[* 1]

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

PRESENT: JUDITH J. GISCHE PART 10
Justice

American Home Assurance Company

-v-

Highrise Construction Company

INDEX NO. 110838/10

MOTION DATE

MOTION SEQ. NO. 001

MOTION CAL. NO.

The following papers, numbered 1 to ____ were read on this motion to/for ____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

motion (s) and cross-motion(s) decided in accordance with the annexed decision/order of even date.

FILED

DEC 15 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 12/14/11

HON. JUDITH J. GISCHE J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

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

Supreme Court of the State of New York
County of New York: Part 10

---x

American Home Assurance Company,

Plaintiff,

-against-

Highrise Construction Company, 21-23 South William Street, LLC, Wall Street Builders, LLC, McCann, Inc., Kennelly Development Company, LLC, and Luz Vasquez, as Administratix of the Estate of David Vasquez, Deceased,

Defendants.

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Decision/Order
Index No.: 110838/10
Seq. No. : 001

Present:
Hon. Judith J. Gische
J.S.C.

Recitation, as required by CPLR 2219 [a], of the papers considered in the review of this (these) motion(s):

Papers	**Numbered**
Pltf's n/m [3212], memo	1
Pltf's KDS affirm, exhs, memo [sep back]	2
Pltf's SP affid, exhs [sep back]	3
Pltf's SAR affid, exhs [sep back]	4
Def [Vasquez] aff in opp w/VG affirm	5
Pltf's reply in supp	6

Hon. Judith J. Gische, J.S.C.:

Upon the foregoing papers, the decision and order of the court is as follows:

This is an action by American Home Assurance Company ("American Home" or "Plaintiff") for a declaratory judgment against the defendants, Highrise Construction Company ("Highrise"), 21-23 South William Street, LLC ("South William"), Wall Street Builders, LLC ("Wall Street"), McCann, Inc. ("McCann"), Kennelly Development Company, LLC ("Kennelly"), and Luz Vasquez, as Administratix of the Estate of David Vasquez,

Deceased ("Vasquez"). Defendants are the parties to an underlying personal injury action entitled Vasquez v. 21-23 South William Street, LLC et al. v. Highrise Construction Company, Index No. 104246/2007, pending in the New York State Supreme Court, New York County ("underlying Vasquez action"). Plaintiff moves for summary judgment, CPLR § 3212, seeking a judicial declaration on its first cause of action, that it has no duty to provide a defense or indemnification for the underlying Vasquez action, because American Home cancelled the policy issued to Highrise three months prior to the occurrence of the Vasquez accident. Although defendants South William, Wall Street, McCann and Kennelly have appeared in the matter, they have not filed any opposition to this motion. Defendant Highrise has not answered the complaint nor appeared in this action. The only opposition to American Home's motion is by defendant Vasquez. Since the note of issue has not yet been filed, the time restrictions of CPLR § 3212 have not been triggered. Consequently, this motion can be considered on the merits. Brill v. City of New York, 2 N.Y.3d 648 (2004).

Facts and Arguments Presented

The following facts are undisputed unless otherwise indicated. American Home claims, through the sworn affidavits of Susan Pinto (an Underwriting Quality Manager in the Speciality Workers' Compensation Unit of Chartis Insurance, underwriter for American Home Workers' Compensation and Employer Liability Policies) and Steven A. Rosenstein (the Complex Director of Chartis Claims, Inc.) the following:

American Home issued Workers' Compensation and Employers Liability Policy No. WC 6708269 ("Policy") to Highrise, effective March 23, 2005. Part One of the Policy provides Workers' Compensation insurance. Part Two provides Employers Liability insurance. Part Six of the Policy, "Conditions," permits the parties to cancel the Policy, as follows:

D. Cancellation

1. You may cancel this policy . You must mail or deliver advance written notice to us stating when the cancellation is to take effect.

2. We may cancel this policy. We must mail or deliver to you not less than ten days advance written notice stating when the cancellation is to take effect. Mailing that notice to you at your mailing address shown in Item 1 of the information Page will be sufficient to prove notice.

3. The policy period will end on the day and hour stated in the cancellation notice.

4. Any of these provisions that conflicts with a law that controls the cancellation of the insurance In this policy is changed by this statement to comply with that law.

Regarding payment of the premium, American Home and Highrise agreed that Highrise would make a 30% down payment followed by six (6), consecutive monthly installment payments. Highrise failed to make both the 30% down payment and its first monthly installment payment. On May 24, 2005, American Home sent Highrise and the Workers' Compensation Board a Notice of Cancellation. The notice stated that the Policy would be canceled 16 days later, on June 9, 2005, because Highrise had failed to pay the premium. Despite this notice, Highrise failed to make its overdue premium payments. As a result, the Policy was canceled, effective June 9, 2005.

On September 21, 2005, more than three months after the Policy was canceled, David Vasquez, while working for Highrise on a job site in downtown Manhattan, sustained a fatal injury ("Vasquez accident").

