Short Form Order

COPY

Supreme Court of the County of Suffolk
State of New York - Part XLVI

PRESENT:
HON. JAMES HUDSON
Acting Justice of the Supreme Court

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DAVIS CONSTRUCTION CORP., TOWN OF ISLIP and SUFFOLK COUNTY WATER AUTHORITY,

Plaintiffs,

-against-

HARTFORD ACCIDENT AND INDEMNITY COMPANY.,

Defendant.

x----------x

INDEX NO.:008981/2014

SEQ. NOS.:001-MG; CASEDISP
002-MD; CASEDISP
003-MD; CASEDISP

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Upon the following papers numbered 1 to 63 read on this motion for Summary Judgment and a Declaratory Judgment, and 2 Cross Motions for Partial Summary Judgment and Declaratory Judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 13; Notice of Cross Motion and supporting papers 14 - 35; 36 - 38; Answering Affidavits and supporting papers 39-43; Replying Affidavits and supporting papers 44-46; 47-55; 56-57; 58-59; 60-61; 62-63; ~~Other 0;~~ ~~(and after hearing counsel in support and opposed to the motion)~~ it is,

ORDERED that the motion (001) by Defendant Hartford Accident and Indemnity Co., the cross motion (002) by Plaintiffs Town of Islip and Suffolk County Water Authority, and the cross motion (003) by Plaintiff Davis Construction Corp. are consolidated for the purpose of this determination; and it is further

ORDERED that the motion (001) by Defendant Hartford Accident and Indemnity Co., seeking summary judgment and an order declaring that Hartford is not obligated to defend or indemnify any entity, including Plaintiff Davis Construction Corp., or Hartford's named insured, Hendrickson Bros., Inc. and Davis Construction Corp., a Joint Venture in connection with the underlying property damage lawsuits commenced by Plaintiff Suffolk County Water Authority and Plaintiff Town of Islip is granted; and it is further

ORDERED that this Court declares that Hartford is not obligated to defend or indemnify any entity, including Plaintiff Davis Construction Corp., or Hartford's named insured, Hendrickson Bros., Inc. and Davis Construction Corp., a Joint Venture in connection with the underlying property damage lawsuits commenced by Plaintiff Suffolk County Water Authority and Plaintiff Town of Islip; and it is further

ORDERED that the cross motion (002) by the Plaintiffs Town of Islip and Suffolk County Water Authority for partial summary judgment and an order declaring that under various joint venture liability insurance policies issued by Defendant Hartford Accident and Indemnity Co. to Plaintiff Davis Construction Corp., that Hartford is obligated to provide a defense for Plaintiff Davis in the underlying actions brought by the Town of Islip and Suffolk County Water Authority; and dismissing Hartford's 12th, 13th, 4th, 16th, 18th,, 20th, and 23rd affirmative defenses is denied; and it is further

ORDERED that the cross motion (003) by Plaintiff Davis Construction Corp. for partial summary judgment and an order declaring that under various joint venture liability insurance policies issued by Defendant Hartford Accident and Indemnity Co. to Plaintiff Davis Construction Corp. that Hartford is obligated to provide a defense for Plaintiff Davis in underlying actions brought by the Town of Islip and Suffolk County Water Authority and dismissing Hartford's 12th, 13th, 4th, 16th, 18th,, 20th, and 23rd affirmative defenses is denied.

In this action, Plaintiffs Davis Construction Inc. ("Davis"), the Town of Islip ("Islip"), and Suffolk County Water Authority ("SCWA") seek a judgment declaring that Defendant Hartford Accident and Indemnity Co. ("Hartford") is obligated to defend and indemnify Davis for required repairs to sewer system improvements constructed by Davis from 1972 through 1975 and completed in or about 1983. SCWA and Islip alleged in their separate lawsuits[1] that Davis failed to properly backfill and support the sewer work it performed causing the roadways and facilities to lose grade, settle, collapse and otherwise disintegrate, which manifested in 1985.

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[1] The separate actions are: ***SCWA v Davis***, Index No. 91/19497; ***Town of Islip v Davis***, Index No. 91/19505, and ***SCWA v Hendrickson***, Index No. 86/16903.

