To commence the statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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WEST STREET PROPERTIES, LLC,

Plaintiff,

-against-

DECISION & ORDER
Index No. 54513/2012
Seq. Nos. 9, 10, 11

AMERICAN STATES INSURANCE COMPANY, LIBERTY MUTUAL INSURANCE GROUP, SAFECO INSURANCE COMPANY OF AMERICA, AND SCOTTSDALE INSURANCE COMPANY,

Defendants.

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WOOD, J.

The following documents numbered 1-86 were read in connection with the motions for summary judgment for sequence numbers 9, 10, and 11 :

Defendant Scottsdale Insurance Company's ("Scottsdale") Notice of Motion (Seq. No. 9), Broerman's Affidavit, Certificate of Conformity, Exhibits.	1-35
Defendants American States Insurance Company ("American States"), Liberty Mutual Insurance Group ("Liberty"), Safeco Insurance Company of America ("Safeco") Notice of Motion (Seq. No. 10), Counsel's Affirmation, Memorandum of Law, Exhibits.	36-62
Plaintiff West Street Properties LLC ("West Street") Notice of Cross Motion, (Seq. No. 11) Cannavo Affidavit, Exhibits, Memorandum of Law.	63-80
Scottsdale's Counsel's Reply Affirmation and Reply Memorandum of Law.	81-82
American States, Liberty and Safeco's Counsel's Reply Affirmation in Support of Motion for Summary Judgment, Exhibit.	83-84
American States Liberty and Safeco's Counsel's Reply Affirmation in Support For Summary Judgment and Opposition to Plaintiff's Cross- Motion, Exhibit.	85-86

The underlying action began on or about December 6, 2007, when Anthony Casterella, ("Casterella") and the companies he controlled Cast Construction, LLC, Cast Construction & Son, Inc., A&A Industries, LLC ("the companies") were hired to perform landscaping services to a residential property at 57 Kenilworth Road in Harrison, ("the premises") owned by plaintiff West Street. While performing said landscaping, Casterella and the companies allegedly released a hazardous substance from an underground fuel storage tank, spilling more than 200 gallons of fuel oil resulting in property damage to the premises. As a result of the oil spill, West Street commenced an underlying action on October 26, 2009, in this court (Lefkowitz, J.) under Index No. 14364/09 against Casterella and the companies ("the underlying action").[1] In defense of the underlying action, in or about October 2009 through December 2009, American States assigned counsel ("Assigned Counsel") to its insured Casterella and the companies. Assigned Counsel encountered significant problems communicating with Casterella, and consequentially, on February 28, 2011, Assigned Counsel's application to withdraw as counsel for Casterella was granted by the court. On March 18, 2011, American States proceeded to disclaim coverage against Casterella and the companies. On May 17, 2011, American States commenced an action for a declaratory judgment against its insured Casterella and the companies. American States was granted a default judgment only as to Casterella, individually, on December 22, 2011, and denied summary judgment against the companies based on service issues.

On September 6, 2011, West Street moved pursuant to CPLR 3212 for summary judgment against Casterella, which was granted on September 26, 2011. On October 14, 2011 a

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[1]On November 24, 2009, Casterella admitted to negligently spilling the oil and plead guilty to Count One of Indictment #08-1414 in Westchester County to the felony of Endangering the Public, Health, Safety and environment under the Environmental Conservation Law.

final judgment against Casterella and the companies in the amount of $2,008,876.70 was filed and entered ("the Final Judgment").

