State Farm Mut. Auto. Ins. Co. v American Empire Surplus Lines Ins. Co.
2023 NY Slip Op 30898(U)
March 23, 2023
Supreme Court, New York County
Docket Number: Index No. 161274/2020
Judge: J. Machelle Sweeting

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 62

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STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Plaintiff,

- v -

AMERICAN EMPIRE SURPLUS LINES INSURANCE COMPANY, ADVANCED CONSTRUCTION EQUIPMENT CORP., DANIEL DELUCCA, THE CITY OF NEW YORK, NEW YORK CITY HOUSING DEVELOPMENT CORPORATION, NEW YORK CITY HOUSING AUTHORITY, BQE INDUSTRIES, INC.

Defendant.

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INDEX NO. 161274/2020

MOTION DATE 06/09/2022, 07/25/2022

MOTION SEQ. NO. 001 002

DECISION + ORDER ON MOTION

HON. J. MACHELLE SWEETING, J. S. C.:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 59, 60, 61, 62, 63, 67, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 88, 89, 90, 94, 95, 96, 97, 98, 115, 116, 117, 118

were read on this motion to/for SUMMARY JUDGMENT (BEFORE JOINDER).

The following e-filed documents, listed by NYSCEF document number (Motion 002) 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, 64, 65, 68, 80, 81, 82, 83, 84, 85, 86, 87, 91, 92, 93, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 119, 120, 121, 122

were read on this motion to/for JUDGMENT - SUMMARY.

Plaintiff State Farm Mutual Automobile Insurance Company ("State Farm") brings this declaratory judgment action against defendant American Empire Surplus Lines Insurance Company ("AESLIC"), seeking a ruling as to which insurer provides coverage for their mutual named insured, Advanced Construction Equipment Corp. ("Advanced Construction"), for the allegations made against it in the third-party complaint for indemnification filed by defendant BQE Industries, Inc. ("BQE") in the action entitled *Daniel DeLucca v The City of New York*, Index No. 450905/2018 ("the DeLucca Action"), which is currently pending. State Farm also seeks

reimbursement of costs that it expended in the defense of the DeLucca Action, and a declaration that coverage, defense, and indemnity is owed to Advanced Construction, Daniel DeLucca's employer, from AESLIC, rather than from State Farm. In its cross-claim, Advanced Construction likewise seeks a declaration that AESLIC is obligated to defend and indemnify Advanced Construction in the DeLucca Action.

Motion Sequence Nos. 001 and 002 are consolidated for disposition. In Motion Sequence No. 001, AESLIC moves, pursuant to Civil Practice Law and Rules ("CPLR") 3212, for summary judgment dismissing the complaint as against it.

In Motion Sequence No. 002, State Farm moves for summary judgment declaring: (1) that it has no duty to defend or indemnify Advanced Construction in the DeLucca Action, including no duty to defend or indemnify against any cross-claims or third-party claims in that action; (2) that AESLIC has a duty to defend or indemnify Advanced Construction in the DeLucca Action, including a duty to defend or indemnify against any cross-claims or third-party claims in that action; (3) that AESLIC must assume the obligation to defend or indemnify Advanced Construction in the DeLucca Action, including a duty to defend or indemnify against any cross-claims or third-party claims in that action; (4) that AESLIC must reimburse it for all litigation expenses and legal fees expended in Advanced Construction's defense in the DeLucca Action, including the defense against any cross-claims or third-party claims in that action, with interest. State Farm also moves for a hearing to determine the amount that AESLIC owes it for all litigation expenses and legal fees expended on Advanced Construction's defense in the DeLucca Action, including the defense against any cross-claims or third-party claims in that action.

Finally, State Farm moves, pursuant to CPLR 3215, for an order granting a default judgment against defendants Daniel DeLucca, the City of New York, the New York City Housing Development Corporation ("the HDC"), the New York City Housing Authority ("NYCHA") and BQE.

NYCHA cross-moves, pursuant to CPLR 3215 (c), for an order dismissing the complaint against it as abandoned on the ground that State Farm failed to move for a default judgment against NYCHA within one year of its default in answering the complaint.

For the reasons set forth below, AESLIC's motion is denied. State Farm's motion is also denied. NYCHA's cross-motion is granted.

FACTS

The DeLucca Action

The complaint in the DeLucca Action was filed on January 22, 2018 (*see* NYSCEF Doc No. 24). The DeLucca complaint names the City of New York, the HDC, NYCHA and BQE as defendants. Advanced Construction is not named as a defendant. The DeLucca complaint alleges that Mr. DeLucca was injured on July 5, 2017 at the premises located at 126 West 127th Street, New York, when "he was caused to be injured in a height related accident" (DeLucca complaint, ¶¶ 77-78).

The DeLucca complaint also alleges that, on August 22, 2016, prior to the commencement of the action, a Notice of Claim was served on the City of New York (*id*., ¶ 1). The Notice of Claim (NYSCEF Doc No. 25), which was incorporated by reference in the DeLucca complaint, includes a more specific recitation of Mr. DeLucca's alleged injury as follows:

> The Claimant was injured when he was caused to fall from a scaffold material/equipment/height while unloading scaffolding materials/equipment at a height (as an employee for Advanced Construction Equipment Corp., 154 East 3rrd Street, Mt. Vernon, New York 10550) on top of scaffold materials/equipment on top of a flatbed truck as part of a construction project located at 126 West 127 Street, in the County of New York, City and State of New York as he was caused to fall from a height to the ground below

(Notice of Claim at 2).

The DeLucca complaint also alleges that, on January 16, 2018, a hearing was held pursuant to General Municipal Law ("GML") section 50-h (DeLucca complaint, ¶ 5). This testimony is also incorporated by reference into the DeLucca complaint. During that hearing, Mr. DeLucca testified that, up to the point that his accident occurred, "we were unloading the scaffolding material from the back of the truck" (transcript of GML § 50-h hearing [NYSCEF Doc No. 25], at 24:16-19). Mr. DeLucca testified that he was employed by Advanced Construction, and knew that Advanced Construction owned the flatbed truck that he was unloading scaffolding from (*id*. at 25:13-14). Mr. DeLucca further testified that, at the time of his accident he was on top of the truck (*id*. at 28:19-22). Mr. DeLucca described the work he was doing as "one person is on top of the truck and they distribute to the other people and then they take it from that area to the staging area" (*id*. at 29:12-17).