The record reveals that Hartford allegedly insured a joint venture, Hendrickson Brothers, Inc. ("Hendrickson") and Davis Construction Corp., a Joint Venture between the two entities over several years from 1978 to 1984 for work performed by them for nonparty Southwest Sewer District in several towns including Islip. After completing the work, the municipal entities sued Hendrickson and alleging the same causes of action which were asserted against Davis.[2] Hendrickson notified Hartford of the pending actions against it. Although Hartford originally disclaimed coverage, by Order dated December 6, 1996 (McCarty, J.)[3], the Court determined that Hartford and Insurance Company of North America[4] had a duty to defend Hendrickson. Notably, there was no issue regarding whether Hendrickson timely notified Hartford. On March 5, 1999, the Town of Hempstead, the Town of Islip, the Town of Babylon, the Bethpage Water District, and the Suffolk County Water Authority entered into an agreement, settling all underlying claims with Hendrickson Brothers, Inc.[5] and its insurers.[6] The parties acknowledged two Suffolk County Southwest Sewer District joint venture contracts in the Town of Islip, contracts 4002-3 and 4004-5, which were executed by Hendrickson and Davis. Islip and SCWA equitably apportioned their alleged road and water main damages on a 50/50 basis between the two contractors and agreed to seek the balance of their damages against Davis only and fully released and discharged Hendrickson from any and all underlying claims arising out of these two contracts. The agreement also acknowledged that the joint venture was dissolved.

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The actions which were commenced against Hendrickson are as follows: ***Town of Hempstead v Hendrickson***, Index No. 85/16673; ***Town of Hempstead v Hendrickson***, Index No. 88/6886; ***Town of Babylon v Hendrickson***, Index No. 87/24711; ***Suffolk County Water Authority v Hendrickson***, Index No. 86/16903; ***Town of Islip v Hendrickson***, Index No. 88/17997; and ***Bethpage Water District v Hendrickson***, Index No. 96/21568.

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The action was commenced in Nassau Supreme Court, captioned ***Hendrickson Bros., Inc., Town of Hempstead, Town of Babylon, Suffolk County Water Authority and Town of Islip, as Intervenors v The Hartford Insurance Company and Insurance Company of North America***, Index No. 90/6491.

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Insurance Company of North America was succeeded by CIGNA Companies, as stated in the settlement agreement dated March 5, 1999.

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The underlying claims which originated from the actions cited in Footnote 2 were settled.

6

Hartford contends that the settlement was made utilizing insurance policies issued solely to Hendrickson Brothers, Inc., not to the joint venture.

There is no dispute that Davis did not notify Hartford of the lawsuits commenced against it. A review of the Court files reveals that SCWA served Davis with the Summons and Complaint on November 21, 1985, and purchased an index number on September 23, 1991. Likewise, Islip served Davis with the Summons and Complaint on June 4, 1987 and purchased an index number on September 23, 1991. The record reveals that by letter dated May 10, 2011, counsel for Davis notified Hartford for the first time of the actions commenced against it. By letter dated June 14, 2011, Hartford disclaimed coverage on the ground that Davis and SCWA failed to timely notify Hartford of the suits, and failed to forward copies of the lawsuit to Hartford as soon as practicable, a condition precedent to coverage. This action was commenced on April 30, 2014.

The amended complaint seeks a judgment declaring that Hartford joint policies are obligated to provide a defense and to indemnify the joint venture against claims pending against the joint venture by the Islip and SCWA. In its answer, Hartford asserted twenty-nine affirmative defenses.

Hartford now moves for summary judgment dismissing the amended complaint and for a declaration that Hartford is not obligated to defend or indemnify Davis in the underlying actions. Islip and SCWA cross-move for partial summary judgment declaring that Hartford is obligated to provide a defense for Davis in the underlying actions brought by Islip and SCWA; dismissing Hartford's twelfth, thirteenth, and fourteenth affirmative defenses related to late notice; dismissing the sixteenth affirmative defense asserting that damages set forth in the underlying actions were not caused by an occurrence under its policies; dismissing the eighteenth affirmative defense, asserting that the underlying activities do not fall within the definition of property damage within the meaning of the Hartford policies; dismissing the twentieth affirmative defense, asserting that Hartford has no indemnification obligations under the Hartford policies to the extent that any property damage took place outside the policy periods of the alleged Hartford policies; and dismissing the twenty-third affirmative defense, asserting that Hartford has no defense or indemnity obligations by virtue of the faulty workmanship/work product exclusion. Davis cross-moves for the identical relief as Islip and SCWA.