After Casterella and the companies failed to satisfy the judgment, West Street commenced this action by motion for summary judgment in lieu of complaint pursuant to CPLR §3213, on March 27, 2012, against Casterella's insurance carriers, pursuant to New York's direct action statute, Insurance Law §3420 (b) (1), seeking to recover on the judgment in the sum of the limits of the insurance policies issued by said insurance carriers up to a total of $2 million, in order to satisfy the Final Judgment entered in the underlying action. Defendants cross-moved for summary judgment and/or dismissal. In the meantime, on or about June 27, 2012, Hon. Nicholas Colabella granted American States' default judgment against Mr. Casterella, citing his failure to cooperate in the defense of the underlying action, which was a material breach of the policy's cooperation clause, precluding coverage for the underlying matter. On October 5, 2012, this court (Lefkowitz, J.) denied all parties herein their respective requests for relief and converted plaintiff's motion to a complaint and defendants' motions to be the answers. The court also found that the cross claim of American States failed to establish as a matter of law that it was entitled to disclaim coverage based upon Casterella's noncooperation. Moreover, even if American States did establish such entitlement as a matter of law, it failed to establish as a matter of law that it issued its disclaimer within a reasonable time after Casterella manifested his clear intent not to cooperate. As part of the court's order, defendants were granted leave to move for summary judgment upon completion of discovery, thus providing the basis for the present

motions. In this case, plaintiff filed the note of issue on or about February 16, 2014.[2] The following actions ensued.

Upon the foregoing papers, the motion is decided as follows:

Summary Judgment

It is well settled that "a proponent of a summary judgment motion 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" (Alvarez v Prospect Hosp., 68 NY2d 320, 324 [1986]; see Orange County-Poughkeepsie Ltd. Partnership v Bonte, 37 AD3d 684, 686-687 [2d Dept 2007]; see also Rea v Gallagher, 31 AD3d 731 [2d Dept 2007]). Once the movant has met this threshold burden, the opposing party must present the existence of triable issues of fact (see Zuckerman v New York, 49 NY2d 557, 562 [1980]; see also Khan v Nelson, 68 AD3d 1062 [2d Dept 2009]). Conclusory, unsubstantiated assertions will not suffice to defeat a motion for summary judgment (Barclays Bank of New York, N.A. v. Sokol, 128 AD2d 492 [2d Dept 1987]). A party opposing a motion for summary judgment may do so on the basis of deposition testimony as well as other admissible forms of evidence, including an expert's affidavit, and eyewitness testimony (Marconi v. Reilly, 254 AD2d 463 [2d Dept 1998]). In deciding a motion for summary judgment, the court is required to view the evidence presented "in the light most favorable to the party opposing the motion and to draw every reasonable inference from the pleadings and the proof submitted by the parties in favor of the opponent to the motion" (Yelder v Walters, 64 AD3d 762, 767 [2d Dept 2009]; see Nicklas v Tedlen Realty Corp., 305 AD2d

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[2]Currently American States and Scottsdale appealed denial of their cross-motions to the Appellate Division, Second Department on or about November 7, 2012. The Appeal has been fully submitted and the parties are awaiting argument.

385, 386 [2d Dept 2003]). The court must accept as true the evidence presented by the nonmoving party and must deny the motion if there is "even arguably any doubt as to the existence of a triable issue" (Kolivas v. Kirchoff, 14 AD3d 493 [2d Dept 2005]); Baker v. Briarcliff School Dist., 205 AD2d 652,661-662 [2d Dept 1994]). Summary judgment is a drastic remedy and should not be granted where there is any doubt as to existence of a triable issue (Alvarez v. Prospect Hospital, 68 NY2d 320,324 [1986]).

