SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: _____ **PART** _____

Justice

Index Number : 400166/2011
ARGO
vs.
ADMIRAL INDEMNITY
SEQUENCE NUMBER : 004
SUMMARY JUDGMENT

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

is decided in accordance with the annexed decision.

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

Dated: 4/1/14

_____, 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: Part 55

----------x

THE ARGO CORPORATION,

Plaintiff,

Index No. 400166/2011

-against-

DECISION/ORDER

ADMIRAL INDEMNITY COMPANY and
CLERMONT SPECIALTY MANAGERS, LTD.,

Defendants.

----------x

HON. CYNTHIA KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for :_____

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	1
Answering Affidavits and Cross Motion.....	2
Replying Affidavits.....	3
Exhibits.....	4

Plaintiff The Argo Corporation ("Argo") commenced the instant action seeking a declaration that defendants Admiral Indemnity Company ("Admiral") and Clermont Specialty Mangers, LTD. ("Clermont") has a duty to defend or indemnify plaintiff in connection with an underlying action. Defendants now move for an order pursuant to CPLR § 3212 granting them summary judgment, dismissing the complaint and declaring that they have no duty to defend or indemnify plaintiff in the underlying lawsuit. For the reasons set forth below, defendants' motion is granted.

The relevant facts are as follows. On or about November 6, 2007, Admiral issued an

insurance policy to The Grand Chelsea Condominium (the "Policy") as owner of the building located at 270 West 17th Street, New York, NY (the "Building"). Pursuant to the Policy, the insured has liability coverage for "those sums that the insured becomes legally obligated to pay as damages because of 'bodily injury' or 'property damage'" caused by an "occurrence," which the Policy defines, in pertinent part, as an "accident, including continuous or repeated exposure to substantially the same general harmful conditions." Additionally, pursuant to the Policy, Admiral has the "right and duty to defend the insured against any 'suit' seeking those damages." This coverage is dependent upon the insured's compliance with the following condition:

> 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. To the extent possible, notice should include:
>
> (1) How, when and where the "occurrence" or offense took place;
> (2) The names and addresses of any injured persons and witnesses; and
> (3) The nature and location of any injury or damage arising out of the "occurrence" or offense.
>
> 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.

Additionally, the Policy explicitly provides that Admiral "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." Pursuant to provision (b)(3) of the Policy, the insurance applies to "bodily injury" or "property damage" only if:

> Prior to the policy period, no insured . . . and no "employee" authorized by you to give or receive notice foof an "occurrence" or claim, knew that the "bodily injury" or "property damage" had occurred, in whole or in part. If such a listed insured or authorized "employee" knew, prior to the policy period, that the "bodily injury" or "property damage" occurred, then any continuation, change or resumption of such "bodily injury" or "property damage" during or after the policy period will be deemed to have been known prior to the policy period.

Beginning in February of 2008 and continuing through December 2012, Argo was employed by the Chelsea Condominium as the managing agent of the Building. Shortly after Argo overtook the management of the Building, its property manager Aniello Lauri ("Lauri") received a letter from the Building's Board Member Thomas Kidwell ("Kidwell") informing Laurie that there was a previous claim of a water leak into the apartment located directly below him, which was owned by Bret Morrison ("Morrison"). Specifically, the letter informed Lauri that a water leak had been reported in 2006 in Morrison's apartment and that while it was allegedly solved, the leak reappeared in August of 2007. Thereafter, on or about May 12, 2008, Lauri received a letter from attorney Guy Keith Vann ("Vann") advising Laurie that his office had been retained to represent Morrison with regard to "recurrent water incursions and consequential mold and bacterial contamination of his apartment." The letter further stated:

> As you may be aware, Mr. Morrison vacated his apartment at the end of November 2007 because of the conditions referenced in this report. The unit remains vacant until this day. Please advise this office if Rose Management [plaintiff's predecessor] and/or your office have had the leaks repaired, and if so, kindly provide this office with copies of all repair invoices and/or in-house maintenance records that indicate the nature and extent of the repairs performed.

