Estee Lauder Inc. v OneBeacon Ins. Group, LLC
2015 NY Slip Op 30520(U)
April 7, 2015
Supreme Court, New York County
Docket Number: 602379/05
Judge: Carol R. Edmead
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[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 35

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ESTEE LAUDER INC.,

Plaintiff,

-against-

ONEBEACON INSURANCE GROUP, LLC (successor in interest to CGU INSURANCE, f/k/a EMPLOYERS GROUP OF INSURANCE COMPANIES, EMPLOYERS COMMERCIAL UNION INSURANCE CO. OF AMERICA and COMMERCIAL UNION INSURANCE COMPANY), ONEBEACON INSURANCE COMPANY and ONEBEACON AMERICA INSURANCE COMPANY,

Defendants.

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Index No. 602379/05

DECISION/ORDER

Motion Seq. 023

Hon. Carol R. Edmead, J.S.C.:

MEMORANDUM DECISION

Plaintiff Estee Lauder Inc. ("Estee Lauder") commenced this insurance declaratory judgment action to compel defendants OneBeacon Insurance Group, LLC,[1] OneBeacon Insurance Company and OneBeacon America Insurance Company (collectively, "OneBeacon") to pay defense costs and indemnify it for underlying claims brought against Estee Lauder arising from the alleged dumping of hazardous wastes in two landfills on Long Island.

OneBeacon now moves for leave to reargue the branch of its motion for summary judgment motion, which this Court denied.

Factual Background

In 1999, the State identified Estee Lauder as a potentially responsible party ("PRP") concerning hazardous waste disposals at certain landfills, *to wit*: the Blydenburgh Landfill and

[1] All of OneBeacon's predecessors will also be referred to as "OneBeacon."

Huntington Landfill (the "Landfills") (collectively, the "Landfill PRP Claims"). In 2001, the State filed a Federal Court action (*State of New York v Hickey's Carting, Inc.*, Case No. CV 01-3136 (EDNY) (*"Hickey's Carting"*)), seeking recovery of costs it incurred to remediate the Blydenburgh Landfill, and a third-party action was filed against Estee Lauder in that action (together, the Landfill PRP Claims and third-party action are referred to as the "Environmental Claims").

In reliance on a certain insurance policy (the "Policy"), Estee Lauder tendered the defense of the Environmental Claims (Amended Complaint, ¶¶ 31, 40, and 48), and OneBeacon declined to defend or settle the three claims (Amended Complaint, ¶¶ 35, 41, and 49). As a result, this declaratory judgment action ensued.

In September 2005, OneBeacon interposed the four affirmative defenses, which are collectively referred to herein as the "Late Notice Defenses."

OneBeacon moved to dismiss the amended complaint on the ground that Estee Lauder failed to provide prompt notice of the Environmental Claims. Estee Lauder cross moved to dismiss OneBeacon's Late Notice defenses. By order dated December 11, 2006, the Court granted OneBeacon's motion and dismissed the complaint on the ground that Estee Lauder provided late notice of the Environmental Claims in violation the notice provisions of the alleged Policy.

On appeal, the First Department held that OneBeacon *waived* any defenses based on late notice, and thus, was obligated to pay the "reasonable and necessary" costs Estee Lauder incurred in defending the Environmental Claims (the "First Department Decision").[2] The First

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[2] *Estee Lauder Inc. v OneBeacon Ins. Group, LLC*, 62 AD3d 33, 873 NYS2d 592 [1st Dept 2009].

Department stated:

> . . . [A]n insurer is deemed . . . to have intended to waive a defense to coverage where other defenses are asserted, and where the insurer possesses sufficient knowledge . . . of the circumstances regarding the unasserted defense . . . . On the basis of, among other things, a tolling agreement between Lauder and the Attorney General relating to the Blydenburgh landfill claim that Lauder produced to OneBeacon in April 2000 . . ., a notice of potential claim relating to the Huntington landfill that Lauder provided to OneBeacon in 1987 and a notification made by Lauder to OneBeacon . . . in May 1999 that the Attorney General had identified it as a "potentially responsible party" in connection with the Huntington landfill, it is clear that long before its July 2002 and November 2002 letters OneBeacon had sufficient knowledge of the circumstances relating to its defense of untimely notice.

On March 6, 2012, Estee Lauder filed its Third Amended Complaint, which was followed by OneBeacon's Amended Answer to the Third Amended Complaint ("Amended Answer"); this Amended Answer omitted the Late Notice Defenses.