Insurer Disclaims Coverage

Late Notice

It is well settled that the "the requirement that an insured provide notice of any occurrence to the insurance company within a reasonable time is considered a condition precedent to the insurer's obligation to defend or indemnify the insured" (C.C.R. Realty of Dutchess, Inc. v. N.Y. Cent. Mut. Fire Ins. Co., 1 A.D.3d 304, 305 [2d Dept 2003]). Notice must be given within a reasonable time in view of all of the facts and circumstances (Eagle Ins. Co. v Zuckerman, 301 AD2d 493, 495 [2d Dept 2003]). It is equally well settled that "absent a valid excuse for a delay in furnishing notice, failure to satisfy the notice requirement vitiates coverage" (Sputnik Rest. Corp. v. United Natl. Ins. Co., 62 AD3d 689 [2d Dept 2009]). However, "circumstances may exist that will excuse or explain the insured's delay in giving notice, such as a reasonable belief in non-liability" (Ponok Realty Corp. v United Natl. Specialty Ins. Co., 69 AD3d 596, 597 [2d Dept 2010]). Thus, "questions of whether there existed a good faith belief that the injured party would not seek to hold the insured liable and whether that belief was reasonable are questions of fact for the fact-finder" (Id.). An insurer must give written notice of disclaimer on the ground of late notice as soon as is reasonably possible after it first learns of the

accident or of grounds for disclaimer of liability, and failure to do so precludes effective disclaimer (Matter of Firemen's Fund Ins. Co. v. Hopkins, 88 N.Y.2d 836, 837 [1996]).

Insured's Lack of Cooperation

Further, an insurer who seeks to avoid defending an insured because of an exclusion, faces the "heavy burden" of demonstrating that the subject exclusion eliminates *all* possibility of coverage (Frontier Insul. Contr. Inc. v. Merchants Mut. Ins. Co., 91 N.Y.2d 169, 175 [1997]). When an insured deliberately fails to cooperate with its insurer in the investigation of a covered incident as required by the policy, the insurer may disclaim coverage under the cooperation condition of an insurance policy (State-Wife Ins. Co. V. Luna, 68 AD3d 882 [2d Dept 2009]). To deny coverage based upon a failure to cooperate, the carrier holds the heavy burden to demonstrate that: (1) it acted diligently in seeking to bring about the insured's cooperation; (2) the efforts it employed were reasonably calculated to obtain the insured's cooperation; and (3) the attitude of the insured, after his cooperation was sought, was one of " 'willful and avowed obstruction' "(Johnson v. GEICO, 72 A.D.3d 900 [2d Dept. 2010], quoting Baghaloo-White v. Allstate Ins. Co., 270 A.D.2d 296, 704 N.Y.S.2d 131 (2d Dept. 2000); Thrasher v. United States Liability Ins. Co., 19 N.Y.2d 159 [1967]). The third prong may be established by an insurer's showing that its insured "engaged in an unreasonable and willful pattern of refusing to answer material and relevant questions or to supply material and relevant documents" (Emigrant Mortg. Co., Inc. v Washington Tit. Ins. Co., 78 AD3d 1112, 1114 [2d Dept 2010]). An insured's conduct may qualify as evincing an attitude of inaction, but mere efforts by the insurer and mere inaction on the part of the insured, without more, are insufficient to establish non-cooperation as the inference of non-co-operation must be practically compelling (Country-Wide Ins. Co. v.

Henderson, 50 AD3d 789, 790, quoting Empire Mutual Ins. Co. v. Stroud, at 721. Insurers can seek to disclaim for noncooperation only after it is clear that further reasonable attempts to elicit their insured's cooperation will be futile (Thrasher, 19 NY2d at 168; Continental Cas. Co. v Stradford, 11 NY3d 443, 450 [2008]).

Timeliness of disclaimer of coverage

New York law holds that even where an insured fails to give timely notice of a claim to its insurer, a carrier waives its affirmative defense of late notice if it fails to disclaim coverage as soon as is reasonably possible (Insurance Law § 3420[d]) after it first learns of the grounds for disclaimer of liability or denial of coverage (First Financial Ins. Co. v. Jetco Contracting Corp., 1 N.Y.3d 64, [2003]); Pennsylvania Lumbermans Mut. Ins. Co. v. D & Sons Const. Corp., 18 AD3d 843 [2nd Dept 2005]). Moreover, while the timeliness of a carrier's disclaimer based on its insured's alleged violation of the policy's cooperation clause is generally a factual question, nevertheless, when the basis for denying coverage was or should have been readily apparent before the onset of the delay [of disclaimer],the insurer's explanation is insufficient as a matter of law (Continental Cas. Co. v. Stradford, at 449; Gulf Ins. Co. v. Stradford, 59 AD3d 598 [2d Dept. 2009]).