Thereafter, by letter dated September 15, 2008, Morrison himself contacted Lauri to confirm the message he left on his machine earlier "wherein [he] informed [Laurie] that a recent inspection of

[his] apartment revealed further water damage to [his] bedroom floor." Additionally, Morrison informed Lauri that the floor was getting much worse and that Lauri was to contact Morrison's attorney, Vann, to arrange for a proper inspection of the floor and coordinate the repairs. Thereafter, by letter dated October 14, 2008, Vann contacted the Building's Board directly to address the water issues in Morrison's apartment (the "October Letter"). The letter stated as follows:

> It should not take a year to repair and remediate an apartment. In an effort to avoid litigation, I have been trying to work with Lauri of Argo Management for the last five months but still have no information even about the status of the leaks. As recently as a few weeks ago, there was active water incursion into the apartment. A copy of my letter of today's date to Mr. Lauri is annexed. As indicated therein, Mr. Morrison would like to avoid litigation, however, the status quo cannot be allowed to continue indefinitely. . . .
>
> Please forward a copy of this letter to your insurance representative. What actions you take in the next ten (10) days will determine whether we need to proceed to litigation.

During his deposition, Lauri testified that he had seen and read the October Letter as it was forwarded to him by the Board on or about October 14, 2008.

On or about March 6, 2009, Morrison commenced a lawsuit against plaintiff, the Grand Chelsea, the Building's Board and plaintiff's predecessor Rose Associates to recover damages stemming from the alleged water damage to his apartment (the "Morrison lawsuit"). In his complaint, Morrison alleges that Argo improperly managed the building by, among other things, allowing "chronic and recurrent dampness, water intrusions, dangerous and harmful substances to be present in and about [his apartment]." Upon being served with Morrison's summons and complaint, Argo forwarded a copy to Admiral's representative, defendant Clermont Specialty Mangers Ltd. ("Clermont"), which was received by Clermont on or about March 19, 2009. When defendants received the summons and complaint, they initially, on behalf of Argo, sought

an extension of time to answer the complaint. Thereafter, Admiral conducted an investigation of the claim.

After Admiral's investigation, on or about April 24, 2009, Admiral issued a disclaimer of coverage to Argo. Specifically, Admiral disclaimed coverage on two grounds: (1) that plaintiff breached the notice conditions of the insurance policy in that it was aware of the ongoing water intrusion and condition of Morrison's apartment but failed to give Admiral notice of said conditions until suit was brought; and (2) the loss at issue in the Morrison lawsuit did not fall within the insurance agreement because the Grand Chelsea had knowledge of Morrison's damages prior to inception of the Admiral policy.

On or about August 19, 2010, plaintiff commenced the instant action seeking a declaratory judgment that defendants have a duty to defend and indemnify it in the Morrison lawsuit under the Policy. Defendants now move for an order granting them summary judgment, dismissing the complaint and issuing a declaration that they have no duty to defend or indemnify Argo in the Morrison lawsuit on the ground that their disclaimer was proper as Argo failed to give timely notice as a matter of law and the request for coverage was based on a pre-existing condition, which is explicitly excluded from coverage under the Policy. Argo opposes the motion on the grounds that it provided timely notice as it had a reasonable basis to believe that no claim would be brought against it, defendants' claim of denial of coverage based on a pre-existing condition is without merit and, in any event, defendants should be estopped from asserting lack of coverage.

On a motion for summary judgment, the movant bears the burden of presenting sufficient evidence to demonstrate the absence of any material issues of fact. *See Alvarez v. Prospect*

Hosp., 68 N.Y.2d 320, 324 (1986). Once the movant establishes a prima facie right to judgment as a matter of law, the burden shifts to the party opposing the motion to "produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim." *Zuckerman v. City of New York,* 49 N.Y.2d 557, 562 (1980). Summary judgment should not be granted where there is any doubt as to the existence of a material issue of fact. *See id.*

In the present case, Admiral has established its prima facie right to a declaratory judgment that it has no duty to defend or indemnify Argo in the Morrison Lawsuit as a matter of law. "For years the rule in New York has been that 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 New York Mut. Ins. Co.*, 4 N.Y.3d 332, 339 (2005). However, the insured's good-faith belief that it is not liable will excuse a failure to give timely notice if the belief is reasonable under all the circumstances of the case. *Security Mutual Ins. Co. of New York v. Acker-Fitzsimons Corp.*, 31 N.Y.2d 436, 440 (1972). The issue "is not whether an insured believes that he or she will ultimately be found liable but whether he or she has a reasonable basis for a belief that no claim will be asserted against him or her." *Long Is. Light. Co. v. Allianz Underwriters Ins. Co.*, 24 A.D.3d 172, 176 (1st Dept 2005). Ultimately, the burden is on the insured to prove, under all the circumstances, the reasonableness of any delay in the giving of notice. *Paramount Ins. Co. v. Rosedale Gardens*, 239 A.D.2d 235, 240 (1st Dept 2002). Additionally, while the issue of reasonableness is usually left for the trier of fact, where there is no valid excuse or mitigating factor, the issue of the reasonableness of an insured's belief that a

claim will not be made, is one for the court rather than the trier of fact. *SSBSS Realty Corp. v. Public Serv. Mut. Ins. Co.*, 253 A.D.2d 583, 584 (1st Dept 1998).

