[* 1]

SHORT FORM ORDER

INDEX No. 10-10335

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 10 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH A. SANTORELLI
Justice of the Supreme Court

MOTION DATE 10-14-14 (#010)
MOTION DATE 10-28-14 (#011)
ADJ. DATE 11-25-14
Mot. Seq. # 010 - MG
011 - MG

EDWARD W. ALLEN and MARIA ALLEN,

Plaintiffs,

-against-

LEON D. DEMATTEIS CONSTRUCTION CORP., CONSENTINI ASSOCIATES, INC., RJR MECHANICAL, INC., COASTAL ELECTRIC CONSTRUCTION, GWATHMEY, SIEGEL & ASSOCIATES ARCHITECTS, LLC, JACOBS ENGINEERING NEW YORK, INC.,

Defendants.

STEVEN F. GOLDSTEIN, LLP
Attorney for Plaintiffs
One Old Country Road, Suite 318
Carle Place, New York 11514

WESTERMANN SHEEHY KEENAN SAMAAN & AYDELOTT LLP
Attorney for Defendant/Third-Party Plaintiff
DeMatteis Construction
The Omni Building, Suite 702
333 Earle Ovington Boulevard
Uniondale, New York 11553

LEON D. DEMATTEIS CONSTRUCTION CORP.,

Third-Party Plaintiff,

- against -

RJR MECHANICAL, INC., INTERSTATE FIRE & CASUALTY COMPANY and ANRON SHEET METAL CORP.,

Third-Party Defendants.

WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER, LLP
Attorney for Defendant Consentini Associates
150 East 42nd Street
New York, New York 10017

L'ABBATE, BALKAN, COLAVITA & CONTINI, L.L.P.
Attorney for Gwathmey Siegel
1001 Franklin Avenue, Room 300
Garden City, New York 11530

RJR MECHANICAL, INC.,

Second Third-Party Plaintiff,

- against -

ANRON SHEET METAL CORP., FIREMAN'S FUND INSURANCE COMPANY/ INTERSTATE FIRE INSURANCE CO., LIBERTY MUTUAL/PEERLESS INSURANCE COMPANY and THE SCHAEFER AGENCY, INC.,

Second Third-Party Defendants.

BELLO & LARKIN
Attorney for Defendant Jacobs Engineering
150 Motor Parkway, Suite 405
Hauppauge, New York 11788

SACKS & MUCCINI LLC
Attorney for Defendant/Third-party Plaintiff RJR Mechanical
410 Park Avenue, 15th Floor
New York, New York 10022

Upon the following papers numbered 1 to 76 read on these motions for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1- 34, 35-55 ; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 56-64, 65-67, 68-74 ; Replying Affidavits and supporting papers 75-76 ; Other Memoranda of Law ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motions (010 and 011) by third-party defendant Interstate Fire & Casualty Company for summary judgment dismissing the third-party complaints against it are consolidated for the purposes of this determination; and it is

ORDERED that the motion by third-party defendant Interstate Fire & Casualty Company for summary judgment dismissing the third-party complaint against it by defendant/third-party plaintiff Leon DeMatteis Construction Corp. is granted; and it is

ORDERED that the motion by third-party defendant Interstate Fire & Casualty Company for summary judgment dismissing the third-party complaint against it by defendant/third party plaintiff RJR Mechanical Inc. is granted.

Plaintiff Edward Allen commenced this action to recover damages for personal injuries allegedly sustained on January 5, 2009, when he fell into an open shaft while performing HVAC related services in the basement of the building housing the United States' Mission to the United Nations, located in Manhattan, New York. After issue was joined, defendant/third-party plaintiff Leon DeMatteis Construction Corp. ("DeMatteis"), the general contractor for the project, brought a third-party action against several of its subcontractors, including third-party defendant/third-party plaintiff RJR Mechanical Inc. ("RJR"), and its insurance carrier, third-party defendant Interstate Fire & Casualty Company ("Interstate"). The third-party complaint seeks, among other things, a judgment declaring that RJR and Interstate are contractually obligated to defend and indemnify DeMatteis in the underlying action, and that Interstate wrongfully denied DeMatteis' June 11, 2010 demand for insurance coverage. RJR also commenced a third-party action seeking similar relief against Interstate, Allen's employer, Anron, and Anron's insurer, Liberty Mutual a/k/a Peerless Insurance Co. ("Peerless").

