Conergics Corp. v Dearborn Mid-West Conveyor Co.
2015 NY Slip Op 31002(U)
June 4, 2015
Supreme Court, New York County
Docket Number: 653724/2012
Judge: Lawrence K. Marks
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 41

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CONERGICS CORPORATION, TOMKINS INDUSTRIES, INC.,

Plaintiffs,

-against- Index No. 653724/2012

DEARBORN MID-WEST CONVEYOR CO., DMW SYSTEMS, INC., KNOX LAWRENCE INTERNATIONAL, LLC,

Defendants.

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LAWRENCE K. MARKS, J.

Plaintiffs Conergics Corporation (Conergics) and Tomkins Industries, Inc. (TII) (together plaintiffs) move for an order granting them partial summary judgment on their fourth claim for declaratory relief, and dismissing defendants' Dearborn Mid-West Conveyor Co.'s (Dearborn) and DMW Systems, Inc.'s (DMW) (together Dearborn defendants) three counterclaims for breach of contract and declaratory relief (motion sequence No. 002). Dearborn defendants move for an order granting them summary judgment on their three counterclaims for breach of contract and declaratory relief, and dismissing plaintiffs' fourth claim (motion sequence No. 003). The motions are consolidated for disposition.

In this action, the parties seek a declaration as to whether plaintiffs, the sellers, were obligated under the parties' 2007 stock purchase agreement to indemnify defendant DMW, the buyer, with respect to 2004 Mexican corporate income taxes that were assessed against defendant Dearborn Mid-West for the time when that company was solely owned by plaintiffs. The Mexican taxing authority, Servicio de Administration Tributaria (SAT), contended that the

Mexican taxing authority, Servicio de Administration Tributaria (SAT), contended that the company was not permitted to deduct certain business expenses because it allegedly had not established a Mexican domicile, assessed taxes. In 2012, the SAT initiated an audit, and the Dearborn defendants contend that they provided plaintiffs with prompt written notice and a demand for indemnification in accordance with the stock purchase agreement, and that, even if they did not, plaintiffs cannot demonstrate that they were actually prejudiced thereby because they cannot show any economic injury. Plaintiffs contend that the Dearborn defendants failed to notify or otherwise issue any demand for almost two years, which was in breach of the parties' agreement and resulted in an adverse outcome with the SAT, causing plaintiffs actual prejudice by depriving them of their sole right to represent Dearborn in any tax audit.

BACKGROUND

In 2004, Conergics owned 100% of the stock of Dearborn. Joint submission of undisputed facts (Joint facts), ¶ 7. Dearborn provides full-service conveyor systems to power generation, industrial, auto and parcel end-markets. *Id.* In 2004, Dearborn began certain business operations in Mexico, and filed tax returns there. *Id.* In March 2006, the SAT sent a letter initiating an audit for the 2004 tax year, and Dearborn responded to it. *Id.*, ¶¶ 8-9. In March 2007, the SAT issued an official letter with its proposed findings disallowing the deduction of business expenses in 2004 before Dearborn had allegedly established a lawful domicile in Mexico, resulting in an increase in Dearborn's tax obligation. *Id.*, ¶ 10. In April 2007, Dearborn replied to the SAT's findings, and in May 2007 the SAT assessed against Dearborn an amount due of MX $19,661,363.05 (pesos). *Id.*, ¶¶ 11-12. In August 2007,

Dearborn appealed the assessment by filing a petition for nullification with the Northeast Regional Chamber of the Federal Tribunal of Fiscal and Administrative Justice, an administrative court in Mexico for disputes with the SAT. *Id.*, ¶ 13. Dearborn posted a surety bond for the period while the petition was pending. *Id.*, ¶ 14.

