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

PRESENT: HON. PAUL WOOTEN PART 7
Justice

ILLINOIS NATIONAL INSURANCE COMPANY,
Plaintiff,

-against-

ARCH SPECIALTY INSURANCE COMPANY,
Defendant.

INDEX NO. 109278/2011

MOTION SEQ. NO. 001

The following papers were read on the defendant's motion to dismiss.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1, 2
Answering Affidavits — Exhibits (Memo)	3, 4, 5
Reply Affidavits — Exhibits (Memo)	6, 7

Cross-Motion: ■ Yes ☐ No

In this action, plaintiff Illinois National Insurance Company (Illinois) seeks a judgment for contribution in the amount of $479,126.70 from defendant Arch Specialty Insurance Company (Arch). Before the Court is a motion by Arch to dismiss the complaint pursuant to CPLR 3211(a)(1) and (a)(7). Illinois opposes Arch's motion and makes a cross-motion for summary judgment on its complaint, pursuant to CPLR 3212.

BACKGROUND

The claim in this action arises out of an underlying lawsuit captioned *Angel Encalada v. CPS 1 Realty, et al.*, New York County Supreme Court Index No. 104782/2007 (Encalada Action). In the Encalada Action, the plaintiff, an employee of a company named Waldorf Demolition LLC d/b/a Waldorf Holding Corp. (Waldorf), alleged that he was injured on January 30, 2007, while performing construction work at the Plaza Hotel, located at 768 Fifth Avenue, New York, New York. El-Ad Properties (El-Ad) was the owner of the Plaza Hotel and Tishman Construction Corporation of New York (Tishman) was the general contractor of the construction project where the accident occurred. Prior to January 30, 2007, Tishman retained Waldorf as a subcontractor for certain demolition work in connection with the construction project. In the Encalada Action plaintiff asserted claims against El-Ad and Tishman, as well as

other parties, under Labor Law §§ 200, 240(1) and 241(6), as well as common law negligence.

Illinois, pursuant to the terms of its policy of insurance, agreed to provide El-Ad and Tishman with a defense and indemnity in the Encalada Action. On January 18, 2008, a third-party action was commenced by El-Ad and Tishman against Waldorf. The third-party action sought contractual and common law indemnification against Waldorf in connection with the Encalada Action.

Waldorf had entered in a contract with El-Ad, pursuant to which Waldorf agreed to indemnify, defend and hold harmless El-Ad and Tishman from and against all claims or causes of action, damages, losses and expenses, including but not limited to attorney's fees and legal costs and expenses, arising out of or resulting from the performance of Waldorf's work. Arch issued a Commercial General Liability Policy to Waldorf covering the period of July 29, 2006 to July 29, 2007 (the Arch Policy). The parties do not dispute that El-Ad and Tishman are considered additional insureds under the Arch Policy. The Arch Policy provides liability coverage for sums that the insureds are legally obligated to pay as damages because of bodily injury or property damage caused by an occurrence. An occurrence is defined in the policy as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions" (Notice of Motion, exhibit 3, p. 16). The policy contains language requiring the insured to notify Arch as soon as practicable of an "occurrence" or offense which may result in a claim, as well as notice of any claim or suit brought against any insured.

Illinois claims that it was not until July 24, 2009, that it was made aware of the fact that Arch had issued a policy of insurance to Waldorf that named El-Ad and Tishman as additional insureds and was in effect on January 20, 2007. On July 24, 2009, Illinois received a copy of a Certificate of Insurance reflecting that Arch had issued a commercial general liability policy to Waldorf and that El-Ad and Tishman were named as additional insureds on the Arch Policy. On August 4, 2009, Illinois wrote to Arch and demanded Arch indemnify Illinois for any

indemnity and defense costs incurred on behalf of El-Ad and Tishman. By letter dated August 29, 2009, Arch denied any obligation to defend or indemnify Tishman and El-Ad on the ground that the notice provision of the policy had not been timely complied with (*see* Notice of Motion, exhibit 4). Waldorf failed to appear in the third-party action in the Encalada Action, and an inquest was held on May 3, 2010. The Court issued a decision fixing the amount of the damages against Waldorf in the sum of $479,126.70. (Affidavit of Leon R. Kowalski, Esq., Exhibit C). Illinois now brings this action seeking a judgment against Arch for its costs in defending and indemnifying Tishman and El-Ad in the underlying action.

In support of its motion to dismiss, Arch maintains that Illinois can not prove any facts that would entitle it to the relief sought because Illinois' notification to Arch was untimely under the policy. While the underlying incident took place on January 30, 2007, Arch did not receive notice of the occurrence or the underlying lawsuit until August 4, 2009, more than two and a half years later. Arch maintains that the notice was untimely as a matter of law. Arch further asserts that Illinois clearly had the means to discover the existence of the Arch Policy as early as 2007.

