NEW YORK SUPREME COURT-COUNTY OF BRONX
PART IA-25

RACANELLI CONSTRUCTION COMPANY, INC. and ARCH INSURANCE COMPANY,

Plaintiffs,

-against

CCI CONSTRUCTION CO., INC. and UTICA FIRST INSURANCE COMPANY,

Defendants.

MEMORANDUM DECISION/ORDER
Index No. 307506/09

HON. MARK FRIEDLANDER

Defendant, Utica First Insurance Company ("Utica") moves for an order: (1) pursuant to CPLR§3211(a)(1) and (7), dismissing the summons and complaint against Utica, together with any and all cross-claims asserted or to be asserted against Utica; and (2) pursuant to CPLR§8101 and 22 NYCRR §130-1.1, awarding Utica its costs, including reasonable attorney fees, on this motion. Utica's motion is decided as hereinafter indicated.

The relevant facts are as follows: Hugo Figueroa ("Figueroa") claims that he was injured on May 26, 2003,, at a construction site at 2748 East Tremont Avenue, Bronx, New York, when he was caused to fall off a scaffold as a result of negligence (and the violation of various provisions of the New York State Labor Law and Industrial Code) by certain parties. On December 7, 2004, Figueroa commenced an action to recover monetary damages for injuries allegedly sustained in the aforesaid accident (the "Figueroa lawsuit"), by filing a summons and verified complaint with the County Clerk, Bronx County. By letter, dated February 8, 2005, the law firm of Fabiani & Cohen, LLP, filed a claim on behalf of its client, Racanelli Construction

Co., Inc. ("Racanelli"), a defendant in the Figueroa lawsuit, demanding that Utica defend and indemnify Racanelli in that action ("Tender Letter"). More specifically, the Tender Letter asserts that, on May 26, 2003, Figueroa was injured in the course of his employment with Utica's insured, CCI Inc. ("CCI"); and that CCI (as subcontractor) had entered into a contract with Racanelli, which contained a defense and indemnification provision (Article 23) in favor of Rancanelli, as well as a provision requiring CCI to procure and maintain commercial general liability insurance and commercial umbrella, endorsed to name Racanelli as an additional insured on a primary and non-contributing basis (Article 24). The Tender Letter further asserts that Utica issued a policy of commercial general coverage to CCI under policy number ART 115696602, effective at the time of the accident, specifically naming Racanelli as an additional insured, and:

> "As the plaintiff (Figueroa) was allegedly injured while carrying out CCI's work under the subcontractor agreement, CCI's indemnity obligations under Article 23 of the subcontractor agreement have been triggered as has the obligation of Utica First to provide Racanelli with a defense and indemnification based upon its additional insured status under Utica First's commercial general liability policy."

By letter, dated February 15, 2005, Utica informed Racanelli's attorneys that the Tender Letter was their first notice of the May 26, 2003 accident, and, as the relationship of plaintiff (Figueroa) to CCI Construction, Inc. was unconfirmed, it was conducting an investigation and reserving its rights pursuant to the policy's employee and contractual liability exclusions.

Utica disclaimed coverage by sending two letters, both dated March 7, 2005. The first letter was addresses to CCI Construction, Inc. That letter disclaimed coverage based upon the Employee Exclusion and the Contractual Liability Exclusion. A copy of the letter was also sent to Racanelli's attorneys. The second letter was addressed to Racanelli's attorneys. This letter disclaimed coverage, stating that a copy of the denial letter to CCI Construction, Inc., which

should be self-explanatory, was enclosed, and that the policy provisions cited as the basis for denial of CCI Construction Inc.'s claim also apply to Racanelli. A copy of this letter was also sent to CCI Construction, Inc.

On September 15, 2009, Racanelli and Arch Insurance Company ("Arch") commenced this action against CCI Construction Co., Inc. and Utica, seeking, *inter alia*, a declaratory judgment that Utica must afford additional insured coverage to CCI Construction Co. Inc, contractual indemnification to Racanelli and Arch, and reimbursement for all attorney's fees incurred as a result of the Figueroa lawsuit. Utica, through its attorneys, again disclaimed coverage by sending two letters, both dated October 7, 2009. The first letter, addressed to CCI Construction Company, Inc., disclaimed upon the grounds that: (1) CCI Construction Company, Inc. is not an insured or an additional insured under Utica's policy; (2) the Employee Exclusion and the Contractual Liability Exclusion provisions preclude coverage for the claims asserted in the Fegueroa lawsuit. The second letter, addressed to CCI Construction Company, Inc. and CCI, Inc., disclaimed coverage for substantially all the reasons stated in Utica's March 7, 2005 letter.

