SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. VERNA L. SAUNDERS, JSC** **PART 36**

Justice

----------X

350 EAST HOUSTON STREET, LLC and BERKELEY INSURANCE COMPANY,

Plaintiffs,

- v -

TRAVELERS INDEMNITY COMPANY OF AMERICA, TEMPLE INSURANCE COMPANY, COPPS FOUNDATIONS, INC, and PETERSON GEOTECHNICAL CONSTRUCTION LLC,

Defendants.

----------X

INDEX NO. 650450/2018

MOTION SEQ. NO. 009

DECISION + ORDER ON MOTION

COPPS FOUNDATIONS, INC,

Third-Party Plaintiff,

-against-

NOBLE CONSTRUCTION GROUP, LLC,

Third-Party Defendant.

----------X

Third-Party
Index No. 595847/2019

The following e-filed documents, listed by NYSCEF document number (Motion 009) 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 297, 313, 316, 319, 322, 344, 352, 377, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 441

were read on this motion to/for **SUMMARY JUDGMENT**[1].

The underlying facts of this case are set forth in detail in the decision and order of this court dated October 9, 2018, deciding Mot. Seq. 001, which, among other things, dismissed the complaint as against defendant Axis Insurance Company (NYSCEF Doc. No. 77, *decision and order on Mot. Seq. 001*). Therefore, familiarity with all the underlying facts is presumed and same shall not be repeated here.

Temple Insurance Company ("Temple") moves, pursuant to CPLR 3212, for an order dismissing plaintiffs' amended complaint and the cross-claims asserted against it by co-defendant Travelers Indemnity Company of America ("Travelers"). Alternatively, Temple seeks an Order, pursuant to CPLR 603, severing the claims against it and ordering a separate trial thereof (NYSCEF Doc. No. 275, *notice of motion*).

In support of its motion, Temple argues that plaintiff 350 East Houston Street ("Houston") does not qualify as an additional insured under the Temple policy because to quality as an additional insured under the Temple policy, it must qualify as an additional insured under

[1] This motion is decided together with Mot. Seqs. 007; 008; 010; and 011.

the Travelers policy, which Travelers has denied in its answer. Furthermore, Temple represents that Houston violated conditions precedent to coverage, and that certain of the claimed damages are limited and/or not covered.

Temple argues that the occurrence giving rise to this suit occurred on March 21, 2017. However, Temple did not receive notice of the occurrence and/or the damage claim, or any request for or tender of coverage, prior to its receipt of the summons and complaint on February 5, 2018.

By letter dated April 3, 2017 and April 5, 2017,[2] Vela Insurance Services, an authorized administrator for plaintiff Berkley Insurance Company, the general liability insurance carrier for third-party defendant Noble Construction Group, LLC ("Noble"), indicated tender of the matter to Copps based on the executed contract between Copps and Noble. The letter states that Temple was sent the letter "Via Certified Mail". As per the documents disclosed by Berkley, the April 3, 2017 letter states it was purportedly sent to Temple via the United States Postal Service ("USPS"), not by certified mail, but by first class mail. The same lacked sufficient postage for USPS Certified Mail and lacks any appropriate certified mail sticker or postal markings. The first-class mail envelope addressed to Temple was returned to Vela by the USPS as undeliverable. Although the letter was addressed to Temple's Canadian address, the address line indicated "Ontario, CA", the abbreviation for California. In addition, an April 5, 2017, letter (identical content) was purportedly sent to Temple via Federal Express ("FedEx"). The FedEx tracking system has no record of delivery of same to Temple. Temple argues it did not have notice of the claim until February 5, 2018, eleven months after the incident. During that time, Houston assumed the obligation to, and conducted extensive stabilization operations, repairs, and remediation of the damage, without notice to, or consent of, Temple. Temple argues prejudice, claiming that "[its] ability to investigate the incident, determine the cause(s) of the incident, evaluate the extent of alleged damages, and to ascertain alternative solutions, remedies and costs, was eliminated, substantially impairing its ability to investigate and potentially defend the claim."

