SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: ELLEN M. COIN J.S.C. PART 63

Justice

Index Number : 110127/2011
NATIONAL FIRE INSURANCE
vs.
GUSHUE, KATHLEEN
SEQUENCE NUMBER : 002
OTHER RELIEFS

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

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

MOTION IS DECIDED IN ACCORDANCE WITH THE ANNEXED DECISION AND ORDER.

This constitutes the decision and order of the Court.

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

Dated: 7/17/13

_____, J.S.C.
ELLEN M. COIN
J.S.C.

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: IAS PART 63

NATIONAL FIRE INSURANCE COMPANY as successor in interest to TRANSCONTINENTAL INSURANCE COMPANY,

Plaintiff,

-against-

Index No.110127/2011

DECISION AND ORDER

KATHLEEN GUSHUE, TRAVELERS INDEMNITY COMPANY OF CONNECTICUT, TRAVELERS CASUALTY AND SURETY COMPANY, NFL REGAL, LLC D/B/A THE REGAL COMPANY, ALICE HUGHES, FRANCIS N. LEVY, as co-representative of the estate of NORMAN LEVY, JEANNE CHURCH LEVY, as co-representative of the estate of NORMAN LEVY, DIAMOND STATE INSURANCE COMPANY, RLI INSURANCE COMPANY, COMMERCE & INDUSTRY INSURANCE COMPANY and ZURICH AMERICAN INSURANCE COMPANY,

Defendants.

ELLEN M. COIN, J.:

Defendant Diamond State Insurance Company (Diamond) moves, pursuant to CPLR 3212, for summary judgment: (a) declaring that Diamond has no duty to defend or indemnify defendants Francis N. Levy and Jeanne Levy Church, as co-representatives of the Estate of Norman Levy, NFL Regal d/b/a The Regal Company, or Alice Hughes with respect to an underlying action styled *Kathleen Gushue v Francis N. Levy, as Co-Representative of the Estate of Norman Levy*, et al., index number 106645/05 (the Underlying Action), reportedly on appeal currently; and (b) dismissing the complaint and any cross-claims as against Diamond.

BACKGROUND

The Underlying Action and this coverage dispute arise from claims brought by Kathleen Gushue against Norman Levy and NFL Regal, LLC. d/b/a/ The Regal Company (Regal), as co-owners and managers of a building located at 443-453 Greenwich Street in downtown New York (the Building), Alice Hughes, as Building Manager (collectively, the Regal Defendants); EJN Corp. d/b/a Tribeca Potters (Tribeca), a tenant that occupied a second floor unit beneath Gushue; and Deidan Industries (Deidan), which installed a flue from Tribeca's kiln on the second floor to the Building roof. Gushue claims that her exposure to manganese contained in a kiln exhaust in the Building caused her to develop Parkinson's Disease.

Regal entered into three separate commercial leases with Gushue for space in the Building, each of which terminated in 2006. Gushue utilized the leased spaces as an art center for aspiring artists, who, following an application process, subleased studio space from Gushue's company. In an overlapping period, Regal also leased to Tribeca the second floor space. Tribeca utilized its space as a ceramics studio in which it designed clay artwork that was hardened and finished by baking in kilns. Pursuant to the terms of Tribeca's lease with Regal (the Tribeca Lease), Tribeca was required to vent all kiln exhaust, and contracted with Deidan to make installations in satisfaction

of that obligation.

The Tribeca Lease contained several indemnification provisions designed to protect Regal from liability associated with Tribeca's use of the premises. Tribeca was also required to maintain primary liability insurance coverage for the demised premises in favor of the Regal Company throughout the Tribeca Lease term for both personal injury and property damage. Tribeca purchased commercial general liability coverage on a yearly basis from defendant Travelers Indemnity Company of Connecticut (Policy Nos. 1-660-135N7732-TCT-99 and 1-660-135N7732- TCT-00) (the Travelers Policies) naming the Regal Company as an additional insured.

