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

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LIBERTY MUTUAL FIRE INSURANCE COMPANY, as subrogee of EDISON PROPERTIES, LLC, EDISON CONSTRUCTION MANAGEMENT, LLC, and 5030 BROADWAY PROPERTIES, LLC,

Plaintiff,

-against-

Index No. 653341/13

NAVIGATORS INSURANCE COMPANY,

DECISION/ORDER

Defendant,

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HON. ELLEN M. COIN, J.:

Motion sequences 004 and 005 are consolidated for disposition.

This action arises from an insurance coverage dispute in which defendant Navigators Insurance Company (Navigators) disclaimed coverage under an excess liability policy based on late notice for an underlying construction site accident involving bodily injury.

In motion sequence number 004, defendant Navigators moves for summary judgment dismissing the complaint. In motion sequence number 005, plaintiff Liberty Mutual Fire Insurance Company (Liberty Mutual), as subrogee of Edison Properties, LLC, Edison Construction Management, LLC, and 5030 Broadway Properties, LLC, seeks satisfaction of a judgment entered on July 3, 2013 in *Pedro Corchado v 5030 Broadway Properties, LLC and Edison Properties, LLC*, Supreme Court, Richmond County, index No. 102779/09 (the Underlying Action) from defendant Navigators in the amount of $850,000, plus interest and costs and disbursements. For the reasons stated, plaintiff's motion is granted, and defendant's motion is denied.

I. Background and Procedural History

On or about August 25, 2008, Pedro Corchado (Corchado) was employed as a sprinkler fitter by V. Barile, Inc. (Barile). Barile had entered into a subcontract with Edison Construction Management, LLC for construction work at 5030 Broadway (Lisa C. Wood Affirmation dated February 28, 2016; Ex. A ¶11 at 3). While working at the premises, Corchado allegedly fell from a ladder and sustained various bodily injuries. On November 19, 2009, Corchado filed the Underlying Action, seeking damages for the injuries he sustained as a result of his fall (Michael L. Ihrig II affidavit sworn to April 12, 2016, Ex. 5).[1]

Pursuant to the terms of the subcontract, Barile was required to procure a commercial general liability insurance policy naming Edison Entities and 5030 Broadway as additional insureds (Ihrig Aff, Ex. 6). Everest Indemnity Insurance Company (Everest) issued a Commercial General Liability policy to Barile as insured and to 5030 Broadway and Edison Entities as additional insureds bearing policy number 51GL002948-071, in effect from January 11, 2008 to January 11, 2009 with a limit of $1,000,000 per occurrence (Wood Aff, Ex. J). Navigators issued a Commercial Umbrella Liability policy naming Barile as insured and bearing number NY08UMB120530NV, in effect for the period of January 11, 2008 to January 11, 2009, with a limit of $4,000,000 per occurrence, and in the aggregate in excess of the $1,000,000 Everest policy (Wood Aff, Ex. P).

In his bill of particulars dated January 18, 2010, Corchado alleged that his injuries include cervical disc herniations; disc bulges; a straightening of the cervical lordosis;

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[1] Corchado's original complaint named 5030 Broadway Properties, LLC and Edison Properties, LLC as defendants. His amended verified complaint dated December 9, 2010 added Edison Construction Management, LLC, as a party defendant. The two Edison defendants are referred to hereinafter collectively as Edison Entities.

radiculopathy; an internal derangement of the cervical, lumbar and thoracic spine as well as of the right shoulder, right elbow and left knee; cervical and lumbar sprain/strain; and a scalp contusion of the vertex with swelling of the soft issues (Wood aff, Ex. F). The bill of particulars further included allegations of severe physical and emotional pain and suffering; restriction and loss of motion and "possible necessity of future surgery" on the right shoulder, right elbow, left knee, and cervical and lumbar spine (*id.*). Corchado also claimed that he had been incapacitated from employment from the date of the accident, and that he incurred approximately $30,000 in physicians' services, $67,200 in past lost earnings, both of which would continue into the future, and approximately $2,500 in hospital expenses (*id.*).