It is well established that summary judgment may be granted only when it is clear that no triable issue of fact exists (*see* ***Zuckerman v New York***, 49 NY2d 557, 562, 427 NYS2d 595 [1980]; ***Sillman v Twentieth Century-Fox Film Corp.***, 3 NY2d 395, 404, 165 NYS2d 498 [1950]). The burden is upon the moving party to make a prima facie showing that he or she is entitled to summary judgment as a matter of law by presenting evidence in admissible form demonstrating the absence of any material facts (***Giuffrida v Citibank Corp.***, 100 NY2d 72, 760 NYS2d 397 [2003]). Once a *prima facie* showing has been made, the burden shifts

to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish material issues of fact which require a trial of the action (***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]).

It is well settled that an insurance policy provision requiring the insured to notify the insurer of a covered occurrence is a condition precedent to the company's duty to defend or indemnify claims against the insured and the failure to provide such notice typically precludes the insured from obtaining coverage under the subject insurance policy (*see*, ***Kambousi Rest., Inc. v Burlington Insurance Company***, 58 AD3d 513, 871 NYS2d 129 [1st Dept 2009]; ***1700 Broadway Co. v Greater N. Y. Mutual Insurance Co.***, 54 AD3d 593, 863 NYS2d 434, [1st Dept 2008]; ***White v New York***, 81 NY2d 955, 957, 598 NYS2d 759 [1993]). The duty to give notice arises when, from the information available relative to the accident, an insured could glean a reasonable possibility of the policy's involvement (***Tower Ins. Co. of N.Y. v Lin Hsin Long Co.***, 50 AD3d 305, 855 NYS2d 75 [1st Dept 2008]; ***Paramount Ins. Co. v Rosedale Gardens, Inc.***, 293 AD2d 235, 743 NYS2d 59 [1st Dept 2002]).

When there is evidence of an excuse or mitigating circumstance recognized by the law, the question of the reasonableness of the insured's failure to promptly notify will generally be one for the jury (***Argentina v Otsego Mut. Fire Ins. Co.***, 86 NY2d 748, 631 NYS2d 125 [1995]). A good faith belief in non-liability or incapacity of the insured, may provide a reasonable excuse for the failure to notify the insurer of a claim (*see* ***D'Aloia v Travelers Ins. Co.***, 85 NY2d 825, 826, 623 NYS2d 837 [1995]; ***Argentina v Otsego Mut. Fire Ins. Co.***, *supra*).

The purpose of an action for a declaratory judgment is to serve some practical end in quieting or stabilizing an uncertain or disputed jural relation either as to present or prospective obligations (***James v Alderton Dock Yards, Ltd.***, 256 NY 298, 305, 176 NE 401, rearg denied 256 NY 681, 177 NE 191 [1931]). An action for a declaratory judgment is not subject to dismissal merely because the Plaintiff is not entitled to the declaration that it seeks (***Lanza v Wagner***, 11 NY2d 317, 334, 229 NYS2d 380 [1962], *appeal dismissed,* 371 US 74, 83 S. Ct. 177, 9 L.Ed.2d 163, cert denied 371 US 901, 83 S. Ct. 205 [1962]). In such a case, rather than dismiss the complaint, the court should make an appropriate declaration of the rights and obligations of the parties with respect to the subject matter of the litigation (***Sweeney v Cannon***, 30 NY2d 633, 331 NYS2d 444 [1972]).

The evidence submitted by the Defendant was sufficient to meet its burden of establishing, as a matter of law, that it is entitled to judgment as a matter of law, and a declaration that it has no duty to defend Davis in these two prior actions. In support of its

motion, Hartford submits, *inter alia*, a copy of the pleadings, copies of complaints from prior actions, a copy of the 1999 settlement agreement, the personal affidavit of David A. Walsh, Claim Specialist for Hartford, and copies of the Court's computerized filing system. Hartford contends that the named insured, Hendrickson Brothers, Inc. & Davis Construction Corp., a Joint Venture, failed to provide Hartford with timely notice of the underlying lawsuits at issue. Upon commencement of the instant lawsuit, Hartford's counsel obtained the pleadings and affidavits of service in the underlying lawsuits from the files of the Supreme Court, Suffolk County. In fact, Hartford's counsel avers, notice was not provided to Hartford for more than two decades after the underlying lawsuits were commenced. In addition, Hartford contends that the Plaintiffs' claims against it are barred by a settlement agreement previously entered into among Hartford, Hendrickson Brothers, Inc., SCWA and Islip in 1999. Hartford's first notice of the underlying SCWA lawsuit was the May 10, 2011 letter, and its first notice of the underlying Islip lawsuit was its receipt of the amended summons and amended complaint in this action. Therefore, notice of the lawsuits were late by over twenty-five and twenty-seven years respectively.

