[*1] SCANNED ON 9/10/2012

SUPREME COURT OF THE STATE OF NEW YORK— NEW YORK COUNTY

PRESENT : DONNA M. MILLS PART 58
Justice

CHOLSHUNG REALTY CORP.,

Plaintiff,

-against-

NEW YORK MARINE & GENERAL INSURANCE CO., et al.,

Defendants.

INDEX NO. 111525/10

MOTION DATE

MOTION SEQ. NO. 004

MOTION CAL NO.

The following papers, numbered 1 to were read on this motion to

	PAPERS NUMBERED
Notice of Motion/Order to Show Cause-Affidavits– Exhibits....	1, 2
Answering Affidavits– Exhibits	3, 4
Replying Affidavits	

CROSS-MOTION: ✓ YES ___ NO

Upon the foregoing papers, it is ordered:

SEE ATTACHED MEMORANDUM DECISION

Dated: 9/5/12

J.S.C.
DONNA M. MILLS, J.S.C.

Check one: ___ FINAL DISPOSITION ✓ NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 58

CHOLSHUNG REALTY CORP.,
Plaintiff,

-against-

NEW YORK MARINE & GENERAL INSURANCE CO. and MARKEL INSURANCE COMPANY,
Defendants.

INDEX NUMBER 111525/2010
Mot. Seq. 004
JUDGMENT & ORDER

DONNA MILLS, J.:

In this action for a declaratory judgment concerning liability insurance coverage, plaintiff Cholshung Realty Corp. (Cholshung) moves for summary judgment, pursuant to CPLR 3212 (b), declaring that defendant Markel Insurance Company (Markel) has a duty to defend and indemnify it in *Hogan v Cholshung Realty Corp.*, Bronx County index No. 304861/2008 (the Hogan Action), a pending personal injury action. Markel opposes and cross-moves for summary judgment in its favor, pursuant to CPLR 3212, dismissing the complaint in its entirety. The action has been discontinued as against defendant New York Marine & General Insurance Co. (NYM).

Background

Cholshung owns the premises at 359 Third Avenue, New York County (the Building), a portion of which it leased to 359 3rd Ave. 26 Restaurant Corp. (the Restaurant) for a ten-year period as of January 1, 1999. The lease did not extend to any part of the Building above the street-level restaurant space, although a rider allowed the Restaurant use of some basement space. On April 16, 2007, Kevin Hogan, a firefighter, was injured in the Building while fighting a fire that had allegedly originated in the Restaurant's kitchen. He commenced an action for personal injuries against Cholshung and the Restaurant, on June 10, 2008, in the Hogan Action.

Pursuant to its lease with Cholshung (Milner Affirm., Ex. B), the Restaurant procured a liability insurance policy from Markel, policy number 02ARGLAR10000 (Gitnik Affirm., Ex. I),

for the period October 15, 2006 through October 15, 2007, and a liability policy from NYM, policy number 9700500-033246. The Restaurant secured a certificate of insurance from Markel, naming Cholshung as an additional insured. Milner Affirm., Ex. D. When Cholshung was served in the Hogan Action, Seneca Insurance Company (Seneca), its general liability insurance carrier, sought defense and indemnification from NYM alone, by a letter dated July 10, 2008. *Id.*, Ex. I. Markel answered instead, on July 22, 2008, as "the general liability insurance carrier" for the Restaurant. *Id.*, Ex. J. It denied defense and indemnification to Cholshung, because Markel asserted that its initial investigation indicated a number of "building code violations, some of which would appear to be the sole responsibility of the building owner/landlord." *Id.* Markel has continued to provide a defense to the Restaurant in the Hogan Action.

On August 27, 2010, Cholshung commenced the instant action requesting a declaratory judgment that it is an additional insured under the NYM and Markel policies, and for breach of contract against each defendant. *Id.*, Ex. F. On August 1, 2011, the court denied both Markel's summary judgment motion and Cholshung's cross motion for summary judgment, with leave to renew upon completion of discovery. *Id.*, Ex. N.

Legal Standards

Under CPLR 3212 (b), a summary judgment "motion shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party." "The proponent of a motion for summary judgment [pursuant to CPLR 3212] must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law." *Dallas-Stephenson v Waisman*, 39 AD3d 303, 306 (1st Dept 2007), citing *Winegrad v New York Univ. Med. Center*, 64 NY2d 851, 853 (1985). Upon proffer of evidence establishing a prima facie case by the movant, "the party opposing a motion for summary judgment bears the burden of 'produc[ing] evidentiary proof in admissible form sufficient to require a trial of material questions of fact.'" *People v Grasso*, 50 AD3d 535, 545 (1st Dept 2008), quoting *Zuckerman v*

City of New York, 49 NY2d 557, 562 (1980). If there is any doubt as to the existence of a triable issue of fact, summary judgment must be denied. *Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 (1978); *Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226 (1st Dept 2002). Where a party fails to meet its prima facie burden, its summary judgment motion shall be denied regardless of the sufficiency of the opposing papers. *Matter of Siegel*, 90 AD3d 937, 940 (2d Dept 2011), citing *Winegrad*, 64 NY2d at 853.