Amount of Recovery

The recovery may not exceed the applicable policy limits (Smith v. Allstate Ins. Co., 38 A.D.3d 522 [2d Dept 2007]).

Insurance Law §3420

Generally, Insurance Law § 3420 grants an injured plaintiff the right to sue a tortfeasor's insurance company to satisfy a judgment obtained against the tortfeasor (Lang v Hanover Ins.

Co., 3 NY3d 350, 352 [2004]). The plaintiff may do so only under limited circumstances—the injured party must first obtain a judgment against the tortfeasor, serve the insurance company with a copy of the judgment and await payment for 30 days. Compliance with these requirements is a condition precedent to a direct action against the insurance company (Thrasher v. United States Liab. Ins. Co., 19 N.Y.2d at 166; Lang v Hanover Ins. Co., 3 NY3d 350, 354 [2004]). It is well-settled that in taking direct action against an insurer, the injured party steps into the shoes of the insured, and has only those rights that the insured would have under the insurance policy (D'Arata v. New York Cent. Mut. Fire Ins. Co., 76 NY2d 659 [1990]). Thus, "the noncooperation of an insured party in the defense of an action is a ground upon which an insurer may deny coverage and may be asserted by the insurer as a defense in an action on a judgment by an injured party pursuant to Insurance Law § 3420 (a) (2) (Van Gordon v Otsego Mut. Fire Ins. Co., 232 AD2d 405, 406 [2d Dept 1996]). Where an insurance company disclaims coverage and declines to defend in an underlying lawsuit, it takes the risk that the injured party will obtain a judgment against the purported insured and then seek payment pursuant to Insurance Law § 3420 (Lang v. Hanover Ins. Co., at 356). Moreover, under those circumstances, having chosen not to participate in the underlying lawsuit, the insurance company may litigate only the validity of its disclaimer and cannot challenge the liability or damages determination underlying the judgment (Lang v. Hanover Ins. Co., at 356).

Here, as a threshold matter, the record shows that West Street complied with the requirements of Insurance Law §3420(d), insofar as West Street first obtained a judgment against the tortfeasor, served the insurance company with a copy of the judgment and awaited payment for 30 days, namely, a money judgment was entered in the Westchester County Clerk's Office on

October 14, 2011, in favor of plaintiff West Street against Casterella and the companies, in the sum of $2,008,876.70; a copy of the Final Judgment together with notice of entry was served on the parties as well as defendants herein,; and plaintiff also waited the requisite thirty days for payment in the underlying case. Thus, West Street has made a prima facie showing of entitlement to summary judgment as a matter of law as it obtained a Final Judgment in the underlying action (which remains unsatisfied), and served defendants herein.

Sequence No. 10

American States seeks summary judgment pursuant to CPLR 3212 and CPLR 3001 declaring that American States has no obligation under the policy issued to Casterella such that plaintiff is foreclosed from recovery under the direct action statute of §3420(a)(1) and (b)(2). It is undisputed that Casterella and the companies were provided with a defense to the underlying action by American States. Actually, American States insured only Casterella and A&A Industries. However, American States claims that while it did not insure Cast Construction, LLC or Cast Construction & Son, Inc., it nevertheless provided a defense to those entities as a courtesy. According to American States, from the inception of the underlying action, Casterella failed to cooperate with assigned counsel. As noted in the court's (Lefkowitz, J) decision, American States alleges that: Casterella failed to respond to numerous requests for an initial interview by counsel causing multiple requests for extensions of time to answer the complaint; that Casterella only responded to the request for an initial interview through the intercession of his attorney in the criminal case; that Casterella cancelled several meetings with counsel; that Casterella failed to respond to requests from Assigned Counsel to meet and prepare for depositions; that Casterella cancelled several scheduled meetings with counsel in July 2010; that

