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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: RAKOWER Justice

PART 15

Index Number : 107712/2011
ELEVENTH AVENUE LP
vs.
HARLEYSVILLE INSURANCE CO.
SEQUENCE NUMBER : 001
SUMMARY JUDGEMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

The following papers, numbered 1 to ____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits X MOTION | No(s). 1

Answering Affidavits — Exhibits _____ | No(s). 2

Replying Affidavits _____ | No(s). 3

Upon the foregoing papers, it is ordered that this motion is

MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION.

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 9/21/12

HON. EILEEN A. RAKOWER, J.S.C.

1. CHECK ONE: ..... ☐ CASE DISPOSED ☐ NON-FINAL DISPOSITION

2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER

3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER

☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

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ELEVENTH AVENUE LP, JEFFREY LEVINE FAMILY LIMITED PARTNERSHIP, DD 11th AVENUE, LLC, J.E. LEVINE BUILDER INC. d/b/a LEVINE BUILDERS,

Plaintiff,

Index No. 107712/11

DECISION and ORDER

- against -

HARLEYSVILLE INSURANCE CO., SJ ELECTRIC INC. and STAR-DELTA ELECTRIC INC. (pertaining to an underlying action entitled *Massa v. Jeffery E. Levine*),

Mot Seq. 01

Defendants.

----------X

HON. EILEEN A. RAKOWER

Plaintiffs Eleventh Avenue, LP ("Eleventh Avenue"), Jeffrey Levine Family Limited Partnership, DD 11th Avenue, LLC ("DD 11th"), and J.E. Levine Builder Inc. d/b/a Levine Builders ("Levine") (collectively, "Plaintiffs"), commenced the instant action on July 1, 2011.

Presently before the Court is a motion by DD 11th and Levine (collectively, "Movants") seeking an Order pursuant to CPLR 3212 for summary judgment and a declaration that defendant Harleysville Insurance Company ("Harleysville") must defend and indemnify Movants in the underlying action entitled *Massa v. Eleventh Avenue LP*. Harleysville cross moves pursuant to CPLR 3212 for issuance of a declaration that it owes no obligation to defend or indemnify Plaintiffs in the underlying matter, or, in the alternative, denying Movants' motion for a declaration, or, in the alternative, staying this action until a final determination of liability is made in the underlying matter. Eleventh Avenue and Jeffrey Levine Family Limited Partnership take no position on this motion and do not oppose Harleysville's cross motion.

At all relevant times, DD 11th was the lessee of property located at 316-318 11th Avenue, New York, NY. By contract dated July 19, 2007, Levine, as construction manager, and defendant S.J. Electric Inc. ("SJ Electric") entered into a contract wherein SJ Electric agreed to perform electrical work at the subject property (the "Contract"). A copy of Contract is annexed as an exhibit to the attorney affirmation of William J. Mitchell. Pursuant to the Contract, SJ Electric agreed to obtain general liability insurance for the Movants. As part of the insurance requirements, SJ Electric was to include on its policy an additional insured endorsement for "DD 11th Avenue LLC" and "J.E. Levine Builder Inc." The general liability coverage SJ Electric was to provide to the Movants was "to be primary to other collectible insurance." Consistent with its contractual obligations, SJ Electric obtained a general liability policy from Harleysville. The Movants obtained their own policy, which was to be in excess according to the Contract.

On August 27, 2008, Thomas Massa, a laborer working at the project at the subject property, allegedly slipped tripped and fell on an electric conduit. He subsequently filed suit against plaintiffs and SJ Electric. Massa was deposed on February 9, 2010, at which time he identified the conduit that he tripped over as gray half-inch pipe used by electricians to run electrical wire through flooring. Massa testified that he did not know who installed the electrical piping he tripped over. SJ Electric's witness Anthony Rappa testified that SJ Electric was the electrician at the project and did all the wiring, including conduit through the floors. At the time of Massa's accident, SJ Electric was "doing deck work, which was putting the conduit on the floor before they pour the concrete." Rappa also testified that there was another electrical contractor on the job at some point, although Rappa testified that the other contractor "wouldn't have been there at the time [of this accident]. None of his conduits would have went into the concrete."

A. Coverage

Movants contend that SJ Electric's insurance obligations to them are triggered because Massa's complaint, allegations, and testimony implicate SJ Electric. As such, the Movants contend that they are entitled to defense and indemnity from Harleysville, based on SJ Electric's contractual obligations. Harlysville contends that there has been no judicial determination in the underlying *Massa* action and insufficient proof that its insured S.J. Electric's acts or omissions caused the accident as there were other potentially responsible parties such as the other electrical or plumbing subcontractors

that placed the pipe.

The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law. That party must produce sufficient evidence in admissible form to eliminate any material issue of fact from the case. Where the proponent makes such a showing, the burden shifts to the party opposing the motion to demonstrate by admissible evidence that a factual issue remains requiring the trier of fact to determine the issue. The affirmation of counsel alone is not sufficient to satisfy this requirement. (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]). In addition, bald, conclusory allegations, even if believable, are not enough. *(Ehrlich v. American Moninger Greenhouse Mfg. Corp.*, 26 N.Y.2d 255 [1970]). (*Edison Stone Corp. v. 42nd Street Development Corp.*,145 A.D.2d 249, 251-252 [1st Dept. 1989]).

With respect to the issue of whether Massa's accident triggered coverage of the Movants as additional insureds under the Harleysville policy, "[a]n insurer's duty to defend 'arises whenever the allegations within the four corners of the underlying complaint potentially give rise to a covered claim'. . .. This standard applies equally to additional insureds and named insureds" (*Worth Constr. Co. v. Admiral Ins. Co.*, 2008 NY Slip Op 3992, *3 [2008]) (citations and internal quotations omitted). "[T]he insured's right to representation and the insurer's correlative duty to defend suits, however groundless, false or fraudulent, are in a sense 'litigation insurance' expressly provided by the insurance contract"(*Hotel des Artistes, Inc. v. General Accident Ins. Co. of America*, 9 A.D.3d 181, 187 [1st Dept. 2004]) (citations omitted). An insurer may avoid the duty to defend under its policy "only if it could be concluded as a matter of law that there is no possible factual or legal basis on which [the insurer] might eventually be held to be obligated to indemnify [the insured] under any provision of the insurance policy." (*id.*) (citations omitted). Coverage of the Movants under the Harleysville policy is for "liability caused, in whole or part, by the acts or omissions" of SJ Electric. Based on the testimony, Massa fell on an electrical conduit and SJ Electric was the electrician running conduit through concrete. Therefore, based on the policy, Massa's accident, which was based "in whole or part, by the acts or omissions" of SJ Electric, triggered coverage to the Movants.

Although the duty to defend was triggered, there remains a question as to whether (1) Plaintiffs gave Harleysville proper and timely notice of their claim; and/or (2) Harleysville properly disclaimed coverage.

B. Notice

The relevant section of Harleysville's insurance policy provides:

> Section IV - Commercial General Liability Conditions
>
> ***
>
> 2. Duties in the Event of Occurrence, Claim or Suit
>
> a. You must see to it that we are notified *promptly* of an "occurrence" that may result in a claim . . .
>
> b. If a claim is made or a "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.* (emphasis added).

The purpose of notice provisions in insurance policies is to give the insurer an opportunity to protect itself. (*Security Mut. Ins. Co. of New York v. Acker-Fitsimons Corp.*, 31 NY2d 436, 441 [1972]) (where insured waited nineteen months to notify insurance company of claim). "[T]he duty to give reasonable notice as a condition of recovery is implied in all insurance contracts, and is applicable to an additional insured." (*Structure Tone v. Burgess Steel Prods. Corp.*, 249 AD2d 144, 145 [1st Dept. 1998]). Where there is an unambiguous notification policy, claims are to be reported "as soon as practicable if they are to become the basis of a claim." (*Republic New York Corp. v. American Home Assur. Co.*, 125 A.D.2d 247, 249[1st Dept. 1986]) (where, even when record was viewed most favorably for the plaintiff, a forty-five day delay in notification was inexcusable). Under certain circumstances, an insured may reasonably explain or excuse his delay in notifying the insurer. For example, a reasonable excuse may be if the insured is not aware that an accident occurred or has

a good-faith basis for believing in their non-liability. (*Security Mutual Ins. Co.*, 31 NY2d at 441). "Absent a valid excuse, a failure to satisfy the notice requirement vitiates the policy." (*Id.* at 440). When no excuse is offered or there are no mitigating circumstances, the court, rather than a jury, deems whether the condition was fulfilled. (*Deso v. London & Lancashire Indem. Co.*, 3 NY2d 127, 131 [1957]) (where there was a fifty-one day delay in notifying the insurance company). Finally, the insured "need not show prejudice before it can assert the defense of noncompliance." (*Security Mutual Ins. Co.*, 31 NY2d at 440).

Harleysville states that plaintiffs Eleventh Avenue and Jeffrey Levine Family Limited Partnership had notice of Massa's suit at least as early as April 2009 when they were served with the summons on complaint. Harleysville states that this put the Movants on notice of the accident and the potential for a claim against them, as all of the parties shared the same director for risk management. Harleysville claims that despite the notice of the suit and the occurrence at least as early as April 2009 when they were served with a summons and complaint, plaintiffs Eleventh Avenue LP and Jeffrey Levine Family Limited Partnerships first provided notice of the suit and the occurrence to Harleysville on October 15, 2010, a delay of over a year.

Likewise, Harleysville claims that the Movants failed to provide timely notice of the occurrence, or the suit against them, which was served on them in March 14, 2011, until over two months later when they first served the Massa suit papers along with their Summons and Complaint in the instant action against Harleysville by service upon the Insurance Department on July 13, 2011.

Movants offer no explanation for their failure to timely notify Harleysville. Indeed, Eleventh Avenue and Jeffrey Levine Family Limited Partnership do not oppose Harleysville's cross motion.

C. Disclaimer

Having determined that the Movants failed to timely notify Harleysville of the claim pursuant to the terms of the policy, the Court must next determine whether such failure was vitiated by Harleysville's failure to timely disclaim. Insurance Law §3420(d) states, in relevant part:

> If under a liability policy delivered or issued for delivery in this state, an insurer shall disclaim liability or deny coverage . . . it shall give written notice as soon as is reasonably possible of such disclaimer of liability or denial of coverage to the insured and the injured person or any other claimant.

Harleysville disclaimed coverage to Eleventh Avenue and Jeffrey Levine Family Limited Partnership by way of its October 21, 2010 letter. Harleysville disclaimed coverage to DD 11th and Levine by way of its answer, served August 2, 2011 (20 days after service of the Massa suit papers upon Harleysville), which contained an affirmative defense raising failure with the notice conditions of the Harleysville policy. The affirmative defense states: "Plaintiffs' action should be dismissed because of its failure and/or claimed insured's failure to fully comply with all the terms of any said policy including, but not limited to, notice, assistance, and cooperation." The Court finds that Harleysville properly disclaimed coverage with respect to all of the plaintiffs, including the Movants. *See Am. Mfs. Mut. Ins. Co. v. CMA Enters., Ltd.*, 246 A.D. 2d 273 (1st Dept 1998) ("Plaintiffs' first notice to Pacific Insurance Company of the underlying claim was given in their summons and complaint in this declaratory judgment action, served nine months after the commencement of the underlying action and two years after plaintiffs first learned of the property damage asserted in the underlying action, a delay that was unreasonable as a matter of law and relieved Pacific of any obligation to defend and indemnify plaintiffs. Pacific's assertion of untimely notice as a defense in its answer constituted timely notice of disclaimer.") As Eleventh Avenue, Jeffrey Levine Family Limited Partnership, and the Movants failed to provide timely notice of Massa's claim to Harleysville and Harleysville timely disclaimed coverage, plaintiffs failed to comply with the conditions precedent to insurance coverage which precludes coverage under the policy.

Wherefore it is hereby

ORDERED that motion of plaintiffs DD 11th Avenue, LLC and J.E. Levine Builder Inc. d/b/a Levine Builders for summary judgment is denied; and it is further

ORDERED that the cross-motion of defendant Harleysville Insurance Co. seeking a declaration that it is not obligated to provide a defense to, and provide

coverage for, the plaintiffs DD 11th Avenue, LLC, J.E. Levine Builder Inc. d/b/a Levine Builders's Eleventh Avenue, LP, and Jeffrey Levine Family Limited Partnership in the action of *Massa v. Eleventh Avenue LP,* Index No. 103649-2009, New York County, is granted; and it is further

ADJUDGED AND DECLARED that defendant Harleysville Insurance Co. is not obliged to provide a defense to, and provide coverage for, plaintiffs DD 11th Avenue, LLC, J.E. Levine Builder Inc. d/b/a Levine Builders's Eleventh Avenue, LP, and Jeffrey Levine Family Limited Partnership in the action of *Massa v. Eleventh Avenue LP,* Index No. 103649-2009, New York County; and it is further

ADJUDGED that defendant Harleysville Insurance Co. do recover from the plaintiffs DD 11th Avenue, LLC, J.E. Levine Builder Inc. d/b/a Levine Builders's Eleventh Avenue, LP, and Jeffrey Levine Family Limited Partnership costs and disbursements as taxed by the Clerk and defendant Harleysville Insurance Co. has execution therefor.

This constitutes the Decision and Order of the court. All other relief requested is denied.

DATED: 9/21/12

EILEEN A. RAKOWER, J.S.C.