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SHORT FORM ORDER

INDEX No. 12-11848

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 9 - SUFFOLK COUNTY

***PRESENT:***

Hon. DANIEL MARTIN
Acting Justice of the Supreme Court

MOTION DATE 8-28-13 (#001)
MOTION DATE 10-8-13 (#002)
MOTION DATE 11-6-13 (#003)
ADJ. DATE 1-7-14
Mot. Seq. # 001 - MD
# 002 - XMotD
# 003 - MotD

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LIBERTY INSURANCE UNDERWRITERS, INC., GAMUT CONSULTING, INC. and HUTCH REALTY PARTNERS, LLC,

Plaintiffs,

- against -

UTICA NATIONAL ASSURANCE COMPANY, ILLINOIS NATIONAL INSURANCE COMPANY and ESSENTIAL ELECTRIC CORP.,

Defendants.

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Upon the following papers numbered 1 to 99 read on these motions and this cross motion for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1-26; 59-71 ; Notice of Cross Motion and supporting papers 26 -58 ; Answering Affidavits and supporting papers 72-73; 74-92; 93-95 ; Replying Affidavits and supporting papers 96-97; 98-99 ; Other Memoranda of Law ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

***ORDERED*** that the motion (001) by plaintiffs Liberty Insurance Underwriters, Inc., Gamut Consulting, Inc., and Hutch Realty Partners, LLC, the cross motion (002) by defendant Utica National Insurance Company, and the motion (003) by defendant Illinois National Insurance Company are consolidated for the purpose this determination; and it is

***ORDERED*** that the motion by plaintiffs Liberty Insurance Underwriters, Inc., Gamut Consulting, Inc., and Hutch Realty Partners, LLC, for, inter alia, a judgment declaring that defendant Utica National Insurance Company is obligated to assume the defense of Gamut Consulting, Inc. and Hutch Realty Partners, LLC in the underlying personal injury action is denied; and it is

***ORDERED*** that the cross motion by defendant Utica National Insurance Company for, inter alia, a judgment declaring that it has no duty to defend or indemnify Gamut or Hutch in the underlying action is granted to the extent indicated herein and is otherwise denied; and it is

***ADJUDGED AND DECLARED*** that defendant Utica National Insurance Company has no obligation to defend or indemnify Gamut Consulting, Inc. and Hutch Realty Partners, LLC in the underlying action entitled *Scott Hein v Hutch Realty Partners, LLC, and Gamut Consulting Inc.,* assigned index number 08-39333; and it is

***ORDERED*** that the motion by defendant Illinois National Insurance Company for, inter alia, a judgment declaring that it has no duty to defend Gamut and Hutch in connection with the underlying action is granted to the extent indicated herein and is otherwise denied; and it is

***ADJUDGED AND DECLARED*** that coverage provided by defendant Illinois National Insurance Company in the underlying action entitled *Scott Hein v Hutch Realty Partners, LLC, and Gamut Consulting Inc.,* assigned index number 08-39333, is excess, and Illinois National Insurance Company has no obligation to defend or indemnify Gamut Consulting, Inc. and Hutch Realty Partners, LLC in such action.

Plaintiff Liberty Insurance Underwriters, Inc. ("Liberty Insurance") commenced this action for a judgment declaring that defendant Utica National Insurance Company, i/s/h/a as Utica National Assurance Company, is obligated to assume the defense of Gamut Consulting Inc. and Hutch Realty Partners, LLC in the underlying personal injury action entitled *Scott Hein v Hutch Realty Partners, LLC, and Gamut Consulting Inc.* currently pending in the Supreme Court, Suffolk County, under index number 08-39333. In the underlying action, Scott Hein seeks damages for personal injuries he allegedly sustained on July 6, 2007, when he fell down an open shaft while performing electrical work at a construction site located at 1250 Waters Place, Bronx, New York. At the time of the accident, Hein was employed by defendant Essential Electrical Corp. ("Essential"), which was hired as the electrical subcontractor for the construction project. Gamut Consulting, Inc. ("Gamut") was the general contractor for the project, and Hutch Realty Partners, LLC ("Hutch") was the owner of the premises. Pursuant to the electrical subcontract, Essential was required to procure general liability insurance which named Hutch and Gamut as additional insureds. Essential obtained primary insurance from defendant Utica National Insurance Company ("Utica"), and excess coverage from defendant Illinois National Insurance Company ("Illinois"). However, following the accident Utica disclaimed coverage for Gamut and Hutch on the bases they failed to provide timely notice of the underlying claim, they did not qualify as

additional insureds under the policy, and even, if they did, coverage was excluded, since Hein's accident did not arise from Essential's acts or omissions. As a result, Liberty assumed the defense of both Gamut and Hutch under a commercial general liability insurance policy obtained by Gamut, which also named Hutch as an additional insured.