In his personal affidavit, David A. Walsh avers that he is the Claim Specialist for Hartford. Walsh states that the May 10, 2011 letter from counsel for SCWA was Hartford's first notice of the underlying SCWA lawsuit and it was first provided to Hartford more than twenty years after the commencement of the suit by SCWA. The May 10, 2011 letter by counsel for SCWA identifies the Defendant in the SCWA lawsuit as Davis and not the joint venture. Counsel did not enclose a copy of the Summons and Complaint in the underlying SCWA lawsuit. In fact, neither SCWA nor its counsel ever provided Hartford with a copy of the Summons and Complaint in the SCWA lawsuit. Neither Davis nor the joint venture has ever provided Hartford with notice of the underlying SCWA lawsuit, or copies of the summons and complaint in the SCWA lawsuit. In addition, Walsh states that Hartford never received any notice of the Islip lawsuit until its receipt of the amended complaint in this action in May 2014. Hartford has never received copies of the summons and complaint in the Islip lawsuit. Walsh further states that Hartford has never been provided with any notice or evidence of a judgment being entered against either Davis or the joint venture in favor of SCWA or Islip.

Walsh states that Hartford has performed an extensive search for the insurance contracts allegedly issued by Hartford to the joint venture. However, to date, Hartford has been unable to locate complete copies of any of the policies alleged issued to the joint venture. The May 10, 2011 letter included several documents, such as certificates of insurance and Hartford policy forms and endorsements. However, Walsh states that Hartford had not been provided with any copies of the alleged policies other than a partial policy for policy number 17C 449724, for the policy period of 10/13/78-10/13/79.

Walsh states that based upon the policy language contained in the partial forms provided for the alleged policy number 17C 449724, and Hartford's own review of specimen forms, the alleged Hartford policies would have contained the following conditions:

> 4. Insured's Duties in the Event of Occurrence, Claim or Suit
>
> (a) In the event of an occurrence, written notice containing particulars sufficient to identify the insured and also reasonable obtainable information with respect to the time, place and circumstances thereof, and the names of and addresses of the injured and of available witnesses, shall be given by or for the insured to the company or any of its authorized agents as soon as practicable.
>
> (b) Of a claim is made or suit is brought against the insured, the insured shall immediately forward tot he company every demand, notice, summons or other process received by him or his representative.
>
> (c) The insured shall cooperate with the company and, upon the company's request, assist in making settlement, * * *. The insured shall not, except at his own cost, voluntarily make any payment, assume any obligation or incur any expense other than for first aid to others at the time of accident.
>
> 5. Action Against Company. No action shall lie against the company unless, as a condition precedent thereto, there shall have been full compliance with all of the terms of this policy, nor until the amount of the insured's obligation to pay shall have been finally determined either by judgment against the insured after actual trial or by written agreement of the insured, the claimant and the company.

Walsh states that based upon Hartford's review of the specimen forms, the alleged Hartford umbrella policies would have contained the following conditions:

> 3. Notice of Occurrence
> Whenever it appears that an occurrence is likely to involve indemnity under this policy, written notice thereof shall be given to the Company or any of its authorized agents as soon as practicable. ***
>
> 4. Assistance and Cooperation of the Insured
>
> The Company shall have the right and shall be given the opportunity to associate with insured or its underlying insurers, or both, in the defense and control of any claim, suit, or proceeding which involves or appears reasonably likely to involve the Company and in which event the insured, its insurers and the Company shall cooperate in all things in defense of such claims, suit or proceeding.
>
> 5. Action Against Company
> No action shall lie against the company unless, as a condition precedent thereto, there shall have been full compliance with all of the terms of this policy, nor until the amount of the insured's obligation to pay shall have been finally determined either by judgment against the insured after actual trial or by written agreement of the insured, the claimant and the Company.

Upon reviewing the affidavits of service from underlying lawsuits, Hartford notes that Davis was served by SCWA on November 21, 1985. The summons and complaint in the underlying lawsuit by Islip against Davis was served upon Davis on June 4, 1987. Hartford's counsel also obtained the underlying lawsuits by SCWA and Islip against Hendrickson, which were commenced in the mid-1980s and assert similar claims and seek the same damages as the underlying lawsuits by SCWA and Islip against Davis.