In November 2007, plaintiffs Conergics and TII and defendants DMW and Knox Lawrence International, LLC (KLI) entered into the stock purchase agreement (SPA), under which DMW purchased from Conergics all of the issued and outstanding capital stock of Dearborn, with TII acting as the parent guarantor of Conergics in certain respects under Article 11 of the SPA. *Id.*, ¶¶ 15-16. In sections 2.9 and 8.5 of the SPA, the seller, Conergics, represented to the buyer, DMW, that all of Dearborn's income taxes had been paid except for certain matters listed in schedule 2.9, in which Conergics disclosed to DMW the 2004 Mexican tax assessment. *Id.*, ¶ 17. In section 8.1 of the SPA, Conergics agreed to fully indemnify DMW with regard to the 2004 Mexican tax assessment, and TII agreed to guarantee that indemnity obligation. The parties both agreed to cooperate fully with regard to filing tax returns and in connection with any tax audit, defined as any audit, examination or proceeding by any taxing authority, including retaining and providing records and information reasonably relevant to the tax audit. Complaint, Exhibit A; SPA § 8.1 at 55-56, § 8.5(a) at 59. In section 8.5(b), they further agreed with respect to tax audits:

> Notwithstanding any other provision in this Agreement, [Conergics] shall have the sole right to represent the Company's interests in any audit, examination or Proceeding by any Taxing Authority ('Tax Audit') with respect to taxable periods or portions thereof ending on or before the Closing Date, including, for the avoidance of doubt, the right to control any such Tax Audit, the right to settle, compromise and/or concede any such Tax Audit and

> the right to employ counsel of its choice at its expense . . . .

SPA § 8.5(b) at 59. In section 8.1© of the SPA, entitled "tax indemnification," the parties agreed:

> After the Closing Date, each party . . . shall promptly notify the other Party in writing of any demand, claim or notice of the commencement of a Tax Audit . . . received by such Party from any Taxing Authority or any other Person with respect to Taxes for which such other Party is liable pursuant to Article 6 or this Article 8; provided however, that a failure to give such notice will not affect such other Party's rights to indemnification under Article 6 or this Article 8, except to the extent that such Party is actually prejudiced thereby . . . .

SPA § 8.1© at 56. The consideration that DMW agreed to pay Conergics for the stock of Dearborn was based in part on the representations and covenants of Conergics, as guaranteed by TII, found in Article 8 of the SPA. Joint facts, ¶ 20.

During the period March 2006 to April 2008, Dearborn's Mexican contact person was Gustav Lopez, Controller of AMP Industrial Mexicana, S.A. de C.V., an indirect subsidiary of TII and a corporate affiliate of Conergics, and Lopez provided some accounting support for Dearborn. *Id.*, ¶¶ 26-27.

On April 14, 2008, the Mexican federal tribunal court ruled in connection with Dearborn's petition for nullification of the SAT's 2004 tax assessment, determining that it was void because of the SAT's violation of a Mexican tax law during the audit process. The tribunal did not resolve the issue of the deductibility of the business expenses in 2004 and propriety of the tax assessed in May 2007. *Id.*, ¶ 25. Conergics did not have to pay the tax, cancelled its bond and reimbursed Dearborn $66,000 for legal expenses. *Id.*, ¶ 30.

Four years later, on April 19, 2012, the SAT sent a letter to Dearborn announcing its

intention to review its audit of the Dearborn 2004 tax year in a "control procedure," reviewing Dearborn's 2004 taxes, requesting books and records and issuing a citation formally noticing its intent to re-audit. *Id.*, ¶ 33. The next day it issued a completed form, documenting its service of the citation. *Id.*, ¶ 34. On April 24, Ernesto Mosso Valdez (Mosso), Dearborn's Mexican accountant, sent an email to Michael Rutkowski of Dearborn, notifying him that there was a tax audit regarding the 2004 tax year, and Rutkowski sent an email to Tim Batchman, also of Dearborn, stating that Rutkowski needed "to get ahold of Tomkins," but he did not contact any representative for plaintiffs. *Id.*, ¶¶ 35-37.

On May 4, 2012, Mosso called Lopez, advising him of the SAT's decision to re-audit. *Id.*, ¶ 38. Mosso had Lopez sign a document to be filed in an "Amparo" proceeding in Mexican federal court for a constitutional challenge of the SAT's authority to re-audit the 2004 taxes. The Amparo is not a Tax Audit, as that term is defined in the SPA, because it is not an audit, examination or proceeding by a taxing authority. *Id.*, ¶ 39; *see* Complaint, Exhibit A; SPA § 8.5(b). Lopez had no further involvement in the Amparo. *Id.*, ¶ 40.

