Turner Constr. Co. v Harleysville Worchester Ins. Co.
2013 NY Slip Op 32209(U)
September 13, 2013
Supreme Court, New York County
Docket Number: 106513/09
Judge: Joan M. Kenney

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: JOAN M. KENNEY Justice

PART 8

Index Number : 106513/2009
TURNER CONSTRUCTION CO.
vs.
HARLEYSVILLE WORCESTER INS.
SEQUENCE NUMBER : 002
SUMMARY JUDGMENT

INDEX NO. 106513/09
MOTION DATE 5/13/13
MOTION SEQ. NO. 002

The following papers, numbered 1 to 45, were read on this motion to/for SJ motion

Notice of Motion/Order to Show Cause — Affidavits — Exhibits + Memo of Law | No(s). 1-31
Answering Affidavits — Exhibits | No(s). 32-43
Replying Affidavits + Memo of Law | No(s). 44-45

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

MOTION IS DECIDED IN ACCORDANCE WITH THE ATTACHED MEMORANDUM DECISION

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).

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

Dated: 9/13/13

JOAN M. KENNEY, 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 8

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TURNER CONSTRUCTION COMPANY, THE CITY OF NEW YORK, GOVERNOR'S ISLAND PRESERVATION AND EDUCATION CORP., NEW YORK CITY ECONOMIC DEVELOPMENT CORPORATION, and TREVCON CONSTRUCTION INC.,

Plaintiffs,

-against-

THE HARLEYSVILLE WORCESTER INSURANCE COMPANY and J.E.S. PLUMBING & HEATING CORP.,

Defendants.

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DECISION & ORDER
Index No. 106513/09

JOAN M. KENNEY, J.S.C.:

This is a declaratory judgment action in which plaintiffs seek defense and indemnification in a personal injury action captioned *Pipia v Turner Constr. Co.*, Index No. 105381/08 (Sup Ct, NY County) (hereinafter, the underlying action). Defendant Harleysville Worcester Insurance Company (Harleysville) moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint as against it, awarding it summary judgment on its cross claims,[1] and declaring that it has no obligation to defend or indemnify plaintiffs in the underlying action.

BACKGROUND

Harleysville issued a commercial general liability policy (policy no. MPA 2J6796) to JES Plumbing & Heating Corp. (JES) for the period August 12, 2007 through August 12, 2008 (Emma aff, exhibit 1). The policy contains an each occurrence limit of $1,000,000 and general aggregate limit of $2,000,000 (*id.*).

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[1]Harleysville did not assert any cross claims against defendant JES Plumbing & Heating Corp. However, Harleysville did assert a counterclaim "seek[ing] a declaration pursuant to CPLR []3001 that Harleysville has no duty or obligation to either defend or indemnify the [p]laintiffs with respect to the underlying action and associated alleged accident" (Harleysville's answer, ¶ 22).

The policy provides for the following coverage:

"**1. Insuring Agreement**

a. We will pay those sums that the insured becomes legally obligated to pay as damages because of 'bodily injury' or 'property damage' to which this insurance applies. We will have the right and duty to defend the insured against any 'suit' seeking those damages. However, we will have no duty to defend the insured against any 'suit' seeking damages for 'bodily injury' or 'property damage' to which this insurance does not apply. . . .

***

(2) Our right and duty to defend ends when we have used up the applicable limits of insurance in the payment of judgments or settlements under Coverages A or B or medical expenses under Coverage C.

No other obligation or liability to pay sums or perform acts or services is covered unless explicitly provided for under Supplementary Payments – Coverages A and B" (*id.*).

The policy contains the following conditions:

"**SECTION IV – COMMERCIAL GENERAL LIABILITY CONDITIONS**

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2. Duties In The Event of Occurrence, Offense, Claim or Suit

a. You must see to it that we are notified as soon as practicable of an 'occurrence' or an offense which may result in a claim . . . .

***

b. If a claim is made or 'suit' is brought against any insured, you must:

(1) Immediately record the specifics of the claim or 'suit' and the date received; and

(2) Notify us as soon as practicable.

You must see to it that we receive written notice of the claim or 'suit' as soon as practicable.

c. You and any other involved insured must:

(1) Immediately send us copies of any demands, notices, summonses or legal papers received in connection with the claim or 'suit';

(2) Authorize us to obtain records and other information;

(3) Cooperate with us in the investigation or settlement of the claim or defense against the 'suit'; . . ." (*id.*).

