Terrasure Dev. LLC v Illinois Union Ins. Co.
2013 NY Slip Op 31912(U)
August 8, 2013
Supreme Court, New York County
Docket Number: 603533/07
Judge: Debra A. James
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SCANNED ON 8/15/2013

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: DEBRA A. JAMES
Justice

PART 59

TERRASURE DEVELOPMENT LLC and GANNETT FLEMING PROJECT DEVELOPMENT CORPORATION,

Plaintiffs,

- v -

ILLINOIS UNION INSURANCE COMPANY,

Defendant.

Index No.: 603533/07

Motion Date: 11/16/12

Motion Seq. No.: 03

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

The following papers, numbered 1 to 4 were read on this motion for summary judgment.

Notice of Motion/Order to Show Cause -Affidavits -Exhibits	No(s). 1, 2
Notice of Cross Motion/Answering Affidavits - Exhibits	No(s). 3
Replying Affidavits - Exhibits	No(s). 4

Cross-Motion: ☒ Yes ☐ No

Plaintiffs, the companies responsible for the remediation of a certain polluted site, seek a declaratory judgment that they are entitled to coverage under a remediation cost containment insurance policy issued by defendant Illinois Union Insurance Company ("Insurance Company"), as well as damages for the Insurance Company's breach of that policy. Plaintiffs move for summary judgment on their complaint. Defendant cross-moves for summary judgment for a contrary declaration and for

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING

Check One: ☒ **FINAL DISPOSITION** ☐ **NON-FINAL DISPOSITION**
Check if appropriate: ☐ **DO NOT POST** ☐ **REFERENCE**

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dismissal of the breach of contract claim.

UNCONTESTED FACTS

Terrasure is environmental mediation company formed in 2002 to market guaranteed fixed price remediations. Terrasure's business was to investigate opportunities to perform such work, negotiate prices for the work, and enter into contracts with owners of sites in need of remediation. The other party to Terrasure's contract with the owners was Gannett Fleming Project Development Corporation ("Gannett"). Gannett would execute the actual environmental remediation work and manage the project, including hiring and paying subcontractors and vendors.

Among the guaranteed fixed price remediation projects that TerraSure and Gannett undertook was the site at College Point, a brownfield located at Fifth Avenue and 121st Street in Queens, New York (the "College Point Site"). The College Point Site was owned by JTR College Point, LLC ("JTR").

On February 4, 2005, TerraSure and Gannett entered into a contract with JTR to remediate the contaminated site for $2.6 million. Terrasure estimated $1.2 million as the cost of the remediation. Terrasure would realize a profit on the College Point Site project only if its total cost of remediation and various other expenses were less than $2.6 million.

Terrasure and Gannett purchased a Remediation Cost Containment Insurance Policy (the Policy) from defendant Illinois

Union Insurance Company for a premium of $250,000. Plaintiffs were co-insured parties under the Policy, which covered the period from March 10, 2005 to March 10, 2008. The Policy was subject to co-insurance of ten percent, a maximum coverage amount of $2 million and a self-insured retention (the SIR) of $2,422,734. Defendant would pay up to $2 million for remediation costs exceeding the SIR.

The original Remediation Plan ("the Plan") dated October 15, 2003, and revised February 27, 2004, attached to the Policy, contained a Remediation Cost Estimate ("Cost Estimate") as an Appendix. The Remediation Cost Estimate set forth the original budget of $1,200,275 and identified various tasks comprising the Remediation Plan, which were identified in an Endorsement to the Policy.

The Cost Estimate listed the tasks as Program Management (Task 1), Site Preparation and Set Up (Task 2), Field Activities, Contaminated Soli and Product Removal (Task 3) and Site Restoration and Closeout (Task 4). As for Task 3, the Remediation Cost Estimate budgeted a sum of $48,600 for the excavation of 2,700 cubic yards of soil, of which it was estimated 1,500 cubic yards (about 1,875 tons) would be contaminated and have to be disposed of as hazardous waste. The estimated cost of soil disposal was $112,500. The Plan contemplated regrading the land using 1,200 cubic yards of

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excavated soil that was not contaminated and an additional 529 cubic yards of clean soil already stockpiled at the site. The Plan did not contemplate that Terrasure would incur costs to purchase clean soil to regrade the site after excavating and disposing of contaminated soil.

