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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. 021 and 022

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 (together, "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 to amend its Answer to reassert several affirmative defenses (motion sequence 002), and for summary dismissal of the complaint based on such affirmative defenses (motion sequence 001) as a result of the Court of Appeals' recent decision in *Key-Span Gas East Corporation v Munich Reinsurance America*, 23 NY3d 583 [2014] ("*Key-Span*")).[2]

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

[2] Motion sequence numbers 021 and 022 are consolidated for joint disposition herein.

Factual Background

This action arises from an insurance policy allegedly issued to Estee Lauder by Employers' Liability Assurance Corp., Ltd ("ELAC") in 1968 (the "Policy") (Amended Complaint, ¶¶16-17). OneBeacon allegedly assumed the obligations of ELAC imposed by the Policy (Amended Complaint, ¶¶19-21). The Policy obligated the carrier to defend and reasonably settle any claims asserting that the Estee Lauder was potentially responsible for "property damage" inflicted during the term of the Policy, *i.e.*, September 18, 1968 to September 18, 1971 (Amended Complaint, ¶26).

In 1998, Estee Lauder signed tolling agreements whereby New York State agreed to "forgo" the commencement of an action to recover costs from Estee Lauder for the hazardous waste disposals at the Blydenburgh and Huntington Landfill (the "Landfills") until 1999, while the State further investigated the matter (the "1998 Tolling Agreements").[3]

In 1999, the State specifically identified Estee Lauder as a potentially responsible party ("PRP") concerning the hazardous waste disposals at the Landfills (collectively, the "Landfill PRP Claims"). In 2001, the State filed a Federal Court action[4] seeking recovery of costs it incurred to remediate the Blydenburgh Landfill; a third-party action was filed against Estee Lauder in that action (together, the three claims are referred to as the "Environmental Claims").

When Estee Lauder tendered the defense of the Environmental Claims (Amended Complaint, ¶¶ 31, 40, and 48), OneBeacon declined to defend or settle the three claims

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[3] In connection withe the Blydenburgh Tolling Agreement, the State issued a letter advising Estee Lauder that Estee Lauder "may be responsible for" the hazardous waste disposal at the Blydenburgh Landfill.

[4] *State of New York v Hickey's Carting, Inc.*, Case No. CV 01-3136 (EDNY) (*"Hickey's Carting"*).

(Amended Complaint, ¶¶ 35, 41, and 49). As a result, this declaratory judgment action ensued.

Estee Lauder amended its complaint in June 2005 (the "First Amended Complaint"), and in September 2005, OneBeacon interposed the following four affirmative defenses, which are collectively referred to herein as the "Late Notice" defenses:

FOURTH AFFIRMATIVE DEFENSE

OneBeacon is not liable to Plaintiff to the extent that there has been a failure to perform or comply with any of the obligations or conditions that may be contained in the alleged insurance policy allegedly issued by ELAC, including, but not limited to, the notice and cooperation requirements.

EIGHTH AFFIRMATIVE DEFENSE

OneBeacon has no contractual duty to defend or obligation to defend and/or reimburse defense costs and/or to indemnify Plaintiff.

TWENTY-FIRST AFFIRMATIVE DEFENSE

Coverage under the alleged ELAC insurance policy is available only to an insured under the alleged ELAC insurance policy. To the extent that Plaintiffs First Amended Complaint asserts claims for defense or reimbursement of defense costs and/or recovery of losses sustained by entities and/or persons who do not qualify as insureds under the alleged ELAC insurance policy, there is no coverage.

THIRTY-EIGHTH AFFIRMATIVE DEFENSE

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 Plaintiffs First Amended Complaint, OneBeacon is not liable to defend or indemnify Plaintiff.

As relevant herein, OneBeacon previously moved to dismiss the amended complaint on the ground of Estee Lauder failed to provide prompt notice of the Environmental Claims. Estee Lauder cross moved to dismiss OneBeacon's Late Notice defenses (Decision, p. 2).

By order dated December 11, 2006, the Court granted OneBeacon's motion and dismissed the complaint on the ground that Estee Lauder violated the notice provisions of the alleged Policy by providing late notice of the Environmental Claims.