On May 12, 2012, Lopez emailed Kathy Sullivan, the assistant secretary of TII, stating: "I know that Dearborn is not part of Tomkins any more, but for your information I received a call last Friday from the actual accountant telling me that Mexican Tax authorities will review once more the 2004 fiscal year. If Tomkins is still involved in any way please tell me and I will update you on new happenings." Joint facts, ¶ 41.

On May 29, 2012, Mosso, on behalf of Dearborn, responded to the SAT and provided various requested documents. *Id.*, ¶ 42. On October 31, 2012, the federal court in the Amparo proceeding denied the Amparo, and Dearborn then appealed. *Id.*, ¶¶ 43-44.

A little less than a year later, on September 13, 2013, the SAT issued a letter to Dearborn with its proposed findings from its review of Dearborn's 2004 taxes. *Id.*, ¶ 45. On October 15, 2013, Mosso responded on Dearborn's behalf, without the assistance of legal counsel, denying any tax liability. In the response, Mosso asserted that the SAT could not conduct an audit process against Dearborn for the same time period on which a tax deficiency had already been assessed, but did not assert a statute of limitations argument. *Id.*, ¶ 46.

On October 24, 2013, the appeals court affirmed the decision of the federal judge in the Amparo, which allowed the SAT to proceed with an audit against Dearborn. *Id.*, ¶ 47. On November 19, 2013, the SAT issued a tax assessment, based on the second audit, of MX $29,666,985.97, which included taxes, surcharges and fines. *Id.*, ¶ 48.

By letter dated January 24, 2014, Dearborn defendants made a written demand to plaintiffs for indemnification relating to the tax assessment from the second audit (Demand Letter). *Id.*, ¶ 49, and Exhibit B annexed thereto. In this demand, Dearborn defendants sought reimbursement for fees and costs for Dearborn's accountants and lawyers. *Id.*, ¶ 51. The Demand Letter stated that February 11, 2014 was the deadline to protect Dearborn's rights and appeals. *Id.*, ¶ 52, and Exhibit B annexed thereto.

By letter dated January 30, 2014, plaintiffs acknowledged receipt of the Demand Letter, but denied any obligation to indemnify Dearborn defendants regarding the 2004 taxes. *Id.*, ¶ 53, and Exhibit C annexed thereto.

On February 10, 2014, Dearborn defendants filed with the local legal office of the SAT an administrative appeal of the November 19, 2013 assessment. *Id.*, ¶ 55. By letter dated April 9, 2014, the SAT advised Dearborn that in light of the appeal it would stay execution of the tax

assessment until a decision was issued. *Id.*, ¶ 56. On April 29, 2014, the SAT issued a ruling, denying Dearborn's administrative appeal and affirming the November 19, 2013 tax assessment, and on May 20 informed Dearborn that it had 45 days to file a petition for annulment with the tribunal. *Id.*, ¶ 57.

By letter dated May 23, 2014, Dearborn defendants made another indemnification demand on plaintiffs, and plaintiffs again objected to the demand. *Id.*, ¶ 58 and exhibits F and G annexed thereto.

On August 12, 2014, Dearborn defendants filed an annulment action with the tribunal with regard to the SAT's April 29, 2014 decision, for which it hired a tax litigation firm that asserted a number of arguments on Dearborn's behalf, including the statute of limitations. *Id.*, ¶ 59. The annulment action remains pending, so there has been no final adjudication on the merits of the SAT's tax assessment, the tax has not yet been paid and the bond posted by Dearborn remains in place. *Id.*, ¶ 61.

Plaintiffs commenced this action seeking recovery against DMW for breach of its obligations under Article 4.7(h) of the SPA; against KLI for breach of the SPA; for specific performance against DMW under a subordination agreement; and for a declaration that plaintiffs are not obligated to indemnify defendants for costs related to the second audit (the fourth claim).