The Regal Defendants maintained a policy with Diamond (Policy No. DSL 7125364) (the Diamond Policy), providing them with general liability coverage. The Policy states Diamond "will pay those sums that the insured becomes legally obligated to pay as damages because of 'bodily injury'" up to a limit of $1 million. Both Regal and Levy are named insureds under the Diamond Policy. The Diamond Policy also contains an "Additional Insured" endorsement for "Managers or Lessors of Premises." The Building is listed as an insured location. An "Amendment of Other Insurance Condition" endorsement provides: "[t]his insurance is excess over [a]ny other primary insurance available to you covering liability for damages arising out of the premises

or operations for which you have been added as an additional insured by attachment of an endorsement."

The Travelers Policies provided general liability coverage for the periods of June 10, 1999 to June 10, 2000, and June 10, 2000 to June 10, 2001. The Travelers Policies provide "[w]e will pay those sums that the insured becomes legally obligated to pay as damages because of 'bodily injury'" up to a limit of $500,000. The second floor of the Building is listed as an insured location. The Policies' "Additional Insured" endorsements for "Managers or Lessors of Premises" list Regal as an additional insured, and the Policies contain an "Other Insurance - Additional Insureds" endorsement that reads: "[t]his insurance is excess over any of the other insurance; whether primary, excess, contingent or on any other basis [t]hat is valid and collectible insurance to you if you are added as an additional insured under any other policy."

Apparently, as early as 1998 Gushue began to complain of kiln odors emanating from Tribeca's premises. She sent correspondence to Hughes, the Managing Agent for the Building, recounting the various allergy-like symptoms she claimed to have experienced as a result of kiln exhaust escaping from the second floor studio. In January of 2001, Gushue wrote to Hughes again to complain of the conditions. A dispute between Gushue and Tribeca then escalated, and Regal intervened in an attempt to

resolve the matter.

By February of 2002, Gushue reiterated that the ceramic odors caused her to suffer symptoms including a runny nose, sneezing, throat irritation, nosebleeds, and headaches. Gushue contacted Regal in May 2003, indicating that Tribeca continued to vent kiln fumes, and attached a study purportedly demonstrating the presence of kiln fumes. Approximately one year later, in June 2004, Tribeca vacated the Building.

However, in the spring of 2003, Gushue observed both a resting and motion tremor in her right hand. In August 2003, she was diagnosed with Parkinson's disease, a degenerative disorder of the central nervous system. At some point after this, Gushue came to understand that there is a connection between manganese exposure and Parkinson's disease, and suspected that she had been exposed to the chemical by the activities of Tribeca. She was eventually rediagnosed with "manganese-induced Parkinsonism," which, reportedly, is not idiopathic.

As of September 7, 2005, the Regal Defendants were apprised of Gushue's claims for physical injury by the Underlying Action. This information was provided to the Regal Defendants' insurance brokers as of September 9, 2005. Concurrently, notice was given to the Regal Defendants' pollution liability carrier, Commerce and Industry Insurance Company (which provided coverage under a commercial pollution liability policy from October 12, 2001

through October 12, 2006), and RLI Insurance Company (which provided general liability coverage from November 19, 2002 through November 19, 2004).

The Underlying Action alleged exposure to "toxic fumes" from 1998 until 2004. On November 21, 2005, one of Regal's insurance brokers gave notice of Gushue's claims to Diamond's claims administrator, Tower Risk Management (Tower), by providing a copy of Gushue's complaint via facsimile. As of December 19, 2005, Tower disclaimed coverage for Gushue's claims, asserting the defenses that Gushue's alleged injuries did not occur during the Policy period, untimely notice, lack of coverage for statutory violations and punitive damages under the Policy, and the Policy's pollution exclusion.

