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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: LUCY BILLINGS J.S.C. PART 46

Justice

Index Number : 112999/2010
ROYAL WASTE SERVICES
vs.
INTERSTATE FIRE
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

The following papers, numbered 1 to 7, were read on this motion ~~to~~/for summary judgment

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). 1-2

Answering Affidavits — Exhibits _____ | No(s). 3-5

Replying Affidavits _____ | No(s). 6-7

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

The court denies plaintiffs' motion and the cross-motion by First Mercury Excess Insurance Services, Inc., for summary judgment, pursuant to the accompanying decision. C.P.L.R. § 3212(b).

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

Dated: 1/31/14

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

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 46
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ROYAL WASTE SERVICES, INC., REGAL RECYCLING CO., INC., ROYAL RECYCLING SERVICES, INC., and M&P REALI ENTERPRISES, INC.,

Plaintiffs

Index No. 112999/2010

DECISION AND ORDER

- against -

INTERSTATE FIRE & CASUALTY COMPANY, a Fireman's Fund Insurance Company, FIREMAN'S FUND RISK MANAGEMENT SERVICES, INC., and FIRST MERCURY EMERALD INSURANCE SERVICES, INC. (pertaining to underlying actions entitled Dahan, et al. v. Regal Recycling Co., Inc., et al., Index No. 17828/2010 (Sup. Ct. Kings Co.), and Rivas v. M&P Reali Enterprises Inc., et al., Index No. 10386/2010 (Sup. Ct. Queens Co.)),

Defendants

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LUCY BILLINGS, J.

I. BACKGROUND TO PLAINTIFFS' CLAIMS

Plaintiffs procured two excess liability insurance policies from defendants Interstate Fire & Casualty Company and First Mercury Emerald Insurance Services, Inc., each policy with a limit of $5,000,000 over plaintiffs' general liability insurance coverage for February 5, 2009, to February 5, 2010. Plaintiffs allege that their exclusive broker, John Rocco, procured both insurance policies, delivered them to plaintiffs, and also procured plaintiffs' financing agreement with Kings Premium Service Corp. for the payment of these two policies' premiums. Plaintiffs further allege that they paid the initial premiums for

the excess coverage policies directly to Rocco and that this payment, along with the payments Kings Premium Service made to Rocco, amounted to payment of the full year of premiums for both policies. Plaintiffs maintain that they continued to make payments to Kings Premium Service from February to December 2009 according to their financing agreement, but were unaware that Rocco failed to transmit to Interstate Fire & Casualty and to First Mercury Emerald payments that plaintiffs made or Kings Premium Service made to him.

On June 29, 2009, three persons died from exposure to hydrogen sulfide fumes released from a drywell on plaintiffs' premises. Darel Dahan, an employee of S. Dahan Piping and Heating Corp., which plaintiff Regal Recycling Co., Inc., hired to unclog a drain at the bottom of a drywell filled with liquid, lost consciousness while in the drywell where the fumes inadvertently were released. Shlomo Dahan, the owner of S. Dahan Piping and Heating Corp., and plaintiffs' employee Rene Rivas entered the drywell to attempt a rescue, but both were overcome by the fumes as well.

In the underlying wrongful death actions commenced by the decedents' estates, plaintiffs are defended by attorneys appointed by plaintiffs' general liability insurer. On December 18, 2009, plaintiffs' attorney for these underlying actions notified Interstate Fire & Casualty of the deaths and the actions against plaintiffs. Interstate Fire & Casualty disclaimed any obligation to provide excess liability coverage because the

insurer cancelled plaintiffs' excess liability policy effective April 23, 2009, due to nonpayment of premiums. Even if the policy was in effect at the time of the deaths, Interstate Fire & Casualty disclaimed coverage because plaintiffs' late notice to their insurer of the claims against plaintiffs violated the policy's conditions.

On January 14, 2010, plaintiffs requested First Mercury Emerald to defend and indemnify plaintiff Regal Recycling, Services, Inc., pursuant to this insurer's excess liability policy. First Mercury Emerald also disclaimed its obligation to provide excess liability coverage citing cancellation of its policy due to plaintiffs' nonpayment of the premiums and, in any event, plaintiffs' late notice of the deaths in violation of the policy's conditions.

