SHORT FORM ORDER

INDEX No. 09-41103

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 48 - SUFFOLK COUNTY

PRESENT:

Hon. HECTOR D. LaSALLE
Justice of the Supreme Court

MOTION DATE 6-5-12
ADJ. DATE 6-19-12
Mot. Seq. # 003 - MG
004 - MD

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ALLEGANY CO-OP INSURANCE COMPANY,

Plaintiff,

- against -

RIVER'S EDGE AT MORICHES, INC. and GEORGE DIFFENDALE,

Defendants.

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Upon the following papers numbered 1 to 52 read on these motions for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 21, 22 - 26 ; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 27 - 45, 46 - 48 ; Replying Affidavits and supporting papers 49 - 50, 51 - 52 ; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that these motions are hereby consolidated for purposes of this determination; and it is further

ORDERED that this motion by the defendant River's Edge at Moriches, Inc. for an order pursuant to CPLR 3212 granting summary judgment declaring that the plaintiff Allegany Co-Op Insurance Company is obligated to defend and indemnify it in an underlying personal injury action is granted; and it is further

ORDERED that this motion (incorrectly designated as a cross motion) by the defendant George Diffendale for an order pursuant to CPLR 3212 granting summary judgment declaring that the plaintiff Allegany Co-Op Insurance Company is obligated to defend and indemnify the defendant River's Edge at

Moriches, Inc. in the underlying personal injury action commenced by him against said defendant, is denied.

The plaintiff Allegany Co-Op Insurance Company (Allegany or Insurer) brings this declaratory judgment action seeking a declaration that it is not obligated to defend or indemnify the defendant River's Edge at Moriches, Inc. (River's Edge) in an underlying action, *George W. Diffendale v River's Edge at Moriches, Inc.*, Supreme Court, Suffolk County, Index No. 10-21228. On May 16, 2008, the defendant George W. Diffendale (Diffendale) allegedly was injured when an apartment building staircase collapsed causing him to fall. Diffendale was a tenant at the senior citizen rental complex which was owned and operated by River's Edge.

It is undisputed that Allegany issued a comprehensive liability policy to River's Edge covering the subject premises under policy number BOP1900000108, effective 12/1/07 to 12/1/08 (the Policy). Allegany claims that it did not receive notice of Diffendale's accident until August 2009, more than 15 months after the occurrence. River's Edge claims that the summons and complaint in the underlying action were served upon it on October 15, 2009. By letter dated November 6, 2010, Allegany disclaimed coverage on the basis that River's Edge failed to timely inform Allegany about the incident, failed to cooperate with the Insurer; failed to preserve evidence, and failed to promptly provide Insurer with copies of notices, demands and legal papers.

River's Edge now moves for summary judgment declaring that Allegany is obligated to indemnify it in connection with the underlying action.[1] 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 issue of fact (*see* ***Alvarez v Prospect Hospital***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). The burden then shifts to the party opposing the motion which must produce evidentiary proof in admissible form sufficient to require a trial of the material issues of fact (***Roth v Barreto***, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; ***Rebecchi v Whitmore***, 172 AD2d 600, 568 NYS2d 423 [2d Dept 1991]; ***O'Neill v Fishkill***, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]). Furthermore, the parties' competing interest must be viewed "in a light most favorable to the party opposing the motion" (***Marine Midland Bank, N.A. v Dino & Artie's Automatic Transmission Co.***, 168 AD2d 610, 563 NYS2d 449 [2d Dept 1990]).

In support of its motion, River's Edge submits, among other things, the pleadings, the affidavit of its corporate secretary, correspondence between the attorney for Diffendale and Allegany, copies of the oral statement and written statement made by the corporate secretary of River's Edge to Allegany, the Policy, Allegany's disclaimer letter dated November 6, 2009, and a copy of a letter by the vice president of River's Edge dated May 19, 2008, allegedly notifying Allegany's agent of the accident. Counsel for River's Edge contends that the instant motion is not based upon the notice of claim allegedly transmitted by River's Edge in said letter. He acknowledges that there are issues of fact whether that letter was actually sent, or if it was received by said agent. Rather, Counsel for River's Edge contends that Allegany was aware of valid reasons to disclaim coverage in the underlying action as early as August 11, 2009, and no later than September 1, 2009, that Allegany's alleged disclaimer of coverage is untimely as a matter of law, and that River's Edge

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[1] It is undisputed that Allegany has undertaken to defend River's Edge in the underlying action. Therefore, the issue of Allegany's duty to defend is not before the Court.

is entitled to recover attorney's fees in defending the instant action.

