

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE DUANE A. HART IA Part 18  
Justice

BARR & BARR, INC.,	x	Index Number <u>29810</u> 2002
- against -		Motion Date <u>March 9,</u> 2005
MERCANDO CONTRACTING CO., INC., et al.		Motion Cal. Number <u>7</u>
	x	

The following papers numbered 1 to 9 were read on this motion by the defendant New York Casualty Insurance, Co., pursuant to CPLR 3212, for summary judgment and a declaration that it is not obligated to defend and indemnify the plaintiff Barr & Barr, Inc. as an additional insured in connection with an underlying action Valente v St. Joseph's Medical Center et al. (Index No. 7354/01).

	Papers Numbered
Notice of Motion - Affidavits - Exhibits .....	1-4
Answering Affidavits - Exhibits .....	5-7
Reply Affidavits .....	8-9

Upon the foregoing papers it is ordered that the motion is determined as follows:

**I. The Relevant Facts**

On May 7, 1999, the defendant Julio Valente (Valente) was injured during the course of his employment at a premises owned by St. Joseph's Medical Center (St. Joseph's). St. Joseph's had contracted with the plaintiff Barr & Barr, Inc. (Barr) to act as construction manager for certain construction at its premises. Although the St. Joseph's/Barr contract is not part of the record, it appears to be undisputed that the work included the construction of an MRI building, an ambulatory surgery building, a parking garage and other unspecified construction.

Barr subcontracted with the defendant Mercado Contracting Co., Inc. (Mercado) for the performance of work on the parking garage portion of the St. Joseph's/Barr contract. Mercado, in turn, sub-subcontracted with Walter Development and Construction Co., Inc. (Walter), Valente's employer.

The Barr/Mercado subcontract included indemnification and insurance procurement provisions obligating Mercado to, inter alia, indemnify Barr for all claims, including attorney's fees, that might result from the performance of the subcontract by Mercado or its subcontractors, and to name Barr as an additional insured on the insurance policy to be procured.

The defendant New York Casualty Insurance Company (NYCIC) issued a general liability insurance policy to Mercado for a policy period which included the date of Valente's injuries. Barr was listed on the policy as an additional insured for "Project: Adult Day Care Center." The policy provides that NYCIC was to be notified "promptly" of any occurrence that might result in a claim.

As a consequence of Valente's injuries on May 7, 1999, his employer Walter filed a C-2 workers' compensation employer's report, dated May 14, 1999. On or about February 22, 2001, Walter sent to Barr by facsimile, a copy of the C-2 form.

In or about March 15, 2001, Valente commenced an action in this court against St. Joseph's and Barr, seeking damages for common-law negligence and violations of Labor Law §§ 200, 240[1] and 241[6] (underlying action).<sup>1</sup>

On or about June 19, 2001 Barr, through a separate insurer, advised Mercado that it had received a summons and complaint naming it as a defendant and requested that Mercado defend and indemnify it and advise Mercado's carrier of the claim. The letter dated June 19, 2001 was copied to NYCIC and others.

Barr commenced this action by summons and complaint filed on November 15, 2002 seeking, inter alia, a declaratory judgment that NYCIC was obligated to provide a defense and indemnification. In

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In the underlying action, Valente alleged that he was injured when construction forms fell on him at the construction site at the parking garage. In response to that complaint, Barr commenced a third-party action against Mercado, which impleaded Walter as a second third-party defendant.

response, NYCIC interposed an answer seeking a declaration that it had no obligation to defend or indemnify Barr.

## II. Motion

NYCIC moves for summary judgment and a declaration that it has no duty to defend or indemnify Barr in the underlying action, asserting that: (1) Barr received notice of the accident on February 22, 2001, but did not advise it of the claim until four months later on June 19, 2001; and, (2) even Barr's notice was timely, it had no duty to disclaim coverage as the parking area in which Valente was working at the time of his injuries did not constitute an "Adult Day Care" project and was outside the scope of coverage.

Barr opposes the motion asserting, *inter alia*, that although it did not notify NYCIC of the accident until June 19, 2001, NYCIC failed to establish whether and when it received notice of the occurrence directly from Mercado, and there is an issue of fact as to whether the parking lot was part of the "Adult Day Care" project.

## III. Decision

As a condition precedent to an insurer's obligation to defend or indemnify, the insured must provide notice of any occurrence to the insurer within a reasonable period of time (see Argo Corp. v Greater N.Y. Mut. Ins. Co., \_\_\_ NY3d \_\_\_, 2005 NY LEXIS 770 [4/25/05]; Kahn v Allstate Ins. Co., \_\_\_ AD3d \_\_\_, 793 NYS2d 120 [2005]; Figueroa v Utica Nat'l Ins. Group, \_\_\_ AD3d \_\_\_, 792 NYS3d 556 [2005]; DeFreitas v TIG Ins. Co., \_\_\_ AD3d \_\_\_, 791 NYS2d 626 [2005]). Absent a valid excuse, the failure to comply with the notice requirement vitiates the policy, and an insurer need not demonstrate prejudice before it can assert the defense of noncompliance (see Argo Corp., *supra*; Brownstone Partners/AF&F, LLC v A. Aleem Constr., Inc., \_\_\_ AD3d \_\_\_, 2005 NY App Div LEXIS 4749 [1st Dept. 5/3/05]; Viggiano v Encompass Ins. Co., 6 AD3d 695 [2004]).

Here, there is no dispute that Barr did not advise NYCIC of the claim until four months after Barr received notice of the accident. Moreover, Barr has not contended that it has any excuse for failing to timely notify NYCIC of the accident or a good-faith belief in its non-liability (see Brownstone Partners/AF&F, LLC, *supra*; Kahn, *supra*). An unexcused four-month delay in providing notice is untimely as a matter of law (see Kahn, *supra*; Figueroa, *supra*).

Where, however, an insurer has sufficient notice of facts entitling it to disclaim, or knows that it will disclaim coverage, it must notify the insured in writing as soon as is reasonably possible (see First Fin. Ins. Co. v Jetco Contr. Corp., 1 NY3d 64 [2003]; Insurance Law § 3420[d]). An insurer's failure to provide notice as soon as is reasonably possible precludes effective disclaimer, even where the policyholder's own notice of the incident to its insurer is untimely (see First Fin Ins. Co., supra; Hartford Ins. Co. v County of Nassau, 46 NY2d 1028 [1979], recons denied, 47 NY2d 951 [1979]; Republic Franklin Ins. Co. v Pistilli, \_\_\_ AD3d \_\_\_, 791 NYS2d 639 [2005]; Pawley Interior Contr., Inc. v Harleysville Ins. Cos., 11 AD3d 595 [2004]).

Here, NYCIC knew that Barr's notice was untimely as of July 21, 2001, but the record fails to disclose any written disclaimer sent by NYCIC to Barr. As NYCIC properly notes, a written disclaimer is not required pursuant to Insurance Law § 3420[d] where a claim falls outside the scope of the policy's coverage (see National Union Fire Ins. Co. of Pittsburgh, PA v Utica First Ins. Co., 6 AD3d 681 [2004]). Although NYCIC appears to assert that a written disclaimer was not required because Barr was an additional insured only for the "Adult Day Care" project, and not for the parking lot construction at issue, NYCIC failed to submit the St. Joseph's/Barr contract or any other document indicating the scope of the "Adult Day Care" project.

As a result, there is an issue of fact as to whether the parking lot construction constituted a portion of the overall "Adult Day Care" project (cf. Maldonado v Kissm Realty Corp., \_\_\_ AD3d \_\_\_, 2005 NY App Div LEXIS 5268 [2d Dept. 5/16/05], quoting, ZKZ Assoc., L.P. v CNA Ins. Co., 224 AD2d 174 [1996], affd 89 NY2d 990 [1997]). Resolution of that issue will determine whether or not NYCIC's failure to issue a timely written disclaimer obligates it to provide coverage to Barr in the underlying action (see Hartford Ins. Co., supra).

Accordingly, NYCIC's motion for summary judgment dismissing the complaint and for declaratory relief is denied.

Dated: May 20, 2005

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J.S.C.