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SUPREME COURT - STATE OF NEW YORK

Present:

HON. ARTHUR M. DIAMOND
Justice Supreme Court

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JAGUAR CONSTRUCTION CORP.

Plaintiff,

-against-

EVEREST NATIONAL INSURANCE COMPANY and LINCOLN GENERAL INSURANCE COMPANY,

Defendants,

----------x

TRIAL PART: 16

NASSAU COUNTY

INDEX NO: 002222-2010

MOTION SEQ. NO: 1

SUBMIT DATE: 07/26/10

The following papers having been read on this motion:

Notice of Motion 1
Memorandum of Law.....2
Opposition.....3
Reply.....4

Motion by the attorneys for the defendant Everest National Insurance Company for an order pursuant to CPLR 3211(a)(7) dismissing the plaintiff's action against Everest National Insurance Company is denied.

Plaintiff, Jaguar Construction Corp. (Jaguar) seeks defense and indemnification from Everest National Insurance Company (Everest) with respect to an underlying bodily injury action involving Alfonso Solano (Solano).

Solano commenced a lawsuit (the underlying action) against Jaguar (Solano v Jaguar Construction Corp., Nassau County Supreme Court Index No. 2517/09) alleging that while Solano was employed at a construction site, he was struck by a steel beam that fell on him causing serious injuries through no fault of his own. Jaguar was the general contractor and project manager. Jaguar had a contract with the owners of the subject premises to build an extension to the residence. Jaguar hired Testani Enterprises, Inc., as subcontractor, to do the demolition work to the garage at the subject premises. Jaguar alleges that on the day of the accident, October 21, 2006, Testani was the only subcontractor working on the site. Solano was employed by the subcontractor Testani. After

being injured Solano was taken to the hospital. Jaguar alleges that immediately after the accident, Solano advised Jaguar that he would only be making a Workers' Compensation claim, and not file a claim against Jaguar (Complaint ¶ 10). Solano did make a Workers' Compensation claim (Complaint ¶ 11). Almost three years later, by letter dated January 8, 2009, Solano's attorney advised Jaguar that Solano was pursuing a claim against Jaguar for personal injuries sustained on October 21, 2006.

Jaguar immediately sent a copy of the January 8, 2009 letter to H.R. Keller & Co., Inc., its insurance broker, who in turn delivered the letter to Everest, and requested, on behalf of Jaguar, a defense and indemnification in the event Solano asserted a formal claim against Jaguar. By disclaimer letter dated January 27, 2009, Everest refused to defend or indemnify Jaguar for any claim made by Solano as a result of the October 21, 2006 incident on the ground that the "loss was not reported to Everest as soon as practicable." On or about February 13, 2009, Solano commenced the underlying action against Jaguar to recover damages for the personal injuries he allegedly sustained on October 21, 2006.

On February 2, 2010, Jaguar commenced the within declaratory judgment action seeking a declaration that Everest is obligated to defend and indemnify Jaguar in the underlying action. The complaint also names Lincoln General Insurance Company as a party defendant. Lincoln issued an insurance policy to Testani under which Jaguar was an additional insured. By disclaimer letter dated October 8, 2009, Lincoln refused to defend and/or indemnify Jaguar for the claims asserted in the underlying action on the grounds of "late notice" in that Jaguar did not give "formal notice" to Lincoln of the happening of the accident and the "filing of the complaint" in the underlying action until March 2009 and thus the "loss was not reported to Everest as soon as practicable." Lincoln appeared in this action by service of an answer dated March 22, 2010, but has not participated in the within motion. The complaint alleges two causes of action against Everest: one cause of action for a declaratory judgment and one cause of action for breach of contract. The first cause of action of the complaint alleges that there is a justiciable and actual controversy existing between Jaguar and Everest with respect to Everest's obligations to defend and indemnify Jaguar against the claims asserted against it in the underlying action and that the court grant, pursuant to CPLR 3001, a declaration of the rights and obligations of the parties under the Everest Policy. The third cause of

action of the complaint alleges that the Everest Policy contractually obligates defendant Everest to provide Jaguar with a defense and indemnification of the claims asserted by Solano against Jaguar in the underlying action and that Everest's refusal to provide Jaguar with a defense and indemnification in the underlying action constitutes a breach of the Everest Policy.

