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

PRESENT : DONNA M. MILLS **PART 58**

Justice

CITNALTA CONSTRUCTION CORP. et al.,

INDEX NO. 102953/11

Plaintiff,

MOTION DATE

MOTION SEQ. NO. 001

-against-

MOTION CAL NO.

GREAT AMERICAN ASSURANCE COMPANY,

Defendant.

The following papers, numbered 1 to _____ were read on this motion for _____.

	PAPERS NUMBERED
Notice of Motion/Order to Show Cause-Affidavits– Exhibits....	1-4
Answering Affidavits– Exhibits	5, 6
Replying Affidavits	

CROSS-MOTION: ✓ YES _____ NO

Upon the foregoing papers, it is ordered that this motion is:

DECIDED IN ACCORDANCE WITH ATTACHED ORDER.

FILED

APR 24 2013

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 4/15/13

J.S.C.

DONNA M. MILLS, J.S.C.

Check one: ✓ FINAL DISPOSITION ____ NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 58

CITNALTA CONSTRUCTION CORP. and ASPEN SPECIALTY INSURANCE COMPANY,

Plaintiffs,

- against -

GREAT AMERICAN ASSURANCE COMPANY,

Defendant.

INDEX NO. 102953/11

DECISION/ORDER

DONNA M. MILLS, J.:

In this action for a declaratory judgement concerning liability insurance coverage, plaintiff Citnalta Construction Corp. ("Citnalta") and, its insurer, Aspen Specialty Insurance Company ("Aspen") (collectively "Plaintiffs"), move for partial summary judgment, pursuant to CPLR 3212, declaring that defendant Great American Assurance Company ("Great American") has a duty to defend and indemnify it in an action entitled Verizon New York Inc. v Felix Indus. Inc. et al., Index No. 11443/2009 (N.Y. Sup. New York Cty.) ("the Underlyng Verizon Action"). Great American opposes and cross-moves for summary judgment in its favor, pursuant to CPLR 3212, dismissing the compliant in its entirety.

BACKGROUND

Citnalta had contracted with the New York City Transit Authority to perform work for the rehabilitation of the Fulton Street subway station in New York City ("Premises"). Citnalta, as the primary contractor for the construction project, subcontracted with Felix Associates, LLC ("Felix") for Felix to perform utility work at the Premises. After an alleged October 19, 2007 water leak that allegedly damaged telecommunication cables owned by Verizon, Verizon commenced an action against Citnalta and Felix, alleging that both entities were performing work at the Premises on October 19, 2007 and both entities were

negligent in their performance of the work. Citnalta was served with the Verizon Action suit papers on October 19, 2009. Upon receipt of the Verizon Action suit papers, on November 2, 2009, Aspen, as the general liability insurer for Citnalta, tendered the defense and indemnification of Citnalta to Great American and Felix, pursuant to the subcontract between Citnalta and Felix. Great American disclaimed coverage to Citnalta based on a lack of evidence that Felix was negligent in the happening of the alleged property damage. Great American also disclaimed to Citnalta based on late notice of occurrence, claim and suit. In its cross-motion, Great American does not dispute the fact that Citnalta qualifies as an additional insured on the Great American policy issued to named insured Felix for the Verizon Action. Rather, Great American argues that additional insured coverage is vitiated for Citnalta because Citnalta provided late notice of the occurrence that is the subject of the Verizon Action to Great American.

APPLICABLE LAW & DISCUSSION

CPLR § 3212(b) requires that for a court to grant summary judgment, the court must determine if the movant's papers justify holding, as a matter of law, "that the cause of action or defense has no merit." It is well settled that the remedy of summary judgment, although a drastic one, is appropriate where a thorough examination of the merits clearly demonstrates the absence of any triable issues of fact (Vamattam v Thomas, 205 AD2d 615 [2nd Dept 1994]). It is incumbent upon the moving party to make a prima facie showing based on sufficient evidence to warrant the court to find movant's entitlement to judgment as a matter of law (CPLR § 3212 [b]). Once this showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues

of fact which require a trial of the action (Zuckerman v City of New York, 49 NY2d 557, 562 [1980]). Summary judgment should be denied when, based upon the evidence presented, there is any significant doubt as to the existence of a triable issue of fact (Rotuba Extruders v Ceppos, 46 NY2d 223 [1978]). When there is no genuine issue to be resolved at trial, the case should be summarily decided (Andre v Pomeroy, 35 NY2d 361, 364 [1974]).