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").[5] Citing *Matter of Firemen's Fund Ins. Co. of Newark v Hopkins* (88 N.Y.2d 836, 837, 644 N.Y.S.2d 481, 666 N.E.2d 1354 [1996]),[6] the First Department declared that "[a]n insurer must give written notice of disclaimer on the ground of late notice as soon as is reasonably possible after it learns of the accident or of grounds for disclaimer of liability, and failure to do so precludes effective disclaimer" (62 A.D.3d at 35).

Thereafter, in May 2012, OneBeacon filed an Amended Answer to Estee Lauder's Third Amended Complaint, omitting the Late Notice Defenses.

On June 10, 2014, the Court of Appeals issued its decision in *Key-Span*, which addressed an insureds' (similar) claim that their insurers had a duty to defend and indemnify them for

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[5] *Estee Lauder Inc. v OneBeacon Ins. Group, LLC*, 62 A.D.3d 33, 873 N.Y.S.2d 592 [1st Dept 2009] (". . . [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")).

Thereafter, OneBeacon paid Estee Lauder nearly $5 million for defense costs.

[6] In *Firemen's Fund Ins. Co. of Newark v Hopkins*, the Court of Appeals upheld the First Department's denial of an automobile insurer's petition to stay arbitration of uninsured motorist's claim, on the ground of that the insurer's delay in giving notice of disclaimer of coverage was unreasonable.

environmental damage claims arising from gas plant sites. 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.

In support of its instant motion to amend, OneBeacon contends that *Key-Span* effectively overruled the First Department Decision, and that the question of whether OneBeacon was required to defend or indemnify Estee Lauder is once again before the Court. Leave to amend should be freely granted, and denied if there is no showing of prejudice or surprise from any delay or if the amendment is palpably improper. Estee Lauder cannot demonstrate a sufficient level of prejudice, as it has not been hindered in contesting OneBeacon's previously asserted Late Notice Defenses, and such affirmative defenses are valid.

In opposition, Estee Lauder argues that OneBeacon's issuance of correspondence disclaiming coverage on selective grounds and concealing the "late notice" ground constitutes a constructive waiver of such "late notice" defense by operation of common law, irrespective of whether the underlying claim is for bodily injury or property damage. The First Department's Decision held that such conduct constituted a waiver pursuant to New York common law, and such Decision is law of the case, which this Court must follow. The underlying suit did not allege bodily injury, and the First Department did not cite Section 3420; instead, the First Department stated that its "conclusion" was the same one it reached in another case, which case involved a property damage claim; the First Department then also cited to another case which

applied the common law in a property damage case. Further, *Key-Span* did not address the issue before the First Department, *to wit*: whether an insurer waives "late notice" by issuing a disclaimer letter that discloses some grounds to deny coverage while concealing the "late notice" ground. And, unlike OneBeacon herein, the insurer in *Key-Span* first disclaimed on the "late notice" ground. *Key-Span* did not affirmatively overturn the First Department Decision in its entirety, but overruled said Decision only "to the extent" that the First Department declared that the mere passage of time is sufficient to compel a finding of waiver in a case that is not a bodily injury matter subject to Section 3420. Thus, *Key-Span* left standing the already established body of caselaw holding that a New York insurer who issues a disclaimer disclosing only some coverage defenses is deemed to have waived all known but concealed coverage-forfeiture defenses (such as "late notice.")

Key-Span also did not address or change caselaw holding that a defendant who withdraws, during discovery, a forfeiture defense is deemed conclusively to have waived whatever rights it had to further litigate the merits of such defense. When OneBeacon amended its answer in 2011 omitting the Late Notice Defenses after its claims handler gave certain testimony, such omission constitutes a waiver of same.

