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

PRESENT: Hon. Doris Ling-Cohan Justice PART 36

Index Number : 103588/2009
STRAUSS PAINTING
VS.
MT. HAWLEY INSURANCE
SEQUENCE NUMBER : 003
SUMMARY JUDGMENT

INDEX NO.
MOTION DATE
MOTION SEQ. NO.
MOTION CAL. NO.

this motion to/for

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1, 2
Answering Affidavits — Exhibits	3
Replying Affidavits	4

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion for summary judgment to dismiss the complaint by defendant Mt Hawley is granted in accordance with the attached memorandum decision

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).

(consolidated for disposition with motion sequence numbers 001 + 002)

Dated: 10-13-2011

DORIS LING-COHAN J.S.C.

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

Check one: ☑ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/JUDG. ☐ SETTLE ORDER /JUDG

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 36

----------X

STRAUSS PAINTING, INC.,

Plaintiff,

Index No.: 103588/09
DECISION/ORDER

-against-

Motion Seq. No.: 001, 002 & 003

MT. HAWLEY INSURANCE COMPANY and METROPOLITAN OPERA ASSOCIATION, INC.,

Defendants.

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HON. DORIS LING-COHAN, J.S.C.:

In this insurance action, defendants submit three motions and a cross-motion that seek, *inter alia,* summary judgment and/or dismissal of the cross-claims and/or the complaint (motion sequence numbers 001, 002 and 003). Defendant Metropolitan Opera Association, Inc. (the Met) has filed a motion for summary judgment as to its cross-claims against defendant Mt. Hawley Insurance Company (Mt. Hawley). Defendant Mt. Hawley has filed: (1) a motion for summary judgment to dismiss the complaint; (2) a motion to dismiss the Met's cross-claims; and (3) a cross-motion for summary judgment on the Met's cross-claims.

BACKGROUND

This action arose after the commencement of a personal injury/negligence claim in this court by non-party Manuel Mayo (Mayo) under Index Number 115545/08 (the Mayo action). *See* Notice of Motion (motion sequence number 001), Mitchell Affirmation, ¶ 2; Exhibit L. The plaintiff herein, Strauss Painting, Inc. (Strauss), is a third-party defendant in the Mayo action, and was a contractor hired by one of the defendants herein, the Met, which is the third-party plaintiff in the Mayo action. *Id.*, ¶¶ 4-7. Defendant herein, Mt. Hawley, issued a commercial general

liability policy to Strauss, which was in effect at the time of Mayo's accident. *Id.*

On September 3, 2008, the Met and Strauss executed a contract (the Strauss contract) under whose terms the Met retained Strauss to perform work at a building, located at Lincoln Center in the County, City and State of New York (the building), of which the Met is the lessee.[1] *Id.*, ¶ 7; Exhibit B. The work consisted of scraping and repainting the steel carriage rails that run along the building's roof, and that support the carriage that is used by the building's mechanical window washing system. *Id.* Exh. C. The relevant portions of the Strauss contract provide as follows:

ARTICLE 17 - INSURANCE

> 17.1 Contractor's liability insurance shall be purchased and maintained by the Contractor [i.e., Strauss] to protect him from claims under workers' or workmen's compensation acts and other employee benefits acts, claims for damages because of bodily injury ... which may arise out of or result from the Contractor's operations under this Contract, whether such operations be by himself or by any Subcontractor or anyone directly or indirectly employed by any of them. This insurance ... shall include contractual liability insurance applicable to the Contractor's obligations under paragraph 10.11. ...
> 17.2 The Owner [i.e., the Met] shall be responsible for purchasing and maintaining his own liability insurance and, at his option, may maintain such insurance as will protect him against claims which may arise from operations under the Contract.

EXHIBIT "D" - INSURANCE REQUIREMENTS ...