According to Mr. DeLucca, his accident happened as he was handing materials down from the truck (*id*. at 29:22-24). Mr. DeLucca further explained that he was shaking pieces of scaffolding staircase apart, and when they came loose, he fell from the back of the truck (*id*. at 30:24-31:5). Mr. DeLucca clarified that he fell from the top of the stacked frames that were on top of the flatbed onto the bottom of the flatbed truck (*id*. at 32:22-33:8), and then fell from the flatbed truck to the ground (*id*. at 36:16-22).

On May 7, 2018, the City of New York tendered the DeLucca complaint to BQE and Advanced Construction for defense and indemnity.

On October 23, 2018, BQE filed a third-party complaint in the DeLucca Action against Advanced Construction, seeking common law indemnity, common law contribution, and breach of contract (*see* NYSCEF Doc No. 77).

Based on the allegations in the DeLucca Action and the complaint in the third-party action, Advanced Construction then tendered the third-party complaint to State Farm and AESLIC for defense and indemnity.

The State Farm Complaint

State Farm commenced this action by filing a complaint on December 8, 2020 (*see* NYSCEF Doc No. 1). State Farm alleges that AESLIC issued a commercial general liability policy to Advanced Construction, Policy Number 16CG0207420, effective November 5, 2016 to November 5, 2017 (complaint, ¶ 27). State Farm further alleges that it issued a policy of business automobile insurance to Advanced Construction under Policy Number 2098-051-52, effective January 29, 2017 to January 29, 2018 (*id.*, ¶ 14).

State Farm alleges that, despite denying coverage to Advanced Construction, it conditionally offered to assign counsel to defend Advanced Construction in the third-party complaint filed by BQE under the State Farm policy, which covered the Advanced Construction truck from which plaintiff fell as he was unloading scaffolding (*id.*, ¶¶ 47, 50).

State Farm alleges that Mr. DeLucca testified that this accident occurred on July 5, 2017 at 3:45 p.m. at 126 West 127th Street while he was on a flatbed truck which he described as a "sixty to twenty feet long" flatbed vehicle that was parked in front of a housing project undergoing

renovation (*id*., ¶ 20). State Farm admits that Mr. DeLucca testified that his accident occurred while he was standing on stacked framing on the back of a flatbed truck while pulling apart pieces of scaffolding (*id*., ¶ 20). State Farm also alleges that Mr. DeLucca was employed by Advanced Construction at the time of the incident (*id*., ¶ 21).

State Farm further alleges that AESLIC wrongfully denied State Farm's tender of defense and coverage to AESLIC for the DeLucca Action and the third-party complaint (*id*., ¶ 35).

The complaint contains two causes of action for declaratory judgment. In the first cause of action, State Farm seeks a declaration that AESLIC owes defense and indemnity to Advanced Construction, and that AESLIC must reimburse State Farm for its litigation expenses and legal fees incurred for the defense of Advanced Construction in the DeLucca Action.

In the second cause of action, State Farm seeks a declaration that the incident forming the basis of the DeLucca Action is not covered by State Farm's policy, that State Farm has no obligation to defend or indemnify Advanced Construction, and that there is no coverage available to Advanced Construction under the State Farm policy.

Advanced Construction's Cross-claims and Counterclaims

On February 24, 2021, with the filing of its answer to the complaint, Advanced Construction asserted cross-claims against AESLIC (*see* NYSCEF Doc No. 28). Specifically, Advanced Construction seeks a declaration that AESLIC owes Advanced Construction defense and indemnification for the DeLucca Action, including the third-party complaint filed by BQE (*id*., ¶ 74).

In its answer, Advanced Construction also asserted a counter-claim against State Farm, seeking a declaration that State Farm owes Advanced Construction a continuing obligation to defend and indemnify Advanced Construction in the DeLucca Action (*see id*., ¶ 67).

On March 11, 2021, AESLIC filed an answer to Advanced Construction's cross-claims, denying all material allegations (*see* NYSCEF Doc No. 74).

The State Farm Policy

State Farm issued a policy of business automobile insurance for the truck owned by Advanced Construction with Policy Number 204 0396-A09-32, with effective dates of January 9, 2017 to January 9, 2018 (*see* NYSCEF Doc No. 50). That policy contains the following provision of coverage:

> 1. ***We*** will pay:
>
> a. damages an ***insured*** becomes legally liable to pay because of:
>
> (1) ***bodily injury*** to others; and
>
> (2) damage to property caused by an accident that involves a vehicle for which that ***insured*** is provided Liability Coverage by this policy

(*id*.).

Under the policy, as amended by endorsement 6030AF entitled Business Named Insured, "Insured" is changed to read:

> 1. you for:
>
> a. the ownership, maintenance, or use of
>
> (1) your car;
>
> (2) a newly acquired car; or
>
> (3) a trailer

(*id*.).

Under the State Farm policy there is no coverage for breach of contract, or for contractual indemnity (*see id*.).

After receiving notice of the third-party suit against Advanced Construction first transmitted to State Farm through its no-fault department on November 5, 2019, by letter dated November 22, 2019 (*see* NYSCEF No. 52), State Farm assigned counsel based on the claims in the third-party complaint, subject to a reservation of rights. In its coverage letter to Advanced Construction, dated December 13, 2019 (NYSCEF Doc No. 53), State Farm advised Advanced Construction that there was no coverage for contractual claims and no coverage based on the employee exclusion, but advised that it would provide a legal defense, in order to protect the interests of Advanced Construction:

> We have received notification of an incident reported to have occurred on or about July 5, 2017, at 126-l27th St, New York, NY. State Farm Mutual Automobile Insurance Company may have no duty to pay, indemnify, defend, or otherwise perform under the policy referenced above because:
>
> It is questionable whether the injuries to Daniel DeLucca arose out of and in the course of his employment by the insured, so as to exclude coverage for the insured with respect to any claim for such injuries.
>
> It is questionable whether the injuries to Daniel DeLucca arose out of liability assumed under any contract or agreement, so as to exclude coverage for the insured with respect to any claim for such injuries.
>
> For these reason(s), and for any other reasons which may become known, State Farm Mutual Automobile Insurance Company reserves all rights under the policy, including the right to deny coverage in its entirety

(*id*.).

Defense counsel assigned by State Farm has represented Atlantic Construction in the DeLucca Action for the past three years.