Casterella ignored seven letters sent to him by Assigned Counsel between August 2010 and December 2010; that Casterella did not respond to seven voice mail messages left by American States in October 2010 urging his cooperation; that on October 19, 2010, Casterella was advised by an investigator from States of the risk of losing coverage if his failure to cooperate continued; that despite this warning Casterella failed to cooperate with counsel in preparing for the depositions which had been rescheduled; that Casterella refused to accept Assigned Counsel's December 7, 2010 certified letter; and Casterella failed to appear at a February 28, 2011 conference before the court despite the court's mandate that he be present. However, American States adds that Casterella did have moments of cooperation with this litigation. American States assets that it was most frustrating that when Casterella was reached, he would apologize and pledge cooperation, but despite this promise, American States concludes that Casterella and the companies ultimately disavowed and repudiated their obligation to cooperate under the American States insurance policy, leaving American States no alternative but to deny coverage. Thus, American States argues that since there is no available coverage to Casterella and the companies, due to their breach of the policy's cooperation condition, West Street may not recover under Insurance Law §3420, as a plaintiff stands in the shoes of the insured and possesses no further rights than the insured under the policy.

Further, American States avers that it properly and timely disclaimed coverage due to Casterella's failure to cooperate in the defense of the underlying action. American States disclaimed coverage on March 18, 2012, two months after Assigned Counsel moved for permission to withdraw as Casterella's counsel upon the grounds of his noncooperation. American States did not personally deliver the disclaimer letter to Casterella until one month

later on April 26, 2011. American States argues that the fact that it took several additional days and the efforts of two investigators to ensure Casterella was personally served with the disclaimer letter is of no moment in gauging the timeliness of the disclaimer, but rather constitutes further evidence of Casterella's obstinacy and level of noncooperation.

In opposition, West Street accuses American States of having permitted Assigned Counsel to withdraw while having no sanction from any court that it had no duty to defend, and thus, American States placed itself in jeopardy. West Street also argues American States cannot make a prima facie case on the issue of the noncooperation of Casterella as it never even sought to produce him for deposition; and it misdirected letters in that a minimum of six letters sent to Casterella were sent to Port Charles and not Port Chester (his address). West Street also points out that American States' original application for summary judgment was denied by this court (Lefkowitz, J.) for failure to establish as a matter of law, that it issued its disclaimer within a reasonable time after Casterella manifested a clear intention not to cooperate.

Like most insurance policies, the American States Policy includes a condition precedent to coverage which specifically requires an insured to cooperate with the defense of a lawsuit. Based upon the applicable law and the facts presented to the court, American States' has not met its heavy burden of proving that it acted diligently in seeking to bring about the insured's cooperation.

Here, the underlying facts demonstrate that while Assigned Counsel had difficulty communicating with Casterella, there were periods of compliance and cooperation by Casterella. On February 7, 2011, Casterella spoke with an adjuster via telephone. In a subsequent telephone conversation on February 8, 2011 Casterella advised the American States adjuster that he would

cooperate in contacting assigned defense counsel in advance of the February 28, 2011 order to show cause regarding withdrawal by Assigned Counsel. Thus, while there were extended periods of inaction and inaccessibility on the part of Casterella, there were also periods of pledged cooperation. The record shows that American States made some attempt to follow up on its investigation and efforts to contact Casterella and his companies, including the retention of a private investigator to deliver the correspondence and meet with him. However those efforts need to be analyzed, as it raises a triable issue of fact for a jury to decide.