Utica previously moved, pursuant to CPLR§3211(a)(1) and (7) to dismiss the verified complaint against it, together with any cross-claims; or to treat the motion as one for summary judgment, pursuant to CPLR§3211(c) and declare, pursuant to CPLR§3001, that Utica has no obligation to defend or indemnify Racanelli or CCI Construction Co., CCI Construction Inc. or CCI, Inc. and no obligation to reimburse Arch in connection with the underlying lawsuit or third party actions. Racanelli cross-moved for an order: (1) to amend the complaint to reflect the proper corporate name of the defendant; and (2) in opposition to Utica's motion to dismiss the summons and complaint. By order, dated July 7, 2010, this Court denied the motion and cross-

motion with leave to renew on proper papers, stating, *inter alia*, as follows:

> Utica, in its motion, seeks dismissal of the complaint based on its argument that the insurance policy it issued does not cover the claims asserted by Racanelli. Racanelli, in its cross-motion, claims to be opposing Utica's application, but sets forth no specific arguments responding to Utica's contentions. Utica's subsequent reply thus merely re-iterates its original contentions. Thereafter, Racanelli submitted a "reply" on its cross-motion which, for the first time, set forth its arguments in opposition to the motion (i.e. disclaimer obligations, lack of good faith, etc.). In other words, Racanelli's "reply," which was truly its opposing papers to Utica's motion, was served in a manner that deprived Utica of its right of reply as movant. While Utica could have called the Court to request the right to submit a sur-reply, the Court will not consider Utica's failure to do so as a waiver, because the Court, for its own benefit, desires the clarification as to what reply arguments Utica can make in response to the belatedly raised issues in Racanelli's "reply," in this rather complex insurance coverage action. In any renewed motion, Utica may address the issues which were raised by Racanelli in the current motion and may also seek costs of the extra motion, inasmuch as it appears that Racanelli may have used the current cross-motion as a subterfuge for improperly eliciting the "last word" on Utica's application and for raising new issues at the last moment.

Utica's renewed motion seeks dismissal of plaintiffs' complaint on the grounds that: (1) any claim for defense and indemnification is precluded by the Employee Exclusion and Contractual Liability provisions of the policy; (2) that CCI Construction Co., Inc. is not entitled to coverage an it is not an insured under Utica's policy. Racanelli opposes dismissal on the grounds that (1) Utica did not timely disclaim; and (2) Racanelli is an additional insured under Utica's policy.

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 reasonably possible of such disclaimer or denial of coverage." A failure to give such prompt notice precludes an effective disclaimer or denial. *Matter of Firemen's Fund Ins. Co. of Newark v. Hopkins,* 88 N.Y.2d 836, 837 [1996]. "Timeliness 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." *First Financial Ins. Co. v. Jetco Contracting Corp.,* 1 N.Y.3d 64, 68-69 (2003), quoting *Matter of Allcity Ins. Co., [Jimenez],* 78 N.Y.2d 1054, 1056 (1991). Further, "an insurer's explanation is insufficient as a matter of law where the basis for denying coverage was or should have been

readily apparent before the onset of the delay." *Id.* at 60; *Hunter Roberts Const. Group, LLC v. Arch Ins. Co.*, 75 A.D.3d 404 (1st Dept. 2010).

The Court finds that Utica's disclaimer under Insurance Law §3420(d(2) was timely, as the basis for denying coverage was not readily apparent. The documentation attached to Racanelli's Tender Letter did not provide sufficient facts to enable Utica to disclaim coverage on the grounds of the Employee Exclusion or the Contractual Liability Exclusion provisions of the policy.

With respect to the Employee Exclusion provision, although Racanelli's counsel, in its demand letter, asserted that Figueroa was an employee of CCI, Figueroa's complaint, in the underlying action, which was attached to the demand, does not identify Figueroa's employer at the time of the accident. Consequently, there was insufficient information to immediately ascertain the validity of Racanelli's demand .

With respect to the Contractual Liability Exclusion provision, Figueroa's complaint in the underlying lawsuit identified the accident location only as 2738 East Tremont Avenue, Bronx, New York, and alleged that the premises was owned, operated, maintained, controlled and managed by either Racanelli or Menlo Associates LLC. The Standard Form of Agreement Between Owner (Uni-Corp. National Development) and Contractor (Racanelli) where the basis of payment is a STIPULATED SUM (pg. 1) identifies the Project as Eckerd's Retail Store, 2748/62 East Tremont Avenue, Bronx, New York. The Subcontractor Agreement, dated December 10, 2002, between Racanelli and CCI, only identifies the Project as Eckerds, Bronx. The lack of specificity of the Project address in the Subcontractor Agreement created a sufficient ambiguity as to the applicability of Contractual Liability Exclusion provision. Under these

circumstances, the 25 day "delay" by Utica was reasonable and justified.

