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

PRESENT: Hon. Shlomo S. Hagler PART: 17
Justice

THE DOE FUND, INC.,
KNICKERBOCKER CONSTRUCTION II, LLC,
ATLANTIC DEVELOPMENT GROUP, LLC
and BORICUA VILLAGE ASSOCIATES, A-2, LP,

Plaintiffs,

-against-

INTERSTATE FIRE & CASUALTY COMPANY,

Defendant.

INDEX NO.: 106985/10

MOTION SEQ. NO.: 002

DECISION and ORDER

NEW YORK PRECAST, LLC and
NEW YORK STEEL FABRICATORS,

Plaintiffs,

-against-

INTERSTATE FIRE & CASUALTY COMPANY,

Defendant.

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 by Defendant Interstate Fire & Casualty Company for summary judgment and an order declaring that it owes no duty to defend or indemnify plaintiffs in an underlying personal injury action in this court entitled *Marin v Doe Fund*, Index No. 106605/09

	Papers Numbered
Defendant Interstate's Notice of Motion for Summary Judgment Against All Plaintiffs	1
Affirmation of Defendant's Counsel Frank A. Valverde, Esq., in Support of Interstate's Motion with Exhibits A through M	2
Affidavit of Interstate's Claims Specialist Ron Blecker in Support of Defendant Motion with Exhibits A through G	3
Defendant Interstate's Memorandum of Law in Support of Defendant's Motion	4
Affirmation of Plaintiffs' Counsel Peter Kreymer, Esq., in Opposition to Defendant's Motion with Exhibits 1 through 8	5
Reply Affirmation of Defendant's Counsel Frank A. Valverde, Esq., in Further Support of Defendant's Motion with Exhibits A through D	6
Copy of Insurance Policy at Issue	7
Transcript of Oral Argument of May 13, 2013	8

Upon the foregoing papers, it is hereby ordered that this Motion is granted as set forth in the attached separate written Decision and Order.

Dated: December 17, 2013
New York, New York

Hon. Shlomo S. Hagler, J.S.C.

Check one: ❑ **Final Disposition** ❑ **Non-Final Disposition**
Motion is: ❑ Granted ❑ Denied ❑ Granted in Part ❑ Other
Check if Appropriate: ❑ SETTLE ORDER ❑ SUBMIT ORDER
❑ DO NOT POST ❑ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 17

----------X

THE DOE FUND, INC., KNICKERBOCKER CONSTRUCTION II, LLC, ATLANTIC DEVELOPMENT GROUP, LLC and BORICUA VILLAGE ASSOCIATES, A-2, LP,

Plaintiffs,

-against-

INTERSTATE FIRE & CASUALTY COMPANY,

Defendant.

----------X

Index No.: 106985/10
Motion Seq. No. 002

DECISION AND ORDER

----------X

NEW YORK PRECAST, LLC and NEW YORK STEEL FABRICATORS,

Plaintiffs,

-against-

INTERSTATE FIRE & CASUALTY COMPANY,

Defendants.

----------X

Index No.: 108080/11

HON. SHLOMO S. HAGLER, J.S.C.:

In this declaratory judgment action involving insurance coverage, defendant Interstate Fire & Casualty Company ("Interstate") moves, under CPLR 3212, for summary judgment and an order declaring that it owes no duty to defend or indemnify plaintiffs in an underlying personal injury action in this court entitled *Marin v Doe Fund*, Index No. 106605/09.

BACKGROUND

Plaintiff, the Doe Fund Inc. ("Doe Fund"), owns a property located at 508 163rd Street in the Bronx (the "Property"). Plaintiff in the underlying action, Kelly Marin ("Marin"), a steelworker, was allegedly injured on October 1, 2008 while working on the Property when he

fell thirteen feet from a steel beam to the ground. At the time, the Doe Fund leased the Property to plaintiff Boricua Village Associates, A-2, LP ("Boricua Village"). Boricua Village hired plaintiff Knickerbocker Construction II, LLC ("Knickerbocker") as the general contractor of the project on which plaintiff was injured. Plaintiff Atlantic Development Group, LLC ("Atlantic") developed the project.

On May 7, 2008, Knickerbocker entered into a form subcontract agreement with New York Precast, LLC ("NY Precast"). Trent Skinner ("Skinner"), a project manager for NY Precast and New York Steel Fabricators ("NY Steel"), a steel erection company that is related to NY Precast, testified that the two companies have common owners, and that NY Precast manufactures hollow concrete flooring, while NY Steel performs steel erection (Skinner May 17, 2012 deposition at 5). While the subcontract was executed by Knickerbocker and NY Precast, there is a notation on the first page that states: "Trade: (A-2) steel." Plaintiffs read NY Steel into the agreement based on this notation, while Interstate does not. Thus, there is a dispute between plaintiffs and defendant as to whether Knickerbocker contracted with NY Precast and NY Steel, or solely with NY Precast. However, it is clear from Skinner's testimony that, while NY Precast fabricated concrete flooring for the project, NY Steel performed steel installation at the project (Skinner deposition at 13, 57).