The policy contains the following additional insured endorsement:

> **"ADDITIONAL INSURED – OWNERS, LESSEES OR CONTRACTORS – AUTOMATIC STATUS WHEN REQUIRED IN CONSTRUCTION AGREEMENT WITH YOU**
>
> This endorsement modifies the insurance provided under the following:
>
> COMMERCIAL GENERAL LIABILITY COVERAGE PART
>
> A. **Section II – Who Is An Insured** is amended to include as an additional insured any person or organization for whom you are performing operations when you and such person or organization have agreed in writing in a contract or agreement that such person or organization be added as an additional insured on your policy. Such person or organization is an additional insured only with respect to liability for 'bodily injury,' 'property damage,' or 'personal and advertising injury' caused, in whole or in part, by:
> 1. Your acts or omissions; or
> 2. The acts or omissions of those acting on your behalf;
>
> in the performance of your ongoing operations for the additional insured. A person's or organization's status as an additional insured under this endorsement ends when your operations for that additional insured are completed" (*id.*).

Plaintiffs Turner Construction Company (Turner), the City of New York (the City), Governor's Island Preservation and Education Corp. (GIPEC), New York City Economic Development Corporation (NYCEDC), and Trevcon Construction Inc. (Trevcon) are defendants in the underlying action, which was commenced on April 15, 2008. In the complaint in the underlying action, Joseph Pipia (Pipia) alleges that, on or about September 25, 2007, he was injured while performing work on a platform or stage off a pier on Governor's Island, which was allegedly owned by the City, GIPEC, and/or NYCEDC. Pipia alleges violations of Labor Law §§ 200, 240 and 241 and seeks recovery for common-law negligence. Pipia's wife, Barbara Pipia, seeks to recover for loss of services, society, and consortium.[2]

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[2]Although the court (Tingling, J.) dismissed the complaint in the underlying action on June 7, 2012, this controversy is not moot (*see Judlau Contr., Inc. v Westchester Fire Ins. Co.*, 46 AD3d 482, 483 [1st Dept 2007]; *Lewis v Nationwide Mut. Ins. Co.*, 202 AD2d 816, 817 [3d Dept 1994]).

Pipia was injured while working on a rehabilitation project on certain piers off Governor's Island. GIPEC retained Turner as a construction manager on the project. Turner subsequently entered into a contract with Trevcon, pursuant to which Trevcon agreed to act as the general contractor on the project. Trevcon entered into a subcontract with JES, which required JES to perform certain work with respect to repairing an existing water station and the waste and water lines at the pier. Pipia was an employee of JES.

JES's subcontract with Trevcon provides, in relevant part, that:

> "Your work as hereinafter specified includes furnishing of all labor and patrol taxes, welfare and trust funds as required by unions, equipment, insurance as stated on page No. 2 part of this contract and all other items necessary to complete this work in accordance with plans and specifications and as directed by us or by the Authorities"

(Mattera affirmation, exhibit C). Page No. 2 states "PLEASE PROVIDE INSURANCE CERTIFICATES, INCLUDING TREVCON, TURNER AND NYC ECONOMIC DEVELOPMENT AS ADDITIONAL INSURED" (*id.*).

Counsel for Turner, the City, GIPEC, NYCEDC, and Trevcon notified Harleysville of Pipia's accident in a tender letter dated June 25, 2008 (Emma aff, exhibit 4). In that letter, counsel sought additional insured coverage under JES's policy (*id.*).

By letter dated June 30, 2008, Harleysville disclaimed coverage to Turner, the City, GIPEC, NYCEDC, and Trevcon for late notice of the incident (*id.*, exhibit 5). Harleysville also indicated that it had not been provided adequate information to make a determination as to whether Turner, the City, GIPEC, NYCEDC, and Trevcon were additional insureds under the policy (*id.*).

In letters dated July 21, 2008, November 20, 2008, and January 30, 2009, counsel for plaintiffs requested that Harleysville reconsider its decision (*id.*, exhibits 6, 8, 10). Harleysville responded by letters dated September 26, 2008, December 3, 2008, and February 12, 2009, in which it reiterated its coverage position (*id.*, exhibits 7, 9, 11).

On March 23, 2012, the court dismissed the instant complaint against JES.

Harleysville moves for summary judgment, arguing that the City and GIPEC are not entitled to additional insured coverage under the language of the additional insured endorsement. As argued by Harleysville, the endorsement limited coverage to those entities for whom JES was "performing operations when [JES] and such person or organization have agreed in writing in a contract or agreement that such person or organization be added as an additional insured on [JES's] policy" (Emma aff, exhibit 1). Harleysville maintains that the subcontract was only between JES and Trevcon and on its face only required that Trevcon, Turner, and NYCEDC be named as additional insureds on the certificate of insurance. Harleysville next argues that the additional insured endorsement does not extend coverage to Turner or NYCEDC, because there was no express written agreement between these entities and JES.

Harleysville further contends that plaintiffs failed to provide timely notice of the accident and underlying action. According to Harleysville, despite being notified immediately of Pipia's injuries, plaintiffs waited until June 25, 2008, more than two months after the underlying action was commenced to notify Harleysville of the accident and underlying action. Moreover, Harleysville maintains that plaintiffs cannot demonstrate a reasonable belief in their nonliability, as no investigation was conducted by these entities other than the preparation of an accident report. Additionally, NYCEDC does not qualify as an additional insured because it had no role or connection in the project. Finally, Harleysville asserts that plaintiffs may not rely on JES's notice to Harleysville, since JES and the additional insured have independent duties, and in any event, JES's notice to Harleysville was also untimely because it did not report the accident until November 30, 2007 (Emma aff, exhibit 2).

In opposition, plaintiffs contend that summary judgment is premature because party and nonparty depositions have not been conducted and plaintiffs are awaiting a document production

from JES's insurance broker. Plaintiffs argue that the affidavit from Rachel Emma, Harleysville's litigation specialist, which annexes the policy and disclaimer, is insufficient because she has no personal knowledge of the claim or disclaimer. Plaintiffs next assert that the City and GIPEC are entitled to additional insured coverage under the Harleysville policy, since the JES/Trevcon subcontract incorporates by reference the provisions of the principal contract relating to Standard Clauses (Mattera affirmation, exhibit C). Moreover, Chartis Claims, Inc., the claims administrator for Illinois National Insurance Company, JES's excess carrier, conferred additional insured status on Turner, the City, GIPEC, and NYCEDC (Rodgers affirmation, exhibit D). Plaintiffs further argue that the additional insured endorsement extends coverage to Turner and NYCEDC because JES's subcontract specifically required that Turner, NYCEDC and Trevcon be named as additional insureds on JES's policy.

In addition, plaintiffs contend that there is a question of fact as to the reasonableness of notice given by Turner and Trevcon, since these entities had a good faith belief of nonliability in light of: (1) Turner's field engineer's testimony in the underlying action that he filled out an accident report, took pictures, and spoke to other JES employees about the accident; (2) testimony that Pipia was only supervised by his employer, JES; and (3) Harleysville's own claims adjuster's conclusion in the claims notes that there was no basis for any claim by Pipia (Rodgers affirmation, exhibit F). Furthermore, plaintiffs contend that there is a question of fact as to whether the City, GIPEC, and NYCEDC gave timely notice under the Harleysville policy.

DISCUSSION

"[T]he proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law" (*Ostrov v Rozbruch*, 91 AD3d 147, 152 [1st Dept 2012]; *see also Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). "Once this showing has been made, the burden shifts to the party opposing

the motion 'to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action'" (*Madeline D'Anthony Enters., Inc. v Sokolowsky*, 101 AD3d 606, 607 [1st Dept 2012], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). "[M]ere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

Initially, the court rejects plaintiffs' contention that the affidavit from Harleysville's litigation specialist is insufficient to meet the requirements of CPLR 3212. An affidavit from a claims representative based upon documentary evidence has been held to be sufficient to support a motion for summary judgment (*see Wausau Bus. Ins. Co. v 3280 Broadway Realty Co. LLC*, 47 AD3d 549 [1st Dept 2008] [denial of plaintiff insurer's motion was improper on the ground that it failed to support its motion with evidence in admissible form where the affidavit of plaintiff's claims handler was based upon documentary evidence and sufficiently complied with the requirement that a motion for summary judgment be supported by an affidavit from a person having personal knowledge of the facts]; *First Interstate Credit Alliance v Sokol*, 179 AD2d 583, 584 [1st Dept 1992] ["affidavit submitted based upon documentary evidence was sufficient to comply with the requirement that a motion for summary judgment be supported by an affidavit from a person having personal knowledge"]).

Harleysville argues that under the plain language of the additional insured endorsement,[3] only Trevcon qualifies as an additional insured because JES only contracted with Trevcon. As noted

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[3]While Harleysville contends that the JES/Trevcon subcontract did not require that Trevcon be listed as an additional insured on JES's policy, the language of the additional insured endorsement requiring that "[JES] and such . . . organization have agreed in writing in a contract or agreement that such . . . organization be added as an additional insured on [JES's] policy" has been satisfied here as to Trevcon. Indeed, the subcontract requires JES to provide certificates of insurance including Trevcon as an additional insured (Mattera affirmation, exhibit C). This contract provision can only be reasonably interpreted as requiring JES to include Trevcon as an additional insured on its liability policy (*see Christ the King Regional High School v Zurich Ins. Co. of N. Am.*, 91 AD3d 806, 807-808 [2d Dept 2012]).

above, the additional insured endorsement states that "Who Is An Insured is amended to include as an additional insured any person or organization for whom you are performing operations when you and such person or organization have agreed in writing in a contract or agreement that such person or organization be added as an additional insured on your policy" (Emma aff, exhibit 1).[4]

The same policy language was in question in *AB Green Gansevoort, LLC v Peter Scalamandre & Sons, Inc.* (102 AD3d 425, 426 [1st Dept 2013]). In that case, the First Department held that:

> "Liberty persuasively argues that this Court's decision in *Linarello v City Univ. of N.Y.* (6 AD3d 192 [1st Dept 2004]) requires that there be an express written agreement between [concrete supplier] and [owner] for [owner] to be an additional insured (*id.* at 195). The language of the insurance policy at issue in *Linarello* is exactly the same as the policy here. It specifically provides that there must be a written agreement between the insured and the organization seeking coverage to add that organization as an additional insured. No such agreement exists here. Absent such an agreement, the plain terms of the policy have not been met and [owner] cannot seek coverage from Liberty as an additional insured. Although policies containing broader language have been found to allow for an agreement naming an additional insured without an express contract between the parties, the language at issue here is restricted to its plain meaning"

(*id.*).

Here, it is undisputed that there is no written agreement between JES and Turner, the City, GIPEC, and NYCEDC. Although plaintiffs argue that JES's subcontract incorporated the terms of the principal contract by reference, these organizations do not qualify as additional insureds under the language of the additional insured endorsement (*see Mayo v Metropolitan Opera Assn., Inc.*, 108 AD3d 422, 425 [1st Dept 2013] ["It does not avail the Met that the subcontract incorporates the general contract by reference, because the policy requires that there be a written agreement between Creative and the Met, as the organization seeking coverage, that the Met will be named an additional insured under the policy"]; *City of New York v Nova Cas. Co.*, 104 AD3d 410, 410-411 [1st Dept

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[4]In their opposition papers, plaintiffs omit the "in a contract or agreement" language in the additional insured endorsement.

2013] ["(t)he language in Grgas's and Coastal's subcontracts incorporating by reference the terms of the prime contract, which required the contractor to add the City as an additional insured under its policies, is insufficient to create that obligation"]). Therefore, only Trevcon qualifies as an additional insured, and the claims for coverage by Turner, the City, GIPEC, and NYCEDC must be dismissed.

Harleysville also claims that Trevcon failed to provide timely notice of the accident and underlying action. Generally, an insured's failure to comply with the requirement in an insurance policy that it give notice as soon as practicable of an incident that may result in a claim constitutes a failure to satisfy a condition precedent which vitiates the policy (*see Great Canal Realty Corp. v Seneca Ins. Co., Inc.*, 5 NY3d 742, 743 [2005]; *White v City of New York*, 81 NY2d 955, 957 [1993]). Nevertheless, there are circumstances where the insured's failure to give timely notice is excusable, including where the insured does not know about the accident or has a good faith belief in nonliability (*see Security Mut. Ins. Co. of N.Y. v Acker-Fitzsimons Corp.*, 31 NY2d 436, 441 [1972]). The insured's belief in nonliability "must be reasonable under all the circumstances, and it may be relevant on the issue of reasonableness, whether and to what extent, the insured inquired into the circumstances of the accident or occurrence" (*id.* at 441). Generally, before the amendments to Insurance Law § 3420, insurers were not required to demonstrate prejudice (*see Briggs Ave. LLC v Insurance Corp. of Hannover*, 11 NY3d 377, 382 [2008]).[5]

The insured bears the burden of proving that there was a reasonable excuse for the delay in giving notice (*White*, 81 NY2d at 957). "Ordinarily, the question of whether the insured had a good-faith belief in nonliability, and whether that belief was reasonable, presents an issue of fact and not one of law" (*St. James Mech., Inc. v Royal & Sunalliance*, 44 AD3d 1030, 1031 [2d Dept 2007]).

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[5]The Harleysville policy had an effective date of coverage commencing on August 12, 2007. The amendment to Insurance Law § 3420, requiring a showing of prejudice, became effective on January 17, 2009 (*see Briggs*, 11 NY3d at 382).

"It is only when the facts are undisputed and not subject to conflicting inferences that the issue can be decided as a matter of law" (*id.* at 1031-1032; *see also SSBSS Realty Corp. v Public Serv. Mut. Ins. Co.*, 253 AD2d 583, 584 [1st Dept 1998]).

Here, it is undisputed that Trevcon did not notify Harleysville of the underlying action (and Pipia's accident) until June 25, 2008 – a delay of approximately 71 days from when the underlying action was commenced on April 15, 2008. Courts have held similar unexcused delays to be unreasonable as a matter of law (*see e.g. Tower Ins. of N.Y. v Amsterdam Apts., LLC*, 82 AD3d 465, 466 [1st Dept 2011] [76 days untimely]; *Juvenex Ltd. v Burlington Ins. Co.*, 63 AD3d 554 [1st Dept 2009] [two-month delay untimely]; *Young Israel Co-Op City v Guideone Mut. Ins. Co.*, 52 AD3d 245, 246 [1st Dept 2008] [40-day delay untimely]; *Pandora Indus. v St. Paul Surplus Lines Ins. Co.*, 188 AD2d 277 [1st Dept 1992] [31-day delay untimely]).

Plaintiffs argue that Trevcon had a good faith belief in nonliability, primarily because it did not supervise Pipia's work. However, "[a]t issue is not whether the insured believes that 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" (*SSBSS Realty Corp.*, 253 AD2d at 584; *see also Tower Ins. Co. of N.Y. v Classon Hgts., LLC*, 82 AD3d 632, 634 [1st Dept 2011]). Plaintiffs do not argue that Trevcon reasonably believed that the accident was so trivial that it would not result in a claim (*see Abbey Richmond Ambulance Serv. v Northbrook Prop. & Cas. Ins. Co.*, 281 AD2d 501, 502 [2d Dept 2001], *lv dismissed* 96 NY2d 897 [2001]), or that it reasonably believed that no claim could be brought against it that would be covered under the policy (*see id.*), or that it reasonably believed that it would be compensated by a third party (*see Sabre v Rutland Plywood Corp.*, 93 AD2d 903, 904-905 [3d Dept 1983]).

Moreover, the record in the underlying action reveals that Trevcon had notice of Pipia's accident shortly thereafter. Donald Opferkuch, a field engineer employed by Turner, testified in the

underlying action that he learned of Pipia's accident when he heard a call over the walkie-talkie system (Opferkuch tr at 21). When he arrived at the scene, Turner's superintendent was already there (*id.* at 24). There was either an NYPD or FDNY boat on site (*id.* at 27). He saw Pipia in a gurney on the boat (*id.*). According to Opferkuch, he took a golf cart back to the office, and immediately returned to the accident scene (*id.* at 25-28). Opferkuch prepared an incident investigative report dated September 25, 2007, which states that:

> "Joe was on a float under Yankee pier. A wave came through and he lost his balance. Stepped in a hole where the rope was tied. His leg got stuck in the hole and twisted. He appears to have either injured his leg or hip. 911 was called numerous boats and rescue personnel came on site including a medovac chopper"

(Mattera affirmation, exhibit E).

Richard Zimmermann testified that he was working with Pipia on the float where the accident occurred (Zimmermann tr at 57). Zimmermann notified another JES employee to call 911 and that both the police and fire departments responded (*id.* at 58, 60). According to Zimmermann, a helicopter responded to the accident (*id.* at 60). Pipia was taken away on a stretcher (*id.*).

Justin Lijo, an employee of Trevcon, testified that the accident report was faxed to Trevcon on September 26, 2007 at 12:27 p.m. (Lijo tr at 46-47). Lijo testified that he would have seen the accident report within a month after the accident (*id.* at 48).

Ronald Treveloni, the president of Trevcon, testified that he first learned of Pipia's through word-of-mouth or the accident report (Treveloni tr at 61). Treveloni talked to his people to find out exactly how he was hurt; he understood that he fell off a float stage and eventually made a claim for injury (*id.*).

Under these circumstances, it was unreasonable for Trevcon to delay in notifying Harleysville of the accident. In light of Trevcon's awareness that Pipia had been injured on the project and had been airlifted from the accident scene, Trevcon should have realized the possibility of the subject

policy's involvement (*see Rivera v Core Cont. Constr. 3, LLC*, 106 AD3d 636 [1st Dept 2013] [insured did not have reasonable good faith belief in nonliability where it was aware of accident within two days of occurrence, and injured worker had to be transported by ambulance]; *QBE Ins. Corp. v D. Gangi Constr. Corp.*, 66 AD3d 593, 594 [1st Dept 2009] [insured's three-year delay in notifying insurer was not excusable based on a reasonable good-faith belief of nonliability where insured's president was aware that worker had sustained serious injuries and had been removed from the accident by ambulance and was subject to potential strict liability under the Labor Law]; *Paramount Ins. Co. v Rosedale Gardens*, 293 AD2d 235, 241 [1st Dept 2002] [fact that worker had been taken by ambulance to hospital was a significant factor in evaluating reasonableness of delay in giving notice]; *Zadrima v PSM Ins. Cos.*, 208 AD2d 529, 530 [2d Dept 1994], *lv denied* 85 NY2d 807 [1995] [delay unreasonable where insureds were aware that worker had been transported by ambulance to a hospital following his fall, and no ordinary prudent person could have reasonably believed himself to be immune from potential civil liability under the Labor Law under the circumstances]).

Plaintiffs' reliance on *St. James Mech., Inc., supra*, is unavailing. There, the Second Department held that the insured raised an issue of fact as to whether its delay in notifying the insurer was reasonably based on a good faith belief in nonliability (*St. James Mech., Inc.*, 44 AD3d at 1032). Notably, in that case, the plaintiff in the underlying action did not name the insured as a defendant until he filed an amended complaint (*id.* at 1031). The insured notified the insurer upon receiving the amended complaint (*id.*).

Although plaintiffs request discovery pursuant to CPLR 3212 (f), they have failed to present "some evidentiary basis . . . to suggest that discovery may lead to relevant evidence" (*Bailey v New York City Tr. Auth.*, 270 AD2d 156, 157 [1st Dept 2000]; *see also Progressive Northeastern Ins. Co. v Penn-Star Ins. Co.*, 89 AD3d 547, 548 [1st Dept 2011] [summary judgment not premature where

defendant failed to present evidence that discovery might have lead to relevant evidence]; *Interested Underwriters at Lloyd's v H.D.I. III Assoc.*, 213 AD2d 246, 248 [1st Dept 1995] [moving party's failure to comply with outstanding discovery request did not render summary judgment motion premature where discovery "was unlikely to reveal unknown defenses or otherwise affect outcome"]). Therefore, since Trevcon failed to comply with a condition precedent to the policy, the complaint must be dismissed (*see Great Canal Realty Corp.*, 5 NY3d at 743-744).

Accordingly, it is

ORDERED that the motion (sequence number 002) of defendant Harleysville Worcester Insurance Company for summary judgment is granted, and the complaint is dismissed with costs and disbursements to defendant as taxed by the Clerk of the Court upon the submission of an appropriate bill of costs; and it is further

ADJUDGED and **DECLARED** that defendant Harleysville Worcester Insurance Company is not obligated to defend or indemnify plaintiffs Turner Construction Company, the City of New York, Governor's Island Preservation and Education Corp., New York City Economic Development Corporation, and Trevcon Construction, Inc. in the underlying action *Pipia v Turner Constr. Co.*, Index No. 105381/08 (Sup Ct, NY County); and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: September 13, 2013

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).

ENTER:

JOAN M. KENNEY J.S.C.