Utica's disclaimer letters to CCI and Racanelli sufficiently identified the applicable policy exclusion provisions and set forth the factual basis for Utica's position that the claims fell within the policy exclusions. The disclaimer letter sent to Racanelli, which enclosed and incorporated by reference the one sent to CCI, served as the functional equivalent of setting forth the applicable language again at length. This practice does not invalidate the disclaimer.

Utica's issuance of its disclaimer twenty-five days after receipt of Racanelli's Tender Letter is timely. *Liberty Ins. Underwriters Inc. v. Great Amer. Ins. Co.*, 2010 WL 3629470 (S.D.N.Y. 2010) [28 days]; *Wausau Business Ins. Co. v. 3280 Broadway Realty Co. LLC*, 47 A.D.3d 549 (1st Dept. 2008) [24 day delay]; *Lehigh Constr. Grp., Inc. v. Lexington Ins. Co.*, 70 A.D.3d 4th Dept. 2010) [4 weeks].

Utica's policy contains an Employee Exclusion, which provides, in full, as follows:

Exclusion of Injury to Employees, Contractors, and Employees of Contractors

This insurance does not apply to:

(i) bodily injury to any employee of any insured, to any contractor hired or retained by or for any insured or to any employee of such contractor, if such claim for bodily injury arises out of and in the course of his/her employment or retention of such contractor by or for any insured, for which any insured may become liable in any capacity;

(ii) any obligation of any insured to indemnify or contribute with another because of damage arising out of the bodily injury; or

(iii) bodily injury sustained by the spouse, child, parent, brother or sister of an employee of any insured, or of a contractor, or an employee of a contractor of any insured as a consequence of bodily injury to such employee, contractor, or employee of such contractor, arising out of and in the course of such employment or retention by or for any insured.

This exclusion applies to all claims and suits by any person or organization for damages because

of such bodily injury, including damages for care and loss of services.

This exclusion replaces Exclusion 8 in the Exclusions Section of the AP-100 policy form to which this endorsement is attached.

Utica's policy also contains a Contractual Liability Exclusion, which provides, in pertinent part, as follows:

EXCLUSIONS THAT APPLY TO ALL LIABILITY COVERAGES

We do not pay for a loss if one or more of the following excluded events apply to the loss, regardless of other causes or events that contribute to or aggravate the loss, whether such causes or events act to produce the loss before, at the same time as, or after the excluded event.

* * * * *

3. **We** do not pay for **bodily injury, property damage, personal injury** or **advertising injury** which is assumed under a contract or agreement. This exclusion does not apply to:

   a. an **incidental contract;** or
   b. liability damages that an **Insured** would have in the absence of the contract or agreement.

Utica's policy defines an "incidental contract" as:

a written:

a. lease of premises;
b. easement agreement ...;
c. promise to indemnify a municipality if required by an ordinance ...;
d. sidewalk agreement; or
e. elevator maintenance agreement.

This does not include any contract or agreement to obtain insurance of any kind in connection with a project upon which **you** may be employed as a sub-contractor, or to indemnify any person with respect to such project.

The Court finds that provisions of Employee Exclusion Endorsement and Contractual Liability Exclusion Endorsements preclude coverage to Racanelli and/or Arch for the injuries allegedly sustained by Figueroa. As Figueroa was an employee of CCI, a subcontractor of Racanelli, no coverage is available because of the Employee Exclusion Endorsement. Moreover, the Subcontractor Agreement with CCI, which Racanelli relies upon for contractual indemnity from CCI, does not fit within the definition of an incidental contract. Hence, no coverage is available because of the Contractual Liability Exclusion. Consequently, it is unnecessary to address the contentions of the parties as to whether CCI Construction Co., Inc. was an insured or an additional insured under Utica's policy, or to address Racanelli's cross-motion to amend the complaint for the purpose of reflecting the proper corporate name of the defendant.

Utica's motion for summary judgment is not premature.

Accordingly, the branch of Utica's motion seeking dismissal of plaintiff's complaint against Utica is granted.

The branch of Utica's motion seeking dismissal of any and all cross-claims is denied, as it does not appear that an answer was served by CCI Construction Co., Inc. or any cross-claims interposed.

The branch of Utica's motion seeking costs, including reasonable attorneys fees, on this motion, is granted to the extent of awarding Utica the sum of One Thousand Five Hundred and 00/100 ($1,500.00) Dollars, to be paid by Racanelli's attorneys, towards the cost of renewing this motion, as anticipated in this Court's earlier order.

The foregoing constitutes the Decision and Order of the Court.

Dated: 6/3/11

MARK FRIEDLANDER, J.S.C.