

**State Natl. Ins. Co., Inc. v Tudor Ins. Co.**

2019 NY Slip Op 35201(U)

January 4, 2019

Supreme Court, Queens County

Docket Number: Index No. 702352/18

Judge: Richard G. Latin

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: Honorable RICHARD G. LATIN

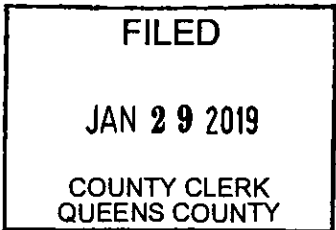
IA PART 40

Justice

STATE NATIONAL INSURANCE COMPANY, INC. AND XINOS CONSTRUCTION CORP.,

Index No.: 702352/18
Motion Date: 9/6/18
Motion Cal. No.: 16
Motion Seq. No.: 1

Plaintiffs,



-against-

TUDOR INSURANCE COMPANY,

Defendant.

The following papers EF numbered as follows read on this motion by defendant for, inter alia, summary judgment dismissing the complaint against it, and on this cross-motion by plaintiffs for summary judgment on their complaint.

Table with 2 columns: PAPERS, NUMBERED. Rows include Notice of Motion-Affidavits-Exhibits-Memo of Law, Notice of Cross-Motion-Affidavits-Exhibits-Memo of Law, Replying, and Additional Memoranda of Law.

Upon the foregoing papers, it is ordered that the motion by defendant, Tudor Insurance Company (Tudor), to dismiss or alternatively, for summary judgment, and the cross-motion by plaintiffs, State National Insurance Company (State National) and Xinos Construction Corp. (Xinos; collectively: Plaintiffs), for summary judgment, are determined as follows:

PROCEDURAL HISTORY

The Underlying Personal-Injury Action

On August 19, 2014, Luis Chimborazo commenced a personal-injury action against Blue Woods Management Group (Blue Woods) and 299 Owners Corp. (299 Owners), in the New York State Supreme Court, County of Queens (Chimborazo v. Blue Woods Management Corp., Index No. 705135/14— (Underlying Action)). His complaint alleges that Blue Woods and 299 Owners entered into a contract with Xinos for the performance of construction work at the premises owned and/or operated by them and that he sustained an injury on the job. Subsequently, within the Underlying Action, Blue Woods and 299 Owners filed a third-party complaint against Xinos for common-law and contractual indemnification and for a declaration that Xinos failed to procure general liability insurance on their behalf.

### Indemnification Action and Third-Party Action in New York County

On June 29, 2016, Greater New York Mutual Insurance Company (GNY) commenced an action in the New York State Supreme Court, New York County (*GNY v. State National*, Index No. 155444/16 (NY County Action)), for a judgment declaring that State National, the general liability carrier and insurer of Xinos, was obligated to defend and indemnify GNY's insured, 299 Owners, for claims in the Underlying Action.

On September 18, 2017, State National filed a third-party complaint within the NY County Action (NY County Action: Third-Party Index No. 595748/17 (NY County Third-Party Action)) against Tudor for a judgment declaring that Tudor is obligated to defend and indemnify both State National's insured, Xinos, and GNY's insured, 299 Owners, in the Underlying Action. State National alleges that Xinos and 299 Owners are entitled to coverage from Tudor under the terms of the additional insured endorsement in a policy issued by Tudor to New City Construction Corp. (New City), a subcontractor hired by Xinos.

On November 30, 2017, Tudor filed a motion, under the NY County Action, to dismiss the third-party complaint against it pursuant to CPLR 3211 (a)(7), or alternatively, for summary judgment pursuant to CPLR 3212. On July 26, 2018, this Court "so ordered" a stipulation filed in the instant action, ordering State National to withdraw and discontinue the NY County Third-Party Action. Accordingly, a stipulation of discontinuance of the NY County Third-Party Action was filed in New York County on August 1, 2018. Subsequently, in an order dated September 4, 2018 the Hon. Robert R. Reed denied Tudor's motion as moot.