On February 26, 2010, Edison Properties and 5030 Broadway filed a third-party summons and complaint (Ihrig aff, Ex. 8) against Barile for contractual and common law indemnification, contribution pursuant to the "grave injury" exception to the Worker's Compensation Law, and breach of contract for failing to procure additional insured coverage in their favor pursuant to Insurance Law § 3420.[2]

Corchado underwent cervical epidural steroid injections on March 31, 2010 and April 21, 2010, to decrease his neck and radiating pain (Wood aff, Ex. G). A supplemental bill of particulars dated June 4, 2010 added that Corchado "will require cervical fusion surgery" and the "necessity to undergo cervical epidural steroid injections and related pain management including but not limited to physical therapy and medications." (Wood aff, Ex. H, ¶ 3). A possible necessity for future surgery of the right shoulder, right elbow and left knee was also noted (*id.*). Furthermore, Corchado asserted that he sustained approximately $90,200 in past lost earnings

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[2] The caption of the third-party action was subsequently amended by stipulation to include Edison Construction Management as a third-party plaintiff (Ihrig aff, Ex. 20).

and is expected to sustain future economic losses totaling approximately $3,000,000 for lost wages and benefits (*id.*).

Corchado then proceeded to consult with Dr. Andrew Merola, whose note dated July 9, 2010, confirms the need for surgery on the cervical spine (Wood aff, Ex. L). His August 27, 2010 entry records Corchado's 100 percent disability and further deteriorating state, and that the operation has been authorized (*id.*).

On November 4, 2010, Dr. Merola operated on Corchado to prevent further neurological deterioration in a surgical discectomy. The procedure included insertion of bone grafts and screws (Ihrig aff, Ex. 10).

On November 17, 2010, Liberty Mutual wrote to Everest and Navigators, tendering a claim for defense and indemnification on behalf of 5030 Broadway and Edison Properties in the Underlying Action (Ihrig aff, Ex. 13). Liberty Mutual sent a follow-up letter, dated December 10, 2010, described as the "last and final tender for additional insured coverage and defense and indemnity." The letter was addressed to Everest, with a copy to Barile's attorneys, Liberty Mutual's defense counsel for its insured, and to Navigators (Ihrig aff, Ex. 17). By letter dated December 22, 2010, Navigators acknowledged receipt only of Liberty Mutual's December 10, 2010 tender. On December 29, 2010, Navigators sent a disclaimer letter to Barile, Liberty Mutual, and others, disclaiming coverage on the ground of late notice of the accident (Ihrig aff, Ex. 19).

In a second supplemental bill of particulars dated January 7, 2011, Corchado set forth his surgical procedure and the necessity for future surgery (Ihrig aff, Ex. 1). On February 11, 2011, Barile notified Navigators of the Underlying Action by email and letter (Wood aff, Ex. M).

In May 2013, Edison Entities settled the Underlying Action with Corchado for $1,850,000. On May 9, 2013, Edison Entities' motion against Barile for contractual indemnification was granted. Everest paid its $1,000,000 policy limit toward the $1,850,000 settlement amount. Liberty Mutual satisfied the remainder of the settlement in the amount of $850,000. On July 3, 2013, 5030 Broadway and Edison Entities were granted judgment in the Underlying Action against Barile in the sum of $850,000 (Christopher Faddis affidavit sworn to April 11, 2016, ¶¶ 30-32 at 7). In the instant action, Liberty Mutual now seeks to satisfy the $850,000 money judgment obtained against Barile in the Underlying Action.

II. Contentions

Navigators claims that Liberty Mutual knew of the severity of Corchado's injuries and the value of his claim by April 15, 2010, when Corchado's January 18, 2010 bill of particulars, containing allegations related to the seriousness of his cervical injuries and the possible need for future surgery, was posted in Liberty Mutual's claim notes. Navigators asserts that Liberty Mutual should have known as a matter of law that Corchado's claim could implicate Navigators' policy no later than July 2010, when plaintiff became aware of Corchado's supplemental bill of particulars (Wood aff, Ex. H) containing claims of serious injuries requiring surgery and $3 million in past and future economic loss.

