SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 7

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COLONY INSURANCE COMPANY and MYM CONSTRUCTION, INC.,

DECISION/ORDER

Index No. 652031/2016

Plaintiffs,

Seq. #001

- against -

TUDOR INSURANCE COMPANY and GREENSIDE CORP.,

Defendants.

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Recitation, as required by CPLR 2219 (a), of the papers considered in reviewing the motion of defendant Tudor Insurance Company (motion sequence no. 001) and plaintiffs' motion for summary judgment (motion sequence no. 002).

Papers	**NYSCEF Documents Numbered**
Defendant's Notice of Motion (motion sequence no. 001)	13
Defendant's Affirmation and Exhibits in Support of the Motion	14, 20-53
Defendant's Memorandum of Law in Support of the Motion	15
Defendant's Affidavits in Support of the Motion	16-19
Plaintiffs' Affidavit in Opposition	82
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Plaintiffs' Notice of Motion (motion sequence no. 002)	55
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Melito & Adolfsen P.C. (S. Dwight Stephens, of counsel), for plaintiffs.
Congdon, Flaherty, O'Callaghan, Reid, Donlon, Travis & Fishlinger (Richard J. Nicolello, of counsel), for defendant Tudor Insurance Company.

Gerald Lebovits, J.:

Motion sequence nos. 001 an 002 are consolidated for disposition.

In motion sequence no. 001, defendant Tudor Insurance Company (Tudor) moves, pursuant to CPLR 3212, for a judgment declaring that plaintiff MYM Construction, Inc. (MYM) is not entitled to coverage under an insurance policy Tudor had issued defendant Greenside Corp. (Greenside), and for an order, pursuant to CPLR 3126, precluding plaintiffs from offering evidence that they notified Tudor of their claim in a letter dated November 5, 2014.

In motion sequence no. 002, MYM and its insurer, plaintiff Colony Insurance Company (Colony), move, pursuant to CPLR 3212, for a judgment declaring that MYM is entitled to additional insured coverage under the policy Tudor had issued to Greenside and that Tudor had a duty to defend and indemnify MYM in an underlying personal-injury action. In the alternative, plaintiffs move for summary judgment against Greenside on their breach-of-contract claim and for a declaration that Greenside is required to defend and indemnify MYM.

Background

This insurance coverage dispute arises out of a Labor Law action commenced by John Gormley and his wife, entitled *Gormley v JSB Realty No 2 LLC et al.*, Sup Ct, Queens County, index No. 5906/2014 (the Gormley action). Gormley claimed he was injured on March 8, 2014, after he allegedly fell from a scaffold while working inside a parking garage at 79-01 Lindenwood Boulevard, Queens, New York, otherwise known as the Lindenwood Mall (the Premises) (affirmation of Tudor's counsel, exhibit D [Gormley bill of particulars], ¶¶ 5, 7, and 18). At the time of the incident, Gormley was employed by Greenside as a labor foreman (*id.*, ¶ 29; affirmation of Tudor's counsel, exhibit E [Gormley tr] at 8-9). Nonparty JSB Realty No 2 LLC (JSB), the owner of the Premises, had hired MYM as its general contractor (affirmation of Tudor's counsel, exhibit C [amended complaint of John Gormley] [Gormley complaint], ¶ 23). MYM and Greenside entered into a blanket agreement for Greenside to perform certain work at the Premises (the Greenside Contract) (complaint, ¶ 7).

The Greenside Contract contains two provisions relevant to this action. Paragraph 6 required Greenside to indemnify and hold harmless JSB and MYM from any claims "attributable to bodily injury . . . cause[d] in whole or in part by [Greenside's] negligent acts or omissions" (affirmation of Tudor's counsel, exhibit I at 4). In addition, paragraph 10 required Greenside to purchase and maintain a commercial general liability policy, including contractual liability, with a $1 million per occurrence limit of liability and a $2 million aggregate per project limit of liability, and an umbrella liability policy with a $1 million per occurrence limit of liability (*id.* at 5).

Tudor issued comprehensive general liability policy no. NPP1353639 to Greenside, in effect from April 1, 2013, to April 1, 2014 (the Tudor Policy) (affirmation of Tudor's counsel, exhibit G [Tudor Policy] at 1). MYM was added as an additional insured on the Tudor Policy by endorsement (*id.* at 8-11), as required by the Greenside Contract. Colony issued a comprehensive general liability insurance policy to MYM (complaint, ¶ 10).