The AESLIC Policy

AESLIC issued Commercial General Liability Policy No. 16CG0207420 to Advanced Construction as the named insured (*see* NYSCEF Doc No. 29). The policy was effective from November 5, 2016 to November 5, 2017 (*id*.). The AESLIC policy provides:

> **Coverages**
>
> **Coverage A – Bodily Injury and Property Damage Liability**
>
> 1. Insuring Agreement
>
> "We will pay those sums that the insured becomes legally obligated to pay as damages because of bodily injury or property damage to which this insurance applies. We will have the right and duty to defend the insured against any 'suit' seeking those damages. However, we will have no duty to defend the insured against any 'suit' seeking damages for bodily injury or property damage to which this insurance does not apply. We may at our discretion investigate any occurrence and settle any claim or suit that may result

(*id*. at page 1).

Under the AESLIC policy, coverage for bodily injury is subject to certain exclusions, including the following:

> This insurance does not apply to:
>
> **g. Aircraft, Auto or Watercraft**
>
> " 'Bodily injury' or 'property damage' arising out of the ownership, maintenance, use or entrustment to others of any aircraft, 'auto' or watercraft owned or operated by or rented or loaned to any insured. Use includes operation and 'loading or unloading'. This exclusion applies even if the claims against any insured allege negligence or other wrongdoing in the supervision, hiring, employment, training or monitoring of others by that insured, if the 'occurrence' which caused the 'bodily injury' or 'property damage' involved the ownership, maintenance, use or entrustment to others of any aircraft, 'auto' or watercraft that is owned or operated by or rented or loaned to any insured

(*id*. at 4).

> This exclusion incorporates the term "auto" which is defined as:
>
> a. A land motor vehicle, trailer or semitrailer designed for travel on public roads, including any attached machinery or equipment; or
>
> b. Any other land vehicle that is subject to a compulsory or financial responsibility law or other motor vehicle insurance law in the state where it is licensed or principally garaged. However, 'auto' does not include 'mobile equipment'

(*id*. at 13).

The AESLIC Policy defines the term "loading or unloading" as:

> Loading or unloading' means the handling of property:
>
> a. After it is moved from the place where it is accepted for movement into or onto an aircraft, watercraft or 'auto';
>
> b. While it is in an aircraft, watercraft or 'auto'; or
>
> c. While it is being moved from an aircraft, watercraft or 'auto' to the place where it is finally delivered; but "loading or unloading" does not include the movement of property by means of a mechanical device, other than a hand truck, that is not attached to the aircraft, watercraft or 'auto

(*id*. at 14).

On June 11, 2018, AESLIC sent a letter to Advanced Construction (*see* NYSCEF Doc No. 54) in which it acknowledged receipt of the May 7, 2018 tender of the DeLucca complaint from the City of New York to BQE and Advanced Construction for defense and indemnity (*id*. at 1-2). AESLIC also acknowledged that it offered a policy of insurance for a policy period covering the date of the accident, but indicated that there were potential circumstances under which coverage would not be provided (*id*. at 2). It also stated that it would continue to investigate the claim.

The letter specifically referenced the DeLucca complaint and the Notice of Claim filed by Mr. DeLucca with the City of New York, and pointed out the allegation contained therein that, in the course of his employment, he was caused to fall while unloading scaffold material/equipment on top of a flatbed truck as part of a construction project. Based on that allegation, AESLIC cited numerous exclusions from its policy, including the Auto Exclusion relating to ownership, maintenance and use of autos owned by the insured when loading and unloading. The letter, which was not copied to the City of New York or Mr. DeLucca, reserved all rights but did not deny coverage (*see id*.).

After Advanced Construction tendered the BQE third-party complaint to AESLIC for defenses and indemnity, by letter dated January 7, 2019 (*see* NYSCEF Doc No. 92), AESLIC acknowledged receipt of the third-party complaint at the end of November, 2018, and stated that its letter supplemented the reservation of rights letter sent seven months earlier on June 11, 2018. The January 7, 2019 letter then quoted the Auto Exclusion, and concluded that "there is no coverage available in this matter to [Advanced Construction] under the AESLIC policy, as AESLIC's investigation has revealed that the auto exclusion quoted above applies to preclude coverage for this loss." Other than stating that it had obtained confirmation from two other people that the truck involved was owned by Advanced Construction, there was no indication of any investigation being done in the seven months between the reservation of rights letter and the declination of coverage. The documents relied upon by AESLIC, which included the DeLucca Complaint, the Notice of Claim, the 50-H hearing transcript and jobsite incident report, all existed and were available for review at the time of the June 11, 2018 reservation of rights letter.

Alleged Defaults in this Action

No answer was served in this action by nominal defendants Daniel DeLucca, the City of New York, the NYSCHA, and the HDC, and State Farm alleges that they are in default (*see* affidavits of service [NYSCEF Doc No. 41]; *see also* supplemental affidavits of service served pursuant to CPLR 3215 [g] [NYSCEF Doc No. 42]).

DISCUSSION

"'[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] [citation omitted]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). The burden is a heavy one: the facts must be viewed in the light most favorable to the non-moving party and every available inference must be drawn in the non-moving party's favor (*Sherman v New York State Thruway Auth.*, 27 NY3d 1019, 1021 [2016]). "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers" (*Winegrad*, 64 NY2d at 853; *see also Lesocovich v 180 Madison Ave. Corp.*, 81 NY2d 982 [1993]).

The party opposing summary judgment has the burden of presenting evidentiary facts sufficient to raise triable issues of fact (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *CitiFinancial Co. [DE] v McKinney*, 27 AD3d 224, 226 [1st Dept 2006]). The court is required to examine the evidence in a light most favorable to the party opposing the motion (*Martin v Briggs*, 235 AD2d 192, 196 [1st Dept 1997]). Summary judgment may be granted only when it is clear that no triable issues of fact exist (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]), and "is inappropriate in any case where there are material issues of fact in dispute or where more than one conclusion may be drawn from the established facts" (*Friends of Thayer Lake, LLC v Brown*, 27 NY3d 1039, 1043 [2016]; *see also Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]; *Tronlone v Lac d'Amiante Du Quebec*, 297 AD2d 528, 528-529 [1st Dept 2002], *affd* 99 NY2d 647 [2003]).

When analyzing a dispute over insurance coverage, courts should look first to the language of the policy (*Raymond Corp. v National Union Fire Ins. Co. of Pittsburgh, Pa.*, 5 NY3d 157, 162 [2005]; *Consolidated Edison Co. of N.Y. v Allstate Ins. Co.*, 98 NY2d 208, 221 [2002]). As with the construction of all contracts, "unambiguous provisions of an insurance contract must be given their plain and ordinary meaning, and the interpretation of such provisions is a question of law for the court" (*White v Continental Cas. Co.*, 9 NY3d 264, 267 [2007] [internal citation omitted]; *see also Vigilant Ins. Co. v Bear Stearns Cos., Inc.*, 10 NY3d 170, 177 [2008]).

"[A]n insurer's duty to defend is broader than its duty to indemnify, and arises whenever the allegations in the complaint in the underlying action, construed liberally, suggest a reasonable possibility of coverage, or where the insurer has actual knowledge of facts establishing such a reasonable possibility" (*Rhodes v Liberty Mut. Ins. Co.*, 67 AD3d 881, 882 [2d Dept 2009]; *accord BP A.C. Corp., v One Beacon Ins. Group.*, 8 NY3d 708, 714 [2007]; *Automobile Ins. Co. of Hartford v Cook*, 7 NY3d 131, 137 [2006]). The determination as to whether the duty of an insurer to defend under a policy is triggered "depends on the facts which are pleaded" (*Allstate Ins. Co. v Mugavero*, 79 NY2d 153, 162 [1992]). "[Only] where it can be determined from the factual allegations that 'no basis for recovery within the coverage of the policy is stated in the complaint, [may a court] . . . sustain [the insurer's] refusal to defend'" (*id*. at 163 [citation omitted]; *Allstate Ins. Co. v Zuk*, 78 NY2d 41, 45 [1991] [court may only sustain insurer's refusal to defend where "as a matter of law . . . there is no possible factual or legal basis on which it might eventually be obligated to indemnify the insured under any policy provision"]; *see e.g. Morse Diesel Intl. v Olympic Plumbing & Heating Corp.*, 299 AD2d 276 [1st Dept 2002] [finding that an insurer owed a duty to defend where it failed to meet its heavy burden of demonstrating that the allegations of

the complaint cast the pleadings wholly within the exclusions of the additional insured endorsement]).

The AESLIC Policy provides coverage for "bodily injury" as that term is defined, subject to the exclusions contained in the policy, specifically in this case, the Auto Exclusion. An insurance coverage analysis begins by reviewing the insuring agreement, but the exclusion clauses expressly set forth what is not covered under the policy (*Albert J. Schiff Assoc., Inc. v Flack,* 51 NY2d 692, 697 [1980]). In the context of an insurance coverage dispute, "[g]enerally it is for the insured to establish coverage and for the insurer to prove that an exclusion in the policy applies to defeat coverage" (*Consolidated Edison Co. of N.Y., Inc.*, 98 NY2d at 218; *see York Restoration Corp. v Solty's Constr., Inc.*, 79 AD3d 861, 862-863 [2d Dept 2010]). Under New York law, "'[i]n policies of insurance . . . if any one exclusion applies there can be no coverage'" (*Monteleone v Crow Constr. Co.*, 242 AD2d 135, 140-141 [1st Dept 1998] [citation omitted]).

AESLIC's Motion for Summary Judgment (Motion Sequence No. 001) and State Farm's Motion for Summary Judgment (Motion Sequence No. 002) with respect to AESLIC's Duty to Defend or Indemnify Advanced Construction in the DeLucca Action

Application of the above principles to the underlying complaint and the language of the insurance policies makes clear the Auto Exclusion applies to bar coverage for all of the allegations and claims of the DeLucca Action against Advanced Construction. Accordingly, State Farm's motion for summary judgment for a declaration that AESLIC is obligated to defend or indemnify Advanced Construction in the DeLucca Action is denied. However, as set forth below, summary judgment in favor of AESLIC is not warranted, because there is an issue of fact as to whether it timely disclaimed coverage, pursuant to Insurance Law § 3420 (d), and thus, whether it is estopped from claiming the Auto Exclusion.

1. The Auto Exclusion

In the complaint, State Farm seeks a declaration that AESLIC is obligated to provide coverage and defense to Advanced Construction for the DeLucca Action (complaint, ¶ 4). Likewise, in its cross-claim, Advanced Construction seeks a declaration that ASELIC owes an obligation to defend and indemnify Advanced Construction for the DeLucca Action (Advanced Construction answer, ¶ 74). However, there is no coverage for the allegations and claims of the DeLucca Action because the Auto Exclusion of the AESLIC policy provides that "[t]his insurance does not apply to . . . "[b]odily injury" arising out of the ownership, maintenance, use or entrustment to others of any . . . 'auto.'"

New York Courts routinely enforce unambiguous, plainly worded exclusions to bar coverage (*see e.g. Monteleone*, 242 AD2d at 140). Further, New York courts have applied the Auto Exclusion to bar coverage (*see Country-Wide Ins. Co. v Excelsior Ins. Co.*, 147 AD3d 407

[1st Dept 2017]; *Zurich Am. Ins. Co. v ACE Am. Ins. Co.*, 165 AD3d 558 [1st Dept 2018]; *see e.g. Nautilus Ins. Co. v 93 Lounge Inc.*, 2017 WL 1207528, * 7, 21 US Dist LEXIS 49539, * 20 [ED NY 2017] [finding that the "Aircraft, Auto or Watercraft" provision at issue "clearly and unambiguously exclude(d) coverage for any and all personal injuries 'arising out of the use of . . . any . . . auto[mobile],' including use by third parties"]; *Ruge v Utica First Ins. Co.*, 32 AD3d 424, 426 [2d Dept 2006] ["We find no ambiguity as to the plain and ordinary meaning of the auto exclusion at bar. Thus, Utica established, prima facie, that the auto exclusion in the policy precluded coverage for the subject accident"]).

Under New York law, "[i]n the context of a policy exclusion, the phrase 'arising out of' is unambiguous, and is interpreted broadly to mean 'originating from, incident to, or having connection with'" (*Scottsdale Indem. Co. v Beckerman*, 120 AD3d 1215, 1219 [2d Dept 2014], quoting *Maroney v New York Cent. Mut. Fire Ins. Co.*, 5 NY3d 467, 472 [2005]). To determine the applicability of an "arising out of" exclusion, the Court of Appeals has adopted a "but for" test (*see Mount Vernon Fire Ins. Co. v Creative Hous.*, 88 NY2d 347, 350 [1996]). Thus, "under New York law . . . the term 'arising out of' is afforded a broader meaning in the context of general liability insurance than the term 'caused by,' and . . . 'a liability policy exclusion which excludes injuries arising out of the ownership, maintenance, or use of a motor vehicle' will extend to any injuries 'originating from, incident to, or having a connection with the use of the vehicle'" (*U.S. Specialty Ins. Co. v LeBeau, Inc.*, 847 F Supp2d 500, 506 [WD NY 2012], quoting *Liberty Mutual Ins. Co. v E.E. Cruz & Co., Inc.*, 475 F Supp2d 400, 408-409 [SD NY 2007]; *see also Country-Wide Ins. Co.*, 147 AD3d at 409 ["(t)he focus of the inquiry 'is not on the precise cause of the accident but the general nature of the operation in the course of which the injury was sustained'"] [internal quotation marks and citations omitted]). In this case, it is clear that, but for the unloading

of scaffolding from Advanced Construction's truck, Mr. DeLucca would not have fallen. Thus, Mr. DeLucca's injuries are "arising out of" the use of Advanced Construction's "auto" as defined in the AESLIC policy.