Navigators denies receiving Liberty Mutual's November 17, 2010 letter and argues that Liberty Mutual's tender of the Corchado claim in December 2010 was untimely, as notice was not provided as soon as practicable, as required by the terms of Navigators' policy. Defendant also argues that there is a question of fact as to whether the November letter was mailed. Furthermore, plaintiff's nearly 5-month delay was unreasonable as a matter of law, as there was no "deliberative determination" to explain it.

Defendant further argues that Liberty Mutual's attempt to notify Navigators of the claim in its November 17, 2010 letter (Wood aff, Ex. O) is insufficient as a matter of law to place Navigators on notice of the Corchado claim, as Liberty failed to proffer information about how, when and where the "event" took place, the names and addresses of any injured persons and witnesses, and the nature and location of the injury. Defendant claims its obligation to cover its insured's loss was not triggered until December 10, 2010, when Liberty Mutual provided notice in accordance with the terms of the policy (Wood aff, Ex. I).

Plaintiff Liberty Mutual alleges that Navigators' sole defense to coverage for Barile has no merit for three reasons. First, Navigators waived its late notice defense by failing to timely disclaim coverage pursuant to Insurance Law § 3420 (d), which provides that an insurance carrier must give its insured and claimants written notice of disclaimer of coverage as soon as is reasonably possible. Plaintiff argues that Navigators received the November 17, 2010 tender letter on November 22, 2010, but waited 37 days, until December 29, 2010 to issue a disclaimer letter, and has no reasonable excuse for this delay. Plaintiff also claims that its notice complied with Insurance Law § 3420 (a) (3), in that it provided Navigators "with particulars sufficient to identify the insured." (Plaintiff's memorandum of law, 4/12/15, p. 6) Liberty Mutual states that Navigators' disclaimer was based solely on late notice of claim, not late notice of the accident, and that its notice conformed to Navigators' policy provision set forth in paragraph 6(b). In any event, Navigators' reliance on its policy provisions set forth in paragraph 6(a) is misplaced as they pertain to the duty to cooperate, not to promptly notify. Secondly, plaintiff asserts that the belated disclaimer was defective pursuant to Insurance Law § 3420 (d), as it was premised on Barile's late notice, rather than Edison Entities' notice, and, thus, the disclaimer fails to apprise Liberty Mutual with a high degree of specificity of the ground or grounds on which it is

predicated. Lastly, Liberty Mutual alleges that there was no breach of the Navigators notice provision as the policy only requires that notice be provided if a claim "may be reasonably expected to result in a claim under this policy." (*Id.* at p. 15).

III. Discussion

A. Summary Judgment Standard

The principle is well settled that the proponent of a summary judgment motion 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 *(Zuckerman v. City of New York*, 49 NY2d 557, 562 [1980]; *Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). The motion shall be granted if neither party has shown "facts sufficient to require a trial of any issue of fact." (CPLR 3212[b]).

B. Motion Sequence Number 004

The Court will consider defendant Navigators' motion first, as the question of whether the notice was timely must be resolved before turning to the issue of whether the disclaimer was proper.

1. Notice Requirements

Compliance with a policy's notice requirements is a condition precedent to an insurer's liability under its policy (*Power Auth. of State of N.Y. v Westinghouse Elec. Corp.*, 117 AD2d 336 [1st Dept 1986]). New York State Insurance Law § 3420 (a) (3) allows notice to be given by or on behalf of the insured, or by or on behalf of the injured party. Notably, an additional insured has an independent duty, separate and distinct from that of the named insured, to provide notice in accordance with the terms of the policy (*City of New York v Investors Ins. Co. of Am.*, 89 AD3d 489 [1st Dept 2011]). The additional insured has the same obligations as the named

insured (*id.*). Where an insurance policy does not specify that an additional insured provide notice to the insurer, courts have construed an implied duty for the additional insured to provide the insurer with the notice required under the policy *(23-08-18 Jackson Realty Assoc. v Nationwide Mut. Ins. Co.*, 53 AD3d 541, 542 [2d Dept 2008]; *Structure Tone v. Burgess Steel Prods. Corp.*, 249 AD2d 144, 145 [1st Dept 1998]). The notice requirement in the policy, thus, applies equally to primary and additional insureds *(Travelers Ins. Co. v. Volmar Constr. Co.*, 300 AD2d 40 [1st Dept 2002]).

2. The Navigators Policy

The insurer's policy governs the time frame of when notice of an occurrence or loss, claim or suit must be provided. Navigators' policy provides the following notice requirements in relevant part (Ihrig aff, Ex. 22):

> "Section IV - CONDITIONS
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> 6. Duties When There is an "Event," Claim or Suit
>
> a. You must see to it that we and any other insurers who could provide coverage are notified as soon as practicable of any "event" which may be reasonably expected to result in a claim under this policy. To the extent possible, notice should include:
>
> I. How, when, and where the "event" took place;
>
> ii. The names and addresses of any injured persons and witnesses; and
>
> iii. The nature and location of any injury or damage arising out of the "event."
>
> b. If a claim is made or suit is brought against any insured which may be reasonably expected to result in a claim under this policy, you must:
>
> I. immediately record the specifics of the claim or suit and the date received; and
>
> ii. notify us, and any other insurers who could provide coverage, as soon as practicable.
>
> c. You and any other involved insured must:
>
> I. Immediately send us, and any other insurers who could provide

> coverage, copies of any demands, notices, summonses or legal papers received in connection with a claim or suit which may be reasonably expected to result in a claim under this policy; ..."

3. Timeliness of the Notice to Excess Carrier

Where a policy requires notice to be given "as soon as practicable" after an occurrence as delineated in Navigators' policy, courts have interpreted that notice must be given within a reasonable time under the circumstances (*Great Canal Realty Corp. v Seneca Ins. Co., Inc.*, 5 NY3d 742, 743 [2005]; *Travelers Ins. Co. v. Volmar Constr. Co.*, 300 AD2d at 42). An insurer may deny coverage for failure to comply with the timeliness provision of the policy. Failure to comply with a policy's timeliness requirements relieves an insurer from its obligation to defend or indemnify absent a valid reason for the delay (*1700 Broadway Co. v Greater N.Y. Mut. Ins. Co.*, 54 AD3d 593 [1st Dept 2008]).[3]

Where notice to an excess liability carrier is in issue, "the focus is on when the insured reasonably should have known that the claim against it would likely exhaust its primary insurance coverage and trigger its excess coverage, and whether any delay between acquiring that knowledge and giving notice to the excess carrier was reasonable under the circumstances" (*Morris Park Contr. Corp. v. National Union Fire Ins. Co. of Pittsburgh, Pa.*, 33 AD3d 763, 765 [2d Dept, 2006]; *National Union Fire Ins. Co. of Pittsburgh, Pa. v. Connecticut Indem Co.*, 52 AD3d 274, 276 [1st Dept 2008]). The issue of when a potential excess claim is likely to involve the excess policy is factually driven and should be considered on a case-by-case basis *(Mighty*

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[3] It is uncontested that Navigators issued the policy on January 11, 2008, prior to the amendment to Insurance Law § 3420(a), to require that an insurer also demonstrate prejudice in order for late notice to be a complete defense to coverage.

Midgets v Centennial Ins. Co., 47 NY2d 12, 19 [1979]). In *Morris Park,* the Court held that it is "the combination of the ad damnum figure and evidence regarding the seriousness of the injuries which triggers" a duty to notify an excess carrier (33 AD3d at 765).

Defendant argues that plaintiff should have known, at the latest in June or July 2010, that Navigators' policy would be implicated. However, while the June 2010 supplemental bill of particulars includes an *ad damnum* figure in excess of the primary policy limit, namely future economic losses totaling $3 million in lost wages and benefits, and makes the need for an operation less uncertain by stating that Corchado "will require cervical fusion surgery," it did not yet make it reasonably clear that the excess coverage might be implicated. As the *Morris Park* Court explained, "[i]n view of the commonplace practice of exaggerating damages requests in personal injury actions, the ad damnum clause alone was not sufficient to require the giving of notice..." (33 AD3d at 765).