Defendants answered the complaint, and asserted three counterclaims for breach of plaintiffs' duty to indemnify under section 8 of the SPA; breach of the duty to indemnify under section 6 of the SPA; and a declaration that plaintiffs are obligated to assume the indemnity obligations associated with the 2004 Mexican corporate tax liability as required by sections 2, 6 and 8 of the SPA.

Plaintiffs now move for partial summary judgment on the fourth claim for declaratory relief, asserting that they are not obligated to indemnify defendants pursuant to sections 6.3 and 8.1 of the SPA for taxes owed and other costs related to the 2012 second tax audit by the SAT, and dismissing defendants' identical counterclaims. They argue that defendants have breached three provisions of the SPA regarding the obligations to indemnify: the prompt notice provision in section 8.1©; plaintiffs' sole right to represent in Section 8.5(b); and the cooperation provision in section 8.5(a). They contend that these breaches excuse plaintiffs from indemnifying defendants in connection with the second audit. On the prompt notice provision, plaintiffs point to the fact that Dearborn received communications from the SAT in April 2012, which were the commencement of a tax audit within the meaning of section 8.1© requiring prompt written notice, but that Dearborn defendants failed to notify plaintiffs until 21 months later. They present emails between Mosso and Rutkowski indicating that Dearborn was aware that a tax audit was commencing, and that they needed to "get ahold of" plaintiffs. Joint facts, ¶¶ 35-36. Plaintiffs assert that any constructive notice through a phone call to Lopez, an officer of a company that is an indirect subsidiary of TII, but who was not an agent of plaintiffs, and Lopez's email to Kathy Sullivan, do not satisfy the SPA. Defendants failed to make any formal demand to indemnify, or include any of the documents or notices received from the SAT.

Plaintiffs further contend that they were actually prejudiced, because they were deprived of their sole right and opportunity to participate in the underlying proceeding with the SAT, and were denied the opportunity to manage the response letter to the SAT in October 2013. They maintain that defendants did not hire counsel to prepare Dearborn's response, relied only upon their accountant, Mr. Mosso, and failed to include the statute of limitations, which plaintiffs

assert was probably Dearborn's best defense. Plaintiffs argue that they need not show tangible economic injury – it is enough to show that an insurer has been denied a meaningful opportunity to participate or control the defense to demonstrate actual prejudice as a matter of law (citing *Wainco Funding v. First Am. Tit. Ins. Co. of N.Y.*, 219 A.D.2d 598 (2d Dep't 1995)). They urge that, under the "no prejudice" rule, the provision in a primary insurance contract requiring the insured to give the insurer prompt notice of a claim operates as a condition precedent to liability, and the insured's failure to give prompt notice relieves the insurer of any obligation to prove actual prejudice. They argue that the rule should be applied here. On the sole right to represent and on cooperation, plaintiffs assert that Dearborn defendants deprived them of the opportunity to employ counsel or control Dearborn's defense until January 2014, after submission to the SAT. They further assert that defendants' failure to provide notice or provide any documentation also could not qualify as cooperation under section 8.5(a).

In opposition and in support of their motion for summary judgment, defendants urge several bases for such relief. First, defendants argue that plaintiffs had actual knowledge that the SAT had decided to review Dearborn's 2004 taxes shortly after defendants had learned of it through communications among Mosso, Lopez and Sullivan. They contend that when plaintiffs received the formal written demand, they responded the same way as they did to the actual notice, by doing nothing and failing to take over or even join in on the appeals.

Second, defendants argue that plaintiffs have not and cannot establish that they suffered any actual prejudice let alone that they were actually prejudiced as a matter of law. Defendants submit the affirmation of Victor L. Bermudez Cancino, an attorney admitted and licensed to practice in Mexico since 1986, with experience in Mexican tax law and procedures, to

