NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE DARRELL L. GAVRIN** IA PART 27
Justice

VISTA ENGINEERING CORPORATION, NEW YORK CITY TRANSIT AUTHORITY and METROPOLITAN TRANSPORTATION AUTHORITY,	Index No. 6960/15
Plaintiffs,	Motion Date July 17, 2016
- against-	Motion Cal. No. 150 & 180
EVEREST INDEMNITY INSURANCE COMPANY, EAST COAST PAINTING & MAINTENANCE, JOSE FERNANDES (pertaining to the underlying action entitled: Fernandes v. Vista),	Motion Seq. No. 1 & 2
Defendants.	

The following papers numbered 1 to 26 read on this motion by plaintiff, Vista Engineering Corporation, for a declaration that defendant, Everest Indemnity Insurance Company's disclaimer of coverage in an underlying personal injury action, entitled Fernandes v Vista, et al, and bearing Supreme Court, Queens County, Index No, 6812/15, was late as a matter of law, pursuant to Insurance Law § 3420(d), and for an award of summary judgment in favor of plaintiff, Vista Engineering, and against defendant, Everest Insurance Company, based upon it's failure to disclaim coverage in a timely manner and a separate motion by defendant, Everest Indemnity Insurance Company, for a declaration that it has no duty to defend or indemnify plaintiff, Vista Engineering Corporation, with respect to the underlying action.

	Papers Numbered
Notice of Motion - Affirmation - Exhibits.....	1-4; 11-14
Affirmation in Opposition - Exhibits.....	5-7; 15-17
Reply Affirmation.....	8-10; 18-26

Upon the foregoing papers, it is ordered that the motion is determined as follows:

Plaintiffs, Vista Engineering Corporation, New York City Transit Authority, and Metropolitan Transportation Authority, commenced this declaratory judgment action seeking a

declaration that defendants, Everest Indemnity Insurance Company and East Coast Painting & Maintenance, are obligated to defend and indemnify them in an underlying personal injury action entitled Fernandes v Vista, et al, and bearing Supreme Court, Queens County, Index No, 6812/15, in connection with a subcontract agreement between plaintiff, Vista Engineering Corporation and East Coast Painting. In the underlying personal injury action, East Coast Painting's employee, Jose Fernandes, was injured while working at the construction site located at 27th Street-41st Avenue in Queens, New York, on or near an elevated subway station. By a letter dated September 29, 2011, Vista Engineering Corporation's insurance carrier sought a defense and indemnification from Everest Indemnity Insurance Company, East Coast Painting's insurance carrier. By a letter dated December 5, 2011, coverage was disclaimed based upon a "Third-Party Action Over" exclusion contained in the Everest Policy on the ground that Fernandes was an employee of East Coast at the time of the accident. This declaratory judgment action seeking coverage was then commenced was commenced for recovery pursuant the policy.

It is alleged herein that pursuant to the contract between Vista and defendant, East Coast Painting, East Coast Painting agreed to procure insurance to indemnify and hold harmless the plaintiffs as additional insureds on its liability insurance policies, including the commercial general liability policy issued by defendant, Everest Insurance Company, to East Coast under policy number EF4ML)1588-101, effective July 6, 2010 through July 6, 2011, with limits of $5,000,000 per occurrence and $5,000,000 in the general aggregate naming plaintiff, Vista, NYCTA and MTA as additional insureds. Defendant, Jose Fernandes, who is also the plaintiff in the underlying action, commenced that action to recover damages for personal injuries he allegedly sustained as a result of a workplace accident, on April 19, 2011, while working for East Coast Painting at the construction site located at Queensboro Plaza Station, in Queens, New York.

Plaintiffs, Vista, NYCTA and MTA, are defendants in the underlying action and have requested that defendant, Everest Insurance Company, tender a defense and indemnify them in the underlying action. Everest has declined to provide a defense and indemnification to them in the underlying action. The complaint alleges a cause of action against East Coast Painting for breach of contract for failing to procure insurance and/or to defend and indemnify Vista, NYCTA and MTA in the underlying action. The complaint also alleges a cause of action against Everest Indemnity for breach of contract for failing to indemnify Vista, NYCTA and MTA for failing to defend and indemnify them in the underlying action despite their being named as additional insureds under the subject policy of insurance.