Here, defendant failed to demonstrate that Liberty Mutual knew or should have known that it was likely the primary policy could be exhausted and the excess layers of Navigators' insurance policy could potentially be triggered before Liberty Mutual learned in January 2011 that Corchado underwent surgery. The record shows that plaintiff became aware that Dr. Merola conducted the November 4, 2010 surgery through discovery in a Medical Exchange report dated January 7, 2011 (Ihrig aff, Ex. 10). Learning that Corchado underwent surgery was the "trigger event" that impacted the enhancement of the value of the claim by potentially triggering the excess layers of defendant's policy *(see Nova Cas. Co. v Interstate Indem. Co.*, 42 Misc 3d 1229[A], 2014 NY Slip Op 50250[U] [Sup Ct, Kings County 2014] [obligation to notify of potential insurance claim triggered at latest when supplemental bill of particulars received listing underlying plaintiff's injuries, beginning with lumbar fusion surgery and lumbar decompression

surgery, and alleging necessity for future spinal surgery, leaving no doubt as to severity and extent of plaintiff's personal injuries and consequently potential for jury verdict exceeding $1 million coverage limit]).

Similarly, in *Eurotech Constr. Corp. v Illinois Natl. Ins. Co.* (51 Misc 3d 1209[A], 2016 NY Slip Op 50514[U] [Sup Ct, NY County 2016]), the Court found that the excess liability policy was triggered no later than when the severity of the underlying plaintiff's injuries was made clear from the evidence of multiple surgeries, including two total knee replacements, and extended physical rehabilitations, as described in the bill of particulars and deposition testimony, or, in any event, no later than upon learning of the likelihood that future surgeries would be necessary, as set forth in the supplemental bill of particulars.

Plaintiff tendered to Navigators in the fall of 2010, months before learning that Corchado underwent surgery. Based on the foregoing, the Court finds that Liberty Mutual's notice was timely.

C. Motion Sequence Number 005

The Court now turns to plaintiff Liberty Mutual's motion, which alleges that Navigators' disclaimer for late notice is meritless.

1. Duty to Timely Disclaim

Insurance Law § 3420 (d) (2) provides that an insurer wishing to disclaim liability or deny coverage for death or bodily injury must "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." However, the duty to timely disclaim is triggered only when an insured satisfies the notice of claim provision in accordance with the terms of the insurance contract (*Security Mut. Ins. Co. of N.Y. v Acker-Fitzsimons Corp.*, 31 NY2d 436, 440 [1972];

Paramount Ins. Co. v Rosedale Gardens, 293 AD2d 235, 239 [1st Dept 2002]).

More specifically, a duty to disclaim comes into existence "'once the insurer has sufficient knowledge of facts entitling it to disclaim, or knows that it will disclaim coverage ... . [T]imeliness of an insurer's disclaimer is measured from the point in time when the insurer first learns of the grounds for disclaimer of liability or denial of coverage'" (*Country-Wide Ins. Co. v Preferred Trucking Servs. Corp.*, 22 NY3d 571, 575-576 [2014] quoting *First Fin. Ins. Co. v Jetco Contr. Corp.*, 1 NY3d 64, 66, 68-69 [2003]).

The insurer must provide written notice as soon as is reasonably possible with an adequate explanation of the basis for the disclaimer *(Zurich Ins. Co. v Lumbermen's Cas. Co.*, 233 AD2d 186, 186-187 [1st Dept 1996]).

Liberty Mutual's November 17, 2010 letter to Navigators states in pertinent part:

> "Upon knowledge of the insurance carriers involved in this matter I am not [sic] formally tendering the matter to both Everest Indemnity Insurance Co and Navigators Insurance Co and request that both acknowledge my request for additional insured status under the Commercial General Liability and Excess Liability policies and advise if 5030 Broadway Properties LLC and Edison Properties LLC qualify as additional named insureds under the policies issued V Barile Inc on the matter presented by Pedro Corchado" (Ihrig aff, Ex. 13).