II. THE PARTIES' MOTIONS

Plaintiffs move for summary judgment and declaratory relief that defendants are obligated to provide excess liability coverage for the claims against plaintiffs arising out of the deaths June 29, 2009. C.P.L.R. §§ 3001, 3212(b). Plaintiffs claim defendants' cancellation of plaintiffs' coverage due to nonpayment was unlawful, because plaintiffs made the policy premium payments to Rocco, the procuring broker, who became defendants' authorized agent pursuant to New York Insurance Law § 2121. Plaintiffs contend that Rocco's failure to remit the payments to defendants did not entitle them to cancel or rescind plaintiffs' policy because Insurance Law § 2121(a) treats the

procuring broker as authorized by the insurer to accept payments on its behalf. Plaintiffs further contend that they never received the cancellation notices Interstate Fire & Casualty and First Mercury Emerald claim to have sent, and, in any event, these notices were deficient because they failed to specify the reasons for the cancellation and cite to the applicable Insurance Law provision. N.Y. Ins. Law § 3426(c)(1)(A) and (h).

Interstate Fire & Casualty opposes plaintiffs' summary judgment motion on the grounds that it is premature before disclosure of documents or depositions necessary for this defendant's opposition. C.P.L.R. § 3212(f). Interstate Fire & Casualty claims that CRC Insurance Services, Inc., an excess lines insurance broker, procured the Interstate Fire & Casualty and First Mercury Emerald policies after receiving an application from either AGC Insurance Services, Inc., or Transportation Coverage Specialist on plaintiffs' behalf. Interstate Fire & Casualty maintains that it never dealt with or even knew of Rocco and needs disclosure to determine the brokers and agents involved in procuring the insurance policies at issue.

Interstate Fire & Casualty also shows that it mailed the cancellation notice to plaintiffs April 16, 2009. It claims that, because its policy was written by an unlicensed insurer through the excess lines market, its notice to plaintiffs canceling that policy is not subject to Insurance Law § 3426(c)'s cancellation notice requirements and thus is not deficient under the law.

Defendant First Mercury Emerald cross-moves for summary judgment dismissing all claims against this defendant. C.P.L.R. § 3212(b). It claims that plaintiff Royal Waste Services, Inc., authorized CRC Insurance Services, the excess insurance broker, and AGC Insurance Services, which applied for the excess insurance policies on plaintiffs' behalf, as the exclusive broker and agent and that this defendant delivered its excess liability policy to CRC Insurance Services, not Rocco. Therefore, after plaintiffs' initial deposit of their first premium payment, their subsequent premium payments were not to First Mercury Emerald's broker or agent. First Mercury Emerald contends that its broker CRC Insurance Services requested the insurer to cancel the policy because insufficient funds prevented CRC Insurance Services from depositing plaintiffs' first premium payment. Based on this nonpayment of the insurer's policy premiums and Insurance Law § 3426(c)'s inapplicability to a notice canceling an excess liability policy, the cancellation notice was valid and undisputedly was received by plaintiffs. Since plaintiffs also unreasonably delayed in notifying First Mercury Emerald of the underlying claims against plaintiffs, they violated its policy, too, even if the policy remained in force when the claims arose.

Distinct from Interstate Fire & Casualty, First Mercury Emerald claims that, because its policy provides only excess liability coverage, plaintiffs lack standing to maintain this declaratory judgment action, and First Mercury Emerald is not obligated to defend plaintiffs in the underlying actions until

plaintiffs have exhausted their general liability insurance limits. First Mercury Emerald also separately insists that its policy's hazardous materials and pollution exclusions apply to and bar the excess coverage sought for the underlying actions.