The actual remediation work began during the period May through July 2005.

By letter dated April 20, 2006, Plaintiffs notified Defendant that "the Insured must incur Excess Remediation Costs above and beyond [the SIR] ... The costs are necessary to complete the approved Remediation Plan in its originally underwritten form.

After conducting some investigation, Defendant wrote back denying coverage on June 13, 2006. Defendant observed that the April 2006 letter from Plaintiffs was the first communication on the status of remediation that Defendant had received, and that opined that Plaintiffs

PLAINTIFFS' CONTENTIONS

Brad Maurer (Maurer), a Terrasure board member, testified at his deposition about quarterly reports distributed at board meetings. The quarterly report for the third quarter of 2005 identified the cost of work completed to date as $1.091 million, estimated that $1.087 million more was needed to complete the entire project, and anticipated that the final cost

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of completing the project would amount to $2.17 million. The quarterly report for the last quarter of 2005 reported the commensurate figures as $1.119 million, $1.084 million, and $2.184 million. The quarterly report for the first quarter of 2006 showed the figures of $2.029 million, $1.243 million, and $3.272 million. It was the first quarter 2006 report that prompted Maurer to place Defendant on notice that the costs as projected would exceed the SIR.

At his deposition, Gannett's president, Dan Morosky (Morosky), testified that the unpaid invoices submitted in March and April 2006 totaled $500,000, a significantly larger sum than usual. It was only at this point that Morosky was able to estimate that the project costs would likely exceed the SIR, and that on that basis the April 20, 2006 notice was prompt under the Policy.

Plaintiffs argue that they are entitled to a declaration that Defendant is required to provide coverage to them for excess remediation costs incurred on the College Point Site since Defendant received notice under the Policy of a "pollution condition" via the Remediation Plan and Cost Estimates incorporated in the Policy. They contend that any provisions concerning additional notice under the Policy are ambiguous and must be interpreted in favor of coverage or are inapplicable to the claim at bar.

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DEFENDANT'S CONTENTIONS

By July 2005, Plaintiffs knew that they had excavated 2,400 cubic yards of soil, almost 90% of the original estimate of 2,700 cubic yards. By early November 2005, Plaintiffs knew that they had imported over 20,000 tons of clean backfill. By the end of 2005, Plaintiffs knew that they had excavated close to 8,000 tons of soil and by the middle of February 2006, about 12,000 tons. By January 2006, Plaintiffs knew that they had imported backfill in the amount of just under 30,000 tons and by April 2006, in excess of 30,000 tons.

Defendant contends that Plaintiffs were therefore well aware of circumstances that could lead to excess remediation costs no later than November 2005, which required Plaintiffs to notify Defendants of such excess costs under the Policy. Defendant also alleges that, by no later than November 2005, Plaintiffs also knew that they would have to depart from the original Plan by importing clean soil for regrading. Defendant asserts that under the Policy, the Plaintiffs, as insured, were not to incur excess remediation costs without the insurer's written approval. Moreover, according to Defendant, Plaintiffs breached the Policy by not providing remediation project updates. Defendant argues that it is entitled to a declaration in its favor since Plaintiffs were in violation of the Policy, and therefore "coverage is not afforded for any excess remediation

costs incurred to date."

ANALYSIS

The Policy, states, in pertinent part:

I. INSURING AGREEMENT

A. To pay on behalf of the "insured" for "excess remediation costs" incurred during the "Policy Period", provided such "excess remediation costs" arise out of "Pollution Conditions" identified in the "remediation plan" or are first discovered during the implementation of the "remediation plan"; and

1. The "insured" provides written notice to the Insurer, during the "Policy Period", of the need to incur such "excess remediation costs" prior to the implementation of any "revised remediation plan"; and

2. The "insured" does not implement a "revised remediation plan" or incur any "excess remediation costs" without the prior written consent of the Insurer, which shall not be unreasonably withheld; and

3. The "insured" provides detailed written "remediation project updates" consistent with the format and schedule established in the Remediation Project Updates Schedule attached to this Policy by endorsement; and

4. The "Pollution Conditions" commenced prior to the inception of the "Policy Period" shown in Item 2. of the Declarations.

(Policy, ¶ I [A], at 1 of 8).