### The Instant Indemnification Action

On February 15, 2018, State National and Xinos commenced the instant action against Tudor for a judgment declaring that Tudor must defend and indemnify Xinos under the terms of the additional insured section of the policy issued to New City.

### FACTS

#### State National's May 5, 2014 Tender Letter

State National tendered the defense and indemnification of Xinos, and all its indemnitees to Tudor by letter dated May 5, 2014. Said letter was drafted and sent by National Claim Services (NCS), on behalf of State National. Additionally, NCS affixed a copy of the Certificate of Liability Insurance coupled with the executed contract between State National's insured, Xinos and Tudor's insured, New City.

This tendering letter reads in relevant part: "This matter involves an allegation that the claimant [Roberto Chimborazo], an employee of your insured, New City Construction Corp. was injured on 4/28/14 ¶ . . . At this time we are requesting New City Construction Corp. and its general liability carrier, Tudor Insurance Company, undertake any defense and indemnification of our insured [Xinos], and all their indemnitees."

### Tudor's Reservation of Rights Letter

In response to State National's May 5, 2014 Tender Letter, Tudor sent an 8-page "reservation of rights" letter, dated August 6, 2014 (Reservation of Rights Letter). Its opening paragraph entitled "Reservation of Rights to Disclaim Coverage" reads in relevant part: "Tudor has reviewed Xinos Construction Corp.'s ... notice of a claim by Robert Chimborazo ("Chimborazo"), relating to Chimborazo's alleged accident on April 28, 2014 (the "Claim"), during the course of his employment with [Tudor's insured] New City Construction Corp...."

Further, it reads: "Tudor's investigation, for the reasons set forth below, demonstrates that there may be no coverage under the Policy for either the claimed liability or any resulting lawsuit. In the event that Chimborazo files a lawsuit against You [Xinos] based on the same allegations asserted in the May 4, 2014 letter from National Claim Services, Tudor would not have a duty to defend or indemnify You [Xinos or its indemnitees] based on the conditions, exclusions, and limitations in the Policy. **That means that Tudor would not pay any damages that may be assessed against Xinos as a result of any lawsuit filed by Chimborazo. This also means that Tudor would neither provide Xinos with a legal defense nor pay for any legal representation that it obtains on its own.** Given that Chimborazo has not yet filed a complaint, however, Tudor cannot definitively determine whether those conditions, exclusions, and limitations apply."

Notably, immediately thereafter, the Reservation of Rights Letter states: "Tudor reserves its right to disclaim coverage on other grounds than those set forth herein [the "Employer's Liability Exclusion" and the "Additional Insured Endorsement Exclusion"]... However, since Tudor's investigation has not been completed on those grounds, Tudor is *not presently disclaiming on those bases*" [emphasis added]. Nevertheless, the Reservation of Rights Letter continues and provides excerpts of the Policy and the relevant exclusionary provisions, i.e., the "Employer's Liability Exclusion" and the "Additional Insured Endorsement Exclusion."

The Reservation of Rights Letter details the Claim and State National's assertion that Xinos qualified as an additional insured under the Policy. Further, it provides an analysis of the subcontract (Subcontract) and the Subcontract's Rider between Xinos and New City. Tudor notes that the Subcontract's Rider contains an indemnification provision in Xinos' favor for claims like the subject Claim.

Tudor further notes that the Subcontract's Rider also contained an insurance provision, which specifically required New City [Tudor's insured] to name Xinos as an additional insured on its commercial general liability policy. Tudor provides an excerpt of the "Commercial General Liability Coverage Part" in which Xinos is in fact named as an "Additional Insured."

Additionally, the Reservation of Rights Letter specifically asserts: "III. Reservation of Rights ¶ A. Coverage May Be Precluded by the Employer's Liability Exclusion ¶ The Policy's Employer's Liability Exclusion is unambiguous . . . It precludes coverage for bodily injury claims brought by any insured's employee [New City's employee, Chimborazo] which arise out of that employee's work."

