Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE HOWARD G. LANE** **IA PART 6**
Justice

FRANCO VOLI,

Plaintiff,

-against-

CAMBRIDGE MUTUAL FIRE INSURANCE COMPANY, et al.,

Defendants.

Index Number 701875/15

Motion Date: June 5, 2015

Motion Seq. No. 1

Motion Cal. No. 116

The following numbered papers read on this motion by plaintiff Franco Voli for an order granting summary judgment and declaring that defendant Cambridge Mutual Fire Insurance Company/Andover Insurance (Cambridge/Andover) is required to defend and indemnify Franco Voli in the underlying action entitled *Capacchione v Voli*, Index No. 703084/2012; and declaring that the Cambridge/Andover policy is deemed to be primary insurance to any and all additional policies.

	Papers Numbered
Notice of Motion- Affirmation-Affidavits-Exhibits.....	EF 7-17
Opposing Affirmation-Exhibits.....	EF 18-23
Reply Affirmation-Exhibits.....	EF 24-27

Upon the foregoing papers this motion is determined as follows:

In September 201, Franco Voli was the owner of the real property located at 157-22 87th Street, Howard Beach, New York, and was also the owner of the real property located at 85-15 159th Avenue, Howard Beach, New York . State Farm Fire and Casualty Company (State Farm) issued a homeowner's policy to Mr. Voli, for the period of January 18, 2011 to January 18, 2012, which provided coverage for the 87th Street property. Cambridge/Andover issued a homeowner's policy to Mr. Voli for the period of

August 30, 2011 through August 30, 2012, in connection with the 159th Avenue property.

On December 5, 2012, Gabriele Capacchione commenced the underlying action entitled *Capacchione v Voli*, (Index No. 703084/2012) and alleges that he sustained personal injuries on September 21, 2011, at approximately 7:00 p.m., when he slipped and fell on the exterior steps of the 87th Street property. Issue has been joined in said action and a note of issue was filed on August 14, 2014. The matter is presently on the calendar in the trial scheduling part.

Franco Voli, at his deposition in the underlying action, testified that in 2009 he purchased the 159th Avenue property and resided there with his family until May 2012, when he sold said property and moved to the 87th Street property. Mr. Voli stated that prior to 2009, he had resided at his parent's house in Howard Beach and that he had purchased the 87th Street property in 2007. He stated that after he purchased the 87th Street property, he had the house completely demolished and hired an architect, as well as a general contractor to construct a new two-story one-family house on the site. Mr. Voli stated that he also hired most of the subcontractors, including Mr. Capacchione. He stated that Mr. Capacchione was hired in the Fall 2009 to construct, deliver, and install custom kitchen cabinets in the new house, but that he did not commence work at the house until the Fall 2011 and that said work was completed in early 2012. Mr. Voli stated that he first learned that anyone had been injured in September 2011 at the 87th Street when he was served with process in the Capacchione action. Mr. Voli stated that after he was served with process he contacted a lawyer and State Farm. State Farm has provided Mr. Voli with a defense in the underlying action.

Mr. Capacchione, at his deposition in the underlying action, testified that he was hired by Franco Voli to manufacture, deliver, and install custom made kitchen cabinets in a newly constructed house located at 157-22 87th Street, Howard Beach, New York. He stated that the accident occurred when he exited the premises, and that the material surface of the steps was slippery. He stated that he had been hired by Mr. Voli about a year prior to starting the job; that at the time of the accident approximately 75% of the job was completed; and that his employees thereafter completed the work. He stated that no one resided in the 87th Street premises while construction was ongoing, and that Mr. Voli and his family intended to move in after the construction work was done. He stated that Mr. Voli was at the premises at the time of his accident and that he picked him up after he fell.

On May 15, 2014, a State Farm representative contacted Mark O'Malley, a Cambridge/Andover claims examiner, and requested that said insurer provide coverage and a defense to Mr. Voli in the Capacchione action. Mr. O'Malley, in a letter dated

May 16, 2014, stated that "[w]hile this incident may qualify as a covered claim under our insured's policy, we would require summary information concerning the facts and circumstances of this claim, to consider coverage confirmation. By definition of an "insured location" it does include "land owned by or rented to an insured on which a one or two family dwelling is being built as a residence for an "insured ".

