Justice Marguerite A. Grays

QUEENS COUNTY
Supreme Court

Attorneys of Record:
Plaintiff: Shay & Maguire, LLP

Defendants: Roberts & Roberts, **Cary Scott Goldinger**, Denis C. Guerin

Justice Grays
It is ordered that the motion and cross motions are determined as follows:

Plaintiff commenced this action for a judgment, declaring that a commercial general liability insurance policy issued to defendant Ruday and David Schildiner Living Trust was void ab initio due to material misrepresentations in the insurance application and plaintiff was not obligated to defend and indemnify defendants Ruday and Crosstown for any claim made in relation to the underlying personal injury action entitled Pstrusinski v. Ruday Realty Corp., (Supreme Court, Kings County, Index No. 19655/2003). In the Pstrusinski action, Erwin Pstrusinski[1] claimed to have fallen from a ladder on May 5, 2003 and sustained personal injuries, while performing renovation work on an exterior wall at the premises known as 464 East 99th Street, Brooklyn, New York. Pstrusinski alleged that Antonio's Lighting Company, Inc. (Antonio's Lighting) leased the premises from Ruday, the lessor, and that defendant Crosstown served as Ruday's managing agent.

Plaintiff also alleges that defendants Rudy and Crosstown breached the contract of insurance by failing to provide timely notice of the claim made against Ruday and Crosstown by Pstrusinski, and failing to cooperate properly with plaintiff in the course of its investigation of the Pstrusinski claim. Defendant Crosstown, as the agent of defendant Ruday allegedly provided fraudulent, false and misleading statements, and negligently misrepresented certain facts to plaintiff's investigator. Plaintiff additionally asserts a claim based upon the "co-insurance" and "other insurance" clauses contained in the Ruday policy. Plaintiff seeks an award of monetary damages, and attorneys' fees incurred due to the necessity of bringing suit.

Defendant Ruday served an answer denying the material allegations of the complaint, asserting various affirmative defenses, including, among others, breach of contract, waiver, estoppel and laches, and interposing counterclaims for declaratory and monetary relief. In the answer, defendant Ruday alleges that plaintiff was obligated to defend it, as the insured, and defendant Crosstown, as a claimed additional insured, in the Pstrusinski action, and to pay any judgment, within the limits of the policy, obtained by the Pstrusinskis against defendants Ruday and Crosstown. Defendant Ruday seeks to recover expenses incurred in the defense of the Pstrusinski action, together with attorneys' fees incurred in the prosecution of the instant action.
Defendant Crosstown served an answer denying the material allegations of the complaint, asserting various affirmative defenses, including, among others, waiver, estoppel, failure to disclaim in a timely and effective manner and breach of contract, and interposing counterclaims based upon its claim that it is an additional insured under the

Ruday policy. Defendant Crosstown also seeks a declaration that plaintiff was obligated to defend and indemnify it with respect to the Pstrusinski action without a reservation of rights, and an award of monetary damages, including attorneys' fees, for breach of contract. Defendant Crosstown asserted cross claims against defendants Ruday and Travelers.

By so-ordered stipulation filed on April 25, 2006, all cross claims asserted by, and between, defendants Crosstown and Ruday have been withdrawn.

Ruday and Crosstown commenced a separate action, entitled Ruday Realty Corp. v. Antonio's Lighting Company, Inc. (Supreme Court, Queens County, Index No. 488/2006), against various defendants, including Pstrusinski, Antonio's Lighting, Antonio's Stairs, Inc., Antonio's Iron Works, Masters Coverage Corp. (Masters), a retail insurance broker, and R.C.A. Insurance Group (RCA), a wholesale insurance broker. The Ruday action and the instant action have been ordered to be jointly tried (see so-ordered stipulation dated March 22, 2006).

