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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE HOWARD G. LANE** **IAS PART 6**
Justice

ALCAZAR CONSTRUCTION CORPORATION,	Index No. 2628/05
Plaintiff,	Motion Date July 14, 2015
-against-	Motion Cal. No. 3
DURAMERICA BROKERAGE INC.,	Motion
Defendant.	Seq. No. 2

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Upon the foregoing papers it is ordered that the branch of the motion by defendant, Duramerica Brokerage Inc. ("Duramerica") for an order pursuant to CPLR 3404 dismissing plaintiff, Alcazar Construction Corporation's ("Alcazar") Complaint as abandoned as a matter of law is hereby denied.

The record reflects that the Note of Issue was filed on or about December 18, 2006, and that the matter was marked "off calendar" via a "So-Ordered" Stipulation of Hon. Lawrence V. Cullen dated January 8, 2007 which "So-Ordered" Stipulation states in relevant part:

> the plaintiff shall mark the above captioned matter off the Queens County Supreme Court's trial calendar pending resolution of the underlying property damage matter entitled, THE CITY OF NEW YORK V. OUTLOOK REALTY LLC, ALCAZAR CONSTRUCTION CORPORATION, CRESCENT STREET CONSTRUCTUION, CORPORATION and WDA ARCHITECTS 7 PLANNERS, PC, New York County Index Number 4000100/05 (hereinafter referred to as the "UNDERLYING ACTION").
> **IT IS HEREBY FURTHER STIPULATED AND AGREED**

> that after the UNDERLYING ACTION has been resolved, plaintiff's counsel shall notify defense counsel and the court, in writing, of said resolution, and the parties hall stipulate to have the matter restored to the Queens County Supreme Court's calendar on 30 days notice so that discovery may proceed if necessary.
> **IT IS HEREBY FURTHER STIPULATED AND AGREED** that upon resolution of the above-captioned matter, the Court shall schedule a conference to set down a discovery schedule and a new date by which plaintiff shall file its Note of Issue.

It is undisputed that the UNDERLYING ACTION was settled in April, 2012. CPLR 3404 states that cases that are marked off the calendar in supreme court or county court are deemed abandoned and shall be dismissed if not restored to the calendar within one year *(see, Chavez v. 407 Seventh Ave. Corp.*, 807 NYS2d 785 (2d Dept 2005). Said section is inapplicable in the instant case as there was no specific date set in the "So-Ordered" Stipulation by which restoration was to occur, as the Stipulation was conditioned on an event occurring at some undetermined point in the future. No legal authority has been provided for the relief requested under CPLR 3404.

Accordingly, that branch of defendant's motion seeking to dismiss plaintiff's Complaint pursuant to CPLR 3404 is denied.

That branch of defendant's motion seeking summary judgment pursuant to CPLR 3212 against plaintiff is hereby denied.

The underlying action results from a disclaimer letter dated January 26, 2005 from Rutgers Casualty Insurance Company ("Rutgers") to plaintiff, Alcazar Construction Corporation ("Alcazar") wherein Rutgers refused to defend and indemnify plaintiff in connection with a lawsuit to recover property damage entitled *City of New York v. Outlook Realty, LLC, Alcazar Construction Corporation and Crescent Street Construction*, under Index Number 400100/05 which arose out of a January 8/9, 2002 collapse of a retaining wall owned by the City of New York. The basis for the disclaimer letter to plaintiff by Rutgers under the Commercial General Liability Policy #SKP3100338 which policy was in effect from June 7, 2001 to June 7, 2002, was a breach of the policy condition regarding plaintiff's contractual obligation to provide written notice of the January 8/9 "occurrence" involving the retaining wall.

Plaintiff commences the instant action against its insurance

broker, defendant, Duramerica Brokerage Inc. ("Duramerica") under a negligence theory maintaining that: notice of the January 8/9, 2002 occurrence and claim against plaintiff was timely received by defendant and plaintiff relied upon defendant to provide notice to its insurance carrier for the occurrence which formed the basis of the claim of the City of New York for the incident of January 8/9, 2002.

Summary judgment is a drastic remedy and will not be granted if there is any doubt as to the existence of a triable issue (*Andre v. Pomeroy*, 32 NY2d 361 [1974]; *Kwong On Bank, Ltd. v. Montrose Knitwear Corp.*, 74 AD2d 768 [2d Dept 1980]; *Crowley Milk Co. v. Klein*, 24 AD2d 920 [3d Dept 1965]). Even the color of a triable issue forecloses the remedy (*Newin Corp. v. Hartford Acc & Indem. Co.*, 62 NY2d 916 [1984]). The evidence will be construed in a light most favorable to the one moved against (*Bennicasa v. Garrubo*, 141 AD2d 636 [2d Dept 1988]; *Weiss v. Gaifield*, 21 AD2d 156 [3d Dept 1964]). The proponent of a motion for summary judgment carries the initial burden of presenting sufficient evidence to demonstrate as a matter of law the absence of a material issue of fact (*Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]). Once the proponent has met its burden, the opponent must now produce competent evidence in admissible form to establish the existence of a triable issue of fact (*see, Zuckerman v. City of New York*, 49 NY2d 557 [1980]). It is well settled that on a motion for summary judgment, the court's function is issue finding, not issue determination (*Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395 [1957]; *Pizzi by Pizzi v. Bradlee's Div. of Stop & Shop, Inc.*, 172 AD2d 504, 505 [2d Dept 1991]). However, the alleged factual issues must be genuine and not feigned (*Gervasio v. DiNapoli*, 134 AD2d 235 [2d Dept 1987]). The role of the court on a motion for summary judgment is to determine if bona fide issues of fact exist, and not to resolve issues of credibility (*Knepka v. Tallman*, 278 AD2d 811 [4th Dept 2000]).

To establish a prima facie case of negligence, a plaintiff must establish the existence of a duty, a breach of the duty, and that said breach was the proximate cause of their injuries (*see, Gordon v. Muchnick*, 180 AD2d 715 [2d Dept 1992]). However, absent a duty of care, there is no breach and no liability(*Id.; see also, Marasco v. C.D.R. Electronics Security & Surveillance Systems Co., et.al.*, 1 AD3d 578 [2d Dept 2003]).

It is well settled that an insurance policy provision requiring the insured to notify the insurer of a covered occurrence is a condition precedent to the company's duty to defend or indemnify claims against the insured and the failure to provide such notice typically precludes the insured from obtaining coverage under the subject insurance policy (*see,*

Kambousi Restaurant, Inc. v. Burlington Insurance Company, 58 AD3d 513 [1st Dept 2009]; *1700 Broadway Co. v. Greater New York Mutual Insurance Co.*, 54 AD3d 593, [1st Dept 2008]; *White v. City of New York*, 81 NY2d 955, 957 [1993]). ("[T]he requirement that an insured notify its liability insurer of a potential claim 'as soon as practicable' operates as a condition precedent to coverage").

Moreover, the insurer is not required to demonstrate that it was prejudiced by the late notice in order to rely upon said ground in its disclaimer (*see, Travelers Ins. Co. v. Cohen*, 61 AD3d 768 [2d Dept 2009]); *1700 Broadway Co. v. Greater New York Mutual Insurance Co., supra; St. Nicholas Cathedral of Russian Orthodox Church in North America v. Travelers Property Casualty Insurance Company*, 45 AD3d 411 [1st Dept 2007]; *Sorbara Const. Corp. v. AIU Ins. Co.*, 41 AD3d 245 [1st Dept 2007] [Notice in compliance with the policy provisions is a condition precedent to the insurer's responsibility under the policy and it is therefore unnecessary for the insurer to show that it has been prejudiced by late notice]; *Great Canal Realty Corp. v. Seneca Ins. Co., Inc.*, 5 NY3d 742 [2005]).

The court notes that in 2008 the Legislature amended Insurance Law § 3420 to prohibit insurers from denying under certain policies issued on or after January 17, 2009, based on the failure of the insured to provide timely notice unless the insurer suffers prejudice as a result of the delay. As the policy here was issued to plaintiff by the carrier with effective dates of coverage of June 7, 2001 to June 7, 2002, the amendments do not apply.

Defendant, Duramerica has established a prima facie case that there was never any "occurrence" arising from the January 8/9, 2002 retaining wall collapse from the standpoint of the insured at issue (plaintiff, Alcazar) and as such, no legal duty was ever triggered for defendant to notify Rutgers Casualty Insurance Company of a purported "occurrence." Defendant also established that plaintiff maintained that it was never notified of any potential claim against it by the City of New York before the commencement of the 2005 lawsuit. In support of this branch of the motion, defendant submits, inter alia, an affidavit of George Douramanis himself, the President and sole shareholder of defendant wherein he avers inter alia, that:

> "with regard to Alcazar Construction Corporation, Emmanuel Stratis [President and sole shareholder of plaintiff] specifically told me that Alcazar Construction Corporation was not at the site on January 8, 2002, having completed its work at 3217 Irwin

> Avenue in the Bronx weeks earlier. As such, Emmanuel Stratis verbally told me that there was nothing to notify Rutgers Casualty Insurance Company about in connection with the January 8, 2002 retaining wall collapse and I should not do so. . . Put another way, as no "occurrence," or accident, had transpired on January 8, 2002 *from the standpoint of Alcazar Construction Corporation*, there was nothing to notify Rutgers Casualty Insurance Company about at any point from January 8, 2002 until receipt of a 2005 lawsuit by the City of New York which named Alcazar Construction Corporation, among others, as defendants (and which was promptly forwarded to Rutgers Casualty Insurance Company upon receipt)."

It is well-established law that in determining whether or not there is a covered "occurrence," the Court should look to see whether there is an accident from the point of view of the insured (*RJC Holding Corp. v. Republic Franklin Insurance Company*, 2 NY 3d 158 [NY 2004]).

As defendant established that the insurance policy provision required plaintiff to provide notification to Rutgers of a covered occurrence as soon as practicable and plaintiff failed to provide such notice, the burden shifted to plaintiff to raise a triable issue of fact.

In opposition, plaintiff raises a triable issue of fact. In opposition, plaintiff submits, inter alia, an affidavit of Emmanuel Stratis himself, President and sole shareholder of plaintiff, wherein he avers inter alia that:

> "In my conversation with GEORGE DOURAMANIS I was advised that the policies of insurance obtained by DURAMERICA BROKERAGE, INC. would provide coverage for claims and that he would provide the necessary information to the respective insurance companies. . .I did not at any time give GEORGE DOURAMANIS instructions as to the appropriate notifications to provide to the insurance companies for ALCAZAR CONSTRUCTION CORPORATION or Outlook Realty, LLC. . . In our meeting when GEORGE DOURAMANIS and I first discussed the policies which should be purchased by ALCAZAR CONSTRUCTION CORPORATION he assured me that he would obtain the right

> policies and that his brokerage would provide fully supported insurance service. . .In our meeting following the wall collapse he specifically advised that he would take all steps necessary to insure that the policy of insurance which was obtained for ALCAZAR CONSTRUCTION CORPORATION would provide all the protections included in the scope of the insurance policy provisions. GEORGE DOURAMANIS specifically stated that he would notify the insurance company and provide all requested information. He advised that he would immediately contact me if further information was required to be provided to the insurance company."

As there are triable issues of fact regrading, inter alia, whether plaintiff notified Rutgers as soon as practicable of the January 8/9, 2002 "occurrence" and whether defendant breached a legal duty owed to plaintiff.

As there are triable issues of fact, the case cannot be disposed of summarily and the motion for summary judgment is denied.

Plaintiff's cross motion for an order setting this matter down for a conference to set a date by which plaintiff shall file its Note of Issue is hereby granted. Said conference was contemplated by the January 8, 2007 "So-Ordered" Stipulation of Hon. Lawrence V. Cullen.

This matter shall be set down for a conference to be held in Part 6 on Tuesday, December 22, 2015, 2:15 P.M., IAS Part 6, courtroom 24, 88-11 Sutphin Blvd., Jamaica, New York.

This constitutes the decision and order of the Court.

A courtesy copy of this order is being mailed to counsel for the respective parties.

Dated: November 16, 2015

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Howard G. Lane, J.S.C.