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NEW YORK SUPREME COURT - QUEENS COUNTY

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

REED DR. CONSTRUCTION CORP.,

Plaintiff,

- against-

ARCH SPECIALTY INSURANCE COMPANY and ENDURANCE AMERICAN INSURANCE COMPANY,

Defendants.

Index No. 706053/14

Motion Date January 19, 2017

Motion Cal. No. 122, 123 & 124

Motion Seq. No. 8, 9 & 10

ARCH SPECIALTY INSURANCE COMPANY,

Third-Party Plaintiff,

- against -

DPC NEW YORK, INC., NEW YORK UNIVERSITY REAL ESTATE CORPORATION and NEW YORK UNIVERSITY,

Third-Party Defendant.

The following papers numbered EF137 through EF296 were read on these motions by defendant, Arch Specialty Insurance Company (Arch); by third-party defendants, New York University Real Estate Corporation and New York University (NYU defendants); and by plaintiff, all for summary judgment, pursuant to CPLR 3212.

	Papers Numbered
Notice of Motion - Affirmation - Exhibits.....	EF 137 - 236
Affirmation in Opposition - Exhibits.....	EF 241 - 289
Reply Affirmation.....	EF 290 - 296

Upon the foregoing papers, it is ordered that the motions by, defendant, Arch (Seq. 8); third-party defendants, NYU defendants (Seq. 9); and plaintiff (Seq. 10), are determined as follows:

Plaintiff filed the instant declaratory judgment action seeking a declaration that it is entitled to a defense and indemnity from defendant, Arch, for any claim arising from a personal injury accident at premises, 12-14 East 8th Street, New York, New York, a job site owned by the third-party NYU defendants. The NYU defendants contracted with third-party defendant, DPC New York, Inc. (DPC), to perform waterproofing on the subject premises. DPC retained plaintiff, Reed Dr. Construction Corp. (Reed or plaintiff), to perform the excavation around the building foundation. Reed subcontracted out the excavation work to Matempa Corp. (Matempa), which employed Segundo Tenesaca, the plaintiff in the underlying action, who alleged personal injuries as the result of the collapse of a subterranean wall while he was working in an excavated trench at the job site.

Pursuant to the contract with the NYU defendants, Reed obtained a commercial insurance policy with Arch. Pursuant to the Purchase Order and Subcontract Agreement with Arch, Matempa agreed to secure commercial insurance listing NYU, DPC, and Reed as "additional insured and Certificate Holder." Matempa obtained insurance with Endurance American Insurance Company (Endurance). After the underlying accident, Arch acknowledged receipt of a claim from Reed on or around October 30, 2013, and disclaimed coverage to Reed on the basis, among other things, of the included New York Limitation Endorsement of said policy. Based upon the allegations of the complaint in the underlying action, Arch issued a revised disclaimer, on November 14, 2013, adding, as a basis, the Subsidence Exclusion of the policy. After receiving a third-party complaint filed by DPC against Reed, Arch issued a second disclaimer letter dated February 27, 2014. In late October and early November 2013, DPC and DPC's insurance carrier, American Empire Insurance Group (American Empire) tendered their defense and indemnification in the underlying action to Reed, and Arch issued disclaimer and reservation of rights letters on November 12, 2013, and a revised letter to both, on November 14th, indicating there was "no coverage for any allegations," and copying NYU on these disclaimer letters.

On January 29, 2014, counsel for DPC and American Empire urged Arch to reconsider its denial of coverage, and Arch issued another disclaimer, indicating there was "no coverage" based on the Subsidence Exclusion, while reserving its rights on other provisions, including the New York Limitation Endorsement. The next day, Arch issued another, identical disclaimer letter. The NYU defendants were copied on both of these letters. Finally, the NYU defendants tendered their defense and indemnification in the underlying action directly to Arch on April 29, 2014, and Arch denied the tender, on the basis of both the New York Limitation Endorsement and on the Subsidence Exclusion, by letter dated July 17, 2014.

In the instant action, plaintiff requests that the court determine the parties' rights and obligations, if any, under the policy issued to Reed by Arch, and under the policy issued to Matempa by Endurance. Arch has filed a counterclaim seeking a declaration that it owes no coverage to Reed for the underlying action, and, in a third party action, a further declaration that it owes no coverage in the underlying action to DPC and the NYU defendants. As DPC never responded to the third-party complaint, Arch obtained an order of this court, dated

October 13, 2015, entering a default judgment against DPC. Further, it appears that the NYU defendants tendered their defense and indemnification in the underlying action to American Empire, who subsequently agreed to defend and cover the NYU defendants.

In Seq. 8, Arch moves for summary judgment, declaring it owes no coverage to Reed or the NYU defendants for the underlying action, based upon both the New York Limitation Endorsement and/or the Subsidence Exclusion of the subject policy. Plaintiff and the NYU defendants oppose, contending that those provisions do not apply herein, and the NYU defendants further allege that Arch's disclaimer was untimely and, therefore, without effect.

"An action for a declaratory judgment as to the rights of the insured vis-á-vis his or her insurance carrier is the appropriate means of resolving a coverage dispute" (*McDonald v Shore*, 100 AD3d 602, 603 [2d Dept 2012]; *see Iacobellis v A-1 Tool Rental, Inc.*, 65 AD3d 1015 [2d Dept 2009]).

"[T]he proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Ayotte v Gervasio*, 81 NY2d 1062, 1063 [1993], citing *Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]; *see Schmitt v Medford Kidney Center,* 121 AD3d 1088 [2d Dept 2014]; *Zapata v Buitriago*, 107 AD3d 977 [2d Dept 2013]). On defendants' motion for summary judgment, the evidence should be liberally construed in a light most favorable to the non-moving parties (*see Boulos v Lerner-Harrington*, 124 AD3d 709 [2d Dept 2015]; *Farrell v Herzog*, 123 AD3d 655 [2d Dept 2014]).

The court's function on a motion for summary judgment is "to determine whether material factual issues exist, not to resolve such issues" (*Lopez v Beltre*, 59 AD3d 683, 685 [2d Dept 2009]; *Santiago v Joyce*, 127 AD3d 954 [2d Dept 2015]). As summary judgment is to be considered the procedural equivalent of a trial, "it must clearly appear that no material and triable issue of fact is presented .... This drastic remedy should not be granted where there is any doubt as to the existence of such issues ... or where the issue is 'arguable' [citations omitted] (*Sillman v Twentieth Century-Fox Film Corp*., 3 NY2d 395, 404 [1957]; *see also, Rotuba Extruders v Ceppos*, 46 NY2d 223 [1978]; *Andre v Pomeroy*, 35 NY2d 361 [1974]; *Stukas v Streiter*, 83 AD3d 18 [2d Dept 2011]; *Dykeman v Heht*, 52 AD3d 767 [2d Dept 2008]. Summary judgment "should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility" (*Collado v Jiacono*, 126 AD3d 927 [2d Dept 2014]), citing *Scott v Long Is. Power Auth.*, 294 AD2d 348, 348 [2d Dept 2002]).

With regard to the disclaimer argument, the NYU defendants contend that the period between its tender of the defense to Reed and Arch, on April 29, 2014, and Arch's disclaimer, on July 17, 2014, constituted a violation of CPLR 3420 (d), which asserts that a disclaimer of coverage in a bodily injury claim must be made "as soon as is reasonably possible." "The timeliness of an insurer's disclaimer is measured from the point in time when the insurer first

learns of the grounds for disclaimer of liability or denial of coverage" (*Allcity Ins. Co. v Jimenez*, 78 NY2d 1054, 1056 [1991]; *see Evanston Ins. Co. v P. S. Bruckel, Inc.*, – AD3d –, 2017 NY Slip Op. 03489 [2d Dept 2017]). Arch alleges that its investigation into the issues which affected its decision whether to disclaim coverage, presented n reasonable excuse for delay in notifying the policyholders of the disclaimer (*see Delphi Restoration Corp. v Sunshine Restoration Corp.*, 43 AD3d 851 [2d Dept 2007]).

While the NYU defendants cited several cases which declared shorter periods than in the case at bar to be unreasonable delays in disclaiming coverage, those cases also found no explanations propounded for such delays. Here, Arch has proffered a credible explanation for the delay in its investigation of the facts, and in its explanation of the incorrect claim numbers utilized by the other parties, and the ensuing lack of notice to Arch. Further, and more to the point, the NYU defendants' reliance on the case of *Sierra v 4401 Sunset Park, LLC*, 24 NY3d 514 (2014) and its ilk, is misplaced and unpersuasive. The Court in said decision held that the disclaimer of coverage by a primary insurer to another insurer, without having giving "notice of its disclaimer directly to its additional insureds or to the lawyer who had been retained to represent them" (at 518), rendered the disclaimer ineffective as against the additional insureds. In this case, the NYU defendants were copied on several disclaimer letters prior to their own tender of the defense of the action to Arch. Such statutorily mandated "written notice" made the NYU defendants fully aware of Arch's position of non-coverage for the underlying action within a "reasonable" time, in compliance with the requirements of CPLR 3420 (d) (*see Harco Const., LLC v First Mercury Ins. Co.*, 148 AD3d 870 [2d Dept 2017]). Consequently, that branch of the NYU defendants' opposition to Arch's motion for summary judgment is without merit, and the court finds that Arch's disclaimer was timely and properly made.