The note of issue in this action was filed on April 5, 2007. It is undisputed that all motions for summary judgment were to be made no later than August 3, 2007. The motion by plaintiff for summary judgment is timely made. Defendants Crosstown and Ruday concede that their cross motions are untimely made.

Absent a showing of "good cause" for the delay in timely filing a motion for summary judgment, the court may not consider such a motion on the merits (see Brill v. City of New York, 2 NY3d 648 [2004]; Rocky Point Drive In, L.P. v. Town of Brookhaven, 37 AD3d 805 [2007]). In this case, there were ongoing settlement negotiations which represented good cause for the failure by defendants Crosstown and Ruday to submit timely cross motions (see generally Bythewood v. 333 East Broadway Owners Corp., 201 AD2d 604 [1994]). However, even assuming such negotiations did not represent good cause for the delay, the court may consider a belated cross motion for summary judgment when the same is made in response to a still pending motion for summary judgment and when the belated cross motion raises issues which are nearly identical to those issues raised by the plaintiff's timely motion (see Grande v. Peteroy, 39 AD3d 590 [2007]; see also Bressingham v. Jamaica Hospital Medical Center, 17 AD3d 496 [2005]). "Notably, the court, in the course of deciding the timely motion, is, in any event, empowered to search the record and award summary judgment to a nonmoving party (see CPLR 3212[b])" (Grande v. Peteroy, 39 AD3d 590 at 592). In this instance, the cross motions by defendants Crosstown and Ruday address nearly the identical issues raised by plaintiff in its motion for summary judgment.

The court, therefore, shall entertain the respective cross motions for summary judgment by defendants Crosstown and Ruday, in addition to that branch of the motion by plaintiff for summary judgment.

It is well established that 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 demonstrate the absence of any material issues of fact," (Alvarez v. Prospect Hosp., 68 NY2d 320, 324 [1986]; Zuckerman v. City of New York, 49 NY2d 557 [1980]). Once there is a prima facie showing, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish material issues of fact which require a trial of action (see Zuckerman v. City of New York, 49 NY2d 557, supra; Alvarez v. Prospect Hosp., 68 NY2d 320

[1986]). However, where the moving party fails to make a prima facie showing, the motion must be denied regardless of the sufficiency of the opposing party's papers (see Winegrad v. New York Univ. Med. Ctr., 64 NY2d 851 [1985]).

Plaintiff seeks, in effect, partial summary judgment, asserting that defendants Ruday and Crosstown made false, fraudulent and negligent representations of fact, which were material to the risk, in answers to questions in the application as to the nature of the occupancy at 464 East 99th Street and in relation to whether the insured contemplated construction or renovations there. Plaintiff asserts that defendants Ruday and Crosstown provided untrue answers when describing the premises at 464 East 99th Street as a mercantile building, used by a paper products distributor as a warehouse, and in representing that no "demolition exposure" or "structural alterations" were contemplated to be performed at the premises. Plaintiff further asserts that in fact, the building was vacant or partially vacant, and was undergoing, or was about to undergo, major renovation and construction for the planned occupancy by Antonio's Lighting, a tenant of Ruday.[2] Plaintiff argues if it had been aware of the truth regarding these matters, it would not have underwritten the policy at issue or accepted the risk, because it did not issue policies including liability coverage for "builder's risk" at the time of the application.

Defendant Ruday opposes the motion of plaintiff and seeks summary judgment dismissing the complaint asserted against it, and for an award of attorneys' fees, costs and disbursements. Defendant Ruday asserts that plaintiff waived the right to rescind by accepting its premium payments, and plaintiff should be equitably estopped from denying coverage under the policy. In addition, defendant Ruday asserts that plaintiff's disclaimer of liability and denial of coverage was untimely. Defendant Crosstown also opposes plaintiff's motion, arguing that plaintiff, by accepting insurance premiums, ratified the policy and waived its right to rescind, or alternatively, should be equitably estopped from asserting its right to rescind, and plaintiff's disclaimer was untimely. Defendant Crosstown seeks summary judgment dismissing the complaint asserted against it on the ground it did not breach the contract of insurance. Defendant Travelers appears in support of the motion by defendant Crosstown.

To establish its right to rescind an insurance policy, an insurer must demonstrate that the insured made a false statement of fact as an inducement to making the contract and the misrepresentation was material (see Insurance Law Â§3105 [a], [b]). Insurance Law Â§3105(a) defines a representation as a "statement as to past or present fact, made to the insurer . . . at or before the making of the insurance contract as an inducement to the making thereof," and "a misrepresentation is a false representation, and the facts misrepresented are those facts which make the representation false." "A misrepresentation is material if the insurer would not have issued the policy had it known the facts misrepresented" (Zilkha v. Mutual Life Ins. Co. of N.Y., 287 AD2d 713, 714 [2001]; see Insurance Law Â§3105[b])" (Schirmer v. Penkert, 41 AD3d 688, 690 [2007]). "'Rescission is available even if the material misrepresentation was innocently or unintentionally made' (Nationwide Mut. Fire Ins. Co. v. Pascarella, 993 F Supp 134, 136 [1998] [citation omitted]; see Holloway v. Sacks & Sacks, 275 AD2d 625 [2000], lv denied 95 NY2d 770 [2000]; Meagher v. Executive Life Ins. Co. of N.Y., 200 AD2d 720, 720 [1994]; Tennenbaum v. Insurance Corp. of Ireland, 179 AD2d 589, 592 [1992]; see also Mutual Benefit Life Ins. Co. v. JMR Elecs., 848 F2d 30, 32 [1988])" (Curanovic v. New York Cent. Mut. Fire Ins. Co., 307 AD2d 435 [2003]).

The issue of materiality ordinarily is a question of fact for the jury (see Process Plants Corp. v. Beneficial Nat. Life Ins. Co., 53 AD2d 214, 216 [1976], affd 42 NY2d 928 [1977]), except where the evidence of materiality is clear and

substantially uncontradicted, the issue will be decided by the court as a matter of law (see Feldman v. Friedman, 241 AD2d 433 [1997]; Equitable Life Assur. Soc. v. Rocanova, 162 AD2d 265 [1990]; see also Mercantile & Gen. Reins. Co. v. Colonial Assur. Co., 82 NY2d 248 [1993]). "To establish materiality as a matter of law, the insurer must present documentation concerning its underwriting practices, such as underwriting manuals, bulletins, or rules pertaining to similar risks, that show that it would not have issued the same policy if the correct information had been disclosed in the application (see Insurance Law Â§3105[c]; Curanovic v. New York Cent. Mut. Fire Ins. Co., 307 AD2d at 437 [2003]; Tuminelli v. First Unum Life Ins. Co., 232 AD2d 547 [1996]; cf. Shapiro v. Allstate Life Ins. Co. of N.Y., 202 AD2d 659, 660 [1994])" (Schirmer v. Penkert, 41 AD3 at 690-691). Evidence of the practice of the insurer, which made the contract, as to the acceptance or rejection of similar risk is also admissible (see Insurance Law Â§3105[c]).

From approximately 1991 through approximately 2003, defendant Crosstown secured property and liability insurance for defendant Ruday through Masters, which had previously placed the insurance for the Ruday properties located at 461, 464 and 470 East 99th Street, Brooklyn, New York, with Liberty Mutual/Fireman's Fund. Steve Ladin, a nonparty witness and employee of Masters, testified that in January 2003, he was assigned the task of replacing or "remarketing the policy," i.e. finding a different insurance carrier to provide coverage for the Ruday properties, because, as of February 1, 2003, Fireman's Fund was no longer going to provide insurance for warehouse properties. Mr. Ladin testified his information indicated that the Ruday properties included a warehouse, and so, in mid-January 2003, he contacted RCA for the purpose of arranging replacement insurance coverage with plaintiff for Ruday's properties.

Stephen Roberson, an underwriter for plaintiff, testified[3] that he received an unsigned "ACORD" application for insurance from RCA, on January 24, 2003. The application sought, among other things, commercial general liability insurance on behalf of "Ruday Realty Corp." and "David Schildiner Living Trust" "C/O Crosstown Management." The application described all three property addresses as presenting "Warehouses-LRO" risks, and indicated that 464 East 99th Street was a warehouse occupied by a "Paper Products Distributor," and that the other two addresses, were mercantile buildings occupied by "Same Tenant." In addition, the "no" boxes on the application were checked in response to the questions of whether "any demolition exposure" or "structural alterations" were "contemplated" at the properties.

Mr. Roberson testified that "LRO" meant "Lessor's risk only, meaning building owner," and that based upon the information in the insurance application, he classified the risk for the Ruday properties as a grade "C" risk, which did not require a management review. He also testified that in 2003, he was not permitted to underwrite the risk of a building undergoing renovations.

Mr. Roberson further testified that all risks are subject to inspection, and that once a wholesaler receives a quote, and requests to bind coverage, coverage is bound and then the underwriter submits a request for issuance of a policy number and conducting of an inspection. Mr. Roberson stated that on February 26, 2003, (following the binding of the policy), he requested that an inspection of the Ruday properties be performed. According to Mr. Roberson, he thereafter received an inspection report from Technical Insurance Services (TIS) which revealed that the property at 464 East 99th Street was "vacant at the time of the inspection" and was "undergoing major renovations, including the installation of new Sheetrock, ceiling, bathroom and fixtures was [sic] in the final stages, ready to be painted and

fixtures installed." He opined that if he originally had had to classify the risk regarding 464 East 99th Street using the information he learned from the inspection report, he would have had no classification to assign "based upon the major renovations."

Although Mr. Roberson testified that plaintiff does not underwrite a risk known as a "builder's risk," which he understood is a risk where a building is undergoing renovation or construction, he also testified that "[t]here's different procedures if we find out there's renovations . . . . One is you can cancel a policy. Another is you can charge for it. I mean, there's various underwriting ways of going at it. More than likely it would be brought to management at that particular point." He stated that when a submission indicated there was a vacant building with some undergoing renovations, plaintiff would require the completion of a supplemental form, and that one of the questions thereon, would be "what type of renovations." Mr. Roberson summarized, "So would we consider it, possibly. Our tradition is not too often but like I said, renovations is kind of broad. It depends on different factors that we consider." He testified that he had declined risks where renovations were "going or for vacancies," but failed to identify any specific applicant.

Mr. Roberson testified that he learned which risks were acceptable to plaintiff as of November 2002, by means of an underwriting manual, and by his checking an underwriting grade which equated to the scope of his approval authority. The copy of the underwriting manual presented in support of the motion is not a publication of company standards and practices, and is silent on the issue of whether an application for liability insurance for a "builder's risk," or a risk involving a vacant property with contemplated construction or renovations at a premises will be rejected. Plaintiff's showing seems to indicate that a "truthful" application would have triggered a review by a supervising underwriter (see Campese v. National Grange Mut. Ins. Co., 259 AD2d 957 [1999]).

Under such circumstances, plaintiff has failed to meet its initial burden of establishing as a matter of law that it would not have issued a commercial general liability insurance policy to Ruday for the premises at 464 East 99th Street if the application had contained accurate information concerning the vacant status of the premises and the "contemplated structural alterations," and "demolition exposure" there (see generally Zuckerman v. City of New York, 49 NY2d at 562; Curanovic v. New York Cent. Mut. Fire Ins. Co., 307 AD2d 435, supra; see also Iacovangelo v. Allstate Life Ins. Co. of New York, Inc., 300 AD2d 1132 [2002]; Carpinone v. Mutual of Omaha Ins. Co., 265 AD2d 752 [1999]). The branch of the motion by plaintiff for partial summary judgment in its favor on its cause of action seeking to declare that the policy is void and it is entitled to rescind the insurance policy is denied.

