[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. EILEEN A. RAKOWER PART 15

Justice

Index Number : 116947/2009
QBE INSURANCE
vs.
INTERSTATE FIRE & CASUALTY
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). 1, 2, 3

Answering Affidavits — Exhibits _____ No(s). 4, 5, 6, 7, 8

Replying Affidavits _____ No(s). 9, 10, 11, 12, 13

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

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 IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION.

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

Dated: 10/25/12

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

----------X

QBE INSURANCE CORPORATION and MORGAN CONSTRUCTION ENTERPRISES, INC.,

Plaintiffs,

- against -

INTERSTATE FIRE AND CASUALTY COMPANY, METRO DEMOLITION CONTRACTING, CORP., HARTFORD INSURANCE COMPANY OF THE MIDWEST, SDCF FLOORING, INC., ONE BEACON INSURANCE GROUP, SRG CONSTRUCTION CONSULTING CORP., UTICA NATIONAL INSURANCE GROUP, PRO-SPEC INTERIORS, INC., ILLINOIS UNION INSURANCE COMPANY and ON PAR CONTRACTING CORP.,

Defendants.

----------X

Index No. 116847/09

DECISION/ORDER

Mot. Seq. 02

HON. EILEEN A. RAKOWER

On or prior to January 20, 2005, Inocencia Wejbe was injured when she was allegedly exposed to certain toxins as a result of certain construction activities at 1190 Fifth Avenue, New York, known as Mount Sinai Medical Center, One Gustave L. Levy Place (the "Project"). Morgan Construction Enterprises, Inc. ("MCE") was the general contractor on the Project. By the filing of the Summons and Complaint dated August 29, 2007, Inocenica Wejbe and George Wejbe commenced an action against MCE and the Morgan Contracting Corp. entitled *George Wejbe v. Morgan Construction Enterprises, Inc. and The Morgan Contracting Corp.*, Index No.: 111846/07, pending in the Supreme Court of the State of New York (the "Underlying Action"). Thereafter, Inocencia Wejbe and George Wejbe filed a Supplemental Summons and Amended Verified Complaint dated December 20, 2007. The

following parties are defendants in the Underlying Action: MCE, The Morgan Contracting Corp., Complete Construction Consortium, Inc., Metro Demolition Contracting Corp. ("Metro"), Pro Spec Interiors, Inc. ("Pro Spec"), RSI Contracting, Inc., SDCF, Inc. ("SDCF"), SRG Construction Consulting Corp., and Waldorf Carting Corp. By the Court's Order dated June 6, 2011, SDCF and Pro-Spec Interiors, Inc., were granted summary judgment and dismissed from the Underlying Action.

QBE Insurance Corporation ("QBE") and its general contractor insured MCE (collectively, "Plaintiffs") commenced the instant action against defendants (various insurance companies and their insureds) seeking a declaration that MCE is entitled to primary coverage as an additional insured under various polices of insurance issued to its subcontractors in connection with the Project that is the subject of the Underlying Action. The action was commenced with the filing of the Summons and Complaint dated December 2, 2009. Interstate Fire and Casualty Company ("Interstate") is named as one of the named defendants along with its insured, Metro Demolition, a subcontractor of MCE that performed demolition work at the Project. Illinois Union Insurance Company ("Illinois Union") is also named as a defendant, along with its insured On Par Contracting Corp ("On Par"), a subcontractor of MCE that installed dry wall and acoustical ceilings at the Project. By the Court's Order dated June 6, 2011, defendants Hartford Insurance Company of the Midwest ("Hartford") and Utica National Insurance Group's ("Utica") insureds' SDCF and Pro-Spec were dismissed from the Underlying Action, but they remain in this action as claimed insurers of named additional insured MCE.

QBE represents that it has been, and currently is, providing a defense to MCE in the Underlying Action and that to date, no other insurers have agreed to assume MCE's defense in the Underlying Action.

Presently before the Court is Interstate's motion for an Order, pursuant to CPLR 3212, granting summary judgment, dismissing those claims asserted against it in the Verified Complaint, and declaring, pursuant to CPLR 3001, that Interstate does not have an obligation to either defend or indemnify plaintiffs in the Underlying Action.

As with respect to Interstate, the Complaint alleges that on, or before January 20, 2005, MCE entered into a contract with Metro for the performance of certain services at the Project. The First Cause of Action set forth in the Complaint alleges

that MCE was or should have been named as an additional insured on the insurance policy issued by Interstate to Metro and that Interstate is obligated to defend and indemnify MCE in the Underlying Action. The Second Cause of Action alleges that Interstate failed to promptly disclaim coverage to the plaintiffs for the claims asserted against them as required by Section 3420 of the New York State Insurance Law. Defendant Illinois Union is also named as a defendant, along with its insured On Par Contracting Corp., a subcontractor of MCE at the Project.

Interstate argues, "Assuming for the purposes of this motion only that MCE is an additional insured under the Interstate Policy, the Interstate Policy does not provide primary insurance for MCE in the Underlying Action since the Additional Insured (Blanket Contractual) Endorsement provides that such coverage is excess of any other insurance." Interstate further contends that because its policy is an excess policy, it has no duty to defend MCE in the Underlying Action and is also not obligated to reimburse to QBE any defense costs incurred in the Underlying Action. Interstate also contends that, assuming that the alleged injuries in the Underlying Action arise out of the work performed by or on behalf of Metro for MCE, Interstate has no obligation to indemnify MCE, until all other primary and excess policies are exhausted. Interstate also asserts that its denial of coverage is timely.

Plaintiffs cross move for an Order pursuant to CPLR 3212 for summary judgment against Interstate. Plaintiffs assert that Interstate's motion for summary judgment should be denied as a matter of law because: (1) Interstate failed to timely disclaim coverage to plaintiffs; (2) the Interstate Policy is not excess to the QBE Policy; and (3) it is premature to render any determination as to the priority of coverage among any of the policies at issue in this action as discovery is not complete.

Illinois Union cross moves for an Order: (1) pursuant to CPLR 3212 granting summary judgment dismissing the claims asserted against Illinois Union in the Complaint by plaintiffs, with prejudice, and (2) denying that portion of Interstate's motion for summary judgment that seeks a declaration that is policy is excess of the Illinois Union Policy.

Defendant One Beacon Insurance Group ("One Beacon") did not submit motion papers; however, counsel for the party appeared at oral argument and stated at oral argument that "to the extent that the Court finds that there is late notice, One

Beacon is similarly situated where they first received tender on February 15, 2008 and disclaimed coverage on March 3, 2008."

No other defendant submitted opposition or appeared at oral argument.

Interstate's Motion and Plaintiffs' Cross Motion

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]).

In its motion, Interstate seeks a declaration that the policy it issued to Morgan (its insured) is not a primary policy for MCE as an additional insured in the Underlying Action based on the terms of the other policies. At oral argument, Interstate addressed what it claimed to be the other relevant policies to support its claim: the CGL policy Interstate issued to Metro, the CGL policy issued by QBE to MCE, the policy issued by Hartford to its insured SDCF, and the policy issued by Illinois Union to its insured On Par. While Interstate originally argued in its motion papers that policy issued by Utica Mutual Insurance Company to its insured Pro-Spec was also relevant, Interstate acknowledged at oral argument that it does not come into play based on the terms of its additional insured endorsement and the Court's granting of summary judgment in its insured's favor in the Underlying Action. With respect to the policy issued by Illinois Union, as explained below, as plaintiffs failed to provide timely notice of the occurrence in accordance with Illinois Union's policy and Illinois Union timely disclaimed coverage, this Court is granting Illinois Union's summary

judgment motion. Therefore, the policy issued by Illinois Union does not come into play as to the extent of Interstate's coverage vis-a-vis other policies.[1]

"An insurance policy is a contract between the insurer and the insured. Thus, the extent of the coverage (including a given policy's priority vis-a-vis other policies) is controlled by the relevant policy terms...." (*Bovis Lend Lease LMB, Inc. v. Great Am. Ins. Co.*, 2008 NY Slip Op 3150, *5 [1st Dept. 2008]). "[A]n umbrella or excess liability insurance policy should be treated as just that, and not as a second layer of primary coverage, unless the policy's own terms plainly provide for a different result" (*id.* at *3). "Where the same risk is covered by two or more policies, each of which was sold to provide the same level of coverage ... priority of coverage ... among the policies is determined by comparison of their respective 'other insurance' clauses" (*Sports Rock Intl., Inc. v. American Cas. Co. of Reading, Pa.*, 65 A.D. 3d 12, 18 [1st Dept 2009]; *Jefferson Ins. Co. of N.Y. v. Travelers Indem. Co.*, 92 N.Y. 2d 363, 372 [1998]). When deciding which policies are primary and which are excess, courts will examine the language of the various "other insurance" provisions (*id.*).

Here, as stated above, the relevant policies at issue in terms of evaluating Interstate's motion are as follows: the policies issued by Interstate, Hartford, and QBE.

Interstate issued a CGL Policy to Metro, bearing policy number GLI 1111836, for the policy period of July 15, 2004 to July 15, 2005 ("the Interstate Policy"). The Interstate Policy provided coverage of $1,000,000 per occurrence, $2,000,000 in general aggregate. In its "Other Insurance" provision, the policy provided; "If other valid and collectible insurance is available to the insured for a loss we cover under Coverages A or B of the Coverage Part, our obligations are limited as follows:

---

[1] As for the policy issued by One Beacon, the Court finds that any determination with respect to this policy to be premature based on plaintiffs' papers. Plaintiffs state that while the One Beacon Policy on its face does not contain an additional insured endorsement, the subcontract between MCE and SRG contained a relevant insurance procurement provision. Plaintiffs contend that relevant discovery with respect to this policy is outstanding.

a. Primary Insurance

This insurance is primary except when b. applies . . .

b. Excess Insurance

This insurance is excess over:

Any of the other insurance, whether primary, excess, contingent or any other basis:

(a) That is Fire, Extended Coverage, Builder's Risk, Installation Risk or similar coverage for "your work";

(2) That is Fire Insurance for premises rented to you . . .; or

(3) If the loss arises out of the maintenance or use of aircraft ...

When the insurance is excess, we will have no duty under Coverage A or B to defend the insured against any "suit" if any other insurer has a duty to defend the insured against that "suit."

When this insurance is excess over other insurance, we will pay only our share of the amount of loss, if any . . .

The Interstate Policy also contains the following endorsement:

ADDITIONAL INSURED (Blanket Contractual)

This endorsement changes the policy. Please read it carefully.

In consideration of the premium charged:

The following provision is added to Section 11, Persons Insured, of the Comprehensive General Liability Coverage Part:

(f) any entity the Named Insured is required in a written contract to name as an insured (hereinafter called Additional Insured) is an insured but only with respect to liability arising out of work performed by or on behalf of the Named Insured for the Additional Insured.

The insurance afforded by this provision shall be excess over any other insurance.

QBE issued a CGL policy of insurance to MCE. The "other insurance" clause provides the QBE Policy is primary, but excess to "[a]ny other insurance, whether primary, excess, contingent or any other basis that is valid and collectible insurance available to you as an additional insured under a policy issued to: (a) a contractor performing work for you."

Hartford issued a Comprehensive Business Liability Policy to SDCF ("the Hartford Policy"). Mount Sinai Hospital and MCE are named additional insureds on the Hartford Policy. In its "other insurance" provision, the Hartford Policy provides that the insurance provided is primary except that it is excess over:

(a) That is Fire, Extended Coverage, Builder's Risk, Installation Risk or similar coverage for "your work";

(b) That is Fire Insurance for premises rented to you . . .; or

(c) If the loss arises out of the maintenance or use of aircraft . . .

As Interstate points out, this excess insurance provision in the Hartford policy is inapplicable in this case since none of the insurance policies are issued are Fire, Extended Risk Coverage, Builder's Risk Installation Risk, Fire Insurance, nor does the loss in the Underlying Action arise out of the maintenance or use of aircraft, autos or watercraft. Furthermore, as Interstate also points out, the primary coverage afforded to the named insured SDCF is not contingent upon any finding of liability of the named insured SDCF, and it is well settled law that "an additional insured" is "an entity enjoying the same protection as the named insured." *BP Air Conditioning Corp. v. One Beacon Ins. Group*, 33 A.D. 3d 116, 122 (1st Dept 2006). Therefore, MCE has primary coverage under the Hartford Policy, and Hartford must pay up to its limits before QBE and Interstate's coverage, as excess insurers are triggered. After the Hartford Policy is exhausted, based upon the contracts, QBE and Interstate are either co-primary insurers or excess insurers as the coverage clauses contained in the Interstate and QBE's respective policies cancel each other out. *Lumbermens Mut. Casualty Co. V. Allstate Ins. Co.*, 51 N.Y.2d 651 (1980). Thus, the Court finds

that the Interstate Policy is not, in fact, in excess to the QBE Policy as Interstate asserts.

As such, MCE has primary coverage under the Hartford policy and Hartford must pay up to its limits before QBE and Interstate's coverage, as excess insurers, is triggered.

As for the duty to defend, "When a policy provides only excess coverage, the duty to defend or indemnify is not triggered until coverage under the primary policy has been exhausted or otherwise terminated." (*L & B Estates, LLC v Allstate Ins.*, 71 AD3d 834, 836, 897 N.Y.S.2d 188 [2d Dept 2010]). Therefore, the Interstate Policy has no duty to defend until the Hartford Policy is exhausted. [2]

---

[2] In their opposition and cross motion, plaintiffs claim that Interstate failed to timely disclaim coverage. However, while the Court finds that Interstate failed to timely disclaim and would be precluded from asserting late notice or an exclusion, Interstate is not moving on those grounds. Interstate's failure to disclaim does not preclude its motion to the extent that Interstate contends that "the Interstate Policy does not provide primary insurance for MCE in the Underlying Action since the Additional Insured (Blanket Contractual) Endorsement provides that such coverage is excess of any other insurance."

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 for death of bodily injury arising out of a motor vehicle accident or any other type of accident occurring within this state, 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.

"The reasonableness of any delay in providing such written disclaimer is measured from the time when the insurer has sufficient knowledge of facts entitling it to disclaim, or knows that it will disclaim coverage." (*First Fin. Ins. Co. v. Jetco Contr. Corp.*, 1 N.Y. 3d 64, 66 [2003]). "While Insurance Law § 3420(d) speaks only of giving notice as soon as is reasonably possible, investigation into issues affecting

an insurer's decision whether to disclaim coverage obviously may excuse delay in notifying the policyholder of a disclaimer." (*Id.*) "It is the responsibility of the insurer to explain its delay." (*Id.* at 70). "When the explanation offered for the delay is an assertion that there was a need to investigate issues that will affect the decision on whether to disclaim, the burden is on the insurance company to establish that the delay was reasonably related to the completion of a necessary, thorough, and diligent investigation." (*Quincy Mut. Fire Ins. Co. v. Uribe,* 45 AD3d 661, 662 [2007]). "Moreover, an insurer's explanation is insufficient as a matter of law where the basis for denying coverage was or should have been readily apparent before the onset of the delay." (*First Fin. Ins. Co.* at 69).

Here, plaintiffs tendered their notice to Interstate by letter, dated February 15, and Interstate did not disclaim coverage until May 20, 2008. Interstate claims that the delay was based on its need to investigate. Interstate states that it did not receive a copy of the Summons and Complaint from MCE's counsel until March 31, 2008; received a copy of the subcontract between MCE and Metro on April 24, 2008 by way of letter dated April 14, 2008; attempted to contact the insured Metro on April 30, 2008; contacted National Insurance Brokers, and the broker on the Interstate Policy on May 10, 2008 who advised that their Metro account was in active and the insured was out of business. Interstate states that by letter dated May 20, 2008, it denied coverage to MCE. By way of letter dated October 8, 2009, Rockville Risk re-tendered MCE's defense to the Underlying Action to Interstate. By letter dated October 20, 2009, Interstate reasserted its previous declination of coverage.

Even if Summons and Complaint and subcontract between MCE and Metro (which were allegedly received by Interstate on March 31, 2008 and April 24, 2008 although sent days before) were necessary as to Interstate's investigation, Interstate still has failed to offer any explanation as to why a declination letter was not issued until May 20, 2008. Interstate has offered no explanation as to why it waited until April 30, 2008 to contact its own insured [Metro] and until May 19, 2008 to contact Metro's insurance or why such a conversation with its insured was necessary in render its determination. As such, the Court finds that Interstate has failed to timely disclaim coverage pursuant to Insurance Law 3420(d). Nonetheless, while its failure to disclaim precludes it from asserting late notice or a certain exclusion, Interstate is not moving on those grounds. Interstate's failure to disclaim does not preclude the Court's analysis as to priority of the respective in order to determine whether the Interstate Policy

Illinois Union's Cross-Motion

Illinois Union cross moves for summary judgment against the claims of plaintiffs based on late notice of the occurrence, claim, and suit.

The relevant policy provides the following notification provisions:

Section IV - Commercial General Liability Conditions

2. Duties in the event of Occurrence, Offense, Claim or Suit

a. You must see to it that we are notified as soon as practicable of an "occurrence" or an offense which may result in a claim. To the extent possible, notice should include:

(1) How, when and where the "occurrence" or offense took place;

(2) The names and addresses of any injured persons and witnesses; and

(3) The nature and location of any injury or damage arising out of the "occurrence" or offense.

b. If a claim is made or "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. . . .

---

provide primary insurance or excess insurance for MCE in the Underlying Action based on its Additional Insured (Blanket Contractual) Endorsement.

You must see to it that we receive notice of the claim or "suit" as soon as practicable.

c. You and any other involved insured must:

(1) Immediately send us copies of any demands, notices, summonses or legal papers received in connection with the claim or "suit";

***

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[1972]) (where insured waited nineteen months to notify insurance company of claim).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 AD 2d 247[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.(*Id.* 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 [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.* at 440). Delays in providing notice to an insurer vitiate coverage as a matter of law. *(Id).*

Here, Illinois Union asserts that the "occurrence" at issue in the Underlying Action allegedly occurred during the exposure period from October 14, 2004 to January 20, 2005 and the Underlying Action against MCE was commenced on August 30, 2007. Illinois Union references the plaintiffs' interrogatories response in which they state that they were served with the pleadings in the Underlying Action on November 15, 2007. However, Rockville Management Associates, the third-party administrator for QBE, did not tender the defense and indemnity of MCE to Illinois

Union until February 15, 2008, three years after the alleged "occurrence" and three months after MCE learned of the claim. Illinois Union, in turn, disclaimed coverage as to MCE on February 26, 2008, eleven days after the tender. Plaintiffs have set forth no reasonable excuse for MCE's delay in reporting the occurrence and/or claim. As such, Illinois Union is entitled to summary judgment dismissing the coverage claims of MCE and QBE as against it because MCE violated the notice conditions of the Illinois Union Policy.

Wherefore, it is hereby

ORDERED, ADJUDGED and DECLARED that defendant Interstate Fire and Casualty Company's motion for summary judgment is granted to the extent that the Interstate Policy is not a primary insurance policy for plaintiff Morgan Construction Enterprises, Inc.; and it is further

ORDERED that plaintiffs QBE Insurance Corporation and Morgan Construction Enterprises, Inc.'s cross motion is denied; and it is further

ORDERED, ADJUDGED, DECLARED that defendant Illinois Union Insurance Company's motion for summary judgment is granted and the Complaint as against defendant Illinois Union Insurance Company is dismissed; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

This constitutes the decision and order of the court.

Dated: 10/25/12

EILEEN A. RAKOWER, J.S.C.