demonstrate that plaintiffs' contentions that certain defenses have been waived are wrong. Mr. Cancino stated that the November 19, 2013 SAT finding may be appealed administratively or challenged in the tax court. Affirmation of Victor L. Bermudez Cancino, dated Feb 6, 2015, ¶ 12. If an administrative appeal is taken, it may be challenged later in court by filing a nullity petition in an annulment proceeding, which was done here in August 2014. *Id.* He affirms that, under Mexican law, all procedural or substantive issues relating to the tax assessment may be raised in the annulment proceeding even if they were not raised previously as a defense in the response to the SAT's assessment. *Id.*, ¶ 13. Based on this, defendants assert that since receipt of the January 2014 demand, plaintiffs have had ample opportunity in the seven months to become involved in and raise any factual and procedural defenses challenging the tax assessment, but they have not. Defendants assert that nothing that transpired prior to the January 2014 demand caused plaintiffs to lose any rights. They argue that plaintiffs' reliance on "late notice" cases under insurance contracts, in which courts apply the "no prejudice" rule, is misplaced. Defendants maintain that the SPA provision requires that plaintiffs show they were actually prejudiced, but plaintiffs cannot meet that burden of proof, as they cannot establish any economic injury. Defendants point to the decision in *CIH Intl. Holdings, LLC v. BT United States, LLC,* 821 F.Supp.2d 604 (S.D.N.Y. 2011), as persuasive in rejecting an indemnitor's attempt to escape its indemnity obligations.

DISCUSSION

The motions of plaintiffs and of Dearborn defendants for summary judgment are denied.

First, on both parties' claims for declaratory relief, the Court finds triable issues of fact as to whether plaintiffs were actually prejudiced by defendants' failure to provide prompt notice. On the issue of notice, the SPA clearly requires under section 8.1© that each party "shall promptly notify the other Party in writing of any demand, claim or notice of the commencement of a Tax Audit." Joint facts, Exhibit A; SPA § 8.1© at 56. It is undisputed that on April 19, 2012, the SAT issued a citation to Dearborn, which constituted a formal notice of its intention to re-audit Dearborn's 2004 taxes, and requested information and records. Joint facts, ¶ 33. That clearly was the commencement of a tax audit under the SPA. The facts that Dearborn commenced an Amparo on May 11, 2012, the SAT did not issue its observation letter until September 12, 2013 and its final assessment was not made until November 19, 2013 did not act as a stay on the Dearborn defendants' obligation to give plaintiffs notice at the commencement of an audit. Contrary to defendants' contention, no language in the SPA provides that the Amparo would stay the prompt notice obligation, and this Court will not read such language into the agreement. Even if November 19, 2013 were considered the date when the tax audit commenced, Dearborn defendants still did not give plaintiffs written notice until January 24, 2014, more than 60 days later, which also would not constitute prompt notice.

Defendants' arguments that plaintiffs had actual and constructive notice of the second audit through Mosso's phone call to Lopez, and then Lopez's email to Sullivan, and that this was sufficient under the SPA, are rejected. Section 8.1© requires written notice and section 13.8 provides to whom this notice must be sent. Joint facts, Exhibit A; SPA §§ 8.1©, 13.8 at 56 and

71. As plaintiffs aptly point out, Lopez was neither an agent of Dearborn defendants nor of plaintiffs, and was not a party listed under section 13.8. Rather, he worked for an indirect corporate affiliate of plaintiffs. Joint facts, ¶ 26. In addition, Sullivan also was not one of the listed notice parties under section 13.8, and the informal communication to her could not satisfy section 8.1©. Further, the notice required under section 8.1© "shall contain factual information (to the extent known) describing the asserted Tax liability and shall include copies of the relevant portion of any notice or other document received from a Taxing authority or any other Person in respect of any such asserted Tax liability." Joint facts, Exhibit A; SPA § 8.5©. It is undisputed that neither Lopez nor Sullivan were given copies of the SAT communication or citation. Thus, this Court finds that defendants failed to provide prompt notice as required by section 8.1©.