## DISCUSSION

### Tudor's Motion Pursuant to CPLR 3211 (a)(4): Duplicative Action

CPLR 3211(a)(4) provides in relevant part that "A party may move for judgment dismissing one or more causes of action asserted against him on the ground that: there is another action pending between the same parties for the same cause of action in a court of any state or the United States."

In support of this motion, Tudor submits, inter alia, the Underlying Action's summons and complaint, along with the NY County Third-Party Action complaint. Tudor argues that the instant action is identical and duplicative to the NY County Third-Party Action, thus should be dismissed pursuant to CPLR 3211(a)(4). However, subsequent to filing this motion, the NY County Third-Party Action was discontinued, and Tudor consented to withdrawing this branch of its motion.

Accordingly, the branch of Tudor's motion to dismiss pursuant to CPLR 3211 (a)(4) is denied as moot.

### Tudor's Motion Pursuant to CPLR 3211 (a)(7)

On a motion to dismiss pursuant to CPLR 3211(a)(7), the facts alleged in the complaint must be accepted as true, the plaintiff is accorded the benefit of every possible favorable inference, and the court's function is to determine only whether the facts as alleged fit within any cognizable legal theory (*see Leon v. Martinez*, 84 NY2d 83, 87-88 [1994]). Here, construing the complaint liberally, accepting the facts alleged in the complaint as true, and according Plaintiffs the benefit of every possible inference, as required, Plaintiffs state a cause of action (*see 4777 Food Services Corp. v. Anthony P. Gallo, P.C.*, 150 AD3d 1054 [2d Dept 2017]). Whether Plaintiffs can ultimately prevail on these allegations is not relevant on this pre-answer motion to dismiss (*see Gorbatov v. Tsirelman*, 155 AD3d 836 [2d Dept 2017]; *Litvinoff v. Wright*, 150 AD3d 714 [2d Dept 2017]).

### Tudor's Motion and Plaintiffs' Cross-Motion Pursuant to CPLR 3212

The proponent of a summary judgment motion has the initial burden of establishing entitlement to judgment as a matter of law, submitting evidence in admissible form demonstrating the absence of any triable issues of fact (*see Giuffrida v. Citibank Corp.*, 100 NY2d 72 [2003]; *see also Alvarez v. Prospect Hosp.*, 68 NY2d 320 [1986]). Only when the movant satisfies its prima facie burden will the burden shift to the opponent "to lay bare his or her proof and demonstrate the existence of triable issues of fact" (*Alvarez*, 68 NY2d at 324; *see also Zuckerman v. City of New York*, 49 NY2d 557 [1980]; *Chance v. Felder*, 33 AD3d 645, 645-46 [2d Dept 2006]).

In support of the motion, Tudor provides, inter alia, State National's May 5, 2014 Tender Letter, the Reservation of Rights Letter, State National's second Tender Letter dated January 21, 2016 (2016 Tender Letter), and its Disclaimer Letter dated February 23, 2016 (Disclaimer Letter). Tudor argues that coverage is precluded by the Employer's Liability Exclusion and the Additional Insured Endorsement Exclusion previously discussed at length in the Reservation of Rights Letter dated August 6, 2014. Tudor further claims that its Disclaimer Letter was timely sent and effective. Tudor

argues that its disclaimer was timely, as its duty to disclaim was not triggered until it received notice of an actual lawsuit against Xinos via the 2016 Tender Letter.

Finally, Tudor argues: "Plaintiffs allege that Tudor failed to comply with Insurance Law § 3420(d) in failing to timely disclaim coverage... However, this allegation is not only preposterous, it is impossible. New York law makes clear that Insurance Law § 3420(d) does not apply between insurers." Tudor argues that State National's May 5, 2014 Tender Letter was merely correspondence between two insurers, i.e., State National and Tudor, and not governed by Insurance Law § 3420(d).