In opposition to the motion to dismiss and in support of its cross-motion for summary judgment, Illinois maintains that it timely placed Arch on notice of the underlying claim immediately after it became aware of the Arch Policy. Relying on affidavits submitted by its claims examiner and appointed defense counsel, Illinois argues that it did not have any prior awareness of the existence of the Arch Policy and therefore its August 4, 2009 tender of the underlying claim was reasonable and timely as a matter of law. In reply, Arch maintains that Illinois has failed to provide any reasonable excuse or explanation as to why it failed to give timely notice and therefore the complaint should be dismissed.

STANDARDS

Motion to Dismiss

When determining a CPLR 3211(a) motion, "we liberally construe the complaint and

accept as true the facts alleged in the complaint and any submissions in opposition to the dismissal motion" (*511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 151-152 [2002]; *Leon v Martinez*, 84 NY2d 83, 87 [1994]; *Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409 [2001]; *Wieder v Skala*, 80 NY2d 628 [1992]). "We also accord plaintiffs the benefit of every possible favorable inference" (*511 W. 232nd Owners Corp.*, 98 NY2d at 152; *Sokoloff v Harriman Estates Dev. Corp*, 96 NY2d at 414).

"In order to prevail on a motion to dismiss based on documentary evidence pursuant to CPLR 3211(a)(1), the documents relied upon must definitively dispose of plaintiff's claim" (*Bronxville Knolls v Webster Town Ctr. Pshp.*, 221 AD2d 248, 248 [1st Dept 1995]; *Demas v 325 W. End Ave. Corp.*, 127 AD2d 476 [1st Dept 1986]). A CPLR 3211(a)(1) "motion may be appropriately granted only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (*Goshen v Mut. Life Ins. Co.*, 98 NY2d 314, 326-27 [2002]).

Upon a CPLR 3211(a)(7) motion to dismiss for failure to state a cause of action, the "question for us is whether the requisite allegations of any valid cause of action cognizable by the state courts 'can be fairly gathered from all the averments'" (*Foley v D'Agostino*, 21 AD2d 60, 65 [1st Dept 1964], quoting *Condon v Associated Hosp. Serv.*, 287 NY 411, 414 [1942]). "However imperfectly, informally or even illogically the facts may be stated, a complaint, attacked for insufficiency, is deemed to allege 'whatever can be implied from its statements by fair and reasonable intendment'" (*Foley v D'Agostino*, 21 AD2d at 65, quoting *Kain v Larkin*, 141 NY 144, 151 [1894]). "[W]e look to the substance [of the pleading] rather than to the form (*id.* at 64). In order to defeat a pre-answer motion to dismiss pursuant to CPLR 3211, the opposing party need only assert facts of an evidentiary nature which fit within any cognizable legal theory (*see Bonnie & Co. Fashions, Inc. v. Bankers Trust Co.*, 262 AD2d 188 [1st Dept 1999]).

Notice Provisions in Insurance Contracts

Under New York law, as applicable to the time the Arch Policy was issued, an insurer's

obligation to cover its insured's loss was not triggered until the insured gave timely notice of the subject occurrence and/or claim in accordance with the terms of the insurance contract (*see York Speciality Food, Inc. v Tower Ins. Co. Of New York*, 47 AD3d 589, 590 [1st Dept 2008]; *Travelers Insurance Company v Volmar Construction Co., Inc.*, 300 AD2d 40, 42 [1st Dept 2002]). An additional insured has an independent obligation to give the insurance reasonably prompt notice of an occurrence (*see 23-08-18 Jackson Realty Assocs. v Nationwide Mutual Ins. Co.*, 53 AD3d 541, 542-543 [2nd Dept 2008]; *Structure Tone v Burgess Steel Products Corp.*, 249 AD2d 144, 145 [1st Dept 1998]; *American Manufacturers Mutual Insurance Co. v CMA Enterprises, Ltd.*, 246 AD2d 373 [1st Dept 1998]). The notice provision in the insurance policy is a condition precedent to coverage and, absent a valid excuse, the failure to satisfy the notice requirement vitiates the policy (*see Great Canal Realty Corp. v Seneca Ins. Co.*, 5 NY3d 742, 743 [2005]; *Ocean Partners, LLC v North River Insurance Co.*, 25 AD3d 514, 515 [1st Dept 2006]). Where an excuse or explanation is offered for delay in furnishing notice, the reasonableness of the delay and the sufficiency of the excuse are matters to be determined at trial (*Travelers*, 300 AD2d at 42). However, if no excuse or mitigating factor is offered for the delay, the issue then becomes a legal question for the court and courts have found relatively short periods of delay unreasonable as a matter of law (*id* at 43; *see also Kahn v Allstate Ins. Co.*, 17 AD3d 408, 409-410 [2nd Dept 2005] [67 day delay in providing notice of claim unreasonable]; *Goodwin Bowler Assocs., Inc. v St. Paul Surplus Lines Ins. Co.*, 259 AD2d 381 [1st Dept 1999] [2 months]; *Pandora Indus., Inc. v St. Paul Surplus Lines Ins. Co.*, 188 AD2d 277 [1st Dept 1992] [31 days]. The insured has the burden of establishing the reasonableness of its proffered excuse (*Great Canal*, 5 NY3d at 744).

DISCUSSION

Here the Court finds that the two and a half year delay in providing notice of Encalada's accident was unreasonable and did not compart with the timely notice provision in the Arch

Policy. Absent a valid excuse, the policy is vitiated and Arch cannot be held liable for Illinois' indemnity and defense costs in the underlying action. Illinois has failed to proffer a valid excuse for failing to provide notice in accordance with the policy provisions. Such is not the case that Illinois had a reasonable argument that it was unaware of the accident or a good faith belief that its insureds, Tishman and El-Ad, were not liable for Encalada's injuries. Instead, Illinois claims that it was unaware that Tishman and El-Ad were additional insureds on the Arch Policy and did not discover this fact until it received the Certificate of Insurance, two and a half years after the accident. The Court finds this to be insufficient.

Illinois submits affidavits from both its claims examiner and its appointed defense counsel, both of which assert that, prior to July 24, 2009, they were not made aware that Arch had issued a policy of insurance to Waldorf that covered the subject accident and named Tishman and El-Ad as additional insureds. These vague affidavits are insufficient given the fact that, as evidenced by the third-party complaint, Illinois was fully aware that Waldorf was obligated under its construction agreement with Tishman and El-Ad to obtain insurance coverage naming the owner and contractor as additional insureds. Illinois does not explain why, in two and a half years time, it could not have simply asked its insureds to search their files for copies of any certificates or insurance policies that would evidence additional coverage. Nor do the affidavits explain the steps Illinois took to investigate insurance information and/or to determine whether other coverage existed that was primary to its policy. Indeed, the affidavit of the claims examiner never even explains how Illinois eventually obtained the copy of the Certificate of Insurance after failing to discover it for two and a half years.

Illinois' claim examiner's statement which indicates that he waited passively to give notice until he was "made aware" of the Arch policy, without having taken any affirmative act to identify or confirm the existence of such coverage, does not satisfy Illinois' burden to demonstrate a reasonable excuse for the late notice (CITATION). It is well-settled that one seeking coverage under another's insurance policy must demonstrate that it acted with as much

due diligence as possible in ascertaining the identity of the additional insurer and providing that insurer with timely notice (*see Government Employees Insurance Company v Torres*, 100 AD3d 411 [1st Dept 2012; *Tower Ins. Co. of N.Y. v Lin Hsin Long Co.*, 50 AD3d 305, 308 [1st Dept 2008]; *Ringel v Blue Ridge Ins. Co.*, 293 AD2d 460, 461-462 [2nd Dept 2002]). Illinois' passive waiting to be made aware of the Arch policy and its failure to take any steps to timely request or obtain insurance information it knew likely existed, does not constitute sufficient due diligence to excuse late notice. Accordingly, the motion to dismiss the complaint is granted and the cross-motion for summary judgment is denied.

CONCLUSION

Accordingly, it is

ORDERED that defendant Arch Specialty Insurance Company's motion to dismiss the complaint pursuant to CPLR 3211(a)(1) and (7) is granted and the complaint is dismissed in its entirety with costs and disbursements to defendant as taxed by the Clerk upon submission of an appropriate bill of cost; and it is further,

ORDERED that plaintiff Illinois National Insurance Company's cross-motion for summary judgment, pursuant to CPLR 3212, is denied; and it is further;

ORDERED that counsel for defendant Arch Specialty Insurance Company is directed to serve a copy of this Order with Notice of Entry upon the plaintiff and upon the County Clerk who is directed to enter judgment accordingly.

ORDERED that the Clerk is directed to enter judgment accordingly.

This constitutes the Decision and Order of the Court.

FILED

FEB 04 2013

COUNTY CLERK'S OFFICE NEW YORK

Dated: 1/22/13

PAUL WOOTEN J.S.C.

Check one: ■ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE