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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 3

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THE TRAVELERS INDEMNITY COMPANY

Plaintiff,

-against-

Index No. 603601/2002
Motion Date: 12/6/2012
Motion Seq. No. 017

ORANGE AND ROCKLAND UTILITIES, INC. and JOHN DOE CORPORATIONS 1-100,

Defendants.

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The following papers, numbered 1 to 3, were read on this motion for summary judgment.

	Papers Numbered
Notice of Motion/Order to Show Cause - Affidavits - Exhibits	1
Answering Affidavits - Exhibits	2
Replying Affidavits	3

Cross-Motion: ☐ Yes X No

Upon the foregoing papers, this motion is decided in accordance with the accompanying memorandum decision.

Dated: July 12, 2013

Hon. Eileen Bransten, J.S.C.

1. CHECK ONE: .....X CASE DISPOSED ☐ NON-FINAL DISPOSITION

2. CHECK AS APPROPRIATE: Motion Is: X GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER

3. CHECK IF APPROPRIATE: .....☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

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

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

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THE TRAVELERS INDEMNITY COMPANY,
Plaintiff,

-against-

ORANGE AND ROCKLAND UTILITIES, INC. and JOHN DOE CORPORATIONS 1-100,
Defendants.

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Index No. 603601/2002
Motion Date: 12/6/2012
Motion Seq. Nos.: 017, 019, 020, 021, 022, & 023

BRANSTEN, J.:

This matter comes before the Court on Plaintiff The Travelers Indemnity Company's ("Travelers") motion for summary judgment (motion seq. no. 017) and the five motions for partial summary judgment brought by Defendant Orange and Rockland Utilities, Inc. ("ORU") (motion seq. no. 019, 020, 021, 022, and 023). The six motions are consolidated for disposition. For the reasons that follow, Travelers' motion for summary judgment is granted, and ORU's motions are denied.

I. Background

In this action, Travelers seeks an order declaring that it is not liable under certain insurance policies issued by it or its predecessors to defendant ORU. Specifically, Travelers seeks to disclaim coverage in connection with ORU's costs for investigation and remediation of pollution and contaminants at seven former Manufactured Gas Plants ("MGPs") owned or previously owned by ORU.

During various periods from approximately 1852 until 1965, ORU (or its predecessors) owned and operated MGPs in Orange County and Rockland County, New York. The MGPs were located at: (1) Fulton and Canal Streets, Middletown, New York ("Middletown Fulton"); (2) Genung and Phillip Streets, Middletown, New York ("Middletown Genung"); (3) Pike and King Streets, Port Jervis, New York ("Port Jervis"); (4) Chestnut Street, Ramapo Avenue and Pat Malone Drive, Suffern, New York ("Suffern"); and (5) 93B Maple Avenue and Clove and Maple Avenue, Haverstraw, New York ("Haverstraw") (collectively, the "MGP sites"). In addition, ORU owned and operated an MGP in Nyack, New York ("Nyack").

MGPs operated primarily between the years 1830 and 1915 during what has been referred to as the "Gaslight Era." At that time, MGPs delivered gas into residential homes and businesses through a network of underground pipes. Each town generally had its own gas plant or plants. While some plants survived well beyond the advent of electricity, generally, the availability of natural gas via interstate pipelines eventually brought the MGPs to an end during the mid-20th century.

On April 14, 1995, ORU notified Travelers of potential environmental liabilities at the MGP sites. In its letter, ORU informed Travelers that the New York State Department of Environmental Conservation ("DEC") intended to require ORU to investigate, and, if necessary, remediate any contamination that may be found to exist at

any of its MGP sites. Together with the notice, ORU sent Travelers a draft consent order from the DEC, requiring ORU to conduct a preliminary investigation for each MGP site. The purpose of the preliminary investigation was to enable the DEC to determine the presence of any hazardous substances at the MGP sites, and to develop and implement a remediation plan with respect to any of the sites that the DEC determined required more comprehensive action.

On May 1, 1995, Travelers acknowledged receipt of ORU's notice. Travelers made no determination of coverage, reserving its rights to do so at a later time.