> a. Workman's Compensation Insurance covering contractor's employees meeting all statutory requirements prescribed in New York State.
> b. Owners and Contractors Protective Liability Insurance with a combined single limit of $5,000,000.00. Liability should add [the Met] as an additional insured and should include contractual liability and completed operations coverage.
> c. Comprehensive General Liability. Combined coverage for property and bodily injury with a minimum single limit of $5,000,000.00 (limits may be met with an "Umbrella Policy.").
> d. Contractor will supply [the Met] with a Hold Harmless and indemnify

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[1] The building's owner is non-party Lincoln Center for the Performing Arts, Inc.

them against any and all claims arising from their work relative to this agreement. *Id.*, Exhibit C. Thereafter, Strauss obtained a commercial general liability insurance policy from Mt. Hawley (the Mt. Hawley policy), that remained in effect for the period of November 7, 2007 through November 7, 2008. *Id.*, ¶ 9; Exhibit D. The "commercial general liability coverage form" portion of the Mt. Hawley policy provides, in pertinent part, as follows:

> Section I - Coverages ...
>
> 1. Insuring Agreement ...
>
> d. "Bodily injury"... will be deemed to have been known to have occurred at the earliest time when any insured [i.e., the Met] ... or any employee authorized by you to give or receive notice of an "occurrence" or claim:
>
> (1) Reports all, or any part, of the "bodily injury" ... to us or any other insurer;
>
> (2) Receives a written or verbal demand or claim for damages because of the "bodily injury" ...; or
>
> (3) Becomes aware by any other means that "bodily injury" has occurred ...
>
> Section IV - Commercial General Liability Conditions ...
>
> ***
>
> 2. Duties in the Event of an Occurrence, Offense, Claim or Suit.
>
> a. You must see to it that we are notified as soon as practicable of an "occurrence" ... 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.
>
> Section V - Definitions ...
>
> ***
>
> 3. "Bodily injury" means bodily injury, sickness or disease sustained by a person, including death resulting from any of these at any time. ...
>
> ***
>
> 13. "Occurrence" means an accident, including continuous or repeated exposure to substantially the same general harmful conditions.

Id.; Exhibit D. The additional insured endorsement of Mt. Hawley policy provides, in pertinent part, as follows:

> A. "Section II - Who Is An Insured" is amended to include as an additional insured any ... organization for whom you are performing obligations when you and such ... organization have agreed in writing in a contract or agreement that such ... organization be added as an additional insured to your policy. Such ... organization is an additional insured only with respect to liability for "bodily injury" ... caused, in whole or in part, by:
>
> 1. Your acts or omissions; or
>
> 2. The acts or omissions of those acting on your behalf;
>
> in the performance of your ongoing operations for the additional insured.
>
> A[n] ... organization's status as an additional insured under this endorsement ends when your operations for that additional insured are completed.

Id.; Exhibit E.

Also on September 3, 2008, Strauss and non-party Creative Finishes Limited (Creative) executed a contract (the Creative contract) under whose terms Strauss engaged Creative as a subcontractor to actually perform the scraping and painting work on the building's rooftop window washing system. *Id.*; Mitchell Affirmation, ¶ 11; Exhibit F. Creative was Mayo's employer. *Id.*, ¶ 12.

On September 16, 2008, Mayo was injured when he fell from a 15-foot-tall ladder that was affixed to a wall on the building's sixth floor, and that led through a hatch in the ceiling to the building's roof where the carriage rails were located. Mayo eventually commenced the Mayo action on November 19, 2008. *Id.*; Exhibit M. On December 5 and 11, 2008, the Met sent letters to Strauss and Creative to demand a defense and indemnification in the Mayo action. *Id.*; Exhibits H, I. Thereafter, on December 29, 2008, the Met's insurer, Travelers Insurance

Company (Travelers), also sent a letter to Strauss and Creative to demand a defense and indemnification for the Met in the Mayo action. *Id.*; Exhibit J. On January 13, 2009, Strauss's and Creative's insurance broker sent a "notice of occurrence" letter to Mt. Hawley, which Mt. Hawley acknowledged by fax on January 14, 2009. *Id.*; Exhibits K, L. On February 3 and again on March 4, 2009, Mt. Hawley wrote to Travelers to request additional information to help it determine whether the Met was an additional insured under the Mt. Hawley policy, and when the Met first had notice of Mayo's accident. *Id.*; Exhibits N, O. The Met points out that neither of these letters contains an actual disclaimer of coverage. *Id.*; Mitchell Affirmation, ¶ 22.