Counsel for Mr. Voli in the underlying action, in a letter dated June 17, 2014, provided Mr. O'Malley with a copy of the summons and complaint, Voli's answer and Capacchione's verified bill of particulars in said action. In a letter dated July 8, 2014, counsel for Andover Companies stated that after a review of the file materials, there was insufficient information to determine whether coverage exists for the 87th Street property. Counsel requested that Mr. Voli's counsel provide a complete and certified copy of the State Farm policy that was in effect on September 21, 2011. In a letter dated August 21, 2014, counsel for Andover Companies stated that they had not received a copy of the State Farm policy, and requested that said policy be forwarded so that they could conduct a complete investigation into the matter.

In a letter dated September 2, 2014, Mr. O'Malley informed Mr. Voli's counsel that Andover was denying tender and disclaimed coverage to Mr. Voli, stating in pertinent part that :

"Based upon our review of the information provided and the terms, conditions and exclusions contained in the policy, it is the position of Andover that there is no coverage for Franco Voli for the reasons set forth below.

"The Cambridge Mutual Fire Insurance Company provided Homeowners Insurance to Franco Voli for the property at 8515 159th Avenue, Howard Beach , New York on September 21, 2011. The Cambridge Policy contained the following relevant provision.

"In this policy, "you" and "your" refer to the "named insured" shown in the Declarations and the spouse if a resident of the same household.

Definitions (pg.1)
3. "Insured" means you and residents of your household who are:
a. Your relatives; or
b. Other persons under the age of 21 and in the care of any person named above.
4. "Insured location" means
f. Land owned or rented to an "insured" in which a one or two family dwelling is being built as a residence for an "insured".

"Please note that our investigation into your tender request reveals that the mutual insured, Franco Voli was living full time in the residence at 157-22 87th Street, Howard Beach at the time of the incident alleged by Plaintiff. Accordingly, the house was fully constructed and was not "being built" as required by the language of the Cambridge Policy. Please note that the Cambridge Policy does not provide coverage for the residence or property located at 157-22 87th Street, Howard Beach, New York because it does not fall within the definition of "insured location" under the Cambridge policy."

Counsel for Mr. Voli, in a letter dated September 18, 2014, stated that Andover's denial of coverage on the grounds that he was living full time in the 87th Street property at the time of the alleged accident was not accurate. Counsel provided the insurer with a copy of Mr. Voli's deposition transcript dated August 26, 2014, and stated that Mr. Voli had testified that he constructed a single family home at said address and did not move into said property until May 2014. Counsel requested that the tender request be re-evaluated.

In a letter dated October 17, 2014, Mr. Voli's counsel inquired as to whether Cambridge would be assuming a defense and indemnification. A series of emails were then exchanged between Mr. Voli's counsel and Cambridge/Andover's counsel. Mr. Voli's counsel provided Cambridge/Andover's counsel with copies of the State Farm policy and Mr. Capacchione's deposition testimony.

In a letter dated January 16, 2015, counsel for Andover requested further information in order to re-evaluate the tender request, stating that their investigation into the tender request "reveals that the mutual insured, Franco Voli, has some inconsistencies regarding this incident, including whether he was living in the Cambridge-insured home on the date of the accident and whether he actually witnessed the accident." Counsel requested a complete copy of State Farm's claims file "so that we may fully evaluate this claim." Counsel further stated that "[i]n addition to our denial of your tender request based on these inconsistencies, your tender is also denied on the grounds of late notice. The incident at issue occurred on September 21, 2011, the Summons and Complaint was filed on December 5, 2012 and State Farm did not make this tender request until approximately May 2014, at which point this matter was in its final stages. Since over three years have elapsed since the occurrence and the subsequent filing of this lawsuit, Andover is greatly prejudiced in that it has been unable to conduct a timely and complete investigation of the matter and as such, also denies your tender request based on late notice".

In an email dated February 24, 2015 and sent to Cambridge/Andover's counsel , Mr. Voli's counsel stated, among other things, that Cambridge/Andover's "refusal to

provide coverage, when it clearly exists, constitutes bad faith". Counsel stated that he would commence a declaratory judgment action and provided a copy of the proposed summons and complaint.

Cambridge/Andover's counsel responded in letter dated February 26, 2015, stating that Cambridge had initially rejected the tender request "based on inconsistencies in Mr. Voli's statements regarding his residence at the time of the accident, as well as State Farm's late notice of the claim to Cambridge" and again requested that they be provided with the entire State Farm file in order to fully evaluate the claim.

Mr. Voli's counsel responded in a letter dated February 27, 2015, stated, in pertinent part, that he had been attempting to obtain coverage for Mr. Voli from Cambridge/Andover for over six months; that counsel "has never provided any evidence whatsoever concerning any 'inconsistencies' "; that "long ago" he had provided Mr. Voli's deposition transcript in which he "clearly testified that at the time of the accident, he was not residing at the accident location"; that the request for the State Farm file was not made until January 16, 2015, and that he informed counsel on January 21, 2015 that State Farm had declined the request. State Farm, however, agreed to provide copies of its log notes, dated January 18, 2013, in which Mr. Voli provided "consistent information" stating that he was not residing at the accident location at the time of the loss, but rather was residing at the property insured by Cambridge/Andover.

The within action for declaratory judgment was commenced on February 27, 2015, and the defendants have served an answer. Plaintiff now moves for summary judgment declaring that Cambridge/Andover has a duty to defend and indemnify it in the underlying action , and declaring that the Cambridge/Andover policy be deemed primary insurance to any and all applicable policies.

The movant on a summary judgment motion has the initial burden of proving entitlement to summary judgment by tender of evidentiary proof in admissible form sufficient to eliminate any material issues of fact from the case (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1st Dept 1980]; *Winegrad v New York Univ. Med, Ctr.*, 64 NY2d 851 [1st Dept 1985]). Only when the proponent of the motion makes a prima facie showing of entitlement to summary judgment does the burden then shift to the party opposing the motion who must then demonstrate, by admissible evidence, the existence of a factual issue requiring a trial of the action (*Zuckerman v City of New York*, 49 NY2d at 562). If the proponent fails to make out its prima facie case for summary judgment, the motion must be denied, regardless of the sufficiency of the opposing papers (*Ayotte v Gervasio*, 81 NY2d 1062 [1993]; *Alvarez v Prospect Hospital*, 68 NY2d 320 [1986]). If the proponent meets its burden, then the opposition must lay bare its proof to raise real

issues of fact and not just shadowy semblances.

"[U]nambiguous provisions of an insurance contract must be given their plain and ordinary meaning, and the interpretation of such provisions is a question of law for the court" (*White v Continental Cas. Co.*, 9 NY3d 264, 267 [2007][citation omitted]). Where an "'agreement on its face is reasonably susceptible of only one meaning, a court is not free to alter the contract to reflect its personal notions of fairness and equity'" (*id.* at 267, *quoting Greenfield v Philles Records*, 98 NY2d 562, 569-570 [2002]).

Here, pursuant to the terms of the Cambridge homeowners policy, the 87th Street property where the occurred the accident that gave rise to the underlying action is an "[i]nsured location" within the meaning of the subject policy, which defines that term as, "[l]and owned or rented to an "insured" in which a one or two family dwelling is being built as a residence for an "insured"." This court finds that the words " being built" encompasses the work being done here, the installation of kitchen cabinets. Contrary to the insurer's assertions, the meaning of the words "being built" do not require a determination as whether the house was substantially complete on the date of loss. In any event, to the extent that said term is ambiguous, "any ambiguity must be construed in favor of the insured and against the insurer" (*White v Continental Cas. Co.*, 9 NY3d at 267; *see Congregation Beth Shalom of Kingsbay v Yaakov*, 130 AD3d 769 [2d Dept 2015]; *Tower Ins. Co. of N.Y. v Diaz*, 58 AD3d 495, 496 [1st Dept 2009]).

This court further finds that no questions of fact exist as to whether Mr. Voli was living in the 87th Street property at the time of Mr. Capacchione's alleged accident. It is undisputed that in the underlying action Mr. Voli testified that he was living at the 159th Avenue property at the time of the alleged accident and that he sold that property and moved into the 87th Street property in May 2012. Mr. Capacchione also testified at his deposition in the underlying action that Mr. Voli was not living at the 87th Street property at the time of his alleged accident.

The insurer, in opposition, seeks to rely upon a transcript of a conversation between an insurance investigator and Mr. Voli, in which Mr. Voli stated that at the time of the alleged accident the property was not in move in condition; that he did not reside at the 87th Street property at the time of the accident; and that he moved into the house in Spring 2011, which he stated was a few months prior to the "Sandy storm" in October 2011. The court, however, takes judicial notice of the fact that Superstorm Sandy impacted New York City on October 29, 2012, and not October 2011. The transcript itself is unsigned. The investigator has not submitted an affidavit in opposition to the motion nor has she in any way certified the correctness of the transcript. There is no certification from the investigator/ transcriber that the transcription of the conversation is

accurate. There is no indication that Mr. Voli was under oath at the time the statement was given. Therefore, it may be fairly concluded that the statement, if actually given by Mr. Voli, was not given under oath. As this statement is unsworn, and as the insurance investigator did not confirm the accuracy, authenticity and reliability of the transcript, it cannot be considered in opposition to this motion for summary judgment (*see Zuckerman v City of New York*, 49 NY2d at 562; *Ramos v National Cas. Co.*, 227 AD2d 250, 251 [1st Dept 1996]; *Horowitz v Kevah Konner, Inc.*, 67 AD2d 38, 41 [1st Dept 1979]).

Contrary to the defendant insurer's contention, its disclaimer of coverage was ineffective. An insurance company has an affirmative obligation to provide written notice of a disclaimer of coverage as soon as is reasonably possible, even where the policyholder's own notice of the claim to the insurer is untimely (*see Hartford Ins. Co. v County of Nassau,* 46 NY2d 1028, 1029-1030 [1979]; *Darling Ferreira v Global Liberty Ins. Co. of N.Y.*, 119 AD3d 837 [2d Dept 2014]; *Prudential Prop. & Cas. Ins. v Persaud*, 256 AD2d 502, 504 [2d Dept 1998]). Here, the defendant insurer learned by May 15, 2014, at the latest, about the underlying personal injury action. The defendant insurer was aware by that date of the grounds for disclaimer of coverage (*see Republic Franklin Ins. Co. v Pistilli*, 16 AD3d 477, 479 [2d Dept 2005]). Nevertheless, it did not disclaim coverage on the grounds of untimely notice of claim until January 16, 2015, almost eight (8) months later, a delay that, under the circumstances of this case, is unreasonable as a matter of law (*see Darling Ferreira v Global Liberty Ins. Co. of N.Y.*, *supra*; *Guzman v Nationwide Mut. Fire Ins. Co.*, 62 AD3d 946, 947 [2d Dept 2009]; *Moore v Ewing*, 9 AD3d 484, 488 [2d Dept 2004]; *Faas v New York Cent. Mut. Fire Ins. Co.*, 281 AD2d 586, 587 [2d Dept 2001]; *Matter of Colonial Penn Ins. Co. v Pevzner*, 266 AD2d 391, 391 [2d Dept 1999]; *Prudential Prop. & Cas. Ins. v Persaud*, 256 AD2d at 504).

Plaintiff, in his reply, has withdrawn his request that the Cambridge/Andover be considered excess to the State Farm policy, and now agrees with Cambridge/Andover's counsel that the policies should be considered to apply on a pro rata basis.

In view of the foregoing, plaintiff's motion for summary judgment is granted and it is the declaration of this court that defendant Cambridge/Andover has a duty to defend and indemnify Franco Voli in the underlying action, and further declares that the applicable State Farm policy and the applicable Cambridge/Andover policies shall apply on a pro rata basis.

Dated: August 21, 2015

.....
Howard G. Lane, J.S.C.