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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON JOAN A. MADDEN **PART** 11
Justice

Index Number : 102316/2011
VIGILANT INSURANCE COMPANY
vs.
SIBBIO, RALPH
SEQUENCE NUMBER : 002
SUMMARY JUDGMENT

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 _____ **No(s).** _____

Answering Affidavits — Exhibits _____ **No(s).** _____

Replying Affidavits _____ **No(s).** _____

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed Memorandum Decision and Order

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: October 9, 2012

_____, 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 11

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VIGILANT INSURANCE COMPANY,

Plaintiff,

INDEX NO. 102316/11

-against-

RALPH SIBBIO,

Defendant

----------X

JOAN A. MADDEN, J.:

Plaintiff Vigilant Insurance Company ("Vigilant") moves to renew its motion for summary judgment on its complaint seeking a declaration that it is not required to defend or indemnify defendant Ralph Sibbio ("Sibbio") under a commercial liability policy. Sibbio opposes the motion.

Background

Vigilant issued a Commercial General Liability Policy to Sibbio covering the period from December 5, 2003 through December 4, 2004 (Policy No. 12654140-01) ("the Policy"). Sibbio purchased a two-family house located at 16-18 York Avenue, Staten Island, New York ("the Property") from Robert Dimperio ("Dimperio") on or about March 9, 2004. By endorsement effective on February 19, 2004, Vigilant and Sibbio added liability coverage for the Property to the Policy.

In this action, Vigilant seeks a declaration that it is not required to defend or indemnify Sibbio in connection with a personal injury action commenced in the Supreme Court, Kings County entitled Ashelie Seye, an infant by her mother and natural guardian, Jamiylah Abdurrahman Seye and Jamiylah Abdurrahman Seye, individually v. Ralph Sibbio and Robert

Dimperio; Index No. 39948/04 (the "Underlying Action"). The Underlying Action, which was commenced on December 8, 2004, seeks damages for personal injuries allegedly caused by exposure to lead during the period of plaintiffs' tenancy between July 2003 and July 2004, in an apartment at the Property (the "Apartment").[1] Notably, according to the complaint in the Underlying Action, the tenancy of the infant plaintiff, Ashelie Seye (the "Infant Plaintiff"), began before Sibbio purchased the Property and before the effective date of the Policy. On February 11, 2005, Vigilant notified Sibbio that there was no coverage under the Policy as the "occurrence" for which Sibbio seeks coverage did occur during the policy period.

In support of its position, Vigilant relies on the following provisions in the Policy:

> **Personal Liability Coverage**
>
> We cover damages a covered person is legally obligated to pay for personal injury or property damage which take place anytime during the policy period and are caused by an occurrence, unless stated otherwise or an exclusion applies. Exclusions to this coverage are described in **Exclusions.**
>
> In lieu of the definition for "occurrence" in the Introduction, the following definition of "occurrence" applies to Personal Liability Coverage:
> "Occurrence" means an accident to which this insurance applies and *which begins within the policy period. Continuous or repeated exposure to substantially the same general conditions unless excluded is considered to be one occurrence*....(emphasis supplied).
>
> "Damages" means the sum that is paid or is payable to satisfy a claim settled by us or resolved by judicial procedure or a compromise we agree to in writing.
>
> "Personal injury" means the following injuries, and resulting death

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[1]Specifically, Paragraph 22 of the complaint alleges "[t]hat commencing approximately during July of 2003, and continuing to date, the infant plaintiff... was caused to suffer serious injuries and lead poisoning as a result of residing [on the Property]."

• bodily injury....

On February 24, 2011, Vigilant commenced this declaratory judgment action seeking to deny coverage based on the above provision, arguing that infant plaintiff was not injured during the policy period. In August 2011, prior to discovery, Vigilant moved for summary judgment (the "Initial Motion") on the grounds that it properly denied coverage with respect to the Underlying Action as the infant plaintiff's lead paint exposure did not begin within the Policy period and, thus, was not covered by the Policy. By its decision and order dated August 19, 2011, this court denied the Initial Motion, finding that there were triable issues of fact as to when the occurrence began, particularly as the allegations in the complaint regarding when the infant plaintiff was first exposed to lead-based paint were verified by an attorney rather than the infant plaintiff's mother, Jamiylah Abdurrahman Seye ("Jamiylah Seye"). However, the Initial Motion was denied without prejudice to renewal upon the presentation of additional proof of the commencement of exposure to lead-based paint.

Vigilant now moves for renewal of its summary judgment motion and submits the deposition testimony of Jamiylah Seye from March 7, 2011, in support of its motion.[2] Vigilant argues that Jamiylah Seye's testimony demonstrates that dust from lead-based paint in the Apartment was present from the time she and the infant plaintiff moved into the Apartment in July 2003, which was prior to the commencement of the policy period in February 2004. In particular, Vigilant points to Jamiylah Seye's testimony that the infant plaintiff was crawling at the time they moved into the Apartment, and that the infant plaintiff played in the area of a

[2]Vigilant does not present the full text of Jamiylah Seye's deposition, but only selected portions.

radiator (Jamiylah Seye dep. at 126), which had flaking paint (Id. at 74), and that the infant plaintiff would put her hands into her mouth at "[e]very opportunity" (Id. at 130).

Vigilant also relies on Sibbio's affidavit as evidence that Jamiylah Seye never permitted him to enter into the Apartment, and that he did not enter the Apartment prior to August 2004, so that he did not know about the lead paint condition in the Apartment that existed prior to his purchase of the Building. Sibbio Aff. at ¶¶ 4, 29.[3] Additionally, Vigilant presents a Lead Paint Poisoning Report from Staten Island University Hospital documenting that the Infant plaintiff had an elevated level of lead in her blood in July 2004. Vigilant also presents a Commissioner of Health Order to Abate Nuisance (the "Order to Abate"), dated July 23, 2004, which provides that the Apartment was inspected on July 15, 2004, and it was determined that the Apartment contained lead-based paint, which was a lead hazard.

Vigilant asserts that this evidence and the undisputed facts show that the infant plaintiff's exposure to lead-based paint began in July of 2003, and was continuous and that, as such, the injury complained of in the Underlying Action is not covered by the Policy as the "Occurrence" at issue began prior to the start of the Policy period.

Sibbio counters that Jamiylah Seye's deposition testimony is insufficient to resolve the issue of coverage as a matter of law as it is inconsistent with the deposition testimony of Dimperio, who owned the Property before Sibbio. In particular, Sibbio points to Dimperio's testimony that before Jamiylah Seye moved into the Apartment, he repainted it and the City of

[3]Sibbio's statement that he did not enter the Apartment prior to August 2004 appears inconsistent with Jamiylah Seye's deposition testimony to the effect that Sibbio performed plumbing repairs in the Apartment prior to that date. Jamiylah Seye dep. at 57-58.

New York (the "City") inspected it. Dimperio dep. at 71-73. Sibbio additionally presents a City inspection report (the "City Inspection Report") for the Apartment that appears to have been signed by a City inspector on June 19, 2003, and by a supervisor on June 20, 2003, which indicates that there were no interior surfaces in the Apartment with "cracked, peeling or loose paint or plaster." Sibbio thus argues that Vigilant has failed to produce evidence sufficient to establish that the lead paint conditions at issue existed prior to Sibbio's ownership of the Property.[4]

Sibbio further argues that the Policy language regarding the definition of an "Occurrence" is ambiguous as to whether it means exposure to the lead paint condition or when the injury from such exposure occurred. As such, Sibbio appears to argue that Vigilant must make a showing as to when any lead-based paint actually caused an "accident" that injured the infant plaintiff. Sibbio asserts that Vigilant has failed to make such a showing.

In reply, Vigilant argues that pursuant to Fitzpatrick v. American Honda Motor Co., Inc., 78 N.Y.2d 61 (1991) and Bovis Lend Lease LMB Inc. v. Garito Contr., Inc., 65 A.D.3d 872 (1st Dep't 2009), appeal dismissed, 13 NY3d 878 (2009) an insurer's duty to defend is triggered by

[4]Sibbio also argues that Jamiylah Seye's deposition testimony is insufficient to support a finding of summary judgment as Vigilant fails to submit the entire transcript and the transcript is unsigned. These arguments are without merit. First, Sibbio's submission of the entire transcript cures the failure of Vigilant to do so. Next, as asserted by Vigilant, although it has no direct means to obtain a copy of the signature page for the transcript of Jamiylah Seye's deposition or request that Jamiylah Seye execute the transcript, it was informed by counsel in the Underlying Action at McGivney & Kluger, P.C. that while deposition transcripts were sent to Jamiylah Seye's counsel to be executed, signed copies of the transcripts were not returned. As such, Vigilant the transcript is deemed signed pursuant to CPLR 3116(a). Alternatively, as Vigilant argues, since the transcript is certified, it may be used in support of its motion for summary judgment, even though it is unsigned.

the allegations in the complaint in the underlying action. Applying that rule here, Vigilant maintains that as the complaint in the Underlying Action alleges that the infant plaintiff suffered continuous injuries from lead poisoning beginning in July of 2003, which was prior to the time Sibbio obtained coverage for the Property, it should not be required to provide a defense to Sibbio. Vigilant argues that "if plaintiffs in the Underlying Action are able to establish their case, it will of necessity be predicated on exposure starting in July of 2003" (Reply at 2), and that Sibbio's own affidavit shows that he did not enter the Apartment during Jamiylah Seye's tenancy. Moreover, Vigilant argues, the Policy language regarding an the definition of an Occurrence is not ambiguous.

In response to Sibbio's arguments that Dimperio's testimony and the City's Inspection Report present issues of fact, Vigilant argues that such evidence is irrelevant since an insurer's defense obligation in measured solely by the pleadings. Furthermore, Sibbio argues that the Order to Abate, which documents the existence of hazardous lead paint in the Apartment, is conclusive proof that hazardous lead paint was present in the Apartment, and whether or not Dimperio applied a new coat of paint before the Seyes began to inhabit the Apartment is irrelevant as lead paint was already on the walls.

Discussion

It is well settled that "when parties set down their agreement in a clear, complete document, their writing should...be enforced according to its terms." W.W.W. Assocs., Inc. v. Giancontieri, 77 N.Y.2d 157, 162 (1990). It is also fundamental to contract interpretation that agreements are construed in accord with the parties' intent. See Slatt v. Slatt, 64 N.Y.2d 966, 967 (1985); see also Hartford Acc. & Indem. Co. v. Wesolowski, 33 N.Y.2d 169, 171 (1973).

"Extrinsic evidence of the parties' intent may be considered only if the agreement is ambiguous, which is an issue of law for the courts to decide." Greenfield v. Philles Records, Inc., 98 N.Y.2d 562, 569 (2002) citing W.W.W. Assocs., Inc. v. Giancontieri, 77 N.Y.2d at 162; see also Matter of Wallace v. 600 Partners Co., 86 N.Y.2d 543, 548 (1995). Generally, a contract is unambiguous if "on its face [it] is reasonably susceptible of only one meaning." Greenfield v. Philles Records, Inc., 98 N.Y.2d at 570; see also Chimart Assocs v. Paul, 66 N.Y.2d 570, 572-573 (1986). Applying these standards, the court finds that contrary to Sibbio's position, the contract provision regarding the definition of an "Occurrence" is reasonably susceptible to only one interpretation. Specifically, under the Policy, an "occurrence" is defined as "an accident to which the insurance applies which begins during the accident period" and goes on to state that "[c]ontinuous or repeated exposure to substantially the same general conditions" is excluded unless it "begins within the policy period." Under these provisions, it is clear the occurrence is measured from the first exposure to lead paint, as opposed to the time of the injury from such exposure.

The remaining issue is whether Vigilant is entitled to summary judgment based on its position that the occurrence began prior to the Policy period. On a motion for summary judgment, the proponent "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case...." Winegrad v. New York Univ. Med. Center, 64 N.Y.2d 851, 852 (1985). Once the proponent has made this showing, the burden of proof shifts to the party opposing the motion to produce evidentiary proof in admissible form to establish that material issues of fact exist which require a trial. Alvarez v. Prospect Hospital, 68 N.Y.2d 320, 324 (1986).

"It is well settled that an insurer's duty to defend its insured is exceedingly broad and an insurer will be called upon to provide a defense whenever the allegations of the complaint suggest a reasonable possibility of coverage" (internal citations and quotations omitted). BP Air Conditioning Corp. v. One Beacon Ins. Group, 8 N.Y.3d 708, 714 (2007); see also Fieldston Property Owners Ass'n, Inc. v. Hermitage Ins. Co., Inc., 16 N.Y.3d 257 (2011); W & W Glass Systems, Inc. v. Admiral Ins. Co., 91 A.D.3d 530 (1st Dep't 2012); Stout v. 1 East 66th Street Corp., 90 A.D.3d 898 (2nd Dep't 2011). "[I]f the complaint contains any facts or allegations which bring the claim even potentially within the protection purchased, a duty to defend exists." City of New York v. Certain Underwriters at Lloyd's of London, England, 15 A.D.3d 228, 230 (1st Dep't 2005)(internal citations omitted). Furthermore, the allegations in the complaint are not "the *sole* criteria for measuring the scope of [the duty to defend]." Fitzpatrick v. American Honda Motor Co., 78 N.Y.2d 61, 66 (1991). And, thus, an "insurer may not rely on the pleadings to narrow the scope of its duty to defend." Id. at 68 (emphasis removed).

Under this standard, while the complaint in the Underlying Action alleges that the Infant Plaintiff's injury occurred "approximately during July 2003 and continuing through July 2004," this does not eliminate a reasonable possibility that the occurrence (i.e. the exposure to lead paint poisoning) began on or after the effective date of the Policy. Notably, the complaint alleges only that the injury occurred "approximately" in July 2003, which corresponds with the beginning of the plaintiffs' tenancy. Moreover, the infant plaintiff was not diagnosed with lead-paint poisoning until more than one year after the tenancy began.

Furthermore, even assuming arguendo that the evidence submitted by Vigilant in support of its motion, including the deposition testimony of Jamiylah Seye, is sufficient to meet its

burden of demonstrating that the infant plaintiff's injuries arose prior to the Policy period, Sibbio has submitted evidence controverting this showing. Specifically, Sibbio submits evidence, including the deposition testimony of Dimperio and the City Inspection Report, from which it could be inferred that the alleged lead paint condition did not exist when the tenancy of Jamiylah Seye and the Infant plaintiff began in July 2003.

Under these circumstances, as a reasonable possibility of coverage exists such that Vigilant has a duty to defend Sibbio in the Underlying Action. In addition, Vigilant's request for relief with respect to its duty to indemnify is premature as the issue depends on the outcome of the Underlying Action. Sibbio's request for attorney's fees is also premature and must be denied.

Conclusion

In view of the above, it is

ORDERED, ADJUDGED and DECLARED that Vigilant Insurance Company shall defend defendant Ralph Sibbio in the action entitled Ashelie Seye, an infant by her mother and natural guardian, Jamiylah Abdurrahman Seye and Jamiylah Abdurrahman Seye, individually v. Ralph Sibbio and Robert Dimperio (Index No. 39948/04).

Dated: October 9, 2012

J.S.C.