Utica and Illinois both joined the instant action denying plaintiff's claims and asserting counterclaims seeking, among other things, declaratory relief as to the existence and/or priority of their coverage for the underlying claim.

Liberty now moves for summary judgment on its complaint seeking a declaration that Utica is obligated to assume the defense of Gamut and Hutch in the underlying personal injury action, and that Illinois must indemnify them upon exhaustion of Utica's policy. Liberty also seeks a judgment for the reimbursement of all defense costs incurred by the parties in connection with their defense of the underlying action. Utica opposes the motion and cross moves for a judgment declaring that it has no duty to defend or indemnify Gamut or Hutch in the underlying action, arguing that neither Hutch nor Gamut provided it timely notice of the underlying claim, and that they failed to establish that the conditions necessary for their coverage as additional insureds were triggered, since a triable issue exists as to whether the accident resulted from Essential's acts or omissions. Liberty opposes the cross motion on the basis Utica waived its late notice defense by failing to assert it against Essential, and that such waiver is equally applicable to Gamut and Hutch as additional insureds under Essential's policy. Alternatively, Liberty asserts that the notice of loss Hutch provided to Utica should be deemed notice on behalf of Gamut, as both parties are similarly situated as additional insureds under the same policy. Liberty further argues that Utica's duty to provide a defense for the underlying action has been triggered, since its duty to defend is broader than its duty to indemnify and arises whenever the underlying complaint suggests a reasonable possibility of coverage.

Form 8E2639 of the policy Utica issued to Essential, entitled "Blanket Additional Insured–Contractors," provides, in pertinent part, as follows:

> WHO IS AN INSURED (Section II) is amended to include as an insured any person or organization (called additional insured), but only:
>
> (a) To the extent that such additional insured is held liable for your acts or omissions arising out of and in the course of ongoing operations performed by you or your subcontractors for such additional insured; and
>
> (b) Arising out of a written contract with such additional insured which was executed prior to . . .[t]he occurrence of any bodily injury or property damage.
>
> (1) The occurrence of any bodily injury or property damage.

Section IV of the policy, which describes the insured's duties in the event of a claim, provides as follows:

(a) You must see to it that we are notified as soon as practicable of an occurrence or an offense which may result in a claim.

(b) If a claim is made or suit is brought against any insured you must (1) Immediately record the specifics of the claim or suit and the date received: and (2) Notify us as soon as practicable.

(c) You and any other involved insured must:

(1) Immediately send us copies of any demands, notices, and summonses or legal papers received in connection with the claim or suit;

(2) Authorize us to obtain records and other information;

(3) Cooperate with us in the investigation or settlement of the claim or defense against the suit.

(d) No insured will, except at that insured's own cost, voluntarily make a payment, assume any obligation or incur any expense, other than first aid, without our consent.

(e) Notice given by or behalf of the insured, or written notice by or on behalf of the injured person or any other claimant to any agent of our in New York State, with particulars sufficient to identify the insured, shall be considered notice to us.

"The requirement that an insured notify its liability carrier of a potential claim 'as soon as practicable' operates as a condition precedent to coverage. There may be circumstances such as lack of knowledge that an accident has occurred or a reasonable belief in nonliability, that will excuse or explain delay in giving notice, but the insured has the burden of showing the reasonableness of such excuse" (***White v City of New York***, 81 NY2d 955, 957, 598 NYS2d 759 [1993]; *quoti ng* ***Security Mut. Ins. Co. of N.Y. v Acker-Fitzsimons Corp.***, 31 NY2d 436, 440, 340 NYS2d 902 [1972]). "Ordinarily, the reasonableness of any delay and the sufficiency of the excuse offered is a matter for trial. In the absence of excuse or mitigating factors, however, the issue poses a legal question for the court and, in such circumstances, relatively short periods have been found to be unreasonable as a matter of law" (***Jenkins v Burgos***, 99 AD2d 217, 220,472 NYS2d 373 [1st Dept 1984]; *see* ***Deso v London & Lancashire Ind. Co.***, 3 NY2d 127, 164 NYS2d 689 [1957]; ***Hanson v Turner Constr. Co.***, 70 AD3d 641, 897 NYS2d 116 [2d Dept 2010]; ***Gershow Recycling Corp. v Transcontinental Ins. Co.***, 22 AD3d 460, 801 NYS2d 832 [2d Dept 2005]). Thus, absent a valid excuse, the failure to satisfy the notice requirement of an insurance policy vitiates coverage altogether (*see* ***Matter of Allcity Ins. Co. (Jimenez)***, 78 NY2d 1054, 581 NE2d 1342, 576 NYS2d 87 [1991]; ***Utica First Ins. Co. v Vazquez***, 92 AD3d 866, 938 NYS2d 625 [2d Dept 2012]; ***Matter of AIU Ins. Co. v Henry***, 14 AD3d 506, 788 NYS2d 168 [2d Dept 2005]).