Hartford relies upon ***Security Mutual Ins. Co. v Acker-Fitzsimons Corp.***, 31 NY2d 436, 340 NYS2d 902 (1972), ***Board of Hudson River-black River Regulating District v Praetorian Ins. Co.***, 56 AD3d 929, 867 NYS2d 256 (3d Dept 2008) which hold that an insurer's coverage obligation is not triggered unless the insured provides timely notice of the loss pursuant to the conditions of the insurance policy. Absent a valid excuse, a failure to

satisfy the notice requirement vitiates the policy, and the insurer need not show prejudice before it can assert the defense of noncompliance. Hartford also relies upon ***Serravillo v Sterling Ins. Co.***, 261 AD2d 384, 689 NYS2d 521 (2d Dept 1999) and ***Hartford Accident & Indem. v CNA Ins. Cos.***, 99AD2d 310, 472 NYS2d 342 (1st Dept 1984), which hold that it is well established that the failure to comply with provisions of an insurance policy requiring timely notice of an accident vitiates that contract, both as to the insured and to one injured or damaged by his acts.

Hartford also cites ***Zimmerman v Peerless Ins. Co.***, 85 AD3d 1021, 926 NYS2d 124 (2d Dept 2011), which states with respect to policies issued before January 17, 2009 (*see* Insurance Law § 3420 (c) (2) (A), an insurer could disclaim coverage without regard to prejudice when the insured failed to satisfy the notice condition, therefore, demonstrating that the amendment to Insurance Law § 3420 does not apply to this matter and Hartford is not required to establish prejudice to succeed on its late notice defense. Hartford also cites ***Great Canal Realty Corp. v Seneca Ins. Co.***, 5 NY3d 742, 800 NYS2d 521 (2005), wherein the court held that where a policy of liability insurance requires that notice of an occurrence be given "as soon as practicable," such notice must be accorded the carrier within a reasonable period of time. Hartford contends that plaintiffs and the joint venture all failed to provide notice of the underlying actions to Hartford for well over twenty years and that this two decade delay was unreasonable as a matter of law, citing ***Mark A. Varrichio and Assocs. v Chic. Ins. Co.***, US Dist Ct, SD NY, 01 Civ 2737, Carter, J., 2001, ruling that insureds failed to provide timely notice where they waited two months before forwarding the summons and complaint against them; and ***Safer v Government Emples. Ins. Co.***, 254 AD2d 344, 6678 NYS2d 667 (2d Dept 1998), which held that a dely in notifying the insurer of incident until more than one month after service of the complaint was unreasonable as a matter of law.

Hartford argues that neither SCWA nor Islip can possibly show that they acted diligently to identify Hartford as an alleged insurer of Davis or that they acted expeditiously to provide notice to Hartford of the underlying actions. Hartford relies upon ***Steinberg v Hermitage Ins. Co.***, 26 AD3d 426, 809 NYS2d 569 (2d Dept 2006), holding that failure to provide an explanation for five month delay by injured party precludes showing of diligence.

In addition, pursuant to Insurance Law § 3420 (a) (3), a claimant providing notice is required, in order to rely upon that provision, to demonstrate that he or she acted diligently in attempting to ascertain the identity of the insurer, and thereafter expeditiously notified the insurer. Hartford also cites, *inter alia*, ***American Home Assur. Co. v State Farm Mut. Auto. Ins. Co.***, 277 AD2d 409, 717 NYS2d 224 (2d Dept 2000), which holds that the claimant failed to meet his burden of proving that he or the attorneys he consulted int his matter acted diligently in identifying State Farm as the insurance carrier of the offending vehicle and

thereafter expeditiously notifying State Farm of the accident. Hartford contends that neither SCWA nor Islip can possibly show that they acted diligently to identify Hartford as an alleged insurer of Davis or that they acted expeditiously to provide notice to Hartford of the underlying actions. In addition, at the time that SCWA and Islip entered into the settlement agreement in 1999 that specifically listed the alleged policies at issue in this coverage action, both SCWA and Islip were aware of Hartford's identity as an insurance carrier for the joint venture but waited another decade before notifying Hartford of the SCWA lawsuit in counsel's May 10, 2011 letter. Notice of the Islip lawsuit was delayed even longer, until this coverage action was filed in 2014.