On its motion, the plaintiff, Vista Engineering, seeks a declaration that defendant, Everest Indemnity's disclaimer of coverage in the underlying personal injury action was late as a matter of law and for summary judgment in favor of plaintiff, Vista Engineering, and against Everest Indemnity based upon the latter's failure to "give written notice as soon as is reasonably possible" as required by New York Insurance Law § 3420 [d].

On its motion, defendant, Everest Indemnity seeks summary judgment dismissing the plaintiffs' complaint against and for a declaration that it has no duty to defend or indemnify plaintiff, Vista Engineering Corporation, with respect to the underlying action on the ground that Everest issued a timely and valid disclaimer to plaintiffs based on the "Third-Party Action Over" exclusion contained in its policy and because pursuant to the provisions of New York Insurance Law § 3420(d)(2) the New York Insurance Law notice requirement does not apply to the subject policy.

In support of their motions, the parties submit a copy of the subcontract agreement between plaintiff, Vista Engineering Corporation, and defendant, East Coast Painting, dated September 3, 2010, wherein East Coast Painting agreed to perform certain painting and related services on an elevated subway structure of the MTA/New York City Transit Authority. The subcontract agreement states in relevant part, the following: "18. To the fullest extent permitted by law, Subcontractor shall indemnify and hold [plaintiff Vista Engineering Corporation], General Contractor, the owner, architect (excluding Professional liability), harmless from claims, damages, losses and expenses, including attorney fees and disbursements, arising out or relating to the performance of this Subcontractor, provided the same is caused in whole or part by Subcontractor, its Subcontractor, supplier, agent employee, or someone for whose acts or omissions any of them might be liable. 19.In addition to workmen's compensation coverage, Subcontractor shall maintain liability insurance coverage for bodily injury and property damage in such forms and in such amounts as required by the prime contract. All insurance policies shall name Owner and Vista as additional insured. Certificates of Insurance shall name Owner and Vista as additional insured. Certificates of Insurance shall be submitted to Vista prior to commencing performance and shall contain a provision that such policies will not be canceled until at least 30 days written notice has been given to Vista. To the fullest extent permitted by law, Subcontractor waives all rights, present and future, of subrogation against Vista and Owner. If subcontractor or its insurer is or becomes subrogated to any claim, then it shall exercise such rights against Vista or Owner."

The parties also submit a copy of the insurance policy and a declination of coverage letter, dated December 5, 2011,indicating that defendant, Everest Indemnity Insurance Company, will not provide coverage to the plaintiffs under the subject insurance policy for the claims made in the underlying action. Provisions of the insurance policy were included which provide, in relevant part, as follows:

"Third Party Action Over Exclusion
This endorsement modifies insurance provided under the following-
Commercial General Liability Coverage Part....

Exclusion e. Employer's liability under paragraph 2. Exclusions of Section 1- Coverage A- Bodily injury and Property Damage Liability is deleted and replaced by the following:

e. Employers Liability

"Bodily injury" to:

(1) An "employee" of an insured arising out of and in the course of:

(a)Employment by an insured; or

(b)Performing duties related to the conduct of the insured's business;

(2) Any contractor, subcontractor, or any subcontractor, or any "employee" of any contractor or subcontractor arising out of, or in the course of, the rendering or performing of services of any kind by such contractor, subcontractor or any "employee" of such contractor or subcontractor...

This exclusion applies whether an insured may be liable as an employer or in any other capacity and to any obligation to share damages with or repay someone else who must pay damages because of the injury....

9. "Insured Contract" means:... f. That part of any other contract or agreement pertaining to your business (including an indemnification of a municipality in connection with work performed for a municipality) under which you assume the tort liability of another party to pay for "bodily injury" or "property damage" to a third person or organization. Tort liability means a liability that could be impaired by law in the absence of any contract or agreement.