Here, Utica established, prima facie, that Hutch and Gamut violated a condition precedent to coverage under its policy when they failed to provide it notice of the underlying claim for more than four months and two years, respectively, after learning of the subject accident (*see* ***Deso v London & Lancashire Ind. Co.***, *supra*; ***Hanson v Turner Constr. Co.***, *supra*; ***Gershow Recycling Corp. v***

***Transcontinental Ins. Co.***, *supra*). Although a letter by Hutch's insurer, Wausau Insurance Company, requesting Utica defend and indemnify it for the happening of the underlying accident indicates that Hutch and Gamut knew of the incident before November 2, 2007, they did not provide notice to Utica until January 31, 2008 and April 23, 2009. Indeed, evidence submitted by Utica suggests that both entities may have had even earlier notice of the incident, as an affidavit by Gamut's director, Gregory Newman, states that an OSHA report was prepared on behalf of Hutch and Gamut by the project's onsite manager, Joe Vitale, at or near the time of the alleged accident.

In opposition to Utica's cross motion, Liberty's submission of affidavits by Hutch's superintendent and property manager stating that the earliest it received notification of accident was on September 21, 2007, and that Gamut's insurer conducted an investigation of the claim for several weeks thereafter, is insufficient to raise a triable issue as to the reasonableness of their delay, as they failed to submit any evidence the purported investigation was conducted, and, if so, that it warranted the length of their delays in reporting the accident (*see* ***Okumus v National Specialty Ins. Co.***, 112 AD3d 797, 977 NYS2d 338 [2d Dept 2013]; ***Matter of Country-Wide Ins. Co. v Ramirez***, 104 AD3d 850, 961 NYS2d 511 [2d Dept 2013]; ***Stout v 1 E. 66th St. Corp.***, 90 AD3d 898, 935 NYS2d 49 [2d Dept 2011]; ***New York City Hous. Auth. v Underwriters at Lloyd's, London***, 61 AD3d 726, 877 NYS2d 193 [2d Dept 2009]). Accordingly, the branch of Utica's cross motion for a judgment declaring that it has no duty to defend or indemnify Gamut or Hutch in the underlying action is granted. Inasmuch as it has been determined that Utica has no duty to defend or indemnify Hutch or Gamut in the underlying action, the branch of Utica's motion for a judgment declaring that Hutch or Gamut are not entitled to additional insured coverage under the subject insurance policy is denied, as academic.

Based upon the foregoing, the motion by Liberty for, inter alia, a judgment declaring that Utica is obligated to assume the defense of Gamut and Hutch in the underlying personal injury action, and to reimburse Liberty for defense costs it incurred in providing such defense, is denied, as moot.

By way of a separate motion, Illinois moves for a judgment declaring, inter alia, that it has no duty to defend Gamut and Hutch in connection with the underlying action, that Utica and Liberty each have a duty to defend said plaintiffs until the limits of their policies are exhausted, and that nonparty New York Marine and General Insurance Company ("NYMAGIC"), which allegedly issued a commercial general liability policy to Hutch, owes an obligation to defend and indemnify Hutch until the limits of its policy are exhausted. Illinois further asserts that Liberty has no standing to bring the action, since it did not underwrite Hutch's policy, and that the claims against Illinois are not presently justiciable, since resolution of those claims must await a determination as to whether coverage under Essential's primary insurance was triggered, and, if so, whether such coverage was exhausted. Alternatively, Illinois seeks an order compelling plaintiffs to produce copies of all insurance policies providing them general or excess liability coverage, including any excess and/or umbrella insurance issued by nonparty Travelers Insurance Company or any other insurer.

Liberty opposes the motion, arguing, inter alia, that Illinois failed to submit a complete copy of the pleadings in support of its motion, that no triable issue exists as to whether it has standing as Gamut's insurer, and that the issue of whether Illinois is contractually obligated to insure Hutch upon the exhaustion of Utica's policy is a present controversy ripe for determination. In addition, Liberty asserts that Illinois's motion should be denied to the extent that it seeks a declaration that Liberty's coverage

must be exhausted prior to the attachment of Illinois's excess coverage, since the construction contract and provisions Illinois incorporated from Utica's underlying insurance policy requires that all coverage provided by Essential, including Illinois's excess policy, be primary to Liberty's policy. Utica only opposes Illinois's motion to the extent that it seeks a declaration that Utica owes a duty of primary coverage to Hutch and Gamut against the claims contained in the underlying action.

Initially, the Court notes that while a movant's failure to include a complete copy of the pleadings is ordinarily grounds for denial of a summary judgment motion (*see* ***Wider v Heller***, 24 AD3d 433, 805 NYS2d 130 [2d Dept 2005]), such a procedural defect may be overlooked if the record is sufficiently complete and the opposing party has not been prejudiced (*see* CPLR 2001; *see also* ***Carey v Five Bros., Inc.***, 106 AD3d 938, 966 NYS2d 153 [2d Dept 2013]; ***Welch v Hauck***, 18 AD3d 1096, 795 NYS2d 789 [3d Dept 2005]). Thus, notwithstanding Illinois's failure to include copies of the pleadings with its motion, to the extent the pleadings have been included in the motions by Liberty and Utica, the record is sufficiently complete, and the Court may decide the motion on its merits (*see* ***Carey v Five Bros., Inc.***, *supra*; ***Welch v Hauck***, *supra*).

The branch of Illinois's motion for an order pursuant to CPLR 3124 compelling Gamut and Hutch to produce, inter alia, copies of all insurance policies providing them general or excess coverage against the underlying claim is denied, as Illinois failed to include with its motion papers, an affirmation of good faith detailing its efforts to resolve such disclosure dispute (*see* 22 NYCRR §202.7 [a]). Furthermore, Liberty's submissions in opposition to the motion include a copy of its response to Illinois's demand for said discovery. Additionally, having determined that Utica is not obligated to defend or indemnify plaintiffs against the underlying the claim, the branch of Illinois's motion for an order declaring that Utica is obligated to provide such coverage is denied, as moot.

As to the branch of Illinois's motion for an order declaring that its coverage is excess and it has no duty to defend or indemnify Hutch and Gamut until all other sources of coverage have been exhausted, Illinois's umbrella policy includes the following provisions:

> DEFENSE PROVISIONS
>
> A. We will have the right and duty to defend any suit against the insured that seeks damages for Bodily Injury . . . covered by this policy, even if the suit is groundless, false or fraudulent when:
>
> > (1) the total applicable limits of scheduled underlying insurance and any applicable other insurance have been exhausted by payment of loss to which this policy reasonably applies.
>
> LIMITS OF INSURANCE
>
> F. This policy applies only in excess of the total applicable limits of scheduled underlying insurance and any other applicable other insurance whether or not such limits are collectible. . .

M. We will not make any payment under this policy unless and until:

(1) The total applicable limits of Scheduled underlying insurance and any applicable other insurance have been exhausted by the payment of loss to which this policy applies; or

(2) The total self-insured retention has been satisfied by the payment of loss to which this policy applies.

OTHER INSURANCE

L. If other valid and collectible insurance applies to damages that are also covered by this policy, this policy will apply excess of the other insurance. However, this provision will not apply if the other insurance is specifically written to be excess of this policy.

Further, the third policy endorsement, which contains a "follow form" provision, excludes its use as primary coverage as follows:

This insurance does not apply to commercial general liability. However, if insurance for commercial general liability is provided by a policy listed in scheduled underlying insurance:

1. This exclusion shall not apply; and

2. Coverage under this policy will follow the terms, definitions, conditions and exclusions of scheduled underlying insurance, subject to the policy period, limits of insurance, premium and all other terms, definitions, conditions and exclusions of this policy. Provided, however, that coverage provided by this policy will be no broader than coverage provided by scheduled underlying insurance.

As a general rule, "unless it would distort the plain meaning of the policies, where there are multiple policies covering the same risk, and each generally purports to be excess to the other, the excess coverage clauses are held to cancel each other out and each insurer contributes in proportion to its limit amount of insurance" (***State Farm Fire & Cas. Co. v LiMauro***, 65 NY2d 369, 374, 492 NYS2d 534 [1985]; ***Lumbermens Mut. Cas. Co. v Allstate Ins. Co.***, 51 NY2d 651, 655, 435 NYS2d 953 [1980]; ***American Tr. Ins. Co. v Continental Cas. Ins. Co.***, 215 AD2d 342, 625 NYS2d 653 [2d Dept 1995]). In contrast, if one party's policy is primary with respect to the other policy, then the party issuing the primary policy must pay up to the limits of its policy before the excess coverage becomes effective (***Great N. Ins. Co. v Mount Vernon Fire Ins. Co.***, 92 NY2d 682, 687, 685 NYS2d 411 [1999]). A determination of the priority of coverage between policies "turns on consideration of the purpose each policy was intended to serve as evidenced by both its stated coverage and the premium paid for it, as well as upon the wording of its provision concerning excess insurance" (***Bovis Lend Lease LMB, Inc. v. Great Am. Ins. Co.***, 53 AD3d 140, 148 [1st Dept 2008], *citing* ***State Farm Fire & Cas. Co. v LiMauro***, *supra* at 374). "[A]n umbrella or excess liability insurance policy should be treated as just that, and not as a second layer of primary coverage, unless the policy's own terms plainly provide for a different