The argument that Arch does not owe coverage to Reed or the NYU defendants, because the Subsidence Exclusion of the subject general liability insurance policy applies to the facts of the instant matter, has merit. "Exclusions from coverage in an insurance policy are to be accorded strict and narrow construction ... (and) an insurer seeking to rely on a policy exclusion bears the burden of establishing that the exclusion is stated in clear and unmistakable language, 'subject to no other reasonable interpretation' " (*Rego Park Holdings, LLC v Aspen Specialty Ins. Co.*, 140 AD3d 1147, 1148 [2d Dept 2016], quoting *Pioneer Tower Owners Assn. v State Farm Fire & Cas. Co.*, 12 NY3d 302, 307 [2009]). Here, although actual "subsidence," i.e., "a gradual settling or sudden sinking of the Earth's surface owing to subsurface movement of earth materials" (U.S. Geological Survey, USGS Groundwater Information: Land Subsidence in the United States [USGS Fact Sheet - 165-00, December 2000]), was not the cause of the subterranean wall collapse herein, the additional language of the exclusionary provision of said policy, unrelated to an event of subsidence, notably "or any other movement of land or earth, regardless of whether such movement is a naturally occurring phenomena or is man-made," undeniably applies to the facts of the underlying incident which allegedly caused the personal injury (*see Bentoria Holdings, Inc. v Travelers Indem. Co.*, 20 NY3d 65 [2012]).

As such, Arch has established its *prima facie* entitlement to summary judgment as a

matter of law (*see Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]). Liberally construing the evidence in a light most favorable to the non-moving parties (*see Nash v Port Washington Union Free School Dist.*, 83 AD3d 136 [2d Dept 2011]; *Pearson v Dix McBride, LLC*, 63 AD3d 895 [2d Dept 2009]), the opposition papers are devoid of evidence demonstrating the presence of any material issue of fact in rebuttal which would deny judgment to Arch (*see Zuckerman v City of New York Transit Auth.*, 49 NY2d 557 [1980]; *Baird v Four Winds Hosp.,* 140 AD3d 810 [2d Dept 2016]), and Arch is declared to owe no duty to defend and indemnify either Reed or the NYU defendants in the underlying personal injury action.

Consequently, the motion (Seq. 9) by third-party defendants, the NYU defendants seeking summary judgment declaring that Arch must defend and indemnify the NYU defendants in connection with the claims alleged in the underlying action, based as it is on the same facts, evidence, and arguments considered in the above-sequenced motion, is, necessarily, denied in its entirety.

Likewise, the branch of the motion (Seq. 10) by plaintiff, Reed seeking summary judgment declaring that Arch must defend and indemnify it in connection with the claims alleged in the underlying action, based as it is on the same facts, evidence, and arguments considered in Arch's above motion, is also denied.

Plaintiff further moves for summary judgment declaring that Endurance must defend and indemnify it in connection with the claims alleged in the underlying action. Plaintiff contends that it qualifies as an "additional insured" under the Endurance general liability policy issued to Matempa. Endurance opposes, demonstrating that the subject Certificate of Insurance identifies plaintiff as a "certificate holder" only, "confers no rights upon the certificate holder," and does not contain the requisite additional insured endorsement. "A party is not entitled to coverage if it is not named as an insured or additional insured on the face of the policy as of the date of the accident for which coverage is sought" (*Vikram Constr., Inc. v Everest Natl. Ins. Co.,* 139 AD3d 720, 721 [2d Dept 2016]; *see Dichira v Nawid*, 126 AD3d 755 [2d Dept 2015]). Consequently, a triable issue of fact remains as to whether plaintiff is entitled to coverage as an additional insured under the Endurance policy, mandating denial of this branch of plaintiff's motion (*see Hargob Realty Associates, Inc. v Fireman's Fund Ins. Co.*, 75 AD3d 856 [2d Dept 2010]; *Home Depot, U.S.A., Inc. v National Fire & Marine Ins. Co.*, 48 AD3d 397 [2008]).

The parties' remaining contentions and arguments are either without merit or need not be addressed in light of the foregoing determinations.

Accordingly, defendant, Arch Specialty Insurance Company's motion for summary judgment is granted. The separate motions for summary judgment by defendants, New York University Real Estate Corporation and New York University, and by plaintiff, Reed Dr. Construction Corp., are both denied.

Dated: June 16, 2017

DARRELL L. GAVRIN, J.S.C.