Strauss commenced this action on March 12, 2009 by serving a summons and complaint that sets forth one cause of action for a declaratory judgment that Mt. Hawley is required to defend or indemnify Strauss in the *Mayo* action. *Id.*; Exhibit B. Mt. Hawley answered on April 9, 2009, and the Met answered on July 21, 2009. *Id.* Thereafter, on June 16, 2010, the Met served a notice of cross claims for declaratory judgment that Mt. Hawley must defend and indemnify the Met in the underlying *Mayo* action. *Id.*

DISCUSSION

The Met's Motion and Mt Hawley's Cross Motion (Motion Seq. No.: 001)

In its motion, the Met seeks summary judgment on its cross claims against Mt. Hawley for declaratory judgment. CPLR 3001 states that declaratory judgment is a discretionary remedy which may be granted "as to the rights and other legal relations of the parties to a justiciable controversy whether or not further relief is or could be claimed." *See e.g. Jenkins v State of New York Div. of Hous. and Community Renewal*, 264 AD2d 681 (1st Dept 1999). Here, the three cross-claims pled in the Met's answer seek declarations that Mt. Hawley: 1) is obligated by the terms of the Mt. Hawley policy to provide the Met with a defense and indemnity in the Mayo

action; 2) is obligated by the terms of "the umbrella policy" to provide the Met with a defense and indemnity in the Mayo action; and 3) is obligated by the terms of the Mt. Hawley policy to provide the Met with a defense and indemnity in this declaratory judgment action. However, it is apparent from the Met's moving papers that it has abandoned the second and third of these claims,[2] and that it only seeks a declaration regarding coverage under the Mt. Hawley policy.

In response, Mt Hawley has cross-moved for summary judgment dismissing the Met's cross-claims and for a declaration that Mt Hawley has no duty to defend or indemnify the Met in connection with the Mayo action.

When seeking summary judgment, the moving party bears the burden of proving, by competent, admissible evidence, that no material and triable issues of fact exist. *See e.g. Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 (1985); *Sokolow, Dunaud, Mercadier & Carreras LLP v Lacher*, 299 AD2d 64 (1st Dept 2002). Once this showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial of the action. *See e.g. Zuckerman v City of New York*, 49 NY2d 557 (1980); *Pemberton v New York City Tr. Auth.*, 304 AD2d 340 (1st Dept 2003). Further, it is well settled that "'on a motion for summary judgment, the construction of an unambiguous contract is a question of law for the court to pass on, and ... circumstances extrinsic to the agreement or varying interpretations of the contract provisions will not be considered, where ... the intention of the parties can be gathered from the instrument itself'." *Maysek & Moran, Inc. v S.G. Warburg & Co., Inc.*, 284 AD2d 203, 204 (1st

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[2] Although the second cause of action refers to a separate "umbrella policy," the Met does not refer to such a policy anywhere in its moving papers, and, indeed, it does not appear to exist. Nor do the Met's moving papers set forth any argument as to why Mt. Hawley should defend and indemnify it in this action. Therefore, the court deems that the Met has abandoned the third claim in its cross complaint.

Dept 2001), quoting *Lake Constr. & Development Corp. v City of New York*, 211 AD2d 514, 515 (1st Dept 1995). Here, upon the within submissions, the Met has established that it is entitled to summary judgment as to the declaration that it seeks; the cross-motion by Mt. Hawley for summary judgment is denied.

As previously mentioned, the Met's first cross-claim seeks a declaration that the Mt. Hawley policy obligates Mt. Hawley to provide the Met with a defense and indemnity in the Mayo action. The Met initially argues that the Mt. Hawley policy "covers all damages incurred by an insured due to allegations of bodily injury." *See* Notice of Motion (motion sequence number 001), Mitchell Affirmation, ¶¶ 27-34. The Met specifically refers to the definitions of the terms "bodily injury" and "occurrence" that are set forth in the Mt. Hawley policy, and to the portion of the additional insured endorsement that extends coverage to liability for injuries to third parties "with respect to liability arising out of your ongoing operations performed for [the] insured." *Id.* The Met then argues that Mayo suffered an "occurrence" of "bodily injury" as a result of Strauss' "ongoing operations performed for" the Met, as Mayo was an employee of Strauss' subcontractor Creative. *Id.* The Met further notes that the Appellate Division, First Department, has interpreted identical insurance policy language as triggering "additional insured" coverage for an owner where a subcontractor's employee suffers an injury and brings suit. *Id.*; *see e.g. Chelsea Associates, LLC v Laquila-Pinnacle*, 21 AD3d 739 (1st Dept 2005). Finally, the Met concludes that Mt. Hawley is obliged to defend and indemnify it in Mayo's suit by the foregoing terms of the Mt. Hawley policy.