The alternative branch of the motion by plaintiff to strike the answer of defendant Crosstown on the ground of alleged spoliation of evidence, and deem the issues raised by plaintiff's claims against Crosstown to be resolved in plaintiff's favor and prohibit Crosstown from opposing plaintiff's claims or supporting Crosstown's defenses is denied. Plaintiff has failed to show defendant Crosstown willfully or contumaciously failed to comply with the plaintiff's requests for, or court orders directing, disclosure (see CPLR 3126; Conciatori v. Port Auth. of N.Y. and N.J., 46 AD3d 501 [2007]; Sau Ting Cheng v. Prime Design Realty, Inc., 44 AD3d 644 [2007]; Resnick v. Schwarzkopf, 41 AD3d 573 [2007]). Plaintiff also has failed to establish that defendant Crosstown intentionally or negligently failed to preserve any crucial evidence after being placed on notice that such evidence might be needed for future litigation (see Sloane v. Costco Wholesale Corp., 49 AD3d 522 [2008]; Denoyelles v. Gallagher, 40 AD3d 1027 [2007]; Kelley v. Empire Roller

Skating Rink, Inc., 34 AD3d 533 [2006]; Lovell v. United Skates of Am., Inc., 28 AD3d 721 [2006]). Contrary to the argument of plaintiff, the deposition testimony of Anthony Musto, the president of Crosstown, is not definitive with respect to the existence of various files, folders, documents and records of Crosstown pertaining to the Ruday properties.

Defendants Ruday and Crosstown each cross-move for summary judgment dismissing the cause of action asserted in the complaint seeking a judgment declaring the policy void ab initio. They assert that plaintiff should be estopped from rescinding the policy of insurance.

"It is well settled that the continued acceptance of premiums by an insurance carrier after learning of facts which allow for rescission of the policy, constitutes a waiver of, or more properly an estoppel against, the right to rescind (see Bible v. John Hancock Mut. Life Ins. Co., 256 NY 458, 462 [1931]; Hydell v. North Atl. Life Ins. Co., 246 AD2d 511 [1998]; Continental Ins. Co. v. Helmsley Enters., 211 AD2d 589 [1995]; Weiner v. Government Employees Ins. Co. of Washington, D.C., 52 AD2d 844, 845 [1976])" (Scalia v. Equitable Life Assur. Soc. of U.S., 251 AD2d 315 [1998]). Defendants Ruday and Crosstown have failed to demonstrate that plaintiff continued to accept premiums following the point where a prompt review and diligent investigation into the facts would have revealed the alleged material misrepresentations in the application (see Belesi v. Connecticut Mut. Life Ins. Co., 272 AD2d 353 [2000]). Although counsel for defendants Ruday and Crosstown each claim that such payments were continually accepted, they have failed to demonstrate when payments were made and accepted by plaintiff. The only evidence of payment of premiums which is properly before the court, is a copy of correspondence dated January 11, 2005. In such correspondence, plaintiff advised defendant Ruday that it considered the policy rescinded, and attempted to return the premiums paid by Ruday with interest by two checks totaling $13,106.20.[4] Such proof, at the most, indicates plaintiff retained the premiums for some period of time (cf. Burdick v. American Modern Home Ins. Co., 6 Misc 3d 1030[A]).[5]

To the extent defendants Ruday and Crosstown seek to rely upon the copy of the document submitted by Masters, purportedly as part of an amicus curiae submission, the court rejected such submission by order of this date. Nevertheless, even were the court to consider such document, the court would find, in the absence of other evidence, that the document, in and of itself, does not demonstrate plaintiff's continued acceptance of premiums. Nor does the document evince an actual amendment to the policy, which was agreed to by plaintiff after plaintiff became aware of the relevant facts (see Prudential Ins. Co. of America v. Brown, 30 Misc 2d 147 [1961]). To the extent defendants Ruday and Crosstown argue they are entitled to summary judgment dismissing the "rescission" cause of action based upon plaintiff's failure to provide timely notice of denial of coverage, such argument is without merit. An insured cannot create coverage that would not otherwise exist by relying upon the failure to provide timely notice of disclaimer (see Zappone v. Home Ins. Co., 55 NY2d 131, 138 [1982]; see also Taradena v. Nationwide Mut. Ins. Co., 239 AD2d 876 [1997]; Morris v. Merchants Mut. Ins. Co., 229 AD2d 992 [1996]; Interested Underwriters at Lloyd's v. H.D.I. III Assoc., 213 AD2d 246 [1995]). Defendants Ruday and Crosstown have failed to establish entitlement to summary judgment dismissing the cause of action for judgment declaring the policy void ab initio. The branch of the cross motions by defendants Ruday and Crosstown for summary judgment dismissing the claims asserted in the complaint against them seeking a judgment entitling plaintiff to rescind the policy is denied.

With respect to the branch of the cross motions for summary judgment dismissing the causes of action based upon

plaintiff's claim of breach of the insurance policy for failure to provide timely notice of occurrence and to cooperate properly during the investigation of the Pstrusinski claim, defendants Ruday and Crosstown assert that plaintiff failed to disclaim coverage "as soon as reasonably possible" (Insurance Law Â§3420[d]). It is well established that when 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 (see Argo Corp. v. Greater N.Y. Mut. Ins. Co., 4 NY3d 332, 339 [2005]; Security Mut. Ins. Co. of N.Y. v. Acker-Fitzsimons Corp., 31 NY2d 436, 441 [1972]). The policy herein requires an insured to provide notice of an "occurrence" as "soon as practicable." Such a notice, therefore, must be provided within a reasonable time in view of all of the facts and circumstances (see Merchants Mut. Ins. Co. v. Hoffman, 56 NY2d 799, 801-802 [1982]; see also Steinberg v. Hermitage Insurance Co., 26 AD3d 426 [2006]; Travelers Indemnity Co. v. Worthy, 281 AD2d 411 [2001]). However, to effectively disclaim liability coverage under a liability insurance policy for bodily injury arising out of an accident, an insurer must give written notice thereof "as soon as is reasonably possible" (Insurance Law Â§3420[d]) after it first learns of the grounds for disclaimer of liability (see Hartford Ins. Co. v. County of Nassau, 46 NY2d 1028, 1029 [1979]; see Matter of Firemen's Fund Ins. Co. of Newark v. Hopkins, 88 NY2d 836 [1996]; Gregorio v. J.M. Dennis Const. Co. Corp., 21 AD3d 1056 [2005]).

Plaintiff claims it first received notice of the occurrence or resulting claim on July 8, 2003, as is reflected in its case notes, a period of more than 60 days after the accident date of May 5, 2003.

Nevertheless, the entry states "Rec'd and reviewed the newly reported claim from Masters . . . . Receipt of their June 26 fax constitutes Seneca's first notice of this claim." Although plaintiff asserts that the entry's reference to the June 26, 2003 date is to the date of a fax sent by Masters to RCA, it has failed to offer proof of such assertion. Additionally, Mr. Roberson identified, during his deposition, a fax cover letter dated July 3, (2003) from Christine Nucera at RCA as displaying the fax number of plaintiff's underwriting unit on it, and stating "attached find first loss with summons." Thus, it appears that plaintiff had notice of the Pstrusinski claim by June 26, 2003.

However even assuming plaintiff did not have notice of the Pstrusinski claim until July 9, 2003, it did not disclaim liability until October 21, 2003,[6] a delay of 105 days.

It is the insurance carrier's burden to explain the delay in notifying the insured of its disclaimer, and the reasonableness of any such delay must be determined from the time the insurance carrier was aware of sufficient facts to disclaim coverage (see First Fin. Ins. Co. v. Jetco Contr. Corp., 1 NY3d 64 [2004]; Mount Vernon Housing Authority v. Public Service Mut. Ins. Co., 267 AD2d 285 [1999]; Prudential Prop. & Cas. Ins. v. Persaud, 256 AD2d 502 [1998]). When the explanation offered for the delay is an assertion that there was a need to investigate issues that will affect the decision on whether to disclaim liability, the burden is on the insurance company to establish that the delay was reasonably related to the completion of a necessary, thorough, and diligent investigation (see Quincy Mut. Fire Ins. Co. v. Uribe, 45 AD3d 661 [2007]; Schulman v. Indian Harbor Ins. Co., 40 AD3d 957 [2007]).

Plaintiff offers the affidavit of John Mrakovcic, its senior claims examiner, to show that it conducted an investigation and obtained information leading it to believe the insured and its agents knew of Pstrusinski's accident or suit by a date earlier than they previously claimed, and that defendants Ruday and Crosstown failed to cooperate properly in

the investigation. Mr. Mrakovcic states that plaintiff received correspondence dated August 1, 2003, in which counsel for Anthony's Lighting asserted that Pstrusinski was a "trespasser at the location of this occurrence and was present without [his client's] knowledge and consent." Mr. Mrakovcic further states that based upon this correspondence, plaintiff assigned an investigator to obtain a statement from a representative of Anthony's Lighting regarding the claim itself and to determine when Ruday received notice of the occurrence. Mr. Mrakovcic states that on September 16, 2003, plaintiff was advised by the investigator that the statement of Antonio's Lighting remained outstanding, and so, plaintiff requested the investigator to continue with the investigation, and obtain additional items, including witness information, photographs, and Building Department records. Mr. Mrakovcic further states that on October 15, 2003, plaintiff contacted the investigator, who advised plaintiff that Antonio's Lighting had yet to provide the requested statement. Mr. Mrakovcic additionally states that plaintiff made efforts to obtain documents and records, witness information and photographs to complete its investigation prior to issuing its disclaimer.

Thus, issues of fact exist as to whether plaintiff acted promptly to disclaim liability after being told the results of the investigation into the question of when defendants became aware of the accident, and whether defendants Ruday and Crosstown cooperated in the investigation of the Pstrusinski claim. Thus, it cannot be determined as a matter of law whether the notice of disclaimer or denial of coverage, based upon failure to give notice of the accident as soon as practicable, was given as soon as was reasonably possible (cf. Pennsylvania Lumbermans Mut. Ins. Co. v. D & Sons Const. Corp., 18 AD3d 843 [2005]; Blue Ridge Ins. Co. v. Jiminez, 7 AD3d 652 [2004]).

Under such circumstances, the cross motions by defendants Ruday and Crosstown for summary judgment dismissing the causes of action for declaratory relief based upon plaintiff's claim that it is not obligated to defend and indemnify defendants is denied.

With respect to the branch of the cross motion by defendant Ruday for summary judgment dismissing all cross claims asserted against it by defendant Crosstown, same is denied as moot. As previously noted, the cross claims asserted against it by defendant Crosstown have been withdrawn. Defendant Ruday has failed to demonstrate that defendants Travelers and Pstrusinski have asserted any cross claims against it. Thus, that branch of the cross motion by defendant Ruday for summary judgment dismissing the cross claims asserted against defendants Travelers and Pstrusinski is denied without prejudice to renewal.

That branch of the cross motion by defendant Ruday for an award of legal fees, costs and disbursements is denied at this juncture.

1. Aleksandra Pstrusinski, Erwin Pstrusinski's wife, filed a derivative claim.

2. To the extent plaintiff alleges in its moving papers, that the application for insurance contained misrepresentations regarding the square footage of the respective Ruday properties and the occupancy and use of 461 East 99th Street and 470 East 99th Street, the complaint and bill of particulars do not contain such allegations. Furthermore, plaintiff did not decline coverage of the Pstrusinski claim based upon such alleged misrepresentations, and has made no showing that it would not have issued the policy had it known those facts allegedly misrepresented (see generally infra at 6). Although plaintiff argues that these misrepresentations had a direct bearing on plaintiff's decision to issue

the policy at the established premium, the standard for rescission in New York is whether the facts misrepresented (or intentionally concealed) would have been material to the underwriting decision, such that the risk would have been refused had the true facts been known (see Insurance Law Â§3105[b]; see generally Jack Stern, Outside Counsel, "Post-Loss Rescission of Insurance Coverage," NYLJ, April 18, 1994 at A1). Furthermore, Stephen Roberson, the underwriter assigned the Ruday insurance application testified that discrepancies which appeared on the inspection report regarding occupancy of 470 East 99th Street "didn't cause a red flag. I mean, these are risks that we can write . . . " and "the square footage wasn't our concern at all." He also testified that "As I said, my concerns with Ruday clearly wasn't the square footage. Even the occupancy. I'm not gonna lie. My concern was the renovations."

3. Mr. Roberson appeared as a witness on December 13, 2005 for a deposition on behalf of plaintiff, and on April 19, 2005 as a nonparty witness for Seneca Insurance Company. The April 19, 2005 deposition was held in connection with the related Ruday action.

4. The law implies an obligation on the part of the insurer to refund consideration to the insured when a contract of insurance has been rescinded as a result of material misrepresentations by the insured (see Curiale v. AIG Multi-Line Syndicate, 204 AD2d 237 [1994]). By correspondence dated January 14, 2005, defendant Ruday rejected plaintiff's attempt to rescind the policy, and returned the premium checks.

5. By correspondence dated November 18, 2003, plaintiff issued a notice of nonrenewal to defendant Ruday and David Schildiner Living Trust ("c/o Crosstown Mgt. Corp."), indicating that the policy would expire on February 1, 2004 and would not be renewed due to "Unsatisfactory risk quality."

6. By letter dated October 21, 2003, plaintiff informed defendants Ruday and Crosstown that it had obtained an investigation, including a statement from Crosstown, as managing agent, and reviewed other information and documents relative to the circumstances of the claim. Plaintiff also indicated that it had consulted with counsel regarding plaintiff's position on coverage of the claim. The letter advised that although plaintiff would continue to provide for the defense of Ruday and Crosstown in connection with the Pstrusinski action (although separate outside counsel would be assigned the case), plaintiff was denying coverage of the Pstrusinski claim. Plaintiff advised in the letter that the insured in applying for the policy had made material misrepresentations regarding "the status of the property and/or the impending status of the property being vacant and undergoing demolition, renovation and construction." In addition, plaintiff advised it was disclaiming coverage because the insured breached the insurance policy's cooperation clause, by the misrepresentations made by "Managing Agent, acting on behalf of Ruday," in a statement provided to plaintiff's investigator, about the insured's and the agent's knowledge of the work conducted at the premises. Plaintiff stated that it received no notice of occurrence of the accident prior to receipt of notice of the claim from the broker on July 8, 2003, and advised that it was disclaiming coverage, because such notice was not timely provided under the policy provision requiring an insured to provide notice in the event of an occurrence "as soon as practicable." Plaintiff also advised that it was disclaiming coverage and would not defend, nor indemnify the insured for the claim "to the extent a Court determines that such notice of the claim was not timely provided in accordance with the terms of the policy." Lastly, plaintiff advised it continued to reserve its right to deny coverage "in the event that it is determined that the insured had notice, or knowledge of the occurrence prior to the service of the plaintiff's [c]omplaint in June of 2003."