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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: LUCY BILLINGS J.S.C.
Justice

PART 46

Index Number : 100691/2010
HERMITAGE INS. CO.
VS.
EVANS FLOOR SPECIALIST, INC.
SEQUENCE NUMBER : 001
DEFAULT JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

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

to/for a default and summary judgment

_____ No(s). 1-2
_____ No(s). 3
_____ No(s). 4

Upon the foregoing papers, it is ordered that this motion is

The court denies plaintiff's motion for a default judgment against defendant Evans Floor Specialist, Inc., and for summary judgment against the remaining defendants, grants the latter defendants' cross-motion for summary judgment, and denies their cross-motion for a stay as moot, pursuant to the accompanying decision. C.P.L.R. §§ 2201, 3001, 3212(b), and 3215(F).

FILED
MAR 18 2013
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 3/5/13

Lucy Billings, J.S.C.

LUCY BILLINGS J.S.C.

1. CHECK ONE: ..... ☑ CASE DISPOSED ☐ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☑ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 46
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HERMITAGE INSURANCE COMPANY,

Plaintiff

- against -

EVANS FLOOR SPECIALIST, INC., MIGUEL LUIS, JUDY LUIS, JEAN JOSEPH BRUNEAU, and VENITA BRUNEAU,

Defendants

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Index No. 100691/2010

DECISION AND ORDER

LUCY BILLINGS, J.S.C.:

I. BACKGROUND

Plaintiff insurer seeks a declaratory judgment that plaintiff is not obligated to defend or indemnify defendant Evans Floor Specialist, Inc., in an underlying personal injury action by the Luis and Bruneau defendants. Evans Floor Specialist has not appeared in this action. The remaining defendants counterclaim in this action for a declaratory judgment that plaintiff must defend and indemnify Evans Floor Specialist in the underlying action. The appearing parties agree that plaintiff issued a commercial general liability insurance policy to Evans Floor Specialist that covered bodily injuries and was in effect at the time the other defendants claim they were injured, but no party presents the policy terms in admissible form.

The underlying action arises from a fire that erupted while Miguel Luis and Jean Joseph Bruneau were refinishing floors on Evans Floor Specialist's behalf. In this action, defendant

workers suggest that they may not have been Evans Floor Specialist's employees, but their answer admits that they were. Aff. of Tania A. Gondiosa (Feb. 23, 2011) Ex. E ¶ 13. The complaint in the underlying action, moreover, alleges that Evans Floor Specialist employed Miguel Luis and Jean Joseph Bruneau, albeit without carrying Workers' Compensation insurance. Id. Ex. B ¶¶ 6-8, 47-49.

The parties also do not dispute that on June 30, 2008, Evans Floor Specialist notified plaintiff of the fire, but did not specify any personal injuries. On July 2, 2009, the attorney for Miguel Luis and Jean Joseph Bruneau notified plaintiff of the clients' personal injuries. Plaintiff disclaimed coverage on July 30, 2009, based on exclusions relating to an employer's liability and an exclusion and limitation relating to contractual liability. The disclaimer based on the contractual liability limitation applied only to claims by the nonparty manager of the building in which the injured workers were refinishing floors and not to the workers' claims against Evans Floor Specialist.

Plaintiff has moved for a default judgment against Evans Floor Specialist and for summary judgment against the other defendants. The Luis and Bruneau defendants have cross-moved for summary judgment on their counterclaim. Their cross-motion also sought a stay pending the outcome of a related federal action, which now has now been decided without resolving any issues in this action. For the reasons explained below, the court denies plaintiff's motion for a default and summary judgment and grants

the Luis and Bruneau defendants' cross-motion for summary judgment. C.P.L.R. §§ 3212(b), 3215.

II. APPLICABLE STANDARDS

To obtain summary judgment, the moving parties must make a prima facie showing of entitlement to judgment as a matter of law, through admissible evidence eliminating all material issues of fact. C.P.L.R. § 3212(b); Smalls v. AJI Indus., Inc., 10 N.Y.3d 733, 735 (2008); JMD Holding Corp. v. Congress Fin. Corp., 4 N.Y.3d 373, 384 (2005); Giuffrida v. Citibank Corp., 100 N.Y.2d 72, 81 (2003). Similarly, to obtain a default judgment, plaintiff must present evidence of the facts constituting plaintiff's claim in admissible form. C.P.L.R. § 3215(f); Wilson v. Galicia Contr. & Restoration Corp., 10 N.Y.3d 827, 830 (2008); Woodson v. Mendon Leasing Corp., 100 N.Y.2d 62, 70-71 (2003); Al Fayed v. Barak, 39 A.D.3d 371, 372 (1st Dep't 2007). See Utak v. Commerce Bank, 88 A.D.3d 522, 523 (1st Dep't 2011); Manhattan Telecom. Corp. v. H & A Locksmith, Inc., 82 A.D.3d 674 (1st Dep't 2011); Mejia-Ortiz v. Inoa, 71 A.D.3d 517 (1st Dep't 2010); Beltre v. Babu, 32 A.D.3d 722, 723 (1st Dep't 2006).

If a party moving for summary judgment satisfies this standard, the burden shifts to the opposing parties to rebut that prima facie showing, by producing evidence, in admissible form, sufficient to require a trial of material factual issues. Morales v. D & A Food Serv., 10 N.Y.3d 911, 913 (2008); Hyman v. Queens County Bancorp, Inc., 3 N.Y.3d 743, 744 (2004). In evaluating the evidence for purposes of plaintiff's motion and

defendants' cross-motion for summary judgment, the court construes the evidence in the light most favorable to the opponent. Cahill v. Triborough Bridge & Tunnel Auth., 4 N.Y.3d 35, 37 (2004).

III. PLAINTIFF'S DISCLAIMER

If plaintiff disclaims coverage, it must do so timely and explicitly, with a high degree of specificity, on the basis of a policy exclusion or limitation that actually applies. Markevics v. Liberty Mut. Ins. Co., 97 N.Y.2d 646, 649 (2001); Estee Lauder, Inc. v. OneBeacon Ins. Group, L.L.C., 62 A.D.3d 33, 35 (1st Dep't 2009); Hotel des Artistes v. General Acc. Ins. Co. of Am., 9 A.D.3d 181, 189 (1st Dep't 2004). Because plaintiff has not presented the applicable insurance policy in admissible form, plaintiff fails to establish a prima facie claim that it disclaimed liability on the basis of a policy exclusion or limitation that actually applied. C.P.L.R. § 3212(b); Hotel des Artistes v. General Acc. Ins. Co. of Am., 9 A.D.3d at 189. For the same reason, plaintiff fails to present evidence supporting a default judgment against Evans Floor Specialist. C.P.L.R. § 3215(f); Utak v. Commerce Bank, 88 A.D.3d at 523; Manhattan Telecom. Corp. v. H & A Locksmith, Inc., 82 A.D.3d 674; Giordano v. Berisha, 45 A.D.3d 416, 417 (1st Dep't 2007); Beltre v. Babu, 32 A.D.3d at 723-24.

Although the answering defendants also fail to present the policy in admissible form, they present plaintiff's admission that the policy covered Evans Floor Specialist when the

individual defendants claim they were injured. That coverage triggers plaintiff's obligation to disclaim timely. Markevics v. Liberty Mut. Ins. Co., 97 N.Y.2d at 648-49.

Plaintiff's claim supervisor, Eric Johnson, in his deposition, acknowledges the notice of June 30, 2008, by Evans Floor Specialist and plaintiff's letter of July 3, 2008, confirming its receipt of that notice. Aff. of Aaron M. Schlossberg (May 2, 2011) Ex. A at 55, 67. Although Evans Floor Specialist's notice of June 30, 2008, to plaintiff did not specify bodily injury, the notice imposed on plaintiff a duty to investigate the claimed injury promptly and diligently. GPH Partners, LLC v. American Home Assur. Co., 87 A.D.3d 843, 844 (1st Dep't 2011); Those Certain Underwriters at Lloyds, London v. Gray, 49 A.D.3d 1, 4 (1st Dep't 2007); Wood v. Nationwide Mut. Ins. Co., 45 A.D.3d 1285, 1286-87 (4th Dep't 2007). An unexplained delay of nine, even six, weeks is unreasonable as a matter of law, yet here plaintiff waited 13 months. Bovis Lend Lease LMB, Inc. v. Royal Surplus Lines Ins. Co., 27 A.D.3d 84, 88-89 (1st Dep't 2005). See N.Y. Ins. Law § 3420(d)(2).

Plaintiff nowhere rebuts defendants' prima facie showing with evidence of an excuse for the delay. Because plaintiff thus disclaimed late, it waived any exclusion or limitation even if it applied. Markevics v. Liberty Mut. Ins. Co., 97 N.Y.2d at 649; Estee Lauder, Inc. v. OneBeacon Ins. Group, L.L.C., 62 A.D.3d at 35. The absence of admissible evidence regarding the policy's specific contents therefore does not bar summary judgment to the

answering defendants. C.P.L.R. § 3212(b).

V. CONCLUSION

For the foregoing reasons, the court denies plaintiff's motion for a default and summary judgment; and grants the cross-motion for summary judgment by defendants Miguel Luis, Judy Luis, Jean Joseph Bruneau, and Venita Bruneau, and denies their cross-motion insofar as it seeks a stay, as the latter relief is moot. C.P.L.R. §§ 2201, 3212(b), 3215(f). The court declares and adjudges that plaintiff must defend and indemnify defendant Evans Floor Specialist, Inc., in Luis v. Van Cortland Village LLC, Index No. 307827/2008 (Sup. Ct. Bronx Co.), and is estopped from disclaiming or denying its duty to defend and indemnify that defendant in that action on any ground. C.P.L.R. § 3001.

DATED: March 5, 2013

LUCY BILLINGS, J.S.C.