The court agrees that the contractual language is clear and speaks for itself. It would, thus, appear plain that Mayo's accident triggered Mt. Hawley's obligation to afford coverage to the Met as an "additional insured" of Strauss. However, Mt. Hawley disagrees and offers a

contractual interpretation of its own.

Mt. Hawley argues that the Met is not entitled to coverage because "the [Strauss] contract does not require additional insured coverage for the Met." *See* Memorandum of Law in Support of Cross Motion, at 6-7. Mt. Hawley argues that the portion of the Strauss contract's "insurance requirements", obligates Strauss to "add [the Met] as an additional insured and should include contractual liability and completed operations coverage" applies only to the "owners and contractors protective liability insurance" policy that Strauss was required to obtain (and failed to), and *not* to the "comprehensive general liability insurance" that it actually obtained (i.e., the Mt. Hawley policy, which is a "general commercial liability insurance" policy). *Id.* Mt. Hawley cites the decision of the Appellate Division, First Department, in *New York City Hous. Auth. v Merchants Mut. Ins. Co.* (44 AD3d 540 [1st Dept 2007]) for the proposition that "a contractual obligation to procure additional insured coverage under a comprehensive general liability policy is separate and distinct from the obligation to procure an owners and contractors protective policy." *Id.* Mt. Hawley is incorrect.

The *Merchants Mut.* holding did not deny coverage because the claimant was not required to be named as an additional insured, but because the plaintiff's injury did not arise out of the work that he was performing for the claimant. Such decision turned on a factual finding, not a contractual interpretation. Moreover, this court cannot find any precedent that would support Mt. Hawley arguments with respect to its interpretation of the Strauss Contract. Indeed, even if the Strauss contract only facially requires Strauss to name the Met as an additional insured on an owners and contractors protective liability policy, it is indisputable that the Mt. Hawley policy (admittedly a comprehensive general liability policy) *does* contain an "additional insured endorsement" that, in turn, names the Met as an additional insured against "liability for

'bodily injury' ... caused, in whole or in part, by ... the acts or omissions of those acting on your behalf ... in the performance of your ongoing operations for the additional insured." *See* Notice of Cross Motion (motion sequence number 001), Exhibit A. Mt. Hawley's argument simply ignores this provision and its effect. Therefore, Mt. Hawley's argument that the Met is not entitled to coverage because the Strauss contract does not provide for such is rejected.

The parties next argue over the efficacy of the Met's demand notice on Mt. Hawley. The Met argues that said notice was timely. *See* Notice of Motion (motion sequence number 001), Mitchell Affirmation, ¶¶ 35-44. Mt. Hawley responds that it was late. *See* Memorandum of Law in Support of Cross Motion, at 8-10. The evidence shows that Mayo's accident occurred on September 16, 2008, that the Mayo action was commenced on November 19, 2008, that the Met and/or Travelers sent demand letters to Strauss on December 5, 11 and 29, 2008, and that Strauss's insurance broker sent a "notice of occurrence" letter to Mt. Hawley on January 13, 2009, which Mt. Hawley acknowledged by fax one day later. *See* Notice of Motion (motion sequence number 001), Exhibits M, H, I, J, K, L. Thus, there was a delay of either three or four months between the occurrence and Mt. Hawley's notification thereof, depending upon whether one counts from the date of the injury, or the date of the commencement of suit.

The Met argues that this delay is not unreasonable because the Mt. Hawley policy's "commercial general liability coverage form", merely required the Met to "see to it" that any pleadings were sent to Mt. Hawley. *See* Notice of Motion (motion sequence number 001), Mitchell Affirmation, ¶¶ 35-44. Mt. Hawley responds that the delay was unreasonable as a matter of law. *See* Memorandum of Law in Support of Cross Motion, at 8-9.

The Met's argument is incorrect, however, since it ignores the full text of Section IV (2) (a) of the Mt. Hawley policy's "commercial general liability coverage form," which required the

Met to "see to it that we are notified *as soon as practicable* of an 'occurrence' ... which may result in a claim [emphasis added]." *See* Notice of Motion (motion sequence number 001), Exhibit D. As the Court of Appeals notes:

> 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. The insured's failure to satisfy the notice requirement constitutes "a failure to comply with a condition precedent which, as a matter of law, vitiates the contract." Hence, the carrier need not show prejudice before disclaiming based on the insured's failure to timely notify it of an occurrence [internal citations omitted].

