SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. CAROL EDMEAD PART 35
Justice

INDEX NO. 153578/2012

TOWER INSURANCE COMPANY
-v-
ANDERSON, JR, JOHN

MOTION DATE

MOTION SEQ. NO. 001

The following papers, numbered 1 to ____, were read on this motion to/for ____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits ____ | No(s). ____

Answering Affidavits — Exhibits ____ | No(s). ____

Replying Affidavits ____ | No(s). ____

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

In accordance with the accompanying Memorandum Decision, it is hereby

ORDERED that the cross-motion by defendants Morton Duke and Charmaine Bennett for summary judgment pursuant to CPLR 3212 (b) to dismiss the complaint of plaintiff Tower Insurance Company of New York is denied; and it is further

ORDERED that counsel for said defendants shall serve a copy of this order with notice of entry within 20 days of entry.

This constitutes the decision and order of the Court.

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

Dated: 6/10/13

J.S.C.
HON. CAROL EDMEAD

1. CHECK ONE: ..... ☒ CASE DISPOSED ☐ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

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TOWER INSURANCE COMPANY OF NEW YORK,

Plaintiff,

-against-

JOHN ANDERSON JR., JOHN ANDERSON SR., GRACE ANDERSON, MORTON DUKE and CHARMAINE BENNETT,

Defendants.

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Index No.: 153578/2012

DECISION AND ORDER
Motion sequence #001

CAROL R. EDMEAD, J.S.C.:

MEMORANDUM DECISION

In this declaratory judgment action, defendants Morton Duke ("Duke") and Charmaine Bennett ("Bennett") (collectively, "the Duke defendants") move by way of a cross-motion, for summary judgment pursuant to CPLR 3212 (b) to dismiss the complaint of Tower Insurance Company of New York ("Tower").

The Duke defendants' cross-motion is denied.

Background Facts

This action arose from an incident that occurred on November 22, 2011, in which Duke sustained personal injuries when he fell on the sidewalk in front of property owned by John Anderson Sr., Grace Anderson and John Anderson Jr. ("the Anderson defendants"),[1] located at 514 Washington Avenue, Brooklyn, New York, which is insured by Tower (the "insured location"). The Duke defendants commenced an underlying personal injury action against the

[1] John Anderson Sr. and Grace Anderson are John Anderson Jr.'s parents.

Anderson defendants in the Supreme Court, Kings County.[2]

The Andersons demanded coverage from Tower for the claims asserted against them, under the homeowner's policy number DPP2184607 (the "policy"), which, pursuant to the renewal certificate, dated October 10, 2010, was in effect at that time. On March 5, 2012, Tower disclaimed coverage on the grounds that the Andersons did not reside at the insured location on the date of the loss and that they falsely represented their residence on their insurance policy. Tower's determination was based on information it obtained after its claim adjuster Steven Jensen ("Jensen") conducted a telephone interview on or about February 17, 2012 with defendant Anderson Jr., during which he stated that he did not reside at the premises and that his parents resided at 137 Midwood Street, Brooklyn, New York.

Thereafter, Tower commenced this declaratory action seeking a declaration that it has no duty to defend or indemnify the Anderson defendants in the underlying personal injury action,[3] and subsequently moved for summary judgment and for a default judgment against the Duke defendants and the Anderson defendants, respectively.

The Duke defendants cross-moved for summary judgment to dismiss Tower's complaint. Thereafter, per stipulation by the parties, dated April 30, 2013, Tower withdrew its motion, leaving in place the opposition to the Duke defendants' cross-motion.

In its cross-motion, the Duke defendants assert several grounds for dismissal of Tower's complaint, arguing that Tower is not entitled to disclaim coverage to the Anderson defendants.

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[2] The Kings County action is entitled *Morton Duke and Charmaine Bennett v Grace M. Anderson, John Anderson Jr and John Anderson Sr.*, Index number 6495/2012 (the "underlying action").

[3] The court notes, that in its complaint, Tower does not allege any causes of action against Duke or Bennett, and only asserts that the Anderson defendants' misrepresentation regarding their residence "voids coverage for Duke or Bennett in the underlying action" (Complaint, ¶35).