While Navigators denies receiving Liberty Mutual's November letter, the record shows that a return receipt card, dated November 22, 2010, bears the signature of Erin Coughlan (Wood aff, Ex. 14). Navigator admits that Erin Coughlan was its employee at the address to which Liberty's letter was mailed on November 22, 2010 (Wood aff, Ex. 15). Notwithstanding the foregoing, Liberty Mutual's November 2010 letter was insufficient as a matter of law to provide notice to Navigators under its policy, as it did not comply with the policy terms.

Liberty Mutual's December 10, 2010 tender goes into far more detail and reads in relevant part:

> "Liberty Mutual, on behalf of 5030 Broadway Properties, LLC ("5030 Broadway") and Edison Properties, LLC ("Edison Properties"), is tendering this claim to Everest Indemnity Insurance Company ("Everest)[4] for additional insured coverage and defense and indemnity pursuant to the Subcontract by and between V. Barile and Edison Construction Management, LLC ("Edison Construction") dated February 27, 2007. This will be Liberty Mutual's last and final tender for additional insured coverage and defense and indemnity for 5030 Broadway and Edison Properties before Liberty Mutual pursues a declaratory judgment against Everest.
>
> Plaintiff Pedro Corchado filed suit in the Supreme Court of the State of New York, County of Richmond, on or about November 19, 2009, against Defendants 5030 Broadway and Edison Properties ... . It is alleged that on or [sic] August 25, 2008, Mr. Corchado was in the employ of V. Barile and was in the scope of his employment when he was caused to sustain serious personal injuries at the Premises." (Wood affirmation, Ex. I)

Liberty Mutual's December 10, 2010 letter meets the policy requirements pertaining to notice and for the reasons stated above is timely. Thus, Navigators' obligation to disclaim came into existence upon its receipt of this tender letter.

Navigators' December 29, 2010 disclaimer letter reads in relevant part as follows:

> "Based upon review of the documents provided to us, Navigators disclaims coverage for this loss under the above referenced policy on the grounds that notice to Navigators of this matter was not timely and in violation of Section IV(1).[5]
>
> Navigators' was placed on notice of this matter on December 22, 2010, two years after the incident occurred. The date of loss per Summons and Complaint is August 25, 2008. The policy requires that Navigators be notified "as soon as practicable" once a claim is made. Based upon our investigation, that did not

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[4] Navigators was an addressee of this letter.

[5] Navigators' letter includes a typographical error, as the letter refers incorrectly to Section IV (1) when it quotes language from Section IV(6) of its policy.

> occur. The notice provision of the policy was breached and as a result, Navigators disclaims coverage for defense and indemnity for this matter." (Wood aff, Ex. N at LM 283).

The record refutes Liberty Mutual's argument that Navigators' disclaimer is predicated on Barile's late tender. While the disclaimer letter starts with "Dear V Barile," it is addressed to Liberty Mutual in addition to Barile, Everest, and Gallagher Bassett in the recipients' address area. It also specifies that Navigators was placed on notice of this matter on December 22, 2010 (Wood aff, Ex. N at LM 279). Furthermore, the disclaimer letter is dated December 29, 2010, well before Barile notified Navigators of Corchado's claim via email and letter dated February 11, 2011 (Wood aff, Ex. M). Therefore, the record shows that Navigators' disclaimer letter is premised on plaintiff's alleged failure to give timely notice.

As the November letter was insufficient as a matter of law to constitute notice under the policy terms and trigger Navigators' obligation to disclaim, the disclaimer was properly premised on the December 10, 2010 tender, and Navigators' mailing of its disclaimer less than 20 days later, on December 29, 2010, was also timely. However, for the reasons stated above, Liberty Mutual's notice was timely, and therefore Navigators did not properly disclaim based on late notice.

IV. Conclusion

Accordingly, it is

ORDERED that plaintiff's motion for summary judgment (mot seq 005) is granted, and the Clerk is directed to enter judgment in favor of plaintiff and against defendant in the amount of $850,000, plus interest from July 13, 2013 at the statutory rate, as calculated by the Clerk, together with costs and disbursements as taxed by the Clerk, and it is further

ORDERED that defendant's motion for summary judgment (mot seq 004) is denied.

This constitutes the decision and order of the court.

Dated: March 16 , 2017

Ellen M. Coin, A. J. S. C.