Great Canal Realty Corp. v Seneca Ins. Co., Inc., 5 NY3d 742, 743 (2005). The court rejects the Met's argument, because well settled New York precedent attaches a "reasonableness" requirement to insurance policy language that requires notice to be given "as soon as practicable," and the Met cannot evade that requirement by selectively keying on the prefacatory "see to it" language instead. Further, where an insurance policy specifies that an insured must give notice of a potentially covered claim "as soon as practicable," a court assessing the timeliness of such notice must determine whether the interval between the occurrence and the notice was reasonable in light of the facts and circumstances of the case. *See e.g. Great Canal Realty Corp. v Seneca Ins. Co., Inc.*, 5 NY3d 742 (2005). "Although what is reasonable is ordinarily left for determination at trial, where there is no excuse for the delay and mitigating circumstances are absent, the issue may be disposed of as a matter of law in advance of trial". *Power Authority . Westinghouse Elec. Corp.*, 117 AD2d 336, 339-40 (1st Dept 1986); *see also Tower Ins. Co. of New York v. Classon Heights, LLC*, 82 AD3d at 634. Courts have found even relatively short periods to be unreasonable as a matter of law. *Hartford Acc. & Indem. Co. v. CNA Ins. Cos.*, 99 AD2d 310, 313 (1st Dept 1984).

Significantly, here, the Met has *not* raised the argument that it reasonably believed that it

bore no responsibility for Mayo's accident. Thus, based upon the above and the within undisputed facts, the court agrees with Mt. Hawley that the Met's three/four-month delay in notifying Mt. Hawley was unreasonable, as a matter of law.

Finally, the Met and Mt. Hawley argue the question of whether or not there has been a valid disclaimer by Mt. Hawley. The law is clear that an insurer will be precluded from disclaiming coverage based upon late notice, where the insured is unable to establish that a notice of disclaimer has been timely issued. *See Hartford Ins. Co. v. County of Nassau*, 46 NY2d 1028 (1979); *Bovis Lend Lease LMB Inc. v. Garito Contracting, Inc.* 38 AD3d 260 (1st Dept 2007).

The Met notes that Mt. Hawley sent letters to Travelers on February 3 and March 4, 2009 that requested additional information to help it determine whether the Met was an additional insured under the Mt. Hawley policy, and when the Met first had notice of Mayo's accident, but that neither of these letters contained an actual disclaimer of coverage. *See* Notice of Motion (motion sequence number 001), Exhibits N, O. The Met then argues that Mt. Hawley's failure to provide a notice of disclaimer violates Insurance Law § 3420 (d).[3]

Mt. Hawley rejects this argument as mere "gamesmanship. Significantly, however, Mt. Hawley has not supplied a copy of an actual notice of disclaimer with respect to the Met, but merely relies upon the February 3, 2009 and March 4, 2009 letters. *See* Memorandum of Law in Support of Cross Motion, at 9-10.

Insurance Law § 3420 (d) provides that:

> If under a liability policy issued or delivered in this state, an insurer shall disclaim liability or deny coverage for death or 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.

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[3] Strauss joins in this argument. *See* Janowitz Affirmation in Opposition, ¶¶ 2-4.

In interpreting this provision, the Appellate Division, First Department, has held that:

> Under Insurance Law § 3420 (d) (2), 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." A failure to give such prompt notice precludes an effective disclaimer or denial. [internal citations omitted].

JT Magen v Hartford Fire Ins. Co., 64 AD3d 266, 268-269 (1st Dept 2009).

Here the Met has established, as a matter of law, that Mt. Hawley did not comply with the statutorily imposed "prompt disclaimer" obligation. The alleged "disclaimers" dated February 3 and March 4, 2009, relied upon by Mt. Hawley, are insufficient in that they did not definitively disclaim coverage, but rather reserved Mt. Hawley's right to disclaim coverage. It has been held that "[a] reservation of rights letter has no relevance to the question [of] whether the insurer has timely sent a notice of disclaimer of liability or denial of coverage. *Hartford Ins. Co. v. County of Nassau*, 46 NY2d 1028 (1979)(citation omitted). Thus, Mt. Hawley is precluded from disclaiming coverage to the Met. *See Hartford Ins. Co. v. County of Nassau*, 46 NY2d 1028 (1979); *Bovis Lend Lease LMB Inc. v. Garito Contracting, Inc.* 38 AD3d 260 (1st Dept 2007).