By decision and order dated September 27, 2012, this Court (Oing, J.) granted the Regal Defendants' motion for summary judgment dismissing the Underlying Action. Thereafter Gushue filed a notice of appeal. As of September 2011, plaintiff National Fire Insurance Company (National Fire) commenced the instant declaratory judgment action to clarify the coverage obligations of the Regal Defendants' general liability carriers. Diamond, which provided coverage for the period from November 19, 1999 to November 19, 2000, has interposed five counterclaims and cross-claims against National Fire and each defendant asserting, inter alia, that it had no duty to defend or indemnify the Regal

Defendants. In the alternative, Diamond seeks a judgment declaring (CPLR 3001) the Diamond Policy to be excess of all other insurance available to the Regal Defendants. Upon this motion, Diamond seeks summary judgment dismissal, alleging late notice of both occurrence and claim.

On this motion for summary judgment, Diamond must show that the potential claims of the other parties for indemnification have no merit. In order to do so, Diamond must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. *Winegrad v New York Univ. Med. Center*, 64 NY2d 851, 853 (1985); *Wolff v New York City Tr. Auth.*, 21 AD3d 956 (2nd Dept 2005).

Once Diamond has made this prima facie showing, the burden shifts to the opposition 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); *Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 (1st Dept 2006).

Finally, on this motion for summary judgment the nonmovants are entitled to the benefit of every favorable inference that may be drawn from the pleadings, affidavits, and competing contentions of the parties. *Myers v Fir Cab Corp.*, 64 NY2d 806, 808 (1985); *Marshall v Vilar*, 303 AD2d 466, 466 (2nd Dept 2003).

CLASSIFICATION OF THE DIAMOND POLICY

In order to properly assess the merit of the motion to dismiss for late notice of occurrence or claim, it must first be determined whether the Diamond Policy was a primary insurance policy or an excess insurance policy. Under the law in effect at the time the Diamond Policy was issued, "where a contract of primary insurance requires notice 'as soon as practicable' after an occurrence, the absence of timely notice of an occurrence is a failure to comply with a condition precedent which, as a matter of law, vitiates the contract." *Argo Corp. v Greater N.Y. Mut. Ins. Co.*, 4 NY3d 332, 339 (2005), citing *Security Mut. Ins. Co. of N.Y. v Acker-Fitzsimons Corp.*, 31 NY2d 436, 440-443 (1972) (failure to notify in a timely manner is basis to disclaim coverage).[1]

However, with regard to excess insurance, "the focus is on whether the insured reasonably should have known that the claim against it would likely exhaust its primary insurance coverage and trigger its excess coverage, and whether any delay between acquiring that knowledge and giving notice to the excess carrier was reasonable under the circumstances." *National Union Fire*

---

[1]New York Insurance Law §3420 was amended to require that an insurer show prejudice before declining coverage for untimely notice. However, that amendment applies only to policies issued or delivered after January 17, 2009, which is not the case here. *In re St. James, Mech., Inc.*, 2010 WL 3212037 n.2 (ED NY, Aug. 9, 2010, Bk No. 09-70124, Adv. No. 09-08136).

Ins. Co. of Pittsburgh, Pa. v Connecticut Indem. Co., 52 AD3d 274, 276 (1st Dept 2008), citing *Morris Park Contr. Corp. v National Union Fire Ins. Co. of Pittsburgh, Pa.*, 33 AD3d 763 (2nd Dept 2006); *see also Savik, Murray & Aurora Const. Mgt. Co., LLC v ITT Hartford Ins. Group*, 86 AD3d 490, 492 (1st Dept 2011), *appeal dismissed* 17 NY3d 901 (2011) ("circumstances that give rise to an insured's 'good-faith belief of nonliability may excuse or explain a seeming failure to give timely notice'"), citing *Security Mut. Ins. Co. of N.Y.*, 31 NY2d at 441.

Thus an important distinction obtains between a policy that provides "insurance that is excess," and a policy that is true "excess insurance." The former simply attempt to set priorities with regard to other primary insurances, while the latter is not primary at all, but rather an insurance policy that cannot be obtained without having an underlying primary policy. *233rd St. Partnership, L.P. v Twin City Fire Ins. Co.*, 52 AD3d 292, 293 (1st Dept 2008) (a primary policy that purports to shift losses to other available insurance under specified certain circumstances is not an excess policy); *see also Bovis Lend Lease LMB, Inc. v Great Am. Ins. Co.*, 53 AD3d 140, 151-152 (1st Dept 2008); *Cheektowaga Cent. School Dist. v Burlington Ins. Co.*, 32 AD3d 1265, 1268 (4th Dept 2006).

The Diamond Policy, by its own terms, is not true excess insurance. First, there is no requirement that the insured have

a primary policy. However, and more plainly, the Diamond Policy itself indicates that "*[t]his insurance is primary* except when [it is excess over any other insurance.]" *See* Diamond Policy, § IV (4) (a) (emphasis added). In addition, the following section in the Diamond Policy indicates a number of provisos for "[w]hen this insurance is excess." This implies, of course, that there are also times when the insurance is *not* excess. As such, it is not a true excess policy, but a primary policy, with all of the concomitant notice requirements.

NOTICE OF AN OCCURRENCE

Gushue maintains, however, that even if the Diamond Policy is primary, her symptoms and complaints did not constitute an occurrence under the Policy, and the Regal Defendants' notice to Diamond in November of 2005 was sufficient to satisfy the notice requirements. This argument is unconvincing. However, it is not the Regal Defendants that have to show entitlement to judgment as a matter of law on this motion. *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 (1957); *Patrolmen's Benevolent Assn. of City of N.Y. v City of New York*, 27 NY2d 410, 415 (1971) (statements made in opposition to the motion must be accepted as true). It is for Diamond to show that there was an occurrence under the provisions of the Diamond Policy and that notice of that occurrence was not given.

The Diamond Policy applies to "'bodily injury' ... caused by an 'occurrence' that takes place in the 'coverage territory' ... during the policy period." Diamond Policy, § I (1) (b). In turn, the Policy defines "bodily injury" as "bodily injury, sickness or disease sustained by a person, including death resulting from any of these." The Policy defines an occurrence as "an accident, including continuous or repeated exposure to substantially the same general harmful condition." Diamond Policy §V (12). Finally, the Policy contains a requirement that in the event of an occurrence, claim, or suit, the insured must notify Diamond as soon as practicable. Id., § IV (2).

There is ample evidence in the record that not only were there occurrences which were reported starting in 1999, but that Gushue complained of exposure to toxic conditions, and the potential deleterious effects on her health, to the Regal Defendants, and of bodily injuries, on a continuous basis, for some six years before any notice was given to Diamond. The obligation of the Regal Defendants to give notice to Diamond was evidently triggered several years before actual notice.

Diamond issued a written disclaimer of coverage within 28 days of the notice. Although under some circumstances, a period of approximately 30 days was found to be unreasonable as a matter of law (*see e.g. West 16th St. Tenants Corp. v Public Serv. Mut. Ins. Co.*, 290 AD2d 278, 279 [1st Dept 2002] [where basis of

disclaimer obvious from face of notice of claim, no need for defendant to conduct investigation before determining whether to disclaim]), there is no strict rule that would govern the timing of Diamond's disclaimer of coverage, and it is the judgment of this court that the disclaimer was made as soon as reasonably possible. *See* Insurance Law § 3420; *compare Squires v Marini Bldrs.*, 293 AD2d 808, 810 (3rd Dept 2002) (42 days); *Matter of Colonial Penn Ins. Co. v Pevzner*, 266 AD2d 391 (2nd Dept1999) (41 days); *Matter of Nationwide Mut. Ins. Co. v Steiner*, 199 AD2d 507, 508 (2nd Dept 1993) (41 days).