Interstate now moves for summary judgment dismissing the third-party complaint against it, arguing that DeMatteis failed to provide it with notice of the underlying claim until approximately 16 months after the accident, thereby violating conditions precedent to coverage requiring that accidents be reported "as soon as practicable," and that all legal papers filed in relation to such accidents be "immediately" provided to Interstate. DeMatteis opposes the motion on the grounds it is premature and that a triable issue exists as to whether the term "as soon as practicable" is ambiguous. DeMatteis also argues that Interstate should be precluded from denying coverage based on late notice, since DeMatteis' delays were based on its good faith belief in its nonliability for Allen's alleged injuries.

On December 30, 2005, DeMatteis and RJR entered into an agreement pursuant to which RJR was to provide certain labor and services in connection with the construction project. The contract contained provisions requiring RJR to purchase insurance naming DeMatteis as an additional insured, and to defend and indemnify it against all claims arising out of its work or the work of anyone or entity directly or indirectly employed by RJR on the project. Interstate issued a policy of insurance to RJR bearing policy number NGL1000113 with a policy period of March 8, 2008 through March 8, 2009. Section IV of the insurance policy, which is entitled "Duties In The Event Of Occurrence, Offense, Claim or Suit," states, in

pertinent part, as follows:

> 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 or 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 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; and
>
> (4) Assist us, upon our request, in the enforcement of any right against any person or organization which may be liable to the insured because of injury or damage to which this insurance may also apply.
>
> d. No insured will, except at that insured's own cost, voluntarily make a payment, assume any obligation, or incur any expense, other than for first aid, without our consent.

Where, as here, a policy of liability insurance requires that notice of an occurrence which may give rise to a claim be given "as soon as practicable," such notice must be provided to the carrier within a reasonable period of time (***Great Canal Realty Corp. v Seneca Ins. Co., Inc.***, 5 NY3d 742, 743, 800 NYS2d 521 [2005]; ***Donovan v Empire Ins. Group***, 49 AD3d 589, 590, 856 NYS2d 139 [2d Dept 2008]). An "insured's failure to satisfy the notice requirement constitutes 'a failure to comply with a condition precedent which, as a matter of law, vitiates the contract'" (***Columbia Univ. Press, Inc. v Travelers Indem. Co. of Am.***, 89 AD3d 667, 667, 931 NYS2d 706 [2d Dept 2011], *quoting* ***Argo Corp. v Greater N.Y. Mut. Ins. Co.***, 4 NY3d 332, 339, 794 NYS2d 704 [2005]). Failure or delay in giving notice may be excused if the insured lacked knowledge that the accident had occurred or had a good faith and reasonable belief of his or her nonliability (*see* ***Ocean Gardens Nursing Facility, Inc. v Travelers Cos., Inc.***, 91 AD3d 734, 736, 936 NYS2d 323 [2d Dept 2012]; ***Ponok Realty Corp. v United Natl. Specialty Ins. Co.***, 69 AD3d 596, 597, 893 NYS2d 125 [2d Dept 2010]). The insured has the burden of establishing that there was a reasonable excuse for the delay (*see* ***Ocean Gardens Nursing Facility, Inc. v Travelers Cos., Inc.***, 91 AD3d 734,736, 936 NYS2d 323 [2d Dept 2012]; ***Tower Ins. Co. of N.Y. v Alvarado***, 84 AD3d 1354, 1355, 923 NYS2d 717 [2d Dept 2011]). The reasonableness of an insured's good faith belief in nonliability is a matter ordinarily left for trial (*see* ***Deso v London & Lancashire Indem. Co. of Am.***, 3 NY2d 127, 129,164 NYS2d 689 [1957]; ***Chiarello v Rio***, 101 AD3d 793, 957 NYS2d 133 [2d Dept 2012]), and will only be determined as a matter of law where the evidence, when construed in favor of the insured, establishes that