Section 8.1©, however, further provides that "a failure to give such notice will not affect such other Party's rights to indemnification under Article 6 or this Article 8, except to the extent that such Party is actually prejudiced thereby." This language does not create an express condition precedent to plaintiffs' indemnification obligation, but rather was simply a contractual duty, and plaintiffs must establish that they were "actually prejudiced" before they may avoid their indemnity obligations to defendants. It is well-established that "a court will not ordinarily construe a contractual duty as a condition precedent 'absent clear language showing that the parties intended to make it a condition.'" *CIH Intl. Holdings, LLC v. BT United States, LLC*, 821 F.Supp.2d 604, 610 (S.D.N.Y. 2011) (quoting *Unigard Sec. Ins. Co. v. North Riv. Ins. Co.*, 79 N.Y.2d 576, 581 (1992)). Thus, where parties include language in their agreement that documents were not to be released "unless and until" the other party executed the contract and agreed to the deal on the terms and conditions set forth in the agreement, *see MHR Capital*

Partners LP v. Presstek, Inc., 12 N.Y.3d 640, 645-646 (2009), or where the purchase agreement made an indemnification demand "contingent" on complying with the notice and consent to settlement requirements, *see Erickson Air-Crane Inc. v. EAC Holdings, L.L.C.*, 84 A.D.3d 464, 465 (1st Dep't 2011) (no notice whatsoever), this clear language would be interpreted as a condition precedent. However, where the language is doubtful, the courts will interpret the provision "as embodying a promise or constructive condition rather than an express condition." *Oppenheimer & Co. v. Oppenheim, Appel, Dixon & Co.*, 86 N.Y.2d 685, 691 (1995); *see also Mount Sinai Hosp. v. 1998 Alexander Karten Annuity Trust*, 110 A.D.3d 288, 296-297 (1st Dep't 2013).

The decision in *CIH Intl. Holdings, LLC v. BT United States, LLC* is instructive on this issue. The parties there disputed whether a notice provision, nearly identical to the one at issue here, created a condition precedent to a party's indemnification obligations, such that it need not plead actual prejudice. Specifically, the notice provision required that each party

> shall promptly notify the other Parties in writing of any demand, claim or notice of the commencement of an audit . . . with respect to Taxes . . . provided, however, that a failure to give such notice will not affect such other Party's rights to indemnification . . . except to the extent that such Party is actually prejudiced by such failure or delay . . . .

821 F.Supp.2d at 610, n. 3 (quoting parties' merger agreement)). The court found that "there is no clear language making prompt notice a condition precedent," and that the indemnifying party's right to "'control the conduct' of tax disputes" was not sufficient to make prompt notice a condition precedent to that party's obligation to indemnify. 821 F.Supp.2d at 611 (citation omitted). Similarly, here plaintiffs' "sole right to represent the Company's interests in any [tax]

audit" for the pre-closing tax periods was insufficient to create a presumption of a condition precedent. The notice provision in section 8.1© simply fails to contain the clear language showing that the parties intended to make prompt notice a condition precedent. Therefore, plaintiffs' indemnification obligations are not conditioned on defendants' prompt notice obligations, and plaintiffs must show that they were actually prejudiced by the delayed notice before they may avoid their indemnification obligations to defendants.

As was argued in *CIH Intl. Holdings,* plaintiffs here urge that notwithstanding this actual prejudice requirement in Section 8.1©, there is a "no prejudice" rule that entitles them to avoid the indemnity obligation without demonstrating prejudice, because of defendants' delayed notice Plaintiffs' memorandum in opposition, at 8, 10. This "no prejudice" rule, an insurance law doctrine, arises in primary and excess insurance cases, in which courts have determined that the notice provisions in those contracts created conditions precedent, and the insured's failure to give prompt notice of a claim relieved the insurer of proving actual prejudice. *See Security Mut. Ins. Co. of N.Y. v. Acker-Fitzsimons Corp.*, 31 N.Y.2d 436, 440 (1972); *see also American Home Assur. Co. v. International Ins. Co.*, 90 N.Y.2d 433, 440 (1997) (excess insurance); *cf. Unigard Sec. Ins. Co. v. North River Ins. Co.*, 79 N.Y.2d at 584 (no prejudice rule does not apply to reinsurance).[1] This rule has been referred to as a "limited" exception for insurance contracts to the general contract law principle that to avoid a contractual obligation a party must demonstrate the other party's material breach or prejudice. *Unigard Sec. Ins. Co. v. North River Ins. Co.*, 79 NY2d at 581, 584.