A review of the record reveals that the following facts are undisputed. By letter dated August 5, 2009, the attorney for Diffendale, Suris & Associates, P.C. (Suris), erroneously notified Allegany that Diffendale had been injured in an accident on May 6, 2009. Because the Policy had been canceled prior to that date, on August 11, 2009, Allegany sent a letter to Suris informing it that there was no coverage available. By letter dated August 17, 2009, Suris corrected its error, writing that the accident had occurred on May 6, 2008. This second letter was received in Allegany's offices on August 18, 2009, and Allegany undertook various actions to investigate the claim. Because this second letter was also incorrect, Suris mailed a third letter containing the correct date of the accident, May 16, 2008. On August 31, 2009, Carolyn Solo (Solo), a claims representative employed by Allegany, conducted an telephone interview with Eileen Quinn (Quinn), the corporate secretary of River's Edge. Quinn informed Solo that the accident had occurred on an exterior staircase at the subject premises in May 2008, that she had faxed the letter dated May 19, 2008 to Allegany's agent, and that the staircase had been replaced shortly after the accident. By letter dated September 3, 2009, Allegany informed River's Edge that it was investigating this matter "to determine if coverage exists under the policy for your claim with regard to your duty to promptly notify us of claims." Allegany then commenced a further investigation into the matter which included, among other things, obtaining a written statement from Quinn regarding the facts of Diffendale's accident. By letter dated November 6, 2009, Allegany informed River's Edge of the Suris correspondence, indicated that it had completed its investigation into the matter, and refused to "defend and/or indemnify [River's Edge] in this matter." Said disclaimer letter also contained the following details:

> "There is no coverage under Policy BOP1900000108 for the following good and valid reasons:
> - Prompt notice of the occurrence was not made as required by the policy.
> - You did not cooperate with this company as required by the policy.
> - You did not furnish this company with copies of notices, demands or legal papers received in connection with this occurrence.
> - You allowed the parts of the staircase that allegedly caused the collapse to be removed and disposed of before reporting the claim to us.
> - You did not preserve the scene of the alleged collapse in order to allow us to inspect the damage in situ.
> - You permitted evidence essential to your defense to be destroyed and/or altered."

The Court notes that the last three items are essentially similar, and can be summarized as allegations that River's Edge failed to preserve evidence regarding the accident. However, the Court will first address the issue of the alleged failure by River's Edge to give Allegany notice of the subject occurrence. The Policy, Form LS-5 (9/02), provides, in pertinent part:

E. WHAT YOU MUST DO IN CASE OF LOSS

1. Notice.
   a. In case of an occurrence or if you become aware of anything that indicates there might be a claim under this policy, you must give us or our agent notice (in writing if requested) as soon as practicable;
   b. The notice to us must state:
      1) your name, policy number and the time, place and circumstances of the occurrence, and
      2) names and addresses of any potential claimants and witnesses.

2. Cooperation - You must cooperate with us in performing all acts required by this policy.

* * *

4. Additional Duties Bodily Injury and/or Property Damages Coverages - In the event of an occurrence which might result in a claim for bodily injury and/or property damage liability under this policy, you must do the following:
   a. promptly forward to us copies of all notices, demands, or legal papers received in connection with the occurrence;

River's Edge has asserted that its alleged failure to provide prompt notice of the occurrence to Allegany is irrelevant, and it concedes the issue for the purposes of this motion. Instead, River's Edge contends that Allegany's failure to issue a timely disclaimer herein, entitles it to summary judgment declaring that Allegany is obligated to indemnify it in the underlying action. Insurance Law § 3420 (d) (2) requires written notice of a disclaimer to be given "as soon as is reasonably possible" after the insurer learns of the grounds for disclaiming liability (*see* ***First Fin. Ins. Co. v Jetco Contr. Corp.***, 1 NY3d 64, 769 NYS2d 459 [2003]; ***Sirius Am. Ins. Co. v Vigo Constr. Corp.***, 48 AD3d 450, 852 NYS2d 176 [2d Dept 2008]; ***Quincy Mut. Fire Ins. Co. v Uribe***, 45 AD3d 661, 845 NYS2d 434 [2d Dept 2007]; ***Schulman v Indian Harbor Ins. Co.***, 40 AD3d 957, 836 NYS2d 682 [2d Dept 2007]; ***Lancer Ins. Co. v T.F.D. Bus Co.***, 18 AD3d 445, 795 NYS2d 70 [2d Dept 2005]); *but see* ***Ciasullo v Nationwide Ins. Co.***, 32 AD3d 889, 823 NYS2d 85 [2006]). The reasonableness of the delay is measured from the time when the insurer "has sufficient knowledge of facts entitling it to disclaim, or knows that it will disclaim coverage" (***Allstate Ins. Co. v Gross***, 27 NY2d 263, 317 NYS2d 309 [1970]; ***Sirius Am. Ins. Co. v Vigo Constr. Corp.***, *supra*; ***Quincy Mut. Fire Ins. Co. v Uribe***, *supra*; ***Schulman v Indian Harbor Ins. Co.***, *supra*). It is the insurer's responsibility to explain its delay in giving written notice of disclaimer, and an unsatisfactory explanation will render the delay unreasonable as a matter of law (***Tully Constr. Co., Inc. v TIG Ins. Co.***, 43 AD3d 1150, 842 NYS2d 528 [2d Dept 2007]; *see* ***Sirius Am. Ins. Co. v Vigo Constr. Corp.***, *supra*; ***Quincy Mut. Fire Ins. Co. v Uribe***, *supra*; ***Schulman v Indian Harbor Ins. Co.***, *supra*)."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" (***First Fin. Ins. Co. v Jetco Contr. Corp.***, *supra*).

The Court finds that Allegany knew of the basis for disclaimer regarding the alleged failure of River's Edge to give it notice of the occurrence on September 2, 2009. In addition, Allegany had been informed on August 31, 2009, that River's Edge had replaced and discarded the subject staircase. Yet, it was not until November 6, 2009, sixty-five days later, that Allegany issued its disclaimer of coverage. The Court of Appeals has held that a delay of forty-eight days in issuing a disclaimer was unreasonable as a matter of law (***First Fin. Ins. Co. v Jetco Contr. Corp.***, *supra*). A forty-nine day delay was found untimely as a matter of law where the facts establishing the right to disclaim were readily ascertainable (***Fish King Enters. v Countrywide Ins. Co.***, 88 AD3d 639, 930 NYS2d 256 [2d Dept 2011]). A delay of forty-five days was found unreasonable in ***Moore v Ewing***, 9 AD3d 484, 781 NYS2d 51 [2d Dept 2004]). In addition, delays as short as thirty-four days have been found unreasonable as a matter of law where no explanation for the delay in disclaiming coverage was established (***Sirius Am. Ins. Co. v Vigo Constr. Corp.***, *supra*; *see also* ***Matter of Allstate Ins. Co. v Swinton***, 27 AD3d 462, 811 NYS2d 108 [2d Dept 2006]).

The failure of an insured to timely notify the insurer of a claim does not excuse the insurer's failure to timely disclaim coverage (***Schulman v Indian Harbor Ins. Co.***, *supra*). Indeed, an insurer waives its affirmative defense of late notice if it fails to disclaim coverage "as soon as is reasonably possible" (*see* ***Hermitage Ins. Co. v Arm-Ing, Inc.***, 46 AD3d 620, 847 NYS2d 628 [2d Dept 2007]). The Court notes that Allegany's letter dated September 3, 2009, advises River's Edge that it is undertaking an investigation into the River's Edge's "duty to promptly notify us of claims," and that Allegany reserves its rights under the policy. It has been held that a reservation of rights letter holds no relevance to the question of whether an insurer has timely sent a disclaimer of coverage (***Hartford Ins. Co. v County of Nassau***, 46 NY2d 1028, 416 NYS2d 539 [1979]).

Here, River's Edge has established its *prima facie* entitlement to summary judgment herein. It is now incumbent upon Allegany to produce evidence in admissible form sufficient to require a trial of the material issues of fact (***Roth v Barreto***, *supra*; ***Rebecchi v Whitmore***, *supra*; ***O'Neill v Fishkill***, *supra*). In opposition to this motion, Allegany submits, among other things, the affidavit of Solo, the affidavit of the agent to whom River's Edge allegedly faxed the notice of claim dated May 19, 2008, two investigative reports, and the deposition transcripts of Quinn and her husband, the vice president of River's Edge.