Temple argues that Houston vitiated any right to coverage by making payments to repair/remediate the damage to the property located at 249 East Second Street, New York, NY 10009 (the, "249 Property"), assuming the obligation to do so, and incurring expenses to remediate said damages, without Temple's consent. Such actions violate the voluntary payment condition of the Temple policy, warranting summary judgment in its favor. To this point, Temple argues that, under New York law, the proper measure of damages for injury to real estate is the lesser of the decline in market value and the cost of repair. Insofar as plaintiffs are seeking indemnification for payments made for repairs, which far exceed the value of the property, Houston's independent decision to repair the damages, without any justification for an award greater than the diminution in the 249 Property's value, should not be binding on Temple. This, claims Temple, reinforces its argument of prejudice.

Furthermore, Temple contends that, although plaintiffs seek damages in the sum of more than $1,140,967.00, the cost to repair or remediate the defective construction work and/or extra costs, or the delay damages (i.e., loss of rental income), same are not covered under the Temple

[2] The letters contain identical content.

policy. Temple also argues that its policy is excess to Travelers' policy. Therefore, such a priority of coverage determination as sought by Travelers is moot as to Temple and, thus, summary judgment on Travelers' cross-claim seeking a "determination of Travelers' share, if any, of the coverage obligations in relation to the other insurers", is moot. Alternatively, Temple argues that, should this court decline to award summary judgment to Temple and/or there are issues that remain to be adjudicated, the action against it should be severed so as to obviate confusion for the jury at the time of trial (NYSCEF Doc. No. 292, *memorandum of law*).

In opposition, plaintiffs argues that, contrary to Temple's position, Houston is an Additional Insured under the Travelers policy and, by extension, the Temple Policy on a primary and non-contributory basis, as confirmed by Stephanie J. Barnes, a claims professional for Travelers, in her April 12, 2023 affidavit (NYSCEF Doc. No. 409, *Barnes affidavit*). Responding to the argument of lack of notice, plaintiffs argue that "there is sufficient documentary proof of Vela's routine and reasonable office practices that the April 5, 2017, notice letter was sent to Temple" and that "Temple's self-serving denial of receipt is insufficient, as a matter of law on this motion, to overcome the presumption that such mailing occurred." Assuming Temple did not receive notice, plaintiffs contend that its claim of prejudice is unsubstantiated.

Plaintiffs further argue that Houston did not breach the voluntary provision because Houston took reasonable and necessary actions to prevent further damage and potential injury to persons, for which it would be responsible, because of the acts and omissions of Copps and Peterson. Plaintiffs further argue that, where, as here, time is of the essence, and a plaintiff's damages would grow without remediation, a court cannot conclude as a matter of law that the remediation costs were "voluntary payments." Plaintiffs also argue that Temple misconstrues the law for the measure of damages allowable for claims of injury to real estate. Additionally, plaintiff contends that "all of the damages suffered by 350 East Houston are third-party damages caused by Copps and its subcontractor, Peterson." Thus, they assert that Temple mischaracterizes Houston's damages as a first-party property claim. Plaintiffs also argues that any potential for prejudice is outweighed by the possibility of inconsistent verdicts with respect to issues common to both actions, warranting denial of the cross-motion seeking severance (NYSCEF Doc. No. 412, *memorandum of law*).

Temple reiterates its arguments by a way of a reply (NYSCEF Doc. No. 441).

Under New York Insurance Law, an insurer may disclaim coverage if it did not receive timely notice in compliance with the policy's notice requirement and it was prejudiced by the untimely notice. (N.Y. Insur. Law. § 3420.)