Interstate issued a commercial general liability policy to NY Precast and NY Steel, as co-insureds, bearing policy number CG 0001798 (the "Policy"). The Policy ran from June 29, 2008 until June 29, 2009.

While the accident report filled out by Knickerbocker describes Marin, the underlying plaintiff, as a NY Precast employee, Skinner, the project manager for both NY Precast and NY Steel, describes Marin as an employee of NY Steel (Skinner deposition at 39-40).

Marin initiated the underlying action by filing a summons and complaint on May 11, 2009. On May 27, 2010, plaintiffs, who are defendants in the underlying action, initiated this action seeking a declaration that Interstate owes a duty to defend and indemnify them in the underlying action. Subsequently, on July 14, 2011, NY Precast and NY Steel, third-party defendants in the underlying action, also filed an action against Interstate seeking a declaration that Interstate owes them a duty to defend and indemnify in the underlying action.[1] By a court-ordered stipulation dated November 30, 2011, the two declaratory judgment actions were consolidated.

Interstate argues that the Doe Fund, Atlantic, and Boricua Village are not additional insureds under the Policy it issued to NY Precast. As to Knickerbocker, Interstate argues, among other things, that it is not entitled to coverage because the accident did not involve NY Precast and because Knickerbocker failed to timely notify it of the accident.

DISCUSSION

"Summary judgment must be granted if the proponent makes 'a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact,' and the opponent fails to rebut that showing" (*Brandy B. v Eden Cent. School Dist.*, 15 NY3d 297, 302 [2010], quoting *Alvarez v Prospect Hosp.*, 68

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[1] *New York Precast, LLC v Interstate Fire Ins. Co.*, Index No. 108080/11 (Sup Ct, NY County).

NY2d 320, 324 [1986]). However, if the moving party fails to make a prima facie showing, the court must deny the motion, "'*regardless of the sufficiency of the opposing papers*'" (*Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008], quoting *Alvarez*, 68 NY2d at 324).

Preliminarily, plaintiffs argue that Interstate's motion is premature and procedurally defective. As to the former, plaintiffs argue that, although they filed the note of issue on October 19, 2012, Interstate's motion for summary judgment is premature. Plaintiffs refer to the note of issue, which states, "There are no outstanding requests for discovery, except for plaintiffs' demand for defendant's deposition – to which defendant has agreed" (Note of Issue dated October 19, 2012, at 2). Plaintiffs argue that they need the deposition of Ron Blecker ("Blecker"), Interstate's adjuster, but have not shown "that other facts essential to justify opposition to the motion might exist but could not be stated without" Blecker's deposition (*Aburto v City of New York*, 94 AD3d 640, 641 [1st Dept 2012]). As such, Interstate's motion is not premature.

Plaintiffs also argue that Interstate's motion is procedurally defective because it submits an uncertified copy of the Policy. Plaintiffs discount an affidavit submitted by Blecker, in which he states that the submitted policy is "a true and correct copy" because Blecker is an adjuster rather than an underwriter (Blecker Affidavit sworn to on December 12, 2011, at ¶ 4). However, plaintiffs provide no cases holding that this is a distinction that makes a difference in these circumstances, or that Interstate's motion is procedurally defective. The case that plaintiffs do offer, *Hudson Hills Tenant Corp. v Stovel* (38 Misc 3d 25, 27-28 [App Term, 2d Dept, 9th and 10th Jud Dists 2012]), involving a holdover proceeding where the landlord's attorney verified a lease without establishing personal knowledge, is inapplicable. Here, as Blecker had personal

knowledge of the Policy through his claim handling of the matter, Interstate's motion is not procedurally defective (Blecker Aff at ¶ 1).

Availability of Additional Insured Coverage

Interstate looks to the language of its Policy to establish entitlement to judgment against the Doe Fund, Atlantic, and Boricua Village. Specifically, the Policy contains an additional insured endorsement that provides that an additional insured is "[a]ny person or organization for whom you are performing operations when you and such person or organization have agreed in writing in a contract or agreement that such person or organization be added as an additional insured on your policy." Interstate argues that since the Doe Fund, Atlantic, and Boricua Village do not have independent contracts with NY Precast or NY Steel establishing their status as additional insureds, then they are not additional insureds under the plain language of the Policy.