Here, Admiral has established that plaintiff failed to give timely notice and Argo has failed to present the court with a valid excuse or mitigating factor to prove that its delay was reasonable. The evidence presented by Admiral establishes that Argo first became aware of the damage to Morrison's apartment stemming from water leaks in February 2008 and that it was directly contacted by Morrison's attorney to discuss these damages in May of 2008, yet did not notify Admiral about the damages until March 19, 2009, when Morrison commenced suit. While Morrison contends that it had no reason to believe that it would be the target of a claim or lawsuit by Morrison until it was served with Morrison's summons and complaint and reasonably believed that it had no liability to Morrison, such contentions are without merit. As an initial matter, Lauri, Argo's property manager, testified that he was forwarded a copy of and read the October Letter wherein Morrison's attorney explicitly mentioned bringing suit and directed that the letter be forwarded to the Building's insurer. Thus, at the very least, starting in October 2008, Argo was on notice that the damage to Morrison's apartment could result in a claim and was under a duty to give notice to Admiral. Additionally, Argo did not have a reasonable basis to believe that no claim would be asserted against it. As an initial matter, its assertion that managing agents generally are not liable to third parties for injuries occurring in an owner's building is immaterial as the inquiry is whether it had a rational basis to believe no claim would be made against it, not whether it could ultimately be held liable. Additionally, under the circumstances present here, there was no reasonable basis to believe a claim would not potentially be brought against Argo. Morrison's attorney explicitly stated in the October Letter

that he had been working with Lauri trying to resolve the issues but had not been successful in even obtaining relevant information from him and had indicated in a letter to Lauri that "Morrison would like to avoid litigation" but would not allow the status quo to continue. Thus, it was clear that Morrison was unhappy with Argo's actions in remediating the situation and was contemplating bringing suit, which would involve Argo.

Additionally, to the extent that Argo contends that Admiral should be estopped from asserting lack of coverage as it sought an extension on behalf of Argo to file an answer in the Morrison lawsuit, such contention is without merit. The Court of Appeals has held that "in an appropriate case, such as where an insurer, though in fact not obligated to provide coverage, without asserting policy defenses or reserving the privilege to do so, undertakes the defense of the case, in reliance on which the insured suffers the detriment of losing the right to control its own defense" an insurer may be estopped from claiming there is no coverage. *Albert J. Schiff Assoc. v. Flack*, 51 N.Y.2d 692, 699 (1980); *see also O'Dowd v. American Sur. Co. of N.Y.*, 3 N.Y.2d 347 (1957) ("It is clear that when an insurer defends an action on behalf of an insured, in his stead, with knowledge of facts constituting a defense to the coverage of the policy, it is thereafter estopped from asserting that the policy does not cover the claim.") Here, there is no question of estoppel as Admiral never undertook Argo's defense but only requested an initial extension of time to answer. After that initial request, Admiral immediately disclaimed coverage and refused to undertake to defend Argo. Moreover, Argo cannot claim a detriment of losing the right to control its own defense as it has been defended throughout the Morrison action by its own counsel. Indeed, none of the cases cited by plaintiff in its papers stand for the broad proposition that an insurer waives coverage defenses by seeking an extension of time to answer

the complaint and, in any event, the cases are inapposite to the instant action. *See Weaver Metal & Roofing Co., Inc. v. Continental Ins. Co.*, 58 A.D.2d 1037 (4th Dept 1997); *Parotta v. Wolgin*, 245 A.D.2d 872 (3rd Dept 1997); *Wilkins v. Huber*, 303 A.D.2d 986 (4th Dept 2003).

Accordingly, defendants' motion is granted and it is hereby

ADJUDGED and DECREED that defendants have no duty to defend or indemnify Argo in the Morrison lawsuit. This constitutes the decision and order of the court.

Dated: 4/1/14

Enter: _____
J.S.C.

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).