In conclusion, the court determines that the Met is an "additional insured" under the terms of the Mt. Hawley policy, that while the Met failed to provide Mt. Hawley with a timely notice of claim, Mt. Hawley failed to establish that it provided the Met with a notice of disclaimer, as a result of the Met's delayed notice of the occurrence, and thus, Mt. Hawley is precluded from disclaiming coverage to the Met. *See Bovis Lend Lease LMB Inc. v. Garito Contracting, Inc.* 38 AD3d at 260. The Met has met its burden of proving that it is entitled to summary judgment awarding it the declaratory relief that it seeks and, therefore, the Met's motion is granted.

In its cross motion, Mt. Hawley requests summary judgment dismissing the Met's cross

claims, and awarding it a declaratory judgment that it is not obligated to defend or indemnify the Met in the Mayo action. However, for the reasons just discussed, Mt. Hawley's cross-motion for summary judgment is denied.

Mt. Hawley's Motion to Dismiss the Met's Cross-Claims (Motion Seq. No.: 002)

In its first motion, dated July 14, 2010, Mt. Hawley seeks an order, pursuant to CPLR 3211 and/or 3025, to dismiss the Met's three cross-claims for declaratory judgment as untimely. Mt. Hawley notes that Strauss commenced this action on March 12, 2009, that it (i.e., Mt. Hawley) answered on April 9, 2009 and the Met answered on July 21, 2009, that Strauss filed its note of issue with the court on April 9, 2010, and that the Met served its notice of cross-claims on June 16, 2010. *See* Notice of Motion (motion sequence number 002), Exhibits C, D, E, G, I. Mt. Hawley also presents a copy of a compliance conference stipulation, signed by all parties and dated March 19, 2010, that stated that "discovery [is] complete" in this action. *Id.*, Exhibit H. Mt. Hawley then raises several arguments as to why the Met's cross-claims should be dismissed as untimely.

Mt. Hawley first argues that the Met's cross-claims "were improperly served as a separate pleading, and were not made a part of the Met's answer" in violation of CPLR 3211. *Id.*; Delahunt Affirmation, ¶ 17. However, Mt. Hawley does not identify the section of CPLR 3211 that the Met is alleged to have violated, and does not cite any case law to support its "separate pleading" argument. The court has been unable to discover any precedent that would support Mt. Hawley's argument. The court does note, however, that motions to dismiss are themselves generally untimely when they are served more than 60 days after issue has been joined (as this one technically is). CPLR 3211 (e); *see e.g. Aretakis v Tarantino*, 300 AD2d 160 (1st Dept

2002). In any case, the court rejects Mt. Hawley's CPLR 3211 argument as unsupported.

Next, Mt. Hawley argues that the Met violated CPLR 3025 (a) and (b), because its time to amend its answer as of right had expired by the time it served its notice of cross-claims, and because it never subsequently moved for leave to amend its answer. *See* Notice of Motion (motion sequence number 002), Delahunt Affirmation, ¶¶ 18-19. The Met does not contest these claims. Mt. Hawley then argues that the Met's nearly one-year unexplained delay in serving its notice of cross-claims is prejudicial to Mt. Hawley. *Id.*, ¶ 20. The Met responds that Mt. Hawley has not presented any proof of such prejudice. *See* Mitchell Affirmation in Opposition, ¶ 9. The Met also argues that it *does* have an explanation for the delay in serving its cross-claims, specifically, that "at the time the Met originally served its answer [i.e., July 21, 2009], Mt. Hawley had not disclaimed or denied insurance coverage to the Met." *Id.*, ¶ 4. The Met then argues that its cross-claims should be permitted to stand in this action "in the interests of justice." *Id.*, ¶ 11. Mt. Hawley replies that the Met has misstated the facts, and that it (i.e., Mt. Hawley) had actually disclaimed coverage to the Met on February 3, 2009. *See* Delahunt Reply Affirmation, ¶ 5. The court disagrees.