On March 28,2007, Luz Vasquez, as Administratrix of the Estate of David Vasquez, filed the underlying Vasquez action, sounding in negligence and violations of the labor law. Five months later, on August 21, 2007, two of the defendants in the underlying Vasquez

action, South William (the owner) and Wall Street (the general contractor), filed a third-party complaint against Highrise, seeking common-law and contractual indemnification.

Meanwhile, the Workers' Compensation Board ("Board") made a series of decisions in a parallel workers' compensation proceeding, brought on behalf of Vasquez' estate, for insurance benefits. Following a hearing, by decision filed on November 26, 2008 ("first decision"), the Board discharged American Home as the workers' compensation carrier for Wall Street, the job site's general contractor, and "H. Contracting," which was apparently an affiliate of Highrise. In doing so, the Board determined that Highrise (not "H. Contracting") was David Vasquez's employer. Since an American Home representative did not appear at the hearing on Highrise's behalf, the Board precluded American Home from litigating the question of coverage for workers' compensation benefits. American Home did not appeal this determination.

Following a subsequent hearing, by decision filed on January 9, 2009 ("second decision"), the Board awarded benefits to David Vasquez's three eligible children and directed the payment of attorneys' fees and funeral expenses incurred by the Vasquez estate. American Home timely appealed this second decision. In its appeal, American Home asked the Board to reverse or rescind its decision because American Home had canceled the Policy before the Vasquez accident and, therefore, should not be required to pay the benefits the Board had awarded to the Vasquez children. American Home also sought reversal of the second decision for the further reason that the Board had not permitted American Home to offer in evidence the testimony of an underwriter that the Policy had, in fact, been canceled before the Vasquez Accident occurred.

On August 27, 2009, a panel of the Board denied American Home's appeal as untimely because it was not taken within 30 days after the first decision dated November 28,

2008. The Board did not address or determine American Home's duty to defend or indemnify Highrise (or any other party) for the underlying Vasquez suit. Nor did the Board consider any issue under Part Two (the Employer's Liability Part) of the Policy.

In June 2008, American Home's Workers' Compensation Unit received a copy of the third-party complaint in the underlying Vasquez action from an attorney representing the executrix of the Vasquez estate. American Home claims that the attorney did not ask American Home to defend, indemnify, or take any action on behalf of Highrise (or anyone other party) in connection with the underlying Vasquez action. American Home further claims that the attorney did not provide American Home's Claims Unit with any other legal papers or other documents concerning the underlying Vasquez action.

On April 16, 2010, more than four years after the Policy was cancelled and the Vasquez accident had occurred, and nearly three years after service of the third-party complaint, American Home claims that it first received notice of the Vasquez accident and the underlying Vasquez action. Twenty days later, on May 6, 2010, American Home disclaimed any duty to provide a defense or indemnification for the Vasquez Suit on the basis that it had canceled the Policy before the Vasquez accident happened. American Home claims that to this day, no one, not Highrise, not anyone representing the Vasquez estate, nor any other party to the underlying Vasquez action has requested that American Home provide a defense in, or indemnification for, the underlying Vasquez action.

Based on the foregoing facts, American Home argues that: [1] its policy with Highrise was no longer in effect when Vasquez suffered his accident, due to cancellation, [2] waiver due to a failure to timely disclaim is not applicable here, where there was cancellation of the policy, and [3] American Home has not taken any action that would warrant estoppel. Moreover, it argues that [4] the Workers' Compensation Board did not determine the

question whether American Home had a duty to provide a defense or indemnification in the underlying suit, therefore the doctrine of *res judicata* does not apply because the issue at bar was not the subject of that hearing, nor did the Workers' Compensation Law Judge decide that issue.

In its reply, Vasquez argues that the Board determined that the Policy was in effect as the time of the accident and, therefore, the doctrines of *res judicata* and *collateral estoppel* apply. According to Vasquez, the Board's decision, ordering American Home to pay workers' compensation benefits to Vasquez under the Policy, is binding on this court and, therefore American Home has to defend and indemnify Highrise.

Discussion

"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 N.Y.2d 557, 562 (1st Dept. 1980); Winegrad v. New York Univ. Med. Ctr., 64 N.Y.2d 851, 853 (1985). Only when the proponent of the motion makes a *prima facie* showing of entitlement to summary judgment does the burden then shift to the party opposing the motion who must then demonstrate, by admissible evidence, the existence of a factual issue requiring a trial of the action. Zuckerman v. City of New York, *supra* at 562. Where the language of an insurance contract is clear and unambiguous, interpretation of that contract and construction of its provisions are questions of law that should be resolved by summary adjudication. Loblaw, Inc. v. Employers' Liability Assurance Cas. Corp., 57 N.Y.2d 872 (1982); Sheehan v. State Farm Fire and Cas. Co., 239 A.D.2d 486 (2d Dept. 1997).