Further, Hartford argues that SCWA and Islip have no standing to bring this suit pursuant to New York Insurance Law § 3420 (a) (2) which authorizes a suit by a claimant when there has been an unpaid judgment against the insured, which has not occurred in this matter. Hartford cites Insurance Law § 3420 (a) (2), which only authorizes a suit by a claimant when there has been an unpaid judgment against the insured. In ***Lang v Hanover Ins. Co.***, 3 NY3d 350, 787 NYS2d 211 (2004), the Court held that Plaintiff could not pursue direct action against the insurer because it was undisputed that Plaintiff did not obtain a judgment against the insured. An injured party has the right to sue the tortfeasor's insurer, but only under limited circumstances - the injured party must first obtain a judgment against the tortfeasor, serve the insurance company with a copy of the judgment and await payment for 30 (thirty) days. Compliance with these requirements is a condition precedent to a direct action against the insurance company. Here, Hartford contends, neither SCWA nor Islip has obtained a judgment against Davis or the joint venture in connection with the underlying actions.

Finally, Hartford contends that claims by SCWA and Islip are barred by the settlement agreement entered into by Hartford, Hendrickson, SCWA and Islip in 1999 which includes a release of any claims for coverage under the primary policies and umbrella policies allegedly issued by Hartford to the joint venture. Pursuant to the settlement agreement, SCWA and Islip released all claims against Hartford "to the extent they in any way relate to or arise out of any Sewer Construction Work by Hendrickson Brothers." This release includes, but is not limited to, claims that were "raised or could have been raised" in a prior coverage action brought by Hendrickson against Hartford, and in which SCWA and Islip had intervened. The alleged policies were specifically listed as a part of the settlement, which were: 17C 44924, 17C 449959, 10 HU 465040, and 10 HU 465046. The broad release necessarily includes all of the claims for coverage under the Hartford policies and the Hartford umbrella policies asserted in this action. Hartford contends that the release of all claims against Hartford in any way related to Hendrickson's work includes claims involving

work performed by Davis as part of the joint venture with Hendrickson pursuant to the contracts entered into with Hendrickson as a joint venturer.

Hartford relies upon ***Scotts Co., LLC v Ace Indem. Ins. Co.***, 51 AD3d 445, 858 NYS2d 121 (1st Dept 2008), where the Court held that the insured's unilateral mistake as to the available policy limits did not void the insured's settlement with its insurer. In addition, Hartford cites, *inter alia*, ***Aglira v Julien & Schlesinger, P.C.***, 214 AD2d 178, 631 NYS2d 816 (1st Dept 1995), which held that a clear and unambiguous release is enforceable between the parties to a contract and is effective regardless of whether one party claims to have meant something else.

As the moving Defendant made a *prima facie* showing of entitlement to summary judgment, the burden shifts to the Plaintiffs to demonstrate the existence of a triable issue of fact (*see* ***Alvarez v Prospect Hosp.***, *supra*; ***Zuckerman v City of New York***, *supra*). Plaintiffs failed to raise a triable issue of fact.

In opposition and in support of their cross motions, Plaintiffs submit, *inter alia*, copies of all the relevant pleadings, a copy of the 1999 settlement agreement, portions of insurance policies issued by Hartford, copies of correspondence between counsel, a copy of an Order, dated December 6, 1996 (McCarty, J.) from the matter captioned ***Hendrickson Bros., Inc. v Hartford***, Index No. 90/6491, and certain submissions from that motion. The Court notes that Plaintiff Davis joins and adopts the same arguments as its co-Plaintiffs in their cross motion papers. Plaintiffs claim that New York Partnership Law §§ 20, 23, 24, and 26 apply to this matter, in that although Hendrickson and Davis were sued separately in separate lawsuits, service upon them individually equalled service on the other and the joint venture.

Partnership Law § 20 provides that every partner is an agent of the partnership for the purpose of its business and the act of every partner, including the execution in the partnership name of any instrument, for apparently carrying on the usual way the business of the partnership which is a member binds the partnership. Partnership Law § 23 provides that the partnership is charged with knowledge of a notice to any partner of any matter relating to partnership affairs. Partnership Law § 24 provides that the partnership is bound by partner's wrongful conduct. Partnership Law § 26 provides that a partner is jointly and severally liable for everything chargeable to the partnership under sections 20-4 and 20-5. A partnership has no separate existence, therefore, service upon a partner confers personal jurisdiction over the partnership and each partner served. Plaintiffs also rely upon CPLR § 1025, which provides that two or more persons conducting business as a partnership may sue or be sued in the partnership name; and CPLR § 310 which provides that personal service upon persons conducting a business as a partnership may be made by personally serving the summons on

any one of them. Therefore, Plaintiffs contend that service on one partner brings the partnership within the Court's jurisdiction. Plaintiffs further state that there is no question that both Hendrickson and Davis were placed on full notice that each of their Southwest Sewer District joint venture contracts were the subject of the municipal Plaintiffs' complaints. Consequently, Plaintiffs argue, there is no question jurisdiction was obtained over the Hendrickson/Davis joint venture by virtue of the service of process on either partner individually.

Plaintiffs rely upon ***Ruzicka v Rager***, 305 NY 191 [Ct App 1953]; ***First American Corporation v Price Waterhouse, LLP***, 154 F3d 16 [2d Circ 1998]; US App LEXIS 16093 [2d Circ NY 1998]; ***Connell v Hayden***, 83 AD2d 30, 443 NYS2d 383 [2d Dept 1981]; ***Hayes v Apples & Bells, Inc.***, 213 AD2d 1000, 624 NYS2d 490 [4 Dept 1991]; ***Brown v Sagamore Hotel***, 184 AD2d 47, 590 NYS2d 34 [3 rd Dept 1992]; and ***Foy v 1120 Avenue of the Am. Assocs.***, 223 AD2d 232, 646 NYS2d 547 [2d Dept 1996], for the proposition that a court obtains jurisdiction over a partnership when personal service is made on any partner.

Plaintiffs further contend that Hendrickson represented the Hendrickson/Davis joint venture partnership and was an agent thereof for service of process. In addition, Plaintiffs assert that jurisdiction was obtained over the Hendrickson/Davis joint venture by virtue of the service of process on either partner individually. Moreover, Plaintiffs note that Hartford acknowledged that the municipal Plaintiffs had secured jurisdiction over the Hendrickson/Davis Joint venture through service of the ***SCWA v Hendrickson*** complaint when it conceded coverage for that lawsuit under its joint venture policy 10C 449724. Plaintiffs rely upon ***Yeager v Transvision, Inc.***, 277 AD 986, 99 NYS2d 858 [2d Dept 1950]; and ***Merrick v New York Subways Advertising Co.***, 178 NYS2d 814, 178 NYS2d 814 [Sup Ct Bronx Co. 1958]; which hold that while it would have been more convenient if the caption of the action named the partnership itself, same is not necessary. Thus, jurisdiction over the partnership, and partnership assets, is secured by service over any individual partner without naming the partnership itself in the caption. Plaintiffs rely upon ***Lauritano v American Fidelity Fire Ins. Co.***, 3 AD2d 564, 162 NYS2d 553 (3d Dept 1957) to solidify their contention that Hartford received notice of the Davis matters at the same time that it was given notice of the Hendrickson matters. However, in ***Lauritano***, notice was provided to the insurer after Plaintiff had difficulty identifying and serving the insured, the insured forwarded the papers in the action to one insurer, and that, in any event, Plaintiff's attorney had furnished the insurers with copies of the summons and complaint. Such facts did not occur here.

Plaintiffs also contend that they have standing to bring the instant action against Hartford inasmuch as they are third-party beneficiaries of the Southwest Sewer District

contracts. Thus, by virtue of privity with the County, SCWA and Islip possess independent standing as "additional insureds" under the sewer contract.

In its reply, Hartford contends that the previously discontinued sewer lawsuits against Hendrickson cannot be used to circumvent the requirement to provide timely notice to Hartford of the underlying actions. The stipulations of discontinuance did not provide that those lawsuits would continue against the joint venture and/or Davis. The settlement agreement also does not purport to preserve any claims against the joint venture. Instead, the settlement agreement provided that the joint venture had been dissolved and that SCWA and Islip specifically stated that they would week damages against Davis only. Although SCWA and Islip purported to preserve their claims against Davis, they asserted those claims in the separate underlying actions, which named Davis as a Defendant. The pleadings in the Hendrickson suits confirm that those suits were not directed against the joint venture or Davis and did not include a single mention fo the joint venture, Davis, or the contracts executed by the joint venture. Moreover, the Hendrickson suits specify that they are based upon contracts entered into in or about 1972. By Plaintiffs' own admission, the joint venture did not enter into its contracts, or even come into existence, until 1978.