A. *The Insurance Policies and Facts Surrounding ORU's Claims*

The primary policies under which ORU seeks coverage were issued by Travelers or its predecessors between 1955 and 1978. The Travelers Policies generally require that ORU provide notice of an accident or occurrence "as soon as practicable" and notice of a claim or suit "immediately" to Travelers.

According to Travelers, ORU was sufficiently aware of its potential liability at the MGP sites dating back to at least 1981. Travelers contends that, pursuant to the terms of the insurance policies, ORU was required to give notice of the likely pollution liability at the MGP sites, including the need to conduct investigations and remediations at the subject MGPs, approximately fourteen years before it was finally given. Moreover,

Travelers asserts that, for the fourteen years during which it was delinquent, ORU continued to be actively aware of the pollution problems at the MGPs. In particular, Travelers maintains that the following events put ORU on notice of a reasonable possibility that the Travelers policy would be implicated:

- On June 9, 1981, ORU forwarded correspondence to the Environmental Protection Agency ("EPA"), notifying the EPA that three of its MGPs – Nyack, Port Jervis, and Middletown Genung – contained "[p]ossible residual from utility gas manufacturing" stemming from "[s]pillage during normal operations and closure" (McNally Affirm. Ex. 44; Travelers Rule 19-a Statement in Support of SJ ¶ 13.[1]);

- ORU investigated and remediated coal tar contamination in September 1985 stemming from a damaged cistern at the Middletown Fulton MGP site, and found that "[a]s cleanup work progressed, it was apparent that the coal tar had leaked from the cistern and extensively migrated through the soil throughout the site and beyond," *see* McNally Affirm. Ex. 44 (November 12, 1985 memorandum from ORU Environmental Department Manager to Director of Risk Management);

- ORU's Administrator of Loss Prevention and Insurance sent an October 24, 1985 internal memorandum entitled "Environmental Pollution," stating that "[i]t has been brought to our attention that there may be a soil pollution problem at the site of our former gas plant [Middletown Fulton] ... and the buried tar and other residue may be coming back to haunt us." (McNally Affirm. Ex. 49.) The memorandum also lists other sites with potential environmental concerns, including Middletown Genung, Clove Avenue in Haverstraw, Port Jervis and Suffern. *Id.*;

- On November 14, 1985, ORU asked its broker to place its primary insurance carrier at the time – AEGIS – on notice of the Middletown Fulton

[1] All references to the Rule 19-a statements submitted by the parties are to undisputed facts, unless otherwise noted.

investigation and remediation. This request drew a response from AEGIS, directing ORU to place its historical insurance carriers, including Travelers, on notice. (McNally Affirm. Exs. 46, 47.) In addition, AEGIS noted ORU's acknowledgement of the "extensive migration [of the coal tar] thought the soil throughout the [Middletown Fulton] site and beyond." (*Id.* Ex. 48.);

- DEC informed ORU in December 1986 that it was performing a remedial investigation of contamination of the Suffern wellfield and that it was investigating whether wastes from the ORU Suffern MGP site were contributing to the contamination. (McNally Affirm. Ex. 55.);

- In March 1987, the EPA retained the NUS Corporation to conduct a "full preliminary site inspection" of the Middletown Genung site. (McNally Affirm. Ex. 58.) Following the inspection, NUS Corporation issued a report, concluding that "[p]ossible groundwater contamination is the primary concern at this site." *Id.* The report further noted the "strong potential for the polycyclic aromatic hydrocarbons to leach into the unconfined, glacial outwash aquifer," while finding "minimal potential for the confined, bedrock aquifer to become contaminated." *Id.*

- In June 1988, Gibbs & Hill ("Gibbs") performed an investigation of the Middletown Fulton MGP site on behalf of the DEC. (McNally Affirm. Ex. 59.) The Gibbs report found coal tar contamination at the site and noted "given the proximity of the site to Monhagen Brook ... there continues to exist the potential for off-site migration of the contaminants." *Id.*

- DEC requested that ORU submit data in April 1991 "explaining the coal tar site activities of your company. . . for all of your company's sites listed in the Registry ... as well as any unlisted and potential sites." ORU responded to the DEC by letter, dated May 10, 1991, attaching reports of the history and operations of all of the MGP sites. (McNally Affirm. Exs. 63, 64.);

- On August 8, 1994, DEC sent ORU samples of multisite consent orders, as part of ongoing discussions between DEC and ORU regarding development of a Consent Order for the MGP sites. (McNally Affirm. Ex. 68.);

- On September 6, 1994, DEC confirmed to ORU that it "would have to address all of the MGP sites under a single Consent Order." (McNally Affirm. Ex. 61.);

- In a December 13, 1994 letter, the New York Department of Public Service ("DPS") requested information from ORU as part of the DPS' investigation and report regarding "Coal Tar Site Investigation and Remediation Costs." (McNally Affirm. Ex. 7.) DPS requested a response within ten days. *Id.* ORU responded to DPS' information requests, describing various investigations and ongoing contacts with NYSDEC regarding MGP sites dating to 1985. (McNally Affirm. Ex. 61.) ORU's response noted that ORU had identified "historical primary insurance coverage for its MGP sites but had not put those insurers on notice." *Id.* ORU stated that it would now put the insurers on notice, "in light of the company's recent discussions with the NYSDEC, and anticipated future activity at these sites." *Id.*

- On December 17, 1994 and April 12, 1995, ORU and DEC exchanged drafts of the Consent Order pertaining to the MGP sites. (McNally Affirm. Ex. 72, 73.)

- On April 14, 1995, ORU issued a notice letter for all of the MGP sites to Travelers. ORU's letter attached a copy of a December 21, 1994 draft of the Consent Order. (McNally Affirm. Ex. 74.)

ORU counters that its April 14, 1995 notice was timely and fully complied with the policies' notice requirements. ORU explains that, prior to giving notice, in 1994, it had discussions with the DEC regarding an investigation of the MGP located in Middletown, New York, but that the DEC indicated that it wanted to broaden the scope of the investigation to encompass all of ORU's MGPs. *See* Affidavit of Maribeth McCormick ("McCormick Aff.") ¶¶ 64-65. ORU claims that, even at this point, no

remedial activities were discussed, and that the DEC's first draft of a consent order required nothing more than investigations of the MGPs.

A later draft consent order that DEC prepared and forwarded to ORU on December 27, 1994, provided for investigation, and, if necessary, remediation of sites that were found to be contaminated. This, ORU contends, was the first time it was apprised of a potential remediation obligation with respect to the MGP sites in the event a pollution problem was found to exist. (ORU Resp. to Travelers Rule 19-a St. ¶ 38.) In its February 8, 1995 response to the draft consent order, ORU objected to the inclusion of all of its MGPs in the investigation, and suggested that the consent order be limited to the Middletown site. (McCormick Aff. ¶ 67.) ORU then notified Travelers, on April 14, 1995, of the possibility of liability at the MGP sites, nine months before a final consent order was signed requiring the investigation of the MGPs.

ORU maintains that Travelers cannot demonstrate that it was obligated to give notice related to the MGP sites at any time prior to April 14, 1995. ORU claims that it performed diligent investigations of each MGP site, which it contends gave it no reason to believe that the Travelers policies would be implicated, since the policies exclude coverage for damage solely to ORU property. Since ORU maintains that it had no knowledge that the MGP sites contaminated third-party sites, it contends that it promptly gave notice to Travelers after appreciating that it potentially would face liability with respect to the MGP sites.

Thus, ORU claims that, prior to giving notice to Travelers in 1995, it had no knowledge that contamination had occurred at the MGP sites, and that, as soon as it was aware that there was potential liability, it notified Travelers. ORU contends that this constituted sufficient notice and that Travelers waived any late notice defense by failing to raise it in its initial response to ORU's April 14, 1995 notice letter. (ORU Opp. Br. at 99.)

B. *The First Department's Ruling*

The instant summary judgment motions are not the first summary judgment motions filed in this litigation. After the completion of discovery, on October 7, 2008, Travelers moved for summary judgment on the same basis advanced here, i.e. that ORU's late notice of its MGP site liabilities vitiated its coverage under the insurance policies. At the same time, ORU likewise filed a motion for summary judgment, arguing that Travelers waived this late notice defense. Following the submission of the parties' moving briefs, Travelers and ORU conferred and agreed to limit the scope of Travelers' request for relief to a single site – Nyack. *See* McNally Affirm. Ex. 98. On August 18, 2009, this Court denied Travelers' motion and granted ORU's motion.

On appeal, the First Department reversed, denying ORU's late notice motion and granted Travelers' motion "to declare denial of coverage on the basis of untimely notice."

Travelers Indem. Co. v. Orange & Rockland Util., 73 A.D.3d 576, 576 (1st Dep't 2010). In holding that ORU did not give timely notice to Travelers, the First Department noted ORU's "ongoing contacts with environmental regulators." *Id.* The court identified two contacts in particular – "Defendant's ongoing contacts with environmental regulators about the Nyack site dat[ing] back to 1981, and ... a site inspection by the Environmental Protection Agency in 1985." *Id.* Despite these interactions, "defendant never provided any notice to its insurer of these contacts or the questions they raised until 1995." *Id.* The court then explained that "the standard with regard to a primary liability policy, such as involved here, is simply awareness of a reasonable possibility that the policy will be implicated." *Id.* at 577. Thus, in the view of the First Department, "Defendant's argument that it never had actual notice of any pollution was insufficient," since "[t]he many reports, including internal reports of a likelihood of contamination at the subject site, as well as inquiries from regulators, placed it on notice." *Id.* at 576. Moreover, while these "many reports" and "inquiries" were sufficient as a matter of law to find that ORU provided late notice, ORU's "willful failure to investigate" further "negat[ed]" any argument by ORU that it lacked "awareness of an occurrence of pollution." *Id.* at 577.

The First Department likewise held that Travelers had not "waived its right to disclaim for late notice simply as a result of the passage of time." *Id.* In so ruling, the First Department rejected ORU's argument that Travelers should be deemed to have

waived its late notice defense by not only failing to deny coverage in its April 14, 1995 notice letter but also for waiting more than seven years after receipt of ORU's notice to offer a late notice defense.

C. *The Instant Motions*

Following the First Department's ruling, the parties each filed motions for summary judgment pertaining to the non-Nyack MGP sites. These six motions are presently before the Court.

Travelers' instant summary judgment motion again seeks a determination that ORU's late notice of its MGP liabilities as to the Middletown Fulton, Middletown Genung, Port Jervis, Suffern, and Haverstraw sites vitiated its coverage under the insurance policies. ORU's five separate motions for partial summary judgment – one for each of the MGP sites – requests a ruling that Travelers breached its duty to defend ORU against the environmental claims asserted against it for the sites. These motions will be considered in turn.

II. Travelers' Motion for Summary Judgment

As noted above, Travelers' motion raises the same arguments brought before this Court and the Appellate Division before, namely that ORU's April 14, 1995 notice was

late as a matter of law and that Travelers therefore has no duty to defend or indemnify ORU in connection with ORU's liability at the MGP sites. Travelers contends that the First Department's earlier ruling in this case as to the timeliness of ORU's notice regarding the Nyack site applies with equal weight to the remaining MGP sites, requiring an identical ruling here. ORU opposes, arguing that the First Department's ruling is distinguishable, as ORU possessed a reasonable good faith belief as to its nonliability and noncoverage for the non-Nyack sites.

A. *Standard*

Under New York law, compliance with the notice provisions of a liability insurance policy is a condition precedent to coverage. *See Am. Home Assur. Co. v International Ins. Co.*, 90 N.Y.2d 433, 442-443 (1997). With regard to primary liability policies, such as here, the notice requirement is triggered by the insured's "awareness of a reasonable possibility that the policy will be implicated." *Travelers Indemn. Co.*, 73 A.D.3d at 577. Thus, "[a]bsent a valid excuse, a failure to satisfy the notice requirement vitiates the policy ... and the insurer need not show prejudice before it can assert the defense of noncompliance." *Am. Home Assur. Co.*, 90 N.Y.2d 433 at 440 (internal citation omitted).

B. *ORU Had a Duty to Notify Travelers Before April 1995*

The First Department's ruling in *Travelers Indemnity Company v. Orange & Rockland Utilities, Inc.*, 73 A.D.3d 576, 576 (1st Dep't 2010) applies here and requires a finding that ORU's April 14, 1995 notice to Travelers was late as a matter of law.

1. ORU Was On Notice Prior to August 1994

In its opinion, the First Department was clear – the many reports, both internal and external, received by ORU, coupled with its contacts with environmental regulators, put ORU on notice with regard to the Nyack site well in advance of April 14, 1995. *Id.* at 576-77. Reports and regulatory contacts of the same kind and character as cited by the First Department are likewise cited here by Travelers with regard to the remaining MGP sites. For example, the First Department cited a June 8, 1981 letter from ORU to EPA notifying EPA that the Nyack, Port Jervis, and Middletown Genung sites all contained "[p]ossible residual from utility gas manufacturing" allegedly resulting from "[s]pillage during normal operations and closure." *See* McNally Affirm. Ex. 43. This letter, however, is plainly not confined to the Nyack site, as it also includes Port Jervis and Middletown Genung.

Moreover, Travelers presents numerous additional reports and regulatory interactions here further demonstrating that ORU should have been aware of a reasonable

possibility that the Travelers' policy would be implicated. As discussed above at Section I.A., ORU itself acknowledged contamination at its own sites had spread to third-party sites. In a November 25, 1985 memorandum, an ORU Environmental Department manager informed ORU's Direct of Risk Management that "[a]s cleanup work progressed [at the Middletown Fulton MGP site], it was apparent that the coal tar had leaked from the cistern and extensively migrated through the soil throughout the site and beyond." *See* McNally Affirm. Ex. 44; *see also* McNally Affirm. Ex. 49 (October 24, 1985 internal ORU memorandum entitled "Environmenal Pollution" and stating that buried tar and other residue at the Middletown Fulton, Middletown Genung, Haverstraw, Port Jervis, and Suffern sites "may be coming back to haunt us."). In addition, ORU acknowledged to one of its other insurers, AEGIS, the "extensive migration" of coal tar "through the soil throughout the [Middletown Fulton] site and beyond." *Id.* Ex. 48.

Further, inspectors retained by government regulators noted concerns that should have put ORU on notice, particularly with regard to contamination spreading to the third-party sites. At the Middletown Genung site, an EPA-retained contractor conducted an inspection in 1987 and noted that "[p]ossible groundwater contamination is the primary concern at this site," due to the "strong potential for the polycyclic aromatic hydrocarbons to leach into the unconfined, glacial outwash aquifer." *See* McNally Affirm. Ex. 58; *see also* McNally Affirm. Ex. 59 (June 1988 report prepared by Gibbs & Hill for EPA based

on investigation of Middletown Fulton finding coal tar contamination and noting "given the proximity of the site to Monhagen Brook ... there continues to exist the potential for off-site migration of the contaminants.").

In addition, the DEC notified ORU in December 1986 that it was performing a remedial investigation of the Suffern wellfield, which led DEC to examine whether wastes from the ORU Suffern site were contributing to the contamination. *See* McNally Affirm. Ex. 55.

These reports and contacts are of the same type and kind as those relied upon by the First Department in its ruling, and they compel the same result here, notwithstanding ORU's opposition. ORU attempts to distinguish the First Department's ruling, arguing that the appellate court's reasoning was based on the premise that ORU failed to conduct any investigations of the Nyack site. *See* ORU Opp. Br. at 2 ("Moreover, in Nyack, the insured admitted that it never investigated pollution conditions at the Nyack site until after it provided notice to Travelers."). With regard to the instant MGP sites, however, ORU now contends that it conducted diligent investigations and concluded that the sites did not pose a "material risk of contaminating third-party property." (ORU Opp. Br. at 2.) Accordingly, ORU maintains on this motion that it had a good faith belief that the laundry list of notice-triggering events cited by Travelers did not implicate the Travelers policies.

As an initial matter, the Court notes that ORU now takes a very different position than it took in its initial 2008 summary judgment briefing. Then, ORU represented that it did not conduct investigations at any of its MGP sites. *See* Supplemental McNally Affirmation ("Supp. McNally Affirm.") Ex. 16 at 6 (ORU's briefing to the First Department stating "[b]y 1994, Orange & Rockland itself had not performed any investigations of any of its former MGP sites.") Now, ORU makes contradictory representations, stating that it in fact conducted investigations at MGP sites, and that these investigations were sufficient to cause it to maintain a good faith belief that the policies would not be implicated, notwithstanding internal reports and regulatory interactions to the contrary.

Putting aside these contradictory statements to the Court, the investigations now alleged by ORU are not sufficient to demonstrate a triable issue of fact, in light of the First Department's ruling. For instance, with regard to the Middletown Fulton site, Travelers introduces an internal ORU report stating that "it was apparent that the coal tar had leaked from the cistern and extensively migrated through the soil throughout the site and beyond." (McNally Affirm. Ex. 4) This report, drafted by an ORU employee to the ORU Director of Risk Management, d strates an awareness that the contamination had spread offsite, implicating the Travelers policy. In response, ORU points to a report prepared by one of its consultants stating that the consultant did not believe that materials

from the Middletown Fulton site were contaminating groundwater. (Failla Affirm. Ex. 23.) The consultant's views, however, are not the point. Travelers cites to a document demonstrating that ORU was aware of contamination "throughout the site and beyond." This far exceeds the standard set forth by the First Department, which again is "simply awareness of a reasonable possibility that the policy will be implicated." *Travelers Indemn. Co.*, 73 A.D.3d at 577.

ORU further notes that the DEC did not conduct an examination of potential groundwater contamination at the Middletown Fulton site. However, the standard to be applied is not whether the insured knew of "actual damage to their property or some other concrete event occurred which made a covered loss likely," as ORU contends in its brief. (ORU Opp. Br. at 94.) Moreover, the standard to be applied is not whether there is "some realistic and certain action from a regulatory agency or third party showing some reasonable possibility of liability." In fact, this was the standard cited in this Court's Nyack summary judgment opinion that was expressly rejected by the First Department in favor of the "simple awareness of a reasonable possibility" standard listed above.

As a further example, Travelers submits a report prepared by an EPA contractor following a "full preliminary site inspection" of the Middletown Genung site. This report concluded that "[p]ossible groundwater contamination is the primary concern at this site." (McNally Affirm. Ex. 58.) In response, ORU notes that EPA and the DEC did not require

ORU to conduct an investigation or remediation of the site immediately following the report. (ORU Resp. to Travelers 19-a St. ¶ 27.) However, again, the standard is not whether there was knowledge of "some realistic and certain action from a regulatory agency." Instead, the pertinent analysis hinges on awareness of a reasonable possibility that the policy will be implicated. Thus, ORU's response does not address the notice received by ORU through the EPA-commissioned report.

These instances, coupled with the internal reports and contacts with regulatory agencies, are in line with the First Department's analysis in the prior Nyack-related opinion. The investigations cited by ORU do not negate the notice established through these ORU documents and related agency interactions. ORU cites to *Reynolds Metal Co. v. Aetna Cas. & Sur. Co.*, 259 A.D.2d 195 (3d Dep't 1999) for the proposition that an insured's good faith belief in non-liability and non-coverage may be supported by the insured's "own investigations and diligent efforts, in conjunction with regulators." (ORU Opp. Br. at 90.) However, unlike the insured in *Reynolds Metal Co.*, the insured here – ORU – possessed internal documents and memoranda directly contradicting the "diligent" investigative findings it now cites in its papers. Thus, while the court could find that Reynolds Metal Co. had no awareness of reasonable possibility that its policies could be implicated, here ORU produced reports and had interactions with regulators that

demonstrated to the contrary. Accordingly, the Court finds no genuine issues of material fact requiring trial with regard to the remaining MGP sites.

2. ORU Was On Notice As of September 1994

Even putting aside all of the reports and regulatory contacts discussed above, Travelers has demonstrated that ORU had a duty to provide notice as of September 6, 1994. On that date, DEC confirmed to ORU that it "would have to address all of the MGP sites under a single Consent Order." (McNally Affirm. Ex. 61 at ¶ 9.) Despite this notice, however, ORU waited over seven months to provide notice to Travelers.

ORU does not address the September 6, 1994 meeting in its papers. Moreover, ORU does not refute that the meeting occurred. (ORU Resp. to Travelers Rule 19-a St. ¶ 35.) ORU also does not dispute Travelers' statement that DEC confirmed to ORU at this meeting that it "would have to address all of the MGP sites under a single Consent Order." *Id.* This September 6, 1994 DEC statement, coupled with DEC's August 8, 1994 transmission of sample multistate consent orders, should have given rise to an awareness of a reasonable possibility that the Travelers policy would be implicated.

ORU provides no justification for its failure to provide notice to Travelers for over seven months. Such a delay under these circumstances renders ORU's notice late as a matter of law. New York courts routinely find notices given after far shorter delays

untimely. *See, e.g., Deso v. London & Lancashire Indem. Co. of Am.*, 3 N.Y.2d 127, 130 (1957) (concluding that 51-day lapse between notice of injury and notice to insured untimely as a matter of law); *Doe Fund, Inc. v. Royal Indem. Co.*, 34 A.D.3d 399, 399 (1st Dep't 2006) (delay of three months between service of complaint on insured and notice to insurer rendered notice untimely); *SSBSS Realty Corp. v. Public Serv. Mut. Ins. Co.*, 253 A.D.2d 583, 585 (1st Dep't 1998) (91 day delay); *Power Auth. of State of N.Y. v. Westinghouse Elec. Corp.*, 117 A.d.2d 336, 342 (1st Dep't 1986) (53 day delay). Here, the Court concludes that ORU's over seven month delay did not constitute timely notice to Travelers. Having not offered a valid excuse, ORU's failure to satisfy the requirement of timely notice, a condition precedent to coverage, vitiates ORU's policy. *See Doe Fund, Inc.*, 34 A.D.3d at 400.

3. ORU Was on Notice As of January 3, 1995

Even if all of the previous incidents described – the reports, the regulatory actions, the August 8, 1994 and September 6, 1994 discussions with DEC regarding the consent order – had not occurred, ORU nevertheless was put on notice as of January 3, 1995. On that date, ORU received a December 27, 1994 letter from DEC, which "require[d] for the first time, Orange & Rockland to investigate and remediate all of its former MGP sites." (ORU Resp. to Travelers 19-a St. ¶ 38.) The December 27, 1994 letter, dubbed the "Draft

Consent Order" by ORU, "required onsite and offsite preliminary site assessments, as well as interim remedial measures, remedial investigations, feasibility studies, remedial design, and extensive environmental remediation to Superfund Standards." *Id.*

Receipt of this "Draft Consent Order" triggered ORU's duty to provide notice to Travelers. ORU concedes as much in its brief, stating that "[p]rior to the time of the Draft Consent Order, there was simply no claim or suit which could have been reported to Travelers under the policies." *See* ORU Opp. Br. at 98. However, once the DEC sent the Draft Consent Order to ORU, the DEC took on "a coercive and adversarial posture towards Orange & Rockland and indicate[d] that Orange & Rockland would be compelled to take certain actions." *Id.* at 99.

ORU offers no excuse for failing to provide notice to Travelers for over three months following receipt of the "Draft Consent Order." Moreover, contemporaneously with ORU's receipt of the "Draft Consent Order," ORU acknowledged to another New York regulatory entity – the Department of Public Service – that ORU would place its insurers, including Travelers, on notice, "in light of the company's recent discussions with the NYSDEC, and anticipated future activity at these sites." *See* McNally Affirm. Ex. 61 at ¶ 8. Nevertheless, ORU did not provide notice until April 14, 1995.

As discussed above, the requirement of timely notice is a condition precedent to coverage. *See Doe Fund, Inc.*, 34 A.D.3d at 599. Without a valid excuse, failure to

satisfy this requirement vitiates the policy, and courts routinely find lapses shorter than the three-month delay here to render notice untimely as a matter of law. *See* Section II.B.2, *supra.* Here, given ORU's unexcused delay in light of its acknowledgment that it was required to provide notice, the Court concludes that ORU's notice was untimely.

Instead of attempting to excuse its delay, ORU instead contends that Travelers waived its right to avoid coverage based on late notice. This argument, however, was raised by ORU both to this Court and to the First Department with regard to the Nyack summary judgment motion. *See* Second Supplemental McNally Affirmation ("Second Supp. McNally Affirm.") Ex. 2; Supp. McNally Affirm. Ex. 16 at 34-35 ("Travelers never says why, when it received the draft consent order from [ORU] in 1995, as well as the later drafts, it was not given enough information at least to investigate whether notice was untimely."). In fact, ORU raises the same arguments here and cites to the same principal cases as it did in its First Department briefing. *Compare* ORU Opp. Br. at 99-103 *with* McNally Affirm. Ex. 16 at 35-38. As noted above, the First Department rejected ORU's argument that Travelers waived its right to disclaim for late notice by not including the defense in its initial response to ORU's notice. *See Travelers Indem. Co.*, 73 A.D.3d at 577.

The First Department's decision as to ORU's waiver argument is law of the case. "An appellate court's resolution of an issue on a prior appeal constitutes the law of the

case and is binding on the Supreme Court, as well as on the appellate court ... [and] operates to foreclose re-examination of [the] question absent a showing of subsequent evidence or change of law." *Carmona v. Mathisson*, 92 A.D.3d 492, 492-93 (1st Dep't 2012) (internal citations omitted). As explained by the *Carmona* court, "[u]nder the doctrine, parties or their privies are precluded from relitigating an issue decided in an ongoing action where there previously was a full and fair opportunity to address the issue." *Id.* at 493.

Here, ORU had a full and fair opportunity to address the waiver issue. The issue was raised both to this court and to the First Department. Moreover, there are no unique facts or circumstances here that differentiate the waiver issue as to the instant MGP sites from Nyack. Both arguments hinge on the timeliness of Travelers' late notice defense and are based on the same documents. ORU presents no "extraordinary circumstances," such as "a change in the law or a showing of new evidence affecting the prior determination." *See Foley v. Roche*, 86 A.D.2d 887, 887 (2d Dep't 1982). Thus, once an issue, such as this, is "judicially determined, either directly or by implication, it is not to be reconsidered by Judges or courts of co-ordinate jurisdiction in the course of the same litigation." *Holloway v. Cha Cha Laundry*, 97 A.D.2d 385, 386 (1st Dep't 1983).

Accordingly, the Court finds ORU's waiver argument unavailing and grants Traveler's summary judgment motion.

III. ORU's Summary Judgment Motions

ORU moves for summary judgment, seeking a declaration that Travelers breached its duty to defend ORU with respect to each of the MGP sites. However, as noted above, compliance with the notice provisions of a liability insurance policy is a condition precedent to coverage. *See Am. Home Assur. Co. v International Ins. Co.*, 90 N.Y.2d 433, 442-443 (1997). Having concluded that ORU provided late notice to Travelers, the Court held that ORU did not fulfill this condition precedent, vitiating its coverage. Accordingly, ORU's breach of the notice condition relieves Travelers of any duty to defend, and ORU's motions for summary judgment are denied as moot.

IV. Conclusion

Accordingly, it is

ORDERED that the motion by The Travelers Indemnity Company for summary judgment (motion sequence no. 17) is granted; and it is further

ORDERED that the motions by Orange and Rockland Utilities, Inc. for partial summary judgment (motion sequence no. 019, 020, 021, 022 & 023) are denied as moot; and it is further

ORDERED that the complaint is dismissed with costs and disbursements to defendant as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

This constitutes the Decision and Order of the Court.

Dated: New York, New York
July 12, 2013

ENTER:

Hon. Eileen Bransten