The New York courts have consistently ruled that a canceled policy does not cover accidents occurring after cancellation. Zappone v. Home Insurance Co., 55 N.Y.2d 131, 136

(1982); Sedgwick Ave. Assocs. v. Insurance Co. of State of P.A., 203 A.D.2d 93, 94 (1st Dept. 1994). Furthermore, the courts in New York have refused to find estoppel where the insurer's policy was not in effect at the time of the alleged accident. See Wausau Ins. Cos. v. Feldman, 213 A.D.2d 179, 180 (1st Dept. 1995) citing Zappone v. Home Ins. Co., 55 N.Y.2d 131, 137 (1982). Moreover, the Board only has authority to hear and determine claims for benefits owed to injured employees. See Landau, P.C v. LaRossa, Mitchell & Ross, 11 N.Y.3d 8, 12 (2008); MacMullan v. Associated Press, 133 A.D.2d 917, 918 (3d Dep't 1987); Lane Constr. Corp. v. Winona Constr. Co., Inc., 49 A.D.2d 142, 146 (3d Dep't 1975). Like estoppel, the doctrine of waiver cannot create coverage where there is none. Albert J. Schiff Assocs., Inc. v. Flack, 51 N.Y.2d 692, 698 (1980); see Axelrod v. Magna Carta Cos., 63 A.D.3d 444, 445 (1st Dept. 2009).

The germane and central issue in this case is not whether American Home can establish that the policy was cancelled, but rather that when it had a full and fair opportunity to raise the issue of cancellation, it did not succeed. In this case, because the Board could have heard the issue about cancellation of coverage, American Home is bound by the Board's decision that it was required to provide benefits under the policy.

The doctrine of *res judicata*, or "claim preclusion," is that a final judgment on the merits, by a court of competent jurisdiction, "bars future actions between the same parties on the same cause of action." Landau, P.C. v. LaRossa, Mitchell & Ross, 11 N.Y.3d 8, 12 (2008); Gramatan Home Investors Corp. v. Lopez, 46 N.Y.2d 481, 485 (1979). The doctrine applies to determinations by quasi judicial agencies, like the Workers' Compensation Board. Samba v. Delligard, 116 A.D.2d 563 (2nd Dept 1986). Therefore, *res judicata* applies to claims that actually were litigated or could have been litigated before the Workers' Compensation Board. The Board has power to determine whether a policy of insurance

covering the liability of an employer was cancelled prior to the time an accident occurs, or whether it is in force, and if so, the liability of the insurance company under it. Skoczlois v. Vinocour, 221 N.Y.276 (1917); Workers' Compensation Law § 54. Furthermore, the Board is deemed to be acting within its discretion when it declines to consider documents after an insurer fails to provide them as directed. Cross v. G.A. Hall, Inc., 24 A.D.3d 903 (3d Dept. 2005); Workers' Compensation Law § 54.

Here, the Workers' Compensation Board held, on November 26, 2008, that American Home was precluded from presenting evidence of cancellation of coverage for Highrise due to its non-appearance at the hearing. On appeal, the Board declined to examine the merits of whether cancellation was a proper defense to American Home's liability for workers' compensation benefits payable to certain Vasquez family members, because American Home had not timely raised the issue pursuant to § 23 of the Workers' Compensation Law, nor provided any reason for its initial non-appearance. Subdivision 2 of Workers' Compensation Law §54 provides that jurisdiction of the employer shall be jurisdiction of the insurance carrier and that the carrier shall in all things be bound by the awards rendered against the employer for the payment of compensation.

At this juncture, American Home does not contest the Board's award of workers' compensation benefits, instead it argues that the issue of benefits payment under the workers' compensation claim presents a different claim than that which is presently before the court. The court disagrees. Generally, the Board's authority "is limited to hearing and determining claims for compensation and otherwise providing for compensation and treatment of injured employees." MacMullan v. Associated Press, 133A.D.2d 917, 918 (3d Dept. 1987), see Workers' Compensation Law § 142(1). Although this limited jurisdiction does not extend to independent disputes between the insurer and the insured employer

(Royal Ins. Co. of Am. v. Lapietra Contr. Corp., 1997 U.S. Dist. LEXIS 24099, at *7-*8 [E.D.N.Y. 1997]), here, American Home itself raised the claim being disputed. Therefore, under the unique circumstances of this case, the Workers' Compensation Board's refusal to consider proof of the Policy's cancellation has *res judicata* effect on whether American Home had liability under its policy with Highrise. Due to the foregoing the motion for summary judgement on the first cause of action in favor of American Home is denied.

Conclusion

In accordance with the foregoing, it is hereby:

ORDERED that plaintiff, American Home Assurance Company's, motion for summary judgment, on its first cause of action, against Highrise Construction Company, 21-23 South William Street, LLC, Wall Street Builders, LLC, McCann, Inc., Kennelly Development Company, LLC, and Luz Vasquez, as Administratix of the Estate of David Vasquez, Deceased is denied; and it is further

ORDERED that the matter is set down for a **preliminary conference, on February 9, 2012, at 9:30 a.m., 60 Centre Street, room 232**; and it is further

ORDERED that any requested relief not otherwise expressly granted herein is deemed denied; and it is further

ORDERED that this constitutes the decision and order of the court.

Dated: New York, NY
December 14, 2011

So Ordered:

Hon. Judith J. Gische, J.S.C.