result. To hold otherwise would . . . merely sow uncertainty in the insurance market" (***Bovis Lend Lease LMB, Inc. v. Great Am. Ins. Co.***, 53 AD3d 140, 855 NYS2d 459 [1st Dept 2008]; *see* ***State Farm Fire & Cas. Co. v. LiMauro***, *supra*). Furthermore, "an excess 'other insurance' clause will not render a policy sold as primary insurance excess to a true excess or umbrella policy sold to provide a higher tier of coverage" (***Sport Rock Int'l v. Am. Cas. Co. of Reading***, 65 AD3d 12, 19, 878 NYS2d 339 [1st Dept 2009]; *see* ***Jefferson Ins. Co. v Travelers Indem. Co.***, 92 NY2d 363, 372, 681 NYS2d 208 [1998]; ***State Farm Fire & Cas. Co. v. LiMauro***, *supra*).

Here, Illinois established, prima facie, that its policy was a "true excess" policy, and that the "follow form" provision contained in its policy endorsement did not, by partially incorporating the terms of Utica's underlying policy, convert the Illinois policy into another source of primary coverage (*see* ***Jefferson Ins. Co. v Travelers Indem. Co.***, *supra*; ***State Farm Fire & Cas. Co. v. LiMauro***, *supra*; ***Vassar Coll. v Diamond State Ins. Co.***, 84 AD3d 942, 923 NYS2d 124 [2d Dept 2011]; ***Bovis Lend Lease LMB, Inc. v. Great Am. Ins. Co.***, *supra*). Significantly, Illinois's umbrella policy explicitly states that it is excess to any "scheduled underlying insurance," and that it will not be required to make payment on a claim for excess coverage "unless and until" such underlying policies have been exhausted. Moreover, the "follow form" provision contained in the Illinois policy only partially incorporates the terms and conditions of Utica's underlying policy, by making such incorporation subject to "all other terms, definitions, conditions and exclusions" provided in the Illinois policy. Thus, the provisions incorporated into the Illinois policy, including Utica's "other insurance" clause, only applies where there is no inconsistency between the two policies, and did not convert Illinois's excess policy into a second layer of primary coverage (*see* ***Jefferson Ins. Co. v Travelers Indem. Co.***, *supra*; ***Bovis Lend Lease LMB, Inc. v. Great Am. Ins. Co.***, *supra*; *see also* ***Central Park Studios, Inc. v Slosberg***, 2014 NY Slip Op 30142(U) [Sup Ct, New York County]; *cf* ***Metropolitan Transp. Auth. v Zurich Am. Ins. Co.***, 68 AD3d 610, 891 NYS2d 376 [1st Dept 2009]). Liberty failed to raise a triable issue in opposition, as it conceded that Illinois's policy purports to provide excess insurance, and it failed to address the extent to which the language of the Illonois policy limited the applicability of the "follow form" provision (*see generally* ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]; ***Perez v Grace Episcopal Church***, 6 AD3d 596, 774 NYS2d 785 [2d Dept 2004]).

Accordingly, the branch of Illinois's motion for a judgment declaring, inter alia, that its coverage is excess and it has no duty to defend or indemnify Hutch and Gamut in the present action is granted. Based on the foregoing, the branch of Illinois's motion for an order declaring, inter alia, that plaintiff's claims against it are not presently justiciable, and that Liberty is obligated to defend and indemnify Hutch and Gamut against the underlying claim until the exhaustion of its policy is denied, as academic. Finally, the branch of Illinois's motion for declaratory relief against nonparty New York Marine and General Insurance Company is denied (*see generally* ***Matter of Morgenthau v Erlbaum***, 59 NY2d 143, 464 NYS2d 392 [1983]; ***J.G. v Zachman***, 34 AD3d 1277, 825 NYS2d 621 [4th Dept 2006]).

Dated: May 6, 2014

A.J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION