SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. MICHAEL D. STALLMAN Justice

PART 7

AMERICAN [illegible] & CASUALTY [illegible]

- v -

STATE NATIONAL [illegible]

INDEX NO. 1-14[illegible]/01

MOTION DATE 8/12/03

MOTION SEQ. NO. 001

MOTION CAL. NO. 3

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits A-I, 1-3	1-3
Answering Affidavits — Exhibits 1-7	4-6
Replying Affidavits	

Cross-Motion: X Yes — No

Upon the foregoing papers, it is ordered that this motion and cross-motion are decided in accordance with the annexed memorandum opinion (decision, order and judgment).

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Dated: 12/10/03

J.S.C.

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

Check one: X FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 7

----------X

AMERICAN GUARANTEE & LIABILITY INSURANCE COMPANY, individually and as subrogee of S&W REALTY, LLC,

Index No.: 107460/07

Decision, Order and Judgment

Plaintiff,

- against -

STATE NATIONAL INSURANCE COMPANY, INC. and TOWER RISK MANAGEMENT CORP.,

Defendants.

----------X

HON. MICHAEL D. STALLMAN, J.S.C.:

In this action, plaintiff American Guarantee & Liability Insurance Company (American), individually and as subrogee of S&W Realty, LLC (S&W), seeks to recover against defendant State National Insurance Company, Inc. (State) $1 million out of a $2.1 million payment it made on S&W's behalf to settle an underlying personal injury action entitled *Antonio Leja-Perez v S&W Realty, LLC*, in the Supreme Court of the State of New York, Kings County, under Index Number 11186/04 (the underlying action).

Defendants State National Insurance Company, Inc. and Tower Risk Management Corporation (Tower) (collectively, defendants) move, pursuant to CPLR 3212, for summary judgment dismissing plaintiff's action.

American cross-moves for an order declaring that (i) State's disclaimer of coverage to S&W was untimely as a matter of law, thereby precluding defendants' ability to rely on the construction exclusion cited in its disclaimer; (ii) the exclusion is, in any event, inapplicable, and State owed primary coverage to S&W up to the full $1 million amount of State's policy limit; (iii) State is therefore obligated to reimburse American, as subrogee of S&W, for the full limits of the State

National Policy, the amount of $1 million dollars, which was paid by American, but should have been paid by State; and (iv) State is required to pay statutory interest to American on that same amount running from the date of the settlement payment in the underlying action.

BACKGROUND

The underlying action arose out of injuries sustained by Antonio Leja-Perez (Leja-Perez) on March 30, 2004, when he fell off a scaffold while doing pointing work on an apartment building owned by S&W (the premises). Leja-Perez was employed by non-party Evergreen Home Improvement (Evergreen). In the underlying action, Leja-Perez testified that, on the date of his accident, he and a fellow co-worker were assigned to perform pointing work at the premises. In order to perform their pointing work, they first mixed two buckets of concrete. While using a scaffold, they then pointed bricks on the facade of the building's fifth through third floors. Leja-Perez explained that, as he was finishing his pointing work on the third floor, the scaffold moved "a little backwards," away from the wall, causing him to fall from the scaffold and become injured. As a result of his accident, Leja-Perez commenced a personal injury suit against S&W, alleging violations of common-law negligence and Labor Law §§ 200, 240 (1) and 241 (6).

At the time of Leja-Perez's accident, State was S&W's primary insurer with respect to the premises, pursuant to a commercial lines policy, effective December 1, 2003 to December 1, 2004 (the State policy). Tower was the general managing agent for the State policy. The State policy's commercial general liability coverage limit was $1 million per occurrence for bodily injury to which the insurance applied.

The State policy included a Designated Ongoing Operations Exclusion (the construction exclusion), which applied to liability for injuries arising out of various construction activities,

including pointing. However, the construction exclusion did not apply to incidental repair and maintenance at the premises.

At the time of the accident, S&W was also American's insured under a commercial umbrella liability policy, which was issued to Apartment & Property Owners Purchasing Group (the American policy). The American policy, effective January 1, 2003 to January 1, 2005, contained a policy limit of $50 million per occurrence and covered "damages the insured become legally obligated to pay by reason of liability imposed by law or assumed under an insured contract because of bodily injury ... covered by this insurance providing the injury ... takes place during the policy period of this policy and is caused by an occurrence happening anywhere" (Defendants' Notice of Motion, Exhibit A, American Policy at § 1, ¶ B). In addition, the American policy also required American to "pay such damages in excess of the Retained Limit specified in Item 5. of the Declarations [i.e., $10,000] or the amount payable by other insurance, whichever is greater" (*id.*).

Within days of the accident, both State and American were notified that Leja-Perez was injured due to a fall from a scaffold. After Tower received legal papers for the underlying action, it hired the law firm of Marshall, Conway & Wright to defend S&W (Marshall). Based on the possible applicability of the State policy's exclusion provision for construction activities, Tower sent S&W a reservation of rights letter, dated May 4, 2004.

On May 21, 2004, Denise Shane, Tower's senior liability claims examiner, received a letter from S&W's managing agent, Wolf Sicherman of Sicherman Management LLC (Wolf), in which he claimed that S&W and Evergreen did not have a written contract for the job "as it was a "minor building repair, a leak in to two apartments" (Defendant's Notice of Motion, Shane Affidavit, Exhibit 4, Sicherman Letter). In addition, this letter noted that S&W had done work with Evergreen

in the past, and that S&W had a certification of insurance on file. It should be noted, however, that, during his February 23, 2006 deposition, Sicherman testified that, although he called Evergreen to fix water leaks in two apartments, he did not know what work was actually performed by Evergreen on the day of the accident, or whether that work included pointing.

In a letter, dated May 21, 2004, Marshall advised Tower that it was too soon to conclude whether Labor Law § 240 (1) applied to Leja-Perez's accident, as more investigation and discovery was needed in order to ascertain whether Leja-Perez's accident occurred while performing construction work, which is covered by the statute, or whether his work was routine maintenance, which is not covered by the statute.

In its November 3, 2004 bill of particulars report to American, Marshall stated that "it is clearly obvious that the plaintiff sustained very substantial injuries and as such this case presents the potential for a very significant exposure," (Defendant's Notice of Motion, Exhibit E, Marshall Bill of Particulars Report). In this report, Marshall also advised American that it appeared "likely" that Leja-Perez would be able to avail himself of a Labor Law § 240 (1) cause of action.

After depositions were completed, Leja-Perez moved for partial summary judgment on his Labor Law § 240 (1) claim against S&W, and S&W cross-moved for summary judgment dismissing the complaint. By letter dated November 9, 2006, Marshall advised State, Tower and American that the court had granted Leja-Perez partial summary judgment on his Labor Law § 240 (1) claim. In this letter, Amy S. Weissman (Weissman) explained that Marshall had opposed Leja-Perez's Labor Law § 240 (1) claim by arguing that, as he was at the premises to repair the area surrounding two leaky windows, Leja-Perez was performing routine maintenance at the time of his accident, which

is not covered under the statute. Weissman then noted:

> [h]owever, as you are aware, the plaintiff testified that they did not just point the area around the leaky windows. Rather they determined that the job was much larger and did "pointing work" on the entire front facade of the building

(Defendant's Notice of Motion, Exhibit 6, November 9, 2006 Weissman Letter). By letter, dated January 30, 2007, Tower disclaimed coverage on State's behalf based on the applicability of the State policy's construction exclusion.

By letter dated March 30, 2007 to Tower, American, on behalf of S&W, requested that State withdraw its January 30, 2007 disclaimer of coverage, noting that the denial of coverage on the basis of the construction exclusion was incorrect. In addition, as State's disclaimer was not issued until 78 days after the decision in the underlying action had been reported to State by counsel, American asserted that the disclaimer was untimely, and therefore legally invalid.

The matter went to mediation at JAMS on May 1, 2007, and the parties in the underlying action settled in the amount of $2.1 million. Although a representative from State attended the mediation, State refused to withdraw State's disclaimer of coverage, therefore making no contribution to the settlement.

By letter dated May 1, 2007, American again requested that State withdraw its disclaimer and contribute the full limit of its policy to the settlement, and again, State refused. As a result, American fully funded the $2.1 million settlement and commenced this action, wherein American asserts that State, as S&W's primary insurer, was obligated to pay the first $1 million of the $2.1 payment it made on S&W's behalf to settle the underlying action. Alternatively, American claims that State is precluded under Insurance Law § 3420 (d) from relying on the construction exclusion due to State's delay in disclaiming coverage. Although American names Tower as a party defendant,

it seeks no relief against Tower.

DISCUSSION

"'The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case'" (*Santiago v Filstein*, 35 AD3d 184, 185-186 [1st Dept 2006], quoting *Winegrad v New York University Medical Center*, 64 NY2d 851, 853 [1985]). The burden then shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact" (*Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *DeRosa v City of New York*, 30 AD3d 323, 325 [1st Dept 2006]). If there is any doubt as to the existence of a triable issue of fact, the motion for summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]; *Grossman v Amalgamated Housing Corporation*, 298 AD2d 224, 226 [1st Dept 2002]).

WHETHER THE STATE POLICY'S CONSTRUCTION EXCLUSION APPLIES

The construction exclusion modifies the insurance provided by State as follows:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

SCHEDULE

Description of Designated Ongoing Operation(s):

Construction Exclusion: "Construction of buildings or structures including, but not limited to, erection ... painting, leaning or pointing, and all work or activity in connection with the foregoing. This exclusion does not apply to incidental repair and maintenance performed by the named insured on buildings owned and operated by the named insured

* * *

This insurance does not apply to "bodily injury" or "property damage" arising out of the ongoing operations described in the Schedule of this endorsement, regardless of whether such operations are conducted by you or on your behalf or whether the

operations are conducted for yourself or for others

(Defendants' Notice of Motion, Exhibit 1 of Shane Affidavit, State Policy, Designated Ongoing Operations Exclusion).

State asserts that, as the provisions of the State policy's construction exclusion and Labor Law § 240 (1), which requires property owners and their agents to "furnish or erect ... scaffolding, hoists ... and other devices which shall be so constructed, placed and operated as to give proper protection" to workers involved in the "erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure," are materially the same, because Leja-Perez succeeded on his Labor Law § 240 (1) claim against S&W, it owes no coverage to S&W.

Plaintiff argues that, while the construction exclusion may be similar in language to Labor Law § 240 (1), as there are some material differences between the two, the court's finding in favor of Leja-Perez on his Labor Law § 240 (1) claim does not establish, *ipso facto*, that he was engaged in work subject to the construction exclusion. To that effect, plaintiff maintains that not every claim that falls within section 240 (1) necessarily falls within the construction exclusion. For example, in certain situations, a defendant can be found liable under Labor Law § 240 (1), even though the plaintiff was not engaged "construction" work at the time of his accident (*see Broggy v Rockefeller Group, Inc.*, 8 NY3d 675, 680 [2007] [Labor Law § 240 (1) applied to interior window cleaning which was not incidental to construction, demolition or repair work, and did not involve a significant alteration to the premises]; *see also Swiderska v New York University*, 10 NY3d 792, 793 [2008]).

As the Court of Appeals has consistently held that policy exclusions are subject to strict construction and must be read narrowly (*see Automobile Ins. Co. of Hartford v Cook*, 7 NY3d 131, 137 [2006]), contrary to defendants' assertion, that the court found in favor of Leja-Perez on is Labor

Law § 240 (1) claim does not establish, *ipso facto*, that he was engaged in work subject to the construction exclusion. However, a strict and narrow reading of the construction exclusion reveals that Leja-Perez's pointing work did, in fact, fall within the purview of the construction exclusion. Leja-Perez testified that, at the time of his accident, he and his co-worker were pointing bricks on the fifth through the third floors of the premises. Notably, the court in the underlying action determined that Leja-Perez and his co-worker were not just doing pointing work around the leaky windows on the day of the accident, but they were also performing pointing work on the entire front facade of the building. In light of this fact, Leja-Perez's work is to be considered more than incidental repair and maintenance.

Plaintiff also asserts that, as the construction exclusion is ambiguous, it should be read against State and in favor of the insured, S&W. To that effect, plaintiff maintains that the construction exclusion could be interpreted as applying to all "pointing" work, or just pointing work that is part of a particular construction project.

"An exclusion from coverage 'must be specific and clear in order to be enforced'" (*Essex Ins. Co. v Pingley*, 41 AD3d 774, 776 [2d Dept 2007], quoting *Seaboard Sur. Co. v Gillette Co.*, 64 NY2d 304, 311 [1984]; *MDW Enters. v CNA Ins. Co.*, 4 AD3d 338, 340-341 [2d Dept 2004] ["when an insurer wishes to exclude certain coverage from its policy obligations, it must do so in clear and unmistakable language"]). "The insurance company bears the burden of establishing that the exclusion applies in a particular case and it is subject to no other reasonable interpretation" (*id.* at 776). "The test for ambiguity is whether the language of the insurance contract is 'susceptible of two reasonable interpretations'" (*MDW Enters., Inc. v CNA Ins. Co.*, 4 AD3d at 340-341, quoting *State of New York v Home Indem. Co.*, 66 NY2d 669, 671 [1985]).

American for the amount of $1 million dollars which American now seeks to recover from State. Accordingly, State is not obligated to pay American statutory interest on that same amount running from the date of the settlement payment in the underlying action.

WHETHER STATE'S PURPORTED DELAY IN DISCLAIMING COVERAGE PRECLUDES IT FROM RELYING ON THE CONSTRUCTION EXCLUSION

Plaintiff asserts that, pursuant to Insurance Law § 3420 (d), State's delay of 78 days in disclaiming coverage after receiving notice of the court's order makes the disclaimer untimely as a matter of law, and thus, defendants are precluded from relying on the construction exclusion to deny coverage to S&W.

When the policy in question otherwise covers a particular occurrence, but for an exclusion in the policy, Insurance Law section 3420 (d) requires the insurer to "give written notice [of any disclaimer or denial of coverage] as soon as is reasonably possible" after it first learns of the accident or grounds for disclaimer (Insurance Law section 3420 [d]; *see Firemen's Fund Ins. Co. of Newark v Hopkins*, 88 NY2d 836, 837 [1996]; *79th Realty Co. v Wausau Ins. Cos.*, 7 AD3d 507, 508 [2d Dept 2004]; *Macari v Nationwide Mut. Ins. Co.*, 296 AD2d 384, 384-385 [2d Dept 2002]). Failure by the insurer to give notice as soon as possible after learning about the accident, or the grounds for denial or disclaimer of liability, precludes effective denial or disclaimer (*First Financial Ins. Co. v Jetco Contr. Corp.*, 1 NY3d 64, 68-69 [2003]; *Firemen's Fund Ins. Co. of Newark v Hopkins*, 88 NY2d at 837; *Hartford Ins. Co. v Nassau County*, 46 NY2d 1028, 1029 [1979]). Plaintiff argues that, as subrogee of S&W, it is entitled to step into the shoes of S&W for the purposes of challenging the timeliness of State's disclaimer.

However, First Department cases have consistently held that Insurance Law § 3420 (d), which requires that a liability insurer give written notice of a disclaimer to the insured and the injured person or any other claimant "as soon as reasonably possible," does not apply to notice given by one insurer to another (*see Bovis Lend Lease LMB, Inc. v Royal Surplus Lines Ins. Co.*, 27 AD3d 84, 92 [1st Dept 2005]; *Sixty Sutton Corp. v Illinois Union Ins. Co.*, 34 AD3d 386, 388 [1st Dept 2006] [because defendant insurance company was requesting defense and indemnification from a co-insurer, the requirements of section 3420 (d) were inapplicable]; *AIU Ins. Co. v Investors Ins. Co.*, 17 AD3d 259, 260 [1st Dept 2005]).

As the Court reasoned in *Bovis Lend Lease LMB, Inc. v Royal Surplus Lines Ins. Co.* (27 AD3d at 92):

> It is clear that the notice requirement of section 3420 (d) is designed to protect the insured and the injured person or other claimant against the risk, posed by a delay in learning the insurer's position, of expending energy and resources in an ultimately futile attempt to recover damages from an insurer or forgoing alternative methods for recovering damages until it is too late to pursue them successfully. Recognizing that these are not the risks to which another insurer seeking contribution is subject, courts have held that section 3420 (d) is not applicable to a request for contribution between coinsurers [internal citations omitted]

(*see also AIU Ins. Co. v Investors Ins. Co.*, 17 AD3d at 260). That the protection of the statute is inapplicable to American's request for reimbursement is demonstrated by the facts of this case, as evidence in the record shows that American was on notice of Leja-Perez's accident, the onset of the underlying action and State's intent to disclaim coverage from a very early date (*see AIU Ins. Co. v Investors Ins. Co.*, 17 AD3d at 260).

In support of its contention that Insurance Law § 3420 (d) applies in cases where one insurer sues another insurer, plaintiff puts forth the case of *Jefferson Ins. Co. of N.Y. v Travelers Indem. Co.*

cited in its disclaimer; (ii) the exclusion is applicable, and thus, State does not owe primary coverage to S&W up to the full $1 million amount of State's policy limit; (iii) State is therefore not obligated to reimburse plaintiff, as subrogee of S&W, for the amount of $1 million dollars; and (iv) State is not required to pay statutory interest to plaintiff on that same amount running from the date of the settlement payment in the underlying action.

This opinion constitutes the decision, order and judgment of this Court.

Dated: December 10, 2008
New York, New York

ENTER:

J.S.C.