Two years later, on June 10, 2014, the Court of Appeals issued its decision in *Key-Span Gas East Corporation v Munich Reinsurance America*, 23 NY3d 583 [2014] ("*Key-Span*"), which addressed an insureds' (similar) claim that their insurers had a duty to defend and indemnify them for environmental damage claims arising from gas plant sites. In *Key-Span*, the Court of Appeals specifically stated, in a footnote, that:

> To the extent [the First Department Decision] *Estee Lauder Inc. v OneBeacon Ins. Group, LLC*, 62 A.D.3d 33, 873 N.Y.S.2d 592 (1st Dept.2009), cited by the Appellate Division here, and other Appellate Division cases hold that Insurance Law § 3420(d)(2) applies to claims not based on death and bodily injury (*see Hotel des Artistes, Inc. v General Acc. Ins. Co. of Am.*, 9 A.D.3d 181, 193, 775 N.Y.S.2d 262 [1st Dept.2004] . . . those cases were wrongly decided and should not be followed.

OneBeacon then moved to amend its Amended Answer to re-assert the Late Notice Defenses (motion sequence 022), and for summary dismissal of the complaint based on such affirmative defenses (motion sequence 021) as a result of *Key-Span*. OneBeacon argued that

Key-Span effectively overruled the First Department Decision, and that the issue of whether OneBeacon was required to defend or indemnify Estee Lauder was once again before the Court.

Estee Lauder opposed the motion, arguing that the proposed Late Notice Defenses lacked merit because (1) they were waived by OneBeacon's voluntary withdrawal of same, more than 26 months after the First Department ruled, and (2) OneBeacon's claims handler testified that both of the Landfill PRP claims were "made" and "noticed" to Estee Lauder in "1999" (and not "1998" as OneBeacon originally argued in its 2006 summary judgment motion) and thus, such claims were noticed within a reasonable time (two months) to OneBeacon in mid-May 1999. Estee Lauder also pointed out that the claims' handler's deposition testimony was, in part, the reason for OneBeacon's withdrawal of the Late Notice Defenses.

In reply, OneBeacon argued that Estee Lauder did not allege any prejudice by the amendment, and thus, the amendment should be permitted. OneBeacon also argued that it did not irrevocably waive its right to defend on late-notice grounds by temporarily withdrawing its Late Notice Defenses. In any event, in the absence of prejudice, caselaw permits an amendment to reassert defenses deemed waived.

By order dated February 9, 2015, this Court granted OneBeacon leave to reassert its Late Notice Defenses, but denied summary judgment on those Defenses, and stated as follows:

> In light of the undeveloped record as to OneBeacon's intent in withdrawing the Late Notice Defenses, Estee Lauder failed, at this juncture, to establish that OneBeacon's Late Notice Defenses lack merit so as to bar its application to amend its Answer to assert same.
>
> Furthermore, Estee Lauder failed to sufficiently assert a claim of surprise or prejudice in its preparation of its defense to any Late Notice Defense raised by OneBeacon.
>
> Therefore, OneBeacon's motion for leave to assert the Late Notice Defenses is granted.

> However, *summary judgment in favor of OneBeacon based upon such Defenses is unwarranted, at this juncture. OneBeacon essentially argues that Key-Span mandates that this Court reinstate its earlier Decision*, in which it purportedly found that (1) Estee Lauder failed as a matter of law to provide timely notice of its claims, and (2) OneBeacon reserved its rights to decline coverage and did not waive its Late Notice Defenses. *However, sworn testimony concerning the circumstances giving rise to OneBeacon's withdrawal of the Late Notice Defense during this litigation must be explored; such factors did not exist at the time of this Court's Decision.*
> (Emphasis added).

OneBeacon now moves for leave to reargue its summary judgment motion, arguing that summary judgment should have been granted because OneBeacon *was incapable* of waiving the right to assert a Late Notice Defense between February 2009 and June 2014 because the right did not exist. The First Department held in February of 2009 that OneBeacon could not invoke its right to prompt notice, and thus, as of February 2009, OneBeacon's right to raise a Late Notice Defense no longer existed. Thus, when OneBeacon removed the Late Notice Defenses by amending its answers filed in 2011 and 2012, it could not, as a matter of law, have permanently waived such Defenses, because the Defenses were not then rights OneBeacon could have enforced, as a matter of law. In mid-2014, when the Court of Appeals abrogated the First Department Decision in *Key-Span*, OneBeacon's Late Notice Defenses became available again.