By letter dated November 20, 2014 (the November 20 letter), Colony employee Stephen Kamoroff notified Tudor of the Gormley action on behalf of MYM, writing that the Greenside Contract required Greenside to indemnify MYM and JSB and to name both as additional insureds on the Tudor Policy (affirmation of Tudor's counsel, exhibit H at 1). Kamoroff's letter also stated that "Colony has been advised that Greenside Corp. is the employer of [Gormley]" (*id.*). Kamoroff furnished Tudor with copies of the certificate of insurance and the Gormley complaint.

In a second letter dated November 20, 2014, Colony employee Regina Tuggle tendered JSB's request for defense and indemnification and additional insured coverage to Greenside and

Tudor (affirmation of Tudor's counsel, exhibit I at 1). Tuggle provided Tudor with a copy of the Greenside Contract.

In two letters dated December 23, 2014, Tudor acknowledged receipt of Kamoroff's November 20 letter and Tuggle's separate tender letter[1] (affirmation of Tudor's counsel, exhibit P at 1 and 4). Rick Hazard, a Tudor claims consultant, wrote that each Colony letter dated November 20 was "our first notice of this claim" (*id.*). Hazard further wrote that "there is no coverage under the Tudor policy issued to Greenside . . . for JSB . . . or MYM . . . in connection with the Gormley action" and that "Tudor is issuing coverage disclaimers setting forth the reasons for no coverage" (*id.*).

In letters dated December 30, 2014 to MYM, JSB, Greenside and Colony, Tudor disclaimed coverage and declined to defend and indemnify them based on several exclusion provisions in the Tudor policy (affirmation of Tudor's counsel, exhibit Q at 2-5). The employers liability exclusion modification excluded coverage for bodily injury sustained by an insured's employee and applied "[t]o any obligation to share damages with or repay someone else who must pay damages because of the injury" (affirmation of Tudor's counsel, exhibit G at 42). The relevant portion of the contractor or subcontractor limitation endorsement states that "[t]his insurance does not apply to 'bodily injury' to: (1) any contractor or subcontractor hired or retained by or for any insured; or (2) [a]n 'employee'. . . of any contractor or subcontractor who was hired or retained by or for any insured" (*id.* at 41). Additionally, section I - Coverages, paragraph 2, of the commercial general liability coverage form, entitled Exclusions, reads, in part:

> "This insurance does not apply to:
> ***
> **b. Contractual Liability**
>
> 'Bodily injury' . . . for which the insured is obligated to pay damages by reason of the assumption of liability in a contract or agreement. This exclusion does not apply to liability for damages:
>
> (1) That the insured would have in the absence of the contract or agreement; or
>
> (2) Assumed in a contract or agreement that is an 'insured contract', provided that the 'bodily injury'. . . occurs subsequent to the execution of the contract or agreement"

(*id.* at 48). The contractual liability limitation endorsement defines an "insured contract" as:

> a. A contractor for a lease of a premises . . .;
> b. A sidetrack agreement;
> c. Any easement or license agreement, except in connection with construction or demolition operations on or within 50 feet of a railroad;

[1] Tudor received Tuggle's letter on December 3, 2014 at 9:34 a.m. (affirmation of Tudor's counsel, exhibit I at 1).

> d. An obligation, as required by ordinance, to indemnify a municipality, except in connection with work for a municipality;
> e. An elevator maintenance agreement.

(*id.* at 67). Because the Greenside Contract did not qualify as an "insured contract" under the contractual liability limitation endorsement, there was no coverage under the Tudor policy for either MYM or JSB.

Colony responded to Tudor's disclaimer letter on January 21, 2015. Kamoroff wrote that Colony first provided Tudor with notice of the Gormley action in a letter dated November 5, 2014 (the November 5 letter), and he provided Tudor with a copy (affirmation of Tudor's counsel, exhibit R at 1). The November 5 letter was a duplicate of the November 20 letter, albeit with an earlier date. Kamoroff further wrote that Tudor should have issued a timely coverage position no later than December 15, 2014. Tudor relied on several exclusions in the Tudor Policy which, Colony suggested, could have been investigated within the time limit set forth by New York Insurance Law. Kamoroff requested that Tudor agree to defend and indemnify Greenside and MYM in the Gormley action.