Moreover, Hartford contends that it never conceded coverage to the joint venture or Davis for the underlying actions or for the sewer lawsuits against Hendrickson. In addition, Hartford argues that claims by SCWA and Islip against the joint venture were released by the prior settlement agreement. Hartford further states that SCWA and Islip have failed to establish that they have standing to commence this coverage lawsuit against Hartford. Hartford reiterates New York law that an injured party must first obtain a judgment against an insured before proceeding with a direct action against the insurance company (***Lang v Hanover Ins. Co.***, 3 NY3d 350, 787 NYS2d 211 [2004]). Hendrickson further argues that the rulings in ***Hendrickson v Hartford*** case are not binding in this matter, in that there is no mention of either the joint venture or Davis in the December 6, 1996 decision, therefore, this decision is not the law of this case and does not have any collateral estoppel effect.

With regard to whether Hartford has a duty to defend and/or indemnify Davis, this Court finds that while jurisdiction may have existed over the joint venture in the ***SCWA v Hendrickson*** suit and the Court may have jurisdiction over the joint venture in the remaining two underlying matters, ***SCWA v Davis*** **and** ***Islip v Davis***, pursuant to partnership law, Plaintiffs are confusing service of process with providing notice of a claim to Hartford. Since Hartford was and is not a partner in the joint venture, no service of the respective complaints could have been made upon it and the fact remains that neither Davis nor Hendrickson, as Plaintiffs' alleged agent of the joint venture, gave timely written notice to Hartford of the suits commenced against Davis as a required condition precedent to

Hartford's duty to defend, as stated above. The Court finds that the event that triggered the notice requirement for Hartford's obligation to defend under the alleged policies was on or about November 21, 1985 and June 4, 1987, respectively, when Davis was served with the copies of the summons and complaints (***Commodore Int'l, Ltd. v National Union Fire Ins. Co.***, 184 AD2d 19, 591 NYS2d 168 [1st Dept 1992]). Plaintiffs' further contention that Hartford had constructive notice of the Davis actions during settlement talks in the Hendrickson matters is also unavailing. Accordingly, this Court declines to declare that Hartford has a duty to defend Davis in the underlying actions.

The Court further declines to conclude that Hartford is collaterally estopped from denying coverage to Davis by the Nassau County Supreme Court's determination of an Order, dated December 6, 1996 (McCarty, J.), in ***Hendrickson v Hartford***, Index No. 90/6491, which held that Hartford was obligated to provide a defense to Hendrickson.

Collateral estoppel prevents a party from relitigating an issue when said issue has been previously litigated and decided against said party or his/her privies. (***Ryan v New York Telephone Company***, 62 NY2d 494, 478 NYS2d 823 [1984]). In order to invoke the preclusive effect of the doctrine of collateral estoppel it must be demonstrated that the issue being raised is identical to an issue previously litigated and decided, that the issue is decisive in the present action and was also decisive or resolved in the prior action, and that the party against whom the doctrine is being asserted, or his privies, had full and fair opportunity to contest and litigate the issue in the prior action (***Id.***; ***Browning Avenue Realty Corp. v Rubin***, 207 AD2d 263, 615 NYS2d 360 (1st Dept 1994); ***Color by Pergament, Inc., v O'Henry's Film Works, Inc.***, 278 AD2d 92, 717 NYS2d 573 (1st Dept 2000); ***Comi v Breslin & Breslin***, 257 AD2d 754, 683 NYS2d 345 (3rd Dept 1999). Here, Plaintiffs provide no legal support for their contention. In ***Hendrickson v Hartford***, notice was not an issue, and the Court held that Hartford was obligated to defend Hendrickson on other grounds. In addition, Davis was not a party in that action and neither Davis nor Hartford had a full and fair opportunity to litigate the issue of notice. Having failed to overcome the notice hurdle, the Court finds that Plaintiffs have failed to raise an issue of fact. Under the present circumstances, Plaintiffs' contentions regarding Hartford's affirmative defenses and all remaining arguments are without merit.

Accordingly, the motion by Hartford seeking a declaratory judgment is granted. This Court declares that Hartford has no duty to defend Davis in the underlying actions. Plaintiffs' cross motion is denied in its entirety.

The foregoing constitutes the decision and Order of the Court.

DATED: JUNE 5, 2017
RIVERHEAD, NY

HON. JAMES HUDSON, A.J.S.C.