"Notice provisions in insurance policies afford the insurer an opportunity to protect itself" (Security Mut. Ins. Co. of N.Y. v Acker -Fitzsimons Corp., 31 NY2d 436, 440 [1972]), and "[t]he notice provision in the policy is a condition precedent to coverage and, absent a valid excuse, the failure to satisfy the notice requirement vitiates the policy" (Travelers Ins. Co. v Volmar Constr. Co., 300 AD2d 40, 42 [1st Dept 2002]). "The burden of justifying the delay by establishing a reasonable excuse is upon the insured" (Philadelphia Indem. Ins. Co. v Genesee Val. Improvement Corp., 41 AD3d 44, 46 [2007]), and such excuses include the lack of knowledge of an accident (see Security Mut. Ins. Co. Of N.Y., 31 NY2d at 441); a good faith and reasonable basis for a belief in nonliability (see Great Canal Realty Corp. v Seneca Ins. Co., Inc., 5 NY3d 742, 743 [2005]); and a good faith and reasonable basis for a belief in noncoverage (see Strand v Pioneer Ins. Co., 270 AD2d 600, 600-601 [2000]).

Here, the Great American insurance policy issued to Felix afforded coverage only if there had been an "occurrence," which is deemed as "an accident." It is undisputed that the October 19, 2007 underground water pipe rupture is the "occurrence" under the Great American policy, and based on the testimony of two of its own management-level employees, it is clear that Citnalta was aware of the "occurrence" or accident on the day it occurred.

As a condition precedent to coverage under the Great American policy, insureds claiming coverage have a duty to provide notice of an "occurrence" to Great American "as soon as practicable." Where a liability insurance policy requires notice "as soon as practicable", notice must be given to the carrier within a reasonable period of time. (Great Canal Realty Corp. v. Seneca, 5 NY3d 742, 743 [2005]). "The duty to give notice arises when, from the information available relative to the accident, an insured could glean a reasonable possibility of the policy's involvement (Paramount Ins. Co. v. Rosedale Gardens, 293 A.D.2d 235, 239–240 [1st Dept.2002]).

The obligation to give notice "as soon as practicable" of an occurrence that may result in a claim is measured by the yardstick of reasonableness (875 Forest Ave. Corp. v. Aetna Cas. & Sur. Co., 37 A.D.2d 11, 12, affd 30 N.Y.2d 726). In support of partial summary judgment by Plaintiffs for a declaratory judgment that Great American owes Citnalta a defense in the underlying Verizon Action, Citnalta argues that Great American can not disclaim coverage because it gave notice as soon as practicable. Citnalta contends that it first became aware of the October 19, 2007 water leak accident when it was served with the Verizon suit papers on October 19, 2009 and Great American was placed on timely notice on behalf of Citnalta when a copy of the suit papers was sent to Great American on November 2, 2009, a mere 14 days after being made aware of the occurrence.

In support of its cross motion for summary judgment, Great American contends that Plaintiffs had notice of the accident on the date it occurred as evidenced by the deposition testimony of two of Citnalta's employees (a supervisor and a project manager) who admitted to knowledge of a flood at or around the time it occurred at the subject location.

A legal question exists whether Citnalta's duty to provide notice of the October 19, 2007 "occurrence" is governed by the Great American policy requirement that Great American receive notice of the "occurrence" "as soon as practicable" in the standard policy, or is governed by the more liberal "Additional Conditions Endorsement," which provides that the duty to notify of the "occurrence" "as soon as practicable" "applies only when the "occurrence is known to an executive officer or insurance manager, if you are a corporation.

Obviously, Citnalta relies upon the "Additional Conditions Endorsement" in the Great American Policy. It argues that its obligation to provide notice of the Underlying Verizon Action was not triggered until October 19, 2009, because that purportedly is the date of its insurance manager's and Citnalta's executive officers' first knowledge of the "occurrence." Great American contends that the "Additional Conditions Endorsement" does not apply to Citnalta, because it only applies to a named insured and excludes an additional insured.

Great American cites no authority, nor is there any, to support its contention that the notice endorsement applies to the named insured, but does not apply to an additional insured. Therefore, Citnalta's notice obligation was triggered by the knowledge of its insurance manager or executive officers pursuant to the "Additional Conditions Endorsement."

Even in light of the fact that Citnalta obtains the benefit of the language of the "Additional Conditions Endorsement," this Court concludes that it still did not comply with its obligation to provide timely notice of the "occurrence" because its executive officers and its insurance manager must have known of the October 19, 2007 "occurrence" from the suit papers in the Century 21 Action, which were served on Citnalta in May 2008. By its

own admission, Citnalta's President, Michael Gargiulo, states that he learned of the Verizon suit papers on the date that Verizon's summons and complaint was served on Citnalta. It is a reasonable inference that Citnalta's executive officers were similarly aware that a lawsuit had been filed against the Company and of the facts of the case when the summons and complaint in the Century 21 Action was served on Citnalta.

In fact, Citnalta in its amended response to Interrogatory No. 27 of Great American's First Set of Interrogatories in the present action, in which Great American asked the following:

> State the dates on which you first became aware or received notice of (1) the Incident, (2) the alleged damage to the communication cable owned by Verizon New York, Inc. as referenced in paragraph "7" of the Complaint, and (3) the Underlying Action, identifying with respect to each such instance: how you first became aware, the person who provided the notice to you, the person who received the notice for you, the sum and substance of the notice, and identify all documents evidencing such notice.

Citnalta's response admitted:

> [U]pon information and belief, Jack Glynn, former Project Manager of Citnalta, had knowledge of an incident that occurred at or near the construction project at or around the time it occurred. Furthermore, Kathy Carpentier had knowledge of a flood that occurred that allegedly caused damage to Century 21 upon receipt of suit papers served by Century 21 in or around May 2008.

The damage to Verizon and Century 21 were not separable events, but, rather, flowed allegedly from one cause, Felix's and Citnalta's alleged construction and excavation work in or around the area of the ruptured water line. The water that flowed from the ruptured water line is alleged to have caused damage to Verizon's cables and to Century

21's stock in its basement.

Citnalta, as a party claiming coverage under the Great American Policy, bears the burden of establishing its compliance with the timely notice condition (see Security Mut. Ins. Co. v Acker-Fitzsimons Corp., 31 NY2d 436, 440 [1972]). Yet, Citnalta failed to provide notice to Great American of the "occurrence" until November 2, 2009, almost one-and-a half years after service of the suit papers in the Century 21 Action arising out of the same "occurrence."

This Court finds that, Citnalta's explained delay in providing Great American with notice of the underlying action was not reasonable. Therefore, Great American is entitled to summary judgment declaring that it does not have a duty to defend and indemnify Citnalta and Aspen in the underlying action.

Accordingly, it is

ORDERED that plaintiffs' motion for partial summary judgment, seeking an order that Great American has a duty to defend Citnalta as an additional insured in the Verizon Action and must reimburse Aspen for costs incurred in defending Citnalta from November 2, 2009 is denied in its entirety; and it is further

ORDERED that defendant's cross motion for summary judgment, seeking an order that Great American is not obligated to defend or indemnify Citnalta in the Verizon Action is granted.

Dated: 4/15/13

ENTER:

DONNA M. MILLS, J.S.C.