OneBeacon asserts that it was not possible for events pre-dating the creation of the right (*via Key-Span*) to give rise to a common law waiver, irrespective of the party's mindset, statements, or conduct. Since OneBeacon was unable to perform a common law waiver under these circumstances, the intent behind omitting from the amended answers is not legally relevant.[3] OneBeacon argues that for a litigant to be capable of waiving a contractual right, it

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[3] OneBeacon further asserts that because a litigant's attorneys are generally responsible for the substantive defenses alleged in the pleadings, any factual investigation into the rationale for those defenses would necessarily involve privileged communications and work product. Requiring a party's lawyers to testify in a case is an

must first know of the existence of an enforceable right, and then manifest the intent to relinquish it. Given that the Late Notice Defense was not a "known right" at the time OneBeacon withdrew it from its Amended Answer, the withdrawal could not have created a waiver of the defense. Consequently, no further factual inquiry or discovery is necessary for the Court to grant OneBeacon's summary judgment. Further, under caselaw, the failure to pre-emptively plead an affirmative defense that is only later established by an intervening higher court decision does not amount to waiver, because the availability of that defense was, as a matter of law, unknowable.

In opposition, Estee Lauder first argues that OneBeacon's motion does not allege any overlooked or misapprehended facts or law. Instead, OneBeacon raises a new argument by its motion: that a conditional right is somehow not a "known" right, such that a conditional right can never be waived. In its Opposition brief below, Estee Lauder argued that "OneBeacon's post-suit conduct operated to waive late notice," and devoted a section of its Background to setting forth the known facts leading up to OneBeacon's curious withdrawal of its late notice defense. In its Reply, OneBeacon never argued that its conditional right to assert a late notice defense was immune from waiver by post-suit conduct or otherwise. Of the 14 cases OneBeacon cites in its present motion, only two of the cases were cited in OneBeacon's four briefs to this Court: the First Department Decision and *Key-Span*. The other 12 cases are all newly cited cases that OneBeacon erroneously cites as supporting its argument that a conditional right cannot be waived. OneBeacon cannot identify a single fact or element of law that was overlooked or

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footnote 3, cont'd.

exceedingly rare remedy . And, OneBeacon expects that its prior counsel, will, if required, provide testimony confirming the lack of any intent to waive OneBeacon's defenses.

misunderstood by this Court when it correctly denied OneBeacon's motion for summary judgment and ruled that discovery was necessary as to whether OneBeacon intended to waive its late notice defense. And, OneBeacon's attempt to limit the discovery as to what it was thinking when it waived its right to assert the Late Notice Defenses is unwarranted, as such issue is an inherently factual issue of OneBeacon's state of mind presented by its position. Under the CPLR, Estee Lauder is entitled to all permissible discovery on this issue.

Further, OneBeacon's right to assert a late notice defense always existed and was always known to OneBeacon. It is black letter law that a party can prospectively waive a known right it does not yet or currently possess.

Because OneBeacon (I) knew that it held a current right to plead late notice notwithstanding the First Department Decision (as OneBeacon continued to plead late notice for 26 months after the First Department Decision was decided), (ii) knew that it had a conditional right to pursue late notice (as it acknowledges here), (iii) took action inconsistent with an intention to pursue late notice even if the condition were to incur (admitting that the claims were made in 1999 while eliminating defenses that depended on a "1998" claim date), and (iv) presented no admissible evidence indicating anything but an actual-intent waiver, the current facts on record are sufficient to compel a finding of actual intent waiver. OneBeacon's cases involve parties who established they were truly ignorant that they held conditional or immediate rights at the time of their alleged waiving conduct.

Thus, the Court properly ruled that discovery is needed to evaluate the "circumstances giving rise to OneBeacon's withdrawal of the Late Notice Defense during this litigation."

In any event, OneBeacon did not raise the affirmative defense of late notice until three

years after it issued its disclaimer letters in 2002. Then, it only raised its affirmative defense in its answer in 2005, and ultimately, in its 2006 summary judgment briefing. In 2009, without reaching whether Estee Lauder's notice was in fact late, the First Department held that OneBeacon waived its late notice defense by not including it in its 2002 disclaimer letters and ordered OneBeacon to pay Estee Lauder's Blydenburgh and *Hickey's Carting* defense costs. OneBeacon was then left with a difficult decision of either (a) continuing to argue that the claim was made in 1998, and be held responsible for defense costs starting in 1998 or (b) adopting Estee Lauder's position that the claim was made in 1999, thus saving it a year of defense costs, but ultimately abandon its ability to argue that Estee Lauder noticed the claim late (because it should have been noticed in 1998 following the Tolling Agreement). Because the First Department did not rule on when the claim was considered "made," the factual determination remained disputed by the parties. OneBeacon's actions following the First Department Decision provide objective *indicia* of OneBeacon's subjective intent to abandon its late notice defense, instead placing a higher premium on not paying defense costs starting in 1998.

Further, as of May 2011, OneBeacon still had not paid any of the legal fees Estee Lauder had incurred since 1998, despite the First Department's directive that such fees be paid "promptly." Instead, OneBeacon strategically began to change its position about when the claim was made. On May 6, 2011, OneBeacon removed late notice defense language from its answer. OneBeacon's new 2011 amended answer eliminated the reference to "notice" in its third affirmative defense, replacing the word with "subrogation."

Further, OneBeacon removed entirely its thirty-eighth affirmative defense which originally asserted:

> OneBeacon is not liable to Plaintiff to the extent that Plaintiff has failed to comply with the notice requirements of the alleged ELAC insurance policy. To the extent that OneBeacon was not provided with timely and proper notice as required by the alleged ELAC insurance policy with respect to the alleged occurrences, claims or suits alleged in Plaintiff's First Amended Complaint, OneBeacon is not liable to defend or indemnify Plaintiff.

As to OneBeacon's position on the extent of its reimbursement liability for fees incurred in 1998, 1999, and after 1999, Estee Lauder took the organizational deposition of OneBeacon on May 11, 2011. OneBeacon's corporate designee and the claims handler for the Estee Lauder Policy, Ed Albanese ("Albanese"), testified that the underlying Potentially Responsible Party "claims" were "made" in 1999. Albanese further acknowledged that notice of the 1999 claims was provided to OneBeacon in mid-May 1999. This testimony was consistent with Estee Lauder's timeline of coverage events. Indeed, the Potentially Responsible Party letter for Blydenburgh was issued on March 18, 1999, and the Potentially Responsible Party letter for Huntington was issued on May 5, 1999. By deleting its Late Notice Defenses from its answer and agreeing that the claim was made in 1999 rather than 1998, OneBeacon effectively eliminated its prior judicial admission that Estee Lauder's notice was late. And, in April 2012 when OneBeacon finally complied with the First Department's order to pay defenses costs, OneBeacon used the start date of 1999 rather than 1998 to calculate defense costs. Following payment, OneBeacon repeatedly represented to this Court and the First Department that by paying fees incurred in and after 1999 — but nothing from 1998 — OneBeacon had paid "all" defense costs incurred by Estee Lauder.

In so representing, OneBeacon judicially admitted once more that it determined that Estee Lauder's claims were made in 1999, and thus notice could not be late, even if it had a late notice

defense available to it.

Even if OneBeacon's lawyer were to testify that he amended the answer in May 2011 merely to conform to the First Department Decision, such testimony will be no more credible than when OneBeacon's current lawyer, Michael Miller, averred to the same facts in the affirmation he signed under penalty of perjury (despite his lack of personal knowledge of same). As noted, the other May 2011 amendments continued to press allegations that the First Department Decision expressly rejected. Additionally, OneBeacon's new conclusory assertion, that its designee may have been confused when he swore in May 2011 that it was now OneBeacon's position that the underlying claims were made in "1999" cannot explain what OneBeacon's witness understood when it testified four years ago that the claims were made in 1999, not 1998.

Estee Lauder contends that, although the First Department held that the Policy required OneBeacon to pay legal fees relating to the Blydenburgh and *Hickey's Carting* claims after those claims were made, it made no finding that Huntington-related fees were covered. However, OneBeacon had privately resolved that Huntington fees were covered (despite having pleaded in its May 2011 Answer that it owed no duty to defend any claim). Later in 2012, OneBeacon represented that it paid "all" costs incurred by Estee Lauder in connection with the "defense" of the "underlying claims relating to Huntington and Blydenburgh." To make that representation, OneBeacon had to accept "1999" as the claims-made date. If OneBeacon still maintained that the claim had been made in "1998" (the basis of its "late notice" defense), OneBeacon would have been required to take action to tender payment of the fees incurred in the year 1998 — or else face liability for failing to do so. In addition, OneBeacon's liability for prejudgment interest

would have been greater because its principal liability would have been greater. OneBeacon has admitted that its payment decision was motivated by its desire to minimize its liability for "prejudgment interest." Thus, it is no wonder that OneBeacon would prefer a reformation of the Order that would limit Estee Lauder's "discovery" to receiving a conclusory statement from former counsel simply denying an intent to waive. Such facts alone should have precluded the Court from granting OneBeacon's motion to amend.