IV. Exclusions

This insurance does not apply to:
***
C. Changes to the "Remediation Plan"

"Excess remediation costs", if any, incurred as a result of any changes to the "remediation plan" or "revised remediation plan", if any, which were

not approved in writing, by the
insured prior to implementation. This exclusion
does not apply to changes specifically approved
by the Insurer under an approved "revised
remediation plan" or in the event of "emergency
response" costs, where the "insured" shall
notify the insurer of such circumstance as soon
as possible.

(Policy, ¶ IV [C], at 3 of 8).

V. Reporting and Cooperation.

A. Notification
The "insured" must see to it that the Insurer receives
prompt written notice . . . of any "Pollution
Condition", or of any circumstance which may lead to
"excess remediation costs". In the event such notice
is provided, the "insured" shall work in cooperation
with the Insurer to develop a "revised remediation
plan". Any costs incurred by the "insured" outside of
or in excess of the original "remediation plan" that
are not approved by the Insurer <u>and</u> incorporated into a
"revised remediation plan" will not be afforded
coverage.
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B. Written Approval
Except in the event of "emergency response", the
"insured" shall not incur any "excess remediation
costs" without the prior written approval of the
Insurer. Only those "remediation costs" specifically
outlined in the Remediation Plan Endorsement or an
approved "revised remediation plan" shall be considered
approved by the Insurer"

(Policy, ¶ V [A], [B], at 6 of 8).

The Policy included a schedule of the remediation work with anticipated costs. It also contained a list of definitions, which state in pertinent part:

"Excess remediation costs" means costs, approved by the Insurer in writing, incurred in excess of the "Self-Insured

Retention" which are necessary to complete the "revised remediation plan. Excess mediation costs are subject to any "Co-Insurance Percentage".

"Pollution Condition" means the presence . . . of any . . . irritant or contaminant . . . upon land . . . , the atmosphere, surface water or groundwater".

"Remediation plan" means only that work specifically described in the Remediation Plan Schedule attached to this Policy . . . , as well as associated costs identified in the Remediation Plan Schedule".

"Revised remediation plan" means a written plan approved by the Insurer and endorsed to this Policy for any work beyond the scope and associated costs of the "remediation plan".

The party moving for summary judgment must establish that the case can be resolved without a trial because there are no material and triable issues of fact, only issues of law for the court to determine (see Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 [1985]). If the moving party succeeds in making this showing, the party opposing the motion bears the burden of producing evidence establishing 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]; Pemberton v New York City Tr. Auth, 304 AD2d 340, 342 [1st Dept 2003]). Failure to make the required showing will lead to the denial of the motion,

regardless of the arguments of the party opposing the motion (Roman v A1 Limousine, Inc., 76 AD3d 552, 552 [2d Dept 2010]).

Plaintiffs contend that they should prevail as a matter of law on their declaratory judgment and breach of contract claims since 1) they gave timely notice to Defendant according to the Policy; 2) the Policy provisions about notice are ambiguous and should be construed against the Insurance Company; and 3) if the court determines that notice was untimely, the untimeliness should pertain only to work completed before the notice was given and insurance coverage should be ordered for work completed after the notice was given; and 4) the Policy provisions requiring Plaintiffs to submit monthly updates and obtain approval before beginning work on a revised remediation plan are not condition precedents, but contractual covenants, which, contrary to Defendant's urging, would constitute merely breaches of the contract and do not vitiate the entire Policy.

Defendant contends that Plaintiffs are not entitled to any coverage because they are in material breach of several provisions in the Policy: 1) Plaintiffs did not obtain Defendant's approval before deviating from the original remediation plan; 2) Plaintiffs incurred costs in excess of the SIR without Defendant's approval; 3) Plaintiffs did not provide Defendant with monthly project updates; and 4) Plaintiffs did not give Defendant prompt notice of a pollution condition or

circumstance that could result in costs in excess of the SIR.

As with any contract, the court determines the meaning of an insurance policy by examining its specific language (Potoff v Chubb Indem. Ins. Co., 60 AD3d 477, 477 [1st Dept 2009]). "[A]n insurance policy is to be construed according to the precepts of common speech and the reasonable expectation and purpose of the ordinary individual . . . and words and phrases used in a contract must be given their plain meaning" (Simons v Blue Cross & Blue Shield of Greater N.Y., 144 AD2d 28, 33 [1st Dept 1989] [citations omitted]). It is said that insurance policies "above all others, should be clear and explicit in their terms . . . they should be so plain and unambiguous that men of average intelligence who invest in these contracts may know and understand their meaning and import" (Katz v American Mayflower Life Ins. Co. of N.Y., 14 AD3d 195, 207 [1st Dept 2004], *affd* 5 NY3d 561 [2005] [citations and quotation marks omitted]). To decide if ambiguity exists, the court asks "whether, affording a fair meaning to all of the language employed by the parties in the contract and leaving no provision without force and effect . . . there is a reasonable basis for a difference of opinion as to the meaning of the policy" (Federal Ins. Co. v International Bus. Machs. Corp., 18 NY3d 642, 646 [2012] [internal quotation marks and citations omitted]). A contract is ambiguous if the terms are susceptible to more than one reasonable interpretation, a

determination made by the court as a matter of law (Ashwood Capital, Inc. v OTG Mgt., Inc., 99 AD3d 1, 7 [1st Dept 2012]). The question of ambiguity is determined by examining the document and not looking to outside evidence (Slattery Skanska Inc. v American Home Assur. Co., 67 AD3d 1, 14 [1st Dept 2009]). Ambiguities in an insurance policy are construed against the insurer (Guardian Life Ins. Co. of Am. v Schaefer, 70 NY2d 888, 890 [1987]) and in favor of the insured (Frazer Exton Development, LP v Kemper Enivronmental, Ltd., 2005 WL 2850247,**2 [2d Cir 2005]).

This court concurs with Defendant that it is the insured's burden to demonstrate that the loss falls within a policy's insuring agreement. Roundabout Theatre Co. V Cont'l Cas. Col., 302 AD2d 1 (1st Dept 2002); Chase Manhattan Bank, NA v Travelers Group, Inc., 269 AD2d 107 (1st Dept 2000).

Plaintiffs have failed to meet their initial burden, putting forth an interpretation of the Policy provisions that is tortured and that constitutes sheer sophistry.

There is no dispute that Plaintiffs departed from the original plan by importing clean soil and did so without Defendant's approval. Plaintiffs claim that notwithstanding such departure, they were unable to ascertain whether such departure would account for excess remediation costs until they received invoices for such work that resulted in the overall

accumulated costs exceeding the SIR, and that such invoices were the only bases upon which they were able to notify Defendant of their need to incur such excess costs. Based on such facts, Plaintiffs contend that they are compliant with the Policy's "prompt notice" provisions and are entitled to coverage.

Defendant counters that in violation of the Policy, Plaintiffs unilaterally implemented a revised remediation plan without its prior written approval, when upon the importation of soil in early November 2005, it became liable for the costs of work that was not set forth in the originally approved remediation plan. Defendant argues that Plaintiffs were obligated to provide it prompt written notice of any circumstance which might lead to "excess remediation costs" as early as November 2005, and because Plaintiffs did not do so, the Policy is vitiated. Defendant also points out that there is no statement from Maurer, the Terrasure board member tasked with the responsibility to provide notice to the Defendant, or any other representative of Plaintiffs that the notice was made in April 2006 because of an ambiguity in the notice provisions of the Policy.

Plaintiffs contend that the provisions of section V.A. of the Policy are ambiguous and should be construed against the Defendant and in Plaintiff's favor. They argue that while the provisions may mean that Plaintiffs must notify Defendant that

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they are going to incur costs in excess of the SIR before they depart from the original plan, another equally reasonable interpretation is that Plaintiffs must notify Defendant when Plaintiffs believe that they will exceed the SIR, irrespective of whether or when they departed from the original plan.

Plaintiffs argue further that in any event, they gave Defendant prompt notice as a matter of law under section V.A. of the Policy because such provision gave Plaintiffs a choice to either notify Defendant of the "pollution condition" or to notify Defendant of a "circumstance which may lead to 'excess remediation costs'". Plaintiffs argue that as the word "or" is disjunctive, they had the option of providing notice of the pollution condition by way of their purchase of the Policy based on their original remediation plan and Cost Estimation and therefore complied with the "prompt notice" provisions at the very inception of the Policy, so there is no need to consider their notice of April 20, 2006

This court is not persuaded by the latter interpretation offered by Plaintiffs, which parses certain parts of the Policy in a way that does not "afford[] a fair meaning to all of the language employed by the parties in the contract" and "leav[es]...[certain] provision[s] without force and effect", Federal Insur. Co., Ibid, 18 NY3d at 546. For example, Plaintiffs' interpretation that the Policy itself constitutes

"prompt notice" to Defendants renders all of the other notification provisions of the Policy without force and effect.

Moreover, though Plaintiffs are correct that the Policy defines "Pollution Condition" as the presence of pollution and that the very purpose of the Policy was to contain costs for remediation of such pollution, their extrapolation that such Policy itself constitutes "prompt notice" under the Policy is unreasonable. Read literally as Plaintiffs urge, the Policy's notice section does not make sense because it requires notice of something that the parties acknowledged to exist at the time the Policy was issued. Remediation was needed in the first place because the site had a "Pollution Condition", and as argued by Defendant, the Policy was not to cover that certainty but to cover the risk of pollution beyond what was known. There is only one reasonable construction to be put on the phrase, "Pollution Condition," as it appears in the notice clause of this Policy to insure against the risk of excess costs. It must mean pollution of a sort or amount unknown at the time that the Policy was purchased, and not identified in the original remediation plan attached to the Policy. Plaintiffs discovered in 2005 that the site had more polluted soil than originally anticipated. Their notice, given in April 2006, was therefore late.

Likewise, Plaintiffs' argument that the provisions ought to be read to be triggered only upon their belief that the costs

would exceed the SIR renders devoid of meaning the language of section V.1. requiring that Plaintiffs obtain Defendant's approval of "excess remediation costs" or of a "revised mediation plan, if any" before Plaintiffs incurred costs associated with any revised plan or incurred costs in excess of the line items budgeted in the Cost Estimate.

I.A.1 and I.A.2 mean that the Defendant will pay for costs exceeding the SIR provided that the insured Plaintiffs gave timely notice to Defendant of their need to incur such costs <u>before</u> submitting a "revised mediation plan" for approval by the Defendant. Section IV.C explicitly <u>excludes</u> from coverage any remediation work performed by Plaintiffs that was not set forth in any revised plan (oral or written) where Plaintiffs failed to obtain prior written approval from Defendant. Likewise, Section V.A, the notification section, clearly states that the insured must give notice when it believes that it will exceed the SIR, under "circumstances that may lead to 'excess remediation costs'". Although the Policy, as urged by Plaintiffs, may be interpreted to mean that the insured should give notice when it believed the costs incurred would exceed the SIR, certainly the importation of twenty thousand tons of backfill by November 2005 constituted a "circumstance that may lead to 'excess mediation costs'" as a matter of law, which triggered the requirement that Plaintiffs provide notice.

There is a question whether Section I.A contains conditions precedent, which is a matter of law for the court to decide (Mullany v Munchkin Enters., Ltd., 69 AD3d 1271, 1274 [3d Dept 2010]). Section I.A. of the Policy unambiguously states that Plaintiffs must meet four conditions of coverage, including Plaintiff's responsibility to provide project updates.

A condition precedent is "[a]n act or event, other than a lapse of time, that must exist or occur before a duty to perform something promised arises. If the condition does not occur and is not excused, the promised performance need not be rendered" (Black's Law Dictionary [9th ed 2009] [Westlaw]). Compliance with the conditions precedent in an insurance policy is a requisite for coverage (Navarro v PC Group, LLC, 100 AD3d 722, 723 [2d Dept 2012]; Unitrin Advantage Ins. Co. v Bayshore Physical Therapy, PLLC, 82 AD3d 559, 560 [1st Dept 2011]). Very often at issue in insurance cases is the condition precedent that the insured must give notice to the insurer in accordance with the terms of the policy; an insured's failure to do so vitiates the policy as a matter of law (White v City of New York, 81 NY2d 955, 957 [1993]; York Speciality Food, Inc. v Tower Ins. Co. of N.Y., 47 AD3d 589, 590 [1st Dept 2008]; Heydt Contr. Corp. v American Home Assur. Co., 146 AD2d 497, 498 [1st Dept 1989]).

Since the result of failing to comply is forfeiture, the law does not favor a construction that creates a condition

precedent (Oppenheimer & Co. v Oppenheim, Appel, Dixon & Co., 86 NY2d 685, 691 [1995]). If the contractual language is in any way doubtful or ambiguous, the court will not find a condition precedent (*id.*; Phoenix Acquisition Corp. v Campcore, Inc., 81 NY2d 138, 144 [1993]; Restatement [Second] of Contracts § 227 [1]). The contract must clearly show that the parties intended to make a condition precedent (Torres v D'Alesso, 80 AD3d 46, 57-58 [1st Dept 2010]). The contract must contain the unmistakable language showing that the obligation does not arise in the absence of the actions listed (International Fid. Ins. Co. v County of Rockland, 98 F Supp 2d 400, 434-435 [SD NY 2000]).

While "[n]o particular form of language is necessary to make an event a condition," [Restatement [Second] of Contracts, § 226, Comment *a*, § 261), language such as "unless and until" has been found sufficient for the purpose (*Oppenheimer & Co.*, 86 NY2d at 691). The word "provided," placed immediately before a contractual requirement, may indicate the creation of a condition precedent (National Fuel Gas Distrib. Corp. v Hartford Fire Ins. Co., 28 AD3d 1169, 1170 [4th Dept 2006]).

Section I.A uses the word "provided" and then lists what plaintiffs must do to be covered. It is the opinion of this court that the provisions are not ambiguous. Such provisions set forth the limitations of the coverage.

Section V (A), the notification section, provides that

the insurance will not pay for any costs incurred outside of or in excess of the original plan without the insurer's approval. This part of Section V (A) is a condition precedent.

Section V (A) requires "prompt notice" of 1) a Pollution Condition or 2) of "circumstances which may lead to" costs exceeding the SIR (Policy, ¶ V [A]). Plaintiffs claim to have given notice under both or one those alternatives. Their April 2006 notice deals with the second alternative.

Insurance policy provisions requiring "prompt" notice are construed to require notice within a reasonable time after the duty to give notice arises (New York Cent. Mut. Fire Ins. Co. v Riley, 234 AD2d 279, 279 [2d Dept 1996]; *Metropolitan N.Y. Coordinating Council on Jewish Poverty v National Union Ins. Co. of Pittsburgh, Pa.*, 222 AD2d 420, 421 [2d Dept 1995]; *see also* Young Israel Co-Op City v Guideone Mut. Ins. Co., 52 AD3d 245, 246 [1st Dept 2008]; Paramount Ins. Co. v Rosedale Gardens, 293 AD2d 235, 239-240 [1st Dept 2002]). The duty to give notice arises when a reasonable person could envision liability giving rise to insurance coverage (White, 81 NY2d at 958; Paramount, 293 AD2d at 239-240). If notice was untimely, the insured bears the burden of showing circumstances that excuse or explain the failure to give timely notice (Heydt, 146 AD2d at 498-499; see also Security Mut. Ins. Co. of N.Y. v Acker-Fitzsimons Corp., 31 NY2d 436, 441 [1972]). For instance, the insured may not have

known that an event giving rise to a claim has taken place or may have "a good-faith belief of non liability" (Security, 31 NY2d at 441). "But the insured's belief must be reasonable under all the circumstances, and it may be relevant on the issue of reasonableness, whether and to what extent, the insured has inquired into the circumstances of the accident or occurrence" (id.; see also Great Canal Realty Corp. v Seneca Ins. Co., 5 NY3d 742, 743-744 [2005]). The court decides, as a matter of law, if notice was timely or not (Juvenex Ltd. v Burlington Ins. Co., 63 AD3d 554, 554 [1st Dept 2009]; Heydt, 146 AD2d at 498-499). Questions regarding the reasonableness of an action are usually for the trier of fact. But when there is no excuse or mitigation for late notice, the issue of whether the insured acted reasonably becomes a matter of law for the court (see SSBSS Realty Corp. v Public Serv. Mut. Ins. Co., 253 AD2d 583, 584 [1st Dept 1998]).

Whether Plaintiffs were prompt in giving notice depends upon when they knew or should have known that they would exceed the SIR amount of $2.4 million. Plaintiffs allege that, until April 2006, there were no circumstances that would lead to them to think that their costs would exceed the SIR. By April 2006, plaintiffs had actually paid $1.68 million. In April 2006, they received invoices for $500,000. It was then, plaintiffs allege, that they saw that their costs would exceed the SIR.

Plaintiffs allege that, every month, the vendors and subcontractors submitted their invoices to Gannett. The information from the invoices was entered into a spreadsheet, which Morosky reviewed each month. The spreadsheets showed invoice dates, costs, monthly totals, and cumulative totals. Between the time that the work was done and the time that an invoice was delivered to Gannett could be as long as two months, according to plaintiffs. Plaintiffs allege that they did not know about any particular cost until an invoice was received.

During his deposition, Maurer was asked about the final 2005 quarterly report, which estimated that the total cost of completion could be $2.184 million. Maurer said that the costs of completing the project could vary from the report's estimation, and that the actual final cost could be $3.8 million or $1.8 million. Maurer also testified that the first quarterly report for 2006 made him think that the project would exceed the SIR. That report shows the cost of work completed to date as $2.029 million and anticipates the final total cost as $3.272 million.

Defendant points out that, by February 2006, costs exceeded the SIR amount of $2.4 million and by April 2006, costs amounted to $2.7 million. Defendant argues that plaintiffs should have been aware of "circumstances which may lead to" exceeding the SIR before or by February 2006. Defendant's figure

of $2.7 million is based on all the invoices for all the work done up to the time that plaintiffs gave notice. Plaintiffs argue that Defendant's figure is based on information that was not available to the parties in April 2006. Plaintiffs argue that, at the time that they gave notice, they had not received all the invoices for all the work done up to that time.

Although the sentence containing "prompt notice" does not use the word "incur," it does use the word "excess mediation costs", which is defined as "incurred" in Section III. Defendant cites cases to show that "incur" means to become subject to a liability, not to actually pay for it (Town of New Windsor v Tesa Tuck, Inc., 935 F Supp 317, 320 n 3 [SD NY 1996]; Quarles Petroleum Co., Inc. v United States, 551 F2d 1201, 1205 [Ct Cl 1977]). According to Defendant, plaintiffs incurred costs when the work was done, not when Plaintiffs received the invoices for the work or paid the invoices, and notice should have been given when incurred costs neared the SIR. Thus, Plaintiffs' notice was late.

Defendant's use of "incur" is correct, and the word is not subject to more than one reasonable interpretation. As the notification section of the Policy states that the insured must give notice of a circumstance which may lead it to "incur" excess costs. So the court will apply such a requirement that the Plaintiffs were required to give notice "of any circumstance

which may lead to" incurred costs exceeding the SIR. Clearly, as early as November 2005, Plaintiffs had incurred costs for the importation of tens of thousands of clean back fill, none of which was budgeted in the Cost Estimate, which work might lead to incurred costs exceeding the SIR. Plaintiffs' notice five months later was not reasonably prompt as a matter of law.

Plaintiffs argue that the no-prejudice rule should apply to bar defendant from denying coverage. Under New York's longstanding no-prejudice rule, an insurer may disclaim for late notice regardless of whether the insurer suffered prejudice by the delay (Argo Corp. v Greater N.Y. Mut. Ins. Co., 4 NY3d 332, 339 [2005]; *American Home Assur. Co. v International Ins. Co.*, 90 NY2d 433, 440 [1997]). Insurance Law § 3420 © (2) (A) changed the law by providing that insurers may not disclaim for late notice unless they are prejudiced. The statute applies to policies issued after January 17, 2009. The statute does not apply here as the Policy issued in 2005, and the law is not retroactive (see Ponok Realty Corp. v United Natl. Specialty Ins. Co., 69 AD3d 596, 596-597 [2d Dept 2010]).

Plaintiffs cite cases to show that the no-prejudice rule does not apply (Rekemeyer v State Farm Mut. Auto. Ins. Co., 4 NY3d 468 [2005]; Matter of Brandon [Nationwide Mut. Ins. Co.], 97 NY2d 491 [2002]; Unigard Sec. Ins. Co. v North Riv. Ins. Co., 79 NY2d 576 [1992]; American Tr. Ins. Co. v B.O. Astra Mgt.

Corp., 12 Misc 3d 740 [Sup Ct, NY County 2006], *affd as mod* 39 AD3d 432 [1st Dept 2007]).

In Brandon, the insured sought supplementary underinsured motorist (SUM) insurance. The insured gave timely notice of the claim, but late notice of the lawsuit. The court held that a SUM carrier that received timely notice of a claim must show prejudice before disclaiming SUM benefits based on late notice of a legal action (Brandon, 97 NY2d at 498). Brandon did not abrogate the no-prejudice rule and should not be extended to cases where the carrier received unreasonably late notice of a claim (see Argo, 4 NY3d at 339 [discussing Brandon and Rekemeyer]). In Rekemeyer (4 NY3d at 475), where the insured gave timely notice of the accident, but late notice of a SUM claim, the court held that the insurer had to establish prejudice before it could disclaim coverage based on the late notice of the SUM claim. In American Tr. (12 Misc 3d at 746-747) a non-SUM case, the injured but not the insured parties notified the insurer of a car accident. The insurer did not receive timely notice of the lawsuit. The insurer was not allowed to disclaim, unless it could show prejudice.

In those cases, the insurer received timely notices of the claim but untimely notices of the lawsuits. With the timely notice of claim, the insurer already knew that some level of coverage would be sought and could conduct a meaningful

investigation, notwithstanding that the notice of the lawsuit was untimely. The case at bar involves no such notice. The facts do not support Plaintiffs' claim that defendant timely knew that there would be a claim or that there was extra pollution on the site or that plaintiffs would be exceeding the SIR.

In Unigard (79 NY2d at 582-583), the court decided that a reinsurer had to show prejudice to disclaim based on an excess insurer's late notice. The rationale in that case that the reinsurer received notice from the primary carrier does not apply in this case.

Plaintiffs advance some other arguments for summary judgment. Defendant's June 13, 2006 letter says that insurance coverage will not be provided "to date." Plaintiffs urge that "to date" be interpreted as an undertaking to provide insurance for remediation costs incurred after the notice. However, a statement that coverage will not be provided to date does not mean it will be provided after that date, and the letter does not contain any statement to that effect. Plaintiffs also argue that Defendant waived its right to the project updates by not demanding them and, if Defendant had received the updates, it would have known about the excess remediation costs. Even if Defendant waived the right to receive the updates, that would not indicate waiving the right to prompt notice. In any event, nothing is alleged to indicate any waiver. A waiver is a

deliberate relinquishment of a right and the mere failure to ask for updates or inaction in that regard does not establish a waiver (see EchoStar Satellite L.L.C. v ESPN, Inc., 79 AD3d 614, 617-618 [1st Dept 2010]). The Defendant's right to conduct its own investigation under the Policy cannot be equated with a waiver or estoppel (Lentini Bros. Moving & Stor. Co. v. New York Prop. Ins. Underwriting Assn, 76 AD2d 759, 761 [3d Dept 1980]).

Accordingly, it is

ORDERED that Plaintiffs' motion for summary judgment is denied, and Defendant's cross motion for summary judgment on Plaintiffs' second cause of action for breach of contract is granted and such cause of action is dismissed and it is further

ORDERED that Defendant's cross motion for summary judgment seeking a declaration on Plaintiffs' first cause of action that it is not obligated to provide coverage for Plaintiffs Terrasure Development LLC and Gannett Fleming Project Development Corporation under Policy Number RCC G22087782 001 is granted; and it is further

ADJUDGED and DECLARED that the Defendant herein is not obligated to provide coverage for Plaintiffs Terrasure Development LLC and Gannett Fleming Project Development Corporation under Policy Number RCC G22087782 001; and it is further

ADJUDGED that Defendant Illinois Union Insurance

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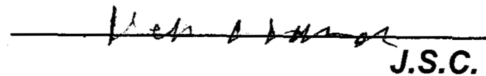
Company, having an address at 523 West Monroe Street, Suite 400, Chicago, Illinois 60661, do recover of Plaintiffs Terrasure Development LLC, having an address at 1740 Broadway, 5th Floor, New York, New York 10019, and Gannett Fleming Project Development Corporation, 207 Senate Avenue, Camp Hill, Pennsylvania 17011 costs and disbursements in the sum of $ ___________ as taxed by the Clerk, and Defendant shall have execution therefor.

This is the decision and order of the court.

Dated: August 8, 2013 ENTER:



J.S.C.

DEBRA A. JAMES

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).