On February 19, 2015, Tudor responded to Colony's January letter, with Hazard writing that Tudor "disagree[d] with your claim that Tudor's disclaimers in this matter were untimely" (*id.* at 5). Hazard denied that Tudor received the November 5 letter and repeated Tudor's position that it was not notified of the Gormley action until November 24, when Tudor received Colony's two letters dated November 20. Hazard indicated that Tudor immediately commenced an investigation upon receiving those letters, that Tudor received the results of the investigation on December 15, 2014, and that disclaimer letters were issued within 15 days of that date. Thus, Hazard believed that the December 30, 2014, disclaimer letters were issued timely.

In July 2016, the Gormley action settled for $1.5 million (affirmation of Tudor's counsel, exhibit F at 1). Colony paid $1 million towards the settlement (*id.*).

Plaintiffs commenced this action for a declaration that Tudor had a duty to defend and indemnify MYM in the Gormley action and to recover the costs incurred in defending or indemnifying MYM in that action. As against Greenside, plaintiffs assert a breach of contract claim for Greenside's failure to obtain or provide primary additional insured coverage. They also seek a declaration that Greenside failed to procure primary additional insured coverage for the defense and indemnity of MYM in the Gormley action.

Tudor moves for summary judgment on three grounds. First, Tudor contends that the employers liability exclusion modification, the contractual liability limitation endorsement, and the contractor or subcontractor limitation endorsement all preclude coverage. In his affidavit, Hazard, a claims consultant, avers that Tudor received Kamoroff's November 20 letter on Monday, November 24, and that the assistant vice president of liability claims assigned the claim to him the next day (Hazard aff, ¶ 10). Hazard submits that, although the letter stated "Colony ***has been advised*** that Greenside Corp. is the employer of [Gormley]" (*id.*, ¶ 7 [emphasis in original]), he "wanted a thorough investigation into . . . [Gormley's] employment status" (*id.*, ¶ 11), as the Gormley complaint did not identify Gormley's employer (*id.*, ¶ 8). Hazard asked David Morse & Associates (DMA) to conduct the investigation. Hazard maintains that he also reached out to its insured, Greenside. He was unable to reach Phil Kelleher, an individual

associated with Greenside, until December 10, after several previous attempts to speak with Kelleher had failed. During that conversation, Kelleher "confirmed that . . . Gormley was an employee of the insured" (*id.*, ¶ 14). Hazard states that he received DMA's investigative report on December 16. The report indicated that Kelleher, who was Greenside's owner and president, and Mike Sheridan, Greenside's superintendent, admitted that Gormley was a Greenside employee (affirmation of Tudor's counsel, exhibit O at 2-3). Therefore, Tudor argues that there was no coverage on the Tudor Policy because of the exclusions referenced above.

Next, Tudor contends that its disclaimer was timely under Insurance Law § 3420 (d). It submits affidavits from three employees of Tudor's parent company, Western World Insurance Group (Western World) – Hazard, Christopher Linnartz, an assistant supervisor in the office services department, and Margaret House, an associate vice president of operations – to describe how Western World processes mail and stores scanned images of claims-related correspondence on behalf of Tudor. According to the date and time stamp imprinted on the scanned document (House aff, 4), Western World received its first notice of the Gormley action on November 24, 2014, at 2:28 p.m., when it received Kamoroff's November 20 letter (House aff, ¶¶ 4, 9). Western World's records indicate that it never received the November 5 letter because there were no entries in the two computer programs Western World used to log and record claims (*id.*, ¶¶ 14-15).

Furthermore, Colony was justified in investigating Gormley's employment status, which it conducted in a prompt and diligent manner. Once Hazard received DMA's report, he contacted coverage counsel on December 17 for review (Hazard aff, ¶ 15). Hazard "received coverage counsel's opinion and proposed draft disclaimers" on December 22 (*id.*, ¶ 16). He drafted brief letters denying coverage on December 23 (*id.*, ¶ 16), and full disclaimer letters on December 30, after the Christmas holidays had passed (*id.*, ¶ 18). As such, Tudor asserts that its disclaimer was timely.

Lastly, Tudor argues that plaintiffs should be precluded from offering evidence pertaining to Kamoroff's November 5 letter. James Weatherwax, a former claims assistant at Colony, testified that he was responsible for printing and mailing correspondence on behalf of Colony's claims examiners, including Kamoroff, from his computer and documenting same by entering the mailing date into Image Right, a computer program that Colony used to track claims (affirmation of Tudor's counsel, exhibit S [Weatherwax tr] at 14-17). While Weatherwax had no specific recollection of printing and mailing the November 5 letter (Weatherwax tr at 36), the Image Right records indicated that Weatherwax performed that task (Weatherwax tr at 43-46).

During discovery, Tudor requested that Colony preserve and produce all electronic evidence related to this litigation, including electronically stored information such as "word processing documents" (affirmation of Tudor's counsel, exhibit CC at 5) and "computer/digital/electronic records of the November 5, 2014, letter (including the native copy, previous and subsequent versions) with all available Metadata produced" (affirmation of Tudor's counsel, exhibit EE at 5). In response, plaintiffs stated that the "computer used to create the letter no longer exists" (affirmation of Tudor's counsel, exhibit FF at 4), and that Weatherwax's computer had been "wiped, imaged and reissued twice" since Weatherwax's retirement in 2016 (affirmation of Tudor's counsel, exhibit GG at 1).

Tudor contends that the electronic data is necessary because Tudor never received the November 5 letter, as noted above. In addition, it appears that Colony mailed the November 5 letter to Mark Makher of MYM and Lester Otway of Greenside. Makher, MYM's owner, avers in an affidavit that he has "no memory of receiving a copy of correspondence from Colony . . . to Tudor . . . dated either November 5, 2014, or November 20, 2014, relating to the [Gormley action]" (Makher aff, ¶ 5). Furthermore, Tudor submits that there are discrepancies between the November 5 letter and November 20 letter. Notably, the headers and Kamoroff's electronic signature on both letters are not identical.

Plaintiffs argue that, notwithstanding Tudor's position with regard to the November 5 letter, Tudor's disclaimer is untimely under Insurance Law § 3420 (d), and seek summary judgment on this ground. First, plaintiffs contend that both the November 5 letter and the November 20 letter informed Tudor that Gormley was a Greenside employee. As such, an investigation was not necessary. Hazard had testified that an employer's liability exclusion coverage defense meant that there is no coverage for "an employee who is in the course or scope of employment" (affidavit of plaintiffs' counsel, exhibit T [Hazard tr] at 20, lines 2-3).

Even if an investigation was necessary, plaintiffs submit that Tudor unduly delayed issuing the disclaimer letters once it received confirmation of Gormley's employment status. Hazard testified that "the first notice or letter that [Tudor] got from Colony said it looked like or appeared that it involved injuries to an employee" (Hazard tr at 41, lines 19-21). In order to make this determination, Hazard testified, "[y]ou need to do an investigation, a thorough investigation to determine, number one, someone's employment" (*id.*, lines 8-10). Once a claimant is determined to be an employee of the insured, it was Hazard's understanding that the exclusion would preclude coverage (*id.*). However, Hazard had confirmed Gormley's employment status in a conversation he had with Kelleher on December 10 (*id.* at 46). Hazard testified that he wanted "additional information just to confirm and verify" Gormley's employment, adding that "[j]ust one phone call to an insured is not enough to confirm if that person is an employee or not" (*id.* at 47, lines 8-11). Plaintiffs, though, contend that the results from the DMA investigation did not alter the basis for Tudor's disclaimer.

Additionally, Hazard requested "input and advice" from coverage counsel (*id.* at 65, line 7). Tudor waited eight days after receiving coverage counsel's opinion before disclaiming coverage.

Plaintiff also move for reimbursement of the costs they incurred in defending MYM in the Gormley action, or, in the alternative, for summary judgment against Greenside on its breach of contract claim.

Discussion

It is well settled that the movant on a summary judgment motion "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). The motion must be supported by evidence in admissible form (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]), and by the pleadings and other proof such as affidavits, depositions, and written admissions (*see* CPLR 3212). The "facts must be viewed in the light most favorable to the non-moving party" (*Vega v Restani Constr. Corp.*, 18

NY3d 499, 503 [2012] [internal quotation marks and citation omitted]). Once the movant meets its burden, it is incumbent upon the non-moving party to establish the existence of material issues of fact (*id.*, citing *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). The "[f]ailure to make [a] prima facie showing [of entitlement to summary judgment] requires a denial of the motion, *regardless of the sufficiency of the opposing papers*" (*Vega*, 18 NY3d at 503 [internal quotation marks and citation omitted, emphasis in original]).

A. The First Cause of Action for a Declaratory Judgment against Tudor

In the first cause of action, plaintiffs allege that Tudor's attempt to disclaim coverage were untimely and invalid. They seek a judgment declaring that Tudor had a duty to defend and indemnify MYM in the Gormley action.

