SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

----------x

LONGWOOD CENTRAL SCHOOL DISTRICT and NEW YORK SCHOOLS INSURANCE FOUNDATION a/s/a attorney-in-fact for NEW YORK SCHOOLS INSURANCE RECIPROCAL,

Plaintiffs,

-against-

COMMERCE AND INDUSTRY INSURANCE COMPANY, BURLINGTON INSURANCE COMPANY, MORE CONTRACTING & CONSULTING, INC., TK CITAK CORP. and MARION BOGACZ,

Defendants.

----------x

MICHELE M. WOODARD
J.S.C.
TRIAL/IAS Part 8
Index No.: 23402/09
Motion Seq. No.: 06

DECISION AND ORDER

Papers Read on this Motion:

Defendant Burlington Insurance Company's Notice of Motion	06
Defendant Burlington Insurance Company's Affidavit in Support of Motion	xx
Defendant TK CITAK Corp.'s Affirmation in Opposition	xx
Defendant More Contracting & Consulting, Inc.'s Affirmation in Opposition	xx
Defendant Burlington Insurance Company's Memorandum of Law in Support of Motion to Reargue	xx
Defendant Burlington Insurance Company's Affidavit in Support of Reply	xx

In this declaratory judgment action, the defendant Burlington Insurance Company moves for an order pursuant to CPLR §2221(d) granting reargument of this court's order dated October 21, 2011 which denied its motion for summary judgment dismissing all claims against it and granted the defendant More Contracting and Consulting, Inc., and Citak Corp.'s motions for summary judgment declaring that it had a duty to defend and indemnify them as well as Longwood Central School District in *Marion Bogacz v Longwood Central School District and More Contracting & Consulting, Inc.* ("the

Bogacz action") and upon reargument, granting it summary judgment dismissing the complaint and all cross-claims against it or in the alternative denying More Contracting and Consulting, Inc.'s and Citak Corp.'s motions for summary judgment declaratory relief.

The facts relevant to the determination of this motion were set forth in this court's order and decision dated October 21, 2011. This court found that Burlington Insurance Company is obligated to defend and indemnify Longwood School District and the general contractor at the school's construction site, More Contracting and Consulting, Inc., as additional insureds as well as its insured TK Citak Corp., which was one of More Contracting's subcontractors in the *Bogacz* action. In that action which was commenced on or about July 22, 2009, Bogacz sought to recover for personal injuries he sustained on September 9, 2008 while working at Longwood School District. This court found that Burlington had clearly become aware that the claim was late when it originally received notice of it from the School District on December 15, 2008, and that it was also put on notice that it was the result of bodily injuries to its insured's Citak's employee no later than February 2, 2009. This court accordingly found that Burlington's grounds for disclaiming, *i.e.*, lateness, was known by it upon its receipt of the claim and the other ground, *i.e.*, Employee Bodily Injury Exclusion, was clearly known by it for over 30 days before coverage was denied. This court therefore held that Burlington's disclaimer to Citak and More failed due to untimeliness. *See, Sirius American Ins. Co. v Vigo Const. Corp., 48 AD3d 450 (2d Dept 2008); Bovis Lend Lease LMB, Inc. v Royal Surplus Lines Ins. Co.*, 27 AD3d 841 (1st Dept 2005); *2833 Third Ave. Realty Associates v Marcus*, 12 AD3d 329 (1st Dept 2004); *West 16th Street Tenants Corp. v Public Serv. Mut. Ins. Co.*, 290 AD2d 278 (1st Dept 2002), *lv den.*, 98 NY2d 605 (2002). The fact that notice had been provided only by the School District was found to be of no consequence with regard to Burlington's obligtions to Citak and More. This court further found that in any event, since Burlington wrote to both the School District and TK Citak following its receipt of the School District's notice on

December 15, 2008, Burlington waived the requirement that TK Citak give notice and that any notice by TK Citak at that point would have been superfluous. *Massachusetts Bay Ins. Co. v Floor*, 128 AD2d 683 (2d Dept 1987), app den., 70 NY2d 612 (1987). This court additionally found that Burlington's policy with TK Citak included coverage for bodily injury assumed in an "insured contract" and that the deleted exception to the exclusion for liability assumed in an "insured contract" was in the employer's liability provision but not the contractual liability provision, which was applicable in this instance. This court concluded that under the rule of *inclusio unius, exclusio alterius*, the presumption is that Burlington intentionally decided not to exclude the exemption coverage for an insured contracts within the contractual exclusion, as it purposely failed to use that term in its determination.

" 'Motions for reargument are addressed to the sound discretion of the court which decided the prior motion and may be granted upon a showing that the court overlooked or misapprehended the facts or law or for some other reason mistakenly arrived at its earlier decision.' " *Barnett v Smith*, 64 AD3d 669, 670 (2d Dept 2009), quoting *E.W. Howell Co., Inc. v S.A.F. La Sala Corp.*, 36 AD3d 653 (2d Dept 2007), citing CPLR §2221[d]; *McDonald v Stroh*, 44 AD3d 720, 721 (2d Dept 2007); *Matter of New York Cent. Mut. Ins. Co. v Davalos*, 39 AD3d 654, 655 (2d Dept 2007).

While effective January 17, 2009, Insurance Law § 3420(5) precludes denial of coverage based upon late notice absent prejudice, that amendment applies only to policies issued on or after that date and does not apply in this matter. *Briggs Ave., LLC v Ins. Corp. of Hanover*, 11 NY3d 377 (2008).

Burlington maintained that this court's determination that its disclaimer to Citak was untimely was incorrect because Citak never gave notice of Bogacz's accident or its claim and so its obligation to deny or disclaim was never triggered. In its prior decision this court, relying on *Quest Builders Group Inc. v Deco Interior Const., Inc.*, (56 AD3d 744 [2d Dept 2008]), rejected that position, finding that Burlington's failure to timely disclaim *vis-a-vis* Citak was unacceptable since it had been notified of the

incident by the School District. In *Quest (supra)*, notice of the underlying accident was first given to the defendant Burlington Insurance Company by Amuty, Demers & McManus, which Quest's insurer Scottsdale Insurance Company had assigned to represent Quest in the underlying action after the injured party had commenced an action. Despite finding Burlington's disclaimer to be untimely, this court (LaMarca, J.) held "that the statutory notice required to be given to the insured or other claimant, to avoid the risk posed by a delay in learning the insurer's position, does not apply to another insurer who seeks contribution or indemnity on the underlying litigation ." *Quest Builders, Inc. v Deco Interior Construction, Inc.*, 2008 WL 6600250 (Supreme Court Nassau County). "[T]he relief sought in [that] action [was] clearly for contribution, indemnification and reimbursement to Scottsdale, Burlington's late notice of disclaimer does not mandate summary judgment to plaintiffs." *Quest Builders, Inc. v Deco Interior Construction, Inc., supra.* The Second Department reversed, holding that "the plaintiffs demonstrated a *prima facie* entitlement to judgment as a matter of law with evidence that Burlington's delay in issuing a disclaimer of coverage was unreasonable as a matter of law, and that, consequently, Burlington was precluded from disclaiming coverage based on a late notice of claim or policy exclusion (citations omitted)." *Quest Builders Group, Inc. v Deco Interior Const., Inc.*, 56 AD3d 744 (2d Dept 2008).

In seeking reargument, Burlington calls upon this court to examine its analysis and application of *Quest*. In *Quest*, the issue presented was coverage for *Quest* as an additional insured and damages to its primary insurer Scottsdale Insurance. This court erred in relying on *Quest* here: The situation here varies significantly. What is at stake here is coverage for the School District as an additional insured which gave notice of Bogacz' accident verses coverage for Citak, which was the primary insured under Burlington's policy as well as Bogacz' employer but **never** gave notice to Burlington and seeks to ride on the School District's coat tails. It may not do so.

Each insured, whether a named or additional insured, has a duty to give notice to an insurer when seeking coverage for an incident under a policy unless both parties are defendants in the same action and the party which gave notice is united in interest with the party that failed to do so. *23-08-18 Jackson Realty Assoc. v Nationwide Mut. Ins. Co.*, 53 AD3d 541, 543 (2d Dept 2008) (citations omitted). This obligation remains when the insurer receives notice of the incident from another party including another insured. *Travelers Ins. Co. v Volmar Constr. Co., Inc.*, 300 AD2d 40 (1st Dept 2005); *23-08-18 Jackson Realty Assoc. v Nationwide Mut. Ins. Co., supra* at p. 542 (citations omitted). "The law is clear that an insured's obligation to provide timely notice is not excused on the basis that the insurer has received notice of the underlying occurrence from an independent source." *Travelers Ins. Co. v Volman Constr. Co., supra*, at p. 43, citing *American Mfrs. Mut. Ins. Co. v CMA Enters.*, 346 AD2d 373 (1st Dept 1989); *Heydt Contr. Corp. v American Home Assur. Co.*, 146 AD2d at 499 (1st Dept 1998).

It is undisputed that Citak never gave Burlington notice of the incident or sought coverage under the policy. In view of Citak's failure to provide notice, Burlington's obligation to timely disclaim was never triggered.

This court also incorrectly relied on *Massachusetts Bay Ins. Co. v Flood, (supra)*, in holding that Citak's failure to give notice was of no consequence because it would have been superfluous. In that case, the court forgave the injured party's failure to give notice as superfluous as the insured had given notice. Quite a different situation than that presented in the case at bar.

Turning to the validity of Burlington's disclaimer of Citak, the policy provided:

> Contractual Liability
>
> "Bodily injury" or "property damage" for which the insured is obligated to pay damages by reason of the assumption of the liability in a contract or agreement.

However, it further provided:

> "This exclusion does not apply to liability for damages:"
> (2) Assumed in contract or agreement that is an 'insured contract,' provided the 'bodily injury' or property damage' occurs subsequent to the execution of the contract or agreement." Solely for the purposes of liability assumed in an "insured contract," reasonable attorney fees and necessary litigation expenses incurred by or for a party other than an insured are deemed to be damages because of "bodily injury" or "property damage," provided: (a) Liability to such party for, or for the cost of, that party's defense has also been assumed in the same "insured contract."
>
> The insurance agreement also provided that it did not apply to "Employer's Liability for 'Bodily injury' to (1) An 'employee' of the insured arising out of and in the course of: (a) employment by the insured." The policy provides that that exclusion applies: (1) Whether the insured may be liable as an employer **or in any other capacity** and (2) **To any obligation to share damage with or repay someone else who must pay damages because of the injury** (emphasis added)." Again, the policy provided that this exclusion "does not apply to liability as assumed by the insured under an 'insured contract.' "

However the endorsement provides:

> Under Exclusion e. Employer's Liability of 2. Exclusions, COVERAGE A BODILY INJURY AND PROPERTY DAMAGE LIABILITY, SECTION 1 – COVERAGES, the paragraph "This exclusion does not apply to liability assumed by the insured under an 'insured contract.' " **is deleted** (emphasis added).

The deletion is under the Employer's Liability exemption to the exclusion, not the Contractual Liability portion. An insured contract is defined by the policy as:

> "That part of any other contract or agreement pertaining to your business (including an indemnification of a municipality in connection with work performed for a municipality) under which you assume the tort liability of another party to pay for "bodily injury" or "property damage" to a third person or organization. Tort liability means a liability that would be imposed by law in the absence of any contract or agreement."

"An insurer bears the burden of demonstrating that a policy exclusion defeats an insured's claim by establishing that the exclusion is 'stated in clear and unmistakable language, is subject to no other reasonable interpretation, and applies in the particular case.' " *Monteleone v Crow Constr. Co.*, 242

AD2d 135, 139 (1st Dept 1998), *lv den.*, 92 NY2d 818 (1998), quoting *Continental Cas. Co. v Rapid-American Corp.*, 80 NY2d 640, 652 (1993); *Moneta Dev. Corp. v General Ins. Co.*, 212 AD2d 428, 429 (1st Dept 1995). "Any ambiguity in such exclusion will be constructed against the insurer." *Wire & Cable Co. v Aetna Cas. & Sur. Co.*, 60 NY2d 390, 398 (1983); *Consolidated Edison Co. v Hartford Ins. Co.*, 203 AD2d 83, 84 (1st Dept 1994); *Ramirez v United States Fid. & Guar. Co.*, 133 AD2d 146, 148 (2d Dept 1987). However, "where coverage rests on the application of an exception, the insured must demonstrate that it applies." *Monteleone v Crow Constr. Co., supra*, at p. 139, citing *State of New York v Schenectady Hardware & Elec. Co.*, 223 AD2d 783, 785 (3rd Dept 1996); *Borg-Warner Corp. v Insurance Co.*, 174 AD2d 24, 31 (3rd Dept 1992), *lv den.*, 80 NY2d 753 (1992).

"Even where one exclusion may at first appear to contradict another, or create an ambiguity, '[e]xclusions in policies of insurance must be read *seriatim*, not cumulatively, and if any one exclusion applies there can be no coverage since no one exclusion can be regarded as inconsistent with another.' " *Monteleone v Crow Constr. Co., supra*, at p. 140-141, quoting *Zandri Constr. Co. v Firemen's Ins. Co.*, 81 AD2d 106, 109, *affd sub nom. Zandri Constr. Co. v Stanley H. Calkins, Inc.*, 54 NY2d 999 (1981); *see also, Maroney v New York Cent. Mut. Fire Ins. Co.*, 5 NY3d 467 (2005); *385 Third Avenue Associates, L.P. v Metropolitan Metals Corp.*, 81 AD3d 475 (1st Dept 2011), *lv den.*, 17 NY3d 702 (2011); *Ruge v Utica First Ins. Co.*, 32 AD3d 424 (2d Dept 2006); *Sampson v Johnson*, 272 AD2d 956 (4th Dept 2000); *Hartford Acc. & Indem. Co. v A.P. Reale & Sons, Inc.*, 228 AD2d 935 (3rd Dept 1996); *Carrier v RLI Ins. Co.*, ___ Fed. Appx ___, 2012 WL 687843 (11thCir. 2012); *United Health Group, Inc. v Hiscox Dedicated Corporate Member Ltd.*, 2010 WL 550991 (D. Minn 2010). "It is immaterial whether the policy proceeds are sought by way of direct claims by the injured party or by way of plaintiff's contractual indemnification claims against [the insured]." *385 Third Avenue Assoc. v Metropolitan Metals Corp., supra*, at p. 476, citing *Guachichulca v Laszlo N. Tauber & Assoc.*, LLC,

37 AD3d 760, 762 [2d Dept 2007], *lv den.*, 9 NY3d 802 (2007).

Coverage for injuries to employees is clearly not afforded by the policy pursuant to the Employer's Liability Exclusion. Burlington is not obligated to defend and/or indemnify Citak in the *Bogacz* action.

Finally, contrary to More's opposition, Burlington is not obligated to defend and/or indemnify it and Longwood as indemnities of Citak in the *Bogacz* action pursuant to the Supplementary Payments coverage. Not only has Citak not been named as a defendant by Bogacz as required by the policy for that coverage, there is a conflict between Citak and More, which precludes application of that section. *United National Ins. Co. v Scottsdale Ins. Co.*, 2011 US Dist. LEXIS 21813 (E.D.N.Y. 2011).

Reargument is ***granted*** and upon reargument, More Contracting & Consulting, Inc.'s motions for summary judgment and Citak's motion for summary judgment are ***denied***. Burlington Insurance Company's motion for summary judgment is ***granted*** and all claims and cross-claims against it are ***dismissed*** and it is declared that it is not contractually obligated to defend or indemnify Longwood Central School District, TK Citak Corp. or More in the action entitled *Marion Bogacz v Longwood Central School District and More Contracting & Consulting, Inc.*

This constitutes the Decision of the Court.

DATED: May 22, 2012
Mineola, N.Y. 11501

ENTER:

HON. MICHELE M. WOODARD
J.S.C.
X X X

F:\Longwood Cent. School Dist. v Commerce & Industry MLP.wpd