Paragraph f, does not include that part of any contract or agreement:

(1)That indemnifies a railroad for "bodily injury" or "property damage" arising out of construction or demolition operations, within 50 feet of any railroad property and affecting any railroad bridge or trestle, tracks, road-beds, tunnel, underpass or crossing...;(4)That indemnifies any person or organization for "bodily injury to an "employee" of an insured, a contractor, or a subcontractor of an insured arising out of and in the course of employment by an insured; or (5)That indemnifies the spouse, child, parent, brother sister, or other family member of an "employee" of an insured, a contractor, subcontractor, or "employee" of an insured, a contractor, subcontractor or 'employee' of a contractor or subcontractor as a consequence of paragraph (4) above...."

After a careful review of the parties' submissions, there appears to be no dispute that the aforementioned policy provisions explicitly exclude coverage for bodily injuries sustained by employees of East Coast Painting, including plaintiff Fernandes in the underlying action, in the underlying incident. Therefore, the only issue presented for determination by this court is whether New York Insurance Law § 3420 (d) applies and, if so, whether the disclaimer rendered by Everest Indemnity on December 5, 2011, more than three months after the claim was filed, was timely made in accordance with requirements of the New York Insurance Law.

Insurance Law 3420(d)(2) provides: "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."

Everest Indemnity Company submits the affidavits of Tom Barrett, Director of Underwriting for Everest Indemnity and Jennifer Connell-Weibelt, an insurance industry service representative for Insurance Office of America, Inc d/b/a Environmental Underwriting Solutions (EUS), which acted as an independent contractor/wholesale broker for Everest Indemnity in connection with the subject insurance policy, dated October 28, 2016 and October 31, 2016, respectively. Mr. Barrett avers that in 2009 and 2010 Everest Indemnity was and still is located in New Jersey. He also states that East Coast Painting and its insurance broker, Global Indemnity Insurance Agency (Global) were also located in New Jersey when the policy was issued as evidenced by Global's completed "Surplus Lines Filing Confirmation" submitted herein, which indicates that the risk location for the subject policy is New Jersey and Global's office is located at a Metuchen, New Jersey address. Mr. Barrett further avers that in 2009 and 2010, Insurance Office of America, d/b/a Environmental Underwriting Solutions (EUS), acted as an independent contractor wholesale broker for Everest, pursuant to a Wholesale Broker Agreement, with respect to policies that Everest issued on a surplus lines basis, including the Everest Indemnity policies. EUS was neither an employee nor an agent of Everest, nor did EUS have binding authority from Everest. EUS was located in Birmingham, Alabama. Moreover, Everest Indemnity, through EUS, issued the subject 2010 Everest Indemnity policy to East Coast in New Jersey and delivered said policies to Global, East Coast's broker, in New Jersey. According to Mr. Barrett, the subject policies nor any endorsement to those polies were issued or delivered in New York. Further, Everest did not prepare or issue any certificates of insurance identifying any New York person or entity as an additional insured on the 2010 Everest Indemnity policy. Lastly, Global was not an agent of Everest Indemnity and did not have any underwriting or binding authority with Everest. In her affidavit, Ms. Connell-Weibelt avers that EUS did not issue or deliver the 2010 Everest policy to any person or entity in New York, nor did it send any other documents relating to the 2010 Everest policy to any person or entity in New York.

The evidence submitted herein demonstrates that the subject policy and endorsements were all issued and delivered outside the State of New York. In opposition, Vista Engineering Corporation does not submit any evidence to contradict Everest Indemnity's showing that the subject policy and endorsements were not issued or delivered in the State of New York. Thus, contrary to the plaintiff's contention, it is clear that the policy and the disclaimer at issue are neither governed by nor subject to the timeliness requirements of Insurance Law § 3420(d)(cf., *Nabutovsky v. Burlington Ins. Co.,* 81 AD3d 615 [2011]). Accordingly, the plaintiff's motion is denied (*see generally, Alvarez v Prospect Hospital*, 68 NY2d 230 [1986]), and defendant, Everest Indemnity Insurance Company's motion is granted.

It is hereby adjudged and declared that Everest Indemnity Insurance Company has no duty to defend and/or indemnify plaintiff, Vista Engineering Corporation, with respect to the

underlying action entitled *Fernandes v Vista Engineering, et al.* and bearing Queens County Index No. 6116/2012.

Dated: January 30, 2017

DARRELL L. GAVRIN, J.S.C.