

**Certain Underwriters at Lloyds London Subscribing  
to Policy No PGIARK01449 05 v Advance Tr. Co. Inc.**

2020 NY Slip Op 30460(U)

February 14, 2020

Supreme Court, New York County

Docket Number: 150656/2019

Judge: Paul A. Goetz

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. PAUL A. GOETZ PART IAS MOTION 47EFM

Justice

-----X

INDEX NO. 150656/2019

CERTAIN UNDERWRITERS AT LLOYDS LONDON
SUBSCRIBING TO POLICY NO PGIARK01449 05,

MOTION DATE 08/29/2019

Plaintiff,

MOTION SEQ. NO. 001

- v -

ADVANCE TRANSIT CO INC, 745 WHITTIER STREET
LLC, MILLIE FELICIANO

DECISION + ORDER ON
MOTION

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 17, 18, 19, 20, 21,
22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49,
50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62

were read on this motion to/for DISMISS

Plaintiff Certain Underwriters at Lloyd's London commenced this action seeking a
declaratory judgment pursuant to CPLR 3001 that it is not liable to indemnify defendant-insured
Advance Transit Co. Inc. for claims asserted against it in an underlying personal injury action
pending in the Supreme Court, Bronx County, entitled Millie Feliciano v. 745 Whittier Street,
LLC, Index No. 21364/2017E (the "Underlying Action"). Defendant Advance now moves
pursuant to CPLR 3211(a)(1) and (7), and CPLR 3211(c), seeking dismissal of the complaint,
and plaintiff Underwriters cross-moves pursuant to CPLR 3212 for summary judgment on the
complaint.

Under CPLR 3211(c), a motion court may, in appropriate circumstances, convert a
motion to dismiss made pursuant to CPLR 3211(a) into a motion for summary judgment,
whether or not issue has been joined. Ordinarily, the court must provide adequate advance notice
to the parties of its intent to do so that the parties have an opportunity to make an appropriate

record before the court decides the motion. *Mihlovan v. Grozavu*, 72 N.Y.2d 506 (1988). However, notice is not required where (1) the action in question involves no issues of fact, but only issues of law which are fully acknowledged and argued by the parties; (2) the parties specifically request that motion be treated as one for summary judgment; and (3) where the parties deliberately lay bare their proof and make it clear that they are charting a summary judgment course. *Wiesen v. New York University*, 304 A.D.2d 459, 460 (1<sup>st</sup> Dep't 2003) (citing cases). Here, defendant Advance specifically requested the court to treat its motion to dismiss as a motion for summary judgment under CPLR 3211(c), and plaintiff Underwriters, by cross-moving for summary judgment, demonstrated that it also believed that summary judgment was appropriate at this point. Thus, the court will treat defendant Advance's motion as a motion for summary judgment, and consider plaintiff Underwriters' cross-motion for summary judgment.

"The 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 eliminate any material issues of fact from the case." *Pullman v Silverman*, 28 N.Y.3d 1060, 1062 (2016). "Failure to make such prima facie showing requires denial of the motion, regardless of the sufficiency of the opposing papers." *Alvarez v Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986). Once prima facie entitlement has been established, in order to defeat the motion, the opposing party must "assemble, lay bare, and reveal his [or her] proofs in order to show his [or her] defenses are real and capable of being established on trial . . . and it is insufficient to merely set forth averments of factual or legal conclusions." *Genger v Genger*, 123 A.D.3d 445, 447 (1st Dept 2014), quoting *Schiraldi v U.S. Min. Prods.*, 194 A.D.2d 482, 483 (1st Dept 1993). If there is any doubt as to the existence of a triable issue of fact, the motion for summary judgment must be denied. *O'Brien v Port Authority N.Y. & N.J.*, 29 N.Y.3d 27, 37 (2017).

In 2016, plaintiff-insurer Underwriters issued a policy of insurance bearing Policy No. PGIARK01449-05 to the defendant-insured Advance Transit for the policy period October 30, 2016 to October 30, 2017 (the "Policy Period"). Affirmation of Lorin A. Donnelly dated June 21, 2019, Exh. A (Complaint, ¶ 15); Affidavit of Marilyn Bonetati sworn to on June 18, 2019, Exh. 1, Pltf-000053. The policy affords coverage to defendant-insured Advance on a claims made and reported basis and provides specific provisions regarding how Underwriters should be notified of a claim. Donnelly Aff., Exh. A (Complaint, ¶¶ 19-21); Bonetati Aff., Exh. 1, Pltf-000057. The policy provides that the insurance applies to bodily injury only if the claim against Advance is made and reported to Underwriters during the Policy Period, or the Extended Reporting Period. Donnelly Aff., Exh. A (Complaint, ¶ 39); Bonetati Aff., Exh. 1, Pltf-000062-63, 000067-68. If the policy is renewed, Advance would have 60 days after the expiration of the policy to report the claim to Underwriters. *Id.* Further, the policy provides no coverage for claims made during the Policy Period under any subsequent policy written by Underwriters. *Id.*

Here, the claims against defendant Advance in the Underlying Action were made on May 30, 2017, when defendant 745 Whittier filed its third-party summons and complaint against defendant Advance in the Underlying Action. Donnelly Aff., Exh. A (Complaint, ¶ 25); Exh. G (Third-party summons and complaint in the Underlying Action). On June 14, 2017, defendant Advance was served with the third-party summons and complaint in the Underlying Action. Donnelly Aff., Exh. A (Complaint, ¶ 26), Exh. H (Affidavit of Service). Since Advance renewed its policy, it had 60 days after the expiration of the Policy Period, or until December 29, 2017, to report the claim to Underwriters. Donnelly Aff., Exh. A (Complaint, ¶ 42); Bonetati Aff., ¶ 6 and Exh. 1(Pltf-000062-63, 000067-68) and Exh. 2. However, Advance failed to notify plaintiff-

insurer Underwriters of the Underlying Action until January 8, 2018. Donnelly Aff., Exh. A (Complaint, ¶¶ 29, 43); Bonetati Aff., ¶¶ 7-11.

“A court interpreting an insurance policy must give its words their plain and ordinary meaning.” *Executive Risk Indemnity, Inc. v. Starwood Hotels & Resorts Worldwide, Inc.*, 98 A.D.3d 878, 880 (1<sup>st</sup> Dep’t 2012) (internal citation omitted). Here, the plain terms of the policy show that it is a claims made and reported policy, which only provides coverage for any claims asserted against Advance and reported to Underwriters during the Policy Period (or 60 days thereafter if the policy is renewed). Donnelly Aff., Exh. A (Complaint, ¶ 39); Bonetati Aff., Exh. 1, Pltf-000062-63, 000067-68. “A claims-made policy is designed to protect the policyholder during the life of the policy upon notice to the carrier within the policy period. The policy provides the distinct advantage for the insurer of providing certainty that, when the policy period ends without a claim having been made, the insurer will be exposed to no further liability. This certainty permits an insurer, in calculating premiums, to discount the risk of a claim being filed long after the policy period has ended . . . and to pass those savings on to the insured in the form of lower premiums. *American Guarantee and Liability Ins. v. Chicago Ins. Co.*, 105 A.D.3d 655 (1<sup>st</sup> Dep’t 2013) (internal quotations and citations omitted). Further, a renewal of the policy does not extend the reporting period for claims made during the earlier policy period. *Cherckrite Ltd. v. Illinois Nat. Ins. Co.*, 95 F.Supp.2d 180, 194 (S.D.N.Y. 2000).

Advance argues that it is entitled to coverage for the claims made in the Underlying Action because Underwriters failed to disclaim coverage on the basis of late notice, thereby waiving its rights. However, it is well-established that only a defense to coverage may be waived, and waiver does not create coverage where none exists. *McCabe v. St. Paul Fire and Marine Ins.*, 79 A.D.3d 1612, 1613 (4<sup>th</sup> Dep’t 2010) (citing *Albert J. Schiff Assoc. v. Flack*, 51

N.Y.2d 692, 698 (1980) (“[W]here the issue is the existence or nonexistence of coverage . . . the doctrine of waiver is simply inapplicable.”)). Given that this is a claims-made and reported policy, coverage for Advance’s claim does not exist unless Advance timely reports the claim to Underwriters pursuant to the terms of the policy. *Id.* at 1613. Thus, contrary to Advance’s argument, such a defense cannot be waived by Underwriters’ failure to disclaim coverage. *Id.*

Advance also argues that the policy does not comply with Insurance Law § 3420(a)(5), and that under Insurance Law § 3103(a), the policy should be enforced as if it conformed to this provision, which Advance argues would render its claim timely. Insurance Law § 3420(a)(5) provides that any liability insurance policy issued in this state shall provide:

“A provision that failure to give any notice required to be given by such policy within the time prescribed therein shall not invalidate any claim made by the insured, injured person or any other claimant, unless the failure to provide timely notice has prejudiced the insurer, except as provided in paragraph four of this subsection. With respect to a claims-made policy, however, the policy may provide that the claim shall be made during the policy period, any renewal thereof, or any extended reporting period, except as provided in paragraph four of this subsection. As used in this paragraph, the terms “claims-made policy” and “extended reporting period” shall have their respective meanings as provided in a regulation promulgated by the superintendent.”

According to Advance, this provision requires claims-made policies issued or delivered in New York, to include a provision that a claim that arose during the policy period may be reported during the renewal policy period. However, the statute itself is ambiguous, stating that a claims-made policy may require “that the claim shall be made during the policy period, any renewal thereof, *or* any extended reporting period . . . .” CPLR 3420(a)(5) (emphasis added). By using “or” rather than “and”, the statute appears, on its face, to give insurers the option of requiring notice to be made during any or all of these three time periods.

Further, the legislative history of this provision does not support Advance’s position. This provision was added in 2008 by the New York State Legislature as part of certain other tort

reforms. The purpose of the amendment to the Insurance Law was to prevent inequitable outcomes caused by insurers, who have collected thousands of dollars in premiums, from simply disclaiming coverage based on late notice, notwithstanding that they may not have suffered prejudice at all by receiving such late notice. (Sponsor's Mem, Bill Jacket, L 2008, ch 388). Recognizing the distinctive nature of claims-made policies, as opposed to occurrence based policies, this provision provides that insurers providing claims-made policies need not comply with the prejudice showing if the policy provides that "the claim shall be made during the policy period, any renewal thereof, or any extended reporting period . . . . Ins. L. § 3420(a)(5). Thus, under the Insurance Law, a claims-made policy can set a definite time frame for reporting claims, irrespective of prejudice, which can include "the policy period, any renewal thereof, or any extended reporting period." *Id.* If the legislature had intended to significantly increase the insurer's liability by requiring insurers to permit a claim to be reported during a renewal policy period, this would have been apparent from the text of the statute and the legislative history. Rather, the legislative history and the interpretation of this statute by the relevant authorities all indicate that the statute should be interpreted in a manner consistent with longstanding construction of claims-made policies, which prohibits late claims under prior policy periods. New York General Counsel Opinion No. 09-06-08 (2009 WL 2006361); New York Circular Letter No. 2008-26 (2008 WL 4938102).

Finally, Advance's interpretation of Insurance Law § 3420(a)(5) is inconsistent with the long-standing function and interpretation of claims-made policies. As discussed above, there is no coverage under a claims-made policy where the insured fails to notify the insurer of a claim by the end of the policy period (or extended reporting period, if any). *Checkrite Ltd. v. Illinois Nat. Ins.*, 95 F.Supp.2d 180, 192 (S.D.N.Y. 2000). "The existence of a cut-off date is integral to a

claims-made policy, as it is a distinct characteristic of such policy that directly relates to rate setting. The insurer is afforded greater certainty in computing premiums, since it does not need to be concerned with the risk of claims filed long after the policy period has ended, and as a result that insured may benefit from lowered premiums. *Id.* Thus, it has also been held that a renewal does not extend the reporting period for claims made during the earlier policy period. *Id.* at 194. This rule is consistent with the rationale underlying claims made policies and the reasonable expectations of the parties. *Id.*; see also *Insite-Properties, Inc. v. Jay Phillips, Inc.*, 271 N.J.Super. 380, 386 (N.J. App. Div. 1994) (had there been timely notice to the carrier, “there undoubtedly would have been an upward rate adjustment based on the claim for the subsequent period.”). Accordingly, Advance’s argument must be rejected.

Advance also opposes plaintiff’s cross-motion for summary judgment by arguing that there are issues of fact with respect to whether it provided timely notice of its claim to plaintiff. However, contrary to Advance’s contentions, notice to an entity called “Claims Service Bureau” is not consistent with the policy, which provides that notice must be provided to “Premier Claims Management LLC.” Bonetati Aff., Exh. 1 (Pltf-000054). Advance’s argument that Claims Service Bureau may be an authorized agent of plaintiff pursuant to Insurance Law § 3420(a)(3) does not vitiate the provision of the policy requiring written notice of the claim to Premier. See *Ar-Glen Corp. v. Travelers Ins. Co.*, 22 Misc.2d 888, 890 (N.Y. Sup. 1960). Finally, Advance’s argument that discovery may lead to evidence that it did in fact provide timely and proper notice to Premier is speculative. Accordingly, it is

ORDERED, ADJUDGED and DECLARED that plaintiffs are not obligated to defend and indemnify Advance Transit Co. Inc. in the action entitled *Millie Feliciano v. 745 Whittier*

Street, LLC, Supreme Court, Bronx County, Index No. 21364/2017 (the "Underlying Action");  
and it is further

ORDERED, ADJUDGED and DECLARED that plaintiffs are entitled to withdraw the  
defense of Advance Transit Co. Inc. in the Underlying Action; and it is further

ORDERED, ADJUDGED and DECLARED that Advance Transit Co. Inc. is obligated to  
reimburse plaintiffs the fees, costs, and expenses associated with the defense afforded to them in  
the Underlying Action; and it is further

ORDERED that the remaining cross-claim asserted by defendant 745 Whittier Street  
LLC is severed and continued; and it is further

ORDERED that the parties shall appear for a preliminary conference on 4/09,  
2020 at 9:30 am.

2/14/2020  
DATE

  
PAUL A. GOETZ, J.S.C.

CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
APPLICATION:	<input type="checkbox"/> GRANTED <input type="checkbox"/> DENIED	<input type="checkbox"/> GRANTED IN PART <input checked="" type="checkbox"/> OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT <input type="checkbox"/> REFERENCE