The Regal Defendants' reliance on *Garfield Slope Hous. Corp. v Public Serv. Mut. Ins. Co.* (973 F Supp 326, 331 [ED NY 1997]) is misplaced. There the insured "plausibly contend[ed] that bodily injury resulting from exposure to malodorous carpet was plainly a 'remote contingenc[y] far removed from the particular [liability] policy in question.'" Moreover, the plaintiff in *Garfield Slope* became ill years after the exposure. Here Gushue complained not of remote contingencies, but of specific ailments and immediate reactions to toxic fumes. To wit, Gushue noted: "headaches, irritated eyes, sneezing, a dry cough and nose bleeds" (January 1999); "being repeatedly sickened by [Tribeca's] fumes for two years now" (January 2001); "experienc[ing] headaches, nosebleeds, burning eyes, sneezing, coughing and throat irritation," (February 2001); being "subjected to toxic

kiln fumes" (June 2001); "runny nose, sneezing, throat irritation, headaches and nosebleeds" (February 2002); "escaping kiln fumes [that made her] space unusable" (February 2002); "intolerable [conditions that continually put her] health at risk [from] breathing toxic kiln fumes and there is no question that [the specific] chemicals are toxic" (April 2002). The Regal Defendants were, therefore, at least on notice of the potential for a *claim*. Indeed, for all this time Gushue apparently understood, and communicated, that "[t]here is no such thing as a harmless kiln fume" (February 2001).

Moreover, reliance on the recent unreported case of *Structure Tone, Inc. v Eurotech Constr. Corp.* (2011 WL 5118140, 2011 NY Misc LEXIS 5009, *15-16, 2011 NY Slip Op 32725 [U], *13, [Sup Ct, NY County 2011]), is not warranted. There "plaintiffs established that [defendant] was given timely notice of the occurrence once plaintiffs learned of it ... [and, in all events, defendant] did not timely disclaim on [the] ground [of untimely notice. As a result, defendant was] precluded from disclaiming coverage on that ground." The issue in that case was notice of the *legal action*, not of the occurrence. Here, in contrast, Diamond did disclaim on the basis of untimely notice, and the Regal Defendants never gave notice of the occurrence.

There is not even a "shadowy semblance of an issue" (*Hanrog Distrib. Corp. v Hanioti*, 10 Misc 2d 659, 660 [Sup Ct, NY County

1945]) as to the sufficiency of notice. As is clear from the numerous communications about the toxic fumes allegedly emanating from Tribeca's premises, and the repeated references to the direct effect on Gushue's health, there is no genuine issue to be tried, and summary judgment is therefore appropriate. *See Rubin v Irving Trust Co.*, 305 NY 288, 306 (1953).

GOOD FAITH BELIEF IN NON-LIABILITY

The Regal Defendants also maintain, however, that they had a good-faith belief in lack of liability for Gushue's injuries. In this regard, it is generally accepted that an "insured may be excused for a delay or failure in giving the required notice to the insurer where it appears that, acting as a reasonable and prudent person, he believed that he was not liable for the accident." *875 Forest Ave. Corp. v Aetna Cas. & Sur. Co.*, 37 AD2d 11, 13 (1st Dept 1971) (internal quotation marks and citation omitted), *affd* 30 NY2d 726 (1972).

However, "the relevant legal standard is 'not whether the insured believes he will ultimately be found liable for the injury, but whether he has a reasonable basis for a belief that no claim will be asserted against him.'" *Tower Ins. Co. of N.Y. v Babylon Fish & Clam, Inc.*, 83 AD3d 547, 548 (1st Dept 2011), quoting *SSBSS Realty Corp. v Public Serv. Mut. Ins. Co.*, 253 AD2d 583, 584 (1st Dept 1998).

In this regard, Gushue wrote to the Regal Defendants that "[t]wo years is long enough to wait for help when my health is at stake. If the problem cannot be fixed, I will be forced to take legal action to have [Tribeca] removed from the building." Notice of motion, Ex J, letter of January 17, 2001. As such, the Regal Defendants factually had direct notice of Gushue's intention "to take legal action," and the basis of that legal action was that her "health is at stake." Thus, they have failed to establish any triable issue of fact regarding Gushue's notice.

CLAIMS OF CONTRIBUTION BY OTHER INSURERS

Plaintiff National Fire Insurance Company (National Fire) also opposes Diamond's motion for summary judgment on separate grounds. It argues that even if the Regal Defendants' notice to Diamond were untimely, a claim for contribution by Regal's other insurers, i.e. Diamond's co-insurers, is still viable, provided that those co-insurers gave timely notice to Diamond themselves. This argument is without merit.

As a preliminary matter, it appears that Diamond and National Fire are not co-insurers. Insurers are co-insurers if they insure the same risk during the same period of time. *See Ace Fire Underwriter's Ins. Co. v ITT Indus.*, 55 AD3d 346 (1st Dept 2008); *Pennsylvania Manufacturers' Assn. Ins. Co. v Liberty Mut. Ins. Co.*, 39 AD3d 1161 (4th Dept), *lv denied* 9 NY3d 810

(2007); *HRH Constr. Corp. v Commercial Underwriters Ins. Co.*, 11 AD3d 321, 323 (1st Dept 2004), *lv denied* 5 NY3d 705 (2005). The Diamond Policy commenced on November 19, 1999, and expired on November 19, 2000. National Fire's policy started on November 19, 2000, and expired on November 19, 2001. As the respective policies were not in effect at the same time, the carriers are not co-insurers. Hence this basis for contribution is unavailing.

Nonetheless, the right of contribution may attach where the insurers are successive insurers as well. In this regard, "[w]here an insured gives ... one of two insurers timely notice of a claim, the insurer that received notice may obtain reimbursement from the other insurer ... if it gives the other insurer notice of the claim that is reasonable under the circumstances." *Continental Cas. Co. v Employers Ins. Co. of Wausau*, 85 AD3d 403, 407 (1st Dept 2011), citing *Matter of Crum & Forster Org. v Morgan*, 192 AD2d 652, 654 (2nd Dept 1993).

National Fire received notice as of November 15, 2005 by letter from HUB International, the insurance broker of the Regal Defendants. The contribution claim against Diamond was given by order to show cause, however, only as of May 2012, some seven years after first receiving notice of claim and is untimely as a matter of law. Thus, the claims for contribution on this basis are unavailing.

COVERAGE FOR PUNITIVE DAMAGES, BREACH OF WARRANTY, AND CODE VIOLATIONS

The remaining theories of obligation to provide coverage are based in liability for punitive damages, and violations of certain regulations. As a matter of public policy, New York does not countenance insurance for punitive damages. *Home Ins. Co. v American Home Prods. Corp.*, 75 NY2d 196, 205 (1990). In addition, upon review, there is no indication that the Diamond Policy covers breach of warranty claims, or violations of the Environmental Conservation Law, New York State Code of Rules and Regulations, or the New York City Administrative Code. It appears that the Diamond Policy provides coverage only for defined occurrences, as noted above.

In accordance with the foregoing, it is hereby

ORDERED that the motion of defendant Diamond State Insurance Company, pursuant to CPLR 3212, for summary judgment declaring that it has no duty to defend or indemnify defendants Francis N. Levy, or Jeanne Levy Church, as co-representatives of the Estate of Norman Levy, NFL Regal d/b/a The Regal Company, or Alice Hughes with respect to the underlying action styled *Kathleen Gushue v Francis N. Levy, as Co-Representative of the Estate of Norman Levy*, et al., index number 106645/05, New York County, is granted; and it is further

ADJUDGED and DECLARED that Diamond State Insurance Company has no duty to defend or indemnify the aforementioned defendants

in the said action; and it is further

ORDERED that the motion of Diamond State Insurance Company, pursuant to CPLR 3212, for summary judgment dismissing the complaint and any cross-claims as against it is granted and the complaint is severed and dismissed as against said defendant with costs and disbursements to said defendant as taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that the remainder of the action shall continue.

This constitutes the Decision and Order of the Court.

Dated: July 17, 2013

Enter:

Ellen M. Coin, A.J.S.C.