Under "Section V – Commercial Liability Umbrella Policy Conditions" the Temple policy states, in relevant part:

"4. Duties In The Event Of An Insured Event, Claim Or Suit

a. You must see to it that we are notified as soon as practicable of an occurrence or an offence which may result in a claim. To the extent possible, notice should include:

(1) How, when and where the occurrence or offence took place;
(2) The names and addresses of any injured persons and witnesses; and
(3) The nature and location of any injury or damage arising out of the occurrence or offence. Notice of an occurrence or an offence is not notice of a claim or suit.

b. If a claim is made or suit is brought against any insured, you must:
(1) Immediately record the specifics of the claim or suit and the date received; and
(2) Notify us as soon as practicable.

You must see to it that we receive written notice of the claim or suit as soon as practicable.

c. You and any other involved insured must:
(1) Immediately send us copies of any demands, notices, summonses or legal
papers received in connection with the claim or suit;
(2) Authorize us to obtain records and other information;
(3) Cooperate with us in the investigation or settlement of the claim or defense
against the suit; and
(4) Assist us, upon our request, in the enforcement of any right against any person or organization which may be liable to the insured because of injury
or damage to which this insurance may also apply.

d. No insured will, except at that insured's own cost, voluntarily make a payment, assume any obligation, or incur any expense, other than for first aid, without our consent."

Here, while this court is persuaded that plaintiffs qualify as additional insureds under the Temple policy, Temple has established, *prima facie*, that it was not properly notified of the claim as soon as practicable, in accordance with the provisions of the policy, and that failure to notify Temple in a timely manner prejudiced its "ability…to investigate or defend the claim." (N.Y. Ins. Law § 3420[c][2][C].) Robert Rosenthal, Senior Casualty Specialist for Temple claims, affirms that Temple did not receive any notice of the incident and/or of the resultant claim until this action was initiated on February 5, 2018, and, prior to this, it received no letter, correspondence, request or tender, from any entity, including 350 E. Houston, seeking coverage under the Temple policy. Proof of mailing submitted by Temple, as exchanged during discovery, reveals that the tender letter was returned as undeliverable. By affirmation dated October 23, 2023, Robert F. Carlin II affirms that, although disclosure of the April 5, 2017, letter included a FedEx label addressed to Temple, Carlin accessed the FedEx on-line tracking system and entered the tracking number shown on the label (i.e., 7788 4192 6058). The system had no record of an item with the tracking number provided. Furthermore, upon calling FedEx customer service, Carlin was informed that their system showed no record of receipt of an item under that tracking number or its delivery. In opposition, plaintiff has failed to proffer any proof that the letter was properly mailed to Temple. Although counsel for plaintiff argues that "Vela also

produced a copy of the Fed Ex label with tracking number establishing proof the notice letter was sent to Temple at its address in Ontario Canada", the mere existence of a shipping label does not establish delivery of same.

Contrary to plaintiffs' contention, this court finds that Temple was prejudiced by the late notice on February 5, 2018, insofar as it was notified approximately eleven (11) months after the subject incident and after payment to remediate the damage to the property. Inasmuch as Houston made payments regarding the stabilization, repair, and remediation work without Temple's consent and prior to affording Temple the opportunity to investigate the claim to adequately defend the claim (*see* NY Ins. Law § 3420[c][2][B]), Temple's motion seeking summary judgment is granted and all claims asserted against it are hereby dismissed. Considering the foregoing, this court need not address the remaining arguments. Accordingly, it is hereby

ORDERED that the motion of Temple Insurance Company, pursuant to CPLR 3212, is granted and all claims are hereby dismissed against it; and it is further

ORDERED that, within twenty (20) days after this decision and order is uploaded to NYSCEF, counsel for Temple Insurance Company shall serve a copy of this decision and order, with notice of entry, upon all parties; and it is further

ORDERED that the caption shall be amended in accordance with the decision and order on Mot. Seq. 010.

This constitutes the decision and order of this court.

October 10, 2024

HON. VERNA L. SAUNDERS, JSC

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