Consequently, the proposed Late Notice Defenses lack 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. OneBeacon's admission

that the Landfill PRP Claims were "made" in 1999 explains its voluntary and intentional abandonment of its Late Notice Defenses, or at a minimum, creates an issue of fact on the issue.[7]

And, that the Late Notice Defenses are absent from the pleadings conclusively establishes the insurer's intent to not litigate the issue going forward. Caselaw provides that an insurer is deemed to waive a late notice defense where its answer on file at the time it sought adjudication of such issue failed to plead late notice. OneBeacon did not present an affidavit explaining its intent in keeping its defenses for 26 months after the First Department Decision and then withdrawing them. And, the "threat" of a lawsuit contained in the 1998 Tolling Agreements may constitute an "occurrence," but did not trigger Estee Lauder's "notice-of-claim" obligation to OneBeacon. Nor could such Tolling Agreements trigger the notice of occurrence obligation because they did not allege injurious conduct or damage within the policy period.[8]

There is no precedent permitting a party to reinstate a withdrawn claim or defense based on the party's mistaken assumption about future developments in the law, and to permit such would "invite dangerous precedent." In order to preserve any right to benefit from a change in the law, the party must not withdraw its claim or defense.

Further, the issue of prejudice need not be reached given that the proposed amendment is futile.

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[7] OneBeacon's admission came in 2011, and therefore, was not part of the record when this Court granted summary judgment in OneBeacon's favor in 2006.

[8] It is noted that the Court's Decision addressed whether the 1998 Tolling Agreements triggered Estee Lauder's obligation to timely notify OneBeacon pursuant to the Policy ("This Court finds that the two 1998 Tolling Agreements constituted sufficient notice to Estee Lauder that the State might bring suit against it as to both the Environmental Claims, and potential lawsuits based on the Environmental Claims, sufficient to trigger Estee Lauder's obligation to notify OneBeacon under the terms of the putative policy." (Decision, p. 18).

Therefore, OneBeacon cannot move for summary judgment on claims it waived by its voluntary withdrawal of same.

In reply, OneBeacon argues that its motion for leave should be granted since OneBeacon did not allege any prejudice by the amendment.

Further, OneBeacon 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. Because Estee Lauder's complaint alleges that it fully performed under the purported contract, OneBeacon was only required to assert a general denial to put all contractual defense at issue. OneBeacon has maintained precisely that kind of general denial at all times in this case. Particularly, the current version of the Fourth Affirmative Defense alleges that OneBeacon is not liable as Estee Lauder failed to comply with the conditions in the alleged Policy "included, but not limited to, subrogation and cooperation requirements." A version of this affirmative defense has appeared in every iteration of OneBeacon's Answer and CPLR 3015 does not require any additional. The cases cited by Estee Lauder are factually distinguishable. And, the "as soon as is reasonably possible" standard cited in the First Department Decision (62 A.D.3d at 35) comes directly from Insurance Law 3420, and is inapplicable here.

Discussion

"It is fundamental that leave to amend a pleading should be freely granted, so long as there is no surprise or prejudice to the opposing party" (*Kocourek v Booz Allen Hamilton Inc.*, 925 NYS2d 51 [1st Dept 2011] citing CPLR 3025[b] and *Solomon Holding Corp. v Golia*, 55 A.D.3d 507, 868 N.Y.S.2d 612 [2008]). "Mere delay is insufficient to defeat a motion for leave

to amend" (*Kocourek citing Sheppard v Blitman/Atlas Bldg. Corp.*, 288 A.D.2d 33, 34, 734 N.Y.S.2d 1 [2001]). "Prejudice requires 'some indication that the defendant has been hindered in the preparation of his case or has been prevented from taking some measure in support of his position'" (*Kocourek citing Cherebin v Empress Ambulance Serv., Inc.*, 43 A.D.3d 364, 365, 841 N.Y.S.2d 277 [2007], *quoting Loomis v Civetta Corinno Constr. Corp.*, 54 N.Y.2d 18, 23, 444 N.Y.S.2d 571, 429 N.E.2d 90 [1981]).

Here, OneBeacon established the absence of surprise or prejudice to Estee Lauder resulting from the proposed Late Notice Defenses, and that such Defenses are arguably meritorious.

In abrogating the First Department Decision on which Estee Lauder relies as law of the case, the Court of Appeals in *Key-Span* reasoned, that "By its plain terms, section 3420(d)(2) applies only in a particular context: insurance cases involving death and bodily injury claims arising out of a New York accident and brought under a New York liability policy" (23 N.Y.3d at 590). Thus, since "the underlying claim [therein did] not arise out of an accident involving bodily injury or death, the ["heightened"] notice of disclaimer provisions set forth in Insurance Law § 3420(d) are inapplicable" (*id.*). Pointedly, the Court of Appeals held that "The environmental contamination claims at issue in this case do not fall within the scope of Insurance Law § 3420(d)(2), which the legislature chose to limit to accidental death and bodily injury claims, and it is not for the courts to extend the statute's prompt disclaimer requirement beyond its intended bounds." The standard in such cases is whether "under *common-law principles*, triable issues of fact exist whether defendants *clearly manifested an intent to abandon their late-notice defense*" (*id.*, at 591) (emphasis added). Thus, the "Appellate Division erred when it

held that defendants had a duty to disclaim coverage 'as soon as reasonably possible' after they learned that LILCO's notice was untimely under the policies."(*id.*, at 591)

Like the Appellate Division's decision in *Key-Span*,[9] the First Department Decision herein did not specifically cite to section 3420(d)(2), but cited to its disclaimer requirements[10] ("[a]n insurer must give written notice of disclaimer on the ground of late *notice as soon as is reasonably possible* after it learns of the accident or of grounds for disclaimer of liability,"). The First Department Decision also cited to the case, *Firemen's Fund Ins. Co. of Newark,* which involved an automobile insurer's delay in giving notice of disclaimer in connection with a personal injuries sustained from an automobile accident (emphasis added). The First Department began its legal synopsis with a citation to a case involving a motor vehicle accident, *General Acc. Ins. Group v Cirucci* (46 NY2d 862 [1979]), for the proposition that an insurer's "notice of disclaimer must promptly apprise the claimant with a *high degree of specificity* of the ground or grounds on which the disclaimer is predicated." (Emphasis added).

Notwithstanding the First Department's additional citations to other cases involving a waiver in property damage cases, the First Department's principal citation to the rule requiring that a disclaimer be both timely and specific implicates that the 3420 standard was heavily imposed. Notably, the First Department Decision is silent as to whether there was sufficient

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[9] In *Key-Span,* the Court of Appeals noted: "Although the Appellate Division did not cite section 3420(d)(2) in its decision, the court essentially recited the statute's disclaimer requirement when it stated that defendants had an 'obligation' to disclaim coverage based on late notice "as soon as reasonably possible after first learning of the ... grounds for disclaimer" . . . ."

[10] 3420(d)(2) provides that "If under a liability policy issued or delivered in this state, an insurer shall disclaim liability or deny coverage for death or bodily injury arising out of a motor vehicle accident or any other type of accident occurring within this state, it shall give written notice *as soon as is reasonably possible of such disclaimer* of liability or denial of coverage to the insured and the injured person or any other claimant" (emphasis added).

evidence of OneBeacon's "clear manifestation of an intent to waive a defense," which is the sole standard applicable in a common law waiver analysis.

Thus, as it cannot be said that the First Department Decision finding of waiver was based upon the application of common-law principles, the First Department Decision has been effectively abrogated by *Key-Span*. Consequently, the First Department's finding that OneBeacon waived the Late Notice Defenses is no longer binding in this pending action.

As to Estee Lauder's claim that OneBeacon waived its right to assert the Late Notice Defenses, such that neither leave to amend nor summary judgment can be granted, whether "an insurer has waived the defense of late notice is ordinarily a question of fact, which is proved by evidence that the insurer intended to abandon that defense" (*Marino v New York Tel. Co.*, 1992 WL 212184, at *7, *13–14, 1992 U.S. Dist. LEXIS 12705, *25–26, *47–49 [S.D.N.Y.1992] [internal citation and quotation marks omitted] [excess insurer waived defense of late notice under the common law by failing to issue a timely disclaimer]). Waiver "is the voluntary relinquishment of a known right and must be predicated upon knowledge of the facts upon which the existence of the right depends (*Long Island Lighting Co. v American Re-Insurance Co.*, 123 A.D.3d 402, 998 N.Y.S.2d 169 [1st Dept 2014] *citing Amrep Corp. v American Home Assur. Co.*, 81 A.D.2d 325, 329, 440 N.Y.S.2d 244 [1st Dept 1981] ["issue of fact concerning waiver existed, where, with knowledge of pending charges against its insureds, the insurer continued to issue policy renewals and did not disclaim coverage until interposing an answer in the declaratory judgment action"]). The failure to assert a known policy defense may constitute a waiver (*see State of New York v Amro Realty Corp.*, 936 F.2d 1420, 1429–1430 [2d Cir.1991] [insurer waived late notice defense in environmental coverage action where it was capable of

asserting a disclaimer based on late notice before the complaint was filed]).

Here, it cannot be said that OneBeacon "forever" waived its right to assert the Late Notice Defenses by virtue of its disclaimer letters omitting any reference to such Defenses or by its subsequent voluntary withdrawal of such Defenses from its pleading. First, as this Court previously stated in its Decision, that "where an insurer expressly reserves all its rights under the insurance contract to disclaim a claim, there is no waiver of any particular ground, merely because it was not made in the initial letter of disclaimer" (Decision, p. 23). Further, the First Department has recognized that leave to amend "shall be freely given" "at any time" (CPLR 3025 [b]), *even as to defenses deemed "waived"* [previously] pursuant to CPLR 3211 (e) when not raised 'either by ... motion or in the responsive pleading.'" (*Marks v Macchiarola*, 221 A.D.2d 217, 634 N.Y.S.2d 56 [1st Dept 1995]; *see also Ficorp, Ltd. v Gourian*, 263 A.D.2d 392, 693 N.Y.S.2d 37 [1st Dept 1999] ("Although CPLR 3211 (e) does deem the defense of release waived if not asserted in the answer or in a motion to dismiss, it can be raised in an amended answer in the absence of prejudice")). "It is the insured's burden to show that there was 'a clear manifestation of intent' by the insurer to abandon its right to assert a defense (*Sulner v G.A. Ins. Co. of N.Y.*, 224 A.D.2d 205, 637 N.Y.S.2d 144 [1st Dept 1996]; *see also Gilbert Frank Corp. v Federal Ins. Co.*, 70 N.Y.2d 966, 520 N.E.2d 512 [1988]).

Here, OneBeacon has indeed argued that it removed the Late Notice Defense language from its affirmative defenses only after the First Department's reversal effectively rendered OneBeacon's Late Notice Defenses moot, when settlement negotiations failed, and OneBeacon made a payment to Estee Lauder pursuant to the First Department Decision in order to cease the continued running of interest. Thus, OneBeacon's withdrawal is a mere factor to consider under

common law principles of waiver, and it cannot be said, as a matter of law, that OneBeacon withdrew its Late Notice Defenses with an intent to waive them.

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.

As pointed out by OneBeacon, this Court found that Estee Lauder failed, as a matter of law, to provide timely notice of its claims based on Estee Lauder's receipt of the 1998 Tolling Agreements, one of which gave rise to the *Hickey's Carting* claim against Estee Lauder. 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.

Conclusion

Based on the foregoing, it is hereby

ORDERED that OneBeacon's motion for leave to amend and its Answer to reassert its

"Late Notice" affirmative defenses (motion sequence 022), is granted, and OneBeacon shall serve and file its Second Amended Answer to Third Amended Complaint in the form attached to its motion; and it is further

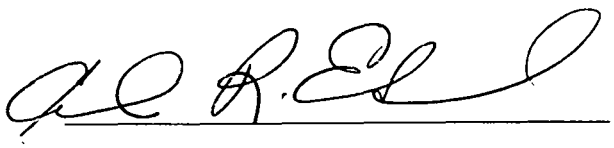
ORDERED that OneBeacon's motion for summary dismissal of the complaint based on such "Late Notice" affirmative defenses (motion sequence 021) is denied; and it is further

ORDERED that the parties shall appear for a status conference on March 31, 2015, 2:15 p.m.; and it is further

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

This constitutes the decision and order of the Court.

Dated: February 9, 2015



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

HON. CAROL EDMEAD