An insurer wishing to "disclaim liability or deny coverage for death or bodily injury . . . shall give written notice as soon as is reasonably possible of such disclaimer of liability or denial of coverage . . ." (Insurance Law § 3420 [d] [2]). A disclaimer is "unnecessary when a claim falls outside the scope of the policy's coverage portion" because coverage "never existed" in the first place (*Matter of Worcester Ins. Co. v Bettenhauser*, 95 NY2d 185, 188 [2000]). An exclusion provision in an insurance policy, though, "subtract[s] from rather than grant[s] coverage" (*Jacobson Family Invs., Inc. v Natl. Union Fire Ins. Co. of Pittsburgh, PA*, 129 AD3d 556, 560 [1st Dept 2015], *lv denied* 27 NY3d 901 [2016]). Thus, when coverage is denied "based on a policy exclusion without which the claim would be covered," then a disclaimer under Insurance Law § 3420 (d) is required (*Matter of Worcester Ins. Co.*, 95 NY2d at 189]). The "[f]ailure to comply with section 3420 (d) precludes denial of coverage based on a policy exclusion" (*id.*). As to the present action, a disclaimer in conformity with Insurance Law § 3420 (d) (2) was required.

"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 (*Matter of Allcity Ins. Co. [Jimenez]*, 78 NY2d 1054, 1056 [1991], *rearg denied* 79 NY2d 823 [1991]; *accord First Fin. Ins. Co. v Jetco Contr. Corp.*, 1 NY3d 64, 66 [2003] [stating that "[o]nce the insurer has sufficient knowledge of facts entitling it to disclaim, or knows that it will disclaim coverage, it must notify the policyholder in writing as soon as is reasonably possible"]). "An insurer who delays in giving written notice of disclaimer bears the burden of justifying the delay" (*First Fin. Ins. Co.*, 1 NY3d at 69). If the grounds for denying coverage are "readily apparent before the onset of the delay," then "an insurer's explanation [for the delay] is insufficient as a matter of law" (*id.*). Thus, if an insurer is aware of a valid ground to disclaim coverage, then the insurer cannot delay issuing the disclaimer "while investigating other possible grounds for disclaiming" (*Endurance Am. Specialty Ins. Co. v Utica First Ins. Co.*, 132 AD3d 434, 436 [1st Dept 2015], *lv dismissed* 27 NY3d 1119 [2016], quoting *George Campbell Painting v Natl. Union Fire Ins. Co. of Pittsburgh, PA*, 92 AD3d 104, 106 [1st Dept 2012]).

Likewise, an insurer must "rapidly" disclaim coverage where "justification for disclaimer is 'readily ascertainable from the face of the complaint in the underlying action' . . . or 'all relevant facts supporting . . . a disclaimer [are] immediately apparent . . . upon . . . receipt of notice of the accident'" (*Country-Wide Ins. Co. v Preferred Trucking Servs. Corp.*, 22 NY3d 571, 576 [2014] [internal citations omitted]).

However, where the grounds for a disclaimer are "not readily apparent, [then] the insurer has the right, albeit the obligation, to investigate, but any such investigation must be promptly and diligently conducted" (*Those Certain Underwriters at Lloyds, London v Gray*, 49 AD3d 1, 4 [1st Dept 2007]; *Tully Constr. Co., Inc. v TIG Ins. Co.*, 43 AD3d 1150, 1152-1153 [2d Dept 2007] [stating that the "burden is on the insurer to demonstrate that its delay was reasonably related to its completion of a thorough and diligent investigation"]). Therefore, to find that a delay because of an investigation is reasonable, a party "must establish as a matter of law that (1) it was not 'readily apparent' from the content of the verified complaint that grounds for the disclaimer in fact existed; and (2) the investigation . . . was promptly and diligently conducted" (*Those Certain Underwriters at Lloyds, London*, 49 AD3d at 4-5).

Here, regardless of the dispute about when Tudor received its first notice of the Gormley action, the basis for disclaiming coverage was not readily apparent from the face of either the November 5 letter or the November 20 letter (*see Racanelli Constr. Co, Inc. v CCI Constr. Co., Inc.*, 2011 NY Slip Op 33854 [U], *5 [Sup Ct, Bronx County 2011] [finding that the documents annexed to the tender letter did not provide the insurer with sufficient facts to enable it to disclaim coverage on the employee exclusion or contractual liability exclusion provisions]). Colony's statement that it had been advised Gormley was a Greenside employee was less than unequivocal, and Gormley did not identify his employer in the Gormley complaint (*see Those Certain Underwriters at Lloyds, London v Gray*, 49 AD3d at 5 [stating that it was "obvious" from the allegations in the verified complaint about plaintiff's employer that grounds existed to disclaim coverage]; *Squires v Marini Bldrs.*, 293 AD2d 808, 810 [3d Dept 2002], *lv denied* 99 NY2d 502 [2002] [finding that the injured plaintiff's complaint and the subcontract "unambiguously provided" the insurer with information about the injured plaintiff's status as an employee]). Therefore, Tudor was not obligated to issue a disclaimer upon its receipt of the November 20 letter or, as plaintiffs suggest, Tudor's alleged receipt of the November 5 letter. In addition, the issue of whether Gormley was a Greenside employee was sufficient to trigger Tudor's obligation to investigate the claim and ascertain Gormley's status (*see Imperium Ins. Co. v Utica First Ins. Co.*, 130 AD3d 574, 574 [2d Dept 2015], *lv denied* 26 NY3d 918 [2016] [concluding that an insurer's decision to investigate whether an employee exclusion applied to preclude coverage was reasonable]; *Public Serv. Mut. Ins. Co. v Harlen Hous. Assoc.*, 7 AD3d 421, 423 [1st Dept 2004] [finding it reasonable for an insurer to conduct an investigation so that the disclaimer could be based on concrete evidence]).

Having determined that an investigation was necessary, it must still be determined whether the investigation was promptly and diligently conducted. Tudor has established that it retained DMA within a week of receiving the November 20 letter and shortly after the Thanksgiving holiday had passed. On December 2, DMA assigned senior adjuster Tom Walsh to conduct the investigation. Walsh's activity log shows that he began investigating the claim on the same day he received the assignment (affirmation of Tudor's counsel, exhibit L at 2). He produced a report on December 15, which Hazard received on December 16. Thus, Tudor has demonstrated that it conducted a prompt and diligent investigation.

Nevertheless, a question of fact exists about whether the disclaimer was issued in a timely manner. Hazard's claim notes reveal that Kelleher confirmed Gormley's employment status on December 10 (affirmation of Tudor's counsel, exhibit K at 3). Although Tudor suggests that it was necessary to await the results of DMA's investigation before denying coverage, the results of that investigation, which Tudor received six days later, did not alter the basis for the

disclaimer, namely the fact that Gormley was a Greenside employee. Significantly, both Hazard and Walsh learned of Gormley's employment status from Kelleher. Hence, any further investigation into the matter was rendered superfluous after December 10. Although New York law compels an insurer to disclaim coverage "as soon as is reasonably possible" (Insurance Law § 3420 [d] [2]), Tudor did not issue a disclaimer until December 30.

Tudor attributes the additional delay, in part, to a "[company] policy that whenever there is a potential denial of coverage on a lawsuit that has already been commenced, the matter is sent to coverage counsel for their review and recommendations" (Hazard aff, ¶ 15), a statement that is consistent with Hazard's earlier testimony. A delay caused by an insurer's need to consult with legal counsel before issuing a disclaimer is not unreasonable (*Magistro v Buttered Bagel, Inc.*, 79 AD3d 822, 825 [2d Dept 2010] [finding a three-week delay after an insurer received an investigation report, during which time it consulted with counsel, not unreasonable]; *McGinley v Odyssey Re (London)*, 15 AD3d 218, 219 [1st Dept 2005] [finding a 39-day delay reasonable where an insurer investigated the claim and obtained legal advice to determine if an exclusion provision precluded coverage]; *New York Central Mut. Fire Ins. Co. v Majid*, 5 AD3d 447, 448 [2d Dept 2004] [finding a 31-day delay during which time an insurer reviewed the file and consulted with counsel regarding the applicability of an exclusion provision considered reasonable]; *State Farm Mut. Auto. Ins. Co. v Daniels*, 269 AD2d 860, 861 [4th Dept 2000] [finding a three-week delay in issuing a disclaimer after an investigation was not unreasonable where the insurer sought counsel's opinion on disclaiming coverage]; *cf. Pennsylvania Lumbermans Mut. Ins. Co. v D & Sons Constr. Corp.*, 18 AD3d 843, 845 [2d Dept 2005] [finding a 47-day delay unreasonable where an insurer chose to consult with counsel instead of promptly disclaiming coverage after learning of the grounds for the disclaimer]).

