Short Form Order

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SUPREME COURT - STATE OF NEW YORK
TRIAL TERM, PART 11 NASSAU COUNTY

PRESENT:

Honorable Karen V. Murphy
Justice of the Supreme Court

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NGM INSURANCE COMPANY,

Plaintiff(s),

-against-

CHB CONSTRUCTION, INC., JOSEPHINE CARINI, FRANK A. MEAK, HORACIO A. CONDE and CLAUDIA GLADYS FERNANDEZ,

Defendant(s).

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Index No. 15060/10

Motion Submitted: 11/7/11
Motion Sequence: 003, 004

The following papers read on this motion:

Notice of Motion/Order to Show Cause.....XX
Answering Papers.....X
Reply.....X

Defendants, Horacio A. Conde and Claudia Gladys Fernandez (collectively referred to herein as the "Conde Defendants"), move pursuant to CPLR § 3212, for an Order granting them summary judgment and determining that the plaintiff, NGM Insurance Company, is obligated to defend and indemnify the defendant, CHB Construction, Inc. ("CHB").

Plaintiff, NGM Insurance Company ("NGM"), in turn, cross moves, pursuant to CPLR § 3212, granting it summary judgment on it's declaratory judgment action and determining that it is not obligated to defend and indemnify CHB in connection with the underlying lawsuit entitled Horacio A. Conde v. Josephine Carini, et. al. pending in this Court under Index No. 7745/08.

The motion and cross motion are determined as herein set forth below.

At the heart of this action is a construction accident that took place on February 19, 2008 as a result of which Horacio A. Conde (and his wife, Claudia Gladys Fernandez)

brought suit, *supra*, alleging violations of Labor Law and negligence to recover damages he sustained as a result of a fall through a "temporary staircase" that he was descending in defendant Josephine Carini's home. As best as can be determined from the papers submitted herein, Carini, the owner of a single family home in Huntington, New York hired defendant Frank A. Meak ("Meak"), who has defaulted in this and the underlying action, to do extensive renovation and construction work. Meak, in turn, subcontracted with defendant CHB Construction, Inc. ("CHB") to do carpentry and framing work at the home. Meak also subcontracted with the plaintiff, Horacio A. Conde, a tile contractor to install tile as part of the renovation work at Carini's home.

Pursuant to an Order of this Court dated March 31, 2011, the underlying plaintiffs' complaint against defendant Carini has been dismissed. In addition, as a result of the outstanding issues of fact, the Conde Defendants' motion in the underlying action for summary judgment on the issue of liability against CHB was denied.

Inasmuch as is pertinent for the determination of this action, it is noted that plaintiff, NGM Insurance Company provided a policy of insurance to its insured, the defendant CHB Construction, Inc. The policy was in effect on February 19, 2008.

On October 7, 2009, counsel for the Conde Defendants sent a letter to CHB (NGM's insured) advising it of plaintiffs' claims and asking it (CHB) to put it's carrier (NGM) on notice of same. CHB did, in fact, forward the letter to NGM and NGM acknowledged receipt of this letter by October 15, 2009 (Cross motion, Ex. E [Aff. of Julio Celerio, Senior Claims Manager at NGM, ¶3]).

Subsequently, on December 10, 2009, NGM issued a disclaimer letter addressed to CHB Construction, Inc. and copied to counsel for the Conde Defendants (plaintiffs in the underlying action) disclaiming coverage based upon CHB's failure to comply with the policy's notice provisions.

The affidavit submitted herein by NGM's Senior Claims Manager, Julio Celerio, confirms that following his receipt of the Conde Defendants' counsel's letter, NGM conducted an investigation and ascertained that the owner of CHB had been notified through his employee, Juan Malagon, that an accident had occurred on a staircase that CHB had performed work on, within a few days of its occurrence. Thus, according to NGM, CHB had knowledge of the underlying accident shortly after it occurred and failed to provide it with timely notice of same. This, NGM maintains, was a breach of the notice provision of the policy by CHB.

Subsequently, by letter dated January 27, 2010, the Conde Defendants, by counsel

sent a letter, enclosing a copy of the pleadings in the lawsuit, to The Main Street America Group, the parent of NGM (hereinafter NGM). It does not appear that an additional disclaimer was sent in response to the January letter.

Upon the instant motion, the Conde Defendants seek summary judgment determining that NGM is obligated to defend it's insured CHB. The Conde Defendants assert two basis for their claim to summary judgment. First, that NGM has not validly disclaimed coverage with respect to the notice that they (the Conde Defendants) provided. And second, the Conde Defendants provided timely notice of the loss and underlying lawsuit to the plaintiff.

Plaintiff, in turn, seeks summary judgment on it's declaratory judgment action on the grounds that it has no obligation to defend or indemnify CHB . NGM also asserts two basis for it's entitlement to summary judgment. First, NGM properly disclaimed coverage for the underlying action because CHB did not provide it with timely notice of the incident. And second, the Conde Defendants, as the underlying plaintiffs, unreasonably delayed in ascertaining the identity of the named insured, and as such, did not exercise sufficient diligence to justify the lateness of any purported notice.

Summary judgment is the procedural equivalent of a trial (***S. J. Capelin Assoc. v. Globe Mfg. Corp.***, 34 N.Y.2d 338, 313 N.E.2d 776, 357 N.Y.S.2d 478 [1974]). It is a drastic remedy that will only be granted when the proponent establishes that there are no triable issues of fact (***Alvarez v. Prospect Hosp.***, 68 N.Y.2d 320, 501 N.E.2d 572, 508 N.Y.S.2d 923 [1986]). Once the party seeking summary judgment has made a *prima facie* showing of entitlement to judgment as a matter of law, the party opposing the motion must come forward with proof in evidentiary form establishing the existence of triable issues of fact, or demonstrate an acceptable excuse for its failure to do so (***Alvarez v. Prospect Hosp., supra; Zuckerman v. City of New York***, 49 N.Y.2d 557, 562, 404 N.E.2d 718, 427 N.Y.S.2d 595 [1980]). Mere conclusions, expressions of hope or unsubstantiated allegations are insufficient (***Zuckerman v. City of New York, supra***).

In this case, NGM issued an insurance policy to CHB, which required the insured to give notice and file proofs of loss or damage thereof as soon as practicable. The purpose of a provision for notice and proofs of loss such as in the case at hand, is to allow the insurer to form an intelligent estimate of it's rights and liabilities, to afford it an opportunity for an investigation, and to prevent fraud and imposition upon it (***Security Mut. Ins. Co. of New York v. Acker-Fitzsimons Corp.***, 31 N.Y.2d 436, 293 N.E.2d 76, 340 N.Y.S.2d 902 (1972); ***Wachtel v. Equitable Life Assur. Socy.***, 266 N.Y. 345, 194 N.E. 850 [1935]).

Notably, the policy in this case makes compliance with the requirement as to notice and proof of loss an express condition precedent; that is recovery under the policy must be

denied in the case of noncompliance with such requirement (***Greater N.Y. Mut. Ins. Co. v. Farrauto***, 136 A.D.2d 598, 523 N.Y.S.2d 853 (2d Dept., 1988); ***Vanderbilt v. Indemnity Ins. Co. of North America***, 265 A.D. 495, 39 N.Y.S.2d 808 [2d Dept., 1943]). Further, in the absence of a valid excuse by the insured of a failure to satisfy the requirements of a policy provision relating to the furnishing of notice or proofs of loss, compels a finding that the policy is vitiated (***American Transit Ins. Co. v. Sartor***, 3 N.Y.3d 71, 814 N.E.2d 1189, 781 N.Y.S.2d 630 [2004]).

Here, the evidence demonstrates that although NGM was first notified of the underlying accident on October 15, 2009, it's investigation confirmed that the insured, CHB, was made aware of the loss by it's employee Juan Malagon "shortly after it happened", i.e. shortly after February 19, 2008. It is clear, therefore, that CHB never reported the accident to NGM until more than a year after the occurrence.

Thus, based upon the foregoing, this Court finds that NGM has satisfied it's *prima facie* entitlement to judgment as a matter of law. CHB clearly failed to comply with the condition precedent to coverage and as a result vitiated the contract of insurance. NGM has established that CHB cannot be found to be entitled to a defense and indemnity coverage in the personal injury action arising from the accident (***Reg-Tru Equities, Inc. v. Valley Forge Ins. Co.***, 44 A.D.3d 570, 846 N.Y.S.2d 84 (1st Dept., 2007), *leave to appeal denied*, 10 N.Y.3d 701 [2008]). In addition, CHB's failure to present a reasonable excuse for failing to provide notice to the insurer for nearly one and a half years after becoming aware of the incident at issue, and thus, CHB's noncompliance with the policy's timely notice provision, relieves the insurer, NGM of any duty to defend and/or indemnify it in the underlying action (***Gallante Props., Inc. v. Allcity Ins. Co.***, 24 A.D.3d 414, 805 N.Y.S.2d 113 (2d Dept., 2005); ***Lobosco v. Best Buy, Inc.***, 80 A.D.3d 728, 915 N.Y.S.2d 305 [2d Dept., 2011]).

In opposition (and in support of their own motion), the Conde Defendants argue that they provided timely notice to the plaintiff and that NGM has not validly disclaimed coverage with respect to the notice that they provided. These arguments are unavailing.

The law is clear that if the injured person provides independent notice of the claim to the insurer, a notice of disclaimer solely based on the insured's failure to provide timely notice of the claim is invalid against the injured person (***Hereford Ins. Co. v. Mohammod***, 7 A.D.3d 490, 776 N.Y.S.2d 87 [2d Dept., 2004]). That is, "when an insurer disclaims coverage, 'the notice of disclaimer must promptly apprise the claimant with a high degree of specificity of the ground or grounds on which the disclaimer is predicated' " (***Hazen v. Otsego Mut. Fire Ins. Co.***, 286 A.D.2d 708, 709, 730 N.Y.S.2d 156 [2d Dept., 2001]). Here, contrary to plaintiff's contention, the above referenced disclaimer of coverage was based only on its insured's failure to notify it of the claim. Ordinarily, this disclaimer would not be

effective against the injured party, who was entitled to give independent notice of the claim. However, the sequence of events in this case cannot be overlooked.

The notice provided to NGM by CHB of plaintiff's claim against it, arising out of the subject accident, also operated to provide NGM with notice of the Conde Defendants claim as against CHB, NGM's insured (***Steinberg v. Hermitage Ins. Co.,*** 26 A.D.3d 426, 809 N.Y.S.2d 569 (2d Dept., 2006); ***Loeffler c. Sirius America Insurance Co.,*** 82 A.D.3d 1172, 923 N.Y.S.2d 550 (2d Dept., 2011); ***Massachusetts Bay Ins. Co. v. Flood***, 128 A.D.2d 683, 513 N.Y.S.2d 182 (2d Dept., 1987); *cf.* ***23-08-18 Jackson Realty Assoc. v. Nationwide Mut. Ins. Co.***, 53 A.D.3d 541, 543, 863 N.Y.S.2d 35 [2d Dept., 2008]).

Herein, the injured party, the Conde Defendants, did not communicate with the insurer until after NGM had already received notice from its insured, albeit in the form of a copy of Conde's counsel's letter, and more critically, after NGM had already disclaimed coverage and had copied the Conde defendants counsel on the disclaimer letter. Any subsequent disclaimer would have been redundant inasmuch as Conde was already aware that the insurer disclaimed based upon the untimeliness of the notice of the accident.

As to the question of whether the Conde Defendants' notice to NGM was timely, in "determining the reasonableness of an injured party's notice, the notice required is measured less rigidly than that required of the insured" (***Malik v. Charter Oak Fir Ins. Co.***, 60 A.D.3d 1013, 877 N.Y.S.2d 114 (2d Dept., 2009); ***Becker v. Colonial Coop. Ins. Co.***, 24 A.D.3d 702, 806 N.Y.S.2d 720 [2d Dept., 2005]). That is, the "sufficiency of notice by an injured party is governed not by mere passage of time but by the means available for such notice" (***Id***). Further, the injured party, such as the Conde Defendants in the case at bar, must nonetheless establish that they had difficulty ascertaining the identity of the insured or of the insurer. This may excuse their delay in giving notice of the accident but only if they demonstrate that they exercised reasonable diligence in their attempts for identification of same (***Spentrev Realty Corp., v. United National Specialty Ins. Co.***, 90 A.D.3d 636, 933 N.Y.S.2d 725 (2d Dept., 2011); ***Elmuccio v. Allstate Ins. Co.***, 149 A.D.2d 653, 540 N.Y.S.2d 465 [2d Dept., 1989]).

The injured party has the burden of proving that he, or counsel acted diligently in attempting to ascertain the identity of the insurer and thereafter acted diligently in attempting to ascertain the identity of the insurer and thereafter expeditiously notified the insurer (***Hanover Ins. Co. v. Prakin ,*** 81 A.D.3d 778, 916 N.Y.S.2d 615 [2d Dept., 2011]). The Conde Defendants submit that the homeowner Carini, never mentioned CHB Construction in her discovery responses or during her deposition in the underlying personal injury action. It was not the burden of Carini to volunteer such information. Rather, it is incumbent upon the Conde's to ascertain the responsible parties. There is no proof that Carini withheld

information, or that the Conde's made so much as an inquiry to elicit such information.

Additionally, Malagon was known to Conde and was on the stairs with Conde at the time of the accident. It is notable that Malagon, from whom the Conde's allegedly first learned the identity of CHB at his August 2009 deposition, is the same person interviewed by an investigator on behalf of the Conde's on December 28, 2008. Although Conde asserts that Malagon did not mention CHB's involvement, Conde again does not suggest that an inquiry was ever made or set forth any reason why Conde could not have learned of CHB earlier.

Conde's efforts to identify the party responsible for the staircase any sooner than one year after commencement of the litigation, and approximately eighteen months after the February 2008 accident were woefully inadequate. Clearly, since Conde alleged that he had some idea of the involvement of contractors in the happening of the incident, and brought an action under the Labor Law, in order to protect his direct claim against the insurer, he was required to make a reasonably diligent effort to locate the responsible party.

While Conde asserts that he was unaware of the involvement of CHB, and attempts to shift responsibility for that lack of knowledge to Carini and Malagon, absent any proof that Conde made the necessary inquiries, or followed up on discovery demands, or took any steps to learn the identity of the responsible party, Conde has failed to establish that he was thwarted in his investigation. Had due diligence been exercised, the Conde's could, should and would have been aware of CHB as early as the date of the accident or at the very least, by December 28, 2008.

Conde's summary judgment motion bases the timeliness of their notice to NGM based upon the October 7, 2009 letter. It was only in counsel's affirmation in opposition to NGM's cross motion for summary judgment, that he claimed the January 2010 letter constituted independent notice by the injured party. In the interest of judicial expediency, the Court will address both letters.

Turning to the issue of notice to the carrier, counsel, on behalf of Conde sent one letter to CHB dated October 7, 2009 wherein he asked CHB to notify the carrier and to "return the enclosed postcard setting forth the insurance company applicable to this claim, your policy number and policy limits". There is no evidence of any followup or additional demand for the name of the insurer to enable the Conde's to independently provide notice. Conde has failed to establish that it diligently attempted to learn the identity of the carrier.

CHB's forwarding of the letter from Conde's counsel did not constitute notice by the injured party to the insurer. It was notice by the insured to the insurer. It was not until

January 27, 2010, 47 days after the Conde's were clearly aware of the identity of the insurer and *after receipt of the disclaimer*, and almost two years after the accident, that the Conde's sent a letter to NGM. The letter neither mentions the prior disclaimer nor does it state that it was exercising the injured party's right to provide notice directly to the insurer. That alone is not dispositive. Assuming said letter constitutes independent notice, no explanation whatsoever was offered for the delay in sending the letter. The Conde's have failed to meet the burden of proving that they or counsel acted diligently in attempting to ascertain the identity of the insurer and thereafter *expeditiously* notified the carrier (***Becker v. Colonial Coop. Ins. Co., supra); Spentrev Realty Corp., v United National Specialty Ins. Co., supra); Tower Ins. Co. Of NY v. Jaison John Realty Corp.,*** 60 A.D.3d 418, 874 N.Y.S.2d 91 [1st Dept., 2009]). There is a failure of proof as to both prongs, thus Conde has not established a *prima facie* case.

Therefore, the Conde Defendants motion for an Order granting them summary judgment and determining that the plaintiff, NGM Insurance Company, is obligated to defend and indemnify the defendant, CHB Construction, Inc. is denied.

Accordingly, plaintiff, NGM's cross motion for summary judgment on the declaratory judgment action and determining that it is not obligated to defend and indemnify CHB in connection with the underlying lawsuit entitled Horacio A. Conde v. Josephine Carini, et. al. is granted in its entirety.

The parties remaining contentions have been considered and do not warrant discussion.

All applications not specifically addressed are denied.

Settle Judgment on Notice.

Dated: February 8, 2012
Mineola, N.Y.

Karen V. Murphy
J. S. C.
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