Notably, American States chose to permit Assigned Counsel to withdraw while the action was still pending. As noted by the court (Lefkowitz,J), in American States' initial summary judgment motion, two months after Assigned Counsel moved for permission to withdraw as counsel, American States issued a letter disclaiming coverage, but that American States did not personally deliver the disclaimer letter to Casterella until one month later on April 26, 2011. This court also recognizes that the timeliness of a disclaimer based on its insured's alleged violation of a policy's cooperation clause almost always presents a factual issue requiring the assessment of all relevant circumstances surrounding the particular disclaimer.

Moreover, the court considers this State's policy in favor of providing full compensation to injured victims, who are unable to control the actions of an uncooperative insured. Accordingly, based upon the arguments raised, and the conflicting evidence presented, the court finds that there is an issue of fact as to whether Casterella failed to cooperate with American States, and, thus, whether American States permissibly disclaimed coverage (Thrasher v United States Liab. Ins. Co., 19 NY2d 159; Commercial Union Ins. Co. v Burr, 226 AD2d 416 [2d Dept1996]). American States has not met its heavy burden of proving lack of cooperation of

Casterella and his companies (Thrasher v. United States Liab. Ins. Co., 19 N.Y.2d 159, 168; Physicians' Reciprocal Insurers v. Keller, 243 AD2d 547 [1997]). Moreover, even if American States did establish such entitlement as a matter of law, it failed to establish as a matter of law that it issued its disclaimer within a reasonable time after Casterella manifested his clear intent not to cooperate.

Furthermore, based on the foregoing, the court declines to grant a declaratory judgment that American States is entitled to a declaration that it does not owe coverage to Casterella and the companies with respect to the underlying action as their willful failure to cooperate in the defense of the underlying action is a material breach of the policy's cooperation clause that precludes recovering on the American States Policy, as a matter of law.

Turning to the argument that both Liberty Mutual Insurance Group and Safeco Insurance Company of America are entitled to dismissal, as a matter of law, as neither entity had any affiliation, interest or decision making authority with respect to this or any other American States policy and any recovery sought by West Street can be accomplished via American States as a named defendant in this action. Their argument is that American States is a wholly owned corporation of Safeco Corporation, which was purchased by Liberty Mutual Group, Inc. in 2008. Safeco Insurance Company of America is an affiliate of Safeco Corporation that underwrites its own separate insurance risks and bears no underwriting connection to American States. Liberty Mutual Group, Inc. does not write any insurance itself, but rather is the parent company of various individual insurance companies, including American States. Consequently, as American states exclusively wrote and issued the American states Policy at issue here, and American States and Safeco Insurance Company of America constitute two separate corporate entities with

separate corporate structures, Safeco Insurance Company of America is not a proper party to the suit and should be dismissed. In opposition, West Street asserts that the documentary evidence on its face refutes American State's assertion that Safeco and Liberty Mutual are not proper parties to this litigation. Since West Street has demonstrated a triable issue of fact, this branch of the motion for summary judgment is denied.

Finally, American States' application for modifying the Final Judgment and declaring that plaintiff must prove its damages in a formal inquest/hearing and /or a declaration capping plaintiff's damages at no more than $240,083.76, is DENIED, in its entirety. An insurer's failure to defend precludes it from relitigating issues of coverage (K2 Inv. Group LLC v. American Guarantee and Liability Insurance Company, 22 NY3d 578[2014]). Under these circumstances, American States may litigate only the validity of its disclaimer and cannot challenge the liability or damages determination underlying the judgment and thus, its application for an inquest as to the award demanded in the complaint is DENIED.

Sequence No. 9- Scottsdale's Motion for Summary Judgment

Scottsdale brings this motion for summary judgment to dismiss the complaint as against it, on the basis that its commercial general liability policy ("the Scottsdale Policy) issued to Cast LLC ,("Cast") and WAM Development LLC was cancelled effective on November 18, 2007, which is prior to the date of the December 6, 2007 oil spill and alleged resulting property damage. Thus, Scottsdale argues that the Scottsdale Policy was cancelled before the loss, due to Casterella's failure to pay premiums; the policy excluded coverage for damages caused by an oil spill; and Casterella failed to timely notify it of the underlying claim.