It is clear that Mt. Hawley's letters of February 3 and March 4, 2009 do *not* set forth any disclaimer of coverage to the Met. *See* Notice of Motion (motion sequence number 001), Exhibits N, O. Indeed, Mt. Hawley had not furnished the Met with such a disclaimer at the time that the note of issue herein was filed on April 9, 2010. Thus, the Met would have been reasonable in assuming, up to that point, that the issue of coverage was still open, and that it was possible that Mt. Hawley might find that the Met was covered by the terms of the Mt. Hawley policy. The court notes that the Met only waited until June 16, 2010 - approximately two months later - to serve its notice of cross claims on Mt. Hawley. In addition to this slight delay, it is clear

that the Met did not formally apply for leave to interpose these cross claims pursuant to CPLR 3025 (b). However, as the Appellate Division, First Department, held in *Long v Sowande* (27 AD3d 247, 250 [1st Dept 2006]), there is no prejudice to a co-defendant opposing cross claims where that co-defendant is aware of the moving co-defendant's position, and where the subject cross-claims arise out of the same transaction or occurrence as the plaintiff's complaint. Here, Mt. Hawley has been aware since January 14, 2009 that the Met is seeking coverage under the Mt. Hawley policy, and it is clear that the Met's cross claims for declaratory relief pursuant to that policy mirror Strauss's declaratory judgment claims against Mt. Hawley. Under these circumstances, there is clearly no prejudice to Mt. Hawley in permitting the Met's cross claims to stand, and the court believes that it would be a provident exercise of discretion - consonant with the liberal amendment policy set forth in CPLR 3025 (b) - to overlook the Met's admitted failure to formally move for leave to interpose those cross claims. Therefore, the court rejects Mt. Hawley's timeliness argument. Accordingly, Mt. Hawley's dismissal motion is denied.

Mt. Hawley's Motion for Summary Judgment to Dismiss Strass' Complaint

In its second motion, Mt. Hawley requests summary judgment to dismiss the sole declaratory judgment claim that is set forth in Strauss' complaint, that it be declared that Mt. Hawley is required to defend Strauss in the *Mayo* action. Mt. Hawley supports this motion with the same two arguments that it raised in its cross-motion to dismiss the Met's cross claims for declaratory judgment, i.e., that Strauss failed to provide it with a timely demand notice, and that Strauss cannot demonstrate that is was excused from providing such timely notice by virtue of a "reasonable, good-faith belief" that it would not be held liable for Mayo's injuries. *See* Memorandum of Law in Support of Motion (motion sequence number 003), at 5-9. Strauss

submits opposition to this motion that includes the same arguments that the Met raised with respect to timely notice, in response to Mt. Hawley's cross motion. *See* Janowitz Affirmation in Opposition, ¶¶ 2-13. As the court has already reviewed all of these arguments in the first portion of this decision, and has concluded that the demand notice to Mt. Hawley was untimely as a matter of law, Mt. Hawley's motion for summary judgment to dismiss Strauss' complaint is granted to the extent that it is declared that Mt. Hawley is not obligated to defend or indemnify Strauss in the *Mayo* action. The court notes that unlike the Met, Strauss, in opposition to Mt. Hawley's motion, does not raise the issue of the validity or the timeliness of Mt. Hawley's notice of disclaimer, and in fact, a notice of disclaimer was issued by Mt. Hawley as to Strauss, denying coverage, due to untimely notice of the Mayo occurrence. *See* Exh. L, Notice of Motion, Seq. No.: 003.

DECISION

ACCORDINGLY, for the foregoing reasons, it is hereby

ORDERED that the motion, pursuant to CPLR 3212, of the defendant Metropolitan Opera Association, Inc. (motion sequence number 001) is granted; and it is further

ORDERED, ADJUDGED and DECLARED that Mt. Hawley is obligated to provide the Met with a defense and indemnity in the Mayo personal injury action; and it is further

ORDERED that the cross motion, pursuant to CPLR 3212, of the defendant Mt. Hawley Insurance Company (motion sequence number 001) is denied; and it is further

ORDERED that the motion, pursuant to CPLR 3211 and/or 3025, of the defendant Mt. Hawley Insurance Company (motion sequence number 002) is denied; and it is further

ORDERED that the motion, pursuant to CPLR 3212, of the defendant Mt. Hawley

Insurance Company (motion sequence number 003) to dismiss the Strauss complaint is granted; and it is further

ORDERED ADJUDGED and DECLARED that Mt. Hawley has no obligation to defend or indemnity Strauss in the Mayo personal injury action; and it is further

ORDERED that within 30 days of entry of this order, the Met shall serve a copy upon all parties with notice of entry.

Dated: New York, New York
October 13, 2011

Hon. Doris Ling-Cohan, J.S.C.

J:\Summary Judgment\straussvmthawley.rewrite.wpd

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).