In reply, OneBeacon argues that Estee Lauder's procedural barrier it seeks to erect is no obstacle. In its underlying reply papers, OneBeacon pointed out that Estee Lauder's position that OneBeacon could not, as a matter of law, amend its Answer because it had withdrawn the defense, was incorrect, and that the only standard for denying a motion to amend is upon a showing of prejudice.

Further, both parties agree that, prior to *Key-Span*, the First Department Decision prevented OneBeacon from pursuing a late-notice defense. Thus, OneBeacon's removal of the Late Notice Defenses cannot have effected a permanent waiver of such defenses under the common law. In a recent and related appellate brief, Estee Lauder argued that the First Department Decision rendered OneBeacon's Late Notice Defenses "futile." And, Estee Lauder's factual inquiries cannot make the First Department Decision—or the rights it removed—"conditional." No one contends that a contractual waiver took place, and this situation is not akin to an "options contract," where a known right exists but cannot by exercised for some time. When a right does not exist at the time of alleged waiver, it cannot be a "known right" as a matter of law, and that, from a common law waiver standpoint, there is nothing to waive.

Discussion

A motion for leave to reargue under CPLR 2221, "is addressed to the sound discretion of the court and may be granted only upon a showing 'that the court overlooked or misapprehended the facts or the law or for some reason mistakenly arrived at its earlier decision'" (*William P. Pahl Equipment Corp. v Kassis*, 182 AD2d 22 [1st Dept 1992] *lv denied and dismissed* 80 NY2d 1005, 592 NYS2d 665 [1992], *rearg. denied* 81 NY2d 782, 594 NYS2d 714 [1993]). On reargument the court's attention must be drawn to any controlling fact or applicable principle of law which was misconstrued or overlooked (*see Macklowe v Browning School*,80 AD2d 790, 437 NYS2d 11 [1st Dept 1981]).

Here, OneBeacon fails to point to any fact or law that the Court overlooked or misconstrued in reaching its determination. The argument that OneBeacon raises herein was not previously raised. When Estee Lauder asserted that OneBeacon's "post-suit conduct" operated to waive "late notice",[4] and argued that a proposed amendment lacking in merit should be barred regardless of any lack of prejudice, OneBeacon merely addressed the issue of prejudice, argued

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[4] For example, in its underlying opposition papers, Estee Lauder asserted, "For more than 26 months after the First Department ruled, OneBeacon stood upon, and did not amend or propose to amend, its affirmative defense that Estee Lauder provided notice of the PRP "claims" later than required by contract or law"; "in or before early May 2011, OneBeacon's claims handler, Ed Albanese, determined that the underlying PRP 'claims' were made in '1999'"; "Mr. Albanese further acknowledged that notice of the 1999 "claims" was provided to OneBeacon in mid-May 1999"; "OneBeacon has not come forward with an affidavit from any OneBeacon lawyer involved in amendments eliminating the late notice defense explaining what he or she was thinking at the time he or she withdrew the defense in May 2011, or what he or she was thinking when the late notice defense was maintained for the 26-month period after the First Department ruled that any late notice defense in this case was unsustainable"; "In contrast . . . the record bristles with evidence as to why OneBeacon would have reasonably concluded that *even if the adverse "waiver" law of the case were to be reversed or overruled, in whole or in part, OneBeacon could no longer prevail on its theory that the PRP claims should be deemed to have been "made" in "1998."* ; "OneBeacon's admission that the PRP claims were 'made' in 1999 not only explains OneBeacon's voluntary and intentional abandonment of its late notice defense, but it also creates, at minimum, a question of fact that would preclude the grant of summary judgment for OneBeacon even if its late notice defense had not been waived by its pre-suit conduct pursuant to New York's common law and by its post-suit conduct of withdrawing the defense " (Pp. 10-11, 16, 17).

that the proposed amendment cured any "prior waiver" (Reply Memorandum of Law, dated November 23, 2014, page 3, fn. 2), and distinguished the caselaw cited by Estee Lauder. When referencing Estee Lauder's post-suit waiver contention, OneBeacon explained that because Estee Lauder did not assert any prejudice, the Court need not address the post-suit waiver theory (id. page, 3); the motion to amend was the proper means to cure any post-suit waiver conduct (id., page 3, fn. 2); and OneBeacon did not fail to plead its Late Notice Defenses with particularity (pages, 4-6). OneBeacon clearly had the opportunity to raise the very argument it raises now, *i.e.*, that as a matter of law, its post-suit conduct of withdrawing its Late Notice Defenses could not operate as a waiver as it could only waive a "known right," a right which did not exist at the time the Amended Answer was filed. Reargument is not designed to afford the unsuccessful party successive opportunities to reargue issues previously decided (*Pro Brokerage v Home Ins. Co.*, 99 AD2d 971, 472 NYS2d 661 [1st Dept 1984]) or to present arguments different from those originally asserted (*Foley v Roche*, 68 AD2d 558, 418 NYS2d 588; *Pahl Equip. Corp. v Kassis*, 182 AD2d at 27; *Kent v 534 East 11th Street*, 80 AD3d 106, 912 NYS2d 2 [1st Dept 2010]). That this Court held that the record was insufficient to determine the issue of waiver as a matter of law for purposes of summary judgment is not a basis to raise the new argument.

Therefore, reargument is unwarranted.

In any event, even if the Court were to address the merits of the argument that OneBeacon could not have waived its Late Notice Defenses since such Defenses were not available to it, such argument is insufficient to warrant a change in this Court's previous determination.

In this regard, the Court must separate the wheat from the chaff.

OneBeacon's ability to "assert" or "state" the affirmative defense of Late Notice is

materially distinct from whether OneBeacon substantively waived the affirmative defense of Late Notice.

The issue of whether OneBeacon may "assert" the affirmative defense of Late Notice was granted by the Court. As this Court previously reasoned, it remains unchallenged that "Estee Lauder failed to sufficiently assert a claim of surprise or prejudice in its preparation of its defense to any Late Notice Defense raised by OneBeacon." (Decision, p. 13). OneBeacon does not now reargue this point on which it prevailed.

However, at issue on this reargument motion, as noticed by OneBeacon, is whether the Court's denial of summary judgment was appropriate. Summary judgment in favor of OneBeacon rests, in part, upon a showing that it did not waive the Late Notice Defenses as a matter of law. OneBeacon now argues that, as a matter of law, it did not waive the Late Notice Defense by its filing of the Amended Answer because the defense (or right to pursue the defense) did not exist at that time.

The Court agrees, that at the time OneBeacon filed its Amended Answer, the Late Notice Defenses had been deemed waived by the First Department; the ability to assert the Late Notice Defenses was not available to OneBeacon at that juncture.

However, that does not mean that OneBeacon, through its interactions with Estee Lauder, had not still "waived" such defense (and abandoned the claim that Estee Lauder's notice was late).

OneBeacon's filing of the Amended Answer *also* came after OneBeacon's claims handler testified (arguably, consistent with the First Department Decision) that the Environmental claims against Estee Lauder were "made" in 1999 and that Estee Lauder provided notice in May 1999.

When the First Department, in 2009, held that OneBeacon waived its Late Notice Defense, and ordered OneBeacon to pay Estee Lauder's defense costs related to the Blydenburgh and *Hickey's Carting* claims "promptly," OneBeacon did not pay such defense costs until in April 2012, *after* OneBeacon's claims handler's deposition and right *after* Estee Lauder filed the Third Amended Complaint in March 2012. OneBeacon allegedly paid defense costs as mandated by the First Department using a start date of 1999, *consistent with the testimony of its claims handler.* Therefore, it cannot be said that OneBeacon's withdrawal of its Late Notice Defenses was not waiver of the Late Notice Defenses, and the circumstances merit further discovery of whether OneBeacon intended to abandon the Late Notice Defense, notwithstanding the First Department's Decision. In other words, the Court need not accept at face value OneBeacon's conclusory claim that the sole or actual intent of withdrawing the Late Notice Defenses was due to the First Department Decision.

Therefore, as the present record fails to conclusively establish that OneBeacon waived or did not waive its Late Notice Defenses, the Court adheres to its earlier determination.

Conclusion

Based on the foregoing, it is hereby

ORDERED that OneBeacon's motions for leave to reargue the branch of its motion for summary judgment motion, is denied. And it is further

ORDERED that OneBeacon shall serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: April 7, 2015

Hon. Carol Robinson Edmead, J.S.C.

HON. CAROL EDMEAD