Everest seeks dismissal of the complaint pursuant to CPLR 3211(a)(7). Everest also requests that to the extent the court considers evidence outside the four corners of the complaint, the within motion be treated as one for summary judgment pursuant to CPLR 3212.

In support of its motion to dismiss (CPLR 3211(1)(7)) and/or for summary judgment (CPLR 3212) movant argues that Jaguar's notice to Everest of the accident involving Solano came more than three years after the accident took place in violation of Everest policy's condition requiring Jaguar to give notice "as soon as practicable." In short, Everest asserts that Jaguar's notice was untimely breaching the condition precedent and vitiating coverage under the Everest policy with respect to the underlying action.

Accepting the facts alleged in the complaint as true, and according plaintiff the benefit of every reasonable inference, Everest's motion to dismiss for failure to state a cause of action is denied. The complaint sets forth a viable cause of action for a declaratory judgment and breach of contract. *See* CPLR 3211(a)(7); *Guggenheimer v Ginzburg*, 43 NY2d 268; *Detmer v Acampora*, 207 AD2d 475. The court will next consider Everest's application to treat the within motion as one for summary judgment pursuant to CPLR 3212.

The determinative issue is not whether Jaguar believed it could be held liable, but rather its belief that no claim would be asserted against it was reasonable. *Philadelphia Indem. Ins. Co. v Genesee Valley Improvement Corp.*, 41 AD3d 44.

A policy of insurance requires that notice of an occurrence be given "as soon as practicable." The requirement operates as a condition precedent to coverage, and the failure to give such notice vitiates the contract. S*ee Argo Corp. v Greater NY Mut. Ins. Co.*, 4 NY3d 332; *Security Mut. Ins. Co. of NY v Acker-Fitzsimons Corp.*, 31 NY2d 436, 441. Nor is it necessary for the carrier to demonstrate prejudice before disclaiming coverage. *Argo Corp. v Greater NY Mut. Ins. Co. supra*, at p. 339. For insurance policies issued after January 19, 2009, the Legislature adopted a code provision that would require an insurer to demonstrate prejudice caused by an untimely delay. This

requirement does not apply here as the policy was issued in 2006. *See* New York Ins. Law § 3420 (Laws 2008, ch. 388, § 8, eff. January 17, 2009). The problem arises in the determination of what constitutes "as soon as practicable," as there may be extenuating circumstances in a particular case that excuse the failure to give notice earlier. S*ee Great Canal Realty Corp. v Seneca Ins. Co., Inc.*, 5 NY3d 742.

Reliance on an injured party's representation that it does not intend to sue has been held to present a triable issue of fact. *D'Aloia v Travelers Ins. Co.*, 85 NY2d 825. *Jordan Const. Products Corp. v Travelers Indemnity Co. of America*, 14 AD3d 655. The reasonableness of an insured's good faith belief that no claim will be asserted against it generally presents an issue of fact rather than one of law. *St. James Mech Inc. v Royal & Sunalliance*, 44 AD3d 1030. It is only where the facts are uncontroverted and not subject to conflicting inferences that these issues can be decided as a matter of law. *Bauerschmidt & Sons, Inc. v Nova Cas. Co.*, 69 AD3d 668.

In the instant case, Everest made a *prima facie* showing of its entitlement to judgment based upon plaintiff's delay in reporting the underlying occurrence. Jaguar has met its burden of creating a triable issue of fact as to the reasonableness of its delay in providing such notice. Defendant's motion for summary judgment is denied.

A Preliminary Conference (see 22 NYCRR 202.12) shall be held at the Preliminary Conference part, located at the Nassau County Supreme Court on the 22nd day of September, 2010, at 9:00 AM. This directive, with respect to the date of the Conference, is subject to the right of the Clerk to fix an alternate date should scheduling require. The attorneys for the plaintiff shall serve a copy of this order on the Preliminary Conference Clerk and the attorneys for the plaintiffs.

This constitutes the decision and order of this Court.

ENTER

DATED: September 2, 2010

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