the belief was inherently unreasonable or formed in bad faith (*see* ***Zimmerman v Peerless Ins. Co.***, 85 AD3d 1021, 1024, 926 NYS2d 124 [2d Dept 2011]; ***Courduff's Oakwood Rd. Gardens & Landscaping Co., Inc. v Merchants Mut. Ins. Co.***, 84 AD3d 717, 922 NYS2d 212 [2d Dept 2011]; ***McGovern-Barbash Assoc., LLC v Everest Natl. Ins. Co.***, 79 AD3d 981, 914 NYS2d 218 [2d Dept 2010]).

Here, Interstate established its prima facie entitlement to judgment as a matter of law by demonstrating that it was not provided with notice of the subject accident until approximately 16 months after it had occurred (*see* ***Deso v London & Lancashire Ind. Co.***, 3 NY2d 127, 164 NYS2d 689 [1957]; ***Hanson v Turner Constr. Co.***, 70 AD3d 641, 897 NYS2d 116 [2d Dept 2010]; ***Gershow Recycling Corp. v Transcontinental Ins. Co.***, 22 AD3d 460, 801 NYS2d 832 [2d Dept 2005]), and that DeMatteis failed to send it copies of the underlying complaint for more than 50 days after its receipt of such complaint (*see* ***Vale v Vermont Mut. Ins. Group***, 112 AD3d 1011, 977 NYS2d 117 [3d Dept 2013]; ***Board of Hudson Riv.-Black Riv. Regulating Dist. v Praetorian Ins. Co.***, 56 AD3d 929, 867 NYS2d 256 [3d Dept 2008]; ***Steadfast Ins. Co. v Sentinel Real Estate Corp.***, 283 AD2d 44, 727 NYS2d 393 [1st Dept 2001]). Significantly, Interstate submitted evidence that DeMatteis' project superintendent Klaus Horatschek filed an incident report on the date of the accident, that Horatschek and the assistant project manager knew that Allen's injuries required he be taken to the hospital via an ambulance, and that DeMatteis' risk manager Steven Mezick became aware of the accident no later than June 10, 2009, when he authorized payment of a $1,500 fine to OSHA after it determined that DeMatteis was liable for an "Unprotected sides and edges" violation in relation to the subject accident (*see* ***Rivera v Core Cont. Constr. 3, LLC***, 106 AD3d 636, 966 NYS2d 50 [1st Dept 2013]; ***Tower Ins. Co. of N.Y. v. Jaison John Realty Corp.***, 60 AD3d 418, 874 NYS2d 91 [1st Dept 2009]). The adduced evidence further indicates that DeMatteis was served with the underlying complaint on March 22, 2010, that the complaint alleged, among other things, strict liability under the Labor Law, and that, despite providing its own insurer with such complaint on March 31, 2010, it still failed to notify Interstate of the accident or provide it with a copy of said complaint until May 19, 2010. It is noted that where, as in this case, the subject insurance policy was issued prior to January 17, 2009, Interstate need not demonstrate that it was prejudiced by DeMatteis' failure to provide timely notice of the underlying accident to meet its prima facie burden on the motion (*see* ***Chiarello v Rio***, *supra*; ***Ponok Realty Corp. v United Natl. Specialty Ins. Co.***, *supra*).

In opposition, DeMatteis failed to adduce facts which raised a triable issue of fact as to whether its delay was reasonable and related to a good faith belief in nonliability (*see* ***Zuckerman v New York***, 49 NY2d 557, 427 NYS2d 595 [1980]; ***Roth v Barreto***, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]). Although DeMatteis' risk manager testified that he did not recall receipt of the incident report sent to him by the project supervisor, mere neglect or inadvertence on the part of DeMatteis' employees in reporting or recording the accident is not a valid excuse (*see* ***Board of Hudson Riv.-Black Riv. Regulating Dist. v Praetorian Ins. Co.***, 56 AD3d 929, 867 NYS2d 256 [3d Dept 2008]; ***Todd v Bankers Life & Cas. Co.***, 135 AD2d 1066, 523 NYS2d 206 [3d Dept 1987]). Indeed, where, as here, DeMatteis' superintendent obtained knowledge of the accident shortly after it occurred, such knowledge may be imputed to DeMatteis (*see* ***Paramount Ins. Co. v Rosedale Gardens, Inc.***, 293 AD2d 235, 743 NYS2d 59 [1st Dept 2002]; ***Holyoke Mut. Ins. Co. v B.T.B. Realty Corp.***, 83 AD2d 603, 441 NYS2d 301 [2d Dept 1981]; ***Bauer v Whispering Hills Assocs.***, 210 AD2d 569, 620 NYS2d 147 [2d Dept 1994]). The court also rejects DeMatteis' assertion that the term "as soon as practicable" is ambiguous, and should be interpreted against Interstate, as the term has been construed as a "condition precedent" and has been specifically interpreted to mean "within a reasonable time period" (***Great Canal Realty Corp. v Seneca Ins. Co.***, 5 NY3d 742, 743, 800

NYS2d 521 [2005]; *see* ***Guideone Ins. Co. v Darkei Noam Rabbinical Coll.***, 120 AD3d 625, 992 NYS2d 66 [2d Dept 2014]).

Further, as discussed above, DeMatteis' project supervisor and assistant project manager were both aware that Allen's injuries were serious, and that fines were imposed by OSHA in relation to DeMatteis' alleged failure to erect a guardrail or safety net which may have prevented the accident. DeMatteis' purported belief in its nonliability is belied by Allen's approximate four-month absence from the worksite following the accident, and the court is not persuaded by its purported reliance on the defense that the worksite was a federal enclave, since it raised such defense for the first time in response to Allen's motion for summary judgment, and such a defense, at best, would have reduced rather than eliminated its liability. DeMatteis also failed to demonstrate that the motion is premature, as it "failed to offer an evidentiary basis to suggest that [further] discovery may lead to relevant evidence" warranting denial of the motion (*see* ***Conte v Frelen Assoc., LLC***, 51 AD3d 620, 621, 858 NYS2d 258 [2d Dept 2008]; *see* CPLR 3212 (f); ***Lopez v WS Distrib., Inc.***, 34 AD3d 759, 825 NYS2d 516 [2d Dept 2006]). Although the note of issue has not been filed, the record indicates that extensive discovery has been conducted, including party depositions. The "mere hope or speculation that evidence sufficient to defeat a motion for summary judgment may be uncovered" by further discovery is an insufficient basis for denying the motion (***Lopez v WS Distrib. Inc.***, *supra* at 760; *see* ***Mahoney v Turner Constr. Co.***, 37 AD3d 377, 831 NYS2d 47 [1st Dept 2007]). Accordingly, Interstate's motion for summary judgment dismissing DeMatteis' third-party complaint against it is granted.

Interstate also moves for summary judgment dismissing RJR's third-party complaint on a similar basis, arguing that, like DeMatteis, RJR failed to provide it with notice of the underlying claim until approximately 16 months after the accident, thereby violating the condition precedent that accidents be reported to the insurer "as soon as practicable." Interstate further argues that RJR failed to fulfill its independent duty to provide Interstate with a copy of the summons and complaint for the underlying claim. RJR opposes the motion on the ground a triable issue exists as to whether its delay was reasonable, since, among other things, it changed its location and was not personally served with the underlying complaint, and only learned of Allen's claim on May 19, 2010, when DeMatteis demanded coverage as an additional insured. RJR also asserts that it had a good faith belief in its nonliability, since, as admitted by Interstate's own claims adjuster, it did not appear that the accident was caused in whole or in part by its acts or omissions or by anyone acting on its behalf.

Under the circumstances of this case, even when the facts are construed in the light most favorable to the non-moving party, Interstate established its prima facie entitlement to summary judgment dismissing RJR's third-party complaint by demonstrating that RJR completely failed to provide it with a copy of the underlying complaint, and belatedly provided notice of the claim 16 months after the alleged accident occurred (*see* ***Deso v London & Lancashire Ind. Co.***, *supra*; ***Vale v Vermont Mut. Ins. Group***, *supra*; ***Hanson v Turner Constr. Co.***, *supra*; ***Gershow Recycling Corp. v Transcontinental Ins. Co.***, *supra*). RJR does not dispute its delay in providing notice or its failure to send Interstate a copy of the underlying complaint. Contrary to RJR's assertions, its failure to update its address with the Secretary of State does not relieve an insured of its contractual duty to provide notice of the claim "as soon as practicable" (*see* ***Briggs Ave. L.L.C. v Ins. Corp. of Hannover***, 550 F.3d 246 [2d Cir. 2008]), or its independent obligation to forward a copy of the complaint to its insurer (*see* ***Roofing Consultants, Inc. v Scottsdale Ins. Co.***, 273 AD2d 933,709 NYS2d 782 [4th Dept 2000] [neither notice provided by another insured nor the insurer's

actual knowledge of the claim satisfies the contractual obligation of the insured to give timely notice]; *see also* ***City of New York v St. Paul Fire & Mar. Ins. Co.***, 21 AD3d 978, 801 NYS2d 362 [2d Dept 2005]). Whether notice can be imputed to RJR when its vice president first learned of the accident on January 5, 2009, or the day it finally received the underlying complaint on March 22, 2010, RJR failed, as a matter of law, to comply with the notice requirement of its insurance agreement with Interstate. Moreover, as noted above, where, as in this case, the subject insurance policy was issued prior to January 17, 2009, Interstate need not demonstrate that it was prejudiced by RJR's untimely notice before it can disclaim coverage (*see* ***Chiarello v Rio***, *supra*; ***Ponok Realty Corp. v United Natl. Specialty Ins. Co.***, *supra*).

RJR also failed to raise a triable issue as to whether its delay in providing notice to Interstate was based on its good faith belief it was not liable (*see* ***Zuckerman v New York***, *supra*; ***Roth v Barreto***, *supra*). Even assuming arguendo, that RJR believed that it could not be held liable because it was not the owner of the subject premises, the credibility of its belief in nonliability is undercut by its broad contractual obligation to indemnify DeMatteis for injuries arising out the performance of the work "by reason of the acts or omissions. . . of [RJR] or anyone directly or indirectly employed by [RJR] in connection with the work regardless of whether said acts or omissions are caused in part by a party or parties indemnified" under the subcontractor agreement. Indeed, RJR never conducted an investigation of the accident to determine its potential liability, the liability of any of its additional insureds, or sought any information from its insurer as to such potential liability (*see* ***Rivera v Core Cont. Constr. 3, LLC***, *supra*; ***National Union Fire Ins. Co. of Pittsburgh, Pa. v Great Am. E&S Ins. Co.***, 86 AD3d 425, 926 NYS2d 508 [1st Dept 2011]). Having determined that RJR's delay was neither reasonable nor based on a good faith belief in nonliability, the court rejects its assertion that Interstate acted in bad faith, and its belated request for reimbursement of attorney's fees. Accordingly, Interstate's motion for summary judgment dismissing RJR' third-party complaint against it is granted.

Dated MAR 26 2015

HON. JOSEPH A. SANTORELLI
J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION

TO: O'CONNOR, O'CONNOR, HINTZ, & DEVENEY, LLP
Attorney for Third-Party Defendant Anron Sheet Metal Corp.
One Huntington Quadrangle, Suite 3C01
Melville, New York 11747

ROBINSON & COLE LLP
Attorney for Third-Party Defendant Interstate Fire
280 Trumbull Street
Hartford, Connecticut 06103

GOLDBERG & SEGALLA LLP
Attorney for Second Third-Party Defendant Liberty Mutual/Peerless Insurance
665 Main Street
Buffalo, New York 14203