In opposition, Plaintiffs cross-move and submit, inter alia, the contract between 299 Owners and Xinos, which incorporated the contract between Xinos and New City, along with the New City's Insurance Policy issued by Tudor. Plaintiffs claim that Tudor, the insurer of New City, insured Xinos and 299 Owners via an additional insurance clause and failed to timely disclaim coverage as to both Xinos and 299 Owners. Further Plaintiffs argue that Insurance Law § 3420(d) applies here, as Xinos is the insured party and Tudor failed to timely disclaim liability.

#### Applicability of New York Insurance Law § 3420(d)

New York 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."

Once the insurer has sufficient knowledge of facts entitling it to disclaim, or knows that it will disclaim coverage, it must notify the insured and the injured person, as well as any other claimant, in writing as soon as is reasonably possible (NY Ins. Law § 3420(d)(2); *see Country-Wide Ins. Co. v. Preferred Trucking Services Corp.*, 22 NY3d 571, 575 [2014]; *First Financial Ins. Co. v. Jetco Contracting Corp.*, 1 NY3d 64, 66 [2003]).

"A disclaimer is unnecessary when a claim does not fall within the coverage terms of an insurance policy. Conversely, a timely disclaimer pursuant to Insurance Law § 3420 (d) is required when a claim falls within the coverage terms but is denied based on a policy exclusion" (*Harco Const., LLC v. First Mercury Ins. Co.*, 148 AD3d 870, 872 [2d Dept 2017], quoting *Markevics v. Liberty Mut. Ins. Co.*, 97 NY2d 646, 648-49 [3<sup>d</sup> Dept 2001]).

The Court finds that Tudor's assertion that "New York courts have held that Insurance Law § 3420 (d) does not apply to claims between insurers," is too broad and misleading. Tudor relies upon caselaw that holds in relevant part that the insurer's duty to timely disclaim mandated by Insurance Law § 3420 (d) is not triggered where an insurer submits a request for contribution and/or a full defense and indemnity of the insurer (*see JT Magen v. Hartford Fire Ins.*, 64 AD3d 266 [1<sup>st</sup> Dept 2009]; *Bovis Lend Lease LMB, Inc. v. Royal Surplus Line Ins. Co.*, 27 AD3d 84 [1<sup>st</sup> Dept 2005]; *AIU Ins. Co. v. Investors Ins. Co.*, 17 AD3d 259 [1<sup>st</sup> Dept 2005]). Further, in those cases the Courts distinguish between an insurer's own claim and a tender letter by an insurer on behalf of its insured (*id.*). The Courts held that a tender letter by an insurer on behalf of its insured, like State National's May 5, 2014 Tender Letter in this case, does in fact

trigger the insurer's duty to timely disclaim as per Insurance Law § 3420 (d) (*id.*; see also *QBE Ins. Corp. v. Adjo Contr. Corp.*, 121 AD3d 1064, 1081-82 [2d Dept 2014]).

Here, it is undisputed that Xinos is an additional insured on the policy issued by Tudor to New City. The Court finds that State National tendered the defense and indemnification of Xinos, and all its indemnitees to Tudor by letter dated May 5, 2014, and that said letter was not an insurer's claim on its own behalf. This is supported by Tudor's Reservation of Rights Letter, which explicitly refers to State National's May 5, 2014 Tender Letter as Xinos Construction Corp.'s notice of claim.

Thus, the Court holds that Insurance Law § 3420(d) does apply in this case (*see* Insurance Law § 3420 [d]; *QBE Ins. Corp.*, 121 AD3d at 1081-82). Furthermore, the Court finds that a timely disclaimer was required, since Tudor was disclaiming under policy exclusions (*see Harco Const., LLC*, 148 AD3d at 872).

#### Compliance with New York Insurance Law § 3420(d)

"[A] reservation of rights letter does not constitute compliance with the requirements of the subdivision" (*Zappone v. Home Ins. Co.*, 55 NY2d 131, 135 [1982]). Here, the Reservation of Rights Letter stated explicitly, throughout the entire letter, that Tudor was not disclaiming at that time on the grounds of the "Employer's Liability Exclusion" and the "Additional Insured Endorsement Exclusion," and merely reserved the right to disclaim on those grounds in the future. Accordingly, the Court finds that Tudor's Reservation of Rights Letter was not an effective disclaimer under the subdivision (*id.*).

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" (*see Country-Wide Ins. Co.*, 22 NY3d 575-76; *First Financial Ins. Co.*, 1 NY3d at 68-69). "A reservation of rights letter has no relevance to the question whether the insurer has timely sent a notice of disclaimer of liability or denial of coverage" (*Hartford Ins. Co. v. County of Nassau*, 46 NY2d 1028, 1029 [1979]).

Here, Tudor sent a Disclaimer Letter almost two years after receiving notice of the subject Claim. Tudor argues that its Disclaimer Letter dated February 23, 2016 was timely, as it sent it shortly after receiving Plaintiffs' second tender letter dated January 21, 2016; further, Tudor argues that timeliness is measured from the point that it learns of an actual lawsuit against the insured. The Court is unconvinced by Tudor's arguments and notes that Tudor has misinterpreted relevant caselaw.

The Court finds that all the relevant facts supporting a disclaimer were immediately apparent upon Tudor's receipt of State National's Tender Letter on behalf of Xinos, dated May 5, 2014 (*see Country-Wide Ins. Co.*, 22 NY3d at 576). Despite Tudor's claim that it could not determine whether an exclusion applied, the Reservation of Rights Letter discussed in painstaking-detail the grounds for which it would likely disclaim liability or deny coverage in the future. Furthermore, the Disclaimer Letter relied upon virtually identical facts recited in Tudor's Reservation of Rights Letter. Since State National's May 5, 2014 Tender Letter triggered Tudor's duty to timely disclaim, the Court finds that Tudor's Disclaimer Letter sent almost two years after receiving Xinos' notice of claim was untimely.

Where an insurer fails to comply with Insurance Law § 3420(d), it will be estopped from disclaiming liability or denying coverage (*see KeySpan Gas E. Corp. v.*

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*Munich Reinsurance America, Inc.*, 23 NY3d 583, 590-91 [2014]; *Hartford Ins. Co.*, 46 NY2d at 1029. Since Tudor failed to comply with Insurance Law § 3420(d), the Court finds that Tudor is estopped from disclaiming liability and denying coverage (*id.*). Furthermore, since Tudor is estopped from disclaiming liability and denying coverage, the Court finds that it cannot be relieved of its duty to defend Xinos and its indemnitees in the Underlying Action (*see Town of Massena v. Healthcare Underwriters Mut. Ins. Co.*, 98 NY2d 435, 445 [2002]; *see generally Illinois Union Ins. Co. v. Assurance Co. of America*, 19 NY3d 942 [2012]).

Accordingly, it is ordered that Tudor's motion to dismiss or alternatively for summary judgment is denied in its entirety; and it is further

ORDERED that Plaintiffs' cross-motion for summary judgment is granted; and it is further

ORDERED that Tudor must defend and indemnify Xinos in the Underlying Action; and it is further

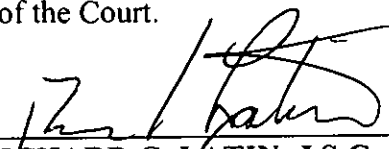
ORDERED that Tudor must reimburse all costs incurred, from the date Tudor received State National's May 5, 2014 Tender Letter, by State National in defending Xinos in the Underlying Action; and it is further

ORDERED that there shall be an inquest against defendant, Tudor, to determine such costs State National has incurred in defending Xinos in the Underlying Action; and it is further

ORDERED that the inquest against defendant, Tudor, is held in abeyance until the time Tudor provides Xinos and its indemnitees with a legal defense or takes over payment for Xinos and its indemnitees' legal defense.

This constitutes the decision and order of the Court.

Dated: January 4, 2019

  
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RICHARD G. LATIN, J.S.C.