In New York, the Insurance Law requires specific procedures for canceling a policy for a

commercial line of insurance: During the first sixty days a covered policy is initially in effect,... no cancellation shall become effective until twenty days after written notice is mailed or delivered to the first-named insured at the mailing address shown in the policy and to such insured's authorized agent or broker (Insurance Law § 3426(b)).

Here, the record shows that on November 6, 2007, a Notice of Cancellation was sent to Cast Construction &Son and WAM Development, LLC notifying them that the Scottsdale Policy would terminate effective November 18, 2007 for nonpayment of premium, prior to the date of loss. Insurance Law §3420 enables plaintiff by virtue of its unsatisfied judgment to step into the shoes of the judgment debtors and to purse a derivative claim for coverage under the Scottsdale policy. Scottsdale argues that the Scottsdale Policy precludes any action for coverage unless there has been full compliance with all of the policy's terms and even then only to the extent the damages sought are payable under the terms of the policy. Thus, Scottsdale argues that coverage under the Scottsdale Policy was cancelled before the underlying incident. Scottsdale also argues that any potential coverage for the Final Judgment is barred based on late notice as Scottsdale was not notified of the December 2007 oil spill or the commencement of the underlying action until February 27, 2012. Furthermore, Scottsdale asserts that the limit of insurance is $1million per occurrence. Scottsdale concludes that assuming that West Street is entitled to any coverage under the Scottsdale Policy, West Street would be entitled to recover no more than $640,083.76. Further, Scottsdale argues that it would be entitled to litigate insured's actual liability for the claims at issue and further litigate the true amount of West Street's recoverable damages.

In opposition, West Street alleges that the November 6, 2007 notice of cancellation was not issued to the named insured under the Scottsdale Policy. The cancellation notice was instead

addressed to Cast Construction & Son as opposed to Cast Construction, LLC, and the other addressee on the notice of cancellation was WAM Development LLC. Thus, the November 6, 2007 notice of cancellation was sent to different entities from the insured. West Street also takes issue with the fact that only one solitary notice of cancellation was issued to both Cast Construction & Son and WAM Development, LLC. West Street further argues that the documentary evidence on its face does not resolve all issues of fact as to the validity of the cancellation of the Scottsdale Insurance Policy as a matter of law. West Street asserts that service of the Final Judgment on Scottsdale was effected by service on the Superintendent of Insurance on January 30, 2012, but that Scottsdale disclaimed on or about June 15, 2012, close to six months after receiving notice of the Final Judgment. Thus, West Street asserts that there are questions of fact as to the reasonableness of such delay of notice.

Scottsdale explains that since Cast LLC and WAM Development LLC were both named insureds under the same Scottsdale Policy and shared the same mailing address, it was entirely proper to issue a single notice of cancellation. Scottsdale also avers that the Scottsdale Policy was issued on an excess line basis with Scottsdale's Managing Agent, NIF Services of New York, Inc. ("NIF"), acting as the New York licensed excess line broker. Scottsdale cites that under New York law, the cancellation of a policy issued on an excess line basis is governed exclusively by the policy's terms, as opposed to the cancellation procedures mandated under Insurance Law §3426 (NY INS. Dept op. No. 02-03-18 [March 21, 2002]). The Scottsdale Policy's cancellation provisions states that Scottsdale could cancel the policy for nonpayment of premium by providing 10 days advance written notice and mailing a notice of cancellation to the first Named Insured's last mailing address known to it. The provision states further that the

notice will state the effective date of cancellation and that if the notice is mailed, proof of mailing will be sufficient proof of notice.

Scottsdale also points to a Second Department decision which held that Scottsdale was entitled to summary judgment on its pre loss policy cancellation defense by presenting evidence that the notice of cancellation complied with the terms of the policy and was properly mailed to the plaintiff (Residential Holding Corp. v. Scottsdale Ins. Co., 286 AD2d 679, 680 [2d Dept 2001]). Further, Scottsdale argues that the notice of cancellation accurately reflects the policy number, and that the notice was mailed to the same 40 Merritt Street address listed on the Scottsdale Policy's declarations page. That same address was also shared by both Cast LLC and Cast & Son. Scottsdale further explains that NIF'S records reflected that Cast & Son was the named insured and therefore the notice of cancellation was addressed to Cast & Son.

In light of the foregoing, and a thorough scrutiny of the record, Scottsdale met its burden of proving as a matter of law that the Scottsdale Policy was cancelled prior to the date of loss. Specifically, Scottsdale has demonstrated that the November 6, 2007 notice of cancellation, effective November 18, 2007, was issued in compliance with Scottsdale Policy's cancellation provision, and effectuated service on its insureds, placing them on notice of the impending cancellation. West Street has failed to demonstrate a triable issue of fact by producing any credible evidence that Cast, LLC did not receive notice of the cancellation as a result of an incorrect name identification. West Street does not dispute that the address listed on the policy is correct, or included correct identifying information. In addition, both Cast LLC and Cast &Sons both listed the same address, and having the same principal, namely Casterella. Thus, West Street failed to submit proof sufficient to rebut the presumption and to raise a triable issues of

fact. Accordingly, the court finds that coverage for WAM Development LLC, and Cast Construction, LLC, under the Scottsdale Policy was cancelled prior to the subject December 2007 oil spill at the premises.

Sequence No. 11-West Street's Cross-Motion

West Street cross-moves pursuant to Insurance Law 3420 (a) (1) and (b)(2) and CPLR 3212 for summary judgment. Based upon the foregoing, West Street's motion for summary judgment is DENIED, inasmuch as triable issues of fact have been raised by the remaining parties. Accordingly, based upon the stated reasons, it is hereby

ORDERED, that Scottsdale's motion for summary judgment (Motion Sequence No. (9) dismissing West Street's complaint as against Scottsdale is GRANTED, and it is further

ORDERED, that it is hereby declared that Scottsdale is not obligated to provide coverage for any portion of the damages awarded to West Street in the Final Judgment; and it is further

ORDERED, that American States' motion for summary judgment (Motion Sequence No. (10) is DENIED in its entirety; and it is further

ORDERED, that West Street's cross motion for summary judgment (Motion Sequence No. 11) is DENIED; and it is further

ORDERED, that the remaining parties shall appear in the Settlement Conference Part, Courtroom 1600, on November 18th, 2014 at 9 15 am at the Westchester County Courthouse; and it is further

ORDERED that defendant Scottsdale shall serve a copy of this order with notice of entry upon the parties within ten (10) days of entry, and file proof of service on NYSCEF within five (5) days of service; and it is further

ORDERED, that Defendant Scottsdale Insurance Group shall Settle judgment on notice. The Clerk shall mark his records accordingly. All other matters not herein decided are denied.

This constitutes the Decision and Order of the Court.

Date: October 3, 2014
White Plains, New York

HON. CHARLES D. WOOD
Justice of the Supreme Court

TO: Anthony G. Piscionere, Esq.
Piscionere Nemarow, P.C.
Attorneys for Plaintiff
West Street Properties LLC
363 Boston Post Road
Rye, New York 10580
By: NYSCEF

Joanna M. Roberto, Esq.
Goldberg Segalla LLP
Attorneys for Defendants
American States Insurance Company, Liberty
Mutual Insurance Group and Safeco Insurance Company of America
200 Garden City Plaza, Suite 520
Garden City, New York 11530
By: NYSCEF

Ann Odelson, Esq.
Caroll McNulty & Kull, LLC
Attorneys for Defendant
Scottsdale Insurance Company
570 Lexington Avenue, 8th Floor
New York, New York 10022
By: NYSCEF