However, the issue of whether the employer's liability exclusion modification, contractor or subcontractor limitation endorsement, or contractual liability limitation endorsement precluded coverage was not particularly complicated (*see Vermont Mut. Ins. Co., Inc. v Mowery Constr., Inc.*, 122 AD3d 974, 976 [3d Dept 2011] [finding that an attorney's investigation to ascertain whether a notice of claim was untimely "wholly unnecessary . . . [because] defendant's claim was not factually complicated"]; *cf. DeSantis Bros. v Allstate Ins. Co.*, 244 AD2d 183, 184 [1st Dept 1997], *lv denied* 91 NY2d 808 [1998] [finding a 31-day delay reasonable for an insurer's attorneys to review a "500-page file and conduct legal research"]). Indeed, Hazard drafted a "reservation of rights [letter] primarily on the cg2139-contractual liability limitation endorsement" on December 10 (affirmation of Tudor's counsel, exhibit K at 3; Hazard tr at 48). Tudor, though, waited until December 17 to contact coverage counsel. Moreover, Tudor received "coverage counsel's opinion and proposed draft disclaimers" on December 22 (Hazard aff, ¶ 16). While Tudor contends that its office was closed for two and one-half days in observance of the Christmas holiday, Tudor did not issue full disclaimer letters until December 30.

Plaintiffs posit that a disclaimer issued within "30 days or less" comports with the "as soon as reasonably possible" requirement in Insurance Law § 3420. In this action, Tudor did not issue a disclaimer until 36 days after it received the November 20 letter. Contrary to plaintiffs' position, there is no "bright-line rule that any delay of 30 days or less in issuing a disclaimer is reasonable as a matter of law" (*Hess v Nationwide Mut. Ins. Co.*, 273 AD2d 689, 690 [3d Dept 2000]). Similarly, a delay of more than 30 days is not automatically deemed unreasonable. A determination about whether a disclaimer is timely is "a fact-sensitive inquiry that is based upon all of the surrounding circumstances and focuses on the period between when the insurer first

learned of the grounds for the disclaimer and finally served its written notice disclaiming coverage on the insured" (*Those Certain Underwriters at Lloyds, London*, 49 AD3d at 4). Furthermore, "[t]he reasonableness of any delay is computed from the time that the insurer becomes sufficiently aware of the facts which would support a disclaimer" (*Hunter Roberts Constr. Group, LLC v Arch Ins. Co.*, 75 AD3d 404, 409 [1st Dept 2010]). Based upon the foregoing, a question of fact exists about whether Tudor's disclaimer was untimely.

Plaintiffs also argue that Weatherwax mailed the November 5 letter to Tudor, as reflected in his Image Right entry. Therefore, Tudor should have received the November 5 letter on November 9, 2014, which makes the 51-day delay in disclaiming coverage unreasonable. Be that as it may, it is well settled that "the mere denial of receipt of a letter that is shown to have been properly mailed does not overcome the presumption of delivery" (*Matter of Futterman v New York State Div. of Hous. & Community Renewal*, 264 AD2d 593, 595 [1st Dept 1999], *lv dismissed* 94 NY2d 847 [1999], citing *Engel v Lichterman*, 62 NY2d 943, 944 [1984]). The affidavits from Western World's employees adequately refute plaintiffs' contention that Tudor should have received the November 5 letter. As a result, a question of fact exists about when Tudor first received notice of the Gormley action.

Accordingly, Tudor's and plaintiffs' motions for summary judgment on the first cause of action are denied.

B. The Second Cause of Action for Defense and Indemnity Payments against Tudor

Plaintiffs allege that they are entitled to recover defense and indemnity payments incurred in the Gormley action based on Tudor's breach of its obligation to provide coverage. As with the first cause of action, an issue of fact exists about whether Tudor timely disclaimed coverage under the Tudor Policy. Consequently, Tudor's and plaintiffs' motions for summary judgment on the second cause of action are denied.

C. The Third and Fourth Causes of Action for Breach of Contract against Greenside

As an alternative, plaintiffs move for summary judgment against Greenside for its alleged failure to procure additional insured coverage and for a declaration that Greenside breached its contractual requirement to obtain coverage for MYM.

It does not appear that Greenside ever joined issue in this action. According to the affidavit of service filed on May 11, 2016 (NY St Cts Electronic Filing [NYSCEF], Doc No. 3), of which the court takes judicial notice (*see Yuppie Puppy Pet Prods., Inc. v Street Smart Realty, LLC*, 77 AD3d 197, 202 [1st Dept 2010], plaintiffs served Greenside pursuant to Business Corporation Law § 306 by leaving the summons and complaint with the secretary of state on April 21, 2016. Tudor's counsel does not represent Greenside, and in their request for judicial intervention, plaintiffs acknowledged that Greenside has not appeared in the action (NYSCEF Doc No. 4). Furthermore, plaintiffs never moved, pursuant to CPLR 3215, for leave to enter a default judgment against Greenside. Therefore, plaintiffs' motion for summary judgment against Greenside is denied.

D. Spoliation of Evidence

Tudor also moves, pursuant to CPLR 3126, for an order precluding plaintiffs from offering any evidence that Colony mailed the November 5 letter.[2]

When crucial evidence has been intentionally or negligently destroyed before an opposing party has had a chance to inspect it, sanctions for spoliation are appropriate (*Kirkland v New York City Hous. Auth.*, 236 AD2d 170, 173 [1st Dept 1997]). The loss of evidence must be "fatal to the other party's ability to present a defense" (*Squitieri v City of New York*, 248 AD2d 201, 203 [1st Dept 1998]), thereby leaving that party "prejudicially bereft of appropriate means to confront a claim with incisive evidence" (*Kirkland*, 236 AD2d at 174 [internal quotation marks and citation omitted]). Therefore, a party seeking spoliation sanctions must establish the following:

> "(1) that the party with control over the evidence had an obligation to preserve it at the time it was destroyed; (2) that the records were destroyed with a 'culpable state of mind'; and finally, (3) that the destroyed evidence was relevant to the party's claim or defense such that the trier of fact could find that the evidence would support that claim or defense"

(*VOOM HD Holdings LLC v EchoStar Satellite L.L.C.*, 93 AD3d 33, 45 [1st Dept 2012], citing *Zubulake v UBS Warburg LLC*, 220 FRD 212, 220 [SD NY 2003]). Where evidence has been "intentionally or willfully destroyed, the relevancy of the destroyed documents is presumed" (*Pegasus Aviation I, Inc. v Varig Logistica S.A.*, 26 NY3d 543, 547 [2015]). Where evidence has been "negligently destroyed, the party seeking spoliation sanctions must establish that the destroyed documents were relevant to the party's claim or defense" (*id.* at 547-547).

Here, Tudor has not established that wiping Weatherwax's computer was "grossly negligent or done as a willful attempt to avoid discovery" (*Peters v Peters*, 146 AD3d 503, 503-504 [1st Dept 2017]), or that it was done "in bad faith" (*Santana v Castillo*, 114 AD3d 621, 621 [1st Dept 2014]). Tudor produced no evidence that a litigation hold on Weatherwax's computer had been issued and ignored. At best, an inference may be made that plaintiffs were negligent in their duty to preserve evidence. Nonetheless, data from Weatherwax's computer about when the November 5 letter was last modified does not resolve the issue of whether Weatherwax physically mailed the document. The averments from Hazard, Linnartz, and House rebut plaintiffs' contention that Tudor should have received the November 5 letter. Thus, Tudor has not established that it has been unable to defend against plaintiffs' claim such that a sanction for spoliation of evidence is appropriate.

Accordingly, it is hereby

ORDERED that the motion of defendant Tudor Insurance Company for an order granting it summary judgment dismissing the complaint and for an order precluding plaintiffs Colony

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[2] The court notes that Tudor's motion is not accompanied by an affirmation of good faith (*see* 22 NYCRR 202.7).

Insurance Company and MYM Construction, Inc. from introducing evidence related to the letter dated November 5, 2014 (motion sequence no. 001) is denied; and it is further

ORDERED that the motion of plaintiffs Colony Insurance Company and MYM Construction, Inc. for summary judgment in their favor against defendant Tudor Insurance Company and defendant Greenside Corp. (motion sequence no. 002) is denied.

10/15/2018
DATE

GERALD LEBOVITS, J.S.C.

CHECK ONE:	☐	CASE DISPOSED		X	NON-FINAL DISPOSITION		
	☐	GRANTED	X DENIED	☐	GRANTED IN PART	☐	OTHER
APPLICATION:	☐	SETTLE ORDER		☐	SUBMIT ORDER		
CHECK IF APPROPRIATE:	☐	INCLUDES TRANSFER/REASSIGN		☐	FIDUCIARY APPOINTMENT	☐	REFERENCE