

Short Form Order and Judgment

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE AUGUSTUS C. AGATE IA Part 24
Justice

<hr/>	x	Index
THE BURLINGTON INSURANCE COMPANY		Number <u>23352</u> 2007
		Motion
-against-		Date <u>May 12,</u> 2009
		Motion
GALINDO & FERREIRA CORP. CO., et al.		Cal. Numbers <u>2, 3, 4</u>
		Motion Seq. Nos. <u>5, 6, 7</u>
<hr/>	x	

The following papers numbered 1 to 38 read on this motion by defendant Galindo & Ferreira Corp. s/h/a Galindo & Ferreira Corp. Co. (Galindo & Ferreira) pursuant to CPLR 3212 for summary judgment dismissing the plaintiff, The Burlington Insurance Company's (Burlington) first, second and eighth causes of action; pursuant to CPLR 3212 for summary judgment on its first, second, third, fourth, fifth, sixth, seventh, eighth, ninth, tenth, eleventh, twelfth, and thirteenth affirmative defenses; pursuant to CPLR 3212 for summary judgment in its favor and against the plaintiff on the part of plaintiff's complaint which requests a declaratory judgment that the plaintiff has no obligation under the insurance policy the plaintiff issued to Galindo & Ferreira to defend or indemnify Galindo & Ferreira in the action brought by the Estate of Daniel Basilio Guerrero, captioned *Public Administrator of Suffolk County for the Estate of Daniel Basilio Guerrero v Galindo & Ferreira Corp., et al.*, Index No. 24550/08, Supreme Court, Queens County (*Guerrero* Action); pursuant to CPLR 3212 for summary judgment in its favor and against the plaintiff on the part of plaintiff's complaint which requests a declaratory judgment that the limits of coverage under Burlington's insurance policy for all claims arising out of or related to the alleged accident of October 7, 2006, including those claims brought by the plaintiffs in *Pedro, et al. v Galindo & Ferreira, et al.*, Index No. 22984/06, Supreme Court, Queens County (*Pedro* Action), as well as those claims brought by the

plaintiffs in the *Guerrero* Action, be reduced to \$50,000; pursuant to CPLR 3212 for summary judgment in its favor declaring that the plaintiff Burlington is required to provide full policy coverage of \$1,000,000 for the claims set forth by the plaintiffs in the *Pedro* and *Guerrero* Actions, and legal defense for Galindo & Ferreira in the *Guerrero* Action and coverage of \$1,000,000 and legal defense for all claims arising out of or related to the alleged accident of October 7, 2006; pursuant to CPLR 3212 for summary judgment in its favor granting Galindo & Ferreira reimbursement by plaintiff of attorneys' fees and costs it paid and those currently due and outstanding, in connection with defending this action and in defending itself against the claims of the plaintiff in the *Guerrero* Action, together with applicable interest at the maximum legal rate.

On the cross motion by plaintiff Burlington pursuant to CPLR 3212 for summary judgment against defendant Galindo & Ferreira.

On the motion by Galindo Construction Corp. (Galindo Construction) pursuant to CPLR 3212 for summary judgment dismissing the plaintiff's first amended complaint in its entirety as against Galindo Construction; pursuant to CPLR 3212 for summary judgment dismissing the plaintiff's third cause of action; pursuant to CPLR 3212 for summary judgment dismissing the plaintiff's fourth, sixth, and seventh causes of action; pursuant to CPLR 3212 for summary judgment dismissing plaintiff's eighth cause of action; pursuant to CPLR 3212 for summary judgment on defendant Galindo Construction's first, second, third, fourth, fifth, sixth, seventh, eighth, ninth, tenth, eleventh, twelfth and thirteenth affirmative defenses; and pursuant to CPLR 3212 for summary judgment and pursuant to 22 NYCRR 130-1.1 in favor of Galindo Construction awarding Galindo Construction reimbursement by plaintiff and/or plaintiff's attorneys of all costs and fees, including attorneys' fees, reasonably incurred by Galindo Construction in defense of this action.

On the motion by Galindo General Construction Corp. (Galindo General) pursuant to CPLR 3212 for summary judgment dismissing the plaintiff Burlington's first amended complaint as against Galindo General; pursuant to CPLR 3212 for summary judgment dismissing the plaintiff's eighth cause of action; and pursuant to CPLR 3212 for summary judgment on defendant Galindo General's first, second, third, fourth, fifth, sixth, seventh, eighth, ninth, tenth, eleventh, twelfth and thirteenth affirmative defenses.

	<u>Papers Numbered</u>
Notices of Motion - Affidavits - Exhibits.....	1-22
Notice of Cross Motion - Affidavits - Exhibits.....	23-26

Answering Affidavits - Exhibits.....	27-29
Reply Affidavits.....	30-38

Upon the foregoing papers it is ordered that this court’s order dated September 2, 2009 is vacated, and the following is substituted in its place and stead:

Upon the foregoing papers it is ordered and adjudged that the motions and cross motion are determined as follows:

This is a declaratory judgment action brought by the plaintiff Burlington. The plaintiff writes commercial liability coverage in New York on an excess and surplus lines basis. Burlington issued a surplus lines commercial general liability policy, No. 477BW07597, to defendant Galindo & Ferreria, which was effective from August 4, 2006 through August 4, 2007 for premises owned by Galindo & Ferreira located at 104-54 and 104-56 Roosevelt Avenue, Queens, New York (the Premises). On October 7, 2006, a construction accident is claimed to have occurred at the Premises. Three workers were injured as a result of the alleged accident and one of those three died as a result of his injuries. The general contractor for the construction work at the Premises was Galindo Construction. The alleged accident gave rise to two lawsuits for personal injury and wrongful death, the *Pedro* Action and the *Guerrero* Action. The *Pedro* and *Guerrero* Actions were consolidated on February 24, 2009, under Index No. 24550/08.

Following the alleged accident, on or about October 10, 2006, a notice of claim was sent to Burlington by Galindo & Ferreira. Burlington investigated the alleged accident. On December 29, 2006, the attorney for Galindo & Ferreira sent a claims representative working for Burlington a copy of the Summons and Complaint in the *Pedro* Action. On January 3, 2007, Burlington informed Galindo & Ferreira that it had assigned the defense of Galindo & Ferreira in the *Pedro* Action to the law firm of Camacho, Mauro and Mulholland and also informed Galindo & Ferreira that Burlington’s coverage limits for the policy were \$1,000,000 for all claims arising out of the accident. There was no reservation of rights to disclaim or limit any insurance coverage relating to any claim or action arising out of or related to the alleged accident. By letter dated June 5, 2007, Burlington, through its counsel, disclaimed any coverage for any claims brought in an action yet to be commenced by the Estate of Daniel Basilio Guerrero, and also announced its intention to limit coverage for all claims arising out of the accident, including claims in the *Pedro* Action, to \$50,000 from \$1,000,000. On November 5, 2007, Burlington commenced this action, seeking a declaration from this court that it owes no defense or indemnification to Galindo & Ferreira with respect to any claim brought on behalf of the Estate of Daniel Basilio Guerrero and the coverage was reduced for any and all claims arising out of the October 7, 2007 accident from \$1,000,000 to

\$50,000, including the claims in the *Pedro* Action. The *Guerrero* Action was commenced on or about October 3, 2008. By letter dated October 20, 2008, Burlington disclaimed any coverage in the *Guerrero* Action and reiterated Burlington's reduction of coverage for all claims arising out of the October 7, 2007 accident from \$1,000,000 to \$50,000. Burlington is currently providing a defense to its insured Galindo & Ferreira in the *Pedro* Action.

A party moving for summary judgment must show by admissible evidence that there are no material issues of fact in controversy and that they are entitled to judgment as a matter of law (*see Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). An insurer's time to disclaim based on a policy exclusion begins to run when the insurer becomes aware of facts sufficient to issue the disclaimer (*see Fireman's Fund Ins. Co. v Farrell*, 57 AD3d 721 [2008]; *Delphi Restoration Corp. v Sunshine Restoration Corp.*, 43 AD3d 851 [2007]; *Schulman v Indian Harbor Ins. Co.*, 40 AD3d 957 [2007]). Under Insurance Law § 3420(d), a written disclaimer is required as soon as reasonably possible after first learning of the grounds for the disclaimer of liability or the denial of coverage, and failure to comply renders any disclaimer ineffective (*see Sirius Am. Ins. Co. v Vigo Constr. Corp.*, 48 AD3d 450 [2008]; *N. Country Ins. Co. v Tucker*, 273 AD2d 683 [2000]). Here, Burlington's claim notes indicate that Burlington became aware of the facts that support the first reason for the disclaimer, the Independent Contractor's Employees Endorsement, as early as 10 days after the accident. The facts also establish that the second reason for a disclaimer, based on the Real Estate Operations Endorsement of the policy, was known to Burlington as early as 10 days after the accident. Additionally, while there is no indication of when the plaintiff became aware of the third reason for the disclaimer, the Amendment of Coverage Endorsement, the evidence established that the plaintiff should have known that insurance coverage was denied for Galindo Construction by the end of October 2006 or shortly thereafter at the latest. The plaintiff, however, waited until its letter dated June 5, 2007, which was sent almost eight months after the accident, before disclaiming coverage and reducing the coverage limits. The plaintiff also has not offered an excuse for the delay. Therefore, the delay in disclaiming coverage and reducing the coverage limits from \$1,000,000 to \$50,000 is unreasonable as a matter of law (*see Delphi Restoration Corp.*, 43 AD3d at 852). Additionally, inasmuch as the plaintiff in its letter dated January 3, 2007, assumed control of the defense and did not reserve the right to decrease the coverage from the \$1,000,000 per occurrence, it is estopped from denying coverage or reducing the coverage amounts based upon a policy exclusion (*see Fireman's Fund Ins. Co. v Zurich Am. Ins. Co.*, 37 AD3d 521 [2007]; *Wise v McCalla*, 24 AD3d 435 [2005]; *Utica Mut. Ins. Co. v 215 W. 91st St. Corp.*, 283 AD2d 421 [2001]).

The opponent of a summary judgment motion must present admissible evidence

that is sufficient to raise an issue of fact (*see Zuckerman v City of New York*, 49 NY2d 557 [1980]). In opposition, the plaintiff failed to raise an issue of fact that would warrant the denial of the summary judgment motion. The reasonableness of any delay must be judged from the time the insurer is aware of the facts to disclaim. Here, given the evidence that established that the plaintiff became aware of the reason to disclaim within a few weeks of the accident, the fact that a lawsuit had yet to have been filed does not constitute a reasonable reason for the delay in disclaiming (*see N. Country Ins. Co.*, 273 AD2d at 685). In fact, the plaintiff was aware of the reason for the disclaimer and sent a letter attempting to disclaim coverage in the *Guerrero* Action before the *Guerrero* Action was commenced.

The request for attorneys' fees by Galindo & Ferreira must be denied as Galindo & Ferreira failed to show the actions of Burlington were frivolous.

Turning next to the summary judgment motion by the defendant Galindo Construction, it must be denied. Galindo Construction failed to make a prima facie showing of entitlement to summary judgment, as a resolution of the matter must await determination of liability in the underlying action (*see Singh v Congregation Bais Avrohom K'Krula*, 300 AD2d 567 [2002]; *Barabash v Farmingdale Union Free School Dist.*, 250 AD2d 794 [1998]). The request for attorneys' fees by Galindo Construction must be denied as Galindo Construction failed to show the actions of Burlington were frivolous.

Finally, the summary judgment motion by the defendant Galindo General is granted without opposition. The defendant Galindo General has been a defunct corporation since the year 2000 and was not connected with the subject matter of this action or the underlying action.

Accordingly, the branch of the motion by the defendant Galindo & Ferreira for attorneys' fees is denied. The cross motion by the plaintiff Burlington for summary judgment is denied. The motion by the defendant Galindo Construction for summary judgment and for attorneys' fees is denied. The motion by the defendant Galindo General for summary judgment is granted and the complaint is dismissed against Galindo General.

The branch of the motion for summary judgment by the defendant Galindo & Ferreira is granted and it is ordered, adjudged and decreed that the plaintiff Burlington Insurance Co. is obligated to defend and indemnify the defendant Galindo & Ferreira up to the \$1,000,000 limits of the insurance policy with respect to the Supreme Court, Queens County action, captioned *Pedro, et al. v Galindo & Ferreira, et al.*, Index No. 22984/06 and the Supreme Court, Queens County action captioned

Public Administrator of Suffolk County for the Estate of Daniel Basilio Guerrero v Galindo & Ferreira Corp., et al., Index No. 24550/08.

Dated: October 26, 2009

AUGUSTUS C. AGATE, J.S.C.