Accordingly, the Auto Exclusion clearly and unambiguously applies to bar coverage for the allegations of the DeLucca Action against Advanced Construction in their entirety. Indeed, New York state and federal courts have found either the exact or similar automobile exclusion provisions like the one at issue to bar coverage in fact scenarios similar to those alleged in the DeLucca Action – i.e., where the underlying plaintiff is injured while loading and/or unloading from the covered automobile (*see e.g. Striker Sheet Metal II Corp. v Harleysville Ins. Co. of N.Y.*, 2018 WL 654445, * 6, 2018 US Dist LEXIS 15892, * 15 [ED NY 2018] [concluding that the policy exclusion barring liability for bodily injury "arising out of the ownership, maintenance or use or entrustment to others of any . . . 'auto' . . . owned or operated by . . . any insured," where "[u]se includes operation and 'loading and unloading'" was "'clear and unambiguous and allow[ed] no opportunity for construction as a question of fact"'] [citation omitted]; *Country-Wide*, 147 AD3d at 409 [where injury occurred "while (the underlying plaintiff) was unloading material from a shipping trailer, an activity clearly encompassed by the exclusion", "(t)he fact that his injury was allegedly caused by the defective nature of the trailer lift does not remove the injury from the policy exclusion"]; *Zurich Am.*, 165 AD3d at 559 ["Although the complaints alleged that the accidents happened due to cages that were improperly constructed, improperly placed, improperly operated, improperly maintained, and not properly secured, the assertions nonetheless 'arise out of' the loading and unloading of a truck, and the ACE policy's auto exclusion is therefore applicable"]).

The facts alleged in the DeLucca Action are nearly identical to those in *Country-Wide* (147 AD3d 407). In *Country-Wide*, the insured's employee was unloading a trailer onto an attached lift gate (*id*. at 408). The lift gate failed and caused the employee to fall (*id*.). The policy exclusion at issue in *Country-Wide* was also an Auto Exclusion, which "excluded coverage for bodily injury 'arising out of' the use, including loading and unloading, of autos operated by or rented or loaned to [the insured]" (*id*.). The First Department held that:

> [T]he underlying plaintiff's accident occurred while he was unloading material from a shipping trailer, an activity clearly encompassed by the exclusion. The fact that his injury was allegedly caused by the defective nature of the trailer lift does not remove the injury from the policy exclusion

(*id*. at 409). The Court then found that "a causal relationship between the injury and exclusion clearly exists here and requires dismissal of the complaint" (*id*.).

The decision in *Country-Wide* was subsequently relied upon in *Zurich Am. Ins. Co. v ACE Am. Ins. Co.* (165 AD3d 558). The language of the Auto Exclusion in the *Zurich* case is identical to the Auto Exclusion in the instant matter (*id*. at 558-559). The First Department held that:

> Here, as in *Country–Wide Ins. Co. v Excelsior Ins. Co.*, the general nature of the operation of unloading the rebar cages, by the necessary step of untying the straps, led to the injuries sustained by the underlying claimants. Although the complaints alleged that the accident happened due to cages that were improperly constructed, improperly placed, improperly operated, improperly maintained, and not properly secured, the assertions nonetheless 'arise out of' the loading and unloading of the truck, and the ACE policy's auto exclusion is therefore applicable

(*id*. at 559 [citation omitted]; *see also American Eur. Ins. Co. v Tirado Iron Works & Fence, Inc.*, 2021 WL 7830143, * 7, 2021 US Dist LEXIS 202660, * 19-20 [ED NY 2021] [where "it (was) clear that (the underlying plaintiff's) injuries were sustained, at a minimum, in connection with his use of an automobile—i.e., unloading the iron truck as part of his employment with Tirado," the court found that "this occurrence falls squarely within the scope of the Auto Exclusion", which "disclaim(ed) liability for bodily injury 'arising out of the ownership, maintenance, use or

entrustment to others of any . . . "auto" . . . owned or operated by or rented or loaned to any insured"]).

Likewise, here, as alleged in the DeLucca Action, Mr. DeLucca was injured while unloading material from the back of the insured's flatbed truck, which led to his fall and subsequent alleged injuries. The Notice of Claim in the underlying action specifically states that Mr. DeLucca "was injured when he was caused to fall from a scaffold material/equipment/height while ***unloading*** scaffolding materials/equipment [from] a flatbed truck" (Notice of Claim at 2 [emphasis added]). Indeed, Mr. DeLucca testified that "we were unloading the scaffolding material from the back of the truck," when he was injured (GML § 50-e hearing tr at 24:16-19). He further testified that he was shaking apart pieces of scaffolding staircase while standing on top of a truck owned by Advanced Construction, that he was handing the scaffolding material down from the truck to other Advanced Construction employees, and that he was caused to fall from the truck when the scaffolding staircase pieces he was holding came apart (*id*. at 28:19-22; 29:12-17; 31:16-32:5). The untying of straps on a truck at issue in *Zurich* is factually indistinguishable from the separating of pieces of scaffolding in this matter, leading to the clear conclusion that Mr. DeLucca's bodily injuries arose from the loading and unloading of scaffolding from Advanced Construction's flatbed truck, as in *Country-Wide*. Thus, Mr. DeLucca's bodily injuries arising out of the loading and unloading of Advanced Construction's truck are excluded from AESLIC's policy under the Auto Exclusion, and there is no coverage for Advanced Construction for the DeLucca Action.

In opposition to the motion, State Farm contends that summary judgment must be denied because the insured, Advanced Construction, denied the allegations that Mr. DeLucca sustained any injury at the work site. However, that is not the test for coverage, and not the test for a duty to defend. Whether or not Mr. DeLucca was actually injured is an underlying liability issue, not a coverage issue. Rather, there is coverage if the allegations of the underlying complaint, if proven to be true, would result in coverage under the policy. Conversely, "if the allegations of the underlying Complaint allow for no interpretation that will bring them within the policy provisions, there is no duty to defend" (*Northville Indus. Corp. v National Union Fire Ins. Co. of Pittsburgh, Pa.*, 218 AD2d 19, 25 [2d Dept 1995]).

State Farm provides no evidence supporting its claim that the injury did not result from a fall from a truck. Yet, evidence showing that there was a fall from a truck is incorporated directly into the DeLucca Complaint, which explicitly references the Notice of Claim and the Rule 50-h Hearing testimony. Accordingly, the Auto Exclusion bars coverage, and State Farm is not entitled to a declaration that AESLIC is required to defend and indemnify Advanced Construction in the DeLucca Action.

2. Insurance Law § 3420 (d) Waiver

However, AELIC is not entitled to summary judgment dismissing the complaint. In opposition to AESLIC's motion, Advanced Construction argues that AESLIC failed to timely deny coverage, as required under Insurance Law § 3420 (d), and has waived its right to rely on policy exclusions to avoid providing defense or indemnity to Advanced Construction for the DeLucca Action.

New York Insurance Law § 3420 (d) provides that when a liability policy is delivered or issued for delivery in this state, "[if] an insurer shall disclaim liability or deny coverage for death or bodily injury . . . it shall give written notice as soon as is reasonably possible" (Insurance Law § 3420 [d]; *see George Campbell Painting v National Fire Ins. Co. of Pittsburgh, Pa.*, 92 AD3d 104, 111 [1st Dept 2012] [the statutory language requires the insurer to disclaim "as soon as is reasonably possible," not "'as soon as is reasonable'"]). A failure by the insurer to give notice as soon as is reasonably possible after it first learns of the accident or of grounds for disclaimer of liability or denial of coverage precludes effective disclaimer or denial (*Matter of New York Cent. Mut. Fire Ins. Co. v Aguirre*, 7 NY3d 772, 774 [2006]).

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 (*Markevics v Liberty Mut. Ins. Co.*, 97 NY2d 646, 649[2001]). "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. [Jiminez]*, 78 NY2d 1054, 1056 [1991]; *accord Matter of New York Cent. Mut Fire Ins. Co. v Aguirre*, 7 NY3d at 774; *Hunter Roberts Constr. Group, LLC v Arch Ins. Co.*, 75 AD3d 404, 409 [1st Dept 2010] [where an insurer "becomes sufficiently aware of the facts which would support a disclaimer," the time to disclaim begins to run]). An insurer

who delays giving written notice of disclaimer bears the burden of proving that the delay was reasonable under the circumstances (*see First Fin. Ins. Co. v Jetco Contr. Corp.*, 1 NY3d 64, 69 [2003]; *Hartford Ins. Co. v County of Nassau*, 46 NY2d 1028, 1030 [1979]). "When the explanation offered for the delay is an assertion that there was a need to investigate issues that will affect the decision on whether to disclaim, the burden is on the insurance company to establish that the delay was reasonably related to the completion of a necessary, thorough, and diligent investigation" (*Okumus v National Specialty Ins. Co.*, 112 AD3d 797, 798 [2d Dept 2013]).

Accordingly, AESLIC was required to prove that its notice of disclaimer was provided as soon as reasonably possible after it learned, or should have discovered through a reasonable and prompt investigation, of the basis for it to disclaim liability or deny coverage.

Atlantic Contracting argues that AESLIC had the information in its possession necessary to immediately deny coverage from the outset. According to Atlantic Contracting, AESLIC waited approximately seven (7) months before asserting that the same exclusions cited in its June 1, 2018 letter justified a declination of coverage under its January 7, 2019 letter. Atlantic Contracting contends that the facts relied upon to decline coverage in January of 2019 existed in May of 2018 when AESLIC was first put on notice of the claim. Thus, Atlantic Contracting argues, the failure of AESLIC to deny coverage based upon the Auto Exclusion cited in their June 11, 2018 reservation of rights letter when they first learned of the accident or of the grounds for disclaimer of liability or denial of coverage, renders its declination of coverage ineffective as a matter of law.

However, "[w]hen construing Insurance Law § 3420 (d), which requires an insurer to issue a written disclaimer of coverage for death or bodily injuries arising out of accidents 'as soon as reasonably possible,' [the Court of Appeals has] made clear that timeliness almost always presents a factual question, requiring an assessment of all relevant circumstances surrounding a particular

disclaimer [and that] cases in which the reasonableness of an insurer's delay may be decided as a matter of law are exceptional and present extreme circumstances" (*Continental Cas. Co. v Stradford*, 11 NY3d 443, 449 [2008]; *see also First Fin. Ins. Co.*, 1 NY3d at 69 [the timeliness of a disclaimer generally presents a question of fact unless "basis for denying coverage was or should have been readily apparent before the onset of the delay"]; *City of New York v Greenwich Ins. Co.*, 95 AD3d 732, 733 [1st Dept 2012] [same]). "One of those circumstances is the time necessary for an insurer to conduct a prompt investigation into those grounds supporting a potential disclaimer" (*Continental Cas. Co.*, 11 NY3d at 449).

In its reply, AESLEC submits evidence sufficient to raise factual issues as to the reasonableness of its delay in denying coverage (*see City Univ. of N.Y. v Utica First Ins. Co.*, 211 AD3d 600 [1st Dept 2022] [genuine issues of material fact as to timeliness of denial of coverage by subcontractor's insurer four months after general contractor's insurer tendered defense precluded summary judgment for declaratory judgment that subcontractor's insurer was estopped from denying coverage based on exclusion]). AESLIC contends that Advanced Construction, its insured, was first named as a defendant in the third-party complaint filed by BQE on October 23, 2018, and that this was the first claim made directly against Advanced Construction in this matter. AESLIC argues that disclaimer was not required until the third-party complaint was tendered to AESLIC at the end of November, and that its disclaimer was issued 37 days later, which was within a reasonable amount of time. AESLIC also argues that, because the DeLucca complaint and the BQE third-party complaint do not explicitly allege that a truck was involved in Mr. DeLucca's incident, and because the Notice of Claim and 50-H hearing transcript are referenced in the DeLucca complaint, but not attached as exhibits, an investigation to locate, review and confirm the information in these documents was required.

Although the Auto Exclusion precludes coverage for Atlantic Contracting for the claims asserted against it in the DeLucca Action, this court finds that AESLIC's motion for summary judgment dismissing the complaint as against it is denied, because there are factual issues with respect to whether it issued its disclaimer of coverage "as soon as is reasonably possible," and whether the delay in issuing the disclaimer "was reasonably related to the completion of a necessary, thorough, and diligent investigation." Likewise, that branch of State Farm's motion for summary judgment for a declaration that AESLIC must defend or indemnify Advanced Construction in the DeLucca Action is also denied.

State Farm's Motion for Summary Judgment for a Declaration That It Has No Duty to Defend or Indemnify Advanced Construction in the DeLucca Action (Motion Sequence No. 002)

In support of its motion for summary judgment declaring that it has no duty to defend or indemnify Advanced Construction in the DeLucca Action, State Farm contends that no coverage is available under its automobile policy because the injuries sustained by Mr. DeLucca do not arise from the use and operation of a motor vehicle, but rather, arose from his performed task to dismantle pieces of scaffolding and was part of his ordinary workplace activities. This court disagrees.

New York courts broadly construe what constitutes use of a vehicle in the context of an automobile policy. It is recognized that "use" of a vehicle encompasses "more than just driving a car" (*see Gering v Merchants Mut. Ins. Co.*, 75 AD2d 321, 323 [2d Dept 1980]). More importantly, under New York law, it is well-settled that "the use of an auto," as set forth in most auto policies, includes loading and unloading (*see ABC, Inc. v Countrywide Ins. Co.*, 308 AD2d 309, 310 [1st Dept 2003] ["Generally speaking, liability insurance on the use of a motor vehicle includes

coverage for bodily injury suffered during the loading or unloading of the vehicle"]; *Paul M. Maintenance, Inc. v Transcontinental Ins. Co.*, 300 AD2d 209, 211 [1st Dept 2002] [holding that loading and unloading was considered to be "use" of the truck under the business auto policy]). In fact, "where the accident occurs during the loading or unloading of property from a covered vehicle, the test as to whether [auto] coverage is triggered under the subject provision of the policy is more flexible and does not require a showing that the vehicle itself produced the injury" (*Eagle Ins. Co. v Butts*, 269 AD2d 558, 559 [2d Dept 2000]). Rather, the alleged injury must result from "some act or omission related to the use of the vehicle" (*id.*; *see e.g. Cosmopolitan Mut. Ins. Co. v Baltimore & Ohio R.R. Co.*, 18 AD2d 460, 462 [1st Dept 1963] ["where an accident results from an act inherent in or directly related to the process of the moving of the goods from the vehicle to the place to which they are to be delivered, then there is (auto) coverage"]).

First Mercury Ins. Co. v State Farm Mut. Auto. Ins. Co., 65 Misc 3d 1220[A], 2019 NY Slip Op 51773[U] [Sup Ct, NY County 2019]) is directly on point. In that case, like here, the insurance action arose from an accident on a construction site. Defendant Europa Construction Corporation ("Europa"), a subcontractor on the project, was insured by State Farm. Non-party Joaquim DaSilva, an employee of Europa, was injured at the construction site while attempting to unload pallets of cement from a flatbed truck owned by Europa, and brought an underlying personal injury action.

Europa was insured by State Farm under an automobile liability policy, which contained the exact provision at issue here. The policy covered "damages an insured becomes legally liable to pay because of a . . . bodily injury to others caused by an accident that involves a vehicle from which the insured is provided liability coverage by this policy" (*id.* at * 3). The policy, like the

one at issue here, also defined "insured" to include the following – "you" (meaning Europa, the insured) for the "ownership, maintenance, or use" of a Europa vehicle (*id*. at * 2-3).

In that case, as is argued here, State Farm disputed whether the scope of the State Farm policy included the accident at issue in the underlying action, and argued that DaSilva's activities leading to his alleged injury did not constitute "use" of the vehicle within the meaning of the policy. The court did not agree with State Farm's reading of the policy, and found that because the underlying plaintiff was injured during the course of loading and unloading pallets of cement from a flatbed truck, the accident at issue arose from the "use" of a vehicle. In making this determination, the court found that "[i]nsurance coverage for injuries suffered as a result of the 'use of motor vehicle' encompasses bodily injury suffered during the loading or unloading of the vehicle" (*id*. at * 5, quoting *ABC, Inc.*, 308 AD2d at 310). The court cautioned that "[i]t is not sufficient, however, merely for the injury to have occurred within the time period in which unloading occurred." Rather, "[t]here must be a 'causal relationship between the accident and the movement of the goods to or from the vehicle'" (*id*., quoting *Cosmopolitan Mut. Ins. Co.*, 18 AD2d at 463).

The court further found that, in the underlying action, the plaintiff alleged acts and omissions relating to the unloading process, and had thus identified "a causal relationship between the accident and the movement of goods from Europa's truck to the construction site" (*id*. at *5). The court concluded that "Europa's potential damages for indemnification and contribution are within the scope of coverage provided by State Farm's auto policy" (*id*. at * 6).

Similarly, in *American Empire Surplus Lines Insurance Co. v State Farm Mutual Automobile Insurance Company*, Index No. 655441/2018 [Sup Ct, NY County 2019], the court held that the same State Farm policy that is the subject of this lawsuit provided a defense for a property owner and general contractor when the subcontractor's employee was injured while loading material to the subcontractor's truck that was insured by State Farm:

> As the underlying complaint alleges that Pitang's accident arose while he was using the truck as an elevated platform from which he could pass wooden planks to his co-workers, that 'use' of the vehicle can reasonably be understood as the proximate cause of Pitang's injury. His deposition testimony shows that he was still on the flat bed of the vehicle when injured, albeit not when passing any wooden planks

(decision at 19 [NYSCEF Doc No. 163 under Index No. 655441/2018).

Likewise, here, it is clear that Mr. DeLucca's alleged injuries arose out of the use of a covered vehicle under the State Farm policy, because he was injured while unloading material from the back of the insured's flatbed truck, which led to his fall and subsequent alleged injuries. It is further clear that, in the underlying action, Mr. DeLucca identified "a causal relationship between the accident and the movement of goods from [Advanced Construction's truck] to the construction site." During his 50-h hearing, the transcript of which was attached to the underlying complaint, Mr. DeLucca specifically testified that he and the other workers were unloading the scaffolding material from the back of the truck owned by Advanced Construction when he was injured. He further testified that he was shaking apart pieces of scaffolding staircase while standing on top of the truck, and that he was handling scaffolding material down from the truck to other Advanced Construction employees when the scaffolding staircase pieces he was holding came apart, leading to his injury. This testimony demonstrates that Mr. DeLucca's injuries clearly arose from the loading and unloading of scaffolding from Advanced Construction's flatbed truck.

This court finds that Mr. DeLucca's alleged injuries arose out the use of a covered vehicle under the State Farm automobile policy and, accordingly, that branch of State Farm's motion in which it seeks a declaration that it is not required to indemnify or defend Advanced Construction in the underlying action is denied.

State Farm's Motion for a Default Judgment and NYCHA's Cross-Motion (Motion Sequence No. 002)

State Farm moves for a default judgment against Mr. DeLucca, the City of New York, the HDC, the NYSCHA and BQE. State Farm contends that none of these nominal parties filed an answer to the complaint and are, therefore, in default. By stipulation dated February 15, 2023, State Farm withdrew its motion for a default judgment against the HDC (*see* NYSCEF Doc No. 123).

NYCHA cross-moves, pursuant to CPLR 3215 (c), for an order dismissing the complaint as against it as abandoned, on the ground that State Farm failed to move for a default judgment within one year of its default in answering the complaint.

Because NYCHA did not own the property or act as a general contractor, it moved for summary judgment dismissing the complaint in the DeLucca Action as against it. Following service of NYCHA's motion for summary judgment, on May 17, 2018, the plaintiff in the DeLucca Action signed a stipulation of discontinuance against NYCHA (*see* NYSCEF Doc No. 84). Nevertheless, State Farm named NYCHA as a "nominal defendant" in this action (*see* complaint, ¶ 45). On January 7, 2021, State Farm served NYCHA with the complaint in this action (*see* affidavit of service). NYCHA alleges that it did not receive notice of the declaratory judgment action until it was recently served with State Farm's motion for a default judgment.

Because the complaint was personally served on NYCHA on January 7, 2021, NYCHA's answer was due within 20 days, or by January 27, 2021. However, State Farm's motion for a default judgment was served on July 13, 2022, more than one year since NYCHA's default in answering the complaint.

Accordingly, NYCHA's cross-motion is granted. CPLR 3215 (c) provides that "if [a] plaintiff fails to take proceedings for the entry of judgment within one year after the default, the court shall not enter judgment but shall dismiss the complaint as abandoned, without costs . . . unless sufficient cause is shown why the complaint should not be dismissed" (*see Citimortgage, Inc. v Sahai*, 172 AD3d 552, 552 [1st Dept 2019] ["An action is deemed abandoned where a default has occurred, and a plaintiff has failed to take proceedings for the entry of judgment within one year thereafter"]). "The language of CPLR 3215 (c), requiring dismissal of an action where judgment is not sought within a year of a default is not discretionary, but mandatory," since it states that the court "shall" dismiss a complaint for which a default judgment is not sought within the requisite one-year period (*Deutsche Bank Natl. Trust Co. v Cruz*, 173 AD3d 610, 610 [1st Dept 2019]; *accord Wells Fargo Bank, N.A. v Martinez*, 181 AD3d 470, 471 [1st Dept 2020] ["The language of CPLR 3215 (c) is not discretionary, and a claim for which a default judgment is not sought within the requisite one-year period will be deemed abandoned"]).

"Notwithstanding, a claim will not be deemed abandoned if the party seeking a default judgment provides sufficient cause as to why the complaint should not be dismissed" (*Wells Fargo Bank, N.A.*, 181 AD3d at 471). "'To establish sufficient cause, the party opposing dismissal must demonstrate that it had a reasonable excuse for the delay in taking proceedings for entry of a default judgment and that it has a potentially meritorious action'" (*Deutsche Natl. Trust Co. v Bakarey*,

198 AD3d 718, 721 [2d Dept 2021] [citation omitted]). "'The determination of whether an excuse is reasonable . . . is committed to the sound discretion of the motion court'" (*id*. [citation omitted]).

Here, it is undisputed that NYCHA defaulted by failing to answer the complaint within the requisite time after service was complete. It is also undisputed, however, that State Farm took no steps to initiate proceedings for the entry of a default judgment against the NYSCHA within one year after its default.

Given that NYCHA is no longer a defendant in the underlying DeLucca Action, State Farm cannot demonstrate that it has a potentially meritorious cause of action against NYCHA. In addition, it fails to submit a reasonable excuse for the delay. Rather, it only states that it did not intend to abandon the complaint as against NYCHA, and that NYCHA's motion should be denied, "given the complexity of service on the nominal defendants" (affirmation in opposition to cross-motion [NYSCEF Doc No. 111], ¶ 2). State Farm does not specify why service on NYCHA was complex.

Accordingly, since State Farm failed to demonstrate sufficient cause as to why the complaint should not be dismissed as against NYCHA as abandoned, and it fails to demonstrate a meritorious cause of action, NYCHA's cross-motion is granted, without costs (as specified in the statute).

State Farm's motion for a default judgment against the remaining nominal defendants is denied, as it was also made more than a year after these defendants, as named below, were served with the complaint:

The City of New York – January 1, 2021;

Mr. DeLucca – March 20, 2021;

BQE – January 8, 2021, with supplemental service on May 25, 2021.

Again, State Farm fails to explain its delay in serving the motion, other than reciting the complexity of service, without explanation, and does not make any attempt to demonstrate that it has a meritorious cause of action as against these nominal defendants.

The court has considered the remaining arguments, and finds them to be either without merit, or moot.

Accordingly, it is hereby

ORDERED that the motion of defendant American Empire Surplus Lines Insurance Company for summary judgment (Motion Sequence No. 001) is **DENIED**; and it is further

ORDERED that the motion of plaintiff State Farm Mutual Automobile Insurance Company for summary judgment (Motion Sequence No. 002) is **DENIED**; and it is further

ORDERED that the cross-motion of defendant the New York City Housing Development Corporation for an order dismissing the complaint against it as abandoned (Motion Sequence No. 002) is **GRANTED**, and the complaint is dismissed in its entirety as against said defendant, without costs, and the Clerk is directed to enter judgment accordingly in favor of said defendant.

This is the Decision and Order of this court.

3/23/2023					J. MACHELLE SWEETING, J.S.C.		
DATE							
CHECK ONE:		CASE DISPOSED		X	NON-FINAL DISPOSITION		
		GRANTED	DENIED		GRANTED IN PART	X	OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE