valentine LLC, JC Neptune LLC, and 718 West 178th St LLC (collectively, the "Building Defendants") on

the grounds that it timely disclaimed coverage. Plaintiff also now moves for a default judgment against defendant Momodou Camara and Rex Management Corp. ("Rex"). For the reasons set forth more fully below, plaintiff's motion is denied.

The relevant facts are as follows. Tower seeks a declaration that it has no duty to defend or indemnify defendants Metro Property Group, LLC, 2710 Valentine LLC, JC Neptune LLC and 718 West 178th St LLC in an underlying personal injury action. Tower asserts that it was first notified of the occurrence or claim on July 17, 2008, when it received a General Liability Notice of Occurrence/Claim Form from Metro Property's insurance broker. Upon being notified, Tower assigned R.M.G. to investigate the claim. Tower disclaimed coverage by letters dated August 12, 2008 (to Metro Property only) and April 3, 2009 (to all the Building Defendants), based on the alleged reason that Metro Property breached the policy by failing to give Tower notice of the incidents and/or claims as soon as practicable.

In the underlying action, Momodou Camara, individually and as parent and natural guardian of infants Baboucarr Camara and Maimuna Camara, alleges that both infant plaintiffs were exposed to lead-based paint while they resided at the premises located at 2710 Valentine Avenue in the Bronx and, as a result, sustained personal injuries. Baboucarr Camara was allegedly exposed to lead-based paint on or about August 11, 2002 and for a period of time before and after that date. Maimuna Camara was allegedly exposed to lead-based paint on or about October 1, 1996 and for a period of time before and after that date.

Up until 2005, defendant Bruce Wittenberg owned the Premises and it was managed by defendant Rex Management Corp. ("Rex"). While owned by Wittenberg and managed by Rex, the Camara family lived in Apartment 25. At some point in 2003 or 2004, the Camaras stated

they intended to make a claim for personal injuries due to lead exposure. Rex subsequently performed some type of repairs or renovations to Apartment 25. The family was not satisfied and moved into Apartment 35, which had been completely renovated. On November 1, 2005, the building was sold to defendants JC Neptune, LLC, 718 West 178th ST., LLC and 2719 Valentine LLC and Metro Property became the managing agent. On August 27, 2007, Metro Property received an Order to Abate a lead paint condition in Apartment 35 from the Department of Health and received violations in connection with that order on October 12, 2007, November 5, 2007 and November 14, 2007.

Tower issued Commercial General Liability Policy No. CGL2500941 to Metro Property covering the period from November 1, 2005 though November 1, 2009. The policy included coverage for injuries to tenants due to lead-based paint exposure if the bodily injury occurred during the policy period. The policy required the insured to notify Tower of any lead occurrence, claim or suit as soon as practicable.

Tower submits a statement signed by Eddie Soto, Metro Property's resident superintendent for the Premises, asserting that Camara told him that he was going to make a claim against Metro Property and that he told Metro Property this information the following day. The statement is undated and not notarized or sworn to under the penalties of perjury but is annexed to an affidavit of Luis Reyes, an investigator with R.M.G. Investigations hired to investigate the Camara claim. Reyes alleges that he transcribed Soto's statement on or about July 31, 2008. The Building Defendants also submit a statement from Eddie Soto, this time a notarized and dated affidavit, in which Mr. Soto states that although he was advised by Mr. Camara that he was going to be making "a claim" for his son's elevated blood lead level, he

believed that the claim was going to be made against Bruce Wittenberg and Rex Management. He believed that the claim related to lead exposure in Apartment 25, which the Camara family had lived in while the building was owned by Mr. Wittenberg and managed by Rex. As noted above, when the family complained about lead exposure and was dissatisfied with renovations done in Apartment 25, it moved to Apartment 35, which had been completely renovated. Mr. Soto asserts that, as a result, he believed that there could be no claim for lead exposure in Apartment 35 and thus the claim must be against Mr. Wittenberg and Rex for exposure in Apartment 25.

Tower's motion for summary judgment is denied because its motion relies on grounds not specifically enumerated in its original disclaimer letter. An insurer's justification for denying coverage is limited to the grounds stated in the notice of disclaimer, which must be stated with a high degree of specificity. *See Paul M. Maintenance, Inc. v Transcontinental Ins. Co.*, 300 A.D.2d 209 (1st Dept 2002). In Tower's notice of disclaimer, it states that "our investigation reveals you were aware of the claimed injuries or damages in or about August 2007." It goes on to state "you breached the policy conditions... by failing to notify us of the incident(s) and by failing to forward the notices of violation you received from the Department of Health in August 2007 immediately." This disclaimer does not adequately specify the grounds for disclaimer. Although it states that Metro Property was aware of the claim as of August 2007 and that Metro Property failed to timely notify it of the claim, it does not state how Metro Property allegedly learned of those claims. It does specifically refer to the notices of violation. However, those notices of violation are insufficiently specific to constitute a claim of which an insurer must be notified. *See Scharf v Generali - U.S. Branch*, 259 A.D.2d 349 (1st Dept 1999). In the disclaimer

letter, Tower does not cite to any statement by superintendent Eddie Soto. Therefore, Tower may not now rely on Mr. Soto's statements when it did not mention them in its disclaimer letter. *See Paul M. Maintenance, Inc.*, 300 A.D.2d 209.

Tower's motion for summary judgment must also be denied on the grounds that there are issues of fact as to when the Building Defendants learned of the claims against it and, therefore, whether it notified Tower of the claims as soon as reasonably practicable. Even if Mr. Soto's first statement is admissible, which is an issue this court does not reach, defendants raise an issue of fact by submitting Mr. Soto's affidavit stating that he believed that there was no claim against Metro Property or the other Building Defendants because of the renovations that had been performed on the Camaras' current apartment. Whether Metro Property notified Tower as soon as reasonably practicable depends on what Mr. Soto actually told Metro Property. This reasoning applies to the other Building Defendants as well, as Tower does not argue that those defendants learned of the claim independently.

Because the court has found that Tower cannot base its motion for summary judgment on Mr. Soto's statement and that there are issues of fact as to whether the Building Defendants notified Tower as soon as reasonably practicable of the claims, it need not reach the issue of whether Tower's disclaimers of coverage were timely.

Tower's motion for default judgments against Camara and Rex is denied and the action as against Camara and Rex is dismissed as abandoned. Pursuant to CPLR 3215(c), the court "shall" dismiss an action as abandoned if the plaintiff fails to move for a default judgment within one year after the default unless "sufficient cause is shown why the complaint should not be dismissed." Tower does not provide any cause other than its conclusory statement that it did not

intend to abandon the action.

Accordingly, plaintiff's motion is denied and the action against defendants Camara and Rex is dismissed as abandoned pursuant to CPLR 3215(c). This constitutes the order and judgment of the court.

Dated: 4/24/12

Enter: _____
J.S.C.