III. STANDARDS FOR SUMMARY JUDGMENT

To obtain summary judgment, the moving party 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); Vega v. Restani Constr. Corp., 18 N.Y.3d 499, 503 (2012); 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). Only if the moving party satisfies this standard, does the burden shift 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). If the moving party fails to meet its initial burden, the court must deny summary judgment despite any insufficiency in the opposition. JMD Holding Corp. v. Congress Fin. Corp, 4 N.Y.3d at 384; Romero v. Morrisania Towers Hous. Co. Ltd. Partnership, 91 A.D.3d 507, 508 (1st Dep't 2012); Chubb Natl. Ins. Co. v. Platinum Customcraft Corp., 38 A.D.3d 244, 245 (1st Dep't 2007); Atlantic Mut. Ins. Co. v. Joyce Intl., Inc., 31 A.D.3d 352, 352 (1st Dep't 2006). See Roman v. Hudson Tel. Assoc., 15 A.D.3d

227, 228 (1st Dep't 2005). In evaluating the evidence for purposes of each party's motion, the court construes the evidence in the light most favorable to the opponents. Vega v. Restani Constr. Corp., 18 N.Y.3d at 503; Cahill v. Triborough Bridge & Tunnel Auth., 4 N.Y.3d 35, 37 (2004).

IV. PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

A. Procurement of the Policies

Insurance Law § 2121(a) protects insured parties from the risks of a broker's dishonesty and insolvency and treats the insureds' broker, who procured the policy and to whom the insurer gives the policy for delivery to the insureds, to be an agent authorized to receive premium payments on the insurer's behalf. Paul Reali, the president of Royal Waste Services, vice president of Regal Recycling Co., and secretary of Regal Recycling Services and the additional plaintiff M&P Reali Enterprises, Inc., attests that Rocco was plaintiffs' exclusive insurance broker and procured the Interstate Fire & Casualty and First Mercury Emerald insurance policies. Plaintiffs insist that, because Rocco is their exclusive insurance broker, their receipt of the policies from Rocco establishes that no one else applied to defendant insurers to procure their policies. Although Reali attests that Rocco delivered the policies to plaintiffs, they make no showing that Rocco was the actual procuring broker who applied to or requested defendants or their agents to issue the policies.

Plaintiffs confuse the circumstances here with the readily distinguishable circumstances where a "sub-agent" applied to a

wholesale broker that undisputedly was the insurer's agent for renewal of an insurance policy, allowing payments from the insured to the sub-agent to be imputed to the insurer. Maclaren Europe Ltd. v. ACE American Ins. Co., 908 F. Supp. 2d 417, 422 (S.D.N.Y. 2012). Here, the record lacks any evidence that Rocco ever dealt with or ever requested or received the policies from defendant insurers, their broker, or their agent. The Interstate Fire & Casualty policy lists "CRC Insurance Services, Inc.," Aff. of Brian Gardner Ex. E, at 1, and the First Mercury Emerald policy lists "CRC Insurance Services, Inc.-Chicago," as the broker. Id. Ex. F, at 4. Plaintiffs present no evidence of any dealing between Rocco and any CRC Insurance Services entity or indication Rocco requested such an entity to apply for the insurance sought, thus becoming CRC Insurance Services' sub-agent authorized to accept premium payments under Insurance Law § 2121. See Maclaren Europe Ltd. v. ACE American Ins. Co., 908 F. Supp. 2d at 422. The only document that even refers to the name "Rocco" is the financing agreement between plaintiffs and Kings Premium Services, which lists not John Rocco, but an entity named "John A. Rocco Co. Inc.," as the broker and in any event, like most of the documents plaintiffs rely on, is unauthenticated. Gardner Aff. Ex. G, at 1. See IRB-Brasil Resseguros S.A. v. Portobello Intl. Ltd., 84 A.D.3d 637, 638 (1st Dep't 2011); Rivera v. GT Acquisition 1 Corp., 72 A.D.3d 525, 526 (1st Dep't 2010); Coleman v. Maclas, 61 A.D.3d 569, 569 (1st Dep't 2009); Babikian v. Nikki Midtown, LLC, 60 A.D.3d 470, 471 (1st Dep't 2009).

Rocco's delivery of the policies to plaintiffs is insufficient to establish that Rocco was the agent who applied to or requested the policies from defendants, their broker, or their agent and that defendants, their broker, or their agent delivered the policies to him, so that any payment of the premiums to him may be imputed to defendants. N.Y. Ins. Law § 2121(a). Even without considering Interstate Fire & Casualty's evidence in opposition, plaintiffs' own evidence leaves a factual issue regarding the broker that applied to defendants for the excess liability policies or requested or procured them from defendants.

B. Payment of the Premiums

Reali attests that plaintiffs' payment directly to Rocco was a downpayment for the two excess liability policies, and Kings Premium Services' payments to Rocco on plaintiffs' behalf were the remainder due for premiums for the 2009 coverage period. Even assuming Reali's various positions with plaintiffs give Reali personal knowledge of plaintiffs' process of insurance procurement, dealings with Rocco, and payments is directly to him, Reali fails to indicate any foundation of how he gained personal knowledge that Kings Premium Services tendered the balance of premium payments to Rocco. Nor does anything in the record apart from Reali's affidavit support any such first hand knowledge or that his attestation of such payments is other than hearsay, at best, if not mere speculation. Rodriguez v. Board of Educ. of City of N.Y., 107 A.D.3d 651, 652 (1st Dep't 2013); Dorsey v. Les Sans Culottes, 43 A.D.3d 261 (1st Dep't 2007). See

Beloff v. Gerges, 80 A.D.3d 460, 460-61 (1st Dep't 2011); Figueroa v. Luna, 281 A.D.2d 204, 206 (1st Dep't 2001). The affirmation by plaintiffs' attorney that Kings Premium Service issued a check to Rocco for $565,800.60 on plaintiffs' behalf for the annual premiums for both policies equally fails to indicate personal knowledge and is unsubstantiated by any admissible documentary evidence of such a payment. Coleman v. Maclas, 61 A.D.3d at 569; Zuluaga v. P.P.C. Constr., LLC, 45 A.D.3d 479, 480 (1st Dep't 2007); 2084-2086 BPE Assoc. v. State of N.Y. Div. of Hous. & Community Renewal, 15 A.D.3d 288, 289 (1st Dep't 2005); Figueroa v. Luna, 281 A.D.2d at 205. The unauthenticated checks from plaintiffs to Rocco and Kings Premium Service, even if authenticated, do not show that Kings Premium Service in turn paid any premiums to Rocco. Rodriguez v. Board of Educ. of City of N.Y., 107 A.D.3d at 652; Beloff v. Gerges, 80 A.D.3d a 460-61. See IRB-Brasil Resseguros S.A. v. Portobello Intl. Ltd., 84 A.D.3d at 638; Rivera v. GT Acquisition 1 Corp., 72 A.D.3d at 526; Coleman v. Maclas, 61 A.D.3d at 569; Babikian v. Nikki Midtown, LLC, 60 A.D.3d at 471.

C. The Notices of Cancellation

Reali's attestation merely that he was unaware either policy had been canceled, without any basis for his personal knowledge whether plaintiffs received the cancellation notices, such as plaintiffs' procedure for incoming mail and recordkeeping, see Brito v. Allstate Ins. Co., 102 A.D.3d 477, 478 (1st Dep't 2013), fails to make a prima facie showing of their nonreceipt.

Rodriguez v. Board of Educ. of City of N. Y., 107 A.D.3d at 652; Dorsey v. Les Sans Culottes, 43 A.D.3d 261; State Farm Mut. Auto. Ins. Co. v. KanKam, 3 A.D.3d 418, 419 (1st Dep't 2004). See Beloff v. Gerges, 80 A.D.3d at 460-61; Figueroa v. Luna, 281 A.D.2d at 206. In reply, Reali attests that plaintiffs' staff is instructed to bring any mail related to insurance to his attention. Although the court may not consider a point in reply such as plaintiffs' incoming mail procedure that was to have been presented in support of the cancellation notices' nonreceipt originally, this evidence, at best, establishes only that Reali himself did not receive defendants' notices, not that the staff responsible for the incoming mail never received them. Sylla v. Brickyard Inc., 104 A.D.3d 605, 606 (1st Dep't 2013); Calcano v. Rodriguez, 103 A.D.3d 490, 491 (1st Dep't 2013); Martinez v. Nguyen, 102 A.D.3d 555, 556 (1st Dep't 2013); JPMorgan Chase Bank, N.A. v. Luxor Capital, LLC, 101 A.D.3d 575, 576 (1st Dep't 2012). Finally, regardless whether the insured actually receives an insurer's cancellation notice, the insurer may cancel its policy by mailing a notice of cancellation to the insured's address shown on the policy, giving effect to the cancellation. Badio v. Liberty Mut. Fire Ins. Co., 12 A.D.3d 229, 231 (1st Dep't 2004). See Tower Ins. Co. of New York v. Ray & Frank Liquor Store, Inc., 104 A.D.3d 482, 483 (1st Dep't 2013).

Plaintiffs' claim that, even if defendants mailed and plaintiffs received defendants' cancellation notices, they are ineffective due to deficiencies in content relies on Insurance

Law § 3426(h)'s requirement that cancellation notices specify the grounds for the cancellation and cite to the supporting paragraph of § 3426(c). The excess line policies in question are policies written over plaintiffs' underlying liability policies to cover the same risk, however, to which Insurance Law § 3426(h)'s content requirements for notices cancelling the policies do not apply. N.Y. Ins. Law § 3426(a)(6) and (l)(2). Therefore the notices canceling these policies need not provide any reason for the cancellation. N.Y. Ins. Law § 3426(h) and (l)(2).

D. Conclusion

Plaintiffs' evidence itself leaves factual issues whether Rocco, in requesting or obtaining the policies, ever dealt with defendants' broker or agent, CRC Insurance Services or AGC Insurance Services; whether Kings Premium Services paid the balance of premium payments; and whether defendants mailed their cancellation notices to plaintiffs. Since plaintiffs fail to meet their prima facie burden, the court need not consider defendants' opposition and denies plaintiffs summary judgment. Chubb Natl. Ins. Co. v. Platinum Customcraft Corp., 38 A.D.3d at 245; Coleman v. Maclas, 61 A.D.3d at 596; Atlantic Mut. Ins. Co. v. Joyce Intl., Inc., 31 A.D.3d at 352. See JMD Holding Corp. v. Congress Fin. Corp, 4 N.Y.3d at 384; Romero v. Morrisania Towers Hous. Co. Ltd. Partnership, 91 A.D.3d at 508.

IV. DEFENDANT FIRST MERCURY EMERALD'S CROSS-MOTION FOR SUMMARY JUDGMENT

Defendant First Mercury Emerald's cross-motion for summary judgment suffers from the same deficiencies as plaintiffs'

motion, also failing to make a prima facie showing of entitlement to judgment through admissible evidence. C.P.L.R. § 3212(b); Vega v. Restani Constr. Corp., 18 N.Y.3d at 503; Smalls v. AJI Indus., Inc., 10 N.Y.3d at 735; JMD Holding Corp. v. Congress Fin. Corp., 4 N.Y.3d at 384.

A. Procurement of the Policy, Payment of the Premiums, and Notice of the Cancellation

As evidence that Rocco was not an authorized broker for the First Mercury Emerald policy, First Mercury Emerald relies on unauthenticated and hearsay correspondence: a letter from Royal Waste Services, authorizing CRC Insurance Services and AGC Insurance Services as Royal Waste Services' exclusive broker for the policy, and quotation and confirmation letters First Mercury Emerald issued to CRC Insurance Services for the policy. These inadmissible documents leave a factual issue regarding the identity of the procuring broker for the First Mercury Emerald policy. IRB-Brasil Resseguros S.A. v. Portobello Intl. Ltd., 84 A.D.3d at 638; Rivera v. GT Acquisition 1 Corp., 72 A.D.3d at 526; Coleman v. Maclas, 61 A.D.3d at 569; Babikian v. Nikki Midtown, LLC, 60 A.D.3d at 471. The affirmation by First Mercury Emerald's attorney that First Mercury Emerald delivered the policy to CRC Insurance Services and not Rocco does not indicate the attorney's personal knowledge of such a fact and is likewise inadmissible. Coleman v. Maclas, 61 A.D.3d at 569; 2084-2086 BPE Assoc. v. State of N.Y. Div. of Hous. & Community Renewal, 15 A.D.3d at 289; Figueroa v. Luna, 281 A.D.2d at 205. See Zuluaga v. P.P.C. Constr., LLC, 45 A.D.3d at 480.

First Mercury Emerald supports its claim that plaintiffs failed to pay their premiums only by an unauthenticated email of CRC Insurance Services' hearsay communication that plaintiffs' premium deposit to CRC Insurance Services was not honored. Raposo v. Robinson, 106 A.D.3d 593, 593 (1st Dep't 2013); Fay v. Vargas, 67 A.D.3d 568, 568 (1st Dep't 2009). The unauthenticated cancellation notices from Interstate Fire & Casualty mailed April 16, 2009, and from First Mercury Emerald mailed April 20, 2009, fail to establish mailing of the notices to plaintiffs' address through an affidavit on personal knowledge or other admissible evidence of a regular mailing procedure that was followed, to effect cancellation of the policies. E.g., Hermitage Ins. Co. v. Zaidman, 107 A.D.3d 579, 580 (1st Dep't 2013); 8112-24 18th Ave. Realty Corp. v. Aetna Cas. & Sur. Co., 240 A.D.2d 287, 288 (1st Dep't 1997). See State Farm Mut. Auto. Ins. Co. v. KanKam, 3 A.D.3d at 419. First Mercury Emerald's claim that, even if the policy remained in force when the claims against plaintiffs arose, they violated the policy by unreasonably delaying notice of the claims to their insurer and preventing its critical investigation also is not based on any personal knowledge. Coleman v. Maclas, 61 A.D.3d at 569; 2084-2086 BPE Assoc. v. State of N.Y. Div. of Hous. & Community Renewal, 15 A.D.3d at 289; Figueroa v. Luna, 281 A.D.2d at 205-206.

B. Standing

First Mercury Emerald further claims that plaintiffs lack standing to maintain this declaratory judgment action due to

their failure to show they have exhausted their primary liability coverage on the underlying claims, triggering the First Mercury Emerald excess liability policy. In a declaratory judgment action, the cognizable stake in the outcome required to maintain standing may be shown before liability against the insureds in the underlying actions is determined. Graziano v. County of Albany, 3 N.Y.3d 475, 479 (2004); Mt. McKinley Ins. Co. V. Corning Inc., 33 A.D.3d 51, 57 (1st Dep't 2006); Long Is. Light Co. v. Allianz Underwriters Ins. Co., 35 A.D.3d 253, 253 (1st Dep't 2006). Since neither First Mercury Emerald nor plaintiffs make any showing of the potential amounts that may be recovered against plaintiffs in the two underlying wrongful death actions and plaintiffs' primary liability, whether plaintiffs' potential liability may reach into First Mercury Emerald's excess coverage remains a factual issue on which disclosure is warranted. C.P.L.R. § 3212(f); Cooke v. City of New York, 95 A.D.3d 537, 538 (1st Dep't 2012); Arbor Leasing, LLC v. BTMU Capital Corp., 68 A.D.3d 580, 580 (1st Dep't 2009); Slemish Corp., S.A. v. Morgenthau, 63 A.D.3d 418, 419 (1st Dep't 2009).

C. Exclusions

Finally, First Mercury Emerald's insistence that its policy's pollution and hazardous materials exclusions bar coverage of the claims against plaintiff suffers from the same deficient evidentiary support as this defendant's other defenses. The First Mercury Emerald policy defines "hazardous materials" as "'pollutants,' toxic substances, lead, asbestos, silica and

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materials containing them." Aff. of Sharon Moreland Ex. D, at 13. The policy defines "pollutants" as "any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste. Waste includes materials to be recycled, reconditioned or reclaimed . . . ." Id. Ex. D, at 14. First Mercury Emerald makes no showing, through admissible evidence or otherwise, that the culprit hydrogen sulfide fumes, inadvertently released from a drywell, fall under the policy's definition of either hazardous materials or pollutants. Once again First Mercury Emerald attempts to establish its defense only through its attorney's affirmation, which equally lacks any evidentiary value in supporting application of the policy's exclusions. C.P.L.R. § 3212(b); Coleman v. Maclas, 61 A.D.3d at 569; 2084-2086 BPE Assoc. v. State of N.Y. Div. of Hous. & Community Renewal, 15 A.D.3d at 289; Figueroa v. Luna, 281 A.D.2d at 205-206.

V. DISPOSITION

Since both plaintiffs and defendant First Mercury Emerald Insurance Services fail to meet their prima facie burden to support summary judgment in their favor as explained above, the court denies plaintiffs' motion for summary judgment and defendant First Mercury Emerald Insurance Services' cross-motion for summary judgment. C.P.L.R. § 3212(b).

DATED: January 31, 2014

LUCY BILLINGS, J.S.C.