Interstate relies on *Linarello v City Univ. of N.Y.* (6 AD3d 192 [1st Dept 2004]). In *Linarello*, parties were denied additional insured status where the policy, as here, required written contracts, and those parties seeking additional insured status had no independent contracts with the policy-holding subcontractor (*id.* at 195).

Plaintiffs argue that *Linarello* is distinguishable because the prime construction contract was incorporated into the subcontract, and, thus, the Doe Fund, Atlantic, and Boricua Village have, effectively, contracted with NY Precast and NY Steel. Plaintiffs point to section 1.1 of the subcontract between Knickerbocker and NY Precast, which states, in relevant part: "The Subcontract Documents consist of (1) this Agreement; (2) the Prime Contract, consisting of the Agreement between the Owner and Contractor and the other Contract Documents enumerated therein. . . ." Section 16.1.2 reiterates that the prime contract is part of the subcontract.

Plaintiffs rely on *Carlisle SoHo E. Trust v Lexington Ins. Co.* (49 AD3d 272 [1st Dept 2008]). In *Carlisle SoHo E. Trust,* plaintiff, a subcontractor "was entitled to coverage under the terms of the policy issued by [the insurer] to its named insured . . . which states that it includes as an additional insured 'any person or entity that is required to be so named in a covered written contract with [the named insured]'" (*id.* at 272). The Court reasoned that:

> "The incorporated subcontract, which required, inter alia, that plaintiff be named as an additional insured under the subcontractor's general liability and umbrella policies, expressly stated that all insurance required thereunder was binding on a sub-subcontractor retained by the subcontractor. Moreover, the sub-subcontractor, in agreeing to be bound by the subcontract, made specific revisions to the provisions setting forth the limits of umbrella coverage but made no change to the provision requiring that plaintiff be covered as an additional insured, thereby demonstrating a specific intent to be bound by the latter"

(*id.*).

Interstate contends that *Carlisle SoHo East Trust* is distinguishable because it lacks the phrase "when you and such person or organization have agreed in writing" which, they maintain, renders the incorporation clause inapplicable. Interstate refers to *200 Fifth Ave. Owner, LLC v New Hampshire Co.* (2012 NY Slip Op 31526[U] [Sup Ct, NY County 2012]), which involved a policy requiring privity between the named insured and any additional insurer, and distinguished *Carlisle SoHo E. Trust*:

> "the policy under scrutiny in *Carlisle* stated that an 'additional insured' would include 'any person or entity that is required to be so named in a covered written contract with [the named insured].' In the case at bar, to be considered an additional insured, 200 Fifth would need to have a written contract directly with Empire City, which it did not have"

(*id.* at *12-13, quoting *Carlisle SoHo E. Trust*, 49 AD3d at 272).

Finally, plaintiffs, in order to demonstrate that the requirement of independent contracts to establish additional insured status conflicts with their expectations, submit an affidavit from Doron Resheff ("Resheff"), Knickerbocker's executive vice president, who states that "it is not the custom or practice with the construction industry to have an owner or developer sign a subcontract agreement with a subcontractor" (Resheff Affidavit sworn to on March 15, 2013, at ¶ 2).

Here, the plain language of the insurance Policy bars coverage for the Doe Fund, Atlantic, and Boricua Village because they did not execute agreements with NY Precast or NY Steel. The line of cases following *Linarello* has made clear that the language in Interstate's Policy requires independent agreements between the insured and the purported additional insured (*see City of New York v Nova Cas. Co.*, 104 AD3d 410 [1st Dept 2013]; *AB Green Gansevoort, LLC v Peter Scalamandre & Sons, Inc.*, 102 AD3d 425 [1st Dept 2013]).[2] In *Nova Cas. Co.*, for example, the Appellate Division found that no additional insured coverage was present where the policy required independent agreements, and the record "contain[ed] no such freestanding agreement" (104 AD3d at 410). Moreover, the Appellate Division added that "[t]he language . . . incorporating by reference the terms of the prime contract, which required the contractor to add [plaintiff] as an additional insured under its policies, is insufficient to create that obligation" (*id.* at 410-411). If it is found that NY Precast or NY Steel owed a duty to these plaintiffs to procure insurance, then they may have a claim for breach of contract. However, such a finding would not

[2] Since the additional insured provision is clear, Resheff's affidavit as to the industry standard is of no import (*see Banco Espírito Santo, S.A. v Concessionária Do Rodoanel Oeste S.A.*, 100 AD3d 100, 106 [1st Dept 2012] ["Parol evidence cannot be used to create an ambiguity where the words of the parties' agreement are otherwise clear and unambiguous]").

obligate Interstate to provide additional insured coverage to these parties (*see Linarello*, 6 AD3d at 195).

As no additional insured coverage is owed to the Doe Fund, Atlantic, and Boricua Village, Interstate's motion for summary judgment must be granted.

Late Notice

Interstate argues that Knickerbocker is not entitled to coverage because it did not notify Interstate of Marin's accident until December 30, 2008, ninety days after Marin's fall, while the Policy requires that notice of the "occurrence" be provided "as soon as practicable" (Interstate Policy, § 4.2 [a]). In order to show that Knickerbocker was aware of the accident, Interstate submits Knickerbocker's accident report, dated October 2, 2008, the day after the accident.

Knickerbocker contends, through an attorney affirmation, that it has a reasonable excuse for the delay, namely that it could not determine whether Marin worked for NY Precast or NY Steel. Knickerbocker also contends that the notice was 70 days late, rather than 90 days late, as the notice was dated December 10, 2008, even though it was fax-stamped 20 days later.

In reply, Interstate argues that Knickerbocker fails to explain why uncertainty as to whether Marin was employed by NY Precast or NY Steel would prevent Knickerbocker from providing notice of occurrence, as Interstate insured both NY Precast and NY Steel.

"For years the rule in New York has been that where a contract of primary insurance requires notice 'as soon as practicable' after an occurrence, the absence of timely notice of an occurrence is a failure to comply with a condition precedent which, as a matter of law, vitiates the contract" (*Argo Corp. v Greater N.Y. Mut. Ins. Co*, 4 NY3d 332, 339 [2005]). For insurance policies, like the subject one, issued before January 17, 2009, there is no requirement that the

insurer show that it was prejudiced by the lateness (*Jimenez v Monadnock Const., Inc.*, 109 AD3d 514 [2d Dept 2013]; *see also* Insurance Law § 3420 (a) (5); *Waldron v New York Cent. Mut. Fire Ins. Co.*, 88 AD3d 1053, 1054-1055 [3d Dept 2011]). This duty extends to putative additional insureds (*see e.g. Bovis Lend Lease LMB, Inc. v Travelers Prop. Cas. Co. of Am.*, 78 AD3d 405, 405 [1st Dept 2010] ["[a]s a purported additional insured under a commercial liability policy, [plaintiff] was required to give defendant notice of the underlying claim as soon as practicable. Absent a valid excuse, the failure to satisfy this notice requirement, which is a condition precedent to coverage, vitiates the policy"]).

Here, it is immaterial whether the delay was 70 days or 90 days. The Appellate Division has recently held that "in the absence of an excuse, even a 60-day delay in notifying the insurer is not 'as soon as practicable.' Such late notice would violate the notice condition of the insurance policy as a matter of law" (*Hermany Farms, Inc. v Seneca Ins. Co., Inc.*, 76 AD3d 889, 890 [1st Dept 2010]). Moreover, Knickerbocker fails to rebut Interstate's prima facie showing of entitlement to judgment. It is not a valid excuse that Knickerbocker did not know whether Marin worked for NY Precast or NY Steel, as both were insured by Interstate. As such, Knickerbocker had sufficient information of the occurrence, and violated the notice condition of the Policy as a matter of law. Accordingly, Interstate's motion for summary judgment dismissing Knickerbocker's application for an order declaring that Interstate has an obligation to defend and indemnify it in the underlying action is granted.

Bad Faith Claim

Interstate argues that all bad faith claims brought against it by the Doe Fund, Atlantic, and Boricua Village should be dismissed as they are not additional insureds under the Policy and the

claims are duplicative of their breach of contract claims. The Doe Fund, Atlantic, and Boricua Village argue that their bad faith claims are valid because Interstate's additional insured Policy is misleading.

Here, the bad faith claims of the Doe Fund, Atlantic, and Boricua Village must be dismissed. In order to recover under a bad faith claim, an insured must show that the insurer evinced a "'gross disregard' of plaintiff's interests" (*DMP Contr. Corp. v Essex Ins. Co.*, 76 AD3d 844, 847 [1st Dept 2010]). Plaintiffs cannot show bad faith on the basis of a contractual requirement that has been upheld repeatedly by the Appellate Division (*see e.g. Linarello*, 6 AD3d 192; *City of New York*, 104 AD3d 410; *AB Green Gansevoort, LLC v Peter Scalamandre & Sons, Inc.*, 102 AD3d 425). As such, the branch of Interstate's motion seeking dismissal of bad faith claims made by the Doe Fund, Atlantic, and Boricua Village is granted.

CONCLUSION

Based on the foregoing, it is

ORDERED that defendant Interstate Fire & Casualty Company's motion for summary is granted; and it is further

ADJUDGED and DECLARED that defendant has no obligation to defend and indemnify plaintiffs in the underlying action in Supreme Court, New York County entitled *Marin v Doe Fund*, Index No. 106605/09.

Dated: December 17, 2013

ENTER:

Hon. Shlomo S. Hagler