First, Tower waived its right to disclaim the policy because it knew or had reason to know that the Anderson defendants did not reside at the insured location, based on the renewal certificate, which clearly indicates two addresses for the insured: "514 Washington Avenue, Brooklyn, NY 11238" and "540 Carlton Avenue, Brooklyn, NY 11238" (the "Carlton location") (*see* exhibit C). Nevertheless, Tower still issued the renewal of the policy to the Andersons and continued to receive insurance premium payments from them.

Second, Tower is equitably estopped from disclaiming coverage because by its conduct of renewing the subject policy, issuing the renewal certificate, and demanding and collecting insurance premiums, Tower led the Andersons to believe that coverage existed on the subject premises regardless of their actual residence. And, they relied to their detriment on such coverage and therefore, did not procure other insurance.

Furthermore, the transcript of Anderson Jr.'s February 17, 2012 interview only shows that he did not reside at the insured premises. However, it does not show that his parents did not reside there on the date of the subject accident.

Finally, Tower cannot disclaim coverage because it failed to give timely notice of the disclaimer to the Anderson defendants[4] in accordance with New York Insurance Law § 3420 (d). Tower purportedly received notice of the claim on February 6, 2012 and thereafter disclaimed, through correspondence dated March 5, 2012. Tower's 28-day delay in disclaiming coverage was unreasonable as a matter of law because the grounds for disclaimer were known to it from the face of the renewal certificate and thus, it did not need to conduct investigation. At the very

[4] In light of the fact that Tower has withdrawn its summary judgment motion, the court does not consider the Duke defendants' arguments in opposition to said motion.

least, there is a triable issue of fact as to whether the delay was reasonable.

In opposition, Tower contends that the Duke defendants are not entitled to relief sought because they submitted no evidence in support of their cross-motion and the attorney affirmation does not constitute evidence for purposes of summary judgement. And, Anderson Jr.'s statement during the interview that his parents live at 137 Midwood Street, Brooklyn, New York, is an admission against interest.

Tower argues that the Duke defendants' arguments of waiver and estoppel are unsupported by law or facts. First, Tower was not aware that the Andersons did not reside at the covered location they indicated on the policy. As explained in the Affidavit of Jerry Tutak, Tower's underwriting manager, insureds routinely indicate on their policies a mailing address, different from their residence address (Tutak Affidavit, ¶5), when they prefer to receive mail either at their business address, or the alternative residence or their attorney's or accountant's office.

Next, in order to obtain coverage, the Andersons were required to and represented in their policy that the location covered by the policy was their primary residence. Thus, based on this representation, Tower did not inquire into the insureds' residency situation, even though the insured provided a different mailing address. And, none of the cases cited by the Duke defendants support their position that a different mailing address on the renewal certificate constitutes a waiver or estoppel.

Finally, Tower's disclaimer was timely, since it was served just 19 days after Jensen interviewed Anderson Jr. and learned that neither he nor his parents resided at the insured premises. Jensen thereafter discussed the matter with Tower's coverage supervisor, who decided

to disclaim coverage. Jensen prepared the disclaimer letter and forwarded it to the coverage supervisor for review on February 17, 2012 (Jensen Affidavit, ¶ 6; Aptman Affidavit, ¶ 8); and, on March 5, 2012, Tower disclaimed coverage (Disclaimer, Saia Affimation, exhibit F; *see also*, Jensen Affidavit ¶ 7; Tower's managing vice president Lowell Aptman's Affidavit, ¶ 9).

In reply, the Duke defendants point out that Tower failed to submit a copy of the subject insurance policy in opposition. Tower had sufficient facts at the time of the application to conduct an inquiry into the residence situation of the Andersons; and in any event, Anderson Jr. stated in his Affidavit that he had told Tower that he resided at another location (exhibit A).

Discussion

The proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, by advancing sufficient "evidentiary proof in admissible form" to demonstrate the absence of any material issues of fact (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Silverman v Perlbinder*, 307 AD2d 230, 762 NYS2d 386 [1st Dept 2003]; *Thomas v Holzberg*, 300 AD2d 10, 11, 751 NYS2d 433, 434 [1st Dept 2002]). Thus, the motion must be supported "by affidavit [from a person having knowledge of the facts], by a copy of the pleadings and by other available proof, such as depositions" (CPLR § 3212[b]). A party can prove a *prima facie* entitlement to summary judgment through the affirmation of its attorney based upon documentary evidence (*Zuckerman, supra*; *Prudential Securities Inc. v Rovello*, 262 AD2d 172 [1st Dept 1999]).

Alternatively, to defeat a motion for summary judgment, the opposing party must show facts sufficient to require a trial of any issue of fact (CPLR §3212[b]). Thus, where the

proponent of the motion makes a prima facie showing of entitlement to summary judgment, the burden shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action, or to tender an acceptable excuse for his or her failure to do so (*Vermette v Kenworth Truck Co.*, 68 NY2d 714, 717 [1986]; *Zuckerman v City of New York, supra*, 49 NY2d at 560, 562; *Forrest v Jewish Guild for the Blind*, 309 AD2d 546, 765 NYS2d 326 [1st Dept 2003]).

Waiver

Waiver is a voluntary and intentional relinquishment of a known right *(Gilbert Frank Corp. v Federal Ins. Co.,* 70 NY2d 966, 520 NE2d 512 [1988]; *Nassau Trust Co. v Montrose Concrete Products Corp.,* 56 NY2d 175, 436 NE2d 1265 [1982]). In the insurance context, "courts find waiver where there is direct or circumstantial proof that the insurer intended to abandon the defense" (*Albert J. Schiff Assoc. v Flack*, 51 NY2d 692, 435 NYS2d 972 [1980], *citing Kiernan v Dutchess County Mut. Ins. Co.*, 150 NY 190, 195; *see* 16A Appleman, Insurance Law and Practice, § 9081).[5]

As the movants, the Duke defendants failed to establish that Tower waived its right to disclaim the policy.

Here, evidence that Tower's renewal certificate indicates two addresses for the insureds, does not conclusively establish that Tower knew that the Andersons were not residing at the insured location (514 Washington Avenue). While the address underneath the names of the insured in the renewal certificate is "540 Carlton Avenue, Brooklyn, NY 11238," the third

[5] "Waiver evolved because of courts' disfavor of forfeitures of the insured's coverage which would otherwise result where an insured breached a policy condition, as, for instance, failure to give timely notice of a loss or failure to co-operate with the insured" (*Albert J. Schiff Assoc. v Flack*, 51 NY2d 692, 435 NYS2d 972 [1980], citing 16A Appleman, Insurance Law and Practice, § 9082).

paragraph of the renewal certificate also indicates that

> "[t]he residence premises covered by this policy are located at the above-insured address *unless otherwise stated below.*
> Loc: 514 Washington Ave
> Brooklyn NY 11238."
> (*See* exhibit C, p.1) (emphasis added).

Arguably, the "residence" of the Andersons is listed as 514 Washington Ave., Brooklyn, New York. Thus, since it is not clear from the face of the certificate that the Andersons did not reside at the insured location, at a minimum, questions of fact exist as to whether Tower knew that the Andersons did not reside at the insured location, and whether, with such knowledge, it ratified its policy contract by accepting premium payments from the insureds.

Further, contrary to the cross-movants' contention, the transcript of the February 17, 2012 recorded interview of Anderson Jr., shows that in response to the question, "the senior [his father] that's on the policy, where does he reside?," Anderson, Jr. replied, "137 Midwood Street and that's Brooklyn, New York 11225." (Pages 2-3).

And in any event, Tower's opposition raises a triable issue of fact[6] requiring denial of summary judgment. The Affidavit of Tower's underwriting manager Tutak, stating that, as a matter of practice, applicants often indicate a different address for mailing purposes on their policy applications, and that the Anderson defendants represented in their policy that the insured premises were their primary residence and that 540 Carlton Avenue appeared to be the

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[6] The court notes that, contrary to the cross-movants' assertion, Tower's evidence is *not* deemed insufficient for failure to specifically attach a copy of the subject policy to their opposition to the cross-motion. A review of the court's record reveals that such copy is provided in support of Tower's summary judgment motion, which was withdrawn as indicated (*see* p. 2). Also, contrary to the Duke defendants' assertion, an affidavit or affirmation of an attorney, even absent personal knowledge of the facts, may serve as the vehicle for the submission of acceptable attachments which do provide "evidentiary proof in admissible form," *e. g.*, documents, transcripts [or copies of insurance policy] (*Zuckerman v City of New York, supra*).

Andersons' mailing address (Tutak Affidavit, ¶5), a question of fact exists as to whether Tower was required to inquire into the insureds' residency situation.

Thus, dismissal based on waiver is unwarranted.

Estoppel

For the same reasons, the Duke defendants' claim of estoppel is equally unavailing.

An insurer may be equitably estopped from denying coverage where the party for whose benefit the insurance was procured reasonably relied upon the provisions of an insurance certificate to that party's detriment (*see Lenox Realty Inc. v Excelsior Insurance Company*, 255 AD2d 644, 679 NYS2d 749 [3d Dept 2003], *citing Zurich Ins. Co. v White*, 221 AD2d 700, 703, 633 NYS2d 415 [3d Dept 1995], *lv denied* 88 NY2d 804 [1996]). Thus, it has been held that, if a carrier continues to accept or retains premiums, or otherwise ratifies or acts consistently with the existence of the contract, after learning the facts necessary to declare the policy void and return the premium, it is estopped to then disclaim the contract (*Burdick v American Modern Home Ins. Co.*, 6 Misc 3d 1030(A), 800 NYS2d 343 (Table), 2005 WL 487720 [Sup Ct, Oneida County 2005][carrier is estopped from declaring the policy void by having retained the premiums paid for an unreasonably long period of time after learning the facts necessary to disclaim coverage], *citing Ellis v Columbian Natl. Life Ins. Co.*, 270 AD 143, 59 NYS2d 335, [1st Dept 1945] [estoppel applies where insurer knew that the insured had not signed the proposed agreement with the war clause rider which limited coverage so as to exclude death while in military service, and the execution of which was dependent on the insured's consent, and collected premiums on the policy for four years]).

Here, based on the preceding discussion, it cannot be said as a matter of law that Tower

continued to accept premiums, thereby ratifying the contract, after learning the facts necessary to declare the policy void. Thus, Tower is not estopped from denying coverage by virtue of its asserted knowledge of such facts.

The cases on which the movants rely are distinguishable and do not support their position. Therefore, dismissal of the complaint on the theory of estoppel is denied.

Timeliness of Disclaimer

The movants likewise failed to establish their entitlement to relief on the ground that Tower's disclaimer is invalid as untimely.

Pursuant to New York Insurance Law § 3420 (d), Tower was required to "give written notice as soon as is reasonably possible" of the disclaimer of coverage.[7] Thus, it has been held that "an insurer is obligated, under Insurance Law § 3420 (d) to disclaim coverage without delay when the grounds for disclaiming are readily apparent based upon the documents delivered to the insurer" *(Ace Packing Co. v Campbell Solberg Associates*, Inc., 41 AD3d 12, 835 NYS2d 32 [1st Dept 2007]).

New York courts, applying this statute, have held that an insurer's failure to provide notice of disclaimer as soon as is reasonably possible after it first learns of the accident or of grounds for disclaimer of liability or denial of coverage, precludes the insurer from disclaiming coverage (*see Hunter Roberts Const. Group, LLC v Arch Ins. Co.*, 75 AD3d 404, 904 NYS2d 52

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[7] New York Insurance Law §3420 (d) provides as follows:
"If under a liability policy delivered or issued for delivery in this state, an insurer shall disclaim liability or deny coverage for death or bodily injury arising out of [an] accident occurring within this state, it shall give written notice as soon as is reasonably possible of such disclaimer of liability or denial of coverage to the insured and injured person or any other claimant."
(NY Insurance Law §3420 [d])(emphasis added).

[1st Dept 2010]; *Matter of New York Cent. Mut. Fire Ins. Co. v Aguirre*, 7 NY3d 772, 774, 854 NE2d 146, 148 [2006]; *First Fin. Ins. Co. v Jetco Contr. Corp.*, 1 NY3d 64, 67, 769 NYS2d 459 [2003]).

The "timeliness of an insurer's disclaimer is measured from the point in time when the insurer first learns of the grounds for [. . .] denial of coverage," and the insurer has the burden of justifying the delay (*Wood v Nationwide Mut. Ins. Co.*, 45 AD3d 1285, 845 NYS2d 641 [4th Dept 2007], *citing First Fin. Ins. Co. v Jetco Contr. Corp., supra*][internal quotation marks omitted]; *Hunter Roberts Const. Group, LLC v Arch Ins. Co.*, 75 AD3d 404, 904 NYS2d 52).

Although the timeliness of such a disclaimer generally presents a question of fact (*see Continental Cas. Co. v Stradford*, 11 NY3d 443, 449, 871 NYS2d 607 [2008]), where the basis for the disclaimer was, or should have been, readily apparent before the onset of the delay, any explanation by the insurer for its delay will be insufficient as a matter of law (*see Aguirre*, 7 NY3d 772, *citing Jetco*, 1 NY3d 64). Conversely, where the basis was not readily apparent, an unsatisfactory explanation will render the delay unreasonable as a matter of law (*see Hunter Roberts Const. Group, LLC v Arch Ins. Co.*, at 409, *citing Bovis Lend Lease LMB, Inc. v Royal Surplus Lines Ins. Co.*, 27 AD3d 84, 88, 806 NYS2d 53 [1st Dept 2005]; *First Fin. Ins. Co.*, 1 NY3d 64).

The Duke defendants failed to establish that Tower's delay in issuing the disclaimer is unreasonable as a matter of law (*Sumner Builders Corp. v Rutgers Cas. Ins. Co.*, 101 AD3d 417, 955 NYS2d 568 [1st Dept 2012][triable issues of fact exist regarding the timeliness of defendant insurer's disclaimer]; *Admiral Ins. Co. v State Farm Fire*, 86 AD3d 486, 927 NYS2d 629 [1st Dept 2011]; *Ace Packing Co. v Campbell Solberg Associates*, Inc. (41 AD3d 12, 835 NYS2d 32

[1st Dept 2007]).

In *Admiral Ins. Co. v State Farm Fire*, where the insurer delayed disclaiming coverage for 113 days, the court found that an issue of fact existed as to whether the insurer (State Farm) acted reasonably in seeking to investigate further, inasmuch as that letter contained no information regarding when the contractor, an insured under the policy, received notice of the underlying incident or suit, and thus did not make it "readily apparent" that State Farm had the right to disclaim coverage.

Similarly, in *Ace Packing Co. v Campbell Solberg Associates, Inc.* (*supra*), where an insurer disclaimed coverage on the ground that the insured, plaintiff in the underlying personal injury action, failed to provide timely notice of the claim to the insurer in violation of the governing insurance policy, the court found that the 38-day delay in disclaiming coverage was not unreasonable because the facts essential to the insurer in determining whether to disclaim were *not readily apparent* from the documents submitted to the insurer by a broker requiring investigation.

Here, Tower learned of the subject incident on February 6, 2012, through the telephone communication from John Anderson Jr. and on February 17, 2012, obtained a recorded statement from Anderson Jr., when it learned that neither he nor his parents resided at the insured premises. Upon receipt of the information, Tower's adjuster Jensen promptly sent the disclaimer letter to the supervisor for review, and approximately 19 days thereafter, on March 5, 2012, Tower served the notice of disclaimer upon the Andersons or their attorney.

Thus, since the basis for the disclaimer was not "readily apparent" to Tower prior to Jensen's interview with Anderson Jr., Tower's 19-day delay in giving notice of disclaimer after

learning of the ground for denying coverage was not unreasonable as a matter of law. Summary judgment on this issue is therefore inappropriate.

In *West 16th Street Tenants Corp. v Public Service Mut. Ins. Co.* (290 AD2d 278, 736 NYS2d 34 [1st Dept 2002]), cited by the cross-movants, where the sole ground for disclaiming coverage, *i.e.*, plaintiff's five-month delay in notifying the defendant insurer of the occurrence giving rise to the claim, was *obvious from the face of the notice of claim and the accompanying complaint*, a 30-day delay in disclaiming coverage was found unreasonable as a matter of law.

Unlike in *West 16th Street Tenants Corp.*, here, the basis for denial coverage, *i.e.,* not residing at the insured location in violation of the policy, was *not obvious* from the face of the renewal certificate, as claimed by the Duke defendants. Therefore, dismissal of the complaint on the ground that Tower's denial was untimely, is denied.

Conclusion

Based on the foregoing, it is hereby

ORDERED that the cross-motion by defendants Morton Duke and Charmaine Bennett for summary judgment pursuant to CPLR 3212 (b) to dismiss the complaint of plaintiff Tower Insurance Company of New York is denied; and it is further

ORDERED that counsel for said defendants shall serve a copy of this order with notice of entry within 20 days of entry.

Dated: June 10, 2013

Hon. Carol R. Edmead, J.S.C.

HON. CAROL EDMEAD