In her affidavit, Solo swears that she was the claims representative handling the subject claim, that Allegany first received notice of the occurrence on August 18, 2009, and that she conducted a telephone interview with Quinn on August 31, 2009. She states that she spoke with Peggy Musarra (Musarra), a claims representative at "our insurance agent who sold the policy to River's Edge" on September 1, 2009, regarding the alleged notice of claim dated May 19, 2008. Musarra told her that her agency never received such notice. Solo indicates that she spoke again to Musarra on September 2, 2009, and that she was told that a search had been conducted and that Musarra "could state with complete certainty that [the agent] had never received any correspondence from [River's Edge] regarding the alleged loss..." On September 3, 2009, she sent a letter to River's Edge advising it that Allegany would undertake an investigation into the River's Edge's "duty to promptly notify us of claims," and that Allegany was reserving its rights under the policy. Solo further swears that between September 3, 2009, and November 6, 2009, Allegany investigated the claim "[including], among other things, hiring an independent claims adjuster, conducting eyewitness interviews, making telephone calls, surveying the site of the alleged incident, and taking photographs." She indicates that four days after she received the final report from the independent adjuster, she mailed the disclaimer

letter dated November 6, 2009.
Solo further swears that Allegany has "already assumed a gratuitous defense of [the underlying] action on behalf of River's Edge under a full reservation of rights."

A review of Musarra's affidavit reveals that it merely reaffirms many of the factual statements in Solo's affidavit. A review of the investigative reports submitted by the independent adjuster reveals that they only explore issues regarding the facts and circumstances surrounding the occurrence on May 16, 2008. The reports do not contain any information regarding the alleged failure of River's Edge to provide prompt notice of the occurrence, its failure to preserve evidence regarding the occurrence, or other issues. In addition, the deposition transcripts of Quinn and her husband, do not address the issues raised in this motion.

Regardless, counsel for Allegany contends that "Allegany did not know it was going to disclaim until after the investigation by the independent adjuster had been concluded. It could not 'reasonably' make a determination without this investigation, as is routine company procedure. Therefore, the basis for denying coverage was not 'readily apparent before the onset of delay.'" In addition, counsel for Allegany contends that the investigation was necessary to establish the other grounds in the disclaimer letter dated November 6, 2009. The affirmation of Allegany's attorney, who has no personal knowledge of the facts herein, is insufficient on a motion for summary judgment (***Sanbria v Paduch***, 61 AD3d 839, 876 NYS2d 874 [2d Dept 2009]; ***Warrington v Ryder Truck Rental, Inc.***, 35 AD3d 455, 826 NYS2d 152 [2d Dept 2006]; ***9394, LLC v Farris***, 10 AD3d 708, 782 NYS2d 281 [2d Dept 2004]; ***Deronde Prods., Inc. v Steve Gen. Contr., Inc.***, 302 AD2d 989, 755 NYS2d 152 [4th Dept 2003]). Allegany has not submitted any evidence that the delay in disclaiming coverage was reasonable, or that it was not readily apparent on September 2, 2009. In addition, it has been held that an insurer's duty to give written notice of disclaimer "as soon as is reasonably possible" precludes the insurer from delaying the issuance of the disclaimer on the ground that insurer knows to be valid, such as late notice of claim, while investigating other possible grounds for disclaiming (***George Campbell Painting v National Union Fire Ins. Co. of Pittsburgh, PA***, 92 AD3d 104, 937 NYS2d 164 [1st Dept 2012]; ***McGinnis v Mandracchia***, 291 AD2d 484, 739 NYS2d 160 [2d Dept 2002]; ***City of New York v Northern Ins. Co. of N.Y.***, 284 AD2d 291, 725 NYS2d 374 [2d Dept 2001].

The Court notes that River's Edge further contends that it is entitled to recover attorney's fees regarding its defense in this declaratory judgment action. In general, an insured who is "cast in a defensive posture by the legal steps an insurer takes in an effort to free itself from its policy obligations," and who prevails on the merits, may recover attorneys' fees incurred in defending against the insurer's action (***Mighty Midgets v Centennial Ins. Co.***, 47 NY2d 12, 416 NYS2d [1979]). However, it has been held that the right to recover attorneys' fees is only available where the dispute involves the insurer's duty to defend (***New York Marine and Gen. Ins. Co. v Lafarge North America, Inc.***, 599 F3d 102 [2d Cir 2010]; ***Liberty Surplus Ins. Corp. v Segal Co***., 420 F3d 65 [2d Cir 2005]; ***Insurance Co. of Greater N.Y. v Clermont Armory***, 84 AD3d 1168, 923 NYS2d 661 [2d Dept 2011]). A review of the record reveals that Allegany has provided Rivers' Edge a defense in the underlying action. Nonetheless, River's Edge is entitled to recover its attorneys' fees in this action as Allegany had a duty to defend River's Edge in the underlying action (***U.S. Underwriters Ins. Co. v City Club Hotel, LLC***, 3 NY3d 592, 789 NYS2d 470 [2004]), and Allegany disputed that issue in commencing this action.