Discussion

Coverage is provided by the Markel policy "only with respect to liability arising out of the ownership, maintenance or use of that part of the premises leased to" the Restaurant. Gitnik Affirm., Ex. L, CG 20 11 01 96, ¶ 3. It is undisputed that Cholshung is an additional insured under the Markel policy, as demonstrated by documentary evidence, and Markel's acknowledgment here. "At the outset, it should be noted that there is no dispute that CHOLSHUNG was named as an additional insured under the subject policy." Gitnik Affirm., ¶ 33. Generally, an additional insured enjoys the same protection as the named insured. *Pecker Iron Works of N.Y. v Traveler's Ins. Co.*, 99 NY2d 391, 393 (2003); *Kwoksze Wong v New York Times Co.*, 297 AD2d 544, 547 (1st Dept 2002). Here, however, the issue is not Cholshung's status under the Markel policy, but rather factual reasons that may have disqualified Cholshung from coverage under the policy in this particular instance. In brief, Markel claims that Cholshung failed to comply with the notice provisions of the policy, and that Hogan's injury occurred outside the Restaurant's insured premises.

Notice

The Markel policy provides that the insured "must see to it that we are notified as soon as practicable of an 'occurrence' or an offense which may result in a claim." CG 00 01 07 98, Section IV (2) (a). Markel claims that Cholshung failed to comply with this provision as understood by New York law. Markel's letter, dated July 22, 2008, responded to a request by Seneca, Cholshung's general liability insurance carrier, for defense and indemnification from

NYM. Admittedly, Cholshung did not make the request directly to Markel. According to Markel, service of the summons and complaint in the instant action was its first communication with Cholshung, years after the incident and commencement of the Hogan Action. Gitnik Affirm., ¶ 62. "The notice provision in the policy is a condition precedent to coverage and, absent a valid excuse, the failure to satisfy the notice requirement vitiates the policy." *Travelers Ins. Co. v Volmar Constr. Co.*, 300 AD2d 40, 42 (1st Dept 2002); *American Mfrs. Mut. Ins. Co. v CMA Enters.*, 246 AD2d 373, 373 (1st Dept 1998) (because the "additional insureds under the policy[] had an independent obligation to give timely written notice of the claim against them, it is irrelevant whether [the insurer] acquired actual knowledge of the occurrence from [other insureds] . . ."). The need for independent notice is heightened when co-insureds may have adverse interests, as Cholshung and the Restaurant may likely have. *City of New York v Investors Ins. Co. of Am.*, 89 AD3d 489, 489 (1st Dept 2011); *Travelers Ins. Co. v Volmar Constr. Co.*, 300 AD2d at 44.

Cholshung, in turn, argues that Markel waived an objection based on late notice when it declined coverage, in its letter of July 22, 2008, solely because of alleged "building code violations." The letter makes no mention of any other reason to reject the "tender of defense and indemnification" of Cholshung. "A ground not raised in the letter of disclaimer may not later be asserted as an affirmative defense." *Benjamin Shapiro Realty Co. v Agricultural Ins. Co.*, 287 AD2d 389, 389 (1st Dept 2001); *see also General Acci. Ins. Group v Cirucci*, 46 NY2d 862, 864 (1979) ("since this ground [of late notice] was not raised in the letter of disclaimer, it may not be asserted now"). While "an insurer may reserve the right to disclaim on such different or alternative grounds as it may later find to be applicable" (*Estee Lauder Inc. v OneBeacon Ins. Group, LLC*, 62 AD3d 33, 35 [1st Dept 2009]), "New York law establishes that an insurer is deemed, as a matter of law, to have intended to waive a defense to coverage where other defenses are asserted, and where the insurer possesses sufficient knowledge (actual or constructive) of the circumstances regarding the unasserted defense" (*State of New York v Amro*

Realty Corp., 936 F2d 1420, 1431 [2d Cir 1991]). Markel's unavailing response to this reasoning is that "it did not state that the notice it received was improper, because it did not receive any notice." Gitnik Affirm., ¶ 55. It thereby dismisses Seneca's letter, which describes an unknown injury to Hogan, incurred on April 16, 2007, at the Restaurant, while he tried to put out a fire that originated in the Restaurant's kitchen area. However, Markel's response to Seneca defined its posture regarding Cholshung, and waives Markel's later attempt to disclaim coverage because of late notice. *Matter of Firemen's Fund Ins. Co. of Newark v Hopkins*, 88 NY2d 836, 837 (1996) ("An insurer must give written notice of disclaimer on the ground of late notice as soon as is reasonably possible after it first learns of the accident or of grounds for disclaimer of liability, and failure to do so precludes effective disclaimer") (internal quotation marks and citations omitted).

Accident Site

Markel relies heavily on Hogan's deposition testimony of March 4, 2010, in the Hogan Action. Gitnik Affirm., Ex. F. Hogan was a lieutenant with the fire company that responded to the fire in the Building on the morning of April 16, 2007. The Restaurant was on street level, with four residential floors above, in a building that dated back 90 years or more. Hogan Transcript at 103-104. He testified that the fire originated at street level, on the first floor, and that he was directed to go one flight up, the second floor, "to stretch a line," that is, to run a fire hose. *Id.* at 104-105. He was the first one on the second floor, followed by four or five firefighters. *Id.* at 106-107.

Hogan spent a few minutes, "assessing the situation under heavy smoke conditions." *Id.* at 111. He had on full protective gear, and carried a flashlight and an officer's tool, similar to a crow bar. He moved forward with "a duck walk," a crouch/crawl that kept him low to the ground. *Id.* at 112-113. He went into an apartment,[1] then returned to the doorway where his crew waited. *Id.* at 115-116. Hogan said that he "fell into a hole . . . in the apartment above the

[1]According to the testimony of Bow-Yok Wong, daughter of the building's owners, the apartment on the second floor was unoccupied. Gitnik Affirm., Ex. G, at 21.

main body of fire which was below us." *Id.* at 109-110. He did not see the "hole that was burned through from the fire below" before he fell into it. *Id.* at 110. His right leg went into the hole, at least shin-deep, and he fell forward, injuring his right wrist. *Id.* at 118-119. One firefighter was by his side, and was the only person to see him fall. *Id.* at 144. As far as Hogan knew, no one else fell into the hole. *Id.* at 110-111.

Hogan "assumed that it was a grease fire" in the restaurant below. *Id.* at 123. He felt "high heat" in the apartment. *Id.* at 208. He said that he saw fire "extending from below" through three or so holes in the floor, but was uncertain whether fire was extending through the hole he fell into. *Id.* at 160-161. However, later, he said that "I shouldn't say I saw the fire, I saw the glow. It was a low orange glow." *Id.* at 209-210. When then asked did he see any holes, he replied: "No. You really couldn't see anything due to the smoke condition." *Id.* at 210. He said that "[c]onditions wouldn't allow me to see anything" before he stepped into the hole. *Id.* at 221. Hogan estimated that the hole was about one foot in diameter, large enough to fit his foot, although he did not look at the hole once he got out of it. *Id.* at 223, 159. He had no role in any ensuing investigation of the fire. *Id.* at 124-125.

The Fire Incident Report of the Bureau of Fire Investigation, dated the date of the incident, states:

> "Examination showed the fire originated at the incident premises, on the first floor, in the Sunflower Diner, in the kitchen, along the north wall, . . . in combustible material (cooking grease). The fire extended via the flu, (drafted by a rooftop exhaust fan), to the second floor, apartments 1 & 2, and further extended via open voids to the third floor, apartments 3 & 4."

Milner Aff., Ex. G.

New York has a broad view of the scope of liability insurance coverage. Generally, "the insurer's duty to furnish a defense is broader than its obligation to indemnify." *Seaboard Sur. Co. v Gillette Co.*, 64 NY2d 304, 310 (1984). "The duty to defend arises whenever the allegations in the complaint fall within the risk covered by the policy." *Ruder & Finn v Seaboard Sur. Co.*, 52 NY2d 663, 669 (1981). "An insured's right to be accorded legal

representation is a contractual right and consideration upon which his premium is in part predicated, and this right exists even if debatable theories are alleged in the pleading against the insured." *International Paper Co. v Continental Cas. Co.*, 35 NY.2d 322, 325 (1974). The alleged negligence complained of in the Hogan Action caused harm beyond the Restaurant's immediate premises. As the Restaurant's insurer, Markel had an obligation to Cholshung, the Restaurant's additional insured, to defend Cholshung. The physical boundaries of the Restaurant are not the legal boundaries of Markel's policy. *Public Serv. Mut. Ins. Co. v Color W. Photo*, 290 AD2d 338, 339 (1st Dept 2002) (Where a fire started in the ceiling of leased premises, "[i]t does not avail defendants tenant and insurer that the underlying actions are for damages or injuries sustained by or in adjacent premises since such damages and injuries resulted from the tenant's use of the insured premises"); *Cuevas v Quandt's Foodservice Distribs.*, 6 AD3d 973, 974 (3d Dept 2004) ("Smoke and water damage to adjacent property are foreseeable consequences of a fire, and plaintiff may recover for such damage if he establishes defendants' breach of duty and proximate cause").[2]

It is undisputed that the fire originated on the insured premises sending smoke and flames to other parts of the Building. Just as the fire could not be limited only to premises insured by Markel, the possible liability arising from the peril cannot be so divided. The fact that Hogan does not claim burn injuries is immaterial. He was on the scene because of fire, and fire may

[2]Each party offers precedents for its position. Cholshung refers to, among others, *ZKZ Assoc. LP v CNA Ins. Co.* (89 NY2d 990, 991 [1997]) ("[Because] the sidewalk where the alleged accident occurred was necessarily used for access in and out of the garage . . . the allegations in the complaint fell within the risk covered by the policy . . .") and *Jenel Mgt. Corp. v Pacific Ins. Co.* (55 AD3d 313, 313 [1st Dept 2008]) (stairwell is "a part of the premises that was necessarily used for access in and out of the [insured] leased space"). Markel opposes this elasticity in defining the scope of coverage, citing, among other cases, *Axelrod v Maryland Cas. Co.* (209 AD2d 336, 336 [1st Dept 1994]) ("Under the terms of the policy, the subject injury [in an elevator shaft] did not occur on the demised premises nor on any appurtenance thereto"); *Rensselaer Polytechnic Inst. v Zurich Am. Ins. Co.* (176 AD2d 1156, 1157 [3d Dept 1991]) ("we first reject the contention that the leased premises included the walkways immediately adjacent to the fieldhouse. Under the clear terms of the contract with plaintiff, Ice Capades leased only space located within the fieldhouse and not areas external to the structure"); *General Acc. Fire & Life Assur. Corp. v Travelers Ins. Co.* (162 AD2d 130, 132 [1st Dept 1990]) ("look[] to the underlying lease agreement to ascertain the premises which were utilized by the insured to determine the scope of insurance coverage"). However, the instant action differs from the circumstances in these several decisions, because the latter deal with the static physical setting, not the progress of a fire.

have produced the hole in the floor which allegedly tripped him up. With credible evidence that the fire arose out of the ownership, maintenance or use of the Restaurant's premises, Markel has a duty to defend Cholshung in the Hogan Action. *International Paper Co. v Continental Cas. Co.*, 35 NY2d 322, 326 (1974) ("While policy coverage such as the one here involved is often referred to as 'liability insurance' it is clear that it is, in fact, 'litigation insurance' as well").

While the issue of Cholshung's defense by Markel is resolved herein, the material facts regarding the need for indemnification of Cholshung by Markel remain in dispute until there is a determination of liability in the Hogan Action, an event still in the future. The respective requests for a declaratory judgment on Markel's duty to indemnify shall be denied. *Prashker v United States Guar. Co.*, 1 NY2d 584, 593 (1956) ("[the insureds'] rights to be indemnified against any further loss can be protected adequately by action against the carrier based upon the nature of the liability, if any, which is actually established against them in the negligence actions"); *North Riv. Ins. Co. v ECA Warehouse Corp.*, 172 AD2d 225, 226 (1st Dept 1991) ("Since resolution of the second issue upon which plaintiff seeks declaratory relief, i.e., whether it is required to indemnify defendant, depends upon resolution of the underlying action, that portion of the complaint which seeks such relief must be dismissed as premature").

Accordingly, it is

ORDERED that that part of plaintiff Cholshung Realty Corp.'s motion for summary judgment, pursuant to CPLR 3212 (b), requesting a declaration that defendant Markel Insurance Company has a duty to defend it in *Hogan v Cholshung Realty Corp.*, Bronx County index No. 304861/2008, a pending personal injury action, is granted; and it is further

ADJUDGED and DECLARED that defendant Markel Insurance Company has a duty to defend Cholshung Realty Corp. in *Hogan v Cholshung Realty Corp.*, Bronx County Index No. 304861/2008; and it is further

ORDERED that that part of plaintiff Cholshung Realty Corp.'s motion for summary judgment, pursuant to CPLR 3212 (b), requesting a declaration that defendant Markel

Insurance Company has a duty to indemnify it in *Hogan v Cholshung Realty Corp.*, Bronx County Index No. 304861/2008, a pending personal injury action, is denied as premature; and it is further

ORDERED that defendant Markel Insurance Company's cross motion for summary judgment in its favor, pursuant to CPLR 3212, is denied as premature.

DATED: ~~August~~ Sept 5, 2012

ENTER:

J.S.C.

DONNA M. MILLS, J.S.C.