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[1] The New York Legislature, in 2008, amended the insurance law to change the no-prejudice rule for policies issued in New York on or after January 17, 2009. *See* Insurance Law § 3420(a)(5).

Plaintiffs fail to demonstrate a basis for this Court to apply this exception outside of the primary or excess insurance context to an indemnity provision in a stock purchase agreement. *See CIH Intl. Holdings, LLC v. BT United States, LLC*, 821 F.Supp.2d at 612; *see also Red Ball Interior Demolition Corp. v. Palmadessa*, 947 F.Supp. 116, 122-124 (S.D.N.Y. 1996), *aff'd* 107 F.3d 4 (2d Cir. 1997) (requirement in indemnification agreement that indemnitee give notice "as soon as practicable" was not a condition precedent). In the insurance context, the primary insurer has an affirmative duty both to defend and indemnify the insured, and must investigate previously unknown claims, post adequate reserves and attempt to assume control to effect any early settlement. *See Unigard Sec. Ins. Co. v. North River Ins. Co.*, 79 N.Y.2d at 583. Here, there is no duty to defend, and no need for plaintiffs to process a volume of claims, timely investigate them and make payments to an insured. Also, here the potential tax liability was previously known. The cases upon which plaintiffs rely involve insurance policies, and the courts found that notice was a condition precedent to coverage. *See, e.g., Wainco Funding v. First Am. Tit. Ins. Co. of N.Y.*, 219 A.D.2d 598, 599 (2d Dep't 1995) (involving a primary title insurance policy where insured failed to give any notice until after it had unsuccessfully appealed to the Appellate Division, depriving the insurer of opportunity to participate in any way in the tax lien proceeding); *Hovdestad v. Interboro Mut. Indem. Ins. Co.*, 135 A.D.2d 783, 784 (2d Dep't 1987) (notice was a condition precedent in auto insurance policy, and four and one-half year delay relieved insurer of liability even without showing prejudice); *see also Chrysler First Fin. Servs. Corp. of Am. v. Chicago Tit. Ins. Co.*, 226 A.D.2d 183, 183-184 (1st Dep't 1996) (mortgage title insurance policy, but court does not discuss whether timely notice was a condition precedent). As noted, there is no basis in the SPA to conclude that prompt notice was a

condition precedent. Therefore, plaintiffs must demonstrate that they were actually prejudiced – that they suffered tangible economic injury due to defendants' late notice. *See Unigard Sec. Ins. Co. v. North Riv. Ins. Co.*, 4 F.3d 1049, 1069 (2d Cir. 1993) (citing *Unigard Sec. Ins. Co. v. North Riv. Ins. Co.*, 79 NY2d at 579).

The Court finds that all parties have failed to submit sufficient proof as to whether and to what extent plaintiffs may be actually prejudiced by the delay in notifying them in writing. While Dearborn defendants submit Mr. Cantino's affirmation, in which he states that all issues procedural and substantive may be contested in the Mexican proceedings post January 2014, it is not clear whether plaintiffs have been or will be denied the opportunity to have all of their potential defenses, including the statute of limitations, heard and determined in the Mexican administrative appeal, or in any Mexican tax proceeding. The parties have failed to present proof as to what defenses were raised in the administrative appeal commenced in February 2014, or in the August 2014 nullity petition, and whether there was any resolution in either of those venues. The Court also notes that Mr. Cantino's affirmation does not meet the requirements of CPLR 2309 in that it is a foreign affidavit that is not notarized in any manner, and is not accompanied by a certificate of conformity. While the absence of a valid certificate of conformity is not a fatal defect and can be cured nunc pro tunc, *Indemnity Ins. Corp., Risk Retention Group v. A1 Entertainment LLC*, 107 A.D.3d 562, 563 (1st Dep't 2013); *Matapos Tech. Ltd. v. Campania Andina de Comercio Ltda*, 68 A.D.3d 672, 673 (1st Dep't 2009), the failure to have the statement notarized at all makes the affirmation inadmissible as proof to support summary judgment. *See Rivers v. Birnbaum*, 102 A.D.3d 26, 45 (2d Dep't 2012). While the court may take judicial notice of foreign law, CPLR 4511(d)), the proof of such law must be admissible to provide the

basis for summary judgment. At oral argument, the parties were unable to inform the Court as to the status or any resolution of the tax proceedings in Mexico. The Court thus finds unresolved issues of fact regarding whether plaintiffs suffered actual prejudice.

With respect to plaintiffs' claim based on Dearborn defendants' breach of plaintiffs' sole right to represent Dearborn in a tax audit, and to select their own counsel, again summary judgment is inappropriate on these papers. As with any breach of contract claim, plaintiffs must demonstrate that defendants' breaches were material, and that plaintiffs suffered damages caused by the breaches. In making such a showing, plaintiffs must demonstrate some tangible economic injury. *See Unigard Sec. Ins. Co. v. North River Ins. Co.*, 4 F.3d at 1069. As with prompt notice, nothing in the SPA demonstrates that the parties intended to make these provisions as conditions precedent to plaintiffs' obligation to indemnify. *See Unigard Sec. Ins. Co. v. North River Ins. Co.*, 79 NY2d at 581. It is premature for plaintiffs to assert that they suffered such injury where there has not been a final adjudication in the pending Mexican annulment proceeding. The Court notes that while plaintiffs had formal written notice in January 2014, before the deadlines for either the administrative appeal or the filing of the nullity petition, they have not participated in and/or represented Dearborn's interests in those Mexican proceedings. Plaintiffs' claims that they were prejudiced because Dearborn's response to the SAT was lackluster are speculative. Their argument that they were prejudiced because defendants' October 2013 response to the SAT failed to contain a statute of limitations defense is unpersuasive. Plaintiffs fail to submit any evidence supporting their claim that this was Dearborn's best defense, or that any issues or defenses that were not included in the October 2013 response were waived. It is undisputed that the defense was included in the nullity petition, Joint facts, ¶ 59, though it has not been established by either

side whether it has been or will be considered and/or successful.

Wyle Inc. v. ITT Corp., 37 Misc.3d 1232[A] (Sup. Ct., NY County, 2012), relied upon by plaintiffs, is factually distinguishable and was reversed, though on other grounds. *See* 114 A.D.3d 505 (1st Dep't 2014). In that case, the parties' agreement contained language specifying that the failure of the indemnified party to notify the indemnitee prior to the settlement of a third-party claim or the entry of judgment on such claim "shall constitute actual prejudice." 37 Misc.3d 1232[A] * 3. The SPA here contains no such language defining actual prejudice, and the tax assessment and appeals have not been resolved, paid or settled. Further, this Court declines to find that actual prejudice is inherent as a matter of law in the denial of plaintiffs' right to control and choose counsel.

With regard to the branch of defendants' motion for summary judgment on their breach of contract counterclaims (first and second counterclaims), summary judgment is denied, because defendants have failed to present prima facie proof of all of the elements of those claims. To establish a breach of contract claim, a party must demonstrate that: (1) the parties entered into a contract; (2) the party claiming breach performed its obligation; (3) the other party breached; and (4) the party claiming breach suffered damages caused by that breach. *Harris v. Seward Park Hous. Corp.*, 79 A.D.3d 425, 426 (1st Dep't 2010). Here, defendants cannot establish, as a matter of law, that plaintiffs have breached their obligations, because they fail to present proof that the tax proceedings in Mexico are concluded, a tax has been assessed, plaintiffs have failed to pay and therefore that defendants have been damaged as a result of the breach.

* * *

The Court has considered the remaining arguments made by the parties and finds them to be unavailing.

CONCLUSION

Accordingly, it is

ORDERED that plaintiffs' motion for partial summary judgment (motion sequence No. 002) is denied; and it is further

ORDERED that defendants' motion for summary judgment (motion sequence No. 003) is denied.

Dated: June 4, 2015

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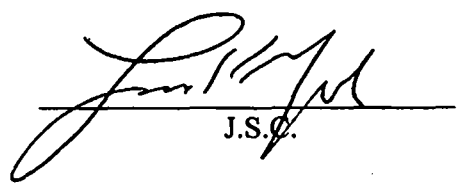

J.S.C.