Accordingly, River's Edge is entitled to a hearing to determine the amount of its attorneys' fees in

defending this action, and entry of judgment declaring that Allegany is obligated to afford coverage, defend, and indemnify the defendant River's Edge of Moriches, Inc. in the underlying action.

Diffendale now moves for summary judgment declaring that Allegany is obligated to defend and indemnify River's Edge in the underlying action. In support of his motion, Diffendale submits the affirmation of his attorney, a copy of Allegany's letter to River's Edge dated September 3, 3009, and a copy of the disclaimer letter dated November 6, 2009. In his affirmation, counsel for Diffendale contends that the disclaimer letter dated November 6, 2009, is not sufficiently specific with regard to Diffendale's alleged failure to give Allegany notice of the occurrence. Notice given by an injured party is not judged by the same standards as govern notice by the insured, since what is reasonably possible for the insured may not be reasonably practical for the injured person. The test is one of reasonableness, measured by the diligence exercised by the injured party in light of the circumstances. The reasonableness of any delay and the sufficiency of the excuse offered ordinarily present questions of fact to be resolved at trial (***Allstate Ins. Co. v Marcone***, 29 AD3d 715, 815 NYS2d 235 [2d Dept 2006]; *see also* ***Tower Ins. Co. of New York v Lin Hsin Long Co.***, 50 AD3d 305, 855 NYS2d 75 [1st Dept 2008]; ***Lauritano v American Fidelity Fire Ins. Co.***, 3 AD2d 564, 162 NYS2d 553 [1st Dept 1957] *affd* 4 NY2d 1028, 172 NYS2d 530 [1958]). Where an injured party has pursued his [or her] rights as diligently as reasonably possible, the statute places the risk of the insured's delay on the insurer (***Tower Ins. Co. of New York v Lin Hsin Long Co.***, *supra*). Stated differently, "where the injured person proceeds diligently in ascertaining coverage and in giving notice, he [or she] is not vicariously charged with any delay by the assured" (***Jenkins v Burgos***, 99 AD2d 217, 472 NYS2d 373 [1st Dept 1984]; *see* ***National Grange Mut. Ins. Co. v Diaz***, 111 AD2d 700, 490 NYS2d 516 [1st Dept 1985]).

Here, the disclaimer letter dated November 6, 2009, provides in pertinent part: "We received notice of a claim from Suris & Associates, the law firm representing George Diffendale ... who was allegedly injured at your property when a staircase collapsed. Three different dates of accident were given by Suris & Associates at different times; May 16, 2008 appears to be the correct date. This claim was reported more than fifteen months after the incident giving rise to this claim." A review of the disclaimer letter reveals that it was mailed to Suris. The Court finds that the disclaimer was adequately specific (***General Acc. Ins. Group v Cirucci***, 46 NY2d 862, 414 NYS2d 512 [1979]).

Diffendale has failed to submit any evidence regarding his actions after the incident, and his diligence under the circumstances in notifying Allegany of the accident. There are multiple issues of fact requiring a trial of Diffendale's claims. In addition, considering the Court's determination in favor of River's Edge herein, it appears that Diffendale's motion is academic.

Accordingly, Diffendale's motion for summary judgment is denied.

The parties are directed to appear for a hearing on **November 7, 2012 at 9:30 a. m.** in Courtroom D62 of the Cohalan Court Complex, 400 Carleton Avenue, Central Islip, New York, and River's Edge is directed to produce appropriate documentation to support the amount of attorneys' fees sought as reimbursement from Allegany.

The parties are directed to settle judgment in accordance with this order. However, the Court directs that settlement of said judgment be held in abeyance pending the outcome of the hearing to determine the amount of attorneys' fee due from the insurer.

The foregoing constitutes the Order of this Court.

Dated: September 11, 2012
Central Islip, NY

HON. HECTOR D. LASALLE, J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION